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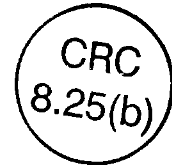

BANNING RANCH CONSERVANCY,
Plaintiff and Appellant,

v.

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

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

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

REPLY BRIEF ON THE MERITS

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INTRODUCTION

Petitioner and Appellant Banning Ranch Conservancy ("Conservancy") respectfully submits the following in reply to the Defendants' and Real Parties in Interest's joint *Answer Brief on the Merits* (AB). As for any matter not specifically addressed herein, the Conservancy will rely on the arguments and points and authorities in its *Opening Brief on the Merits* (OB). The effort to keep this reply concise should not be interpreted as a lack of confidence in the merits of the matters set out in the Conservancy's OB and *Petition for Review* and not expressly addressed herein. (See, *People v. Hill* (1992) 3 Cal.4th 959, 995, fn. 3 [disapproving "the brief and unsupported suggestion to the contrary in *People v. Adams* (1983) 143 Cal.App.3d 970, 992"] (overruled on other grounds in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13).)

MACRO CRITIQUE OF THE AB

Two foundational problems plague virtually all of the AB's arguments. The first problem is they are largely based on factual assertions the record shows are false. The second problem is the AB fails to acknowledge that the California Environmental Quality Act (Public Resources Code §§ 21000, *et seq.*: "CEQA"), the Guidelines for Implementation of CEQA (Title 14, Cal. Code of Regs., §§ 15000, *et seq.*: "CEQA Guidelines"), the California Planning and Zoning Law Code (Gov. Code §§ 65000, *et seq.*), and the California Coastal Act of 1976 (Pub. Resources Code § 30000, *et seq.*), all placed obligations on the City that it simply ignored. Once these two problems become salient, the AB's major arguments largely crumble, leaving minor claims and quibbles to address.

A. The AB Continually Misrepresents the Facts

> *Facts are stubborn things; and whatever may be our wishes, our inclinations, or the dictates of our passions, they cannot alter the states of facts and evidence.*
>
> – John Adams, December 4, 1770

As the late Daniel Patrick Moynihan said, "Everyone is entitled to his own opinion, but not his own facts." Given how often the City repeats it, the primary opinion the City most wishes were fact is that it "met several times" with Coastal Commission staff while processing of the Project's development approvals. (AB pp. 6, 26.) However, when one looks at the cites it again and

again proffers to support this claim, they tell a different story. AR 12297-12298 is a 2012 letter from the Conservancy's executive director *informing* the City that Coastal Commission staff had toured Banning Ranch. AR 14141 is a Coastal Commission staff document showing a future meeting with City staff and notes that the City has had "No recent contacts with [Commission] staff." AR 14151 is a City "EIR Update" noting that night lighting "appears to be the key concern of [Coastal Commission] staff." And finally, AR 16058 is an email from the Coastal Commission to the Conservancy's president noting Commission staff had met with "Banning Ranch reps" – not the City – "and advised them that we were not satisfied by the response to our comments in the the [draft] EIR." Page 26 of the AB repeats these cites and adds several more to them. However, upon reviewing those cites one learns they pertain to the United State Army Corps of Engineers and Fish and Wildlife Service. In sum, the evidence the AB cites to demonstrate "several meetings" with Coastal Commission staff fails to prove any meetings.

Similarly, the AB claims the EIR "relied on" the vanishing 2008 Lukos Report and that it also "references the report repeatedly." (AB pp. 9, 40.) However, upon reviewing the cites the AB lists to support this claim one sees those cites are actually to other studies by Lukos and not the missing 2008 Lukos Report.

B. The AB Fails to Address State Laws the City Ignored

Like "Sherlock Holmes' 'dog in the night-time' which tellingly failed to bark" [*Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1380], the AB's complete silence on subdivision (b) of Public Resources Code section 21081.6 is telling. After the Conservancy's *Petition for Review* identified it [p.4] and raised it [p. 34], and the OB discussed it [pp. 55-56], the AB simply ignores it – just as the City and real parties did in their joint *Answer to Petition for Writ of Mandate*. Thus, it appears they concede the point that General Plan Policy LU 6.5.6 was a CEQA mitigation measure the City incorporated into the General Plan update's EIR "that most directly affect implementation of the proposed project, and would further guarantee that project impacts to land use and planning would remain ***less than significant***." [AR 10:32164; emphasis in original] and as such is a mitigation measure that must be "fully enforceable." (Pub. Resources Code § 21081.6, subd. (b).)

With regard to the Coastal Act, the AB makes no mention of (Public Resources Code section 30009, where the Legislature decrees the Coastal Act must "be liberally construed to accomplish its purposes and objectives." Neither does it mention Public Resources Code section 30003, in which the Legislature commanded *all* public agencies – which would, of course, include the City – to comply with the Coastal Act.

CLOSE CRITIQUE OF THE AB

The following corrects misstatements of facts in the AB and addresses the specific claims and arguments raised in it. For clarity, the numbering corresponds to the relevant section in the AB.

I. Response to the AB's Planning and Zoning Law Arguments

A. Standard of Review: *Yamaha* Shows "Deference Is Not Abdication"

The AB string-cites [pp. 11-14] 20 decisions, none from this Court, as support for the blanket assertion that courts "universally" grant deference to "[a] city's determination that a land-use decision is consistent with its own general plan... ." In a footnote at page 14, it claims the Conservancy "conceded this standard applied." Not so. Citing *California Native Plant Society v. City of Rancho Cordova* (2009) 172 Cal.App.4th 603, 642 ["*CNPS*"], the Conservancy also noted that "[d]eference, however, is not abdication," and that "Courts will not defer to an unreasonable interpretation of a general plan." (1 AA 174.) Citing *Lesher Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531, 543, and *People v. Park* (2013) 56 Cal.4th 782, 796 ("*Park*"), the Conservancy further clarified that the relevant focus was the adopting body's intent. (4 AA 709-710.)

Responding to the Conservancy's citation of *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 10-12 ("*Yamaha*"), in support

of the proposition that the standard of judicial review applicable to a city's interpretation of its general plan is "fundamentally situational," the AB claims [pp. 14-17] *Yamaha* cited three "factors as relevant to determining the degree of deference" owed an agency's interpretation of its own regulations and then claims those "factors confirm that deference is appropriate here." The AB's bulleted three "factors" misrepresents what *Yahama* said. With regard to the AB's third bulleted factor – "Whether the law is one that the agency is charged with enforcing, rather than some other general law" – *Yamaha* held that formulation was not dispositive, noting the court of appeal had adopted that same formulation but that it was "apt to lead a court (as it led here) to abdicate a quintessential judicial duty--applying its independent judgment de novo to the merits of the legal issue before it."

> Courts must, in short, independently judge the text of the statute, taking into account and respecting the agency's interpretation of its meaning, of course, whether embodied in a formal rule or less formal representation. Where the meaning and legal effect of a statute is the issue, an agency's interpretation is one among several tools available to the court. Depending on the context, it may be helpful, enlightening, even convincing. It may sometimes be of little worth.

(*Id.*, at pp. 7-8.) *Yamaha* then concluded, "Because an interpretation is an agency's *legal opinion*, however "expert," rather than the exercise of delegated legislative power to make law, it commands a commensurately lesser degree of judicial deference." (*Id.*, at p. 11.)

Just as the court of appeal in *Yahama* "failed to distinguish between two classes of rules–quasi-legislative and interpretive–that, because of their differing legal sources, command significantly different degrees of deference by the courts," the AB missed that the Conservancy's challenge is not to the City's right under its constitutional police powers and CEQA to enact LU 6.5.6 but instead to the view that the City's interpretations of LU 6.5.6 and Public Resources Code sections 21081.6, 30240 and 30336 carry the judicial day.

The AB claims [pp. 17-19] that "the voter's adoption of the City's 2006 General Plan Update does not alter the traditional, deferential standard of review" because the voters approved it after the City Council drafted it. To the contrary, "the intent of the electorate would prevail over the intent of the drafters if there were a reliable basis for determining that the two were in conflict." (*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1212.) Equally misguided is the AB's attempt to distinguish *Park*, *Lesher* and *Arntz v. Superior Court* (2010) 187 Cal.App.4th 1082, because in those cases voters' intent could be gleaned from ballot materials whereas the record here "contains no such evidence" of the voters' intent. As the Conservancy extensively documented in its OB [pp. 27-32; 56-60], the General Plan update's EIR ("GP-EIR") repeatedly assured the public that mitigation measures incorporated into the General Plan such as LU 6.5.6 would "ensure" that environmental impacts caused by the development of Banning Ranch would be reduced to a level of

insignificance because the City was being required to "work with appropriate" federal and state agencies. The City's preparation of the GP-EIR was not a superfluous act; state law required it as a prerequisite to the City placing the General Plan before the voters – and it was relevant to how they voted:

> Requiring CEQA compliance before placing a city-council-generated initiative on the ballot does no more than ensure that the electorate is informed of any potential substantial impact the measure could have on the environment. ... initiative measures generated and placed on the ballot by a public agency are not exempt from CEQA. Before placing any such measure that may lead to voter approval of a project on the ballot, the agency must comply with CEQA. If compliance leads to the preparation and consideration of an EIR, when that process is final the information contained in the EIR must be made available to the electorate for its consideration prior to the election.

(*Friends of Sierra Madre v. City of Sierra Madre* (2001) 25 Cal.4th 165, 190-191, fn. 16.)

"Calling it "squarely on point," the AB [pp. 19-20] knocks the Conservancy for ignoring *San Francisco Tomorrow v. City and County of San Francisco* (2014) 229 Cal.App.4th 498. While the case may be on point (*i.e.*, the appellants argued the court owed deference to the intent of the voters), the Conservancy submits it was wrongly decided owing to the court ignoring its own guidance in *Arntz v. Superior Court, supra,* 187 Cal.App.4th at p. 1092, and this Court's *Legislature v. Eu* (1991) 54 Ca.3d 492, 505, approvingly cited therein; ignored *Yamaha*; ignored *Park*; and relegated *Lesher* to a parenthetic pin cite. This perhaps explains why the Opinion is the

only published decision since to rely on it.

The AB tries [pp. 20-22] to minimize case law holding a city abuses its discretion if it approves a project that is inconsistent with even a single policy requirement in its general plan by pointing out that "perfect conformity ... is impossible." Nevertheless, to its credit it concedes that "an overall consistency with general plan policies 'cannot overcome 'specific, mandatory and fundamental inconsistencies' with plan policies'" and further observes "there may be instances in which a general plan includes a fundamental land-use polity, cast in mandatory and specific terms, with which the project cannot be reconciled." The Conservancy appreciates the concession.

B. <u>The City Failed to Proceed in the Manner Required by Law</u>

The AB proffers three reasons for rejecting the plain meaning of LU 6.5.6. First, it claims [p. 24] "no evidence" exists showing that LU 6.5.6 "was aimed at determining what constitutes 'ESHA' under the Coastal Act." Given everyone agrees the entirety of Banning Ranch lies within the Coastal Zone jurisdiction of the Coastal Commission, that the Coastal Act mandates the preservation of ESHA in the Coastal Zone, and that LU 6.5.6 expressly directs the City to "work with appropriate state [] agencies to identify habitats to be preserved," the Commission is obviously the "appropriate" agency the City needs to "work with" "to identify" ESHA, and the claim is implausible.

Second, the AB implies [pp. 24-25] there is some significance in

LU 6.5.6 not citing in fine print below it an "Implementation Measure" pertaining to the Coastal Commission, quoting the Court of Appeal's comment that it is "conspicuous by its absence." However, the Implementation Plan itself explains that its measures in no way limit the General Plan's policies: "implementation programs ... do not reiterate the [General Plan's] policies' specific standards or requirements that must be addressed in implementation... *Consequently, in implementing the programs it is necessary to review the [General] Plan's policies to assure they are fully addressed.*" (3 AA 670; emphasis added.) In the Implementation Plan's section entitled "Interagency Coordination," it further clarifies that its list of programs is not intended to be exhaustive. (3 AA 683 ["The following summarizes many of the interagency coordination procedures..."].) The omission is of no import.

Third, the AB claims [pp. 25-33] LU 6.5.6 "contains no time limit" committing the City to work with any agency before Project approval and in any event is not a "mandatory, fundamental, and specific" General Plan policy. However, in addressing the Banning Ranch "district," the Land Use Element of the General Plan notes that a "preliminary field evaluation" already identified 165 acres of habitat that "are likely to require a resource permit from federal and/or state agencies prior to development." (AR 10:26301-26304.) And, in its "Policy Overview," it notes that intensities specified for the fall-back residential village alternative are maximums subject to what will be

"required to satisfy state and federal environmental regulatory requirements" (*Id.* at 10:26304.) The Land Use Element then sets out specific "policies"[1] pertaining to the development of a residential community on Banning Ranch. Policy LU 6.4.10 requires any development of Banning Ranch to consider "preservation of wetlands and other habitats," and Strategy LU 6.4.11 "[r]equire[s] the preparation of a master development or specific plan for any development on the Banning Ranch *specifying lands to be developed, preserved, and restored.*" (AR 10:26309; emphasis added.) Finally, Strategy LU 6.5.6 mandates that the City "[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." (*Id.*; emphasis added.)

Reading each statement and policy "in light of the overall scheme," the intent here is more than obvious; it is temporally compelled. Strategy LU 6.5.6 calls for a process of subtraction whereby the City must first "work with" regulatory agencies to "identify wetlands and habitats to be preserved and/or restored" in order to "identify" where "development will be [future tense] permitted." Logically, then, the identification of lands off-limits to

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[1] Notably, the "policies" in the General Plan are not the loosey-goosey "goals and philosophy" that "do not state specific mandates or prohibitions" that the court dealt with in *Friends of Lagoon Valley v. City of Vacaville* (2007) 154 Cal.App.4th 807, 817. To the contrary, the City stated that its "General Plan policies are more than 'statements of aspiration,'" and the General Plan defines policies as "[s]tatements guiding action and implying clear commitment found within each element of the general plan." (AR 10:26102 & 26948.)

development must occur before RPI is able to prepare a plan "specifying lands to be [future tense] developed, preserved, and restored." Thus, logic and the plain meaning of words refutes the AB's claim that Strategy LU 6.5.6 did not commit the City to "work with" the Coastal Commission "to identify" wetlands and habitats *before* Project approval. The trial court concurred:

> 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.
>
> * * *
>
> [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.)

Moreover, when it comes to the Coastal Commission's "permitting process," the AB's assumption that this process was supposed to occur *after* the City approved the development of Banning Ranch is simply incorrect. The

proper process was for the City to stop stalling on its statutory duty and "work with" the Coastal Commission *first* on securing a certified Local Coastal Program (LCP) and after completing that "process" the City could then process a coastal development permit for the Project under the Coastal Act:

> There is no statutory or regulatory authority for the kind of coastal development permit review process described in the DEIR. Rather, the process the DEIR describes is more akin to requesting approval of a Local Coastal Program, not a coastal development permit. ... Given the scope and complexity of the proposed project, *Commission staff would recommend that the project be considered in the context of a Local Coastal Program review, submitted by the City.* This would allow for consideration of significant threshold issues at the planning level, such as the kind, location and intensity of development that would be appropriate for the site given the priorities established under the Coastal Act and the constraints present on the site (e.g. biological resources, geologic hazards, etc.). Furthermore, we do not endorse the 'master CDP' process described in the DEIR, and believe it would be unworkable. ... **Thus, references to a 'master CDP' process should be removed from the DEIR.**

(AR 3:910-911; emphasis in original, italics added.) Notably, almost a year and a half later, the Coastal Commission reiterated this, informing the real parties that "based upon the information submitted to date, it appears that much of the site would constitute ESHA" and advising them that their Project would be "better served" by the City *first* complying with the Commission's permitting process:

> 6. LUP/LCP Planning. In past letters, we have advised the applicant that the proposed project would be better served through processing an LUP amendment / LCP.

> However, the applicant has asserted that the City of Newport Beach and/or Orange County do not wish or are unable to perform land use planning for the site. Please submit a letter from those agencies to support this assertion.

(6 AA 1404-1406.) Thus, had the City done as the Coastal Commission directed and allowed the Project to be "considered in the context of a [LCP] review," that "permitting process" would have, in fact, occurred *before* the City approved the Project and the City would have complied with LU 6.5.6 by working with the Commission "to identify" ESHA "in the context of a [LCP] review."

As for the AB claiming LU 6.5.6 is not a "mandatory, fundamental, and specific" General Plan policy because the Court of Appeal found the term "work with" "simply too vague on its face to impose a mandatory requirement on the City," other courts would beg to differ. For example, in another CEQA case, *North Coast Rivers Alliance v. Marin Municipal Water Dist. Bd. of Directors* (2013) 216 Cal.App.4th 614, petitioners challenging the approval of a desalination plant claimed a mitigation measure like LU 6.5.6 directing the water district to "work with" others failed to comply with CEQA. The trial court agreed, finding the measure identified in the EIR "which required the District to 'work with a landscape architect and the cities of San Rafael and Larkspur' to develop and implement a landscaping plan" was deficient because "it established no guidelines or criteria" and was "vague." (*Id.* at p. 629.) The

appellate court rejected this and reversed, finding "the mitigation measure does not fail for indefiniteness" since the district had committed itself to "work with" the other cities. (*Id.* at p. 629.)

Similarly, in *Fernandez v. California Dept. of Pesticide Regulation* (2008) 164 Cal.App.4th 1214, the court addressed whether the Department of Pesticide Regulation (DPR) violated a statute calling for another state agency to "participate in the development of any regulations" DPR adopted. Applying principles of statutory construction and *Yamaha's* caution that an agency's interpretation of a statute is simply its legal opinion, the court concluded the statutory language was clear and DPR "must work with" the Office of Environmental Health Hazard Assessment's recommendations during DPR's "development process" of its regulations. (*Id.* at pp. 1228-1236.)

Finally, when the Legislature drafts a statute directing one government agency to "work with" another agency "to identify" something is "simply, that statute is not "too vague on its face" as the Opinion concluded. For example, subdivision (b) of Health & Safety Code section 121358 directs the California Department of Health Services (DHS) to "work with local health jurisdictions to identify a detention site for recalcitrant tuberculosis patients appropriate for each local health jurisdiction in the state." In addressing this statute, the court in *Souvannarath v. Hadden* (2002) 95 Cal.App.4th 1115, 1128, had no problem finding its wording clear enough to impose "a duty upon DHS to

work with the local health officers to identify proper placements for noncompliant TB patients."

Every court day in this state hundreds of judges direct thousands of lawyers to "work with" each other to do things: resolve discovery disputes, hammer out visitation schedules, stipulate to briefing schedules, etc. While the Opinion suggests those judges are being "vague and ambiguous," it is doubtful these lawyers instructed to "work with" each other to accomplish something would agree. (And if they did, heaven help our courts!)

Contrary to what the AB claims [p. 28], the Conservancy does not want the Court to rewrite the plain wording of LU 6.5.6. The record shows the Conservancy's objective has always been to compel the City to comply with its clear mandate as a "fully enforceable" mitigation measure the City incorporated into its General Plan as a mitigation measure in accordance with Public Resources Code section 21081.6. (AR 10:23164-23177.) "Having placed these conditions on the [] project, the city cannot simply ignore them. Mitigating conditions are not mere expressions of hope." (*Lincoln Place Tenants Assn. v. City of Los Angeles* (2005) 130 Cal.App.4th 1491, 1508.)

> CEQA requires the agency to find, based on substantial evidence, that the mitigation measures are "required in, or incorporated into, the project" ... In addition, the agency "shall provide that measures to mitigate or avoid significant effects on the environment are fully enforceable through permit conditions, agreements, or other measures" (§ 21081.6, subd. (b)) ... *The purpose of these requirements is to ensure that feasible*

mitigation measures will actually be implemented as a condition of development, and not merely adopted and then neglected or disregarded.

(*Federation of Hillside & Canyon Associations v. City of Los Angeles* (2000) 83 Cal.App.4th 1252, 1260-1261; italics in original.)

In addressing *CNPS*, the AB makes two arguments.[2] First, it tries [pp. 31-33] to distinguish the general plan policy at issue in *CNPS* from LU 6.5.6 by noting that, while the former used the verb "coordinate," LU 6.5.6 uses the noun "coordination" in the heading plus the phrase "work with." In doing so, it glosses over the *CNPS* court's observation that "coordination means negotiating with others in order to *work together* effectively" and ignores the infinitive verb "to identify" in LU 6.5.6's immediately following "work with." (*CNPS* at p. 641; emphasis added.)

The AB's second *CNPS*-based argument [pp. 33-36] claims *CNPS* is bad law; an "outlier" inviting judicial micromanagement of land use policy. The argument only works if one ignores the fact that LU 6.5.6 is a CEQA mitigation measure and accepts the Opinion's view that LU 6.5.6's "work with appropriate federal and state agencies to identify wetlands and habitats" is "an amorphous policy." As noted above, what with other courts having no

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[2] The Conservancy appreciates the AB's admission that the *CNPS* court correctly followed this Court's direction in *Coalition of Concerned Communities v. City of Los Angeles* (2004) 34 Cal.4th 733, 737, that "courts must look to the plain language of the law, giving the words their ordinary meaning within their statutory context."

problem finding "work with" actually requires parties to do something, it is the Opinion that is the outlier. Judicial interpretations of statutes, regulations, general plan policies and/or CEQA mitigation measures that result in compelling a public agency's compliance with them are not "micromanagement" but courts simply doing what they are supposed to do.

II. Responses to AB's CEQA Arguments

A. The Standard of Review

The AB [pp. 36-39] corroborates the OB's discussion of the CEQA standard of review and concedes the correctness of the OB's citation of this Court's holding in *Sierra Club v. State Bd. Of Forestry* (1994) 7 Cal.4th 1215, 1236, that, "an agency violates CEQA when it fails to gather information based on the erroneous legal position that it lacked authority to do so." However, the AB then claims the standard of review in this appeal is not the "de novo" first prong enunciated in *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435 ["improper procedure"] but the deferential "substantial evidence" second prong ["dispute over facts"]. The AB claims this is because the Conservancy "never cites a CEQA statute or guideline establishing a [legal] duty" for the City to include in the EIR "a prediction where the [Coastal Commission] would find ESHA."

There are two problems here. First, throughout this action the

Conservancy has never argued the EIR had to make any "predictions" as to future Coastal Commission findings. In fact, the verb "predict" and noun "prediction" are found nowhere in the OB or, for that matter, in any other brief the Conservancy has filed. Nevertheless, the record shows the City repeatedly asserting this in its briefs. What the record shows is the Conservancy repeatedly arguing that the City failed to comply with CEQA and the Coastal Act by rebuffing the Coastal Commission's request that the EIR identify – like the Coastal Commission asked – the *probable* ESHA on Banning Ranch and to do so *before* the City approved the Project. (AR 3:914-915.)

Second, the Conservancy's briefs throughout this action have repeatedly cited the statutory and regulatory authority that required the City not to "predict" but to *disclose* in the EIR the *probable* ESHA on Banning Ranch. The OB devotes an entire subsection [pp. 43-47] to explaining how the City violated its duty under CEQA by refusing to identify and present to the public the acres of ESHA the City knew existed on Banning Bench. The record shows the City *knew* it had previously designated *all* of Banning Ranch as ESHA, *knew* the USFWS had designated *all* of Banning Ranch critical habitat for the California gnatcatcher and that the site hosted numerous other listed species, *knew* that "generally, habitat which supports sensitive species would be considered ESHA," and *knew* that the Coastal Commission had urged the City to revise the Project's EIR to include an ESHA analysis under the Coastal

Act and the City's CLUP, even offering to have the Commission's staff biologists review it "before the EIR is finalized." (AR 3:914.) Yet the City willfully failed to "use its best efforts to find out and disclose all that it reasonably can." (Guidelines § 15144; see also *Berkeley Keep Jets Over the Bay Com. v. Board of Port Cmrs.* (2001) 91 Cal.App.4th 1371, 1344 ["The EIR failed to acknowledge the opinions of responsible agencies and experts who cast substantial doubt on the adequacy of the EIR's analysis of this subject."].) This is classic failure to proceed in the manner required by law and make this Court's review of that failure de novo.

B. The City Violated CEQA By Hiding Evidence

The AB calls [pp. 39-41] the Conservancy's "accusation" that the City concealed the 2008 Lukos Report "unfair and immaterial." As a threshold matter, the City's concealment of this key information is not an accusation but a demonstrable material fact the Conservancy rightfully raises.

The AB implies there was no harm in the City making the 2008 Lukos Report vanish from its records and never mentioning it in the EIR because at one time the City had made it available to the public. This is insufficient to satisfy CEQA. (See *Laurel Heights Improvement Ass'n v. Regents of the Univ. of Cal.* (1988) 47 Cal.3d 376, 405 [holding that "'whatever is required to be considered in an EIR must be in that formal report; what any official might have known from other writings or oral presentations cannot supply what is

lacking in the report.'"].) Moreover, by admitting the 2008 Lukos Report was made available to the public, the AB concedes the City violated a CEQA procedural requirement by excluding it from the record. (See Pub. Resources Code § 21167.6, subd. (e) ["The record of proceedings shall include ... (10) Any other written materials relevant to the respondent public agency's compliance with [CEQA] including [] any drafts of any environmental documents, or portions thereof, that have been released for public review"].)

The AB tries to buttress its claim that the EIR "relied on Lukos' work" with a half dozen cites, none of which address in any way the 2008 Lukos Report. It then lists a dozen cites that it implies demonstrate "[t]here was no attempt to hide the original report; the EIR references the report repeatedly." The City and real parties probably should have thought twice about claiming this since the City provided the EIR in PDF format as searchable text, and a search of the EIR reveals that, while the EIR mentions *other* studies conducted by Glenn Lukos Associates, it never once makes mention of the 2008 Lukos Report.[3]

Reversing itself, the AB appears to concede the EIR did not mention the 2008 Lukos Report but defends the City's jettisoning of it because it used "the inapplicable CLUP" in finding ESHA throughout Banning Ranch and thus the

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[3] The "GLA 2008" citation in the EIR is not to the BTR but is instead to the other study Glenn Lukos Associates prepared for RPI's 2008 CDP: the *Draft Jurisdictional Delineations for the Newport Banning Ranch Property*. (RA 7.)

City was not going "to perpetuate a consultant's mistake." This excuse fails for multiple reasons.

First, when the City originally announced it would prepare an EIR for the Project, it informed the public that "[t]he Project site also includes areas that may be defined and regulated under the California Coastal Act (CCA) as either wetlands or environmentally sensitive habitat areas (ESHAs) and may be defined by the City of Newport Beach Coastal Land Use Plan (CLUP) as an Environmental Study Area (ESA)." (AR 5:4521.) Thus, the City started out using both the Coastal Act and the CLUP as yardsticks for the Project.

Second, since the Coastal Commission previously found the CLUP in conformance with the Coastal Act and sanctioned its use as the City's official yardstick by which to determine the presence of ESHA everywhere in the City *except* Banning Ranch, the Coastal Commission urged the City to apply the CLUP's ESHA policies in identifying the presence of ESHA on Banning Ranch. (AR 3:913.) Third, and related to the second, given the Commission's prior endorsement of the CLUP's relevance for ESHA determinations, the City had no reason not to use it in the EIR's evaluation of the Project.

Fourth, the record shows Lukos did *not* make "a consultant's mistake" by relying solely on the CLUP. As Lukos' February 2009 Revised Addendum shows, Lukos based its ESHA analysis on both the CLUP's *and* the Coastal Act's definitions of ESHA:

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

(AR 9:13801; emphasis added.)

Fifth, if, in fact, it was "a consultant's mistake" for the EIR to identify the acres of ESHA on Banning Ranch, then Lukos, the real parties' biological consultant, was not the only consultant to make that mistake: the City's biological consultant – BonTerra – made it too. The EIR's analysis of biological resources on Banning Ranch was "based on and summarizes" BonTerra's 2011 Biological Technical Report, and the report itself is included in the EIR as Appendix E. (AR 4:3558.) Three years after the 2008 Lukos Report, BonTerra found and identified ESHA throughout Banning Ranch – once again thwarting the City's leaders' desire to pave roadways over it. Consequently, the City did what it had done before and made BonTerra's ESHA discoveries disappear from public view so the public would never learn about them and the EIR could conclude that the Project was "consistent" with section 30240 of the Coastal Act. (AR 4:3674.)

The City's concealment of all ESHA identification in the EIR from public view was almost perfect except for one thing: *the City forgot to scrub*

the invisible metadata from BonTerra's report. And one tech-savy individual, himself a professional biologist, found it:

> If a reader conducts a search for the term "ESHA" within the PDF version of the current DEIR, numerous wetland polygons are highlighted within Exhibit 4.6-3c and 4.6-7c, indicating the EIR preparer's opinion regarding the limits of wetland ESHA on the project site; many of these areas are proposed for permanent impacts, which is inconsistent with the Coastal Act.

(AR 3:1516.) The Court can corroborate this[4] by opening the EIR in Adobe and typing "ESHA" into Find. When the search reaches BonTerra's maps at AR pages 4:3607 and 3643, and AR 5:6529 and 6607, red contour lines will become barely visible delineating each of the numerous ESHA polygons BonTerra found. To date, no court has ever approved such a flagrant concealment of key empirical information from the public, and the Conservancy hopes no court ever will.

Finally, the AB's claim in footnote 11 that the Conservancy never asked the City to include the 2008 Lukos Report in the record is absurd. The Conservancy repeatedly asked the City to include the real parties' massive 2008 Community Development Plan in the record, and the 2008 Lukos Report was a part of it. (RA 7-9.) When the City's lawyers refused the complete plan in the record – claiming they themselves had never seen it – the Conservancy lodged it on disk with the court and filed a hard of copy portions of the 2008

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[4] Assuming the City did not sanitize the EIR's metadata from the electronic copy of the record it lodged with the Court.

Lukos Report and another report extracted from it. (RA 1-29.)

C. The City Was Never Asked to "Speculate" About ESHA

The AB next devotes nine pages [pp. 41-49] arguing the Conservancy's CEQA claims boil down to a demand that the EIR "speculate" about the presence of ESHA on Banning Ranch. Yet it never quotes the CEQA Guideline that specifically addresses speculation, and the reason it declines to do so can be surmised from the wording of the regulation: "If, *after thorough investigation*, a lead agency finds that a particular impact is too speculative for evaluation, the agency should note its conclusion and terminate discussion of the impact." (Cal. Code Regs., tit. 14 § 15145.) The Conservancy's point is that thorough investigations were made and ESHA was identified, but then the City violated CEQA by failing to "use its best efforts to ... disclose all that it reasonable can." (Cal. Code Regs., tit. 14 § 15144; *Laurel Heights* at p. 399.)

At bottom, when it comes to deciding what CEQA requires of a lead agency's analysis and disclosure of ESHA, the AB urges this Court to affirm a variant of the so-called "Potter Stewart" test: since ESHA is difficult to define, and only the Coastal Commission will know it when it sees it, EIRs need not inform the public whether its existence is "probable" or not.[5] A fair reading of CEQA and the Coastal Act show this cannot be correct.

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[5] *Jacobellis v. United States*, 378 U.S. 184, 197 (1964).

Two minor points. The AR's claim [p. 45] that having the EIR disclose the presence of ESHA would have had no value is belied by the fact the Coastal Commission expressly urged the City to revise the EIR to include determinations of probable ESHA. (AR 3:914-915.) The AB's claim [p. 47] that the General Plan "calls for" the extension of Bluff Road across the ESHA on Banning Ranch is not supported by the record cites following the claim; the General Plan instead shows Bluff Road would curve away from the ESHA and connect either to 17th Street or Whittier Avenue. (AR 10:23987, 10:36564.)

III. Responses to AB's Coastal Act Arguments

A. The Opinion Conflicts with *Douda* and the Coastal Act[6]

Four years after CEQA became law, this Court declared, "It is of course, too late to argue for a grudging, miserly reading of CEQA." (*Bozung v. Local Agency Formation Com.* (1975) 13 Cal.3d 263, 274.) It reaffirmed this in *Laurel Heights, supra,* 47 Cal.3d 376, at p. 390-392. As can be seen, the AB's discussion of *Douda* [pp. 48-51] is founded on just such a grudging, miserly reading of the Coastal Act. However, given the express legislative findings and declarations in the Coastal Act, the Conservancy submits it

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[6] The AB's quibble that *Douda* was not raised below is irrelevant. *Douda* and its expansive interpretation of the Coastal Act was never at issue until the Opinion announced for the first time that ESHA determinations are the sole province of the Coastal Commission. Regardless, Rule 8.516(b)(1) of the California Rules of Court allows this Court to decide any issues that are raised or fairly included in the petition for review or answer. (*People v. Alice* (2007) 41 Cal.4th 668, 677.)

became "too late to argue for a grudging, miserly reading of [it]" and its protection of ESHA as soon as the Legislature enacted it in 1976.

The Legislature decreed that the Coastal Act must "be liberally construed to accomplish its purposes and objectives" and commanded *all* public agencies (even federal agencies to the extent lawfully allowed) to comply with it. (Pub. Resources Code §§ 30003, 30009; see *Charles A. Pratt Construction Co., Inc. v. California Coastal Com.* (2008) 162 Cal.App.4th 1068, 1075 ["In fact, a fundamental purpose of the Coastal Act is to ensure that state policies prevail over the concerns of local government."].) "The Coastal Act expressly recognizes the need to 'rely heavily' on local government '[t]o achieve maximum responsiveness to local conditions, accountability, and public accessibility . . . .' (Pub. Resources Code, § 30004, subd. (a).)" (*Pacific Palisades Bowl Mobile Estates, LLC v. City of Los Angeles* (2012) 55 Cal.4th 783, 794.) The relevant command here is Public Resources Code section 30240:

> (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 the continuance of those habitat and recreation areas.

The AB would have courts create a carve-out and exempt bad-actor cities who have failed to obtain a certified Local Coastal Program (LCP) from following the Legislature's command that all public agencies comply with the Coastal Act. Such a grudging and miserly reading of the Coastal Act is untenable.

B. Public Resources Code Section 30336 Is Relevant

The Conservancy commends the City and real parties for finally abandoning their claim, raised at both the trial court and court of appeal, that Public Resources Code section 30335.1 barred the City from complying with LU 6.5.6. (5 AA 1301-1303.) As for the AB's claim that the City did not violate Public Resources Code section 30336, the claim is refuted by the facts in the record and the clear and unambiguous language of that section.

CONCLUSION

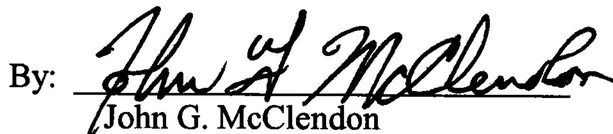
Based on the foregoing and as more fully set forth in the Conservancy's *Opening Brief on the Merits* and *Petition for Review*, the decision of the Court of Appeal should be reversed.

Dated: April 4, 2016 Respectfully submitted,

LEIBOLD MCCLENDON & MANN, P.C.

CERTIFICATION OF WORD COUNT:

In accordance with California Rule of Court, Rule 8.204(d)(1), I certify that this *Reply Brief on the Merits* contains 6,851 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: 
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[Code Civ. Pro. § 1013a; revised 5/1/88]

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I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 9841 Irvine Center Drive, Suite 230, Irvine, California 92618.

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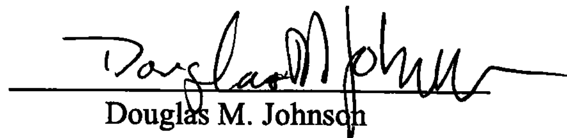

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