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.

AFTER A DECISION BY THE COURT OF APPEAL
FOURTH APPELLATE DISTRICT, DIVISION THREE
[4th Civil No. G049691]

OPENING BRIEF ON THE MERITS

LEIBOLD McCLENDON & MANN, P.C.
*John G. McClendon (SBN 145077)
John@CEQA.com
Douglas M. Johnson (SBN 297582)
Douglas@CEQA.com
9841 Irvine Center Drive, Suite 230
Irvine, California 92618
(949) 585-6300
(949) 585-6305 (fax)

Attorneys for Plaintiff and Appellant
BANNING RANCH CONSERVANCY

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page:

CASES:

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

STATUTES:

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

Page:

REGULATIONS:

OTHER AUTHORITY:

ISSUES PRESENTED

In petitioning this Court for review of the Court of Appeal's decision, Petitioner and Appellant Banning Ranch Conservancy ("Conservancy") identified the following questions for review:

1. California's Coastal Act accords extraordinary protection to environmentally sensitive habitat areas ("ESHA") within the 1.5 million-acre Coastal Zone. Is an ESHA determination a *legal* determination that a local government cannot make under the Coastal Act if it lacks a local coastal plan?
2. May a local government reject an offer from the California Coastal Commission to assist in identifying ESHA that might be impacted by a proposed project within the Coastal Zone?
3. May a city or county incorporate a specific policy in its general plan to fully mitigate the environmental impacts of a future project and later refuse to implement that policy in a way that effectuates it purpose?
4. May a local government purge from its files empirical evidence showing a proposed project within the Coastal Zone will impact ESHA and not mention that evidence in the environmental impact report it prepares for the project?

Refining these, this Court announced this action presents three issues:

1. Did the City [of Newport Beach]'s approval of the project at issue comport with the directives in its general plan to "coordinate with" and "work with" the California Coastal Commission to identify habitats for preservation, restoration, or development prior to project approval?

2. What standard of review should apply to a city's interpretation of its general plan?

3. Was the City [of Newport Beach] required to identify environmentally sensitive habitat areas – as defined in the California Coastal Act of 1976 (Pub. Resources Code § 30000, *et seq.*) – in the environmental impact report for the project?

INTRODUCTION

No laws do more to protect California's coastline than the California Environmental Quality Act [Pub. Res. Code § 21000 *et seq.*: "CEQA"] and the Coastal Act of 1976 [Pub. Res. Code § 21000 *et seq.*: "Coastal Act"]. And key to this protection is the restriction the latter act places on development in "environmentally sensitive habitat areas," or "ESHA," by protecting these areas from any disruption.

In *Banning Ranch Conservancy v. City of Newport Beach* (2012) 211 Cal.App.4th 1209, 1233-1234 ("*BRC I*"), Division Three of the Fourth District Court of Appeal held the analysis of a proposed project by the City of Newport

Beach ("City") was sufficient because it acknowledged areas having the potential to be considered ESHA by the California Coastal Commission ("Coastal Commission"). In *Banning Ranch Conservancy v. City of Newport Beach* (2015) 236 Cal.App.4th 1341 ("the Opinion"), that court significantly extended *BRC I* by holding local governments do not have to make even this acknowledgment because an ESHA determination is a *legal* conclusion only the Coastal Commission can make. In so holding the Opinion rejected the Second District's holding in *Douda v. California Coastal Com.* (2008) 159 Cal.App.4th 1181 ("*Douda*"), which held the Coastal Act allows ESHA designations to be made by either a local agency or the Coastal Commission.

The Opinion also rejected the Third District's holding in *California Native Plant Society v. City of Rancho Cordova* (2009) 172 Cal.App.4th 603 ("*Native Plant*"), that when a general plan policy directs "coordination" with federal and state resource agencies it has real meaning. (Opinion, at p. 26.) Finally, the Opinion repudiated several fundamental CEQA principles. This Court's review is thus needed to (1) resolve the conflict between the Opinion and *Douda* by explaining whether the determination of ESHA is a legal determination only the Coastal Commission is empowered to make; (2) decide whether the Coastal Act mandates cooperation between local governments and the Coastal Commission on identifying ESHA in EIRs for projects within the Coastal Zone; (3) resolve the conflict between the Opinion and *Native Plant*;

(4) settle important issues of law fundamental to CEQA; and (5) determine what standard of review should apply to a city's interpretation of its general plan.

STATEMENT OF FACTS

A. Banning Ranch

Located in the western-most portion of the City, Banning Ranch lies less than a quarter mile from the Pacific Ocean and is bordered on the north by a 180-acre nature preserve, on the south by West Coast Highway and residential communities, on the east by residential and industrial units, and on the west by the Santa Ana River and a 92-acre federally restored salt marsh basin. (Administrative Record ["AR"] 4:3180-3184.)[1] Approximately 53 acres are within the City's boundaries and 361 acres are under the jurisdiction of Orange County. (AR 10:22881, 26051.) However, the 361-acre portion is mostly "inside" the City since it is within the City's "sphere of influence" and surrounded by a one-foot strip of City land, making it an unincorporated "island" within the City. (*Id.*) Banning Ranch is the largest parcel of unprotected coastal open space remaining in Orange County. (AR 10:15855.)

Since the mid-1940s most of Banning Ranch has been a producing oilfield with hundreds of wells (most now abandoned) and related

---

[1] Citations to the 49,046-page electronic Administrative Record are in the following format: "X:Y" where "X" is the file number (1–10) and "Y" is the page number.

infrastructure and facilities. (AR 4:3180; 5:4518.) Although it has experienced disturbance due to oil production operations, "Banning Ranch contains relatively high-quality wildlife habitat due to its size, habitat diversity, and continuity with the adjacent Semeniuk Slough and federally-restored wetlands." (*Id.*; AR 10:23010.) The property contains riparian and wetland habitat with a broad variety of vegetation types providing habitat for state and federally listed endangered and threatened species, "supports several special status plants and wildlife species," including "substantial populations of southern tarplant," and the coastal cactus wren and federally listed coastal California gnatcatcher are present on the site. (AR 4:3180; 9:14041 [map].)

In 2003, the U.S. Fish and Wildlife Service designated the entirety of Banning Ranch as "critical habitat" for the California gnatcatcher, and in 2007 also designated fifteen acres of "vernal pool complexes" as "critical habitat" for the federally endangered San Diego fairy shrimp. (*Id.*; AR 3:1256, 1825; 9:14342, 14352; 9:15864, 15859, 15863, 10:46338.) Its unique critical habitat supporting endangered and threatened species makes Banning Ranch highly important and desirable as mitigation for the loss of habitat resources from development elsewhere especially because it is "located within the boundaries of the county's Central-Coastal Natural Community Conservation Plan/Habitat Conservation Plan." (AR 3:3171.)

B. The California Coastal Act and "ESHA"

In 1972, California voters approved the Coastal Zone Conservation Act (Proposition 20), creating temporary commissions to develop a statewide plan for coastal protection. (AR 10:32959-32960; *Marine Forests Society v. California Coastal Commission* (2005) 36 Cal.4th 1, 18-19.) This plan was submitted to the Legislature in 1975, and led to the passage of the California Coastal Act of 1976, which established a State agency – the California Coastal Commission ("Coastal Commission") – charged with protecting and enhancing the resources of the Coastal Zone mapped by the Legislature. (*Id.*; Pub. Res. Code § 30000, *et seq.*) The Coastal Act establishes policies guiding development and conservation along California's coast, and its intent is to "[p]rotect, maintain, and where feasible, enhance and restore the overall quality of the coastal zone environment and its natural and artificial resources." (*Id.*; Pub. Res. Code § 30001.) Through its review of development plans, the Coastal Commission strives to "[a]ssure orderly, balanced utilization and conservation of coastal zone resources, taking into account the social and economic needs of the people of the state." (*Id.*)

By law 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].' "].) One of those key purposes and objectives is "providing heightened protection" to what are called environmentally sensitive habitat areas ("ESHA"). (*Id.*) Section 30107.5 of the Coastal Act defines ESHA as "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 consequences of land having ESHA on it are delineated in section 30240 of the Coastal Act:

> (a) Environmentally sensitive habitat areas shall be protected against any significant disruption of habitat values, and only uses dependent on those resources shall be allowed within those areas.
>
> (b) Development in areas adjacent to environmentally sensitive habitat areas and parks and recreation areas shall be sited and designed to prevent impacts which would significantly degrade those areas, and shall be compatible with continuance of those habitat and recreation areas.

"Thus development in ESHA areas themselves is limited to uses dependent on those resources, and development in adjacent areas must carefully safeguard their preservation." (*Bolsa Chica*, at 506-507.)

To assure conformity with the Coastal Act, local governments lying in whole or in part within the Coastal Zone must prepare and submit to the

Coastal Commission a local coastal plan ("LCP") consisting of a coastal land use plan ("CLUP") plus zoning and other implementing actions. (Pub. Res. Code §§ 30108.5, 30108.6; *Yost v. Thomas* (1984) 36 Cal.3d 561, 566.) This submittal can be done in two phases, with the CLUP submitted first for approval. (*Id.*; Pub. Res. Code § 35011.)

C. The City's CLUP and ESHA

The City elected to submit for its LCP in two phases and obtained approval of its CLUP from the Coastal Commission in 2005. (AR 4:3260-3261.) The CLUP establishes goals, objectives and policies that govern the use of land and water in the City's Coastal Zone. (*Id.*) With regard to ESHA, the CLUP establishes the following policies:

> "Policies 4.1.1-1. Define 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 as an environmentally sensitive habitat area (ESHA). Using a site-specific survey and analysis by a qualified biologist, evaluate the following attributes when determining whether a habitat area meets the definition of an ESHA:
>
> > A. The presence of natural communities that have been identified as rare by the California Department of Fish and Game.
> >
> > B. The recorded or potential presence of plant or animal species designated as rare, threatened, or endangered under State or Federal law.
> >
> > C. The presence or potential presence of plant or animal species that are not listed under State or Federal

> law, but for which there is other compelling evidence of rarity, such as designation as a 1B or 2 species by the California Native Plant Society....."

(AR 3:1242-1243.) The City's CLUP further entitles ESHA to protections such as:

> "4.1.1-4. Protect ESHAs against any significant disruption of habitat values.
>
> 4.1.1-6. Require development in areas adjacent to environmentally sensitive habitat areas to be sited and designed to prevent impacts that would significantly degrade those areas, and to be compatible with the continuance of those habitat areas.
>
> 4.1.1-7. Limit uses within ESHAs to only those uses that are dependent on such resources.
>
> 4.1.1-9. Where feasible, confine development adjacent to ESHAs to low impact land uses, such as open space and passive recreation."

(*Id.*) Most important, when habitats meeting the definition of ESHA occur, the City's CLUP states "the presumption is that they are ESHA and the burden of proof is on the property owner or project proponent to demonstrate that that presumption is rebutted by site-specific evidence." (AR 3:913.)

"[D]ue to unresolved issues relating to land use public access, and the protection of coastal resources," the CLUP "whiteholed" Banning Ranch by designating it as a Deferred Certification Area "in order to avoid delay in certifying the balance of the LCP." (AR 3:925; 4:3260-3261.) However, the City had previously designated *all* of Banning Ranch as ESHA. (AR 10:23695

[City's 2002 study to assist Coastal Commission in designating ESHA on Banning Ranch].)

D. The Voters Approve the Plan for Banning Ranch's Future

To its credit, the City began the process of addressing these unresolved issues through a General Plan Update–its first comprehensive revision in more than thirty years. (AR 10:26214-26216.) This process gathered input from thousands of City residents and volunteers and included over four years of work by the General Plan Advisory Committee comprised of 38 residents representing all segments of the community. (*Id.*; AR 3:1565.) The result was "a 'Vision Statement' – a description of the City that residents want Newport Beach to be now and in 2025 – to serve as a blueprint for th[e] General Plan Update" and "ensure that the City achieves the vision" by doing fourteen specific things. (*Id.*)

One of those things was "[s]upporting efforts to acquire Banning Ranch for permanent open space." (*Id.*) The General Plan Update's Natural Resources Element noted Banning Ranch was one of 28 undeveloped areas within the City referred to as "Environmental Study Areas" ("ESAs"), and noted that "[t]he portions of the ESAs within the Coastal Zone that contain sensitive or rare species are referred to as [ESHAs] by the California Coastal Act." (AR 10:26780-26781.) Recognizing its "relatively high-quality wildlife habitat," the General Plan Update "prioritize[d] the acquisition of Banning

Ranch as an open space amenity for the community and region" and called for consolidating oil operations, restoring wetlands, providing nature education and interpretative facilities, and a park to serve residents. (AR 10:26244; 26302-26305.)

If acquisition was not ultimately successful, the General Plan Update's proposed Land Use Element allowed Banning Ranch to be developed as a residential village with a majority of the site to be preserved as open space. (AR 10:26305.) The policy for accomplishing this required "the preparation of a master development or specific plan for any development on the Banning Ranch specifying ... [a] habitat preservation and restoration plan." (AR 10:36309.)

Thus, under either scenario the proposed Land Use Element called for the restoration and enhancement of "wetlands and wildlife habitats in accordance with the requirements of state and federal agencies." (AR 10:26309-26310.) And under the specific action "Strategy" prescribed for accomplishing this, the proposed Land Use Element mandated the following:

> **LU 6.5.6 Coordination with State and Federal Agencies**
>
> 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.

(*Id.*; bold in original.)

Since the City did not have a fully certified LCP, and thus could not issue a Coastal Development Permit ("CDP") for new development in the City, this requirement, together with other policies mandated in the General Plan Update, assured the active involvement of the Coastal Commission in shaping the form of any future development of Banning Ranch. (AR 4:3260; 5:4526.) The Council adopted the General Plan Update on July 25, 2006, and the voters approved it on November 25, 2006. (AR 4:3100.)

E. NBR's Proposal to Develop Banning Ranch

The party proposing to develop the project at issue in this action is Newport Banning Ranch, LLC, a limited liability company formed by the owners of Banning Ranch: Aera Energy, LLC, and Cherokee Newport Beach, LLC (collectively, "NBR"). (AR 4:3173.) On August 22, 2008, NBR submitted documents to the City proposing the development of 1,375 residential dwelling units, 75,000 square feet of commercial uses, and a 75-room resort on 149 acres of Banning Ranch as well as the construction of new vehicular access and an internal circulation system (the "Project"). (AR 4:3175-3178; 9:13707-13711.)

//

In compliance with General Plan Policy NR 10.9,[2] NBR noted it had "documented and mapped the extensive field survey work that the environmental team has done on potential special status habitats (potential ESHA), as demonstrated in the Biological Technical Report." (AR 9:13710.) Utilizing the City's CLUP criteria for determining the presence of ESHA on Banning Ranch, NBR's Biological Technical Report ("BTR") found a total of 33 acres of upland ESHA for which "application of the criteria that would allow rebutting the presumed ESHA status does not lead to a conclusion that the subject areas are not ESHA, and found the "majority of wetlands and/or riparian habitat" in the lowlands "are considered ESHA." (3 Appellant's Appendix ["AA"] 744.) Upland and lowland ESHAs were mapped in green and blue, respectively, on Exhibit 12 to the BTR's volume two. (3 AA 749; see also AR 10:46022 [Coastal Commission adopted same map].)

Recognizing that ESHA cannot be disturbed by development, the BTR noted the proposed Project was "designed to avoid all areas of ESHA ... and provide minimum setbacks of at least 50 feet" except for at total of 0.08 acres

---

[2] **NR 10.9 Development on Banning Ranch**
Protect the sensitive and rare resources that occur on Banning Ranch. *If future development is permitted, require that an assessment be prepared by a qualified biologist that delineates sensitive and rare habitat and wildlife corridors.* Require that development be concentrated to protect biological resources and coastal bluffs, and structures designed to not be intrusive on the surrounding landscape. Require the restoration or mitigation of any sensitive or rare habitat areas that are affected by future development. (AR 10:26504, 26800; NBR's requested edit in italics)

of potential scrub and riparian ESHAs. (3 AA 745-746.) The BTR also disclosed that the largest area of upland ESHA was in the northeast corner of Banning Ranch. (*Id.*) Therefore, in order to avoid disturbing this large mass of ESHA, NBR's development plan terminated the proposed Bluff Road at 17th Street and did not extend it across that ESHA to 19th Street. (3 AA 755-756; see also AR 10:36559.) However, since this extension was in the County's Master Plan of Arterial Highways and the City's Master Plan of Streets and Highways , NBR noted that its Project would require an amendment to both plans to "[d]elete the segment between 17th Street and 19th Street." (3 AA 757.)

F. The City Ignores the Major ESHA Problem NBR Found and Requires NBR to Literally Pave Over It

Ironically, NBR's compliance with Policy NR 10.9 caused a big problem for City Council members who wanted to use NBR's project as a way to extend Bluff Road across this ESHA to 19th Street. In what appears to be a violation of the Ralph M. Brown Act,[3] on January 15, 2009, Mayor Edward Selich sent an email to Council members Steve Rosansky and Don Webb recounting his meeting with Mr. Webb at which they agreed on Banning

---

[3] Gov. Code § 54950 *et seq.*; see *Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152, 1167 [council member's private discussions with other council members violated the Brown Act]; see also 84 Cal.Ops.Atty.Gen. 30, 31, 32 (2001) [use of e-mails by a majority of board members to exchange facts, advance or clarify a member's understanding of an issue, or advance the ultimate resolution of an issue regarding an agenda item violates Gov. Code § 54952.2].

Ranch "Circulation Issues" and reached a "consensus" that included "Bluff Road continue to 19th street; at least grade/partial improvements from 17th to 19th." (AR 9:13781-13782, 13906.) Compounding this Brown Act violation, Council members began using Assistant City Manager Sharon Wood as their intermediary[4] to achieve consensus on the Bluff Road extension in their private conversations. (AR 9:13723.) In an email to the City's planner dated February 4, 2009, and with the subject line "Bluff Road," Wood said she had "connected with the Council members" and conveyed to NBR's representative "that the project will include Bluff Road construction and Alternative 1 will include [right-of-way] reservation only." (AR 9:13790.) In an email to the same planner two days later, and again with the subject line "Bluff Road," Wood instructed that "[the] Council guys want full improvement, including 4 lanes, and landscaping, medians only if needed." (AR 9:13791.)

The Council's insistence on the Bluff Road extension put NBR in a quandary. In an addendum to the Project's Habitat Restoration Plan (HRP), NBR's biologist explained it had been "prepared in order to address the recommended changes to the existing HRP that would be necessitated by the proposed road circulation network requested by the City [] as a public benefit," noting that these changes,

---

[4] See *Page v. MiraCosta Community College Dist.* (2009) 180 Cal.App.4th 471, 503 [board members' use of intermediaries to exchange facts to reach collective concurrence outside the public forum violates Brown Act].

> would significantly impact scrub, wetlands, and riparian habitat that would be considered Environmentally Sensitive Habitat Area ("ESHA") pursuant to the City's Coastal Land Use Plan (CLUP) Policies as well as the [] Coastal Act []. It is important to note that impacts to ESHA are prohibited [under the] Coastal Act except for certain allowable uses, and the proposed connectors would be problematic to the California Coastal Commission ("CCC").

(AR 9:13801.) Referring to the Bluff Road extension as the "17/19 Connector," the addendum disclosed it "would cross through a large portion of project open space containing areas of ESHA," "impact significant areas of ESHA scrub and wetlands," and "would result in temporary impacts to ESHA scrub and jurisdictional drainages, and significant permanent impacts to ESHA scrub and wetlands." (AR 9:13802-13803, 13805.) Looking to please his client, however, the biologist came up with a solution the Coastal Act enjoins: mitigate the ESHA impacts, *i.e.*, relocate and recreate the destroyed ESHA at a 3:1 ratio. (AR 9:13806-13807; see *Bolsa Chica*, at 507.) But this required further sleight-of-hand by recasting several acres formerly counted as "Project Design Feature" restoration land as ESHA mitigation land. (AR 9:13806.) On February 24, 2009, NBR's representative emailed the revised HRP addendum to the City's planner, and thereafter revised the Project's land use plan to include the 17/19 Connector blowing through the upland ESHA and later depicted this extension of Bluff Road in the Project's draft environmental impact report ("EIR"). (AR 4:3177; 9:15760.)

G. The City Commences Preparation of an EIR for the Project

In March 2009, the City circulated a "Notice of Preparation" of the Project's draft EIR. (AR 5:4516 *ff.*; 8:13623.) Noting the Project site "contains diverse flora and fauna" that "supports several special status species" and the City's inability to issue CDPs, the notice stated NBR would not seek a CDP from the Coastal Commission until *after* the City approved the Project's land use entitlements, including a master site plan. (AR 5:4521 & 4525.) The notice precipitated seventy-seven written responses, and two "scoping meetings" were held to discuss it, one for public agencies and the other for public input at which twenty citizens spoke. (AR 5:4538-4630; 7:12664-12756; 9:13842-13989.)

A key issue repeatedly raised was the need for the EIR to properly acknowledge and address ESHA, with one commenter noting that "Banning Ranch qualifies as an environmentally sensitive area under the Coastal Act definition" and that during the earlier General Plan Update process "they were considering the whole of Banning Ranch as ESHA" and protesting that NBR's proposed 50-foot ESHA buffers were three to seven times smaller than those the Coastal Commission had approved for a nearby project. (*Id.*; AR 5:4599-4600, 4752, 4793; 10:13960-13966.) Other commenters similarly urged the EIR to treat the Project site as ESHA, with some urging the EIR to add the discussion of an alternative that took into account the fact that Banning Ranch

was mostly ESHA and that analyzed a project which could be developed with buffers the Coastal Commission was likely to require. (AR 5:4606-4607, 4673, 4727-4728, 4737, 4745, 4749-4752, 4755, 4789-4790; 10:13968-13982.)

H. After Acknowledging that ESHA Exists on Banning Ranch, NBR Decides to Fight About It Instead of Revising the Project

On April 14, 2011, the Coastal Commission, the City and NBR agreed to a consent restoration agreement for Banning Ranch in which they acknowledged the presence of ESHA on Banning Ranch that had been illegally cleared, and the violators agreed to restore that ESHA plus additional acreage and pay a $300,000 fine. (AR 9:14161-14162.) The following month the City's planning manager wrote NBR asking, "Can you give me some idea on what revisions to the project, if any, with regards to Coastal Commission-designated ESHA areas? I need to give direction to BonTerra and right now, I have no idea how this will affect the project." (AR 9:14170.) NBR replied the next day saying, "No revisions. We will have to fight for our project." (*Id.*)

I. The EIR Is Condemned for Ignoring the Presence of ESHA

On September 9, 2011, the City circulated the draft EIR for the Project for public review. (AR 8:13625-13626.) The EIR acknowledged the Project site supported both endangered and threatened species and that commenters had previously noted the EIR "must be based on not only the City's criteria but

also [Coastal Commission] criteria, particularly with respect to [ESHA] and the provision of buffers between development and sensitive biological areas." (AR 4:3171.)

Nevertheless, the EIR simply ignored this. In its section analyzing *Project Impacts on Land Use and Related Planning Programs*, the EIR conceded that Banning Ranch's status as a Deferred Certification Area excluded it from the City's CLUP and put it entirely within the Coastal Commission's jurisdiction yet stated that the Coastal Commission would evaluate the Project's potential impacts to ESHA by using the Coastal Act *and* guidance from the CLUP. (AR 5:3261.) However, in its analysis of the Project's consistency with land use policies, it claimed the Project was "considered consistent" with Coastal Act land use policies despite not working with the Coastal Commission to identify any ESHA on Banning Ranch; made no analysis of the Project's consistency with the voter-approved General Plan Update's preference for preserving Banning Ranch as open space and its LU 6.5.6 requirement that any development be in "coordination" with state and federal agencies; and ignored section 30240 of the Coastal Act. (AR 4:3323, 3334-3342.) Conversely, the EIR's section analyzing the Project's impacts on Biological Resources recited section 30240 of the Coastal Act and disclosed the role of the Coastal Commission and other agencies in the permitting process, conceded that the Project would impact the jurisdictional areas of

those agencies, but despite this concluded mitigation measures would reduce these impacts to less than significant and that the Project was consistent with the General Plan Update's LU 6.4.11, 6.5.3 and 6.5.6, *and* the Coastal Act – including section 30240 thereof – all without ever addressing the City's December 2002 determination that Banning Ranch was *entirely* ESHA. (AR 4:3560, 3565, 3638-3644, 3667-3668, 3674; AR 10:23695.)

One federal, seven state, and fourteen regional and local agencies submitted written comments on the EIR, as did 90 organizations, companies and individuals. (AR 3:858-862.) While many criticisms of the EIR were raised in these comments, the main issue was the EIR's failure to address the presence of ESHA on the Project site. For example, the Conservancy's executive director noted the EIR's "[s]ignificant omission of ESHA and CSS (gnatcatcher and Cactus Wren habitat) data and information," and other Conservancy officers, members and consultants likewise criticized the EIR for failing to analyze the extent of ESHA on the Project site under both the Coastal Act's definition and the City's own CLUP. (AR 3:1152, 1248-1249, 1429, 1434-1435, 1512-1517, 1823-1824.) This failure to make any determination as to the existence of ESHA on the Project site baffled them since it was not only contrary to CEQA policy, but an earlier City study had previously mapped probable ESHA on the Project site, and the Project

included the Bluff Road "17/19 Connector" through what NBR's own biologist admitted was ESHA. (AR 3:1248, 1516, 1824; 10:15859 [map].)

The Coastal Commission was particularly critical of the Project and EIR. Coastal Commission staff's 15-page comment letter addressing the City's CLUP and the ESHA issue noted the CLUP provided "strong guidance" ... "aimed at the protection of coastal resources" and stated that "**[t]he EIR should analyze the consistency of the proposed development with applicable policies in the certified [CLUP] and Chapter 3 policies of the Coastal Act and identify and address impacts accordingly.**" (AR 3:911-912; emphasis in original.) While acknowledging that the CLUP did not currently apply to Banning Ranch, the letter noted that the CLUP nevertheless

> contains numerous policies for coastal resource protection that should be referenced with regard to this site. As the most proximate and relevant discussion of habitat areas in and around the City, **a discussion of the policies of the [CLUP] for the City of Newport Beach should be included within the EIR.**

(AR 3:913; emphasis in original.) The letter then noted the City's CLUP's *presumption* of ESHA and its placement of the burden of proof on landowners and project applicants to show otherwise, and reiterated the "significant amount of guidance available in both the Coastal Act and the [CLUP] for the City." (*Id.*)

Focusing on whether the Project site actually contained ESHA, the letter commented that, while Coastal Commission staff had not yet performed a formal ESHA delineation for Banning Ranch,

> the site is known to support significant numbers of sensitive species, and there are likely significant areas of ESHA on the site. ESHA determinations are based on site specific circumstances, which the Commission has not had the ability to review in full. However, generally, habitat which supports sensitive species would be considered ESHA.

(AR 3:914.) Noting how important it was "that the EIR process incorporate a determination of probable ESHA locations and their required buffers before land use areas and development footprints are established," the letter urged "**that ESHA and wetland delineations and recommended buffers be reviewed by Coastal Commission staff biologists before the EIR is finalized.**" (*Id.*; emphasis in original.) The letter then informed the City that, based on Coastal Commission staff's "preliminary analysis" of the Project, "the development proposed in the EIR does not appear to be compatible with Coastal Act Section 30240," and specifically noted Coastal Commission staff had *already* "determined that a four lane arterial road in the proposed location would result in significant, unavoidable impacts to ESHA. Therefore, staff has determined that the proposed arterial road would be inconsistent with the Coastal Act." (AR 3:914-915.)

J. The City Approves the Project

Written comments on the draft EIR and the City's written responses to them were assembled as part of the final EIR for the Project which was released on March 16, 2012. (AR 3:852 *ff.*) On March 22, 2012 and June 21, 2012, the City's planning commission held public hearings to consider the final EIR, after which it adopted a resolution recommending certification. (AR 1.5:11-13; 1.5:34-36.) The Conservancy presented opposition to the EIR and the Project at both hearings, with several members again raising the ESHA issue and one member providing a PowerPoint presentation referencing the General Plan and its LU 6.5.6 "requirement for the City to work with State and Federal agencies to identify habitat and wetlands to be restored and those where development will be permitted" as well as "the Coastal Commission comments regarding review of the wetlands delineations and recommended buffers by Coastal Commission staff biologists before the EIR is finalized." (AR 7:12884-12900, 13110-13121.)

On July 23, 2012, the Council held a public hearing on the Project. (AR 7:13148 *ff.*) At the subsequent public hearing, the Conservancy's officers, members and many others appeared and urged the Council not to certify the final EIR or approve the Project. (*Id.*, at 13151-13158.) Nevertheless, the Council adopted a resolution certifying the EIR and thereafter approved the Project's land use entitlements (AR 1.5:351-697.)

PROCEDURAL HISTORY

A. Trial Court Proceedings

In August 2012, the Conservancy petitioned for a writ of mandate on the grounds that the EIR was legally inadequate and that the City violated its General Plan by approving the Project. (Opinion, at p. 17; 1 AA 1-22.) The Conservancy asked for the City's approval of the Project be set aside and the court to order the City to comply with the Planning and Zoning Law (Gov. Code § 65000 *et seq.*) and CEQA. (*Id.*)

Finding *California Native Plant Society v. City of Rancho Cordova* (2009) 172 Cal.App.4th 603 ("*Native Plant*") "directly on point here," the court concluded the City's approval of the Project was inconsistent with the General Plan because "the City had 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." (*Id.*, Reporter's Transcript ["RT"] 6:8-9; 5 AA 1272-1285.) Turning next to the Conservancy's CEQA claims predicated on the City's failure to identify potential ESHA on Banning Ranch and address it in the EIR, the court found *Banning Ranch Conservancy v. City of Newport Beach* ["*BRC I*"] (2102) 211 Cal.App.4th 1209, settled "as a matter of law" that "[i]t is not within the auspices of the City to define ESHAs, that is solely within the realm of the Coastal Commission." (5 AA 1285-1288.)

In a last-gasp attempt to persuade the court to "allow[] the Project approvals to remain in place," the City raised a new argument: that section 30335.1 of "the Coastal Act prohibits Commission staff from 'working with' or 'coordinating' with the City in its efforts to identify ESHA or wetlands." (5 AA 1301:16-1302:1, 1379:11-14.) The court rejected this argument, and in January 2014, entered judgment and issued a writ of mandate in the form submitted by the Conservancy directing the City to set aside all Project approvals except its certification of the EIR. (Opinion, at p. 18; 6 AA 1442.) The City and NBR appealed and the Conservancy cross-appealed.

B. Court of Appeal Proceedings

After the parties briefed the appeal, in November 2014, the Coastal Commission applied for and was granted permission to file an amicus brief to correct the City's erroneous interpretation of Public Resources Code section 30335.1. On May 20, 2015, the Court of Appeal filed its Opinion, agreeing with the trial court's CEQA ruling but concluding the court erred by finding the City violated its General Plan. (Opinion, at p. 3.)

Rejecting the trial court's conclusion that Policy LU 6.5.6 logically required the City to work with the Coastal Commission in identifying ESHA on Banning Ranch to be preserved and restored *before* the City approved its development, the Opinion embraced the City's argument "that LU 6.5.6 was designed as a *helpful reminder* of the City's legal obligation to 'work with' all

necessary agencies in the course of developing Banning Ranch." (*Id.* at 22, italics added.) The Court of Appeal found LU 6.5.6 "simply too vague on its face" to require the City to work with the Coastal Commission to identify ESHA on Banning Ranch and found the cooperation mandated by Coastal Act section 30336 did not extend to ESHA designations. (*Id.* at pp. 22-23.) Acknowledging *Native Plant* "was not easily distinguished," the Court of Appeal nevertheless rejected its reasoning.[5] (*Id.* at pp. 23-26.)

Noting the Conservancy's CEQA arguments all flowed from its premise that CEQA required the City to identify ESHA in the EIR, the Court of Appeal rejected them based on its holding in *BRC I.* (*Id.* at pp. 28-31.) The Court of Appeal reversed the judgment and directed the trial court to enter a new one setting aside the peremptory writ of mandate. (*Id.* at p. 31.)

//

---

[5] "...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.)

ARGUMENT

A. The City's Approval of the Project Failed to Comport with the General Plan's *Requirement* that the City "Coordinate With" and "Work With" the Coastal Commission to Identify Habitats for Preservation, Restoration or Development *Prior to* Project Approval

1. The City Assured Its Voters that It Would "Work With" Government Agencies in Siting and Designing Any Development of Banning Ranch *Before* the City Approved that Development

In cities where residents do not entirely trust their elected officials to wield land use police powers, the people sometimes exercise their "precious" right under the California Constitution to make *themselves* the final arbiters of important land use decisions.[6] (*Committee of Seven Thousand v. Superior Court* (1998) 45 Cal.3d 491, 504 ["adoption and amendment of a general plan may be the subject of initiative or referendum"]; see *Lee v. City of Monterey Park* (1985) 173 Cal.App.3d 798, 811 ["Measure L, with certain specified exceptions, required amendments to City's land use element of the general

---

6 "The amendment of the California Constitution in 1911 to provide for the initiative and referendum signifies one of the outstanding achievements of the progressive movement of the early 1900's. Drafted in light of the theory that all power of government ultimately resides in the people, the amendment speaks of the initiative and referendum, not as a right granted the people, but as a power reserved by them. Declaring it 'the duty of the courts to jealously guard this right of the people' [citation], the courts have described the initiative and referendum as articulating 'one of the most precious rights of our democratic process' [citation]." (*Associated Home Builders etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 591; *Rossi v. Brown* (1995) 9 Cal.4th 688, 695; accord *Pala Band of Mission Indians v. Board of Supervisors* (1997) 54 Cal.App.4th 565, 574; *Wal-Mart Real Estate Business Trust v. City Council of the City of San Marcos* (2005) 132 Cal.App.4th 614, 622-623.)

plan, zoning map or zoning code to be approved by the voters."].) The City is one such city.

In November 2000, the City's voters approved a ballot initiative – "Measure S" – requiring voter approval of any project that increases density, intensity, or peak hour trip, above that provided for in the General Plan.[7] (AR 10:26502.) Measure S became Section 423 of the City Charter and provides that "[v]oter approval is required for any major amendment to the Newport Beach General Plan." (*Id.*; 5 AA 1195-1196.) Because the General Plan's update was such a major amendment, "[o]n November 11, 2006, the City's comprehensive General Plan Update was placed on the ballot (Measure V) as required by Charter Section 423 and approved by the voters." (AR 10:26502.)

As this Court explained in *Friends of Sierra Madre v. City of Sierra Madre* (2001) 25 Cal.4th 165, 191, a public agency must comply with CEQA before placing on the ballot any measure that may lead to voter approval of a project. If such compliance leads to the preparation of an EIR, then "the information contained in the EIR must be made available to the electorate for its consideration *prior to* the election." (*Id.*[emphasis added].) Accordingly, the City prepared an EIR for the General Plan update (the "GP-EIR") in which it repeatedly assured voters that the General Plan *ensured* Banning Ranch's

---

[7] Section 1003 of the City Charter "reserves to the electors of the City the powers of the initiative and referendum and recall of municipal elected officers." (5 AA 1211.)

natural resources would not be impacted by its development. This was for two reasons.

First, while "[d]evelopment of the Banning Ranch subarea could lead to habitat fragmentation, which occurs when new development divides undisturbed habitat,

> [n]onetheless, implementation of applicable General Plan policies would *ensure* that substantial impacts to native, resident, or migratory wildlife species or corridors would not occur in areas of infill and redevelopment. [] the main area of concern is the Banning Ranch, which includes important habitat types and numerous special-status species and is largely undeveloped. [] The magnitude of this development could adversely affect the existing wildlife habitats and interfere with its movement corridors. Many proposed General Plan Update policies would *ensure* that impacts on the movement of native resident [or] migratory wildlife species or corridors in Banning Ranch remain less than significant."

(AR 10:23010-23011 [emphasis added]; see also 10:23151-23152 ["If development occurs, policies in the proposed General Plan Update would ensure compatibility between proposed uses"].) The GP-EIR identified (among others) Policies LU 6.4, LU 6.4.5, LU 6.4.8, LU 6.4.11, LU 6.5.3 ["Habitat and Wetlands–Restore and enhance wetlands and wildlife habitats, in accordance with the requirements of state and federal agencies"], and LU 6.5.6 as General Plan policies "guarantee[ing] that project impacts to land use and planning would remain ***less than significant***" if Banning Ranch was developed. (AR 10:23164 & 23167 [bold in original]; see also AR 10:23151

["Policies LU 6.5.1 through 6.5.6 pertain to both land use options for Banning Ranch. These policies help *ensure* that either development option would result in compatibility with adjacent uses."].) Similarly,

> Many proposed General Plan Update policies would *ensure* that impacts on the movement of native resident [or] migratory wildlife species or corridors in Banning Ranch remain less than significant. These policies [] include General Plan Update Policy NR 10.10, which protects sensitive and rare species located on Banning Ranch; Policy NR 10.7, which would maintain buffers around significant or rare species..."

(AR 10:23011 [emphasis added].) And Section 4.8 of the GP-EIR concluded that, upon the City's compliance with the "Policies/Mitigation Measures" identified in the GP-EIR, "[i]mpacts associated with land use compatibility would be less than significant." (AR 10:23177.)

Second, and most important, the GP-EIR assured the public that the City would not approve the development footprint for Banning Ranch in a vacuum, because General Plan policies in general *ensured* the City would cooperate with federal and state agencies; moreover, one policy specifically applicable to Banning Ranch *required* the City to "work with" federal and state agencies in locating and designing a development footprint on the site that avoided any impacts to wetlands and habitat. For example, the GP-EIR assured the public that "[i]mplementation of Policies NR 10.1[8] and NR 10.2

---

[8] **"Policy NR 10.1 Terrestrial and Marine Resource Protection** Cooperate with the state and federal resource protection agencies and private organizations to protect terrestrial and marine resources."

would *ensure* that all future development *cooperates* with federal, state, and private resource protections agencies/organizations." (AR 10:23010-23011 [emphasis added].) The GP-EIR further assured the public that the General Plan's "[p]olicies stipulate that any development would have to be located and designed to protect views, the bluffs, natural drainage, and important habitat," and in responding to public comments on the GP-EIR, the City stated those policies "provide for protections of the resources *that are considered by state and federal agencies as rare, endangered, or otherwise significant.*" (AR 10:22892, 26013; emphasis added.) "Compliance with existing federal, state, and local regulations, implementation of the identified proposed General Plan Update policies would limit impacts associated with biological resources within the Planning Area to ***less-than-significant*** level. Cumulative impacts would also be ***less-than-significant.***" (AR 10:23019; bold in original.)

Notably, in responded to a comment from the City's Environmental Quality Affairs Citizens Advisory Committee regarding the need to bolster the GP-EIR's "conclusion of less than significant impact on biological resources," the City assured that Policy LU 6.5.6 did not merely oblige the City to "cooperate" with federal and state agencies like Policy NR 10.1; it *required* the City to "coordinate" with those agencies in excluding wetlands and habitats from any development of Banning Ranch that – future verb tense – "*will be permitted.*"

> Policies NR 10.5, NR 10.6, NR 10.7,and NR 10.8 provide for protections of the resources that are considered by state and federal agencies as rare, endangered, or otherwise significant. *These policies are supplemented by Land Use Element Policy LU 6.5.6 that* ***requires*** *coordination with state and federal agencies in the '...identification of wetlands and habitats to be preserved and/or restored and those on which development will be permitted* ... as well as LU 6.5.4 that established criteria for the location and design of development to protect the site's resources.'

(AR 10:26013 [emphasis added].) Thus, the City admitted it interpreted LU 6.5.6 as requiring a process of subtraction whereby it was *required* to first "work with" regulatory agencies such as the Coastal Commission in identifying wetlands and habitats such as ESHA "to be preserved and/or restored" *before* it "permitted" any development of Banning Ranch. Indeed, what with the General Plan not identifying the location of any future development of Banning Ranch, LU 6.5.6 was the hard "security" backing the General Plan's paper "guarantee" that such development would not create adverse environmental impacts because the City was required to "work with" other government agencies in identifying wetlands and habitats excluded from development.

2. *Native Plant's* Analysis of "Coordinate" Is Sound

The trial court found *Native Plant* was "directly on point," and for good reason. (RT 6:8-9.) In *Native Plant*, the challenged project was strikingly similar to the Project and included single- and multi-family residential,

commercial, a park, detention/water basins, open space/wetland preserve, and pedestrian facilities, bikeways, parkways, and drainage corridors. (*Native Plant*, at p. 606.) Although not a coastal project, it would impact vernal pools and threaten vernal pool fairy shrimp and endangered vernal pool tadpole shrimp which, in turn, led to the involvement of three federal agencies. (*Id.* at p. 609.) The natural resources element of the city's general plan included Policy NR.1.1, requiring the city to "[p]rotect rare, threatened, and endangered species and their habitats in accordance with State and federal law." (*Id.* at p. 635.) To effectuate this policy, Action NR.1.1.3 of the general plan provided that,

> As part of the consideration of development applications for individual Planning Areas containing habitats that support special-status plant and animal species that are planned to be preserved, the City shall require that these preserved habitats have interconnections with other habitat areas in order to maintain the viability of the preserved habitat to support the special-status species identified. *The determination of the design and size of the 'interconnections' shall be made by the City, as recommended by a qualified professional,* ***and will include consultation with the California Department of Fish and Game and U.S. Fish and Wildlife Service.***

(*Id.*, emphasis added.)

To implement Policy NR.1.1.1, the city's general plan also included Action NR.1.7.1, directing that:

> For 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.

(*Id.* [emphasis added].) The trial court found, *inter alia*, that the project was inconsistent with, and did not comply with, a mandatory requirement of the city's general plan, and the city and developer appealed.

On appeal the city claimed the trial court applied the incorrect standard of review in finding the project inconsistent with the general plan. (*Id.* at p. 637.) Addressing the petitioner's general plan inconsistency claim, the court acknowledged that Government Code section 66473.5 barred the city from approving the project unless it was consistent with the general plan. (*Id.* at pp. 636-637.) It also noted that "[n]o one disputes the Project site is an area "in which special-status species are found or likely to occur or where the presence of species can be reasonably inferred" and that this triggered Action NR.1.7.1 requiring mitigation to be designed "*in coordination with*" the USFWS and CDFG. (*Id.* at pp. 639-640; italics in original.) Thus, the general plan consistency issue turned on the definition of the word "coordinate." (*Id.*)

> The City argues that to "coordinate" means 'to 'negotiate with others in order to work together effectively,' ' and "[t]he City

satisfied its obligation of trying to work together with [the Service]" by "solicit[ing], carefully consider[ing], and respond[ing] to comments from [the Service]."

The definition of "coordinate" the City cites is a valid one (see New Oxford Dict. (2001) p. 378, col. 2), but we believe that even under this definition the concept of "coordination" means more than *trying* to work together with someone else. Even under the City's definition of the word, "coordination" means negotiating with others *in order to work together effectively*. To "coordinate" is "to bring into a common action, movement, or condition"; it is synonymous with "harmonize." (Merriam-Webster's Collegiate Dict., *supra*, at p. 275, col. 1.) Indeed, the very dictionary the City cites for the definition of the word "coordinate" defines the word "coordination" as "cooperative effort resulting in an effective relationship." (New Oxford Dict., *supra*, at p. 378, col. 3.)

* * *

That the word "coordination," as used in the City's general plan, implies a measure of cooperation is apparent not only from the dictionary definition of the word, but also from the context in which the word is used in the plan. Essentially, the plan provides that when development projects will occur in areas where special-status species are found or likely to occur, the City will require mitigation for the impacts of development on those species, and the mitigation will be designed in coordination with the Service. **Cooperation is important in this context** -- particularly with regard to this Project -- because, as the City admitted in its response to the Service's comments on the draft EIR, "If the City approves the project, the applicants still need to obtain Clean Water Act permits from the Corps . . . , which will consult with the . . . Service, pursuant to Section 7 of the Endangered Species Act, as part of its process of considering those permits." **Because the Service will have a role in the issuance of later permits for the Project, "coordination" between the City and the Service in designing mitigation for the impacts of the Project on special-status species like the vernal pool fairy and tadpole shrimp serves the laudable purpose of minimizing the chance the City will approve the**

> **Project, only to have later permits for the Project denied because of the Service's disapproval of the mitigation measures the City imposed on the Project in the absence of "coordination" with the Service.**
>
> Unlike the City, we do not read this "coordination" requirement as "requir[ing] the City to subordinate itself to state and federal agencies by implementing their comments and taking their direction." At the same time, however, we cannot reasonably deem this "coordination" requirement satisfied by the mere solicitation and rejection of input from the agencies with which the City is required to coordinate the design of mitigation measures for the Project. Although our standard of review on the interpretation of the general plan is highly deferential, "deference is not abdication." (*People v. McDonald* (1984) 37 Cal.3d 351, 377.) Because we conclude the City's interpretation of the word "coordination" in this context is unreasonable, deference to the City's interpretation of its general plan in this instance is unwarranted. Thus, we conclude the trial court ultimately did not err in determining the City violated the Planning and Zoning Law because the Project is inconsistent with Action NR.1.7.1 in the City's general plan.

(*Id.*, at p. 641-642 [italics in original; bold added].)

Thus, *Native Plant* diverges from the Opinion in at least three respects. First, whereas *Native Plant* held the word "coordination" in a general plan has a meaning beyond "consultation," the Opinion held LU 6.5.6's "work with" means whatever the City says its means with no temporal aspect. (Opinion, at p.7.) But given the language of LU 6.5.6 reads, "[w]ork 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 General

Plan's intent is even clearer and more unambiguous than the "coordination" discussed in *Native Plant.*

Second, *Native Plant* followed this Court's caution that courts give effect to the plain text of a city's general plan and not rewrite it to conform to an assumed intent not apparent in its language. (*Lesher Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531, 543 ["*Lesher*"]; see also *Diamond Multimedia Systems, Inc. v. Superior Court* (1999) 19 Cal.4th 1036, 1047 [where statutory language "is clear and unambiguous our inquiry ends. There is no need for judicial construction and a court may not indulge in it."].)

Third, *Native Plant* recognized *context* can be key to resolving any interpretive doubts. The Opinion dismissed LU 6.5.6's *requirement* that the City "work with" other agencies prior to permitting the development of Banning Ranch by claiming it was "vague and ambiguous–the Conservancy's position depends on inferences made after considering multiple sections of the general plan." (Opinion, at p. 26.) But if this was true, then LU 6.5.6's context and purpose would be key to interpreting it:

> In interpreting a statute, we apply the usual rules of statutory construction. "We begin with the fundamental rule that our primary task is to determine the lawmakers' intent. [Citation.] ... To determine intent, '"The court turns first to the words themselves for the answer."' [Citations.] 'If the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature (in the case of a statute) ....'" (*Delaney v. Superior Court* (1990) 50 Cal.3d 785, 798.) We give the language of the statute

> its "usual, ordinary import and accord significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose. A construction making some words surplusage is to be avoided. The words of the statute must be construed in context, keeping in mind the statutory purpose...." (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1386-1387.)

(*Kane v. Hurley* (1994) 30 Cal.App.4th 859, 862.)

The Conservancy submits the *Native Plant* court's reasoning is sound. And as explained below, that court's reasoning derives from a long line of cases illustrating that the degree of deference courts accord cities and counties in interpreting their general plans varies according to the *type* of provision being interpreted.

3. The City Improperly Rejected the Coastal Commission's Offer to Assist the City in Identifying ESHA that Would Be Impacted by NBR's Development of Banning Ranch

The Coastal Act actually *requires* the Coastal Commission to assist local governments in complying with the Act and further *requires* those agencies to "cooperate with" the Coastal Commission at the outset of the planning process. Public Resources Code section 30336 directs that,

> 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.

As the Coastal Commission noted below, Public Resources Code section 30336,

> both requires the Commission to assist local governments in exercising their planning and regulatory powers and responsibilities under the [Coastal] Act and requires local governments to cooperate with the Commission and, to the extent their resources permit, provide any information the Commission may require to perform its duties and to more effectively exercise its authority.

(*Amicus Curiae Brief of California Coastal Commission* at p. 10.)

Thus, all the City needed to do to *compel* the Commission to "work with" the City "to identify wetlands [Pub. Res. Code § 30255] and habitats [Pub. Res. Code § 30240] to be preserved and/or restored and those on which development will be permitted" as LU 6.5.6 requires, was to simply "request[] assistance from the [C]ommission." Yet even after the City declined to trigger Coastal Commission assistance under section 30336, Coastal Commission staff offered to assist the City. Noting it was "important that the EIR process incorporate a determination of probable ESHA areas and their required buffers *before land use areas and development footprints are established*," Coastal Commission staff offered to have their own biologists work with the City in delineating ESHA [Pub. Res. Code § 30240] and wetlands [Pub. Res. Code § 30255] on Banning Ranch "before the EIR is finalized." (AR 3:910-914

[emphasis added].) That offer jibed perfectly with LU 6.5.6. However, rather than respond to that offer, the City simply ignored it despite coastal cities regularly obtaining assistance from Coastal Commission staff under section 30336 in identifying ESHAs and wetlands to be preserved and protected in order to preclude proposed development projects from encroaching upon those coastal resources. (6 AA 1418:13-26.)

What the City displayed here was scofflaw behavior, pure and simple. Public Resources Code section 30336 obligated the City to cooperate with the Coastal Commission by providing it with the information necessary to perform its duties and effectively exercise its authority, *e.g.*, review the Project for compliance with the Coastal Act. Coastal Commission staff specifically asked the City to make "a determination of probable ESHA locations on Banning Ranch and their required buffers,"[9] and then asked the City to provide "ESHA and wetland delineations" to the Coastal Commission for review. (AR 3:914.) The City's rejection of this request not only traduced LU 6.5.6; it also violated section 30336.[10]

---

[9] The Coastal Commission obviously does not agree with the Opinion's claim that only the Coastal Commission may make ESHA determinations.

[10] Ironically, Coastal Commission staff's lack of that "formal ESHA delineation for the site" due to the City's failure to comply with section 30336 became one of "a host of issues" that later compelled Coastal Commission staff to urge NBR to withdraw its application for a CDP. (5 AA 1336, 1339-1340.)

B. CEQA and the Coastal Act Both Required the City to Identify ESHA in the EIR for the Project

1. The Standard of Review Is De Novo

In evaluating an EIR for CEQA compliance a reviewing court must determine whether the agency has prejudicially abused its discretion. (Pub. Res. Code § 21168.5.) "An abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence." (*Id.*)

This Court has explained there are two distinct grounds for finding an agency abused its discretion under CEQA, each having a significantly different standard for determining error. (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435 ["*Vineyard*"]; *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 131.) "In evaluating an EIR for CEQA compliance . . . a reviewing court must adjust its scrutiny to the nature of the alleged defect, depending on whether the claim is predominantly one of improper procedure or a dispute over the facts." (*Vineyard*, 40 Cal.4th at p. 435.)

Challenges to an agency's failure to proceed in the manner required by CEQA, such as the failure to address a subject required to be covered in an EIR or to disclose information about a project's environmental effects, are subject to a less deferential standard than challenges to an agency's substantive

factual conclusions. (*Vineyard* at p. 435.) In reviewing these claims, this Court must "determine de novo whether the agency has employed the correct procedures, 'scrupulously enforc[ing] all legislatively mandated CEQA requirements'." (*Id.*) This less deferential standard of review is applied to "questions of interpretation or application of the requirements of CEQA" because such questions "are matters of law." (*County of San Diego v. Grossmont-Cuyamaca Community College Dist.* (2006) 141 Cal.App.4th 86, 96 [citing *Save Our Peninsula Committee v. Monterey Board of Supervisors,* (2001) 87 Cal.App.4th 99, 118].)

Examples of challenges that are properly analyzed under the "failure to proceed in the manner required by law" standard include an EIR's failure to provide certain information mandated by CEQA and include that information in its environmental analysis [*Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, 1236]; informational deficiencies of cumulative impacts analysis that preclude an accurate accounting of air quality impacts [*Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1220-21]; and the lead agency's incorrect application of a legal standard that omits "meaningful information and analysis of cumulative effects and significant environmental effects" [*East Peninsula Ed. Council v. Palos Verdes Peninsula Unified Sch. Dist.* (1989) 210 Cal.App.3d 155, 165, 174].)

The substantial evidence standard of review applies only to factual disputes, such as whether to recirculate an EIR. (*Vineyard, supra*, 40 Cal.4th at 447.) In evaluating the Conservancy's CEQA claims, this Court's role is identical to that of the trial court. (*Bolsa Chica, supra*, at p. 503.) Moreover, the conclusions of the lower court, and its disposition of the issues, are not accorded deference, and this Court reviews *de novo* the Conservancy's CEQA claims. (*Id.*)

2. The City's Refusal to Identify ESHA on Banning Ranch and Decision to Conceal Evidence of its Existence from the Public Violated Foundational CEQA Policies

"The Legislature has made clear that an EIR is an 'informational document' and that '[t]he purpose of an environmental impact report is to provide public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment; to list ways in which the significant effects of a project might be minimized; and to indicate alternatives to such a project.'" (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 391 ["*Laurel Heights*"].) "The EIR is the primary means of achieving the Legislature's considered declaration that it is the policy of this state to 'take all action necessary to protect, rehabilitate, and enhance the environmental quality of the state.' [Citation.] The EIR is therefore 'the heart of CEQA.'" (*Id.* at p. 392.)

Above all, CEQA is a sunshine law, and the Legislature has declared "that noncompliance with its information disclosure provisions which precludes relevant information from being presented to the public agency" may constitute a prejudicial abuse of discretion. (Pub. Res. Code § 21005, subd. (a).) This Court has affirmed such compliance mandates "an agency must use its best efforts to find out and disclose all that it reasonably can" when preparing an EIR. (*Laurel Heights* at p. 399; Cal. Code Regs., tit. 14 § 15144.) This Court has also approvingly cited Professor Selmi's observation that CEQA accords members of the public a "privileged position"[11] in its process so that "citizens can make important contributions to environmental protection" and on notions of democratic decision-making ... ." (*Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929, 936.) Moreover, the CEQA process "must be [] premised upon a full and meaningful disclosure of the scope, purposes, and effect of a consistently described project, with flexibility to respond to unforeseen insights that emerge from the process." (*County of Inyo v. City of Los Angeles* (1984) 160 Cal.App.3d 1178, 1185.) "This process helps demonstrate to the public that the agency has in fact analyzed and considered the environmental implications

---

[11] Selmi, *The Judicial Development of the California Environmental Quality Act* (1984) 18 U.C. Davis L.Rev. 197, 215-216.

of its action." (*Concerned Citizens of Costa Mesa, Inc., supra,* 42 Cal.3d at p. 936 [citing *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 86].)

As noted above, the Biological Technical Report ("BTR") NBR submitted to the City in 2008 found ESHA throughout Banning Ranch. The City initially posted the BTR on its website. However, the EIR the City later released to the public never mentioned this study or the acres of ESHA it found on the site, with the BTR vanishing not only from the City's website but from its files on the Project such that its own attorneys never saw it – despite the Conservancy twice providing the City a copy after it vanished. (4 AA 1256; AR 3:1156, 1823.) This violated CEQA's fundamental policies of full disclosure so essential to the decision-making process.

The Opinion found the BTR's disappearance and the EIR's failure to mention it did not violate CEQA because the EIR contained 625 pages of subsequent biological studies that were "longer and more detailed" than the missing study yet still failed to identify potential ESHA. (Opinion, at pp. 12-13.) In so holding, the Opinion rejected another basic CEQA principle: that an EIR's fundamental purpose is to be an informational document the public can understand. "The Legislature further finds and declares that it is the policy of the state that [] (b) Documents prepared pursuant to [CEQA] to be organized and written in a manner that will be meaningful and useful to decisionmakers and to the public." (Pub. Res. Code § 21003, subd. (a);

Cal. Code Regs., tit. 14, § 15001, subd. (c); Cal. Code Regs., tit. 14, § 15121, subd. (a).) This is why CEQA Guidelines section 15140 directs that, "EIRs shall[12] be written in plain language and may use appropriate graphics so that the decisionmakers and the public can rapidly understand the documents" and further directs agencies to prepare EIRs that are "analytic and not encyclopedic," normally less than 300 pages for major projects, written in plain language the public can understand, and to avoid highly technical and specialized analysis. (Cal. Code Regs., tit. 14, §§ 15006, subd. (o), 15141-15142, 15147.) The BTR and its maps showing areas of probable ESHA on Banning Ranch were exactly the type of "appropriate graphics" enabling rapid understanding.

> "Furthermore, 'when an agency fails to proceed as required by CEQA, harmless error analysis is inapplicable. The failure to comply with the law subverts the purposes of CEQA if it omits material necessary to informed decisionmaking and informed public participation. Case law is clear that, in such cases, the error is prejudicial.' [Citation.]" (*Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1106 [11 Cal. Rptr. 3d 104].)

---

[12] "'Must' or 'shall' indicates a mandatory element which all public agencies are required to follow." (CEQA Guidelines § 15005(a).)

(*Sierra Club v. County of Napa* (2004) 121 Cal.App.4th 1490, 1497.) It goes without saying that the EIR's refusal to acknowledge the *fact* of acres of ESHA on Banning Ranch and the City concealing the BTR from the public subverted CEQA's foundational policies, and this procedural violation cascaded into a host of substantive CEQA violations: failure to establish an accurate baseline of the existing environmental setting; improper deferral of identification and imposition of mitigation measures; improper Project description; incomplete data and analysis; and failure to adequately analyze alternatives to avoid ESHA. (Opinion, at p. 17.)

3. The City's Rejection of the Coastal Commission's Request to Identify the ESHA on Banning Ranch in the EIR Violated Foundational Coastal Act Policies

Similar to CEQA, the public holds a "privileged position" under the Coastal Act:

> The Legislature further finds and declares that the public has a right to fully participate in decisions affecting coastal planning, conservation, and development ... and that development is dependent upon public understanding and support; and that the continuing planning and implementation of programs for coastal conservation and development should include the widest opportunity for public participation.

(Pub. Res. Code § 30006.)

In enacting the Coastal Act, the Legislature found and declared that careful planning of future development in the Coastal Zone is "essential to the economic and social well-being of the people of this state. (Pub. Res. Code

§ 30001, subd. (d).) To accomplish this, the Legislature encourages "state and local initiatives and cooperation in preparing procedures to implement coordinated planning and development" and mandates that "[a]ll public agencies and federal agencies [] shall comply with the provisions of [the Coastal Act]." (Pub. Res. Code §§ 30001.5, subd. (e) & 30003.)

The Opinion incorrectly affirms the City's position that it lacked the legal authority to declare portions of Banning Ranch ESHA due to the City not having an LCP for Banning Ranch, and therefore the City could properly defer the discussion of Project impacts on ESHA from the EIR until the Coastal Commission made that determination. In doing so, the Opinion contravenes the Second District's decision in *Douda v. California Coastal Com.* (2008) 159 Cal.App.4th 1181 ("*Douda*"). The *Douda* court found that an "issuing agency," whether it be the California Coastal Commission *or a local government agency*, can unilaterally designate ESHA prior to the certification of a local coastal program (LCP). (*Id.* at p. 1193.) While the court found that an issuing agency cannot deviate from a certified LCP and designate additional ESHA, it held that if an LCP has not been certified, then "allow[ing] the issuing agency to protect natural resources for the benefit of the public by designating new areas when they meet the definition of environmentally sensitive area...more closely comports with the declared and salutary purposes of the Coastal Act." (*Ibid.*)

The Doudas had filed an application for a coastal development permit to construct a single-family home in the Coastal Zone in Los Angeles County. (*Id.* at p. 1190.) The Coastal Commission's staff denied the application, concluding that the property met the definition of an environmentally sensitive habitat area. (*Ibid.*) In that case, the County of Los Angeles had not yet prepared a local coastal program, and the Doudas argued that prior to the certification of a local coastal program a local government is powerless to designate ESHA. The court held, however, that in the absence of a certified land use plan or certified local coastal program, a local government cannot escape the responsibility of identifying ESHA by deferring that designation to the Coastal Commission. (*Id.* at p. 1198.) In enacting the Coastal Act, the Legislature declared, "[I]n carrying out the provisions of [the Coastal Act] such conflicts be resolved in a manner which on balance is the most protective of significant coastal resources." (*Id.* at p. 1194; Pub. Resources Code § 30007.5.) Applying this mandate, the *Douda* court properly found that ESHA must be protected:

> "This conclusion is supported by the observation that section 30240 is not specific to the Commission. It provides guidance to any issuing agency, whether that agency is the Commission or a local government. If section 30240 was circumscribed by section 30502, then *a local government acting as an issuing agency* ***prior to the certification of a local coastal program*** *would be rendered powerless to protect environmentally sensitive habitat areas that are undesignated.* This does not

> comport with the directive in section 30240 that such areas "shall" be protected."

(*Douda*, at p. 1198, emphasis added.)

In contrast, the Opinion holds that the Coastal Act's mandate does not apply to local governments when the identification of ESHA is involved, since "an ESHA designation is a legal determination." (Opinion, at p. 23, fn. 13.) There is simply no support in the Coastal Act allowing for this relegation of ESHA to a matter of line drawing. The proper reading of the Coastal Act is to carry out whatever of its provisions provide the "great[est] oversight and protection for environmentally sensitive habitat areas." (*Douda*, *supra* at p. 1194.)

C. The Standard of Review Applicable to a City's or County's Interpretation of Its General Plan Is Fundamentally Situational

This Court's foundational question – "What standard of review should apply to a city's interpretation of its general plan?" – presents a "purely legal question" for which courts "exercise independent judgment ... no matter whether the issue arises by traditional or administrative mandate." (*County of San Diego v. State of California* (1997) 15 Cal.4th 68, 109.) In *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, this Court noted the distinction between two categories of administrative rules. (*Id.* at pp. 10-12.) One kind – quasi-legislative rules – have the dignity of statutes and the doctrine of separation of powers compels a narrow scope of judicial review.

(*Id.*) The other kind – "those *interpreting* a statute" – "command[] a commensurably lesser degree of judicial deference" because they represent "an agency's legal opinion," and present "questions lying within the constitutional domain of the courts." (*Id.*) As will be shown, case law addressing the validity of a city's or county's *interpretation* of its general plan implicitly endorses this Court's observation that "[w]hether judicial deference to an agency's interpretation is appropriate and, if so, its extent--the 'weight' it should be given--is [] fundamentally *situational.*" (*Citizens for Responsible Equitable Environmental Development v. City of San Diego* (2010) 184 Cal.App.4th 1032, 1041-1042; italics in original.)

1. Courts Have Long Recognized that the Degree of Deference Accorded a City's or County's General Plan Consistency Determination Varies

Judicial deference varies depending on what *kind* of general plan issue is in question. Government Code section 65040.2 requires the Governor's Office of Planning and Research to develop and adopt guidelines for the preparation of general plans and directs that those guidelines "shall be advisory to each city and county in order to provide assistance in preparing and maintaining their respective general plans." Although not mandatory, as "the state's only official document explaining California's legal requirements for general plans" and that "closely adheres to statute and case law," for over 40 years the *State of California General Plan Guidelines* ("GP Guidelines") have

been the general plan bible for cities and counties, and courts periodically reference them for assistance in determining compliance with planning law. (http://opr.ca.gov/docs/General_Plan_Guidelines_2003.pdf, p. 8; see *Corona-Norco Unified School Dist. v. City of Corona* (1993) 17 Cal.App.4th 985, 994, fn. 6.)

The GP Guidelines explain that the various terms used in general plans are not interchangeable but have discreet, formal and specific meanings:

> **Goal**
> A goal is a general direction-setter. It is an ideal future end related to the public health, safety, or general welfare. A goal is a general expression of community values and, therefore, may be abstract in nature. Consequently, a goal is generally not quantifiable or time-dependent."
>
> * * *
>
> **Policy**
> A policy is a specific statement that guides decision-making. It indicates a commitment of the local legislative body to a particular course of action. A policy is based on and helps implement a general plan's objectives."
>
> * * *
>
> **Standards**
> A standard is a rule or measure establishing a level of quality or quantity that must be complied with or satisfied. Standards define the abstract terms of objectives and policies with concrete specifications. (*Id.*)
>
> * * *
>
> **Implementation Measure**
> An implementation measure is an action, procedure, program, or technique that carries out general plan policy. Each policy must have at least one corresponding implementation measure.

(GP Guidelines, pp. 14-16.) Consistent with the GP Guidelines, the City's General Plan uses similarly precise terminology:

> While the Plan's narrative text and maps frame the key proposals, the essence of the Plan lies in its goals, policies, and implementation actions. These are declarative statements that set forth the City's approach to various issues. Goals, policies, and implementation actions are described as follows:
>
> - Goals describe ideal future conditions for a particular topic, such as for Banning Ranch, the Harbor and Bay, traffic congestion, or affordable housing. Goals tend to be very general and broad.
>
> - Policies provide guidance to assist the City as it makes decisions relating to each goal. *Some policies include guidelines or standards against which decisions can be evaluated.*
>
> - Implementation Actions identify the specific steps to be taken by the City to implement the policies. They may include revisions of current codes and ordinances, plans and capital improvements, programs, financing, and other measures that should be assigned to different City departments.

(AR 10:26221; emphasis added.) The City stated that its "General Plan policies are more than 'statements of aspiration,'" and the General Plan itself defines policies as "[s]tatements guiding action and implying *clear commitment* found within each element of the general plan." (AR 10:26102 & 26948; emphasis added.)

Native Plant is but the latest in a line of cases extending back at least 30 years holding that a project is inconsistent with a general plan if it conflicts with a single basic policy *requirement*. Notably, *Native Plant* approvingly cited *Endangered Habitats League, Inc. v. County of Orange* (2005) 131

Cal.App.4th 777 ("*EHL*"), where the court reiterated that "[a] project is inconsistent if it conflicts with a general plan policy that is fundamental, mandatory, and clear." (*Native Plant* at p. 637.) Like the court in *Native Plant*, in *EHL* the court confronted a situation where a project was inconsistent not with a plan's permissive goals or guidelines but with the plan's specific and mandatory regulations. Noting 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 rejected the County's consistency finding because the project was inconsistent with unambiguous and mandatory general plan policies. (*EHL*, at pp. 787-789.) The City made the identical mistake here when it refused to comply with the unambiguous and mandatory LU 6.5.6 before approving the Project. The *EHL* court then distinguished *Corona-Norco Unified School Dist., supra*, 17 Cal.App.4th at 994, where "the general plan did not contain any specific, mandatory requirement." (*Id.* at pp. 789-790.)

EHL follows from *Families Unafraid to Uphold Rural etc. County v. Board of Supervisors* (1998) 62 Cal.App.4th 1332, 1341 ("*FUTURE*") where the court rejected the argument that "simply one general plan policy should not be enough to scuttle a project." Again distinguishing *Corona-Norco Unified School Dist.*, and noting that "the nature of the policy and the nature of the inconsistency are the critical factors to consider," the court rejected a county's

determination that a proposed project was consistent with the general plan because the project violated a *single* policy in the general plan's land use element that was fundamental, mandatory and "anything but amorphous." (*Id.*)

FUTURE in turn followed from *San Bernardino Valley Audubon Society, Inc. v. County of San Bernardino* (1984) 155 Cal. App. 3d 738, 753, where the court affirmed the lower court's rejection of the county's general plan consistency finding for a project because the project was inconsistent with a single general plan policy. Like LU 6.5.6, that policy – "Policy C4-a5 of the conservation element of the [c]ounty's general plan" – was a mitigation measure hardwired into the general plan that "require[d] the protection of 'beneficial, rare or endangered animals and plants with limited or specialized habitats.'" (*Id.*)

2. Courts Owe No Deference to a City's or County's Interpretation that Vitiates a Policy Incorporated Into the General Plan as a CEQA Mitigation Measure

As this Court has noted, "[u]nder CEQA, the public agency bears the burden of affirmatively demonstrating that, notwithstanding a project's impact on the environment, the agency's approval of the proposed project followed meaningful consideration of alternatives and mitigation measures. (Citation.)" (*Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 134.) To implement this, Public Resources Code section 21081.6, subd. (b)

requires all public agencies to "provide that measures to mitigate or avoid significant effects on the environment are fully enforceable through permit conditions, agreements, or other measures." When it comes to a *public* project such as a general plan, cities and counties are allowed to incorporate those mitigation measures into the plan itself. (*Id.*) A review of the GP-EIR reveals this is exactly what the City did:

> Banning Ranch could either be restored and preserved as open space (the priority use), or be developed as a mixed- density residential village.
>
> ***
>
> If development occurs, ***policies in the proposed General Plan Update would ensure compatibility*** between proposed uses, on-site open space areas, and the adjacent existing residential uses.
>
> * * *
>
> Policies LU 6.5.1 through 6.5.6 pertain to both land use options for Banning Ranch. These policies help *ensure* that either development option would result in compatibility with adjacent uses.

(AR 10:23151-23152; emphasis added.) The GP-EIR identified specific General Plan policies that "guarantee that project impacts to land use and planning would remain less than significant" with regard to Banning Ranch: LU 6.4, LU 6.4.5, LU 6.4.8, LU 6.4.11, LU 6.5.3 ["Habitat and Wetlands Restore and enhance wetlands and wildlife habitats, in accordance with the requirements of state and federal agencies"], *and LU 6.5.6.* (AR 10:23164 & 23167.) Section 4.8 of the GP-EIR concluded that, upon the City's compliance with the "Policies/Mitigation Measures" identified in the EIR, "[i]mpacts

associated with land use compatibility would be less than significant." (AR 10:23177.) With that, the GP-EIR made it clear that LU 6.5.6 is not a policy the City had discretion to ignore but was a "fully enforceable" CEQA mitigation measure the City incorporated into the General Plan Update in accordance with Public Resources Code section 21081.6 in order to *ensure* that Banning Ranch's future uses would not cause environmental impacts. Lest there be any question that LU 6.5.6 and similar policies constituted CEQA mitigation measures incorporated into the General Plan, the GP-EIR assured the public that those "[p]olicies stipulate that any development would have to be located and designed to protect views, the bluffs, natural drainage, and important habitat," and in responding to public comments on the EIR the City stated that those policies "provide for protections of the resources *that are considered by state and federal agencies as rare, endangered, or otherwise significant.*" (AR 10:22892, 26013; emphasis added.)

To date, no reported decision has discussed the degree of deference courts owe cities and counties when they interpret a policy expressly incorporated in a general plan as a CEQA mitigation measure. The Conservancy submits that such policies' special status as CEQA mitigation measures does not permit cities and counties to interpret them any way they like, and because CEQA mitigation measures are mandated by the Legislature,

courts should accord no deference to any interpretation that vitiates the purpose for which they were incorporated into a general plan.

3. Judicial Deference Must Be Accorded to Voters' Intent When They Amend a General Plan at the Ballot Box

Case law makes clear that judicial deference in reviewing consistency determinations does not always go to elected officials; it goes to the adopting body. (*Lesher,* at p. 543 ["Basic to all statutory construction, however, is ascertaining and implementing the intent of the adopting body."].) Thus, if elected officials adopted the general plan then a court gives deference to that body's interpretation of its policies. However, as this Court explained in *People v. Park* (2013) 56 Cal.4th 782, 796, when the electorate is the adopting body then "it is the voters' intent that controls."

Thus, to the extent the Court owes any deference here, it is to the intent of the City's voters in approving the Land Use Element to the General Plan. (See *Lesher* at 541-542 [the "dispositive question" in evaluating contents of general plan is voters' intent]; see also *Arntz v. Superior Court* (2010) 187 Cal.App.4th 1082, 1092 ["in the words of our Supreme Court, it is the intent of the voters of San Francisco that is 'the paramount consideration.'"].) Recent case law involving a voter-approved land use plan explains how this intent is determined:

> "In construing a provision adopted by the voters our task is to ascertain the intent of the voters. [Citation.] ... Literal

> construction should not prevail if it is contrary to the voters' intent apparent in the provision. [Citation.] "An interpretation that renders related provisions nugatory must be avoided ... , [and] each sentence must be read ... in the light of the [charter's overall] scheme ... ." [Citation.] Provisions relating to the same subject matter must be harmonized to the extent possible. [Citation.]"

(*Building a Better Redondo, Inc. v. City of Redondo Beach* (2012) 203 Cal.App.4th 852, 875, fn. 5.) In conducting this inquiry, the Court

> first look[s] to "the language of the statute, affording the words their ordinary and usual meaning and viewing them in their statutory context. [Citation] Once the electorate's intent has been ascertained, the provisions must be construed to conform to that intent. ... the voters should get what they enacted, not more and not less.

(*People v. Park, supra,* 56 Cal.4th at 796.) Absent ambiguity, the Court "presume[s] that the voters intend the meaning apparent on the face of an initiative measure." (*Lesher* at p. 543; *OCM Principal Opportunities Fund, L.P. v. CIBC World Markets Corp.* (2008) 168 Cal.App.4th 185, 203 [extrinsic "evidence does not control over an intent disclosed by the language of the law."].) As explained above, the City assured its voters in the GP-EIR that specific policies incorporated into the General Plan as CEQA mitigation measures would reduce potential environmental impacts resulting from Banning Ranch's future development to a level of insignificance. Relying on

the City's representation in the GP-EIR, the voters approved the General Plan update. Thus, judicial deference here should go to the voter's intent.[13]

CONCLUSION

The Conservancy respectfully requests rulings from this Court that (1) the City's General Plan and Section 30336 of the Coastal Act required the City to work with the Coastal Commission to identify wetlands and habitats on Banning Ranch before the City approved NBR's development; and (2) CEQA and the Coastal Act required the City to identify ESHA on Banning Ranch in the EIR prepared for NBR's development. The Conservancy further requests that this Court reverse the decision of the Court of Appeal and make all consistent and appropriate orders.

Dated: November 9, 2015

Respectfully submitted,

LEIBOLD McCLENDON & MANN, P.C.

[13] Regardless, the General Plan's policies for Banning Ranch were perspicuous and their intent unambiguous and clear regardless of *whose* intent they reflect.

CERTIFICATION OF WORD COUNT:

In accordance with California Rule of Court, Rule 8.204(d)(1), I certify that this *Opening Brief on the Merits* contains 13,987 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 9841 Irvine Center Drive, Suite 230, Irvine, California 92618.

On November 9, 2015, I served the foregoing document described as ***OPENING BRIEF ON THE MERITS*** on the parties shown on the **Attached Service List** as follows:

OND (By **O**vernight **D**elivery) I caused the envelope(s) containing the foregoing document to be delivered to GOLDEN STATE OVERNIGHT for overnight delivery to the parties on the attached service list.

USM (By **U.S. M**ail) I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States mail at Irvine, California. I am "readily familiar" with the firm's practice of processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Irvine, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

SCE (**S**upreme **C**ourt **E**-service) Pursuant to California Rule of Court Rule 8.212, I electronically transmitted such document(s) to the California Supreme Court by sending it to that Court's electronic service address.

FAX (By **Fax**) I caused such document(s) to be transmitted by facsimile to _____. A transmission report was properly issued by the fax machine and the transmission was reported as complete and without error to the number listed herein.

Executed on November 9, 2015, in Irvine, California.

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

Douglas M. Johnson

SERVICE LIST
for:
BANNING RANCH CONSERVANCY V. CITY OF NEWPORT BEACH, ET AL.
California Supreme Court Case No. S227473
[Fourth District Court of Appeal Case No. G049691]

Attorneys for City of Newport Beach and City Council of the City of Newport Beach: **By: USM**

Aaron C. Harp, City Attorney
Leonie H. Mulvihill, Assistant City Attorney
OFFICE OF THE CITY ATTORNEY, CITY OF NEWPORT BEACH
100 Civic Center Drive
Newport Beach, CA 92658
Phone: (949) 644-3131
Fax: (949) 644-3139
E-mail: aharp@newportbeachca.gov
lmulvihill@newportbeachca.gov

Whitman F. Manley / Laura M. Harris
REMY MOOSE MANLEY, LLP
555 Capitol Mall
Suite 800
Sacramento, CA 95814
Phone: (916) 443-2745
Fax: (916) 443-9017
E-mail: wmanley@rmmenvirolaw.com
lharris@rmmenvirolaw.com

Attorneys for Newport Banning Ranch, LLC, Aera Energy, LLC and Cherokee Newport Beach, LLC: **By: USM**

Susan K. Hori / Benjamin G. Shatz
MANATT, PHELPS & PHILLIPS, LLP
695 Town Center Drive
14th Floor
Costa Mesa, CA 92626
Phone: (714) 371-2528
Fax: (714) 371-2550
E-mail: shori@manatt.com
b.shatz@manatt.com

One copy to: **By: USM**

Honorable Judge Kim G. Dunning
Orange County Superior Court – Civil Complex Center
751 West Santa Ana Boulevard
Department CX104
Santa Ana, CA 92701

One copy to:
Clerk of the Court
California Court of Appeal
Fourth District, Division Three
601 West Santa Ana Boulevard
Santa Ana, CA 92701

By: USM

One copy to:
Christopher H. Pederson, Chief Counsel
Louise Ann Warren, Staff Counsel
California Coastal Commission
45 Fremont Street
Suite 2000
San Francisco, CA 94105
E-mail: Chris.Pederson@coastal.ca.gov
LWarren@coastal.ca.gov

By: USM

One copy to:
Attorney General Kamala D. Harris
% Jamee J. Patterson, Supervising Deputy Attorney General
Office of the Attorney General
P.O. Box 85266
San Diego, CA 92186-5266
E-mail: Jamee.Patterson@doj.ca.gov

By: USM