



Banning Ranch Park & Preserve Task Force

August 31, 2016
California Coastal Commission
45 Fremont Street
San Francisco, CA 94105-2219
BanningRanchComments@coastal.ca.gov

RE: Newport Banning Ranch, Application No. 5-15-2097, Opposition to Applicant's Submission and Support for many Staff Proposed Modifications and Positions

Dear Commissioners,

Since 1892, the Sierra Club has fought tirelessly to preserve open spaces and open them for the enjoyment of the public. Our 140,000 members believe that exposing families to the wonders of nature not only improves the quality of life for those families but it also those families also understand the value of protecting those same open spaces.

Our local chapter covers Los Angeles and Orange Counties and was founded in 1911, was the first local chapter of the Sierra Club. Today, we help nearly 40,000 residents of Los Angeles County and Orange County to Explore and Enjoy the outdoors and when needed help them protect it.

Our Task Force, the Banning Ranch Park and Preserve Task Force, is part of the Angeles Chapter of the Sierra Club and was founded to facilitate the acquisition and preservation of all of Banning Ranch as open space for the public to enjoy. Our mission is as relevant at this hearing as it was when we formed this task force in 1999. Our positions will be stated as "The Sierra Club"

Thank you for the opportunity to provide these comments to the California Coastal Commission ("Commission") in response to the Newport Banning Ranch's ("Developer") Revised Newport Banning Ranch Development ("Project") and the August 25th Coastal Commission Staff Report ("Staff").

POSITION: *Staff is correct in that the Coastal Development Permit is the wrong process for this Project. The Developer should have first coordinated with a Lead Agency and created a Local Coastal Plan. The application as submitted is so far from the Coastal Act that creating an LCP after the fact, if approved as presented, would make an LCP impossible.*

The LCP or Land Use Plan would identify ESHA and other restrictions based on the Coastal Act on Land Use first, then a proposed project would be able to incorporate the restrictions. The Developer wants to ignore the Coastal Act restrictions by using a Coastal Development Permit then creating an LCP. This precedent should not be allowed. Please ask the Developer to follow the process intended by the Coastal Act. The Commission can use this opportunity to give an improved clear delineation of when a CDP should be used and when the LCP must come first. The LCP is the first process for a project that has complicated ESHA designations, subdivisions, infrastructure and future annexation planned.

Evidence that this Project as proposed should be denied and the LCP process should be used.

- 1) The gaps as outlined by Staff between the Coastal Act and the Project as proposed by the Developer
- 2) The Developer has been making a series of Land Use commitments to the public that would normally be reviewed by the public in the LCP process, open to debate and then become binding in the Certified Implementation Plan. See Exhibit 1 for just one sample related to beach parking and free shuttle. Land Use claims like these are designed to build public support and are popular, but unless part of a Certified LCP, the public risks not getting what it is promised. The Developer can simply blame the Commission for not approving the Project as submitted. How many businesses can sustain beach parking in a commercial/retail parking area and a free shuttle?
- 3) There are two CDP's for Banning Ranch before the Commission at the same time, but on separate tracks. It is an oversimplification to say that CDP 5-15-2097 related to surface rights and that CDP No 9-15-1649 related to the mineral rights. There are many Banning

Ranch Land Use issues that involve site issues like traffic, air quality and other items covered in the LCP. For example, without having the LCP certified first, the public is being denied important land use discussions, such as should the North ORA oil operations described in CDP No 9-15-1649 be served by the existing road between 17th Street and North ORA or served by a new route along Semenuik Slough.

POSITION: *The Commission and Staff do not have the ability to change Coastal Act Section 30107.5 – either with a new “degraded” ESHA designation or creating new parameters for wetlands designations. The Coastal Act does not provide for negotiation of ESHA designations.*

Coastal Act section 30107.5 defines environmentally sensitive area:

“Environmentally sensitive area” means any area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activities and developments.

The Sierra Club feels the CDP is the wrong venue to negotiate the definition of ESHA. This is the role of the legislature. The Developer offered in July 2016 to “no longer contest Staff’s ESHA determination” is the Developer’s conditions were met. This attempt to negotiate ESHA is inappropriate. ESHA is determined through Science and Biology. ESHA cannot be “reinterpreted” because it is inconvenient for an applicant which seemed to be the case in the May 2016 Staff Report which allowed for more buildable area than the October 2015 based on a reinterpretation of ESHA.

The definition in 30107.5 clearly states “easily disturbed or degraded”, so it should be no surprised that some of the ESHA on Banning Ranch is degraded. The whole idea of the Coastal Act is to allow degraded areas to recover.

Even is degraded, Banning Ranch still supports an extensive network of ecological habitats over a 401 acre area, as described by The City of Newport Beach’s General Plan Land Use Element: *Although the Banning Ranch site contains an assemblage of diverse habitats that have been historically disturbed, when this area is considered with the contiguous Semenuik Slough and restored wetlands, it provides wildlife with a significantly large, diverse area for foraging, shelter, and movement. Biological studies performed for Banning Ranch indicate that, while disturbance associated with oil activities diminishes the quality of existing habitat to some extent,*

overall, the area should be regarded as relatively high-quality wildlife habitat due to its size, habitat diversity, and continuity with the adjacent Semeniuk Slough and federally-restored wetlands

Under the Coastal Act, if an ESHA is identified, it cannot be relocated, and must instead be avoided, unless the proposed development is “a use dependent on the resource.” This fundamental requirement of the Act was confirmed in *Bolsa Chica Land Trust v. Superior Court* (1999), 71 Cal.App.4th, 493, 507, wherein the Court found:

Importantly, while the obvious goal of section 30240 is to protect habitat values, the express terms of the statute do not provide that protection by treating those values as intangibles which can be moved from place to place to suit the needs of development. Rather, the terms of the statute protect habitat values by placing strict limits on the uses which may occur in an ESHA....

Degraded or not degraded, the designated areas outlined in the staff reports of October 2015 and In *Kirkorowicz v. California Coastal Com.*, 83 Cal.App4th 980, 994 (2000) the court noted that “*in determining whether a wetland is protected under the Coastal Act ... the quality of the wetland is essentially legally irrelevant.*”

POSITION: *Landscaped California Native Plants are not ESHA and ESHA cannot serve as a buffer area. The Fire Modification Boundaries cannot include ESHA as they would be subject to clearing by the Fire Department. See our 8/1/16 letter on the subject. (Exhibit 2)*

POSITION: *The Developer’s Project as proposed needs to be denied as it does not allow for adequate Buffers. We support the Staff position to provide adequate ESHA protection, Staff recognized a 100 foot buffer for Vernal Pools, wetlands and gnatcatcher habitat, a minimum 50 foot buffer for all sensitive vegetation, and a 164 foot buffer for burrowing owl wintering habitat.*

Staff wrote as follows: Section 30233 requires feasible mitigation measures to minimize adverse environmental effects to wetlands. In this case, the recommended 100 foot buffer around wetland would minimize adverse environmental effects.

POSITION: *The Developer’s Project as proposed needs to be denied as it requires filling and grading of wetlands and ESHA that is not consistent with Section 30233.*

We agree with the Staff position: Although not all wetlands are within the project footprint, all wetlands, including those in the lowlands, need to be protected under the Coastal Act section 30233. The development plan

does not meet the list of limited approvable projects for fill of wetlands, nor is it the least environmentally damaging alternative, nor does the project include adequate mitigation for the impacts. The development plan, as proposed, is inconsistent with Coastal Act section 30233.

POSITION: *The Project as proposed by the Developer is not consistent with Section 30253 and thus it should be denied*

Section 30253 of the Coastal Act states, in relevant part:

New development shall do all of the following:

(a) Minimize risks to life and property in areas of high geologic, flood, and fire hazard.

(b) Assure stability and structural integrity, and neither create nor contribute significantly to erosion, geologic instability, or destruction of the site or surrounding area or in any way require the construction of protective devices that would substantially alter natural landforms along bluffs and cliffs...

We agree with Staff that the grading plans as proposed by the Developer are not consistent with Section 30253 and there is inadequate protection of Arroyos and ESHA. Limiting development areas to outside of ESHA and although the Staff offered a 15 feet setback, the Sierra Club feels that a setback of 60 feet from the Arroyos edges would be more consistent with 60 foot setback being required for the Coastal Bluffs.

We disagree with the Staff that Flooding is not a consideration as the current road between 17th Street and the North ORA would be the only emergency access to North ORA during a flooding event in the Santa Ana River floodplain. The Developer has not supported how a flood event would be treated in their Project as proposed.

POSITION: *The Project, as proposed by the Developer has impacts on public view that cannot be mitigated, and it does not make changes sufficient to reduce these impacts. This application should be denied.*

The Coastal Act section 30251 states: "*The scenic and visual qualities of coastal areas shall be considered and protected as a resource of public importance. Permitted development shall be sited & designed to protect views to and along the ocean and scenic coastal areas*"

The method of clean-up is designed to impact the views in ways inconsistent with the Coastal Act and this increased grading and land form alteration is inconsistent with section 30251.

Not only are views being impacted from Newport Crest and surrounding neighborhoods, they are also impacting the views from Newport Shores and all travelers along PCH. As the development calls for residential development that

destroys ESHA on the mesa adjacent to the coastal bluffs between the arroyos and wetlands.

POSITION: *The connections of proposed subdivisions in the Project as proposed by the Developer, commonly called Bluff Rd is not consistent with the Coastal Act as it impacts ESHA, causes grading of protected Arroyos and impacts local quality of life. The Project as proposed with Bluff Rd or any connection between Coast Hwy and/or 15th Street and/or 16th Street and/or 17th Street*

POSITION: *Using non-native invasive species eradication as a reason to destroy ESHA is not consistent with the Coastal Act. Using Clean Up alone as a reason to destroy ESHA is also not consistent with the Coastal Act. The Project as proposed by the Developer should be denied as it does not adequately protect ESHA during eradication of invasive species and during Abandonment and Clean Up from Oil Operations.*

The project is inconsistent with Section 30240. The use of a non-native invasive species threat by the applicant is simply a strategy to circumvent the Coastal Act. Like everywhere else in California, non-native vegetation has been invading Banning Ranch for decades, if not centuries. There is no evidence that non-native vegetation is an urgent threat to the wildlife of Banning Ranch. Rather, it is the unpermitted vegetation clearance that occurred for many years that is the much greater threat to the wildlife. Indeed, the return of native California brittlebush scrub in areas where the mowing has ceased suggests that Banning Ranch is “self-restoring.” The application does not keep to the clear priorities of Coastal Act Section 30240.

Gravel roads and abandoned pipes can be left in place if their removal would cause more destruction. Transporting concrete and asphalt off site for use in other construction projects would avoid the digging of large destructive onsite disposal areas known as “Borrow Placement Areas.” The Soil Remediation Planning Areas (the areas planned for Bio Remediation, Borrow Placement, Clean Soil Flip, Staging/Stockpiling Area, Concrete Processing, etc...) can be reduced in acreage and located to avoid ESHA and buffers. The applicant is using abandonment and remediation as a cover to grade, dig and destroy more ESHA than allowed under the Coastal Act.

Use oil and gas operations or oil and gas operation clean up as an excuse to grade ESHA in a way that is not allowed under the Coastal Act.

POSITION: *The Project as proposed by the Applicant calls for the destruction of Vernal Pools that predates any oil operation. It should be denied.*

The US Fish and Wildlife Service (USFWS) recognizes the vernal pool complex at Banning Ranch as one of only two remaining on the Orange County coast (the other being the complex at near-by Fairview Park) and the only vernal pool complex in Orange County containing critical habitat for the endangered San Diego Fairy Shrimp. Historic aerial photos show vernal pools and mima mounds that predated the oil operation. Although nearly all the vernal pools on Banning Ranch show varying degrees of disturbance from the oil operation, the vernal pool complex at Banning Ranch, contrary to what the applicant claims, is not the product of the oil operation. The applicant has refused to take some of the precautions to protect these protected areas and goes so far as to deny their existence in some locations.

The applicant also ignores the need for a larger area of open space around the vernal pool to allow for sufficient hydrology to sustain the vernal pools. These pools are a network and are not islands of vernal pools. There is also insufficient protection to prevent contamination or destruction of the vernal pools through changes in hydrology being proposed in the grading process and residential and commercial construction and the property maintenance after construction.

These Vernal Pools must be protected better than the current Project allows for.

POSITION: *Phytoremediation meets many of the Coastal Act requirements for least impact and it is not given enough consideration in the Project as proposed by the Developer*

Banning Ranch is an oil field operated in an open space. It has been fenced off with minimum human interaction to support oil operations for decades and in just this time the open space has evolved into a 401-acre private wildlife preserve. California native plants are breaking down the petrochemicals naturally and cleanup is occurring naturally. By applying a little more science, plants can be selected to accelerate what is happening naturally.

The 401-acre wildlife preserve should not be destroyed for development, and “clean up” should not be used as an excuse for its destruction. The CCC should support phytoremediation and deny the applicants request to use other more destructive clean up methods. The CDP should be DENIED

POSITION: *The Project as proposed by the Developer should address all of the cultural concerns. Although some progress has been made, the Developer needs to work with all parties. This has not yet happened and the Project as proposed by the Developer should be denied until all of those concerns are met.*

Banning Ranch is a site of prehistorical Native American cultural interest. Descendants of the original inhabitants of this area want Banning Ranch saved as a sacred place. The Native American Heritage Commission contacted the City of Newport Beach as early as 2011 expressing their concerns. This application does not go far enough in meeting the intentions of current laws in place for the protection and preservation of Native American cultural resources.

POSITION: *Acquisition and Preservation is the best Land Use that meets the requirements of the Coastal Act.*

The Sierra Club is in a position to work with other NGOs to coordinate the acquisition of Banning Ranch. The Coastal Act approval process is only the first step in defining buildable areas and in determining a fair value. It is of no surprised that the Developer has not made an offer to sell based on the Coastal Zone value, because the Coastal Zone value has not yet been determined – although the Staff Reports of October 2015 and September 2016 will contribute greatly to the negotiations. As with anything real estate in the Coastal Zone, the Land Use must be first established by a certified LCP, then negotiations occur on the value of the land uses available.

SUMMARY

In summary, the Project is still a long way from complying with the provisions of the Coastal Act and still requires significant revisions to comply. The Developer has also ignored the Coastal Act process in hopes of economic benefit by convincing the commissioners to directly approve a non-conforming project and using a political process to influence staff recommendations. As such both the Coastal Development Permit No 5-152097 at the May Hearing and CDP No 9-15-1649 before the Energy Department should be denied and the process to develop a Certified LCP for Banning Ranch should start.

Submitted by the Sierra Club Banning Ranch Park and Preserve Task Force,
Sierra Club Angeles Chapter
3435 Wilshire Blvd., Los Angeles, CA 90010
http://angeles.sierraclub.org/banning_ranch
<https://www.facebook.com/SaveBanningRanch/>

EXHIBIT 1: Land Use Offers Made to the Public by the Developer

**NBR - A Plan to Open the Land to the Public
Visitor Serving Retail & Overnight Accommodations an Important
Component**



Dear Neighbors & Friends:

A number of you have asked for more information relating to the 70 acres of development. Can you describe the commercial and visitor-serving components? The plan does so much more than open the site and provide access - keep reading to find out the exciting things in store. The visitor-serving facilities include a 75-room hotel, a 20-bed hostel, specialty commercial, and public park sites...

Open to the public - what you'll see is exciting...

Offering visitor serving retail spaces - some 29,000 square-feet - and overnight accommodations with a 75 room coastal inn and 20-bed hostel - there will be something for everyone at Newport Banning Ranch. The retail will be designed in a way to offer goods and services to the community and visiting public - these will include shops to rent bikes and beach gear; a place to pick-up sandwiches and picnic supplies; maybe even a spot to pick-up that perfect beach dress or aloha shirt. And if you want to stay for a while, book a room at the inn or bunks at the hostel for your entire family. While there enjoy the bluff-top pool or a sunset from the outdoor spaces while enjoying your favorite beverage.

Getting to the beach just got easy...

And in addition to the amenities onsite we cannot forget our best asset - the nearby beach. It's about to get a lot easier to get there. If our project gets approved you'll be able to park your car and hop on the free shuttle. We will have

a shuttle that safely gets folk down the beach and back - so you can stop worrying about jockeying for parking and just enjoy the ride.

Help us make all of this a reality and support the Newport Banning Ranch plan - see below for details on how.

Next week we will focus on an important collaboration with the site's ancestors.

Show your support for the Banning Ranch plan: email the Coastal Commission at BanningRanchComments@coastal.ca.gov with a cc: to mike@newportbanningranch.com. Keep checking our website for updates - www.NewportBanningRanch.com , follow us on Facebook <https://www.facebook.com/NewportBanningRanch> and Twitter (@NWPBanningRanch).

Sign the Newport Banning Land Trust petition <https://www.change.org/p/california-coastal-commission-clean-restore-and-preserve-newport-banning-ranch>.

Regards,

Michael A. Mohler
Senior Project Manager

1300 Quail St., Suite 100, Newport Beach, CA 92660