MEMORANDUM

GLENN LUKOS ASSOCIATES

Regulatory Services

PROJECT NUMBER: 05320009NOV

TO: Dr. Jonna Engel
Dr. John Dixon

FROM: Tony Bomkamp

DATE: November 9, 2010

SUBJECT: Comparison of Areas of Disturbed Encelia Scrub on Slope Above Northwest Polygon with Areas of Undisturbed Maritime Succulent Scrub and Coastal Bluff Scrub at Newport Banning Ranch

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In previous documentation, I have stated that in my professional opinion, that while the Northwest Polygon and disturbed encelia scrub exhibited use by CAGN, that due to the level of disturbance, that the Northwest Polygon should not be considered ESHA. During a meeting on October 26, 2010 at the Coastal Commission Long Beach office, Mr. Andrew Willis indicated that the Coastal Commission believed that the slope immediately above the Northwest Polygon was ESHA due to the presence of the coastal California gnatcatcher during some years. During this discussion, I pointed out that substantial portions of the slope had been covered with an asphalt-like oil-based material that was intended to prevent erosion, which has substantially degraded the slope and limited the ability of the slope to exhibit high levels ecological function. Previously, GLA collected transect data on a portion of this slope, in order to account for the conditions that occurred prior to the activities addressed in the Notice of Violation.

On November 8, 2010, Biologists from Glenn Lukos conducted more detailed and extensive sampling on the subject slope (i.e., above the Northwest Polygon), extending along the slope to the south such that the entire slope area was sampled as depicted on Exhibit 1. The purpose of the sampling was to accurately characterize the habitat on this slope in order in provide additional information to the Coastal Commission regarding the Northwest Polygon. In addition, in order to provide a comparison with undisturbed habitat on the site, GLA sampled two areas that exhibit high quality maritime succulent scrub (MSS) and coastal bluff scrub (CBS). Because of the high density of the habitat in these areas and the significant cactus component, these areas were sampled using the Relevé method.[1]

[1] Mueller-Dombois, D. and H. Ellenberg. 1974. *Aims and Methods of Vegetation Ecology*. John Wiley and Sons, New York. See Chapter 5, "Community Sampling: The Relevé Method".

Methodology

The slope above the Northwest Polygon was sampled using the point-intercept method with sampling points at every half meter along four transects that were placed approximately every four meters beginning at the bottom of the slope. This spacing allowed for four transects, evenly separated and sufficient for capturing the conditions on the slope [see Exhibit 1]. Each transect was approximately 125 meters in length. A summary of the sampling results is provided in Table 1.

Undisturbed MSS and CBS Areas

As noted, these areas were sampled using the Relevé method due to the dense habitat including local areas with up to 60-percent cover by cactus, making collection along transects infeasible (and potentially dangerous). In using this technique, two biologists experienced in vegetation sampling independently estimated the percent cover for all species on the subject slopes above and below transect lines [depicted on Exhibits 2 and 3]. The results of the two estimates were averaged to obtain the final cover for each species (the final average was determined by consensus and so does not always exactly equal the arithmetic average). A summary of the sampling results is provided in Tables 2 and 3.

Results

Slope Above Northwest Polygon

As noted, GLA previously collected data along transects on the portion of the slope immediately above the Northwest Polygon, extending from the northern edge of the disturbance to the southern edge of the disturbance. In that instance, data was collected along two transects, one near the tow of the slope immediately above the area disturbed by the unpermitted activities and one transect approximately one-third of the way up the slope, where the native vegetation is the most dense. The expanded transect locations depicted on Exhibit 1, provide for a more comprehensive characterization of the slope. As already stated, it is important to note, that this slope has been impacted by previous treatments with oil/asphalt-like material, applied on the slope to limit erosion. This material is still evident on the surface of the slope, covering an estimated 25 to 30-perecent of the surface (other areas are likely still impacted where the material is now covered by material that has sloughed off portions of the slope). In some areas the asphalt-like material precludes the growth of vegetation and would need to be removed prior to restoration.

Overall, as summarized in Table 1, the slope exhibits about 26-percent cover by native species, with California encelia (*Encelia californica*) accounting for 24-percent cover and coast goldenbush (*Isocoma menziesii*) at one percent. No other native shrubs were detected in the

transects and with the exception of two cactus plants, no other native shrubs were observed on the slope). The approximately 54-percent cover by non-native species includes fig marigold accounting for roughly 31 percent, along with a variety of other non-natives including tocalote (*Centaurea melitensis*), red brome (*Bromus rubens madritensis*), small-flowered iceplant (*Mesembryanthemum nodiflorum*), statice (*Limonium perezi*), Russian thistle (*Salsola tragus*), Australian saltbush (*Atriplex semibaccata*), and Bermuda buttercups (*Oxalis pes-caprae*). Bare areas account for about 20 percent of the slope.

My previous assertion that this slope is highly disturbed is confirmed by the data which show sparse native cover and low diversity of the natives, with non-native cover more than twice as much as the native cover.

Large Arroyo

Areas adjacent to the Large Arroyo are dominated by MSS and southern cactus scrub (SCS) that overall, exhibit a range of conditions from pristine to somewhat or moderately disturbed (mainly due to the presence of non-natives such as black mustard or fennel growing in the dense scrub).

The area sampled in along the Large Arroyo exhibited moderate diversity; however, the relative contribution of each species is high with three species contributing substantial cover. Overall, California encelia is the dominant species ranging from 48- to 79-percent cover in the areas sampled, with coast prickly pear (*Opentia littoralis*) accounting for 9- to 28-percent cover and coast cholla (*Cylindopuntia prolifera*) ranging from 7 to 17-percent. The area sampled exhibited essentially no non-native species as reflected in the transect data. Overall, native cover was 100 percent.

Middle Arroyo

The south-facing slope, overlooking the Middle Arroyo exhibits two distinct communities, with coastal bluff scrub (CBS) covering the westerly one-third and SCS covering the easterly two-thirds. The CBS, which exhibts 100-percent cover by natives is in near pristine condition and exhibits a very high diversity relative to all of the other areas of scrub habitat on the site, as summarized in Table 3 below. California encelia is dominant accounting for 35 percent of the cover with coast prickly pear at 30 percent cover. California buckwheat is locally dominant and overall accounts for 18 percent cover. California boxthorn, a characteristic CBS species accounts for nine percent cover and bladderpod, another CBS species totals five percent cover.

The SCS also exhibits dense cover with 98 percent native and only two percent non-native. California encelia and coastal prickly pear are co-dominant with 40 and 42-percent respectively. Both the CBS and SCS regularly support coastal California gnatcatcher and the Coastal Cactus Wren.

Table 1. Transect Date for Slope Above Northwest Polygon

Species	Transect 1	Transect 2	Transect 3	Transect 4	Average
ENCA	23.3%	28.4%	20.6%	25.6%	24.4%
ISME	0.8%	0.8%	0.8%	1.8%	1.1%
DULA			0.4%		0.1%
*CAED**	20.8%	41.6%	0.8%	62.6%	31.5%
*ATSE**	2.9%				0.7%
*BRRU**	19.2%	11.6%	12.9%	1.5%	11.3%
*SATR**	1.7%		2.8%		1.1%
*MENO**	0.8%		18.0%		4.7%
*OXPE**	2.9%			0.4%	0.8%
*BRNI**	0.8%	0.8%		0.4%	0.5%
*ERCI**	4.2%	1.6%	1.2%		1.7%
*CEME**	2.1%	0.8%	2.4%		1.3%
LIPE(			1.6%		0.4%
Bare Ground	20.4%	14.4%	38.5%	7.8%	20.3%
Sub-Total Natives	24.2%	29.2%	21.8%	27.4%	25.6%
Sub-Total Non-Natives + Bare Ground	75.8%	70.8%	78.2%	72.6%	74.4%
Total	100%	100%	100%	100%	100%

Denotes non-native species

Table 2 – Large Arroyo

Large Arroyo – Transect 1 (Percent Cover)			
Species	R. Schanna	T. Bomkamp	**Average**
ENCA	50%	47%	**48%**
OPLI	30%	25%	**28%**
CYOP	12%	23%	**17%**
ISAR	8%	5%	**7%**
Native Cover	**100%**	**100%**	**100%**
Large Arroyo – Transect 2 (Percent Cover)			
ENCA	78%	80%	**79%**
OPLI	8%	10%	**9%**
CYOP	8%	5%	**7%**
ISAR	6%	5%	**5%**
Native Cover	**100%**	**100%**	**100%**

Table 3 – Middle Arroyo

Middle Arroyo – Transect 1 (Percent Cover)			
Species	R. Schanna	T. Bomkamp	**Average**
ENCA	34%	35%	**35%**
OPLI	31%	30%	**30%**
CYOP	1%	3%	**2%**
ISAR	5%	5%	**5%**
ERFA	20%	15%	**18%**
LYCA	8%	10%	**9%**
BAPI	1%	2%	**1%**
Native Cover	**100%**	**100%**	**100%**
Middle Arroyo – Transect 2 (Percent Cover)			
ENCA	40%	40%	**40%**
OPLI	45%	40%	**42%**
ISAR	7%	8%	**8%**
ERFA	3%	6%	**5%**
BASA	3%	2%	**2%**
Native Cover	**98%**	**98%**	**98%**
COSE*	2%	2%	2%

* Denotes non-native species

Conclusions

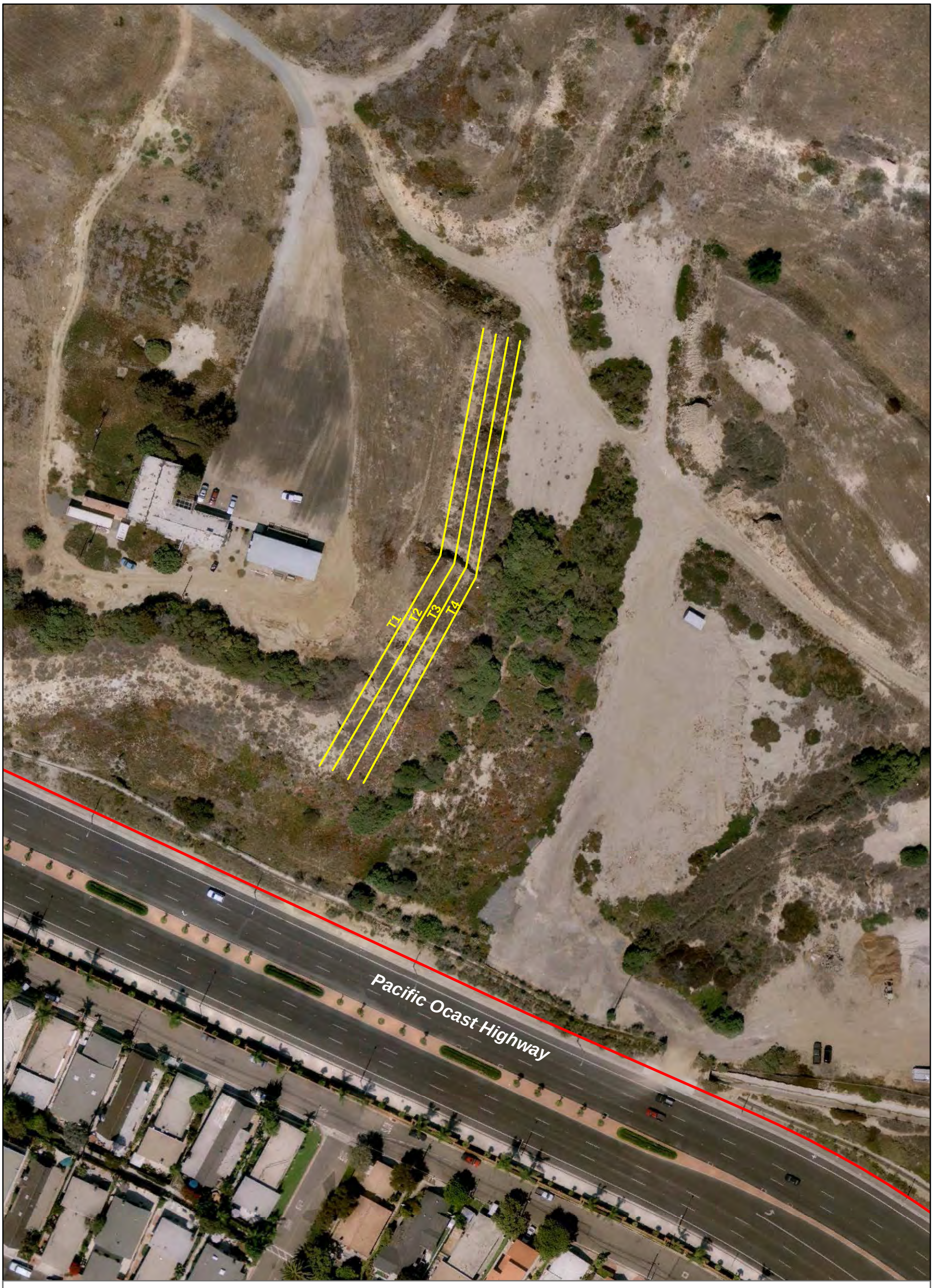
A number of important points derive from this data.

First, it is clear that the subject slope overlooking the Northwest Polygon, which was created by extensive grading in the mid 1960s, exhibits high levels of disturbance with cover by non-native species more than double that of the native species. While the area has been documented to support the CAGN, an ESHA designation is in my opinion not appropriate because of the very degraded character of the slope, including the impacts associated with asphalt-like material spread on the slope to limit erosion.

This conclusion is further supported when the disturbed slope is compared with areas on the site that exhibit high quality habitat that has not been subject to disturbance, which is typical of many areas on the site associated with legal oilfield operations. This comparison provides additional context relative to the value of the habitat immediately adjacent to the Northwest Polygon. It also provides a template for future restoration efforts that would be implemented on this slope.

While 30-percent or more of the slope is still impacted by the asphalt-like material, it would not be difficult to remove most of the material which forms a thin veneer on the slope, generally a few millimeters thick. This could be removed using had tools (i.e., flat end shovels), without impacting much (if any) of the sparse native habitat on the slope).

Finally, it is important to note, as was done by Mr. Jeff Ahrens of GLA (see pages 1 and 2 of October 13, 2010 Memorandum by Mr. Ahrens) that the habitat on the Banning Ranch site is not easily characterized due to the long-standing disturbance by oilfield operations. Areas occasionally occupied by CAGN include highly disturbed areas, many of which will require removal or at least disturbance of habitat in order complete the oilfield cleanup operations that will be required by law. Evaluation of any area relative to habitat functions cannot be accurate accomplished without considering the overall context of the site and conditions associated with specific areas under consideration.



Legend

Property Location

Transect Location

N

0 40 80 160

Feet

NEWPORT BANNING RANCH

Transect Map

GLENN LUKOS ASSOCIATES

Exhibit 1

X:\0363-THE REST\0532-09NOV\532-9_GIS\TransectGIS\532-9_TransectEx1.mxd
November 8, 2010

Legend

Property Location

Transect Location

N

0 40 80 160

Feet

NEWPORT BANNING RANCH

Transect Map

GLENN LUKOS ASSOCIATES

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November 8, 2010

Legend

Property Location

Transect Location

N

0 40 80 160

Feet

NEWPORT BANNING RANCH

Transect Map

GLENN LUKOS ASSOCIATES

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November 8, 2010

Photograph 1. CAGN & CAWR occupied MSS habitat on slope adjacent to the middle arroyo.

Photograph 2. Close-up view of CAGN & CAWR occupied MSS habitat on slope adjacent to the middle arroyo.

Photograph 3. CAGN & CAWR occupied MSS habitat on slope adjacent to the large arroyo.

Photograph 4. CAGN & CAWR occupied MSS habitat on slope adjacent to the large arroyo.

GLENN LUKOS ASSOCIATES

NEWPORT BANNING RANCH

Site Photographs

CALIFORNIA COASTAL COMMISSION
South Coast Area Office
200 Oceangate, Suite 1000
Long Beach, CA 90802-4302
(562) 590-5071

VIA REGULAR MAIL AND EMAIL

November 22, 2010

Leonie Mulvihill
City of Newport Beach
3300 Newport Boulevard
PO Box 1768
Newport Beach, CA 92658

Property Location:	Newport Banning Ranch property, including, but not limited to Assessor Parcel Nos. 424-041-04, 424-041-10 (City of Newport Beach property), 114-170-43, and 114-170-79
Unpermitted Development:	Removal of major vegetation, including coastal sage scrub; placement of solid material, including staging numerous significant stacks of pipe conduits, vehicles, mechanized equipment, and construction materials; and grading

Dear Ms. Mulvhill:

Thank you for meeting with Commission staff on November 17, 2010 to discuss resolution of the Coastal Act violations described and identified in the Notice of Intent to Commence Cease and Desist and Restoration Order Proceedings ("NOI") dated October 5, 2010. We're encouraged by your statement that the City takes resolution of these violations seriously and that your preference is, as ours certainly is, to resolve this issue consensually. We are very encouraged by our meeting and hope that we can work collaboratively to address the situation and greatly appreciate your assistance in achieving a resolution. You asked for some more detail about what a consent agreement, in other words, a consent order, would entail, and for more time to submit a Statement of Defense in response to our NOI letter. Therefore, the purpose of this letter is to explain further certain elements of a consent order to settle this matter that staff could propose to the Commission for its review, and also to address the response deadlines set in the October 5 NOI.

As you know, the October 5 NOI proposed consent and cease and desist and restoration orders as one option to resolve the issue of unpermitted development on the subject properties. Through the consent order process, all of the Commission's claims against the settling parties arising out of the Coastal Act violations at issue, and provided for in Chapter 9 of the Coastal Act (Judicial Review, Enforcement, and Penalties) would be resolved. The consent cease and desist and restoration orders would authorize and order the parties subject to the orders to restore the impacted areas of the subject properties and mitigate the resource damage caused by the unpermitted activities at a ratio consistent with the resource loss, and would resolve the issue of monetary penalties provided for in the Coastal Act for violations of the act.

Restoration orders are site and resource specific remedies to Coastal Act violations authorized in Coastal Act Section 30811, which states: the Commission "may, after a public hearing, order restoration of a site if it finds that the development has occurred without a coastal development permit from the Commission..., the development is inconsistent with this division, and the development is causing continuing resource damage." To achieve a resolution of this matter that is consistent with the terms of the Coastal Act, in part through issuance of a restoration order pursuant to Coastal Act Section 30811,[1] the habitat eliminated by the unpermitted development must be restored to the sites of the unpermitted development.

Restoration orders, pursuant to California Code of Regulations, Title 14, Section 13196(f), must provide the factual and legal basis for the Commission to issue a restoration order, which, as noted above, includes finding that the development is unpermitted or inconsistent with a permit issued under the Coastal Act, is inconsistent with the Coastal Act, and is causing continuing resource damage. Vegetation comprising rare native plant communities, including coastal sage scrub species and species of a very rare subset of coastal sage scrub, maritime succulent scrub, and habitat for the federally threatened coastal California gnatcatcher, constitute the predominant coastal resources affected by the unpermitted development in this case.

Commission staff ecologist Dr. Jonna Engel visited the subject properties, reviewed historic aerial photographs and available biological information pertaining to the site, and concluded, based on the information available, that two of the areas impacted by the unpermitted development, the northwest and southeast polygons[2], prior to the unpermitted activities, most likely would have met the definition of Environmentally Sensitive Habitat Areas (ESHA), as that term is defined in Section 30107.5 of the Coastal Act, due to the presence of a rare vegetation association (maritime succulent scrub) and by the presence and habitat requirements of the coastal California gnatcatcher.

Restoration specifically of the impacted areas is especially critical given the habitat characteristics of the impacted areas. The Bolsa Chica decision [*Bolsa Chica Land Trust v. Superior Court* (1999) 71 Cal. Ap.4th 493, 507-508] confirmed that the Coastal Act requires the protection of "*the area* of an ESHA" from development impacts and that habitat values are not "intangibles which can be moved from place to place." Id. at 507 (emphasis in original). Thus, providing mitigation is not sufficient justification for allowing development with avoidable impacts to ESHA. For the Commission to approve a consent restoration order that fails to require restoration of the habitat within the impacted areas would in essence be authorizing removal of ESHA for the purpose of construction staging, which is clearly inconsistent with the Coastal Act 30240, which restricts development within ESHA to uses dependent upon ESHA, and the Bolsa Chica decision.

Staff would be happy to meet with you on site to further discuss ESHA on the subject properties, including, but not necessarily limited to documented and probable gnatcatcher use areas. To that end, as you know, we are arranging a site visit with our respective staffs and representatives of the parties involved in early December. To ensure that this meeting can be productive in the

[1] Such resolution would also involve issuance of Cease and Desist Order pursuant to Coastal Act Section 30810 and resolution of the Commission's monetary claims for relief for those violations of the Coastal Act alleged in the October 5 NOI.

[2] As the locations of those areas are identified in the "Polygon Acreage Map" provided to staff by Newport Banning Ranch, LLC.

context of negotiating towards a consensual resolution to this matter, I am again extending the deadline set in our October 5, 2010 "Notice of Intent" letter for submittal of a statement of defense, and the deadline to object to recordation of a Notice of Violation of the Coastal Act pursuant to Coastal Act Section 30812, both deadlines since extended by staff on October 21, 2010 and November 5, 2010, to **January 5, 2011**. I look forward to meeting with the parties on the site; please contact me at any time to continue our discussion of resolving this matter through consent orders.

Again, our goal is to resolve this situation amicably and as quickly as possible so that all parties can move forward. As you know, we invited permit staff to attend our meeting this week so that all parties, but especially the City, could consider the long term options at the site, and have a more full set of thoughts about the options and constraints we all are operating under. We greatly appreciate your time and input and look forward to discussing this matter further and working on consent orders to resolve the current NOI.

Sincerely,

Andrew Willis
District Enforcement Analyst

cc: Mike Mohler, Newport Banning Ranch, LLC
Marc Lusebrink, Southern California Edison
Herman Weissker, Inc., c.o. Tony Vedova, Meruelo Enterprises, Inc.
Sherilyn Sarb, Deputy Director, CCC
Lisa Haage, Chief of Enforcement, CCC
Karl Schwing, Orange County Planning Manger, CCC

LSA ASSOCIATES, INC.
20 EXECUTIVE PARK, SUITE 200
IRVINE, CALIFORNIA 92614
949.553.0666 TEL
949.553.8076 FAX

BERKELEY
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SAN LUIS OBISPO
SOUTH SAN FRANCISCO

MEMORANDUM

DATE: December 9, 2010

TO: Mike Sinacori, City of Newport Beach, Department of Public Works

FROM: Art Homrighausen and Richard Erickson

SUBJECT: California Gnatcatcher Issues at the Sunset Ridge Park/Newport Banning Ranch Site

At your request, this memo was prepared by LSA Associates, Inc. (LSA) in response to the California Coastal Commission's (CCC) Notice of Intent to Record a Notice of Violation (NOV) dated October, 5, 2010, for unpermitted development on portions of Newport Banning Ranch (NBR) and adjacent City of Newport Beach properties. In particular, discussed herein are issues relevant to the CCC Staff's suggestion that two impacted areas may constitute "environmentally sensitive habitat areas" (ESHA) under the Coastal Act because of observations of the coastal California gnatcatcher (*Polioptila californica californica*), federally listed as threatened, and that a portion of the removed vegetation consisted of disturbed native scrub habitats.

SUMMARY OF RELEVANT DATA

Clarification of LSA's Gnatcatcher Data from 1992 to 1996

LSA biologists conducted gnatcatcher surveys on NBR from 1992 through 1996. A table and maps prepared by Glenn Lukos Associates (GLA; memo addressed to Christine Medak dated February 10, 2010) summarize the results of those surveys, along with 6 additional years of surveys conducted by others. Figures 1–6 (attached) show information for the NOV area from those maps, along with information obtained from LSA's files. Survey efforts varied annually: nine person-mornings in 1992, three in 1993, and four each from 1994 through 1996.

Each year of the LSA surveys, composite maps were prepared that showed the distribution of approximate gnatcatcher territory boundaries at NBR. Normally, the maximum extent of area observed to be used by a gnatcatcher pair was illustrated. Because unmated gnatcatchers are rare early in the breeding season (when surveys were conducted) and surveys were necessarily brief, observations of single males or females were generally assumed to represent a pair. The composite maps were prepared from maps drawn in the field while birds were under observation and, when those were unavailable, the maps were based on recollections of gnatcatcher observations. The composite territories thus identified generally represented the most conservative polygons possible that combined all observation points. Notions of what might constitute gnatcatcher habitat were put aside; only those areas where gnatcatchers were observed were mapped. However, because polygons were mapped by combining all outlying observation points, on a finer scale many areas within polygons never were actually used by gnatcatchers. Most of the polygons depicted include suitable habitat as well as unused pockets (e.g., ice plant, barren or developed areas), and the territory maps do not distinguish suitable habitat from unsuitable habitat such as solid ice plant, roads, and structures.

The gnatcatcher polygon drawn in the southeast corner of NBR in 1993 is apparently of particular interest to the CCC at this time. This polygon straddles the boundary between NBR and the Sunset Ridge Park property and overlaps the southeast polygon identified in the NOV. It is one of the largest polygons identified in the 5 years of LSA surveys and is based primarily upon observations of a male that was observed at the far east and west ends of the polygon on March 22, 1993 (LSA data on file; Figure 2). LSA has no more precise information on bird use of that polygon that year, but gnatcatcher use was not uniformly observed throughout the polygon and the appearance given by Figure 2 that the bird may have used denuded areas is not accurate (see Concerns discussed further below).

The southern portion of the northwest polygon identified in the NOV was included within gnatcatcher territories identified by LSA in 1992, 1994, and 1996 (Figures 1, 3, and 5). Note that in spite of the small size of the territory polygon drawn in 1992, LSA field notes on file indicate that gnatcatchers were observed in that area that year

Vegetation Within the NOV's Potential ESHAs

As shown in Figures 1–6, the area within the NOV's northwest polygon was mapped as Ruderal Scrub by LSA in about 1991. The entire area within the NOV's southeast polygon was mapped as Disturbed. Vegetation in these areas more recently was described in some detail in a GLA memo addressed to Michael Mohler dated August 26, 2010.

Gnatcatcher Use of the Southeast Corner of Newport Banning Ranch, 1992–2009

The February 2010 GLA memo provides details of gnatcatcher use of the entire NBR from 1992 through 2009. LSA's polygon data are compared with subsequent dot-location data provided by consultants PCR Services Corporation (PCR) in 1997 and 1998; GLA in 2002, 2006, and 2007; and BonTerra Consulting in 2009.

The GLA memo documents up to three gnatcatcher territories in the southeast corner of NBR, an area including two of the polygons (northwest and southeast) identified in the NOV, which CCC Staff is considering as potential ESHA. As shown in Table A, in 8 years of surveys prior to the vegetation removal discussed in the NOV, LSA, PCR, and GLA located an average of 1.25 territories per year in that area. Annual totals ranged from zero to three territories. Three years of surveys by GLA and BonTerra subsequent to the unpermitted development (vegetation removal) revealed a similar average of 1.33 territories per year with a range of one to two, and that despite the unpermitted development, the numbers of gnatcatchers using this area has remained essentially the same. (Note that GLA shape files show a 2007 dot in the exact spot as the 2006 dot, and thus obscured in Exhibit 4 of the GLA memo.) Survey results in excess of one territory were recorded in 2 of the 8 years prior to vegetation clearing and once in the 3 years following.

Concerns Associated with the Current Analysis

The effort to analyze California gnatcatcher use of specific locations within the NOV area over the past 20 years is a rather tortured process. To our knowledge, the emphasis of all of the NBR surveys conducted from 1992 through 2009 was to document the number and *approximate* locations of gnatcatcher territories over time. Territory polygons were drawn by LSA in the 1990s, but this was

not done by subsequent surveyors. None of LSA's surveys were done according to the multiple-visit survey protocol subsequently recommended by the United States Fish and Wildlife Service (USFWS), which are primarily designed to determine presence/absence. Although the locations of specific gnatcatcher observations were recorded during some LSA visits to the NOV area, there is no such record for many visits. Also, all direct recollection of events occurring >14 years ago are now lost. When specific locations were recorded in the field, their primary purpose was to aid in the determination of how many territories were represented. On top of all of this, the gnatcatcher mapping that was done in the 1990s was very crude compared with the tools and technology employed today to generate GIS shape files. LSA has done its best to accurately transfer those data, but a considerable amount of uncertainty remains.

CONSIDERATION OF ESHA DESIGNATION

LSA has several concerns about the evaluation of the NOV polygons with respect to an ESHA determination.

Application of the ESHA Definition to the NOV Polygons

There are two important aspects of the ESHA definition that both should be fulfilled to merit that classification: (1) "…rare or especially valuable…"; and (2) "…which could be easily disturbed or degraded by human activities or developments." The California gnatcatcher is undeniably a threatened species. However, the habitat that was likely present at the time of the alleged violation is by no means rare or especially valuable, even for the gnatcatchers that may utilize it from time to time. This disturbed type of habitat occurs throughout the NBR property; some years it is incorporated into spatial limits of a particular gnatcatcher territory, and some years it is not. More importantly, the value of this habitat is not easily disturbed or degraded. This disturbance and degradation have occurred for decades, and the particular disturbance cited in the NOV had no substantial effect on gnatcatcher utilization of the area, given the fact that gnatcatchers continued to use this area after the disturbance. It should also be noted that of the 5 years of LSA surveys in the 1990s, the northwest polygon was a relatively small portion of gnatcatcher territories in 3 years, and the southeast polygon was a portion of one territory in 1 year. This is additional evidence that the NOV polygons are not critically important to the persistence of gnatcatcher territories in this portion of the property.

Consideration of Facts

When ultimately making an ESHA determination, available facts should be carefully considered. For example, it is tempting to make an a priori assumption that if an area is utilized by the gnatcatcher, it must support essential habitat for that species. However, there are two facts that belie this assumption: (1) large portions of the NBR property and Sunset Ridge Park, including the southeast area that encompasses the NOV polygons, have been frequently disturbed for decades; and, (2) California gnatcatcher territories in this area have been variable, with one or two pairs in most years and a great deal of variability in the configuration of territories. Interestingly, in some years, the mapped territories have been relatively small and limited to various scrub habitats, and in other years, they have been larger and more inclusive of disturbed habitat areas that are typically not considered gnatcatcher habitat by the USFWS.

Timing

It is premature, unnecessary, and ill-advised to make an ESHA determination on these relatively small patches of ground identified in the NOV at this time. The consequences of such a determination on the important planning efforts for the NBR and Sunset Ridge Park are significant. As noted by the Court in Bolsa Chica Land Trust v. Superior Court, the CCC has substantial latitude in determining whether a particular area should be considered an ESHA, but once that determination has been made, the CCC does not have the power to alter its strict limitations. Given these circumstances, it seems that if an ESHA, by law, is so valuable that it cannot be altered, or that habitat values cannot be transferred elsewhere, then the ESHA threshold should be reserved for areas that likewise cannot be easily altered or transferred for biological reasons. For the NBR and Sunset Ridge Park properties, it seems best to make such judgments about the relative value of resources within the context of the entire area. Of course, the key aspects of the ESHA definition, which are discussed above, should be considered at that time.

REMEDY

The restoration remedy proposed by the City of Newport Beach, in association with the Sunset Ridge Park project, combined with the existing habitat in the vicinity of the NOV polygons, will almost certainly increase the habitat value in that area, compared to conditions observed by LSA in the 1990s, as well as the conditions that have existed over this past decade. The facts that such restoration efforts are entirely feasible and will enhance the persistence of gnatcatcher territories in this area obviate the need to make an ESHA determination at this time.

Attachments: Figures 1–6
Table A

LSA

LEGEND

- Project Boundaries
- Areas of Violation
- 1992 CAGN Observations (LSA)
- 1992 Estiamted CAGN Territories

Habitat (c. 1991)

- Annual Grassland (AG)
- Coastal Bluff Scrub (CBS)
- Mixed AG/CBS
- Disturbed Coastal Bluff Scrub (CBSD)

Distrubed (DIST)

- Non-native Woodland (NNW)
- Palustrine, Scrub, Evergreen, Baccharis (mulefat scrub) (PSEB)
- Ruderal Scrub (RS)

0 60 120
FEET

SOURCE: Bing Maps (2008); LSA (c. 1991)

I:\CNB1006\GIS\CAGN_Veg_Series.mxd (12/3/2010)

FIGURE 1

Exhibit 20
CCC-CD-11-03 (NBR)
CCC-RO-11-02
Page 5 of 11

Newport Banning Ranch/Sunset Ridge Park
Habitat and 1992 California Gnatcatcher (CAGN) Territories with Areas of Violation

LSA

LEGEND

- Project Boundaries
- Areas of Violation
- 1993 CAGN Observations (LSA)
- 1993 Estiamted CAGN Territories

Habitat (c. 1991)

- Annual Grassland (AG)
- Coastal Bluff Scrub (CBS)
- Mixed AG/CBS
- Disturbed Coastal Bluff Scrub (CBSD)

Distrubed (DIST)

- Non-native Woodland (NNW)
- Palustrine, Scrub, Evergreen, Baccharis (mulefat scrub) (PSEB)
- Ruderal Scrub (RS)

0 60 120
FEET

SOURCE: Bing Maps (2008); LSA (c. 1991)

I:\CNB1006\GIS\CAGN_Veg_Series.mxd (12/3/2010)

FIGURE 2

Habitat and 1993 California Gnatcatcher (CAGN) Territories with Areas of Violation

LSA

LEGEND

- Project Boundaries
- Areas of Violation
- 1994 CAGN Observations (LSA)
- 1994 Estiamted CAGN Territories

Habitat (c. 1991)

- Annual Grassland (AG)
- Coastal Bluff Scrub (CBS)
- Mixed AG/CBS
- Disturbed Coastal Bluff Scrub (CBSD)

Distrubed (DIST)

- Non-native Woodland (NNW)
- Palustrine, Scrub, Evergreen, Baccharis (mulefat scrub) (PSEB)
- Ruderal Scrub (RS)

N

0 60 120
FEET

SOURCE: Bing Maps (2008); LSA (c. 1991)

I:\CNB1006\GIS\CAGN_Veg_Series.mxd (12/3/2010)

FIGURE 3

Habitat and 1994 California Gnatcatcher (CAGN) Territories with Areas of Violation

Newport Banning Ranch/Sunset Ridge Park

LSA

LEGEND

- Project Boundaries
- Areas of Violation
- 1995 Estiamted CAGN Territories

Habitat (c. 1991)

- Annual Grassland (AG)
- Coastal Bluff Scrub (CBS)
- Mixed AG/CBS
- Disturbed Coastal Bluff Scrub (CBSD)

Distrubed (DIST)

- Non-native Woodland (NNW)
- Palustrine, Scrub, Evergreen, Baccharis (mulefat scrub) (PSEB)
- Ruderal Scrub (RS)

N

0 60 120
FEET

SOURCE: Bing Maps (2008); LSA (c. 1991)

I:\CNB1006\GIS\CAGN_Veg_Series.mxd (12/3/2010)

FIGURE 4

Exhibit 20
CCC-CD-11-03 (NBR)
Newport Banning Ranch/Sunset Ridge Park
CCC-RO-11-02
Habitat and 1995 California Gnatcatcher (CAGN) Territories with Areas of Violation
Page 8 of 11

LSA

FIGURE 5

LEGEND

- Project Boundaries
- Areas of Violation
- 1996 Estiamted CAGN Territories

Habitat (c. 1991)

- Annual Grassland (AG)
- Coastal Bluff Scrub (CBS)
- Mixed AG/CBS
- Disturbed Coastal Bluff Scrub (CBSD)

Distrubed (DIST)

- Non-native Woodland (NNW)
- Palustrine, Scrub, Evergreen, Baccharis (mulefat scrub) (PSEB)
- Ruderal Scrub (RS)

0 60 120
FEET

SOURCE: Bing Maps (2008); LSA (c. 1991)

I:\CNB1006\GIS\CAGN_Veg_Series.mxd (12/3/2010)

Habitat and 1996 California Gnatcatcher (CAGN) Territories with Areas of Violation

LSA

FIGURE 6

LEGEND

- Project Boundaries
- Areas of Violation
- CAGN Observations (GLA and others) (1997, 1998, 2002, 2006, 2007, 2009)

Habitat (c. 1991)

- Annual Grassland (AG)
- Coastal Bluff Scrub (CBS)
- Mixed AG/CBS
- Disturbed Coastal Bluff Scrub (CBSD)

Distrubed (DIST)

- Non-native Woodland (NNW)
- Palustrine, Scrub, Evergreen, Baccharis (mulefat scrub) (PSEB)
- Ruderal Scrub (RS)

N

0 60 120
FEET

SOURCE: Bing Maps (2008); LSA (c. 1991)

I:\CNB1006\GIS\CAGN_Veg_Series.mxd (12/3/2010)

Habitat and 1997 to 2009 California Gnatcatcher (CAGN) Observations with Areas of Violation

Newport Banning Ranch/Sunset Ridge Park

Table A. History of California Gnatcatcher Use in the NOV Area.

Year (Observer)	Number of California Gnatcatcher Territories Identified
1992 (LSA)	1
1993 (LSA)	1
1994 (LSA)	1
1995 (LSA)	0
1996 (LSA)	1
1997 (PCR)	2
1998 (PCR)	3
2002 (GLA)	1
1992–2002 (n=8)	**mean = 1.25**
2006 (GLA)	2
2007 (GLA)	1
2009 (BonTerra)	1
2006–2009 (n=3)	**mean = 1.33**

HAMILTON BIOLOGICAL

December 11, 2010

Dr. Jonna Engel
California Coastal Commission
200 Oceangate
Long Beach, CA 90802-4316

SUBJECT: REVIEW OF ESHA ISSUES
BLUFF ROAD/SUNSET RIDGE PARK ENTRANCE

Dear Dr. Engel,

On behalf of the Banning Ranch Conservancy, Hamilton Biological, Inc. has reviewed biological issues related to the proposed Sunset Ridge project, located in Newport Beach at the corner of Superior Avenue and West Coast Highway, and including part of the adjacent Newport Banning Ranch property. We are aware that the California Coastal Commission is currently evaluating unpermitted habitat removal that took place in the southeastern part of Newport Banning Ranch starting in 2004. In a letter to Karl Schwing dated May 25, 2010 (copied to you and others), I provided biological information on the Sunset Ridge project. My current comments focus mainly upon the western portion of the project site (the area proposed for construction of the park's entry road), in the vicinity of your ongoing investigation (see Figure 1).

Figure 1. The yellow line represents the proposed limits of grading for the Sunset Ridge entrance road and parking lot; grading for the rest of the park would extend off to the southeast. Green screen shows an "island" of coastal scrub and grassland that would be preserved under the proposed grading plan. Pink screen shows three areas cleared in 2004 without a coastal development permit. Proposed grading overlaps entirely with the Southeastern Polygon, partially with the Northeastern Polygon, and is adjacent to the Northwestern Polygon.

316 Monrovia Avenue ~ Long Beach, CA 90803 ~ 562-477-2181 ~ Fax 562-433-5292

CLEARING IN THE EARLY 1980S

Before discussing the issues surrounding the current Notice of Violation in the southeastern part of Newport Banning Ranch, let me bring to your attention another large area in the same general vicinity that was completely cleared between 1980 and 1984 (see Figures 2, 3). Was this clearing permissible under the California Coastal Act?

Figures 2, 3. As shown in these historical aerials, vegetation in the circled area was generally intact in 1980 (left) but completely cleared by 1985 (right). A largely barren scar remains visible in the area proposed for the park's entry road (see, for example, Figure 1).

ESHA DETERMINATION

A key issue to be resolved is whether some or all of the cleared areas, as well as other areas planned for impacts under the City's proposed grading plan, qualify as Environmentally Sensitive Habitat Areas (ESHA) under the California Coastal Act. Before addressing this question directly, I will discuss various relevant considerations.

Designated Critical Habitat

First, the entire project site is designated as critical habitat for the federally threatened Coastal California Gnatcatcher (*Polioptila californica californica*). Section 3(5)(A) of the federal Endangered Species Act defines critical habitat as:

> the specific areas within the geographical area occupied by the species, at the time it is listed, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection . . .

Within areas broadly mapped as critical habitat, the U.S. Fish and Wildlife Service (USFWS) has specified Primary Constituent Elements (PCEs) that define the actual extent of habitats that may be useful to the listed species. PCEs for California Gnatcatcher critical habitat in-

clude not only intact sage scrub habitats (i.e., PCE 1), but also "non-sage scrub habitats such as chaparral, grassland, riparian areas, in proximity to sage scrub habitats . . . that provide space for dispersal, foraging, and nesting"[1] (i.e., PCE 2).

The City has consistently argued that only limited portions of the Sunset Ridge/Newport Banning Ranch site provide the PCEs of gnatcatcher critical habitat. For example, one of the City's responses to my comments on the DEIR reads:

> As stated in the Draft EIR, the entire Project site is located in gnatcatcher critical habitat. Only limited areas on the Project site exhibit Primary Constituent Elements (PCEs) for the gnatcatcher.

When I asked Chris Medak of the U.S. Fish & Wildlife Service (USFWS) whether this was true, she e-mailed the following response on March 23, 2010: "I have advised the City that the whole [Sunset Ridge] site would be considered critical habitat containing the primary constituent elements for the gnatcatcher (primarily PCE 2)."

Distribution of California Gnatcatchers on the Site

The City has consistently attempted to portray the occurrence of California Gnatcatchers as being largely or entirely outside the limits of grading for the Sunset Ridge project. For example, the Sunset Ridge DEIR's Impact section states:

> The Encelia scrub, Encelia scrub/ornamental, and disturbed Encelia scrub on the Project site would not be considered utilized by the gnatcatcher due to the periodic mowing and traffic/pedestrian edge effects in this area.

My comments on the DEIR and my letter to Mr. Schwing include photos of at least one pair of gnatcatchers that I found foraging in three different "non-utilized" parts of the Sunset Ridge site in November 2009. The City replied, in part:

> In the winter, California gnatcatchers are known to forage in a variety of habitat types including single coastal sage scrub plants as well as ornamental habitats outside of their general territories.

To clarify, the birds were using patches of native scrub and the term "general territories" has no defined meaning, so this reply was non-responsive. I will address the gist of the City's reply — that areas used outside of the breeding season are unimportant to the gnatcatcher — after discussing (a) updated information concerning the gnatcatcher's status and distribution on the project site, and (b) the City's repeated mischaracterizations of the site's upland scrub communities.

On June 3, 2010, I photographed an adult male California Gnatcatcher (Figures 4–5), and on December 10, 2010, I photographed another California Gnatcatcher — probably a first-year male (Figures 6, 7). Both of these birds were using parts of the Sunset Ridge project site that the City claims to be unoccupied (Figure 8).

---

[1] Department of the Interior, Fish and Wildlife Service, 50 cfr part 17, RIN 1018–AV38, endangered and threatened wildlife and plants; revised designation of critical habitat for the Coastal California Gnatcatcher (*Polioptila californica californica*). Federal Register 72:72069 (December 19, 2007).

Figures 4, 5. Photos taken on June 3, 2010, showing an adult male California Gnatcatcher using a portion of the Sunset Ridge project site that the City claims as being unoccupied by this species (see Figure 8, below).

Figures 6, 7. Photos taken on December 10, 2010, showing a California Gnatcatcher (probably a first-year male based upon the grayish brown back and faint black streak over the eye) using California Encelia in a portion of the Sunset Ridge project site that the City claims as being unoccupied by this species (see Figure 8, below).

Figure 8. Yellow polygons show four locations of California Gnatcatchers during the non-breeding seasons of 2009 and 2010. Green polygon shows one location of an adult male gnatcatcher during the breeding season in 2010. The City argues that these areas are not occupied by the gnatcatcher.

As documented in my letter to Mr. Schwing, various plant assemblages that include a strong native scrub component have been erroneously mapped as "ornamental" and "ruderal" by the City's consultants. Figures 9 and 10 show mis-mapped areas located directly within the proposed alignment of the park's entrance road and parking lot.

Figure 9. Photo taken on November 15, 2010, showing native scrub growing along West Coast Highway at the proposed entrance road to Sunset Ridge Park. The habitat contains native Big Saltbush, Mulefat, and Coast Goldenbush. Non-native Pampas Grass is also present, but this scrub clearly provides suitable habitat for California Gnatcatchers. In the DEIR, BonTerra Consulting mapped this scrub as "ornamental." In the Coastal Commission's file, a map by Glenn Lukos Associates classifies this area as "invasive/ornamental."

Figure 10. This photo, taken on December 10, 2010, shows native Mulefat surrounded by resprouting California Encelia. In the DEIR for Sunset Ridge, this vegetation was erroneously mapped as "ruderal." I observed a pair of California Gnatcatchers foraging in this Mulefat on November 4, 2009 (see the northernmost polygon on Figure 8). This stand of native scrub would be removed for the park's parking lot.

The City's consultants have erroneously mapped the vegetation in several other parts of the Sunset Ridge site, always in the direction of under-representing sensitive resources. The City has claimed that the mapping is adequate, and also that any possible errors should be ignored because some of the areas involved are too small to map. And yet, as shown in my letter to Mr. Schwing, the DEIR's plant community map identifies "ornamental" and "disturbed" polygons as small as 0.01 acre. This prejudicial abuse of discretion by the City violates Section 21168.5 of CEQA.

Figure 11 shows locations in the vicinity of the proposed park entrance road where biologists have documented breeding pairs of California Gnatcatchers during nine survey efforts conducted during the last two decades.

Figure 11. Point locations for California Gnatcatcher pairs documented during the breeding season in 1992 (one pair), 1994 (one pair), 1996 (one pair), 1997 (two pairs), 1998 (three pairs), 2000 (two pairs), 2006 (two pairs), 2008 (one pair), and 2009 (one pair). The birds do move around to forage, and so the actual area of habitat usage during the breeding season is much more extensive than just the points shown here (see Figure 12).

To demonstrate that some patches of suitable scrub habitat in the southeastern corner of Newport Banning Ranch are not used by gnatcatchers during the breeding season, one would have to map the areas of habitat use and non-use throughout the breeding season, preferably over a period of years (since areas of habitat use may shift from year to year, and during some years multiple pairs occur in this area). At Newport Banning Ranch, such an effort has never been undertaken[2]. Furthermore, since 1997, most surveys have simply mapped a point for each pair, with no effort made to graphically depict areas of habitat usage. Since the determination of use and non-use areas during breeding season cannot be made directly, from examining field data, the current effort by the Coastal Commission staff to evaluate habitat usage by gnatcatchers should consider the typical and minimum

[2] Having conducted some of these focused gnatcatcher surveys of the subject property for LSA Associates in the early 1990s, I am aware that they were mainly presence/absence surveys. It is my recollection that we typically spent 15–30 minutes per pair per day, for a maximum of two days, mapping the birds' movements. We did not follow pairs for extended periods throughout the course of the breeding season, as would have been necessary to determine which patches of habitat were and were not being used by the birds during the breeding season (much less the non-breeding season).

home range/territory size of gnatcatchers (as determined in studies designed to measure territory size) and the species' known habitat requirements.

As summarized in the *Birds of North America Online*[3], the minimum territory size for California Gnatcatchers in coastal areas during the breeding season is 1.0 hectare, and the mean territory size during the breeding season is 2.3 hectares:

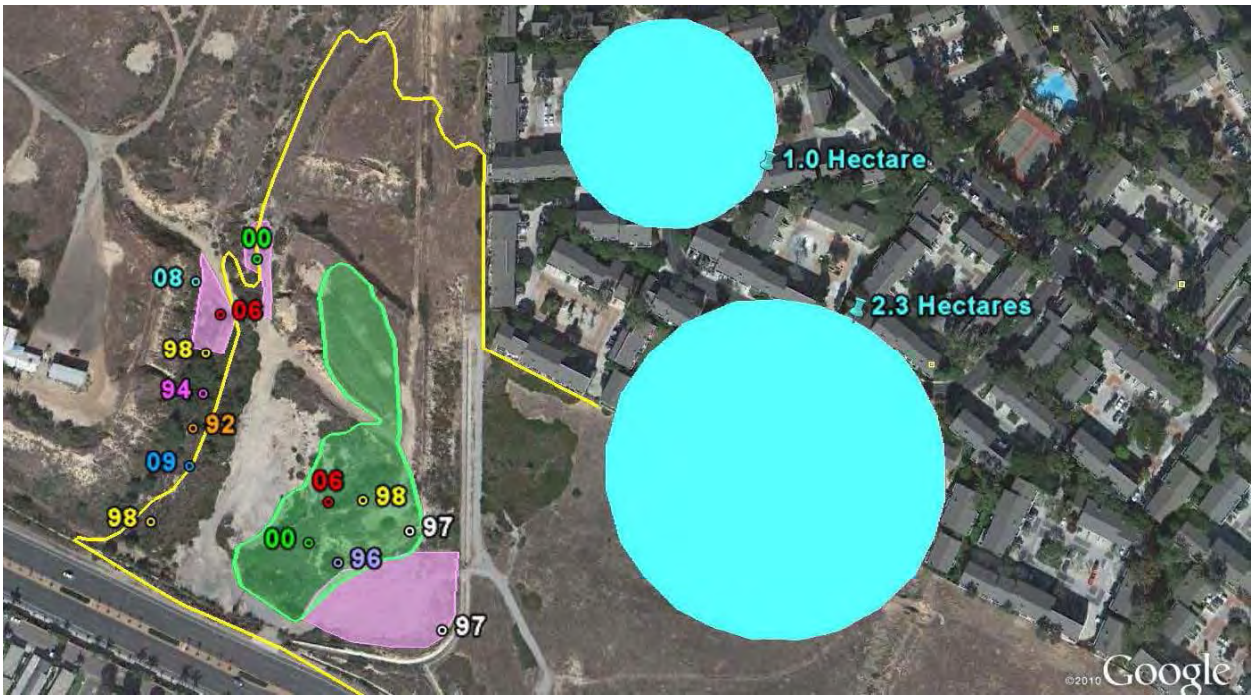


Figure 12. Blue circles help to visualize the minimum (1.0 ha) and mean (2.3 ha) breeding territory sizes for a pair of California Gnatcatchers in a coastal area (from Atwood and Bontrager 2001).

As shown in Figure 12, a breeding pair of gnatcatchers in the southeastern part of the Newport Banning Ranch property is likely to utilize all areas of scrub habitat in the local area. During years when more than one pair breeds in this area (as in 1997, 1998, 2000, and 2006), the effective territory sizes (excluding barren areas) may be even smaller than the 1.0-ha minimum reported in the literature.

With regard to patterns of habitat utilization outside of the breeding season, the species account in *Birds of North America* (Atwood and Bontrager 2001) explains that California Gnatcatchers utilize much more of the landscape during fall and winter:

> Territories defended during nonbreeding season (Preston et al. 1998)[4]; wandering into adjacent territories or unoccupied habitat may result in up to 80% increase in home range size

[3] Atwood, Jonathan L. and David R. Bontrager. 2001. California Gnatcatcher (*Polioptila californica*), The Birds of North America Online (A. Poole, Ed.). Ithaca: Cornell Lab of Ornithology; retrieved from the Birds of North America Online: http://bna.birds.cornell.edu/bna/species/574

[4] Preston, K. L., P. J. Mock, M. A. Grishaver, E. A. Bailey, and D. F. King. 1998b. *California Gnatcatcher territorial behavior*. Western Birds 29:242–257.

> relative to area used during nesting (Bontrager 1991[5], Preston et al. 1998). Small, disjunct patches of coastal sage scrub, distributed within grassland matrices, may be incorporated into nonbreeding season home range even if too small to support a breeding pair; use of such patches may require regular movements of 25–100 m across grassland gaps (DRB). In San Diego Co., established pairs (n = 11) in Dec spent about 62% of time outside boundaries of territory defended during previous breeding season (Preston et al. 1998).

The City maintains that this increase in home range size during the winter is not important to the gnatcatcher, and that the birds could persist just as well by remaining in the same areas utilized during the breeding season. This position presents some important questions that its proponents have not attempted to answer. For example:

- If all needs can be met within the breeding territory, why would the birds expend extra energy, increase their exposure to predators, and increase their competition with other small insectivores (including other gnatcatchers) in order to forage over a much wider area during the colder months of the year?
- The above-quoted text mentions "regular movements of 25–100 m across grassland gaps." Such movements by small, weak-flying species provide good predation opportunities for hawks. Would gnatcatchers undertake such risky flights for no reason at all?

It should be clear that this entire argument is speculative — a hypothetical exercise comparable to debating whether Arctic-breeding Baird's Sandpipers *really need* to migrate all the way to South America (as they all do) when they could more easily satisfy their winter habitat needs in North America without having to fly so far. Scientific studies in the peer-reviewed literature have demonstrated that California Gnatcatchers utilize different parts of the landscape during different times of the year. My observations demonstrate that gnatcatchers also do this at the Sunset Ridge site. Unless the City provides credible scientific evidence showing that gnatcatchers on the Sunset Ridge project site *need not behave the way they do*, the default conclusion should be that the birds' behavior reflects their own survival needs.

It is my personal observation that California Gnatcatchers utilize essentially all mature, scrub-containing communities on the Sunset Ridge project site, including areas of scrub intermixed with Pampas Grass and other exotic plants. For the reasons I have explained, I believe that all of these areas should be regarded as occupied habitat, consistent with (1) my documented observations in 2009 and 2010; (2) the scientific literature describing the gnatcatcher's habitat requirements and patterns of landscape use during breeding and nonbreeding periods; and (3) the USFWS critical habitat designation, including Christine Medak's confirmation that "the whole site would be considered critical habitat containing the primary constituent elements for the gnatcatcher (primarily PCE 2)."

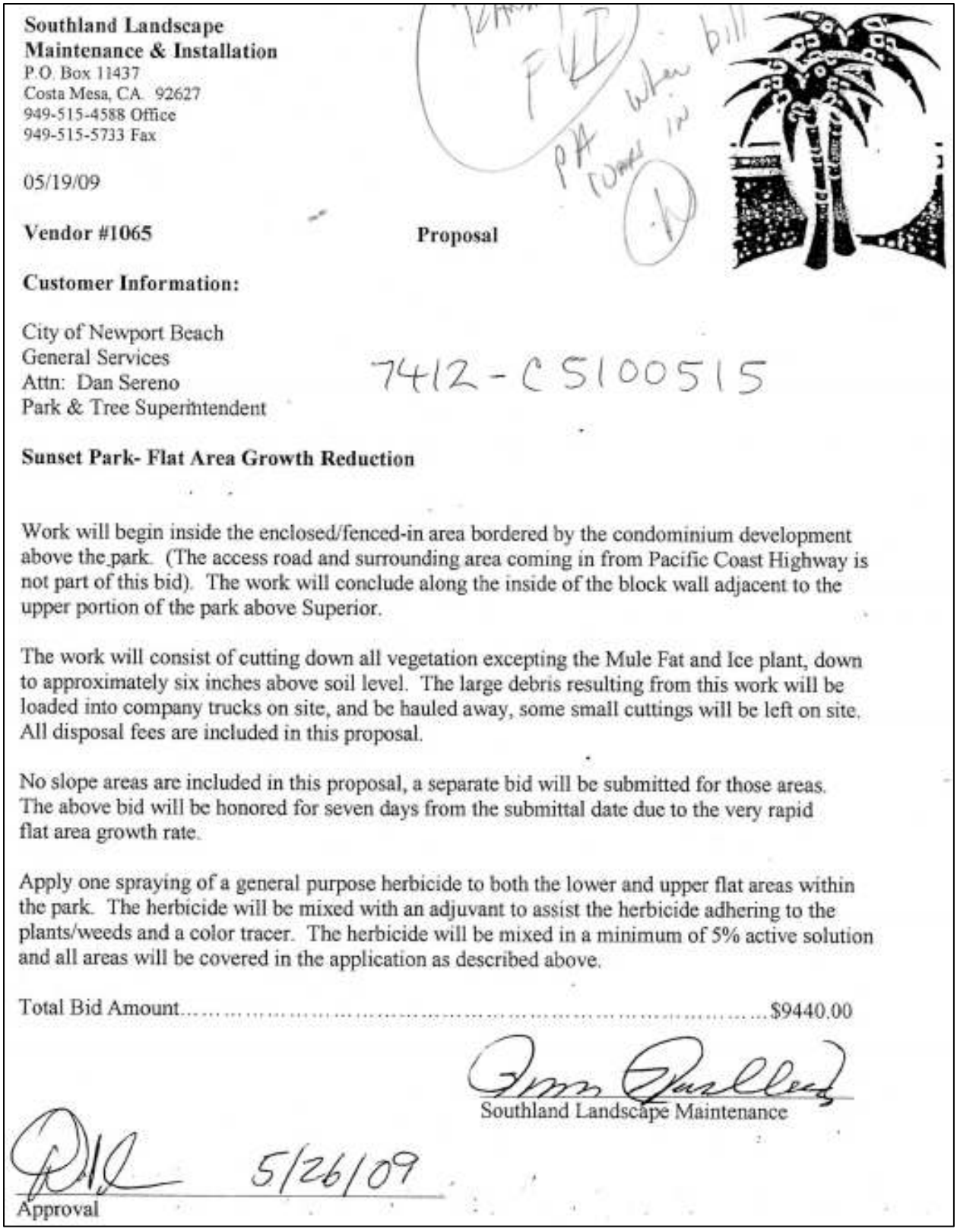
---

[5] Bontrager, D. R. 1991. *Habitat requirements, home range and breeding biology of the California Gnatcatcher (*Polioptila californica *) in south Orange County, California.* Report dated April 1991 prepared for Santa Margarita Co., Rancho Santa Margarita, CA.

Unpermitted Mowing and Spraying of Encelia Scrub

If California Gnatcatchers are mainly restricted to the Newport Banning Ranch portion of the Sunset Ridge site during the breeding season, this may be largely or entirely attributable to the City's repeated, unpermitted mowing and spraying of several acres of encelia scrub on the lower mesa of Sunset Ridge:

Figures 13–15. Photos of the site's lower plateau, taken on November 6, 2009 (left), March 20, 2010 (right), and December 10, 2010 (below). In this area of several acres, the City routinely mows native California Encelia to within inches of the ground and sprays it with herbicide.



Southland Landscape
Maintenance & Installation
P.O. Box 11437
Costa Mesa, CA. 92627
949-515-4588 Office
949-515-5733 Fax

05/19/09

Vendor #1065 **Proposal**

Customer Information:

City of Newport Beach
General Services
Attn: Dan Sereno
Park & Tree Superintendent

7412-C5100515

Sunset Park- Flat Area Growth Reduction

Work will begin inside the enclosed/fenced-in area bordered by the condominium development above the park. (The access road and surrounding area coming in from Pacific Coast Highway is not part of this bid). The work will conclude along the inside of the block wall adjacent to the upper portion of the park above Superior.

The work will consist of cutting down all vegetation excepting the Mule Fat and Ice plant, down to approximately six inches above soil level. The large debris resulting from this work will be loaded into company trucks on site, and be hauled away, some small cuttings will be left on site. All disposal fees are included in this proposal.

No slope areas are included in this proposal, a separate bid will be submitted for those areas. The above bid will be honored for seven days from the submittal date due to the very rapid flat area growth rate.

Apply one spraying of a general purpose herbicide to both the lower and upper flat areas within the park. The herbicide will be mixed with an adjuvant to assist the herbicide adhering to the plants/weeds and a color tracer. The herbicide will be mixed in a minimum of 5% active solution and all areas will be covered in the application as described above.

Total Bid Amount.....$9440.00

Southland Landscape Maintenance

5/26/09
Approval

Figure 16. Copy of a proposal to the City dated May 19, 2009, for the mowing and spraying of encelia-dominated scrub across the City-owned portion of the Sunset Ridge project site (a.k.a. "Flat Area Growth Reduction"). See also Figure 17, on the next page.

PAYMENT AUTHORIZATION

CITY OF NEWPORT BEACH

COPY

Demand of: Southland Landscape

Address: P.O. Box 11437
Costa Mesa, Ca. 92627

Date: 07/02/2009

Dept. General Services

Amount: $9,440.00

Item of Expenditure	Invoice No.	Budget No.	Amount
Park develepment clearing at Sunset Ridge Park.	GS10087	7412-C5100515	$9,440.00
TOTAL			$9,440.00

Comments/Special Instructions: FY 08/09

Work performed as per Mike Sinacori's request.

Department Approval: _____ Date: _____

Fiscal Svcs Manager Approval: _____ Date: _____

Admin Svc Director Approval: _____ Date: _____

Figure 17. This authorization of payment of $9,440 to Southland Landscape for "Park develepment [*sic*] clearing at Sunset Ridge Park" indicates that the City itself views habitat removal as a preliminary step toward its planned development of Sunset Ridge Park, rather than as routine maintenance.

California Encelia is a fast-growing native shrub favored by California Gnatcatchers. For example, of the nine sage scrub associations studied by Weaver (1998), "encelia scrub" dominated by California Encelia and California Sagebrush (*Artemisia californica*) had the second-highest median density of gnatcatchers[6]. California Encelia can quickly form coastal scrub habitat, but the routine disturbance of this habitat decreases its functionality. Later in the season, when the encelia's bloom fades, mustards and other weeds become more apparent within this chronically disturbed scrub. The City's repeated mowing and spraying of this large area prevents mature coastal scrub habitat from developing across the main portion of the site.

The City's repeated removal of encelia scrub (a.k.a. "Park develepment clearing at Sunset Ridge Park") appears to represent a form of unpermitted "development," as defined in Section 30106 of the Coastal Act:

> "Development" means, on land, in or under water, the placement or erection of any solid material or structure . . . **the removal or harvesting of major vegetation** other than for agricultural purposes, kelp harvesting, and timber operations . . .

Responding to comments on the DEIR, the City stated:

> The requirement to clear the property of all weeds, grass, vines, and other vegetation comes from Fire Code Section 1103.2.4, Combustible Vegetation.

California Encelia is not a "weed," it is a native shrub and an integral component of designated critical habitat for the California Gnatcatcher. In notes from an *ex parte* communication with City agent Donald Schmitz on August 3, 2010, Coastal Commissioner Bonnie Neely wrote, "the Fire Marshall continued to maintain the property [by removing all encelia scrub annually] for fire protection purposes." One major problem with the City's explanation is that California Encelia is not a fire hazard. Page 28 of the Orange County Fire Authority's "Guideline for Fuel Modification Plans and Maintenance Program," dated January 1, 2008, *expressly allows* California Encelia to remain "in all fuel modification wet and dry zones in all locations."[7] Furthermore, removal of encelia scrub is carried out across the entire mesa area, as far as 570 feet from the structures to the north. This is much farther than would be required for any legitimate fuel modification purpose, particularly given that the 100 feet closest to structures is maintained as essentially barren land.

Finally, it should go without saying that *all* vegetation is "combustible." Many natural areas around Newport Beach, such areas as Upper Newport Bay and Buck Gully, support scrub dominated by native plant species known to be more combustible than California Encelia (by the Orange County Fire Authority's standards). Yet in those areas, the City seems to understand that it would be illegal to remove, without any form of environmental review, native habitat up to a distance of 570 feet from existing structures. Thus it is bizarre for the City to claim, without further explanation, that these radical landscape alterations are required at Sunset Ridge in order to comply with the Fire Code.

---

[6] Weaver. K. L. 1998. *Coastal sage scrub variations of San Diego County and their influence on the distribution of the California Gnatcatcher.* Western Birds 29:392–405.

[7] http://www.ocfa.org/_uploads/pdf/guidec05.pdf

The City has been mowing designated critical habitat for a federally listed species without any environmental review or oversight, and without providing any plausible rationale for why this constitutes an acceptable maintenance practice for sensitive coastal open space. "Caltrans did it first," "Fire Marshall's orders," and "People have complained about dead-looking plants" are not adequate explanations. The City's current practice is inconsistent with the Coastal Act's requirements to protect the ecological balance of the coastal zone and prevent its deterioration and destruction. Furthermore, the City's actions may represent a form of unpermitted "development" per Section 30106 of the Coastal Act.

Finally, it should be obvious that, with its program of mowing and spraying, the City *has been contributing to* the disturbed and degraded conditions that it claims to be abating. After years of this practice, the City now claims that encelia scrub on the site is not biologically valuable. If one agrees with this conclusion, it is because the habitat has been "easily disturbed or degraded by human activities and developments." The annual cost of disturbing and degrading this habitat is a modest $9,440.

Notice of Violation

Of three areas cleared without permits in 2004, only the Southeast Polygon is visible from adjacent public lands, and so I will focus most of my comments on this polygon.

In the Commission's file, communications from Newport Banning Ranch LLC and their consultants refer to biological work that has taken place on the property starting in the late 1990s, with no reference to work that was done by LSA Associates in the early and mid 1990s. The public files available at the U.S. Fish and Wildlife Service include a vegetation map dated February 13, 1993, which I helped to prepare when I was an employee of LSA. The copy obtained by the Banning Ranch Conservancy is too small and smudged to be completely legible, and this map would have been largely outdated by the time the violation took place in 2004, but it should be reviewed as part of any effort to evaluate the vegetation that was likely present in the three polygons at the time of their clearance.

I have not seen the vegetation map by PCR that is referred to in some documents, but given that there is no way of field-checking such a map I would have low confidence in its accuracy. This is based on my experience reviewing numerous biological reports by PCR, and also takes into consideration the many errors contained in the recent mapping of vegetation on the Sunset Ridge and Newport Banning Ranch properties by BonTerra Consulting and Glenn Lukos Associates (see, for example, Figures 9 and 10 in this letter and Figures 1–9 in my letter to Mr. Schwing).

The following Figures 18 and 19 show the Southeast Polygon as it appeared in 2003 and 2009. Figures 20–22 are photos of this polygon taken on December 10, 2010. When evaluating the arguments set forth by Glenn Lukos Associates in a series of memoranda prepared on behalf of Newport Banning Ranch, LLC, it is important to bear in mind the obvious loss and degradation of the habitat that was present in this area, adverse effects on the environment that persist to this day.

Figure 18. Aerial image dated December 30, 2003, showing the vegetative cover present in the Southeast Polygon several months prior to the start of clearing in 2004.

Figure 19. Aerial image dated November 14, 2009, showing the vegetative cover present in the Southeast Polygon *several years* after the start of clearing in 2004. The scrub vegetation that was present in this area before the clearing took place showed little sign of recovery as of the date of this photo. Figures 20–22 on the next page show this polygon as it appears now.

Figure 20. Photo of the Southeast Polygon, view to the northeast, taken on December 10, 2010. Some California Encelia is growing back along the margins, but much of the vegetation shown here is Castor Bean, a non-native, invasive weed typical of disturbed areas.

Figure 21. Photo of the Southeast Polygon, view to the north, taken on December 10, 2010. Only limited recruitment of California Encelia is visible throughout most of the cleared area.

Figure 22. Photo of the Southeast Polygon, view to the northwest, taken on December 10, 2010. Most of the cleared area remains barren.

Tony Bomkamp of Glenn Lukos Associates prepared a memorandum to Michael Mohler dated August 26, 2010, that was submitted to the Coastal Commission staff. In the memo, Mr. Bomkamp does not claim to know with certainty the composition of the vegetation that existed in the violation areas prior to their clearing, but on Page 5 he suggests:

> . . . the Southeast Polygon likely supported areas of fig marigold (*Carpobrotus edulis*), small-flowered ice plant (*Mesembrianthemum nodiflorum*) and non-native grasses (*Bromus madritensis rubens* and *Bromus diandrus*) as well as moderately to highly disturbed MSS [maritime succulent scrub], dominated by California encelia (*Encelia californica*) and limited amounts of California buckwheat (*Eriogonum fasciculatum*).

He is stating a belief that disturbances conducted in years prior to 2004 degraded the vegetation in the Southeast Polygon. Nevertheless, it appears (from Mr. Bomkamp's description and the December 2003 aerial image) that this polygon was being successfully colonized by pioneering native scrub species, such as California Encelia and California Buckwheat. As shown in Figure 18 in this letter, the habitat had clearly recovered to a point where it was providing suitable habitat for the California Gnatcatchers known to occupy this area. Through natural succession, the scrub likely would have become more complex and more fully developed during the past several years (had it not been cleared).

As of December 2010, several years after being cleared, the scrub in the Southeast Polygon has yet to recover (see Figures 20–22 in this letter). I have not been able to see the other two violation polygons from public lands. If the Southeast Polygon did support a mix of non-native plants and "moderately to highly disturbed MSS" in 2003/2004, several years later the area supports even more weeds, more bare areas, and *extremely* disturbed MSS. There has also been temporal loss of functional upland scrub habitat. The habitat present now is severely degraded compared to conditions in 2003/2004. Furthermore, had this area not been cleared, the scrub that would have existed there now presumably would have been of higher quality than it was at the time of clearing.

On Page 5 of his memorandum, Mr. Bomkamp asserts that clearing of scrub dominated by California Encelia (with some California Buckwheat) would not constitute a loss of ESHA, in part because California Encelia is neither rare nor easily disturbed. It is not the rarity of the plant species themselves that is at issue, but the rarity of the habitat those plants provide for the a listed species, the California Gnatcatcher, due to the structure of the habitat and its position on the landscape.

Also on Page 5, Mr. Bomkamp states, "It is important to note that California Encelia is a highly opportunistic species, capable of colonizing areas following periods of substantial disturbance such as the clearing that occurred beginning in 1964." Please refer to Figures 19–22 in this letter. California Encelia can recover quickly from disturbance that does not remove its roots, but there is obviously a big difference between mowing this plant and grading it, a fact omitted from Mr. Bomkamp's analysis.

In a follow-up memorandum to you dated October 13, 2010, Jeff Ahrens of Glenn Lukos Associates provides additional opinions concerning gnatcatcher use of the cleared areas and about the extent of ESHA on the Newport Banning Ranch/Sunset Ridge site. Please

recall that, in 2009, Mr. Ahrens argued that the Belding's Savannah Sparrow did not occur on the Cabrillo Mobile Home violation site in Huntington Beach, until I provided photos documenting the species' presence there. Page 1 of his memorandum states:

> While the focus of the Notice of Violation (NOV) is on the three polygons designated as the Southeast Polygon, Northwest Polygon, and the Northeast Polygon [depicted on Exhibit 1], it is important to note that portions of the Banning Ranch site contain fairly large blocks of undisturbed or relatively undisturbed maritime succulent scrub (MSS) or coastal bluff scrub (CBS), with the best examples associated with the large arroyo and middle arroyo [see Exhibit 2 for areas of high quality CAGN habitat with CAGN locations]. Any evaluation of the relative importance of these three polygons in my opinion should be made in the context of the larger Banning Ranch site.

In yet another analysis, this one dated November 9, 2010, Mr. Bomkamp makes a similar argument about the scrub on the slope above the Northwest Polygon (comparing that scrub to the most pristine patches of scrub on the property). Despite all this hand-waving, the relevant question is not whether the cleared scrub was the most pristine scrub in the area, but whether it satisfied the criteria of ESHA prior to its clearing.

In their analyses of whether gnatcatcher use of the cleared areas could provide a valid reason to make an ESHA designation, I find it remarkable that both Mr. Bomkamp and Mr. Ahrens fail to so much as *mention* that the habitat in question is designated as critical habitat for the California Gnatcatcher. Furthermore, it seems clear that at least some, if not all, of the violation areas contained the Primary Constituent Elements required for nesting and foraging (PCE 1). The federal Endangered Species Act makes it clear that areas of critical habitat are considered to be especially valuable to listed species; "PCE 1" lands with a legacy of occupancy by the species in question are regarded as the most valuable of all.

A heading on Page 7 proclaims "No Effects on the California Gnatcatcher by the 2004 Activities." Mr. Bomkamp cannot know whether additional birds might have occupied this area if more habitat was present, or whether the reproductive success of birds that nested in this area would have been greater with additional habitat available to them. As such, the proclamation of "no effects" is completely speculative and contrary to common sense. Not even his colleague, Mr. Ahrens, makes this claim.

At the bottom of Page 7, Mr. Bomkamp suggests that the cleared areas were not "mapped as consistently occupied" by gnatcatchers, and that scrub growing on the hill formation north of the Southeast Polygon provides the truly valuable habitat in this area. Mr. Ahrens makes similar statements in his memo of October 13, 2010, and Mr. Bomkamp promotes a similar position in his November 9, 2010, memorandum. As discussed previously in this letter, no surveys of Newport Banning Ranch have ever attempted to define areas of habitat usage/non-usage by the gnatcatcher using standard, accepted methods; furthermore, most surveys since 1997 have represented gnatcatcher pairs by placing single dots on a map. It is not valid to use the results of presence/absence surveys to suggest that specific areas of suitable habitat were not regularly used by gnatcatchers prior to clearing.

Consider also that, in the limited time I have spent on the City-owned portion of the site in 2009 and 2010, I have *three times* photographed California Gnatcatchers perched on the fence bordering the *south* side of the Southeast Polygon (see Figure 4 in this letter and Figures 13 and 14 in my earlier letter to Mr. Schwing). And yet, Mr. Bomkamp claims the species is basically limited to scrub on the hillside *north* of this polygon (again, Mr. Ahrens is more circumspect, offering tepid suggestions that the birds probably stayed mostly on the north side of the Southeast Polygon). The use of presence/absence surveys to make arguments that gnatcatchers have used (or have likely used) certain areas of scrub, but not others in the nearby vicinity, is speculative and highly inappropriate.

Finally, I note that both Mr. Bomkamp and Mr. Ahrens chose to ignore the observations of gnatcatchers on the site that I reported in my comments on the DEIR.

On Pages 9 through 14 of his memo of August 26, 2010, Mr. Bomkamp engages in lengthy discussion of issues related to patch size and connectivity, invasive plants, and proximity to development. Each of these discussions is taken straight from the City's Coastal Land Use Plan (CLUP), which does not apply to the area in question (because it is an area of deferred certification)[8]. This discussion is irrelevant, at least with reference to the Southeast Polygon, since this area is not isolated, dominated by non-native plants (at the time of clearing), or located in close proximity to forms of development that would render it incapable of supporting ESHA.

With regard to the CLUP, I wish to state clearly that there are very good reasons why Newport Banning Ranch was left as an area of deferred certification: Many people, myself included, believe that this area of extremely high biological diversity warrants a higher degree of protection than is afforded those parts of Newport Beach covered under the CLUP. I consider it inappropriate to apply the CLUP anywhere on Newport Banning Ranch, especially in light of the plans that are being set forth to intensively develop this area (starting with the current effort to establish a signalized intersection at West Coast Highway and to construct the first leg of Bluff Road as the entrance to Sunset Ridge Park).

Let me also address the City's argument, expressed in a letter to Commission staff dated October 27, 2010, that any restoration of the cleared areas must be to the conditions that would have existed without the unpermitted clearing. Even if someone is able to determine what the conditions actually were in the first part of 2004, we are left with the question of what the habitat would have developed into by now. We should also consider the temporal loss of habitat that resulted from the apparent violation. Whatever the case, suggestions that the most reasonable solution is to consolidate scrub restoration off in some tucked-away corner that won't bother anyone's development plans is transparently self-serving.

---

[8] One interesting twist, also seen in a draft biological report for the upcoming Newport Banning Ranch development project (posted on the City's web page in 2008), is that Glenn Lukos Associates consistently refers to the City's "Coastal Land Use *Policies* (CLUP)" rather than the Coastal Land Use Plan. This appears to be an attempt to set forth the concept that these are stand-alone City policies, applicable to any City project, rather than items taken directly out of the Coastal Land Use Plan (i.e., policies not applicable to areas of deferred certification).

Satisfaction of ESHA Criteria

The criteria for ESHA are given in Section 30107.5 of the Coastal Act:

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

Habitats designated as critical habitat for a listed species, and that have a documented legacy of supporting that listed species over a period of many years, are generally considered to be rare and especially valuable. As discussed at length in this letter, the upland scrub habitats that support gnatcatchers on the Sunset Ridge and Newport Banning Ranch sites can be, and have been, easily disturbed or degraded by human activities and developments. Nevertheless, areas that are not severely impacted by clearing continue to function as habitat for the gnatcatcher during both breeding and non-breeding periods. Therefore, it seems clear that all areas of upland scrub, including scrub intermixed with non-native species, meet the criteria defining ESHA. Finally, as Andrew Willis has discussed in correspondence with the respondents, the Coastal Commission has established precedence for determining breeding areas for the gnatcatcher, as well as probable and observed gnatcatcher use areas, to be ESHA.

Several acres of encelia scrub on the flat portion of the Sunset Ridge site that have been repeatedly mowed and sprayed with herbicides may also qualify as ESHA. This determination may hinge upon a secondary consideration of whether the City is justified in routinely disturbing and degrading this habitat without any regulatory approvals. The fact that clearing of this vegetation in 2009 was conducted as "Park develepment clearing at Sunset Ridge Park" suggests a clear connection between the habitat removal and the City's development plans.

The three areas cleared without a permit in 2004 are designated as critical habitat for the California Gnatcatcher. Based upon the survey data, my own observations, and the gnatcatcher's minimum and mean territory sizes (see Figure 12), I believe the default assumption should be that gnatcatchers regularly use all areas of suitable habitat in the southeastern corner of Newport Banning Ranch. In the absence of credible, verifiable information indicating that the cleared areas did *not* support scrub and/or gnatcatchers prior to their clearing, I believe that these areas should be regarded as satisfying ESHA criteria. If designated as ESHA, these areas must be restored in place rather than in a "consolidated" area that poses no constraints to proposed development.

ESHA Buffer for Upland Scrub

Whatever is decided concerning buffers, all areas identified as ESHA must be protected and adequately set back from the intensive development that is being proposed at Sunset Ridge Park and at Newport Banning Ranch. Under no circumstances should the minimal buffer standards contained in the City of Newport Beach CLUP be applied to these areas. Newport Banning Ranch is a deferred certification area precisely because of its high resource values, which warrant greater protections than those specified in the City's CLUP.

The Brightwater project at the Bolsa Chica Mesa (with resource values truly comparable to those present at Newport Banning Ranch/Sunset Ridge) provides a relevant benchmark. At Brightwater, ESHA buffers range in width from 150 to 382 feet, with the Coastal Commission staff biologist having recommended a minimum buffer width of 164 feet[9].

At Marblehead in San Clemente, the recommended upland buffers were 100 feet, where feasible, and a minimum of 50 feet[10]. Given that the Marblehead site did not have nearly the ecological values present on the Sunset Ridge/Newport Banning Ranch site, it is my opinion that this level of buffer would be inadequate for either the Sunset Ridge project or the upcoming Newport Banning Ranch project (which would share the same entry road off West Coast Highway).

IN CONCLUSION

I appreciate the opportunity to provide input into the process of evaluating potential violations of the Coastal Act identified to date at the Newport Banning Ranch/Sunset Ridge site. If and when the Sunset Ridge and/or Newport Banning Ranch projects continue to move forward through the process of applying for Coastal Development Permits, I anticipate providing additional information for your consideration.

If you have any questions or would like clarification of any items, please call me at 562-477-2181 or send e-mail to robb@hamiltonbiological.com.

Sincerely,

Robert A. Hamilton
President, Hamilton Biological, Inc.

cc: Andrew Willis, Enforcement Officer
Karl Schwing, Orange County Area Supervisor
Sherilyn Sarb, South Coast Deputy Director
Dr. John Dixon, Ecologist, Environmental Program Manager
Dr. Terry Welsh, President, Banning Ranch Conservancy

[9] http://www.coastal.ca.gov/lb/Th11a-10-2005.pdf.
[10] http://www.coastal.ca.gov/lb/5-03-013.pdf.

HAMILTON BIOLOGICAL

December 14, 2010

Dr. Jonna Engel
California Coastal Commission
200 Oceangate
Long Beach, CA 90802-4316

SUBJECT: REPLY TO LSA MEMORANDUM
BLUFF ROAD/SUNSET RIDGE PARK ENTRANCE

Dear Dr. Engel,

On behalf of the Banning Ranch Conservancy, Hamilton Biological, Inc. has reviewed a memorandum dated December 9, 2010, from Art Homrighausen and Richard Erickson of LSA Associates (LSA) to Mike Sinacori of the City of Newport Beach (City) concerning the California Coastal Commission staff's ongoing evaluation of unpermitted habitat removal that took place in the southeastern part of Newport Banning Ranch starting in 2004. I have already provided extensive input to you in a letter dated December 11, 2010, but I wanted to take this opportunity to address LSA's memo.

Omission of PCR (2000) Gnatcatcher Data

LSA biologists were apparently unaware of gnatcatcher surveys that PCR Services conducted in 2000. In that breeding season, PCR mapped two gnatcatcher territories in the southeastern part of Newport Banning Ranch. Territory 1 was adjacent to the Southeast Polygon, and Territory 2 overlapped both the Northwest and Northeast Polygons.

Figure 1. Partial map showing that, in 2000, PCR biologists mapped California Gnatcatchers as using habitats located within or immediately adjacent to the Southeast Polygon (Territory 1) and the Northeast and Northwest Polygons (Territory 2). Discussions by LSA and Glenn Lukos Associates of known habitat usage by gnatcatchers have not mentioned the data shown here.

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More Visits Needed to Map Complete Territories

The discussion of LSA's efforts to map gnatcatcher territories in the 1990s is accurate, but I must emphasize that we generally did not follow birds for extended periods throughout the breeding season. Therefore, the territory boundaries that were mapped almost certainly left out many habitat patches that the birds actually used during the breeding season (just not during those limited periods when biologists were present).

On Page 3, LSA states:

> It should also be noted that of the 5 years of LSA surveys in the 1990s, the northwest polygon was a relatively small portion of gnatcatcher territories in 3 years, and the southeast polygon was a portion of one territory in 1 year. This is additional evidence that the NOV polygons are not critically important to the persistence of gnatcatcher territories in this portion of the property.

To reiterate, nobody has conducted surveys in such a way that the resulting maps can be used to determine which patches of scrub habitat in the southeastern corner of Newport Banning Ranch were and were not used during a given year. During most surveys since 1997, no effort at all has been made to map territory boundaries/habitat use areas.

Application of ESHA Definition

On Page 3, LSA states:

> The California gnatcatcher is undeniably a threatened species. However, the habitat that was likely present at the time of the alleged violation is by no means rare or especially valuable, even for the gnatcatchers that may utilize it from time to time. This disturbed type of habitat occurs throughout the NBR property; some years it is incorporated into spatial limits of a particular gnatcatcher territory, and some years it is not.

Why do both Glenn Lukos Associates and LSA refuse to mention that the cleared habitat is designated as critical habitat for the California Gnatcatcher? Section 3(5)(A) of the federal Endangered Species Act defines critical habitat as:

> the specific areas within the geographical area occupied by the species, at the time it is listed, on which are found those physical or biological features (I) essential to the conservation of the species and (II) which may require special management considerations or protection . . .

The southeastern part of Newport Banning Ranch has been occupied by breeding pairs of California Gnatcatchers on a nearly annual basis for many years, so the scrub habitats in this area are clearly suitable for nesting. If this part of Newport Banning Ranch did not satisfy the criteria for critical habitat, the U.S. Fish and Wildlife Service would have excluded it when critical habitat was re-designated in December 2007. The status of this occupied scrub as critical habitat should be highly relevant to the Coastal Commission's consideration of whether the cleared scrub warrants designation as ESHA.

Although Newport Banning Ranch is an area of deferred certification under the City's Coastal Land Use Plan (CLUP), City-owned land does extend into the Southeast Polygon;

furthermore, Coastal Commission staff has indicated that the CLUP is a relevant document that will be used to provide staff with some form of guidance as it considers the issuance of a Coastal Development Permit for the Sunset Ridge Park project. Section 4.1.1 of the CLUP states:

> In determining whether a habitat area meets the statutory definition of ESHA contained in Section 30107.5 of the Coastal Act and should be designated as an ESHA, the following attributes need to taken into consideration:
>
> - The presence of natural communities that have been identified as rare by the California Department of Fish and Game.
>
> - The recorded or potential presence of plant or animal species designated as rare, threatened, or endangered under State or Federal law.

Also:

> Several of the natural communities that occur in Newport Beach are designated rare by the CDFG and are easily disturbed or degraded by human activity and therefore are presumed to meet the definition of ESHA under the Coastal Act. These include . . . southern dune scrub, southern coastal bluff scrub, maritime succulent scrub . . .

Also (emphasis added):

> Another important habitat within the City of Newport Beach is coastal sage scrub (CSS). Although CSS has suffered enormous losses in California (estimates are as high as 85%), there are still thousands of acres in existence and this community type is no longer listed as rare by CDFG. **Nevertheless, where CSS occurs adjacent to coastal salt marsh or other wetlands, or where it is documented to support or known to have the potential to support rare species such as the coastal California gnatcatcher, it meets the definition of ESHA because of its especially valuable role in the ecosystem.**

Policy 4.1.1-1 in the CLUP directs an applicant to evaluate various attributes when determining whether a habitat area meets the definition of an ESHA, including "The recorded or potential presence of plant or animal species designated as rare, threatened, or endangered under State or Federal law."

Policy 4.1.1-2 in the CLUP states that the City shall "Identify ESHA as habitats or natural communities listed in Section 4.1.1 that possess any of the attributes listed in Policy 4.1.1-1."

If these CLUP criteria and policies are at all relevant to the Sunset Ridge Park project, we should all be prepared to acknowledge that areas of scrub habitat known to be routinely occupied by California Gnatcatchers satisfy the City's own definition of ESHA.

Finally, independent of the City's CLUP, the Coastal Commission has well-established precedent for designating as ESHA scrub habitats known to support nesting California Gnatcatchers. I am unaware of any precedent for requiring the scrub to be pristine; certainly this was not the case at the Marblehead site in San Clemente, where the Commission designated coastal scrub as ESHA based upon the occurrence of nesting California Gnatcatchers.

For all of these reasons, it would be quite remarkable for the Coastal Commission to refrain from identifying as ESHA any area of coastal scrub that is known to support nesting California Gnatcatchers, especially when the scrub has been designated as critical habitat for the species.

"Timing"

Toward the end of the memorandum, under this heading, Mr. Homrighausen and Mr. Erickson suggest that it is "premature, unnecessary, and ill-advised to make an ESHA determination" at this time. It is in no way "premature" or "unnecessary" to make an ESHA determination now. The violation occurred years ago, and the habitat that was cleared has yet to recover. To sidestep an ESHA determination in favor of restoring habitat somewhere else would require Commission staff to ignore the area's well-documented history of occupation by gnatcatchers, the critical habitat designation, the relevant language from the City's own CLUP, and all the applicable Coastal Commission precedents for identifying such areas as ESHA.

In my view, Commission staff would be "ill-advised" to take LSA's recommended approach, as it would establish terrible new precedents. First, it would pave the way for great swaths of ecologically functional, if not pristine, habitats on Newport Banning Ranch and Sunset Ridge to be declared "disturbed" or "degraded" and therefore "non-ESHA." Failing to make an ESHA determination in this instance would also encourage other land owners to wipe out their own sensitive habitat areas, in hopes that such a determination might never be made, thereby allowing them to mitigate damages in a more convenient location.

"Remedy"

LSA's memo concludes with an endorsement of the City's proposal to undertake restoration at an out-of-the-way location as mitigation for the unpermitted clearance:

> The facts that such restoration efforts are entirely feasible and will enhance the persistence of gnatcatcher territories in this area obviate the need to make an ESHA determination at this time.

Bolsa Chica Land Trust v. Superior Court established the legal principle that ESHA cannot be destroyed and then recreated somewhere else. At least some, if not all, of the cleared areas appear to have satisfied ESHA criteria before they were cleared without a permit. The only way this remedy makes sense is if the City can somehow succeed in convincing the Commission staff to make no ESHA determination in the cleared areas.

Conclusion

The last page of LSA's memorandum warns that making an ESHA determination at the three areas of unauthorized clearing would have "significant" consequences for "the important planning efforts for the NBR and Sunset Ridge Park." Had LSA biologists been involved in CEQA review of Sunset Ridge Park, they would be more aware of how the City and their former consultant, BonTerra, completely botched "the important planning efforts" in this area, cutting backroom deals with Newport Banning Ranch (over the entry

road and dumping of fill on grasslands) and basically stonewalling every effort to examine and address the relevant planning issues. The three areas of unpermitted clearing are only the tip of the iceberg. There are obvious coastal wetlands that the City and their consultants have refused to recognize, areas of coastal scrub mis-mapped as ruderal or ornamental vegetation, several acres of California Encelia that are routinely mowed and sprayed with herbicide, highly productive grasslands on Newport Banning Ranch that would become dumping grounds for 34,000 cubic yards of fill from the park project, etc. At what point in the "important planning efforts" will all of these other serious biological issues be addressed in a forthright manner?

All three cleared polygons have a documented history of having been utilized by California Gnatcatchers during the nesting season, and therefore appear to satisfy ESHA criteria. The ESHA determination must be made immediately, not only to remedy the unauthorized impacts but also to avoid establishing some very bad precedents.

If you have any questions or would like clarification of any items, please call me at 562-477-2181 or send e-mail to robb@hamiltonbiological.com.

Sincerely,

Robert A. Hamilton
President, Hamilton Biological, Inc.

cc: Andrew Willis, Enforcement Officer
Karl Schwing, Orange County Area Supervisor
Sherilyn Sarb, South Coast Deputy Director
Dr. John Dixon, Ecologist, Environmental Program Manager
Dr. Terry Welsh, President, Banning Ranch Conservancy

CITY OF NEWPORT BEACH

OFFICE OF THE CITY ATTORNEY
David R. Hunt, City Attorney

January 18, 2011

Via Email awillis@coastal.ca.gov,
Facsimile (562) 590-5084 & U.S. Mail

Andrew Willis
District Enforcement Analyst
California Coastal Commission
200 Oceangate, 10th Floor
Long Beach, CA 90802

RE: October 5, 2010 Notice of Intent to Record a Notice of Violation of the Coastal Act and Notice of Intent to Commence Cease and Desist Order and Restoration Order Proceedings
Assessor Parcel No. 424-041-10

City Matter No.: A10-00433

Dear Mr. Willis:

This letter is submitted on behalf of the City of Newport Beach ("City") in regard to the letter from Executive Director Peter M. Douglas, dated October 5, 2010, entitled "Notice of Intent to Record a Notice of Violation of the Coastal Act and Notice of Intent to Commence Cease and Desist Order and Restoration Order Proceedings" ("NOI"). Since receipt of the NOI, the City has repeatedly expressed its desire to quickly resolve this matter and avoid litigation over the allegations described in the NOI. On behalf of the City, we want to express our appreciation of your significant efforts towards resolution of the NOI via a mutually-agreeable consent and restoration order. The purpose of this letter is to explain our concern that any of the property identified in the NOI and owned by the City is considered environmentally sensitive habitat area ("ESHA") as that term is defined by Public Resources Code Section 30107.5.

Although the NOI described unpermitted development that included removal of major vegetation, it is significant that the NOI did not state whether ESHA was impacted by the alleged unpermitted development. Over the course of the past three months, you have declared the impacted area to be ESHA. In contrast, the City has maintained that none of the vegetation in the approximately .16 acre portion of the southeast polygon ("SE polygon") owned by the City removed by the unpermitted development, if any, was

Telephone: (949) 644-3131 · Fax: (949) 644-3139
City Hall • 3300 Newport Boulevard • Post Office Box 1768
Newport Beach California 92658-8915 • www.city.newport-beach.ca.us

ESHA. Following our office's repeated requests for information supporting your ESHA determination, you provided that the basis for the ESHA identification in the SE polygon is an "estimation" of the native vegetation existing prior to the unpermitted development based on the following: (1) reports of Glenn Lukos and Associates ("GLA") dated August 26, 2010 and October 13, 2010; (2) 1998 PCR mapping of vegetation within the SE polygon; (3) historical aerial photos; and (4) evidence of use by the California gnatcatcher ("CAGN"). In turn, the determination of CAGN use of the City's portion of the SE polygon is based upon: (1) a 1993 siting of a gnatcatcher within the SE polygon; and (2) point location surveys completed in 1997 and 1998; and (3) the 2006 point location siting of a gnatcatcher outside of the SE polygon.

We have reviewed the above-referenced materials and consider these materials to be insufficient to support an ESHA finding. In fact, as more fully set forth below, we believe that an ESHA finding based on the above-cited materials would be inconsistent with the Coastal Act as these materials evidence that the vegetation on the City-owned property, does not satisfy the definition of ESHA set forth in Public Resources Code Section 30107.5.

By way of background, on March 23, 2010, the City certified Environment Impact Report ("EIR") No. 2009051036, which analyzed the biological impacts of the proposed Sunset Ridge Park project. The City circulated and certified EIR No. 2009051036 which concluded that the impacted areas were not ESHA. During the EIR review process, the City did not receive any comments from the California Coastal Commission ("CCC") relating to the adequacy of EIR No. 2009051036 prior to certification. As a responsible agency, the CCC was required to advise the City, and pursue a court action if necessary, if it believed that this ESHA determination made as part of its certification of the EIR, was inadequate. (See Public Resources Code §§ 21083, 21080.4, 21002.1(d); 14 CCR §§ 15050, 15096.) [1] Notwithstanding this clear mandate, subsequent to certification of Sunset Ridge EIR and in a letter dated September 1, 2010, CCC Program Analyst John Del Arroz advised that a precise ESHA delineation would be made as part of the processing of CDP No. 5-10-168. Because the CCC has taken the position that an ESHA determination will be analyzed as part of the processing of CDP No. 5-10-168, any ESHA finding at this time would seem premature at best.

Putting aside the procedural difficulties of an ESHA determination prior to CCC's consideration of CDP No. 5-10-168, we now address the sufficiency of the evidence you rely on to support an ESHA finding.

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[1] It should be noted that CCC has a practice of submitting written comments during EIR review periods i.e. Recirculated EIR No. 2008051096 (Marina Park) which was subject to review contemporaneously.

Coastal Act Definition of ESHA

Section 30240 of the Coastal Act states:

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

Section 30107.5 of the Coastal Act defines environmentally sensitive areas (a.k.a. Environmentally Sensitive Habitat Areas) as follows:

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

Given this regulatory framework, there is insufficient evidence to establish that the unpermitted development resulted in the removal of ESHA in the City-owned portion of the SE polygon. First and foremost is the fact that the SE polygon is bisected by a road that has been used for vehicular access to the City property for the past several decades. Second, vegetation in the impacted area includes a significant amount of non-native plants and invasive species, which do not meet the definition of ESHA set forth in the Coastal Act. Third, CAGN were not observed in the SE polygon for most of the years for which there is data, which is in contrast to other areas for which CAGN has been observed nearly every year for which there is data. In fact, there has been no effect on CAGN by the alleged unpermitted development. Thus, the SE polygon, and especially the City-owned portion, is not especially valuable, or sensitive under the definitions provided by the Coastal Act.

Any Vegetation Removed from the SE Polygon was not ESHA

The reports dated August 26, 2010, and October 13, 2010 submitted by GLA's document via aerial photographs that the SE polygon was used for as an access road resulting in a disturbed area with little or no vegetation present as far back as the 1960's. Based on the condition of the adjacent hill formation, which is outside the SE polygon, GLA concluded that a portion of the SE polygon supported areas of fig marigold, ice plant, non-native grasses and California encelia. However, as noted by

GLA, this vegetation in the SE polygon was disturbed and of a monocultural character. In other words, at most, there was one coastal sage scrub indicator species identified, the highly opportunistic *California encelia*. As noted by GLA, the *California encelia* is capable of colonizing areas of substantial disturbance and is not considered rare under any definition. In terms of the significance or sensitivity of this vegetation, the historic activities lawfully occurring on this site are critical in assessing the vegetation habitat characteristics of the SE polygon. As to the City-owned parcel, these activities include semi-annual mowing, an access road, and other activities undertaken by, or at the direction of, the State of California, which owned the property prior to selling to the City. Not only is it well established that *California encelia*, is not easily disturbed, it is in fact present notwithstanding disturbance. Thus, it does not meet the definition of ESHA set forth in Section 30107.5 of the Coastal Act. The 1998 PCR mapping further supports this conclusion. The depiction of the 1998 PCR mapping included as Exhibit 9 to the GLA memorandum dated August 26, 2010, shows that to the extent any coastal scrub was mapped in the SE polygon, most if not all, was not City-owned property. A copy of this mapping is attached hereto for your reference.

The Documented CAGN Use does not Establish that the SE Polygon is ESHA

You rely on observations of CAGN in 1993 and 1997 and point-location surveys completed in 1998 and 2006 to evidence CAGN use in the SE polygon. Quite simply, these observations fall woefully short of substantial evidence of CAGN use in the City-owned portion of SE polygon.

CAGN were not observed in the SE polygon for most of the years for which there are at least some data and there is no evidence that the City's portion of the SE polygon was used or occupied by CAGN on a consistent basis prior to the unpermitted development alleged in the NOI. At most, it may be that this area was used by CAGN for foraging on an occasional basis.

The CCC has previously found areas that are isolated segments of coastal scrub used for foraging and that are not considered attractive as nesting areas due to the presence of automobile traffic and vegetation having low plant height and density did not meet the definition of ESHA. (*See,* CCC Staff Report, April 19, 2007, Application No. 5-06-300; CCC Staff Report, March 26, 2003, Application No. 5-3-013.) The standards employed by the CCC are consistent with the findings issued on September 29, 2010 by the United States Fish and Wildlife ("USFW") in its 2010 Coastal Gnatcatcher 5-Year Review wherein USFW confirmed that all coastal scrub is not equal with respects to CAGN and, more importantly, notes that not all coastal scrub vegetation supports CAGN. (2010 Coastal Gnatcatcher 5-Year Review, September 29, 2010, p. 9, 13.) We recommend that you review the findings included in the USFW 5-Year Review including

the conclusion that CAGN density depends on the quality of the habitat. (2010 Coastal Gnatcatcher 5-Year Review, September 29, 2010, p. 17 *citing* Winchell, C.S. and Doharty, P.F. *Using California Gnatcacher to Test Underlying Models of Habitat Conservation Plans* (2008), Journal of Wildlife Management, 72:1322-1327.) Based on the past CCC determinations, the quality of the vegetation of the SE polygon documented by GLA indicate that the vegetation removed, if any, was not ESHA.

Finally, the evidence clearly establishes that impacts to vegetation if any, was not critical to CAGN use. The subsequent protocol surveys completed in 2006 that mapped a CAGN pair in the scrub on the adjacent hill form (immediately to the north of the SE polygon) indicate that the area continued to be suitable for CAGN, suggesting that the SE polygon was not necessarily critical for the CAGN.

Thus, CAGN use of the SE polygon, and especially the City-owned portion of the SE polygon, is sporadic at best and that conclusions regarding the overall importance of this area to the CAGN are ambiguous. As noted by the Court in *Bolsa Chica Land Trust v. Superior Court* (1999) 71 Cal.App.4th 493, the CCC has substantial latitude in determining whether a particular area should be considered an ESHA, but once that determination has been made, the CCC has no the power to alter its strict limitations. Given these circumstances, it seems that if an ESHA, by law, is so valuable that it cannot be altered, or that habitat values cannot be transferred elsewhere, then the ESHA threshold should be reserved for areas that likewise cannot be easily altered or transferred for biological reasons. It seems prudent, and in furtherance of the Coastal Act, to make judgments about the relative value of resources within the context of the entire area such as during the CCC's consideration of CDP No. 5-10-168.

In closing, and to reiterate the City's desire to avoid a lengthy dispute as to whether there is sufficient evidence that the Coastal Act definition of ESHA is met, we believe it more efficient for the parties to enter into a mutually-agreeable consent and restoration order. A litigious dispute between two public agencies, relating to a relatively small area (.16 acre) is neither cost effective nor in public's interest. This is especially true given that the City is currently processing Coastal Development Permit Application No. 5-10-168 for the proposed Sunset Ridge Park ("CDP No. 5-10-168), which will include an ESHA delineation and proposes to not only restoration but <u>enhance</u> the entire SE polygon at the sole cost of the City. Also, the Coastal Act does not require an ESHA determination to effectuate the proposed consent or a restoration order. A mutually-agreeable consent order would require the parties to agree not to contest issues they would otherwise pursue in a court of law. From the City's perspective, these issues relate to what constitutes ESHA under the Coastal Act, and whether the Coastal Act requires enhanced restoration replacement of the vegetation in place at the time of the alleged unpermitted development. Therefore we believe it unproductive to suggest that a consent order will encompass a determination by the CCC that the City-owned portion

of the SE polygon is ESHA.

We look forward to working with you towards a mutually agreeable consent and restoration order.

OFFICE OF THE CITY ATTORNEY

Leonie Mulvihill,
Assistant City Attorney

LM/cm

Enclosure

cc: Alex Helperin, California Coastal Commission
Dave Kiff, City Manager
David R. Hunt, City Attorney
Dave Webb, Deputy Public Works Director
Mike Sinacori, Assistant City Engineer

[A10-00433] Willis from LM 01.18.11 re: NOV

BLOCK & BLOCK

A PROFESSIONAL CORPORATION

1880 CENTURY PARK EAST, SUITE 415
LOS ANGELES, CALIFORNIA 90067-1604

ALAN ROBERT BLOCK
JUSTIN MICHAEL BLOCK

TELEPHONE (310) 552-3336
TELEFAX (310) 552-1850

SENDER'S E-MAIL
alan@blocklaw.net

January 20, 2011

Mr. Andrew Willis
Enforcement Analyst
California Coastal Commission
South Coast District Office
200 Oceangate, Suite 1000
Long Beach, CA 90802

Re:V-5-09-008

Project Location: Newport Banning Ranch property, including, but not limited to, Assessor Parcel Nos. 424-041-04, 424-041-10; City of Newport Beach Property) 114-170-43, and 114-170-79

Un-permitted Development: Removal of major vegetation, including coastal sage scrub; placement of solid material, including staging numerous significant stacks of pipe conduits, vehicles, mechanized equipment, and construction materials, and grading

Dear Andrew:

As you know this office represents Herman Weissker, Inc. ("HWI") with regard to the above captioned violation. The purpose of this correspondence is to confirm our meeting of Tuesday morning and the monetary offer made to the Commission to resolve the civil penalty portion of the violation as well as to set forth the facts as they relate to my clients use of the subject property during a portion of the time in question

HWI is a licensed building contractor who entered into a contract with Southern California Edison ("SCE") to construct underground utilities in the City of Newport Beach ("City"). HWI, pursuant to recommendations from the City, leased the subject property in the City from West Newport Oil Company ("WNOC") to use as a staging area for the SCE contract. HWI believed that all applicable building permits to perform the contract, as well as necessary to use the leasehold premises as a staging area, had been issued. At no time was HWI advised by any party, including the City, WNOC, or Newport Banning Ranch ("NBR"), a subsequent purchaser of the property, that a Coastal Development Permit ("CDP") was necessary in order to use the leasehold premises as a

staging area for materials in order to perform the contract. Possibly no party believed a CDP was necessary because WNOC had a previously issued Coastal Commission Exemption for its long standing oil producing and related business activities which had taken place on the property for decades prior to the effective date of the Coastal Act. It was a matter of common knowledge in the City that the subject site was the site of numerous oil wells, that its existing vegetation was greatly disturbed, and that the property had previously been proposed as the location for a future freeway access.

HWI was in possession of the leasehold property from April 2003 through November 2003, and then again in mid September 2004 through mid February 2006. As stated above, the leased area was used by my client as a staging area for construction materials. HWI readily admits that it drove vehicles and staged materials and equipment on the property. HWI denies that it removed major vegetation and/or performed grading. The aerial photographs that accompanied the initial notice of violation letter, dated May 14, 2010, reveal that the subject areas were vegetated in December 2003 after HWI first vacated the property in November 2003. The Commission's second violation letter, dated October 5, 2010, further provides that the un-permitted development activities, including the removal of major vegetation, commenced between April 16, 2004 and October 23, 2004, and continued through November 2009. HWI steadfastly contends that the major vegetation was cleared before it re-entered the property in mid September 2004 and that its employees did not remove the vegetation and/or perform grading. Declarations and time sheet records from HWI employees, prepared in the normal course of business, support these assertions.

After notice of the alleged violation was received, the alleged violators, NBR, City, SCE and HWI, agreed that NBR and the City would take the lead in preparing a restoration and mitigation plan, and that SCE and HWI would attempt to resolve the civil penalty portion of the alleged violation. In that HWI had accepted a demand by SCE to indemnify SCE for any prospective liability and/or damages which might incur under the contract, HWI has accepted the responsibility to attempt to resolve the monetary aspects of the violation. HWI has agreed to do so, despite its vigorous contention that its actual culpability was limited. HWI is informed that NBR leased the subject premises to other companies who also used the property for staging equipment during the alleged violation period, and that Coastal Act violations run with the land. HWI has made a business decision that it is in the best interests of all parties to resolve the violation, and desperately desires to preserve its long standing business relationship with SCE.

In a good faith attempt to resolve the monetary aspects of the violation, HWI makes a settlement offer in the amount of $200,000 conditioned on NBR and the City both agreeing to waive any claims each may have against SCE and/or HWI to fund the cost of the proposed restoration of the property and/or acquisition costs, if any, for off-site mitigation property, and SCE and HWI being released from any further obligation under the consent order and removed as parties to the same. As you are well aware, NBR has made recent, continued, demands that SCE and HWI agree to indemnify it for any and all costs it incurs as a result of the violation. These demands, which we have been advised total in excess of $650,000 at this time, not including acquisition costs for the purchase of off-site mitigation properties, if necessary, make it impossible for HWI to offer a meaningful settlement amount to the Commission without a waiver of any indemnification claims and agree to execute mutual releases pertaining to any and all aspects of the violation. As you know, HWI's biological expert, Dr. Edith Read, has estimated the cost of remediation, including monitoring costs, but not including the cost for off-site mitigation property, at $101,000.

In light of the fact that the cleared vegetation has substantially grown back in the northwest and northeast polygons, and that the south polygon has shown re-vegetation, HWI believes the conditional offer is sufficient to resolve the monetary aspects of the violation. If the offer is not accepted, or if NBR and the City will not agree to waive any indemnification claims against SCE and/or HWI, my client will have no alternative except to contest the consent order. I don't see how the consent order can be approved without an amount of civil penalties agreed to and referenced in the consent order.

On a personal level, the aerial photographs you provided this office evidenced only minor clearance of vegetation while HWI occupied the leasehold premises from mid September 2004 to mid February 2006 in the northeast polygon near the entrance to the leasehold property which has not been delineated as ESHA by the Commission. The minor clearance of vegetation, driving of vehicles and storage of equipment on the leased property by HWI hardly relates to the major civil penalties the Commission is seeking in the notice of violation.

If HWI resolves the civil penalty portion of the violation with the Commission it must be removed from the proposed order and know that mutual releases will be executed releasing it from any future claims by NBR and/or the City for indemnification for restoration and/or mitigation costs for the acquisition of off-site properties.

I look forward to the Commission's favorable response to this offer and your discussions with NBR and the City with regard to the waiver demands.

Thank you for your continued courtesy and anticipated cooperation.

Very truly yours,

LAW OFFICES OF
BLOCK & BLOCK
A Professional Corporation

ALAN ROBERT BLOCK

ARB:sp

cc: Tony Vedova
Mario Tapanes, Esq.
Rick Zbur, Esq.
Laura Godfrey, Esq.
George Soneff, Esq.
Susan Hori, Esq.
City of Newport Beach

CALIFORNIA COASTAL COMMISSION
South Coast Area Office
200 Oceangate, Suite 1000
Long Beach, CA 90802-4302
(562) 590-5071

Th 9a

Filed:	March 30, 2011
180th Day:	September 26, 2011
270th Day	December 25, 2011
Staff:	John Del Arroz - LB
Staff Report:	Sept. 23, 2011
Hearing Date:	October 5-7, 2011
Commission Action:	

STAFF REPORT: REGULAR CALENDAR

APPLICATION NUMBER: 5-10-168

APPLICANT: City of Newport Beach

AGENT: Don Schmitz + Associates

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

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

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

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

SUMMARY OF STAFF RECOMMENDATION:

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

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

Executive Summary:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

LIST OF EXHIBITS:

Click on the link at left
to go to the exhibits

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

STAFF RECOMMENDATION:

I. STAFF RECOMMENDATION OF DENIAL

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

A. MOTION

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

B. STAFF RECOMMENDATION OF DENIAL

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

C. RESOLUTION TO DENY THE PERMIT

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

II. FINDINGS AND DECLARATIONS:

A. PROJECT LOCATION & DESCRIPTION

Project Vicinity

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

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

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

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

History & Current Planning

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

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

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

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

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

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

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

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

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

Past Commission Action

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

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

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

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

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

Description of Project:

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

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

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

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

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

B. BIOLOGICAL RESOURCES

Coastal Act Section 30107.5 states:

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

Coastal Act Section 30240 states:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. Designation of Environmentally Sensitive Habitat Areas

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

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

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

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

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

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

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

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

…

ESHA Determination

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

...

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

…

<u>ESHA West</u>

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

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

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

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

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

ESHA East

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

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

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

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

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

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

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

2. Intensity of Use

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

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

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

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

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

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

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

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

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

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

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

3. Inadequate buffers.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

4. Development Within ESHA

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

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

5. Mobility of Wildlife

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

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

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

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

6. Inability to ensure compliance with Special Conditions

Coastal Act Section 30601.5 states:

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

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

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

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

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

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

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

C. DEVELOPMENT

1. Mowing

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

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

Coastal Act section 30600 states:

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

Section 30608 of the Coastal Act states:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

2. Access Road – Alternatives

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

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

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

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

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

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

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

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

3. Growth Inducing Development

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

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

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

D. ALTERNATIVES TO PROPOSED PROJECT

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

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

a. Active recreational park revised to ensure habitat protection

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

b. Lesser Intensity of Use

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

c. Active park with alternative access

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

Conclusion

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

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

E. VISUAL RESOURCES

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

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

Land Use Plan policy 4.4.1-1 states:

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

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

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

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

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

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

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

F. MARINE RESOURCES

Section 30230 of the Coastal Act states:

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

Section 30231 of the Coastal Act states:

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

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

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

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

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

1. Vernal Pools

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

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

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

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

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

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

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

[9] Ibid.

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

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

2. Wetlands and Wetland Buffers

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

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

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

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

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

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

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

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

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

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

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

3. Water Quality

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

G. PUBLIC ACCESS / RECREATION

Section 30210 of the Coastal Act states:

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

Coastal Act Section 30213 states (in relevant part):

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

Coastal Act Section 30223 states:

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

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

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

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

H. GEOLOGY / HAZARDS

Coastal Act Section 30253 states in part:

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

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

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

I. ARCHEOLOGY

Coastal Act Section 30244 states:

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

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

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

J. LOCAL COASTAL PROGRAM (LCP)

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

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

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

K. CALIFORNIA ENVIRONMENTAL QUALITY ACT (CEQA)

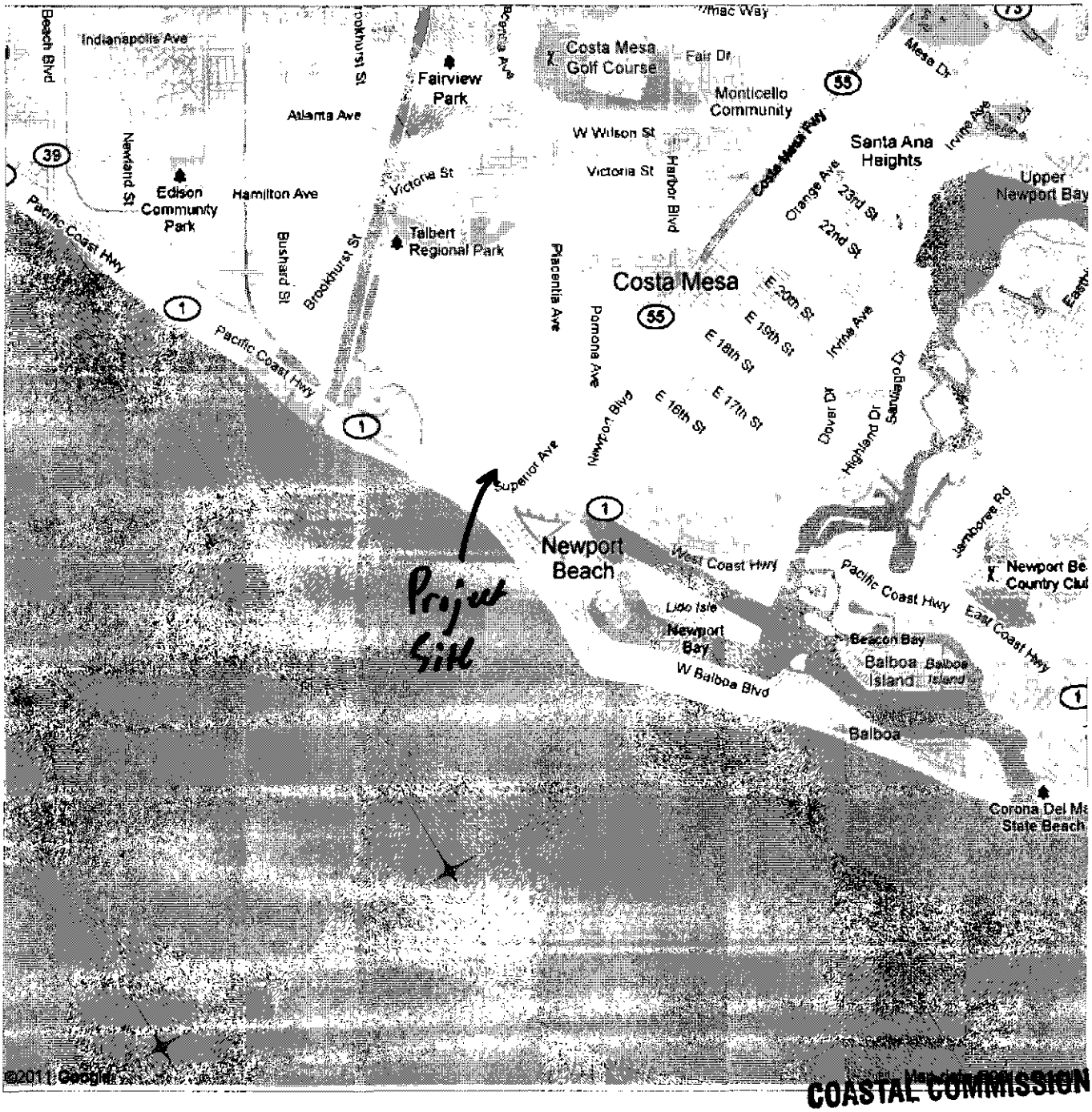
Section 13096 of Title 14 of the California Code of Regulations requires Commission approval of coastal development permits to be supported by a finding showing the permit, as conditioned by any conditions of approval, to be consistent with any applicable requirements of the California Environmental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

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

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

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

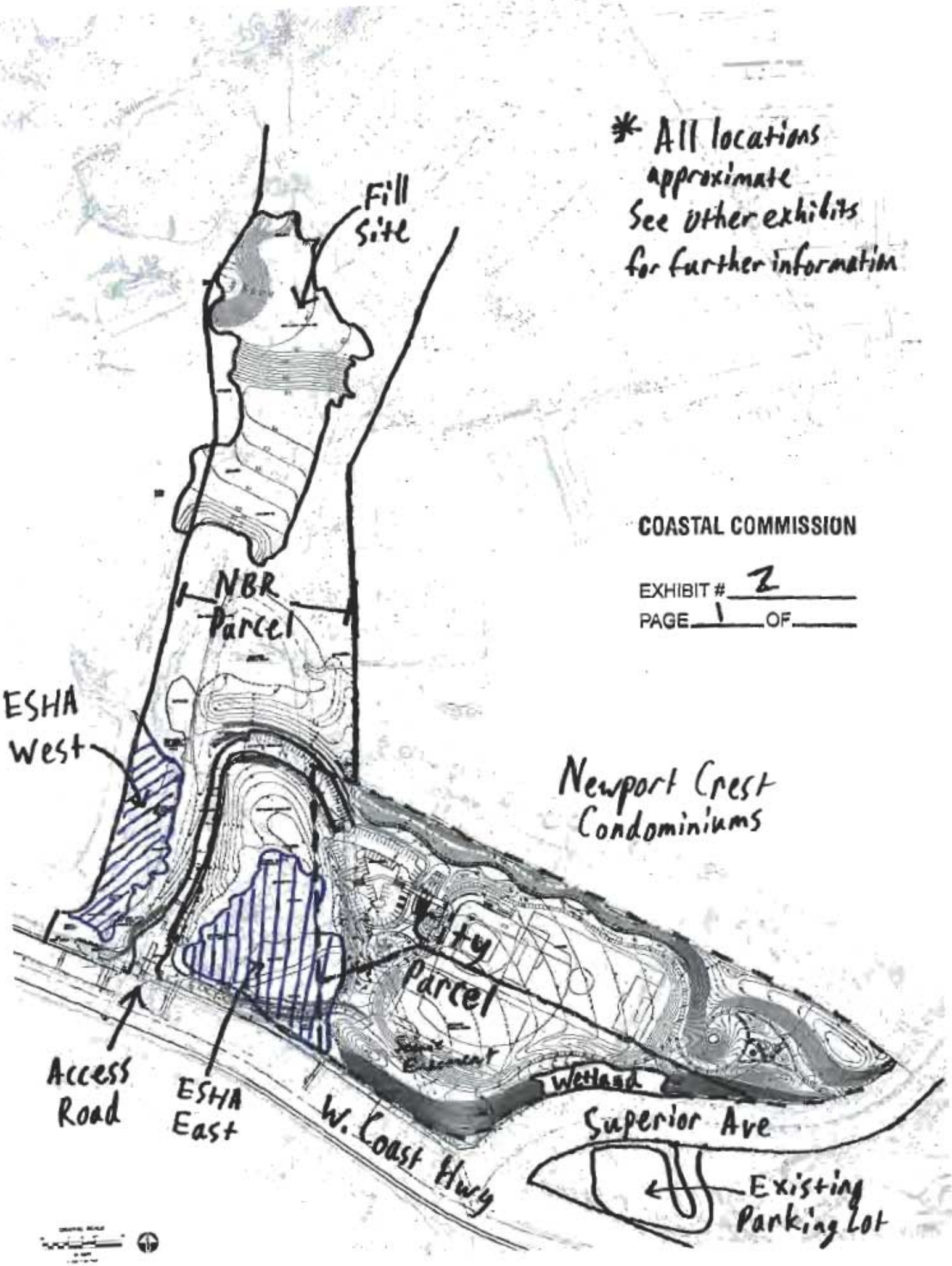
Google maps



COASTAL COMMISSION

EXHIBIT # ____

PAGE 1 OF ____


* All locations approximate See other exhibits for further information
Fill Site
NBR Parcel
ESHA West
Newport Crest Condominiums
City Parcel
Access Road
ESHA East
W. Coast Hwy
Wetland
Superior Ave
Existing Parking Lot
COASTAL COMMISSION
EXHIBIT # 2
PAGE 1 OF

LEGEND

- Existing Disturbed CSS - Native
  Acreage: .80 ac.
- Expanded CSS - Native
  Acreage: 1.20 ac.
- Entry Area - Non Irrigated, Non Native
  Acreage: 2.70 ac.
- Water Infiltration Area
  Acreage: .50 ac.
- Residential Buffer
  Acreage: 2.70 ac.
- Active Area - Ornamental Evergreen Grasses
  Acreage: 1.20 ac.
- Turf Area
  Acreage: 4.40 ac.
- Butterfly Garden
  Acreage: .10 ac.
- Streetscape Slope
  Acreage: 2.10 ac.
- Streetscape
  Acreage: .50 ac.
- Existing - Not to Be Disturbed*
  Acreage: .90 ac.
- Existing - Disturbed, Non Native*
  Acreage: 2.90 ac.
- Hardscape
  Acreage: 2.90 ac.

*Areas are outside of Grading Limits and are Not to Be Disturbed as part of the Sunset Ridge Park Project.

NOV Areas

Caltrans Scenic Easement

Previous Park Entry Road Alignment
Last Used: December 2010

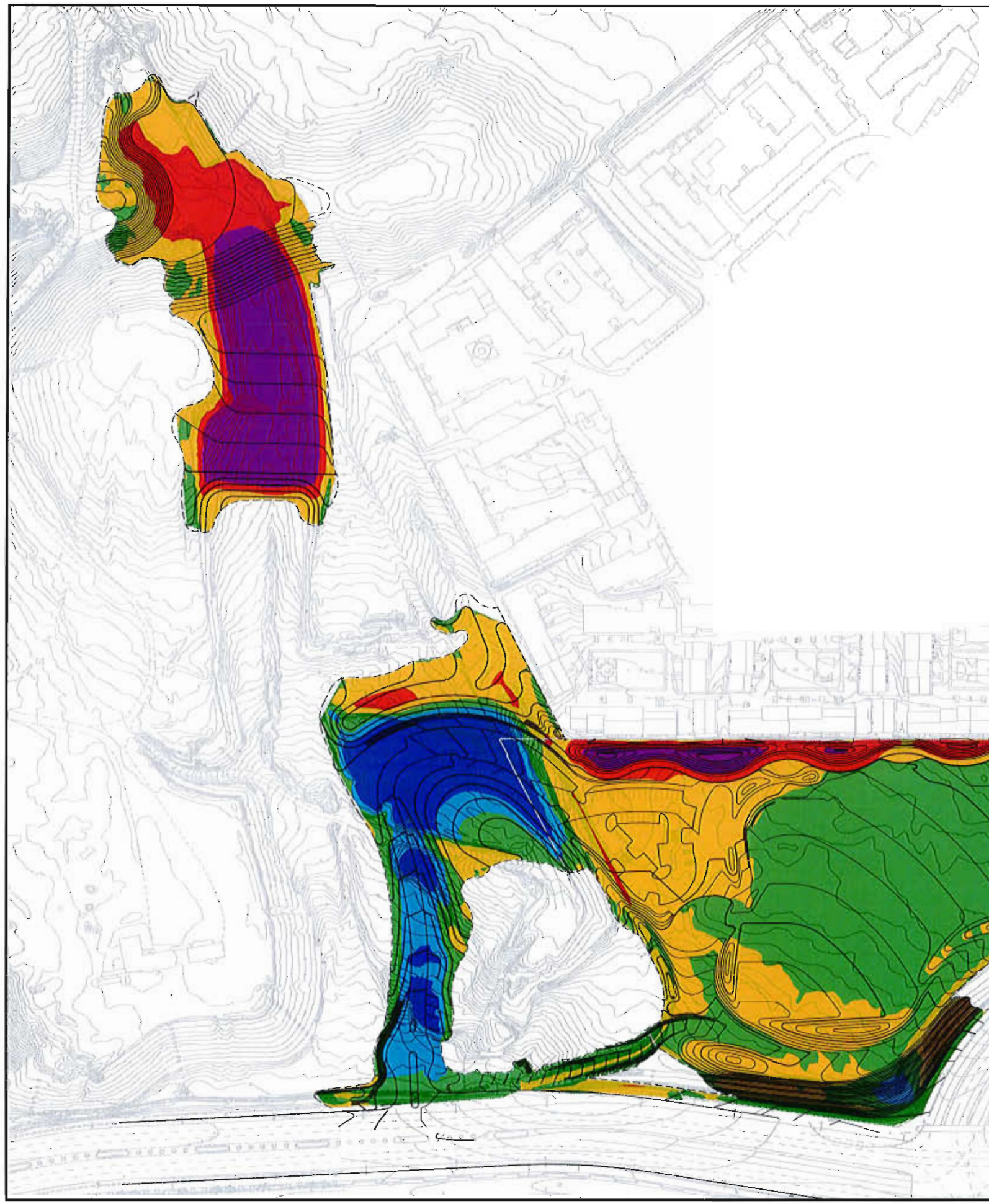
TOTAL PARK ACREAGE
20.00 ac.

Sunset Ridge Park Planting Concept

Plan

EPTDESIGN

City of Newport Beach
09 September 2011



EARTHWORK		
COLOR	CUT(−) / FILL(+)	AREA (SF)
	−30' to −12'	84,400
	−12' to −6'	81,377
	−6' to 0'	323,267
	0' to +6'	281,054
	+6' to +12'	67,865
	+12' to +27'	75,421

ENTRY EARTHWORK QUANTITY	
CUT	52,148 CY
FILL	4,432 CY
EXPORT	47,716 CY

*EXPANSION INDEX = 0

PARK SITE EARTHWORK QUANTITY	
CUT	57,627 CY
FILL	27,951 CY
EXPORT	29,676 CY

*EXPANSION INDEX = 0

FILL SITE EARTHWORK QUANTITY	
CUT	188 CY
FILL	69,315 CY
IMPORT	69,127 CY

*EXPANSION INDEX = 0

TOTAL EARTHWORK QUANTITY	
CUT	109,963 CY
FILL	101,698 CY
EXPORT	8,265 CY

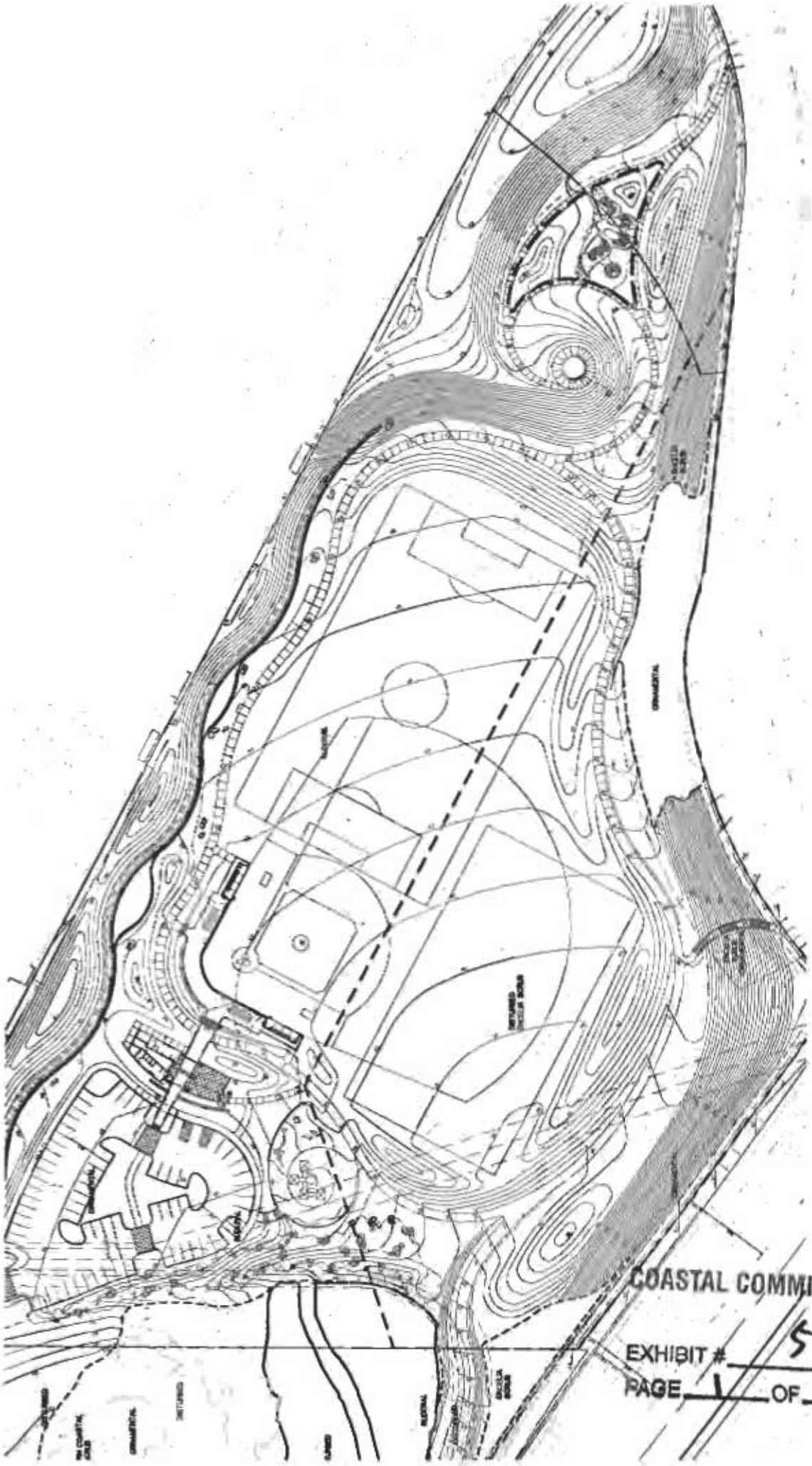
*EXPANSION INDEX = 0

URBAN RESOURCE
CONSULTING CIVIL ENGINEERS

23 MAUCHLY, SUITE 110
IRVINE, CA 92618
PHONE: 949-727-9095
FAX: 949-727-9098

SUNSET RIDGE PARK
EARTHWORKS EXHIBIT

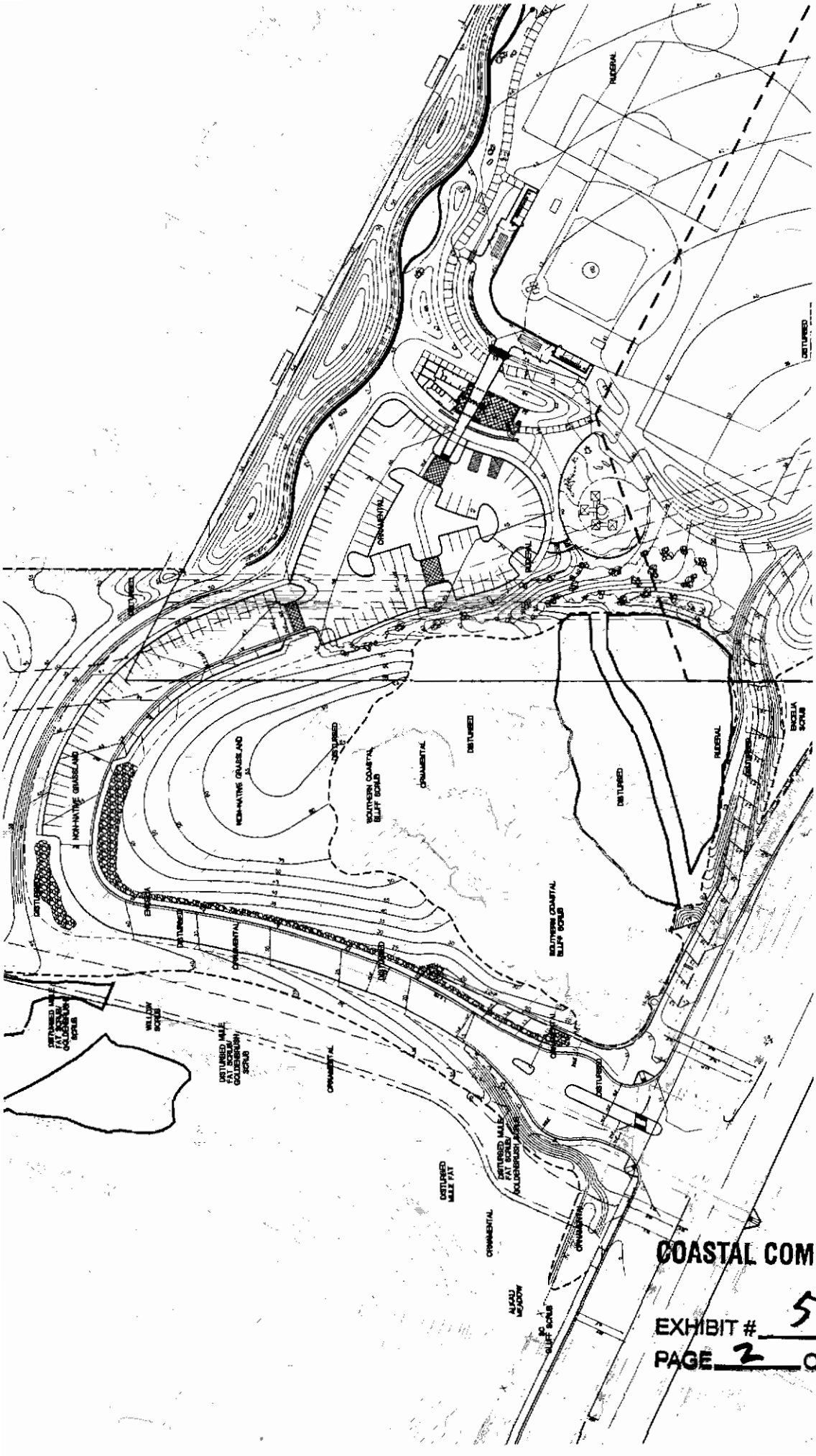
AUGUST 31, 2011



COASTAL COMMISSION

EXHIBIT # 5

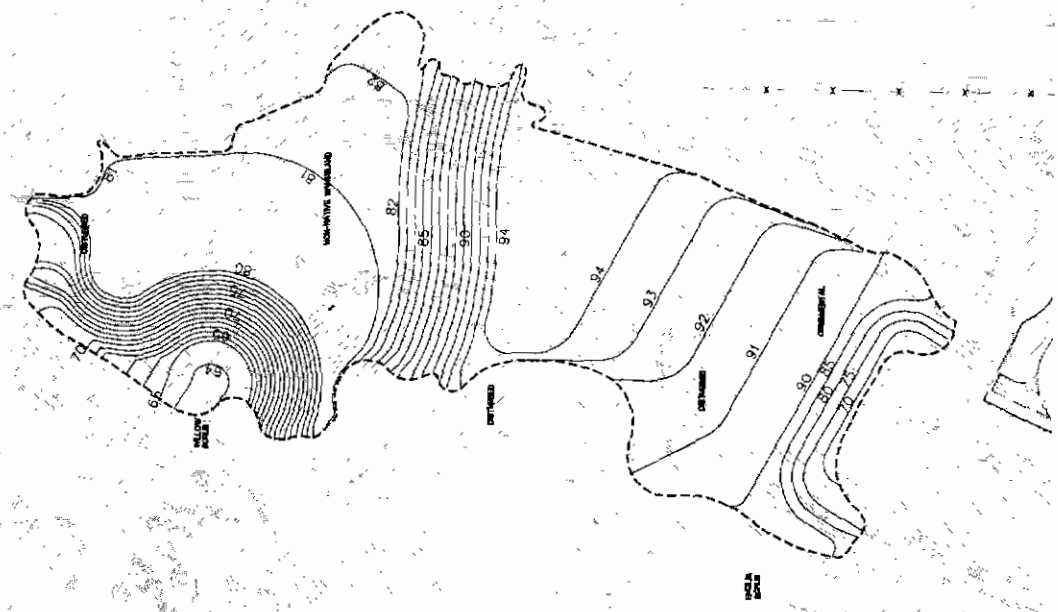
PAGE 1 OF



COASTAL COMMISSION

EXHIBIT # 5

PAGE 2 OF



COASTAL COMMISSION

EXHIBIT # 5

PAGE 3 OF

FORM FOR DISCLOSURE
OF EX PARTE
COMMUNICATIONS

Date and time of communication 8/11/11 12:45

Location of communication: (If communication was sent by mail or facsimile, indicate the means of transmission.) Wassonville CA

Identity of person(s) initiating communication Don Schmitz

Identity of person(s) receiving communication: Commissioner McClure

Description of content of communication:
(If communication included written material, attach a copy of the complete text of the written material
California Coastal Commission
[CDP Application No. 5-10-168]

Applicant: City of Newport Beach

Agent: Schmitz & Associates, Inc.

Project Site/Property Address: 4850 West Coast Hwy, Newport Beach, CA; APNs:

Project Description: Sunset Ridge Park:

- Youth baseball field and two youth soccer fields
- Playground ("tot lot") and picnic areas
- Memorial garden, pedestrian paths, overlook area with shade structure and seating
- 1300 s.f. one-story restroom and storage facility (20 ft. max height)
- 97 public parking spaces
- Habitat enhancement plan

I, Commissioner Martha McClure, had ex parte communication with Don Schmitz, agent for the above-referenced project on August 11, 2011. During our discussion, we generally reviewed the proposed public park project components, the additional analysis and plan revisions that the City of Newport Beach has undertaken to address Banning Ranch Conservancy's and Coastal Staff's potential resource impact concerns, and the issues with alternative access off of Superior Avenue and with an off-site garage and bridge proposal.

8/15/11 Martha McClure

Date Signature of Commissioner

COASTAL COMMISSION

EXHIBIT # 6

PAGE 1 OF

FORM FOR DISCLOSURE
OF EX PARTE
COMMUNICATIONS

Date and time of communication: 8/25/11 12:15P.M.

Location of communication: (If communication was sent by mail or facsimile, indicate the means of transmission.) Phone

Identity of person(s) initiating communication: Steve Ray, Executive Director Banning Ranch Conservancy

Identity of person(s) receiving communication: Commissioner McClure

Description of content of communication:
(If communication included written material, attach a copy of the complete text of the written material
I spoke with Steve on two primary issues concerning Banning Ranch/ Sunset Ridge Park. 1. The History of Banning Ranch including size, cultural significance, local initiatives, farming and oil use of the land 2. Discussion of the project which included scope, ingress and egress, possible encouragement of development if entrance is on the Banning Ranch site, development being beyond need, alternatives to access locations and possible lack of adequate environmental review.

8/26/11 — **Date**

Michael McClure — **Signature of Commissioner**

COASTAL COMMISSION

EXHIBIT # 6
PAGE 2 OF

FORM FOR DISCLOSURE OF EX PARTE COMMUNICATIONS

Name or description of project, LCP, etc.: Brown Ranch

Date and time of receipt of communication: 8/11/11 approx 12:30

Location of communication: Watsonville City Hall

Type of communication (letter, facsimile, etc.) meeting

Person(s) initiating communication: Steve Ray

Person(s) receiving communication: Mary Shallenberger

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

see attached

8/20/11
Date

Mary Shallenberger
Signature of Commissioner

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 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.

If communication occurred within seven days of the hearing, complete this form, provide the information orally on the record of the proceeding and provide the Executive Director with a copy of any written material that was part of the communication.

Aug 12, 20011 @ approx 12:30 PM

Watsonville City Hall

I met with Steve Ray, Executive Director of the Banning Ranch Conservancy.

He gave me a brief history of the Banning Ranch

- Sunset Ridge was slated to be an interchange until the passage of the Coastal Act
- Legislation authorized Caltrans to sell the Sunset Ridge to Newport Beach for a park
- The City decided to make it an active park (ball fields) even though there isn't adequate space for parking.
- The City decided to put the access road on the Banning Ranch in the exact alignment of the Banning Ranch proposed development.
- In 2006 the voters approved an initiative that required Banning Ranch to be preserved as open space/park.
- The Conservancy had the funds to purchase the Ranch but the owner doesn't want to sell until he has all the permits, which will increase the price of the land.

The Conservancy is objecting to the road. They haven't had a chance to review the relevant documents. The commission staff is still in the process of conducting the ESHA delineation and the conservancy won't have the time to review before the September meeting.

The Conservancy is asking to have the hearing in October in Huntington Beach but that would be 8 days after the permit streamlining deadline. So far the City hasn't agreed to an extension of the deadline.

Commission staff asked for alternatives, and the City came up with outrageous alternatives. Caltrans and a professional traffic engineer agree on a preferred alignment that goes straight from Hwy 1 to the park without going into the Banning Ranch.

The EIR is being litigated on the grounds that CEQA is being violated by dividing Banning Ranch into to parcels.

RECEIVED
South Coast Region

DEC 1 5 2010

CALIFORNIA
COASTAL COMMISSION

To: Coastal Commissioners

From: Christy Flesvig

Date: December 12, 2010

Re: Banning Ranch and Wildlife Observations

I have lived at 9 Landfall Ct. in Newport Beach, CA for 5 years and 11 months. My townhouse faces the ocean and overlooks the city land that is a potential site for the proposed park. From both of my decks, I also see the Banning Ranch area and the area where they are proposing to build an entry road from PCH into these currently undeveloped properties.

I work from my home and my desk overlooks the ocean and the proposed park area, so I have been able to observe the activities of wildlife frequently throughout the day over the last 5 plus years. The animals I have observed include egrets, herrings, many squirrels, several hawks, many varieties of birds and coyotes. I often see the hawks circling and am worried about leaving my dog on the decks because I can tell that they are hunting for prey to eat. I have observed them eating prey (maybe squirrels?) in the field. Looking out the window now, I easily counted 15 squirrels hunting for food in the field close to my deck. A night, the coyotes often howl in the field and wake us up. I have seen them in the field as well. A bird just landed on my deck. We have one bird that keeps trying to get in the house and keeps hitting our window.

The hawks often land on our deck. One time when I was home a hawk crashed loudly into our downstairs window. My husband has video tape of a hawk on our deck which I am forwarding as well.

I am concerned that development of Banning Ranch, the park and road will endanger wildlife.

Sincerely,

Christy Flesvig

Christy Flesvig

9 Landfall Ct.

Newport Beach, CA 92663

Cell: 949-295-9089

OPPOSED

COASTAL COMMISSION

EXHIBIT # 7

PAGE 1 OF

Members of the California Coastal Commission
Coastal Commission Staff
45 Fremont St. Suite 2000
San Francisco, CA 94105
July 28, 2011
Re: *Coastal Development Permit for Sunset Ridge Park, No. 5-10-168*

Dear Honorable California Coastal Commissioners and Commission staff,

The inclusion of the controversial Banning Ranch entrance road into the Sunset Ridge Park plan has generated great concern in our local community. The proposed road traverses through one of the most active California Gnatcatcher areas on Banning Ranch.

Despite the City of Newport Beach's General Plan making preservation of Banning Ranch as open space a priority, the road as currently proposed for Sunset Ridge Park seems to be placed to serve as a future entrance road for proposed Banning Ranch development (EIR for Banning Ranch development expected to be released in September).

Sunset Ridge Park can be built with an alternative to this controversial entrance road.

The hearing for Sunset Ridge Park is currently scheduled for September in Crescent City, a nearly 800 mile drive from Orange County. As many of you are aware, members of the Banning Ranch Conservancy and the Sierra Club Banning Ranch Park and Preserve Task Force have been attending almost every local hearing over the past several years and either speaking at public comment or addressing the recent enforcement issue associated with this area.

We have done everything we can to communicate our concerns with this proposed project, and now is the time for us to comment on the critical Coastal Development Permit. However, to do so we are forced to make a very long and expensive trip to almost the border of Oregon.

When the Newport Beach City Council approved the EIR for Sunset Ridge Park in April 2010, the Newport Beach City Council Chambers was overflowing. The majority of those in attendance argued for an alternative to the controversial entrance road. We hoped to be able to show this same level of public concern at the upcoming CDP hearing.

With this in mind, we ask you to please re-schedule the hearing until a later date, when local residents can attend and speak. The October and November hearings are within a reasonable driving distance. If the hearing is re-scheduled to October, the applicant is being asked to postpone for only one month. We hope you can appreciate our position and support us on this requested postponement.

Thank you.

Sincerely,

Kevin J. Riggs
409 62nd St
Newport Beach
Ca 92663

RE: Sunset Ridge Park Project

Introduction:
The Banning Ranch Conservancy contends that the entrance road proposed by the applicant, the City of Newport Beach, for the Sunset Ridge Park project, if permitted to be constructed as currently planned, would violate both the letter and the intent of the California Coastal Act. Further, it would establish a precedent where such future violations could become commonplace. Plus, there is a better alternative.

1. Standard of Review:
The proposed entrance road for Sunset Ridge Park would be located on the adjacent Banning Ranch property, which, under the Coastal Act, is designated an Area of Deferred Certification. As such, the Coastal Act is the standard of review for all portions of the Sunset Ridge Park project which are located on Banning Ranch. In addition, since the City of Newport Beach does not have a certified Local Coastal Plan (LCP), the Coastal commission retains original jurisdiction not only on the Banning Ranch property, but also on the City-owned Sunset Ridge property. Although the Newport Beach Coastal Land Use Plan can provide guidance on the City-owned property, the Coastal Act remains the only standard of review for both properties in the proposed Sunset Ridge Park project.

2. ESHA Determination and Data Requirements:
Final determination of Environmentally Sensitive Habitat Area (ESHA) should not be made until all data is available to the Coastal Commission. The U.S. Fish & Wildlife Service (USFWS) has identified the entire Banning Ranch and Sunset Ridge sites as critical habitat for the federally threatened Coastal California Gnatcatcher (*Polioptila californica californica*). When a biologist conducts a protocol Gnatcatcher survey, specific and detailed information on where Gnatcatchers are observed is collected from *six separate episodes*. In the case of the Gnatcatcher surveys for 2002, 2006, 2007 and 2009, the data were subjectively "condensed" by the consultants down to a single point representing a bird, or pair of birds, for each year. This unscientific and non-standard practice excludes the vast majority of the data and vastly underrepresents the "home ranges" the birds occupy for nesting and foraging. In the exacting process of determining whether a particular area of vegetation is utilized by Gnatcatchers and should be identified as ESHA, it is unacceptable to use a single "condensation point" rather than the entire set of data. If ESHA is to be based on where Gnatcatchers are located, then all field data from the protocol studies must be made available, without the use of "condensation points". Gnatcatchers have been observed on Banning Ranch and Sunset Ridge in several areas that biological consultants BonTerra and Glenn Lukos Associates (GLA) have erroneously characterized as unsuitable. Most of the area in the vicinity of the proposed entrance road is suitable Gnatcatcher habitat and in the absence of compelling data showing lack of use, the habitat should be presumed to be utilized by breeding Gnatcatchers based upon the size of territory the birds typically occupy near the coast in southern California. To make final ESHA determinations without reviewing the actual field data would set a precedent where future developments (including [illegible] Banning Ranch development) could provide single "condensation points" to the Coastal

Commission during application for Coastal Development Permits (CDPs). The Banning Ranch Conservancy has discussed, and been in agreement with Coastal Commission staff, regarding the importance of reviewing the relevant field data collected by the EIR consultants. To date, however, the applicant has denied specific requests to allow the Coastal Commission staff and/or Conservancy to review the relevant data.

Please refer to the attached letter dated June 29, 2011, from Ann Johnston of BonTerra Consulting to Michael Sinacori of the City of Newport Beach. In this letter, Ms. Johnston provides her opinions about which portions of the Sunset Ridge project site do and do not satisfy ESHA criteria. There are too many distortions and erroneous statements in her letter to review in detail, but one part stands out as being especially egregious. The second paragraph on Page 2 refers to small patch of native encelia scrub:

> 0.08-Acre Encelia Scrub Northwestern Patch/Not ESHA. This vegetation type is dominated by bush sunflower, with several coastal prickly pear. The vegetation in this area occurs within a bowl shaped canyon that has been partially filled with large pieces of concrete and re-bar. The presence of a monotypic cover of bush sunflower, with little or no understory species in the small canyon, is common for this species that frequently occurs within areas subject to disturbance. Although gnatcatchers may periodically fly across the dirt/asphalt road (approximately 55-feet wide in this area), this area is not expected to provide important nesting opportunities for gnatcatchers in the area. Due to a mapping error, this area had previously been identified as the location of a pair of gnatcatchers by Glenn Lukos Associates. This erroneous location has been corrected (Appendix A). Based on the lack of known nesting observations, the lack of existing vegetation diversity, and significantly compromised soil conditions, this area is not expected to improve over time in regards to habitat quality (i.e., native species to not grow well in concrete and re-bar). The 0.08 acre area of encelia scrub is not considered ESHA.

First, California Gnatcatchers routinely occupy scrub consisting of bush sunflower mixed with coastal prickly-pear. If BonTerra was able to restore an area to dense sunflower mixed with prickly-pear there is no doubt they would consider this a success, and for a valid reason if the purpose was to create suitable habitat for California Gnatcatchers. The "compromised soil conditions" referred to above result from the land owner dumping rubbish in the native scrub. Although Ms. Johnston describes this basically as an intractable problem, the condition could, and should, be easily remedied by the land owner disposing of trash properly. What is most interesting, however, is the suggestion that California Gnatcatchers were erroneously mapped as nesting in this patch of scrub in 2002. This claim falls apart under the slightest scrutiny.

The "Appendix A" referred to by Ms. Johnston is the attached letter, dated 14 June 2011, which GLA biologist Tony Bomkamp wrote to Christine Medak of the USFWS. In this letter, Mr. Bomkamp discloses the following:

> During preparation of our submittal information to U.S. Fish and Wildlife Service for the Newport Banning Ranch Assessment, dated February 10, 2010, I noted that one of the [California Gnatcatcher] locations depicted in the year 2002 45-day report was incorrectly mapped. GLA corrected the error in our database such that the map February 10, 2010 submittal shows the corrected [California Gnatcatcher] location; however, I did not notice you of the change at that time.

This is troubling on multiple levels. First, Mr. Bomkamp is admitting that he changed his company's database on Gnatcatcher locations and submitted the "corrected" version to the USFWS without mentioning the change. He does not explain why he waited more than a year to inform the Service (or anyone else) of this tampering with the original mapping. The implication is that either the mapping discrepancy was noticed, or was likely to be noticed, as people started paying close attention to the dots that are being used to represent bird ranges over the course of a season. This explains the need to issue this "damage control" letter in June 2011.

Second, Mr. Bomkamp is admitting that he changed the database *eight years after the fact* based on a "clear recollection" that his original mapping was wrong. Please examine Exhibit 2 attached to his letter. The location where he originally mapped "Pair 1" in 2002 (using two dots to represent two birds) was in the location described in Ms. Johnston's letter. His 2002 mapping shows this as a small, distinct area of green, which represented "bluff scrub or succulent scrub." Compare the 2002 map with Exhibit 1 in Ms. Johnston's letter and appreciate how clearly defined this area is – 0.08 acre of scrub in a small, bowl shaped canyon that stands apart from the more extensive patch of scrub to the west, where Mr. Bomkamp re-mapped the pair's location in 2010. According to Mr. Bomkamp, in 2002 he placed the two dots representing the Gnatcatcher pair in this rather conspicuous outpocket of scrub because he did not have access to "sub-meter GPS combined with highly accurate GIS technology." But the map in question does show topography, and the topography shown in that area is rather well defined: it is a small, bowl shaped canyon on the east side of the main canyon, set apart from the scrub in the mainstem of the canyon by a flat, cleared area. As a biologist and wetland delineator, Mr. Bomkamp has worked with topographic maps at a very fine level of detail for many years. In fact, in 2002 he mapped the scrub in this small canyon just as it appears today. It simply defies credibility for him to argue, *eight or nine years later*, that he mapped the birds in that little canyon in error, and that he intended to map them 100-200 feet away, on the west side of the mainstem of the canyon. The fact that Mr. Bomkamp admits to altering GLA's database in 2010, and then submitting the doctored map to the USFWS without notifying anyone of the change, is but one more valid reason to be skeptical of these very odd and unlikely claims.

Another remarkable aspect of this entire issue is the fact that Ms. Johnston and Mr. Bomkamp are treating the placement of the dots representing the gnatcatcher pair in 2002 as though they represent anything other than perhaps the location of a nest. In fact, California Gnatcatchers roam over substantial areas in search of food to feed themselves and their young. They routinely use small patches of sunflower and cactus, even when these areas are separated from larger patches of occupied scrub by distances of 55 feet or more. There is no credible argument otherwise, and so the tactic of BonTerra and GLA appears to be to convince everyone that "condensation points" represent appropriate and useful depictions of Gnatcatcher home ranges. If they are successful, perhaps the Coastal Commission will be persuaded to exclude from ESHA areas of suitable native coastal scrub that are, presumably, used regularly by California Gnatcatchers.

The CDP application for Sunset Ridge Park must be considered incomplete until all field data from the 2002, 2006, 2007 and 2009 studies is produced. Additionally, the more recent data from the 2010 and 2011 studies must be provided and considered. The doctoring of the 2002 map cannot be allowed to stand.

3. ESHA Protection:
The Coastal Act clearly states that ESHA must be protected from development. Section 30240 of the Coastal Act states:

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

4. Grading:
Grading is defined as "development" under the Coastal Act. Section 30106 states:

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

5. Buffers Defined:

The areas of setback between ESHA and development are known as "buffers".

Since the City of Newport Beach's Coastal Land Use Plan may serve as guidance, it defines "buffer" in Chapter 5, Pg. 5-4, as follows:

*"A **buffer is a development setback that provides essential open space between development and protected habitat**. Buffers keep disturbance at a distance, accommodate errors in estimation of habitat boundaries and **provide important auxiliary habitat** that may be used, for example, **for foraging**, maintenance of pollinators, or refuge from high tides. **Buffers should be measured from the delineated boundary of an ESHA or wetland** or, for streams, from the top of bank or landward edge of riparian vegetation, which ever provides the larger buffer."*

Under Govt. Code 65560(b) "open space land" is defined as:

"any parcel or area of land or water that is essentially unimproved and devoted to an open space use as defined in this section, and that is designated on a local, regional or state open-space plan as any of the following:

(1) Open space for the preservation of natural resources including, but not limited to, areas required for the preservation of plant and animal life, including habitat for fish and wildlife species, areas required for ecological and other scientific study purposes; rivers, streams and estuaries; and coastal beaches, lakeshores, banks of rivers and streams, and watershed lands."

The significance of the above is that "graded areas" cannot qualify as "unimproved land...for the preservation of natural resources..." Thus, under both state law and the Newport Beach LUP "buffer" definition "graded areas" are not open space and cannot serve as ESHA protection.

6. Coastal Act Precedent on Buffers:
In previous Coastal Commission decisions, ESHA buffers have been required to be as large as 600 feet (for raptors at Bolsa Chica). For Gnatcatchers, the most relevant example, based on its location on the Orange County coast and presence of a Gnatcatcher population, is the Marblehead project, in San Clemente. There, the Coastal Commission recommended ESHA buffers of 100 feet, with a minimum general requirement of 50 feet, with grading clearly excluded from ESHA buffers. Indeed, the owners of Banning Ranch brought up the Coastal Commission staff report on the Marblehead project in discussions with the City concerning Sunset Ridge (see Public Records on Sunset Ridge mowing, provided to Coastal Commission staff by the Banning Ranch Conservancy) further underlining its importance as a guiding document. According to the Commission staff report on Marblehead (March 2003),

Page 22 says, *"Upland ESHA shall have 100-foot wide (horizontally) buffers, where feasible. The minimum buffer width shall be 50 feet wide (horizontally).* ***There shall be no development, including grading, within 50 feet of ESHA boundaries and no grading within 50 feet of*** *coastal bluff scrub, Blochman's dudleya populations, native grasslands and* ***those stands of CSS within gnatcatcher use areas.***"

Page 97 says, *"Other than the exceptions outlined below, there should be* ***no grading within 50 feet of ESHA boundaries****, and* ***no grading at any time within 50 feet of coastal bluff scrub*** *or native grasslands"*

While the "exceptions" were focal exceptions where a few ESHA buffers were less than 50 feet at Marblehead, the great majority of the Gnatcatcher ESHA had buffers ranging from 50 feet to over 100 feet.

In accordance with the legal and Coastal Act requirements for ESHA "buffers," in keeping with precedent-setting permitting decisions of the Coastal Commission on

comparable proposed projects and even in line with the Newport Beach Coastal Land Use Plan, the appropriate "buffer" requirements for the Sunset Ridge Park project and roadway must be a minimum of 50 feet, a recommended minimum of 100 feet, and with no development permitted in the ESHA's or their "buffers".

7. Grading in Buffers and Restoration:
Based on the revised July 12, 2011, project plan proposal for the entrance road through Banning Ranch and into Sunset Ridge Park, the distance from the Coastal Commission staff's tentative (but not final until "field data" is secured) ESHA delineations to the edge of the grading range from 0 feet - 47 feet. *Nowhere do the ESHA buffers even reach the minimum 50 feet.*

Every effort is being made to "squeeze" in this road. The applicant wants to grade right through the buffers up to the edge of the ESHA boundaries, but promises to restore the buffers as Gnatcatcher habitat. Perhaps the applicants don't understand that nature, in this case the Gnatcatchers, do not follow our rules, but live by their own. And the Coastal Act (30240) requires that there not be "*any significant disruption of habitat values, and only uses dependent on those resources shall be allowed within those*" ESHAs and buffers. That excludes the applicant's bulldozers. To allow grading of the ESHA buffers along so much of the road, even if it is promised to be restored as Gnatcatcher habitat, would set a precedent and would require a re-interpretation of the Coastal Act. There are no preceding projects known to us where grading has been allowed in ESHA buffers, certainly not to the extent proposed here. Simply stated, there can be no grading in buffers. Grading is development and development is not allowed in buffers.

Additionally, there is no guarantee that the graded areas could be restored as viable Gnatcatcher habitat. The Gnatcatchers may not wait around a few years to see if the "new" habitat is successful. Plus, there are examples of failed habitat restoration programs in Southern California, such as Hobo Aliso Ridge, and Laguna Terrace Mobile Home Park in Laguna Beach, and the Campbell case in Torrance. These failures were due to a variety of unforeseen circumstances, any one of which could occur here, anywhere in this long process (keep in mind this is really two projects, one right after the other - Sunset Ridge followed by Banning Ranch). And due to staffing and fiscal shortages, monitoring and enforcement is often difficult.

Furthermore, it must be added that the applicant has a history of lack of cooperation. They mounted a strong contrary position against the Coastal Commission on the recent violations concerning the illegally cleared polygons, and despite ultimately signing the Consent Orders, wherein two of the polygons were declared to be ESHA, the applicant still publicly maintains that none of the cleared polygons represent ESHA. Additionally, despite requests from the Coastal Commission and the Banning Ranch Conservancy, the applicant has, to date, failed to produce requested information in the form of the "field data" on Gnatcatcher studies. Indeed, they refused to cooperate with Commission staff requests for a variety of information related to the application for the project.

8. The Banning Ranch Road:

It must be stated again that that this road would also be used as the entrance road for the anticipated Banning Ranch Development project. The EIR for the proposed Banning Ranch development, which was released for public review on September 9, 2011, envisions expansion of the Sunset Ridge Park entrance road to a four-lane primary roadway (Bluff Road) through the entire Banning Ranch property, including this portion of it that is attached to the Sunset Ridge project. If the four-lane entryway and two-lane road can be "squeezed" in for Sunset Ridge, and done so with minimal buffers and, even, grading, in those buffers, the plan may be to just keep "squeezing" to get the whole four lanes for the Banning Ranch development. There is an "Access Agreement" contract between the City of Newport Beach and the owners of Banning Ranch, and passed by the City Council as part of the approval of the Sunset Ridge Park project, that states that the two lanes being built for the Sunset Ridge project on Banning Ranch property "shall align with the two eastern lanes" of the road for the Banning Ranch development. Therefore, approval of this "squeezed" in road may, in some form, presage approval of the Banning Ranch project road.

9. Alternative Roadway:
There is an alternative to the proposed roadway on the Banning Ranch property, one that would exit off of Coast Highway directly onto the Sunset Ridge property, totally avoiding any involvement with the Banning Ranch property. While it may not serve the Council's goal to spur development of the Banning Ranch, it is a road that will fulfill all of the stated goals of the proposed Sunset Ridge Park project. Plus, it is an environmentally superior alternative, it is easier, simpler, costs much less to complete than the proposed roadway, and will relieve many of the concerns of the public and the Banning Ranch Conservancy relative to the proposed Sunset Ridge project. The Conservancy will provide additional information to the Coastal Commission on this alternative roadway under separate cover in the near future.

10. Vernal Pool/Wetlands:
The Banning Ranch Conservancy has identified at least four potential vernal pool/wetlands on the Banning Ranch property at the proposed dump site for the Sunset Ridge project. It is estimated that 40,000 cubic yards of excess dirt excavated from the Sunset Ridge/Banning Ranch roadway project will be dumped in the wetlands, thereby destroying them. Since the endangered San Diego Fairy Shrimp exists in other vernal pool/wetlands on Banning Ranch, it is possible they may also exist at this site. If not, it is highly probable that they would meet the Coastal Act definition of wetland and would need to be protected. As yet, no protocol studies have been conducted on these potential vernal pool/wetlands. Further, staff from the Commission and the USFWS were scheduled to visit the site to view and analyze the vernal pool/wetlands, but the owners of Banning Ranch denied staff permission to enter the property and canceled the visit.

11. Finally, it must be re-stated that Banning Ranch is the last large parcel of privately-held unprotected coastal open space remaining in Orange County. The contiguous Banning Ranch and Sunset Ridge properties are home to several listed endangered species and others of special concern. The proposed Newport Banning Ranch development would be nearly as large as the five previous large Orange County coastal

developments, combined, and, at least, three times as dense as the next highest. With the Banning Ranch roadway attached to the Sunset Ridge Park project, the two projects actually comprise just one project. As a note, the Banning Ranch Conservancy is currently in litigation with the City of Newport Beach alleging that the City has violated the California Environmental Quality Act (CEQA) by segmenting the project between two Environmental Impact Reports and finding no cumulative or growth-inducing impacts from the City building a roadway that will spur the development of the Banning Ranch project. While the Coastal Commission may have no consideration for the litigation, we feel obligated to inform that the Commission may revisit this issue in the future.

Summary:
The proposed entrance road for the Sunset Ridge Park project, if permitted to be constructed as currently planned, would violate both the letter and intent of the Coastal Act, and establish a precedent where such future violations would be more commonplace. We assign no credibility to the claim of GLA and BonTerra that the mapping of California Gnatcatchers in 2002 was in error. As we have demonstrated, the area where the birds were originally mapped -- a small, scrub-filled canyon set apart from the main canyon – is as obvious on the 2002 map as it is today. Tony Bomkamp's belated claim that he placed dots there in error, and that he really meant to put them in an area of much different topography 100-200 feet farther west, insults our intelligence. We have full faith in Mr. Bomkamp's ability to read a topographic map, and in 2002 he mapped the scrub in that small canyon with admirable accuracy. As ludicrous as it is to depict birds as occupying point locations, if this is the way the applicant's consultants insist on proceeding they must at least be honest about where the dots are placed.

Additional information is required from the applicant for the project, especially field data from Gnatcatcher studies and protocol studies for potential vernal pool/wetlands, among others. ESHA "buffers" must be a minimum of fifty feet, and preferably more, to adequately protect the resources -- with no grading permitted in those buffers. Approval of a roadway that is "squeezed" in for the Sunset Ridge Park project will provide the gateway for the massive Newport Banning Ranch development project. The roadway on the Banning Ranch property that is proposed for the Sunset Ridge project is not necessary, as a preferable alternative roadway is available.

The Banning Ranch Conservancy recommends denial of the Sunset Ridge Park project as currently proposed with the Banning Ranch roadway. If the applicant does not cooperate and provide all the requested and necessary information, the Conservancy would recommend denial with the opportunity for the applicant to re-submit the application with ALL the required information, including an alternative roadway that is environmentally superior to the one currently proposed.

For any questions or additional information, please feel free to contact the undersigned or Steve Ray, Executive Director of the Banning Ranch Conservancy via email at

steve.banningranch@hotmail.com. or via phone at 310-961-7610. You may also visit our website at www.banningranchconservancy.org. Thank you.

August 23, 2011

California Coastal Commission
Attn: Mr. John Del Arroz, Coastal Program Analyst; & Mr. Karl Schwing, Supervisor, Planning & Regulation
200 Oceangate, 10th Floor
Long Beach, CA 90802-4302

Subject: Sunset Ridge Park Vehicle Access
Response to 8/12/11 Letter from Newport Crest HOA Board of Directors

Dear Mr. Del Arroz & Mr. Schwing:

As concerned residents of the Newport Crest community, we feel compelled to provide you with additional information in response to the recent letter you received from our Board of Directors (attached). We believe that our Board failed to reflect the majority opinion of its residents when it stated its preference for the "current evolving design" of the access road to Sunset Ridge Park.

Although we are not necessarily opposed to an entrance road to the park from Coast Highway, we are adamantly opposed to a road that would include the adjacent Banning Ranch property. Prior to the Board voting on the matter, they received several letters opposing their action to support the current road alignment. We are not aware of any letters received in support of such an action.

Additionally, the undersigned have had the opportunity to discuss the Banning Ranch issue with many of our neighbors and know firsthand the feelings of our community on the Banning Ranch issue. In an initial door-to-door campaign held December 2010, the overwhelming majority of those contacted expressed opposition to development on Banning Ranch and support for the property remaining as open space. We believe that an entrance road to the park that traverses onto the Banning Ranch property and includes an agreement with its property owners is, essentially, the first stage of development on the property.

Thank you for your consideration of our comments. Please contact Dorothy Kraus (medjkraus@yahoo.com, 949-337-6651) or Bill Bennett (shokobennett@gmail.com, 949-642-8616) if you would like to discuss this important matter further.

Respectfully,
Concerned residents of Newport Crest (signatures attached)

cc: Newport Crest Homeowners Association Board of Directors

Attachments (2)

Signature	Address
Helen Nadel	
Richard F. Cruce	17 SWIFT COURT NPB 92663
Suzanne Forte	8 Summerwind Court
Mary Lee	7 Summerwind Court
Allan Forte	8 Summerwind Court
[illegible]	17 Swift Ct, Newport Be Ca 92
Beverly & Michael Kaus	10 Wild Goose Ct Newport Beach CA 926
Cathy Hahn	7 Aries Ct.
Dave Sutherland	12 Summerwind
Natalie Sutherland	12 Summerwind
Bill Bento	10 ODYSSEY CT
Chuck Schuyler	11 Summerwind Ct
Isabella Caffrey	9 Summerwind Ct
Mike Federoff	

California Coastal Commission
c/o Karl Schwing and John Del Arroz
200 Oceangate, 10th Floor
Long Beach, CA 90802-4416

July 12, 2011

SUBJECT: City of Newport Beach – Sunset Ridge Park Project
Coastal Development Permit Application # 5-10-168

Dear Coastal Commissioners:

I am a resident of the Newport Shores community in Newport Beach. The Sunset Ridge Park Project is located just southeast of Newport Shores and I would like to express my support for this much needed park facility.

The western portion of Newport Beach is a wonderful place to live, but one thing the area is distinctly lacking is a modern park facility that is easily accessible to the general public. This park will not only be used by local Newport residents but by all of the surrounding Orange County communities.

Lack of parking commonly discourages many visitors from enjoying the coastal resources located in this area. The plans for the Sunset Ridge Park include ample parking for visitors to come and enjoy the park amenities and wonderful vista views that are not readily available to the general public.

As with most development projects in the Coastal Zone, the Coastal Commission staff may have concerns that development of the park will impact environmentally sensitive habitat areas (ESHA: protection policy of the Coastal Act Section 30240). I encourage the Commissioners to exercise their authority under the "balancing" provisions of sections 30007.5 and 30200 of the Coastal Act. In the case of the Sunset Ridge Project, balancing is perfectly appropriate to resolve conflicts between the ESHA policies of the Act and the policies of the Act which promote public access (Section 30210) and encouragement of lower cost visitor-serving and recreational facilities (Section 30213). On balance, the latter two provide a greater level of consistency with the Coastal Act.

Thank you for your consideration in this matter and I urge you to approve this much needed public park project.

SUPPORT

Sincerely,

Paul Bopp

Paul A. Bopp
Resident
Newport Beach, CA

NEWPORT CREST
NEWPORT BEACH

August 12, 2011

CALIFORNIA COASTAL COMMISSION
Attention : Mr John Del Arroz, Coastal Program Analyst
Mr Karl Schwing, Supervisor, Planning and Regulation
200 Oceangate, 10th Floor
Long Beach, CA 90802-4302

Subject : Sunset Ridge Park Vehicle Access
Statement of Preference from Newport Crest Homeowners Association's Board of Directors

Dear Mr Del Arroz and Mr Schwing,

On behalf of the Board of Directors of the Newport Crest Homeowners Association, we are writing this letter in preference of vehicle access from PCH to SRP as city proposed. We have always and will continue to favor a completely passive park. The City has worked with Newport Crest HOA in developing this balanced park project which is both passive and active. In addition, the City has worked with addressing numerous issues raised by residents of Newport Crest HOA. The current proposed project design reflects this collaboration.

As the community which will be the most impacted by the development of the Sunset Ridge Park project, we believe the City has developed a project which considers public-need. We believe that the current evolving design is superior to other options contemplated and we urge the Commission to approve the project with the access entrance from PCH.

We understand the City has submitted an Alternative Access analysis that includes an entry from Superior or a potential pedestrian bridge/parking structure alternative off of Superior. We would strongly oppose any option that would create a point of vehicle ingress and egress to/from the Park from Superior Avenue, and any option that would block public views traveling on Superior Avenue. Both of these options would have a negative impact on our community and the general public.

Please note that our Board of Directors is an elected five member board representing 460 homes. The approval to send this letter of support was obtained at our scheduled meeting of the Board of Directors on August 11th, 2011. The vote was 3 to 2.

Sincerely,

Newport Crest HOA Board of Directors
Mark Gonzalez, Steve Porter, Ginny Lombardi, Mike Rosenthal, Sharon Boles

Cc: Mike Sinacori, City of Newport Beach Assistant City Engineer (Public Works)
Dave Kiff, City of Newport Beach City Manager

August 8, 2011

California Coastal Commission
C/O Karl Schwing and John Del Arroz
200 Oceangate, 10th Floor
Long Beach, CA 90802-4416

SUBJECT: City of Newport Beach – Sunset Ridge Park Project
Coastal Development Permit Application # 5-10-168

Dear Coastal Commissioners,

As a resident of the city of Newport Beach for the past 56 years I have seen first hand the urgent need for park and recreation facilities continue to be an ever-present issue facing the city and it's surrounding communities. I have six children all of whom have played youth sports within the community. Each year the field "load" increases and the availability of fields for youth sports continues to be a much talked about issue. The new park is part of the city charter and is a rare opportunity to add park areas to our city.

I have seen the impact of the lack of fields and the inability of letting the fields rest for best use.

As a past board member of AYSO Region 97 I see first hand the need for the facility and I urge you to continue with your plans for the successful building and completion of the Sunset Ridge Park. This will not only bring much needed facilities and sports accommodations to our community and our city but will also allow the 3,000+ youth athletes across all sports in our immediate area a place where they can continue to develop into healthy young adults.

As you know the city of Newport Beach offers many diverse opportunities for all lifestyles and this project would only enhance its viability and visibility within the Southern California Community.

The city engineers have worked tirelessly to make the part fit nicely in the neighborhood, adds a nice space for the environment, and adds a safe access to the park.

Thank You,

Ted Barry
Fields Manager
AYSO Region 97

August 8, 2011

California Coastal Commission
C/O Karl Schwing and John Del Arroz
200 Oceangate, 10th Floor
Long Beach, CA 90802-4416

SUBJECT: City of Newport Beach – Sunset Ridge Park Project
Coastal Development Permit Application # 5-10-168

Dear Coastal Commissioners,

As a resident of the city of Newport Beach for the past 9 years I have seen first hand the urgent need for park and recreation facilities continue to be an ever-present issue facing the city and it's surrounding communities. I have three children all of whom play youth sports within the community. Each year the field "load" increases and the availability of fields for youth sports continues to be a much talked about issue.

As a board member of AYSO Region 97 I see first hand the need for the facility and I urge you to continue with your plans for the successful building and completion of the Sunset Ridge Park. This will not only bring much needed facilities and sports accommodations to our community and our city but will also allow the 3,000+ youth athletes across all sports in our immediate area a place where they can continue to develop into healthy young adults.

As you know the city of Newport Beach offers many diverse opportunities for all lifestyles and this project would only enhance its viability and visibility within the Southern California Community.

Thank You,

Alex Kassouf
Assistant Regional Commissioner
AYSO Region 97

August 8, 2011

California Coastal Commission
C/O Karl Schwing and John Del Arroz
200 Oceangate, 10th Floor
Long Beach, CA 90802-4416

SUBJECT: City of Newport Beach – Sunset Ridge Park Project
Coastal Development Permit Application # 5-10-168

Dear Coastal Commissioners,

I understand that the Coastal Commission will be considering the proposed Sunset Ridge Park project in the city of Newport Beach at an upcoming hearing. I am writing to express my full support for approval of this project.

I've been a resident of the City of Newport Beach for the past 10 years and a resident of the immediate area for over 20 years. I am also an AYSO Region 97 Board member and a volunteer coach for the past 6 years. As such, I realize the need for additional park and recreation facilities in the City of Newport Beach. I have three children all of whom play youth sports within the community. Each year, the issue of field availability and quality is a topic of discussion amongst the community. With too few fields to adequately accommodate the local youth sports, existing fields get "over-played" which diminishes the quality and thus affects the experience for the youth athletes.

We have a desperate need for the additional soccer and baseball fields that would result from the completion of the Sunset Ridge Park project. The location is convenient for visitors and provides a unique, enjoyable playing environment for our 3000+ youth athletes with views that are truly representative of the City of Newport Beach. I know that the City carefully listened to the community and balanced the issues well in creating this outstanding park project. We are also pleased that ample parking and safe areas to load and unload equipment is provided with this project design.

Youth athletic programs play a critical role in guiding and developing our community's children into healthy young adults. This Sunset Ridge Park project will only improve our City's ability to accommodate these programs.

We urge you to approve this beautiful and much-needed public park project.

Thank you.

Sincerely,

Preston Kenney
AYSO Region 97 Board Member

playNHBA.com

June 27, 2011

California Coastal Commission
c/o Karl Schwing and John Del Arroz
200 Oceangate, 10th Floor
Long Beach, CA 90802-4416

SUBJECT: City of Newport Beach – Sunset Ridge Park Project:
Coastal Development Permit Application # 5-10-168

Dear Coastal Commissioners:

We understand that the City of Newport Beach's Sunset Ridge Park project proposal will be considered by you at a Commission hearing in the very near future. On behalf of Newport Harbor Baseball Association, I am writing to express our full support for this project. Newport Harbor Baseball Association is comprised of over 600 families from Newport Beach, Costa Mesa, and the surrounding areas. Accordingly, we see first-hand the health and social benefits for our youth athletes from participating in these team activities.

Having adequate facilities for practices and games for our kids is critical. The youth baseball field and two soccer fields proposed as part of the City of Newport Beach's Sunset Ridge Park project are much-needed in this region. The location of this park is both convenient for visitors and unique in the beautiful vistas it offers.

As we were involved in some of the initial community meetings during the planning phase of this project, we know that the City carefully listened to the community and balanced the issues well in creating this outstanding park project. We are also pleased that ample parking and safe areas to load and unload equipment is provided with this project design.

We urge you to approve this beautiful and much-needed public park project.

Sincerely,

Lantz Bell
President
Newport Harbor Baseball Association

June 30th, 2011

California Coastal Commission
c/o Karl Schwing and John Del Arroz
200 Oceangate, 10th Floor
Long Beach, CA 90802-4416

SUBJECT: City of Newport Beach – Sunset Ridge Park Project:
Coastal Development Permit Application # 5-10-168

Dear Coastal Commissioners:

We understand that the City of Newport Beach's Sunset Ridge Park project proposal will be considered by you at a Commission hearing in the very near future. On behalf of Newport Beach Bat Rays Youth baseball, I am writing to express our full support for this project. The Bat Rays is comprised of approximately 100 kids ranging from 8 years old to13 years old. Accordingly, we see first-hand the health and social benefits for our youth athletes from participating in these team activities.

Having adequate facilities for practices and games for our kids is critical. The youth baseball field and two soccer fields proposed as part of the City of Newport Beach's Sunset Ridge Park project are much-needed in this region. The genuine desire for new facilities has been expressed to me and our organization by numerous parents and residents of Newport Beach. The location of this park is both convenient for visitors and unique in the beautiful vistas it offers.

As we were involved in some of the initial community meetings during the planning phase of this project, we know that the City carefully listened to the community and balanced the issues well in creating this outstanding park project. We are also pleased that ample parking and safe areas to load and unload equipment is provided with this project design.

We urge you to approve this beautiful and much-needed public park project.

Thank you.

Sincerely,

Scott Liolios
Parent, Resident and Business Owner
Newport Beach, CA.

September 12, 2011

Via Hand Delivery

Karl Schwing and John Del Arroz
California Coastal Commission
200 Oceangate. 10th Floor
Long Beach, CA 90802-4416

RE: City of Newport Beach – Sunset Ridge Park Project [CDP Application No. 5-10-168]

Dear Karl and John:

Pursuant to our recent discussions, we are submitting the following to you for your consideration:

1. **Park Plan** (reduced copy atlached; full-size copy was delivered to your office on August 12, 2011 and digital copy was emailed to you on August 25, 2011) This plan was revised to reflect our discussions and, in particular, the following design changes and staff suggestions:
   a. The reduction in width of the Park access road entrance at West Coast Highway from 85 ft. to 54 ft. – i.e. an approximately 36% reduction.
   b. The narrowing of the median near the Park access road entrance from 33 ft. down to 12 ft. – i.e. an approximately 63% reduction.
   c. The relocation of the proposed Park parking lot and "tot lot" to be further setback from the "southeast polygons."

2. **Updated Existing Vegetation Exhibit**: (reduced copy attached; full-size copy was delivered to your office on August 12, 2011) The content of the project vegetation plan has not been revised, but only updated to correspond with the aforementioned revised Park plan.

3. **Revised Planting Diagram**: (reduced and full-size copies) The planting diagram was updated to correspond with the scope of the aforementioned revised Park plan.

4. **Revised Grading Plan Exhibit**: (reduced and full size copies) This exhibit was prepared to correspond with the scope of the aforementioned revised Park plan.

COASTAL COMMISSION

EXHIBIT # 9

PAGE 1 OF

SCHMITZ & ASSOCIATES, INC.
PROVIDERS OF LAND USE PLANNING
FOR A BETTER COMMUNITY
HEADQUARTERS - MALIBU OFFICE
29350 PACIFIC COAST HWY., SUITE 12
MALIBU, CA 90265
TEL: 310.589.0773 FAX: 310.589.0353
REGIONAL - COASTAL VALLEY OFFICE
5234 CHESEBRO ROAD, SUITE 296
AGOURA HILLS, CA 91301
TEL: 818.338.3636 FAX: 818.338.3423
EMAIL: INFO@SCHMITZANDASSOCIATES.NET WEBSITE: WWW.SCHMITZANDASSOCIATES.COM

5. **Supplemental Biological Report prepared by BonTerra**: Please find enclosed a report prepared by project consulting biologist Ann Johnston of BonTerra dated September 9, 2011. Please be advised that this report contains additional information to address specific points and concerns raised by CCC staff such as those related to alleged vernal pools and supersedes Ms. Johnston's reports dated June 29, 2011 and July 15, 2011. This September 9, 2011 report addresses the following items:

   - Banning Ranch Conservancy's vernal pools claims are unsubstantiated by professional biological assessments. Nevertheless, the applicant commissioned its consulting biologists - who also enlisted the services of a recognized vernal pool expert – to once again assess the four alleged vernal pools in the Park project's proposed spoils site. The enclosed report includes analysis and findings prepared through established and recognized professional protocol from established experts in the assessment of vernal pools. 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.

   - Delineation of certain native vegetation boundaries along the Western and Eastern portions of the project site in the park entrance road area and assessment of the setback of the proposed project limits from these boundaries. It should be noted that this delineation is being provided in support of the City's project and its proposed areas of development. As such, this information is qualified as to the City's project only and has no application to areas beyond the boundary of the City's project boundary with the exception of a 50-foot buffer from any areas of proposed development;

   - Delineation of encelia scrub within the northwestern and southern portions of the project site that do not support any possible determinations of ESHA; and

   - Delineation of the location of native vegetation at the intersection of Pacific Coast Highway and Superior Avenue that do not support any possible determination of ESHA.

6. **Shapefiles**: As you know, on June 30th, we previously submitted on disc the requested CCC identified supposed native vegetation lines in AutoCAD format that were requested by Dr. Engel on the June 7, 2011 site visit. Pursuant to Mr. Del Arroz's email request dated August 11, 2011, please find enclosed a disc with BonTerra's GPS coordinates in a shapefile format. We have included Dr. Engel's identified native vegetation lines as well as the BonTerra identified westerly native vegetation line. As noted in the September 9, 2011 letter from BonTerra, BonTerra believes the western native vegetation line is further west of the line identified by Dr. Engel.

7. **Raw Data**: The City's project biologist received an emailed request from Dr. Jonna Engel dated July 6, 2011 and a second request on August 22, 2011 for "the individual /pair sighting data underlying (that was compiled to create) your gnatcatcher survey single point observations." The City's policy is to not release this information as they are not public records.

   As you know, there is no professional protocol on the recordation of data gathered in the field and therefore the interpretation of said notes is appropriately made by the note taker her/himself. As you are also aware, the City has retained professionals to prepare technical biological documents for this project and said documents reflect the independent professional judgment of the consulting biologists, which is appropriately reviewed and considered by the California Coastal Commission (CCC) in its biological assessment of the project. If CCC Staff has specific questions about the findings in any of these reports, we can make our consulting biologists available at your convenience to review and discuss their conclusions with your office.

8. **Open Space Deed Restriction Request:** During our discussions, CCC staff suggested that an Open Space Deed restriction be imposed on the property adjacent to the access road as a special condition. As you know, this property is not owned by the City and therefore the City has no legal ability to consent to such a special condition. We understand that the owner of this property has not been contacted by CCC staff to discuss the matter. Further, based on our discussion with the property owner, we believe they will not agree to such a restriction. Given the Park project's scope of development and the limitations on the City's ability to impose restrictive covenants on privately-owned property, we believe this suggested special condition is unreasonable, disproportionate, and inappropriate.

9. **Areas Beyond the Project Boundary**: As noted above, certain data is being provided to you in support of the City's application, in response to CCC's staff request for additional information, and presumably to support CCC staff's recommendations on the City's Park project. As you know, in 2010, the City entered into an "Access Agreement Between the City of Newport Beach and Newport Banning Ranch, LLC Regarding Sunset Ridge Park", which facilitates the City's development of the Sunset Ridge Park by permitting the City to construct certain improvements within a designated easement area located on property owned by Newport Banning Ranch, LLC. Given the limited area in which the City's development is authorized, it is our position that, to the extent that the data requested references areas beyond the City's project area, such information is irrelevant, unqualified and cannot be used to support any findings for the City's application. One exception to this limitation, and

consistent with the City's Coastal Land Use Plan, is a 50-foot buffer area depicted from the City's development boundary area and, in some locations, extending slightly beyond the Access Agreement area.

10. **Digital Copies**. Please find enclosed a disc containing all of the items submitted to your office today with this transmittal. The requested shapefiles are located on a separate disc as noted above.

Thank you for your continuing assistance and consideration of the City of Newport Beach's Sunset Ridge Park project application. Should you have any questions, please do not hesitate to contact us.

Sincerely,
SCHMITZ & ASSOCIATES, INC.

Donna Tripp
Regional Manager

CC: Michael J. Sinacori, PE, City of Newport Beach
Ann Johnston, BonTerra
Teresa Henry, District Manager, CCC
Sharilyn Sarb, Deputy Director, CCC
Dr. Jonna Engel, Ecologist, CCC

Attachments:
Revised Site Plan (Aerial & Topographic formats, reduced size)
Revised Site Plan with Existing Vegetation Shown (Aerial & Topographic formats, reduced size)
Revised Planting Diagram (reduced and full size)
Revised Earthwork Exhibit – Dated September 1, 2011 (reduced and full size)
BonTerra Supplemental Biological Resource letter dated September 9, 2011 (this letter replaces and supersedes the pevious letters submitted by Bonterra's Ann Johnston dated June 29, 2011 and July 15, 2011)
Disc containing requested shapefiles.
Disc containing digital copies of today's submittal.

BonTerra CONSULTING

PASADENA COSTA MESA

T: (714) 444-9199 F: (714) 444-9599 | 151 Kalmus Drive, Suite E-200
www.BonTerraConsulting.com | Costa Mesa, CA 92626

September 9, 2011

Mr. Michael Sinacori, P.E.
Public Works Department
City of Newport Beach
330 Newport Boulevard
Newport Beach, California 92663

VIA EMAIL
MSinacori@city.newport-beach.ca.us

Subject: Supplemental Biological Resource Information for the Sunset Ridge Park Project

Dear Mr. Sinacori:

This Letter Report presents supplemental information regarding biological information requested by the California Coastal Commission (CCC) staff for specific biological information listed below, and supersedes our previous letters submitted on June 29 and July 15, 2011 regarding biological resources. The following specific items requested by CCC staff have been addressed in this letter:

- delineation of the BonTerra and CCC native vegetation boundary along the western portion of the project site in the park entrance road area,
- delineation of the BonTerra and CCC native vegetation boundaries along the eastern portion of the park entrance road and proposed park natural open space area;
- delineation of encelia scrub within the northwestern and southern portions of the project site that do not support potential determinations of Environmentally Sensitive Habitat Area (ESHA);
- delineation of the location of native vegetation at the intersection of West Coast Highway (WCH) and Superior Avenue that do not support a determination of ESHA; and
- lack of vernal pools on the project site.

At the outset, the City of Newport Beach wishes to clarify the scope of its response. The CCC staff's request was made in order to assist in the preparation of a staff recommendation on the City's application for a Coastal Development Permit (CDP) for its proposed Sunset Ridge Park project. The application proposes development on three separate areas: (1) development of the park on 13.7 acres owned by the City; (2) development of a two-lane access road from WCH to the park on approximately 7 acres of land owned by Aera/Cherokee over which the City has an agreement with Newport Banning Ranch LLC for access over that portion of its property used for the access road; and (3) placement of fill on 4 acres of property also owned by Aera/Cherokee. Therefore, for purposes of responding to the CCC staff's questions, the information addresses those three areas that are the subject of the City's CDP application.

CCC Western Native and Non-Native Vegetation

The vegetation line that was delineated by CCC biologist Dr. Jonna Engel on the June 7, 2011 site visit as the western native vegetation boundary occurs along the western portion of the project site, west of the proposed park entrance road on property owned by Aera/Cherokee (Exhibit 1). The native vegetation boundary identified by CCC staff in

this area includes substantial areas dominated by myoporum (*Myoporum laetum*) and hottentot fig (*Carpobrotus edulis*), non-natives that do not constitute high value habitat areas in the opinion of the BonTerra biologists. BonTerra's opinion is that any designation of areas of significance should be further to the west.

The existing dirt/gravel access road on the Aera/Cherokee property is on average 44 feet (0-feet closest point/99-farthest point) from the limits of CCC western native vegetation boundary. The proposed construction limits in this same area will be the closest to the CCC western native vegetation boundary at two locations (18 and 12 feet). The remainder of the construction limits will be on average 38 feet from the CCC western native vegetation boundary.

The finished road edge will be 47 feet from the CCC western native vegetation boundary at its closest point. The remainder of the road edge will be on average 69 feet from this CCC western native vegetation boundary. In addition, the road will on average be 7 feet lower in elevation than the western most edge of construction (i.e., the road will be below natural grade). When compared to WCH, the CCC western native vegetation boundary is 58 feet from WCH. The 2-lane park access road will be at an average greater distance away from the CCC western native vegetation boundary than from the existing and heavily traveled WCH.

WCH in this location includes 6 lanes of traffic. According to the project Environmental Impact Report (EIR), existing noise level contours of 65 and 60 dba CNEL occur within 50 and 170 feet into the project in the vicinity of the proposed access road. Relative to the CCC western native vegetation boundary, these noise contours cover approximately 50 percent of the area identified by CCC as western native vegetation. Based on the most recent gnatcatcher surveys, gnatcatchers have been located within the 60 dba CNEL contour, which indicates that the gnatcatchers in the area have become accustomed to the long-term, existing noise that is generated by traffic along WCH. With the addition of the 2-lane park access road, which is at a greater distance from this mapped CCC western native vegetation boundary, the noise levels will not appreciably increase within the area already generated by WCH.

BonTerra Western Native and Non-Native Vegetation and Fragments

Four small fragmented areas of habitat (with a higher occurrence of native vegetation than surrounding areas) occur separate from the western native vegetation boundary identified by CCC staff. The mapping of the fragmented areas focused on those native plant that are important nesting and foraging elements for the coastal California gnatcatcher. In this area, these plants include bush sunflower (*Encelia california*), mule fat (*Baccharis salicifolia*), goldenbush (*Isocoma menziesii*), and arroyo willow (*Salix lasiolepis*). Areas that were not included within the fragmented areas include vegetation dominated by non-native, invasive species such as hottentot fig, pampas grass *(Cortaderia selloana)*, and myoporum. The fragmented areas with a higher occurrence of native plant species have been known to support gnatcatchers in conjunction with the habitats west of the CCC identified western native vegetation boundary under consideration. The three southernmost and smallest areas contain scattered mule fat and bush sunflower, with a significant understory of hottentot fig. The forth area to the north primarily contains arroyo willow and mule fat, with scattered sunflower and a significant understory of hottentot fig throughout this area. In total, these four small areas are 0.137 acre in size.

The native vegetation boundary identified by BonTerra biologists extends off the project site to the west of the western vegetation boundary, further onto the Aera/Cherokee property. This western vegetation boundary area includes vegetation of a higher biological value that those areas identified by CCC staff due to the lower occurance of invasive/non-native species species and connection of vegetation to other high value areas.

BonTerra Eastern Native Vegetation

The area identified as the BonTerra eastern native vegetation boundary occurs along the eastern portion of the project access road. Two eastern boundary lines are again depicted on Exhibit 1. The green line is the extent of native vegetation identified by Bon Terra biologist, and the red line is where the CCC staff biologist would establish the native vegetation boundary line. This area also coincides with planned park natural open space. These boundaries were delineated by focusing on those native plants that are important nesting and foraging elements for the coastal California gnatcatcher. In this area, these plants include bush sunflower, goldenbush, California buckwheat *(Eriogonum fasciculatum)*, bladderpod *(Isomeris arborea)*, mule fat, saltbush (*Atriplex* sp.), coastal cholla *(Opuntia prolifera)*, and coastal prickly pear (*Opuntia littoralis)*. Areas that were not included within the eastern vegetation boundary include those areas dominated by non-native, invasive species such as hottentot fig, myoporum, tocalote (*Centaurea melitensis*), crystalline iceplant (*Mesembryanthemum crystallinum*), castor bean (*Ricinus communis*), and black mustard (*Brassica nigra*). This entire BonTerra eastern native vegetation area is 0.75 acre in size.

CCC Eastern Native Vegetation

The area identified as the CCC eastern native vegetation boundary occurs along the eastern portion of the project access road. This area also coincides with planned park natural open space.

The existing dirt/gravel access road on the Aera/Cherokee property is on average 83 feet (0-feet closest point/154-farthest point) from the limits of the CCC eastern native vegetation boundary. The proposed construction limits in this same area will be 8 feet at its closest point to the eastern native vegetation boundary. The remainder of the construction limits will be on average 28 feet from the CCC eastern native vegetation boundary.

The finished road edge will be 51 feet from the CCC eastern native vegetation boundary at its closest point. The remainder of the road edge will be on average 85 feet from this eastern native vegetation boundary. In addition, the road will be between 8 feet and 31 feet lower in elevation than the western edge of the CCC eastern native vegetation boundary (i.e., the road will be below natural grade). When compared to existing WCH, the CCC eastern native vegetation boundary is 59 feet from existing WCH at its closes point. The 2-lane park access road will be at an average greater distance away from the CCC eastern native vegetation boundary than the existing WCH.

The proposed park also includes a parking area to the east of the CCC eastern native vegetation boundary. At its closest point the parking area will be 51 feet from the CCC eastern native vegetation boundary. In addition to this horizontal difference, there will be a vertical distance of between 10 and 15 feet, to provide an additional barrier between parking lot activities and the CCC eastern native vegetation boundary.

As discussed previously for the CCC western native vegetation boundary, the EIR documents the existing noise level contours of 65 and 60 dba CNEL, which occur within 50 and 170 feet into the project in the vicinity of the proposed access road. Relative to the CCC eastern native vegetation boundary, these noise contours cover approximately 50 percent of the area identified by the CCC as the eastern native vegetation boundary. Based on the most recent gnatcatcher surveys, gnatcatchers have been located within the 60 dba CNEL contour to the west, which indicates that the gnatcatchers in the area have become accustomed to the long-term, existing noise that is generated by traffic along WCH. The addition of the park access road at a greater distance from this mapped eastern native vegetation boundary, will not appreciably increase the noise levels.

0.08-Acre Encelia Scrub - Northwestern Patch

This vegetation type is dominated by bush sunflower, with several coastal prickly pear. The vegetation in this area occurs within a small bowl shaped area that has been partially filled with large pieces of concrete and re-bar. The presence of a monotypic cover of bush sunflower, with little to no understory species in the small area, is common for this species that frequently occurs within areas subject to disturbance. Although gnatcatchers may periodically fly across the existing dirt/asphalt road (approximately 55-feet wide in this area), this area is not expected to provide important nesting opportunities for gnatcatchers in the area. Due to a mapping error, this area had previously been identified as the location of a pair of gnatcatchers in 2002 by Glenn Lukos Associates. This erroneous location has been corrected (Appendix A). Based on the lack of known nesting observations, the lack of existing vegetation diversity, and significantly compromised soil conditions, this area is not expected to improve over time in regards to habitat quality (i.e., native species do not grow well on concrete and re-bar). This 0.08 acre area of encelia scrub does not have high biological value and is not considered potentially sensitive.

0.10-Acre Encelia Scrub - Southern Patch

This vegetation type is dominated by bush sunflower, with California buckwheat and saltbush occurring in lesser quantities. The vegetation in this area is surrounded on all sides by large concrete culverts that are actively maintained. These culverts are frequently used by pedestrians in the area to cross the park site, or by skate board riders who utilize the site culverts for jumps. In addition, this area is immediately adjacent (within 10 feet) of manufactured slopes along WCH that are subject to regular vegetation and trash removal by Caltrans. In addition, 6 lanes of 50-mile per hour traffic occurs within 26 feet of this area. Although gnatcatchers may periodically use this area (e.g., during the non-breeding season), this habitat patch is less than optimal in support of nesting gnatcatchers and their long term survival in this area. The 0.10 acre area of encelia scrub does not have high biological value and is not considered potentially sensitive

0.09-Acre Encelia Scrub/Ornamental Patch

A small area of encelia scrub/ornamental occurs at the intersection of WCH and Superior Avenue on a slope manufactured by Caltrans. This area supports fragmented bush sunflower, saltbush, mule fat, hottentot fig, pampas grass, and bare ground (Exhibit 1). This area is also surrounded by large concrete culverts (both upslope and downslope) that are actively maintained. These culverts are also frequently used by pedestrians and skate board riders. In addition, this area is also immediately adjacent (within 10 feet) of manufactured slopes along WCH that are subject to regular vegetation and trash removal by Caltrans. In addition, 10 lanes (including turn lanes) of traffic occur within 60 feet of this area. Although gnatcatchers may periodically use this area (e.g., during the non-breeding season), this habitat patch is less than optimal in support of nesting gnatcatchers and their long term survival in this area. The 0.09 acre area of encelia scrub/ornamental vegetation does not have high biological value and is not considered potentially sensitive.

Vernal Pool Habitat

Although no vernal pool habitat had previously been documented on the project site, at the request of the City, BonTerra Consulting Biologist Allison Rudalevige conducted a site visit on July 11, 2011 with Michael Sinacori to confirm the absence of vernal pool resources. Ms. Ruadlevige is a biologist with both vegetative and hydrological expertise relative to vernal pools and is also permitted by the U.S. Fish and Wildlife Service (10(a) permit:TE177979-0) to conduct surveys for listed fairy shrimp.

No vernal pools were observed onsite. However, Ms. Rudalevige did note three areas of cracked soils, a potential indicator of ponding water. These areas were dominated by a mix of perennial and annual vegetation including, but not limited to, deerweed (*Acmispon glaber* [*Lotus scoparius*]), fascicled tarweed (*Deinandra fasciculata* [*Hemizonia fasciculata*]), white-stem gum-plant (*Grindelia camporum*), curly dock (*Rumex crispus*), foxtail chess (*Bromus madritensis* ssp. *rubens*), soft chess (*Bromus hordeaceus*), and wild oat (*Avena* sp.). Moving south along the access road to the proposed fill site, vegetation was increasingly dominated by hottentot fig with smaller amounts of tocalote, non-native grasses, black mustard, and crystalline iceplant.

In order to determine whether these, or any other portions of the access road/fill area, are considered "vernal pools", one must consider not just whether the areas hold water temporarily during the rainy season, but also the biological characteristics of the area. A Manual of California Vegetation (Sawyer, Keeler-Wolf, and Evens 2009) considers vernal pools to be "seasonally wet habitats with high levels of biological diversity described as 'complex ecosystems' including plants, insects, and crustaceans". According to the Recovery Plan for Vernal Pool Ecosystems of California and Southern Oregon (USFWS 2005), almost all California vernal pool plants are annuals and many are endemic and exhibit unique adaptations to survive in vernal pools.

The vegetation observed on the project site is predominantly upland and there is a large amount of perennial species present. Plant species characteristic of the vernal pools (e.g., perennial spike rush [*Eleocharis macrostachya*] and woolly marbles [*Psilocarphus brevissimus*]) and ephemeral ponds know to occur in the area (e.g., woolly marbles, goldfields [*Lasthenia californica*] and grass poly [*Lythrum hyssopifolium*]) were not observed during the site visit. Therefore, due to the lack of plant species characteristic of vernal pools, lack of sustained/observable ponding over multiple years of surveys onsite, the project site does not contain vernal pools.

The City received a PowerPoint Presentation from the Banning Ranch Conservancy (BRC) titled "Complete Banning Ranch Mesa Vernal Pools/Wetlands, First Edition - 6-27-11" on August 15, 2011 provided by Terry Welsh. The information contained in this PowerPoint provides no evidence of vernal pools. Vernal pools (as described above) must consider not just whether the areas hold water temporarily during the rainy season, but also the biological characteristics of vernal pools that include the unique assemblages of native plants, insects, and crustaceans. The BRC PowerPoint does not utilize any appropriate vernal pool identification protocol for this resource issue, as it does not document ponding duration, soil types present, plant indicator species, invertebrate activity, and other necessary parameters. Never the less, our office conducted a second field review on August 31, 2011 of the areas identified on PowerPoint slide 6 as features 34, 35, 36 and 39. These features identified by BRC occur in the proposed fill site. Tony Bomkamp from GLA and Jeff Crain from BonTerra were present for this second field review. Mr. Bomkamp is a permitted expert with the USFWS regarding vernal pools and also performs graduate level instructions on the subject at California State University Fullerton. Mr. Crain is also permitted by the USFWS to conduct surveys for listed fairy shrimp (10(a) permit:TE-047998-1). Photographs of each area are provided to show the lack of any vernal pool habitat (Exhibit 2). Mr. Bomkamp provided the following statement regarding the field walk and his observations:

> "On August 31, 2011, I attended a site visit with biologists Ann Johnston and Jeff Crain of BonTerra Consulting to review four features identified as pools 34, 35, 36, and 39 in the Banning Ranch Conservancy Power Point Presentation dated June 27, 2011. After reviewing the features, it is clear that none of the four features are vernal pools as all of the features lack vernal pool indicator plant species and all of the features occur on previously graded areas and exhibit a predominance of upland plant species such as fascicled tarplant (*Deinandra fasciculata*, UPL), soft chess (*Bromus hordeaceus*, FACU), and coastal goldenbush (*Isocoma menziesii*, UPL)."

Based on the EIR and the two subsequent field reviews in July and August 2011 we again assert and conclude that no vernal pool habitat is present on the Sunset Ridge Park project site.

Conclusions

The park project has been revised at the request of CCC staff to further avoid direct impacts to those areas identified as the western and eastern native vegetation boundaries by CCC staff in the areas to the west and east of the 2-lane park access road. For both the western and eastern areas (as defined by CCC), the road limits will be on average 76 feet from the boundaries. In addition, a significant portion of the access road will be either below the grade of the native vegetation boundaries or substantially above the grade of the native vegetation boundaries (e.g. the park parking area). Because construction impacts will occur outside of the native vegetation boundaries with an average distance of 34 feet from the native vegetation boundaries, any construction within the vicinity of the western and eastern native vegetation boundaries are not expected to impact the root zones of the native sage scrub plants based on known root structure forms for these species. Construction impacts are temporary in nature and will also involve removing a significant amount of invasive, non-native species that are currently detrimental to the native vegetation. The removal of the non-native species during construction will be a benefit to the native vegetation and gnatcatchers in the area.

The park site does not contain vernal pools, and no additional surveys or documentation regarding this issue is warranted for the project.

The proposed park site is expected to provide adequate avoidance from both direct and indirect impacts to important biological resources through modifications of the proposed plan and implementation of EIR mitigation measures (Attachment C). No additional buffers or areas of avoidance are warranted beyond that which is illustrated in the current proposed City plan.

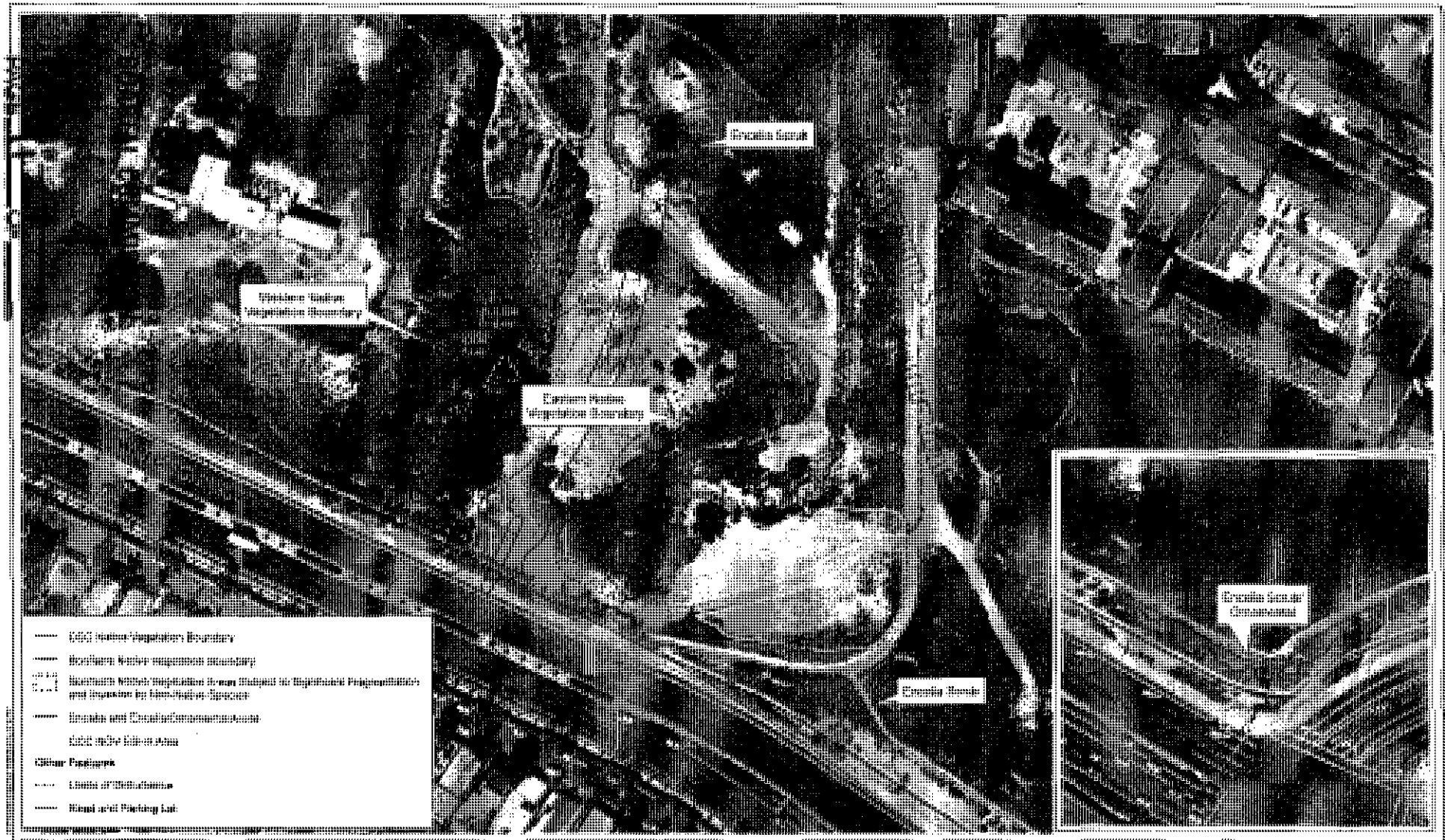
BonTerra Consulting appreciates the opportunity to assist with this project. Please contact Ann Johnston at (714) 444-9199 if you have questions or comments.

Sincerely,

BONTERRA CONSULTING

Ann M. Johnston
Principal

Attachments: Exhibit 1
Exhibit 2
Attachment A – Glen Lukos Associates Memorandum
Attachment B – Biological Resource Mitigation Measures



Native Vegetation Aerial View

Exhibit 1

BBC Features 34, 35, 36, and 39

Exhibit 2

Round Ridge Park

ATTACHMENT A

GLEN LUKOS ASSOCIATES MEMORANDUM

MEMORANDUM

GLENN LUKOS ASSOCIATES

Regulatory Services

PROJECT NUMBER: 04720008BANN

TO: Christine Medak

FROM: Tony Bomkamp

DATE: June 14, 2011

SUBJECT: Clarification Regarding CAGN Mapping from 2002 Protocol Surveys Conducted by Glenn Lukos Associates for West Newport Oil

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During preparation of our submittal information to U.S. Fish and Wildlife Service for the Newport Banning Ranch Biological Assessment, dated February 10, 2010, I noted that one of the CAGN locations depicted in the year 2002 45-day report was incorrectly mapped. GLA corrected the error in our database such that the map in February 10, 2010 submittal shows the corrected CAGN location; however, I did not notice you of the change at that time.

The correction was made for the location of Pair Number 1 as this pair was incorrectly depicted approximately 100-200 feet east of the actual location where this pair was observed. Exhibit 1 shows the incorrect location as depicted on the 2002 map and the corrected location, which is consistent with all of the mapping that we have provided to you. I did not notice this error at the time the mapping was prepared and submitted in 2002 and only became aware of this during the preparation of the documents for the Biological Assessment. I would note that GLA did not have GIS Technology in 2002 and the map was prepared by attaching "sticky dots" to the base map, a process that was not as accurate as using sub-meter GPS combined with highly accurate GIS technology. The actual location of the pair, based on a clear recollection of their location (I conducted the surveys personally) was on the slope immediately adjacent to the area later designated as the Northwest Polygon during the processing of the Notice of Violation recently completed with the California Coastal Commission. Attached is a copy of the original 2002 map showing the location of Pair 1 and the February 10, 2010 map that shows the corrected location for the 2002 survey. As already noted, this corrected location is shown on all maps that have been submitted beginning with the February 10, 2010 submittal as well as in all submittals to the Coastal Commission relative to the recent Notice of Violation and Consent Order.

This does not in any way affect the analysis of use areas or carrying capacity that has been performed in support of the Biological Assessment, nor does it affect the proposed mitigation. My purpose for submitting this at this time is to ensure that the record is as accurate as possible. Exhibit 1 is a close-up of the area showing the incorrect location and the corrected location. Exhibit 2 is the original 2002 map and Exhibit 3 is the revised and accurate composite map submitted to you in February of 2010.

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ATTACHMENT B
BIOLOGICAL RESOURCE MITIGATION MEASURES
REGARDING COASTAL SAGE SCRUB AND GNATCATCHER IMPACTS
FROM THE MITIGATION MONITORING AND REPORTING PROGRAM

SUNSET RIDGE PARK PROJECT,
NEWPORT BEACH, CALIFORNIA
SCH NO. 2009051036

MM 4.6-1: Project-related activities likely to have the potential to disturb suitable bird nesting habitat shall be prohibited from February 15 through August 31, unless a Project Biologist acceptable to the City of Newport Beach surveys the Project area prior to disturbance to confirm the absence of active nests. Disturbance shall be defined as any activity that physically removes and/or damages vegetation or habitat or any action that may cause disruption of nesting behavior such as loud noise from equipment and/or artificial night lighting. Surveys shall be conducted weekly, beginning no earlier than 30 days and ending no later than 3 days prior to the commencement of disturbance. If an active nest is discovered, disturbance within a particular buffer shall be prohibited until nesting is complete; the buffer distance shall be determined by the Biologist in consideration of species sensitivity and existing nest site conditions. Limits of avoidance shall be demarcated with flagging or fencing. The Biologist shall record the results of the recommended protective measures described above and shall submit a memo summarizing any nest avoidance measures to the City of Newport Beach to document compliance with applicable State and federal laws pertaining to the protection of native birds.

Similarly, for preserved vegetation that occurs within 50 to 100 feet of construction activities, if construction is occurring during the nesting season, preserved vegetation shall be surveyed for the presence of nesting birds.

MM 4.6-2: To the maximum extent practicable, habitats that provide potential nest sites for raptors/burrowing owls shall be removed from September 1 through January 31. If Project construction activities are initiated during the raptor/burrowing owl nesting season (February 1 to August 31), a nesting raptor/burrow survey shall be conducted. Seven days prior to the onset of construction activities, a qualified Biologist shall survey within the limits of the proposed Project disturbance area for the presence of any active raptor nests/burrows (common or special status). Any nest/burrow found during survey efforts shall be mapped on the construction plans. If no active nests/burrows are found, no further mitigation would be required, and survey results shall be provided to the CDFG.

If nesting activity is present, the active site shall be protected until nesting activity has ended to ensure compliance with Section 3503.5 of the California Fish and Game Code. To protect any nest/burrow site, the following restrictions on construction are required between February 1 and August 31 (or until nests/burrows are no longer active, as determined by a qualified Biologist): (1) Clearing limits shall be established a minimum of 300 feet in any direction from any occupied nest/burrow and (2) access and surveying shall be restricted within 200 feet of any occupied nest/burrow. Any encroachment into the 300- and/or 200-foot buffer area(s) around the known nest/burrow shall only be allowed if a qualified Biologist determines that the proposed activity shall not disturb the nest occupants. During the non-nesting season, proposed work activities can occur only if a qualified Biologist has determined that fledglings have left the nest/burrow.

If an active nest/burrow is observed during the non-nesting season, a qualified Biologist shall monitor the nest site; when the raptor/owl is away from the nest, the Biologist shall flush any raptors to open space areas or exclude the owl from the burrow and then remove the burrow so the owl cannot return.

MM 4.6-3: The NCCP/HCP does not authorize Incidental Take resulting from the conversion of habitat occupied by coastal California gnatcatchers in Existing Use Areas. Consistent with Federal Endangered Species Act (FESA) processes, the City has two options to mitigate for the impacts to the coastal California gnatcatcher:

a. On-site avoidance of habitat that would constitute Incidental Take of gnatcatcher habitat or

b. Mitigation of Incidental Take through a Section 7 or Section 10 process.

In addition, the following construction-related minimization measures shall be required:

1. All activities involving the removal of gnatcatcher/coastal sage scrub habitat shall be prohibited during the breeding and nesting season (February 15 to July 15) unless otherwise directed by the USFWS.

2. The use of any large construction equipment during site grading shall be prohibited within 200 feet of an active gnatcatcher nest during the breeding and nesting season of these species (February 15 to July 15) unless otherwise directed by the USFWS.

3. All areas containing habitat suitable for occupation by the gnatcatcher adjacent to the impact area shall be delineated by the use of orange snow fencing or the use of lath and ropes/flagging.

4. All grubbing operations shall be monitored by a qualified Biologist. The monitoring Biologist shall ensure that only the amount of coastal sage scrub habitat approved for removal by the USFWS will be removed.

5. The monitoring Biologist shall flush gnatcatchers from occupied habitat areas immediately prior to brush-clearing and earth-moving activities. It shall be the responsibility of the monitoring Biologist to assure that gnatcatchers shall not be directly impacted by brush-clearing and earth-moving equipment in a manner that also allows for construction activities on a timely basis.

6. If construction occurs during the nesting season, a summary of construction monitoring activities shall be provided to the USFWS and the CDFG following completion of construction.

Following the completion of initial clearing activities, all areas of coastal sage scrub habitat to be avoided by construction equipment and personnel shall be marked with temporary fencing or other appropriate markers clearly visible to construction personnel. No construction access, parking, or storage of equipment shall be permitted within such marked areas.

MM 4.6-4: Implementation of the Project would result in the loss of 0.41 acre of coastal sage scrub habitat. Permanent impacts on coastal sage scrub vegetation shall be mitigated at a two to one (2:1) ratio on the Project site or in suitable off-site locations in the Newport Beach/Costa Mesa area. A 2:1 ratio for mitigation is appropriate for the habitat impacted which is non-typical for gnatcatchers and subject to degradation by invasive, non-native species. A coastal sage scrub restoration plan shall be prepared by the City prior grading activities. The City shall be responsible for implementing the restoration plan. Restoration shall consist of seeding and planting of containers of appropriate coastal sage scrub species and cactus cuttings. The restoration areas shall be maintained and monitored by the City until the success criteria documented in the restoration plan have been met.

The restoration plan shall contain the following items.

1. ***Responsibilities and qualifications of the personnel to implement and supervise the plan.*** The responsibilities of the landowner, specialists, and maintenance personnel that shall supervise and implement the plan shall be specified.

2. ***Site selection.*** The site shall be located in a dedicated open space area and shall be contiguous with other natural open space areas.

3. ***Site preparation and planting implementation***, including protection of existing native species; trash and weed removal; native species salvage and reuse (i.e., duff); soil treatments (i.e., imprinting, decompacting); erosion control measures (i.e., rice or willow wattles); and seed mix application.

4. ***Schedule.*** Establishment of restoration/revegetation sites shall be conducted between October and January 30. Seeding and planting of container plants shall take place immediately after preparation of the restoration sites.

5. ***Maintenance plan/guidelines.*** The maintenance plan shall include weed control; herbivory control; trash removal; irrigation system maintenance; maintenance training; and replacement planting.

6. ***Monitoring Plan.*** The monitoring plan shall be conducted for three years, depending upon the performance of the mitigation site, and shall include qualitative monitoring (i.e., photographs and general observations); quantitative monitoring (i.e., randomly placed transects); performance criteria; and monthly reports for the first year, bimonthly reports thereafter, and annual reports for all three years.

7. ***Long-term preservation.*** Long-term preservation of the site shall be outlined in the conceptual mitigation plan to ensure the mitigation site is not impacted by future development. A conservation easement and a performance bond shall be secured prior to implementation of the site.

8. ***Identification of performance standards for the revegetation of coastal sage scrub.*** Restoration shall be considered successful at three years if the percent cover and species diversity of the restored and/or created habitat areas are similar to percent cover and species diversity of adjacent existing habitats, as determined by quantitative testing of existing, restored, and created habitat areas.

In addition, earth-moving equipment shall avoid maneuvering in areas outside the identified limits of grading in order to avoid disturbing open space areas that would remain undeveloped. Prior to grading, the natural open space limits shall be marked by the Construction Supervisor and the Project Biologist. These limits shall be identified on the grading plan. No earth-moving equipment shall be allowed within the open space areas.

GLENN LUKOS ASSOCIATES
Regulatory Services

September 19, 2011

Erin McCarthy
U.S. Fish & Wildlife Service
6010 Hidden Valley Road
Carlsbad, California 92009

SUBJECT: Results of Dry-Season Survey for Listed Fairy Shrimp for a Single Feature at the 412.5-acre Newport Banning Ranch Property, City of Newport Beach and Unincorporated Orange County, Orange County, California

Dear Ms. McCarthy:

Please accept this letter and attachments as the final report regarding the results of a dry-season survey for listed fairy shrimp within a single feature (BRC 39) at the above referenced property. The survey of the subject feature was conducted in coordination with Chris Medak of USFWS, who suggested that a dry-season survey for this feature be conducted.

The Newport Banning Ranch property is approximately 412 acres and is located within both the City Newport Beach as well as an unincorporated portion of Orange County. The property is located north of Pacific Coast Highway (PCH), east of the Santa Ana River, south of 19th Street, and west of existing residential and commercial areas. The Project is situated within Unsectioned areas of Township 6 South, and Range 10 West of the USGS Newport Beach 7.5' Topographic quadrangle maps [Exhibit 1 – Vicinity Map]. The Study Area occurs at Universal Transverse Mercator (UTM) coordinates 412214 mE and 3722187 mN.

As noted in our September 14, 2011 notification, David Moskovitz (TE-084606-1) is the point of contact for GLA and Frank Wegscheider (TE-038716-2) conducted the dry-season sampling in accordance with the U.S. Fish and Wildlife Service Vernal Pool Branchiopods Survey Guidelines (USFWS 1996). The survey was limited to one disturbed feature located near the southeast corner of the site consisting of a low area in a drainage swale that currently supports a predominance of upland grasses and forbs but which ponded water in late December 2010 following extreme rainfall events. A photograph of BRC 39 is included as Exhibit 2.

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METHODS

Soil Collection

Soil sample collection was conducted by Frank Wegscheider and followed the USFWS Interim Survey Guidelines to Permittees for Recovery Permits Under Section 10(a)(1)(A) of the Endangered Species Act for the Listed Vernal Pool Branchiopods (April 1996). The subject feature was sampled at 10 equidistant points starting at the edge of the feature continuing lengthwise and widthwise, including at least two samples from the lowest portions. Soil samples of approximately 100-milliliter (ml) aliquots were removed at each sub-sample site (for a total of 1 liter/ponded area) and transferred to labeled plastic bags for future analysis. The feature had been previously mapped by Tony Bomkamp of GLA using sub-meter global positioning system (GPS) technology and photographed.

Soil Analysis

USFWS-approved branchiopod biologist Frank Wegscheider conducted soil analyses. Soil samples were placed into a one-gallon plastic container and allowed to pre-soak in water. The resulting slurry was slowly poured into a graded set of stacked U.S. standard eight-inch soil sieves (710, 300, and 150 micron), while concurrently being gently washed with flowing water. Water was directed through the samples for a time period sufficient to wash all of the resting eggs (cysts) into the 150-micron sieve. Soil remaining in the 150-micron and 300-micron sieves was used for analysis. The Project site lies outside of the currently documented range of the federally endangered vernal pool tadpole shrimp (*Lepidurus packardi*), which is endemic to California's Central Valley; therefore, it was unnecessary to examine the 300-micron sample. Nonetheless, the 300-micron sample was examined for the presence of cladoceran ephippia. To facilitate the analyses, the 150-micron samples were transferred to a saturated sodium chloride (NaCl) solution whereupon the organic components were twice decanted. The remaining organic contents were then examined under a Bausch & Lomb dissecting microscope at 10-30X for the presence of anostracan cysts.

RESULTS OF THE 2011 DRY-SEASON STUDY

Anostracan (fairy shrimp) cysts were not detected within the feature and it is concluded that listed fairy shrimp, specifically the San Diego fairy shrimp does not occur within this feature. Notably, cysts of widespread and common seed shrimp (Ostracoda) were also not detected within the feature. A number of hexapod (insect) parts were found in the soil samples taken from this feature but were not identified to species.

Table 1: Feature BCR 39					
Subsample number	Cyst quantity	Genus/species	Ostracod cysts	Hexapod exoskeleton	Cladocera ephippia
1	0	N/A	0	+	0
2	0	N/A	0	+	0
3	0	N/A	0	+	0
4	0	N/A	0	+	0
5	0	N/A	0	+	0
6	0	N/A	0	+	0
7	0	N/A	0	+	+
8	0	N/A	0	+	+
9	0	N/A	0	+	+
10	0	N/A	0	+	0

DISCUSSION

In our notification, we noted that based on separate site assessments conducted by BonTerra Consulting permitted Biologists Allison Rudalevige (TE177979-0) and Jeff Crain (TE-047998-1)[1] as well as by Tony Bomkamp of GLA (TE-825679-1 - permit currently inactive), BRC-39 is not a vernal pool, lacking not only vernal pool indicator species but also lacking a predominance of wetland indicator plants along with a complete absence of indicators for hydric soils, showing that it rarely ponds and then for only short duration. The dry-season survey results confirm this, and the lack of not only Anostracan cysts but also cysts of Ostracoda demonstrates that the feature as noted ponds at best rarely, and when it does (i.e., following extreme rainfall in late December 2010), the ponding lasts for only brief periods. In our notification, GLA proposed a modified protocol consisting of one dry-season sampling as a "complete" survey in the event that fairy shrimp cysts are absent, including the listed San Diego fairy shrimp and common versatile fairy shrimp (both of which are absent). Given the complete absence of Anostracan cysts, GLA believes that the dry-season survey has definitively demonstrated that listed species do not occur within feature BRC-39 due to the lack of suitable habitat and that a "Complete" survey has been accomplished for this feature. No additional wet- or dry-surveys are necessary.

[1] The results of the BonTerra's review of the site relative to potential areas of seasonal ponding are included in a report dated September 9, 2011 referencing: *Supplemental Biological Resource Information for the Sunset Ridge Park Project*. This report was submitted to Chris Medak of your office.

If you have any questions regarding this request, please call me at (949) 837-0404, ext. 42, or Tony Bomkamp at ext. 41.

I certify that the information in this survey report and attached exhibits fully and accurately represents my work.

GLENN LUKOS ASSOCIATES, INC.

David F. Moskovitz — TE-084606-1 — 9/19/2011

David F. Moskovitz, Biologist | Permit # | Date

s:0472-8a.2011_dry survey_90 day.doc

CC: Christine Medak (U.S. Fish and Wildlife Service)
Jonna Engel (California Coastal Commission)

COASTAL COMMISSION

EXHIBIT # 10

PAGE 5 OF

GLENN LUKOS ASSOCIATES

Exhibit 1

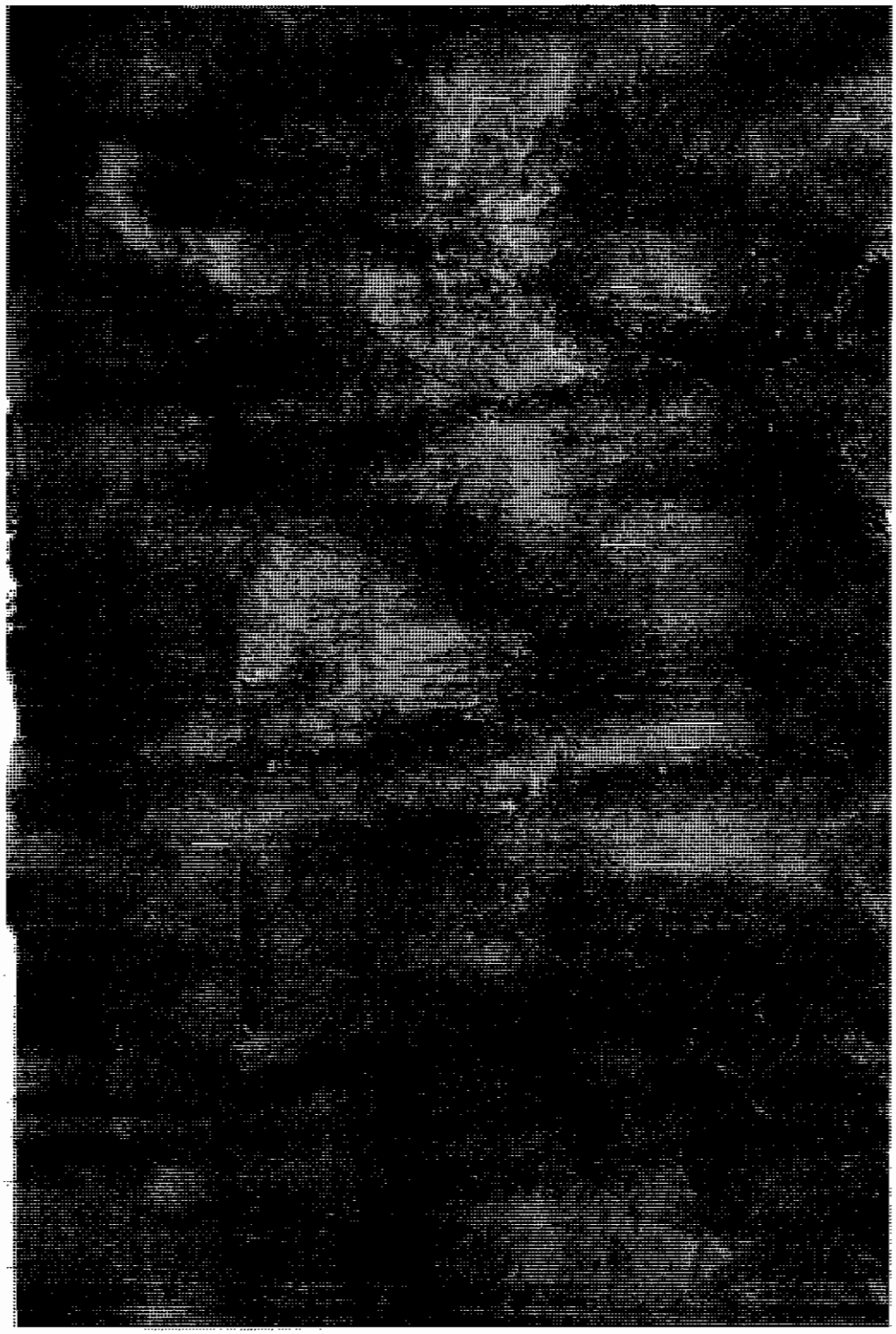
NEWPORT BANNING RANCH

Vicinity Map

Adapted from USGS Newport Beach, CA quadrangle

NORTH

0 1,000 2,000 4,000 Feet



Feature BRC-39 exhibiting predominance of upland vegetation. No fairy shrimp cysts were detected.

NEWPORT BANNING RANCH

Fairy Shrimp Surveys: Site Photograph

GLENN LUKOS ASSOCIATES

EXHIBIT 2

Tom Brohard and Associates

September 16, 2011

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

SUBJECT: Sunset Ridge Park – Access Review and Safety Evaluation

Dear Mr. Ray:

As requested, Tom Brohard, P.E., has reviewed access alternatives for the proposed Sunset Ridge Park at the northwest corner of West Coast Highway and Superior Avenue in the City of Newport Beach. This evaluation included a field review of the existing conditions at the park site with you on August 30, 2011 as well as review of various documents relating to the Proposed Project including:

- October 2009 Traffic Impact Study prepared by Kimley-Horn and Associates
- Letters from Schmitz & Associates to the California Coastal Commission
- A 1"=50' scale topographic map provided by the City of Newport Beach

From my review of these documents and information gathered during my field review at the site, direct driveway access from the Sunset Ridge Park site to West Coast Highway about 350 feet west of Superior Avenue as shown on the enclosed Conceptual Drawing is the best alternative from a traffic engineering viewpoint. This report explains the current traffic conditions as well as those that are expected to occur in 2013 with development of Sunset Ridge Park and provides technical traffic engineering support for direct driveway access to West Coast Highway. While concerns regarding traffic safety of this access (Alternative B) have been expressed in the March 2, 2011 letter from Schmitz & Associates to the California Coastal Commission, those concerns have been dramatically overstated, are not supported by traffic engineering analyses, and do not reflect the conditions that will occur with direct access from Sunset Ridge Park to West Coast Highway.

Education and Experience

Since receiving a Bachelor of Science in Engineering from Duke University in Durham, North Carolina in 1969, I have gained over 40 years of professional engineering experience. I am licensed as a Professional Civil Engineer both in California and Hawaii and as a Professional Traffic Engineer in California. I formed Tom Brohard and Associates in 2000 and now serve as the City Traffic Engineer for the City of Indio and as Consulting Transportation Engineer for the Cities of Big Bear Lake, Mission Viejo, and San Fernando. I have extensive experience in traffic engineering and transportation planning. During my career in both the public and private sectors, I have reviewed numerous environmental

81903 Mountain View Lane, Indio, California 92201-7611
Phone (760) 398-8885 Fax (760) 398-8897
Email tbrohard@earthlink.net

documents and traffic studies for many projects in California. Several recent assignments are highlighted in the enclosed resume.

Trip Generation of Proposed Project

From Table 5 on Page 16 of the October 2009 Sunset Ridge Park Traffic Impact Study, the development of two soccer fields at the site is forecast to generate 143 daily trips. Of these, two trips including one inbound and one outbound are forecast to occur during the weekday AM peak hour. In the weekday PM peak hour, 42 trips including 29 inbound and 13 outbound are forecast.

While these traffic volumes are extremely low, Land Use 488, Soccer Complex, in Trip Generation, 8th Edition published by the Institute of Transportation Engineers (ITE) notes "Caution should be used when applying these data. Peaking at soccer complexes typically occurred in time periods shorter than one hour. These peaking periods may have durations of 10 to 15 minutes."

The City Department of Parks and Recreation will utilize staggered scheduling between games on each soccer field. Assuming there will be 30 minutes between the end of one game and the start of warm up for the next game on each field, trips would be spread out over the entire PM peak hour as follows:

- Field 1 game ends at 5:00 PM; next Field 1 game warm up begins at 5:30 PM
  - 7 outbound vehicles depart between 5:00 PM and 5:15 PM
  - 15 inbound vehicles arrive between 5:15 PM and 5:30 PM

- Field 2 game ends at 5:30 PM; next Field 2 game warm up begins at 6:00 PM
  - 6 outbound vehicles depart between 5:30 PM and 5:45 PM
  - 14 inbound vehicles arrive between 5:45 PM and 6:00 PM

Staggering of Ending and Starting Times for Games

In my recent review of traffic and parking issues associated with up to 13 fields in simultaneous operation at the Youth Athletic Park in the City of Mission Viejo, it was confirmed that staggered scheduling of ending times and starting times of games is necessary to avoid traffic and parking problems.

On Page 8 of the March 2, 2011 letter to the California Coastal Commission, the City recognized the importance of staggered scheduling by stating "As proposed by the City Department of Parks and Recreation, scheduling of the games will be managed by this Department to ensure that they are adequately staggered such that the majority of participants in games are leaving the Park before participants in a subsequent game are arriving."

Page 14 of the same March 2, 2011 letter to the California Coastal Commission contradicts the proposed staggered scheduling and identifies a "Stacking Traffic Hazard" at the driveway stating "...given that these games will have specific start times (and specific end times), the likelihood of visitors arriving (and departing) at similar times is great; this presents a potential stacking problem, especially if adequate deceleration and right-turn in lanes are not or cannot be provided."

Queuing (Stacking) of Traffic at Project Driveway

With the extremely low traffic volumes spread out across the PM peak hour with planned staggered scheduling between games, the arrival rate would average one vehicle per minute in the peak 15 minutes before warm up for the next game. There would be no queuing on the driveway itself after entering from West Coast Highway based on the very low entering traffic volumes and the access road distance of about 300 feet between West Coast Highway and the parking area. Any queuing on West Coast Highway would be nominal with only a short duration to allow pedestrians on the sidewalk to pass or westbound bicyclists in the bike lane to cross the driveway. A "potential stacking problem" would not occur.

Right Turn Deceleration Lane

According to Figure 5-25 on Page 5-55 of Transportation and Land Development, 2nd Edition published by ITE, right turn bays (lanes) are recommended when the right lane volume equals or exceeds 350 vehicles per hour. The forecast of 29 inbound right turns in the PM peak hour for two soccer fields at Sunset Ridge Park is less than 10 percent of the recommended minimum right turn volume that is needed for a right turn lane. A commercial type driveway approach with curb radius returns of 25 feet on both sides would facilitate entry and exit at the driveway (in contrast to a dustpan type driveway approach).

W. Coast Highway/Superior Avenue/W. Balboa Boulevard Signal Operation

Existing lane configurations and traffic control at the five intersections evaluated in the October 2009 Traffic Impact Study for Sunset Ridge Park (referenced above) are shown in that report in Figure 3 on Page 7. No geometric or operational changes are planned through 2013 at Intersection #4, West Coast Highway and Superior Avenue/West Balboa Boulevard. This intersection is controlled by a traffic signal that includes protected left turn green arrows for each leg and U-turns prohibited in all four directions. Northbound traffic on West Balboa Boulevard and southbound traffic on Superior Avenue proceeds at different times rather than simultaneously. The two right turn lanes from Superior Avenue to West Coast Highway receive a right turn green arrow at the same time as eastbound left turns are made from West Coast Highway to Superior Avenue.

Calculations of the traffic signal operation on West Coast Highway at Superior Avenue/West Balboa Boulevard are included in Appendix C to the October 2009 Traffic Impact Study for various conditions. For Cumulative Conditions (existing volumes plus growth plus committed and cumulative projects) together with Project traffic in the PM peak hour in 2013, Page 10-1 indicates this intersection would operate at Level of Service C with an average delay of 28.9 seconds per vehicle. The traffic signal cycle, the amount of time needed to serve each movement at this intersection, is 100 seconds or just less than two minutes. At different times during each traffic signal cycle, westbound traffic on West Coast Highway at the Park access driveway includes northbound left turns from West Balboa Boulevard, southbound right turns from Superior Avenue, and westbound through traffic on West Coast Highway. Near the bottom of the calculation sheet, the green time allocated to each of these three movements for PM peak hour conditions in 2013 with Project traffic is calculated (Green/Cycle) as follows:

- Northbound left turns from West Balboa Boulevard – 14 percent
- Southbound right turns from Superior Avenue – 39 percent
- Westbound through traffic on West Coast Highway – 46 percent

It is very important to note that traffic volumes are heavier at the beginning of each green signal display for these three movements. Toward the end of each of these three signal phases, traffic is lighter and more spread out, resulting in fewer vehicles passing the proposed Park access driveway as well as correspondingly larger gaps.

While the calculations indicate the westbound traffic volumes on West Coast Highway are high during the weekday PM peak, left turns from West Balboa Boulevard can be made safely at up to 30 miles per hour and southbound right turns from Superior Avenue can be made safely at up to 25 miles per hour on a green light for these turning movements. At other times, right turning traffic from southbound Superior Avenue is faced with a red signal indication requiring these vehicles to stop. As discussed below, vehicles turning right from the Park driveway will have ample sight distance and time to perceive and then react to turning traffic from West Balboa Boulevard and from Superior Avenue before entering West Coast Highway.

Page 14 of the March 2, 2011 letter to the California Coastal Commission states "...due to rapid speeds of drivers using the dual right-turn lanes from southbound Superior onto West Coast Highway particularly on uninterrupted (constant green) and downhill speeds from Superior onto the Highway..." As discussed above, southbound right turns from Superior Avenue can only be safely made at up to 25 miles per hour on a green light to avoid losing control, and the green indication for this movement is displayed only 39 percent of the time. Concerns expressed regarding the "downhill speeds from Superior" and the "uninterrupted (constant green)" are unfounded.

OCTA Bus Stop on West Coast Highway

OCTA provides local bus service on Pacific Coast Highway between San Clemente and Long Beach every day with a bus stop and bus shelter located on the north side of West Coast Highway about 150 feet west of Superior Avenue. Northbound service on OCTA Route 1 is provided 16 times per weekday with stops approximately every hour between 5:48 AM and 9:16 PM. During the PM peak hour, northbound busses are scheduled to stop at this location at 4:22 PM and at 5:28 PM. Northbound OCTA Route 1 stops at this location 14 times on Saturdays between 6:55 AM and 7:57 PM and 14 times on Sundays and holidays between 7:00 AM and 7:56 PM.

According to data collected in January 2010 by Stops and Zones at OCTA, an average of one passenger got on/three passengers got off the 4:22 PM bus and two passengers got on/eight passengers got off the 5:28 PM bus at this location. The unloading and loading of passengers at this bus stop typically takes less than 60 seconds. While the OCTA Route 1 bus may wait at this stop, a time point, if it is running ahead of schedule, this rarely occurs during congested conditions in the PM peak hour. Temporary stopping of the OCTA northbound Route 1 bus for less than 60 seconds once each peak hour (less than the amount of time of 100 seconds needed for the traffic signal to serve all movements at West Coast Highway and Superior Avenue/West Balboa Boulevard) has a nominal impact and should not create any issues or conflicts with the proposed Sunset Ridge Park access driveway.

Geometry at West Coast Highway Park Access

The access driveway for the proposed Sunset Ridge Park is proposed to be located near the western edge of the Park frontage on West Coast Highway about 350 feet west of Superior Avenue. Turning movements at the driveway would be restricted to only right turns in and only right turns out by the existing raised median on West Coast Highway. Traffic entering West Coast Highway from the driveway would be required to stop before turning right.

At this location about 350 feet west of Superior Avenue/West Balboa Boulevard, the West Coast Highway roadway provides three westbound travel lanes and a westbound bicycle lane. From the 1"=50' scale topographic map provided by the City of Newport Beach and my field review, the inside westbound vehicle lane closest to the raised median is about 13 feet wide, the center westbound vehicle lane is about 12 feet wide, the outside westbound vehicle lane closest to the north curb is about 22 feet wide, and the westbound bicycle lane is about 8 feet wide. In the area of the proposed driveway, the four westbound lanes on West Coast Highway that end about 200 feet west of Superior Avenue/West Balboa Boulevard gradually transition to three westbound lanes about 800 feet west of Superior Avenue/West Balboa Boulevard, resulting in a gradual narrowing of the

outside westbound vehicle lane. A sidewalk about 11 feet wide is also provided along the Park frontage in this area.

As identified in the October 2009 Traffic Impact Study, 42 trips including 29 inbound and 13 outbound are forecast in the PM peak hour for the two soccer fields proposed at Sunset Ridge Park. These trips would be spread out over the entire PM peak hour with the staggered scheduling of games proposed and managed by the City's Department of Parks and Recreation. From the example earlier in this report, entering trips would average one vehicle per minute during the peak 15 minutes of the PM peak hour and exiting trips would average less than one vehicle every two minutes during the peak 15 minutes of the PM peak hour. These volumes are extremely light. From my experience and considering the geometry and lane widths on West Coast Highway, there would be no unusual conditions or circumstances at this driveway that would negatively impact traffic safety as has been alleged in different letters from Schmitz & Associates to the California Coastal Commission.

Sight Distance at West Coast Highway Park Access

From my field review of the site, the posted speed limit on West Coast Highway in this area is 50 MPH. In addition, Page 14 of the March 2, 2011 letter to the California Coastal Commission states that "...the average measured speeds on West Coast Highway are 52 MPH." Since the California Department of Transportation (Caltrans) has jurisdiction over West Coast Highway, this report follows the provisions of their Highway Design Manual rather than those contained in A Policy on Geometric Design of Highways and Streets 2004 published by the American Association of State Highway and Transportation Officials.

For urban driveways, Page 200-26 of the Highway Design Manual states "Corner sight distance requirements are not applied to urban driveways." Instead, Caltrans uses stopping sight distance as the controlling criteria. Stopping sight distance is comprised of brake reaction time (the distance traveled from the instant the driver sights an object necessitating a stop to the instant the brakes are applied) plus braking distance (the distance needed to stop the vehicle from the instant brake application begins). Stopping sight distance is based on the design speed of the roadway, a speed that is typically about 10 miles per hour higher than the posted speed limit. Based upon the posted speed limit of 50 MPH, a design speed of 60 MPH should be used to evaluate sight distance at the proposed driveway location.

Table 201.1 on Page 200-1 of the Highway Design Manual indicates 580 feet of stopping sight distance should be provided for a design speed of 60 MPH. At this location, the right turning vehicle would be able to easily turn into the 22 foot wide third westbound travel lane or could alternatively utilize a portion of the 8 foot

wide bicycle lane as to accelerate and safely merge into the westbound West Coast Highway vehicle traffic lanes.

Left turns from West Balboa Boulevard to West Coast Highway can be safely made at up to 30 MPH on a green light. The view of approaching left turning traffic on a green light from West Balboa Boulevard at a "worst case" of 30 MPH requires 200 feet of stopping sight distance. The stopping sight distance from the driveway 350 feet west exceeds 200 feet and is more than adequate.

Right turns from Superior Avenue to West Coast Highway can be safely made at up to 25 MPH on a green light. The view of approaching right turning traffic on a green light from Superior Avenue at a "worst case" of 25 MPH requires 150 feet of stopping sight distance. The stopping sight distance from the driveway of 350 feet west exceeds 150 feet and is more than adequate.

From the proposed driveway location 350 feet west of Superior Avenue on West Coast Highway, the view of approaching through traffic on West Coast Highway at 60 MPH requires 580 feet of stopping sight distance. The stopping sight distance from the driveway of more than 600 feet (through and beyond the east crosswalk across West Coast Highway at the east side of Superior Avenue/West Balboa Boulevard) is more than adequate.

Page 13 of the March 2, 2011 letter to the California Coastal Commission states "In order for a driver to safely decelerate while traveling westbound on West Coast Highway to safely turn onto the City property directly, he/she would have to begin decelerating well before the intersection of Superior and West Coast Highway resulting in unsafe driving speeds on West Coast Highway." Based on my field review and measurements from the City's scaled topographic map, this statement is incorrect. Drivers westbound on West Coast Highway will be turning into the park access driveway at about 15 MPH. The 45 MPH change in speed from the design speed of 60 MPH to the right turn speed of 15 MPH requires about 500 feet and would begin at the east crosswalk of the Superior Avenue/West Balboa Boulevard intersection, not "well before the intersection."

Page 14 of the March 2, 2011 letter to the California Coastal Commission states "Moreover, as the Park will host visiting youth athletes, many Park users may not be familiar with the Park location until a sign at the intersection of Superior and West Coast Highway becomes visible resulting in attempts to rapidly and unsafely decelerate along westbound West Coast Highway in order to turn into the Park access road per Alternative B."

While guide signing for the park on West Coast Highway should be located west of Superior Avenue, the sign legend would be clearly visible to westbound motorists on West Coast Highway prior to Superior Avenue. These motorists will be able to begin reacting to the directional sign before entering the signalized

intersection. Most first time visitors to the park would probably receive directions to the park and/or use their GPS devices. These motorists would be cautiously looking for the park rather than traveling at high speeds on westbound West Coast Highway. First time visitors turning left at up to 30 MPH from West Balboa Boulevard or turning right at up to 25 MPH from southbound Superior Avenue will have ample time to see and react safely to the park directional signing.

Design Considerations for Park Access Roadway and Parking

As indicated earlier in this report, it would be desirable to construct a commercial type driveway approach at West Coast Highway with curb radius returns of 25 feet on both sides to facilitate entry and exit. The access should provide two 13 foot wide travel lanes, one inbound and one outbound. A relatively flat area immediately behind the driveway for one vehicle (about 20 feet in length) should be provided. A roadway design profile of 7 percent, commonly used for local streets, would be adequate for the park access. With a difference in elevation between West Coast Highway and the lower mesa in the park of about 20 feet, the roadway would "daylight" into the park about 300 feet north of West Coast Highway, about midway across the park site and directly into the parking lot as it has been currently designed.

As illustrated on the enclosed conceptual drawing, the access roadway would be located a minimum of 50 feet from the ESHA. Changing the access to a direct driveway connection to West Coast Highway would require the redesign and relocation of about 30 parking spaces that are currently shown at the entrance to the parking area as it has been designed. The enclosed conceptual drawing illustrates three different areas that should be considered to replace the 30 parking spaces and include the following:

- Construct perpendicular parking on both sides of the alternate access driveway just before it enters the parking area.
- Change parallel parking to perpendicular parking along the west side of the parking area.
- Expand the parking area as currently designed to the east so it is closer to the proposed baseball diamond and relocate any potentially conflicting features from the expanded parking area.

Summary of Access Review and Safety Evaluation

In summary, a direct driveway connection between Sunset Ridge Park and West Coast Highway is the best of several different access options to serve this facility. As discussed throughout this letter, I disagree with many of the comments in the March 2, 2011 letter to the California Coastal Commission. In my professional opinion, right turns in to and out of a driveway located on the north side of West Coast Highway about 350 feet west of Superior Avenue/West Balboa Boulevard

can be made safely and no adverse traffic impacts will occur. With West Coast Highway under the jurisdiction of Caltrans, an encroachment permit will be needed before the driveway can be built. With the proximity of the existing bus stop, OCTA Stops and Zones should also be given the opportunity to review the final plans for the driveway.

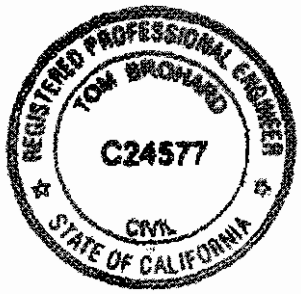
If you have questions regarding these comments, please call me at (760) 398-8885 your convenience.

Respectfully submitted,

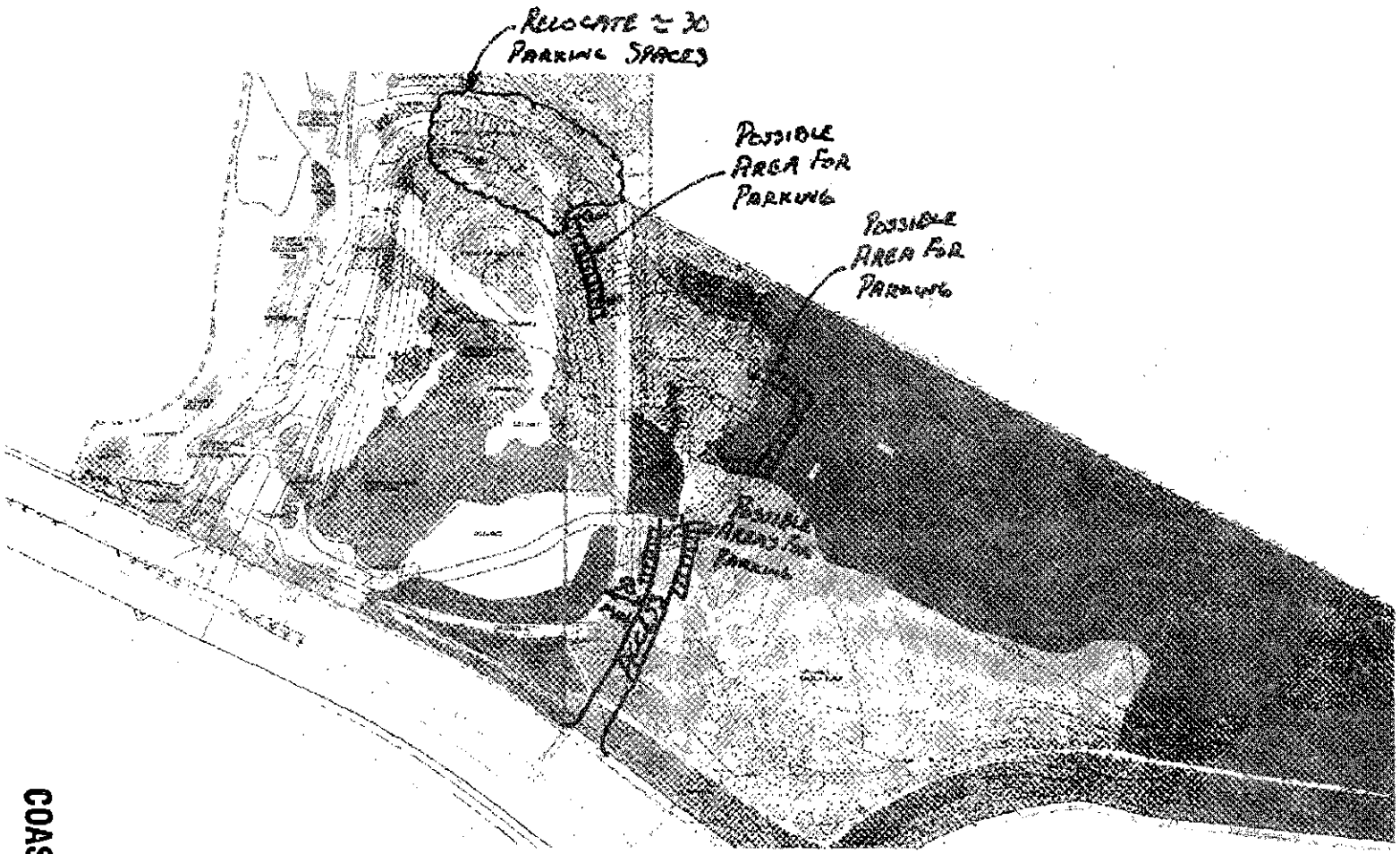
Tom Brohard and Associates

Tom Brohard, PE
Principal

Enclosures



CONCEPTUAL DRAWING



CONCEPTUAL DRAWING

ALTERNATE ACCESS VIA DIRECT DRIVEWAY CONNECTION TO WEST COAST HIGHWAY

▥▥▥ INDICATES POSSIBLE AREA FOR PARKING

ACCESS ROADWAY TO BE 50' MINIMUM FROM ESHA

Tom Bollard 9/15/2011

COASTAL COMMISSION

EXHIBIT # 11

PAGE 10 OF

Land Use: 488
Soccer Complex

Description

Soccer complexes are outdoor parks that are used for non-professional soccer games. They may consist of one or more fields, and the size of each field within the land use may vary to accommodate games for different age groups. Ancillary amenities may include a fitness trail, activities shelter, aquatic center, picnic grounds, basketball and tennis courts and a playground.

Additional Data

Caution should be used when applying these data. Peaking at soccer complexes typically occurred in time periods shorter than one hour. These peaking periods may have durations of 10 to 15 minutes.

One study noted that ridesharing was common for teams traveling to out-of-town matches.

The sites were surveyed in the 1990s in Indiana and Washington.

To assist in the future analysis of this land use, it is important to collect driveway counts in 10-minute intervals.

Source Numbers

377, 519, 565

Warrants for Right-Turn Bays

Warrants for right-turn lanes are not as universally adopted as for left-turns. However, many states follow a practice of striping right-turn bays where wide shoulders are already present. Suggest warrants are given in Figure 5–25.

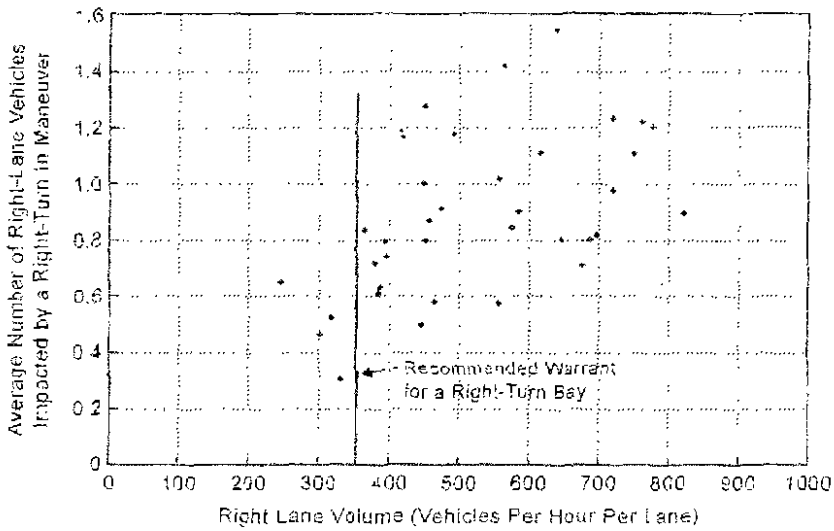


Figure 5–25. *Suggested Warrant for Right-Turn Bays*

Source: Unpublished information from NCHRP Project 3-52.

Right-Turn Bay Length

The length of a right-turn bay should permit drivers to clear the through traffic lane at a speed differential of 10 mph (15 km/h) or less and decelerate to a stop before reaching the end of the stopped queue. The deceleration/maneuver distance may be obtained using Table 5–13. Table 5–14 can be used to estimate the resulting speed differential when the length of the turn bay to be provided is less than the desirable length. Urban arterial-residential collector intersections typically have low right-turn volumes during off-peak periods. The on-site circulation system should be designed to internally store traffic after the vehicles have entered the site. Similarly, the corner clearance on public streets should be sufficient so that conflicts at a downstream intersection do not cause spill-back onto the major street (Figure 5-26). Therefore, only minimum storage for right-turning vehicles should be needed at unsignalized access connections.

Sunset Ridge Park Traffic Impact Study
Cumulative Conditions With Project PM Peak Hour
HCM Methodology

Level Of Service Computation Report
2000 HCM Operations Method (Future Volume Alternative)

Intersection #3 Bluff Rd at PCH

Cycle (sec):	100	Critical Vol./Cap.(X):	0.634
Loss Time (sec):	0 (Y+Rs=4.0 sec)	Average Delay (sec/veh):	0.6
Optimal Cycle:	62	Level Of Service:	A

Street Name:	Bluff Road						Pacific Coast Hwy					
Approach:	North Bound			South Bound			East Bound			West Bound		
Movement:	L	T	R	L	T	R	L	T	R	L	T	R
Control:	Protected			Protected			Protected			Protected		
Rights:	Include			Include			Include			Include		
Min. Green:	0	0	0	0	0	0	0	0	0	0	0	0
Lanes:	0	0	0	0	0	1	0	0	1	1	0	3	0	0	0	0	3	0	1
Volume Module:	PM Peak Hour											
Base Vol:	0	0	0	0	0	0	0	1487	0	0	2818	0
Growth Adj:	1.00	1.00	1.00	1.00	1.00	1.00	1.04	1.04	1.04	1.04	1.04	1.04
Initial Bse:	0	0	0	0	0	0	0	1547	0	0	2932	0
Added Vol:	0	0	0	12	0	1	1	196	0	0	137	26
Approved Pr:	0	0	0	0	0	0	0	102	0	0	177	0
Initial Fut:	0	0	0	12	0	1	1	1845	0	0	3246	26
User Adj:	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00
PHF Adj:	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00
PHF Volume:	0	0	0	12	0	1	1	1845	0	0	3246	26
Reduce Vol:	0	0	0	0	0	0	0	0	0	0	0	0
Reduced Vol:	0	0	0	12	0	1	1	1845	0	0	3246	26
PCE Adj:	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00
MLF Adj:	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00
FinalVolume:	0	0	0	12	0	1	1	1845	0	0	3246	26
Saturation Flow Module:												
Sat/Lane:	1900	1900	1900	1900	1900	1900	1900	1900	1900	1900	1900	1900
Adjustment:	1.00	1.00	1.00	0.95	1.00	0.85	0.95	0.91	1.00	1.00	0.91	0.85
Lanes:	0.00	0.00	0.00	1.00	0.00	1.00	1.00	3.00	0.00	0.00	3.00	1.00
Final Sat.:	0	0	0	1805	0	1615	1805	5187	0	0	5187	1615
Capacity Analysis Module:												
Vol/Sat:	0.00	0.00	0.00	0.01	0.00	0.00	0.00	0.36	0.00	0.00	0.63	0.02
Crit Moves:				****			****				****	
Green/Cycle:	0.00	0.00	0.00	0.01	0.00	0.01	0.00	0.99	0.00	0.00	0.99	0.99
Volume/Cap:	0.00	0.00	0.00	0.62	0.00	0.06	0.63	0.36	0.00	0.00	0.63	0.02
Delay/Veh:	0.0	0.0	0.0	101.3	0.0	50.5	199.8	0.1	0.0	0.0	0.1	0.0
User DelAdj:	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00
AdjDel/Veh:	0.0	0.0	0.0	101.3	0.0	50.5	199.8	0.1	0.0	0.0	0.1	0.0
LOS by Move:	A	A	A	F	A	D	F	A	A	A	A	A
HCMQkAvgQ:	0	0	0	1	0	0	1	1	0	0	1	0

Note: Queue reported is the number of cars per lane.

Sunset Ridge Park Traffic Impact Study
Cumulative Conditions With Project PM Peak Hour
HCM Methodology

Level Of Service Computation Report
2000 HCM Operations Method (Future Volume Alternative)

Intersection #4 Superior Ave at PCH

Cycle (sec):	100	Critical Vol./Cap.(X):	0.750
Loss Time (sec):	0 (Y+Rs=4.0 Sec)	Average Delay (sec/veh):	28.9
Optimal Cycle:	91	Level Of Service:	C

Street Name:	Superior Avenue						Pacific Coast Hwy					
Approach:	North Bound			South Bound			East Bound			West Bound		
Movement:	L	T	R	L	T	R	L	T	R	L	T	R
Control:	Split Phase			Split Phase			Protected			Protected		
Rights:	Include			Ovl			Include			Include		
Min. Green:	0	0	0	0	0	0	0	0	0	0	0	0
Lanes:	1	1	0	1	0	2	1	0	2	2	0	3	0	1	1	0	3	1	0
Volume Module:	>> Count Date: 12 Feb 2009 << Existing PM Peak Hour											
Base Vol:	254	208	78	228	243	710	258	985	343	226	1854	162
Growth Adj:	1.00	1.00	1.00	1.00	1.00	1.00	1.04	1.04	1.04	1.04	1.04	1.04
Initial Bse:	254	208	78	228	243	710	268	1026	282	235	1929	169
Added Vol:	1	0	0	90	0	16	13	186	1	0	144	64
Approved Pr:	0	16	1	0	27	110	63	16	3	0	67	9
Initial Fut:	257	224	79	318	270	836	344	1228	287	235	2140	233
User Adj:	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00
PHF Adj:	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00
PHF Volume:	257	224	79	318	270	836	344	1228	287	235	2140	233
Reduce Vol:	0	0	0	0	0	0	0	0	0	0	0	0
Reduced Vol:	257	224	79	318	270	836	344	1228	287	235	2140	233
PCE Adj:	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00
MLF Adj:	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00
FinalVolume:	257	224	79	318	270	836	344	1228	287	235	2140	233
Saturation Flow Module:												
Sat/Lane:	1900	1900	1900	1900	1900	1900	1900	1900	1900	1900	1900	1900
Adjustment:	0.91	0.91	0.91	0.91	0.93	0.95	0.92	0.91	0.85	0.85	0.93	0.98
Lanes:	1.38	1.20	0.42	1.62	1.38	2.00	2.00	3.00	1.00	1.00	3.61	0.39
Final Sat.:	2379	2074	737	2852	2422	3542	3502	5187	1615	1805	6145	658
Capacity Analysis Module:												
Vol/Sat:	0.11	0.11	0.11	0.11	0.11	0.39	0.10	0.24	0.18	0.13	0.35	0.35
Crit Moves:			****			****	****				****	
Green/Cycle:	0.14	0.14	0.14	0.26	0.26	0.39	0.33	0.39	0.39	0.21	0.46	0.46
Volume/Cap:	0.75	0.75	0.75	0.43	0.43	0.75	0.75	0.62	0.47	0.62	0.75	0.75
Delay/Veh:	45.3	45.3	45.3	31.1	31.1	29.1	48.5	25.3	22.7	39.1	23.1	23.1
User DelAdj:	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00	1.00
AdjDel/Veh:	45.3	45.3	45.3	31.1	31.1	29.1	48.5	25.3	22.7	39.1	23.1	23.1
LOS by Move:	D	D	D	C	C	C	D	C	C	D	C	C
HCMQkAvgQ:	8	8	8	6	6	16	7	12	6	7	18	18

Note: Queue reported is the number of cars per lane.

CHAPTER 200 GEOMETRIC DESIGN AND STRUCTURE STANDARDS

Topic 201 - Sight Distance

Index 201.1 - General

Sight distance is the continuous length of highway ahead visible to the driver. Four types of sight distance are considered here: passing, stopping, decision, and corner. Passing sight distance is used where use of an opposing lane can provide passing opportunities (see Index 201.2). Stopping sight distance is the minimum sight distance to be provided on multilane highways and on 2-lane roads when passing sight distance is not economically obtainable. Stopping sight distance also is to be provided for all elements of interchanges and intersections at grade, including private road connections (see Topic 504, Index 405.1, & Figure 405.7). Decision sight distance is used at major decision points (see Indexes 201.7 and 504.2). Corner sight distance is used at intersections (see Index 405.1, Figure 405.7, and Figure 504.3J).

Table 201.1 shows the standards for stopping sight distance related to design speed, and these shall be the minimum values used in design. Also shown are the values for use in providing passing sight distance.

Chapter 3 of "A Policy on Geometric Design of Highways and Streets," AASHTO, contains a thorough discussion of the derivation of stopping sight distance.

201.2 Passing Sight Distance

Passing sight distance is the minimum sight distance required for the driver of one vehicle to pass another vehicle safely and comfortably. Passing must be accomplished assuming an oncoming vehicle comes into view and maintains the design speed, without reduction, after the overtaking maneuver is started.

Table 201.1
Sight Distance Standards

Design Speed(1) (mph)	Stopping(2) (ft)	Passing (ft)
20	125	800
25	150	950
30	200	1,100
35	250	1,300
40	300	1,500
45	360	1,650
50	430	1,800
55	500	1,950
60	580	2,100
65	660	2,300
70	750	2,500
75	840	2,600
80	930	2,700

(1) See Topic 101 for selection of design speed.
(2) For sustained downgrades, refer to advisory standard in Index 201.3

The sight distance available for passing at any place is the longest distance at which a driver whose eyes are 3 ½ feet above the pavement surface can see the top of an object 4 ¼ feet high on the road. See Table 201.1 for the calculated values that are associated with various design speeds.

In general, 2-lane highways should be designed to provide for passing where possible, especially those routes with high volumes of trucks or recreational vehicles. Passing should be done on tangent horizontal alignments with constant grades or a slight sag vertical curve. Not only are drivers reluctant to pass on a long crest vertical curve, but it is impracticable to design crest vertical curves to provide for passing sight distance because of high cost where crest cuts are involved. Passing sight distance for crest vertical curves is 7 to 17 times longer than the stopping sight distance.

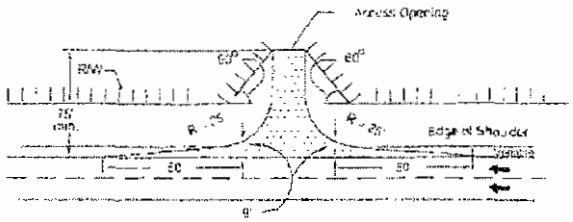
Ordinarily, passing sight distance is provided at locations where combinations of alignment and

line is not normal to the right of way line, care should be taken in designing the joint opening so that both owners are adequately served.

(5) Surfacing. All points of private access should be surfaced with adequate width and depth of pavement to serve the anticipated traffic. The surfacing should extend from the edge of the traveled way to the right of way line.

Figure 205.1

Access Openings on Expressways



RECESSED OPENING

NOTES:

- By widening the expressway shoulder, deceleration lanes may be provided where justified.
- This detail, without the recess, may be used on conventional highways.

205.2 Private Road Connections

The minimum private road connection design is shown on Figure 205.1. Sight distance requirements for the minimum private road connection are shown on Figure 405.7 (see Index 405.1(2)(c)).

205.3 Urban Driveways

These instructions apply to the design of driveways to serve property abutting on State highways in cities or where urban type development is encountered.

Details for driveway construction are shown on the Standard Plans. Corner sight distance requirements are not applied to urban driveways. See Index 405.1(2) for further information.

(1) Correlation with Local Standards. Where there is a local requirement regulating driveway construction, the higher standard will normally govern.

(2) Driveway Width. The width of driveways for both residential and commercial usage is measured at the throat, exclusive of any flares. ("W" as shown in Standard Plan A87A).

(3) Residential Driveways. The width of single residential driveways should be 12 feet minimum and 20 feet maximum. The width of a double residential driveway such as used for multiple dwellings should be 20 feet minimum and 30 feet maximum. The width selected should be based on an analysis of the anticipated volume, type and speed of traffic, location of buildings and garages, width of street, etc.

(4) Commercial Driveways. Commercial driveways should be limited to the following maximum widths:

(a) When the driveway is used for one-way traffic, the maximum width should be 25 feet. If the driveway serves a large parcel, where large volumes of vehicles or large vehicles are expected, the entrance maximum width should be 40 feet and the exit maximum width should be 35 feet.

(b) When the driveway is used for two-way traffic, the maximum width should be 35 feet. If the driveway serves a large parcel, where large volumes of vehicles or large vehicles are expected, then the maximum width should be 45 feet.

(c) When only one driveway serves a given property, in no case should the width of the driveway including the side slope distances exceed the property frontage.

(d) When more than one driveway is to serve a given property, the total width of all driveways should not exceed 70 percent of the frontage where such a frontage is 100 feet or less. Where the frontage is more than 100 feet, the total driveway

Tom Brohard, PE

Licenses:	1975 / Professional Engineer / California – Civil, No. 24577 1977 / Professional Engineer / California – Traffic, No. 724 2006 / Professional Engineer / Hawaii – Civil, No. 12321
Education:	1969 / BSE / Civil Engineering / Duke University
Experience:	40+ Years
Memberships:	1977 / Institute of Transportation Engineers – Fellow, Life 1978 / Orange County Traffic Engineers Council - Chair 1982-1983 1981 / American Public Works Association - Member

Tom is a recognized expert in the field of traffic engineering and transportation planning. His background also includes responsibility for leading and managing the delivery of various contract services to numerous cities in Southern California.

Tom has extensive experience in providing transportation planning and traffic engineering services to public agencies. Since May 2005, he has served as Consulting City Traffic Engineer for the City of Indio. He also currently provides "on call" Traffic and Transportation Engineer services to the Cities of Big Bear Lake, Mission Viejo, and San Fernando. In addition to conducting traffic engineering investigations for Los Angeles County from 1972 to 1978, he has previously served as City Traffic Engineer in the following communities:

- Bellflower ..... 1997 - 1998
- Bell Gardens ..... 1982 - 1995
- Huntington Beach ..... 1998 - 2004
- Lawndale ..... 1973 - 1978
- Los Alamitos ..... 1981 - 1982
- Oceanside ..... 1981 - 1982
- Paramount ..... 1982 - 1988
- Rancho Palos Verdes ..... 1973 - 1978
- Rolling Hills ..... 1973 - 1978, 1985 - 1993
- Rolling Hills Estates ..... 1973 - 1978, 1984 - 1991
- San Marcos 1981
- Santa Ana ..... 1978 - 1981
- Westlake Village ..... 1983 - 1994

During these assignments, Tom has supervised City staff and directed other consultants including traffic engineers and transportation planners, traffic signal and street lighting personnel, and signing, striping, and marking crews. He has secured over $5 million in grant funding for various improvements. He has managed and directed many traffic and transportation studies and projects. While serving these communities, he has personally conducted investigations of hundreds of citizen requests for various traffic control devices. Tom has also successfully presented numerous engineering reports at City Council, Planning Commission, and Traffic Commission meetings in these and other municipalities.

In his service to the City of Indio since May 2005, Tom has accomplished the following:

- Oversaw preparation and adoption of the Circulation Element Update of the General Plan including development of Year 2035 buildout traffic volumes, revised and simplified arterial roadway cross sections, and reduction in acceptable Level of Service criteria under certain constraints. Reviewed Riverside County's updated traffic model for consistency with the adopted City of Indio Circulation Plan.

- Oversaw preparation of fact sheets/design exceptions to reduce shoulder widths on Jackson Street over I-10 as well as justifications for protected-permissive left turn phasing at I-10 on-ramps, the first such installation in Caltrans District 8 in Riverside County; reviewed plans and provided assistance during construction of a $1.5 million project to install traffic signals and widen three of four ramps at the I-10/Jackson Street Interchange under a Caltrans encroachment permit.

- Oversaw preparation of fact sheets/design exceptions to reduce shoulder widths on Monroe Street over I-10 as well as striping plans to install left turn lanes on Monroe Street at the I-10 Interchange under a Caltrans encroachment permit; reviewed plans to install traffic signals and widen three of four ramps at the I-10/Monroe Street Interchange.

- Reviewed traffic impact analyses for Project Study Reports evaluating different alternatives for buildout improvement of the I-10 Interchanges at Jefferson Street, Monroe Street, Jackson Street and Golf Center Parkway.

- Oversaw preparation of plans, specifications, and contract documents and provided construction assistance for over 40 traffic signal installations and modifications.

- Reviewed and approved over 600 work area traffic control plans as well as signing and striping plans for all City and developer funded roadway improvement projects.

- Oversaw preparation of a City wide traffic safety study of conditions at all schools.

- Prepared over 500 work orders directing City forces to install, modify, and/or remove traffic signs, pavement and curb markings, and roadway striping.

- Oversaw preparation of engineering and traffic surveys to establish enforceable speed limits on over 200 street segments.

- Reviewed and approved traffic impact studies for more than 25 major developments.

- Developed the Golf Cart Transportation Program and administrative procedures; implemented routes forming the initial baseline system.

Since forming Tom Brohard and Associates in 2000, Tom has reviewed many traffic impact reports and environmental documents for various development projects. He has provided expert witness services and also prepared traffic studies for public agencies and private sector clients.

CALIFORNIA COASTAL COMMISSION
SOUTH CENTRAL COAST AREA
89 SOUTH CALIFORNIA ST., SUITE 200
VENTURA, CA 93001
(805) 585-1800

M E M O R A N D U M

FROM: Jonna D. Engel, Ph.D., Ecologist

TO: John Del Arroz, Coastal Analyst

SUBJECT: Sunset Ridge Park ESHA Determination, Buffer Dimension Recommendation, and other Considerations

DATE: September 22, 2011

Documents Reviewed:

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

Johnston, A.M. (BonTerra). July 15, 2011. Supplemental Biological Resource Information for the Sunset Ridge Park Project Regarding Vernal Pool Habitat and Buffers for Gnatcatcher Habitat. Letter to Michael Sinacori, Public Works Department, City of Newport Beach.

Johnston, A.M. (BonTerra). June 29, 2011. Supplemental Biological Resource Information for the Sunset Ridge Park Project. Letter to Michael Sinacori, Public Works Department, City of Newport Beach.

Meideiros, G.A. (BonTerra). June 29, 2011. Response to California Coastal Commission Staff Email Dated June 8, 2011 Regarding CDP Application No. 5010-168 (City of Newport Beach – Sunset Ridge Park), Specifically Jurisdictional Delineation of Slope Areas Along Superior Avenue. Letter to Michael Sinacori, Public Works Department, City of Newport Beach.

Bomkamp, T. (Glenn Lukos Associates). June 14, 2011. Clarification Regarding CAGN Mapping from 2002 Protocol Surveys Conducted by Glenn Lukos Associates for West Newport Oil. Memorandum to Christine Medak, USFWS.

Meideiros, G.A. (BonTerra). February 11, 2011. Response to California Coastal Commission Correspondence Dated September 1, 2010 Regarding CDP Application No. 5010-168 (City of Newport Beach – Sunset Ridge Park). Letter to Michael Sinacori, Public Works Department, City of Newport Beach.

Hamilton, Robb (Hamilton Biological). December 14, 2010. Reply to LSA Memorandum; Bluff Road/Sunset Ridge Park Entrance. Memorandum from Hamilton Biological to Jonna Engel, California Coastal Commission.

Hamilton, Robb (Hamilton Biological). December 11, 2010. Review of ESHA Issues; Bluff Road/Sunset Ridge Park Entrance. Memorandum from Hamilton Biological to Jonna Engel, California Coastal Commission.

LSA Associates. December 9, 2010. California Gnatcatcher Issues at the Sunset Ridge Park/Newport Banning Ranch Site. Memorandum from Art Homrighausen and Richard Erickson, LSA Associates, to Mike Sinacori, City of Newport Beach, Department of Public Works. This memorandum includes LSA's 1991 vegetation map and LSA's annual gnatcatcher survey maps from 1992 through 1996.

Ahrens, Jeff. (Glenn Lukos Associates) October 13, 2010. California Gnatcatcher Use of Polygons Addressed in Notice of Violation. Memorandum to Jonna Engel, CCC.

Bomkamp, Tony. (Glenn Lukos Associates) August 26, 2010. Response to Coastal Commission Notice of Violation dated May 14, 2010 for Vegetation Removal on Portions of Newport Banning Ranch and City of Newport Beach Properties. Memorandum to Michael Mohler, Newport Banning Ranch, LLC.

Hamilton, Robb (Hamilton Biological). December 10, 2009. Review of Biological Resource Issues, Sunset Ridge Draft EIR. Memorandum from Hamilton Biological to Janet Johnson Brown, City of Newport Beach.

BonTerra Consulting. October 2009. Draft Environmental Impact Report: Sunset Ridge Park Project. SCH No. 2009051036. Vol I & II. Prepared for the City of Newport Beach.

Glenn Lukos Associates. September 24, 2009. Habitat Characterization for Areas Affected by Alleged Clearing near Southeast Corner of Banning Ranch Referenced in July 29, 2009 Letter from California Coastal Commission. Memorandum to Andrew Willis, CCC.

BonTerra Consulting. June 25, 2009. Results of Coastal California Gnatcatcher Surveys for Newport Banning Ranch Project Site, Orange County, California. Letter addressed to Ms. Sandy Marquez, USFWS.

Bartel, Jim A. (Field Supervisor, USFWS). April 2, 2009. Formal Section 7 Consultation for Montebello Hills Development and Conservation Project, City of Montebello, Los Angeles County, California. Montebello Biological Opinion. To: Colonel Thomas H. Magness, IV District Engineer, U.S. Army Corps of Engineers

Glenn Lukos Associates. August 2008. The Newport Banning Ranch Biological Technical Report. Report prepared for Mike Mohler, Newport Banning Ranch, LLC.

Glenn Lukos Associates. July 19, 2007. Submittal of 45-Day Report for coastal California gnatcatcher Surveys for the 412.5 Newport Banning Ranch Property, City of Newport Beach and Unincorporated Orange County, Orange County, California. Survey report from Glenn Lukos Associates Biologist Ingrid Chlup to Sandra Marquez, USFWS.

Glenn Lukos Associates. July 25, 2006. Submittal of 45-Day Report for Coastal California Gnatcatcher Presence/Absence Surveys for the 412.5 Newport Banning Ranch Property, City of Newport Beach and Unincorporated Orange County, Orange County, California. Survey report from Glenn Lukos Associates Biologist Jeff Ahrens to Daniel Marquez, USFWS.

Glenn Lukos Associates. October 14, 2002. Protocol Surveys for the Coastal California Gnatcatcher; West Newport Oil Property, Orange County California. Survey report from Glenn Lukos Associates Biologist Tony Bompkamp to Leonard Anderson, West Newport Oil Property.

Gnatcatcher survey map. 2000. Unknown source (we believe the source is PCR Services).

PCR Services. 1998. Gnatcatcher survey map.

PCR Services. 1997. Gnatcatcher survey map.

LSA. 1996. Spring 1996 California Gnatcatcher Survey. Survey report from LSA Biologist Richard Erickson to Leonard Anderson.

LSA. 1995. Spring 1995 California Gnatcatcher Survey. Survey report from LSA Biologist Richard Erickson to Leonard Anderson.

LSA. 1994. Results of 1994 Gnatcatcher and Wren Surveys. Survey report from LSA Biologists Robb Hamilton and Richard Erickson to Leonard Anderson, West Newport Oil Company.

The City of Newport Beach (hereafter ‘City’) is proposing to construct an active recreational park (Sunset Ridge Park) on a site approximately 20 acres in size at the northwest corner of the intersection of West Coast Highway and Superior Avenue. The proposed park site includes 6.3 acres in the southeast corner of Newport Banning Ranch, a 505 acre property located near the mouth of the Santa Ana River in Orange

County, California (Figure 1). The City has an access agreement with Newport Banning Ranch that allows the park entrance road to occur on ranch property. The project site is one of 28 areas identified in the City's general plan as an Environmental Study Area (ESA) which are undeveloped areas that support natural habitats defined as potentially capable of supporting sensitive biological resources. The two properties that comprise the proposed Sunset Ridge Park site do support a number of important and sensitive habitats and plant and animal species.

On September 15, 2010, I accompanied several other Coastal Commission staff on a site visit to observe and study the biological resources on the proposed park property, in particular, at and around three disturbed areas referred to as the southeast, northwest, and northeast polygons that were the subject of a violation on Newport Banning Ranch that will be resolved once compliance with the Commission's Consent Order is fully carried out[1] (Figure 2). During our site visit we examined the various plant communities supported by the property and discussed the current and historical use of the site by California gnatcatchers. Representatives of Newport Banning Ranch and the City, Newport Banning Ranch's biological consultant (Tony Bomkamp, Glenn Lukos Associates), and Southern California Edison's biologist (Tracy Alsobrook) were also along on the site visit.

I visited the site again on December 15, 2010, with other Coastal Commission staff to review the biological resources on the proposed park site and in and around the three polygons and to discuss the history of gnatcatcher use, the nature of gnatcatcher survey collection, and my approach to making an ESHA determination. Representatives of Newport Banning Ranch, the City, and Southern California Edison, Newport Banning Ranch's biological consultant (Tony Bomkamp, Glenn Lukos Associates), the City's biological consultant's (Art Homrighausen and Richard Erickson, LSA & Ann Johnston, BonTerra), and a USFWS biologist (Christine Medak), accompanied us on the site visit. On both site visits we spent several hours walking and talking while I made visual and audio observations of the natural resources on the proposed park site.

I visited the site again on June 7, 2011 with John Del Arroz, CCC Coastal Analyst; Don Schmitz, Principle, Don Schmitz and Associates; Mike Sinacori, Engineer, City of Newport Beach; Ann Johnston, Biologist, BonTerra Consulting, and Ann Johnston's assistant. During this site visit we carefully examined the seep areas along Superior Avenue. We also walked, and BonTerra mapped (using a GPS unit), the boundary of the ESHA/non-ESHA areas that I had preliminarily mapped on an aerial based on gnatcatcher individual point and use area data spanning 1992 to 2009, vegetation mapping, and site visit observations. In addition to the site visits, I have reviewed the documents listed above (presented in chronological order), peer reviewed literature, and aerial photographs to determine the history of gnatcatcher use and the nature of the habitat on the site of the proposed Sunset Ridge Park in order to make an Environmentally Sensitive Habitat Area (ESHA) determination, buffer size recommendations, and to discuss other considerations such as burrowing owls, coastal

[1] CCC-11-CD-03 and CCC-11-RO-02 issued by the Commission on April 14, 2011.

sage scrub improvement and restoration, invasive species, cowbird parasitism, and predation.

ESHA Definition

Section 30107.5 of the Coastal Act defines Environmentally Sensitive Habitat as:

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

Plants and animals and habitats that meet the rarity criterion under this definition may include rare plant communities identified by the California Department of Fish and Game (CDFG), federal and state listed species, California Native Plant Society "1B" and "2" plant species, California species of special concern, and habitats that support the type of species listed above.

The City of Newport Beach Coastal Land Use Plan (CLUP) also provides criteria for determining what constitutes ESHA. CLUP policy 4.1.1-1 states that the following site attributes are among those characteristics that are determinative of whether an area constitutes ESHA:

- The presence of natural communities that have been identified as rare by the California Department of Fish and Game.
- The recorded or potential presence of plant or animal species designated as rare, threatened, or endangered under State or Federal law.

CLUP Section 4.1.1 states that coastal sage scrub is an especially important habitat and "where coastal sage scrub occurs adjacent to coastal salt marsh or other wetlands, or where it is documented to support or known to have the potential to support rare species such as the coastal California gnatcatcher, it meets the definition of ESHA because of its especially valuable role in the ecosystem... coastal sage scrub also provides essential nesting and foraging habitat for the coastal California gnatcatcher, a rare species designated threatened under the Federal Endangered Species Act."

Habitats - Plant Communities

The 20-acre site proposed for Sunset Ridge Park supports a number of different habitats. There are several types of coastal scrub communities on the property including coastal sage, coastal bluff, and maritime succulent scrub. Other habitats occurring in large swaths are disturbed encelia scrub, disturbed mulefat/goldenbush scrub, non-native grasslands, and ruderal and ornamental areas (Figure 3; Exhibit 6 of the DEIR Biological Technical Report). There are several small wetland seeps along the slope bordering Superior Avenue and the Banning Ranch Conservancy has alleged that several vernal pools exist in the upper Western corner of the site in the project

footprint. All the native plant communities are invaded by non-native plants to a greater or lesser extent.

Coastal Sage Scrub

Coastal sage scrub is comprised of dominant species that are semi-woody and low-growing, with shallow, dense roots that enable them to respond quickly to rainfall[2]. The species composition and structure of individual stands of coastal sage scrub depend on moisture conditions that derive from slope, aspect, elevation and soil type. Sawyer & Keeler-Wolf (1995) divide coastal scrub communities into series including California sunflower (*Encelia californica*), California buckwheat (*Eriogonum fasciculatum*), and coast prickly-pear, (*Opuntia litteralis*) series[3]. The coastal sage scrub found within the Sunset Ridge park footprint (including the southeast corner of Newport Banning Ranch), it is best characterized as California sunflower series; however, there are also patches of California buckwheat and coast prickly-pear series. Coastal sage scrub is increasingly rare in the coastal zone and provides an especially valuable ecosystem service when occupied by the coastal California gnatcatcher or other rare species.

Coastal Bluff Scrub

Coastal bluff scrub is found in localized areas along the coast below Point Conception [4] and is identified as a rare plant community in CDFG's Natural Diversity Data Base. It often intergrades with other scrub community types, as is the case within the Sunset Ridge Park project footprint (southeast corner of Newport Banning Ranch). Coastal bluff scrub is comprised of small stature woody or succulent plants including dwarf shrubs, herbaceous perennials, and annuals[5]. Dominant species include California sunflower, live-forever (*Dudleya sp.*), and prickly pear[6].

Maritime Succulent Scrub

Maritime succulent scrub, also identified as a rare plant community in CDFG's Natural Diversity Data Base, is a low growing, open (25% - 75% ground cover) scrub community dominated by drought deciduous, semi-woody shrubs that grow on rocky or sandy soils of coastal headlands and bluffs[7]. This community type has a very limited distribution along the coast between southern California and northern Baja California and on the Channel Islands. Characteristic species include California sunflower, prickly pear, and California box-thorn (*Lycium californicum*)[8]. Box-thorn is a CNPS list 4.2 species and is the only special status plant species found on the project site (Figure 4). Like coastal bluff scrub, maritime succulent scrub intergrades with other scrub community types, as is the case on the site proposed for Sunset Ridge Park.

[2] Holland, R.F. 1986. Preliminary Descriptions of the Terrestrial Natural Communities of California. State of California, The Resources Agency, Department of Fish and Game.
[3] Sawyer, J. and T. Keeler-Wolf. 1995. A manual of California vegetation. California Native Plant Society.
[4] Holland (1986) op cit.
[5] Ibid.
[6] Ibid.
[7] Ibid.
[8] Ibid.

The coastal scrub communities within the Sunset Ridge Park project footprint tend to be dominated by California sunflower and distinguished by those species which are diagnostic of the particular coastal scrub community types. BonTerra lumps some of the coastal scrub communities together as "southern coastal bluff scrub" and finds a total of 1.15 acres of this habitat type on the site (Figure 3). BonTerra treats California sunflower separately and maps the following habitats; "Encelia Scrub", "Disturbed Encelia Scrub", and "Encelia/Ornamental Scrub". All of the coastal scrub communities are invaded to a greater or lesser degree by non-native and invasive species, such as highway iceplant (*Carpobrotus edulis*), crystalline iceplant (*Mesembryanthemum crystallinum*), castor bean (*Ricinus communis*), myoporum (*Myoporum laetum*), pampas grass (*Cortaderia selloana*), tree tobacco (*Nicotiana glauca*), fennel (*Foeniculum vulgare*), black mustard (*Brassica nigra*), tocalote (*Centaurea melitensis*), and European annual grasses (*Bromus diandrus, B. madritensis, B. hordeaceus, Lolium multiflorum*).

Encelia Scrub

BonTerra mapped 0.53 acres of "Encelia Scrub", 3.64 acres of "Disturbed Encelia Scrub", and 0.21 acres of "Encelia/Ornamental Scrub" (Figure 3). The western-most area that BonTerra mapped as "Encelia Scrub" is an area that has a history of California gnatcatcher use and is an area I include in my "ESHA East" delineation (see ESHA discussion below and Figure 12). In addition to the "Encelia Scrub" patch that is included in my "ESHA East" delineation, there are several patches of "Encelia Scrub" along West Coast Highway and Superior Avenue (Figure 7; BonTerra Exhibit 2, Detailed vegetation types and other areas). All of these patches are adjacent to or very close to the large patch (approximately 3.3 acres) of "Disturbed Encelia Scrub" (Figure 3). The patches of "Encelia Scrub" (Figure 7) along the slope are within areas where foraging gnatcatchers have been observed by Robb Hamilton (Figure 30).

California sunflower is one of the dominant native scrub species found in the coastal scrub communities on the City and Newport Banning Ranch property. Weaver (1998) found that gnatcatcher densities in northern San Diego County were highest in areas where California sunflower or California buckwheat were co-dominate with sagebrush[9]. Both areas mapped as "Disturbed Encelia Scrub" by BonTerra are areas routinely mowed once or twice a year to ground level by the City and Newport Banning Ranch.

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

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

I disagree with this statement and believe that in absence of the routine mowing, the areas identified as "Disturbed Encelia Scrub" would become dense stands of robust, nearly pure, California sunflower. California sunflower is a fast growing shrub and if it wasn't mowed it would reach heights of two to three feet over one growing season.

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

During my site visits I have seen these areas numerous times and have observed how closely spaced the mowed individual California sunflower plants are to each other. I have also reviewed the photographs of fresh growth during the growing season in Robb Hamilton's December 10, 2009 memorandum to Janet Johnson Brown, City of Newport Beach, "Review of Biological Resource Issues, Sunset Ridge Draft EIR" and I have no doubt that these areas would be dominated by California sunflower suitable for gnatcatcher foraging and possibly nesting without continued mowing. If the periodic mowing is legal, this area would not be ESHA, however, if the mowing is not legal, the area would be ESHA.

The area mapped "Encelia Scrub/Ornamental" by BonTerra, that includes native big saltbush (*Atriplex lentiformis*) and the invasive species, pampas grass, and highway iceplant, is on the slope on the corner of West Coast Highway and Superior Avenue. The patch of "Encelia Scrub/Ornamental" is between the two patches mapped as "Encelia Scrub". The patches of "Encelia Scrub" (Figure 7) and "Encelia Scrub/Ornamental" (Figure 3) on the slope of the property are within areas where California gnatcatchers have been observed foraging on several occasions (Figure 30).

Disturbed Mulefat/Goldenbush Scrub

BonTerra mapped 0.48 acres of "disturbed mulefat/goldenbush scrub" which they describe as co-dominated by mulefat and goldenbush and invaded by myoporum, highway iceplant, and pampas grass (Figure 3). In addition to the species identified by BonTerra as inhabiting this area, I have also observed a significant amount of California sunflower and black mustard. This habitat has a history of California gnatcatcher use and is within the area I have delineated "ESHA West" (see ESHA discussion below and Figure 12).

Non-native Grasslands

BonTerra mapped the majority of the project site (6.58 acres) directly north of the proposed park entry road as non-native grasslands "dominated by a mix of non-native species including ripgut grass (*Bromus diandrus*), foxtail chess (*Bromus madritensis* ssp. *rubens*), black mustard, and tocalote" (Figure 3).

This same area was mapped as mixed scrub or scrub/grassland by Glenn Lukos Associates in 2002 (Figure 5; Glenn Lukos Associates 2002 vegetation map) and as a mix of non-native grassland, disturbed goldenbush scrub, and invasive/ornamental in 2008 (Figure 6; Exhibit 9, Glenn Lukos Associates, August 2008, Draft Biological Technical Report for Newport Banning Ranch). In the DEIR BonTerra makes the following statement about the site grasslands, as well as the ruderal, ornamental, and disturbed areas:

> *These areas generally have low biological value because they are composed of unvegetated areas or are vegetated with non-native species. These areas generally provide limited habitat for native plant and wildlife species although they may occasionally be used by native species. Therefore, impacts on these areas would not be considered significant, and no mitigation would be required.*

While the grassland areas are clearly disturbed in that they are regularly mowed and dominated by non-native European annual grasses, I do not agree with BonTerra's assessment that they have low biological value and provide limited habitat for native plant and wildlife species. If these areas were not mowed I believe they would transition into a more mixed scrub/ grassland habitat that would support higher biodiversity including numerous native plants and animals. However, currently the non-native grasslands provide dwelling habitat for burrowing animals and significant foraging habitat for numerous species including mammals, birds, and reptiles. Robb Hamilton reported seeing large numbers of grasslands bird species in just two visits: "two Red-tailed Hawks, an American Kestrel, 14 Killdeers, 25 American Pipits, 70 Western Meadowlarks, 100 Mourning Doves, and 100 House Finches (minimum estimates provided for the last four species)"[10]. The non-native grasslands are important raptor foraging habitat and suitable habitat for burrowing owls, a sensitive species that has been documented nearby in similar habitat (see below, Figure 32). CDFG under CEQA recommends 0.5 ac of preservation for every 1.0 ac of non-native grassland impacted to provide raptor foraging opportunities.

Ruderal and Ornamental Areas

BonTerra maps a total of 7.75 acres as "Ruderal" and a total of 3.19 acres as "Ornamental" (Figure 3). The ruderal areas are described by BonTerra as dominated by black mustard and tocalote. They also state that:

> *They consist of areas that have been previously disturbed and now consist primarily of non-native vegetation that is well adapted to disturbed conditions and high nitrogen soils. The ruderal vegetation that covers most of the park portion of the Project site appears to be periodically mowed.*

I believe that in the absence of disturbance (including mowing) ruderal areas would become a mixture of grassland and scrub that would slowly transition from an area dominated by non-natives to an area dominated by natives.

BonTerra describes the areas they mapped as "ornamental" as dominated by a mix of invasive species including highway iceplant, myoporum, pampas grass, and castor bean; this is consistent with my observations of the site.

Wetlands

There are several areas on the slope along Superior Drive with water seeps. Several of the plants associated with these seeps are wetland species including narrowleaf cattail (*Typha angustifolia*), spike-rush (*Eleocharis* sp.) growing in mud and standing water, spike bentgrass (*Agrostis exarata*), rabbitfoot grass (*Polypogon monspeliensis*), marsh fleabane (*Pluchea odorata*), and seaside heliotrope (*Heliotropium curassavicum*). In addition, Mediterranean tamarisk (*Tamarix ramosissima)*, a non-native species with

[10] Hamilton, R. (Hamilton Biological). December 10, 2009. Review of Biological Resource Issues, Sunset Ridge Draft EIR. Memorandum from Hamilton Biological to Janet Johnson Brown, City of Newport Beach.

wetland plant status, also occurs in this area. Pampas grass, another non-native species, is abundant in this area. While the federal government has yet to assign pampas grass a wetland indicator status, this species grows in damp soils along river margins in its native range in South America[11]. In coastal California it is an insidious invader colonizing disturbed areas including moist slopes in urban centers. Robb Hamilton reports that examination of 82 records of Pampas Grass in California showed that 32 percent were from wetlands[12]. Upon my request, BonTerra mapped in detail the slope along the southern perimeter of the proposed park site (Figure 7; BonTerra Exhibit 2, Detailed vegetation types and other areas). The wetland seeps occur in the areas mapped "Cattail" and "Tamarisk" and within some of the areas mapped "Pampas Grass".

In many areas the soils in these moist areas have a salt crust and/or what appear to be oxidation stains. BonTerra dug two soil pits in the seep areas and in both cases found hydric soils (Figure 8; BonTerra Exhibit 1, Detailed vegetation types and other areas, soil sample sites). BonTerra has maintained that the seep areas are not wetlands for numerous reasons including their determination that the water source is artificial[13], the presence of non-native species, and that the seeps are "small areas of low function/value hydrophytic vegetation".

I disagree with this conclusion. In fact, the small seeps and surroundings supporting a preponderance of hydrophytic plants, or hydric soils, or wetland hydrology meet the definition of wetlands in the Coastal act and the Commission's regulations. Whether or not wetland plants are non-native, or wetlands are degraded, or residential development contributes to wetland hydrology is not germane. Although the City's biological consultant, BonTerra, erroneously concluded that the slope seeps are not wetlands, the City revised the park plans to avoid these areas.

Vernal Pools

The Banning Ranch Conservancy has alleged that four vernal pools exist on the proposed park site at the fill area to the north of the access road, and states that these pools could contain the endangered San Diego Fairy Shrimp. They submitted a powerpoint presentation titled "Complete Banning Ranch Mesa Vernal Pools/Wetlands First Edition 6-7-11" on June 30, 2011 in which they assign the potential vernal pools numbers "34", "35", "36", and "39" (Figure 9, BonTerra Exhibit 2, BRC Features 34, 35, 36, and 39). In response to the vernal pool allegation, BonTerra consulting biologist Allison Rudalevige revisited these areas along with BonTerra consulting biologist Jeff Crain and Glenn Lukos Associates biologist Tony Bomkamp. They observed three

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

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

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

areas of cracked soil, a potential indicator of ponding water, but state that "it is clear that none of the four features are vernal pools as all of the features lack vernal pool indicator plant species and all of the features occur on previously graded areas and exhibit a predominance of upland plant species." They conclude that "Therefore, due to the lack of plant species characteristic of vernal pools, lack of sustained/observable ponding over multiple years of surveys onsite, the project site does not contain vernal pools.[14]" Regarding the Banning Ranch Conservancy's powerpoint presentation BonTerra states "The BRC PowerPoint does not utilize any appropriate vernal pool identification protocol for this resource issue, as it does not document ponding duration, soil types present, plant indicator species, invertebrate activity, and other necessary parameters.[15]"

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

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

I have reviewed BonTerra's vernal pool analyses and the Banning Ranch Conservancy powerpoint. I find that both are inconclusive regarding the existence or non-existence of vernal pools. Comprehensive vernal pool protocol surveys require two full wet season

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

[15] Ibid.

surveys done within a 5-year period or two consecutive seasons of one full wet season survey and one dry season survey (or one dry season survey and one full wet season survey**).** In addition, as BonTerra points out, appropriate vernal pool identification protocol includes documentation of ponding duration, identification of soil types and plant species present, invertebrate activity, and other necessary parameters. Neither BonTerra nor the Banning Ranch Conservancy have submitted the full complement of information necessary to make a firm conclusion regarding the existence or not of vernal pools on the proposed Sunset Ridge Park site. It is important to point out that vernal pools are a special type of wetland that are especially valuable because of the rare and unique species that they support. However, regardless of whether presumptive wetlands are vernal pools, they are protected under the Coastal Act. Given the lack of information and considering the review and conclusions of the USFWS, I recommend that a technical wetland delineation be conducted and that vernal pool protocol surveys be required on all four purported vernal pools.

California Gnatcatcher

Coastal sage scrub in southern California provides habitat for about 100 rare species, many of which are also endemic to limited geographic regions[16]. One such species is the coastal California gnatcatcher (*Polioptila californica)*. The California gnatcatcher is an obligate, year-round resident of coastal sage scrub communities[17]. California gnatcatchers typically live a total of 4 to 6 years. They primarily feed on insects, which are eaten directly off coastal scrub and other vegetation. California gnatcatchers range from Baja California north to Ventura and San Bernadino Counties in southern California. Gnatcatchers in southern California preferentially nest and feed in coastal scrub vegetation on mesas and gentle slopes that are characterized by varying abundances of California sagebrush, California sunflower; and California buckwheat[18]. Gnatcatcher densities in northern San Diego County were found to be highest in areas where California encelia and California buckwheat were co-dominant with sagebrush[19]. Where these species are in low abundance, California gnatcatchers will forage on other species, including some non-natives such as black mustard[20]. They also use grassland, chaparral, and riparian habitats in proximity to sage scrub for dispersal and foraging[21].

In the last 60 years extensive southern California suburban sprawl has reduced and fragmented coastal scrub habitats, resulting in a significant decline in California gnatcatcher populations. In addition, the majority of remaining coastal scrub habitats

[16] Westman, W.E. 1981. Diversity relations and succession in Californian coastal sage scrub. Ecology, Vol. 62: 170-184

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

[18] Ibid.

[19] Weaver (1998) op. cit.

[20] Dixon, J. Dec. 18, 2002. ESHA Determination for the Marblehead Property. Memorandum to Karl Schwing

[21] Ibid.

are disturbed to a greater or lesser extent by non-native and invasive plant species. In response to the drop in gnatcatcher numbers in southern California due to the habitat loss and fragmentation resulting from urban and agricultural development, the northernmost subspecies (*Polioptila californica californica*) was listed as federally threatened in 1993[22]. The California gnatcatcher is also a California Species of Special Concern. Loss of gnatcatcher coastal scrub habitat in southern California is estimated to be 70 to 90 percent[23,24] and, in 1999, the United States Fish and Wildlife Service (USFWS), estimated the number of gnatcatcher breeding pairs in Los Angeles, Orange and San Diego Counties at only 144, 643, and 1,917, respectively[25]. Fragmented habitats have reduced biological integrity due to the increased potential for human disturbance. An increase in recreational use of habitats, fire frequency, trash dumping, air pollution, invasive species, predators, cowbird parasitism, domestic pets, herbicides and pesticides, and night lighting are directly associated with development and can have adverse impacts on the quality of gnatcatcher habitat.

In 2007, the USFWS identified and mapped critical gnatcatcher habitat in southern California[26]. In determining areas to designate they "consider the physical and biological features (primary constituent elements (PCEs)), that are essential to the conservation of the species". Primary constituent elements define the actual extent of habitats that contribute to the primary biological needs of foraging, nesting, rearing of young, intra-specific communication, roosting, dispersal, genetic exchange, or sheltering. Primary constituent elements for California gnatcatcher critical habitat include not only intact sage scrub habitats, but also "non-sage scrub habitats such as chaparral, grassland, riparian areas, in proximity to sage scrub habitats that provide space for dispersal, foraging, and nesting." The USFWS defines sage scrub as a broad category of vegetation that includes coastal sage scrub, coastal bluff scrub, and maritime succulent scrub in their extensive list of the various sage scrub plant communities. The USFWS designated all of the City's property and all of Newport Banning Ranch as critical habitat for California gnatcatchers in 2007[27] (Figure 10; California Gnatcathcer Critical Habitat Unit Map). In designating this block of land as critical habitat, USFWS noted that the area was occupied by gnatcatchers at the time of listing and at the time of designation of critical habitat and the area "contains all the features essential to the conservation of the coastal California gnatcatcher."[28] This

[22] Department of the Interior, Fish and Wildlife Service, 50 cfr part 17, RIN 1018–AV38, Endangered and threatened wildlife and plants; Notice of determination to retain the threatened status for the coastal California gnatcatcher under the endangered species act. Federal Register 60:72069. (March 1993).

[23] Westman (1981) op. cit.

[24] Michael Brandman Associates. 1991. Unpubl. Report. A rangewide assessment of the California Gnatcacher (Polioptila californica). Prepared for Building Industry Assoc. of Southern California; July 23.

[25] Department of the Interior, Fish and Wildlife Service, 50 cfr part 17, RIN 1018–AV38, Endangered and threatened wildlife and plants; Revised designation of critical habitat for the Coastal California Gnatcatcher (*Polioptila californica californica*). 50; Federal Register 72:72069. (December 19, 2007).

[26] Ibid.

[27] Ibid. See also Exhibit 13, Banning Ranch DEIR.

[28] USFWS (Dec. 19, 2007) op. cit.

block of land is the only immediately coastal land mapped as critical gnatcatcher habitat in Unit 7 in Orange County (Figure 11; USFWS Federal Register Vol. 72, No. 243). USFWS pointed out in the final rule that the critical habitats in northern Orange County "may require special management considerations or protection to minimize impacts associated with habitat type conversion and degradation occurring in conjunction with urban and agricultural development." It is important to note that specific observations of gnatcatchers within any particular area are not necessary in order to conclude that the area is "occupied" by gnatcatchers. If gnatcatcher foraging or nesting is observed in the general proximity of a site, it is considered "occupied." Therefore, based on the many observations of gnatcatcher use, the USFWS concluded that all of the City property and Newport Banning Ranch is occupied by coastal California gnatcatchers.

California gnatcatcher breeding season territories range in size from less than 2.5 acres to 25 acres[29,30], with a mean territory size generally greater for inland populations than coastal populations[31]. Nesting territories typically have greater than 50 percent shrub cover and an average shrub height that exceeds 2.3 ft; nests are most often at 3 feet above the ground[32]. The relative density of shrub cover influences gnatcatcher territory size, with territory size increasing as shrub cover decreases presumably as a result of limited resources. In a 1989 to 1992 study of two sites in San Diego County, breeding season territories averaged 20 acres; non-breeding season territories were larger[33]. In studies by Bontrager (1991)[34] and Preston et al. (1998)[35], territory size during the non-breeding season increased 82 percent and 78 percent, respectively. Increase in non-breeding season territory size is thought to serve two purposes; to allow gnatcatchers to acquire more habitat resources and to obtain information about potential mates. California gnatcatchers are known to occupy (i.e., to breed, nest, and forage in) year round various locations of coastal scrub habitat on the city's property and Newport Banning Ranch. Numerous gnatcatcher surveys have been conducted on Newport Banning Ranch; only one survey has been conducted on the city property. The USFWS California gnatcatcher survey protocols, published in 1997, require a minimum of six or more surveys covering all potentially occupied habitat areas during the gnatcatcher breeding season which extends from March 15 to June 30[36,37]. All surveys must take

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

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

[31] Ibid.

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

[33] Atwood and Bontrager (2001) op. cit.

[34] Bontrager, D.R. 1991. Unpublished Report: Habitat requirements, home range and breeding biology of the California Gnatcatcher (Polioptila californica) in south Orange County. Prepared for Santa Margarita Co., Rancho Santa Margarita, CA; April.

[35] Preston et. al. (1998) op. cit.

[36] U.S. Fish and Wildlife (USFWS). 1997a (February 28). Coastal California Gnatcatcher (Polioptila californica californica) Presence/Absence Survey Protocol. Washington, D.C.:USFWS.

place during the morning hours and no more than 80 acres of suitable habitat may be surveyed per visit. Typically gnatcatcher survey reports include a compilation of gnatcatcher observations (dot/point locations) in the form of a map of gnatcatcher breeding pair use areas (breeding territories).

The gnatcatcher survey data for the southeast corner of Newport Banning Ranch, made available to us from Newport Banning Ranch, City of Newport Beach, and Newport Banning Ranch Conservancy (via USFWS), includes the following: gnatcatcher use areas and gnatcatcher observations collected by LSA from 1992 through 1994, gnatcatcher use areas collected by LSA in 1995 and 1996, gnatcatcher use areas and gnatcatcher observations collected by PCR in 1997, gnatcatcher observations collected by PCR in 1998, gnatcatcher use areas in 2000 (collector unknown, we believe it may have been PCR), gnatcatcher observations collected by GLA in 2002, 2006, and 2007, and gnatcatcher observations collected by BonTerra in 2009. For some years we have the reports associated with the data maps (1994 - 1996, 2002, 2006, 2007, and 2009) and for other years we do not (1992, 1993, 1997, 1998, and 2000).

We also have breeding season and non-breeding season gnatcatcher observations collected by Robb Hamilton in 2009 and 2010[38]. Mr. Hamilton was one of the biologists who collected gnatcatcher data for LSA in the early 1990's. Mr. Hamilton currently runs his own environmental consulting firm, Hamilton Biological, and holds a permit to conduct gnatcatcher presence/absence surveys (No. TE-799557).

The Newport Banning Ranch gnatcatcher survey efforts (number of days per annual survey), methodology (timing, areal coverage, etc.), and data presentation vary among the biological consulting firms. LSA surveyed for nine days in 1992, three in 1993, and four each from 1994 through 1996. Regarding the presentation of their data LSA states that:

> *Each year of the LSA surveys, composite maps were prepared that showed the distribution of approximate gnatcatcher territory boundaries at NBR. …The composite territories thus identified generally represented the most conservative polygons possible that combined all observation points. Notions of what might constitute gnatcatcher habitat were put aside; only those areas where gnatcatchers were observed were mapped. However, because polygons were mapped by combining all outlying observation points, on a finer scale many areas within polygons never were actually used by gnatcatchers. Most of the polygons depicted include suitable habitat as well as unused pockets (e.g., ice plant, barren of developed areas), and the territory maps do not distinguish*

[37] U.S. Fish and Wildlife (USFWS). 1997b (July 28). Coastal California Gnatcatcher (Polioptila californica californica) Presence/Absence Survey Protocol. Washington, D.C.:USFWS.

[38] Mr. Hamilton did not have access to Newport Banning Ranch so his observations are limited to those areas of the southeastern corner of Newport Banning Ranch that he could survey from the property boundary.

> *suitable habitat from unsuitable habitat such as solid ice plant, roads, and structures.*[39]

PCR conducted surveys in 1997, 1998, and 2000[40]. We do not have any information regarding these surveys other than the survey maps.

Glenn Lukos Associates and BonTerra present gnatcatcher sightings for individuals and breeding pairs as dot/point observations on their annual survey maps. We asked Glenn Lukos Associates to interpret their dot/point observations and they said they represent an interpolation of a few to multiple individual gnatcatchers and/or a gnatcatcher pair within a use area (pers. comm. Tony Bomkamp, January 3, 2011). We asked BonTerra the same question and they said their dot/point observations were their best approximation or estimation of the center point of observed gnatcatcher activity (pers. comm. Ann Johnston, December 15, 2010).

The only protocol gnatcatcher survey that was performed specifically for the proposed Sunset Ridge Park site was the 2009 survey conducted by BonTerra. Since that time numerous gnatcatcher sightings have occurred on the site including those of Robb Hamilton discussed above (Figure 30). In addition to Mr. Hamilton's gnatcatcher observations, Christine Medak, USFWS biologist, and Andrew Willis, CCC Enforcement Analyst, have observed gnatcatchers on several occasions in the location identified on the emails and maps attached here (Appendix 2).

The USFWS California gnatcatcher survey protocols require a minimum of six surveys conducted in the morning during the gnatcatcher breeding season. Surveys conducted in the early '90's did not always meet the six-day minimum, however, they did take place in the morning during the breeding season. We are assuming that surveys conducted from 1997 on followed the USFWS gnatcatcher survey protocols. We are also assuming that gnatcatcher survey data presented as dot/point observations have associated use polygons subject to gnatcatcher habitat requirements. Our conclusions are based on the data we have and our assumptions regarding these data. The gnatcatcher survey results are reported below in the ESHA discussions. The details of the observations are not critical, because it is clear that any suitable gnatcatcher habitat on the City property and on Newport Banning Ranch must be considered "occupied."

ESHA Delineation

Areas of coastal scrub habitat with significant gnatcatcher use perform an important ecosystem function, are increasingly rare, and are easily disturbed and therefore meet the definition of ESHA under the Coastal Act and the City of Newport LUP.

[39] Quote from December 9, 2010 "California Gnatcatcher Issues at the Sunset Ridge Park/Newport Banning Ranch Site" letter to Mick Sinacori, City of Newport Beach, Department of Public Works from Art Homrighausen and Richard Erickson of LSA

[40] The 2000 gnatcatcher use map is unlabeled and therefore, while the format suggests it was made by PCR, we can not be sure who created the exhibit.

In general, relatively pristine coastal sage scrub, scrub vegetation with significant coastal California gnatcatcher use, and appropriate gnatcatcher habitat in "occupied" areas[41] are increasingly rare in coastal California and meet the definition of ESHA. However, all ESHA determinations are based on an analysis of site-specific conditions. Since the entire Newport Banning Ranch and City property have been identified by the USFWS as California gnatcatcher critical habitat the determination of ESHA is appropriately based on both observations of gnatcatcher use, which is assumed in "occupied" areas, and on the presence of vegetation that constitutes suitable habitat.

I applied the following criteria in determining what areas of the proposed park site rose to the level of ESHA:

1. Areas occupied by California gnatcatchers (the entire site), and
2. Areas supporting habitat suitable for gnatcatchers, and
3. Unfragmented patches of suitable gnatcatcher habitat of substantial size – not small, isolated, fragmented patches, and
4. Areas supporting other rare species or rare vegetation communities.

In addition to the gnatcatcher habitat ESHA, the proposed Sunset Ridge Park site supports several wetland seep areas as discussed above. Opponents of the project allege that the proposed park site supports several vernal pools that will be impacted by the project footprint. While the project consultant maintains that these areas are not vernal pools, technical wetland delineations and vernal pool fairy shrimp protocol surveys must be performed in order to accurately identify the status of these areas.

ESHA Determination

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

I reviewed all the vegetation and ESHA mapping that has been performed on the Newport Banning Ranch portion of the project site and for the City's property. Four vegetation maps and one ESHA map are available for the southeast corner of Newport Banning Ranch: vegetation maps created by LSA, PCR Services, and Glenn Lukos Associates and a vegetation and ESHA map created as part of the Newport Banning Ranch Technical Appendices[42] by Glenn Lukos Associates. In addition, the City's consultant, BonTerra, mapped vegetation on the City's property.

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

[42] Glenn Lukos Associates, Inc. August 2008. Draft Biological Technical Report for the Newport Banning Ranch.
This document is a part of the "Banning Ranch, Planned Community Development Plan, Technical Appendices Volume II" that was posted on the City of Newport Beach website and downloaded in August 2009; it has since been removed from the City's website. While the report text is marked draft, the exhibits and appendices are not. Given that the vegetation (Exhibit 9) and ESHA (Exhibit 12) exhibits

In 1991 LSA mapped various habitat types including coastal bluff scrub on the southeast corner of Newport Banning Ranch (Figure 13; Figure 1, LSA December 9, 2010 letter). In 1998 PCR Services mapped coastal sage scrub habitat on the southeast corner of Newport Banning Ranch (Figure 14; Exhibit 9, Glenn Lukos Associates, August 26, 2010 memorandum). In 2002 Glenn Lukos Associates mapped "bluff scrub or succulent scrub" in several areas on the southeast corner of Newport Banning Ranch (Figure 15; Exhibit 2, Glenn Lukos Associates, West Newport Oil Property 2002 Gnatcatcher surveys). The 2008 Glenn Lukos Associates vegetation map (Figure 6 and 16; Exhibit 9, Glenn Lukos Associates. August 2008. Draft Biological Technical Report for the Newport Banning Ranch) identifies several native plant communities including maritime succulent scrub, disturbed encelia scrub, disturbed mule-fat scrub, goldenbush scrub, and disturbed goldenbush scrub on the southeast corner of Newport Banning Ranch. The ESHA map (Figure 17; Exhibit 12, Glenn Lukos Associates. August 2008. Draft Biological Technical Report for the Newport Banning Ranch) identifies two areas of ESHA: maritime succulent scrub and disturbed encelia scrub on the southeast corner of Newport Banning Ranch. In 2009 and in greater detail in 2011, BonTerra mapped the vegetation on the City's property as discussed above.

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

ESHA West

Between 1992 and 2009 gnatcatchers have been documented during eight surveys on the western boundary of the proposed Sunset Ridge Park project (Figure 18). In 1992 LSA mapped a gnatcatcher use area and six gnatcatcher observations along the western boundary of the proposed park property (Figures 19a and 19b; Figure 1, December 9, 2010 LSA memorandum and from LSA map submitted by the Newport Banning Ranch Conservancy, respectively). In 1993 LSA mapped a very large gnatcatcher use area that contains a wide swath of vegetation along the western boundary of the proposed park (Figure 20; Figure 2, December 9, 2010 LSA memorandum). In 1994 LSA mapped a large gnatcatcher use area that encompasses a large amount of habitat along the western boundary of the proposed park (Figures 21a and 21b; LSA map submitted by the Newport Banning Ranch Conservancy). In 1996, LSA mapped a gnatcatcher use area about three times the size of the area mapped in 1996 that overlaps all of the 1996 gnatcatcher use area and extends eastward (Figures

portray the expert opinion of Glenn Lukos Associates, Inc., at the time they were developed, we believe it is appropriate to consider this information, along with other sources, in our ESHA determination. We note that these data support our ESHA conclusions and we are awaiting the revised analysis, but in the interim, we continue to note the significance of the data presented in draft form.

22a and 22b; Figure 5, December 9, 2010 LSA memorandum). In 1998 PCR Services mapped point observations for two breeding pairs along the western boundary of the proposed park (Figures 23a and 23b; Glenn Lukos Associates map submitted by the Newport Banning Ranch Conservancy).

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

Based on the vegetation and ESHA maps, the vegetation I observed during my site visits, and the gnatcatcher survey data, I have delineated an area I have labeled "ESHA West" (Figure 12) on the western boundary of the proposed park that rises to the level of ESHA because it provides an especially valuable ecosystem service by providing critical habitat that is utilized by the California gnatcatcher for nesting, breeding, foraging and dispersal; the critical habitat is also easily disturbed by human activities as evidenced by bare areas (road), imported fill, and graded areas on the property and therefore meets the definition of ESHA in the Coastal Act.

<u>ESHA East</u>

A second area of ESHA, "ESHA East", occurs east of the ESHA West, on the other side of an access road that serves oil operations on Newport Banning Ranch. Between 1992 and 2009, gnatcatchers have been documented during six surveys in this area (Figure 18). The ESHA East includes a bluff with slopes that support coastal sage, coastal bluff, and maritime succulent scrub habitat. In 1993 LSA mapped a very large gnatcatcher use area that includes the entire bluff area (Figure 20; Figure 2, December 9, 2010 LSA memorandum). In 1996, LSA mapped another very large gnatcatcher use area that includes most of the bluff area (Figures 18a and 18b; Figure 5, December 9, 2010 LSA memorandum). In 1997 PCR Services mapped a gnatcatcher use area that covers the entire bluff (Figure 29a; PCR use area map submitted by the Newport Banning Ranch Conservancy). In 1997 PCR also mapped point observations for two

breeding pairs; one of the breeding pairs was located on the bluff in maritime succulent scrub while the second pair was located on a slope above PCH in disturbed California sunflower scrub (Figures 29c and 29b; Glenn Lukos Associates map submitted by the Newport Banning Ranch Conservancy). PCR Services conducted another survey in 1998 and mapped an observation of a gnatcatcher pair in maritime succulent scrub on the bluff (Figures 23a and 23b; Glenn Lukos Associates map submitted by the Newport Banning Ranch Conservancy).

In 2000, a gnatcatcher use area was mapped on the bluff (Figure 24; Gnatcatcher use map I believe was created by PCR that was submitted by the Newport Banning Ranch Conservancy). In 2006 Glenn Lukos Associates mapped a gnatcatcher breeding pair observation on the bluff in maritime succulent scrub (Figure 26; Exhibit 3 July 26 2006 Glenn Lukos Associates memorandum). In addition to Newport Banning Ranch's and the City of Newport Beach's biological consultant's surveys, Mr. Hamilton mapped gnatcatcher use areas in 2009 and 2010. He mapped two gnatcatcher pair use areas outside the breeding season on November 4, 2009; one in the disturbed California sunflower scrub above PCH and one to the northeast in mulefat near the proposed parking lot (Figure 30; Figure 8, December 11, 2010 Hamilton Biological letter). Mr. Hamilton also mapped a gnatcatcher male use area during the breeding season above PCH in the disturbed California sunflower scrub on June 3, 2010 (Figure 30; Figure 8, December 11, 2010 Hamilton Biological letter). Mr. Hamilton's 2009 gnatcatcher observations indicate that the area around the disturbed area identified as the southeast polygon in the NOV continues to be utilized by gnatcatchers outside the breeding season. Between 1993 and 2009, seven gnatcatcher use areas and four dot/point gnatcatcher observations were mapped (Figure 18). I believe that had gnatcatcher use areas been mapped for the gnatcatcher observations, they would overlap most of the area I have mapped as ESHA east. I base this on the documented minimum gnatcatcher breeding territory size (2.5 acres)[43,44] (Figure 31).

Based on the vegetation and ESHA maps; the vegetation I observed during my site visits, and the gnatcatcher survey data, I have delineated an area of ESHA that I call "ESHA East" (Figure 12). From the extensive history of gnatcatcher survey data it is clear that the disturbed coastal sage, coastal bluff, and maritime succulent scrub within the area provide an especially valuable ecosystem service by furnishing critical habitat utilized by the California gnatcatcher for nesting, breeding, foraging, and dispersal; the critical habitat is also easily disturbed by human activities, as evidenced by bare areas (road), imported fill, and graded areas, and therefore meets the definition of ESHA in the Coastal Act.

Buffers

There are several areas where the proposed park development, including the entrance road, parking lot, and children's playground, is designed near the west and east

[43] Atwood et al. (1998) op. cit.
[44] Preston et. al. (1998) op. cit.

gnatcatcher habitat ESHA areas. From the time the Commission began recognizing coastal scrub habitat occupied by gnatcatchers as ESHA, several of our past permit actions have required 100 foot buffers between gnatcatcher ESHA and development to adequately protect gnatcatchers and their habitat from human disturbance. The entire site of the proposed Sunset Ridge Park is gnatcatcher critical habitat and therefore protective ESHA buffers are essential. I recommend 100 foot buffers between the parking lot and the children's playground to adequately protect gnatcatchers from human disturbance. I believe however, that a 50 foot minimum buffer between the park entrance road and gnatcatcher ESHA is adequate to protect gnatcatchers for several reasons. The park entrance road is located in a canyon with slopes on either side which enable gnatcatchers to fly over it with ease. Studies have shown that the California gnatcatcher can become accustomed to some disturbance by vehicles. That disturbance is best accommodated in situations where the bird can easily fly over the disturbed area (i.e. narrow roads), and where there is appropriate habitat immediately on either side of the road. Car trip estimates for the park are 173 per day which is a low impact traffic pattern; the use intensity of the road will be comparatively less than with most other types of development (e.g. housing, commercial, etc.). This low level of impact is a key factor in my determination that reducing the buffer from 100 feet to 50 feet along the entrance road is acceptable in this particular case. If the anticipated traffic estimates were larger, or were to increase, I believe that this would constitute a significant impact on the gnatcatcher habitat and a reduction to a 50 foot buffer along the proposed park entrance road would no longer be appropriate. Thus, it is critical that the road remain just that, a park entrance road as planned and nothing more.

Development of the park entrance road will further fragment the two patches of ESHA on the Sunset Ridge Park site. Restoring the existing ESHA to higher quality coastal sage scrub and vegetating the buffers, which currently consist of bare dirt or ruderal habitat, with coastal sage scrub species, provides improved and new suitable gnatcatcher habitat that to some degree offsets any loss in connectivity between the two ESHA areas.

My 50 foot buffer recommendation for the road is contingent on the entirety of all the buffers and the adjoining ESHA being re-vegetated or restored to high quality coastal scrub habitat specifically designed to be attractive to gnatcatchers. This will help minimize habitat fragmentation caused by the development. Small habitat fragments can only support small populations of plants and animals and small populations are more vulnerable to extinction. Minor fluctuations in resources, climate, or other factors that would be trivial in large populations can be catastrophic in small, isolated populations. Habitat fragmentation is an important cause of species extinction[45] and given the importance of the proposed park site to the survival of California gnatcatchers, habitat fragmentation must be avoided to the greatest extent possible.

The park development plans include grading within the buffer along the road which is an activity the Commission typically does not allow. The only use the Commission typically

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

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

Burrowing Owls

BonTerra conducted protocol surveys for burrowing owls and California gnatcatchers and determined that the only sensitive species that occurs on the project site is the gnatcatcher. Burrowing Owls (*Athene cunicularia hypugaea*) are a California Species of Special Concern that are rare in Orange County due to loss of suitable grasslands to development, especially near the coast. The Commission considers habitat that supports burrowing owls ESHA. In January 2008, Glenn Lukos Associates conducted winter-season surveys for burrowing owls at Newport Banning Ranch and found two in the ranch's southern grasslands and a third individual 212 feet to the west (Figure 32; Exhibit 7 in the 2008 draft biological report prepared by Glenn Lukos Associates for NBR), outside the Sunset Ridge Park project site, but in habitat similar to that in the western portion of the park project site. BonTerra downplays the site's potential value to the species:

> *Limited suitable habitat and burrow sites for this species are present on the Project site. Focused surveys for the burrowing owl were conducted in winter 2008/2009 and in spring/summer 2009; the burrowing owl was not observed. Therefore, burrowing owl is not expected to occur on the Project site due to lack of detection during focused surveys. However, there is potential for the burrowing owl to occasionally occur on the Project site as a migrant or rare winter visitor.*

I disagree and find that the project site's grasslands comprise ideal habitat for burrowing owls. To ensure that the proposed project does not impact burrowing owls I recommend that an additional set of protocol burrowing owl surveys be performed before development in the area is given further consideration.

Coastal Sage Scrub Habitat Creation and Restoration

The Commission's findings of approval of the LUP amendment (NPB-MAJ-1-06 part b, July 2006) state that "the siting and design of a park development on the proposed City

property, particularly an active park, must take into account on-site natural resources and avoid substantial landform alteration…" The findings also note that

> *…the site currently exists as undisturbed open space and may contain potential wildlife habitat. The subject site is located directly adjacent to Banning Ranch, a 505-acre undeveloped area known to support a number of sensitive habitat types, including coastal bluff scrub. There is a potential biological connection between the two sites that will need to be addressed when specific development is contemplated at the Caltrans West property…*

The Commission further noted that "the developable area of the site may be restricted by the existence of habitat and associated setbacks/buffers…"

Given the importance of the property to the survival of the federally threatened California gnatcatcher (*Polioptila californica californica*) I recommend that all suitable areas of the property not proposed for formal park development and that are not currently non-native grassland (except for the area adjacent to the "ESHA East") be restored to high quality coastal sage scrub habitat suitable for gnatcatchers. The entire site has been identified by the USFWS as critical gnatcatcher habitat and is also within the boundaries of a CDFG NCCP which recognizes the importance of the site for gnatcatchers. The site is the only immediately coastal critical California gnatcatcher habitat in Orange County. Three breeding pairs are known to use the property proposed for the park. The minimum breeding territory for gnatcatchers is 2.5 acres and when habitat is less than premium breeding territories necessarily increase. In addition, non-breeding season territories are much larger; by as much as 80 percent. Furthermore, we have only one year of formal gnatcatcher surveys for the City's property and Robb Hamilton, a biologist who holds a permit to survey for gnatcatchers, has documented gnatcatchers in several areas of the site of the proposed park on several occasions (Figure 30) and Christine Medak, USFWS biologist and Andrew Willis, CCC Enforcement Analyst have observed gnatcatchers on the site on several occasions (Appendix 2).

In order to ensure that three gnatcatcher pairs are able to persist on the site I recommend that the site be designed to support a minimum of 7.5 acres of high quality coastal sage scrub. This can be accomplished by creating or restoring to high quality coastal sage scrub habitat in all suitable areas of the property not proposed for formal park development and that are not currently non-native grassland, as stated above. In addition, high quality coastal sage scrub creation and/or restoration must occur in the ESHA areas, ESHA buffer areas, and all suitable areas adjacent to the ESHA. The created and restored coastal sage scrub areas will provide habitat for California gnatcatchers and other species. A habitat maintenance and management plan designed to ensure that the coastal sage scrub habitat remains healthy and robust in perpetuity should be developed.

Non-Native and Invasive Species

Throughout the range of gnatcatchers in southern California, not only are coastal scrub communities being lost to development at an alarming rate, they are also being type converted to non-native grassland and other ornamental or ruderal habitats[46,47]. A combination of factors is thought to be behind this conversion including competitive displacement by European annual grasses, increased fire frequency, nitrogen deposition due to air pollution, high silt, and high pH[48]. Loss and type conversion of coastal sage scrub habitats in southern California is another reason that improving and restoring all the appropriate areas on the proposed Sunset Ridge Park site that are not slated for formal development is essential.

In addition to loss and type conversion of coastal sage scrub habitats, invasive animals are also a threat to California gnatcatchers. Invasive ants such as the Argentine ant (*Linepithema humile*) can be abundant in landscaped areas and can move up to 1400 feet toward native habitat from an urban or urban/rural boundary[49]. Irrigation encourages invasive ants which prefer wetter soil conditions. Argentine ants are documented predators on gnatcatcher nestlings and their presence can also alter the native arthropod community by reducing their diversity and abundance[50]. A number of measures should be taken to prevent or limit invasive ants including using low-water use turf and/or artificial turf on all playing fields and playground areas, maintaining drainage best management practices, maintaining a clean, trash free park, and planting high quality coastal sage.

Cowbird Parasitism

Brown Headed cowbirds are brood parasites; that is they lay their eggs in the nests of other birds. Cowbird chicks usually hatch one or two days before the eggs of the host bird and grow rapidly, giving them a competitive head start. Rapid growth allows the cowbird chick to out-compete the host's chicks for food and space in the nest so that

[46] Allen, E.B., S.A. Eliason, V.J. Marquez, G.P. Schultz, N.K. Storms, C.D. Stylinski, T.A. Zink, and M.F. Allen. 2000. What are the limits to restoration of coastal sage scrub in southern California? In: Keeley, J.E., M. Baer-Keeley, and C.J. Fotheringham (Eds.). 2nd Interface Between Ecology and Land Development in California. U.S. Geological Survey Open File Report 00-62.

[47] Allen, E.B. 2004. Restoration of Artemisia Shrublands Invaded by Exotic Annual Bromus: A comparison between southern California and the Intermountain region. In: Hild, A.L., N.L. Shaw, S.E. Meyer, D.T. Booth, and E.D. McArthur (Comps.), Seed and Soil Dynamics in Shrubland Ecosystems: Proceedings: 2002 August 12-16; Laramie, Wyoming. Proceedings RMRS-P-31. Ogden, U.T. U.S. Department of Agriculture, Forest Service, Rocky Mountain Research Station.

[48] Talluto, M.V. and K.N. Suding. 2008. Historical change in coastal sage scrub in southern California, USA, in relation to fire frequency and air pollution. Landscape Ecology, Vol. 23: 803-815.

[49] Suarez, A.V., D.T. Bolger and T.J. Case. 1998. Effects of fragmentation and invasion on native ant communities in coastal southern California. Ecology, Vol. 79: 2041-2056

[50] Bolger, D.T., A.V. Suarez, K.R. Crooks, S.A. Morrison and T.J. Case. 2000. Arthropods in Urban Habitat Fragments in Southern California: Area, Age, and Edge Effects. Ecological Applications, Vol. 10(4): 1230-1248.

host chicks usually perish. In areas where cowbirds have invaded California gnatcatcher breeding territories, gnatcatcher fitness has decreased[51].
Brood parasitism of gnatcatcher nests by cowbirds is a problem encountered in urban and urban/rural settings. Fast food restaurants, equestrian and livestock facilities, and large expanses of turf grass associated with developments, schools, and parks all provide foraging opportunities for cowbirds. The turf covered ball fields proposed for Sunset Ridge Park adjacent to residential and commercial development including fast food restaurants is a perfect set-up for a cowbird invasion. I recommend that park monitoring plans include cowbird monitoring. If cowbirds are found on the park I recommend immediate implementation of a cowbird trapping program.

Predation

The most common cause of gnatcatcher nest failure is predation which accounts for up to 66 percent of nest failures in some areas[52,53]. Predation is more prevalent where native habitat edges up against urban or urban/rural development. 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[54]. 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.

In summary, areas of coastal scrub occupied by California gnatcatchers perform an important ecosystem function, are increasingly rare, and are easily disturbed and therefore meet the definition of ESHA under the Coastal Act and the City of Newport LUP. Coastal Bluff Scrub and Maritime Succulent Scrub rise to the level of ESHA, whether occupied by gnatcatchers or not, because they are identified as rare plant communities by CDFG. The “ESHA West” and “ESHA East” areas on the proposed Sunset Ridge Park site meet the definition of ESHA because they support areas of rare habitat (coastal bluff scrub and maritime succulent scrub) and habitat important to the federally threatened California gnatcatcher, have a history of gnatcatcher use, and are

[51] Smith, J.M.N., T.L. Cook, S.I. Rothstein, S.K. Robinson, and S.G. Sealy. 2000. Ecology and management of cowbirds and their hosts. University of Texas Press; Austin, Texas.
[52] Braden, G., R. McKernan, and S. Powell. 1997a. Association of within-territory vegetation characteristics and fitness components of California gnatcatchers. The Auk, Vol. 114: 601-609.
[53] Grishaver, M., P. Mock and K. Preston. 1998. Breeding behavior of the California gnatcatcher in southwestern San Diego County, California. Western Birds, Vol. 29: 299-322.
[54] Crooks, K.R. and M.E. Soulé. 1999. Mesopredator release and avifaunal extinctions in a fragmented system. Nature, Vol. 400: 563-566.

easily disturbed. As I state above, provided the City improves and restores the ESHA areas, buffers, and other suitable areas not slated for formal park development with high quality coastal sage scrub in perpetuity, I believe 50-foot buffers are protective of the gnatcatchers and their habitat. In addition, if the City incorporates the coastal sage scrub improvement and restoration that I recommend here and takes measures to prevent non-native and invasive species invasion, cowbird parasitism, and predation, I believe that development of Sunset Ridge Park will not significantly impact California gnatcatchers and has the potential to improve the success of gnatcatchers on this site.

This ESHA analysis applies only to the area proposed for development as part of the proposed Sunset Ridge Park and immediately adjacent areas. It specifically does not apply to the larger area of Newport Banning Ranch. A similar analysis for the latter area would include consideration of the presence of wetlands, rare species and habitats, dispersal opportunities, and potential for habitat fragmentation.

Jonna Engel

From: Christine_Medak@fws.gov
Sent: Tuesday, September 13, 2011 1:41 PM
To: Jonna Engel
Cc: 'Basye GL (George) at Aera'; Sinacori, Mike; Michael Mohler
Subject: Review of vernal pools on Sunset Ridge Project Site

Jonna,

Per your request, we have reviewed the vernal pool information on Sunset Ridge Project Site, which we received from Terry Welsh (Banning Ranch Conservancy) on June 30, 2011. The information (a powerpoint presentation titled Complete Banning Ranch Mesa Vernal Pools/Wetlands First Edition 6-27-11) includes the identification of 4 potential vernal pools within the grading area for the project (VP 34, 35, 36, and 39). The four ponded areas were identified by photos taken between February 2009 and March 2011.
All four areas are located within a drainage (as opposed to a mesa top).
VP 34, 35, and 36 are within a drainage that flows in a southerly direction (towards the Coast Hwy) and VP 39 is in a drainage that flows westward to meet up with the primary drainage running through the Banning Ranch property. The reason this is significant is that typically vernal pools do not form in a drainage because the water runs downstream (as opposed to ponding). Because the water is running downstream, it will not typically pond long enough to support vernal pool species. Ephemeral drainage areas will more often support riparian vegetation or transitional scrub vegetation (e.g., mulefat, elderberry...) if mowing does not occur. A significant exception is when the drainage is artificially blocked (e.g., to form a stock pond). The drainage below VP 39 has been blocked by roadway fill to the west, which may allow this area to pond longer than expected. VP 39 also appears to have the classic bathtub ring look of a vernal pool (e.g., rings of different vegetation types extending outward around the pool).

Several pools on Banning Ranch are occupied by the federally endangered San Diego fairy shrimp. San Diego fairy shrimp cysts (eggs) may persist in the soil for several years until conditions are favorable for successful reproduction. Cysts from this species can be picked up by animals and distributed throughout the site, however, not all areas where the cysts are deposited will be suitable to support the life cycle of San Diego fairy shrimp. Critical habitat for the San Diego fairy shrimp was designated on December 12, 2007 (72 FR 70648), and includes a portion of Banning Ranch, but not the Sunset Park project site. The Primary Constituent Elements (PCEs) of critical habitat provide a good summary of the physical and biological features essential to the conservation of the species. The PCEs for San Diego fairy shrimp are:

1. Vernal pools with shallow to moderate depths (2 inches to 12 inches) that hold water for sufficient lengths of time (7 to 60 days) necessary for incubation, maturation, and reproduction of the San Diego fairy shrimp, in all but the driest years.

2. Topographic features characterized by mounds and swales and depressions within a matrix of surrounding uplands that result in complexes of continuously, or intermittently, flowing surface water in the swales connecting the pools described in PCE 1, providing for dispersal and promoting hydroperiods of adequate length in the pools (i.e., the vernal pool watershed).

3. Flat to gently sloping topography and any soil type with a clay component and/or an impermeable surface or subsurface layer known to support vernal pool habitat (including Carlsbad, Chesterton, Diablo, Huerhuero, Linne, Olivenhain, Placentia, Redding, and Stockpen soils).

Conclusion:
After reviewing the available information we conclude that all four areas (VP 34, 35, 36, and 39) could potentially support San Diego fairy shrimp if ponding sufficient to support the species happens at a time when cysts are present. Extensive vernal pool habitat once occurred on the coastal plain of Los Angeles and Orange counties (Mattoni and Longcore 1997) and soils over the majority of Banning Ranch are likely suitable. However, the

probability that ponding will be adequate to support the species is low in VP 34, 35, and 36 because the "pools" are located in a drainage and hydrological processes (including erosion and water flow) are not currently impeded by substantial alterations in the natural topography. In the absence of maintenance these ponds are unlikely to persist or to support the species over time. Vernal pool 39 has a higher probability of supporting the species because fill deposited in the drainage is likely contributing to longer periods of ponding. The rings of vegetation around the pool are another indication that ponding may occur at a freqency and for a length of time sufficient to support San Diego fairy shrimp. In the absence of maintenance we expect VP 39 will continue to pond (and pond for longer periods over time as silts collect in basin), unless the roadway fill is removed. To ensure the proposed project does not result in unintended impacts to listed species, we recommend protocol surveys for San Diego fairy shrimp are conducted in VP 39 prior to filling the pool.

Should you have any questions regarding this message please feel free to call me.

Christine L. Medak
Fish and Wildlife Biologist
U.S. Fish and Wildlife Service
6010 Hidden Valley Road
Carlsbad, CA 92011
(760) 431-9440 ext. 298
http://www.fws.gov/carlsbad/

Mattoni, R. and T. R. Longcore. 1997. Down memory lane: the Los Angeles coastal prairie, a vanished community. Crossosoma 23(2):71-102.

To "Tony Bomkamp" <tbomkamp@wetlandpermitting.com>

06/15/2011 01:34 PM

cc "'Michael Mohler'" <mohler@brooks-street.com>,"'Basye GL \(George\) at Aera'"<GLBasye@aeraenergy.com>

Subject Banning Ranch Site Visit

Thank-you for taking the time to walk me through Banning Ranch to see the extent of mowing on the property. The following is a summary of my observations on the site, recommendations for avoiding impacts to gnatcatchers, and suggested revisions to your vegetation mapping to reflect conditions on the site

The first area we stopped at (east of the apartment housing, north of territory #2)**[LOCATION A ON EXHIBIT 1]** was an area not documented as supporting a gnatcatcher
territory; however, a family group was foraging in the depression, mapped as disturbed scrub on your vegetation map. Prior to conducting any mowing through this canyon, additional monitoring for the gnatcatcher should be conducted in this location to ensure the mowing is not impacting habitat supporting gnatcatcher foraging.

Next, we took a close look at mowed vegetation in the vicinity of territories #2 **[LOCATION B ON EXHIBIT 2]** and #4. It appears a portion of territory #2 that was mowed at the top of the bluff was mapped as disturbed scrub on your vegetation map but is actually primarily iceplant and non-native grasses. Vegetation mapping should be changed to reflect the actual vegetation community in this area. The mowing that occurred near territory #4 is consistent with previous mowing. The mowed areas appeared to consist of non-native grasses and other weeds. Therefore, it does not appear that mowing activities impacted habitats for the gnatcatcher in territories #2 or #4.

The third area we stopped at was located under a power line (north of territory #5, east of territory #10), in an area not previously supporting a gnatcatcher pair. This area consisted predominantly of encelia scrub that was mowed but was growing back. This area was previously mapped as CSS by PCR in 1997. Your vegetation map should be changed to reflect the predominantly native scrub vegetation located in this area.

Finally, we stopped at the vernal pools occupied by SDFS (pools 1, 2, and 3). The smallest pool was mowed, consistent to prior mowing patterns. The other two pools were previously flagged to prevent oil operators from entering the pools. The flagging is almost all gone and pool #2 to appears to extend outside the limits of old flagging now. All three pools should be flagged, with a buffer to minimize the potential for disturbance. We should also discuss options to initiate

restoration of the pools. Some manual vegetation removal within the pools may contribute to increasing the quality of habitat in the pools for SDFS.

I look forward to continuing our discussions of a potential consulation on oil operations and restoration on the project site.

Christine L. Medak
Fish and Wildlife Biologist
U.S. Fish and Wildlife Service
6010 Hidden Valley Road
Carlsbad, CA 92011
(760) 431-9440 ext. 298
http://www.fws.gov/carlsbad/

From: Christine_Medak@fws.gov [mailto:Christine_Medak@fws.gov]
Sent: Monday, July 11, 2011 4:13 PM
To: Jonna Engel
Subject: Fw: Banning Ranch Site Visit

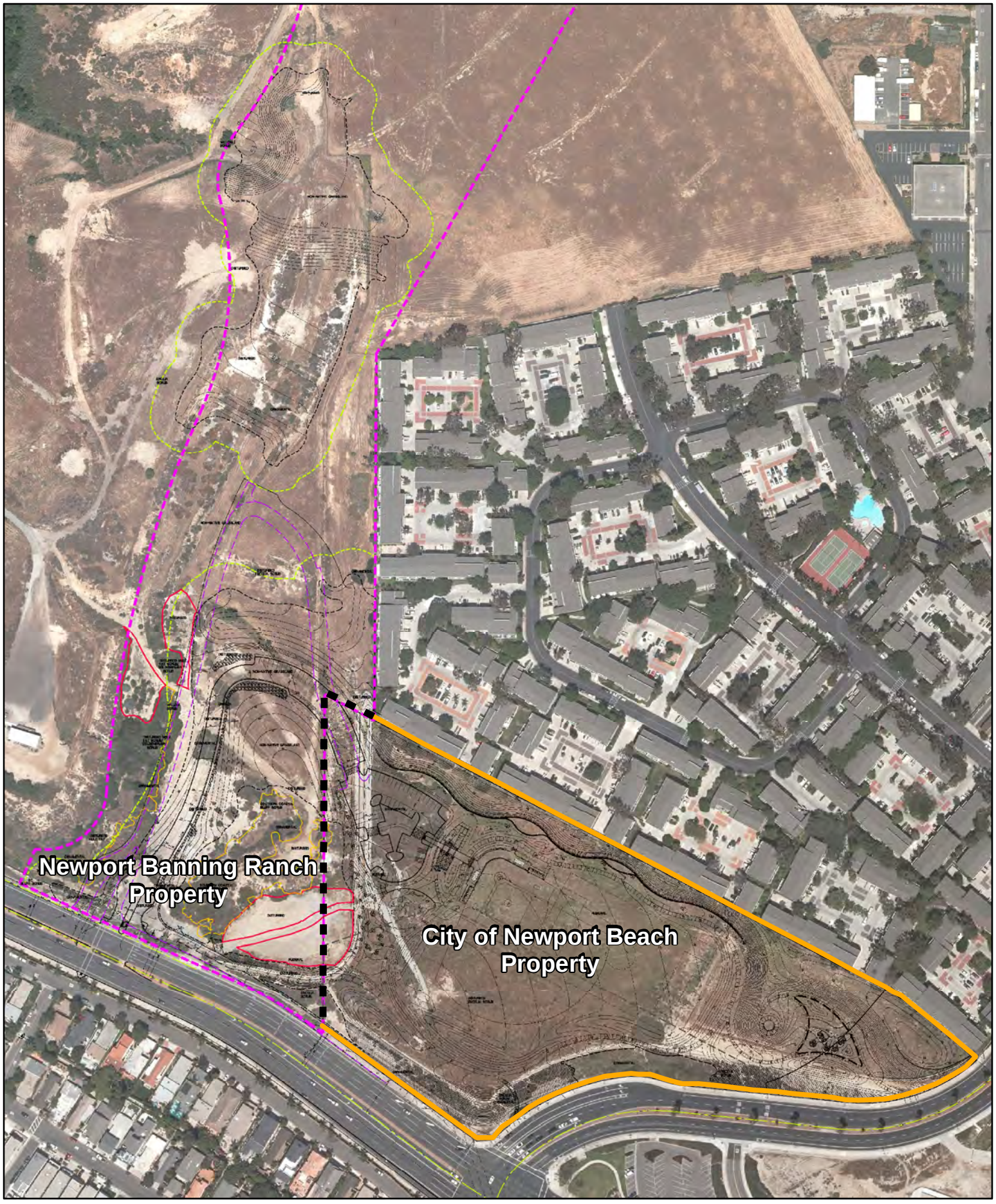
Jonna,

These are the recommendations I provided to Tony following our site Visit on June 14. The following week, I again visited the site with Mike Mohler, George, Mike Sincacore, Ann Johnston and another biologist from BonTerra(don't remember his name). While reviewing the potential revised alignment of the park entryway we again encountered gnatcatchers east of the apartment complex and north of territory 2 in a small patch of CSS and willow scrub vegetation. **[LOCATION A ON EXHIBIT 1]** It appeared that a male was defending a territory in this location and was not just foraging in the vicinity. My understanding was that Mike Mohler was planning to have 2 independent biologists survey the area to determine how it was being used by the gnatcatchers.

Hope this helps.

Appendix 2: Exhibit 1

Appendix 2: Exhibit 2



CALIFORNIA COASTAL COMMISSION
Technical Services Division - GIS Unit

All Locations Approximate.
For Illustrative Purposes Only.
Source: BonTerra Consulting, NAIP 2007.

N

Figure 1: Site of proposed Sunset Ridge Park. Includes property owned by the City of Newport Beach and Newport Banning Ranch.

DSM 9/11

CALIFORNIA COASTAL COMMISSION
Technical Services Division - GIS Unit

Not To Scale.
All Locations Approximate.
For Illustrative Purposes Only.
Source: AirPhotoUSA 2007.

N

5-10-168, Exhibit 12
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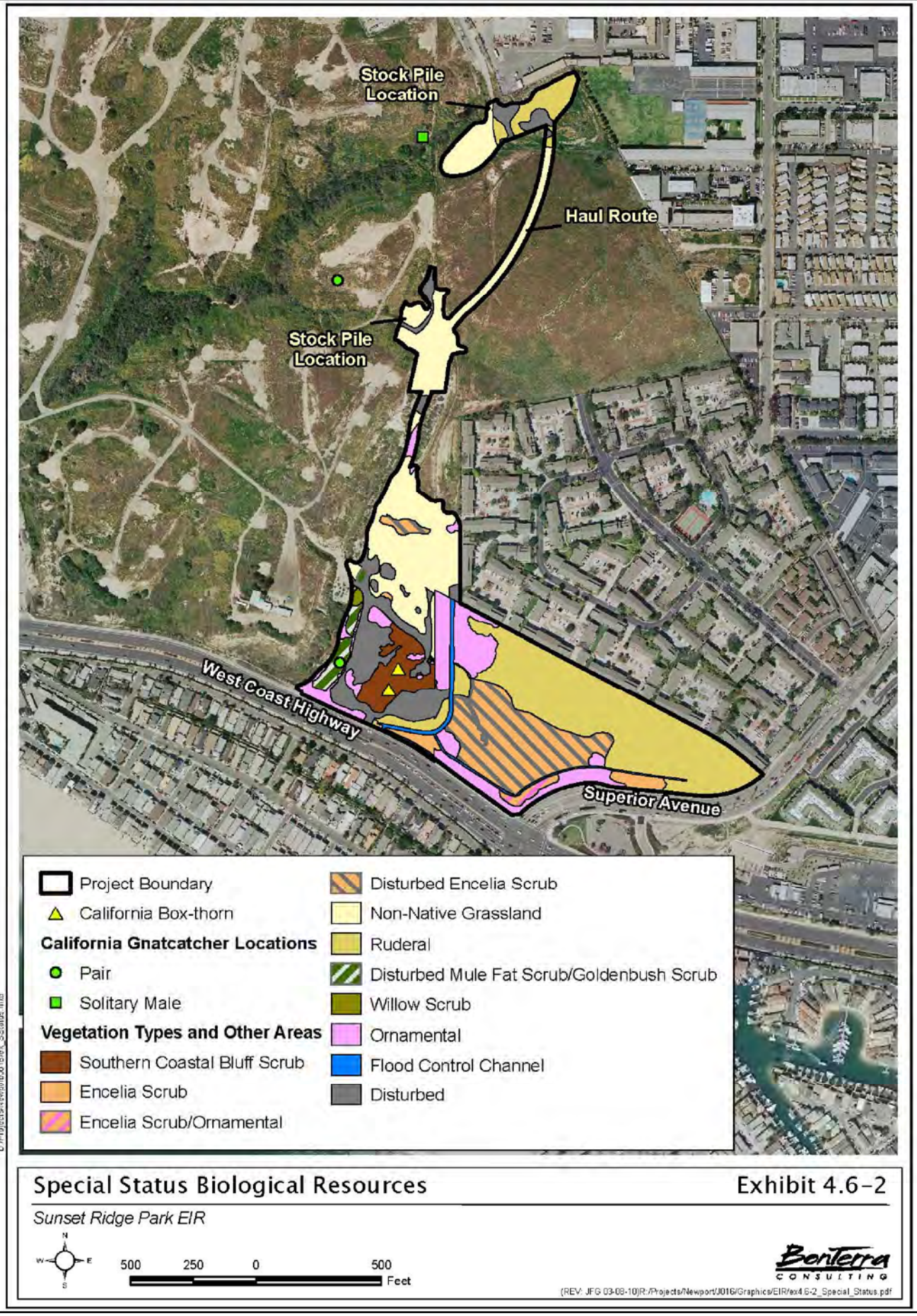
Figure 2

DSM 9/11



Special Status Biological Resources — Exhibit 4.6-2

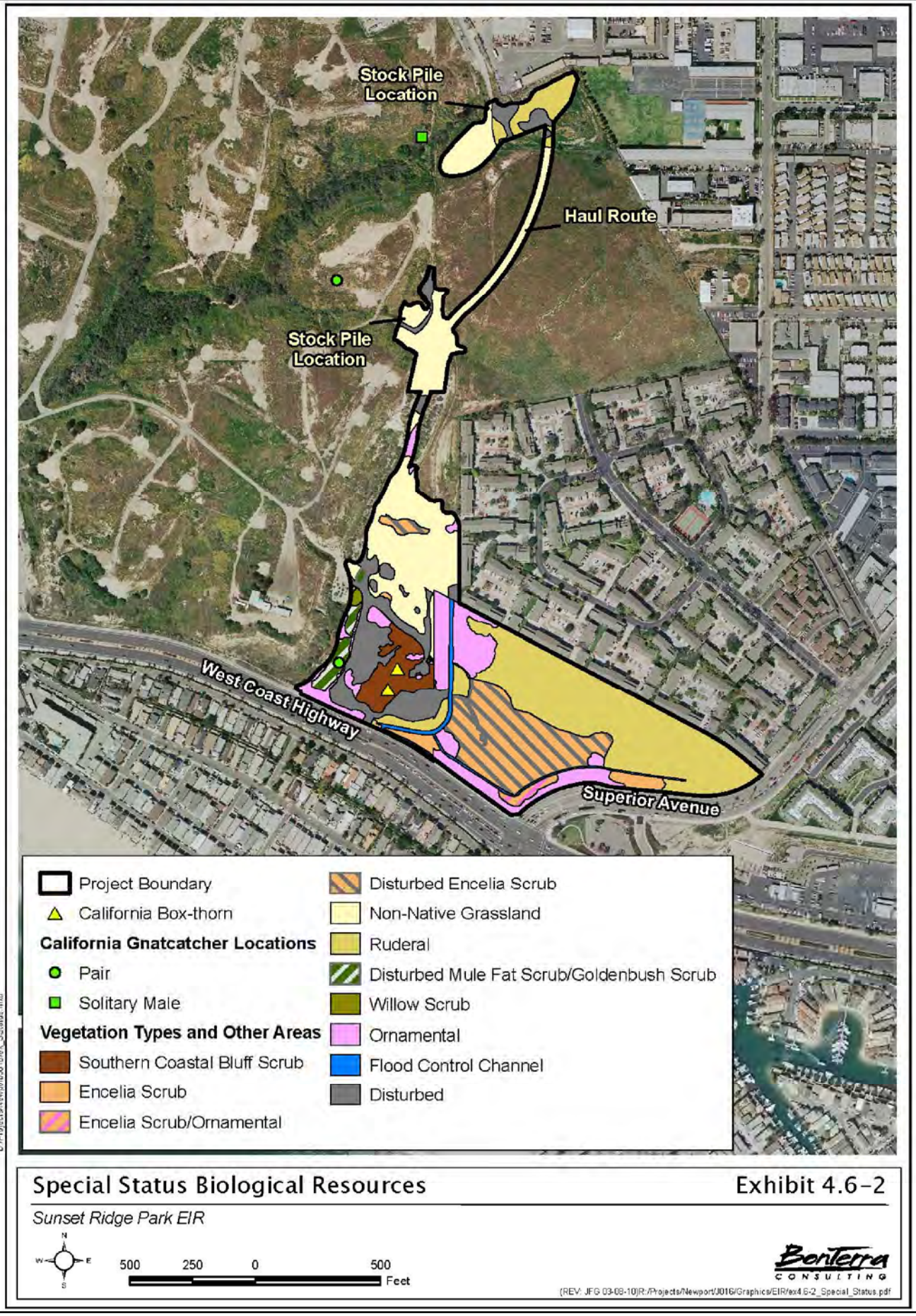
Sunset Ridge Park EIR

N W E S

500 250 0 500 Feet

BonTerra CONSULTING

(REV: JFG 03-08-10)R:/Projects/Newport/J0016/Graphics/EIR/ex4.6-2_Special_Status.pdf



Special Status Biological Resources — Exhibit 4.6-2

Sunset Ridge Park EIR

N W E S

500 250 0 500 Feet

BonTerra CONSULTING

(REV: JFG 03-08-10)R:/Projects/Newport/J0016/Graphics/EIR/ex4.6-2_Special_Status.pdf

CALIFORNIA COASTAL COMMISSION
Technical Services Division - GIS Unit

All Locations Approximate.
For Illustrative Purposes Only.
Source: BonTerra Consulting.

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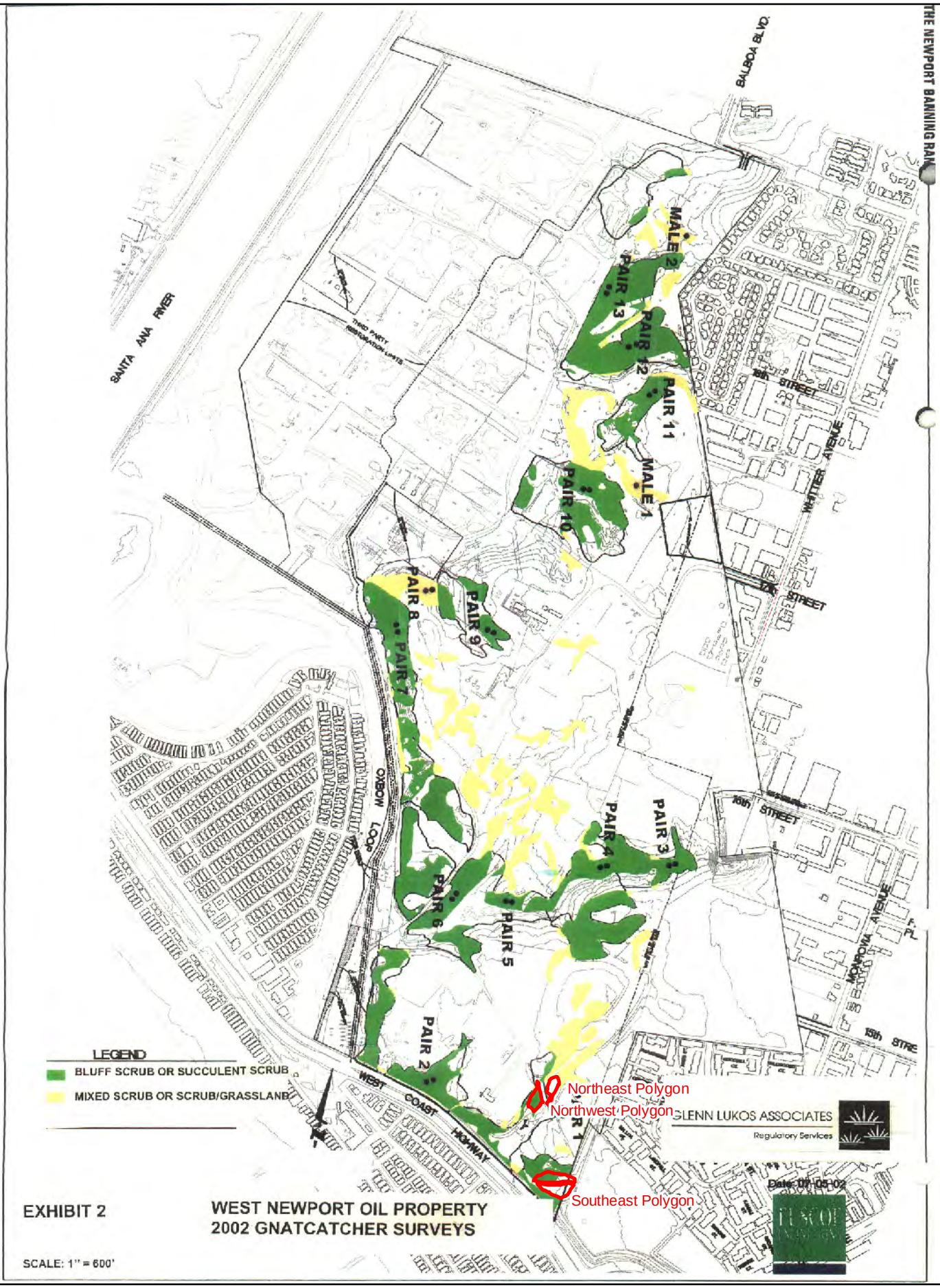
Figure 4

DSM 9/11



CALIFORNIA COASTAL COMMISSION
Technical Services Division - GIS Unit

Not To Scale.
All Locations Approximate.
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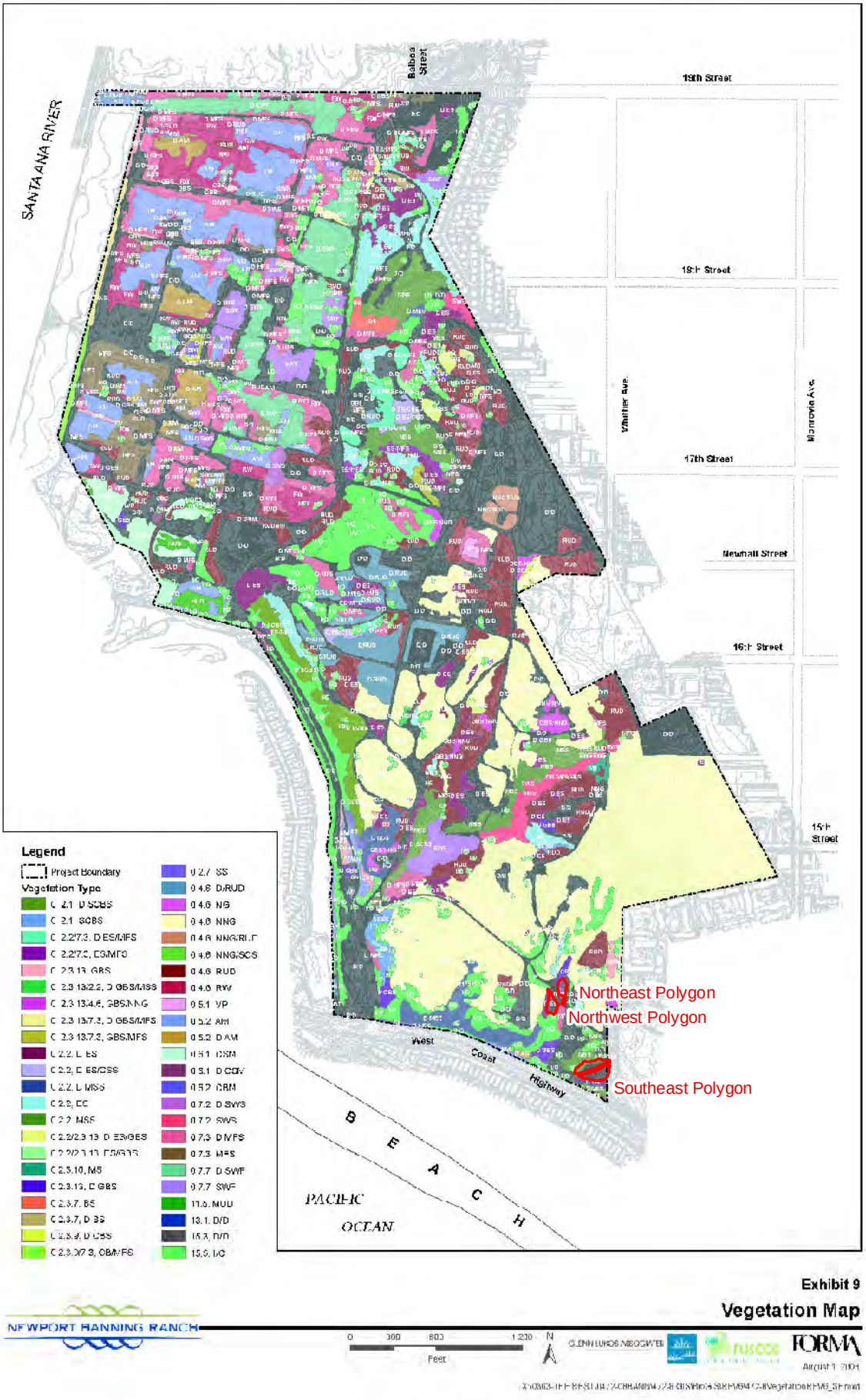
Figure 5

DSM 9/11



CALIFORNIA COASTAL COMMISSION
Technical Services Division - GIS Unit

Not To Scale.
All Locations Approximate.
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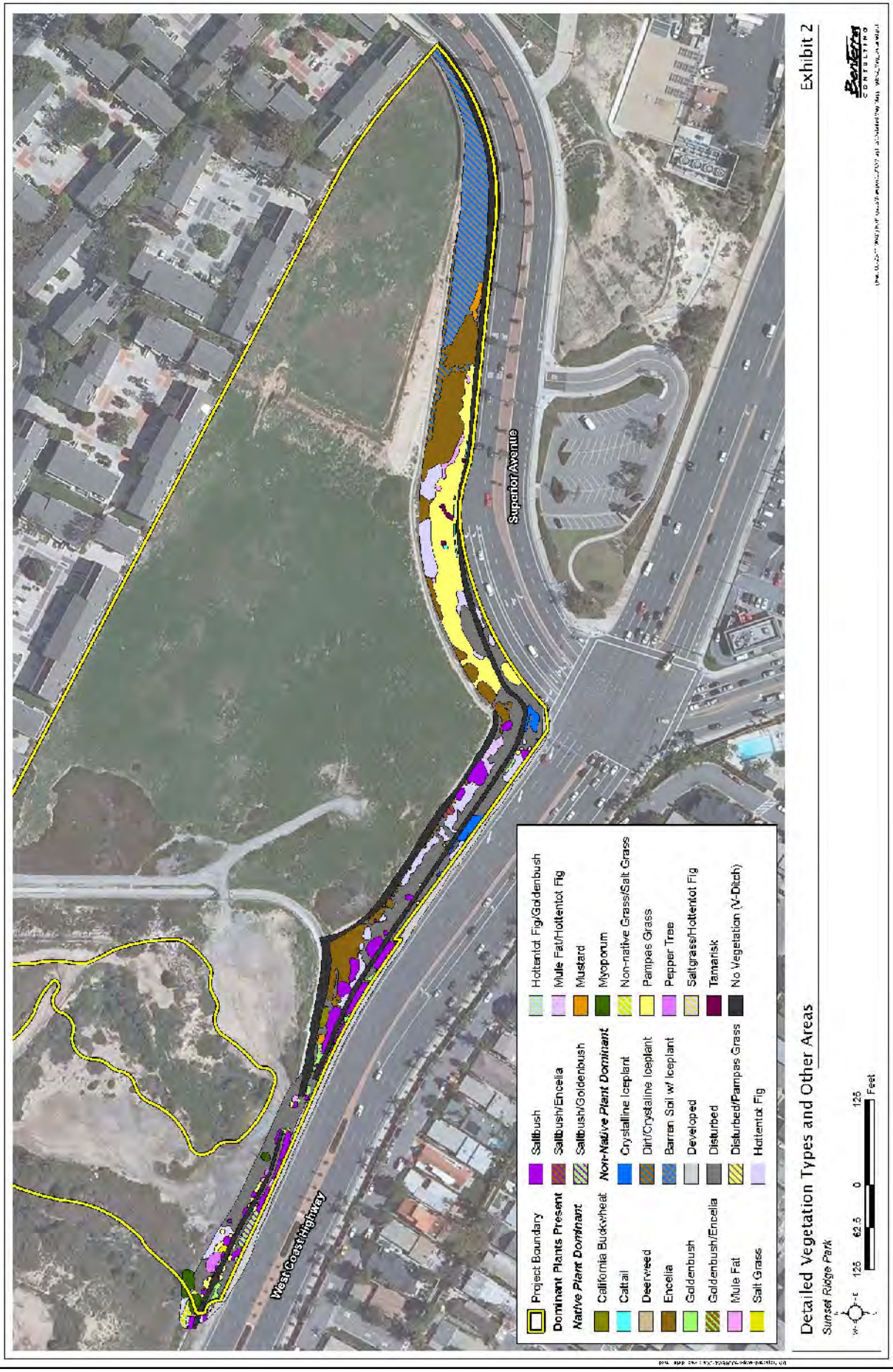
Figure 6

DSM 9/11



CALIFORNIA COASTAL COMMISSION
Technical Services Division - GIS Unit

All Locations Approximate.
For Illustrative Purposes Only.
Source: BonTerra Consulting.

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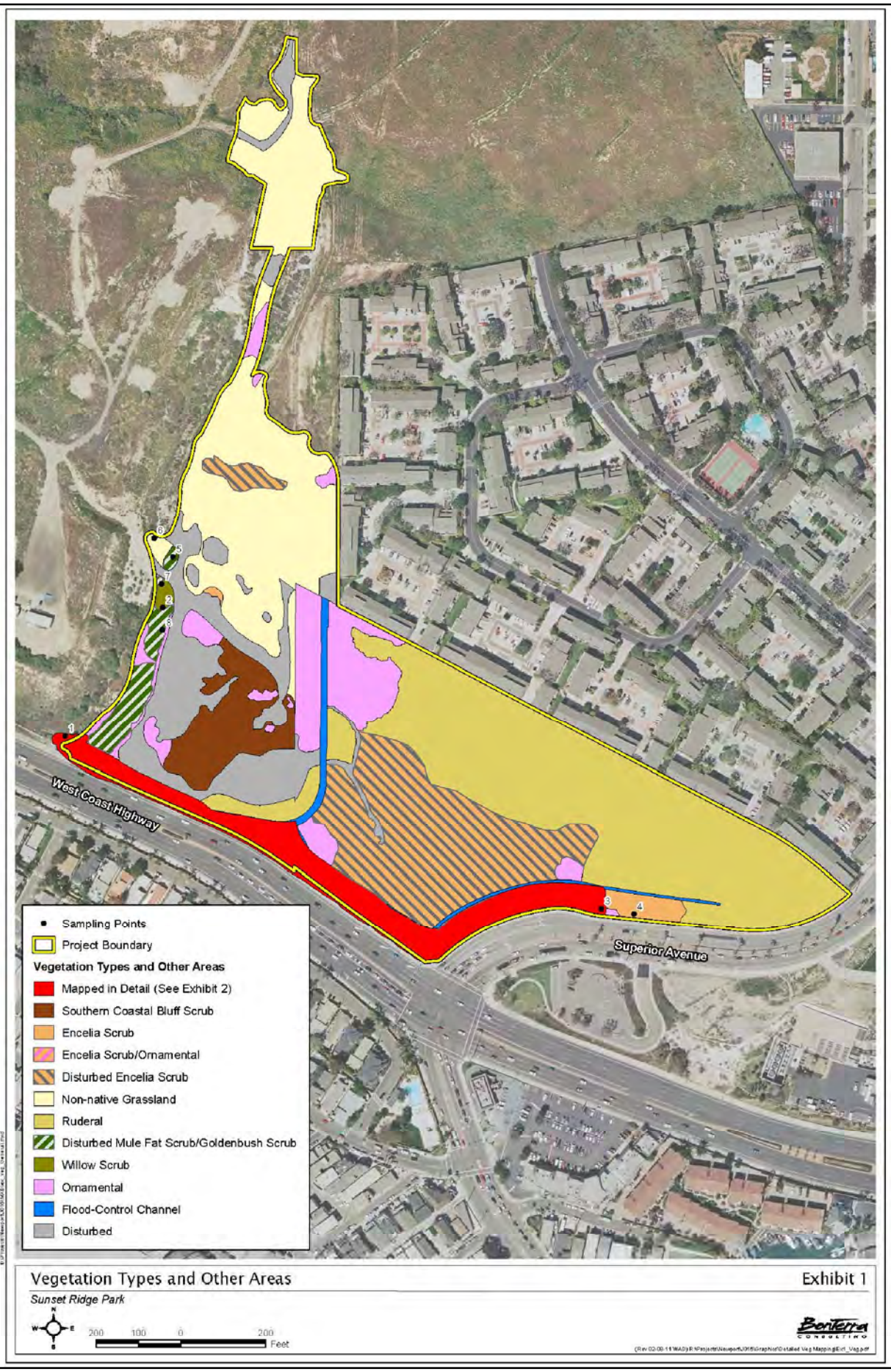
Figure 7

DSM 9/11



CALIFORNIA COASTAL COMMISSION
Technical Services Division - GIS Unit

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Source: BonTerra Consulting.

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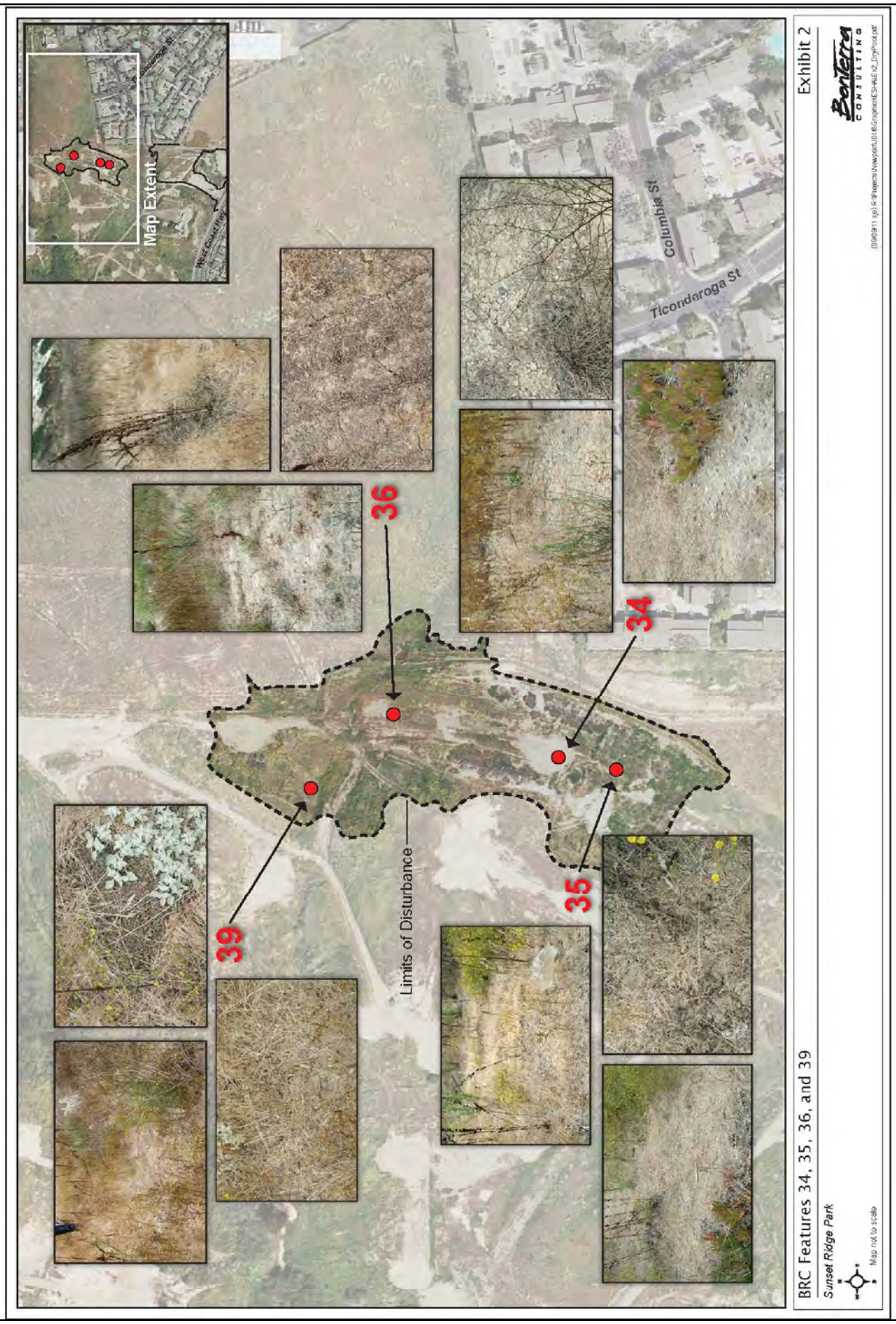
Figure 8

DSM 9/11



All Locations Approximate.
For Illustrative Purposes Only.
Source: BonTerra Consulting.

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Figure 9

DSM 9/11

Technical Services Division - GIS Unit

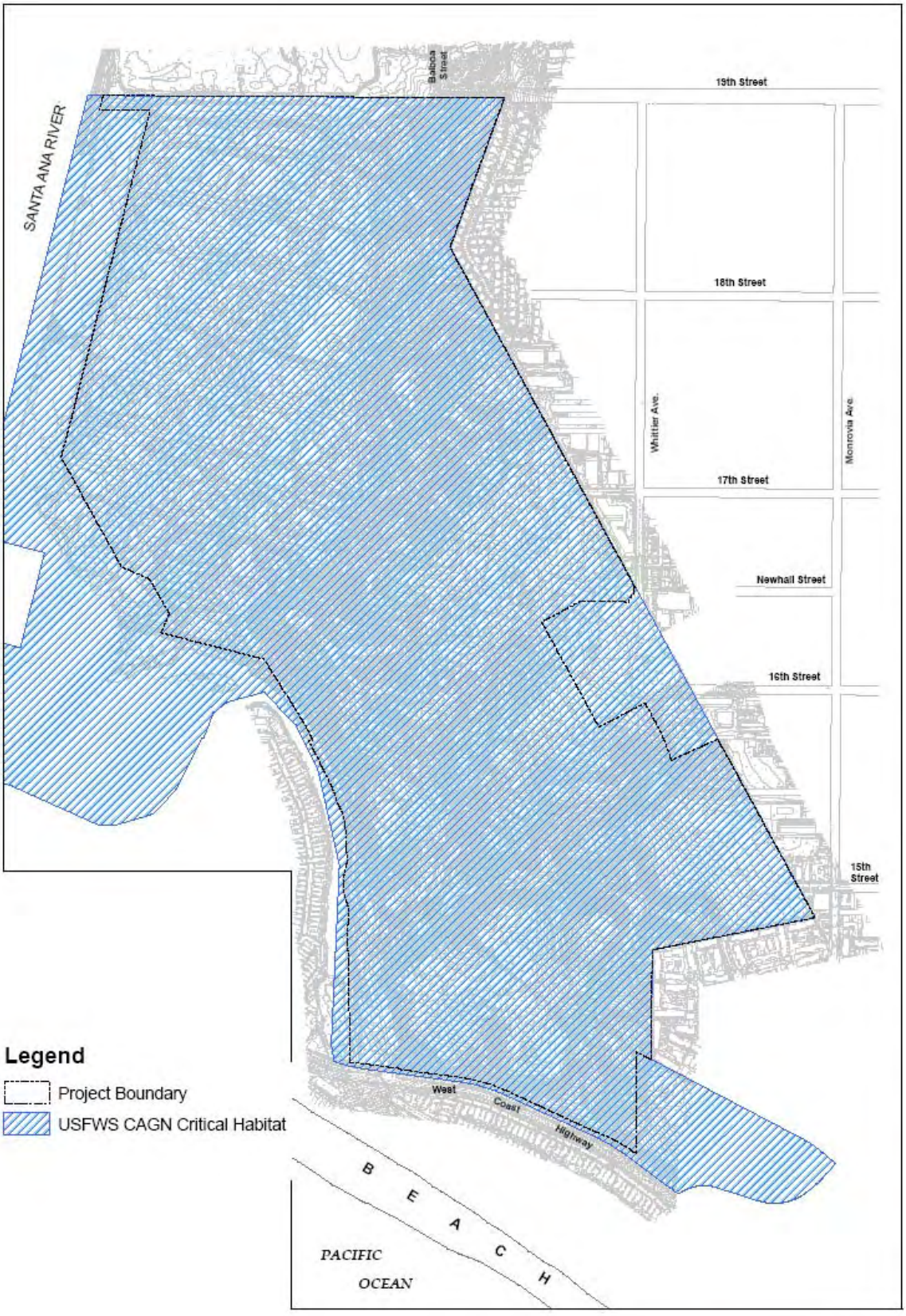


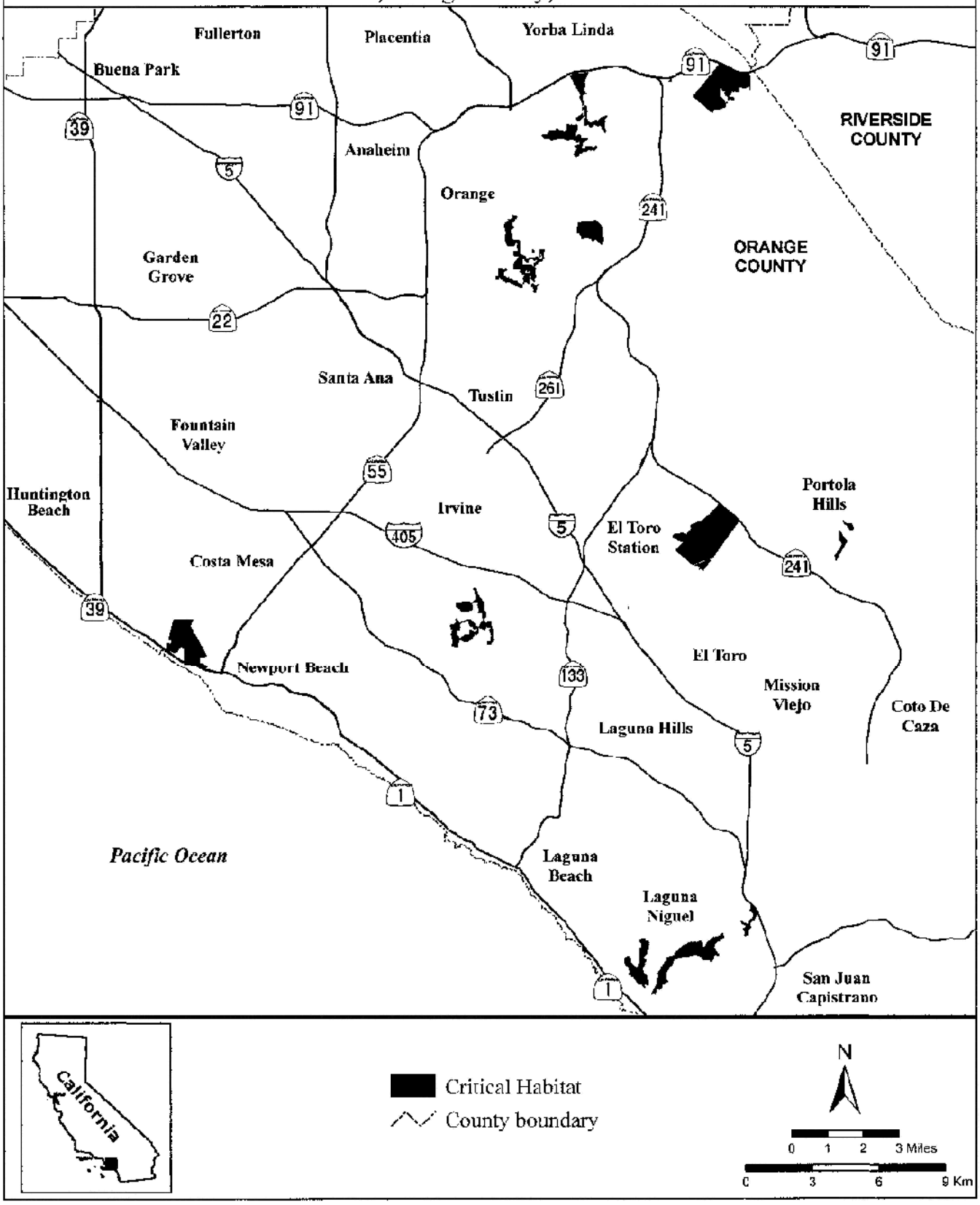
Exhibit 13

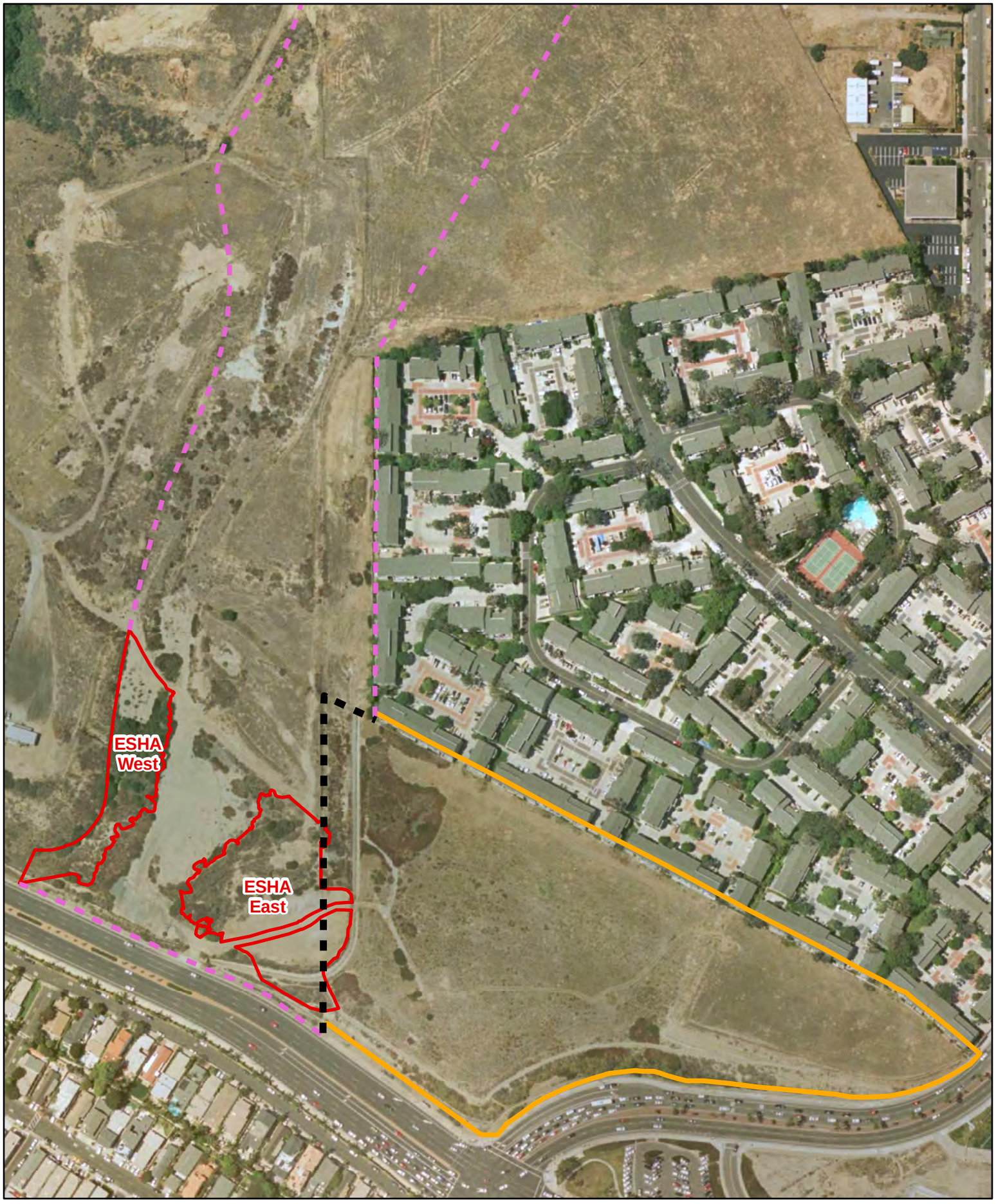
California Gnatcatcher Critical Habitat Unit Map

All Locations Approximate.
For Illustrative Purposes Only.
Source: Glenn Lukos Associates.

Figure 10

Map 7
Critical Habitat for Coastal California Gnatcatcher (*Polioptila californica californica*), Unit 7, Orange County, California





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All Locations Approximate.
For Illustrative Purposes Only.
Source: BonTerra Consulting, NAIP 2007.

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Figure 12

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Habitat from LSA (c. 1991)

- Annual Grassland (AG)
- Coastal Bluff Scrub (CBS)
- Mixed AG/CBS
- Disturbed Coastal Bluff Scrub (CBSD)
- Disturbed (DIST)
- Non-native Woodland (NNW)
- Palustrine, Scrub, Evergreen Baccharis (mulefat scrub) (PSEB)
- Ruderal Scrub (RS)

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Not To Scale.
All Locations Approximate.
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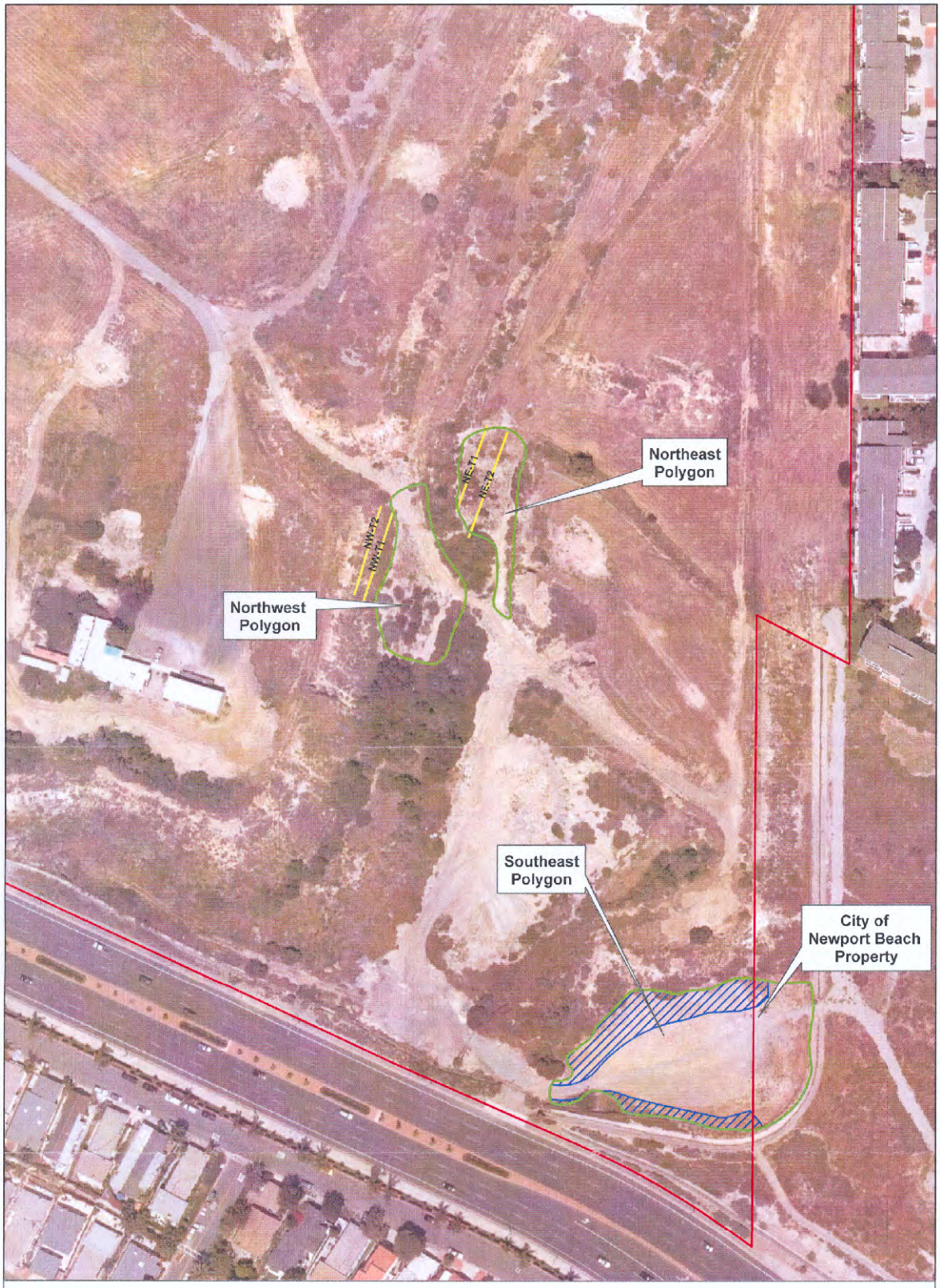
Sources: LSA, 1991.

Figure 13

DSM 9/11



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Not To Scale.
All Locations Approximate.
For Illustrative Purposes Only.

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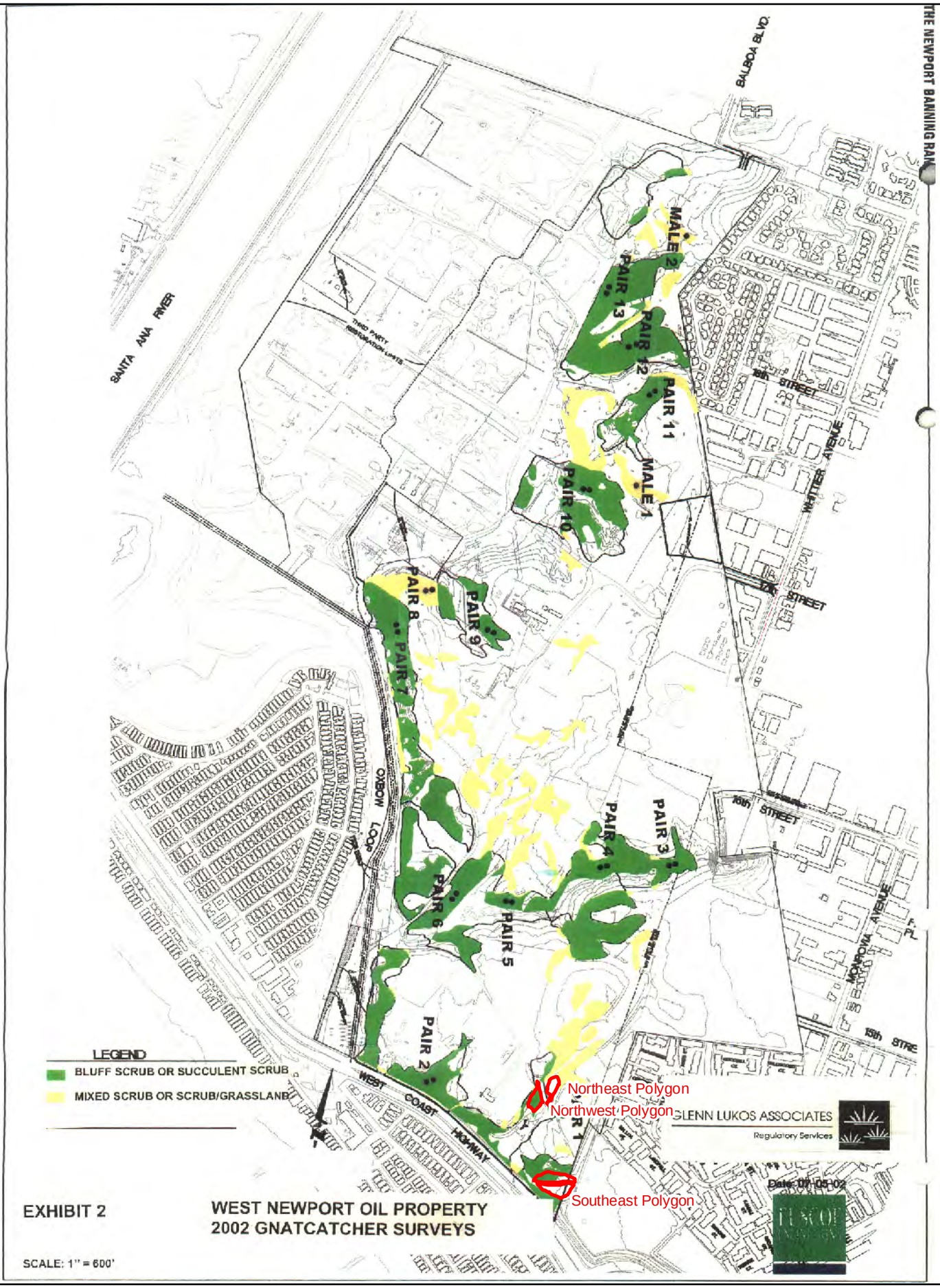
Figure 14

DSM 9/11



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Not To Scale.
All Locations Approximate.
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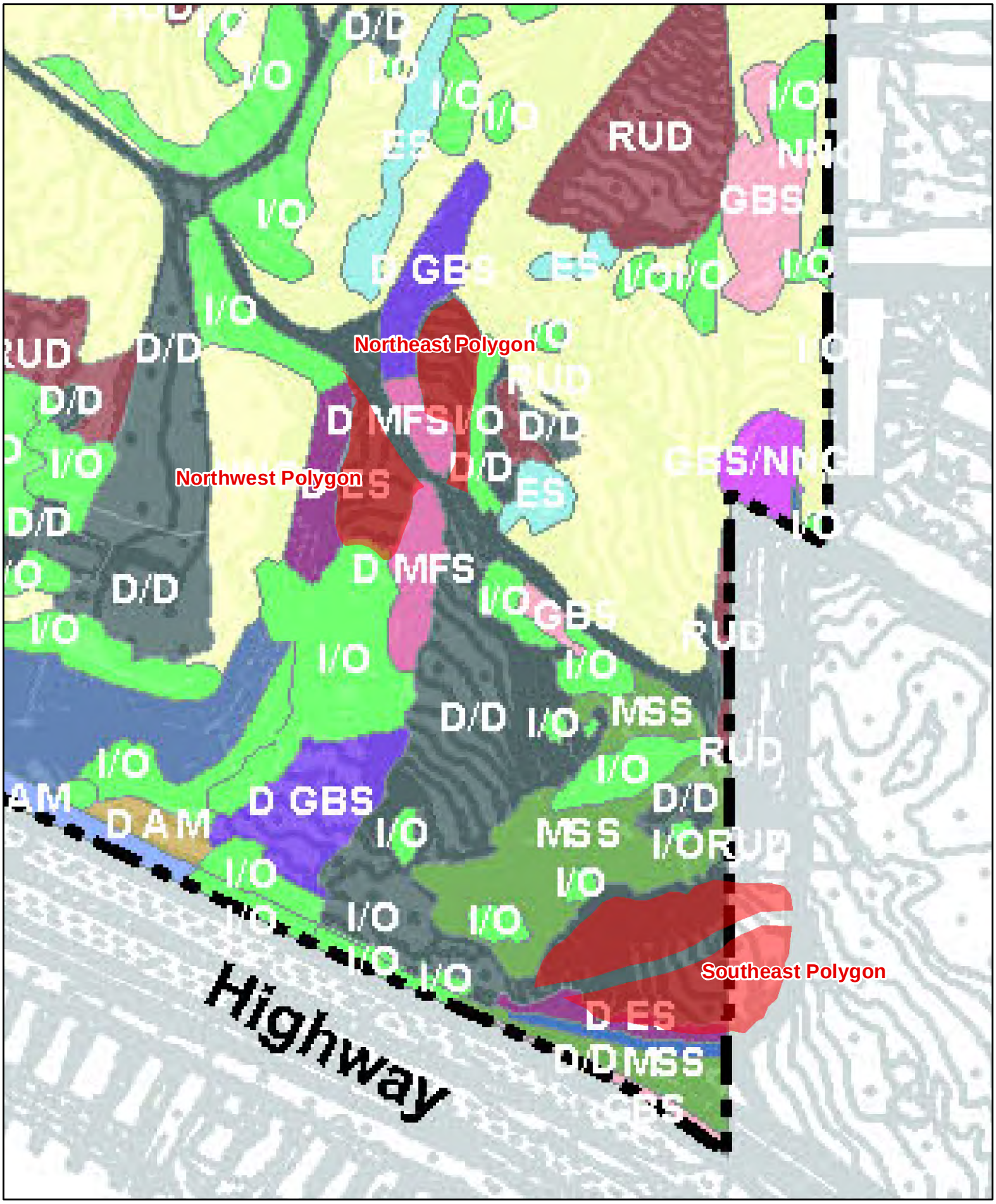
Figure 15

DSM 9/11



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Technical Services Division - GIS Unit

Not To Scale.
All Locations Approximate.
For Illustrative Purposes Only.
Source: Glenn Lukos Associates.

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Figure 16

DSM 9/11

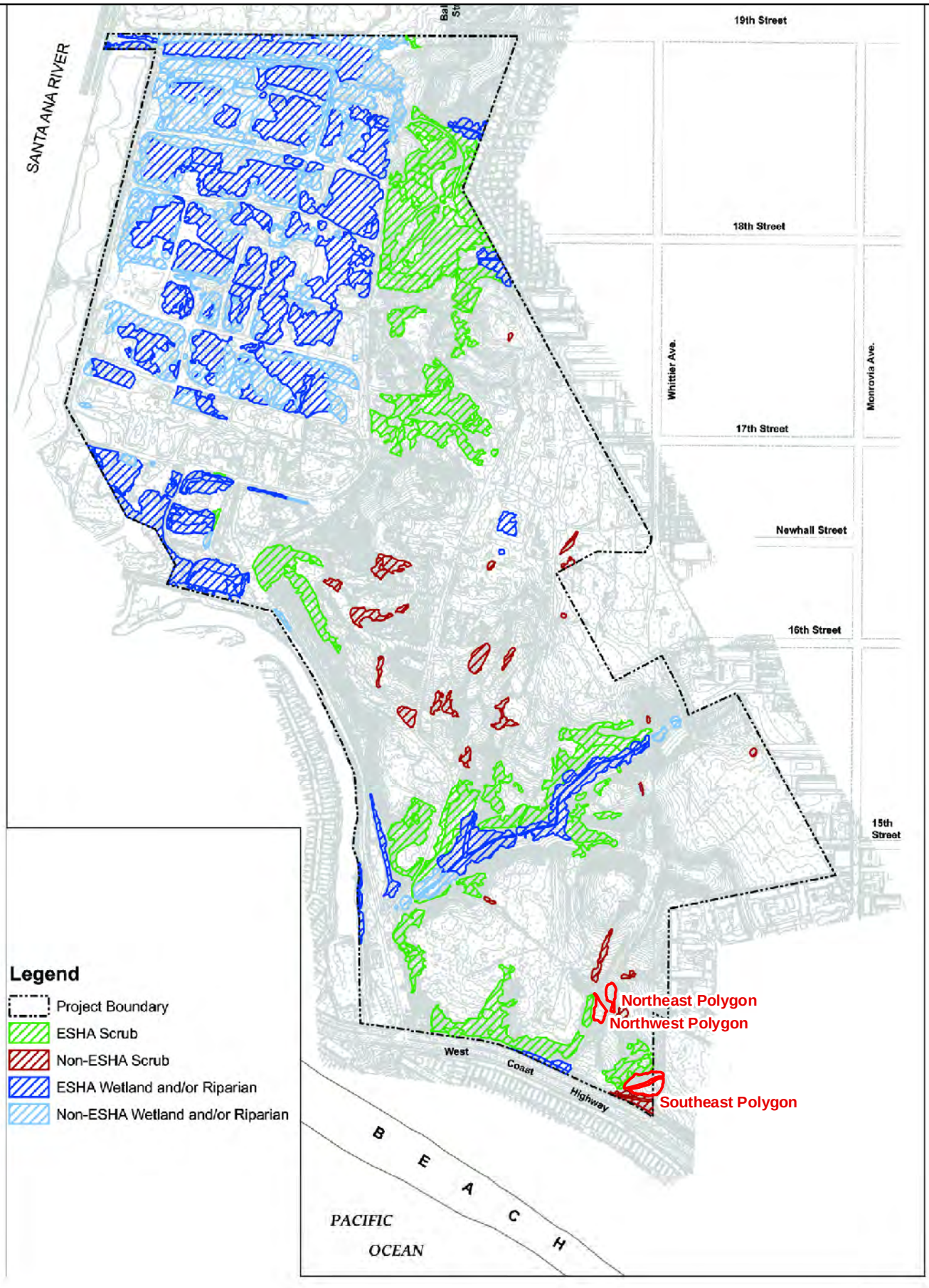

Exhibit 12

Environmentally Sensitive Habitat (ESHA) Map

CALIFORNIA COASTAL COMMISSION
Technical Services Division - GIS Unit

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All Locations Approximate.
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Figure 17

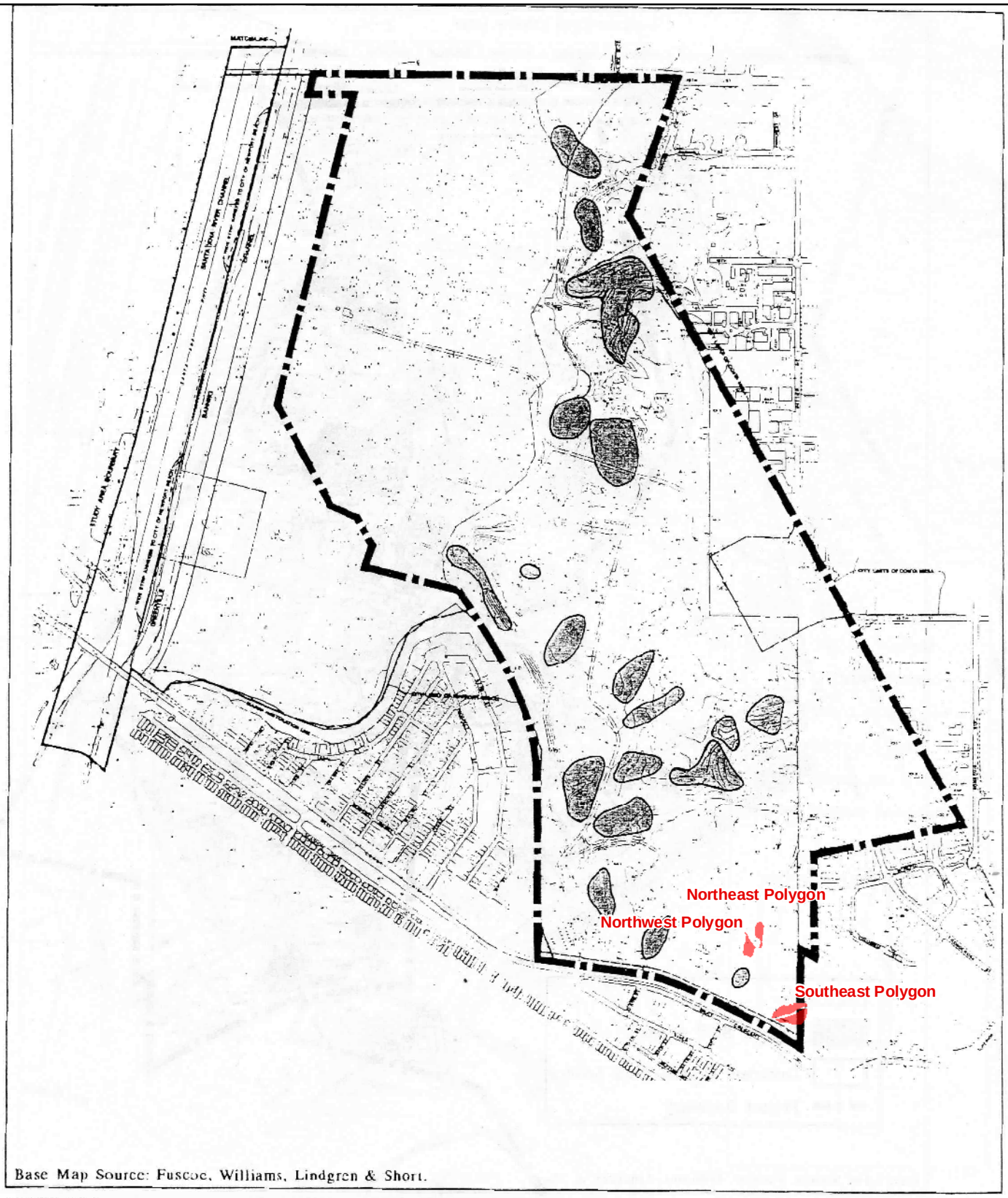
DSM 9/11

CALIFORNIA COASTAL COMMISSION
Technical Services Division - GIS Unit

Not To Scale.
All Locations Approximate.
For Illustrative Purposes Only.
Sources: GLA, LSA.

Figure 18

DSM 9/11



CALIFORNIA COASTAL COMMISSION
Technical Services Division - GIS Unit

Not To Scale.
All Locations Approximate.
For Illustrative Purposes Only.
Source: LSA 1992.

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Figure 19a

DSM 9/11

CALIFORNIA COASTAL COMMISSION
Technical Services Division - GIS Unit

Not To Scale.
All Locations Approximate.
For Illustrative Purposes Only.
Sources: LSA, 1992.

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Figure 19b

DSM 9/11

CALIFORNIA COASTAL COMMISSION
Technical Services Division - GIS Unit

Not To Scale.
All Locations Approximate.
For Illustrative Purposes Only.
Sources: LSA, 1993.

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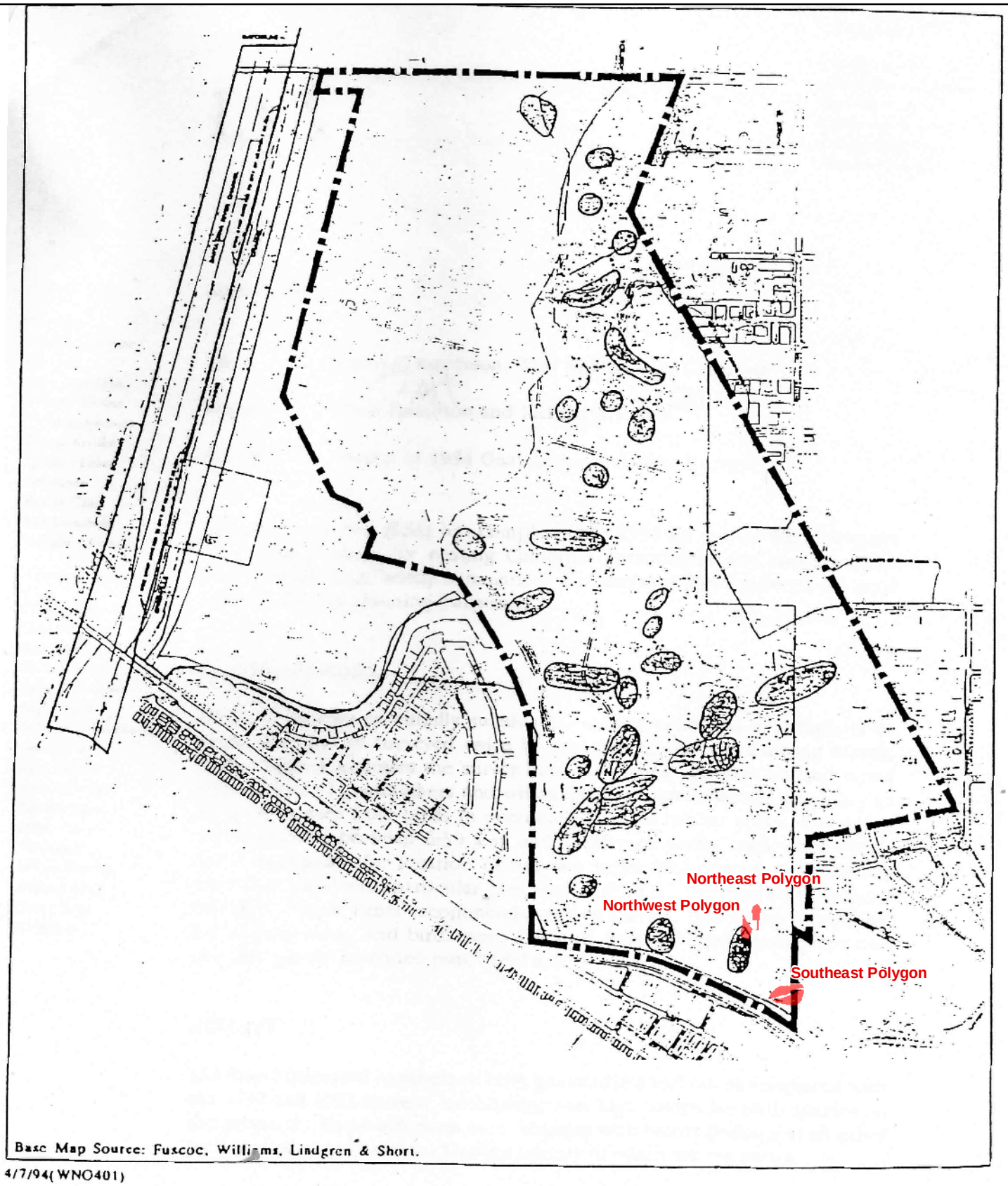
Figure 20

DSM 9/11



CALIFORNIA COASTAL COMMISSION
Technical Services Division - GIS Unit

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All Locations Approximate.
For Illustrative Purposes Only.
Source: LSA 1994.

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Figure 21a

DSM 9/11

CALIFORNIA COASTAL COMMISSION
Technical Services Division - GIS Unit

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All Locations Approximate.
For Illustrative Purposes Only.
Sources: LSA, 1994.

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Figure 21b

DSM 9/11

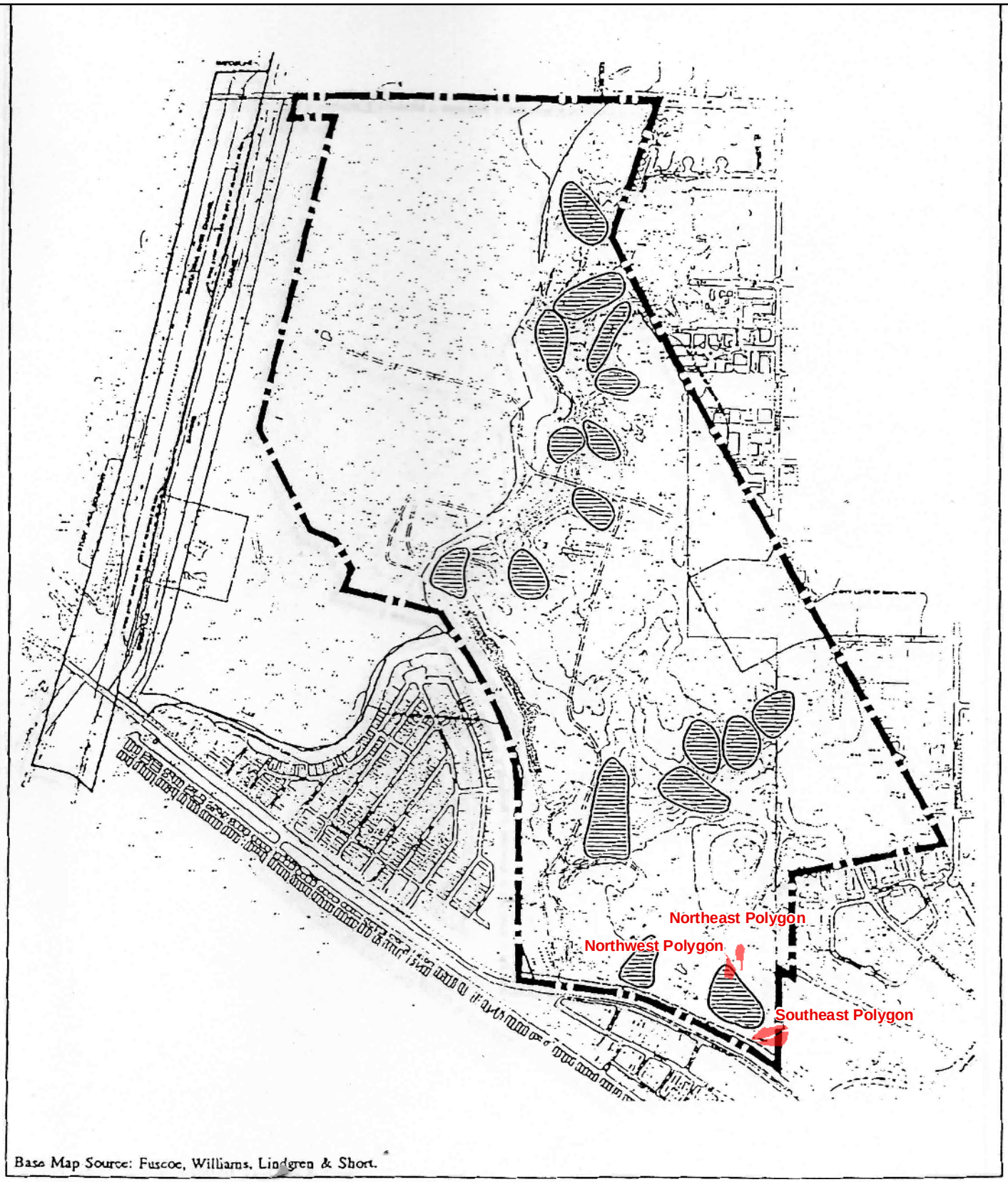

Figure 1

CALIFORNIA COASTAL COMMISSION
Technical Services Division - GIS Unit

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All Locations Approximate.
For Illustrative Purposes Only.
Source: LSA 1996.

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Figure 22a

DSM 9/11

CALIFORNIA COASTAL COMMISSION
Technical Services Division - GIS Unit

Not To Scale.
All Locations Approximate.
For Illustrative Purposes Only.
Sources: LSA, 1996.

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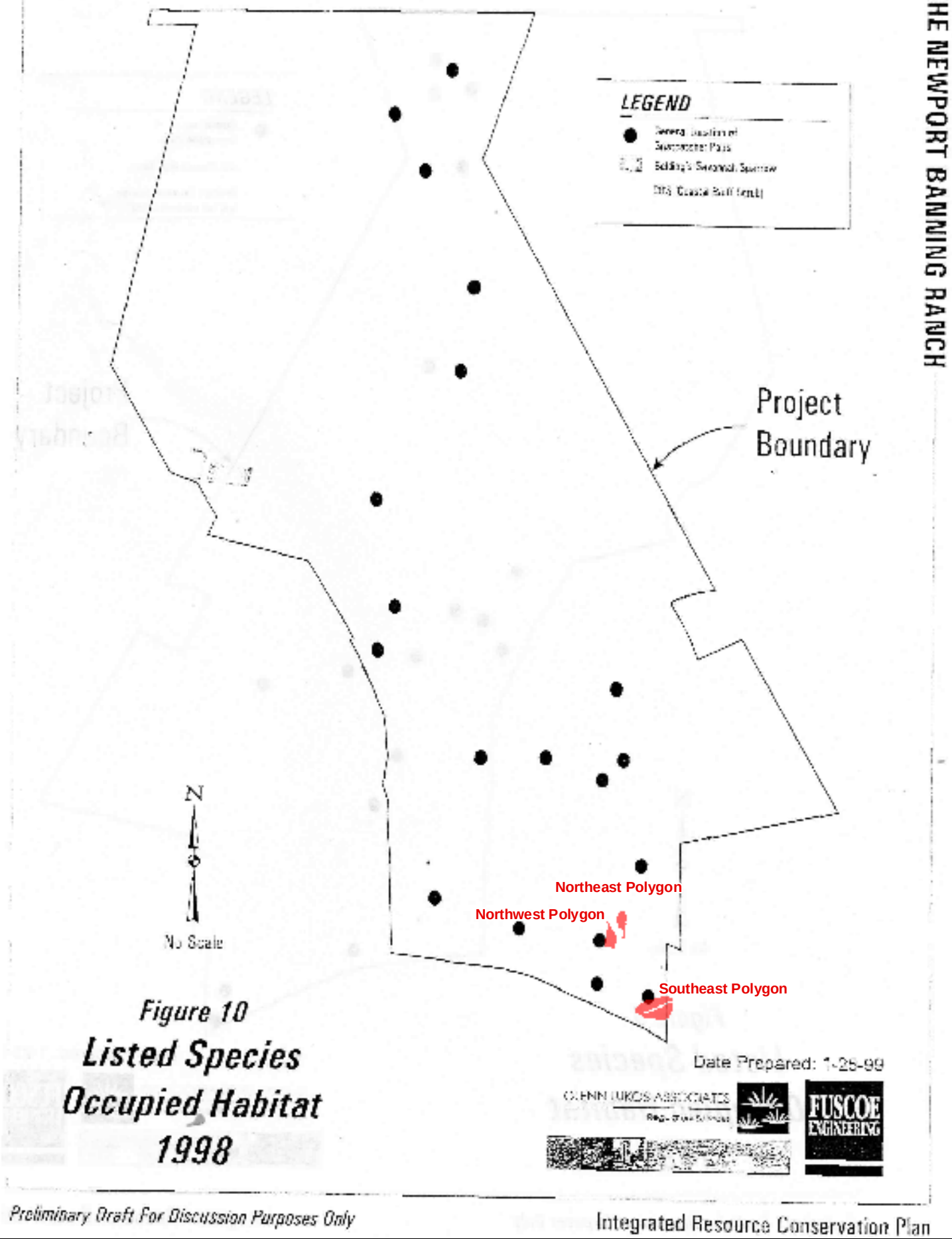
Figure 22b

DSM 9/11


THE NEWPORT BANNING RANCH
LEGEND
Project Boundary
N
No Scale
Northeast Polygon
Northwest Polygon
Southeast Polygon
Figure 10
Listed Species
Occupied Habitat
1998
Date Prepared: 1-25-99
FUSCOE ENGINEERING
Preliminary Draft For Discussion Purposes Only
Integrated Resource Conservation Plan

CALIFORNIA COASTAL COMMISSION
Technical Services Division - GIS Unit

Not To Scale.
All Locations Approximate.
For Illustrative Purposes Only.
Sources: GLA, 1998.

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Figure 23b

DSM 9/11

CALIFORNIA COASTAL COMMISSION
Technical Services Division - GIS Unit

Not To Scale.
All Locations Approximate.
For Illustrative Purposes Only.

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Figure 24

DSM 9/11

CALIFORNIA COASTAL COMMISSION
Technical Services Division - GIS Unit

Not To Scale.
All Locations Approximate.
For Illustrative Purposes Only.
Sources: GLA, 2002.

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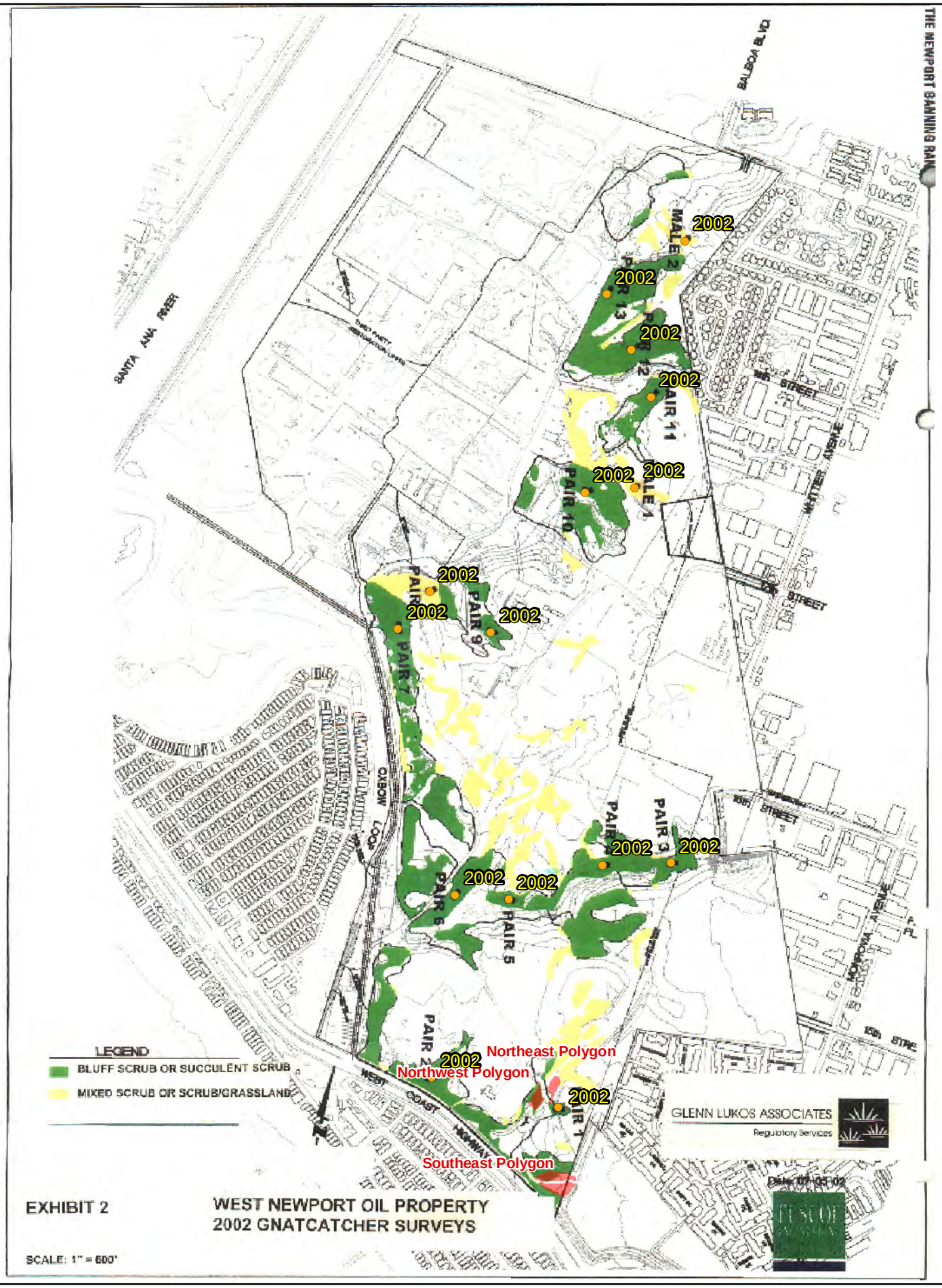
Figure 25a

DSM 9/11



Not To Scale.
All Locations Approximate.
For Illustrative Purposes Only.
Source: GLA 2002.

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Figure 25b

DSM 1/11

Technical Services Division - GIS Unit