

CALIFORNIA COASTAL COMMISSION

SOUTH CENTRAL COAST AREA
89 SOUTH CALIFORNIA ST., SUITE 200
VENTURA, CA 93001
(805) 585-1800



February 15, 2013

Tim Marsh
NMUSD Administrative Director, Facilities Support Services
2985 Bear St., Bldg. E
Costa Mesa, CA 92626

Violation File Number: V-5-13-003

Property location: Whittier Ave., in between 16th and 17th St.
Newport Beach; County of Orange
APN 114-170-63

Unpermitted Development¹: Chain-link fence constructed in environmentally sensitive habitat

Dear Mr. Marsh:

This letter is regarding the chain-link fence constructed around the Newport Mesa Unified School District (NMUSD) property located adjacent to the Banning Ranch property in Newport Beach, which was completed without the required coastal development permit (CDP) and proper study of potential significant impacts on environmentally sensitive habitats related to construction.

Thank you for taking the time during our telephone call on January 29, 2013 to discuss the habitat characteristics of this site, and the potentially significant impacts resulting from a fence bisecting areas of high ecological value. We are encouraged by your statement that the school district takes resolution of this issue seriously, and that your preference is, as ours certainly is, to resolve this issue consensually. To that end, our goal is to continue to work with you and the school district to come to a mutually agreeable solution to resolve the fence development issue.

For reference, the California Coastal Act² was enacted by the State Legislature in 1976 to provide long-term protection of California's 1,100-mile coastline through implementation of a comprehensive planning and regulatory program designed to

¹ Please note that the description herein of the violation at issue is not necessarily a complete list of all development on the subject property that is in violation of the Coastal Act and/or that may be of concern to the Commission. Accordingly, you should not treat the Commission's silence regarding (or failure to address) other development on the subject property as indicative of Commission acceptance of, or acquiescence in, any such development.

² The Coastal Act is codified in sections 30,000 to 30,900 of the California Public Resources Code. All further section references are to that code, and thus, to the Coastal Act, unless otherwise indicated.

manage conservation and development of coastal resources. The California Coastal Commission (“Commission”) is the state agency created by, and charged with administering, the Coastal Act of 1976. In making its permit and land use planning decisions, the Commission carries out Coastal Act policies, which, amongst other goals, seek to protect and restore sensitive habitats (such as *wetlands, grasslands, and nesting sites for protected species*); protect natural landforms; protect scenic landscapes and views of the sea; protect against loss of life and property from coastal hazards; and provide maximum public access to the sea.

Pursuant to Section 30600 (a) of the Coastal Act, any person wishing to perform or undertake development in the Coastal Zone must obtain a CDP, in addition to any other permit required by law. “Development” is defined by Section 30106 of the Coastal Act as:

“Development” means, on land, in or under water, the placement or erection of any solid material or structure; discharge or disposal of any dredged material or any gaseous, liquid, solid, or thermal waste; grading, removing, dredging, mining, or extraction of any materials; change in the density or intensity of the use of land, including, but not limited to, subdivision pursuant to the Subdivision Map Act (commencing with Section 66410 of the Government Code), and any other division of land, including lot splits, except where the land division is brought about in connection with the purchase of such land by a public agency for public recreational use; change in the intensity of water, or of access thereto; construction, reconstruction, demolition, or alteration of the size of any structure, including any facility of any private, public, or municipal utility; and the removal or harvest of major vegetation other than for agricultural purposes, kelp harvesting, and timber operations....

The above-mentioned chain-link fence constitutes development under the Coastal Act and, therefore, requires a coastal development permit. Any non-exempt development activity (which is the case here) conducted in the Coastal Zone without a valid CDP, or which does not substantially conform to a previously issued permit, constitutes a violation of the Coastal Act.

Background

Commission staff received complaints regarding the subject fence on January 8, 2013, and confirmed its placement on January 23, 2013. As we discussed, the location of the fence is especially problematic due to the proximity of rare biological resources which occur in and around the defined area of the NMUSD property and the Banning Ranch property. The subject fence could potentially cause adverse impacts to these sensitive species and habitats including, but not limited to: habitat for various migratory birds such as California gnatcatcher (for which the entire NMUSD property and much of Banning Ranch are USFWS designated critical habitat), Burrowing owl, Northern harrier, White-tailed kite, Loggerhead shrike, Horned lark, and Killdeer; wetland vernal pools habitat (home to native amphibians, insects, and fairy shrimp – specifically, San Diego fairy shrimp, for which parts of the NMUSD property are USFWS designated critical habitats); and rare native grasslands and scrub habitats. These habitats serve a crucial role in the ecology and survival of the multiple threatened, endangered, and

special-status species that inhabit the greater Banning Ranch ecosystem (which includes the subject property).

On January 31, 2013, staff viewed the site from an adjacent property and confirmed the presence of two Burrowing owls in the immediate vicinity of the subject chain-link fence; at two different locations in the northern area of the development. One owl was observed on the outer edge of a burrow, atop a berm, located approximately 50 feet from the subject fence. During that same visit, another owl was observed 175 feet east of owl #1, and approximately 30 feet from the fence. Although these 2 owls appear to be wintering on property adjacent to NMUSD (belonging to NBR LLC), they are in close proximity to the subject fence. Additionally, on January 6, 2013, a member of the public documented a burrowing owl roosted just inside the fence on NMUSD property, beneath a small palm tree on the northern boundary. Finally, the presence of Burrowing owls on, or in close proximity to the site, has been documented in multiple surveys of the Banning Ranch property, which on occasion extended onto the subject property. Numerous sightings of owls at these locations have been documented, including the past several weeks.

Thus, it is our conclusion that the subject fence could potentially pose a threat to the well-being and continued survival of multiple sensitive species inhabiting the greater Banning Ranch ecosystem. Clearly then, important ecological resources exist in vicinity of the fence and any Commission review of the fence would necessarily include an assessment of the fences potential impacts on the site's significant resources (as described above).

Please be advised that, per the request of the USFWS, any activity on or around the fence should be avoided at this time of year due to the presence of vernal pools, as well as ongoing study of these pools, and the presence of wintering Burrowing owls. We appreciate your cooperation in seeing that this request is upheld.

Resolution

In some cases, a violation involving non-compliance with an approved coastal permit may be resolved through the Commission to authorize the removal of the unpermitted development and restore the site. However, in light of USFWS's request to postpone activity around the fence to a time of year that would have the least impact to sensitive species, we look forward to working with you and the USFWS to set an appropriate date discuss our options. You indicated, in our telephone conversation last week, your desire to resolve this matter amicably and in a timely manner. To that end, we would be more than happy to meet and discuss potential solutions, at your earliest convenience. Please contact me no later than **March 17, 2013**, to set up a time to do so.

While we are hopeful that we can resolve this matter cordially, please be advised that the Coastal Act has a number of potential remedies to address violations of the Coastal Act including the following:

Section 30810 states that if the Commission determines that any person has undertaken, or is threatening to undertake, any activity that may require a permit from the Coastal Commission without first securing a permit, they may issue an order directing that person to cease and desist. A cease and desist order may be subject to terms and conditions that are necessary to avoid irreparable injury to the area or to ensure compliance with the Coastal Act. Section 30811 also provides the Coastal Commission the authority to issue a restoration order to address violations at a site.

However, as noted above, we would like to work with you to resolve these issues amicably. One available option to consider is agreeing to a “consent order”. A consent order would provide you with an opportunity to resolve this matter consensually, and to have input into the process and timing of resolving the unpermitted development and restoration of the subject property.

Please call me at (562) 590-5071 if you have any questions or concerns regarding this letter. Thank you for your cooperation and attention to this matter.

Sincerely,

Adam V. Radpour
South Coast District Enforcement

cc: Sherilyn Sarb, Deputy Director, CCC
Teresa Henry, South Coast District Manager, CCC
Karl Schwing, Orange County Planning Supervisor, CCC
Patrick Veesart, Southern California Enforcement Supervisor, CCC
Andrew Willis, Enforcement Analyst, CCC