S227473

No. _____

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.

PETITION FOR REVIEW

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

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

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

BANNING RANCH CONSERVANCY respectfully petitions for review of a published opinion of the Court of Appeal.

QUESTIONS FOR REVIEW

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

INTRODUCTION

As former California Coastal Commission member Steve Blank noted, "With 39 million people in the state, there's no rational reason there aren't condos, hotels, houses, shopping centers and freeways, wall-to-wall for most of the length of our state's coast (instead of just in Southern California)."[1] There is, however, a political reason: the voters' approval of Proposition 20 in 1972 which resulted in the Legislature's enactment of the California Coastal Act of 1976 ("Coastal Act").

> "The Coastal Act saved California from looking like the coast of New Jersey, giving us the most pristine and undeveloped coast in the country — with recreation and access for all.
>
> To achieve this amazing accomplishment, the coastal zone has the strictest zoning and planning requirements in the country."[2]

At the heart of the Coastal Act is the restriction it places on development in "environmentally sensitive habitat areas," or "ESHA," by protecting these areas from any disruption.

Banning Ranch Conservancy v. City of Newport Beach (2015) 236 Cal.App.4th 1341 ("the Opinion," attached as Exhibit A), in which Petitioner

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[1] "Farming for Developers: Coastal Commission Stories – Lesson 1" (June 10, 2014), http://steveblank.com/category/california-coastal-commission/.

[2] *Ibid.*

seeks review, now severely curtails that protection. Indeed, the Opinion tiers off of an earlier published opinion from Division Three of the Fourth District, *Banning Ranch Conservancy v. City of Newport Beach* (2012) 211 Cal.App.4th 1209, 1233-1234 ("*BRC I*"), which held a local agency's ESHA analysis of a proposed project is sufficient as long as it simply acknowledges areas having the potential to be considered ESHA by the California Coastal Commission ("Coastal Commission").

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

The Opinion does not, however, simply stop at paving the pathway for local agencies to sidestep the Coastal Act's ESHA protections. By insisting that only the Coastal Commission (and not the City of Newport Beach) could make an ESHA designation despite documentation that the project site contained numerous potential ESHAs, the Opinion undoes, without citation, the Second District's holding in *Douda v. California Coastal Com.* (2008) 159 Cal.App.4th 1181 ("*Douda*"), which held ESHA designations could be made by either the local agency or the Coastal Commission.

The Opinion also dismisses the Third District's decision in *California Native Plant Society v. City of Rancho Cordova* (2009) 172 Cal.App.4th 603 ("*Native Plant*"), by expressly rejecting its reasoning as "incompatible" with the Fourth District's deferential review accorded to a local agency's interpretation of a city's general plan. (Opinion, at p. 26.) In so doing, the Opinion ignores this Court's mandate that courts give effect to the plain text of a city's general plan.[3] *Native Plant* follows that mandate and, in comparison, is better reasoned. Thus, the Opinion's holding results in a disagreement between the Third and Fourth District, and this Court should provide clarification.

Finally, the Opinion repudiates several key principles of the California Environmental Quality Act "("CEQA").[4] CEQA requires collaboration between a lead agency and state agencies.[5] The Opinion would allow lead agencies to go it alone. Also, CEQA contains stringent procedural prerequisites. The Opinion would relax those strictures and allow environmental impact reports ("EIRs") to follow less than complete methodologies. Furthermore, CEQA mandates open and transparent informational disclosures. The Opinion enables certain substantive facts about

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[3] *Lesher Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531, 543 ("*Lesher*").

[4] Public Resources Code section 21000, *et seq.*

[5] Cal Code Regs., tit. 14 § 15050.

a project to be withdrawn from public scrutiny if other comparable information is provided, however incomplete or equivocal. Moreover, CEQA requires mitigation measures to be fully enforceable by (among other things) incorporating those measures into a plan.[6] The Opinion permits a city to classify its incorporated mitigation measure a "helpful reminder" if the city chooses to refuse to implement that measure. (Opinion, at p. 22.) No reported decision has ever held a CEQA mitigation measure may later be disregarded as a vague, optional suggestion.

Pursuant to California Rules of Court, rule 8.500(b)(1), Supreme Court review is needed to (1) resolve the decisional conflict between the Opinion and the Second District Court of Appeal's opinion in *Douda*; (2) settle the important issue of law as to whether the determination of ESHA is a legal determination local governments are not empowered to make; (3) resolve the decisional conflict between the Opinion and the Third District Court of Appeal's opinion in *Native Plant*; and (4) settle important issues of law fundamental to CEQA.[7]

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[6] Public Resources Code section 21081.6, subdivision (b).

[7] It may also be appropriate for this Court to grant review pursuant to California Rules of Court, rule 8.512, subdivision (d), and defer briefing pending decision on a pending case also addressing general plan interpretation and authored by Justice Ikola. (*Orange Citizens for Parks & Recreation v. Superior Court* (2013) 217 Cal.App.4th 1005, review granted Oct. 30, 2013, S212800.)

STATEMENT OF FACTS

A. The Coastal Act and "ESHA"

In 1972, California voters approved the Coastal Zone Conservation Act (Proposition 20), creating temporary commissions to develop a statewide plan for coastal protection. This plan was submitted to the Legislature in 1975, and led to the passage of the California Coastal Act in 1976, which established a State agency–the California Coastal Commission–charged with protecting and enhancing the resources of the Coastal Zone mapped by the Legislature. (*Id.*; Pub. Res. Code § 30000, *et seq.*) The Coastal Act contains policies guiding development and conservation along the state's 1,100-mile coastline, and its intent is to protect, maintain, and where feasible, enhance and restore the overall quality of the 1.5 million-acre Coastal Zone environment and its natural and artificial resources. (*Id.*)

The Coastal Act must "be liberally construed to accomplish its purposes and objectives." (Pub. Resources Code § 30009; *Bolsa Chica Land Trust v. Superior Court* (1999) 71 Cal.App.4th 493, 506 ("*Bolsa Chica*") ["under both the Coastal Act and CEQA: 'The courts are enjoined to construe the statute liberally in light of its beneficent purposes. [Citation.] The highest priority must be given to environmental consideration in interpreting the statute [citation].'"].) One of the Coastal Act's key purposes is to provide "heightened protection" to what are called environmentally sensitive habitat areas, or

ESHA. (*Id.*) Section 30107.5 of the Coastal Act defines ESHA as "any area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activities and developments." The consequences of land having ESHA on it are delineated in section 30240 of the Coastal Act:

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

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

B. Banning Ranch

Encompassing over 400 acres within the Coastal Zone, Banning Ranch is the largest parcel of unprotected coastal open space remaining in Orange

County. (AR 10:15855.) Despite disturbance from oil production operations, it contains high-quality riparian and wetlands habitat with a broad variety of vegetation types providing habitat for state and federally listed endangered and threatened species. (*Id.*; AR 10:23010; AR 4:3180; 9:14041 [map].) A 2002 City-commissioned biological study delineated the entirety of Banning Ranch as ESHA. (AR 10:23695.) In 2003, the United States Fish and Wildlife Service designated the entirety of Banning Ranch as "critical habitat" for the federally threatened California gnatcatcher, and in 2007 designated fifteen acres of "vernal pool complexes" as "critical habitat" for the federally endangered San Diego fairy shrimp. (*Id.*; AR 3:1256, 1825; 9:14342, 14352; 9:15864, 15859, 15863, 10:46338.)

C. The City's CLUP and ESHA

To assure conformity with the Coastal Act, local governments lying in whole or in part within the Coastal Zone must prepare and submit a local coastal plan ("LCP") to the Coastal Commission consisting of a coastal land use plan ("CLUP") plus zoning and other implementing actions. (Pub. Resources Code §§ 30108.5, 30108.6; *Yost v. Thomas* (1984) 36 Cal.3d 561, 566.) The City's CLUP contains the following policy regarding ESHA:

> "Policies 4.1.1-1. Define any area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be

easily disturbed or degraded by human activities and developments as an environmentally sensitive habitat area (ESHA). Using a site-specific survey and analysis by a qualified biologist, evaluate the following attributes when determining whether a habitat area meets the definition of an ESHA:

A. The presence of natural communities that have been identified as rare by the California Department of Fish and Game.

B. The recorded or potential presence of plant or animal species designated as rare, threatened, or endangered under State or Federal law.

C. The presence or potential presence of plant or animal species that are not listed under State or Federal law, but for which there is other compelling evidence of rarity, such as designation as a 1B or 2 species by the California Native Plant Society...."

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

"4.1.1-4. Protect ESHAs against any significant disruption of habitat values.

4.1.1-6. Require development in areas adjacent to environmentally sensitive habitat areas to be sited and designed to prevent impacts that would significantly degrade those areas, and to be compatible with the continuance of those habitat areas.

4.1.1-7. Limit uses within ESHAs to only those uses that are dependent on such resources.

4.1.1-9. Where feasible, confine development adjacent to ESHAs to low impact land uses, such as open space and passive recreation."

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

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

D. General Plan Update Policies Specific to Banning Ranch

While seeking an LCP, the City also initiated its first comprehensive General Plan update in over thirty years. (AR 10:26214-26216.) What with Banning Ranch being "high-quality wildlife habitat," the General Plan Update

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

If acquisition for open space proved unsuccessful, the General Plan Update allowed Banning Ranch to be developed as a residential village with a majority of the site preserved as open space. (AR 10:26305.) However, either scenario required the restoration and enhancement of "wetlands and wildlife habitats in accordance with the requirements of state and federal agencies." (AR 10:26309-26310.) And to guarantee environmental impacts caused under either scenario would be less than significant, the General Plan Update incorporated as policies specific to Banning Ranch several mitigation measures, including the following:

> "**LU 6.5.6 Coordination with State and Federal Agencies**
>
> Work with appropriate state and federal agencies to identify wetlands and habitats to be preserved and/or restored and those on which development will be permitted."

(AR 10:23164, 23167, 10:22892, 26013; bold in original.) Because those policies stipulated "that any development would have to be located and designed to protect views, the bluffs, natural drainage, and important habitat," the environmental impact report prepared for the General Plan Update

concluded the City's compliance with them ensured that "[i]mpacts associated with land use compatibility would be less than significant." (*Id.*; AR 10:23177.)

The City adopted the General Plan Update on July 25, 2006, and the voters approved it on November 25, 2006. (AR 4:3100.)

E. Banning Ranch's Biologist Finds ESHA on the Property

After the City concluded the General Plan Update's preferred Banning Ranch scenario was infeasible, in August 2008 the owners of Banning Ranch ("RPI") submitted a proposal to develop the property at the maximum density allowed under the alternative scenario. (Opinion, at p. 10.) In compliance with the CEQA mitigation measures built into the General Plan Update, RPI concurrently submitted its biologist's Biological Technical Report, which identified and mapped large areas of potential ESHA present on Banning Ranch by utilizing the City's CLUP criteria for identifying ESHA. (Opinion, at p. 11; AR 9:13710; 3 AA 744, 749; AR 10:46022.) To avoid disturbing this ESHA, RPI's development plan did not include the extension of an arterial four-lane road across it. (3 AA 755-756; AR 10:36559.)

Outside of public purview, however, the City's elected officials insisted on the road extension being part of RPI's development. (AR 9:13723, 13790-13791.) Despite RPI's biologist cautioning that the road extension "would cross through a large portion of project open space containing areas of ESHA,"

"impact significant areas of ESHA scrub and wetlands," and "result in temporary impacts to ESHA scrub and jurisdictional drainages, and significant permanent impacts to ESHA scrub and wetlands," RPI revised its development plan to include the road extension. (AR 4:3177; AR 9:13801-13803, 13805, 15760.)

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

F. The City Refuses to Address ESHA in the EIR

In September, 2011, the City circulated for public review a 1,400-page draft environmental impact report with 5,560 pages of appendices ("DEIR") for the Project. (AR 8:13625-13626, Opinion, at 12.) The DEIR noted Banning Ranch's status as a Deferred Certification Area excluded it from the City's CLUP yet stated the Coastal Commission would evaluate the Project's potential impacts to ESHA by using the Coastal Act *and* guidance from the

City's CLUP. (AR 5:3261.) However, despite not working with the Coastal Commission to identify any ESHA on Banning Ranch or applying either the Coastal Act's or the CLUP's definition of ESHA to the Project, the DEIR concluded the Project was "considered consistent" with the Coastal Act. (AR 4:3323, 3334-3342.)

Numerous public and private entities and individuals submitted comments on the DEIR, with the main complaint being the DEIR's failure to address the presence of ESHA on the Project site. (AR 3:858-862, 1152, 1248-1249, 1429, 1434-1435, 1512-1517, 1823-1824.) This failure to make any determination as to the existence of ESHA on the Project was baffling since it was not only contrary to CEQA policy, but an earlier City study had previously mapped probable ESHA on the Project site, and the Project included the 17/19 Extension through what RPI's own consultant admitted was ESHA. (AR 3:1248, 1516, 1824; 10:15859 [map].)

G. The City Refuses to Work With the Coastal Commission

Coastal Commission staff was particularly critical of the Project and DEIR, noting in a letter the City's CLUP provided "strong guidance"..."aimed at the protection of coastal resources" and urged that "**[t]he EIR should analyze the consistency of the proposed development with applicable policies in the certified [CLUP] and Chapter 3 policies of the Coastal Act and identify and address impacts accordingly.**" (AR 3:911-912; emphasis

in original.) While acknowledging the CLUP did not currently apply to the Project site, staff noted the CLUP nevertheless:

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

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

Focusing on whether the Project site actually contained ESHA, staff noted that, while it had not yet performed a formal ESHA delineation for the site,

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

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

The City responded by claiming the determination of what areas on Banning Ranch are ESHA was the Coastal Commission's to make and not the City's; thus, it was unnecessary for the City, whether under CEQA, the Coastal Act, or its own CLUP, to identify ESHA in the EIR. (Opinion, at p. 16.) In July 2012, the City approved the Project.

PROCEDURAL HISTORY

A. The Trial Court Finds *Native Plant* Controlling and the Project Inconsistent With the General Plan

The Conservancy petitioned for a writ of mandate challenging on the grounds that the EIR was legally inadequate and the City violated its General Plan by approving the Project. (Opinion, at p. 17; 1 AA 1-22.) Finding *Native Plant* "directly on point here," the trial court concluded the City's approval of the Project was inconsistent with the General Plan. (Reporter's Transcript ["RT"] 6:8-9; 5 AA 1272-1288.)

> "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 must identify which parts of Banning Ranch will be restored, preserved and developed. And, in so identifying those parts, the City's policy is to coordinate with the State and Federal agencies in making that identification.
>
> Did the City coordinate with the Coastal Commission to identify the wetlands and habitats that would be developed *[sic]*, preserved or developed as required by **California Native Plant Society**? The answer is no. And, the exact opposite is true. When the Coastal Commission offered to coordinate, offered to

assist in identifying, the City rejected the offer and deferred the issue altogether.

[T]here *is* an implicit timeframe in Strategy 6.5.6; what the Petitioner calls the "temporal" aspect of Strategy 6.5.6. The identification of what Property is to be developed, rather than preserved or restored, must be determined prior to an authorization of a project, as the Strategy talks to the future, what "will be" developed.

The Strategy doesn't state that the City is to identify the property to be developed and then seek the Coastal Commission's approval; the Strategy states that what is to be developed is to be identified through the coordination.

[I]f the City's position is correct, that it could coordinate up to the point of the approval or denial of the Project by the Coastal Commission, with regard to the existence of potential ESHA, what is the purpose of Strategy 6.5.6? It would have none.

(5 AA 1281-1284; bold and italics in original.)

Judgment was entered for the Conservancy and a writ of mandate issued in January, 2014 directing the City to set aside all Project approvals except certification of the EIR. (Opinion, at p. 18; 6 AA 1442.) The City and RPI appealed and the Conservancy cross-appealed.

B. The Court of Appeal Decision

The Opinion reversed the judgment and directed the trial court to set aside the peremptory writ of mandate. (Opinion, at p. 31.) Rejecting the trial court's conclusion that General Plan Policy LU 6.5.6 logically required the City to work with the Coastal Commission in identifying ESHA on Banning Ranch to be preserved and restored *before* approving its development, the Opinion upheld the City's conclusion "that LU 6.5.6 was designed as a *helpful reminder* of the City's legal obligation to 'work with' all necessary agencies in the course of developing Banning Ranch." (*Id.* at 22, italics added.) Acknowledging that *Native Plant* "was not easily distinguished," the Fourth District nevertheless rejected its reasoning. (*Id.* at p. 26.)

The Conservancy did not petition for rehearing in the Court of Appeal, and the Opinion is final as of June 19, 2015. (Cal. Rules of Court, rule 8.264(b)(1).) The Conservancy now files this Petition in this Court under California Rules of Court, rule 8.500(a)(1) & (e)(1).

ARGUMENT

A. The Opinion Conflicts with *Douda v. California Coastal Com.*

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

The Doudas had filed an application for a coastal development permit to construct a single-family home in the Coastal Zone in Los Angeles County. (*Id.* at p. 1190.) The Coastal Commission's staff denied the application, concluding that the property met the definition of an environmentally sensitive

habitat area. (*Ibid.*) In that case, the County of Los Angeles had not yet prepared a local coastal program, and the Doudas argued that prior to the certification of a local coastal program a local government is powerless to designate ESHA. The court held, however, that in the absence of a certified land use plan or certified local coastal program, a local government cannot escape the responsibility of identifying ESHA by deferring that designation to the Coastal Commission. (*Id.* at p. 1198.) In enacting the Coastal Act, the Legislature declared, "[I]n carrying out the provisions of [the Coastal Act] such conflicts be resolved in a manner which on balance is the most protective of significant coastal resources." (*Id.* at p. 1194; Pub. Resources Code § 30007.5.) Applying this mandate, the *Douda* court properly finds that ESHA must be protected:

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

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

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

In contrast, the Opinion holds that the Coastal Act's mandate does not apply to local governments when the identification of ESHA is involved, since "an ESHA designation is a legal determination." (Opinion, at p. 23, fn. 13.) There is simply no support in the Coastal Act allowing for this relegation of ESHA to a matter of line drawing.

B. The Opinion Contravenes Section 30336 of the Coastal Act

The Opinion also fails to recognize the second conflict it creates with *Douda*, which is its interpretation of the provision in the Coastal Act pertaining to State collaboration with local government agencies in Public Resources Code section 30336. Section 30336 actually *requires* the Coastal Commission to assist local agencies in complying with the Coastal Act and similarly mandates that those agencies "cooperate with" the Coastal Commission at the outset of the planning process. This provision of the Coastal Act directs that,

"The commission shall, to the maximum extent feasible, assist local governments in exercising the planning and regulatory powers and responsibilities provided for by this division where the local government elects to exercise those powers and

> responsibilities and requests assistance from the commission, and shall cooperate with and assist other public agencies in carrying out this division. Similarly, every public agency, including regional and state agencies and local governments, shall cooperate with the commission and shall, to the extent their resources permit, provide any advice, assistance, or information the commission may require to perform its duties and to more effectively exercise its authority."

(Pub. Resources Code § 30336.)

Douda affirmed that protection of the Coastal Zone necessitates a collaborative effort between the Coastal Commission and local governments. The Coastal Act reflects this by requiring local governments to cooperate with the Coastal Commission by providing information necessary to perform its duties. Moreover, the court rejected plaintiffs' contention that Public Resources Code, § 30500, establishes that local governments essentially have exclusive say over the content of land use plans and local coastal programs. (*Douda v. California Coastal Com., supra,* 159 Cal.App.4th at p. 1182.)

The Legislature's finding that the Coastal Act "rel[ies] heavily on local government and local land use planning and procedures" to accomplish its purpose contrast with the Opinion's holding that the Coastal Act's mandate does not apply to local governments when the identification of ESHA is

involved, because"an ESHA designation is a legal determination" and "[w]e have not been pointed to any authority indicating that the City is required under the Coastal Act to identify ESHA in a project not covered by a coastal land use plan." (Opinion, at pp. 22-23, and fn. 13.)

C. The Opinion Conflicts with *California Native Plant Society*

As noted above, the Council's approval of the Project included the approval of a zoning amendment, a tentative map, and a development agreement. A key prerequisite for approvals such as these is that they must be consistent with the general plan, and in fact the Council made findings that each of these actions was consistent with the City's General Plan. (See Gov. Code § 65860 and AR 1.5:520 [(re)zoning]; Gov. Code § 66473.5 [tentative map] and AR 1.5:594; Gov. Code § 65867.5(a) and AR 1.5:626 [development agreement].) The City's Land Use Element of the voter-approved General Plan Update imposed a "coordination" requirement on ***either*** any acquisition of Banning Ranch for open space [LU 6.3] ***or*** development of Banning Ranch as a residential village [LU 6.4, emphasis added.]:

> "**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." (AR 10:26309-26310, bold in original.)

The trial court determined that the City had failed to work with the Coastal Commission and relied on the holding in *Native Plant*. However, faced with this holding, the Opinion is forced to reject *Native Plant* in order to find the City compliant with its General Plan:

> "...we acknowledge that Native Plant is not easily distinguished. Thus, to the extent the holding of *Native Plant* applies to this case, we reject its reasoning as incompatible with our deferential review of the City's legislative acts." (Opinion, at p. 26.)

In *Native Plant*, the local agency appealed the decision of the trial court determining that the city had violated the Planning and Zoning Law by failing to work with a federal regulatory agency as required by the city's general plan. (*Native Plant, supra*, 172 Cal.App.4th at p. 608.) The City of Rancho Cordova approved an EIR that concluded the vernal pool impacts would be mitigated to less than significant levels, but no proposed mitigation site was identified. (*Id.* at pp. 610-612.) U.S. Fish and Wildlife complained that the mitigation measures were inadequate. (*Id.* at pp. 611-612.) Petitioner California Native Plant Society sued, claiming that the city violated its own general plan's policies. (*Id.* at p. 613.)

The natural resources element of the city's general plan included Policy NR.1.1, requiring the city to "[p]rotect rare, threatened, and endangered

species and their habitats in accordance with State and federal law." (*Id.* at p. 635.) To effectuate this policy, Action NR.1.1.3 of the general plan provided that:

> "[a]s part of the consideration of development applications for individual Planning Areas containing habitats that support special-status plant and animal species that are planned to be preserved, the City shall require that these preserved habitats have interconnections with other habitat areas in order to maintain the viability of the preserved habitat to support the special-status species identified. The determination of the design and size of the 'interconnections' shall be made by the City, as recommended by a qualified professional, ***and will include consultation with the California Department of Fish and Game and U.S. Fish and Wildlife Service***." (*Id.* at p 635, emphasis added.)

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

> "[f]or those areas in which special-status species are found or likely to occur or where the presence of species can be reasonably inferred, the City shall require mitigation of impacts to those species that ensure that the project does not contribute

to the decline of the affected species populations in the region to the extent that their decline would impact the viability of the regional population. Mitigation shall be designed by the City ***in coordination with*** the U.S. Fish and Wildlife Service (USFWS) and the California Department of Fish and Game (CDFG), and shall emphasize a multi-species approach to the maximum extent feasible." (*Id.*)

On appeal, the general plan consistency issue turned on the definition of the word "coordinate," which the court discussed at length and is summarized below:

> "The City argues that to 'coordinate' means "to 'negotiate with others in order to work together effectively,'" and "[t]he City satisfied its obligation of trying to work together with [the Service]" by "solicit[ing], carefully consider[ing], and respond[ing] to comments from [the Service]."
>
> ...
>
> "Although the City suggests 'coordination' is synonymous with 'consultation'–and therefore the City satisfied its "coordination" obligation under the general plan at the same time it satisfied its "consultation" obligation under the plan–that is not true. While the City could "consult" with the Service by soliciting and

considering the Service's comments on the draft EIR, the City could not "coordinate" with the Service by simply doing those things."

...

"Unlike the City, we do not read this "coordination" requirement as "requir[ing] the City to subordinate itself to state and federal agencies by implementing their comments and taking their direction." At the same time, however, we cannot reasonably deem this "coordination" requirement satisfied by the mere solicitation and rejection of input from the agencies with which the City is required to coordinate the design of mitigation measures for the Project."

(*Native Plant, supra,* 172 Cal.App.4th at pp. 641-642.)

In summary, *Native Plant* held the general plan's "coordination" policy meant the city had to actually "work with" those agencies and not merely "consult" with them, and because the city did not work with them, its approval of the project was inconsistent with its general plan. (*Id.* at pp. 640-642.)

By the Opinion's own language, "...[T]he City's level of interaction thus far with the Coastal Commission was ***closer to consultation than coordination***, as defined in *Native Plant.*" (Opinion, at p. 25, emphasis added.) But then the Opinion does an about-face and proclaims that it is simply too

hard for judges to determine if a local agency has "coordinated" with another regulatory agency under the holding in *Native Plant*:

> "Perhaps a good faith negotiation between Rancho Cordova and the Service 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 the Service prior to submitting their project to Rancho Cordova. These might be good or bad ideas. But none of them were in the general plan. And any other specific requirement the trial court might have tried to impose would likewise by necessity be designed out of whole cloth." (Opinion, at p. 27.)

Despite the fact that courts make life-altering and even life-and-death decisions daily, these same courts cannot be called upon to evaluate a local agency's "coordination" efforts because, according to the Opinion, that is "micomanage[ing]." (Opinion, at p. 28.) Unlike the Court of Appeal here, the trial court seemed to have no problem in explaining to the City what it needed to do. The writ of mandate issued by the trial court explained that the City's failure was in not "coordinat[ing] and work[ing] with the ... Coastal Commission in identifying which wetlands and habitats present on the Project

site would be preserved, restored or developed, prior to your approval of the Project." (Opinion, at pp. 27-28.)

The Opinion tells us that "identifying which wetlands and habitats present on the Project site would be preserved" in coordination with the Coastal Commission is simply too much to understand. (Opinion, at p. 27.) After declaring its own inability to absorb the rather specific instruction made by the trial court, the Opinion concludes that this must mean that the City is entitled to interpret "consultation" virtually any way its wants:

> "But the lack of specific guidance in the general plan indicates to us that it is unreasonable to find the City's view of LU 6.5.6 to be arbitrary." (Opinion, at p. 28.)

While *Native Plant* stands for the proposition that the word "coordination" has meaning beyond "consultation," the Opinion stands for the proposition that "coordination" means what the City says its means.

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

The Opinion circumvents this stricture by claiming "LU 6.5.6 is vague and ambiguous–the Conservancy's position depends on inferences made after considering multiple sections of the general plan." (Opinion, at p. 26.) But if this was true, then LU 6.5.6's context and purpose is key to interpreting it:

"In interpreting a statute, we apply the usual rules of statutory construction. "We begin with the fundamental rule that our primary task is to determine the lawmakers' intent. [Citation.] ... To determine intent, '"The court turns first to the words themselves for the answer."' [Citations.] 'If the language is clear and unambiguous there is no need for construction, nor is it necessary to resort to indicia of the intent of the Legislature (in the case of a statute) ....'" (*Delaney v. Superior Court* (1990) 50 Cal. 3d 785, 798.) We give the language of the statute its 'usual, ordinary import and accord significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose. A construction making some words surplusage is to be avoided. The words of the statute must be construed in context, keeping in mind the statutory purpose....'" (*Kane v. Hurley* (1994) 30 Cal.App.4th 859, 862.)

Given that the exact language of LU 6.5.6 reads, "[*w*]*ork with* appropriate state and federal agencies to identify wetlands and habitats to be preserved and/or restored and those on which development will be permitted," the General Plan's intent is even more clear and unambiguous than the "coordination" discussed in *Native Plant*. (Opinion, at p. 7.)

D. The Opinion Rejects Fundamental CEQA Principles

The Opinion rejects four fundamental tenets of the California Environmental Quality Act ("CEQA"). (Pub. Resources Code § 21000, *et seq.*) First, like the Coastal Act, CEQA mandates a collaborative effort between a lead agency and state agencies in preparing an environmental impact report ("EIR") for a proposed project. (Cal. Code Regs., tit. 14 § 15050.) Here, the City of Newport Beach ("City") prepared an EIR for a massive proposed project on a 400-acre site. When Coastal Commission staff biologists reviewed the EIR they found it failed to identify *any* probable ESHA on the site and offered to assist the City in identifying it. The Opinion held CEQA did not require the City to work with Coastal Commission staff since "an ESHA determination is a legal determination." (Opinion, at p. 29.)

Second, CEQA is a sunshine law requiring procedural rigor, and the Legislature has declared "that noncompliance with its information disclosure provisions which precludes relevant information from being presented to the public agency" may constitute a prejudicial abuse of discretion. (Pub. Resources Code § 21005, subd. (a).) This Court has affirmed such compliance means "an agency must use its best efforts to find out and disclose all that it reasonably can" when preparing an EIR. (Cal. Code Regs., tit. 14 § 15144.) A biological study prepared by the project applicant found ESHA throughout the site and submitted that study to the City. The City initially posted this study on its

website. However, the EIR the City later prepared for the project never mentioned the study or the acres of ESHA it found on the site, and the study vanished not only from the City's website but from its files on the project. The Opinion impairs CEQA's basic procedural requirements, permitting the denial of information essential to an educated decision-making process. Despite insisting that the Banning Ranch EIR was adequate, the City cannot get around the fact that it made key project documents vanish.

Third, and related to the second, the Opinion found the study's disappearance and the EIR's failure to mention it did not violate CEQA because the EIR contained 625 pages of subsequent biological studies that were "longer and more detailed" than the missing study but failed to identify potential ESHA. (Opinion, at pp. 12-13.) In so holding, the Opinion rejects CEQA's basic principle that the EIR's fundamental purpose is to be an informational document the public can understand. (Cal. Code Regs., tit. 14, § 15001, subd. (c), and Cal. Code Regs., tit. 14, § 15121, subd. (a).) This is why CEQA requires EIRs to be "analytic and not encyclopedic," normally less than 300 pages for major projects, written in plain language the public can understand, and to avoid highly technical and specialized analysis. (Cal. Code Regs., tit. 14, §§ 15140-15141.) In essence, the Opinion holds an EIR can dispense with telling the public "there is an elephant in the room" and say instead "there is a large terrestrial quadrupedal mammal of the genus

Luxodonta in the confines of an area enclosed within four walls." This is contrary to CEQA and 45 years of CEQA case law.

Fourth, CEQA requires mitigation measures to be fully enforceable by (among other things) incorporating those measures into a plan. (Pub. Resources Code § 21081.6, subd. (b).) In accordance with that requirement, the City incorporated specific mitigation measures into its General Plan Update requiring it to identify and avoid potential environmental impacts resulting from the future development of the 400-acre Banning Ranch site. One of those mitigation measures, labeled LU 6.5.6, required the City to *work with* federal and state agencies to parse from any future development's footprint "wetlands and habitats to be preserved and/or restored" before the City permitted that development. According extreme deference to the City, the Opinion found the City's refusal to work with the Coastal Commission in identifying ESHA *before* permitting the site's development was reasonable. It did so by construing the General Plan's LU 6.5.6 not as the mitigation measure the City previously claimed it was but merely "a helpful reminder." (Opinion, at p. 22.)

The Opinion also errs in its failure to recognize that LU 6.5.6 is much more than a "helpful reminder" from the City–*the City put it in the General Plan Update as a CEQA mitigation measure*. Public Resources Code 34 section 21081.6(b) requires all public agencies to "provide that measures to mitigate or avoid significant effects on the environment are fully enforceable

through permit conditions, agreements, or other measures." When it comes to a *public* project such as a general plan, section 21081.6(b) allows cities and counties to incorporate those mitigation measures into the plan itself.

A review of the EIR the City prepared for its General Plan Update reveals this is exactly what the City did:

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

(AR 10:23151-23152; emphasis added.)

Lest there be any question that LU 6.5.6 and similar policies constituted CEQA mitigation measures incorporated into the General Plan Update, the EIR assured the public that those "[p]olicies stipulate that any development would have to be located and designed to protect views, the bluffs, natural drainage, and important habitat," and in responding to public comments on the EIR the City stated that those policies "provide for protections of the resources *that are considered by state and federal agencies as rare, endangered, or otherwise significant.*" (AR 10:22892, 26013; emphasis added.)

By classifying the General Plan's incorporated mitigation measures merely as optional recommendations rather than binding obligations, the Opinion upsets longstanding CEQA principles and sows confusion into previously settled law.

CONCLUSION

Review of the important questions here is necessary to resolve the conflict between the Opinion and *Douda* as to whether an ESHA designation is a purely legal determination that a local government cannot make under the Coastal Act if it lacks a Coastal Commission-designated local coastal plan, and whether a local government must collaborate with the Coastal Commission formulating a local coastal program. Review is also necessary because the Opinion expressly rejected the holding in *Native Plant* as applied

to identical facts, and therefore a guidance is needed to resolve the split between the Third and Fourth District Courts of Appeal. Finally, review is warranted given the Opinion's rejection of several key procedural and substantive requirements of CEQA.

Dated: June 29, 2015

Respectfully submitted,

LEIBOLD McCLENDON & MANN, P.C.

By: _____
Douglas M. Johnson
Attorney for Petitioner
BANNING RANCH CONSERVANCY

CERTIFICATION OF WORD COUNT:

In accordance with California Rule of Court, Rule 8.204(d)(1), I certify that this Petition contains 7399 words, exclusive of this certificate and the tables of contents and authorities, according to the word count function of the word processing program I used to prepare it.

By: _____
Douglas M. Johnson

EXHIBIT A
(Cal. Rules of Court, rule 8.204(d).)

COURT OF APPEAL - 4TH DIST DIV 3

FILED

May 20, 2015

Deputy Clerk: D. Jackson

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

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.	G049691 (Super. Ct. No. 30-2012-00593557) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Robert Louis Becking, Temporary Judge. (Pursuant to Cal. Const., art. VI, § 21.) Reversed.

Office of the City Attorney for the City of Newport Beach, Aaron Harp, City Attorney and Leonie Mulvihill, Assistant City Attorney; Remy Moose Manley, Whitman F. Manley and Jennifer S. Holman for Defendants and Appellants.

Leibold McClendon & Mann and John G. McClendon for Plaintiff and Appellant.

Manatt, Phelps & Phillips, Susan K. Hori and Benjamin G. Shatz for Real Parties in Interest and Appellants.

Kamala D. Harris, Attorney General, John A. Saurenman, Assistant Attorney General, and Jamee Jordan Patterson, Deputy Attorney General, for California Coastal Commission as Amicus Curiae.

* * *

Banning Ranch consists of approximately 400 acres of largely undeveloped coastal property, with active oilfield facilities and operations dispersed thereon. Project proponents[1] seek to develop one-fourth of Banning Ranch for residential and commercial purposes, and to preserve the remaining acreage as open space and parks, removing and remediating much of the oil production equipment and facilities (the Project). The City of Newport Beach and its City Council (collectively the City) approved the Project. Banning Ranch Conservancy (the Conservancy), "a community-based organization dedicated to the preservation, acquisition, conservation and management of the entire Banning Ranch as a permanent public open space, park, and coastal nature preserve," filed a mandamus action against the City.

The trial court agreed with the Conservancy's claim that the City violated the Planning and Zoning Law (Gov. Code, § 65000 et seq.) and its own general plan by its alleged failure to adequately coordinate with the California Coastal Commission before its approval of the Project. On the other hand, the court rejected the Conservancy's claim that the City violated the California Environmental Quality Act (CEQA; Pub. Resources Code, § 21000 et seq.) by failing to identify in the environmental impact report (EIR) the "environmentally sensitive habitat areas"

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[1] Project proponents are real parties in interest Newport Banning Ranch LLC, Aera Energy LLC, and Cherokee Newport Beach, LLC.

(ESHAs) — a defined term in the California Coastal Act of 1976 (Coastal Act; Pub. Resources Code, § 30000 et seq.). All interested parties appealed. We agree with the court's CEQA ruling but conclude the court erred by finding the City violated its general plan. We therefore reverse the judgment to the extent it provides for mandamus relief to the Conservancy.

FACTS[2]

We describe in this section: (1) the City's general plan, as it pertained to Banning Ranch; (2) the City's coastal land use plan, which, by its own terms, did not apply to Banning Ranch; (3) the proposed Project; (4) the draft EIR; (5) The City's response to comments and final EIR; (6) the City's approval of the Project; and (7) the procedural history of this action. Keep in mind the primary legal disputes: (a) What actions were required of the City vis-à-vis the Coastal Commission, prior to Project approval, regarding the decision whether to develop, preserve, or restore particular portions of Banning Ranch; and (b) Was the City required to designate ESHAs in the EIR?

The City's General Plan, as it Pertains to Banning Ranch

"Each planning agency shall prepare and the legislative body of each county and city shall adopt a comprehensive, long-term general plan for the physical

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[2] Collectively, the parties' thorough, well-researched "briefs" exceed 300 pages. The City's appendix features 1,489 pages and the Conservancy's appendix adds 98 pages. The electronic administrative record totals a whopping 49,046 pages. We have striven to limit our recitation of facts to those strictly necessary to the analysis of the issues before us and to refrain from discussing unnecessary background material and the parties' arguments in the alternative. We assure the parties, however, that we appreciate their diligence in bringing all potentially relevant materials and issues to our attention.

development of the county or city, and of any land outside its boundaries which in the planning agency's judgment bears relation to its planning." (Gov. Code, § 65300.) The general plan adopted by a legislative body is "a '"constitution" for future development' [citation] located at the top of 'the hierarchy of local government law regulating land use' [citation]." (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 773.) "The planning law . . . compels cities and counties to undergo the discipline of drafting a master plan to guide future local land use decisions." (*Ibid.*)

The City's 2006 general plan recognizes Banning Ranch as a distinct "[d]istrict" within its "sphere of influence."[3] The general plan acknowledges both the damage done by longstanding ("at least 75 years") use of Banning Ranch for oil extraction activities and the value of Banning Ranch as a wildlife habitat and open space resource for citizens. The environmental value of the "diverse habitats" contained within Banning Ranch varies. Some of Banning Ranch (particularly the northwestern portion) has a "high biological resource value"; other segments are of lesser environmental importance.

The general plan notes resident support for the preservation of all of Banning Ranch as open space or, alternatively, the limited development of Banning Ranch if necessary "to help fund preservation of the majority of the property as open space." A highlighted "Policy Overview" section states as follows: "The General Plan prioritizes the acquisition of Banning Ranch as an open space amenity for the community and region. Oil operations would be consolidated, wetlands restored, nature education and interpretive facilities provided, and an active park developed containing playfields and other facilities to serve residents of adjoining neighborhoods. [¶] Should the

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[3] The vast majority of Banning Ranch (361 acres) is within the jurisdiction of unincorporated Orange County; the remaining 40 acres are within the City. Nonetheless, all of Banning Ranch falls within the City's "'sphere of influence'" and is therefore the appropriate subject of the City's general plan. (See *Merritt v. City of Pleasanton* (2001) 89 Cal.App.4th 1032, 1034; Gov. Code, §§ 65300, 65859, subd. (a).)

property not be fully acquired as open space, the Plan provides for the development of a concentrated mixed-use residential village that retains the majority of the property as open space. . . . While the Plan indicates the maximum intensity of development that would be allowed on the property, this will ultimately be determined through permitting processes that are required to satisfy state and federal environmental regulatory requirements."

Building on its stated policy preferences, the general plan identifies two alternative land use "Goal[s]."[4] The first goal, "LU 6.3," is "[p]referably a protected open space amenity, with restored wetlands and habitat areas, as well as active community parklands to serve adjoining neighborhoods." The second goal, "LU 6.4," is a backup option: "If acquisition for open space is not successful, a high-quality residential community with supporting uses that provides revenue to restore and protect wetlands and important habitats."

Each alternative goal features a "Policies"[5] section beneath the goal. The policies in support of Goal LU 6.3 are simple. The first, described as a "LAND USES" policy and entitled "Primary Use," declares the intended use of Banning Ranch to be open space. A "STRATEGY" listed underneath is entitled "Acquisition for Open Space" and announces support for the acquisition of Banning Ranch by the City through a variety of possible funding mechanisms. Both the land uses and strategy sections cross-reference several implementation actions,[6] described elsewhere in the general plan.

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[4] According to the general plan, "Goals describe ideal future conditions for a particular topic, such as for Banning Ranch . . . . Goals tend to be very general and broad."

[5] According to the general plan, "Policies provide guidance to assist the City as it makes decisions relating to each goal. Some policies include guidelines or standards against which decisions can be evaluated."

[6] According to the general plan, "Implementation Actions identify the

The Policies listed beneath Goal LU 6.4 are more detailed. The "LAND USES" section entitled, "Alternative Use," describes the limited development of a residential village, "with a majority of the property preserved as open space." Next follows nine separate policies setting forth requirements pertaining to development density, capacity, design, and methods.[7] A "STRATEGY" also requires "the preparation of a master development or specific plan for any development on the Banning Ranch specifying lands to be developed, preserved, and restored, land uses to be permitted, parcelization, roadway and infrastructure improvements, landscape and streetscape improvements, development regulations, architectural design and landscape guidelines, exterior lighting guidelines, processes for oil operations consolidation, habitat preservation and restoration plan, sustainability practices plan, financial implementation, and other appropriate elements." Various implementation actions were also referenced throughout this section.[8]

The general plan then announces "Policies Pertaining to Both Land Use Options (Goals 6.3 and 6.4)." The first three policies pertain to "PERMITTED USES" and discuss oil operations, an active community park, and the restoration of wetlands and

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specific steps to be taken by the City to implement the policies. They may include revisions of current codes and ordinances, plans and capital improvements, programs, financing, and other measures that should be assigned to different City departments."

[7] Specific limits on development include a maximum of 1,375 residential units, a maximum of 75,000 square feet of retail commercial uses, and a maximum of 75 rooms in a facility offering overnight accommodations.

[8] In addition, section 10.9 of the natural resources element of the general plan (entitled "Development on Banning Ranch"), provides: "Protect the sensitive and rare resources that occur on Banning Ranch. If future development is permitted, require that an assessment be prepared by a qualified biologist that delineates sensitive and rare habitat and wildlife corridors. Require that development be concentrated to protect biological resources and coastal bluffs, and structures designed to not be intrusive on the surrounding landscape. Require the restoration or mitigation of any sensitive or rare habitat areas that are affected by future development."

wildlife habitat. The fourth and fifth policies pertain to "DESIGN AND DEVELOPMENT" in connection with the preservation of environmental resources and the public's views.

The focus of this appeal as it relates to the general plan is the final section of the land use discussion of Banning Ranch, listed under the "Policies Pertaining to Both Land Use Options," but designated specifically as a "STRATEGY," a term not defined in the general plan. We quote this section in its entirety. "LU 6.5.6 [¶] Work with appropriate state and federal agencies to identify wetlands and habitats to be preserved and/or restored and those on which development will be permitted." The citations at the end of the quote refer to Implementation Actions 14.7 and 14.11, which are listed elsewhere in the general plan. Implementation Action 14.7 is entitled "Coordinate with the California Resources Agency, Department of Fish and Game," and describes various issues on which the City should either "consult[]," "support," or "cooperate with" this agency. Implementation Action 14.11 is entitled, "California Public Utilities Commission" (PUC) and states that the City "shall work with the PUC in obtaining funding and implementing the undergrounding of remaining overhead utilities."

Implementation Action 14.6 is conspicuous by its absence from LU 6.5.6 and the rest of the section of the general plan pertaining specifically to Banning Ranch. Implementation Action 14.6 is entitled "Coordinate with California Coastal Commission." Its text reads: "The California Coastal Commission is responsible for the implementation of the *California Coastal Act of 1976*. As described [elsewhere in the general plan], the City's Local Coastal Program's (LCP) Land Use Plan (CLUP) had been certified at the time of the adoption of the updated General Plan. The City shall work with the Coastal Commission to amend the CLUP to be consistent with the General Plan and pursue certification of the Implementation Plan. The City shall ensure that on certification, applications for development shall be reviewed by the City for consistency with the certified LCP and *California Coastal Act of 1976*."

The City's Coastal Land Use Plan, Which Specifically Excludes Banning Ranch

Pursuant to the Coastal Act, the Coastal "Commission is required to protect the coastal zone's delicately balanced ecosystem." (*Bolsa Chica Land Trust v. Superior Court* (1999) 71 Cal.App.4th 493, 506 (*Bolsa Chica*).) Banning Ranch is within the "'[c]oastal zone'" (Pub. Resources Code, § 30103) and is therefore subject to the Coastal Commission's jurisdiction.

Among other things, the Coastal Act "provides heightened protection to" ESHAs within the coastal zone. (*Bolsa Chica, supra*, 71 Cal.App.4th at p. 506.) "'Environmentally sensitive area' means any area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activities and developments." (Pub. Resources Code, § 30107.5.) "Environmentally sensitive habitat areas shall be protected against any significant disruption of habitat values, and only uses dependent on those resources shall be allowed within those areas." (Pub. Resources Code, § 30240, subd. (a).) "Development in areas adjacent to environmentally sensitive habitat areas . . . shall be sited and designed to prevent impacts which would significantly degrade those areas, and shall be compatible with the continuance of those habitat . . . areas." (Pub. Resources Code, § 30240, subd. (b).)

"A combination of local land use planning procedures and enforcement to achieve maximum responsiveness to local conditions, accountability, and public accessibility, as well as continued state coastal planning and management through a state coastal commission are relied upon to insure conformity with the provisions of the act [citation]. Therefore, all local governments lying in whole or in part within the coastal zone had to prepare and submit to the Commission a local coastal plan (LCP) [citation]. The LCP consists of a local government's '(a) land use plans, (b) zoning ordinances, (c) zoning district maps, and (d) within sensitive coastal resources areas, other implementing actions, ...' [Citation.] The precise content of each LCP is determined

by the local government in full consultation with the Commission [citation] and must meet the requirements of, and implement the provisions and policies of [the act] at the local level [citation]." (*Yost v. Thomas* (1984) 36 Cal.3d 561, 566.)

In 2005, the City obtained Coastal Commission approval of its coastal land use plan (Pub. Resources Code, § 30108.5) — a key facet of its local coastal program (Pub. Resources Code, § 30108.6). The City has not submitted an implementation plan to the Coastal Commission, however, so it was not able to issue coastal development permits on its own. Hence, all new applications for coastal development permits must be processed by the Coastal Commission.

Despite its inability to issue coastal development permits, "[t]he City reviews pending development projects for consistency with the General Plan, Zoning regulations, and the [coastal land use plan], before an applicant may file for a [coastal development permit] with the Coastal Commission." And the City's coastal land use plan, Policies 4.1.1-1, states: "Define any area in which plant or animal life or their habitats are either rare or especially valuable because of their special nature or role in an ecosystem and which could be easily disturbed or degraded by human activities and developments as an [ESHA]." The City's coastal land use plan sets forth criteria for determining if a habitat is an ESHA, and includes a presumption that habitat meeting the prescribed criteria is ESHA, subject to rebuttal by "*site-specific evidence.*"

Banning Ranch, however, is specifically excluded from the scope of the CLUP. "A Deferred Certification Area . . . refers to an area where both the land use plan and implementing actions plan have been deferred to some future date in order to avoid delay in certifying the balance of the [coastal land use plan]. The Coastal Commission retains permit jurisdiction in all deferred certification areas. [¶] Newport Banning Ranch is a [Deferred Certification Area]." The City's coastal land use plan policies "[d]esignate the Banning Ranch property as an area of deferred certification 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."

In sum, the City would ordinarily be obligated under its coastal land use plan to identify ESHAs in its review of a coastal project. But the City's coastal land use plan explicitly excludes Banning Ranch from its scope.

The City Does Not Acquire Banning Ranch; Instead, Development is Proposed

As one can well imagine, 400 acres of coastal property in Orange County does not come cheap. A pricing study commissioned by the City indicated it could take between $184 million to $211 million to acquire Banning Ranch, although the amount might be reduced to a range of $138 million to $158 million if the entire property were purchased in a single transaction. These purchase prices would not include the cost of oil field clean up and remediation. After efforts to obtain funding from a variety of sources foundered, the City ultimately concluded that acquisition of Banning Ranch for preservation as open space in its entirety (i.e., the preferred outcome specified in the general plan) was infeasible.

Parallel with the City's exploration of the possibility of acquiring Banning Ranch, a development proposal was formally submitted to the City in August 2008.[9] The proposal precisely tracks upper limits for development set forth in the general plan (e.g., number of residential units, amount of commercial space) and indicates that the majority of Banning Ranch will be preserved as open space. The proposal includes a planned community development document, designed to address the City's strategy to develop a master plan for Banning Ranch's development.

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[9] The general plan endorses the dual-track pursuit of development "entitlement[s] and permits for a residential village during the time allowed for acquisition as open space."

The proposal "documented and mapped the extensive field survey work that the environmental team has done on potential special status habitats (potential ESHA), as demonstrated in the Biological Technical Report." The referenced biological technical report, prepared by Glenn Lukos Associates, Inc., identifies "potential ESHA in accordance with the City's Coastal Land Use Policies."[10] A map of Banning Ranch identifying potential ESHA and non-ESHA areas was also included with the report.

Draft Environmental Impact Report

"With narrow exceptions, CEQA requires an EIR whenever a public agency proposes to approve or to carry out a project that may have a significant effect on the environment." (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 390 (*Laurel Heights*).) "The Legislature has made clear that an EIR is an 'informational document' and that '[t]he purpose of an environmental impact report is to provide public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment; to list ways in which the significant effects of a project might be minimized; and to indicate alternatives to such a project.'" (*Id.* at p. 391.) "The EIR is the primary means of achieving the Legislature's considered declaration that it is the policy of this state to 'take all action necessary to protect, rehabilitate, and enhance the environmental quality of the state.' [Citation.] The EIR is therefore 'the heart of CEQA.'" (*Id.* at p. 392.)

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10 This 2008 "draft" biological technical report was not included in the administrative record prepared by the City. The court granted the City's motion to strike the document from the record, finding fault with the Conservancy's tardy attempt to lodge this document rather than filing a timely motion to augment the administrative record. We sidestep the issue of whether the court's ruling was proper by considering this document to be part of the record. In our view, the inclusion of this document in the record makes no difference to the outcome of this appeal. Moreover, by considering the excluded document, we avoid the appearance that the City gained an advantage in this case by excluding (whether intentionally or unintentionally) a document from the administrative record.

"Under CEQA, the public is notified that a draft EIR is being prepared [citations], and the draft EIR is evaluated in light of comments received. [Citations.] The lead agency then prepares a final EIR incorporating comments on the draft EIR and the agency's responses to significant environmental points raised in the review process. [Citations.] The lead agency must certify that the final EIR has been completed in compliance with CEQA and that the information in the final EIR was considered by the agency before approving the project. [Citation.] Before approving the project, the agency must also find either that the project's significant environmental effects identified in the EIR have been avoided or mitigated, or that unmitigated effects are outweighed by the project's benefits." (*Laurel Heights, supra*, 47 Cal.3d at p. 391, fn. omitted.)

A notice of preparation of an EIR concerning the Project was distributed in March 2009 to affected individuals and agencies, including the Coastal Commission. After years of study and preparation, a 1,400-page draft EIR, with 5,560 additional pages in the appendices, was completed in September 2011.

The draft EIR devotes approximately 625 pages (including the biological technical report as an appendix) to the analysis of biological resources at Banning Ranch. This analysis is based on biological surveys conducted by BonTerra Consulting from 2008 through 2011 and by Glenn Lukos Associates, Inc. (i.e., the same firm that submitted the biological technical report in 2008), from 1998 to 2002 and 2006 to 2011. The material in the draft EIR is longer and more detailed than the 2008 draft biological technical report. It breaks down to the hundredth of an acre the precise vegetation types at Banning Ranch. It features multiple, color-coded maps identifying the various forms of vegetation. The analysis likewise bores into details concerning the animal life in Banning Ranch, using text and maps to provide an in-depth view of wildlife at Banning Ranch. And the draft EIR analyzes the effects of the Project on habitat, special status species, and other biological resources, using charts and maps to illustrate the impacts described in the textual analysis.

The draft EIR also describes the development proposal in depth, dividing the proposed uses of Banning Ranch down to the tenth of an acre. It specifies which oil production facilities and infrastructure would be removed, and which areas would continue to be used for oil production "on an interim basis." It pinpoints the areas of Banning Ranch that would be used as natural open space, public parks, residences, and mixed-use. It provides for circulation and parking improvements. Maps of Banning Ranch illustrate the planned development with color-coding and detailed labeling.

In discussing the Coastal Act, the draft EIR states: "The Project site is within the boundary of the Coastal Zone. . . . The Project is considered consistent with the applicable land use policies of the . . . Coastal Act. . . ." With regard to the Coastal Act's general rule prohibiting development of ESHAs, "[s]ection 4.6.4 of this [draft EIR] has identified and mapped the vegetation types and special status species occurrences known to occur within the Project Site. The Project and associated mitigation measures avoid, minimize, and compensate for the placement of development within these areas to prevent a substantial degradation of these areas or significantly disrupt habitat values. The determination of what areas would be regulated as ESHA would be made by the Coastal Commission as part of the [coastal development permit] process for the Project."

Thus, the draft EIR does not actually label sectors of Banning Ranch as ESHA or potential ESHA. Instead, after noting Banning Ranch's status as a deferred certification area within the City's coastal land use plan, the draft EIR defers to the Coastal Commission the determination of whether and to what extent ESHAs are present at Banning Ranch. The draft EIR repeatedly notes that the Project cannot go forward without a coastal development permit from the Coastal Commission, something the City could not provide at the Banning Ranch site. Indeed, the draft EIR acknowledges that multiple other federal, state, and local agencies will need to approve the Project before it can proceed.

Response to Comments and Final Environmental Impact Report

In March 2012, the final EIR was produced, collecting comments, responding to comments, issuing clarifications and revisions, and adopting additional appendices. These new components added approximately 2,200 pages to the draft EIR, bringing the EIR grand total to over 9,000 pages. We focus solely on those aspects pertinent to the issues raised in this appeal.

Negative comments concerning the draft EIR's failure to designate ESHAs were received from both the Conservancy's members and Coastal Commission staff. We highlight several of the objections raised in the Coastal Commission's letter. The letter first objects to the procedure contemplated by the City, recommending that the City consider the Project "in the context of a Local Coastal Program review" rather than the current plan to submit the Project for a coastal development permit without having undergone the initial review. Noting "the scope and complexity of the proposed project," the letter suggests the City's proposed process would prove "unworkable." The letter requests "that the EIR process incorporate a determination of probable ESHA areas and their required buffers" and further requests that the Coastal Commission's staff biologists have the opportunity to review such designations prior to EIR finalization. The letter opines that a "preliminary analysis" indicates the Project proposed in the draft EIR could not be compatible with the Coastal Act, in part because a planned "four lane arterial road in the proposed location would result in significant, unavoidable impacts to ESHA."[11]

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[11] The Conservancy suggests that the City's motivation for declining to identify ESHAs in the draft EIR stemmed from its desire to build roads that would necessarily infringe on ESHAs. In February 2009 correspondence, Glenn Lukos Associates, Inc., noted that changes to the habitat restoration plan for Banning Ranch would be required as a result of "the proposed road circulation network requested by the City . . . as a public benefit. . . . [T]he changes associated with the Proposed Project would significantly impact scrub, wetlands, and riparian habitat that would be considered [ESHA] pursuant to the City's Coastal Land Use Plan . . . Policies as well as the [Coastal Act]. It is important to note that impacts to ESHA are prohibited . . . except for certain allowable uses, and the proposed [road] connectors would be problematic to the [Coastal

The City responded to the critique that it should designate ESHAs as part of the CEQA process. The "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 Coastal Commission, or a local agency as part of its local coastal program certification process. While the Draft EIR must identify a project's impact on the environment, including biological resources such as sensitive species and sensitive native vegetation, it is not required to make a finding pursuant to the Coastal Act. That would be within the discretion and authority of the Coastal Commission when this Project comes before them. [¶] For other coastal projects, the Coastal Commission has identified a variety of habitats and resources as ESHA which include, but are not limited to, coastal bluff scrub, coastal sage scrub, riparian scrub, freshwater marsh, and habitat occupied by listed species. These habitats and resource, and many others, have been quantified, qualified, and graphically illustrated in the Draft EIR and supporting Biological Technical Report for the proposed Project. This technical information is available to the Coastal Commission for their consideration of ESHA in accordance with the Coastal Act."

In response to criticism that it should apply its coastal land use plan in the draft EIR, the City explained that Banning Ranch is not currently covered by the City's coastal land use plan. "Consequently, the Applicant is proposing to apply for a Coastal

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Commission]." "The Proposed Project would include a north/south connection . . . that would cross through a large portion of project open space containing areas of ESHA as well as areas proposed for habitat restoration . . . ."

The four lane arterial road extension is proposed as consistent with the Orange County Transportation Authority's map of arterial networks. Included in the EIR is an analysis of an alternative that excludes the disputed road extension.

Development Permit to implement its proposed Project. The Coastal Commission's comments regarding the level of detail required for a Coastal Development Permit will be forwarded to the Applicant for its consideration in preparing its application to the Coastal Commission." The City also acknowledged in an additional response to comments that the Coastal Commission had already "identified areas of ESHA on the Project site" in an unrelated proceeding — a .21-acre portion and a .46-acre portion — but reiterated that "the Coastal Commission has not made an ESHA determination for the remainder of" Banning Ranch.

In short, the City stands by the position taken in the draft EIR: it is unnecessary for the City (whether under CEQA, the Coastal Act, or its own coastal land use plan) to identify ESHAs in the EIR.

Approval of the Project

On July 23, 2012, the City held a public hearing on the Project. At the conclusion of the hearing, the City adopted a series of resolutions, which, taken together, amounted to approval of the Project. Among other things, the resolutions: (1) certified the final EIR, (2) approved the Project's master development plan (and related entitlement changes), (3) approved zoning changes to Banning Ranch, and (4) approved the development agreement between the City and Project proponents.

The City found that the "Project would have direct and indirect impacts on habitat and special status species associated with oilfield remediation, grading, construction, and long-term use of the Project site. Grading activities could impact several sensitive natural communities on the Project site." But the impact of the Project on the biological resources at Banning Ranch "is Less Than Significant as a result of the implementation" of mitigation measures. The City also found that the "Project is consistent with the goals and policies of the General Plan."

Procedural History of Mandamus Action

In August 2012, the Conservancy petitioned for a writ of mandate on the grounds that the EIR was legally inadequate and the City violated its own general plan by approving the Project. The Conservancy requested that the City's approval of the Project be set aside and that the court order the City to comply with its legal obligations under CEQA and the Planning and Zoning Law.

The court took the matter under submission after briefing and oral argument. It granted the petition for writ of mandate in part, based on its conclusion "that the General Plan Amendment implementing the Project, and the Project itself, as approved, is inconsistent with the General Plan, particularly [land use policies] 6.3 and 6.4, and more specifically [land use policy] 6.5.6, in that the City failed to coordinate and work with the Coastal Commission in identifying which wetlands and habitats present in Banning Ranch would be preserved, restored or developed, prior to its approval of the Project." The court's analysis on this point was driven by *California Native Plant Society v. City of Rancho Cordova* (2009) 172 Cal.App.4th 603 (*Native Plant*).

The court denied relief to the Conservancy with regard to its CEQA allegations. The Conservancy's primary argument was "that the City failed to identify potential ESHAs on the Project site and deal with that potentiality in the EIR. [The Conservancy] uses that as a basis for arguing: 1) that the EIR did not properly describe the baseline; 2) that the EIR improperly deferred the identification and imposition of mitigation measures; 3) that the EIR did not contain a proper description of the Project; 4) that the EIR was based on incomplete data and analysis; 5) that the EIR had to be recirculated; and 6) that the EIR failed to adequately analyze alternatives." The court cited *Banning Ranch Conservancy v. City of Newport Beach* (2012) 211 Cal.App.4th 1209 (*Banning Ranch I*) in rejecting the notion that CEQA requires a city to predict in its EIR the ESHAs that will be designated by the Coastal Commission in the future.

Judgment was entered and a peremptory writ of mandate issued in January 2014. The writ of mandate stated in relevant part that the City "shall set aside and vacate all approvals relating to the Project except as to the approval of the environmental impact report and take no further steps toward approving or otherwise implementing the development of the Project site unless and until [the City] fully compl[ies] with Policy LU 6.5.6 in accordance with this Court's aforementioned determination."

DISCUSSION

Consistency of Project with General Plan

"We review decisions regarding consistency with a general plan under the arbitrary and capricious standard. These are quasi-legislative acts reviewed by ordinary mandamus, and the inquiry is whether the decision is arbitrary, capricious, entirely lacking in evidentiary support, unlawful, or procedurally unfair. [Citations.] Under this standard, we defer to an agency's factual finding of consistency unless no reasonable person could have reached the same conclusion on the evidence before it." (*Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 782.) "'It is, emphatically, *not* the role of the courts to micromanage these development decisions.' [Citation.] Thus, as long as the City reasonably could have made a determination of consistency, the City's decision must be upheld, regardless of whether *we* would have made that determination in the first instance." (*Native Plant, supra*, 172 Cal.App.4th at p. 638.) We review the City's decision and do not defer to the trial court. (*Id.* at p. 637.)[12]

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12 The Conservancy argues our level of deference to the City should be reduced because the City's general plan was endorsed by the voters in a referendum. A similar argument was rejected, persuasively, in *San Francisco Tomorrow v. City and County of San Francisco* (2014) 229 Cal.App.4th 498, 515-516.

The primary general plan policy at issue is LU 6.5.6 (which can be described, consistent with the general plan, as a "policy," a "strategy," or both): "**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." Also of note is LU 6.4, the alternative policy allowing development, pursuant to which the general plan requires "the preparation of a master development or specific plan for any development on the Banning Ranch specifying lands to be developed, preserved, and restored . . . ." A master development plan was approved by the City; this plan (among other documents) identifies lands to be developed, preserved, or restored as part of the Project.

The Conservancy's claim, accepted by the court, is that the City neither coordinated nor worked with the Coastal Commission (an "appropriate" state agency in LU 6.5.6) to identify wetlands and other habitats to be preserved, restored, or developed. The Conservancy insists that the only reasonable interpretation of the general plan is that the City must work with the Coastal Commission to decide the appropriate uses of habitats *before* Project approval. Recall that the general plan states, "Policies provide guidance to assist the City as it makes decisions relating to each goal. *Some policies* include guidelines or standards against which decisions can be evaluated." (Italics added.) The Conservancy asserts that LU 6.5.6 is just such a policy, and that the City's process leading up to the approval of the Project fell short of what LU 6.5.6 required, thereby making the Project inconsistent with the general plan. By the City's own admission, the Project has not yet received Coastal Commission assent. To the contrary, Coastal Commission staff in their comments to the draft EIR criticized (at least based on their preliminary review of the Project) the City's approach thus far (e.g., not analyzing the Project under the City's coastal land use plan, not identifying ESHA in the EIR, and allowing road improvements through areas that include probable ESHA).

The City's counterargument takes two tacks. First, the City marshals evidence of its interactions with federal and state agencies. The City distributed a Notice of Preparation of an EIR to a lengthy list of state agencies concerned with land use issues at Banning Ranch, including the Coastal Commission. Several of these agencies, including the Coastal Commission, provided comments to the City concerning the draft EIR. The National Marine Fisheries Service, a federal agency, attended a scoping meeting early in the environmental review process and provided oral comments. The United States Army Corps of Engineers concurred with a determination of its jurisdiction over certain wetlands at Banning Ranch. Consultation procedures under the Endangered Species Act were initiated with the United States Department of Fish and Wildlife.

City staff members and consultants even met with Coastal Commission staff about the Project and responded in some measure to Coastal Commission concerns. An in-person meeting occurred on March 30, 2011 at which various aspects of the proposed Project were discussed. In April 2011, instructions were provided to a biological resource consultant "to beef up" the EIR in some respect to address Coastal Commission concerns. Coastal Commission staff again met in person in 2012 with "Banning Ranch rep[resentatives] and advised them that we were not satisfied by the response to our comments in the [draft] EIR and advised them that they will need to fully address those comments if/when the project is submitted to the Commission. Since then, some of our staff including our staff biologists have had a staff visit and I believe they underscored the need for further study during that site visit."

Much of this evidence can fairly be characterized as compliance, in part, with LU 6.5.6. The City certainly worked with federal and state agencies, including the Coastal Commission, before approving the Project. But none of this evidence addresses the lack of coordination with the Coastal Commission prior to Project approval on the Project's identification of habitats for preservation, restoration, or development. Instead, the record seems clear that the Project's choices as to habitat preservation, restoration,

and development were made by the project proponents and the City. The Coastal Commission was certainly put on notice that the Project had been proposed and that an environmental review process had been initiated. The Coastal Commission (through its staff) took advantage of the opportunity to comment on the draft EIR and even met with Project proponents and the City on a few occasions. But it cannot fairly be said that the City worked with the Commission prior to Project approval to identify habitats for preservation, restoration, or development.

To this point, the City's second contention is that the Conservancy's interpretation of LU 6.5.6 is not the only reasonable interpretation, and that this court is required to defer to the City's interpretation of its own general plan in making its consistency finding. To wit, the City suggests compliance with LU 6.5.6 is not limited to its conduct prior to Project approval. LU 6.5.6 does not say that the Coastal Commission (or its staff) must sign off on the land uses contemplated by the Project before the City approves the Project. Instead, LU 6.5.6 asserts a vague strategy to "work with" all pertinent state and federal agencies. There is no temporal cut off for the completion of this vague strategy.

The City asserts its process is perfectly legitimate under LU 6.5.6: (1) "[w]ork with" all interested agencies to the extent of notifying them of the Project, meeting with agency representatives upon request, and taking their views into consideration during the Project review process; (2) approve (or not) the Project after completing CEQA requirements and measuring the Project for consistency with the general plan; and (3) continue to "[w]ork with" agencies from whom additional approvals and permits are necessary, including the Coastal Commission, which might determine that ESHA at Banning Ranch requires the Project to be altered. According to the City, it was free under LU 6.5.6 to reject the preferred procedure suggested by the Coastal Commission's comment letter, i.e.: (1) review the Project under the City's coastal local use plan, notwithstanding Banning Ranch's exclusion (as a deferred certification area)

from this plan; (2) identify in the Project planning documents all ESHAs within Banning Ranch; (3) eliminate any development that would affect an ESHA; (4) continue coordinating with Coastal Commission staff until the Project was up to snuff in the Coastal Commission staff's opinion; and (5) approve (or not) the Project.

In addition to its repeated acknowledgement that the Coastal Commission must provide a coastal development permit before the Project proceeds, the City also cites various mitigation measures included in the EIR as proof that it intends to "[w]ork with" the Coastal Commission in the future. Each of these measures references individual federal and state agencies (including the Coastal Commission) that must approve of the implementation plan for these measures to go into effect.

Our review of the general plan and the record in this case leads us to conclude that the City's interpretation of the process contemplated by LU 6.5.6 and its ensuing consistency finding are reasonable. 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 Coastal Commission before the City's approval of the Project (e.g., by complying, in part or in full, with the suggestions provided by the Coastal Commission in its comment letter). Given the lack of measurable standards as to the extent or timing of the coordination required, it was rational for the City to conclude that LU 6.5.6 was designed as a helpful reminder of the City's legal obligations to "work with" all necessary agencies in the course of developing Banning Ranch.[13] This "work"

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[13] The trial court thought that LU 6.5.6 logically must mean something beyond simply complying with preexisting legal obligations (e.g., to notify appropriate agencies about the Project, to obtain necessary permits), else what would be the point of including it in the general plan? (See, e.g., Pub. Resources Code, §§ 30600, 30604 [coastal development permit issuance by Coastal Commission]; Cal. Code Regs., tit. 14, § 15086, subd. (a) [lead agency shall consult with and request comments from other agencies following preparation of draft EIR].) But not every sentence in a general plan creates a new legal obligation. Indeed, the City's general plan implicitly acknowledges that not every "Policy" creates guidelines or standards against which the City's behavior can be measured.

would, of course, center on the question of which segments of Banning Ranch would be preserved, which would be restored, and which would be developed. But it was up to the City to decide precisely how this strategy of working with concerned agencies would be implemented. The City's decision to forego additional engagement with the Coastal Commission prior to Project approval did not make the Project inconsistent with the general plan.

The trial court ruled to the contrary, applying what it deemed to be binding precedent. (See *Native Plant, supra*, 172 Cal.App.4th 603.) *Native Plant* held that Rancho Cordova violated its general plan by its failure to sufficiently coordinate with the United States Fish and Wildlife Service (the Service) in designing mitigation measures in connection with a development project. (*Id.* at p. 608.)

The *Native Plant* project concerned a 530 acre site at which a mix of development and preservation was proposed. (*Native Plant, supra*, 172 Cal.App.4th at p. 608.) The project site featured vernal pools and seasonal wetland vegetation, which

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We have not been pointed to any authority indicating that the City is required under the Coastal Act to identify ESHA in a project not covered by a coastal land use plan. (See, e.g., Cal. Code Regs., tit. 14, § 13052 [setting forth minimum "preliminary approvals" before request for coastal development permit will be accepted for filing; list of requirements does not include ESHA designations].) The closest the Conservancy comes to supporting such a claim is the following section from the Coastal Act: "The commission shall, to the maximum extent feasible, assist local governments . . . . Similarly, every public agency, including . . . local governments, shall cooperate with the commission and shall, to the extent their resources permit, provide any advice, assistance, or information the commission may require to perform its duties and to more effectively exercise its authority." (Pub. Resources Code, § 30336.) The Conservancy reasons that once the Commission requested the City to do something in its comment letter, it was the City's obligation to follow up on the request. We agree with the City that an ESHA designation is a legal conclusion, not the sort of cooperation mandated by Public Resources Code section 30336. There is no authority for the proposition that the City violated its statutory duty to cooperate with the Coastal Commission by not including ESHA designations in its EIR. And regardless, there is not a Coastal Act claim before this court. This case is about the City's obligations under the general plan and CEQA.

provided "habitats for two species of vernal pool crustaceans — vernal pool fairy shrimp and vernal pool tadpole shrimp — that are listed as threatened and endangered (respectively) under the federal Endangered Species Act of 1973." (*Id.* at p. 609.) In the spring of 2004, the Service, in conjunction with other federal agencies, jointly created a "conceptual-level strategy" composed of principles and standards designed to protect aquatic resource habitats at the site. (*Id.* at p. 609.) Both after the proposed project was announced in September 2004 and after the release of the draft EIR in October 2005, the Service commented that the proposed project appeared to be inconsistent with the conceptual-level strategy endorsed by the Service. (*Id.* at pp. 610-612.) Rancho Cordova nonetheless approved the project. (*Id.* at p. 612.)

Among other contentions, it was argued that Rancho Cordova violated its general plan by failing to comply with Policy NR 1.7, which "provides that '[p]rior to project approval the City shall require a biological resources evaluation for private and public development projects in areas identified to contain or possibly contain listed plant and/or wildlife species based upon the City's biological resource mapping provided in the General Plan EIR or other technical materials.' To implement this policy, Action NR.1.7.1 provides that '[f]or those areas in which special-status species are found or likely to occur or where the presence of species can be reasonably inferred, the City *shall* require mitigation of impacts to those species that *ensure* that the project does not contribute to the decline of the affected species populations in the region to the extent that their decline would impact the viability of the regional population. Mitigation *shall* be designed by the City *in coordination with* the . . . Service . . . 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.'" (*Native Plant, supra*, 172 Cal.App.4th at p. 635.)

It was undisputed that the site contained special-status species. (*Native Plant, supra*, 172 Cal.App.4th at p. 639.) Rancho Cordova "[u]nquestionably" included

mitigation provisions in the project. (*Id.* at p. 640.) And there was sufficient evidence in the record for Rancho Cordova to reasonably conclude that its mitigation measures were consistent with the substantive requirements set forth in Action NR 1.7.1. (*Ibid.*) But Rancho Cordova did not coordinate with the Service in designing the project's mitigation measures. (*Id.* at pp. 640-642.) Rancho Cordova posited that its obligation to coordinate with the Service was met by consulting with the Service, i.e., by soliciting comments to the project and draft EIR, by considering those comments, and by responding to comments in the final EIR. (*Id.* at p. 641.) But, given the language in its general plan, the appellate court held it was unreasonable for Rancho Cordova to construe the words "coordination with" as meaning mere consultation. (*Ibid.*) "[W]e cannot reasonably deem this 'coordination' requirement satisfied by the mere solicitation and rejection of input from the agencies with which [Rancho Cordova] is required to coordinate the design of mitigation measures for the Project. Although our standard of review . . . is highly deferential, 'deference is not abdication.'" (*Id.* at p. 642.)

The Conservancy is correct that the City's level of interaction thus far with the Coastal Commission was closer to consultation than coordination, as defined in *Native Plant*. The Conservancy is also correct that, like the *Native Plant* case, the lack of coordination here could be counterproductive for the City in that the Coastal Commission could ultimately refuse to issue development permits. (See *Native Plant, supra*, 172 Cal.App.4th at p. 642 [reasoning that the Service's role in deciding whether the project would obtain a federal permit at the project site explained why the general plan would require pre-approval coordination with the Service].)

But the City's LU 6.5.6 is not as clear as Rancho Cordova's NR 1.7.1. In the context of discussing the substantive requirements for mitigation, NR 1.7.1 issues a specific command to Rancho Cordova to coordinate with a specific agency ("Mitigation *shall* be designed by the City *in coordination with* the . . . Service") to accomplish a specific task (i.e., the *design* of the mitigation measures). (*Native Plant*, *supra*, 172 Cal.App.4th at p. 635.) The mitigation at issue pertained to a biological resources evaluation that had to occur "prior to project approval." (Cf. *Endangered Habitats League, Inc. v. County of Orange*, *supra*, 131 Cal.App.4th at pp. 793-796 [mitigation measures cannot be deferred to date beyond EIR certification].)

In contrast, LU 6.5.6 (entitled "**Coordination with State and Federal Agencies**") does not compel coordination with the Coastal Commission prior to approval of the Project: "Work with appropriate state and federal agencies to identify wetlands and habitats to be preserved and/or restored and those on which development will be permitted." The Coastal Commission is not mentioned in the text or in the referenced implementation actions. There is no indication in LU 6.5.6 that this "work" must be completed before the City approves the Project. Whereas coordination in *design* suggests work done together at the beginning of the process, coordination in *identification* can be more naturally construed as an ongoing process. LU 6.5.6 is vague and ambiguous — the Conservancy's position depends on inferences made after considering multiple sections of the general plan; NR 1.7.1 is more resistant to multiple interpretations as to the timing of coordination. (Cf. *Families Unafraid to Uphold Rural etc. County v. Board of Supervisors* (1998) 62 Cal.App.4th 1332, 1341 [county must comply with policy that is "fundamental . . . mandatory and anything but amorphous"].)

With that said, we acknowledge that *Native Plant* is not easily distinguished. Thus, to the extent the holding of *Native Plant* applies to this case, we reject its reasoning as incompatible with our deferential review of the City's legislative acts. After acknowledging the limits of its review (*Native Plant*, *supra*, 172

Cal.App.4th at pp. 637-638), the *Native Plant* court proceeded to fault the City for failing to give the proper interpretation to a vague term — "coordination with." But, recognizing that the general plan itself did not make clear what "coordination with" meant in practical terms, the appellate court declined to give guidance as to what Rancho Cordova needed to do to comply with the coordination requirement. "[W]e do not read this 'coordination' requirement as 'requir[ing] the City to *subordinate* itself to state and federal agencies by implementing their comments and taking their direction.' At the same time, however, we cannot reasonably deem this 'coordination' requirement satisfied by the mere solicitation and rejection of input from the agencies with which the City is required to coordinate the design of mitigation measures for the Project." (*Id.* at p. 642.) In other words, 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. (*Id.* at pp. 642-643.) Perhaps a good faith negotiation between Rancho Cordova and the Service 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 the Service prior to submitting their project to Rancho Cordova. These might be good or bad ideas. But none of them were in the general plan. And any other specific requirement the trial court might have tried to impose would likewise by necessity be designed out of whole cloth.

The same problem played out here at the trial court. The writ of mandate issued by the court prevents the City from "approving or otherwise implementing the development of the Project site unless and until [the City] fully compl[ies] with Policy LU 6.5.6 in accordance with this Court's aforementioned determination." The aforementioned determination was that "the City failed to coordinate and work with the . . . Coastal Commission in identifying which wetlands and habitats present on the Project site would be preserved, restored or developed, prior to your approval of the

Project." The court does not explain what it means, in practical terms, to coordinate and work with the Coastal Commission prior to project approval. Presumably, it is something in between consultation and capitulation. But the lack of specific guidance in the general plan indicates to us that it is unreasonable to find the City's view of LU 6.5.6 to be arbitrary. 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.

Adequacy of EIR Under CEQA

"In reviewing an agency's compliance with CEQA in the course of its legislative or quasi-legislative actions, the courts' inquiry 'shall extend only to whether there was a prejudicial abuse of discretion.' [Citation.] Such an abuse is established 'if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence.'" (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 426, fn. omitted.) "An appellate court's review of the administrative record for legal error and substantial evidence in a CEQA case, as in other mandamus cases, is the same as the trial court's: The appellate court reviews the agency's action, not the trial court's decision; in that sense appellate judicial review under CEQA is de novo." (*Id.* at p. 427.)

"CEQA requires an EIR to reflect a good faith effort at full disclosure . . . ." (*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 712.) "Before the impacts of a project can be assessed and mitigation measures considered, an EIR must describe the existing environment. It is only against this baseline that any significant environmental effects can be determined." (*County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 952.)

The Conservancy contends the City violated CEQA by refusing to identify ESHAs in the EIR; all of its sub-arguments follow from this initial premise. The Conservancy claims the City consciously avoided making this determination because it was aware that a good faith effort in that direction could short circuit aspects of the Project that it wished to include (e.g., the extension of a road through ESHA). At least as early as December 2003, the City was on notice that determining which portions of Banning Ranch were ESHAs would be an important and controversial issue. Previous studies done by other agencies had determined that Banning Ranch included critical habitat for the California gnatcatcher and San Diego fairy shrimp. The initial biological study performed by Glenn Lukos Associates, Inc., in connection with the Project application indicated that ESHAs were present at Banning Ranch. The Coastal Commission's comments on the draft EIR specifically indicated that roads proposed as part of the Project "would result in significant, unavoidable impacts to ESHA." In short, an honest, good faith effort to categorize specific Banning Ranch habitats as ESHA (or not) may have necessitated a reworking of the Project.

The City's response is that an ESHA determination is a legal determination, ultimately made by the Coastal Commission in a project like the instant one (i.e., a project not covered by the City's coastal land use plan). (Cf. *Chaparral Greens v. City of Chula Vista* (1996) 50 Cal.App.4th 1134, 1145 [no "requirement under CEQA that a public agency speculate as to or rely on proposed or draft regional plans in evaluating a project"].) All of the necessary data pertaining to biological resources and habitat at Banning Ranch is included in the EIR. The EIR describes the environmental impacts of the Project and mitigation measures designed to address those impacts. The Conservancy's complaint concerns the City's reluctance to draw a legal conclusion based on a review of the data, not the failure to include data or scientific analysis that would enable a decisionmaker to classify a habitat as ESHA.

The City's position is supported by our opinion in *Banning Ranch I, supra*, 211 Cal.App.4th at pages 1233-1234, which rejected a similar contention by the Conservancy pertaining to a separate project. In *Banning Ranch I*, the Conservancy argued that "the EIR failed to disclose the park project's inconsistency with the Coastal Act." (*Id.* at p. 1233.) The supposed inconsistency was that the EIR "stated no area of [the] project had been designated an ESHA, according to the City's coastal land use plan. It acknowledged two areas had 'the potential to be considered . . . ESHA[s] by the California Coastal Commission.'" (*Id.* at pp. 1233-1234.) The Conservancy claimed that "the Coastal Commission is 'highly likely' to designate the two areas as ESHAs, and will reject the attempted mitigation." (*Id.* at p. 1234.) This court's response was that it "remain[ed] to be seen" whether the Coastal Commission would designate the contested habitats as ESHAs. (*Ibid.*) "There are no inconsistencies at the moment; the EIR adequately flagged potential inconsistencies and addressed them in advance through proposed mitigation." (*Ibid.*)

Similarly, in the instant case, the City found the Project to be consistent with the policies of the Coastal Act. The main differences between the cases are that the City was not obligated to apply its coastal land use plan to Banning Ranch (unlike the park project at issue in *Banning Ranch I*) and the City opted not to speculate about *potential* ESHA at Banning Ranch in this case. Instead, the City simply deferred ESHA determinations to the Coastal Commission. This difference between the cases is unimportant for our purposes. The important point is that the City adequately flagged potential inconsistencies with the Coastal Act by emphasizing (1) that the Project was outside the scope of its coastal land use plan, and (2) that the Coastal Commission would determine whether ESHAs were affected by the Project. Clearly, it "remains to be seen" (*Banning Ranch I, supra*, 211 Cal.App.4th at p. 1234) whether the Coastal Commission will issue a development permit for the Project as currently constituted. CEQA does not

require the City to prognosticate as to the likelihood of ESHA determinations and coastal development permit approval.

DISPOSITION

The judgment is reversed. The court shall set aside the peremptory writ of mandate issued on January 15, 2014, and enter a new judgment denying relief to the Conservancy. The City shall recover its costs on appeal.

IKOLA, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

THOMPSON, J.

PROOF OF SERVICE

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

STATE OF CALIFORNIA)
) ss.
COUNTY OF ORANGE)

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

On June 29, 2015, I served the foregoing document described as ***PETITION FOR REVIEW*** on the parties shown on the **Attached Service List** as follows:

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

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

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

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

Executed on June 29, 2015, in Laguna Hills, California.

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

Carmen Ortiz

SERVICE LIST

for:

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

Fourth District Court of Appeal Case No. G049691

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

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