

Thomas P. Infusino, Esq.
P.O. Box 792
Pine Grove, CA 95665
(209) 295-8866
tomi@volcano.net

4/26/17

Planning Commission
County of El Dorado
2850 Fair Lane Court, Bldg. C
Placerville, CA 95667

(sent by email)

RE: FORCED: Lessons to learn from the *Banning Ranch Conservancy* decision.

Dear Commissioners:

Planning Commissioners and County Supervisors who are responsible for reviewing and certifying Environmental Impact Reports can learn a great deal from the recent unanimous decision of the California Supreme Court in the *Banning Ranch Conservancy* case (attached). I am sending you this letter on behalf of Rural Communities United, to help you understand your important role in helping El Dorado County to comply with the California Environmental Quality Act (CEQA).

1) Forecast the Foreseeable.

One issue that came up in the case is the obligation of a lead agency to evaluate the impacts of a project, even when those impacts are somewhat uncertain. Quoting a much earlier case, the Court wrote:

“The fact that precision may not be possible . . . does not mean that no analysis is required.

‘Drafting an EIR . . . involves some degree of forecasting. While foreseeing the unforeseeable is

not possible, an agency must use its best efforts to find out and disclose all that it reasonably can.' (Guidelines, § 15144.)" (*Laurel Heights I, supra*, 47 Cal.3d at p. 399.)

(*Banning*, p. 22)

Thus, when evaluating an EIR, ensure that the consultant has not incorrectly determined that the impact is too uncertain to evaluate. Make sure that the EIR has forecasted the foreseeable.

2) Omissions of relevant information are unacceptable.

Another issue that arose in the case was whether the omission of information regarding an impact was acceptable. Again reinforcing past precedent, the Court reminded lead agencies that the opinion of these agencies as to the acceptability of an omission carries no weight with the court. The Court wrote:

Whether an EIR has omitted essential information is a procedural question subject to de novo review. (Vineyard, supra, 40 Cal.4th at p. 435; Sierra Club v. State Bd. of Forestry (1994) 7 Cal.4th 1215, 1236 (Sierra Club).)

The Court ultimately concluded that the lead agency's omission of necessary information from the EIR was a prejudicial abuse of discretion.

Thus, when evaluating an EIR or a negative declaration, a Planning Commissioner or Supervisor would be wise to ensure that information regarding impacts is not left out. For example, if reputable comments on the Draft EIR indicate the need for essential impact information, the Final EIR should include that information. This is true whether the information is wildlife habitat data, air pollution information, traffic level of service or traffic safety data, groundwater reliability data, water quality information, fire safety information, or noise measurements.

3) Respond to Comments.

Another related issue that arose in the case was the need for reasoned responses to comments on environmental reviews from agencies and the public. The Court recognized the importance that the lead agency's response to comments plays in the integrity of the CEQA process. Again reinforcing past precedent, the Court wrote:

The preparation and circulation of an EIR is more than a set of technical hurdles for agencies and developers to overcome. The EIR's function is to ensure that government officials who decide to build or approve a project do so with a full understanding of the environmental consequences and, equally important, that the public is assured those consequences have been taken into account. (*Laurel Heights I, supra*, 47 Cal.3d at pp. 391-392.)" (*Vineyard, supra*, 40 Cal.4th at p. 449; see *Concerned Citizens, supra*, 42 Cal.3d at pp. 935-936.) The subject of ESHA on Banning Ranch was raised early and often by City residents and Coastal Commission staff. The City owed them a reasoned response.

(Banning p. 26-27)

A County would be wise to avoid repeating inaccurate, curt, boilerplate responses to reasonable environmental concerns repeatedly raised in comments on EIRs by sister agencies and concerned citizens. As a Planning Commissioner, if citizens and/or agencies identify defective responses to comments before or during public hearings on the plan or project, it is your responsibility to recommend that the EIR be sent back to the Planning Department and its EIR consultants for correction. If a Supervisor is aware of defective responses to comments, it is a Supervisor's legal obligation not to certify the EIR. If you need the help of outside CEQA counsel to review the responses, have them do so.

4) Consider and Integrate the related regulatory schemes of sister agencies.

Another question that arose in the case was whether a local lead agency could ignore the regulatory schemes of a state agency when evaluating alternatives, and defer that consideration until the state agency reviewed the project. The Court first noted that CEQA calls for a local lead agency not only to consider the regulatory schemes of other agencies, but also to concurrently integrate CEQA review with other planning and environmental review procedures. The Court wrote:

CEQA sets out a fundamental policy requiring local agencies to "integrate the requirements of this division with planning and environmental review procedures otherwise required by law or by local practice so that all those procedures, to the maximum feasible extent, run concurrently, rather than consecutively." (§ 21003, subd. (a).) The CEQA guidelines similarly specify that "[t]o the extent possible, the EIR process should be combined with the existing planning, review, and project approval process used by each public agency." (Guidelines, § 15080.)

(Banning, p. 18-19)

The court went on to note the specific requirement for local lead agencies to consider the regulatory schemes of state agencies when evaluating the feasibility of alternatives. The Court wrote:

The Guidelines specifically call for consideration of related regulatory regimes, like the Coastal Act, when discussing project alternatives. An EIR must “describe a range of reasonable alternatives to the project,” or to its location, that would “feasibly attain” most of its basic objectives but “avoid or substantially lessen” its significant effects. (Guidelines, § 15126.6, subd. (a).) Among the factors relevant to the feasibility analysis are “other plans or regulatory limitations, [and] jurisdictional boundaries (projects with a regionally significant impact should consider the regional context).” (Id., subd. (f)(1).)

(Banning, p. 19)

Thus, a prudent County would not repeatedly defer the discussion of significant impacts, and alternatives to reduce them, to later consideration by other agencies with jurisdiction. Instead, the discussions of impacts and alternatives in the EIR need to consider the regulatory schemes of other agencies. For example, if the project proposes highway encroachment that does not meet Caltrans’ safety standards, then the County cannot avoid the issue by deferring the analysis of highway encroachment until Caltrans considers issuing the permit. Instead, the County must address the issue in the EIR.

5) Explain conflicting data using reasoned analysis.

The Court understood that responsible agencies and commenting agencies may present the lead agency with conflicting data, and may opine that an EIR is inadequate. In these instances, the Court indicated that it is the lead agency’s responsibility to explain conflicting data using reasoned analysis. Quoting a previous case, the Court wrote:

“ “[W]here comments from responsible experts or sister agencies disclose new or conflicting data or opinions that cause concern that the agency may not have fully evaluated the project

and its alternatives, these comments may not simply be ignored. *There must be good faith, reasoned analysis in response.’* ” (*People v. County of Kern* (1974) 39 Cal.App.3d 830, 841-842; accord, *Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929, 935 (*Concerned Citizens*).)

(*Banning*, p. 25)

Thus, a Planning Commissioner or Supervisors should scrutinize staff responses to comments from sister agencies to ensure that the County’s responses are well reasoned.

6) Disclose disagreements among agencies and experts.

The Court also recognized that a disagreement among agency experts over an environmental impact may not be resolved during the environmental review process. In these instances, it is the lead agency’s obligation to disclose these disagreements in the EIR. The Court wrote:

In order to serve the important purpose of providing other agencies and the public with an informed discussion of impacts, mitigation measures, and alternatives, an EIR must lay out any competing views put forward by the lead agency and other interested agencies. (See § 21061; *Laurel Heights I, supra*, 47 Cal.3d at p. 391.) The Guidelines state that an EIR should identify “[a]reas of controversy known to the lead agency including issues raised by [other] agencies.” (Guidelines, § 15123, subd. (b)(2).) “Disagreement among experts does not make an EIR inadequate, but the EIR should summarize the main points of disagreement among the experts.” (Guidelines, § 15151.) “[M]ajor environmental issues raised when the lead agency’s position is at variance with recommendations and objections raised in the comments must be addressed in detail.” (Guidelines, § 15088, subd. (c).)

(*Banning*, pp. 24-25.)

The Court went on to note that:

[B]oth the commissioners and interested members of the public are entitled to understand the disagreements between commission staff and the City on the subject of ESHA. The requirement that the City spell out its differences with commission staff “ ‘helps [e]nsure the integrity of the

process of decision by precluding stubborn problems or serious criticism from being swept under the rug. . . .’ ”

(*Banning*, 25.)

The Court also noted that burying the disagreement in voluminous appendices and other parts of the administrative record is not sufficient.

Readers of an EIR should not be required to “ferret out an unreferenced discussion in [related material] The data in an EIR must not only be sufficient in quantity, it must be presented in a manner calculated to adequately inform the public and decision makers, who may not be previously familiar with the details of the project. “[I]nformation “scattered here and there in EIR appendices,” or a report “buried in an appendix,” is not a substitute for “a good faith reasoned analysis” ’ ” (*Vineyard, supra*, 40 Cal.4th at p. 442.)

(*Banning*, p. 26.)

Thus, a Planning Commissioner or Supervisor must ensure that the text in the body of the EIR clearly discloses any disagreement among experts regarding the impacts, mitigation measures, or alternatives. An EIR that fails to make such a disclosure must not be certified as complying with CEQA.

In conclusion, we hope that you will keep this important CEQA guidance from the California Supreme Court in mind as you review the adequacy of environmental impact reports and negative declarations. The advice is easy to remember, because the first letter of each phrase (Forecasting, Omissions, Respond, Consider, Explain, and Disclose) spell out the word “FORCED.” We hope that Planning Commissioners will not recommend certification of EIRs that do not meet the aforementioned standards. We hope that Supervisors will direct the Planning Department and its consultants to correct substandard EIRs. We hope that by following the direction of the California Supreme Court, El Dorado County will promote sound economic development, protect the environment, and preserve informed self-government.

Sincerely,

A handwritten signature in cursive script that reads "Thomas P. Infusino".

Thomas P. Infusino, for

Rural Communities United

cc. BOS, Chief Assistant County Counsel, Planning Department