Case No. S227473

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

BANNING RANCH CONSERVANCY,
Plaintiff and Appellant,

v.

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

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

ANSWER BRIEF ON THE MERITS

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

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

OFFICE OF THE CITY ATTORNEY
CITY OF NEWPORT BEACH
AARON HARP, SBN 190665
City Attorney
LEONIE MULVIHILL, SBN 184851
Assistant City Attorney
P.O. Box 1768
Newport Beach, California 92658
Telephone: (949) 644-3131
Facsimile: (949) 644-3139

REMY MOOSE MANLEY, LLP
*WHITMAN F. MANLEY, SBN 130972
JENNIFER S. HOLMAN, SBN 194681
555 Capitol Mall, Suite 800
Sacramento, California 95814
Telephone: (916) 443-2745
Facsimile: (916) 443-9017
wmanley@rmmenvirolaw.com

Attorneys for Defendants and Respondents
City of Newport Beach et al.

CAPTION CONTINUED ON NEXT PAGE

Case No. S227473

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

BANNING RANCH CONSERVANCY,
Plaintiff and Appellant,

v.

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

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

ANSWER BRIEF ON THE MERITS

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

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

OFFICE OF THE CITY ATTORNEY
CITY OF NEWPORT BEACH
AARON HARP, SBN 190665
City Attorney
LEONIE MULVIHILL, SBN 184851
Assistant City Attorney
P.O. Box 1768
Newport Beach, California 92658
Telephone: (949) 644-3131
Facsimile: (949) 644-3139

REMY MOOSE MANLEY, LLP
*WHITMAN F. MANLEY, SBN 130972
JENNIFER S. HOLMAN, SBN 194681
555 Capitol Mall, Suite 800
Sacramento, California 95814
Telephone: (916) 443-2745
Facsimile: (916) 443-9017
wmanley@rmmenvirolaw.com

Attorneys for Defendants and Respondents
City of Newport Beach et al.

CAPTION CONTINUED ON NEXT PAGE

MANATT, PHELPS & PHILLIPS, LLP
*SUSAN K. HORI, SBN 091429
BENJAMIN G. SHATZ, SBN 160229
695 Town Center Drive, 14th Floor
Costa Mesa, California 92626-1924
Telephone: (714) 371-2500
Facsimile: (714) 371-2550
SHori@Manatt.com
BShatz@Manatt.com

Attorneys for Real Parties in Interest
Newport Banning Ranch LLC,
Aera Energy LLC, and Cherokee Newport Beach, LLC

TABLE OF CONTENTS

Page

TABLE OF CONTENTS
(Continued)

Page

TABLE OF AUTHORITIES

California Cases Page(s)

TABLE OF AUTHORITIES
(Continued)

Page

TABLE OF AUTHORITIES
(Continued)

Page

TABLE OF AUTHORITIES
(Continued)

Page

TABLE OF AUTHORITIES
(Continued)

Page

TABLE OF AUTHORITIES
(Continued)

Page

TABLE OF AUTHORITIES
(Continued)

Page

California Constitution

TABLE OF AUTHORITIES
(Continued)

Page

California Statutes

TABLE OF AUTHORITIES
(Continued)

Page

California Regulations

Cal. Code of Regs., tit. 14, § 15000 et seq. ("CEQA Guidelines")

California Rules of Court

INTRODUCTION

This case concerns the deference due to locally-elected officials when they interpret and apply policies in locally-adopted plans.

Case law uniformly holds that the deferential "abuse of discretion" standard applies to claims challenging such decisions. This deference recognizes that local agencies are constitutionally charged with adopting and applying local land-use policy (Cal. Const., art. XI, § 7); that local agencies have unique competence to do so; that general plans invariably address a host of competing policies; and that locally-elected officials are accountable to the electorate with respect to how they strike a balance among these policies.

Petitioner Banning Ranch Conservancy (BRC) argues no deference is warranted. BRC relies heavily on *California Native Plant Society v. City of Rancho Cordova* (2009) 172 Cal.App.4th 603 (*CNPS*). The Court of Appeal rejected BRC's argument, concluding that the policy at issue in this case, adopted as part of the General Plan Update of the City of Newport Beach (City), differed in material ways from the policy at issue in *CNPS*. (*Banning Ranch Conservancy v. City of Newport Beach*, Fourth District Court of Appeal, Division Three, No. G049691, slip op. dated May 20, 2015 (*BRC-II*).) The Court of Appeal was right to distinguish both the City's policy, and the City's application of that policy to the Banning Ranch project. The Court was also right to question whether *CNPS* embodies an appropriately deferent standard of review.

Such deference is indeed appropriate. "The separation of powers doctrine limits the authority of one of the three branches of government to arrogate to itself the core

functions of another branch." (*In re Lira* (2014) 58 Cal.4th 573, 583.) The standard of review should reflect judicial reluctance to overturn the decisions of another branch of government, particularly where (as here) the policy involves a subject constitutionally assigned to local government, and the policy is locally-made and applied by officials who are directly accountable to the electorate.

To be sure, there is a role for judicial review; "deference is not abdication." (*People v. McDonald* (1984) 37 Cal.3d 351, 377, overruled on other grounds in *People v. Mendoza* (2000) 23 Cal. 4th 896.) Yet, as this Court has observed, "[t]he amendment of a general plan . . . is an act of formulating basic land use policy, for which localities have been constitutionally endowed with wide-ranging discretion. 'Land use regulation in California has historically been a function of local government under the grant of police power contained in California Constitution, article XI, section 7.' [Citation.] We have recognized that a city's or county's power to control its own land use decisions derives from this inherent police power, not from the delegation of authority by the state. [Citations.]" (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 781-782.)

BRC also argues that, under the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.),[1] the Environmental Impact Report (EIR) prepared for the proposed Banning Ranch project (Project) had to speculate about permitting decisions that would be made in the future by the California Coastal Commission (CCC). This argument finds no support in CEQA.

---

1 All statutory citations are to the Public Resources Code unless indicated otherwise.

STATEMENT OF FACTS AND PROCEDURE

A. The City's decision to approve the Newport Banning Ranch Project culminated years of planning, study. and debate.

The Property. Banning Ranch encompasses about 401 acres. Roughly 40 acres are within the City of Newport Beach; the remaining 361acres are in unincorporated Orange County, within the City's sphere of influence. (AR:3099-3100, 3175.)[2] The area in the sphere of influence may be annexed to the City in the future, if approved by the Orange County Local Agency Formation Commission (LAFCO). (AR:23144.)

The property has been a producing oilfield since the 1940s. The site contains structures, machinery, graded roads, and gravel- and asphalt-covered equipment pads. (AR:3180-3182.) Some of these facilities no longer operate, but they remain on the site. (AR:3536-3540.)

The General Plan. The City adopted its "General Plan Update" in 2006. The plan designates the property "Open Space/Residential Village," and identifies two options for its use. Goal LU 6.3 calls for acquiring and restoring the property as habitat, parks, and open space. (AR:26304-26305.) Goal LU 6.4 authorizes development of a "high-quality residential community" if "acquisition for open space is not successful." (AR:26305, 26244, 26308.) The Residential Village designation allows up to 1,375 dwelling units, 75,000 square feet of commercial uses, and 75 hotel rooms, while preserving a large portion as open space. (AR:3186, 26308.) The General Plan Update also includes the following policy with respect to Banning Ranch:

---

[2] The citation "AR:3099-3100" refers to the City's Administrative Record at pages 3099 through 3100.

STRATEGY
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. *(Imp 14.7, 14.11)*

(AR:26310.)

The Proposal. The General Plan contemplates the owners of Banning Ranch could pursue entitlements for development even while the City explores acquisition. (AR:26305.) The City spent several years seeking funding to buy Banning Ranch, but was unsuccessful. (AR:10077-10130, 13678-13679, 13684, 46519.) In 2008, the landowner—Newport Banning Ranch (NBR)—submitted a development proposal. (AR:25851.)

Under the proposal, 303.7 acres—more than 75% of the property—would remain as open space; 235.8 acres of that, including most of the property adjacent to the Santa Ana River and wetlands, would remain natural. (AR:3099-3100, 3177-3179.)

Oil operations would be consolidated and, as they ceased, land would be deed-restricted to prohibit development. (AR:3099-3100.) The remaining 97.4 acres would be devoted to resort, residential, and mixed uses consistent with General Plan Policies LU 6.4.2 through 6.4.4. (AR:3099-3100, 3194.)

The site has no existing public access. The Project includes a circulation system for vehicles, bicycles, and pedestrians. (AR:3178, 3199.) This circulation system implements the City's General Plan. (AR:3186, 26665, 26696, 36564.)[3]

---

[3] BRC accuses the City of secretly demanding that NBR construct Bluff Road. (BRC's Opening Brief (OB):14-16.) There was nothing nefarious about such a

The EIR. The City devoted three years to preparing a 9,000-page EIR for the Project. (AR:852-10076.) Roughly 625 pages analyze biological resources. (AR:3558-3674, 6484-7006.) Four endangered or threatened species, and "critical habitat" for two of them, are present (AR:3180, 3594, 3596), along with wetlands and other sensitive habitat. (AR:3565-3607.) Most of these resources—at least 220 acres—will be protected, and indeed enhanced as oil facilities are decommissioned. (AR:3608, 3663.) Where sensitive species or habitat cannot be avoided, the EIR identified (and the City adopted) mitigation. (AR:3663.) No significant impacts to biological resources remain. (AR:844-847.) Thus, although there are important resources on the site, the EIR describes those resources, evaluates the Project's potential impacts on them, and identifies appropriate mitigation.

The City consulted with various resource agencies throughout this process. The City provided notice it would prepare an EIR to various state and federal agencies (AR:3166, 4516-4795, 13826-13827), and received comments from several of them. (AR:13838, 13856, 13884.)

The City's staff and consultants communicated with state and federal agencies to identify wetlands and habitats to be preserved or restored. The agencies encompassed by these efforts included the Army Corps of Engineers regarding potential federal wetlands

---

requirement: the City's General Plan calls for constructing the road (AR:26696), and the General Plan EIR identifies Bluff Road as necessary to handle traffic in the area. (AR:23323-23338.) The record shows consultants had concerns about whether the CCC would approve Bluff Road. (AR:13801.) There is nothing unusual or improper about voicing such concerns. (*Banning Ranch Conservancy v. City of Newport Beach* (2012) 211 Cal.App.4th 1209, 1234, fn. 13.)

(AR:6526, 6634) and the U.S. Fish and Wildlife Service (USFWS) regarding federally-protected species and habitat. (AR:931, 6691, 14033.) The City also met several times with CCC staff; these meetings included a site tour. (AR:12297-12298, 14141, 14151, 16058.)

The City's decision. In July 2012, the City Council held a public hearing, certified the EIR, adopted findings, and approved the Project. (AR:351-592, 13161.) The approved Project includes an 87-page Mitigation Monitoring and Reporting Program (AR:45766-45853), including 16 measures addressing biological resources (AR:45784-45810). The Council concluded the Project's impacts to important biological resources would be substantially lessened or avoided. (AR:743-770.) The Council also found the Project is consistent with the goals and policies of the City's General Plan. (AR:520, 3256-3342, 3662-3674.)

The CCC, Banning Ranch and "ESHA." The City Council's decision does not mean the Project can go forward. NBR still must obtain permits and approvals from other agencies, including the CCC. (AR:3103, 3248, 3251-3253.)

Local governments generally implement the Coastal Act (§ 30000 et seq.) through a Local Coastal Program (LCP). The LCP consists of a "Coastal Land Use Plan" (CLUP) and an Implementation Plan, both of which the CCC must certify. (§§ 30512, 30513.) A local government may elect to submit its CLUP and Implementation Plan to the CCC in two phases (§ 30511), as the City has done here. (AR:3260.)

The CCC certified the City's CLUP in 2005. Banning Ranch is not within the certified CLUP. (AR:3248, 3260, 14670.) Instead, the CLUP identifies the property as a

"deferred certification" area "until such time as the future land uses for the property are resolved and policies are adopted to address the future of the oil and gas operations and the protection of the coastal resources on the property." (AR:926 [CLUP policies 2.2.4-1, 2.2.4-2], 3261, 4526.) Thus, the CLUP policies quoted by BRC (see BRC's Opening Brief on the Merits (OBM) at pp. 8-9) do not apply to the Project.[4]

Because Banning Ranch is not within the CLUP, the City cannot issue a coastal development permit (CDP) for the Project. (AR:3260.) The Project must therefore obtain a CDP from the CCC. (§§ 30601, 30604; AR:3248, 3253, 3260-3261.)

The Coastal Act protects biological resources including wetlands, riparian habitats and other "environmentally sensitive habitat areas" (ESHA) (§§ 30107.5, 30240). (AR:3261.) The determination whether habitat is ESHA rests either with the local agency when implementing a certified LCP, or (as here, where there is no such program) with the CCC when it issues a CDP. (AR:873.) The CCC makes ESHA determinations on a case-by-case basis, considering site-specific conditions. (AR:873, 46412, 46417.)

BRC accuses the City of burying information regarding the presence of ESHA on the property, and of snubbing CCC efforts to designate ESHA. Neither accusation is true.

---

[4] An agency is not required to analyze a project's consistency with an unadopted plan because such a plan is inapplicable. (*Chaparral Greens v. City of Chula Vista* (1996) 50 Cal.App.4th 1134, 1145, fn. 7 (*Chaparral Greens*); *City of Long Beach v. Los Angeles Unified School Dist.* (2009) 176 Cal.App.4th 889, 919; cf. CEQA Guidelines, § 15125, subd. (d) [EIR to address "applicable" plans].) One court went so far as to rule that basing an analysis on a "draft" plan is misleading. (*County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 941.)

First, BRC claims the City previously designated the entire Banning Ranch property as ESHA under the Coastal Act (OBM at p. 9), citing a 2003 report prepared in conjunction with the City's General Plan and CLUP. (AR:23695.) BRC mischaracterizes the report. The report stated an appendix to a 2002 study had identified 19 "environmentally sensitive habitat areas" within the City, including Banning Ranch. (AR:23695.) In the 2002 report, the City used the term "environmentally sensitive habitat areas" as a layperson might understand the term—as areas that might contain sensitive habitat. The CCC, however, advised the City that the term had legal significance under the Coastal Act that the City might not intend. (AR:23702; § 30107.5 [Coastal Act definition of ESHA].) So the City switched to the term "environmental study area" or "ESA" to describe areas where sensitive habitat might exist, and to avoid any legal implication that these areas were ESHA as defined under the Coastal Act. (AR:23702-23703.) Ultimately, the City determined that some areas could appropriately be found to be ESHA; but for other areas, *including Banning Ranch*, the City concluded there was not enough data to make the call. (AR:23695.) Thus, the City has never found that all of Banning Ranch is "ESHA." (AR:23725-23730.)

Second, BRC argues the City ignored ESHA that NBR's consultant found on the property. (OBM at pp. 12-16, 45.) Not so. In 2008, the applicant submitted a draft report prepared by Glenn Lukos Associates; the draft was attached as a technical appendix to a 2008 draft of the Community Development Plan. (RA:10.) The 2008 report purported to evaluate onsite resources, including ESHA, using the standards contained in the *inapplicable* CLUP (RA:11; AR:873-874, 1244-1245, 3248.) Of course, an individual—

even an expert—cannot unilaterally modify a CLUP to encompass Banning Ranch. The Lukos report was subsequently updated to remove this faulty assumption and to include several years of additional data. (AR:1157-1158 [2008 report superseded], 6691-6785 [Lukos reports and data attached as EIR appendices].) The EIR stated repeatedly that it relied on the Lukos data and analysis. (AR:879, 1170, 3563, 3605, 3641, 4447; see AR:1503, 1505, 1157-1158, 1720, 2131, 2139, 2140, 2213, 2459, 2464, 2473, 2474 [references to Lukos reports].) Nothing was "buried."[5]

Third, BRC claims the CCC offered to "work with" the City in identifying ESHA, but was snubbed. (OBM at p. 39, citing AR:910-914.) CCC staff did not offer to work with the City. Staff instead stated "that ESHA and wetland delineations and recommended buffers [ought to] be reviewed by CCC staff biologists before the EIR is finalized." (AR:914.) The Draft EIR included the wetlands delineations for CCC staff review. (AR:3560, 3564-3565, 3604-3607, 6505-6506, 6526-6528.)

CCC staff also recommended that the City "determin[e] *probable* ESHA" (AR:914, emphasis added) based on policies in the *inapplicable* CLUP. CCC staff never offered to "work with" the City in identifying EHSA. Rather, staff reaffirmed that the CCC—not agency staff—would make the ESHA determination based on "site specific circumstances" after CCC staff "performs a formal ESHA delineation . . . ." (AR:914.)

The EIR provided exhaustive information on biological resources present at the site, including wetland delineations (AR:3604-3607, 6529, 6711-6720), vegetation

---

[5] BRC also implies that the City or NBR illegally caused impacts to ESHA. (OBM at p. 18.) In fact, a small patch of ESHA was impacted by a third party impermissibly using the property. That ESHA is outside the Project footprint. (AR:14161-14162.)

(AR:3566-3578), wildlife (AR:3578-3581), and special-status species and critical habitat (AR:3180, 3581-3605, 3596). However, the City deferred to the CCC to make the ESHA determination, declining to apply inapplicable policies in the CLUP or otherwise speculate about future ESHA determinations the CCC might make. As the Final EIR explained: ". . . [T]he purpose of an EIR is to analyze the impacts of a proposed project on the physical environment. The Draft EIR analyzes the proposed Project and its impact on biological resources .... In so doing, the City has fulfilled its obligation under CEQA to analyze the significant impacts of a project on the physical environment. To what extent these areas constitute ESHA—a concept unique to the Coastal Act—is a finding within the discretion of the [CCC], or a local agency as part of its LCP certification process. ... [That finding is] within the discretion and authority of the [CCC] when this Project comes before them." (AR:874-875.)

B. BRC sues the City.

Public debate about the property centered on whether to use public money to acquire Banning Ranch, or to allow some development on the property while ensuring consolidation and remediation of oil operations. The City Council opted for the latter course. Having lost the public debate, BRC sued (Appellant's Appendix, Volume 1 (1-AA), pp. 1-22, 156-194), as it has before. (*Banning Ranch Conservancy v. City of Newport Beach* (2012) 211 Cal.App.4th 1209 (*BRC-I*) [rejecting BRC's claim that the City violated CEQA in approving a park adjacent to Banning Ranch].)

The trial court rejected BRC's CEQA claims, including the allegation that the EIR ought to have made ESHA determinations under the Coastal Act. (5-AA-1277-1279,

1285-1288.) The court relied heavily on *BRC-I*—a case BRC never cited, drawing the trial court's ire. (RT:3.)

BRC also challenged the City's actions under the Planning and Zoning Law (Gov. Code, §65000 et seq.). (1-AA-176-181.) The trial court ruled for BRC on that claim because, in the court's view, the City had not complied with General Plan Strategy LU 6.5.6. (5-AA-1282-1285; 6-AA-1435-1444.)

The City and NBR appealed from the judgment. BRC cross-appealed the denial of its CEQA claims. The Fourth District Court of Appeal affirmed the trial court's CEQA ruling, and reversed its Planning and Zoning Law ruling. (*BRC-II*, *supra*, slip op. at p. 31.)

ARGUMENT

I. THE PLANNING AND ZONING LAW CLAIM

A. The courts have consistently applied the "abuse of discretion" standard in reviewing an agency's interpretation of policies in its own plan.

This Court's summary of the issues presented in this case includes the following question: "(2) What standard of review should apply to a city's interpretation of its general plan?" As explained below, this standard is well established.

1. The courts review a city's interpretation of its own general plan for abuse of discretion.

A city's determination that a land-use decision is consistent with its own general plan comes with a strong presumption of regularity. (Evid. Code, § 664; *Napa Citizens for Honest Government v. Napa County Bd. of Supervisors* (2001) 91 Cal.App.4th 342, 357 (*Napa Citizens*).) This presumption can be overcome only by showing that the local

agency acted "arbitrarily, capriciously, or without evidentiary basis." (*San Franciscans Upholding the Downtown Plan v. City & County of San Francisco* (2002) 102 Cal.App.4th 656, 677 (*San Franciscans*).) Such abuse of discretion is established "only if the [local agency] has not proceeded in a manner required by law, its decision is not supported by findings, or the findings are not supported by substantial evidence." (*Sequoyah Hills Homeowners Assn. v. City of Oakland* (1993) 23 Cal.App.4th 704, 717 (*Sequoyah Hills*).)

Reported decisions universally embrace this deferential standard of review. (*Jamieson v. City Council of City of Carpinteria* (2012) 204 Cal.App.4th 755, 763 ["the body which adopted the general plan policies in its legislative capacity has unique competence to interpret those policies when applying them in its adjudicatory capacity"; such a determination cannot be overturned except on showing abuse of discretion]; *Pfeiffer v. City of Sunnyvale City Council* (2011) 200 Cal.App.4th 1552, 1562-1563 (*Pfeiffer*) [petitioner must demonstrate agency abused its discretion in finding project to be consistent with General Plan]; *Clover Valley Foundation v. City of Rocklin* (2011) 197 Cal.App.4th 200, 238-239 (*Clover Valley*) [city did not abuse its discretion in concluding project was consistent with policies regarding stream buffers, even though roads intruded into those buffers, because encroachment furthered underlying policies to protect natural resources]; *Wollmer v. City of Berkeley* (2009) 179 Cal.App.4th 933, 940 [court's role is not to reweigh policies or second-guess city's elected officials]; *CNPS, supra*, 172 Cal.App.4th at p. 638 [acknowledging "deferential nature" of court's review]; *Friends of Lagoon Valley v. City of Vacaville* (2007) 154 Cal.App.4th 807, 817 (*Friends of Lagoon*

Valley) [perfect conformity with General Plan policies not required]; *Eureka Citizens for Responsible Government v. City of Eureka* (2007) 147 Cal.App.4th 357, 373-374 [great deference due to local agency's interpretation of its own general plan due to its unique "competence to interpret those policies when applying them in its adjudicatory capacity"]; *Woodward Park Homeowners Assn. v. City of Fresno* (2007) 150 Cal.App.4th 683, 706 [city's determination that the project was consistent with the general plan can be overturned only on abuse of discretion]; *Anderson First Coalition v. City of Anderson* (2005) 130 Cal.App.4th 1173, 1192 [agency's interpretation of its general plan is accorded great deference and will be upheld if not arbitrary, capricious, unsupported, or procedurally unfair]; *Endangered Habitats League v. County of Orange* (2005) 131 Cal.App.4th 777, 782 (*EHL*) [applying "arbitrary and capricious" standard of review to Planning and Zoning Law claim]; *Sierra Club v. County of Napa* (2004) 121 Cal.App.4th 1490, 1509-1510 [agency's decision regarding project's consistency with general plan entitled to "great deference"]; *Napa Citizens, supra,* 91 Cal.App.4th at p. 357 [consistency finding "carries a strong presumption of regularity"]; *Save Our Peninsula Committee v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99,141-142 [local agency has unique competence to interpret its general plan]; *Families Unafraid to Uphold Rural El Dorado County v. El Dorado County Bd. of Supervisors* (1998) 62 Cal.App.4th 1332, 1336-1338 (*FUTURE*) [agency's determination that a project is consistent with general plan is subject to review under the abuse of discretion standard; perfect conformity with plan policies not required]; *No Oil, Inc. v. City of Los Angeles* (1987) 196 Cal.App.3d 223, 243 [courts defer to city's interpretation of its general plan

and factual findings unless reasonable person could not have reached same conclusion]; *Bownds v. City of Glendale* (1980) 113 Cal.App.3d 875, 880 [local elected officials best suited to make policy decisions inherent in land-use regulation].)[6]

BRC bears the burden of proof to show the City abused its discretion. (*Foothill Communities Coalition v. County of Orange* (2014) 222 Cal.App.4th 1302, 1309; *San Diego Citizenry Group v. County of San Diego* (2013) 219 Cal.App.4th 1, 25-26; *Pfeiffer*, *supra*, 200 Cal.App.4th at pp. 1562-1563.)

2. Under *Yamaha*, deference is warranted.

Yamaha Corp. of America v. State Bd. of Equalization (1998) 19 Cal.4th 1 (*Yamaha*) is the leading case addressing the circumstances affecting the extent to which a court should defer to agency interpretation and application of a statute. As this Court explained, "the binding power of an agency's *interpretation* of a statute or regulation is contextual: Its power to persuade is both circumstantial and dependent on the presence or absence of factors that support the merit of the interpretation." (*Id.* at p. 7, emphasis in original.) The Court cited the following factors as relevant to determining the degree of deference:

- The agency's expertise and technical knowledge, especially where the interpretation of the legal text is obscure, technical, complex, "open-ended, or entwined with issues of fact, policy, and discretion."
- If the agency authored the law in question, such as a regulation, the courts are more likely to defer "since the agency is likely to be intimately familiar with

---

[6] At trial, BRC conceded this standard applied. (1-AA-174-175.)

regulations it authored and sensitive to the practical implications of one interpretation over another."

- Whether the law is one that the agency is charged with enforcing, rather than some other general law.

(*Ibid.*; see *Environmental Protection Information Center v. California Dept. of Forestry and Fire Protection* (2008) 44 Cal.4th 459, 490 (*EPIC*) [citing *Yamaha* to hold court would not disturb agency's "judgment call" unless "clearly unreasonable"].) Deference also derives from the respect one branch of government affords another co-equal branch in reviewing policy decisions, particularly where that policy is established and applied by locally-elected officials who are directly accountable to the citizenry. (*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 572 ["legislative branch is entitled to deference from the courts because of the constitutional separation of powers"], citing Cal. Const., art. III, § 3; see *Carmel Valley Fire Protection Dist. v. State* (2001) 25 Cal.4th 287, 297 ["The separation of powers doctrine limits the authority of one of the three branches of government to arrogate to itself the core functions of another branch."].)

The *Yamaha* factors confirm that deference is appropriate here. First, the development and enforcement of land-use policy is expressly entrusted to local agencies by article XI, section 7 of the California Constitution. (*DeVita, supra*, 9 Cal.4th at p. 782; *Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1151.)

Second, as the courts have recognized, land-use policy is inherently obscure, technical, complex, "open-ended, or entwined with issues of fact, policy, and discretion." (*Yamaha*, *supra*, 19 Cal.4th at p. 12.) To provide two pithy quotes illustrating this truism:

> [I]t is beyond cavil that no project could completely satisfy every policy stated in the [General Plan], and that state law does not impose such a requirement. ... Once a general plan is in place, it is the province of elected city officials to examine the specifics of a proposed project to determine whether it would be "in harmony" with the policies stated in the plan. [Citation.] It is, emphatically, *not* the role of the courts to micromanage these development decisions. Our function is simply to decide whether the city officials considered the applicable policies and the extent to which the proposed project conforms with those policies, whether the city officials made appropriate findings on this issue, and whether those findings are supported by substantial evidence.

(*Sequoyah Hills*, *supra*, 23 Cal.App.4th at pp. 719-720, emphasis in original.)

> When we review an agency's decision for consistency with its own general plan, we accord great deference to the agency's determination. ... Because policies in a general plan reflect a range of competing interests, the governmental agency must be allowed to weigh and balance the plan's policies when applying them, and it has broad discretion to construe its policies in light of the plan's purposes. [Citations.]

(*Save Our Peninsula*, *supra*, 87 Cal.App.4th at p. 142.)

BRC argues inscrutably that the standard of review in such cases is "situational," without acknowledging that the situation—review of a local agency's application of its own planning policies—calls for deference. *Citizens for Responsible Equitable Environmental Development v. City of San Diego* (2010) 184 Cal.App.4th 1032 (*CREED*), cited by BRC, does not support its argument. In that case the petitioner's claim did not arise under the Planning and Zoning Law. (*Id.* at p. 1040.) Moreover, the court concluded "the City's interpretation of its own Municipal Code is entitled to considerable

deference [citation], since notice provisions under the Municipal Code are a subject as to which the City has expertise and technical knowledge. [Citation.]" (*Id.* at p. 1047.) Thus, *CREED* undermines BRC's argument.

3. The voters' ratification of the City's 2006 General Plan Update should not alter the traditional, deferential standard of review.

BRC argues deference is unwarranted here because the voters adopted the General Plan Update (and with it Strategy LU 6.5.6). (OBM at p. 58.) BRC argues the voters' intent, not the intent of the City Council, is what matters. BRC then proceeds to divine the voters' intent with respect to Strategy LU 6.5.6.

BRC is correct that the City's Charter requires voter ratification for certain General Plan amendments. (5-AA-1195-1196.) BRC is also correct that the 2006 General Plan Update was such an amendment, and that the voters ratified it. (AR:26502.) Nevertheless, BRC's argument is unpersuasive.

First, BRC ignores the fact that the 2006 General Plan Update did not appear on the ballot because the voters circulated petitions. Rather, the voters approved the General Plan Update after the City Council drafted and approved it (AR:3100), with input from its residents (AR:1565), and then placed the plan on the ballot. (AR:26423, 26502.) For this reason, the City Council's intent matters at least as much as that of the voters. (*Yamaha*, *supra*, 19 Cal.4th at p. 12 [deference appropriate where the agency authored law].)

Second, the City drafted and the voters approved the plan against the backdrop of the Planning and Zoning Law's consistency requirement, and the large body of case law addressing this requirement. This case law makes clear that judicial review is highly

deferential. (See section I.A.1, *supra*.) BRC asserts the voters' intent in adopting the 2006 General Plan Update is clear. (OBM at pp. 27-32.) BRC cites no evidence, however, suggesting that when the voters ratified the General Plan Update, their intent somehow differed from that of the Council. (5-AA-1280 [court noted the project "comports with the actual language of the [voters'] Pamphlet"].) The record contains no such evidence; nothing in the City's General Plan Update hints at the voters' intent to alter the traditional, deferential standard of review. If anything is to be gleaned of the voters' intent, it is that they expected the courts to continue the long-established practice of deferring to the decisions of local, elected officials. After all, these same voters elected the City Councilmembers, presumably in the belief they were best suited to implement the plan.

In contrast, the primary case relied upon by the trial court and BRC for the supposed proper interpretation of the General Plan—*CNPS*, *supra*, 172 Cal.App.4th 603—was published in 2009. No one could reasonably argue that in 2006 the City's voters understood that the City Council ought to interpret Strategy LU 6.5.6 in the same rigorous fashion that the Third District interpreted Rancho Cordova's General Plan in 2009.

Other cases cited by BRC are distinguishable:

- *People v. Park* (2013) 56 Cal.4th 782, involved the interpretation of a statute adopted by state-wide initiative. The court stated it would attempt to ascertain "the lawmakers' intent," which in that case was the electorate. (*Id.* at p. 796.)

- *Arntz v. Superior Court* (2010) 187 Cal.App.4th 1082, concerned a term-limit ordinance drafted and adopted by local voters. Neither party argued that deference was (or was not) due to the City's interpretation of this ordinance. The court looked to the words of the ordinance and the voter pamphlet to ascertain the voters' intent. (*Id.* at p. 1096.)
- *Lesher Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531 (*Lesher*), involved a growth-control initiative drafted and adopted by the voters. The Supreme Court declined to infer an intent on behalf of the voters that was not evident from the text of the measure or accompanying ballot materials. (*Id.* at pp. 542-544.)

All of these cases look to the voters' intent, based on the text of the measure and on ballot materials, to construe the meaning of measures drafted and adopted by the voters themselves. None involves a plan authored and implemented by the agency itself.

BRC ignores the one case squarely on point: *San Francisco Tomorrow v. City and County of San Francisco* (2014) 229 Cal.App.4th 498. As that court observed, in words equally relevant here: "As is often the case, the standard of review and the degree of deference this court is to apply to the decision of the City is determinative of many of the issues presented." (*Id.* at p. 513.) The appellants argued the normal, deferential standard of review did not apply because the General Plan policies at issue were adopted by voter-sponsored initiative. The court disagreed, citing agencies expertise developed in implementing the plan:

> It is true that many cases explain that reviewing courts accord great deference to the agency's determination "'because the body which adopted the general plan policies in its legislative capacity has unique competence to interpret those policies when applying them in its adjudicatory capacity. [Citation.]'" [¶] However, the Board's role in implementing the General Plan, including its discretion to determine whether proposed projects are consistent with the General Plan, is at least as important. . . . Such deference to the actions of the legislative body stems from well-settled principles of court respect for the separation of powers. [Citation.]"

(*Id.* at p. 515.) That the policies were adopted by initiative, rather than by the city council itself, was immaterial. "Any other conclusion would undermine the well-established limited role of judicial review in these types of cases and could lead to unworkable results, such as requiring application of *different* standards of review to consistency determinations in the same proceeding where some General Plan policies were adopted by initiative and others by the agency." (*Id.* at p. 516, emphasis in original, footnote omitted.)

Here, even if there were evidence of the voters' intent in 2006 (there is none), as the court held in *San Francisco Tomorrow*, an approach that draws distinctions between the intent of the city council and that of the voters is untenable. The same, deferential standard of review applies.

4. Perfect conformity with every general plan policy is neither achievable nor required; the existence of an alleged inconsistency does not alter the standard of review.

BRC cites "a line of cases extending back at least 30 years" holding that the local agency abuses its discretion if it approves a project that is inconsistent with even a single policy "requirement" in the agency's general plan. (OBM at p. 53.) BRC cites four cases to support this sweeping statement: *EHL*, *supra*, 131 Cal.App.4th 777; *FUTURE*, *supra*,

62 Cal.App.4th 1332; *San Bernardino Valley Audubon Society, Inc. v. County of San Bernardino* (1984) 155 Cal.App.3d 738 (*San Bernardino*)[7]; and *CNPS, supra,* 172 Cal.App.4th 603. (OBM at pp. 53-55.) These cases recognize, however, that perfect conformity with every general plan policy is impossible. As the *EHL* court explained:

> A "project is consistent with the general plan if, considering all its aspects, it will further the objectives and policies of the general plan and not obstruct their attainment. [Citation.]" Perfect conformity is not required, but a project must be compatible with the objectives and policies of the general plan. [Citation.] A project is inconsistent if it conflicts with a general plan policy that is fundamental, mandatory, and clear. [Citation.]

(131 Cal.App.4th at p. 782; accord *CNPS*, *supra*, 172 Cal.App.4th at pp. 637-638; *FUTURE*, *supra*, 62 Cal.App.4th at p. 1336.)

Other courts echo this approach. *Friends of Lagoon Valley*, *supra*, for example, stated that a project's approval is consistent with the general plan if, on balance, "it will further the objectives and policies of the general plan and not obstruct their attainment." (154 Cal.App.4th at p. 817.) Similarly, in *San Franciscans*, *supra*, the court concluded that this standard does not require that project approvals be "in rigid conformity with every detail" of a general plan; "[b]ecause policies in a general plan reflect a range of competing interests, the governmental agency must be allowed to weigh and balance the plan's policies when applying them, and it has broad discretion to construe its policies in light of

---

[7] BRC overstates *San Bernardino*. The court did not purport to make sweeping holdings about the mandatory nature of "hardwired" general plan policies. (OBM at p. 55.) Instead, the court held that the agency's findings—regarding conformity with a particular policy—were not supported by substantial evidence. (*San Bernardino*, *supra*, 155 Cal.App.3d at p. 753.)

the plan's purposes." (102 Cal.App.4th at p. 678; accord, *Sequoyah Hills*, *supra*, 23 Cal.App.4th at p. 719.)

Although perfect conformity is not required, an overall consistency with general plan policies "cannot overcome 'specific, mandatory and fundamental inconsistencies' with plan policies." (*San Francisco Tomorrow*, *supra*, 229 Cal.App.4th at p. 517, citing *FUTURE*, *supra*, 62 Cal.App.4th at p. 1342 and *Clover Valley*, *supra*, 197 Cal.App.4th at p. 239.) Thus, there may be instances in which a general plan includes a fundamental land-use policy, cast in mandatory and specific terms, with which the project cannot be reconciled. (See *EHL*, *supra*, 131 Cal.App.4th at pp. 789-791 [policy requiring adherence to specific traffic standard]; *FUTURE*, *supra*, 62 Cal.App.4th at pp. 1341-1342 [policy prohibiting hopscotch development in rural area]; *San Bernardino*, *supra*, 155 Cal.App.3d at p. 753 [policy providing unqualified protection to specified habitat].) As explained below, however, Strategy LU 6.5.6 is nothing like that; it describes a general "strategy" for accomplishing the specific goals identified elsewhere.

B. The City did not abuse its discretion in finding that the Project is consistent with the General Plan.

This Court's summary of issues presented by this case includes the following question: "(1) Did the City'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?"

This question focuses on the meaning of Strategy LU 6.5.6 in the City's General Plan. This policy states: "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" at Banning Ranch. (AR:26310.)

No one could plausibly deny that the City studied "wetlands and habitats" on the property, or that the City considered this information in approving the Project. Instead, BRC argues Strategy LU 6.5.6 created a fundamental, mandatory, and specific policy to work with the CCC to determine, before taking any action, what constitutes ESHA on the property. In making this argument, BRC relies primarily on *CNPS*, *supra*, 172 Cal.App.4th 603, which interpreted a different policy adopted by another city involving different property. This Court should decline BRC's invitation to read new requirements into the policy that cannot be gleaned from the words themselves.

1. The City had ample basis to conclude the Project is consistent with its General Plan.

The City Council found that the Project is consistent with the goals and policies of the City's General Plan. (AR:520, 3256-3342, 3662-3674.) Under Goal LU 6.4, the City may approve a "high-quality" clustered development on portions of the site, with the balance preserved as open space. (AR:26305.) The General Plan also establishes express limits on development. (AR:3186, 26308 [policies LU 6.4.2, 6.4.3, 6.4.4].) As approved, the Project adheres to these limits. (AR:698-851.)

BRC argues the Project does not comport with Strategy LU 6.5.6 because the City did not "work with" the "CCC" to identify ESHA "before" approving the Project. (OBM at pp. 27-40.) The text of Strategy LU 6.5.6 does not support this argument:

> ***STRATEGY***
> **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. *(Imp 14.7, 14.11)*

(AR:26310.)

First, there is no evidence this policy was aimed at determining what constitutes "ESHA" under the Coastal Act. The policy refers only generally to "wetlands and habitats to be preserved and protected." BRC quotes from various documents (including the General Plan EIR) that cited Strategy LU 6.5.6 to show that impacts to wetlands, habitat, and species would be evaluated and mitigated. (OBM at p. 29.) Impacts to all these resources were fully evaluated and mitigated. (AR:3099-3100, 3558-3674, 6484-7006, 45784-45810.) At least 220 acres of habitat will be preserved and restored. (AR:3608, 3663.) BRC cites no evidence—in the text of the strategy, in voter information, or in the General Plan narrative or EIR—suggesting that Strategy LU 6.5.6 obliged the City to go further and make an ESHA prediction before approving the Project.

Second, Strategy LU 6.5.6 does not even mention the CCC. Strategy LU 6.5.6 states that it will be implemented by Implementation Measures 14.7 and 14.11. (AR:26310.) These measures identify "the specific steps" the City will take to implement policies. (AR:26221.) Measure 14.7 states: "Implementation of the General Plan's

policies for natural resource protection shall be achieved through the City's consultation with the [Department of Fish and Game (DFG)] in the review of projects that may impact terrestrial and marine resources and identification of resource protection and impact mitigation measures, including support for the DFG's efforts for habitat acquisition and restoration on Banning Ranch." (AR:37397-37398; 3-AA-685.) Measure 14.11 refers to the Public Utilities Commission. (AR:37397-37398; 3-AA-685-686.) Neither measure references the CCC. Measure 14.6, entitled "Coordinate with California Coastal Commission," is "conspicuous by its absence from LU 6.5.6" or its implementation measures. (*BRC-II, supra*, slip op. at p. 7.)

Third, the strategy contains no time limit. Nothing in this strategy commits the City to complete this "work" within a particular time frame, much less "before" project approval, with either the CCC or any other agency. (Compare OBM at p. 27 with AR:26310, 26013 [work would occur through agency's permitting processes, rather than the City's].) The City thus had ample reason to regard the strategy to "work" with "appropriate" agencies as an ongoing effort. Indeed, as the EIR acknowledges, the City Council understood the CCC retained jurisdiction over the CDP required by the Project. (AR:874, 3249.) Coordinated efforts between the City and the CCC did not end with the City's certification of the EIR, but will continue through the CCC's permitting process. This process is consistent with the express language of the General Plan.[8]

---

[8] The record contains an example of how such coordination occurred in the past at the adjacent Sunset Ridge Park. After certifying an EIR and approving the park, the City applied for a CDP. The CCC approved the CDP only after the City modified the park to avoid ESHA. (*BRC-I, supra*, 211 Cal.App.4th at p. 1225, fn. 6; see AR:46336-46337.)

The record shows the City consulted and "worked" with resource agencies throughout the planning process. In early 2009 the City gave notice of intent to prepare an EIR to other agencies, including the CCC. (AR:3166, 4516-4795, 13826-13827.) The City's consultants were in direct and repeated communications with state and federal agencies to identify wetlands and habitats to be preserved and/or restored as described in the General Plan policy. (AR:931, 6526, 6634, 6691, 14033.)

The City and its consultants spent the next two years preparing the Draft EIR. (AR:13625.) The City drafted proposed mitigation based on input from various agencies. (AR:1101.) The EIR's analysis described consultations with the Corps regarding wetlands; the Corps concurred with the analysis. (AR:3604-3605.)

City staff and consultants also met several times with CCC staff. Meetings occurred in 2011 and 2012. (E.g., AR:14141, 16058.) In fact, the record shows the City and its consultants made changes to proposed mitigation measures in order to address concerns voiced by CCC staff about impacts on biological resources. (AR:14151.) The record also shows that, in Spring 2012, the City and consultants participated in a site visit with USFWS and CCC staff. (AR:12297-12298.)

The Draft EIR included measures requiring further consultation and coordination with various resources agencies. Mitigation Measures 4.6-1, 4.6-3, 4.6-4, 4.6-5, 4.6-8, 4.6-9, and 4.6-11 mitigate impacts to coastal sage scrub, vernal pools and fairy shrimp habitat, marsh habitat, wetlands and riparian habitat, and bird species including

---

These events show that coordination between the City and the CCC does not end upon certification of the EIR.

gnatcatcher and Least Bell's Vireo, at specified ratios; the measures also require development of an implementation plan meeting detailed specifications; and the plans must be approved by the City, DFG, USFWS *and the CCC*. (AR:3646-3661, 45785-45807.) The City circulated the Draft EIR for comment by agencies and the public. (AR:13625.) The City received comments from various agencies, including CCC staff. (AR:858.) The City disagreed with some comments, agreed with others, and revised the EIR as appropriate. (E.g., AR:932 [measure 4.6-6 revised to address CCC staff comments].) Thus, the "work" with the CCC and other agencies occurred. Indeed, the mitigation measures adopted by the City ensured that work would continue into the future through implementation of these measures. (AR:3646-3661.)

2. No mandatory, fundamental, and specific policy required the City to work with the CCC to identify ESHA prior to Project approval.

BRC argues that, notwithstanding these efforts, the City failed to "work with" the CCC because the City's actions did not result in the *actual identification* of ESHA prior to Project approval. BRC cites to *CNPS*, *supra*, 172 Cal.App.4th 603, and *EHL*, *supra*, 131 Cal.App.4th 777, for the proposition that "[a] project is inconsistent if it conflicts with a general plan policy that is fundamental, mandatory, and clear." (OBM at pp. 53-55.)

The problem with this argument is that the City's General Plan contains no "fundamental, mandatory, and clear" policy requiring the City to complete its work with the CCC to identify ESHA prior to Project approval. Strategy LU 6.5.6 and its implementation measures mention neither ESHA nor the CCC. Nor does Strategy LU

6.5.6 require that the City complete its "work" *before* Project approval; indeed, the adopted mitigation measures commit the City to continue working with various agencies (including the CCC) throughout the permitting process and project implementation. (AR:3646-3647, 3652-3653, 3660-3661; see AR:45785, 45791-45792, 45796, 45799, 45807.) Thus, as the Court of Appeal concluded: "This 'strategy' (or policy) is simply too vague on its face to impose a mandatory requirement on the City that it complete an unspecified level of coordination with the [CCC] before the City's approval of the Project (e.g., by complying, in part or in full, with the suggestions provided by the [CCC] in its comment letter)." (*BRC-II*, *supra*, slip op. at p. 22; see *San Francisco Tomorrow*, *supra*, 229 Cal.App.4th at p. 520 [policies at issue were "neither 'mandatory' nor 'clear,' and the project does not directly conflict with them. . . . [T]he policies themselves contain no objective standards, but only subjective standards that neither prohibit any particular development or type of development nor command any particular outcome."].) The strategy is "amorphous" (*FUTURE*, *supra*, 62 Cal.App.4th at p. 1341), and contains no concrete standards by which to assess compliance.

BRC plainly wants the Court to rewrite Strategy LU 6.5.6. This Court should decline BRC's invitation. *Lesher*, *supra*, 52 Cal.3d 531, is on point. In that case, the Court evaluated a growth-control initiative that was inconsistent with the city's general plan. Under established law, all such measures had to be consistent with the general plan when adopted, so the question before the Court was whether (1) the initiative was invalid when adopted, or (2) the initiative could be understood as a general plan amendment. This Court refused to infer an intent on behalf of the voters that was not evident from

"the ballot measure itself or the explanatory material in the ballot pamphlet." (*Id.* at p. 542.) "Absent ambiguity, we presume that the voters intend the meaning apparent on the face of an initiative measure [citation] and the court may not add to the statute or rewrite it to conform to an assumed intent that is not apparent in its language. [Citation.] No basis exists for believing that the voters viewed Measure H as anything other than an ordinance in the nature of a zoning ordinance. Therefore ... Measure H cannot be deemed a general plan amendment." (*Id.* at pp. 543-544.) Thus, *Lesher* confirms that courts, under the guise of statutory interpretation, should not rewrite a statute to achieve an outcome that cannot be gleaned from the language itself. (*DiCampli-Mintz v. County of Santa Clara* (2012) 55 Cal.4th 983, 992; *Vasquez v. State* (2008) 45 Cal.4th 243, 253; *Drouet v. Superior Court* (2003) 31 Cal.4th 583, 593.)

BRC cites to Measure S (now City Charter section 423), which requires voter approval for land-use measures that increase planned densities, and Measure V, which placed the 2006 General Plan Update on the ballot, as required by Measure S. (OBM at p. 28.) These general mandates do not support BRC's interpretation of Strategy LU 6.5.6.

BRC selectively quotes from a response to comment in the General Plan EIR as evidence of such intent. (OBM at pp. 31-32.) This response did not appear in Measure V or the accompanying ballot pamphlet, so it offers no insights into the voters' intent. In any event, the response does not support BRC's argument. The response emphasizes the need to study and mitigate biological impacts, but nowhere mentions making legal or policy determinations regarding whether such habitat constitutes ESHA under the Coastal Act. (AR:26013.) It concludes:

> [Policies NR10.4, 10.5, NR10.6, NR10.7, and NR10.8] 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," which *would occur through the agencies' permitting processes*, as well as LU 6.5.4 that establishes criteria for the location and design of development to protect the site's resources.

(AR:26013, emphasis added.) If anything, this response shows that Strategy LU 6.5.6 is implemented during the permitting processes of the various resources agencies, which occur *after* the lead agency's (City's) project approval. In fact, none of the policies referenced in this response mentions ESHA, the CCC, or the need to work with the CCC to identify ESHA *before* Project approval. (AR:26310, 26799-26800.) These policies simply state the City must identify and evaluate potential impacts to habitat, and identify areas the City deems appropriate for development. The City did all those things.

Elsewhere, BRC argues Strategy LU 6.5.6 has "special status" because the City cited this policy when it approved the 2006 General Plan Update to support the conclusion that Banning Ranch would not result in significant impacts. (OBM at pp. 55-57, citing § 21081.6.) To the extent this argument is based on the premise that the General Plan Update EIR's analysis of land-use impacts was inadequate, or that the City should have formally adopted Strategy LU 6.5.6 as mitigation, the attack comes years too late. (§ 21167; *Citizens for a Green San Mateo v. San Mateo County Community College Dist.* (2014) 226 Cal.App.4th 1572, 1591-1594 [challenge to project must be brought within 30 days].) Moreover, the argument begs the question; it assumes the City, in adopting the General Plan, committed to complete its "work" under Strategy LU 6.5.6 before approving development on Banning Ranch. This assumption is false, as the

General Plan EIR makes clear. (AR:26013.) To the extent the General Plan EIR signifies anything, it confirms that coordination (or, more precisely, "work") with other agencies would occur "through the agencies' permitting processes." Those agencies include the CCC.

This response is consistent with the General Plan itself, which states that development at Banning Ranch will be determined by both the City *and* "through permitting processes that are required to satisfy state and federal environmental regulatory requirements." (AR:26304; see AR:26308 [development footprint to be determined by City and "through required federal and state regulatory environmental permitting processes."].) Thus, the "work" to be performed with other agencies (including the CCC) did not end with the City's approval of the Project. Indeed, the record repeatedly states the Project cannot proceed until it obtains a CDP from the CCC. (AR:596-597, 3248, 3253, 3260; see § 30604.)

In sum, the record contains no evidence that the voters, or the City, understood Strategy LU 6.5.6, to include the mandates that BRC attributes to it. BRC simply "invent[s] obligations out of thin air." (*BRC-II*, *supra*, slip op. at p. 28.)

3. *CNPS* did not compel the City to "coordinate" with the CCC in making an ESHA determination before approving the Project.

BRC argues *CNPS*, *supra*, 172 Cal.App.4th 603, is controlling because the policy at issue there used similar words to Strategy LU 6.5.6. BRC is wrong.

Although BRC states the Court of Appeal abdicated its duty to interpret the General Plan (OBM at p. 36 [the plan means "whatever the City says it means"]), in fact

the court explained why the policies at issue in *CNPS* differed from Strategy LU 6.5.6. In *CNPS*, the Third District considered Rancho Cordova's policy NR1.7.1, which in relevant part reads:

> Mitigation [for impacts to special-status species] *shall* be designed by the City *in coordination with* the U.S. Fish and Wildlife Service (USFWS) and the California Department of Fish and Game (CDFG), and shall emphasize a multi-species approach to the maximum extent feasible. This may include development or participation in a habitat conservation plan.

(172 Cal.App.4th at p. 635, emphasis in original.) According to the *CNPS* court, the word "coordination" implies something more than mere consultation. The court left open how much cooperation would be required to satisfy this policy, except to note that it does not require the city to "*subordinate* itself to state and federal agencies by implementing their comments and taking their direction." (*Id.* at pp. 641-642, emphasis in original.)

BRC argues *CNPS*' discussion of the word "coordinate" compelled the City to adopt the same meaning when interpreting Strategy LU 6.5.6 because the word "coordination" appears in its title. As this Court has emphasized, however, the courts must look to the plain language of the law, giving the words their ordinary meaning *within their statutory context.* (*Coalition of Concerned Communities v. City of Los Angeles* (2004) 34 Cal.4th 733, 737.) The *CNPS* court recognized this precept in interpreting Rancho Cordova's general plan: "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." (*CNPS, supra,* 172 Cal.App.4th at p. 641.) In the context of *that* plan, the term "coordination" meant more than mere "consultation" (*Id.* at pp. 641-642.) As the Fourth

District explained, Rancho Cordova's Policy NR1.7.1 required that the city "coordinate" with a specific agency (USFWS) on a specific task (designing mitigation for the impacts), which by its very nature (adopting mitigation) had to be completed prior to project approval. Strategy LU 6.5.6, by contrast, does not mention the CCC or ESHA; uses the phrase "work with" rather than the verb "coordinate"; and provides no specific time frame for finishing this work. (*BRC-II*, *supra*, slip op. at pp. 20-27.) Thus, as the appellate court noted, "the City's interpretation of the process contemplated by LU 6.5.6 and its ensuing consistency finding are reasonable" (*id.* at p. 22) and, accordingly, neither arbitrary nor capricious.

4. *CNPS* invites judicial micromanagement of land-use policy.

After upholding the City's interpretation of its general plan as reasonable, the Fourth District went on to discuss some of the analytical difficulties presented by *CNPS*. First, the court noted the difficulties confronted by Rancho Cordova in complying with the Third District's decision:

> Rancho Cordova needed to do something in between consultation and capitulation. The appellate court declined to dictate the terms of the writ of mandate, leaving it to the trial court. [Citation.] Perhaps a good faith negotiation between Rancho Cordova and [USFWS] should have occurred. Perhaps a minimum number of hours should have been devoted by Rancho Cordova toward reaching consensus with the Service. Perhaps the project developers should have been required to meet with [USFWS] prior to submitting their project to Rancho Cordova.

(*BRC-II*, *supra*, slip op. at p. 27.)

The Fourth District worried that, in requiring the City to do "more" to implement an amorphous policy, *CNPS* invited courts to second-guess local agencies' efforts to

implement land-use policy: "It is improper for courts to micromanage these sorts of finely tuned questions of policy and strategy that are left unanswered by the general plan. Cities are free to include clear, substantive requirements in their general plans, which will be enforced by the courts. But courts should not invent obligations out of thin air." (*Id.* at p. 28.)

The Fourth District's opinion follows the long line of cases emphasizing judicial deference to a city's interpretation and application of its own general plan. (See section I.A.1., *supra*.) Given the nature of the document as a broad policy tool, susceptible to multiple reasonable interpretations, and recognizing the authority of locally-elected officials to adopt and implement local policy, courts have long instructed that an agency's finding that a project "is consistent with its general plan can be reversed only if it is based on evidence from which no reasonable person could have reached the same conclusion." (*A Local & Regional Monitor v. City of Los Angeles* (1993) 16 Cal.App.4th 630, 648.)

If anything, *CNPS*, *supra*, 172 Cal.App.4th 603, represents an outlier. In that case, the Third District gave lip service to the need for deference, but its analysis of Rancho Cordova's General Plan exhibited little. General Plan Action NR1.7.1 required the city (1) to design effective mitigation, and (2) to do so in "coordination" with the USFWS. The record showed the city asked for and considered the input of USFWS, but the agencies did not reached a consensus. According to the *CNPS* court, "coordination" means "to 'negotiate with others in order to work together effectively.'" (*Id.* at p. 641.) Conceding that this policy did not require outright capitulation to USFWS, the court maintained that policy NR1.7.1 required more than merely consulting with and "trying"

to work with the USFWS. (*Id.* at pp. 641-642.) Although the court could not precisely define what was required, the court still concluded that the city's efforts were insufficient, and that its interpretation of policy NR1.7.1 was "unreasonable" and therefore entitled to no deference. (*Id.* at p. 642.) The court was concerned that the city's interpretation would not achieve the "laudable" goal of "minimizing the chance the [c]ity will approve the Project, only to have later permits for the Project denied because of [USFWS'] disapproval of the mitigation measures the [c]ity imposed on the Project." (*Ibid.*) This goal, however "laudable," was not reflected in the city's plan. Thus, the court fashioned a new policy outcome—consensus between the city and USFWS—and then interpreted the city's general plan through the lens of that policy. Although the *CNPS* court could not explain how much effort was enough to satisfy the city's *own policy*, the court still concluded that the city's actions fell short. This conclusion invites precisely the kind of judicial "micromanagement" of land-use decision-making that the courts have long eschewed.

Here, the trial court accepted the *CNPS* court's invitation to micromanage the City's implementation of Strategy LU 6.5.6: "*The reasonable reading* of Strategy 6.5.6 would lead to the conclusion that before the Project goes forward, before it can be approved," the City and the CCC had to jointly identify what parts of the property contained ESHA and were therefore off limits. (5-AA-1281, emphasis added.) The Fourth District held this was error, reasoning that where, as here, a general plan policy is susceptible to multiple plausible interpretations, the court oversteps its role when it substitutes its judgment for that of locally-elected officials. *CNPS* erred in concluding the

relevant policy was susceptible to only one possible interpretation, and compounded that error in imposing new policy on Rancho Cordova. The Fourth District's critique of *CNPS* was not essential to its decision due to the distinctions between Rancho Cordova's policies and the City's Strategy LU 6.5.6. Nevertheless, that critique was appropriate.

II. THE CEQA CLAIM

This Court's summary of the issues presented in this case includes the following question: "(3) Was the city required to identify environmentally sensitive habitat areas—as defined in the California Coastal Act of 1976 (Pub. Resources Code, § 3000[0], et seq.)—in the environmental impact report for the project?" As explained below, the answer is no.

A. Standard of Review

The reviewing court determines whether the respondent public agency prejudicially abused its discretion under CEQA by either failing to proceed in the manner required by law or to support its decision with substantial evidence. (*Laurel Heights Improvement Assn. v. Regents of Univ. of Cal.* (1988) 47 Cal.3d 376, 392 (*Laurel Heights*); §§ 21168, 21168.5.) An EIR is presumed adequate (§ 21167.3) and "the party challenging the EIR has the burden of showing otherwise." (*Santa Clarita Organization for Planning the Environment v. County of Los Angeles* (2007) 157 Cal.App.4th 149, 158.)

In determining whether an agency abused its discretion, the 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 Area*

Citizens for Responsible Growth, Inc. v. City of Rancho Cordova (2007) 40 Cal.4th 412, 435 (*Vineyard*).) If the dispute is predominately factual, the court must uphold the agency's actions if supported by substantial evidence. On the other hand, the court determines "de novo whether the agency has employed the correct procedures, 'scrupulously enforc[ing] all legislatively mandated CEQA requirements.'" (*Ibid.*)

BRC argues any claim that an agency failed to include in an EIR "certain information mandated by CEQA" is subject to de novo review. (OBM at p. 42.) This argument, if accepted, would allow petitioners, through artful pleading, to characterize all factual challenges as claims about procedure. But the omission of information amounts to a failure to proceed "in a manner required by law" only if the petitioner can point to a clear legal duty that the respondent agency has violated. (§ 21168.5.) Thus, for example, an agency fails to proceed "in a manner required by law" where the agency does not include in its EIR an analysis of project alternatives, because CEQA expressly *requires* such an analysis. (*Laurel Heights*, *supra*, 47 Cal.3d at pp. 400-405.) Similarly, an agency violates CEQA when it fails to gather information based on the erroneous legal position that it lacked authority to do so. (*Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, 1236.) In these cases, the agency erred by disregarding an express duty under CEQA, and by limiting its review based on a legal error. Absent such legal duty or error, the "substantial evidence" test applies. (*Laurel Heights*, *supra*, 47 Cal.3d at pp. 407-422 [applying substantial evidence test to claims regarding sufficiency of EIR's analysis and adequacy of mitigation]; see *Ebbetts Pass Forest Watch v. California Dept. of Forestry and Fire Protection* (2008) 43 Cal.4th 936, 954 (*Ebbetts Pass*) ["failure to proceed"

prong applies to whether agency used the "correct legal standard to determine the scope of analysis"; substantial evidence prong applies to review of agency's application of that standard]; *Center for Biological Diversity v. California Department of Fish and Wildlife* (2015) 62 Cal.4th 204, 219 (*CBD*) [reviewed de novo whether agency erred in adopting consistency with State goals for reduction of greenhouse gas emissions as significance threshold], 225 [substantial evidence test applied to application of that threshold].)

BRC argues the City had a legal duty under CEQA to include in the EIR a prediction where the CCC would find ESHA. (OBM at pp. 41-50.) The "failure to proceed" prong of the standard of review is premised on the existence of a law that the agency allegedly failed to heed. But BRC never cites a CEQA statute or guideline establishing such a duty. The "substantial evidence" prong of the standard of review therefore applies.[9]

"In reviewing for substantial evidence, the reviewing court 'may not set aside an agency's approval of an EIR on the ground that an opposite conclusion would have been equally or more reasonable.'" (*Ebbetts Pass*, *supra*, 43 Cal.4th at p. 944.) The court does not "pass upon the correctness of the EIR's environmental conclusions, but only upon its sufficiency as an informative document." (*Citizens of Goleta Valley v. Bd. of Supervisors* (1990) 52 Cal.3d 553, 564.)

---

[9] If BRC cannot establish the existence of such a legal duty, its claim would fail under either prong of the standard of review. After all, an agency cannot "fail to proceed in the manner required by law" where the "law" it allegedly failed to follow does not exist.

BRC bears the burden to show the record contains no substantial evidence supporting the disputed conclusions. BRC cannot carry that burden by pointing only to excerpts of the record favoring its position. (*CNPS, supra*, 172 Cal.App.4th at p. 626; *Tracy First v. City of Tracy* (2009) 177 Cal.App.4th 912, 934-935; *Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1266.) BRC also must show that the error (if any) was prejudicial. (§ 21005, subd. (b); *Neighbors for Smart Rail v. Exposition Metro Line Const. Authority* (2013) 57 Cal.4th 439, 463; *CBD, supra*, 62 Cal.4th at p. 228.)

B. BRC's accusation that the City violated CEQA by hiding evidence from the public is baseless.

BRC accuses the City of concealing a 2008 Biological Technical Report. (OBM at pp. 43-47.) The accusation is unfair and immaterial.

In 2008, NBR commissioned a report from Lukos in support of its draft 2008 Community Development Plan. (RA:10.) The City made the report public; BRC submitted comments. (AR:1503, 1823.)

The City did not rely on the 2008 Lukos Report in preparing its analysis (AR:1157-1158), largely because the report relied on a significant and misleading assumption. The 2008 Lukos Report purported to evaluate biological resources, including ESHA, using the standards contained in the City's CLUP (RA:11), which does not apply to Banning Ranch. (AR:873-874, 1244-1245, 3248 [Banning Ranch not in CLUP].) The report was subsequently updated to remove this faulty assumption, and to include additional biological survey data. (AR:1157-1158, 6691-6785.) The City relied on this updated analysis. In response to comments, the Final EIR confirmed that the analysis

relied on Lukos' work. (AR:879, 1170, 3563, 3605, 3641, 4447.) There was no attempt to hide the original report; the EIR references the report repeatedly. (Compare OBM at p. 45 ["EIR's failure to mention" Lukos report] with AR:1503, 1505, 1157-1158, 1720, 2131, 2139, 2140, 2213, 2459, 2464, 2473, 2474 [EIR references to Lukos work].)

BRC does not argue the omission of the 2008 Lukos Report undermined the EIR's analysis of biological resources. Indeed, BRC cannot make such an argument, since the 2008 Lukos Report contains the same survey data available elsewhere in the record. BRC's only argument is that the EIR was flawed because it failed to include the 2008 Lukos Report's *ESHA* conclusions. But those conclusions were based on the inapplicable CLUP. BRC cites the report's graphics (OBM at p. 46), but the same figure appears elsewhere in the record (AR:46022).[10]

BRC's argument boils down to the assertion that the EIR ought to have discussed a report that applied the wrong plan to reach conclusions that are themselves misleading and erroneous—because BRC liked the graphics. Nothing in CEQA obliged the City to perpetuate a consultant's mistake. (*Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155, 175 [common sense "is an important consideration at all levels of CEQA review."].)[11] In sum, the document was never hidden from the public,

---

[10] BRC states the CCC "adopted" this map, presumably to designate ESHA. (OBM at p. 13.) This statement is false. The map is an exhibit to a CCC staff report; the CCC did not "adopt" it. (AR:45864-46326.)

[11] BRC mischaracterizes what occurred during the litigation regarding the contents of the record. BRC states that it asked the City to include the 2008 Lukos Report in the record, but that the City refused. This statement is incorrect. BRC asked the City to include a different report—the 2008 "Community Development Plan"—in the record.

was subject to public review, was referenced in the EIR, and was part of the record available to the appellate court. (*BRC-II, supra*, slip op. at p. 11, fn. 10; see § 21005, subd. (b); *Neighbors for Smart Rail, supra*, 57 Cal.4th at p. 463 [flaw in EIR caused no prejudice].)

C. The EIR analyzed fully the Project's potential to impact biological resources; CEQA does not require that the EIR speculate about what ESHA determinations the CCC might make in the future.

CEQA requires that the EIR analyze the potential for a project to impact the physical environment, and identify ways in which those impacts can be avoided or mitigated. (§ 21002.1.) BRC does not point out any way in which the EIR failed to satisfy these requirements. Instead, BRC argues the City did not comply with CEQA because the EIR did not determine what portions of the Project site constitute ESHA as defined in the Coastal Act. (OBM at p. 47.) BRC's argument fails.

". . . '[T]he purpose of an [EIR] 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

---

(4-AA-1005.) The record already included the 2011 Community Development Plan, and the 2011 plan was the source of the analysis for environmental review. (4-AA-1033.) BRC insists that it demanded that the City include the 2008 plan; the City asserts that BRC did not make such a demand, and failed to respond to the City's repeated queries. (4-AA-823-825; 5-AA-1254.) BRC never asked the city to include the "2008 Biological Technical Report" in the record. (5-AA-1254.) The trial court record shows a skirmish occurred about BRC's belated attempt to augment the record with the 2008 report. The trial court criticized BRC's tactics as untimely and abusive. (5-AA-1276-1277.) Ultimately, the dispute, while unpleasant, was immaterial; the document was part of the record available on appeal, and the Fourth District's decision did not turn on this issue. (*BRC-II, supra*, slip op. at p. 11, fn. 10.)

be minimized; and to indicate alternatives to such a project.'" (*Laurel Heights*, *supra*, 47 Cal.3d at p. 391, quoting § 21061, CEQA Guidelines, § 15003, subds. (b)-(e).) In *Neighbors for Smart Rail*, *supra*, this Court described the "the fundamental goal of an EIR" as "to inform decision makers and the public of any significant adverse effects a project is likely to have on the physical environment." The EIR must therefore "delineate environmental conditions prevailing absent the project, defining a 'baseline' against which predicted effects can be described and quantified." (57 Cal.4th at p. 447.)

Here, there is no dispute that the EIR describes environmental resources present at the site, and analyzes the Project's impacts on those resources. The EIR identifies existing biological resources (AR:3558-3675), cataloguing existing vegetative types (e.g., AR:3566-3578), wildlife (e.g., AR:3578-3581), and special-status biological resources such as endangered species (e.g., AR:3581-3605, 3180, 3596.) The EIR identifies 16 mitigation measures to address the Project's impacts. (AR:3610-3663.) The EIR concludes that, as mitigated, all significant impacts to biological resources would be avoided. (AR:3663, 743-770.) The analysis is based on a 500+ page biological technical report included as an appendix to the EIR. (AR:6484-7006.) BRC does not point to any errors in this analysis.

Instead, BRC argues the EIR had to make a legal and factual determination under the Coastal Act, specifically whether certain habitat on the Project site constitutes ESHA. (OBM at pp. 47-48.) BRC is wrong.

Noncompliance with CEQA's information disclosure provisions that "*precludes relevant information from being presented to the public agency* ... may constitute a

prejudicial abuse of discretion." (§ 21005, subd. (a), emphasis added.) Such compliance mandates that "an agency must use its best efforts to find out and disclose all that it reasonably can" when preparing an EIR. (*Laurel Heights*, *supra*, 47 Cal.3d at p. 399.) "Absolute perfection is not required," and the level of analysis in an EIR "is subject to a rule of reason." (*Id.* at pp. 406-407.) The absence of information in an EIR does not necessarily constitute a prejudicial abuse of discretion. (§ 21005, subd. (b).) After all, as BRC correctly notes, EIRs are supposed to be analytic, not encyclopedic. (OBM at p. 46; CEQA Guidelines,[12] §§ 15006, subd. (o), 15143 [focus on significant effects on the environment].) For these reasons, a "challenger … asserting inadequacies in an EIR must show the omitted information 'is both required by CEQA and necessary to informed discussion.'" (*Citizens for a Sustainable Treasure Island v. City and County of San Francisco* (2014) 227 Cal.App.4th 1036, 1046-1047; see *Rialto Citizens for Responsible Growth v. City of Rialto* (2012) 208 Cal.App.4th 899, 925 ["'[a] prejudicial abuse of discretion occurs if the failure to include relevant information precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process."].)

The EIR analyzed, disclosed and mitigated the *environmental implications* of the Project, thereby satisfying CEQA. BRC fails to demonstrate the City had a further legal duty to identify ESHA as part of this process. Under the legal standards adopted by the Legislature, a court should not find that the omission of information amounts to a failure to proceed "in a manner required by law," unless the petitioner can point to a clear legal

---

12 The "CEQA Guidelines" appear at title 14, Cal. Code Regs., § 15000 et seq.

duty that the agency has violated. (§§ 21168.5 ["Abuse of discretion is established if the agency has not proceeded in a manner *required by law,*" emphasis added], 21083.1; CEQA Guidelines, § 15204, subd. (a) ["lead agencies need only respond to significant environmental issues and do not need to provide all information requested by reviewers, as long as a good faith effort at full disclosure is made in the EIR."].) "The relevant inquiry here is not whether the record establishes compliance" but whether the record shows that the agency "*failed* to comply" with CEQA's requirements. (*Gilroy Citizens for Responsible Planning v. City of Gilroy* (2006) 140 Cal.App.4th 911, 919, emphasis in original.)

The EIR provided the statutory definition of ESHA, and described the CCC's role in deciding what constitutes ESHA on the property. (AR:872, 873, 3103, 3261.) CCC staff agreed, reiterating that the ultimate determination is vested with the CCC itself, and that the CCC will make the ultimate call based on "site specific circumstances" once CCC staff "performs a formal ESHA delineation for the site." (AR:914.)

The EIR's description of ESHA and the CCC's permitting authority is accurate. "ESHA" is not a particular kind of habitat, but is defined under the Coastal Act 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." (§ 30107.5.) While identified ESHA must be protected from degradation (§ 30240, subd. (a)), the CCC has discretion to determine whether any particular habitat is ESHA. (*Bolsa Chica Land Trust v. Superior Court* (1999) 71 Cal.App.4th 493, 508 ["in deciding whether a particular area

is an ESHA within the meaning of section 30107.5, [the CCC] may consider, among other matters, its viability."]. But see *Dunn v. County of Santa Barbara* (2006) 135 Cal.App.4th 1281, 1297, fn. 7 [questioning this analysis].)

The record shows the CCC's practice aligns with both the EIR and *Bolsa Chica*. (AR:873, 46412 [ESHA determination based on habitat type, condition, fragmentation status, location, etc.; degraded status may render habitat non-ESHA], 46417 [rejecting notion that all coastal sage scrub is ESHA].)

Recognizing that the City had no authority to designate ESHA on its own, CCC staff suggested the City "determin[e] *probable* ESHA." (AR:914, emphasis added.) The Final EIR responded that predicting where the CCC would find "ESHA" on the property involved speculation about what decisions the CCC would make in the future. "To what extent these areas constitute ESHA—a concept unique to the Coastal Act—is a finding within the discretion of the [CCC], or a local agency as part of its LCP certification process. … [That finding is] within the discretion and authority of the [CCC] when this Project comes before them." (AR:874-875.) The EIR further noted that speculating about what might constitute ESHA would not bind the CCC or even "elucidate" what determinations the CCC might ultimately make. (AR:872.) In other words, such speculation would not aid the CCC decision-makers in reaching their ESHA determination, nor would it aid the public in understanding the environmental impacts of the project.

CEQA does not require an agency to speculate. (CEQA Guidelines, § 15145; *In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings* (2008)

43 Cal.4th 1143, 1172 [CEQA does not require program EIR to speculate about impacts of future, project-specific components of program]; *Citizens for a Sustainable Treasure Island, supra*, 227 Cal.App.4th at pp. 1058-1059 [speculation not required]; *Environmental Council of Sacramento v. City of Sacramento* (2006) 142 Cal.App.4th 1018, 1031 [same].) Indeed, the court in *BRC-I* rejected the exact same argument. There, BRC argued the city had to identify ESHA in an EIR prepared for the adjacent Sunset Ridge Park. The court held that the city was not required to speculate about whether the CCC would find ESHA on site. The city merely had to identify potential inconsistencies with the Coastal Act, which it did. (*BRC-I, supra*, 211 Cal.App.4th at pp. 1233-1234.)

In this case, the appellate court observed that although the City opted not to "speculate" about "potential ESHA," the City did flag potential inconsistencies with the Coastal Act by noting that the CLUP did not apply, and that the CCC would make the ultimate call about whether ESHA was present on the site. As the court explained, "CEQA does not require the City to prognosticate as to the likelihood of ESHA determinations" during CCC's review under the Coastal Act. (*BRC-II, supra*, slip op. at pp. 30-31.)

The appellate court was right. "[T]he fundamental goal of an EIR is to inform decision makers and the public of any significant adverse effects a project is likely to have on the physical environment." (*Neighbors for Smart Rail, supra*, 57 Cal.4th at p. 447.) Thus, in *Chaparral Greens, supra*, the court declined to require further environmental review simply because of a change in a species' legal status under the Endangered Species Act. Because the EIR evaluated fully the project's impact on the

species, the listing decision itself had "no bearing on the impact of the project." (50 Cal.App.4th at p. 1149; see *Moss v. County of Humboldt* (2008) 162 Cal.App.4th 1041, 1065 [change in legal status of species did not, in itself, affect analysis]; *Fort Mojave Indian Tribe v. California Department of Health Services* (1995) 38 Cal.App.4th 1574, 1605-1606 [designation of "critical habitat" under Endangered Species Act was not "significant new information" where EIR analyzed physical impacts to species and its habitat]; §§ 21060.5 ["'Environment' means the physical conditions which exist within the area which will be affected by a proposed project"], 21002.1, subd. (a) ["The purpose of an environmental impact report is to identify the significant effects on the environment of a project"].)

Here, the EIR focused on the physical impacts of the Project. (*BRC-II*, *supra*, slip op. at pp. 28-31.) That satisfied CEQA.

The record suggests that the outcome of the CCC permitting process is uncertain.[13] The City's 2006 General Plan Update calls for extending Bluff Road through the property. The General Plan states the City will extend this roadway, regardless of whether or how Banning Ranch is developed. (AR:26674, 36564, 26696; see *BRC-I*, *supra*, 211 Cal.App.4th at p. 1217.) ESHA may be present in areas traversed by this extension. (AR:13801-13810, 914-915.) The Coastal Act places limits on whether

---

[13] The same could be said of the adjacent Sunset Ridge Park. There, the City modified the park to obtain a permit from the CCC. (*BRC-I*, *supra*, 211 Cal.App.4th at p. 1225, fn. 6.)

development can disturb ESHA. (§ 30240, subd. (a); *Bolsa Chica*, *supra*, 71 Cal.App.4th at pp. 506-507.)

BRC portrays these facts as posing an insurmountable problem. (OBM at pp. 14-16.) At this point, however, there is no way to know whether BRC's portrayal is accurate. Perhaps the CCC will conclude the area affected by the road extension does not contain ESHA. Perhaps the CCC will conclude the roadway is a "use dependent on those resources," or that "on balance" the coastal access provided by the roadway is more protective of coastal resources such that the disturbance of ESHA is permissible. (§§ 30240, subd. (a), 30007.5.) As the *BRC-I* Court observed in identical circumstances, "[t]hat remains to be seen." (211 Cal.App.4th at p. 1234.) Even if the agencies ultimately do not agree, however, that is no basis for invalidating the EIR. (*CNPS*, *supra*, 172 Cal.App.4th at pp. 638-639; *North Coast Rivers Alliance v. Marin Municipal Water Dist. Bd. of Directors* (2013) 216 Cal.App.4th 614, 643 [disagreement regarding water sampling did not invalidate agency's conclusions].)

Finally, even if there were a duty to speculate about the CCC's future permitting decisions (there is no such duty), BRC has not shown, and cannot show, prejudice. (§ 21005, subd. (b); *Neighbors for Smart Rail*, *supra*, 57 Cal.4th at p. 463.) After all, as the EIR makes clear, the Project requires a CDP from the CCC, and development cannot occur until after the CCC has its say. (AR:872-875.)

III. BRC'S Coastal Act Arguments

BRC peppers its brief with arguments based on Coastal Act case law and statutes. These arguments are both misleading and irrelevant.

A. *BRC-II* does not conflict with *Douda v. California Coastal Com.*

BRC argues that, under *Douda v. California Coastal Com.* (2008) 159 Cal.App.4th 1181 (*Douda*), the City had both the power and duty to designate ESHA on the property. (OBM at pp. 48-50.)

Because BRC did not raise this argument at trial or on appeal, this Court need not consider it. (Cal. Rules of Court, rule 8.500(c)(1); *Associated Builders and Contractors, Inc. v. San Francisco Airports Com.* (1999) 21 Cal.4th 352, 366, fn. 2.) Moreover, *Douda* is a Coastal Act case; this case is not. (*BRC-II*, *supra*, slip op. at pp. 22-23, fn. 13; see 1-AA-1-22.)

In any event, BRC mischaracterizes *Douda.* According to BRC, the *Douda* court holds a local agency has authority to designate ESHA even in the absence of a certified LCP. (OBM at pp. 48-50.) In *Douda*, however, the issue was not whether the local agency——Los Angeles County—had such authority. Rather, the issue was whether the "issuing agency" under the Coastal Act had such authority. Both in *Douda* and in this case, the local agency (Los Angeles County and the City, respectively) was not the "issuing agency"; the CCC was. The *Douda* court held that the CCC had authority to designate ESHA, stating that "primary responsibility for implementing section 30240"—the ESHA provisions—"must go to the [CCC]." (*Id.* at p. 1194.)

Under the Coastal Act, the "issuing agency" is the agency issuing the CDP. (§ 30604, subds. (a)-(b); *Douda*, *supra*, 159 Cal.App.4th at pp. 1188-1189.) In this case, as BRC concedes (OBM at p. 12), the CCC is the issuing agency. Thus, *Douda* merely holds that the "issuing agency"—here the CCC and not the City—is the agency with the

authority to designate ESHA. That is exactly what the EIR says. (AR:872-875, 914, 3103, 3261.)

BRC-II concludes that, where the lead agency is not the issuing agency, the EIR need not speculate about the ESHA determinations the CCC will make in the future. Thus there is no tension, much less conflict, between *BRC-II* (or, for that matter, *BRC-I*) and *Douda*.

B. Public Resources Code section 30336 is irrelevant.

BRC argues the City violated section 30336. That section states:

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

The plain language of this statute imposes a reciprocal, general obligation on the CCC and other agencies to "cooperate and assist" one another in implementing the Coastal Act. The statute says nothing about how a City should implement its own General Plan. That issue arises under the Planning and Zoning Law. It does not involve the Coastal Act (or, for that matter, the other statutes BRC throws into the mix). (OBM at pp. 38-40, 47-50 [Coastal Act], 14 [gratuitous accusation that City violated the Brown Act].)

Indeed, BRC does not allege a Coastal Act violation. (*BRC-II*, *supra*, slip op. at pp. 22-23, fn. 13; 1-AA-1-22.) Nor does BRC explain how section 30336 implicates the City's implementation of Strategy LU 6.5.6. The strategy mentions neither section 30336 nor the CCC. Nor does section 30336 say anything about a local agency's obligations under the Planning and Zoning Law—or CEQA. There is no way to torture a general duty to "cooperate" into a legal duty to attempt to predict the permitting decisions another agency will make in the future.

At most, section 30336 requires the City to provide the CCC the information "the [CCC] may require" so it can "perform its duties and [] more effectively exercise its authority." As described above, the City did that. (AR:3558-3674, 6484-7006.) The only thing the City did not do was presume to speculate about what ESHA determinations the CCC might make when exercising its independent permitting authority. As the Court of Appeal aptly noted, "an ESHA designation is a legal conclusion, not the sort of cooperation mandated by Public Resources Code section 30336." (*BRC-II*, *supra*, slip op. at pp. 22-23, fn. 13.)

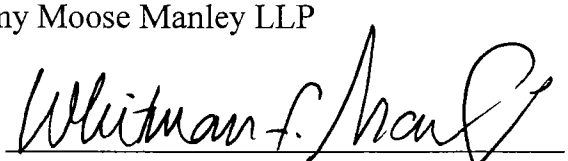
CONCLUSION

The Court of Appeal's decision was correct and should be affirmed.

Dated: February 8, 2016

Respectfully submitted,

Remy Moose Manley LLP

By: 

Whitman F. Manley
Attorneys for Defendants and Respondents
City of Newport Beach et al.

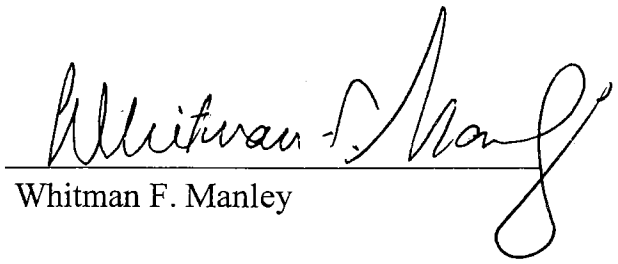
Manatt, Phelps & Phillips, LLP

By: /s/
Susan K. Hori
Attorneys for Real Parties in Interest
Newport Banning Ranch LLC et al.

CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.520, subdivision (c), of the California Rules of Court, I hereby certify that this ANSWER BRIEF ON THE MERITS contains 13,999 words, according to the word counting function of the word processing program used to prepare this brief. This total does not include the caption, table, index, or certificate of word count. This total does include footnotes.

Executed on this 8th day of February 2016, at Sacramento, California.



Whitman F. Manley

Banning Ranch Conservancy v. City of Newport Beach et al.
California Supreme Court Case No. S227473
(Fourth District Court of Appeal, Division Three, Case No. G049691)
(County Superior Court Case No.: 30-2012-00593557-CU-WM-CXC)

PROOF OF SERVICE
SERVICE LIST

I, Michele L. Nickell, am a citizen of the United States, employed in the City and County of Sacramento. My business address is 555 Capitol Mall, Suite 800, Sacramento, California 95814. My email address is mnickell@rmmenvirolaw.com. I am over the age of 18 years and not a party to the above-entitled action.

I am familiar with Remy Moose Manley, LLP's practice whereby the mail is sealed, given the appropriate postage and placed in a designated mail collection area. Each day's mail is collected and deposited in a U.S. mailbox after the close of each day's business.

On February 8, 2016, I served the following:

ANSWER BRIEF ON THE MERITS

☑ On the parties in this action by causing a true copy thereof to be placed in a sealed envelope with postage thereon fully prepaid in the designated area for outgoing mail addressed as follows; or

☐ On the parties in this action by causing a true copy thereof to be delivered via Federal Express to the following person(s) or their representative at the address(es) listed below; or

☐ As a courtesy copy on the parties in this action by causing a true copy thereof to be electronically delivered via the internet to the following person(s) or representative at the electronic mail address(es) listed below:

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury that the foregoing is true and correct and that this Proof of Service was executed this 8th day of February, 2016, at Sacramento, California.

Michele L. Nickell

Banning Ranch Conservancy v. City of Newport Beach et al.
California Supreme Court Case No. S227473
(Fourth District Court of Appeal, Division Three, Case No. G049691)
(County Superior Court Case No.: 30-2012-00593557-CU-WM-CXC)

PROOF OF SERVICE
SERVICE LIST

John G. McClendon David H. Mann LEIBOLD McCLENDON & MANN 9841 Irvine Center Drive, Suite 230 Irvine, CA 92618 Telephone: (949) 585-6300 Facsimile: (949) 585-6305 Email: John@ceqa.com	***Attorneys for Plaintiff and Appellant*** Banning Ranch Conservancy **VIA U.S. MAIL**
Susan K. Hori/Benjamin G. Shatz MANATT, PHELPS & PHILLIPS, LLP 695 Town Center Drive, 14th Floor Costa Mesa, CA 92626 Telephone: (714) 371-2528 Fax: (714) 371-2550 Email: shori@manatt.com b.shatz@mannatt.com	***Attorneys for Real Parties in Interest and Respondents*** Newport Banning Ranch, LLC, Aera Energy, LLC and Cherokee Newport Beach, LLC **VIA U.S. MAIL**
Kamala D. Harris ATTORNEY GENERAL OF CALIFORNIA Jamee Jordan Patterson SUPERVISING DEPUTY ATTORNEY GENERAL 600 West Broadway, Suite 1800 San Diego, CA 92186 P.O. Box 85266 San Diego, CA 92101 Telephone: (619) 645-2023 Facsimile: (619) 645-2010 Email: Jamee.Patterson@doj.ca.gov	***Attorneys for Amicus Curiae*** California Coastal Commission **VIA U.S. MAIL**
Hope Schmeltzer, Chief Counsel Louise Warren, Staff Counsel California Coastal Commission 45 Fremont Street, Suite 2000 San Francisco, CA 94105 Email: Hope.Schmeltzer@coastal.ca.gov Warren.Louise@coastal.ca.gov	**VIA U.S. MAIL**

Banning Ranch Conservancy v. City of Newport Beach et al.
California Supreme Court Case No. S227473
(Fourth District Court of Appeal, Division Three, Case No. G049691)
(County Superior Court Case No.: 30-2012-00593557-CU-WM-CXC)

PROOF OF SERVICE
SERVICE LIST

Honorable Robert Louis Becking, Temporary Judge **VIA U.S. MAIL**
Orange County Superior Court
751 West Santa Ana Boulevard
Department CX104
Santa Ana, CA 92701

Clerk of the Court **VIA U.S. MAIL**
California Court of Appeal
Fourth District, Division 3
601 West Santa Ana Boulevard
Santa Ana, CA 92701