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NEWPORT BEACH LLC, AND AERA ENERGY
14 LLC

15 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
16 **FOR THE COUNTY OF ORANGE**

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

21 Petitioners and Plaintiffs,

22 v.

23 CALIFORNIA COASTAL COMMISSION,
a State Agency, and DOES 1 through 25,
24 inclusive,

25 Respondents and Defendants.
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Case No.

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

1 Petitioners/Plaintiffs Newport Banning Ranch LLC, Cherokee Newport Beach LLC, and
2 Aera Energy LLC allege:

3 **OVERVIEW**

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

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

15 3. In 1973, when Proposition 20 (the predecessor to the 1976 Coastal Act) was
16 adopted, all oil operations were deemed vested and exempt from regulation by the Commission
17 because the oil operations had been previously approved by the State Department of Oil & Gas
18 (now known as the Department of Oil, Gas and Geothermal Resources). An exemption to this
19 effect was issued by the Commission’s predecessor agency. Accordingly, the Commission has
20 never had jurisdiction to regulate oil production operations at the site, provided that the operations
21 were consistent with the pre-1973 approvals.

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

27 5. In 2008, NBR applied to the City of Newport Beach (“**City**”) for approval of a
28 project to accelerate oil field abandonment, clean up, habitat restoration, and development of the

1 site (“**the Project**”). The Project, as initially proposed, would spend about \$50 million to fully
2 remediate the NBR Property pursuant to strict agency standards, and restore and create about 245
3 acres of permanently protected open space and restored natural habitat, 40 acres of parks and seven
4 miles of trails available for public use. This abandonment, remediation, and open space restoration
5 and dedication of roughly 75% of the site would be made possible by the proceeds from the
6 development to be built on portions covering only about 25% of the site — new homes, a small
7 coastal inn, and retail and commercial uses.

8 6. The Project was fully consistent with the 2006 voter-approved City of Newport
9 Beach General Plan, and in 2012 the City certified an Environmental Impact Report (“**EIR**”) for
10 the Project and unanimously approved NBR’s application to build the Project. The Project won
11 approval because it would provide enormous environmental benefits on the moribund site, create
12 expansive, new public amenities near the beach, and include a primary road that would improve
13 traffic circulation from Pacific Coast Highway to underserved neighborhoods inland.

14 7. In February 2013, NBR applied to the Commission for a Coastal Development
15 Permit (“**CDP**”) to develop the Project as approved by the City.

16 8. The process of obtaining a decision at the Commission was, and continues to be,
17 extraordinarily drawn out, and very expensive. Over the three years after applying to the
18 Commission, NBR was required to submit voluminous additional documentation just to convince
19 the Commission Staff that the CDP application was complete enough such that it could even be
20 considered. Thereafter, in order to satisfy Commission Staff, NBR was required to undertake and
21 submit to the Commission Staff an extensive array of studies documenting investigations into the
22 site’s biology and potential impacts of the proposed development. NBR also engaged in
23 discussions and workshops with a wide variety of parties and interested organizations about the
24 development details. During this three-year period, as a result of input from Coastal
25 Commissioners and discussions with Staff, NBR twice reduced the development proposed as part
26 of the Project in an effort to respond to specific issues under the Coastal Act. This resulted in a
27 revised project (**the “Revised Project”**) that substantially scaled back the residential and
28 commercial development planned for the site with increased environmental remediation costs, but

1 also increased the amount of open space, habitat protection, and public amenities even beyond what
2 had been approved by the City.

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

- 12 • Commission Staff told Commissioners that the oil impacts on the NBR Property
13 from past oil operations would be sufficiently remediated regardless of whether
14 development was permitted on the site. This is not true. The fact is that
15 substantial remediation of the oil field and habitat restoration of the site — a
16 very costly undertaking — will occur only if there is a development project that
17 will finance the work. Absent the proposed development project which
18 accelerates oil field clean up and implements habitat restoration, the NBR
19 Property will remain in its current, unremediated state for years. The
20 Commission thus acted under a demonstrably mistaken assumption about the
21 consequences of its action — i.e., the erroneous assumption that the site will be
22 remediated even without the proposed development project such that native
23 plants and wildlife can repopulate the abandoned oil production areas.
- 24 • Shortly before the hearing, Commission Staff received a letter from a zoologist
25 working with the project opponents expressing (for the first time) a view on the
26 need to set aside 64 additional acres as foraging habitat for breeding burrowing
27 owls. This contradicted the results from years of prior environmental and
28 biological review. More importantly, no breeding burrowing owls have ever

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been identified on the site. Not surprisingly, the zoologist’s proposed foraging habitat was squarely in one of the prime areas to be developed, and thus would essentially gut the Revised Project. Despite ongoing communications between NBR and Staff, Commission Staff withheld that letter from NBR until shortly before the September 7 hearing, and publication of the Commission Staff report with its ecologist’s recommendation that the additional acreage be reserved for foraging habitat. At the hearing, the Commission’s Acting Executive Director acknowledged that the recommendation for burrowing owl foraging habitat came “late in the process . . . [t]hat was very unfortunate.” Furthermore, the Commission Staff ecologist in charge of preparing the biological recommendations in the Staff Report admitted, “You know, to be honest — I am not a burrowing owl expert.” The alleged need for additional foraging habitat was an ambush of the Revised Project and was not supported by credible evidence, but was nonetheless cited by some Commissioners as a reason for 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.

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- 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 that refusal to advise the Commissioners that the Bluff Road would impermissibly impact ESHA.

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

11. Accordingly, Petitioners/Plaintiffs seek (a) a writ of mandate to compel the Commission to set aside and vacate its September 7, 2016 action; (b) a remand to the Commission for a new public hearing on the Revised Project based on a fair process, consistent with specific direction from the Court; and (c) just compensation for a permanent and temporary taking of the NBR Property. 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.

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PARTIES

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

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

14. Cherokee, Aera, and NBR do not own the mineral rights with regard to the NBR Property. The mineral rights underlying the NBR Property are separately owned by Horizontal Development, LLC, whose operating affiliate is the West Newport Oil Company. In all allegations below, Cherokee, Aera, and NBR are collectively referred to as either “**NBR**” or “**Petitioners/Plaintiffs.**”

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

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

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JURISDICTION AND VENUE

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

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

STATEMENT OF FACTS

A. The NBR Property

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

20. The NBR Property is generally bounded on the south by West Coast Highway and residential communities in West Newport Beach; on the east by the City’s Sunset Ridge Park, residential developments, parcels partially occupied by storage facilities that are owned by the Newport Mesa Unified School District, and industrial uses; on the north by residential development and the City of Costa Mesa Talbert Nature Preserve, an approximately 180-acre nature preserve and wilderness park owned and operated by Orange County Parks; and on the west by a residential community in the City of Newport Beach, the Santa Ana River where it meets the Pacific Ocean, and 92 acres of U.S. Army Corps of Engineers restored wetlands.

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

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

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

10 **B. The Coastal Act**

11 24. The Coastal Act provides that in addition to any other entitlement required by law
12 from local government, anyone wishing to undertake a development project in the coastal zone
13 must obtain a CDP. The Coastal Commission has original jurisdiction to issue CDPs unless the
14 local government has a certified Local Coastal Program (“LCP”), in which case the local
15 government has original permit jurisdiction. However, neither the City of Newport Beach nor the
16 County of Orange currently has a certified LCP that includes the NBR Property. While the
17 Commission approved the first part of the City’s LCP in 2005, a Coastal Land Use Plan (“CLUP”),
18 the CLUP designates the NBR Property as an area of “deferred certification,” *i.e.*, an area which
19 has not yet been certified by the Commission; therefore, the CLUP currently does not apply to the
20 NBR Property notwithstanding that the Project is consistent with the CLUP. (The City’s LCP was
21 recently certified by the Commission, but still does not apply to the NBR Property.)

22 25. Chapter 3 of the Coastal Act (commencing with Public Resources Code section
23 30200 *et seq.*) sets forth the coastal resource policies which govern the Commission’s exercise of
24 original permit jurisdiction. The policies are divided into six groups: public access, recreation,
25 marine environment, land resources, development generally, and industrial development. Where
26 there is no certified LCP, the permit issuing agency (here, the Commission) must issue a CDP if it
27 finds that the development proposed is in conformity with the Chapter 3 policies and will not
28 prejudice the local government’s ability to prepare an LCP in conformity with those policies.

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

3 26. In 2006, the voters of the City of Newport Beach adopted a General Plan that set
4 forth land uses for all property within the City and the City’s sphere of influence. For the NBR
5 Property, the General Plan allowed:

- 6 • 1,375 housing units;
- 7 • A 75-room coastal inn; and
- 8 • 75,000 square feet for retail commercial uses, with a focus on providing uses
9 for residents and visitors to the Newport Beach coastal area.

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

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

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

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

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

3 30. Specifically, NBR’s application provided that most of the proposed development
4 would be clustered on the upland, or mesa, area, away from the Santa Ana River and wetlands in
5 the lowland area. NBR’s Project proposed precisely the uses delineated in the voter-approved
6 General Plan: 1,375 residential dwelling units, 75,000 square feet of commercial uses, a 75-room
7 coastal inn, active and passive parks, 7 miles of new public trails, new roads, including a new road
8 (“Bluff Road”) extending from Pacific Coast Highway to 19th Street, consistent with the
9 Circulation Element of the City and the County of Orange. The application additionally proposed
10 that the remainder of the NBR Property — approximately 245 acres or nearly twenty-five percent
11 more than required by the General Plan — would be devoted to open space, wetlands restoration,
12 and habitation protection for species protected by the federal Endangered Species Act (16 U.S.C.
13 § 1531, et seq.), all of which would be permanently funded through implementation of the NBR
14 Project.

15 31. In 2012, after preparing and circulating an EIR pursuant to the California
16 Environmental Quality Act (“CEQA”), and following months of public workshops, meetings and
17 hearings, the City approved NBR’s application. The City-approved statutory development
18 agreement for NBR made a specific finding that efforts to implement the open space acquisition
19 alternative had been satisfied.

20 **E. NBR’s Application to the Commission for a CDP**

21 32. On February 1, 2013, NBR applied to the Commission for a CDP for the Project
22 (Application No. 5-13-032). What followed thereafter was a years-long series of delays and ever-
23 expanding demands from Commission Staff. The review of permit applications is governed by the
24 California Permit Streamlining Act (“PSA”; Cal. Gov’t Code § 65920, et seq.) which contemplates
25 that the agency identify all of the information needed to deem an application complete after review
26 of the initial application.

27 33. Over a two-year period, Commission Staff rejected NBR’s application as
28 “incomplete” seven (7) times, each time requesting extensive additional information and studies

1 relating to the Project. All told, NBR submitted an enormous amount of information beyond the
2 certified EIR in response to Commission Staff’s requests, the majority of which concerned existing
3 site conditions from the ongoing oil field maintenance operations conducted pursuant to the 1973
4 Exemption.

5 34. Frustrated by Commission Staff’s refusal to deem the application complete, and at
6 Commission Staff’s written suggestion, NBR filed an appeal to the Commission in June 2014 to
7 resolve the dispute over the completeness of NBR’s application. In July 2014, before the
8 Commission could hear the matter, Commission Staff decided not to require more information
9 regarding the oil field maintenance operations and the 1973 Exemption. However, in August 2014,
10 Commission Staff issued a “Cease and Desist Order” to halt ongoing oil field maintenance
11 activities because of allegedly “unpermitted” activities conducted by the third party oil
12 operator/mineral owner, and sought to impose liability on NBR as the landowner. To move its
13 CDP application forward, NBR was forced to address these allegations of third party activities and
14 resolve the matter. NBR did so by entering into a “Consent Cease and Desist Agreement”
15 (“**Settlement Agreement**”), that was approved by the Commission in March 2015, which set forth
16 agreements to modify certain historic oil field maintenance activities and specific oil field
17 structures and wells on the NBR Property.

18 35. Ultimately, on April 29, 2015, Commission Staff deemed NBR’s CDP application to
19 be “complete.”

20 **F. The Commission’s First Public Hearing in October 2015: Rejection of**
21 **Commission Staff’s Recommendation to Deny the Project**

22 36. The Commission’s first hearing on NBR’s application for a CDP was scheduled for
23 October 7, 2015. On September 25, 2015, Commission Staff issued its first Staff Report for the
24 NBR Project, recommending that the Commission deny the CDP application outright. Although
25 more than 750 pages in length (with exhibits), the Staff Report failed to accurately describe and
26 analyze the NBR Project. The Staff Report analyzed the version of the Project submitted in
27 February 2013, but failed to disclose to the Commission and the public that during the more than
28 two years of preparing submittals in response to Commission Staff’s letters, NBR had agreed to

1 reduce the size of its project from that which was approved unanimously by the City of Newport
2 Beach, by 201 residential units (1,174 reduced from 1,375); to reduce by 30,000 square feet the
3 amount of commercial development; to add almost 40 more acres of open space; and to provide
4 additional affordable hostel accommodations (20 beds instead of 10).

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

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

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

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

3 40. Each time NBR resolved a Commission Staff issue, Commission Staff would raise
4 the bar higher, adding yet new requirements. Ultimately, to respond directly to comments and
5 suggestions at the October 2015 Commission meeting, NBR again revised and substantially
6 reduced the size of the NBR Project to create the Revised Project. Specifically, by March 2016, the
7 Revised Project proposed the following:

- 8 • 895 homes (a further reduction of 280 homes);
- 9 • A 40% reduction in the Project’s development footprint to 62 acres, including 5
10 acres of parks;
- 11 • A 40% reduction in project grading, traffic, and water demand;
- 12 • Retention of the 75-room coastal inn;
- 13 • A 20 bed low-cost hostel (at \$59 per night) which would include a youth
14 outreach program to be administered by a non-profit organization, the Newport
15 Banning Ranch Land Trust, to provide unique opportunities for young people
16 from inland communities to experience the restored natural habitat and public
17 trails on the NBR Property, as well as the nearby beaches;
- 18 • Public parks and parking;
- 19 • Shuttle access to the nearby beaches and to the parks and trails onsite;
- 20 • Affordable housing; and
- 21 • 45,000 square feet of commercial uses.

22 41. NBR additionally continued to propose the following substantial public benefits (the
23 “**Public Benefits**”), as part of its Revised Project:

- 24 • 7 miles of public trails on the NBR Property, which currently is fenced off to
25 the public;
- 26 • Acceleration of oil field abandonment and onsite site remediation and recycling
27 of oil-impacted material pursuant to the RWQCB-approved RAP; and

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- A Habitat Management Plan to restore and permanently protect 324 acres of wetlands, grasslands, and coastal sage scrub on the NBR Property as open space.

Together with the passive and active parks also proposed, the total open space proposed by the Revised Project increased to 329 acres, or 82%, of the 401-acre NBR Property. The Revised Project was fully compliant with the policies and requirements of the Coastal Act.

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

43. In response to the February 2016 listing by the Native American Heritage Commission of the NBR Property on the State’s Sacred Lands Inventory, disclosed after-the- fact to NBR in March 2016, NBR initiated consultation with nine Native American tribes regarding tribal cultural resources and voluntarily agreed to conduct additional archaeological testing.

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

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

None of this information, however, was provided to the Commissioners.

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

2 45. By mid-August 2016, NBR had satisfied all of Commission Staff’s additional
3 requirements. However, unbeknownst to NBR, two months earlier, on June 24, 2016, Commission
4 Staff had received a letter from a zoologist working with a project opponent expressing the view
5 that additional “foraging habitat” for breeding burrowing owls should be ruled off limits for
6 development. The Revised Project was already proposing to set aside 199 acres as foraging habitat
7 for *wintering* burrowing owls, and the alleged need for additional foraging area for breeding
8 burrowing owls would doom the project. Despite ongoing communications between NBR and
9 Commission Staff, Commission Staff withheld the zoologist’s letter and gave no indication that the
10 letter might subsequently be used by Commission Staff to impose additional project-killing habitat
11 protection beyond what Staff had discussed with NBR. More significantly, Staff did not note the
12 distinction between wintering burrowing owls which were observed on the NBR Property, and
13 breeding burrowing owls which had not been documented as being on the NBR Property.

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

20 47. Nonetheless, as of August 23, 2016, the Revised Project, with all of the changes
21 made, was consistent in all respects with the Chapter 3 policies of the Coastal Act, the standard of
22 review for approval of NBR’s application for a CDP.

23 **I. Commission Staff’s Evaluation of the Revised Project: A Program to**
24 **Prevent all Development**

25 48. The Commission’s second hearing on NBR’s application for a CDP was scheduled
26 for September 7, 2016. Despite the request by Commissioners in October 2015 that Commission
27 Staff work with NBR to develop a new recommendation for approval of a revised project
28 consistent with the Chapter 3 policies of the Coastal Act, Commission Staff did precisely the

1 opposite.

2 49. On August 25, 2016, 13 days before the scheduled September 7, 2016 hearing,
3 Commission Staff issued a new 172-page Staff Report (not including exhibits), ostensibly
4 recommending approval of some development, but with 56 pages of “conditions” that eviscerated
5 most of NBR’s Revised Project. Commission Staff proposed to limit development to three,
6 disjointed areas totaling little more than 10 acres where no economically feasible or beneficial
7 project could be developed. (Although the Staff Report described the three areas as consisting of
8 19.7 acres, application of the Commission Staff-imposed development conditions would reduce the
9 developable acreage almost in half.)

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

20 51. The Staff Report also tainted the hearing and the Commission’s review by
21 selectively including only the biological reports prepared by Commission Staff’s ecologists and by
22 environmental advocates hired by opponents of the Revised Project. Commission Staff failed to
23 include for review by Commissioners any of the 10 additional expert reports that NBR submitted
24 on the key biological issues raised concerning the Revised Project. The Staff Report also failed to
25 include the “Banning Ranch Archaeological Testing Memorandum,” which concluded and
26 explained that the Revised Project would have no impact on archaeological resources.

27 52. Relying solely on the letter prepared by the zoologist working with the project
28 opponents in June 2016 — and never meaningfully disclosed to NBR until only shortly before the

1 hearing — the Staff Report, based on a memorandum prepared by the Commission Staff ecologist,
2 recommended that an additional 64 acres of the NBR Property be designated as off limit for
3 development (i.e., as ESHA and a buffer area) in order to provide further foraging habitat for
4 “breeding” burrowing owls. Commission Staff’s new ESHA recommendation eliminated all
5 development proposed in the southern portion of the NBR Property — including virtually all of the
6 visitor-serving uses and public access and recreation elements of the NBR Revised Project: the
7 parks, the coastal inn, the youth hostel and its youth conservation program, the connection of Bluff
8 Road to West Coast Highway, as well as a small area of residences.

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

20 54. On September 6, 2016, the day before the hearing, Commission Staff conducted a
21 private site tour of the NBR Property for several Commissioners. The site visit was not a publicly
22 noticed field trip or otherwise accessible to interested members of the public or NBR, whose
23 representatives were told by Commission Staff to not speak to anyone, especially Commissioners,
24 and to observe the irregular site visit from a short, but still inaudible, distance away. The site visit
25 amounted to a private presentation to six of the 10 Commissioners present at the hearing, five of
26 whom ultimately voted to deny the Revised Project. NBR is informed and believes, and thereon
27 alleges, that given the contents of Commission Staff’s Staff Report and its favoritism toward
28 information and allegations submitted by project opponents, along with the inaccurate and

1 incomplete information provided by Staff at the hearing, Commission Staff delivered a presentation
2 designed to support its recommended development-killing conditions — and NBR had no chance
3 to participate or respond to correct the inaccuracy of the information provided, even though the
4 meeting took place on NBR’s property.

5 **J. The Coastal Commission’s September 7, 2016 Public Hearing: The**
6 **Decision to Deny All Development**

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

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

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

26 58. The Commission followed with questions of Commission Staff and the zoologist
27 working with the project opponents, including questions specifically directed to Commission
28 Staff’s last minute addition of 64 acres of burrowing owl foraging habitat based on the

1 memorandum prepared by the Staff’s ecologist. The Commission Staff’s ecologist, however,
2 admitted, “You know, to be honest — I am not a burrowing owl expert.”

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

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

- 1 much as 1500 miles to visit different foraging areas and, unlike breeding
2 owls, are not at all tethered to a site.
- 3 d) Commission Staff failed to inform the Commission of the correct and
4 extraordinary amount of burrowing owl foraging area, 199 acres, that the
5 Revised Project proposed onsite.
- 6 e) Commission Staff wrongly informed the Commission that the burrowing owl
7 does not forage in wetland and lowland areas, implying that large portions of
8 the site and adjacent open space are not suitable foraging habitat, contrary to
9 scientific data that shows use of lowlands for foraging by burrowing owls
10 elsewhere across the State.
- 11 f) Commission Staff failed to inform the Commission of the substantial
12 additional acreage offsite in nearby protected open space, i.e., the 100-acre
13 U.S. Army Corps of Engineers’ wetlands, the 180-acre Talbert Nature
14 Preserve, and the 208-acre Fairview Park, which, together with the ample
15 onsite burrowing owl foraging habitat proposed, provided more than enough
16 foraging habitat to protect the one “overwintering” owl that had been
17 observed for a few weeks each year on the NBR Property.
- 18 g) Commission Staff failed to inform the Commission of its own prior
19 decisions regarding the treatment of burrowing owl and other raptor foraging
20 habitat with which the Revised Project is consistent.
- 21 h) Commission Staff failed to accurately inform the Commission, contrary to
22 the statement of the Commission Staff’s ecologist after the close of the
23 public hearing, that the precedent it cited to the Commission was in fact
24 misplaced and erroneous and did not serve as any precedent for determining
25 foraging habitat area on the NBR Property.

26 60. There were numerous other ways in which the information presented at the hearing
27 was either biased, distorted, based upon assertions that lacked evidence, or resulted in arbitrary
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1 decisions that are not in accord with the law or with Commission regulations and practices. Further
2 examples include:

- 3 a) The Commission was persuaded to treat an area as “potential ESHA” for possible
4 Gnatcatcher habitat, and to apply a 100 foot buffer in which development would be
5 prohibited, despite the fact that *potential* habitat is not the applicable and controlling
6 criterion for determining ESHA under the Coastal Act, and despite the fact the
7 “potential ESHA” consisted of areas with no documented Gnatcatcher use ever and
8 areas with Gnatcatcher observations once or twice since 1992, but in any event more
9 than 10 years ago; thus, the Commission acted inconsistently with its prior decisions
10 in other areas, including the Sunset Ridge Park site immediately adjacent to the
11 NBR Property, which Commission Staff failed to bring to the Commission’s
12 attention.
- 13 b) Commission Staff failed to inform the Commission of its past decisions in which the
14 Commission determined that marginal habitat, such as Special Features “C” and
15 “CC,” does not qualify as “wetland” subject to regulation as such under the Coastal
16 Act.
- 17 c) Commission Staff failed to inform the Commission of its numerous past decisions,
18 including its decision to approve Sunset Ridge Park immediately adjacent to the
19 NBR Property, in which the Commission approved ESHA and wetland buffers of
20 less than the maximum 100 foot buffer width recommended by Commission Staff
21 on the NBR Project and consistent with the buffers proposed by the Revised Project,
22 taking into account the degraded nature of the ESHA or wetland involved; thus, the
23 Commission acted inconsistently with its prior decisions.
- 24 d) On August 23, 2016, 15 days before the September 7, 2016 hearing, in response to
25 comments from Commission Staff, NBR submitted a revised grading plan with
26 minor modifications to Bluff Road to ensure the road and all portions of the
27 development/grading footprint would fully avoid ESHA. Commission Staff
28 improperly refused to consider the revised grading plan and, without analyzing the

1 modifications, erroneously advised the Commission at the hearing that Bluff Road
2 and other portions of the Revised Project, as proposed, would impact ESHA. There
3 was no basis in the Coastal Act or the Commission’s regulations for Commission
4 Staff’s refusal to analyze a minor submission in response to Commission Staff’s
5 comments two weeks before the hearing, contrary to Commission Staff’s treatment
6 of all other applicants.

- 7 e) Commission Staff failed to inform the Commission that, contrary to a statement by
8 the Acting Chair of the Commission, Commission decisions have permitted fuel
9 modification in habitat buffers, such as the Fire Department-approved, fire-resistant,
10 native plant habitat buffer that NBR proposed; thus the Commission acted
11 inconsistently with its prior decisions.
- 12 f) Commission Staff failed to inform the Commission that although the U.S. Fish and
13 Wildlife Service designated critical habitat for the gnatcatcher on the NBR Property,
14 the designation merely indicates the presence of gnatcatchers, and such designation
15 still required site-specific surveys to identify the actual presence of suitable habitat
16 and use and occupation of that habitat by the gnatcatcher. Commission Staff failed
17 also to inform the Commission that a critical habitat designation is not the
18 controlling criterion for determining ESHA under the Coastal Act, especially as to
19 an area adjacent to occupied gnatcatcher habitat that is substantially degraded and
20 consists of sparse patches of disturbed scrub that have had gnatcatcher sightings
21 once or twice since 1992, but in any case more than 10 years ago. In short,
22 Commission Staff misused the critical habitat designation to manipulate and mislead
23 the Commission.
- 24 g) Commission Staff failed to provide the Commission with the August 23, 2016
25 “Banning Ranch Archaeological Testing Memorandum” or to bring to the
26 Commission’s attention the critical conclusions in that expert report that the NBR
27 Project would create no archaeological impacts. Instead of describing the Native
28 American consultation conducted by NBR, and the site visit during which Staff and

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Native American tribal representatives examined the archaeological sites, Staff preferred instead to create the impression that archaeological issues were significant and unresolved. This deprived the Commission of a timely and meaningful opportunity to review the Archaeological Testing Memorandum or its conclusions.

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

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

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

1 Commission Staff failed to accurately inform the Commission that denial of the
2 Revised Project would leave the NBR Property as an active, producing oil field in
3 its unremediated, unrestored, increasingly degraded, and fragmented state, subject to
4 proliferation and expansion of invasive species, for decades to come, fenced off
5 from public access; thus the Commission was led to an erroneous conclusion about
6 the consequence of denying the Revised Project.

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

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

25 61. At the conclusion of its deliberations, the Commission voted 9 to 1 to deny the CDP
26 application for the Revised Project.

27 62. The Commission failed to make written findings with respect to its decision to deny
28 the application for the Revised Project. Under the Commission’s Regulations, when the

1 Commission acts in a manner different from Commission Staff’s recommendation, the Commission
2 must prepare revised written findings which the Commission must then consider in a public hearing
3 and adopt or modify to reflect the basis for its action. (*See* 14 Cal. Code Regs. § 13096(b).)

4 Despite the passage of almost two months since the Commission’s decision, the Commission has
5 yet to prepare revised findings, and consequently no written findings have yet been adopted to set
6 forth the basis for the Commission’s decision, as expressed by Commissioners at the hearing.

7 Accordingly, NBR expressly reserves the right to amend this Petition and Complaint to plead
8 further or different allegations if and when the Commission has acted to adopt revised findings.

9 63. NBR has now exhausted all administrative remedies available to it.

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

12 **FIRST CAUSE OF ACTION**

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

14 65. Petitioners/Plaintiffs reallege Paragraphs 1 through 64, which are incorporated by
15 reference as though fully set forth herein.

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

24 67. Insofar as the Commission purported to make findings with respect to the Revised
25 Project’s conformity with the Chapter 3 policies of the Coastal Act, the findings and the
26 Commission’s decision are not supported by substantial evidence in the record.

27 68. Section 30010 of the Coastal Act provides that the Commission shall not exercise its
28 power to grant or deny an application for a permit in a manner that will take property for public use

1 without the payment of just compensation. In acting to deny the CDP application, following
2 multiple iterations of the proposed development which led to the substantially reduced-size Revised
3 Project, the Commission’s actions led to restrictions on the NBR Property that frustrated
4 Petitioners/Plaintiffs’ reasonable investment-backed expectations concerning the NBR Property
5 and deprived Petitioners/Plaintiffs of substantially all economically feasible use of the NBR
6 Property, thus causing a permanent and temporary taking of the NBR Property, in violation of the
7 Fifth Amendment of the United States Constitution and Article I, section 19 of the California
8 Constitution.

9 69. Accordingly, Petitioners/Plaintiffs are entitled to an alternative and peremptory writ
10 of mandate directing the Commission to set aside its decision denying the Revised Project and to
11 reconsider the Revised Project in a new hearing, consistent with the Court’s decision.

12 **SECOND CAUSE OF ACTION**

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

14 70. Petitioners/Plaintiffs reallege Paragraphs 1 through 64, which are incorporated by
15 reference as though fully set forth herein.

16 71. In acting to deny Petitioners/Plaintiffs’ application for a CDP, the Commission has
17 taken the NBR Property, without just compensation, in violation of the Fifth Amendment to the
18 United States Constitution and Article I, § 19 of the California Constitution. Petitioners/Plaintiffs
19 proposed multiple iterations of the Project, beginning with a Project fully consistent with the City
20 of Newport Beach voter-adopted General Plan, a reduced-size project presented to the Commission
21 for review in October 2015, and the further substantially reduced-size Revised Project, consistent
22 with the Chapter 3 policies of the Coastal Act, which the Commission denied on September 7,
23 2016.

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

1 the site is impossible. As owners of the surface rights of the NBR Property, Petitioners/Plaintiffs
2 have been deprived of their reasonable investment-backed expectations and all economically
3 feasible and beneficial use of the NBR Property.

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

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

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

15 **THIRD CAUSE OF ACTION**

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

17 76. Petitioners/Plaintiffs reallege Paragraphs 1 through 64, which are incorporated by
18 reference as though fully set forth herein.

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

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- 6. For costs of suit incurred in this action.
- 7. For such other and further relief as the Court deems just and proper.

Dated: November 4, 2016

RICHARDS, WATSON & GERSHON
STEVEN H. KAUFMANN
GINETTA L. GIOVINCO

By: _____
STEVEN H. KAUFMANN

and

MANATT, PHELPS & PHILLIPS, LLP
MICHAEL M. BERGER
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By: _____
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VERIFICATION

George L. Bayse 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 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 4th day of November, 2016, at Newport Beach, Orange County, California.

:

GEORGE L. BAYSE

