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VIA Email and US Mail

Steve Kinsey and Dayna Bochco Chairman and Vice Chair California Coastal Commission 45 Fremont Street #2000 San Francisco, CA 94105	Coastal Commissioners California Coastal Commission 45 Fremont Street, Suite 2000 San Francisco, CA 91405
Mr. Jack Ainsworth Acting Executive Director California Coastal Commission 45 Fremont Street, Suite 2000 San Francisco, CA 91405	Ms. Sherilyn Sarb Deputy Director California Coastal Commission 7575 Metropolitan Drive, Suite 103 San Diego, CA 92108

**Re: Newport Banning Ranch, Coastal Development Permit Application No. 5-15-2097**

Dear Chair Kinsey, Vice Chair Bochco, Mr. Ainsworth and Ms. Sarb:

Thank you again for the opportunity to meet on June 22<sup>nd</sup>. Newport Banning Ranch (NBR) has now met with the Acting Executive Director, the Deputy Director and staff over a dozen times and conducted three site tours since the Commission reviewed the Project in October 2015. These meetings have allowed NBR to sharpen our focus as we prepare for the September hearing in Newport Beach. Pursuant to your request, this letter provides Staff with a revised Project Description, which addresses the issues we have discussed relating to Staff's recommended ESHA, wetlands, buffers and Project land uses/circulation/connectivity. NBR believes the revised Project fully addresses all Coastal Act concerns and responds to the greatest degree feasible to suggestions made by Staff.

**Staff's ESHA Recommendation**

With respect to Staff's recommendation on ESHA, NBR and its biologists have struggled with some of the ESHA calls – given the fact that they include many areas that are heavily disturbed with invasive plants and oil facilities - or bare dirt. Additionally, a significant portion of these potential ESHA areas rely on the "presumption of use" theory that the Commission has rejected in a number of prior cases. NBR is willing to no longer contest Staff's ESHA determination, if the Commission will approve NBR's few remaining requests – that provide the difference between a feasible and infeasible project.

**NBR Requests**

In connection with our revised Project Description, NBR is asking the Commission and Staff to agree with NBR on only three remaining areas of disagreement (discussed more fully on Page 3 and 4):

1. Proposed Buffers from recommended ESHA – consistent with prior Commission determinations, revised Newport Beach Fire Department requirements and the Commission-certified Land Use Plan
2. Seasonal Features C and CC – pipeline repairs that do not qualify as wetlands
3. Connecting Bluff Road from West Coast Highway to 17<sup>th</sup> Street – coastal access for inland communities

**Newport Banning Ranch LLC**

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

**Background**

At the October 2015 hearing, the Commission directed NBR and Staff to work together to move the Project forward. A significant number of Commissioners commented that they would like to see:

- A means to allow the oil field clean up to occur in the near term
- A less intense development proposal
- More focus on delineating ESHA and wetlands given site-specific conditions, and avoiding those resources as much as possible
- Protection of the north/south arroyo
- Less landform alteration (grading)
- More Progress in Regulatory Permitting

NBR has taken to heart the Commission's comments, along with additional comments provided by Staff and the public, and in these intervening months has worked together to respond to Commission direction.

**Results to Date**

1. Greatly expanded open space and access
2. Reduction of the development plan footprint and number of units
3. Minimization of landform alteration
4. Avoidance of cultural resources
5. Refinement of low-cost visitor-serving uses and social programming measures
6. Refinement of public access linkages to and from the shoreline and adjacent communities

<b>Acreage Comparison: October Hearing v. Current Project</b>	October Hearing	Current Project	Change
Open Space Preserve and Public Parks	290 acres	329 acres	+39 acres
Regional Coastal Vehicular Access	17 acres	12 acres	-5 acres
Visitor Serving Overnight Accommodations & Retail	10 acres	8 acres	-2 acres
Residential	67 acres	37 acres	-30 acres
Continuing Oil Operations	17 acres	15 acres	-2 acres
Residential Density	1,174 units	895 units	-276 units
Grading Volume	3.6 million c.y.	2.8 million c.y.	-800K c.y.
<b>Total:</b>	<b>401 acres</b>	<b>401 acres</b>	

At the same time, with greatly reduced project development areas, NBR has retained the numerous coastal resource benefits initially proposed:

1. Accelerated comprehensive abandonment, remediation and restoration, and oil field consolidation by the oil operator;
2. Habitat restoration, creation;
3. Funding for perpetual maintenance of natural open space maintenance;
4. Miles of trails and public coastal access;
5. On-site affordable housing and superior low-cost overnight accommodations, and
6. Needed water quality improvements.

### Status of Regulatory Permitting

1. California Department of Fish & Wildlife – 1602 Agreement Issued
2. Regional Water Quality Control Board – Remedial Action Plan and 401 Certification Approved
3. US Army Corps of Engineers – 404 Permit Initiated – Waiting for Coastal Commission Notice of Intent
4. US Fish & Wildlife – Section 7 Consultation Initiated – Waiting for Coastal Commission Notice of Intent

The result now is a revised Project that is fully compliant with all of the Chapter 3 policies of the Coastal Act. Attachment 1, the Revised Project Description, includes detailed tables which summarize these project revisions, and Attachment 2 reflects the revised development footprint.

### Justification for NBR Request

NBR acknowledges that the May 2016 Staff Report recommended approval, however, that recommendation included a number of overreaching conditions. While we have made significant progress with Staff on a number of issues, unfortunately, Staff has thus far indicated there will be no change from the May 2016 Staff recommendation to impose rigid buffers from highly degraded site areas that have minimal habitat value, and to prohibit any fuel modification within those buffers. Based on these conditions, the May 2015 Staff Report included a graphic reflecting a highly constrained and disjointed development footprint which Staff suggested could be approved as consistent with the Coastal Act's wetland and ESHA protection policies.

Staff's proposal would go well beyond what the Coastal Act requires to protect ESHA and wetlands and in any event would not leave a viable development, much less one that would produce many of the important coastal resource features originally proposed.<sup>1</sup>

However, despite our few remaining disagreements and following on many months of productive coordination, NBR believes that a workable framework has been developed with Staff from which we can all move forward with a viable Project that provides the substantial coastal resource and public benefits currently embedded in the NBR Project, including the financial incentive to accelerate abandonment, remediation and restore and/or preserve approximately 324 acres of open space on the site (80% of the property), and to open and improve the site for public access and recreational uses, low-cost visitor-serving accommodations, affordable housing, and substantial water quality improvements. As summarized on

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<sup>1</sup> Prior to NBR receiving revised fuel modification criteria from the Newport Beach Fire Department, a literal application of the Staff Recommendation, and assuming a 100 ft. fuel modification area is required (**which it is not; see additional discussion of NBR's revised proposal for fire-safe buffers below**) essentially reduces the developable area of the proposed Project to only approximately 15 acres, not 55 acres as identified in the Staff Report. In addition, Staff's recommended development areas are located in disparate and disconnected areas of the property, and when coupled with the substantially reduced development footprint, renders the project wholly infeasible. Essentially, the current Staff Recommendation takes us back to where we were in October, a Staff recommended project alternative that is not viable. Because Staff's residual development footprint would not result in a viable development or one that could support the substantial open space restoration (abandonment, remediation, and restoration) and public access, recreational and visitor-serving uses proposed, these project features are now proposed "conditionally," i.e., conditioned on approval of the Project as described in the revised Project Description and associated exhibits included in this transmittal. As a matter of practical reality, NBR could not realistically accelerate the abandonment and remediation, resulting in consolidation and restoration with a development area configured and restricted in size and location as recommended by Staff. There also would be no legal or factual justification to require those significant coastal resource benefits because, simply stated, there would be no "nexus," "rough proportionality," or reasonable relationship tying Staff's restricted development footprint to the lowlands and related areas.

Page 1 - our current differences break down into three areas for which our proposed solutions are subsequently described:

- ESHA, Buffers and Fire Protection
  - What constitutes ESHA under the Coastal Act? Staff has revised its ESHA determination to include potential ESHA, substantially degraded areas that have not supported gnatcatcher habitat. Under the Coastal Act, potential ESHA is not ESHA. The Commission itself acknowledged this most recently in **Stoloski (A-2-HMB-12-005)**, where the Commission found “no substantial issue” on an appeal, and rejected the claim that red-legged frogs and the San Francisco garter snake might potentially come to the “Pullman Ditch” despite the lack of any evidence that they have done so.
  - What is the appropriate ESHA buffer under the Coastal Act? Staff has suggested a rigid 100’ buffer should be required from their recommended ESHA and potential ESHA Areas. As previously stated, many of these areas are comprised of oil field roads, graded and completely disturbed areas (bare and oil facility areas, soil remediation areas, concrete debris areas, oil sumps, oil wells and pipelines, and utility poles), have wholly fragmented areas of vegetation, and no recorded instances of gnatcatcher sightings. In the most relevant precedent involving the immediately adjacent Sunset Ridge Park (5-11-302), the Commission explained: *“The Commission has typically imposed buffers of 50-100 feet for gnatcatcher occupied ESHA,” and imposed a condition eliminating “grading within 50 feet of ESHA, except in areas where the applicant has demonstrated to the Executive Director’s satisfaction that such grading is necessary for the construction of the proposed water infiltration swale and underground drainage culvert.”*
  - How should fire protection be addressed? Staff has suggested that, in addition to including potential ESHA as ESHA and then an arbitrary and rigid 100’ buffer, all fuel modification should be accomplished within the development footprint, when the Fire Department and site characteristics demonstrate that is not necessary.
- Seasonal Features C and CC (Pipe Repair Areas)
  - Do the oil pipeline repair Features C and CC truly represent wetlands pursuant to the “wetland” definition in Section 30121 of the Coastal Act?
- Project Circulation/Connectivity (i.e. Bridges)
  - Is it reasonable, or consistent with the Coastal Act, to eliminate the north-south connecting section of Bluff Road, given that the proposed redesign of Bluff Road where it crosses the Southern and North-South Arroyos: 1) avoids impacts to ESHA and wetlands, 2) results in restoration of hydraulic and habitat connectivity within the historically filled portion of the North-South Arroyo, and 3) is a critical Project element that is necessary to improve and maintain maximum public access to shoreline and upland recreation areas as required by the Coastal Act?

As revised, the Project avoids all development footprint and fuel modification impacts to Staff’s recommended ESHA and wetlands, with a very limited exception related to impacts to 0.002 acre (90 square feet) of isolated and highly degraded Seasonal Features C and CC (discussed further below), and Staff has confirmed that the Project minimizes resource impacts from abandonment and remediation to only those that are absolutely necessary to restore the site for the benefit of habitat restoration and public access. Accordingly, NBR has provided substantial site-specific evidence to support the Commission’s review and approval of the revised Project pursuant to the development plan and proposed resource buffers illustrated in Attachment 3.

## SOLUTIONS

As identified on Page 1, NBR is asking that the Commission and Staff further consider only three remaining areas of disagreement and the proposed solutions:

1. Proposed Buffers from recommended ESHA – consistent with prior Commission determinations, revised Newport Beach Fire Department requirements and the Commission-certified Land Use Plan
2. Seasonal Features C and CC – pipeline repairs that do not qualify as wetlands
3. Connecting Bluff Road from West Coast Highway to 17<sup>th</sup> Street – coastal access for inland communities

## ESHA, BUFFERS AND FIRE PROTECTION

### ESHA

As stated on Page 1, NBR is willing to not contest Staff's ESHA determination, despite NBR's biologists differing point of view, if the Commission approves NBR's proposed buffers, a through connection for Bluff Road, and allow for the minimal development plan impacts to Seasonal Features C and CC, described further below.

While agreeing to not contest Staff on this ESHA matter and in an effort to move the Project forward, NBR is mindful of the opinions of Staff, its own scientific experts, and prior Commission actions on other cases:

1. Staff has reviewed the proposed abandonment and remediation elements of the Project and concurs that, as conditioned per the Staff recommendation, the proposed abandonment and remediation activities have been designed to avoid and minimize impacts to all Staff's recommended ESHA on the site, and that remaining unavoidable impacts are permissible under the Coastal Act given that the proposed abandonment and remediation would result in restoration of the ESHA impacted.
2. NBR continues to maintain that the extent of Staff's scrub and Gnatcatcher ESHA determination, particularly in areas that are surrounded by or occur along the edges of existing oil field development, is not supported by site-specific evidence. The combination of low native plant coverage and diversity, non-native invasive plant species, obvious disturbance in the form of dispersed oil structures, roads, well pads, staging and stockpiling areas (See Attachment 4), and the existing and foreseeable level of ongoing disturbance associated with daily operations of the oil field in these areas should be given due consideration in the determination of ESHA for this site.
3. Staff's analysis and exhibits largely rely on the presence of isolated, fragmented and highly invaded monoculture stands of shrub species that *may be* a component of a rare coastal sage scrub community and *may be* occupied by gnatcatcher. These conditions, in this particular setting, do not represent rare, or diverse high quality habitats rising to the level of ESHA, not only due to their fragmented and degraded condition, but also because of their existing level of ongoing disturbance (i.e. existing edge effects such as noise, dust, lighting, etc.) from oil field operations that surround and/or are immediately adjacent to these areas. These particular areas are highly degraded by oil field activities both in terms of their vegetative structure and other less tangible environs, such as the presence of human induced noise, dust, artificial water inputs, etc., and therefore do not meet the definition of ESHA because their modified condition no longer fits the definition of their natural habitat structure or function. The May 2016 Staff Report stops short of considering and analyzing these factors and other existing edge effects in the context of Staff's ESHA delineation.

4. Rather than basing the ESHA determination on the presumption that these degraded site areas may, at some point in the future, be used by gnatcatcher given the sparse presence of a single plant species, one must consider why these areas have not and are not being used by gnatcatcher.

NBR draws attention to Items 2-4 above, not for the purpose of justifying additional development plan footprint that would impact Staff's recommended ESHA, which it does not, but because the above enumerated site-specific factors are critically important to establishing resource protection buffers that are appropriately governed by the site's conditions, and not an arbitrary 100 ft. buffer standard.

### Buffers

Staff has recommended buffers from the recommended ESHA onsite, 100 ft. from wetlands and upland scrub communities (some not occupied by gnatcatcher for decades and some presumably occupied at some point in the future) and 50 ft. from purple needlegrass, with a few exceptions for select elements of the Project's circulation system. However, in past permit actions, and in certifying the City of Newport Beach Coastal Land Use Plan, the Commission has recognized that there are certain circumstances where smaller buffers may be appropriate and that, pursuant to Section 30240(b) of the Coastal Act, there is no rule requiring uniform application of 100 ft. or 50 ft. buffers. Rather, Section 30240(b) requires that "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."

To address the buffer issue, and in a continued effort to work with Staff on this issue, the revised Project proposes scientifically informed and justified buffers which are both supported and consistent with Section 30240(b) of the Coastal Act, as opposed to Staff's recommended rigid 100 ft. ESHA buffer, which is not necessary nor required under the circumstances.

To better define the buffer areas, NBR proposes the following:

- **Urban Colony and North Family Village – 50 ft. Minimum Buffer from Staff's recommended Gnatcatcher ESHA.**

The Urban Colony and North Family Village development footprints consist of some of the most intensely currently developed and actively used portions of the property, containing oil field operation support structures, roads, parking areas, equipment staging and lay down areas, active wells and pipelines. A significant portion of the proposed development footprint is topographically separated from Staff's recommended ESHA.

Staff's recommended ESHA along the Urban Colony and North Family Village consists largely of monoculture, disturbed scrub vegetation patches (less than 50% cover) that are disjointed from each other by existing roads, well pads and pipelines, utility poles/lines and comprised largely by extensive stands of invasive vegetation.

Given the substantially degraded structural condition of these patches of scrub vegetation, and a consistent level of edge effects from existing oil field operations, several of the suggested ESHA patches have received little to no use by gnatcatchers. The areas that have been used by gnatcatchers are located on slopes that descend from the mesa into adjacent drainages or the lowlands and are therefore topographically separated from the proposed development area.

NBR's proposed minimum 50 ft. buffers will provide for sufficient setbacks from Staff's recommended ESHA for planting of native habitats of sufficient size and density to protect both existing and restored habitat from the edge effects of the proposed site uses.

- **Community Park – 50-100 ft. Minimum Buffer from Staff's recommended Gnatcatcher ESHA**

At the direction of Staff, the Community Park footprint is now located between the North-South and Southern Arroyos, and consists of oil field roads and well pads that are surrounded by disturbed areas (largely bare dirt) and non-native annual grasslands on an area previously proposed for residential development (See Attachment 5).

Despite arguments from existing Newport Crest neighbors and NBR, who share concerns related to moving the park to this location and replacing it with housing directly adjacent to their homes, Staff has been consistent in identifying their proposed Community Park area as a portion of the site that is important for open space use.

Accordingly, based on the guidance provided by Staff, the Project has eliminated residential development in this area and provides for a 100 ft. buffer from Staff's recommended ESHA along the northwest development edge, and a 50 ft. foot buffer along the southeast development edge, consistent with Staff's recommended buffers for this development area.

- **South Family Village – 50-100+ ft. Minimum Buffer from Staff's recommended Gnatcatcher ESHA**

The South Family Village development footprint consists of oil field operation support structures, parking areas, oil field roads and well pads that are surrounded primarily by non-native annual grasslands.

The northern edge of the South Family Village development footprint is adjacent to the Southern Arroyo, which has well-documented gnatcatcher use. With the exception of three (3) instances where extremely isolated and disturbed, monoculture scrub patches, never used by gnatcatchers, have been identified by Staff as ESHA, the revised Project meets or exceeds the 100 ft. minimum buffer recommended by Staff.

The rest of the South Family Village development edge (the meandering southern edge) is proposed with a minimum 50 ft. buffer from Staff's recommended Gnatcatcher ESHA, except in one location adjacent to the southern bluff with documented gnatcatcher use, where an additional ESHA buffer (varying from 80-100 ft.) is proposed.

Similar to conditions surrounding the North Family Village, Staff's recommended ESHA along the southern South Family Village edge consists largely of monoculture, disturbed scrub vegetation patches (less than 50% cover) that are disjointed from each other by existing roads, well pads and pipelines, utility poles/lines and extensive stands of invasive vegetation. In addition, given the substantially degraded structural condition of these patches of scrub vegetation, and a consistent level of edge effects from existing oil field operations and West Coast Highway, all of the suggested ESHA patches, with the one exception noted above, have received no use by gnatcatchers.

Given the extensively degraded site conditions surrounding the proposed South Family Village footprints, combined with the site's topographic separation between much of the proposed

development footprint and Staff's recommended ESHA, NBR's proposed 50-100+ ft. buffers will provide for sufficient setbacks from Staff's recommended ESHA for planting of native habitats of sufficient size and density to protect both existing and restored habitat from the edge effects of the proposed site uses.

- **Bluff Road Entrance from Coast Highway – 25-100+ ft. Minimum Buffer from Staff's recommended Gnatcatcher ESHA**

The Bluff Road development footprint has, since initial concept planning, been located within a historic road cut that contains substantially fragmented and disturbed scrub vegetation which is highly degraded by large stands of invasive plants. Again, at the direction of Staff, which we understand is "driven" by a small patch of unoccupied monocultural scrub, Bluff Road has been realigned closer to the existing homes in Newport Crest, despite arguments from existing Newport Crest neighbors and NBR, who share concerns related to moving Bluff Road to this location.

Staff has recommended a reduced buffer for suggested gnatcatcher ESHA (50 feet instead of 100 feet) in this area, provided mitigation measures such as continuous sound walls, dense vegetation, and grade separations are incorporated into the design of the entire portion of road that is within the 100-foot setback.

Accordingly, Bluff Road has been substantially redesigned to avoid and minimize Staff's recommended buffer to the extent possible. There are two (2), minor pinch points where lesser buffers (25 ft.) are proposed; however, considering the degraded site conditions and that much of the road exceeds Staff's recommended buffers, the minor buffer reductions proposed are warranted.

Following necessary oil field abandonment and remediation, within NBR's proposed buffers, only the following uses would be allowed:

1. Grading of 25 ft. beyond the approved development footprint edge to allow for construction of a 10 ft. wide accessible (no more than 5% grade) public pedestrian trail.
2. Habitat restoration designed and maintained as a mosaic of native grassland, shrub and succulent/cactus habitats to minimize fire risk and provide nesting and foraging habitat for special-status birds, including California gnatcatcher and coastal cactus wren.

Given the extensively degraded site conditions surrounding the proposed development plan footprint, combined with the site's topographic separation between much of the proposed development footprint and Staff's recommended ESHA and the comprehensive habitat restoration planned, NBR's proposed buffers will provide for sufficient setbacks from Staff's recommended ESHA for planting of native habitats of sufficient size and density to protect both existing and restored habitat from the edge effects of the proposed site uses.

### Consistency with Prior Commission Determinations

NBR's proposed buffers, and buffer uses consisting only of a passive use trail and habitat restoration designed to facilitate fire safety (discussed more below), are consistent with past permit actions in which the Commission has approved reductions in buffers for properties similarly subject to prior development and disturbance, and for which the Commission has also permitted low-impact uses within reduced buffers on properties containing gnatcatcher habitat.

In its approval of permit A-NOC-12-005 on appeal in 2013 (involving construction of a 33,368 sq. ft. office building, a three-story, 58,970 sq. ft. office building, surface and underground parking, and other improvements on a 14.35 acre hilltop property containing California coastal sage scrub and Southern maritime chaparral, within which California gnatcatcher had been observed foraging on the site), the Commission approved the project allowing for what it determined to be low impact development between the office uses and upland ESHA, consisting of at-grade parking, sidewalks and landscaping. Here, the Commission permitted parking, sidewalk and landscaping areas with an average combined width of 79 feet to serve as the project's ESHA buffer, concluding: *"While this is not a natural buffer area, this area will provide separation between the upland habitat and the commercial buildings"* and *"the at-grade parking, sidewalk and landscape areas will be sufficient to conclude that the project will not adversely impact the adjacent upland resources consistent with the City's LCP."*

In its approval of permit A-6-CII-00-087-A2 for a Carlsbad golf course, originally approved in 2003 and amended in 2011, the Commission approved the project with zero buffers to upland habitat containing gnatcatcher habitat, determining that, given the passive nature of golfing and the fact that the golf course would be a vegetated area, the golf course would not have the same development impacts associated with the development of structures directly adjacent to ESHA and its associated disruption would not be significant enough to require a buffer. The Commission later determined that a paved emergency access route, given the limited necessary use of the road, would also not result in impacts on adjacent native habitat areas.

More recently, in its review and approval of the adjacent Sunset Ridge Park project (CDP 5-11-302), the Commission noted that "The Commission has typically imposed buffers of 50-100 feet for gnatcatcher occupied ESHA (e.g. CDP 5-03-013, MT No. 1, LLC, 5-92-188-A4, CPH Resorts)", and that the "buffer width is designed based on the specific circumstances of the habitat which is being protected and the impact of the development." In the case of Sunset Ridge Park, a project site immediately adjacent to NBR, far less degraded and with the same vegetation and species constraints, the Commission approved a 50 ft. buffer from gnatcatcher habitat, allowing for native landscaping, drainage and water quality improvements within the buffer. Although obviously highly pertinent to a determination of the buffer required under the Coastal Act, Sunset Ridge Park was not discussed in the May 2016 staff report, but the Commission here is not writing on a blank slate. **A 50 ft. buffer was appropriate for gnatcatcher habitat, and therefore it must necessarily be an appropriate buffer width from the disputed, highly disturbed Staff recommended ESHA.**

These prior Commission actions highlight the need and appropriateness to consider site-specific conditions when establishing buffers, and buffer uses, for new development on sites containing gnatcatcher habitat. Given the specific context of the NBR site, its currently degraded conditions and ongoing oil field operations that effectively result in zero buffers from adjacent habitat areas, NBR's proposed buffers, consisting only of habitat restoration, would be amply protective of ESHA, consistent with Section 30240(b) of the Coastal Act.

### **Fire Protection**

One of the primary issues with the May 2016 Staff Recommendation is the requirement that all developable area and associated fuel modification be located within the Staff identified 55 acre "potential developable areas". As noted, this condition requirement essentially eliminates the ability to utilize approximately 40 acres of Staff's "potential developable areas" for anything other than vegetation management, leaving only 15 acres of disconnected land areas to be used for the proposed residential, visitor-serving commercial,

and overnight accommodation uses. Staff's recommendation is not a viable option for NBR; however, given that the property has recently been removed from the High Fire Hazard Area designation, and the resulting updated direction provided by the City of Newport Beach Fire Department regarding necessary fire protection plans for the Project, NBR is able to revise its proposed Project to include the following fire protection plan:

- Defensible Space of 30 Feet:
  - Within the approved development plan footprint, a minimum 20 ft. wide defensible space separating all habitable structures from proposed natural open space areas and habitat buffers.
  - A 10 ft. wide non-combustible public access trail located just outside of and along the approved development plan edge.
- ESHA Buffer – A minimum 50 ft. wide zone located between the Defensible Space and ESHA, consisting of habitat restoration area designed and maintained as a mosaic of native grassland, shrub and succulent/cactus habitats, including native plant species such as purple needlegrass, California encelia, Coastal golden bush, Coastal prickly pear, and Coastal cholla. No existing native vegetation will be removed and vegetation maintenance within this zone consists only of maintaining the mosaic of native habitats as described, inclusive of non-combustible/succulent habitats that minimize fire risk, and which also provide nesting and foraging habitat for special-status birds, including California gnatcatcher and coastal cactus wren.

With this proposal, the ESHA buffer area would be vegetated and maintained with native plants pursuant to the original Zone C planting list and approved habitat restoration plan. Given the extraordinary degraded condition of the buffer areas, the proposed project would, in fact, create new, functioning native habitat buffers from Staff's recommended ESHA where none currently exist, and where no vegetation maintenance would be conducted pursuant to standard fuel modification requirements, as described above. In addition, we note that the proposed treatments for restored fire-safe native habitat within newly established buffers adjacent to documented gnatcatcher habitat is far less intensive than others uses previously supported by Staff and permitted by the Commission as cited above.

Staff has indicated their concern with the proposed Fire Protection measures as approved by the Newport Beach Fire Department, given the *potential* that the Newport Beach Fire Department could require additional measures in the future. This is true of any development approved in the Coastal Zone, and that the Commission's Special Conditions for Landscape and Fuel Modification Plans ensure that any such change in approved fire protection measures would be subject to further Commission review via a permit amendment or new coastal development permit.

**As such, the Project's proposed fire-safe restored native habitat within the newly established buffers is consistent with Newport Beach Fire Department requirements and will not adversely affect the quality or viability of existing and restored habitats onsite, and is wholly consistent Section 30240(b) of the Coastal Act.**

#### **PIPELINE REPAIR FEATURES C AND CC**

With respect to the proposed development plan, only two man-made seasonal features in question (Features C and CC) remain within the proposed development plan footprint, and based on additional field studies, NBR maintains that these features do not qualify as sensitive wetland habitat and do not meet the Coastal Act definition of wetland for the following reasons:

- The features are the direct result of documented oil operation activities and consist of small excavations for pipeline repairs. Both features consist of oil spill locations and still contain contaminated soils (crude oil) that impact any habitat value and must be remediated.
- Though both features support wetland indicator plants, hyssop loosestrife (*Lythrum hyssopifolia*, OBL) and brass buttons (*Cotula coronopifolia*, OBL), both species are non-native invasive species on the CallIPC list of invasive species.
- The features contain only non-listed versatile fairy shrimp, the presence of which actually poses a threat to the federally listed San Diego fairy shrimp as it has been shown to hybridize with the versatile fairy shrimp.
- Feature C is largely underlain by a 2-inch layer of asphalt, which largely negates any habitat value of the feature.
- Feature CC consists of an excavated pit created to remove 3 pipelines, and contains a monoculture of a non-native, invasive plant species.
- Both Feature C and CC contain hydrocarbon impacted soils that impact any habitat value and that must be remediated
- These features are not connected in any way to other seasonal features on the site. Feature C is located at the base of a large spoil pile, which blocks any connectivity to the watersheds of other seasonal features. Similarly, Feature CC is a deep depression (approximately 2.5 feet deep) that exhibits no potential for overflow as ponding depths generally reach only a few inches.
- Feature C consists of an excavated depression approximately five feet by seven feet and about three to four inches in depth. The depression was created by excavating the soil to expose a broken pipe, which was ultimately abandoned in place and the pipe left within the excavated depression for future remediation. An approximately two-foot by four-foot area in the center of the feature is underlain by a one to two inch thick layer of asphalt-like material which is at a depth of three to four inches. This information along with site photographs were provided to Dr. John Dixon and Dr. Engel dated March 22, 2016 and is cited in Dr. Dixon's Memorandum referenced above.

In Dr. Dixon's Memorandum, he discusses Feature P, which has similar characteristics to C.

Specifically, Dr. Dixon noted:

*"Pond P had strong wetland vegetation, including vernal pool species, and indicators of wetland hydrology. Both areas have been shown to be shallow depressions with a thin veneer (0-5") of sediment that has accumulated over a layer of asphalt that was installed as part of the oil field operations (Bomkamp 2015b). We recommend that these features not be considered wetlands under the meaning of the Coastal Act and Commission's Regulations, not because they are anthropogenic, but rather because they are based on an artificial substrate and are unable to support the normal processes that promote the formation of hydric soils. Although Pond P supports a predominance of wetland indicator species, we do not believe that "lands" in the wetland definition in Section 30121 of the Coastal Act was meant to include asphalt, concrete, and the like, even where sediments sufficient to support some plants have accumulated at the surface."*

It would seem reasonable that the same reasoning would apply given that Features C and CC were created through excavation to repair and ultimately abandoned a broken pipe that was the source of the underlying asphalt materials and hydrocarbon impacted soils. Attachment 6 includes comparison photographs of Features C, CC and P. Ecologically, the features are not substantially different and it would be reasonable and consistent for the Coastal Commission to make such a finding.

For the reasons above, NBR maintains that features C and CC should not be considered coastal wetlands, and given their degraded state and lack of habitat function for rare or native species, they certainly do not meet the definition of ESHA.

**Ecologically, there are no sound reasons to maintain these man-made features within their current isolated locations, supporting non-native invasive species when there is the option to re-establish features that would support native plants and the San Diego fairy shrimp.**

## PROJECT CIRCULATION AND CONNECTIVITY

Staff is recommending that the segment of Bluff Road connecting the South Village to the North Village and Urban Colony be eliminated from the Project, contending that this segment of the road “would impact habitat areas of federally threatened species, would impact areas of ESHA, and would have significant adverse effects... *“would divide the North-South arroyo from the vernal pool complex and would divide the watershed”* and *“elimination of Bluff Road as a through connection...is critical for the site’s overall habitat connectivity.”*

These statements are not substantiated by site-specific evidence and Staff’s conclusion ignores the significant public access benefits that are inherent to this critical Project circulation element.

Bluff Road, as proposed and further revised pursuant to the revised Project, would not result in impacts to federally threatened plant or animal species, or their habitats. Its design (e.g., routing, expanded bridge clear span, soft bottom drainage crossing, etc.) avoids all of Staff’s recommended ESHA and wetlands.

The road connection would not divide the North-South Arroyo from the vernal pool complex as there is currently no connection between these site areas now. The upper portion of the North South Arroyo was substantially filled in the 1940’s as part of the oil field development, eliminating any hydrologic connection with fill that now supports a routinely used oil facility road.

Per the revised Project, the road has been redesigned at its two drainage crossings to avoid impacts to Staff’s recommended ESHA, and to protect and create, where feasible, habitat and hydrologic connectivity. The bridge span proposed for the Sothern Arroyo has been lengthened to ensure bridge abutments do not impact the drainage top of bank, scrub or riparian ESHA.

The road connection across the North-South Arroyo would restore hydrologic connectivity and create a habitat corridor between the North-South Arroyo and vernal pool complex by removing the existing fill and a roadbed placed in the drainage and replacing it with an open, soft bottom culvert crossing that allows for water flow and wildlife movement below the new road.

Finally, Bluff Road has been realigned throughout the site to avoid Staff’s recommend ESHA, and to substantially reduce both the amount and extent of its grading footprint. The section of the road Staff suggests should be eliminated is located at the easternmost extent of the NBR property on the Mesa, near the east property boundary and adjacent developed areas, and within the most upper reaches of the North-South Arroyo and Southern Arroyo where these watersheds essentially begin to lose their natural topography and function for habitat connectivity as they approach the adjacent urban area.

These factors, coupled with the substantial coastal resource benefits that are inherent to this critical Project element, demonstrate that maintaining Bluff Road in the development plan is not only consistent with the ESHA and wetland protection policies of the Coastal Act, but it's also necessary to improve and maintain maximum public access to shoreline and upland recreation areas.

**Construction of Bluff Road, as proposed, would facilitate and encourage multi-modal transportation options to the coast and recreation areas via a modest two-lane thoroughfare, with sidewalks and bicycle lanes designed along the entirety of the access corridor. Providing circulation and connectivity via Bluff Road to and from the shoreline through the Project site, its low-cost visitor-serving, recreational and affordable housing elements, and to the Project's underserved neighbors in Coast Mesa, would implement the coastal access and recreation policies of the Coastal Act mandating that maximum public access and recreational opportunities in the Coastal Zone be provided for all people, consistent with the need to protect public safety, private property and natural resources.**

## CLOSING

NBR is committed to continuing working with Staff as we proceed to the September hearing. We would like to schedule a further meeting after you have had the opportunity to consider the revised Project and site-specific buffers proposed in hopes that the significant changes made since the October 2015 Commission hearing will produce a positive staff recommendation.

Respectfully submitted,



Michael A. Mohler  
Newport Banning Ranch LLC

### Attachments:

Attachment 1 – Project Description

Attachment 2 – Site Plan

Attachment 3 – Project Footprint & CCC Staff Recommended ESHA

Attachment 4 – Existing Site Conditions & CCC Staff Recommended CAGN ESHA

Attachment 5 – CCC Staff Suggested Land Plan Changes

Attachment 6 – Features C, CC & P Comparison

Cc: Karl Schwing – Via Email  
Amber Dobson – Via Email