S227473

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

BANNING RANCH CONSERVANCY,
Plaintiff and Appellant,

v.

CITY OF NEWPORT BEACH, et al.,
Defendants and Appellants,

NEWPORT BANNING RANCH LLC, et al.,
Real Parties in Interest and Appellants.

SUPREME COURT
FILED

JUL 21 2015

Frank A. McGuire Clerk

Deputy

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DEFENDANTS, REAL PARTIES IN INTEREST, AND APPELLANTS' ANSWER TO PETITION FOR REVIEW

After a Decision by the Court of Appeal
Fourth Appellate District, Division Three
Case No. G049691

Reversing a Judgment of the Superior Court of the State of California
For the County of Orange, The Honorable Robert Louis Becking,
Temporary Judge.
Case No. 30-2012-00593557

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I.
INTRODUCTION

The Court of Appeal's well-reasoned Opinion [1] does not conflict with established case law interpreting the California Environmental Quality Act (CEQA), the Planning and Zoning Law or the California Coastal Act. Nor does the Opinion raise any important legal questions. The Opinion is not "contrary" to any existing precedent.

Banning Ranch Conservancy (BRC) scoffs at the notion advanced by the Court of Appeal – that courts ought to defer to those decisionmakers in the interpretation of their own planning documents – noting that courts are called upon to make life-and-death decisions daily, and thus are capable of interpreting a local agency's planning document. (Petition for Review, p. 29, citing Opn., p. 28.)

The problem with this argument is not that the courts are incapable of such review, but that the searching review advocated by BRC would be improper. Case law uniformly recognizes that some decisions are properly committed not to the courts, but to local officials who are directly accountable to those who elected them. (See, e.g., *Save Our Peninsula Committee v. Monterey County Board of Supervisors* (2001) 87 Cal.App.4th 99, 142.) The Court of Appeal's decision in this case merely reflects a straightforward application of this settled principle.

BRC's other grounds for review are similarly misguided. BRC advances two theories based on the Coastal Act, even though BRC alleged

[1] Citation to the Opinion (Opn.) are to the Slip Opinion. The official published decision is available at 236 Cal.App.4th 1341.

no claims under the Coastal Act, and even though BRC pursued none of these arguments at trial or on appeal.

BRC also seeks review of the Court of Appeal's ruling on its CEQA claim. Here, too, review is unwarranted. The court's CEQA ruling is entirely consistent with, if not compelled by, a published decision in earlier litigation involving these same parties. (*Banning Ranch Conservancy v. City of Newport Beach* (2012) 211 Cal.App.4th 1209, 1233-1234 (*Banning Ranch Conservancy I*), petition for review denied March 27, 2013.)

II.
OPPOSITION TO PETITION FOR REVIEW

BRC fails to demonstrate that Supreme Court review is warranted under the rules of court. (Cal. Rules of Court, rule 8.500(b).) BRC devotes little attention to the application of these principles. BRC advances four issues that, in its view, warrant review. None is persuasive.

The first two issues arise under the Coastal Act and were not previously raised in either the trial court or the Court of Appeal.

The second two, arising under the Planning and Zoning Law and CEQA, were litigated, but do not warrant review. In the trial court, BRC originally prevailed on the Planning and Zoning Law claim. The trial court granted BRC's petition based on its conclusion that the Project is inconsistent with the City's General Plan, particularly Strategy "[LU] 6.5.6, in that the City failed to coordinate and work with the Coastal Commission in identifying which wetlands and habitats present in Banning Ranch would be preserved, restored or developed, prior to its approval of the Project." In

particular, the court held that the City had to "coordinate" with the Coastal Commission to identify "environmentally sensitive habitat areas" (ESHA) on the project site prior to the City's approval of the project. In reaching this conclusion, the trial court cited *California Native Plant Society v. City of Rancho Cordova* (2009) 172 Cal.App.4th 603 (*Rancho Cordova*). (Opn., p. 17.) The trial court denied BRC's CEQA claim, citing *Banning Ranch Conservancy I, supra*, 211 Cal.App.4th at pp. 1233-1234, for the proposition that the City did not need to predict in its environmental impact report (EIR) where the Coastal Commission would find ESHA on the site. (Opn., p. 17.)

The Court of Appeal affirmed on the CEQA issue, but reversed on the Planning and Zoning law claim, finding that the City's interpretation of its own general plan was reasonable and not arbitrary and capricious. This determination was consistent with abundant case law.

As explained below, no ground for review exists here. There is neither a split of authority, nor an important question of law at issue. There is nothing new, novel, or important warranting this Court's attention. The Petition should therefore be denied.

A. *Douda v. California Coastal Commission* is not in conflict with, or even in tension with, the Opinion.

BRC argues that the Opinion is purportedly in irreconcilable conflict with *Douda v. California Coastal Commission* (2008) 159 Cal.App.4th 1181 (*Douda*).

The Court need not consider this argument. As the Court of Appeal observed, "[w]e have not been pointed to any authority indicating that the City is required under the Coastal Act to identify ESHA in a project not covered by a coastal land use plan." (Opn., p. 23, fn. 13.) That statement is accurate. BRC did not cite *Douda*, or any other case, for that proposition.

BRC's appellate briefing spanned 133 pages, yet BRC cited *Douda* zero times. BRC thus seeks review based on a purported conflict with a case BRC has never before discussed on an issue it never raised.

This Court will not consider an issue that was not raised during the briefing on the merits or at the very least in a petition for rehearing. (Cal. Rules of Court, rules 8.500(c)(1), (c)(2).) Those policies apply with full force to this case.

Moreover, *Douda* is inapplicable. *Douda* is a Coastal Act case, not a CEQA case. The Court of Appeal specifically noted that there are no claims pending under the Coastal Act here. (Opn., p. 23, fn. 13 ["there is not a Coastal Act claim before this court"].) *Douda* does not even mention CEQA, nor does it discuss a local agency's duty under CEQA to forecast future Coastal Act determinations when an agency is not and cannot act as a decisionmaker under the Coastal Act. Whether habitat constitutes "ESHA" is a determination made under the Coastal Act. (Pub. Resources Code, § 30240.) Simply put, nothing in *Douda* even suggests that a local agency has to make gratuitous, non-binding ESHA predictions in the context of CEQA – which is essentially the allegation here. In short, *Douda* is irrelevant.

B. The Opinion does not contravene section 30336 of the Coastal Act.

BRC also argues that the Opinion "contravenes" section 30336 of the Coastal Act and conflicts with *Douda*'s interpretation of this provision. There are four reasons why review of this issue is unwarranted.

First, BRC did not bring any alleged errors with respect to section 30336 to the Court of Appeals' attention. (Cal. Rules of Court, rule 8.500(c)(2).)

Second, as the Opinion notes, none of BRC's claims arises under the Coastal Act. (Opn., p. 23, fn. 13.)

Third, *Douda* does not cite, much less discuss, section 30336, so its relevance to BRC's argument is obscure.

Fourth, on its own terms, section 30336 stops far short of requiring the City to predict where the Coastal Commission would find ESHA on Banning Ranch. That section states:

> The commission shall, to the maximum extent feasible, assist local governments in exercising the planning and regulatory powers and responsibilities provided for by this division where the local government elects to exercise those powers and responsibilities and requests assistance from the commission, and shall cooperate with and assist other public agencies in carrying out this division. Similarly, every public agency, including regional and state agencies and local governments, shall cooperate with the commission and shall, to the extent their resources permit, provide any advice, assistance, or information the commission may require to perform its duties and to more effectively exercise its authority.

(Pub. Resources Code, § 30336.) A general duty to "cooperate" cannot be construed as a legal obligation to predict permitting decisions that will be

made by the Coastal Commission some day in the future. (See Opn., p. 23, fn. 13 [rejecting the notion that section 30336 required the City to forecast "ESHA designations in its EIR"].)

C. The Opinion does not conflict with *Rancho Cordova.*

BRC argues that the Opinion is inconsistent with in *Rancho Cordova, supra*, 172 Cal.App.4th 603. BRC is wrong. The Opinion found that the City's interpretation of, and adherence to, its general plan was not arbitrary and capricious. (Opn., p. 28.) The *Rancho Cordova* court applied the same standard of review, and reached the opposite conclusion based on a different policy and a different record. There is no split in authority.

The Opinion explained the policies at issue in *Rancho Cordova* were not substantially similar to the policies at issue in this case. In *Rancho Cordova*, the Court of Appeal considered Rancho Cordova General Plan Action NR.1.7.1, which stated:

> [F]or those areas in which special-status species are found or likely to occur or where the presence of species can be reasonably inferred, the City *shall* require mitigation of impacts to those species that ensure that the project does not contribute to the decline of the affected species populations in the region to the extent that their decline would impact the viability of the regional population. Mitigation *shall* be designed by the City *in coordination with* the U.S. Fish and Wildlife Service (USFWS) and the California Department of Fish and Game (CDFG), and shall emphasize a multi-species approach to the maximum extent feasible. This may include development or participation in a habitat conservation plan.

(*Rancho Cordova, supra*, 172 Cal.App.4th at p. 635, emphasis in original.) The *Rancho Cordova* court held that this measure required more than mere

"consultation" with USFWS and CDFG, which is normally understood as notice and opportunity to submit comments. The word "coordination" implies something more – a measure of "cooperation." The court left open how much more cooperation would be required to satisfy this policy, except to note that the policy did not require the city to "subordinate itself to state and federal agencies by implementing their comments and taking their direction." (*Id.* at pp. 641-642.)

BRC argues that *Rancho Cordova* compels a similar conclusion here. As the Court of Appeal noted, however, the "strategy" at issue here is substantially different from the policy in Rancho Cordova. Rancho Cordova's policy NR 1.7.1 required (1) that the city "coordinate" with specific agencies, (2) that the city coordinate on a specific task, and (3) that, by its very nature, the city had to complete the task – adoption of mitigation – prior to approving the project. (Opn., p. 26.)

The City's Strategy LU 6.5.6 is much less specific:

> [¶] Work with appropriate state and federal agencies to identify wetlands and habitats to be preserved and/or restored and those on which development will be permitted.

The strategy does not even mention the Coastal Commission. The strategy uses the term "work with" rather than "coordinate." And the strategy provides no specific time frame for completing this obligation. (Opn., p. 26.) The Court of Appeal concluded that the City's interpretation – that its work with the various agencies is an ongoing process that did not have to be fully satisfied before project approval – was not arbitrary and capricious: "Our review of the general plan and the record in this case leads us to

conclude that the City's interpretation of the process contemplated by LU 6.5.6 and its ensuing consistency finding are reasonable." (Opn., pp. 18-22.) The court concluded that the general commitment to "work with" agencies could not be read to impose more without inventing obligations "out of thin air." (Opn., p. 28.)

The Opinion is entirely consistent with *Rancho Cordova*, and with the decisions of all the other appellate districts addressing the standard of review governing claims under the Planning and Zoning Law. [2] Review is unwarranted.

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[2] See, e.g., *Sequoyah Hills Homeowners Assn. v. City of Oakland* (1993) 23 Cal.App.4th 704, 717 (First District: noting strong presumption in favor of agency's interpretation; reviewing only for abuse of discretion); *Jamieson v. City Council of City of Carpinteria* (2012) 204 Cal.App.4th 755, 763 (Second District: noting great deference due to the local agency's consistency determination; "the body which adopted the general plan policies in its legislative capacity has unique competence to interpret those policies when applying them in its adjudicatory capacity" and such a determination cannot be overturned except on showing abuse of discretion); *Families Unafraid to Uphold Rural etc. County v. Board of Supervisors* (1998) 62 Cal.App.4th 1332, 1338 (Third District: local governing body's determination that a project is consistent with a general plan is subject to judicial review under the abuse of discretion standard); *Anderson First Coalition v. City of Anderson* (2005) 130 Cal.App.4th 1173, 1192 (Third District: an agency's decision for consistency with its *own* general plan, is accorded great deference; if the agency's decision is not arbitrary, capricious, unsupported, or procedurally unfair, it is upheld); *Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 782 (Fourth District: applying "arbitrary and capricious" standard of review to Planning and Zoning Law claim); *Woodward Park Homeowners Assn., Inc. v. City of Fresno* (2007) 150 Cal.App.4th 683, 706 (Fifth District: deferential standard governs city's determination that the project was consistent with the general plan; such a determination can be overturned only on abuse of discretion); *Save Our Peninsula Committee v. Monterey County Board of Supervisors*, *supra*, 87 Cal.App.4th at pp. 141-142 (Sixth
(Continued)

D. The Opinion is consistent with settled law regarding CEQA.

BRC argues that the Opinion departs from established law on CEQA. BRC's petition, however, does not even cite the main decision relied on by both the trial court and the Court of Appeal: *Banning Ranch Conservancy I, supra*, 211 Cal.App.4th 1209. This omission is particularly startling because *Banning Ranch Conservancy I* involved the same parties, and because the trial court in this case sharply criticized BRC for ignoring the case in its trial briefs.

BRC argues that under CEQA the City was required to identify ESHA in the EIR, citing the general obligation that the EIR must use best efforts to disclose "all it reasonably can" in the EIR. (Petition for Review, p. 32.) The Opinion upheld the EIR's discussion of this issue, noting that the issue had already been resolved in *Banning Ranch Conservancy I*, which involved the same parties, an adjacent property, and indistinguishable contentions by BRC. (Opn., p. 30.) In that case, BRC argued there that the city had to identify ESHA in an EIR prepared for a park project on a parcel next door to Banning Ranch. The *Banning Ranch Conservancy I* court held that the city was not required to speculate about whether the Coastal Commission would find ESHA on site. The city merely had to identify potential inconsistencies with the Coastal Act, which it did.

(Continued)
District: noting unique competence of local agency to interpret its own general plan; reviewing for abuse of discretion in that light).

(*Banning Ranch Conservancy I, supra,* at pp. 1233-1234.) BRC sought review in that first case, which was denied.

In this case, the court concluded that the City complied with CEQA. The court noted the extensive and thorough environmental review prepared for the Project. (Opn., p. 12.) The City opted not to "speculate" about "potential ESHA," but "CEQA does not require the City to prognosticate as to the likelihood of ESHA determinations" during the Coastal Commission's review under the Coastal Act. (*Id.*, p. 31.) In reaching this conclusion, the court merely applied the settled rule established by *Banning Ranch Conservancy I.* (*Ibid.*) [3]

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[3] Underlying BRC's CEQA argument is the contention that the City suppressed a report prepared by Glen Lukos in 2008. (Petition for Review, pp. 32-33.) The 2008 Lukos Report was made public, and in fact BRC submitted comments on the report. For reasons that are discussed at length in the Clerk's Transcript, the report was initially not included in the Administrative Record. The Court of Appeal, however, indisputably included the 2008 Lukos Report in the Administrative Record, and considered the report in reaching its conclusions. (Opn., p. 11, fn. 10.) Thus, the record belies BRC's arguments pertaining to the Lukos report.

Because BRC's petition ignores settled law, and points to no important question or lack of uniformity requiring Supreme Court review, the Court should deny BRC's petition. (Cal. Rules of Court, rule 8.500 (b).)

III.
CONCLUSION

This Court should deny review.

Dated: July 20, 2015

REMY MOOSE MANLEY LLP

By: Whitman F. Manley
Whitman F. Manley

Attorneys for Defendants and Appellants
CITY OF NEWPORT BEACH, et al.

CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, rule 8.504(d)(1))

I, Whitman F. Manley, declare as follows:

1. I am an attorney at law duly licensed to practice before the courts of the State of California, and am one of the attorneys for the CITY OF NEWPORT BEACH, et al., in this action.

2. California Rules of Court, rule 8.504(d)(1), states that an answer to a petition for review produced on a computer must not exceed 8,400 words, including footnotes.

3. This Answer to Petition for Review was produced on a computer using a word processing program. This Answer consists of 2,692 words, including footnotes but excluding the caption page, tables and this certificate, as counted by the word processing program.

Dated: July 20, 2015

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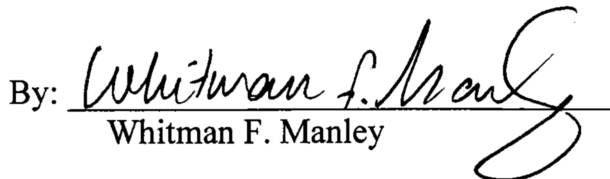
By: 
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California Supreme Court Case No. S227473
(Fourth District Court of Appeal, Division Three, Case No. G049691)
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Angela Powers

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