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NEWPORT BANNING RANCH LLC, CHEROKEE
12 NEWPORT BEACH LLC, AND AERA ENERGY
LLC

13
14 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
15 **FOR THE COUNTY OF ORANGE**

16 NEWPORT BANNING RANCH LLC, a
Delaware limited liability company,
17 CHEROKEE NEWPORT BEACH, LLC, a
Delaware limited liability company and
18 AERA ENERGY LLC, a California limited
liability company,

19 Petitioners and Plaintiffs,

20 v.

21 CALIFORNIA COASTAL COMMISSION,
a State Agency, and DOES 1 through 25,
22 inclusive,

23 Respondents and Defendants.
24

25 Petitioners/Plaintiffs Newport Banning Ranch LLC, Cherokee Newport Beach LLC, and
26 Aera Energy LLC allege:

27 ///

28 ///

ELECTRONICALLY FILED
Superior Court of California,
County of Orange

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Clerk of the Superior Court
By Sarah Loose, Deputy Clerk

Case No. 30-2016-00885114-CU-WM-CXC

**VERIFIED FIRST AMENDED
PETITION FOR WRIT OF MANDATE
AND COMPLAINT FOR INVERSE
CONDEMNATION**

OVERVIEW

1
2 1. This action arises from the September 7, 2016 decision by the California Coastal
3 Commission (“**Commission**”) to deny the application of Newport Banning Ranch LLC (“**NBR**”)
4 for a Coastal Development Permit to undertake environmental cleanup, habitat restoration, and new
5 development at a site known as the Newport Banning Ranch (“**NBR Property**”).

6 2. Since this action was filed, the California Supreme Court decided *Banning Ranch*
7 *Conservancy v. City of Newport Beach* (2017) 2 Cal.5th 918, invalidating the environmental impact
8 report (EIR) certified by the City in connection with the City’s approval of the NBR project. The
9 Supreme Court’s decision that the City’s EIR was inadequate requires the City to prepare a revised
10 EIR and reconsider the NBR Project in light of the revised EIR. The effect of the Supreme Court’s
11 decision is that the NBR Project that was before the Coastal Commission and is the subject of this
12 action must be reconsidered by the City. In other words, the City approval that was before the
13 Commission has been vacated. Therefore, rather than expend this court’s resources adjudicating
14 the findings for a project that has been ordered by the Supreme Court to be sent back to the City for
15 reconsideration, and then perhaps reconsideration (and new findings) by the Commission, the court
16 should vacate the Commission’s findings for the NBR Project. With no underlying City project
17 approval, the Commission’s findings are attached to nothing and can cause nothing but confusion.

18 3. The NBR Property is 401 acres abutting West Coast Highway located partly in the
19 City of Newport Beach and mostly in unincorporated Orange County. It is a remarkable property
20 — a large, degraded Brownfield site with scattered oil operations in a highly desirable and valuable
21 coastal location, surrounded by urban development — which has sat fenced off from the public for
22 over 70 years. The reason is that the entire site is an active oil field dating back to the 1940’s, a
23 time when Orange County was small and oil drilling along the coast (as well as other industrial
24 uses) was much more prevalent.

25 4. In 1973, when Proposition 20 (the predecessor to the 1976 Coastal Act) was
26 adopted, all oil operations were deemed vested and exempt from regulation by the Commission
27 because the oil operations had been previously approved by the State Department of Oil & Gas
28 (now known as the Department of Oil, Gas and Geothermal Resources). An exemption to this

1 effect was issued by the Commission's predecessor agency. Accordingly, the Commission has
2 never had jurisdiction to regulate oil production operations at the site, provided that the operations
3 were consistent with the pre-1973 approvals.

4 5. Thereafter, although oil production at the NBR Property declined from prior years'
5 activities, it still remained a constant presence on the site. Currently, there are approximately 60
6 active production wells. As a result of 72 years of operations, oil production equipment is scattered
7 over a large part of the 401-acre site, and hundreds of acres have been altered and impacted by oil
8 field operations.

9 6. In 2008, NBR applied to the City of Newport Beach ("**City**") for approval of a
10 project to accelerate oil field abandonment, clean up, habitat restoration, and development of the
11 site ("**the Project**"). The Project, as initially proposed, would spend about \$50 million to fully
12 remediate the NBR Property pursuant to standards promulgated by the Division of Oil & Gas and
13 Geothermal Resources and the Regional Water Quality Control Board, and restore and create about
14 245 acres of permanently protected open space and restored natural habitat, 40 acres of parks and
15 seven miles of trails available for public use. This abandonment, remediation, and open space
16 restoration and dedication of roughly 75% of the site would be made possible by the proceeds from
17 the development to be built on portions covering only about 25% of the site — new homes, a small
18 coastal inn, and retail and commercial uses.

19 7. The Project was consistent with the 2006 voter-approved City of Newport Beach
20 General Plan approved land uses, and in 2012 the City council certified an Environmental Impact
21 Report ("**EIR**") for the Project and unanimously approved NBR's application to build the Project.
22 The Project won approval because it would provide enormous environmental benefits on the
23 moribund site, create expansive, new public amenities near the beach, and include a primary road
24 that would improve traffic circulation from Pacific Coast Highway to underserved neighborhoods
25 inland.

26 8. In February 2013, NBR applied to the Commission for a Coastal Development
27 Permit ("**CDP**") to develop the Project as approved by the City. The application was accompanied
28 by the certified EIR, reports, studies and other documentation to demonstrate the Project's

1 conformity with the requirements of the Coastal Act (Pub. Resources Code § 30000 *et seq.*).

2 9. The process of obtaining a decision at the Commission was extraordinarily drawn
3 out, and very expensive. Over the three years after applying to the Commission, NBR was required
4 to submit voluminous additional documentation just to convince the Commission Staff that the
5 CDP application was complete enough that it could even be considered. Thereafter, in order to
6 satisfy Commission Staff, NBR was required to undertake and submit to the Commission Staff an
7 extensive array of studies documenting investigations into the site's biology and potential impacts
8 of the proposed development. NBR also engaged in discussions and workshops with a wide variety
9 of parties and interested organizations about the development details. During this three-year
10 period, as a result of input from Coastal Commissioners and discussions with Staff, NBR twice
11 reduced the development proposed as part of the Project in an effort to respond to specific issues
12 under the Coastal Act. This resulted in a revised project (**the "Revised Project"**) that substantially
13 scaled back the residential and commercial development planned for the site with increased
14 environmental remediation costs, but also increased the amount of open space, habitat protection,
15 and public access and other public amenities even beyond what had been approved by the City.

16 10. On September 7, 2016, however, the Commission denied the Revised Project. It
17 effectively rejected any development whatsoever on the NBR Property after a hearing that was not
18 a fair review of the Revised Project. The hearing was a borderline sham event, dominated by a
19 selective and misleading presentation provided by Commission staff members who had been
20 hostile throughout the three-year review process to the notion that *any* development should be
21 allowed on the site. The Commissioners were fed assertions about the NBR Property, the scope of
22 the Revised Project, and impacts to the environment that were not accurate or complete and were
23 not supported by substantial evidence. Some, but not all, of the inaccuracies and irregularities that
24 occurred are alleged below in the Statement of Facts section of this Petition. A few examples are:

- 25 • Commission Staff told Commissioners that the oil impacts on the NBR Property
26 from past oil operations would be sufficiently remediated regardless of whether
27 development was permitted on the site. This is not true. The fact is that
28 substantial remediation of the oil field and habitat restoration of the site — a

1 very costly undertaking — will occur only if there is a development project that
2 will finance the work. Absent the proposed development project which
3 accelerates oil field clean up and implements habitat restoration, the NBR
4 Property will remain in its current, unremediated state for years. The
5 Commission thus acted under a demonstrably mistaken assumption about the
6 consequences of its action — i.e., the erroneous assumption that the site will be
7 remediated even without the proposed development project such that native
8 plants and wildlife can repopulate the abandoned oil production areas.

- 9 • Shortly before the hearing, Commission Staff received a letter from a zoologist
10 working with the project opponents expressing (for the first time) a view on the
11 need to set aside 64 additional acres as foraging habitat for breeding burrowing
12 owls. This contradicted the results from years of prior environmental and
13 biological review. More importantly, no breeding burrowing owls have ever
14 been seen on the site. Not surprisingly, the zoologist's proposed foraging
15 habitat was squarely in one of the prime areas to be developed, and thus would
16 essentially gut the Revised Project. Despite ongoing communications between
17 NBR and Staff, Commission Staff withheld that letter from NBR until shortly
18 before the September 7 hearing, and publication of the Commission Staff report
19 with its ecologist's recommendation that the additional acreage be reserved for
20 foraging habitat. At the hearing, the Commission's Acting Executive Director
21 acknowledged that the recommendation for burrowing owl foraging habitat
22 came "late in the process . . . [t]hat was very unfortunate." Furthermore, the
23 Commission Staff ecologist in charge of preparing the biological
24 recommendations in the Staff Report admitted, "You know, to be honest — I
25 am not a burrowing owl expert." The alleged need for additional foraging
26 habitat was an ambush of the Revised Project and was not supported by credible
27 evidence, but was nonetheless cited by some Commissioners as a reason for
28 project denial.

- With narrow exceptions, under the law any development in the coastal zone must avoid any area that qualifies as an Environmentally Sensitive Habitat Area (“ESHA”) as defined in the Coastal Act (Pub. Res. Code § 30240). In this case, the Revised Project avoided all areas currently designated by the Commission as ESHA. The Commission, however, went further and decided that development could not occur on areas of the site that Staff said were “potential ESHA” because those areas *might* later become habitat for the California gnatcatcher (a species of bird listed as threatened under the federal Endangered Species Act). This unwarranted and speculative expansion of the ESHA development prohibition contradicts the law and the Commission’s prior decisions which have concluded that “potential ESHA” (i.e., areas that may at some time in the future support sensitive species) do not qualify as subject to ESHA regulation under the Coastal Act.
- Two weeks before the hearing on the Revised Project, in response to a comment by Commission Staff, NBR submitted a change to the site grading plan to ensure the primary roadway, Bluff Road, and other areas along the development edge, would in all respects avoid any Commission Staff-identified ESHA area. Commission Staff, however, refused to consider the change, contrary to the Coastal Act and the Commission’s Regulations, and instead used their own refusal to consider the change as the basis for Staff to advise the Commissioners that the Bluff Road would impermissibly impact ESHA.

11. The Staff Report that was prepared for the September 7, 2016 hearing recommended approval of the Revised Project with conditions. However, in light of the Commission’s denial of the Revised Project, the Commission staff was instructed to prepared Revised Findings reflecting the Commission’s decision to deny the Project and to bring the Revised Findings back at a future hearing for Commission review and adoption. On February 9, 2017, however, the Commission was presented with Revised Findings which essentially were the same as the September 2016 Staff Report about which the Commissioners had expressed concerns at the September 7, 2016 hearing,

1 except now the conclusion was to deny the Revised Project instead of approve it with conditions.

2 12. As more fully set forth below, the Commission prejudicially abused its discretion
3 because its decision to deny NBR's CDP application and adopt Revised Findings was not
4 supported by substantial evidence in the record or by legally required written findings. The action
5 was arbitrary, and the Commission exceeded its jurisdiction by misapplying the Coastal Act. As a
6 result of an unprecedented number of irregularities, NBR was deprived of a fair hearing, due
7 process, and equal protection of the laws. Further, the Commission's action deprived NBR of its
8 reasonable investment-backed expectations and substantially all economically productive or
9 beneficial use of its property, resulting in a taking of the NBR Property without payment of just
10 compensation, in violation of the Fifth Amendment to the United States Constitution and Article I,
11 section 19 of the California Constitution.

12 13. Subsequent to the Commission's decision, the California Supreme Court decided
13 *Banning Ranch Conservancy v. City of Newport Beach* (2017) 2 Cal.5th 918, invalidating the EIR
14 for the Project. The Court held that the EIR was inadequate under the California Environmental
15 Quality Act ("CEQA"; Pub. Resources Code § 21000 *et seq.*) because it failed to consider the
16 potential presence of ESHA as defined by the Coastal Act, on the NBR Property. Specifically, the
17 Court concluded that because the EIR did not discuss whether areas on the NBR Property might
18 qualify as ESHA or potential ESHA, the City's EIR fell short by failing to account of the Coastal
19 Act's ESHA protections which affected the City's evaluation of feasible alternatives and
20 mitigation measures. The Court explained that "both the [coastal] commissioners and interested
21 members of the public are entitled to understand the disagreements between [coastal] commission
22 staff and the City on the subject of ESHA," and the failure to discuss ESHA requirements
23 suppressed "information highly relevant to the Commission's permitting function." (*Banning*
24 *Ranch Conservancy, supra*, at 940, 942.) Consequently, environmental review of the NBR Revised
25 Project will now return to the City. This new review and the City's new approval is a fundamental
26 step in the local agency permitting process that is required before a project can be considered by the
27 Coastal Commission. Given the practical effect of the Supreme Court's decision, the project that
28 was submitted to the Coastal Commission must now be re-evaluated by the City in the context of a

1 revised EIR prepared to account for the Supreme Court's recent analysis. To adjudicate the old
2 findings would be a waste of judicial resources, and to retain the old findings would fail to
3 acknowledge the practical import of the Supreme Court's decision. Those findings are no longer
4 attached to anything and can no longer provide the basis for any action. Therefore, this court
5 should vacate the Coastal Commission's findings. The Coastal Commission remains free to
6 exercise its discretion to adopt new findings when a project – approved by the City of Newport
7 Beach after it has prepared and considered an EIR that satisfies the mandates of the Supreme Court
8 – is submitted to it.

14. Accordingly, Petitioners/Plaintiffs seek a writ of mandate to compel the Commission to set aside and vacate its September 7, 2016 action, and its subsequently adopted Revised Findings, and in the alternative, if the Revised Findings are not vacated, (b) the award of just compensation for a permanent and temporary taking of the NBR Property. If the court does not set aside the Revised Findings, Petitioners/Plaintiffs hereby request that the Commission promptly prepare the administrative record related to the denial of the Revised Project, including all reporter's transcripts of the Commission hearings that were conducted, and make the full record available to Petitioners/Plaintiffs.

PARTIES

18 15. Petitioner and Plaintiff Cherokee Newport Beach, LLC ("**Cherokee**") is a limited
19 liability company organized and operating under the laws of the State of Delaware. Petitioner and
20 Plaintiff Aera Energy LLC ("**Aera**") is a limited liability company organized and operating under
21 the laws of the State of California. Cherokee and Aera jointly own the surface rights to the NBR
22 Property, located in the 5100 block of West Coast Highway, in the City of Newport Beach, County
23 of Orange, California.

24 16. Petitioner and Plaintiff NBR is a limited liability company organized and operating
25 under the laws of the State of Delaware. NBR has an option to acquire the surface ownership from
26 Cherokee and Aera, and has the right to seek entitlement approvals for development of the NBR
27 Property.

28 17. Cherokee, Aera, and NBR do not own the mineral rights with regard to the NBR

1 Property. The mineral rights underlying the NBR Property are separately owned by Horizontal
2 Development, LLC, whose operating affiliate is the West Newport Oil Company. In all allegations
3 below, Cherokee, Aera, and NBR are collectively referred to as either “NBR” or
4 “Petitioners/Plaintiffs.”

5 18. Respondent and Defendant Commission is a state agency organized and existing
6 pursuant to the Coastal Act. The Commission is the primary state agency responsible for
7 implementing the Coastal Act, subject to any and all limitations set forth in the Act, the California
8 Constitution, and the United States Constitution.

9 19. Petitioners/Plaintiffs are unaware of the true names and capacities of the
10 Respondents and Defendants sued herein as Does 1 through 25, inclusive, and therefore sue these
11 Respondents and Defendants by fictitious names. Petitioners/Plaintiffs will amend this Petition and
12 Complaint to specifically identify such persons when they are ascertained. Petitioners/Plaintiffs are
13 informed and believe, and on that basis allege, that each of the fictitiously named Respondents and
14 Defendants is in some manner responsible for the acts alleged herein.

15 JURISDICTION AND VENUE

16 20. This Court has jurisdiction over this action pursuant to Code of Civil Procedure
17 section 1094.5, as well as Public Resources Code section 30801.

18 21. Venue is proper in the Superior Court of the County of Orange pursuant to Code of
19 Civil Procedure section 393 because the causes of action alleged herein arose in Orange County
20 and the NBR Property is located in Orange County.

21 STATEMENT OF FACTS

22 A. The NBR Property

23 22. The NBR Property is 401 acres located partly in the City and principally in
24 unincorporated Orange County (within the City’s sphere of influence), located in the “coastal
25 zone,” as defined in the Coastal Act.

26 23. The NBR Property is generally bounded on the south by West Coast Highway and
27 residential communities in West Newport Beach; on the east by the City’s Sunset Ridge Park,
28 residential developments, parcels partially occupied by storage facilities that are owned by the

1 Newport Mesa Unified School District, and industrial uses; on the north by residential development
2 and the City of Costa Mesa Talbert Nature Preserve, an approximately 180-acre nature preserve
3 and wilderness park owned and operated by Orange County Parks; and on the west by a residential
4 community in the City of Newport Beach, the Santa Ana River where it meets the Pacific Ocean,
5 and 92 acres of U.S. Army Corps of Engineers restored wetlands.

6 24. The NBR Property divides into two areas topographically: (1) a 147-acre lowland
7 area in the northwestern portion of the site, and (2) a 254-acre largely flat upland, or mesa, area that
8 is part of the Newport Mesa.

9 25. The NBR Property has been a producing oilfield since the 1940s. In 1973, after
10 passage of Proposition 20, the predecessor to the Coastal Act, and pursuant to a process offered to
11 existing businesses in the coastal zone, the Coastal Commission's predecessor agency issued an
12 exemption for the existing and planned oil operations because they were considered vested prior to
13 the enactment of the Coastal Act under the 1973 Exemption ("1973 Exemption").

14 26. Although the scope of oil operations at the NBR Property has decreased over time,
15 oil production activities still continue, scattered over both the upland and lowland areas. Large
16 areas of the NBR Property have been impacted by prior or current oil operations, including oil and
17 natural gas production wells, steam and water injection wells, related oil facility infrastructure,
18 pipelines, storage tanks, machinery, graded roads and gravel, and asphalt covered equipment areas.
19 Absent accelerated abandonment and remediation driven by an economically beneficial re-use
20 project, these areas will remain so indefinitely or for decades to come. There is no public access
21 allowed; the entire site is fenced and accessible only to persons involved in the oil production
22 operations.

23 **B. The Coastal Act**

24 27. The Coastal Act provides that, in addition to any other entitlement required by law
25 from local government, anyone wishing to undertake a development project in the coastal zone
26 must obtain a CDP. The Coastal Commission has original jurisdiction to issue CDPs unless the
27 local government has a certified Local Coastal Program ("LCP"), in which case the local
28 government has original permit jurisdiction. However, neither the City of Newport Beach nor the

1 County of Orange currently has a certified LCP that includes the NBR Property. While the
2 Commission approved the first part of the City's LCP in 2005, a Coastal Land Use Plan ("CLUP"),
3 the CLUP designates the NBR Property as an area of "deferred certification," i.e., an area which
4 has not yet been certified by the Commission; therefore, the CLUP currently does not apply to the
5 NBR Property notwithstanding that the Project is consistent with the CLUP. (The City's LCP was
6 recently certified by the Commission, but still does not apply to the NBR Property.)

7 28. Chapter 3 of the Coastal Act (commencing with Public Resources Code section
8 30200 *et seq.*) sets forth the coastal resource policies which govern the Commission's exercise of
9 original permit jurisdiction. The policies are divided into six groups: public access, recreation,
10 marine environment, land resources, development generally, and industrial development. Where
11 there is no certified LCP, the permit issuing agency (here, the Commission) must issue a CDP if it
12 finds that the development proposed is in conformity with the Chapter 3 policies and will not
13 prejudice the local government's ability to prepare an LCP in conformity with those policies.

14 **C. The Voter-Approved City of Newport General Plan for the NBR Property**

15 29. In 2006, the voters of the City of Newport Beach adopted a General Plan that set
16 forth land uses for all property within the City and the City's sphere of influence. For the NBR
17 Property, the General Plan allowed:

- 18 • 1,375 housing units;
- 19 • A 75-room coastal inn; and
- 20 • 75,000 square feet for retail commercial uses, with a focus on providing uses
21 for residents and visitors to the Newport Beach coastal area.

22 The General Plan also required that at least fifty percent of the NBR Property be devoted to
23 open space. (General Plan Policies 6.4.1-6.4.4.)

24 30. The approved General Plan identified two alternatives for the NBR Property. One
25 alternative proposed the acquisition of the entire NBR Property for its long-term protection and
26 preservation as open space. (General Plan Policy LU 6.3.1.) The other alternative was the
27 residential and commercial option listed above to be developed "as a cohesive urban form that
28 provides the sense of a complete and identifiable neighborhood." (General Plan Policy 6.4.5.)

1 31. Although some entities expressed an interest in preserving the NBR Property, no
2 one stepped forward to demonstrate capabilities or present an offer to purchase the site and
3 implement the open space alternative —undoubtedly because of the high potential development
4 value of the site and the enormous remediation cost that would be incurred to restore the site as
5 open space suitable for public use. Pursuant to the General Plan, the NBR Property, if not acquired
6 for open space, could be developed as a residential village. (General Plan Policy 6.4.1.)

7 **D. City of Newport Beach Review and Approval of the Project**

8 32. In September 2008, consistent with the Newport Beach General Plan, NBR applied
9 to the City to accelerate removal and remediation of a portion of the oil production facilities on the
10 NBR Property, and to develop the NBR Property with new land uses - consistent with the General
11 Plan. The application proposed that 75 percent of the 401-acre site would be kept as natural open
12 space. The remaining oil operations would be restricted to 16 acres, and upon cessation of the oil
13 operations in the future, the 16 acres would be deed restricted to open space.

14 33. Specifically, NBR's application provided that most of the proposed development
15 would be clustered on the upland, or mesa, area, away from the Santa Ana River and wetlands in
16 the lowland area. NBR's Project proposed precisely the uses delineated in the voter-approved
17 General Plan: 1,375 residential dwelling units, 75,000 square feet of commercial uses, a 75-room
18 coastal inn, active and passive parks, 7 miles of new public trails, new roads, including a new road
19 ("Bluff Road") extending from Pacific Coast Highway to 19th Street, consistent with the
20 Circulation Element of the City and the County of Orange. The application additionally proposed
21 that the remainder of the NBR Property — approximately 245 acres or nearly twenty-five percent
22 more than required by the General Plan — would be devoted to open space, wetlands restoration,
23 and habitation protection for species protected by the federal Endangered Species Act (16 U.S.C.
24 § 1531 *et seq.*), all of which would be permanently funded through implementation of the NBR
25 Project.

26 34. In 2012, after preparing and circulating an EIR pursuant to the California
27 Environmental Quality Act ("CEQA"), and following months of public workshops, meetings and
28 hearings, the City certified the EIR and approved NBR's application. The City-approved statutory

1 development agreement for NBR made a specific finding that efforts to implement the open space
2 acquisition alternative had been satisfied.

3 **E. NBR's Application to the Commission for a CDP**

4 35. On February 1, 2013, NBR applied to the Commission for a CDP for the Project
5 (Application No. 5-13-032), submitting the record of proceedings before the City, including the
6 certified EIR and a substantial number of reports, studies and other documentation to demonstrate
7 the Project's conformity with the requirements of the Coastal Act. What followed thereafter was a
8 years-long series of delays and ever-expanding demands from Commission Staff. The review of
9 permit applications is governed by the California Permit Streamlining Act ("PSA"; Cal. Gov't
10 Code § 65920 *et seq.*) which contemplates that the agency identify all of the information needed to
11 deem an application complete after review of the initial application.

12 36. Over a two-year period, Commission Staff rejected NBR's application as
13 "incomplete" seven (7) times, each time requesting extensive additional information and studies
14 relating to the Project. All told, NBR submitted an enormous amount of information beyond the
15 certified EIR in response to Commission Staff's requests, the majority of which concerned existing
16 site conditions from the ongoing oil field maintenance operations conducted pursuant to the 1973
17 Exemption.

18 37. Frustrated by Commission Staff's refusal to deem the application complete, and at
19 Commission Staff's written suggestion, NBR filed an appeal to the Commission in June 2014 to
20 resolve the dispute over the completeness of NBR's application. In July 2014, before the
21 Commission could hear the matter, Commission Staff decided not to require more information
22 regarding the oil field maintenance operations and the 1973 Exemption. However, in August 2014,
23 Commission Staff issued a "Cease and Desist Order" to halt ongoing oil field maintenance
24 activities because of allegedly "unpermitted" activities conducted by the third party oil
25 operator/mineral owner, and sought to impose liability on NBR as the landowner. To move its
26 CDP application forward, NBR was forced to address these allegations of third party activities and
27 resolve the matter. NBR did so by entering into a "Consent Cease and Desist Agreement"
28 ("Settlement Agreement"), that was approved by the Commission in March 2015, which set forth

1 agreements to modify certain historic oil field maintenance activities and specific oil field
2 structures and wells on the NBR Property.

3 38. Ultimately, on April 29, 2015, Commission Staff deemed NBR's CDP application to
4 be "complete."

5 **F. The Commission's First Public Hearing in October 2015: Rejection of**
6 **Commission Staff's Recommendation to Deny the Project**

7 39. The Commission's first hearing on NBR's application for a CDP was scheduled for
8 October 7, 2015. On September 25, 2015, Commission Staff issued its first Staff Report for the
9 NBR Project, recommending that the Commission deny the CDP application outright. Although
10 more than 750 pages in length (with exhibits), the Staff Report failed to accurately describe and
11 analyze the NBR Project. The 2015 Staff Report analyzed the version of the Project submitted in
12 February 2013 – more than two years earlier – but failed to disclose to the Commission and the
13 public that during the more than two years of preparing submittals in response to Commission
14 Staff's letters, NBR had agreed to reduce the size of its project from that which was approved
15 unanimously by the City of Newport Beach, by 201 residential units (1,174 reduced from 1,375); to
16 reduce by 30,000 square feet the amount of commercial development; to add almost 40 more acres
17 of open space; and to provide additional affordable hostel accommodations (20 beds instead of 10).

18 40. During the days leading up to the Coastal Commission hearing, Commission Staff
19 was actively engaged in soliciting opposition to the NBR Project. On October 6, 2015,
20 Commission Staff biologist, Jonna Engel, thanked staff at the California Department of Fish and
21 Wildlife for its support of the staff's ESHA determination which in staff's view "would have a
22 strong impact on the Commissioners." In reality, the CDFW letter was written by a CDFW staff
23 member who had never even stepped foot on the property, a fact uncovered at the hearing by
24 UnderSecretary for Natural Resources Janelle Beland. Despite knowing that the letter was written
25 by someone who had no firsthand knowledge of the site, Commission staff proclaimed it
26 "AWESOME" and suggested that the CDFW staff "could come incognito" to the hearing.

27 41. As further evidence of Commission Staff's bias in its evaluation of the NBR project,
28 Commission staff biologist Engel circulated letters supporting the denial of the project to other

1 public agencies, such as the U.S. Fish and Wildlife Service, with the hope that a letter from the
2 Service also opposing the project would be the “icing on the cake.”

3 42. On October 7, 2015, the Commission conducted an 11 hour public hearing on the
4 Project, at the conclusion of which Coastal Commissioners made several comments and
5 suggestions for yet further revisions to the Project. The Commission requested Commission Staff
6 and NBR to work together to develop a revised plan for the Project, and several Commissioners
7 asked Commission Staff to develop a new recommendation for approval of a revised project
8 consistent with the Chapter 3 policies of the Coastal Act.

9 43. The Commission took no action at that hearing, and the matter was continued with
10 the understanding that it would be expeditiously rescheduled for hearing at the Commission’s
11 January 2016 meeting. However, because of Commission Staff’s request for additional time to
12 meet with NBR and analyze the Project and an impending legal deadline for Commission action
13 under the PSA, on December 16, 2015, NBR withdrew its application — at Commission Staff’s
14 urging — and then immediately resubmitted it (Application No. 5-15-0297) in order to provide
15 more time for Commission Staff review before the Commission would be legally mandated to take
16 action on the CDP application under the PSA.

17 **G. NBR’s Further Revised Project in an Effort to Appease Commission Staff**

18 44. Thereafter, NBR engaged in a concerted outreach effort. NBR had over 20
19 meetings with Commission Staff, five tours of the NBR Property with Commission Staff, 14
20 meetings with the City of Newport Beach and other agencies, three meetings with the principal
21 project opponent, the Banning Ranch Conservancy, meetings with nine Native American tribes,
22 and over 30 community stakeholder meetings. In addition to a California Department of Fish and
23 Wildlife Agreement obtained in September 2015, NBR also obtained approval from the Regional
24 Water Quality Control Board (“RWQCB”) for (1) a Remedial Action Plan (“RAP”) which
25 addressed oil field clean up and remediation requirements for areas impacted by past oil operations,
26 and (2) a Clean Water Act—Section 401 Water Quality Certification.

27 45. Each time NBR resolved a Commission Staff issue, Commission Staff would raise
28 the bar higher, adding yet new requirements. Ultimately, to respond directly to comments and

1 suggestions at the October 2015 Commission meeting, NBR again revised and substantially
2 reduced the size of the NBR Project to create the Revised Project. Specifically, by March 2016, the
3 Revised Project proposed the following:

- 4 • 895 homes (a further reduction of 280 homes);
- 5 • A 40% reduction in the Project's development footprint to 62 acres, including 5
6 acres of parks;
- 7 • A 40% reduction in project grading, traffic, and water demand;
- 8 • Retention of the 75-room coastal inn;
- 9 • A 20 bed low-cost hostel (at \$59 per night) which would include a youth
10 outreach program to be administered by a non-profit organization, the Newport
11 Banning Ranch Land Trust, to provide unique opportunities for young people
12 from inland communities to experience the restored natural habitat and public
13 trails on the NBR Property, as well as the nearby beaches;
- 14 • Public parks and parking;
- 15 • Shuttle access to the nearby beaches and to the parks and trails onsite;
- 16 • Affordable housing; and
- 17 • 45,000 square feet of commercial uses.

18 46. NBR additionally continued to propose the following substantial public benefits (the
19 "Public Benefits"), as part of its Revised Project:

- 20 • 7 miles of public trails on the NBR Property, which currently is fenced off to
21 the public;
- 22 • Acceleration of oil field abandonment and onsite site remediation and recycling
23 of oil-impacted material pursuant to the RWQCB-approved RAP; and
- 24 • A Habitat Management Plan to restore and permanently protect 324 acres of
25 wetlands, grasslands, and coastal sage scrub on the NBR Property as open
26 space.

27 Together with the passive and active parks also proposed, the total open space proposed by
28 the Revised Project increased to 329 acres, or 82%, of the 401-acre NBR Property. The Revised

1 Project was fully compliant with the policies and requirements of the Coastal Act.

2 47. As support for the Revised Project, NBR's project consultants prepared and
3 submitted to Commission Staff 10 additional detailed expert reports addressing the biological
4 issues relating to the NBR Property.

5 48. In response to the February 2016 listing by the Native American Heritage
6 Commission of the NBR Property on the State's Sacred Lands Inventory, disclosed after-the- fact
7 to NBR in March 2016 in the Coastal Commission's Staff Report dated March 1, 2016, NBR
8 initiated consultation with nine Native American tribes regarding tribal cultural resources and
9 voluntarily agreed to conduct additional archaeological testing.

10 49. On August 17, 2016, in response to the Native American tribal consultation, NBR's
11 archaeological consultant, Psomas, commenced the additional archaeological testing on the NBR
12 Property, monitored by Gabrieleño and Juaneño Native American tribes. All Native American
13 tribal representatives were invited to observe the work. On August 23, 2016, upon completion of
14 the testing, Psomas submitted to Staff an additional expert report, the "Banning Ranch
15 Archaeological Testing Memorandum," which concluded:

- 16 • No new tribal cultural resources were found;
- 17 • There are no significant impacts to the known archaeological sites on the NBR
18 Property;
- 19 • Nothing of cultural significance was found in the proposed development areas;
20 and
- 21 • Avoidance measures incorporated into the Revised Project's design will
22 appropriately address impacts to historic properties.

23 Staff provided none of this information to the Commissioners.

24 **H. Commission Staff Hides the Ball from NBR**

25 50. By mid-August 2016, NBR had satisfied all of Commission Staff's additional
26 requirements. However, unbeknownst to NBR, two months earlier, on June 24, 2016, Commission
27 Staff had received a letter from a zoologist working with a project opponent expressing the view
28 that additional "foraging habitat" for breeding burrowing owls should be ruled off limits for

1 development. The Revised Project was already proposing to set aside 199 acres as foraging habitat
2 for *wintering* burrowing owls, and the alleged need for additional foraging area for breeding
3 burrowing owls would doom the project. Despite ongoing communications between NBR and
4 Commission Staff, Commission Staff withheld the zoologist's letter and gave no indication that the
5 letter might subsequently be used by Commission Staff to impose additional project-killing habitat
6 protection beyond what Staff had discussed with NBR. More significantly, Staff did not note the
7 distinction between wintering burrowing owls which were observed on the NBR Property, and
8 breeding burrowing owls which had not been seen or otherwise recorded on the NBR Property.

9 51. In addition, two weeks before the Commission's second public hearing on the
10 Revised Project, in response to a comment by Commission Staff, NBR submitted a minor change
11 to its grading plan to ensure the primary roadway, Bluff Road, and other areas along the
12 development edge, would in all respects avoid any Staff-identified ESHA. Commission Staff,
13 however, refused to consider the change, contrary to the Coastal Act, the Commission's
14 Regulations, and Commission Staff's treatment of other projects to come before the Commission.

15 52. Nonetheless, as of August 23, 2016, the Revised Project, with all of the changes
16 made, was consistent in all respects with the Chapter 3 policies of the Coastal Act, the standard of
17 review for approval of NBR's application for a CDP.

18 **I. Commission Staff's Evaluation of the Revised Project: A Program to Prevent**
19 **all Development**

20 53. The Commission's second hearing on NBR's application for a CDP was scheduled
21 for September 7, 2016. Despite the request by Commissioners in October 2015 that Commission
22 Staff work with NBR to develop a new recommendation for approval of a revised project
23 consistent with the Chapter 3 policies of the Coastal Act, Commission Staff did precisely the
24 opposite.

25 54. On August 25, 2016, 13 days before the scheduled September 7, 2016 hearing,
26 Commission Staff issued a new 172-page Staff Report (not including exhibits), ostensibly
27 recommending approval of some development, but with 56 pages of "conditions" that eviscerated
28 most of NBR's Revised Project. Commission Staff proposed to limit development to three,

1 disjointed areas totaling little more than 10 acres where no economically productive or beneficial
2 project could be developed. (Although the Staff Report described the three areas as consisting of
3 19.7 acres, application of the Commission Staff-imposed development conditions would reduce the
4 developable acreage almost in half.)

5 55. Commission Staff was, in short, recommending a de facto denial of the Revised
6 Project — while attempting to preserve the façade that some small level of development could go
7 forward. The alleged development was, obviously, financially infeasible because Commission
8 Staff included conditions that required NBR to provide all of the unrelated Public Benefits
9 conditionally proposed (7 miles of public trails, accelerated oil field abandonment and site
10 remediation, and ESHA and wetland restoration), at a present-day cost of approximately \$75
11 million. Not only would it be financially infeasible to spend \$75 million on such benefits given the
12 small amount of development proposed by Commission Staff, but the requirement to provide such
13 benefits as a condition of development would amount to an unconstitutional exaction given the lack
14 of a nexus, rough proportionality, or reasonable relation to the development that would be allowed.

15 56. The Staff Report also tainted the hearing and the Commission's review by
16 selectively including only the biological reports prepared by Commission Staff's ecologists and by
17 environmental advocates hired by opponents of the Revised Project. Commission Staff failed to
18 include for review by Commissioners any of the 10 additional expert reports that NBR submitted
19 on the key biological issues raised concerning the Revised Project. The Staff Report also failed to
20 include the "Banning Ranch Archaeological Testing Memorandum," which concluded and
21 explained that the Revised Project would have no impact on archaeological resources.

22 57. Relying solely on the letter prepared by the zoologist (Pete Bloom) working with the
23 project opponents in June 2016 — and never disclosed to NBR until only shortly before the hearing
24 — the Staff Report, based on a memorandum prepared by the Commission Staff ecologist,
25 recommended that an additional 64 acres of the NBR Property be designated as off limit for
26 development (i.e., as ESHA and a buffer area) in order to provide further foraging habitat for
27 "breeding" burrowing owls. Commission Staff's new ESHA recommendation eliminated all
28 development proposed in the southern portion of the NBR Property — including virtually all of the

1 visitor-serving uses and public access and recreation elements of the NBR Revised Project: the
2 parks, the coastal inn, the youth hostel and its youth conservation program, the connection of Bluff
3 Road to West Coast Highway, as well as a small area of residences.

4 58. Lacking sufficient scientific studies to support its assertion of the presence of
5 foraging habitat for burrowing owls on the NBR Property, the Commission staff resorted to
6 requesting project opponents to provide data for its use, as evidenced in an August 21, 2016 email
7 from Robert Hamilton, a biologist working with the project opponents, who stated that he had
8 “been asked by both CDFW [California Department of Fish and Wildlife] and CCC [California
9 Coastal Commission] biologists to pull together the information on Burrowing Owl sightings at
10 Banning Ranch, going back to 2008.”

11 59. Commission Staff issued a first addendum to the Staff Report at approximately 5:00
12 p.m. on Friday afternoon, September 2, 2016 — the Friday before Labor Day. Commission Staff
13 did not provide NBR’s September 2, 2016 detailed rebuttal to the Staff Report, including NBR’s
14 requested changes to the Commission Staff’s 56 pages of “conditions,” until it issued a second
15 addendum on September 6, 2016, at 3:00 p.m. — the afternoon before the hearing — when
16 Commissioners were traveling, or preparing to travel to the hearing, or participating in the private
17 tour of the NBR Property. That left virtually no time for any meaningful Commissioner review of
18 NBR’s detailed rebuttal to the Staff Report. Moreover, NBR’s rebuttal to the Staff Report, which
19 Commission Staff received on September 2, 2016, was purposely buried in the 231-page
20 addendum, following the opposition’s response materials, which Commission Staff specially
21 received in its office on Saturday, September 3, 2016, at a time when the office was closed.

22 60. On September 6, 2016, the day before the hearing, Commission Staff conducted a
23 private site tour of the NBR Property for several Commissioners. The site visit was not a publicly
24 noticed field trip or otherwise accessible to interested members of the public or NBR, whose
25 representatives were told by Commission Staff to not speak to anyone, especially Commissioners,
26 and to observe the irregular site visit from a short, but still inaudible, distance away. The site visit
27 amounted to a private presentation to six of the 10 Commissioners present at the hearing, five of
28 whom ultimately voted to deny the Revised Project. NBR is informed and believes, and thereon

1 alleges, that given the contents of Commission Staff's Staff Report and its favoritism toward
2 information and allegations submitted by project opponents, along with the inaccurate and
3 incomplete information provided by Staff at the hearing, Commission Staff delivered a presentation
4 designed to support its recommended development-killing conditions — and NBR had no chance
5 to participate or respond to correct the inaccuracy of the information provided, even though the
6 meeting took place on NBR's property.

7 **J. The Coastal Commission's September 7, 2016 Public Hearing: The Decision to**
8 **Deny All Development**

9 61. The Commission conducted its public hearing on the CDP for NBR's Revised
10 Project on September 7, 2016. Commission Staff requested approximately one hour for its initial
11 presentation, but instead spent two hours in a presentation to the Commission that was skewed
12 against the Revised Project. Specifically, the presentation was marked by erroneous, irrelevant,
13 omitted, or completely unsupported information regarding the Revised Project and NBR Property
14 and on key issues for decision by the Commission — all of which portrayed the Revised Project
15 and NBR in an unfavorable light.

16 62. Commission Staff focused its efforts on convincing the Commission that the same
17 degree of oil field cleanup, site remediation, and habitat restoration would somehow occur on the
18 NBR Property without the Revised Project, when, but for the Revised Project, oil operations on the
19 NBR Property would remain exempt from the Coastal Act, the site would remain fenced, oil
20 production would not be restricted to the two sites totaling 16 acres, and the site remediation and
21 habitat restoration would not occur for decades to come — if ever.

22 63. NBR was then limited to only 40 minutes to both present the Revised Project and to
23 respond, in addition, to the extended Commission Staff presentation. Approximately six hours of
24 public testimony followed, with testimony by individuals and organizations in support of and in
25 opposition to the Revised Project. NBR was then provided with 15 minutes of rebuttal testimony,
26 after which the Commission closed the public hearing and Commission Staff took an additional
27 half hour to provide further comments to the Commission.

28 64. The Commission followed with questions of Commission Staff and the zoologist

1 working with the project opponents, including questions specifically directed to Commission
2 Staff's last minute addition of 64 acres of burrowing owl foraging habitat based on the
3 memorandum prepared by the Staff's ecologist. The Commission Staff's ecologist, however,
4 admitted, "You know, to be honest — I am not a burrowing owl expert."

5 65. The Commission was persuaded that there was a need to designate additional
6 foraging habitat for breeding burrowing owls, a decision which effectively destroyed the Revised
7 Project. It was an arbitrary action, and not supported by the evidence. For example:

- 8 a) Commission Staff failed to inform the Commission that the Commission
9 Staff ecologist issued separate memoranda on September 25, 2015 and on
10 April 29, 2016 expressing the opinion based "on the burrowing owl winter
11 survey data," that as to the southern portions of the NBR Property, "there are
12 insufficient data to designate a particular area as ESHA." Although there
13 was no change at all in the data, at the September 7, 2016 hearing,
14 Commission Staff instead designated the southern portions of the NBR
15 Property as ESHA and buffer for burrowing owl foraging habitat,
16 eliminating all development proposed in that area.
- 17 b) Commission Staff failed to inform the Commission that the opposition's
18 zoologist never walked on or independently surveyed the NBR Property and
19 *assumed*, as the basis for his opinion, a higher number of burrowing owls
20 than actually was determined through professional protocol surveys
21 conducted on the NBR Property — namely that, in most years, only a single
22 "overwintering" owl has foraged on the NBR Property and only for a few
23 weeks each year — and that *breeding* burrowing owls did not occupy the site.
- 24 c) The zoologist's letter on which Commission Staff relied for the designation
25 of burrowing owl foraging habitat stated that his opinion was based on
26 foraging habitat for "breeding pair nesting," a wholly erroneous assumption
27 because it was undisputed that no breeding burrowing owl, let alone three
28 "breeding pairs" of owls, has ever been observed on the NBR Property.

1 Commission Staff failed to explain the difference between “breeding pairs”
2 and an “overwintering owl,” which expert evidence demonstrates fly as
3 much as 1500 miles to visit different foraging areas and, unlike breeding
4 owls, are not at all tethered to a site.

- 5 d) Commission Staff failed to inform the Commission of the correct and
6 extraordinary amount of burrowing owl foraging area, 199 acres, that the
7 Revised Project proposed onsite.
- 8 e) Commission Staff wrongly informed the Commission that the burrowing owl
9 does not forage in wetland and lowland areas, implying that large portions of
10 the site and adjacent open space are not suitable foraging habitat, contrary to
11 scientific data that shows use of lowlands for foraging by burrowing owls
12 elsewhere across the State.
- 13 f) Commission Staff failed to inform the Commission of the substantial
14 additional acreage offsite in nearby protected open space, i.e., the 100-acre
15 U.S. Army Corps of Engineers’ wetlands, the 180-acre Talbert Nature
16 Preserve, and the 208-acre Fairview Park, which, together with the ample
17 onsite burrowing owl foraging habitat proposed, provided more than enough
18 foraging habitat to protect the one “overwintering” owl that had been
19 observed for a few weeks each year on the NBR Property.
- 20 g) Commission Staff failed to inform the Commission of its own prior
21 decisions regarding the treatment of burrowing owl and other raptor foraging
22 habitat with which the Revised Project is consistent.
- 23 h) Commission Staff failed to accurately inform the Commission, contrary to
24 the statement of the Commission Staff’s ecologist after the close of the
25 public hearing, that the precedent it cited to the Commission was in fact
26 misplaced and erroneous and did not serve as any precedent for determining
27 foraging habitat area on the NBR Property.

28 66. There were numerous other ways in which the information presented at the hearing

1 was either biased, distorted, based upon assertions that lacked evidence, or resulted in arbitrary
2 decisions that are not in accord with the law or with Commission regulations and practices.
3 Specifically, the Commission's Staff – which was charged with providing the Commission with
4 accurate and pertinent data – distorted or evaded the data. Examples include:

- 5 a) The Commission was persuaded to treat an area as “potential ESHA” for possible
6 Gnatcatcher habitat, and to apply a 100 foot buffer in which development would be
7 prohibited, despite the fact that *potential* habitat is not the applicable and controlling
8 criterion for determining ESHA under the Coastal Act, and despite the fact the
9 “potential ESHA” consisted of areas with no documented Gnatcatcher use ever and
10 areas with Gnatcatcher observations once or twice since 1992, but in any event more
11 than 10 years ago; thus, the Commission acted inconsistently with its own prior
12 decisions in other areas, including the Sunset Ridge Park site immediately adjacent
13 to the NBR Property, which Commission Staff failed to bring to the Commission's
14 attention.
- 15 b) Commission Staff failed to inform the Commission of its past decisions in which the
16 Commission determined that marginal habitat, such as Special Features “C” and
17 “CC,” does not qualify as “wetland” subject to regulation under the Coastal Act.
- 18 c) Commission Staff failed to inform the Commission of its numerous past decisions,
19 including its decision to approve Sunset Ridge Park immediately adjacent to the
20 NBR Property, in which the Commission approved ESHA and wetland buffers of
21 less than the maximum 100 foot buffer width recommended by Commission Staff
22 on the NBR Project and consistent with the buffers proposed by the Revised Project,
23 taking into account the degraded nature of the ESHA or wetland involved; thus, the
24 Commission acted inconsistently with its prior decisions.
- 25 d) On August 23, 2016, 15 days before the September 7, 2016 hearing, in response to
26 comments from Commission Staff, NBR submitted a revised grading plan with
27 minor modifications to Bluff Road to ensure the road and all portions of the
28 development/grading footprint would fully avoid ESHA. Commission Staff

1 improperly refused to consider the revised grading plan and, without analyzing the
2 modifications, erroneously advised the Commission at the hearing that Bluff Road
3 and other portions of the Revised Project, as proposed, would impact ESHA. There
4 was no basis in the Coastal Act or the Commission's regulations for Commission
5 Staff's refusal to analyze a minor submission in response to Commission Staff's
6 comments two weeks before the hearing, contrary to Commission Staff's treatment
7 of all other applicants.

8 e) Commission Staff failed to inform the Commission that, contrary to a statement by
9 the Acting Chair of the Commission, Commission decisions have permitted fuel
10 modification in habitat buffers, such as the Fire Department-approved, fire-resistant,
11 native plant habitat buffer that NBR proposed; thus the Commission acted
12 inconsistently with its prior decisions.

13 f) Commission Staff failed to inform the Commission that although the U.S. Fish and
14 Wildlife Service designated critical habitat for the gnatcatcher on the NBR Property,
15 the designation merely indicates the presence of gnatcatchers, and such designation
16 still required site-specific surveys to identify the actual presence of suitable habitat
17 and use and occupation of that habitat by the gnatcatcher. Commission Staff failed
18 also to inform the Commission that a critical habitat designation is not the
19 controlling criterion for determining ESHA under the Coastal Act, especially as to
20 an area adjacent to occupied gnatcatcher habitat that is substantially degraded and
21 consists of sparse patches of disturbed scrub that have had gnatcatcher sightings
22 once or twice since 1992, but in any case more than 10 years ago. In short,
23 Commission Staff misused the critical habitat designation to manipulate and mislead
24 the Commission.

25 g) Commission Staff failed to provide the Commission with the August 23, 2016
26 "Banning Ranch Archaeological Testing Memorandum" or to bring to the
27 Commission's attention the critical conclusions in that expert report that the NBR
28 Project would create no archaeological impacts. Instead of describing the Native

1 American consultation conducted by NBR, and the site visit during which Staff and
2 Native American tribal representatives examined the archaeological sites, Staff
3 preferred instead to create the impression that archaeological issues were significant
4 and unresolved. This deprived the Commission of a timely and meaningful
5 opportunity to review the Archaeological Testing Memorandum or its conclusions.

6 h) Commission Staff failed to inform the Commission concerning compliance with the
7 Native American consultation process and that NBR, for its part, went well beyond
8 what it was legally required to do in terms of consulting with the Native American
9 tribes. This left the Commission with the erroneous impression that the Native
10 American consultation process was not properly followed.

11 i) Commission Staff made improper and extensive representations concerning the
12 Settlement Agreement between NBR and the Commission. Commission Staff
13 portrayed NBR as a supposed "violation" of the Coastal Act, despite the fact that the
14 Settlement Agreement (i) was wholly irrelevant since it relates to property which is
15 not included in the Revised Project, as proposed, and (ii) represented a mutually
16 agreed-upon compromise which included multiple reservations by NBR of its
17 position that no activity on that unrelated property involved any Coastal Act
18 violation; thus NBR was cast in an unfair and negative light in the eyes of the
19 Commission and the public.

20 j) Commission Staff failed to accurately inform the Commission that under a Clean Up
21 and Abatement Order previously issued by the RWQCB regarding oil well
22 abandonment practices, the RWQCB deferred required restoration of less than 3
23 acres of the NBR Property pending the Commission's approval of the Project and
24 NBR's proposed comprehensive site clean-up and restoration of the NBR Property;
25 thus the Commission was misled regarding the RWQCB Order. Commission Staff
26 created the impression for the Commission that through the Settlement Agreement
27 and actions of other agencies, including the RWQCB, site remediation and habitat
28 restoration of a substantial portion of the NBR Property would necessarily occur in

1 the short term on the NBR Property independent of the Revised Project.

2 Commission Staff failed to accurately inform the Commission that denial of the
3 Revised Project would leave the NBR Property as an active, producing oil field in
4 its unremediated, unrestored, increasingly degraded, and fragmented state, subject to
5 proliferation and expansion of invasive species, for decades to come, fenced off
6 from public access; thus the Commission was led to an erroneous conclusion about
7 the consequence of denying the Revised Project. At the same time, Commission
8 Staff was actively attempting to engage Division of Oil Gas and Geothermal
9 Resources (“DOGGR”) staff and encourage them to initiate enforcement
10 proceedings to require cleanup of the NBR Property despite DOGGR’s reluctance to
11 do so.

12 k) The Commission Staff’s ecologist, erroneously stated that she had not observed
13 evidence of a threat of invasive vegetation on the NBR Property, when, in fact
14 during a video-taped, publicly noticed field trip in 2014, she stated just the opposite.
15 In response to a question from a Commissioner regarding the presence of invasive
16 vegetation, she observed that “it’s on its way to becoming the dominant species.”
17 Commission Staff failed to inform the Commission of uncontradicted evidence in
18 the record, including mapping that demonstrated that invasive vegetation currently
19 occupies approximately 90 acres on the NBR Property – increasing nearly 15% in
20 the past two years in the upland area alone. Thus, the Commission was misled
21 regarding the increasing amount of invasive vegetation dominating other species on
22 the NBR Property.

23 l) Commission Staff, in making recommendations on the Project’s impact on ESHA,
24 acknowledged in response to questioning from the State Resources Agency’s ex
25 officio representative on the Commission, Janelle Beland, that its conclusions were
26 based on a memorandum from the California Department of Fish and Wildlife
27 (“CDFW”) that Staff itself had requested, but that CDFW personnel had never
28 entered onto the NBR Property to actually survey or view the alleged ESHA areas

1 before rendering its conclusions.

2 67. At the conclusion of its deliberations, the Commission voted 9 to 1 to deny the CDP
3 application for the Revised Project.

4 K. **The Commission Adopts “Revised Findings”: The Findings Do Not Accurately**
5 **Reflect the Basis for Decision the Commissioners Expressed in Voting to Deny**
6 **the Revised Project**

7 68. In voting to deny the Revised Project, it was clear that despite NBR’s submission of
8 its written response to the Staff Report the week before, Commissioners had no opportunity to
9 review NBR’s written response to the Staff Report and so indicated on the record. Yet despite
10 expressing reservations regarding its inability to review all of the issues presented by the Revised
11 Project, the Commission voted to deny the Revised Project. While the Commission stated that
12 more information was needed for them to be comfortable identifying potential areas for
13 development, the Commission ultimately adopted the September 2016 Staff Report now aptly-
14 renamed “Revised Findings” that not only did not accurately reflect their reasons for denying the
15 Revised Project, but would effectively eliminate any possibility of development on the property
16 despite their statements to the contrary.

17 69. Underscoring the arbitrariness of their decision making, the Commissioners
18 acknowledged that they failed to review all information that had been submitted to them, and that
19 while fully aware that issues needed additional consideration, they rushed to a decision without full
20 consideration of all the material and issues before them.

- 21 • “Something [NBR’s 55-page document] that we clearly are unable to read,
22 much less analyze.” (Commissioner Shallenberger.)
- 23 • “And there are too many issues here that seem unresolved or at least still require
24 more attention,” and “there just isn’t an opportunity in my opinion to get this
25 right tonight, and we’d need to get it right.” (Commissioner Luevano.)
- 26 • “[T]here’s still lots of issues, questions to clear up, because there’s still some
27 debate on this, obviously . . .” (Commissioner Uranga.)

28 70. Nonetheless, on February 9, 2017, five months after the Commission’s decision, the

1 Commission, after a hearing, adopted "Revised Findings." The Revised Findings, prepared by the
2 Commission's Staff, completely ignored the Commissioners' comments as the rationale for their
3 decision to deny the Revised Project. Instead, the Commission adopted, almost in toto, the same
4 analysis and definitive conclusions that Commission Staff recommended in its September 2016
5 staff report on virtually every issue. Thus, Commission Staff, by further sleight of hand, succeeded
6 in getting the Commission to adopt its original staff recommendation anyway, undermining the
7 Commission's request for more information, and eliminating the possibility of a solution that might
8 produce a win-win project for the public and NBR.

9 L. **The California Supreme Court's Invalidation of the Project EIR: Because The**
10 **Project That Was the Subject of the Revised Findings Must be Reconsidered**
11 **By the City Pursuant to the Supreme Court's Decision, the Revised Findings**
12 **Should be Vacated.**

13 71. Subsequent to the Commission's adoption of Revised Findings, the California
14 Supreme Court, in *Banning Ranch Conservancy v. City of Newport Beach* (2017) 2 Cal.5th 918,
15 invalidated the EIR submitted to the Commission for consideration in connection with NBR's
16 application for permit. The EIR did not identify ESHA on the property or discuss the issue in any
17 substantive detail, but simply noted that the Project would require a CDP from the Commission,
18 and that the Commission itself would determine whether the property contains ESHA. The Court
19 held the EIR inadequate under CEQA because it failed to analyze the Coastal Act's ESHA
20 requirements, identify areas on the property that might qualify as ESHA, or feasible alternatives or
21 mitigation measures to minimize or avoid impacts to ESHA or potential ESHA. Central to the
22 Court's decision was the importance of a new, revised EIR's analysis of ESHA *before* the
23 Commission's consideration of the development of the NBR Property. Pursuant to the California
24 Supreme Court's decision, the City will now undertake to prepare and certify a new, revised EIR
25 consistent with the Supreme Court's decision, and approve a project after consideration of the
26 revised EIR. Because the Supreme Court has ordered the NBR Revised Project to be reconsidered
27 by the City, the Revised Findings arising from a City approval and EIR that has been rejected
28 should be vacated.

1 72. NBR has now exhausted all administrative remedies available to it.

2 73. NBR has no plain speedy or adequate remedy in the ordinary course of law, other
3 than the relief sought in this Petition and Complaint.

4 **FIRST CAUSE OF ACTION**

5 **(Administrative Mandamus – CCP § 1094.5)**

6 74. Petitioners/Plaintiffs reallege Paragraphs 1 through 70, which are incorporated by
7 reference as though fully set forth herein.

8 75. In denying the Revised Project, the Commission acted in excess of its jurisdiction,
9 prejudicially abused its discretion by failing to proceed in the manner required by law, and denied
10 Petitioners/Plaintiffs a fair hearing, due process of law, and equal protection of the laws, in
11 violation of the Fourteenth Amendment to the United States Constitution and Article I, section 7 of
12 the California Constitution. As set forth above, and as to be further demonstrated during the
13 adjudication of this matter, the Commission's decision was both procedurally and substantively
14 prejudiced against the Revised Project by an extraordinary and unprecedented number of erroneous
15 and incomplete factual and legal assertions, which led to a denial of the Revised Project.

16 76. The Commission's Revised Findings do not accurately reflect the basis for the
17 Commission's decision to deny the Revised Project, and the Revised Findings and the
18 Commission's decision are not supported by substantial evidence in the record.

19 77. The Commission's Revised Findings were for a Revised Project that the Supreme
20 Court has ordered the City to reconsider after preparing an EIR that addresses the issue of ESHA
21 on the NBR Property. Because the Revised Project that was before the Commission must be
22 reconsidered by the City, the Commission's Revised Findings should be vacated. The Commission
23 will have the opportunity to fully consider a revised project after the City has prepared a new,
24 revised EIR. To adjudicate the adequacy of the Revised Findings for a project that has been
25 ordered to be reconsidered by the Supreme Court is a waste of judicial resources.

26 78. Section 30010 of the Coastal Act provides that the Commission shall not exercise its
27 power to grant or deny an application for a permit in a manner that will take property for public use
28 without the payment of just compensation. In acting to deny the CDP application, following

1 multiple iterations of the proposed development which led to the substantially reduced-size Revised
2 Project, the Commission's actions led to restrictions on the NBR Property that frustrated
3 Petitioners/Plaintiffs' reasonable investment-backed expectations concerning the NBR Property
4 and deprived Petitioners/Plaintiffs of substantially all economically beneficial or productive use of
5 the NBR Property, thus causing a permanent and temporary taking of the NBR Property, in
6 violation of the Fifth Amendment of the United States Constitution and Article I, section 19 of the
7 California Constitution.

8 79. Accordingly, Petitioners/Plaintiffs are entitled to an alternative and peremptory writ
9 of mandate directing the Commission to set aside its decision denying the Revised Project and
10 vacate the Revised Findings.

11 **SECOND CAUSE OF ACTION**

12 **(Inverse Condemnation -- U.S. Const. amend. 5; Cal. Const., art. 1, § 19)**

13 80. Petitioners/Plaintiffs reallege Paragraphs 1 through 70, which are incorporated by
14 reference as though fully set forth herein.

15 81. In acting to deny Petitioners/Plaintiffs' application for a CDP, the Commission has
16 taken the NBR Property, without just compensation, in violation of the Fifth Amendment to the
17 United States Constitution and Article I, § 19 of the California Constitution. Petitioners/Plaintiffs
18 proposed multiple iterations of the Project, beginning with a Project fully consistent with the City
19 of Newport Beach voter-adopted General Plan, a reduced-size project presented to the Commission
20 for review in October 2015, and the further substantially reduced-size Revised Project, consistent
21 with the Chapter 3 policies of the Coastal Act, which the Commission denied on September 7,
22 2016.

23 82. The habitat and other restrictions imposed on the NBR Property as a result of the
24 September 7, 2016 Commission action render it futile for Petitioners/Plaintiffs to make further
25 application for a development project for the NBR Property. The site development limitations
26 imposed by the Commission, coupled with the demand for extensive remediation and restoration of
27 the entire site, are so severe and costly that any economically productive or beneficial development
28 of the site is impossible. As owners of the surface rights of the NBR Property, Petitioners/Plaintiffs

1 have been deprived of their reasonable investment-backed expectations and all economically
2 productive and beneficial use of the NBR Property.

3 83. The actions of the Commission were arbitrary and capricious and not reasonably or
4 substantially related to any legitimate or recognized governmental interest. Petitioners/Plaintiffs
5 are informed and believe, and thereon allege, that it was the Commission's intent to effectuate a
6 taking of the NBR Property without just compensation, and no compensation has been paid.

7 84. As a direct and proximate result of the unconstitutional taking, Petitioners/Plaintiffs
8 have suffered damages in an amount that exceeds \$490 million, plus interest, the precise amount to
9 be proven at the time of trial.

10 85. Petitioners/Plaintiffs have been required to retain legal counsel to pursue legal
11 redress for the Commission's wrongful conduct. Accordingly, Petitioners/Plaintiffs are entitled to
12 recovery of their attorneys' fees, costs of suit, fees and expenses pursuant to Section 1036 of the
13 Code of Civil Procedure and other applicable laws.

14 **THIRD CAUSE OF ACTION**

15 **(Inverse Condemnation – Temporary Regulatory Taking)**

16 86. Petitioners/Plaintiffs reallege Paragraphs 1 through 70, which are incorporated by
17 reference as though fully set forth herein.

18 87. In acting to deny Petitioners/Plaintiffs' application for a CDP, the Commission has
19 caused a temporary taking of the NBR Property, without just compensation, in violation of the
20 Fifth Amendment to the United States Constitution and Article I, § 19 of the California
21 Constitution. Petitioners/Plaintiffs seek just compensation under the Fifth Amendment to the
22 United States Constitution and Article I, § 19 of the California Constitution for the period of time
23 during which they have been deprived of their reasonable investment-backed expectations and
24 substantially all economically beneficial or productive use of the NBR Property as a result of the
25 Commission's action to deny the application.

26 88. As a direct and proximate result of the unconstitutional temporary taking,
27 Petitioners/Plaintiffs have suffered damages in an amount that exceeds the jurisdictional minimum
28 of this Court, plus interest, the precise amount to be proven at the time of trial.

89. Plaintiffs/Petitioners have been required to retain legal counsel to pursue legal redress for the Commission's wrongful conduct. Accordingly, Plaintiffs/Petitioners are entitled to recovery of its attorneys' fees, costs of suit, fees and expenses pursuant to Section 1036 of the Code of Civil Procedure and other applicable laws.

REQUEST FOR RELIEF

WHEREFORE, Petitioners and Plaintiffs Newport Banning Ranch LLC, Cherokee Newport LLC, and Aera Energy LCC pray for judgment against Respondent and Defendant California Coastal Commission as follows:

ON THE FIRST CAUSE OF ACTION:

1. For issuance of an alternative and peremptory writ of mandate commanding the Commission to:

(a) Vacate and set aside its decision to deny the Revised Project and its subsequently adopted Revised Findings;

(b) Defer further action on NBR's application for permit until a new, revised EIR is prepared and certified by the City of Newport Beach; and

(c) Reconsider NBR's proposed development of the NBR Property in a new public hearing, consistent with the Court's decision and in light of the new, revised EIR prepared pursuant to the California Supreme Court's decision in *Banning Ranch Conservancy v. City of Newport Beach* (2017) 2 Cal.5th 918.

2. For the Court to retain continuing jurisdiction over this matter to ensure compliance with the Court's decision, the Coastal Act, the Commission's Regulations, the California Constitution, and the U.S. Constitution.

ON THE SECOND CAUSE OF ACTION:

3. For damages and just compensation in an amount that exceeds \$490 million, plus interest thereon, for the permanent taking of property, the precise amount to be proven at the time of trial.

1 ON THE THIRD CAUSE OF ACTION:

2 4. For damages and just compensation for the temporary taking of property, the precise
3 amount to be proven at the time of trial.

4 ON ALL CAUSES OF ACTION:

5 5. For attorneys' fees under Code of Civil Procedure section 1036, Government Code
6 section 800, and as otherwise permitted by law.

7 6. For costs of suit incurred in this action.

8 7. For such other and further relief as the Court deems just and proper.

9 Dated: August 4, 2017

NOSSAMAN LLP

11 By: 

STEVEN H. KAUFMANN

13 and

14 MANATT, PHELPS & PHILLIPS, LLP
15 MICHAEL M. BERGER
16 SUSAN K. HORI
17 GEORGE M. SONEFF

18 By: 

GEORGE M. SONEFF

19 Attorneys for Petitioners and Plaintiffs
20 NEWPORT BANNING RANCH LLC, CHEROKEE
21 NEWPORT BEACH, LLC AND AERA ENERGY
22 LLC
23
24
25
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27
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VERIFICATION

George L. Basye declares as follows:

I am the Manager of Newport Banning Ranch LLC, a party to this action, and am authorized to make this verification for and on its behalf. I have read the foregoing Verified First Amended Petition for Writ of Mandate and Complaint for Inverse Condemnation. The facts stated therein are true to my knowledge, and as to those matters stated on information and belief, I believe them to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this verification was executed this 5th day of August, 2017, at Brea, Orange County, California.


GEORGE L. BASYE

319081587.2

PROOF OF SERVICE

The undersigned declares:

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and am not a party to the within action; my business address is c/o Nossaman LLP, 777 S. Figueroa Street, 34th Floor, Los Angeles, CA 90017.

On August 7, 2017, I served the foregoing **VERIFIED FIRST AMENDED PETITION FOR WRIT OF MANDATE AND COMPLAINT FOR INVERSE CONDEMNATION** on parties to the within action as follows:

SEE ATTACHED SERVICE LIST

☒ (By U.S. Mail) On the same date, at my said place of business, Copy enclosed in a sealed envelope, addressed as shown on the attached service list was placed for collection and mailing following the usual business practice of my said employer. I am readily familiar with my said employer's business practice for collection and processing of correspondence for mailing with the United States Postal Service, and, pursuant to that practice, the correspondence would be deposited with the United States Postal Service, with postage thereon fully prepaid, on the same date at Los Angeles, California.

☐ (By Electronic Service) By emailing true and correct copies to the persons at the electronic notification address(es) shown on the accompanying service list. The document(s) was/were served electronically and the transmission was reported as complete and without error.

Executed on August 7, 2017.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.


Judith P. Robbins

PROOF OF SERVICE

SERVICE LIST

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CHEROKEE NEWPORT BEACH, LLC
AND AERA ENERGY LLC

PROOF OF SERVICE