No. 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

AUG - 3 2015

Frank A. McGuire Clerk

Deputy

CRC 8.25(b)

REPLY TO ANSWER TO PETITION FOR REVIEW

Of a Published Decision of the
Fourth Appellate District, Division Three, Case No. G049691

Reversing a Judgment of the Superior Court of Orange County
Case No. 30-2012-00593557
The Honorable Nancy Wieben Stock and Robert Becking

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To the Honorable Chief Justice of the State of California and Associate Justices of the California Supreme Court:

BANNING RANCH CONSERVANCY ("Conservancy") respectfully submits this reply to respondents' and real parties in interest's joint Answer to Petition for Review ("Answer").

SUMMARY OF REPLY

The Answer fails to refute the Conservancy's showing that the Court of Appeal's decision in *Banning Ranch Conservancy v. City of Newport Beach* (2015) 236 Cal.App.4th 1341 ("the Opinion") should be reviewed to ensure consistency of court decisions and decide important questions of law. Responding to the four issues the Petition raises, the Answer notes the first two, arising under the Coastal Act and pertaining to *Douda v. California Coastal Com.* (2008) 159 Cal.App.4th 1181 ("*Douda*"), and Public Resources Code section 30336 ("section 30336"), were not raised below. However, *Douda* never became an issue until the Opinion rejected its holding. As for section 30336, the briefing below and the Opinion both show section 30336 has been a key issue throughout this litigation – an issue the California Attorney General found so important, in fact, that intervened on behalf of the California Coastal Commission ("Coastal Commission") to address it.

Regarding the third and fourth issues, the Answer attempts to dismiss the third, arising under the Planning and Zoning Law (Gov. Code § 65000,

et seq.), by claiming no conflict exists between the Opinion and *California Native Plant Society v. City of Rancho Cordova* (2009) 172 Cal.App.4th 603 ("*Native Plant*"). The attempt fails because the Opinion expressly states it rejects the *Native Plant* court's reasoning as "incompatible" with its own.

As for the fourth issue, which arises under the California Environmental Quality Act (Pub. Resources Code § 21000, *et seq.*: "CEQA") but also implicates both the Coastal Act and the Planning and Zoning law, the Answer insists the Opinion's holding is correct because it is compelled by the same court's holding in *Banning Ranch Conservancy v. City of Newport Beach* (2102) 211 Cal.App.4th 1209 ["*BRC I*"], and asserts contentions in the two actions are "indistinguishable." The Answer conveniently fails to mention that in *BRC I* "the City maintained the two projects were distinct" and the Court of Appeal agreed, finding they "have 'different project proponents'" and "serve different purposes." (*Id.* at pp. 1218 & 1226.) The Answer also fails to mention that in *BRC I* the City *did* identify in that EIR portions of the site that were probable environmentally sensitive habitat areas ("ESHA"), whereas the City refused to do so in this action despite knowing ESHA was present.

This Court has not issued a significant decision addressing general plan law since its landmark decision two decades ago in *DeVita v. County of Napa* (1995) 9 Cal.4th 763, which reaffirmed the general plan's important role as a community's land use constitution. The Opinion undercuts not only *DeVita,*

it also wrongly decides a land use issue of critical statewide importance and never addressed by this Court: Must a court defer to a legislative body's "interpretation" of a policy incorporated in its general plan as a CEQA mitigation measure that nullifies its purpose? (Pub. Resources Code § 21801.6, sub. (b).)

REPLY ARGUMENT

A. Review Should Be Granted to Resolve the Conflict the Opinion Creates with *Douda v. California Coastal Com.*

The Answer makes two arguments to support its claim that *Douda* is not in conflict with the Opinion.

The first argument is premised on Rule 8.500(c) and urges this Court to ignore the Opinion's rejection of *Douda* because the Conservancy did not cite *Douda* in its appellate briefing. The reason why the Conservancy did not cite *Douda* below or discuss any conflict with it is simple: no conflict with *Douda* existed until the Opinion created it. For the first time in any published opinion the Opinion holds an ESHA determination under section 30240 of the Coastal Act is a *legal* conclusion that only the Coastal Commission can make. In so holding, the Opinion created a conflict with *Douda's* holding that section 30240 must be construed to permit local government agencies to designate ESHA because it *requires* all ESHA to be protected and "operate[s] to preserve 'rare' and 'especially valuable' resources" and therefore "is not specific to the [Coastal] Commission." (*Douda*, at pp. 1197-1198.)

In claiming *Douda* is "inapplicable" since it is "not a CEQA case," the second argument inadvertently reveals why review should be granted:

> "*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 such habitat constitutes "ESHA" is a determination made under the Coastal Act."

(Emphasis added.) On its face, this argument begs the question whether the Coastal Act, in fact, bars local governments lacking certified local coastal programs from making *their own* ESHA determinations.

The Coastal Act plainly assumes local governments will implement Chapter 3 of the Coastal Act, including section 30240 thereof. (See Pub. Resources Code § 30200 ["Where the commission or any local government in implementing the provisions of this division..."].) Acknowledging "[t]he [Coastal] Commission and an issuing agency both have oversight functions" under the Coastal Act and that section 30240 "require[s] all [ESHA] to be protected, whether they are designated in the past, present or future," *Douda* holds that "section 30240 of the Coastal Act is not specific to the [Coastal] Commission" and therefore local governments lacking certified local coastal

programs may make their own ESHA determinations on projects based on empirical data. (*Douda*, at pp. 1195-1198.)

Douda bases its holding on two foundational Coastal Act premises. First, that "the Coastal Act specifically provides heightened protection for [ESHA] through section 30240." (*Id.* at p. 1193.) Second, and flowing from the first, that in construing the Coastal Act, courts must favor interpretations that "permit[] greater oversight and protection for [ESHA]." (*Id.* at p. 1194.)

The Opinion entirely rejects this. Based solely on its prior decision in *BRC I*, it extends that decision by holding local governments lacking certified local coastal programs cannot make an ESHA determination because that is a legal conclusion and can only be made by the Coastal Commission. (Opinion, at pp. 23, fn. 13 & 29-31.) It is hard to imagine a more striking conflict between cases.

B. Review Should Be Granted Because the Opinion Negates the Legislative Purpose of Section 30336 of the Coastal Act

The Opinion is the only published decision to address Public Resources Code section 30336, and it does so in the specific context of CEQA. In doing so, it forgets the Coastal Act must "be liberally construed to accomplish its purposes and objectives." (Pub. Res. Code § 30009; *Bolsa Chica Land Trust v. Superior Court* (1999) 71 Cal.App.4th 493, 506 ("*Bolsa Chica*") ["under both the Coastal Act and CEQA: 'The courts are enjoined to construe the

statute liberally in light of its beneficent purposes. [Citation.] The highest priority must be given to environmental consideration in interpreting the statute [citation].' "].)

Instead, the Opinion holds "an ESHA designation is a legal conclusion, not the sort of cooperation mandated by Public Resources Code section 30336." (Opinion, at p. 23, fn. 13.) Thus, the Opinion creates a new limitation on the scope of cooperation mandated by section 30336.

The Opinion's crabbed interpretation of this key Coastal Act mandate raises an important question of law affecting the State's 1,100-mile coastline. Nevertheless, the Answer gives four reasons why this Court should not grant review of the Opinion's narrowing of section 30336.

First, the Answer claims the Conservancy did not raise section 30336 below. As the Opinion shows, the claim is false. (Opinion, at p. 23, fn. 13.) Notably, it fails to mention that the City was the reason *why* section 30336 became such a major issue in this action. As the briefing below shows, in a last-ditch effort to dissuade the trial court from issuing the writ of mandate, the City insisted Public Resources Code section 30335.1 *barred* the Coastal Commission from working with the City in identifying ESHA. When the City made the same claim to the Court of Appeal, the California Attorney General intervened on behalf of the Coastal Commission to oppose it and uphold the proper interpretation of that section and section 30336.

Second, the Answer notes none of the Conservancy's claims arise under the Coastal Act. This point is irrelevant to the important question of law the Opinion raises for the first time: whether an ESHA determination is a legal determination and therefore beyond the scope of cooperation between the Coastal Commission and local governments that section 30336 mandates.

Third, it claims the relevance of section 30336 to the Conservancy's Petition is "obscure" because *Douda* does not cite it. Again, the Opinion makes not just new law regarding section 30336 but *the only* decisional law on section 30336, and if left to stand its narrowing of the scope of section 30336 cooperation between Coastal Commission and local governments on the issue of ESHA will be binding authority on every superior court in the Coastal Zone.

Fourth, its argument that "section 30336 stops far short of requiring the City to predict where the Coastal Commission would find ESHA on Banning Ranch" is correct only if *Douda* was incorrect in holding that the Coastal Act must be expansively construed as authorizing both the Coastal Commission and local governments to protect ESHA by making ESHA determinations. However, *Douda* is in harmony with the heretofore consensus view that ESHA determinations are science-driven, *objective* determinations made by utilizing the Coastal Act's section 30107.5 definition of the phrase "environmentally sensitive area." (*Douda*, at p. 1196; see also *Sierra Club v. County of Napa* (2004) 121 Cal.App.4th 1490, 1497.)

The Opinion takes the exact opposite approach. It narrowly construes the Coastal Act as preventing local governments within the Coastal Zone that lack local coastal programs from making their own ESHA determinations since such determinations are not objective and empirically based but instead are "legal conclusions" solely within the province of the Coastal Commission to make. Based on this construction, the Opinion holds that local governments need not "prognosticate as to the likelihood of ESHA." (Opinion, at p. 31.)

Review is necessary to resolve whether the Opinion's holding that ESHA determinations fall outside the ambit of section 30336 is correct.

C. Review Should Be Granted to Resolve the Conflict the Opinion Creates with *California Native Plant Society*

The Answer's contention that the Opinion does not conflict with *Native Plant* is based on four false claims. First, the Answer's claim that "no split in authority" exists between *Native Plant* and the Opinion is refuted by the Opinion itself:

> "we acknowledge that *Native Plant* is not easily distinguished. Thus, to the extent the holding of *Native Plant* applies to this case, we reject its reasoning as incompatible with our deferential review of the City's legislative acts."

(Opinion, at p. 26.) Elaborating on why it rejected the court's reasoning in *Native Plant*, the Opinion chides *Native Plant* for improperly giving effect to

a general plan policy the Opinion calls a "vague term" – "coordination with" – and faults *Native Plant's* holding that Rancho Cordova General Plan Action NR 1.7.1 required the City of Rancho Cordova "to do something between consultation and capitulation." (*Id.* at p. 27.)

Second, the claim that the general plan policy at issue in *Native Plant* was not substantially similar to the policy at issue in this case is wrong and, in any event, irrelevant. The Opinion itself concedes "it cannot be fairly said that the City worked with the [Coastal] Commission prior to Project approval to identify habitats for preservation, restoration, or development." (*Id.* at p. 21.) Both the policy at issue in *Native Plant* and LU 6.5.6 were incorporated into their respective cities' general plans as CEQA mitigation measures to mitigate or preclude specific environmental impacts on specific properties.

The *Native Plant* court reasonably concluded that the policy at issue was put in the general plan *for a purpose* and enforced it accordingly. By contrast, the Opinion dismisses CEQA mitigation measure policy LU 6.5.6 as but a "helpful reminder" and in so doing completely frustrated its intended purpose to mitigate future environmental impacts on Banning Ranch by requiring the City to work with state agencies such as the Coastal Commission "to identify wetlands and habitats to be preserved and/or restored" *before* development "will be [future tense] permitted." (*Id.* at p. 22.) Traducing basic principles of interpretation, the Opinion ignores the verb tense.

Third, the claim that LU 6.5.6 "does not even mention the Coastal Commission" is a red herring, and the claim that it omits the term "coordinate" is false. As to the former, mentioning the Coastal Commission by name does not make LU 6.5.6 "vague and ambiguous" like the Opinion claims since it is undisputed that all 400 acres of Banning Ranch lie within the Coastal Zone. As to the latter claim, the Opinion itself refutes it, noting the general plan titles LU 6.5.6 "**Coordination with State and Federal Agencies.**" (*Id.* at p. 19; bold in original.)

Fourth, the claim that the Opinion "is entirely consistent with [*Native Plant*], and with the decisions of all other appellate districts" is false. As noted above, the Opinion expressly rejected *Native Plant*. Indeed, the City told the appellate court just the opposite, proffering as a main argument in its opening brief that *Native Plant* "is not sound precedent for deciding this case" because it "incorrectly departs from precedent."

To the contrary, it is the Opinion that radically departs from prior precedent by failing to grasp that general plan policies are qualitatively not all the same. Some general plan policies are "amorphous in nature," and courts correctly accord deference to cities and counties in interpreting those policies. (*Families Unafraid to Uphold Rural El Dorado County v. County of El Dorado* (1998) 62 Cal.App.4th 1332, 1331-1342 ("*FUTURE*"); *Anderson First Coalition v. City of Anderson* (2005) 130 Cal.App.4th 1173, 1192

["nebulous statement" not inconsistent with general plan].) On the other hand, when a policy is a measure incorporated into a general plan to mitigate a specific environmental impact, courts will not allow a legislative body to play Humpty Dumpty with it and decree it means "just what I choose it to mean." To hold otherwise, as the Opinion does, not only ignores this Court's mandate that courts give effect to the plain text of a city's general plan, it also guts CEQA's mandate that such mitigation measures must be "fully enforceable." (*Lesher Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531, 543; Pub. Res. Code § 21081.6, subd. (b).)

For example, in *San Bernardino Valley Audubon Society, Inc. v. County of San Bernardino* (1984) 155 Cal. App. 3d 738, 753, the court rejected the county's general plan consistency finding for a project because it was inconsistent with a single general plan policy that was a mitigation measure hardwired into the general plan "requir[ing] the protection of 'beneficial, rare or endangered animals and plants with limited or specialized habitats.'" In *FUTURE*, the court addressed a general plan policy the purpose of which was to avoid impacts on "important natural resources" and rejected the argument that "simply one general plan policy should not be enough to scuttle a project," noting that "the nature of the policy and the nature of the inconsistency are the critical factors to consider." (*FUTURE*, at pp. 1340-1341; overruled on other grounds in *Conservatorship of Whitley* (2010) 50 Cal.4th 1206, 1221-1225.)

And acknowledging that "[c]onsistency requires more than incantation, and a county cannot articulate a policy in its general plan and then approve a conflicting project," the court in *Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 782, rejected the county's consistency finding because the project was inconsistent with a single policy incorporated in the general plan to mitigate traffic impacts in a specific geographical area. (See also *Napa Citizens for Honest Government v. Board of Supervisors* (2001) 91 Cal.App.4th 342, 378-79 [even without a direct conflict, an ordinance or development project may not be approved if it interferes with or frustrates the general plan's policies and objectives].)

Tellingly, the Answer says nothing to counter the Petition's point that the Opinion violates settled principles of interpretation by holding "LU 6.5.6 is vague and ambiguous — the Conservancy's position depends on inferences made after considering multiple sections of the general plan." (Opinion, at p. 26.) If LU 6.5.6 is "vague and ambiguous" then resort to the companion LU 6.5 policies and extrinsic sources like the EIR prepared for the City's General Plan Update is proper. Those policies and the EIR plainly show LU 6.5.6 is a CEQA mitigation measure the City incorporated in the General Plan to mitigate environmental impacts caused by the development of Banning Ranch. Review is needed to resolve the conflict between *Native Plant* and the Opinion on whether legislative bodies may later nullify such measures.

D. Review Should Be Granted to Close the CEQA Loopholes the Opinion Creates as a Result of its Conflict with *Douda* and Rejection of *Native Plant*

In claiming the Opinion is consistent with CEQA, the Answer forgets this Court's admonition that "[i]t is, of course, too late to argue for a grudging, miserly reading of CEQA." (*Bozung v. Local Agency Formation Com.* (1975) 13 Cal.3d 263, 274.) By rejecting *Douda's* holding that Public Resources Code section 30240 applies equally to the Coastal Commission and local governments, the Opinion creates a loophole placing any discussion of ESHA outside the ambit of CEQA and an EIR. And by expressly rejecting *Native Plant*, the Opinion creates a loophole that circumvents CEQA's mandate that mitigation measures must be fully enforceable; *e.g.*, a legislative body can just incorporate CEQA mitigation measures in a general plan or similar document and thereafter it can exercise its "discretion" to interpret those measures as toothless "helpful reminders." These are loopholes that potentially impact not just the 1.5 million acre Coastal Zone but the entire state.

The Answer falsely claims the Petition did not mention the Court of Appeal's prior decision in *BRC I*. To the contrary, the Petition noted that,

> "the Opinion tiers off of [*BRC I*], which held a local agency's ESHA analysis of a proposed project is sufficient as long as it simply acknowledges areas having the potential to be considered ESHA by the [] Coastal Commission [].

> The Opinion here significantly extends *BRC I* by holding local governments do not have to make even this acknowledgment because an ESHA determination is a *legal* conclusion that only the Coastal Commission is empowered to make under the Coastal Act. This one-two punch into the gut of the Coastal Act's ESHA protections is a matter of critical statewide importance justifying review by this Court."

Tellingly, the Answer avoids addressing the Opinion's rejection of the four fundamental CEQA tenets discussed in the Petition. Review is needed to reaffirm the validity of these tenets protecting the quality of life of all Californians.

CONCLUSION

For the foregoing reasons, the Conservancy respectfully requests this Court to review the Court of Appeal's Opinion.

Dated: July 31, 2015

Respectfully submitted,

LEIBOLD McCLENDON & MANN, P.C.

By: _____

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CERTIFICATION OF WORD COUNT:

In accordance with California Rule of Court, Rule 8.204(d)(1), I certify that this Reply to Answer contains 3,138 words, exclusive of this certificate and the tables of contents and authorities, according to the word count function of the word processing program I used to prepare it.

By: _____
John G. McClendon

PROOF OF SERVICE

[Code Civ. Pro. § 1013a; revised 5/1/88]

STATE OF CALIFORNIA)
) ss.
COUNTY OF ORANGE)

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 23422 Mill Creek Drive, Suite 105, Laguna Hills, California 92653.

On July 31, 2015, I served the foregoing document described as ***REPLY TO ANSWER TO PETITION FOR REVIEW*** on the parties shown on the **Attached Service List** as follows:

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Executed on July 31, 2015, in Laguna Hills, California.

I declare under penalty under the laws of the State of California that the foregoing is true and correct.

John G. McClendon

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Banning Ranch Conservancy v. City of Newport Beach, et al.

Fourth District Court of Appeal Case No. G049691

[Orange County Superior Court Case No. 30-2012-00593557]

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