

Alford, Patrick

From: Bruce Bartram [b.bartram@verizon.net]
Sent: Wednesday, October 26, 2011 10:54 AM
To: Alford, Patrick
Cc: robb@hamiltonbiological.com; knelson@web-conferencing-central.com; steve.banningranch@hotmail.com; margaret.royall@gmail.com; dobehave@earthlink.net; mamalili@pacbell.net; skyking965@earthlink.net; hbalig@yahoo.com; dodgeva@sbcglobal.net; rhschnur@aol.com; janeolinger@cox.net; rjmj1937@verizon.net; kristenbender0@gmail.com; wre2lef@sbcglobal.net; nagemot@pacbell.net; malawrence@lbcc.edu; valsanto@yahoo.com; nicolai@nicolaiglazer.com; malawrence@prodigy.net; beth@suply.com; sandyfazio@gmail.com; applelib@aol.com; tevishill@aol.com; dennis.mchale@pcm-inc.org; greenp1@cox.net; cblack949@hotmail.com; jimmosher@yahoo.com; pcmalkemus@gmail.com; ropc@sbcglobal.net; ftrapper@hotmail.com; paularms@socal.rr.com; evenkee14@sbcglobal.net; jimcassidy52@earthlink.net; ginnylombardi@yahoo.com; mikepowell@ca.rr.com; cheryl.johnston@hbcasd.k12.ca.us; a71673.1300@netzero.net; jamesrquigg@yahoo.com; winifree@earthlink.net; cmcevoy@dusd.net; techcowboy@ca.rr.com; blush1996@aol.com; davesutherland4@gmail.com; bnerhus@gmail.com; jp_seque@msn.com; powell.michael@aaa-calif.com; p.martz@cox.net; bmlserv@juno.com; jon_crawford@hurley.com; norbpuff@sbcglobal.net; j_shunda@yahoo.com; slgenis@stanfordalumni.org; christopherbunyan@yahoo.com; medjkraus@yahoo.com; sharon.boles@roadrunner.com; dardentrade@yahoo.com; alfredgcruz@sbcglobal.net; terry@tdpowell.com; shokobennett@gmail.com; swellmel4@juno.com; stephaniepa@socal.rr.com; susantheresalee@msn.com; jtmansfield@ca.rr.com; mtabbert15@gmail.com; mezzohiker@msn.com; dkoken@hmausa.com; terrymwelsh@hotmail.com; jenniferfrutig@aol.com
Subject: Newport Banning Ranch DEIR Comment II
Attachments: NB General Plan Banning Ranch Development Constraints.pdf; NBR DEIR Master Development Plan.pdf; USFWS CAGN Critical Habitat.jpg; USFWS NBR Fairy Shrimp Map.pdf; NBR DEIR Vernal Pool Interpretive Area.pdf; NBR DEIR Comment Letter I 101411.pdf

October 26, 2011

Sent via US Mail and email

Patrick J. Alford, Planning Manager
City of Newport Beach, Community Development Department
3300 Newport Boulevard
P.O. Box 1768
Newport Beach, CA 92658-8915

Re: Newport Banning Ranch DEIR Comment II

Dear Mr. Alford:

The Newport Banning Ranch DEIR claims the Newport Banning Ranch Project (NBR) is consistent with the City of Newport Beach's General Plan Land Use Element regarding Banning Ranch. Specifically, Land Use Goal LU 6.4 which states: "If acquisition (of Banning Ranch) is not successful, a high-quality residential community with supporting uses that provides revenue to restore and protect wetlands and important habitats."

The NBR DEIR then states that the proposed residential units, retail commercial uses and overnight accommodations to be constructed are consistent with the following NB General Plan Land Use Policies:

"LU 6.4.2 Residential

Accommodate a maximum of 1,375 residential units, which shall consist of a mix of single-family detached, attached, and multi-family units to provide a range of choices and prices for residents.

LU 6.4.3 Retail Commercial

Accommodate a maximum of 75,000 square feet of retail commercial uses that shall be oriented to serve the needs of local and nearby residents.

LU 6.4.4 Overnight Accommodations

Accommodate a maximum 75 rooms in a small boutique hotel, "bed and breakfast," or other overnight accommodations."

However, on Pg. 3-75 of the Newport Beach General Plan Land Use Element it is stated that the above Banning Ranch development capacities "represent general development capacity estimates, with the property's ultimate development footprint and capacity determined through required federal and state regulatory environmental permitting processes and a planned community development plan approved by the City of Newport Beach."

On Pgs. 3-66-3-76 the Newport Beach General Plan Land Use Element discusses Banning Ranch. On Pgs. 3-67-3-70 the development constraints affecting Banning Ranch are discussed. These included the presence of "habitat and species" in areas likely to require "resource permitting" with "the actual acreage subject to environmental permitting will be determined in subsequent studies to be conducted in accordance with state and federal regulations." Additionally, on Pg 3-70 additional development constraints affecting Banning Ranch including bluff areas "forming a important visual backdrop from West Coast Highway....arroyos with riparian habitats andbluff face geology...highly erodible and has experienced sliding over the years. Figure LU 17 illustrates these constraints."

On Pg. 77 of the Newport Beach General Plan Land Use Element concludes its discussion of Banning Ranch with "LU 6.5.6 Coordination with State and Federal Agencies." This section states:

"Work with appropriate state and federal agencies to identify wetlands and wildlife habitats to be preserved and/or restored and those on which development will be permitted." (Emphasis added).

Attached is Figure LU17 from the City of Newport Beach General Plan which illustrates Banning Ranch Building Constraints. As you can see, Banning Ranch is listed as totaling 518 acres, with "development constraints" equaling 302 acres with the remaining 216 acres as "total buildable area." This diagram is stated to have been prepared on "3/24/06." As noted above in the General Plan "the ultimate development footprint and capacity determined through required federal and state regulatory environmental permitting processes..." Thus, LU17's conclusion of 216 acres of buildable area on Banning Ranch was preliminary only, subject to actions by state and federal environmental regulatory agencies.

Next attached, is NBR DEIR Exhibit 3-15 the Master Development Plan for the project. As noted above, the NBR Project calls for the construction of the maximum number of "residential units" (1,375), the maximum square feet number of "retail commercial" (75,000), and the maximum number of "overnight accommodations" (75 rooms) allowed under the General Plan which was adopted in 2006. A visual comparison of LU17 and Exhibit 3-15 reveals the NBR project "builds" in every area of Banning Ranch not "constrained" under the General Plan LU17. Nowhere in the NBR DEIR is LU17 mentioned or referenced in any way. In any event, the conclusion the NBR DEIR wishes the public to draw is that no federal or state environmental regulatory actions have occurred since 2006 that have affected the "development constraints" on Banning Ranch and reduced the lawful "buildable area" for any NBR project on the property. In fact, as shown below there have been multiple state and federal agency environmental regulatory actions affecting the "buildable area" on Banning Ranch since the General Plan was adopted in 2006.

Next attached is my NBR DEIR Comment I emailed and mailed October 14, 2011 to you. I incorporate by reference here the comments contained therein. In brief, as you can see the comment references environmental regulatory actions concerning Banning Ranch by the state and federal agencies specifically, the California Coastal Commission and the United States Fish and Wildlife Service. As discussed in the 10/14/11 comment on April 14, 2011 hearing, the Coastal Commission approved Consent Cease and Desist Order No. CCC-11-CD-03 and Consent Restoration Order No. CCC-11-RO-02 against the Newport Banning Ranch property owners and the City of Newport Beach (owners of adjacent property - site of the proposed Sunset Ridge Park).

That order, among other things, required both the NBR and the City to restore habitat on the subject properties by planting coastal sage scrub vegetation native to Orange County that will provide foraging and breeding habitat for the coastal

California gnatcatcher. As part of the Consent Orders the City and NBR agreed that for purposes of the enforcement action the restored constituted environmentally sensitive habitat areas (ESHA) as defined by the Coastal Act (Public Resources Code 30000 et seq.) and subject to special protections under Public Resources Code 30240.

In addition, as part the CCC Staff Report prepared for April 14, 2011 hearing was the Memorandum prepared for the Coastal Commission by Dr. Jonna Engels dated March 31, 2011. The Memorandum concerns "Newport Banning Ranch NOV (Notice of Violation) Subject Development ESHA Determination. On Pg. 7 of the Memorandum, Dr Engels indicates that the United States Fish and Wildlife Service (USFWS) in 2007 "designated all of Newport Banning Ranch as critical habitat for the California gnatcatcher", a federally protected endangered species under Endangered Species Act. The Memorandum further states that [I]n designating Newport Banning Ranch Ranch as critical habitat, the USFWS noted that the area was occupied by gnatcatchers at the time of the listing and at the time of designation of critical habitat and the area "contains all of the features essential to the conservation of the coastal California gnatcatcher." A copy of the California Gnatcatcher Critical Habitat Map designating both Newport Banning Ranch and the City's Sunset Ridge Park properties is attached for your review.

In addition to above environmental regulatory actions by the Coastal Commission and the USFWS affecting "building area" on Banning Ranch is the 2007 USFWS action designating 15 acres of Banning Ranch as critical habitat for the San Diego Fairy Shrimp, a federal protected endangered species.

The following is a weblink to a page in the Federal Register which contains federal regulations promulgated by federal agencies:<http://www.federalregister.gov/articles/2007/12/12/07-5972/endangered-and-threatened-wildlife-and-plants-designation-of-critical-habitat-for-the-san-diego#p-25>. The webpage announces a rule by the USFWS effective January 11, 2008 as follows:

"We, the U.S. Fish and Wildlife Service (Service), are designating revised final critical habitat for the San Diego fairy shrimp (*Branchinecta sandiegonensis*) under the Endangered Species Act of 1973, as amended (Act). Approximately 3,082 acres (ac) (1,248 hectares (ha)) of habitat in Orange and San Diego counties, California, are being designated as critical habitat for the San Diego fairy shrimp. This revised final designation constitutes a reduction of 943 ac (382 ha) from the 2000 designation of critical habitat for the San Diego fairy shrimp."

One of the areas designated as critical habitat is Newport-Banning Ranch. It states:

"Subunit 1C: Newport-Banning Ranch

We are designating subunit 1C as critical habitat for the San Diego fairy shrimp. Subunit 1C consists of 15 ac (6 ha) of habitat occupied by the species at the time of listing and the species continues to occur within this subunit. This subunit contains all of the features essential to the conservation of the species. It is located south of the Santa Ana River, 2 mi (3 km) inland from the coast. Subunit 1C consists of privately owned land. (Emphasis added)

The vernal pool complex at Newport-Banning Ranch is one of only five known vernal pool complexes containing the San Diego fairy shrimp in Orange County. This vernal pool complex and the vernal pool complex at Fairview Park (subunit 1B) represent the only remaining examples of coastal vernal pools in Orange County. Subunit 1C is closed to recreational use; however, this area has been degraded by past activities and may face future impacts from the development of this site and/or its watershed. The PCEs(primary constituent elements) in this critical habitat subunit may require special management considerations or protection to address threats from development activities and nonnative species that may negatively impact the San Diego fairy shrimp, its PCEs, and its habitat. (Emphasis added)

The map -Subunit 1C- depicting the 15 acres of Banning Ranch designated as critical habitat is attached. As you can see, it's a huge chunk of NBR. A review of the Biological Resources Section 4.6 of NBR DEIR reveals no mention of this USFWS critical habitat designation. In fact, on Pg 4.6-34 Table 4.6-5 lists only "0.500 total acres" as "pools/ponded areas supporting San Diego Fairy Shrimp on the Project Site." Further, on Pgs. 4.6-69-70 the NBR DEIR discusses vernal pools occupied by the San Diego fairy shrimp. It concludes by talking about a Mitigation Measure involving "the restoration and preservation of a 3.58-acre vernal pool complex..." A copy of NBR DEIR Exhibit 4.8-8 "Nature Center & Vernal Pool Interpretive Area Development Plan" is attached. As you can see, when comparing the USFWS critical habitat map with the NBR DEIR Vernal Pool Exhibit reveals the proposed "pool" to be north of the USFWS 15 acres critical habitat.

Instead, the USFWS 15 acres appears to encompass all of the "North Family Village" development shown on the NBR Master Development Plan Exhibit 3-15.

Again, no mention anywhere in the NBR DEIR appears regarding the Coastal Commission Restoration Order and/or the USFWS designations of Banning Ranch as critical habitat for the California Gnatcatcher and San Diego Fairy Shrimp, both federally protected endangered species. Thus, no discussion occurs in the NBR DEIR concerning how these "federal and state" environmental regulatory actions affect the "buildable area" permissible on Banning Ranch under the General Plan. In addition, NBR DEIR's non-disclosure of the Coastal Commission and USFWS actions regarding Banning Ranch show a clear violation of Newport Beach General Plan Land Use Element "LU 6.5.6 Coordination with State and Federal Agencies" discussed above. Once again, the section states:

"Work with appropriate state and federal agencies to identify wetlands and wildlife habitats (on Banning Ranch) to be preserved and/or restored and those on which development will be permitted." (Emphasis added).

Lastly, it should be noted the while the NBR DEIR contains no discussion concerning the USFWS actions the NBR Biological Technical Report contains two brief references concerning its action regarding the San Diego Fairy Shrimp and the California Gnatcatcher. The Biological Technical Report is part of the NBR Appendices and is posted online only with no "hard copy" circulated and available for public review. In any event, on Pg. 50 of the Biological Technical Report it is briefly stated:

"On December 12, 2007, the USFWS published a final rule designating 3,082 acres of land as critical habitat for the San Diego fairy shrimp in San Diego and Orange Counties (USFWS 2007b). The Project site is located in final critical habitat Unit 1, Subunit C for San Diego fairy shrimp."

And on Pg. 67 of the Biological Technical Report it is briefly stated:

"On December 19, 2007, USFWS published a Final Rule revising critical habitat for the coastal California gnatcatcher. The revised critical habitat designates 197,303 acres of land in Ventura, Los Angeles, Orange, Riverside, San Bernardino and San Diego Counties (USFWS 2007a). The Project site is within the revised critical habitat (Unit 7) for this species."

No description concerning how much of Banning Ranch is designated as critical habitat is disclosed in either entry. So instead of honest disclosure and discussion of the USFWS actions in the NBR DEIR are these buried references located on line only in the NBR DEIR Appendices. In NBR DEIR Section 2.2.1 "Standards of Adequacy Under CEQA" it is stated in pertinent part:

"The courts have not looked for perfection but for adequacy (in an EIR), and good faith effort at full disclosure."(Emphasis added).

In conclusion, the omissions in the NBR DEIR listed in this and my 10/14/11 comment demonstrate a complete lack of a "good faith effort at full disclosure" of the environmental impacts of the NBR Project.

Very truly yours,

Bruce Bartram

2 Seaside

Circle

Newport Beach, CA 92663



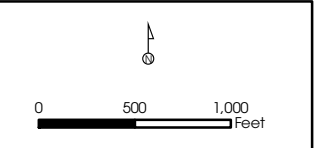
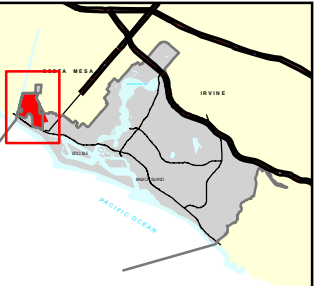
CITY OF NEWPORT BEACH
 GENERAL PLAN
 Figure LU17
**BANNING RANCH
 DEVELOPMENT
 CONSTRAINTS**

Legend

-  Sub-Area
-  Bluff*
-  Earthquake Setback Zone
-  Habitat Value Ranking**
-  Habitat Restoration Area

Notes:
 * Bluff includes 100 foot buffer
 ** Resource permitting required and/or areas where additional surveys are required to determine significance of resources; includes a 50 foot buffer

Banning Ranch=518 acres
 Development Constraints=302 acres
 Total Buildable Area=216 acres



Source: City of Newport Beach and EIP Associates
 PROJECT NUMBER: 10579-01
 Date: 3/24/06





Source: FORMA 2011

Master Development Plan

Exhibit 3-15

Newport Banning Ranch EIR



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October 14, 2011

Sent via US Mail and email

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Re: Newport Banning Ranch DEIR Comment 1

Dear Mr. Alford:

According to the Newport Banning Ranch draft Environmental Impact Report Sections 2.0 Introduction:

"This Environmental Impact Report (EIR) has been prepared to evaluate the potential environmental impacts associated with the construction and implementation of the proposed Newport Banning Ranch Project (Project). The EIR has been prepared in conformance with the California Environmental Quality Act (CEQA) (California Public Resources Code [PRC] Sections 21000 et seq.) and the State CEQA Guidelines (Title 14, California Code of Regulations (CCR), Chapter 3, Sections 15000 et seq.)...

The City of Newport Beach (City) is the "public agency which has the principal responsibility for carrying out or approving the project" and as such, is the "Lead Agency" for this Project under CEQA (14 CCR 15367). CEQA requires the Lead Agency to consider the information contained in an EIR prior to taking any discretionary action. This EIR is intended to provide information to the Lead Agency and other public agencies, the general public, and decision makers regarding the potential environmental impacts from the construction and operation of the proposed Project.

The City, as the Lead Agency, will review and consider this EIR in its decision to approve, revise, or deny the proposed Project... Pursuant to CEQA, "[t]he purpose of the environmental impact report is to identify the significant effects on the environment of a project,

to identify alternatives to the proposed project, and to indicate the manner in which significant environmental effects can be mitigated or avoided.(PRC 21002.1(a)." (Emphasis added)

PRC 21002.1 contains policies the State Legislature declares "shall apply to the use of environmental impact reports" prepared under CEQA. PRC 21002.1(b) contains another such mandated policy: "Each public agency shall mitigate or avoid the significant effects on the environment of projects that it carries out or approves whenever it is feasible to do so." (Emphasis added)

In the Newport Banning Ranch (NBR) draft Environmental Impact Report (DEIR) Section 4.1 Land Uses and Related Planning Programs states that CEQA and the State CEQA Guidelines require that land use issues be evaluated as part of the environmental impact analysis process." One such land use issue is the impact the California Coastal Act (PRC 30000 et seq.) will have on the Project. The California Coastal Act provides a comprehensive scheme to govern land use planning for the entire coastal zone of California. One of its goals is to protect, maintain, and where feasible, enhance and restore the overall quality of the coastal zone. The Coastal Act creates a shared responsibility between local governments and the California Coastal Commission for the planning of coastal development.

The Coastal Act reflects a strong rule of policy, adopted for the benefit of the public that implicates matters of vital interest. The Act provides heightened protection for areas that are designated environmentally sensitive habitat areas (ESHA) and establishes strict preferences and priorities that guide development in them (PRC 30240). *Hines v. California Coastal Commission* (2010) 186 Cal. App. 4th 830; *McAlister v. California Coastal Commission* (2008) 169 Cal. App. 4th 912.

Public Resources Code 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.

Given the mandate under the Coastal Act regarding protections to environmentally sensitive habitat areas (ESHA) and the restrictions on development in and adjacent to them described above one should expect a detailed analysis regarding the presence, extent, project impacts on and mitigation measures concerning ESHA in the project site in the NBR DEIR. Instead, on Pg. 4.1-6 of the Land Use and related Planning Programs Section of the DEIR, it states as follows:

"California Coastal Act Environmentally Sensitive Habitat Areas and Guidelines

The California Coastal Act protects important coastal biological resources including wetlands, riparian habitats, and other areas defined as environmentally sensitive habitat areas (ESHAs) by the Coastal Commission. Section 30107.5 of the California Coastal Act defines ESHA 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." Because the Project site is within the boundary of the Coastal Zone, the Coastal Commission would evaluate the proposed Project relative to (1) potential impacts to ESHAs (as defined under Section 30107.5 of the California Coastal Act and (2) guidance from the Newport Beach CLUP. The Coastal Commission determines whether a property contains ESHA." (Emphasis added)

The NBR DEIR, thus "defers" the determination of any ESHA on the Project and of any Project environmental impacts on such ESHA for another public agency -the Coastal Commission- to another environmental review proceeding- the requirement that the NBR Project obtain a coastal development permit (CDP) from the Commission under the Coastal Act. This ESHA avoidance position of the NBR DEIR is further confirmed NBR DEIR Biological Resources Section 4.6. As part of Section 4.6, Table 4.6-10 Summary on Pg. 4.6-102 lists the project's consistency with regarding biological resources with the Coastal Act specifically Section 30240. Once again, Section 30240 protects ESHA and restricts adjacent development. Not surprisingly, it finds the project consistent with the Coastal Act's Section 30240 ESHA protections. However, as you can see the key "qualifier/loophole" is stated at the end. It states:

"The determination of what areas would be regulated as ESHA would be made by the Coastal Commission as part of the CDP process for the Project." (Emphasis added)

The NBR DEIR's ESHA determination delegation to the Coastal Commission flies in the face of that state legislature mandated policy of PRC 21002.1(b) discussed above that "Each public agency shall mitigate or avoid the significant effects on the environment of projects that it carries out or approves whenever it is feasible to do so." (Emphasis added). Thus, the City of Newport Beach must consider the Project's potential environmental impacts on any ESHA areas in the project site as part of its review process. The NBR DEIR lack of any ESHA analysis violates PRC 21100 (b)(1) which states "[T]he environmental impact report shall include a detailed statement setting forth all of the following: (1) All significant effects on the environment of the proposed project." Additionally, it violates CEQA Guideline 151262(a) which states an "EIR shall identify and focus on the significant environmental effects of the proposed project."

The NBR DEIR's ESHA determination avoidance further violates long standing California court decisions regarding adequacy of EIR contents and the timing of environmental assessment under CEQA. In *Borzung v. Local Agency Formation Com.* (1975) 13 Cal. 3d 263, 282, the Supreme Court approved "the principle that the environmental impact should be assessed as early as possible in government planning." In short, "the determination of whether a project will have significant environmental impacts, and the formulation of measures to mitigate those measures, must occur *before* the project is approved." (Emphasis in the original) *California Native Plant Society v. City of Rancho Cordova* (2009) 172 Cal. App 4th 603, 621.

As noted above, the NBR DIER mentions that the City of Newport Beach's Coastal Land Use Plan (CLUP) is to provide "guidance" to the Coastal Commission regarding ESHA determination as part of NBR's CDP process. The weblink to the City's website containing its CLUP is as follows: <http://www.newportbeachca.gov/index.aspx?page=107>.

A review of the CLUP reveals it requires the City to conduct an ESHA determination of the NBR Project in this proceeding as part of its review. In Section 1.3 General Policies it states that "[T]he policies of Chapter 3 of the Coastal Act (PRC Sections 30200 - 30265.5) shall be the guiding policies of the Coastal Land Use Plan." Further, it states "[W]here there are conflicts between the policies set forth in this Coastal Land Use Plan and those set forth in any element of the City's General Plan, zoning, or any ordinance, the policies of the Coastal Land Use Plan shall take precedence."

In the CLUP's 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.

Policies 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....."

Under the City's CLUP Policies ESHA is entitled to such protections as:

"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."

In short, the City is required to make a determination of the presence ESHA in the NBR Project site under the City's own CLUP's Policies listed above in addition to such requirements under CEQA.

Lastly, what makes the NBR DEIR ESHA determination avoidance request so egregious is that both the NBR Project applicants Newport Banning Ranch, LLC (NBR) and the City of Newport Beach know that ESHA is present on the NBR Project site. Indeed, both know it is present on the adjoining City-owned property which is the site of the proposed Sunset Ridge Park Project. Both the City and NBR as property owners were the subjects of an enforcement action for violation of the California Coastal Act brought by the Commission. The violation involved the unpermitted removal of major vegetation including vegetation comprising native plant communities and habitat for the federally threatened California gnatcatcher; placement of solid material, including pipes, vehicles and construction equipment; and grading.

The above Coastal Act violation was the subject of a Coastal Commission hearing conducted on April 14, 2011 at the Santa Barbara Board of Supervisors 105 E. Anapamu Street. Santa Barbara, CA 93101. According to the Staff Report prepared for the hearing, the unpermitted development occurred in three areas totaling 1.01 acres (referred to by their relative locations as "Northwest Polygon," "Northeast Polygon," and "Southeast Polygon") (Exhibit #4 of the staff report for the Consent Cease and Desist Order and Consent Restoration Order) of portions of land owned by NBR and the City property (which is continuous to the southeast) (Exhibits #1 and #2 of the staff report for the Consent Cease and Desist Order and Consent Restoration Order), all of which are located immediately inland of the 5000 block of West Coast Highway, Orange County, California. A copy of the April 14, 2011 Staff Report with the aforementioned exhibits is attached.

At the April 14, 2011 hearing, the Coastal Commission approved Consent Cease and Desist Order No. CCC-11-CD-03 and Consent Restoration Order No. CCC-11-RO-02. Under the terms of the Consent Orders the City and NBR are, among other actions, to restore the Northwest and Southeast Polygons on the subject properties by planting coastal sage scrub vegetation native to Orange County that will provide foraging and breeding habitat for the coastal California gnatcatcher. As part of the Consent Orders the City and NBR agreed that for purposes of the enforcement action the Northwest and Southeast Polygons constituted environmentally sensitive habitat areas (ESHA) as defined by the Coastal Act.

As part the CCC Staff Report, attached is the Memorandum prepared for the Coastal Commission by Dr. Jonna Engels dated March 31, 2011. The Memorandum concerns "Newport Banning Ranch NOV (Notice of Violation) Subject Development ESHA Determination. On Pg.

7 of the Memorandum, Dr Engels indicates that the United States Fish and Wildlife Service (USFWS) in 2007 "designated all of Newport Banning Ranch as critical habitat for the California gnatcatcher", a federally protected endangered species under Endangered Species Act.

The Memorandum further states that [I]n designating Newport Banning Ranch as critical habitat, the USFWS noted that the area was occupied by gnatcatchers at the time of the listing and at the time of designation of critical habitat and the area "contains all of the features essential to the conservation of the coastal California gnatcatcher." A copy of the California Gnatcatcher Critical Habitat Map designating both Newport Banning Ranch and the City's Sunset Ridge Park properties is attached for your review.

The USFWS designation of all of Newport Banning Ranch as critical habitat certainly qualifies under the City's CLUP Policy 4.1.1-1(B) as "[T]he recorded or potential presence of plant or animal species designated as rare, threatened, or endangered under State or Federal law." Thus, the City is bound by its own Coastal Land Use Plan and the statutory and case law regarding CEQA cited above to demand the NBR DEIR contain a full determination of ESHA present on the NBR Project site. As noted above, "[t]he purpose of the environmental impact report is to identify the significant effects on the environment of a project, to identify alternatives to the proposed project, and to indicate the manner in which significant environmental effects can be mitigated or avoided.(PRC 21002.1(a)." (Emphasis added) In its deliberate avoidance in determining the presence of ESHA on the NBR Project site, the NBR DEIR fails in fulfilling the basic purpose of its preparation under CEQA.

Very truly yours,

Bruce Bartram

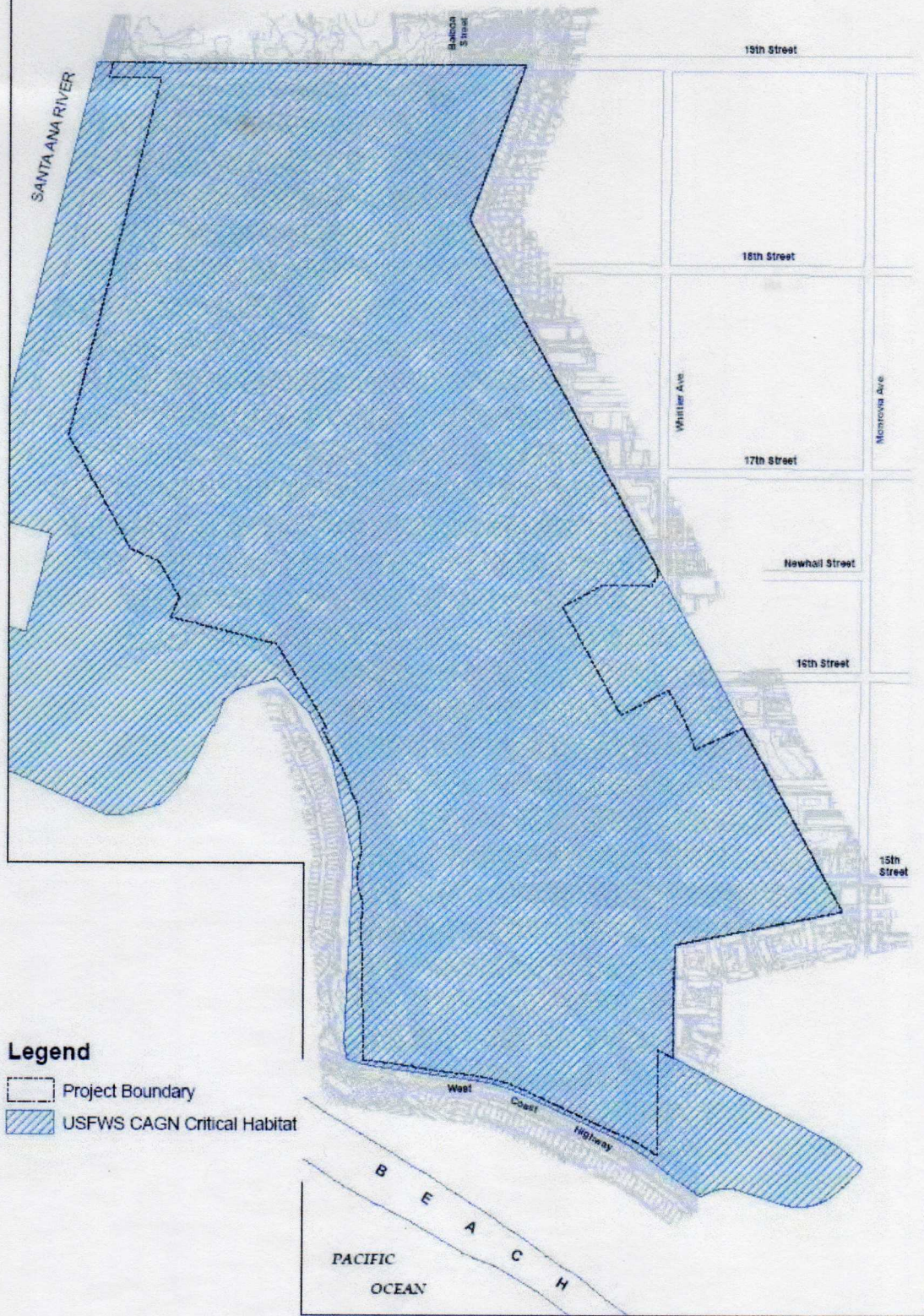
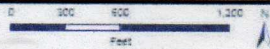


Exhibit 13
California Gnatcatcher Critical Habitat Unit Map

NEWPORT BANNING RANCH



March 26, 2008

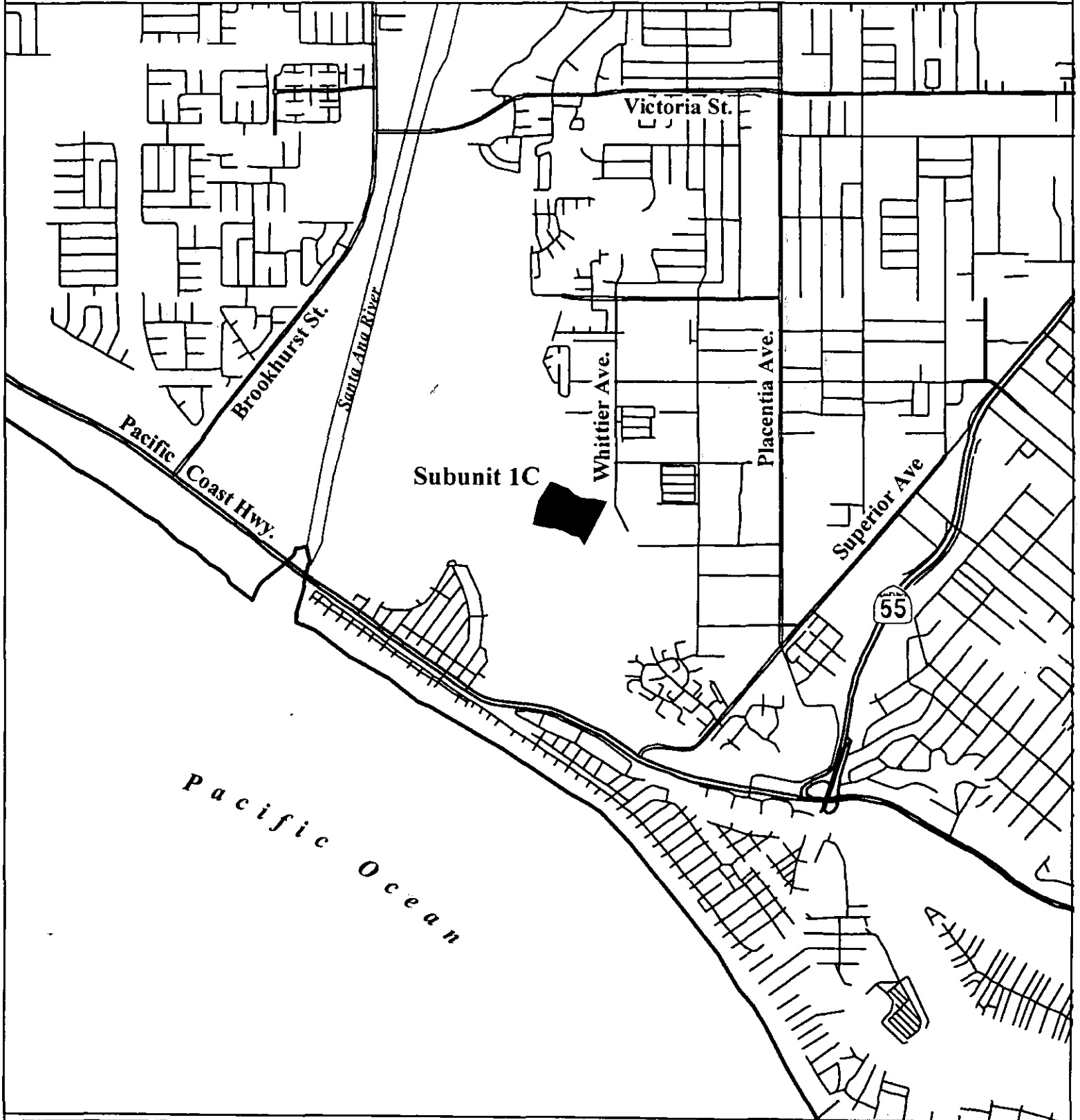
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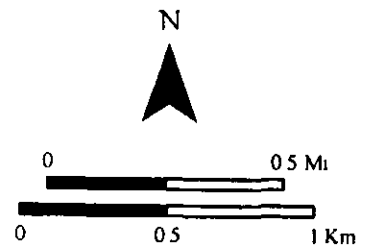
Figure 2

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

Map 2.
Critical Habitat for San Diego fairy shrimp (*Branchinecta sandiegonensis*)
Unit 1, Subunit C, Orange County, California



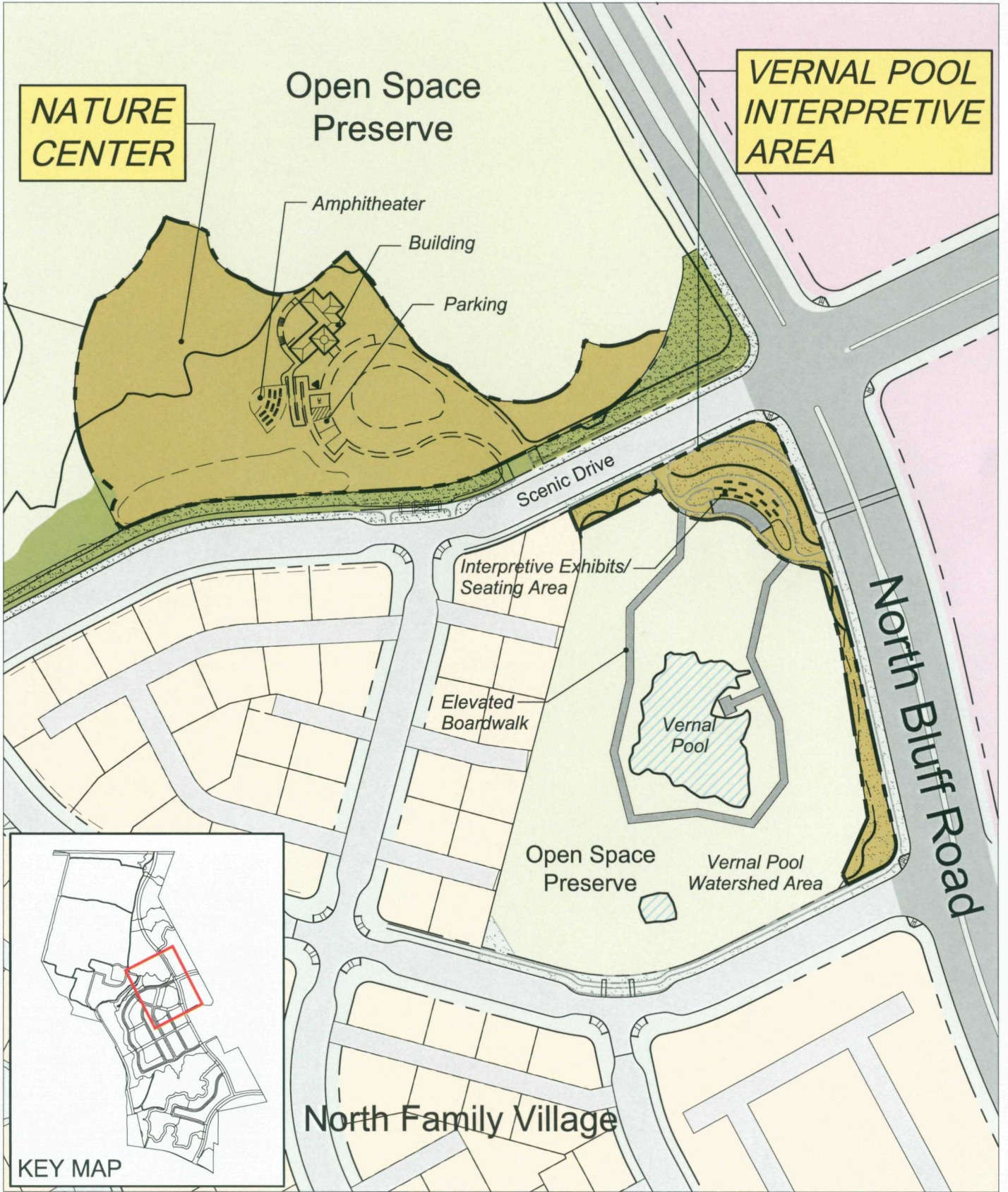
-  Critical Habitat
-  Roads
-  Water Channel



NATURE CENTER

Open Space Preserve

VERNAL POOL INTERPRETIVE AREA



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Source: FORMA 2011

Nature Center & Vernal Pool Interpretive Area Development Plan Exhibit 4.8-8

Newport Banning Ranch EIR



Bonterra
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