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## Item Th12a

February 3, 2017

**VIA ELECTRONIC MAIL & U. S. MAIL**

Dayna Bochco, Chair  
Honorable Coastal Commissioners  
California Coastal Commission  
45 Fremont Street, #2000  
San Francisco, CA 94105

**Re: CDP Application No. 5-15-2097 (Newport Banning Ranch, LLC)  
Item Th12a (Revised Findings)**

Dear Chair Bochco and Commissioners:

On behalf of Newport Banning Ranch LLC (“NBR”), we appreciate the opportunity to comment on the above Revised Findings. Unfortunately, Staff’s recommended Revised Findings do not accurately reflect the Commission’s discussion following the close of the September 7, 2016 public hearing or the basis on which the Commission acted to deny the Newport Banning Ranch Project (“Project”). For the reasons set forth below, NBR respectfully requests that the Commission continue the agenda item and direct Staff to make changes and to bring back the Revised Findings for adoption at the next regularly scheduled Commission meeting.

The Commission made clear that in denying the Project, there remain unresolved issues and the Commission was not prepared to “find a project” between NBR’s proposed project and Staff’s recommendation without the opportunity to consider additional site-specific and scientific information. Set forth below are quotes from the Commission’s deliberations from a number of Commissioners reflecting that decision. The draft Revised Findings, however, do not reflect this direction. If adopted in the form proposed, the draft Revised Findings would preempt further Commission review and, despite the Commission’s discussion, simply adopt the conclusions regarding Coastal Act consistency that Staff recommended in the September 2016 staff report – which was not the action taken. More significantly, the current draft of the Revised Findings reflect the lack of nexus between the evidence that was presented to the Commission and the Commission’s deliberations – precisely the basis for the Applicant’s decision to legally challenge the Commission’s decision for abuse of discretion.

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A copy of this letter has been provided to Coastal Commission Staff

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The Revised Findings should therefore be revised before Commission adoption. Minor revisions to the “Overview” portion of the staff report are needed to conform to the sentiments expressed by Commissioners, and we have included a short redline for that purpose. The Commission made no final determinations regarding the consistency of the Project with the applicable Chapter 3 policies of the Coastal Act, although the draft Revised Findings, if adopted without revision, would do so as to all of the policies. Minor revisions to the Revised Findings should be made to permit the Commission to fully consider all of the information which bears on the Project so that it can make the informed judgment the Commission felt it was unable to make at the conclusion of the hearing. And, the conclusion reached as to each coastal resource policy should read as follows:

“Without additional site-specific or scientific information, the Commission is not able to determine whether the Project, as proposed or conditioned, is not consistent with Section \_\_\_ of the Coastal Act.”

Accordingly, the Commission should continue the agenda item and provide direction to Staff to make changes and to schedule the Revised Findings for adoption at the Commission’s next regularly scheduled meeting.

#### I.

#### **The “Overview” to the Revised Findings**

The Introduction to the draft Revised Findings – the “Overview” – does capture in many respects the general sentiment expressed by Commissioners in acting to deny the permit application. The draft Revised Findings themselves, however, do not reflect that sentiment or the articulated basis for the action taken. As the hearing transcript demonstrates, there is instead a fundamental “disconnect” between the comments that the Commissioners made and Staff’s recommended Revised Findings which, if adopted, do nothing more than cement Staff’s incomplete view of the evidence and its analysis and conclusions from the September 2016 Staff Report.

The Overview correctly states that Commissioners noted they were not opposed to approving development on a portion of the site, but that they “were not prepared to ‘find a project’ between the applicant’s project and the staff recommendation and therefore did not make an amending motion at the hearing.”

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(Overview, p. 4.) Commissioners clearly expressed that they were not comfortable making the decision without the benefit of additional site-specific and scientific evidence and that there remain many unresolved issues which require more attention. Staff's version of the Revised Findings nonetheless proceeds to resolve those issues anyway and base conclusions regarding Coastal Act consistency on Staff's own evidence to the exclusion of the rest of the substantial evidence in the record, including that presented by NBR, and the information that the Commission has not yet had the opportunity to fully review, analyze and consider.

**Put another way, Staff has framed the Revised Findings to make determinations that the record demonstrates the Commission did not make and which, consequently, would undermine and foreclose the very flexibility and additional information the Commission has requested that would enable NBR, Staff and the Commission to achieve an approvable project in the future.**

Attached are the following:

- (1) A redline of the "Overview" portion of the draft Revised Findings (Pages 2-4);
- (2) A matrix which neatly encapsulates the Commissioner comments made after the close of the public hearing, broken down by issue area; and
- (3) A summary of some of the evidence on key issues that has not been reflected in the draft Revised Findings.

It is abundantly clear from the evidence reflected in the record that there were no "Commission" determinations as Staff suggests in the Revised Findings. Rather, the door was left open to continue the dialogue, to review site-specific and scientific information, and then, at a future hearing, to make final decisions on whether or how to approve the NBR Project consistent with Chapter 3 policies.

The Overview accurately states that the Commission "did agree that a substantial amount of development was likely approvable on the site, although the Commission determined that more information was needed to conclusively identify the precise location of the developable acres." The absence of any precise determination was highlighted by several earnest Commissioner comments:

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- Commissioner Shallenberger was the first Commissioner to offer comments: “They’ve [NBR] has made it clear with a 55-page document, which we got this morning, which has been, you know, underlined, redlined, how they would like this to be, taking Staff’s language and crossing out and adding. *Something that we clearly are unable to read, much less analyze.*” (Transcript, p. 365; italics added.) Thus, there was no determination made on the issues raises, much less consideration of NBR’s detailed, written response to the Staff. Instead, Commissioners made loud and clear that they needed more information and that the NBR Project is one that, in the words of Commissioner Shallenberger, the Commission needs “to get right.”
- Commissioner Luevano echoed Commissioner Shallenberger’s comments: “And there are too many issues here that seem unresolved or at least still require more attention,” and again that “there just isn’t an opportunity in my opinion to get this right tonight, and we’d need to get it right.” (Transcript, pp. 397-398.)
- Commissioner Cox stated: “I think that the proposal that has been laid out by the developer I think is – is not something’s probably going to be sustained based on the staff’s recommendation. On the other hand, I think the staff’s recommendation is – is over limiting . . . I’m somewhere in between. I . . . don’t like necessarily staff’s limitation in regards to the – the 19 acres or whatever the residual of that is, I’d really like to see some additional opportunities, maybe, to take another look at the – the south parcel.” (Transcript, pp. 441 and 443.)
- Commissioner Vargas stated: “. . . [M]y fear on this tactic of – of denying the project is that we’re basically taking the commissioners’ ability to have a negotiation and a discussion. We’re taking our power out of this, and we’re handing it to a judge, potentially. . . . So I . . . at least want to have a discussion with my fellow commissioners in terms of whether they see any other opportunities for adaption of the staff recommendation, that might save us from a scenario like that.” (Transcript, p. 393.)
- Commissioner Uranga stated: “. . . there is a project, staff is recommending a “yes” vote, so there is something there. It’s just not to the capacity or to the level that is acceptable to everyone. I mean, there’s still a lot of issues,

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questions, things to clear up, because there's still some debate on this, obviously. There's a lot of debate on this. And there's probably still some opportunity to come to a middle ground on this. We just haven't reach that yet." (Transcript, p. 432.)

- Commissioner Turnbull-Sanders: "And I share the concerns, I believe, of – of my fellow commissioner, Commissioner Luevano in that if we make a decision today, there is no way to kind [of] undo whatever – whatever happens going forward, and in light of particularly a level of raising of consciousness around issues pertain to indigenous people's rights . . . I think it's very important that we make sure that we get that piece of it right. (Transcript, p. 402.)
- Chair Bochco: "So let me just say that I don't think that if we support this motion of a denial today that that's the end of this project. I don't think that that's going to happen." (Transcript, p. 446.)

The clear sentiment of Commissioners was that more information is required so that the Commission can "get it right." But, the further information becomes irrelevant and the Commission's ability to "get it right" would be fruitless if the Commission were to adopt the Revised Findings, without changes, along with Staff's conclusions at this point regarding Coastal Act consistency.

## II.

### **THE "DISCONNECT" BETWEEN THE OVERVIEW AND**

### **DRAFT REVISED FINDINGS**

While Staff took pains in the "Overview" to acknowledge the Commission's discomfort at making a decision at the conclusion of the hearing without having a fuller opportunity to consider everything, the rest of Staff's draft Revised Findings, if adopted, would simply preempt any future effort by the Commission to fully evaluate the evidence and, if possible, to find a middle ground by virtue of Staff's proposed conclusions that would lock its September 2016 recommendation in place.

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Again, as noted, Commissioner Shallenberger's opening comments astutely explained:

“They've [NBR] has made it clear with a 55-page document, which we got this morning, which has been, you know, underlined, redlined, how they would like this to be, taking staff's language and crossing out and adding. *Something that we clearly are unable to read, much less analyze.*” (Tr. p. 365, line 4; italics added.)

In fact, although the Commission conducted a lengthy public hearing on what admittedly is a complex project, NBR's submissions were not timely provided to the Commission. This included NBR's 10 expert reports which addressed, in particular, the biological issues. It included Psomas' “Banning Ranch Archaeological Testing Memorandum,” which concluded that “1) no new tribal cultural sites were found; 2) There are no impacts to the known archaeological sites on the property; 3) nothing of significance was found in the proposed development area; and 4) avoidance measures incorporated into the Project's design will eliminate impacts to historic properties.” It also included a revised set of grading plans that modified the development plan and Bluff Road specifically to eliminate all Staff proposed ESHA and wetland impacts, which Staff explained it would not and did not review or analyze.

While NBR submitted its 55-page document (a comprehensive letter addressing the issues, exhibits, and a detailed redline of the conditions) on September 2, 2016, the Friday before the hearing, it was, unfortunately, buried in the midst of a 231-page addendum posted to the Commission's website at 3 p.m. the day before the hearing and, as Commissioner Shallenberger noted, was not provided to Commissioners until the morning of the hearing. While we have great faith in the Commission's ability to digest documents, that timing sequence, coupled with the sheer amount and nature of the material, would not have enabled the Commission to digest NBR's detailed written arguments and reference to the evidence.

So, indeed, the Commission was careful to determine only that “more information was needed to conclusively identify the precise location of the developable acres,” (Draft Revised Findings, p. 3), that “the differences between staff's recommended conditions and the applicant's were too great to bridge at the public hearing” (*id.*, p. 3), and that “the Commissioners were not prepared to ‘find project’ between the applicant's project and the staff recommendation.” (*Id.*, p. 4).

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The transcript of Commissioner comments following the close of the public hearing makes clear that the Commission made no determination whatsoever as to conformity of the NBR Project with Section 30240 (ESHA), Section 30233 (wetlands), Section 30231 (clean-up and site remediation), or Section 30244 (archaeological resources). The best that can be said is that the Commission was not satisfied that it had before it sufficient site-specific and scientific information relating to the burrowing owl or evidence that the Project, as proposed or conditioned, would avoid all cultural resources on site. (*Id.*, p. 3.) The Commission made no other determinations, but simply left the door open to secure additional information so that it could make an informed decision on whether or how ultimately to approve the Project. This was prudent, but it would be a mistake to interpret this as an endorsement of the staff report that Staff prepared for the September 2016 hearing. But that is what the draft Revised Findings, if adopted, would accomplish.

Directly contrary to the Commissioners' comments, the draft Revised Findings would adopt, almost in toto, the analysis and definitive conclusions that Staff recommended in its September 2016 staff report on virtually every issue – ESHA and ESHA buffers (*e.g.*, pp. 7, 42-43, 53, 62), burrowing owl and foraging habitat and buffers (*e.g.*, pp. 45, 47-53, 55-59), potential ESHA qualifying as ESHA (*i.e.*, the highly degraded area adjacent to occupied Gnatcatcher habitat which protocol surveys for years have indicated no occupied Gnatcatcher use – *e.g.*, p. 42), Bluff Road (*e.g.*, pp. 7, 47, 57), fuel modification in buffers (*e.g.*, pp. 59, 64), seasonal features C and CC and 100' wetland buffers (*e.g.*, p. 88), and site clean-up in wetlands (*e.g.*, p. 85).

It is important to understand that preemptive statements appear throughout the Revised Findings. For example, at several places, the draft Revised Findings retain the flat statement from the original Staff Report that, in Staff's view, approximately 19 acres of the property could be developed.<sup>1</sup> (Draft Revised Findings, pp., 3, 7, 61 and 133.) The draft states that it is necessary to designate 64 acres of grasslands for burrowing owl foraging. (*Id.*, pp. 49, 62.) And, the draft further states that new development “outside of the mapped constraints” would be approvable. (*Id.*, p. 4; emphasis added.)

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<sup>1</sup> For the sake of accuracy, the habitable developable area is not 19 acres at all, but rather less than 10.2 acres of the 401-acre site, reduced to three tiny, disjunct areas, which could not possibly support “hundreds” of housing units, as Staff suggests.

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These preemptive conclusions are completely inconsistent with the sentiment expressed by the Commission and reflected in the Overview. As discussed in Attachment 3 to this letter, the issue of burrowing owl ESHA and foraging habitat completely unraveled at the public hearing. Of note, Commissioner questions demonstrated inadequate literature view, that the Commission's ecologist, by her own admission, is not "a burrowing owl expert," and that the paid opposition biologist on which Staff relied based his foraging habitat opinion on a faulty assumption -- "breeding burrowing owl," not overwintering burrowing owl. Without the further information sought by the Commission, the definitive reference to "19 acres" (which had been 55 acres in the May 2016 staff report), or definitively designating "64 acres" of burrowing owl foraging habitat which would wipe out the entire South Village hotel/hostel/park/ residential development, or locking in Staff's "mapped constraints" makes no sense and it is at best premature and unsupported. Constraints will have to be "remapped," as informed by the additional information.

Pages 84-86 of the draft Revised Findings also include new additions to the discussion of whether clean-up activities conform to the wetland policy in Section 30233 of the Coastal Act. But, this was never discussed in the September 2016 staff report and addenda, was not raised or discussed by Staff at the hearing, and was certainly not discussed by Commissioners. That kind of post-hoc addition to Revised Findings is not proper.

Most importantly, at this point, Staff has presented basically one side of the evidence, its staff report from the September hearing. The draft Revised Findings will therefore necessarily only reflect that information. But, while the Commission has called for additional site-specific and scientific evidence to inform its decision, there is overwhelming evidence in the record right now that the Commission has not had the opportunity to consider. Whether it would ultimately produce a different result is not the issue. It is that the Commission have that evidence in hand and the opportunity to analyze and address it before looking for a way to bridge the gap between Staff and the Applicant and finally committing one way or the other on this Project.

Attachment 3 is a summary of some of the evidence on key issues that has not been reflected in the draft Revised Findings. This evidence is provided merely to demonstrate that while the Commission, in effect, denied the application "without

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prejudice,” the Revised Findings should be modified in a way that, like the Overview, preserves the parties’ options for future review.

NBR has edited the “Overview” portion of the draft Revised Findings to conform them to the Commissioners’ comments. (*See* Attachment 1.) We have not, however, gone line by line through the draft Revised Findings to propose redlined changes. That, we believe, is better addressed by Staff through direction by the Commission. We also would be happy to provide our own thoughts to Staff. As noted, while the draft Revised Findings simply recite Staff’s view of the evidence as of September 2016, without regard to the additional evidence in the record and which the Commission has requested, NBR respectfully submits that the conclusion as to each coastal resource policy issue should read as follows:

“Without additional site-specific or scientific information, the Commission is not able to determine whether the Project, as proposed or conditioned, is consistent with Section \_\_\_\_\_ of the Coastal Act.”

That would be consistent with the Commission’s determination that it neither fully agreed with Staff nor fully agreed with the Applicant, and would enable the Commission in the future to make a well-considered decision concerning the Project, based on all the evidence. To simply adopt the Revised Findings proposed by Staff, however, would instead place the Commission and the parties in a straight-jacket.

### III.

### CONCLUSION

There was a recognition by Commissioners that the NBR Project offers substantial public benefits – several hundred acres of oil field abandonment, site remediation, ESHA and wetland restoration, and miles of public access to an area that currently is fenced-off and highly degraded. Even without the further information the Commission would like to see, Staff’s reference to 19 acres of developable area is not 19 acres at all, but rather less than 10.2 acres of the 401-acre site, reduced to three tiny, disjunct areas, which could not possibly support “hundreds” of housing units, as Staff suggests, much less an economically viable development meeting NBR’s reasonable investment-backed expectations sufficient to justify the \$75 million

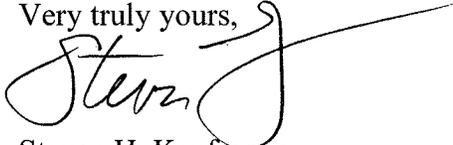
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needed to produce the public benefits that Staff seems to think are constitutionally required on this Property.

The Commissioners' comments reflected the clear desire to ferret out further site-specific and scientific evidence so that the Commission might better determine whether and how to approve the NBR Project, consistent with the Chapter 3 policies of the Coastal Act. The Commissioners underscored their view that development of the NBR property is too important and that they want to "get it right." While the Commission very clearly concluded that it could not make that determination based on the state of the record, the Staff's recommended Revised Findings would force that determination, undermine the Commission's request for more information, and eliminate the possibility of a solution that might produce a win-win for the public and the Applicant.

For these reasons, NBR respectfully requests that after the close of the public hearing, the Commission move to continue the Revised Findings and direct Staff to make the modest changes requested above and bring back the Revised Findings for adoption at the next regularly scheduled Commission meeting.

We look forward to discussing these issues further with you at the hearing.

Very truly yours,  
  
Steven H. Kaufmann

Ccs (w/attachments):

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