[See fee exemption, Gov. Code § 6103]

Case No. S227473

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

BANNING RANCH CONSERVANCY,

Plaintiff and Appellant,

v.

CITY OF NEWPORT BEACH, et al.,

Defendants and Appellants,

NEWPORT BANNING RANCH LLC, et al.,

Real Parties in Interest and Appellants.

LEAGUE OF CALIFORNIA CITIES' AND CALIFORNIA STATE ASSOCIATION OF COUNTIES' APPLICATION FOR LEAVE TO FILE AN AMICI BRIEF; AMICI CURIAE BRIEF IN SUPPORT OF DEFENDANTS AND APPELLANTS CITY OF NEWPORT BEACH ET AL.

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

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APPLICATION FOR LEAVE TO FILE AN AMICI BRIEF IN SUPPORT OF REAL PARTY IN INTEREST

Pursuant to Rule 8.200(c) of the California Rules of Court, the League of California Cities ("League") and the California State Association of Counties ("CSAC") respectfully request leave to file the accompanying amici brief in this proceeding in support of Defendants and Respondents City of Newport Beach and the City Council of the City of Newport Beach.

This brief was drafted by Margaret M. Sohagi, Nicole H. Gordon, and R. Tyson Sohagi of The Sohagi Law Group, PLC on behalf of the amici, as counsel for the League and CSAC. No party or counsel for a party in the pending case authored the proposed amici brief in whole or in part, or made any monetary contribution intended to fund its preparation.

STATEMENT OF INTEREST AS AMICI CURIAE

The League is an association of 474 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys from all regions of the state. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance. The League has served as amicus curiae in dozens of matters before this Court and the Courts of Appeal, as well as the United States Supreme Court and the Ninth Circuit Court of Appeals.

CSAC is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California

and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

The issues of fundamental importance to the League and CSAC are (1) the standard of review applicable to a city's interpretation of its General Plan, and (2) whether a city is required to identify environmentally senstive habitat areas – as defined in the California Coastal Act of 1976 (Pub. Resources Code, § 3000 et seq.) – in a review of environmental impacts under the California Environmental Quality Act ("CEQA"; Pub. Resources Code, § 21000 et seq.).

CSAC and the League combined represent more than 500 jurisidictions and have a direct interest in the outcome of the first issue, as they are the entities responsible for drafting, adopting, interpreting and implementing their own General Plans. The League's member cities and CSAC's member counties also frequently serve as "lead agencies" or "responsible agencies" under CEQA, as well as project sponsors. In both of these roles, they are tasked with compliance and implementation of CEQA. (*See*, *e.g.*, Pub. Resources Code, § 21000(a) ["All local agencies shall prepare, or cause to be prepared by contract, and certify the completion of, an environmental impact report on any project that they intend to carry out or approve which may have a significant effect on the environment."].) Whether this duty includes identification of environmentally sensitive habitat areas as defined in the California Coastal Act is thus of direct and signficant interest to the League and CSAC.

As entities that routinely deal with matters related to General Plan implementation and interpretation, as well as CEQA compliance, the League

and CSAC are well-positioned to offer insights on the questions facing the Court and believes their persective is worthy of the Court's consideration in deciding this matter.

CSAC and the League's counsel have examined the briefs on file in this case and are familiar with the issues involved and the scope of their presentation and do not seek to duplicate that briefing.

Wherefore, the League and CSAC respectfully request that the Court grant this application for leave to file the accompanying *Amici Curiae* brief.

Respectfully submitted,

DATE: June 1, 2016

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I. INTRODUCTION

Amici Curiae the League of California Cities (the "League") and the California State Association of Counties ("CSAC") support the arguments advanced by Defendants and Respondents City of Newport Beach and the City Council of the City of Newport Beach (collectively, the "City") and Real Parties in Interest Newport Banning Ranch LLC, et al.

The League and CSAC, combined, represent more than 500 jurisidictions which are charged with adopting, implementing, and interpreting their General Plans. As discussed below, cities and counties are in a unique position of balancing a complex web of General Plan goals and policies and should be afforded a highly deferential standard of review regarding the interpretation and implementation of those policies.

The League and CSAC are also greatly concerned with Banning Ranch Conservancy's ("BRC") attempt to dramatically increase the scope of environmental review under CEQA by requiring an Environmental Impact Report ("EIR") to disclose whether portions of the project site meet the legal definition of environmetally senstive habitat area ("ESHA"), as defined in the Coastal Act of 1976 (Pub. Resources Code § 30000 et seq.). The purpose of the EIR is to disclose the potentially significant impacts on the environment, i.e., "the physical conditions which exist within the area which will be affected by the proposed project." (Pub. Resources Code §§ 21002.1(a), 21060.5, 21068; Cal. Code of Regs., tit. 14 ["CEQA Guidelines"] §§ 15126.2(a), 15382.) As outlined in Section II.B, *infra*, concluding that a project must disclose future regulatory or statutory determinations would dramatically increase the scope of EIRs and place additional, unnecessary burdens on public agencies.

II. LEGAL DISCUSSION

A. The Court Should Apply the Deferential Abuse of Discretion Standard of Review to the City's General Plan Interpretation and Consistency Conclusions

The Court of Appeal's decision in *Banning Ranch Conservancy v. City of Newport Beach*, Fourth District Court of Appeal, Division Three, No. G049691, slip op. dated May 20, 2015 ("*Banning Ranch-II*"), followed a long line of cases that apply a highly deferential standard of review regarding a City's/County's interpretation of its General Plan and its associated consistency findings. As explained in *Banning Ranch-II*:

> 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. 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. It is, emphatically, not the role of the courts to micromanage these development decisions. 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.

(*Id.* at p. 18, internal quotes and citations omitted.)

BRC's petition seeks to upend this well-established standard of review by asserting that deference to the City's General Plan interpretation and consistency findings is inherently "situational" under the factors elucidated in *Yamaha Corp. of America v. State Board of Equalization* (1998) 19 Cal.4th 1, 12-15 ("*Yamaha*"). BRC also asserts that courts must apply a strict consistency determination for each individual policy in a General Plan. (BRC Opening Brief, pp. 53-55.)

As described in greater detail below, the League and CSAC do not believe the Court should deviate from the well-established line of cases

concluding that (1) public agencies are afforded substantial deference in the interpretation and implementation of their General Plans, and (2) General Plan consistency is based upon review of a project with the General Plan as a whole, rather than a review for consistency with each individual policy.

1. A Public Agency's Interpretation of Its General Plan and Its Consistency Findings are Entitled to a Highly Deferential Standard of Review

City and county land use authority stems from the California Constitution. (Cal. Const., art XI, § 7.) Public agencies all wrestle with the interpretation, implementation, and application of their policies and regulations on a daily basis. This provides city and county decision-makers with a keen understanding of the interpretation and implementation of those policies. While all cities and counties are required to adopt General Plans, they each face a unique set of factual circumstances that requires a balancing of policy directives, a fact expressly recognized under Government Code section 65300.7 [General Plans are broad policy documents designed to "accommodate local conditions and circumstances"] and Government Code section 65300.9:

> The Legislature recognizes that the capacity of California cities and counties to respond to state planning laws varies due to the legal differences between cities and counties, both charter and general law, and to differences among them in physical size and characteristics, population size and density, fiscal and administrative capabilities, land use and development issues, and human needs…*recognizing that each city and county is required to establish its own appropriate balance in the context of the local situation when allocating resources to meet these purposes.* (Emphasis added.)

General Plans incorporate a broad range of elements, including an open space and conservation element (Gov. Code §§ 65302(d) and (e), 65560), as well as other potentially competing elements, which ensure the General Plan provides for the appropriate level of residential, commercial, and resource development (Gov. Code §§ 65302(a), (b) and (c), 65580).

Given all of these factors, public agencies have been afforded a highly deferential standard of review regarding the interpretation and application of their General Plans, which are only overturned if no reasonable person could have reached the same conclusion. (See, e.g., *Save Our Peninsula Committee v. Monterey County Board of Supervisors* (2001) 87 Cal.App.4th 99, 142*; San Franciscans Upholding the Downtown Plan v. City & County of San Francisco* (2002) 102 Cal.App.4th 656, 677; *Anderson First Coalition v. City of Anderson* (2005) 130 Cal.App.4th 1173, 1192; see also Answer Brief ("AB"), Section I.A.) This deferential standard of review has also been applied to the interpretation and application of zoning ordinances. (*Santa Clarita Organization for Planning the Environment v. City of Santa Clarita* (2011) 197 Cal.App.4th 1042, 1059, 1062 ("*SCOPE*"); *Save Our Heritage Organization v. City of San Diego* (2015) 237 Cal.App.4th 163, 178; *Anderson First Coalition*, *supra*, 130 Cal.App.4th 1173, 1193.) BRC does not provide a rationale for deviating from this well settled standard of review.

While BRC generally asserts that this Court should apply the *Yamaha* factors to determine the appropriate level of deference, its brief largely pays lip service to these factors and the level of deference that should ultimately be afforded to the City of Newport Beach. (BRC Opening Brief, pp. 50-60.) The *Yamaha* factors actually support the highly deferential standard of review utilized by the Court of Appeal in *Banning*

Ranch-II. As discussed in *Yamaha,* courts consider several factors to determine the appropriate level of deference, including the following:

1. The agency's "expertise and technical knowledge, especially where the legal text to be interpreted is technical, obscure, complex, open-ended, or entwined with issues of fact, policy, and discretion."
2. If the agency authored the law in question, the courts are more likely to provide deference "since the agency is likely to be intimately familiar with regulations it authored and sensitive to the practical implications of one interpretation over another."
3. Whether the law is one that the agency is charged with enforcing.

(*Yamaha, supra,* 19 Cal.4th 1, 12.)

These factors all support the line of cases, discussed above, which conclude that a city's interpretation of its General Plan, Specific Plan, and zoning are entitled to great weight unless clearly erroneous or unauthorized.

The contents of a General Plan fall squarely within the first *Yamaha* factor. As noted above, Government Code sections 65300.7 and 65300.9 expressly recognize that a General Plan is a document uniquely tailored to the circumstances of each jurisdiction. The interpretation and application of General Plan policies is highly complex and subject to a series of factors, which may ultimately be parcel specific.

As an example, jurisdictions in Central California have historically been comprised of agricultural land uses and have adopted policies for their preservation. (Gov. Code §§ 65302(a), 65560(b)(2), 51200 et seq. [Williamson Act].) However, at the same time, these jurisdictions are legally obligated to provide housing for their residents. (Gov. Code §§ 65302(c), 65580, 65863(b), 65589.5 ["The lack of housing…is a critical

problem that threatens the economic, environmental, and social quality of life in California."].) Consequently, when implementing policies based upon these directives, cities and counties will often need to review parcel specific information, including concerns associated with the nature of surrounding land uses (e.g., are the surrounding parcels already residential), water quality, water supply, fire hazards, flood hazards, seismic hazards, utilization of pesticides, vehicle miles traveled ("VMT"), access to services, etc. Cities and counties are in a unique position to consider all of these local factors, which form the essential underlying knowledge base for interpreting and implementing their General Plans. This complex web of facts, policy, and discretion strongly supports a highly deferential standard of review for an agency's General Plan consistency conclusions and interpretation.

Under the second and third *Yamaha* factors, deference is also owed to cities and counties, which are tasked with both (1) adopting/amending a General Plan (Gov. Code §§ 65302, 65356, 65358), and (2) implementing the General Plan, and reviewing projects/entitlements for consistency therewith (Gov. Code §§ 65400, 66473.5, 66474, 65867.5, 65401, 65402). BRC implies that no deference is owed to the City because portions of its General Plan were adopted by initiative. (BRC Opening Brief, p. 58.) BRC glosses over the fact that the initiative at issue was a *City Council-sponsored* initiative measure (AR: 3100), and that the legislative body is still tasked with enforcing and implementing the General Plan. (See Gov. Code §§ 65400, 65401, 65402, 66473.5, 66474, 65867.5.) Furthermore, even if a portion of the General Plan has been adopted by initiative, it must still be interpreted as "an integrated, internally consistent, and compatible statement of policies," including those provisions not adopted by initiative.

(Gov. Code § 65300.5; *Sierra Club v. Board of Supervisors of Kern County* (1981) 126 Cal.App.3d 698, 708.) Both *Yamaha* factors support providing deference to the City's interpretation and findings.

BRC's Opening Brief also ignored the most salient case on point, which confirms that deference is provided to the City's interpretation of a General Plan, even when it is adopted by a *voter-sponsored initiative: San Francisco Tomorrow, et al. v. City and County of San Francisco* (2014) 229 Cal.App.4th 498, 515 ("*San Francisco Tomorrow*"). In concluding that the City and County of San Francisco's interpretation was entitled to great deference, the *San Francisco Tomorrow* court held such deference was warranted due to (1) well-settled principles respecting the separation of powers, (2) the fact that the Board of Supervisors was tasked with implementing and applying the General Plan, and (3) the practical difficulties associated with utilizing multiple standards of review for the same General Plan. (*Id.* at pp. 515-516.)

While BRC's Reply begrudgingly acknowledges this case, it attempts to distinguish it by asserting that the Court of Appeal ignored *Yamaha*. (Reply, p.8.) Contrary to this assertion, *San Francisco Tomorrow* is consistent with the second and third *Yamaha* factors. (*San Francisco Tomorrow, supra*, 229 Cal.App.4th 498, 515 ["the Board's role in implementing the General Plan, including its discretion to determine whether proposed projects are consistent with the General Plan is at least as important [as the voters' intent]."].)

2. A Standard of Review that Requires Perfect Conformity with Every General Plan Policy is Unworkable

BRC's Opening Brief also asserts that courts must apply a strict consistency determination for each individual policy in a General Plan, even those that are procedural in nature, such as LU 6.5.6. (Opening Brief, p. 53.) Such a stringent standard of review is inconsistent with the very nature of the General Plan and would have the practical effect of prohibiting most types of development, regardless of merit.

As discussed by this Court in *Lesher Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531, 541, the General Plan is "a statement of policy *to govern future regulations.*" (Emphasis added; see also Gov. Code § 65400.) It is not itself intended to be a regulatory document, requiring compliance with every broad planning concept described therein. As also discussed in the State Office of Planning and Research's ("OPR") General Plan Guidance, "given the long term nature of a general plan, its diagrams and text should be general enough to allow a degree of flexibility in decision-making as times change." (OPR General Plan Guidelines (2003)[1], p. 14.)

The current case is an apt example of a growing trend from petitioner groups attempting to convert General Plans from broad policy documents into detailed and inflexible regulatory documents, with no discretion to balance competing interests. The fact that the General Plan EIR identified Strategy LU-6.5.6 as a policy (among many) in assisting in the reduction of

[1] Available at: https://www.opr.ca.gov/docs/General_Plan_Guidelines_2003.pdf.

environmental impacts[2] does not mean the policy should be interpreted under a different standard of review or as a separate stand-alone policy, as suggested by BRC. (Opening Brief, pp. 55-58.) The CEQA process does not change the inherent nature of a General Plan. (CEQA Guidelines § 15146 ["the degree of specificity required in an EIR will *correspond to the degree of specificity involved in the underlying activity*…"], emphasis added; *Koster v. County of San Joaquin* (1996) 47 Cal.App.4th 29, 37 ["a first-tier EIR may contain generalized mitigation criteria and policy-level alternatives."]; CEQA Guidelines § 15097(b) ["When the project at issue is the adoption of a general plan…[t]he [mitigation] monitoring plan may consist of…[t]he annual report on general plan status required pursuant to the Government Code [§ 65400]…")[3]

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[2] Many of the substantive requirements for a General Plan mirror CEQA's analytical requirements. For example, Government Code section 65302(f)(1) requires public agencies to "appraise noise problems in the community" and to prepare noise contours which "shall be used as a guide for establishing a pattern of land uses…that minimizes the exposure of community residents to excessive noise." Consequently, it is not surprising that when public agencies prepare CEQA documents during their General Plan amendment process that many of the General Plan policies are called out as reducing environmental impacts.

[3] BRC's Opening Brief also implies that Strategy LU 6.5.6 must occur before certification of the EIR. (BRC Opening Brief, p. 27.) However, public agencies routinely rely upon actions which occur after certification of an EIR or other CEQA document. (See *Bowman v. City of Berkeley* (2004) 122 Cal.App.4th 572, 594 [Municipal Code Design Review, which occurs after approval of the CEQA document, can be used to ensure aesthetic impacts remain less than significant "… even if some people are dissatisfied with the outcome. A contrary holding that mandated redundant analysis would only produce needless delay and expense."]; see also *Citizens for a Sustainable Treasure Island v. City and County of San Francisco* (2014) 227 Cal.App.4th 1036, 1064 [upholding finding that "[c]onsultation prior to final building design would assure that the Coast Guard operations would not be affected by proposed development on Treasure Island, and therefore no impacts would occur to vessel safety on

Footnote continued on next page

Nearly every city and county that goes through the CEQA process for their General Plan has addressed arguments similar to those raised in BRC's Opening Brief. During the CEQA process, public agencies routinely have to explain why it is infeasible to adopt inflexible general plan policies. For example, as discussed in the EIR for the National City General Plan, it was infeasible to convert a policy that generally suggested avoidance of development near freeways to an absolute and inflexible prohibition on development near freeways:[4]

> While Policy HEJ-2.3 contains some exceptions for smart growth and other related developments, such exceptions are necessary to provide sufficient flexibility and to balance other competing planning and environmental considerations. While air quality is an important consideration, the City has to balance other factors and risks, such as fire risks, flood risks, geologic hazards, hazardous materials, biological impacts, aesthetic impacts, agricultural resources, hydrology and water quality, land use, noise, population and housing, public services and recreation, utilities, GHG emissions, cultural resource impacts, as well as local impacts versus regional impacts. These factors will be considered at the time specific projects are proposed. Eliminating these exceptions is considered infeasible because it would provide insufficient flexibility… Furthermore such a revision would place air quality above consideration of other resource areas and could result in increased impacts to other resources areas and would therefore not be environmentally superior (i.e. forcing development away from transportation corridors increasing GHG emissions, or forcing development into flood zones or fire zones…)… Furthermore, such a restriction without "where feasible" could potentially result in a taking of private property… Lastly, the commenter's suggested policy revision would result in a high number of non-conforming uses and could lead to an increase in urban decay and blight in those areas. Such conditions could preclude reinvestment in these areas which could prevent installation and maintenance of ventilation

Footnote continued

the Bay."].)

[4] National City General Plan Final EIR, page 5-80: http://www.nationalcityca.gov/Modules/ShowDocument.aspx?documentid=5238

systems, air filters/cleaners and other effective measures to minimize existing air quality problems and other existing environmental conditions (i.e. earthquake retrofits, etc…).

Similar responses were provided in the EIR for the Tulare County General Plan:[5]

> [F]lexibility is needed to address the peculiarities of specific parcels and specific projects as they are proposed. The County will need to balance numerous planning, environmental, and policy considerations in the General Plan based upon the specific parcels of land and projects. Mandatory language or outright bans on development in certain areas suggested in some comment letters while beneficial for one resource area, could potentially have unintended consequences for other resources areas…
>
> The prevailing theme among the commenter's suggestions is that every policy must be mandatory… In their aggregate, the commenter's suggestions potentially exceed constitutional nexus requirements to the extent that every policy is made applicable to every project… For example, a few of the commenter's suggestions request the, (1) creation of Transportation Management Associations (TMAs)…; (2) mandatory ridesharing programs …; (3) requiring construction of ancillary employee service facilities (child care, restaurants, banking facilities, and convenience markets) …; (4) requiring new development to incorporate solar PV and solar heating …, (5) requiring LEED certification…; (6) requiring a project to exceed Title 24 energy efficiency standards by 35% …, (7) requiring a transfer fee at each sale of a building …; (8) new project partial funding for off-site energy efficiency programs; (9) new project partial funding of public transportation…; (10) new project fees for area solar PV incentives…, and; (11) new project payment of GHG fees…. Implementing all of these requirements on a project-specific

[5] Tulare County Final EIR, page 5-16: http://generalplan.co.tulare.ca.us/documents/GeneralPlan2011/Chapter5.pdf and Tulare County General Plan Response to Comments After the Close of the Comment Period, page 2: http://generalplan.co.tulare.ca.us/documents/GP/002Board%20of%20Supervisors%20Materials/001BOS%20Agenda%20Items%20-%20Public%20Hearing%20August,%2028%202012/008Attachment%20G.%20Public%20Comment,%20%20Staff%20Matrix,%20and%20Responses/003Item%203.%20Resp%20to%20Cmts%20aft%20close%20CEQA%20CP/CEQA%20Response.PDF.

basis may exceed a project's contribution to an environmental impact and may make numerous projects economically infeasible.

Similar balancing also typically occurs when determining compliance with zoning restrictions. (*SCOPE, supra*, 197 Cal.App.4th 1042, 1059, 1062; *Bowman v. City of Berkeley, supra,* 122 Cal.App.4th 572, 585.)

BRC's proposed standard of review, requiring strict individual policy compliance and providing special status to policies identified during the CEQA process, would elevate environmental concerns over other important planning considerations, and would be contrary to providing "an integrated, internally consistent, and compatible statement of policies." (Gov. Code § 65300.5; *Sierra Club v. Board of Supervisors of Kern County* (1981) 126 Cal.App.3d 698, 708; see also Gov. Code § 65300.9 [noting the importance of planning for "human needs"].) As noted above, there are a number of planning factors, such as housing needs, no less important than the environmental considerations reviewed during the CEQA process. (Gov. Code §§ 65302(c), 65580, 65589.5 ["The lack of housing…is a critical problem that threatens the economic, environmental, and social quality of life in California."], 65302(a)(2) [consideration of "military readiness"].) Indeed, a General Plan inconsistency finding that results in denial of a project, may itself have repercussions inconsistent with other General Plan policies and environmental considerations, which on balance, weigh in favor of project approval. (See Gov. Code § 65589.5(b) ["It is the policy of the state that a local government not reject or make infeasible housing developments, including emergency shelters … without a thorough analysis of the economic, social, and environmental effects of [denial]."].)

BRC relies on a narrow line of cases that have found a project inconsistent with a general plan, based upon noncompliance with a single

General Plan policy, reviewed in a vacuum, which was allegedly "fundamental, mandatory, and clear." (Opening Brief, pp. 53-54; citing *Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 783 ("*EHL*") [finding a project inconsistent based upon failing to achieve a specified vehicular Level of Service standard].)

EHL, and its brethren, demonstrate the difficulties of applying such a rigid standard of review, which arguably applied the arbitrary and capricious standard of review in name only. The court in *EHL* concluded the project was inconsistent with a General Plan policy that *it* considered to be "fundamental," due in part to use of the word "shall." (*Id.* at p. 783.) However, as demonstrated in greater detail below, such a narrow focus upon the text of a single policy, interpreted in isolation, may result in project denial, which is inconsistent with a host of other competing interests and policies, of equal or greater importance.

OPR has explained that, "given the long term nature of a general plan, its diagrams and text should be general enough to allow a degree of flexibility in decision-making as times change." (OPR General Plan Guidelines, p. 14.) Indeed, planning and environmental concepts associated with vehicular circulation and transportation have dramatically changed, contemporaneously with the Court's decision in *EHL*. Municipalities should be afforded the deference to interpret the strength of such policy directives "as times change" and in the context of other important General Plan policies and planning considerations.

While vehicular LOS and other traffic metrics discussed in *EHL* have historically been an important consideration in the context of both CEQA and planning law, there has been a dramatic shift in recent years to move away from an exclusive focus on vehicular access, and the associated

LOS methodology. In 2008, shortly after *EHL*, the Legislature modified Government Code section 65302(b)(2) [AB 1358] to require cities and counties to "plan for a balanced, multimodal transportation network that meets the needs of all users of streets, roads, and highways" including "bicyclists, children, persons with disabilities, motorists, movers of commercial goods, pedestrians, users of public transportation and seniors." Similarly, Government Code section 65088.4(a), adopted in 2013 [SB 743], declares:

> It is the intent of the Legislature to balance the need for level of service standards for traffic with the need to build infill housing and mixed use commercial developments within walking distance of mass transit facilities, downtowns, and town centers and to provide greater flexibility to local governments *to balance these sometimes competing needs*. (Emphasis added.)

Public agencies should be afforded the deference to consider the weight afforded to their existing LOS policies, in the light of such changes and taking into consideration other policy considerations (e.g., other policies related to non-vehicular transportation).

Furthermore, unlike many policies in a General Plan, Newport Beach General Plan Strategy LU 6.5.6 is focused upon procedure. Under both CEQA and Planning and Zoning law, non-compliance with procedural requirements is normally insufficient to invalidate a decision in the absence of evidence of prejudice. (See *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439, 463; Gov. Code § 65010(b) ["[n]o action…by any public agency…on any matter subject to this title shall be held invalid or set aside by any court on the ground of any…matters of procedure subject to this title, unless the court finds that the error was prejudicial."]; *Rialto Citizens for Responsible Growth v. City*

of Rialto (2012) 208 Cal.App.4th 899, 928-931; *Roberson v. City of Rialto* (2014) 226 Cal.App.4th 1499, 1506-1509.)

As succinctly discussed in *Save Our Peninsula Committee v. Monterey County Board of Supervisors, supra,* 87 Cal.App.4th 99, 142, "[b]ecause policies in a general plan reflect a range of competing interests, the governmental agency must be allowed to weigh and balance the plan's policies when applying them, and it has broad discretion to construe its policies in light of the plan's purposes." (*Id.*, emphasis added.) City and County General Plans have been drafted recognizing this well-established standard of judicial review. Any action by this court to modify this standard would result in the application of General Plan policies in ways never intended by public agencies and their elected officials, and may have the practical effect of prohibiting many types of projects, regardless of their net benefits. The League and CSAC urge this Court to maintain the deferential standard of review for interpretation and application of a General Plan.

B. A Local Agency Should Not Be Responsible for Determining Another Agency's Future Legal Conclusion

1. The Court Should Not Expand CEQA to Require Lead Agencies to Make ESHA Determinations

For all of the reasons set forth in the Answer Brief, the League and CSAC agree that CEQA does not require a lead agency to determine what portions of a project site constitute ESHA as defined in the Coastal Act. (AB at pp. 41-48.) The League and CSAC emphasize the following:

- A lead agency fulfills its obligations under CEQA when it provides all reasonably available information about, and analysis of, a project's effect on the physical environment; identifies

mitigation for significant impacts; and evaluates alternatives to the project that would avoid significant impacts.

- When an agency has fulfilled these obligations, its duty under CEQA is complete. There is no requirement in CEQA to determine what constitutes ESHA, or to make any other permitting determination within the exclusive purview of another agency.
- Requiring local agencies to determine what constitutes ESHA has no practical value and merely puts extra responsibilities on the plate of local agencies with less expertise than the California Coastal Commission ("CCC").

Notably, the CCC did not demand that the City determine ESHA; it merely expressed the CCC's opinion that "it is important that the EIR process incorporate a determination of *probable* ESHA areas…" (AR: 914.) Even then, the CCC made it clear that the City should not make even a "probable" determination without first reviewing it "with Coastal Commission staff biologists." (Id.) This accurately reflects the fact that the determination of what is, and isn't, ESHA is not a black and white matter. While an inexpert agency's opinion might be helpful to a future CCC permitting decision, it is obviously not determinative, nor is it required by law, policy, or regulation.

BRC's Reply does not attempt to explain what would be gained by requiring the City to identify ESHA in the CEQA document. (Reply at p. 25.) In fact, no practical purpose is served by requiring a lead agency to make legal determinations in an EIR, particularly when such determinations are squarely and exclusively in the statutory purview of another agency, as in the case of ESHA.

2. Existing Case Law Correctly Protects Lead Agencies from Making Uncertain Legal Determinations in CEQA Documents

Though project opponents sometimes cast CEQA as the be-all and end-all of environmental laws in California, it is in fact only one of a massive suite of laws designed to protect practically every resource within the state, and beyond.[6] Local lead agencies already face enormous hurdles trying to navigate the interplay between these various laws themselves, and with CEQA. (See 2 Kostka & Zischke, *Practice Under the California Environmental Quality Act* (CEB 2016) Chap. 20 [Relationship Between CEQA and Other Statutes and Programs].)

While CEQA is a powerful tool for mitigating the significant environmental impacts of public projects, it is far from the only tool. Lead agencies should not be required to step into the shoes of other agencies

[6] In the context of biological resources alone, just one of the approximately 17 topical areas lead agencies evaluate under CEQA, these laws include: the federal Endangered Species Act of 1973 (16 U.S.C. § 1531 et seq.), the federal Migratory Bird Treaty Act (16 U.S.C. § 703 et seq.), the federal Bald and Golden Eagle Protection Act (16 U.S.C. § 668), Section 404(b) of the federal Clean Water Act (33 U.S.C. § 1344(b)), the federal Marine Mammal Protection Act of 1972 (16 U.S.C. § 1361 et seq.), the federal Nonindigenous Aquatic Nuisance Prevention and Control Act of 1990 (16 U.S.C. § 4701 et seq.), the California Endangered Species Act (Chapter 1.5 (commencing with Section 2050) of Division 3 of the Fish and Game Code), Sections 1602, 3503.5, 3511, 3513, and 4700 of the Fish and Game Code, the Oak Woodlands Conservation Act (Article 3.5 (commencing with Section 1360) of Chapter 3 of Division 2 of the Fish and Game Code), Article 3 (commencing with Section 355) of Chapter 3 of Division 1 of the Fish and Game Code, Division 5 (commencing with Section 5000) of the Fish and Game Code, Division 6 (commencing with Section 5500) of the Fish and Game Code, subdivision (e) of Section 65302 of the Government Code.

specifically tasked with managing particular resources. The Coastal Commission is just one example of such an agency.

The California Department of Fish and Wildlife ("CDFW") and the United States Fish and Wildlife Service ("the Service") are two other examples. These agencies are responsible for administering the California Endangered Species Act ("CESA") and the federal Endangered Species Act ("ESA"), respectively. In that capacity, CDFW may authorize individuals, public agencies, and others to "take" endangered species, threatened species, or candidate species through an incidental take permit. (Fish & G. Code § 2081(b).) Similarly, the Service may authorize "take" under Section 10 of the ESA. (16 U.S.C. § 1539.)

In *Association of Irritated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, 1397, appellants argued that CEQA required the lead agency to obtain an incidental take permit from CDFW and the Service for "take" of San Joaquin kit fox, a special status animal under the CESA and the federal ESA. The Court of Appeal disagreed, explaining,

> CEQA neither requires a lead agency to reach a legal conclusion regarding 'take' of an endangered species nor compels an agency to demand an applicant to obtain an incidental take permit from another agency. The finding that the [project] would not significantly impact biological resources did not limit the federal government's jurisdiction under the Endangered Species Act or impair its ability to enforce the provisions of this statute. It is not precluded from declaring that a 'take' has occurred and requiring [the applicant] to obtain an incidental take permit.
>
> (*Id.*)

That is the correct rule. Where other laws exist to protect a resource – be it threatened or endangered species, or environmentally sensitive habitat – the project applicant will have the responsibility of complying with such laws. In such cases, no purpose is served by requiring the lead

CEQA agency to make a legal determination relevant only to some other law, especially a law that is interpreted and enforced by a separate and independent legal agency.

This Court is already aware of how difficult those determinations can be. In *Center for Biological Diversity v. California Dept. of Fish and Wildlife* (2015) 62 Cal.4th 204, 236, this Court explained that it "consider[s] an agency's interpretation of statutes and regulations in light of the circumstances, giving greater weight where the interpretation concerns technical and complex matters within the scope of the agency's expertise." (*Id.*, citing *Yamaha, supra,* 19 Cal.4th 1, 12.) Even then, however, this Court disagreed with CDFW's interpretation. (*Id.*) How, then, can a local agency preparing a CEQA document be expected to guess how a permitting agency with superior expertise will interpret its own statutes and regulations in a particular circumstance? It cannot, and requiring it do so in the context of the Coastal Act or any other similar law would do nothing more than create an opportunity for misinterpretation and misapplication.

This is true whenever a future approval will be made by an agency other than the lead agency. That is why the court in *Chaparral Greens v. City of Chula Vista* (1996) 50 Cal.App.4th 1134, 1145 determined that, though it may have been advisable to do so, the lead agency was not required to consider the impacts of a project on regional goals for the preservation of multiple species, as reflected in a draft Multiple Species Conservation Program and draft Natural Community Conservation Planning under development during the lead agency's CEQA review. "[T]here is no express legislative or regulatory requirement under CEQA that a public agency speculate as to or rely on proposed or draft regional plans in evaluating a project." (*Id.*) Thus, the *Chaparral Greens* court found that so

long as the lead agency discusses the significant environmental impacts of the project and sets forth required findings about whether those impacts are mitigatable or are supported by overriding considerations, it complies with CEQA. (*Id.* at 1146.)

Similarly, the *Banning Ranch Conservancy v. City of Newport Beach* (2012) 211 Cal.App.4th 1209, 1234 court determined that EIRs need not make determinations about future permitting that "remains to be seen."

As the Answer Brief discusses in detail, the City's EIR adequately analyzed impacts to biological resources at the project site. (AB, p. 42.) Nothing more is required by CEQA. This Court should decline BRC's invitation to expand CEQA's requirements to include legal determinations that add nothing to the analysis of physical environmental impacts.

3. Requiring an Agency to Identify ESHA, or Even "Probable ESHA", Would Require Courts to Review that Determination De Novo without the Benefit of CCC Expertise

Almost any determination an agency makes in an EIR can, and frequently will, be subject to challenge. If EIRs must contain a determination of ESHA, or even "probable ESHA", project opponents will have one more CEQA target. But the determination of ESHA or "probable ESHA" is different from other determinations a lead agency must make in an EIR, such as the determination of whether a particular impact is significant. The determination of whether an environmental impact is significant is based on substantial evidence and is subject to "[t]he highly deferential substantial evidence standard of review." (*California Native Plant Soc. v. City of Santa Cruz* (2009) 177 Cal.App.4th 957, 984-985 [quoting *Western States Petroleum Assn. v. Super. Ct.* (1995) 9 Cal.4th 559,

572].) This standard applies "to conclusions, findings, and determinations, and to challenges to the scope of an EIR's analysis of a topic, the methodology used for studying an impact, and the reliability or accuracy of the data upon which the EIR relied because these types of challenges involve factual questions." (*City of Long Beach v. Los Angeles Unified School Dist.* (2009) 176 Cal.App.4th 889, 898; see *Santa Monica Baykeeper v. City of Malibu* (2011) 193 Cal.App.4th 1538, 1546 [same].) Under this substantial evidence test, the court does not rule on the correctness of an EIR's conclusions, but only on its sufficiency as an informational document. (*Save Cuyama Valley v. County of Santa Barbara* (2013) 213 Cal.App.4th 1059, 1066-1067.)

Since ESHA is a legal determination and not a factual one, a challenge to a local lead agency's identification of a particular habitat as ESHA, or not ESHA, would be reviewed de novo. (*Duncan v. Dept. of Personnel Admin.* (2000) 77 Cal.App.4th 1166, 1174 ["[W]e review questions of law de novo."].) Under this standard, the court would be asked to evaluate whether the lead agency's legal determination was accurate. The obvious difficulty in this scenario is that, in most cases, a reviewing court's decision would not be informed by the CCC's expert interpretation of the Coastal Act or its determination of ESHA, since in many cases, including in the case of the Banning Ranch project, the CCC will not make its determination of whether the habitat in question is, or is not, ESHA until well after the lead agency acts. This means courts would be asked to determine whether a particular habitat, as a matter of law, is ESHA, without any evidentiary assistance from the CCC, the only agency with the technical expertise to make such decisions.

Even if this court were to require an agency to only determine "probable ESHA", substantial difficulty arises from the fact that there is no definition of "probable ESHA" or standard by which to review such a determination. Further, if a lead agency made a determination in an EIR that a particular habitat is "probably not ESHA" and the CCC ultimately disagreed with that determination, project opponents would likely argue that the EIR must be recirculated to disclose the existence of ESHA. Again, however, so long as the EIR adequately analyzes impacts to sensitive species and their habitat, recirculation of an EIR to disclose the fact that a particular habitat is, in fact, ESHA, does not add to the public's ability to comment on "a substantial adverse environmental effect of the project or a feasible way to mitigate or avoid such an effect." (CEQA Guidelines § 15088.5(a).)

4. A Requirement to Determine ESHA in CEQA Documents Will Likely Spill Over to Other Permitting Decisions Best Made Outside of CEQA

Allowing BRC to prevail on this issue in the context of ESHA would not only conflict with established CEQA principles, it would have a domino effect on numerous other laws, putting excessive burdens on limited local agency resources, without adding anything of practical value to an agency's CEQA analysis.

Currently CEQA contains no provisions governing its application to wetlands or wetland-related projects. If BRC here prevails on the ESHA issue, EIRs would arguably be required to identify "waters of the United States" – a decidedly difficult legal determination, currently left to the U.S. Army Corps of Engineers. (See *Rapanos v. U.S.* (2007) 547 U.S. 715.)

Similarly, an EIR could be required to identify wetlands as defined in the U.S. Army Corps of Engineers' regulations, an extremely complex task, typically requiring evaluation by qualified consultants and confirmation by the Corps. (See, U.S. Army Corps of Engineers Wetland Delineation Manual (1987).) As with identifying ESHA, no purpose would be served by hampering the CEQA process by adding requirements already covered by the Federal Clean Water Act.

Taken to its logical conclusion, compelling agencies to reach legal determinations would have unintended consequences for broad federal permitting requirements as well. Currently, CEQA does not require lead agencies evaluating projects with a federal component to determine in an EIR whether the project also complies with the National Environmental Policy Act ("NEPA"). This job is appropriately left to the federal lead agency under NEPA. Similarly, an EIR need not make a determination of conformity with the federal Clean Air Act, as such decisions are in the hands of the federal lead agency. (42 U.S.C. § 7506(c).) Yet, what rationale would there be for requiring an EIR to identify ESHA, but stopping short of compelling it to make all sorts of far-fetched legal determinations that can only properly be made by the agency charged with administering the statute in question?

In short, finding that the City ought to have identified ESHA in the EIR would set a precedent that will allow project opponents to force local governments to undertake unnecessary, costly, and time-consuming analysis of issues they are simply not best-suited to make. The League and CSAC urge the Court to, instead, determine that EIRs are adequate where they analyze and disclose a project's impacts on the physical environment,

recognizing that the CEQA lead agency cannot, and should not, be responsible for legal determinations under every applicable law.

III. CONCLUSION

Amici respectfully request that this Court determine that the substantial evidence standard of review applies to a city's interpretation of its General Plan, and that cities are not required to identify environmentally senstive habitat areas – as defined in the California Coastal Act of 1976 – in a review of environmental impacts under CEQA.

Respectfully submitted,

DATE: June 1, 2016

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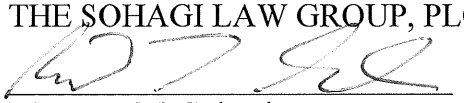

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CERTIFICATION OF WORD COUNT

The text of the BRIEF OF AMICI CURIAE consists of 6,645 words, including footnotes. The undersigned legal counsel has relied on the word count of the Microsoft Word 2013 Word processing program to generate this brief. (Cal. Rules of Court, Rule 8.204(c)(1).)

Respectfully submitted,

DATE: June 1, 2016

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PROOF OF SERVICE

STATE OF CALIFORNIA)
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COUNTY OF LOS ANGELES)

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 11999 San Vicente Boulevard, Suite 150, Los Angeles, California 90049.

On June 2, 2016, I served true copies of the following document(s) described as **LEAGUE OF CALIFORNIA CITIES' AND CALIFORNIA STATE ASSOCIATION OF COUNTIES' APPLICATION FOR LEAVE TO FILE AN AMICI BRIEF; AMICI CURIAE BRIEF IN SUPPORT OF DEFENDANTS AND APPELLANTS CITY OF NEWPORT BEACH ET AL.** on the interested parties in this action as follows:

☒ BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with The Sohagi Law Group, PLC's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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

Executed on June 2, 2016, at Los Angeles, California.

Cheron J. McAleece
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Signature

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