IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. S227473

BANNING RANCH CONSERVANCY,
Plaintiff and Appellant,

v.

CITY OF NEWPORT BEACH and
CITY OF NEWPORT BEACH CITY COUNCIL,
Defendants and Appellants,

and

NEWPORT BANNING RANCH, LLC;
AERA ENERGY, LLC; CHEROKEE NEWPORT BEACH, LLC;
Real Parties in Interest and Appellants.

After an Opinion by the Court of Appeal,
Fourth Appellate District, Division Three
(Case No. G049691)

On Appeal from the Superior Court of Orange County
(Case No. 30-2012-00593557, Honorable Kim Dunning, Judge)

APPLICATION TO FILE BRIEF AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF DEFENDANTS AND APPELLANTS

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APPLICATION TO FILE BRIEF AMICUS CURIAE

Pursuant to California Rule of Court 8.520(f),[1] Pacific Legal Foundation requests leave to file the attached brief amicus curiae in support of Defendants and Appellants/Cross-Respondents City of Newport Beach and City of Newport Beach City Council. Amicus is familiar with the arguments and believes the attached brief will aid the Court in its consideration of the issues presented in this case.

IDENTITY AND INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) is the oldest and largest donor-supported public interest law foundation of its kind in America. Founded in 1973, PLF provides a voice in the courts for mainstream Americans who believe in limited government, private property rights, balanced environmental regulation, individual freedom, and free enterprise. Thousands of individuals across the country support PLF, as do numerous organizations and associations nationwide. PLF is headquartered in Sacramento, California.

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[1] Pursuant to California Rule of Court 8.520, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

PLF maintains a Coastal Land Rights Project, which promotes the property rights of coastal landowners in California and nationwide. In furtherance of PLF's and the Coastal Land Rights Project's objectives, the Foundation has directly litigated several cases against the California Coastal Commission (Commission) on behalf of property owners. *See, e.g.*, *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *Lynch v. Cal. Coastal Comm'n*, 229 Cal. App. 4th 658 (2014), *review granted by* 339 P.3d 328 (Cal. 2014). While the Commission is not a party to this case, it has the ultimate power to grant a Coastal Development Permit (CDP) for the proposed Banning Ranch development. The issues presented in this case regarding the interpretation of the City of Newport Beach's General Plan and the California Environmental Quality Act (CEQA) significantly affect the amount of control the Commission has over the City's approval process.

Amicus believes this case is important because a ruling in favor of the Petitioners would increase the burden on local governments which attempt to approve development projects. In this case, the City consulted with the Commission before approving development on previously vacant 400-acre Banning Ranch. It should not be required to follow the Commission's preference, particularly when the Commission maintains jurisdiction to grant or deny a Coastal Development Permit. PLF believes its experience in

property rights litigation and experience with the Coastal Commission will provide an additional and useful viewpoint in this case.

For the above reasons, Pacific Legal Foundation respectfully requests this Court to grant its application to file the accompanying brief amicus curiae.

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF DEFENDANTS AND APPELLANTS

INTRODUCTION

Banning Ranch is a 400-acre plot of largely undeveloped coastal property in Orange County. *Banning Ranch Conservancy v. City of Newport Beach*, 236 Cal. App. 4th 1341, 1344 (2012) (decision below). While the City of Newport Beach preferred to leave the Banning Ranch property undeveloped, it could not afford the steep price necessary to acquire the property through eminent domain. *Id.* at 1344, 1350. Therefore, through various resolutions adopted by the City Council, the City approved a plan to develop a quarter of the ranch for residential and commercial purposes. *Id.* at 1355. The City Council saw this as its best alternative, as it would maintain most of Banning Ranch as open space without costing the taxpayers a small fortune. *Id.* at 1350.

Two factors complicated approval of this limited development. First, the City's General Plan recognizes Banning Ranch as "a distinct 'district' within [the City's] 'sphere of influence.'" *Id.* at 1345 (quoting General Plan). It provided that "[i]f acquisition for open space is not successful," the City

would pursue "a high-quality residential community with supporting uses that provides revenue to restore and protect wetlands and important habitats" *Id.* at 1346. Second, Banning Ranch was specifically excluded from the City's Coastal Land Use Plan (LUP), meaning that the California Coastal Commission, and not Newport Beach, retained permitting jurisdiction over the area. *Id.* at 1350. Thus, while "the City would ordinarily be obligated under its coastal land use plan to identify [Environmentally Sensitive Habitat Areas (ESHAs)] in its review of a coastal project," the exclusion of Banning Ranch from the LUP made that obligation less clear. *Id.*

The Banning Ranch Conservancy opposes all development at Banning Ranch and was therefore dissatisfied with the City Council's decision to approve limited development. The Conservancy sought a writ of mandate against the City, arguing that the City violated the Planning and Zoning Law (Cal. Gov't Code § 65000, *et seq.*), its own General Plan, and the California Environmental Quality Act (CEQA, Cal. Pub. Res. Code § 21000, *et seq.*). *Banning Ranch,* 236 Cal. App. 4th at 1344. As to the General Plan and the Planning and Zoning Law, the Conservancy argues that the City failed to adequately coordinate with the Commission before it approved the project. The Conservancy further argues the City violated CEQA by failing to identify ESHAs in its Environmental Impact Report (EIR). Both of these claims should fail, because the Coastal Commission retains final permitting authority—including the identification of ESHAs—for the project.

Newport Beach's General Plan includes a directive to "[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." It satisfied that obligation by consulting with the Commission during the approval process. *See id.* at 1357-58. The Conservancy's argument that the City violated its General Plan amounts to an assertion that the City was obligated to accept the Commission's advice. The Conservancy is wrong; Newport Beach was under no obligation to agree to the Commission's demands. This is especially true because the Commission maintained the ultimate power to reject the project no matter what the City thought of the Commission's comments. The same is true for the Conservancy's CEQA claim: the Commission, not the City, had the obligation to identify ESHAs. And because the project must still get Commission approval, it will still have the opportunity to identify ESHAs. The City did not violate either its General Plan or CEQA.

ARGUMENT

I

NEWPORT BEACH DID NOT VIOLATE ITS OWN GENERAL PLAN OR CEQA

Newport Beach's General Plan has the goal of maintaining Banning Ranch as open space, but recognizes an alternative of limited development if necessary "to help fund preservation of the majority of the property as open

space." *Id.* at 1346. The City proceeded with the plan to develop a small portion of the large Ranch. In a section of the General Plan entitled "Coordination with State and Federal Agencies," the City is required to "[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.* at 1356-57. In order to comply with that provision, Newport Beach extensively coordinated with the Commission and other agencies before its City Council approved the development. *See id.* at 1358 ("[T]he City certainly worked with federal and state agencies, including the Coastal Commission, before approving the Project.").

Nevertheless, the Conservancy contends that the City was required to do more. In essence, the Conservancy argues that the City should have allowed the Commission an opportunity to reject the project—something the Commission still has the authority to do. The Conservancy's position reads too much into the language of the General Plan. The text itself is quite ambiguous. It does not require the City to accept the Commission's demands. In fact, it does not require any result at all. The coordination requirement is one of process, not result.

The "coordination" requirement in the General Plan is similar to the permit procedure under the Clean Water Act. The U.S. Army Corps of Engineers has ultimate discretion on whether to grant a discharge permit on property considered a wetland under federal law. *See* 33 U.S.C. § 1344.

While "the Corps must consider the comments of other agencies in evaluating a particular proposal, it is within the Corps' discretion to determine what level of analysis is required in its permitting decision." *Stewart v. Potts*, 996 F. Supp. 668, 678 (S.D. Tex. 1998). "[T]he Corps is not bound to agree with the conclusions reached by these resource agencies, but simply required to listen to and consider their views in the decisionmaking process." *Sierra Club v. U.S. Army Corps of Engineers*, 772 F.2d 1043, 1054 (2d Cir. 1985). Even if the EPA and the Forest Service actively disagree with the Corps, the Corps may issue the permit anyway. *Stewart*, 996 F. Supp. at 678 (noting that "FWS and EPA expressed misgivings about the permit").

Similarly, typical notice-and-comment rulemaking under the Administrative Procedure Act, 5 U.S.C. § 553, requires that the relevant agency consider all comments submitted by interested persons during the period. *See United States v. Mead Corp.*, 533 U.S. 218, 223 n.3 (2001) (describing rulemaking procedure). "An agency must consider and respond to significant comments received during the period for public comment." *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1203 (2015). But many rules become effective even though substantial comments oppose them, even when those comments are from influential organizations. A requirement to interact with the public does not bind the agency to any particular result. The agency retains discretion over the final outcome.

The same is true of the coordination requirement here. In fact, the City's position is even stronger here, because it lacks authority to issue a Coastal Development Permit for the Banning Ranch project. *Banning Ranch*, 236 Cal. App. 4th at 1349. Whether or not the City agreed with the Commission's position regarding the project, the Commission still had final decisionmaking authority over the project because of the area's exclusion from the City's General Plan. *Id.* ("[A]ll new applications for coastal development permits must be processed by the Coastal Commission."). The City fulfilled its obligation under its General Plan by coordinating with the Commission. Importantly, it is not clear why this Court should grant the relief the Conservancy seeks when the Commission could cure what it perceives as a problem simply by declining to issue a Coastal Development Permit. *See id.* at 1365 ("[I]t 'remains to be seen' whether the Coastal Commission will issue a development permit for the Project as currently constituted." (quoting *Banning Ranch Conservancy v. City of Newport Beach*, 211 Cal. App. 4th 1209, 1234 (2012)). Perhaps the scope of Newport Beach's General Plan, and the potential that the City did not do enough to "work with" the Commission and other agencies, might matter if the City had actually granted a CDP and the Commission had only appellate jurisdiction. But the City is not allowed to issue a development permit; only the Commission has that authority. If this Court were inclined to read more into the "coordinate" or "work with" language, it should not do so in a case where the City's decision is not the final word on the development.

By the same token, Newport Beach had no obligation to identify environmentally sensitive habitat areas in its environmental impact report. The same principle applies. "[T]he City simply deferred ESHA determinations to the Coastal Commission." *Id.* "CEQA requires an EIR to reflect a good faith effort at full disclosure; it does not mandate perfection, nor does it require an analysis to be exhaustive." *Kings County Farm Bureau v. City of Hanford*, 221 Cal. App. 3d 692, 712 (1990). This is especially true when the City—which produced the EIR—is not the entity making the decision on the ultimate permit application. So long as the City disclosed everything that was necessary for the Commission to make its final decision, the City complied with CEQA. As the court of appeal recognized, "[a]ll of the necessary data pertaining to biological resources and habitat at Banning Ranch is included in the EIR." *Banning Ranch*, 236 Cal. App. 4th at 1365. It would be duplicative and a waste of resources for this Court to require the City to identify ESHAs when their identification would have no legal effect. *Cf. People v. Herrera*, 49 Cal. 4th 613, 622 (2010) ("The law does not require the doing of a futile act." (quoting *Ohio v. Roberts*, 448 U.S. 56, 74 (1980)).

The City's General Plan does not reach as far as the Conservancy argues. The City complied with the requirement that it "coordinate" with the Commission and other appropriate agencies in the process of approving the Banning Ranch development project. The General Plan does not guarantee the Commission two chances at rejecting the development.

II

A RULING FOR THE CITY WOULD ENSURE PROPER POLITICAL ACCOUNTABILITY AND NOT EXACERBATE THE HOUSING SHORTAGE

There are two principal policy reasons to reject the Conservancy's argument that the City's approval violated CEQA and its General Plan. First, the Conservancy's position would undermine the political accountability of local government by co-opting the City to accept the Commission's preferred outcome. Second, it obstructs the City's modest efforts to provide housing in an area sorely in need of it. This Court should use caution before adopting a construction of either Newport Beach's General Plan or CEQA that encourages either result.

In its anti-commandeering and spending clause cases, the Supreme Court of the United States has recognized the importance of preserving the political accountability of the States vis-a-vis the federal government. As the Chief Justice recently observed, "[p]ermitting the Federal Government to force the States to implement a federal program would threaten the political accountability key to our federal system." *Nat'l Federation of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2602 (2012) (opinion of Roberts, C.J.). While federal officials are able to insulate themselves from consequences of these actions, "it may be state officials who will bear the brunt of public disapproval." *New York v. United States*, 505 U.S. 144, 169 (1992). To

preserve political accountability, the federal government may not require the States to adopt legislation. It must enforce its laws in States on its own.

This same principle is applicable to the relationship between the City and the Commission in this case. If the Commission exercises too much control over the City's decisionmaking process in cases where the City does not have the authority to grant a Coastal Development Permit, it forces the City to take responsibility for the Commission's policies. The City would bear the burden of the negative consequences for rejecting the development plan even if it did so at the behest of the Commission, insulating the unelected Commissioners even further. It is better policy to permit the City to approve the project and let the Commission decide whether or not to grant the Coastal Development Permit. Then, if the development is ultimately rejected, Newport Beach residents would know that the Coastal Commission, and not their City Council, was responsible.

Finally, the Conservancy's position could unwisely prevent the City from pursuing a plan to help ease the housing shortage in the area. Last year, the average rent for an apartment in Orange County was $1,848 per month, and that number has been steadily rising in recent years.[2] Even if the City's General Plan is ambiguous, this Court should not interpret it to invalidate the

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[2] *See* Jeff Collins, *Want to Live in Orange County? It'll Cost You $1,848 a Month for an Apartment - An All-Time Average High, Orange County Register*, July 16, 2015, http://www.ocregister.com/articles/rent-671796-percent-month.html.

City's approval of a modest plan for development of Banning Ranch, particularly when high rents in the City and the County are such a significant problem. Any hurdles to solving the housing problem should not be exacerbated by the courts.

CONCLUSION

The bottom line in this case is that the project that the Conservancy opposes cannot be finally approved without the Coastal Commission's blessing. This Court should not intervene in the process until the permit process under the Coastal Act has run its course. If the Commission does not find the City's reasons for approval persuasive, then it may reject the Coastal Development Permit application. But this Court should not invalidate the plan now. It should instead allow the Commission to act on the project and determine appropriate ESHAs. The City complied with its responsibilities under both its General Plan and CEQA. The Conservancy's claims should fail and the judgment below should be affirmed.

DATED: May 3, 2016.

Respectfully submitted,

JOSHUA P. THOMPSON
CHRISTOPHER M. KIESER

By /s/ CHRISTOPHER M. KIESER
CHRISTOPHER M. KIESER
Attorneys for Amicus Curiae
Pacific Legal Foundation

CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.204(c)(1), I hereby certify that the foregoing APPLICATION TO FILE BRIEF AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF DEFENDANTS AND APPELLANTS is proportionately spaced, has a typeface of 13 points or more, and contains 2,723 words.

DATED: May 3, 2016.

/s/ CHRISTOPHER M. KIESER
CHRISTOPHER M. KIESER

DECLARATION OF SERVICE BY MAIL

I, Karen Gould, declare as follows:

I am a resident of the State of California, residing or employed in Sacramento, California. I am over the age of 18 years and am not a party to the above-entitled action. My business address is 930 G Street, Sacramento, California 95814.

On May 3, 2016, true copies of APPLICATION TO FILE BRIEF AND BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF DEFENDANTS AND APPELLANTS were placed in envelopes addressed to:

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which envelopes, with postage thereon fully prepaid, were then sealed and deposited in a mailbox regularly maintained by the United States Postal Service in Sacramento, California.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 3rd day of May, 2016, at Sacramento, California.

/s/ Karen Gould
Karen Gould