Case No. B282319

COURT OF APPEAL FOR THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION THREE

STOPTHEMILLENNIUMHOLLYWOOD.COM,
COMMUNITIES UNITED FOR REASONABLE DEVELOPMENT,
AND GEORGE ABRAHAMS

Petitioners, Respondents and Cross-Appellants

v.

CITY OF LOS ANGELES AND THE CITY OF
LOS ANGELES CITY COUNCIL

Defendants, Appellants and Cross-Respondents

MILLENNIUM HOLLYWOOD LLC

Real Party in Interest, Appellant and Cross-Respondent

Appeal from Judgment of the Superior Court of California,
County of Los Angeles, Case No. BS144606
Hon. James C. Chalfant

APPLICATION OF THE LEAGUE OF CALIFORNIA CITIES FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANTS CITY OF LOS ANGELES AND MILLENNIUM HOLLYWOOD LLC; [PROPOSED] AMICUS CURIAE BRIEF

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LEAGUE OF CALIFORNIA CITIES

APPLICATION FOR LEAVE TO FILE AN AMICUS BRIEF

Pursuant to Rule 8.200, subdivision (c) of the California Rules of Court, the Applicant, League of California Cities ("League of Cities"), respectfully requests leave to file an Amicus Curiae brief ("Brief") in this proceeding in support of Appellants City of Los Angeles and the Los Angeles City Council ("City") and Real Party in Interest Millennium Hollywood LLC (collectively, "Appellants").

A. AUTHORSHIP AND FUNDING

This Brief was drafted by Whitman F. Manley and Sara F. Dudley of Remy Moose Manley, LLP on behalf of the League of Cities as its counsel. No party or counsel for a party in the pending case authored the proposed Brief in whole or in part, directly or indirectly, or made any monetary contribution intended to fund its preparation.

B. STATEMENT OF INTEREST

The League of California Cities is an association of 475 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 of Cities is advised by its Legal Advocacy Committee, 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.

C. ISSUES ON WHICH AMICUS CURIAE SEEK TO ASSIST THE COURT OF APPEAL

This matter raises important issues under the California Environmental Quality Act ("CEQA") (Pub. Resources Code, § 21000 et seq.), the CEQA Guidelines (Cal. Code Regs., tit. 14, § 15000 et seq.), and California climate change and housing law and policy.

Under CEQA, an environmental impact report ("EIR") must contain a general description of the proposed project that is accurate, finite, and stable. (CEQA Guidelines, § 15124, subdivision (c); *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 199.) In *Citizens for a Sustainable Treasure Island v. City and County of San Francisco* (2014) 227 Cal.App.4th 1036 (*Treasure Island*), the court interpreted this requirement to allow the incorporation of flexibility in a project description, permitting an EIR to defer detailed descriptions of design elements, when the EIR provides a complete analysis of the environmental impacts that may result. (*Id.* at p. 1053.)

Flexibility of this sort is critically important when analyzing multi-phase, mixed-use, infill development like the project at issue here. This type of development is frequently proposed within the jurisdictions of the League of Cities' members. The trial court's Decision on Writ of

Mandamus ("Decision") largely eliminates the possibility of such flexibility. (Court Transcript ["CT"] 12:2763–2769.) In the first section of the attached Brief, the League of Cities describes CEQA requirements concerning project descriptions and the standard of review, *Treasure Island*'s role in interpreting these requirements, and the extent to which the Decision cannot be squared with this precedent.

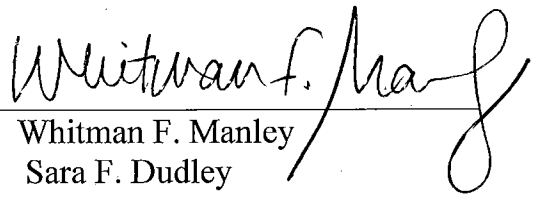
The second part of the Brief discusses California's twin mandates to both reduce greenhouse gas ("GHG") emissions, particularly from the transportation sector (cars and light trucks), and to produce more residential housing for California's growing and aging population. These developments demonstrate that the Legislature seeks to encourage, rather than erect needless barriers to, proposals like the Millennium Project. The Decision is inconsistent with these mandates, as it makes these projects more difficult to describe and analyze in an EIR. (CT 12:2763–2769.)

The League of Cities believes that this Court may benefit from this perspective. The League of Cities has drafted the accompanying Brief in order to complement, but not duplicate, the detailed arguments that have already been submitted to this Court by the parties to this case. The League of Cities therefore respectfully requests that this Court grant its application and order the accompanying Brief of Amicus Curiae to be filed.

Dated: December 13, 2018

Respectfully submitted,

REMY MOOSE MANLEY, LLP

By: 

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INTRODUCTION

Member cities of the League of California Cities ("League of Cities") face a challenge: an urgent need to encourage the development of new housing, a shortage of land on which to build it, and a legislative requirement to reduce greenhouse gas ("GHG") emissions from the transportation sector. Mixed-use, transit-oriented development is an effective, common-sense approach to address these challenges. The Legislature has encouraged cities to promote this sort of development in statutes that provide density bonuses, streamline permitting and environmental review, and establish exemptions for such projects under the California Environmental Quality Act ("CEQA") (Pub. Resources Code, § 21000 et seq.). The appellate court in *Citizens for a Sustainable Treasure Island v. City and County of San Francisco* (2014) 227 Cal.App.4th 1036 (*Treasure Island*) provided guidance regarding how to describe and analyze such projects in environmental impact reports ("EIRs"). The *Treasure Island* court found that there was nothing wrong with building flexibility into such projects, where the EIR identified and analyzed the project's potential environmental impacts. (*Id.* at p. 1053.)

In this case, the trial court strayed from these principles. Essentially, the trial court confused flexibility with instability. They are not the same thing. By equating them, the trial court applied a line of cases noting the

perils of project instability in the CEQA process. But the cases cited by the trial court in support of its ruling do not apply.

Instead, as the *Treasure Island* court and other courts have found, there is nothing inherently wrong with approving a project that provides flexibility regarding the mix of uses or the design of the buildings that will ultimately be built. Applicants often seek such flexibility in the context of mixed-use development because they do not know at the outset how the real estate market will respond to their projects: whether the demand for land zoned for mixed-use will tilt towards residential, commercial or office space. So long as the EIR acknowledges this flexibility, and analyzes the most impactful mix of uses that may occur under the agency's approvals, the public has been provided an opportunity to weigh in, the decision-makers have made an informed decision, and CEQA has done its job.

The League of Cities respectfully requests that, in resolving this appeal, this Court take care to avoid erecting needless barriers to the consideration of mixed-use projects of this sort.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Because the facts in this case have been extensively discussed in Appellants' Opening Brief and in the trial court's Decision, the League of Cities will not repeat them here. (See generally Appellants' Opening Brief,

pp. 3–10; Clerk's Transcript ("CT"), 12:2737–2742.) [1] In relevant part, the project site is located in the City of Los Angeles ("City"), on 4.4 acres straddling Vine Street, south of Yucca Street and north of Hollywood Boulevard. It is surrounded by urban development. (AR 4211.) [2] The site is within a Transit-Oriented District ("TOD"), less than one block from the Hollywood/Vine Metro Red Line Station, and within a five minute walk to the Metro Local lines 180, 181 and 217 and the Metro Rapid line 780. (AR 4211, 4217.) The site also has access to U.S. 101. (AR 4217.)

The Millennium Project will create just under 1.2 million square feet of development, with a mix of uses. Permitted uses include a hotel, residential units, retail, restaurants, office space, and a fitness club. The iconic Capitol Records and Gogerty Buildings are located on the site. Both buildings will be retained and integrated into the Millennium Project. (AR 4226–4245.)

The exact mix of uses is not set. Instead, the Millennium Project authorizes a range of development, provided that the development stays within a defined envelope of permitted uses, densities and design parameters. (AR 4105–4254 [project description].) The EIR describes and

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[1] References to the Clerk's Transcript are by volume and page number. "CT 12:2732" refers to volume 12 of the Clerk's Transcript at page 2732. The same format is used throughout this Brief to refer to the Clerk's Transcript.

[2] "AR 4211" means page 4211 of the administrative record certified by the City. The same format is used throughout this Brief to refer to the administrative record.

analyzes three different scenarios that are consistent with these parameters: (1) the Concept Plan (AR 4233–4236); (2) the Commercial Scenario (AR 4237); and (3) the Residential Scenario (AR 4238–4239). Each of these scenarios reflects one way in which the project may build out, consistent with the entitlements as approved by the City.

The applicant designed this mix of uses to provide flexibility to respond to changing market conditions. In due course, the market may move in the direction of demanding relatively more housing. Or that demand may shift in favor of more commercial or office space. In all events, however, uses will be represented to a greater or lesser degree. The project will retain its "mixed-use" character; under any scenario, the project will include at least some residential uses, along with a mix of office and/or residential uses. (AR 4234, 4237, 4238.)

Development must also occur within the specified development envelope, cannot generate more than 1,498 vehicle trips per day, and must adhere to the following land-use controls: (1) Development Regulations (AR 18574–18635); (2) a Land Use Equivalency Program ("LUEP") (AR 13789–13790); and (3) conditions of approval incorporated into the City's ordinance (AR 11644–11695 [Ordinance and Q-Conditions].) Taken together, these land-use controls limit development to features permitted by the zoning; dictate building height, density and massing; regulate street wall parameters; regulate ground-level standards; and impose a 6:1 floor

area ratio ("FAR"). (Appellants' Opening Brief, pp. 4–5, citing AR 18581, 4243–4244, 18587, 18588–18597, 18598–18600, 18604, 18583, 18586.)

This approach is consistent with development under form-based zoning codes. Form-based codes typically "create an 'envelope' within which any building must fit. This envelope is created by specifying setbacks, heights limits and sometimes limits on the percentage of a site that may be covered by" development. (Fulton & Shigley, Guide to California Planning (4th Ed. 2012) [hereafter "Fulton & Shigley"], attached as Exhibit A to the Declaration of Sara F. Dudley in Support of Motion and Request for Judicial Notice In Support of the Application of the League of California Cities to File an Amicus Brief ("Dudley Declaration"), p. 7.)

The City of Los Angeles ("City") released its Draft EIR in April 2011 and certified the Final EIR and related approvals at a City Council meeting on July 24, 2013. Petitioners filed a petition for writ of mandate challenging these approvals under CEQA, including an allegation that the project description was unstable. Petitioners also found fault with the traffic analysis methodology. As relevant here, the trial court found for Petitioners on their claims concerning the project description. (CT 12:2763–2769.) The appeal followed.

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ARGUMENT

A. The Millennium Project EIR's project description satisfied CEQA's requirements.

The Millennium Project description applied well-established CEQA principles to a mixed-use project to be carried out over time. (See generally *Treasure Island, supra*, 227 Cal.App.4th at pp. 1052–1055.) While an EIR's project description must be accurate, finite and stable, that description is not intended to handcuff the decision makers. The "CEQA reporting process is not designed to freeze the ultimate proposal in the precise mold of the initial project; indeed, new and unforeseen insights may emerge during investigation, evoking revision of the original proposal." (*County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 199 (*County of Inyo I*); see *Dusek v. Anaheim Redevelopment Agency* (1986) 173 Cal.App.3d 1029, 1041 (*Dusek*) [project description in EIR "does not handcuff decisionmakers"].) The trial court's ruling cannot be reconciled with these principles.

1. Petitioners have the burden to show that the City, in describing the Millennium Project, prejudicially abused its discretion.

The project description in an EIR must provide a general description of the project components so that decision makers and the public can understand how these components will affect the environment, mitigate these effects, and weigh alternatives. (Cal. Code Regs., tit. 14, § 15124

("CEQA Guidelines").) In challenging the EIR's project description, petitioners must demonstrate that the agency prejudicially abused its discretion. (*Rialto Citizens for Responsible Growth v. City of Rialto* (2012) 208 Cal.App.4th 899, 924–925 (*Rialto Citizens*); *Dry Creek Citizens Coalition v. County of Tulare* (1999) 70 Cal.App.4th 20, 25–26 (*Dry Creek*) [claim regarding absence of information in a project description analyzed for abuse of discretion].) There is no presumption that an error is prejudicial. (Pub. Resources Code, § 21005, subd. (b).) Instead, a "prejudicial abuse of discretion occurs if the failure to include relevant information precludes informed decisionmaking and informed public participation, thereby thwarting the statutory goals of the EIR process." (*Dry Creek*, *supra*, 70 Cal.App.4th at p. 26; accord *Rialto Citizens*, *supra*, 208 Cal.App.4th at p. 925.)

2. The CEQA Guidelines list the required elements of an EIR's project description.

The Legislature has directed the courts to refrain from requiring anything that goes beyond the express words of the statute or guidelines. (Pub. Resources Code, § 21083.1.) As the Supreme Court recently observed, the Legislature enacted section 21083.1 "to 'limit judicial expansion of CEQA requirements' and to 'reduce the uncertainty and litigation risks facing local governments and project applicants by providing a "safe harbor" to local entities and developers who comply with

the explicit requirements of the law.' [Citation.]" (*Berkeley Hillside Preservation v. City of Berkeley* (2015) 68 Cal.4th 1086, 1107.)

"In the wake of the enactment of [section 21083.1], it has been said that 'the literal, i.e., explicit, approach to statutory construction is [now] mandatory under CEQA.' [Citation]." (*Picayune Rancheria of Chukchansi Indians v. Brown* (2014) 229 Cal.App.4th 1416, 1423.) Thus, the issue is simply what the statute and guidelines expressly require, not what the petitioners would like them to require.

The four required elements of a project description are: (1) a detailed map with the precise location and boundaries of the proposed project, (2) a statement of project objectives, (3) a *general description* of the project's technical, economic, and environmental characteristics, and (4) a statement briefly describing the intended uses of the EIR, including a list of the agencies with approval or permitting authority over the project. (CEQA Guidelines, § 15124, subds. (a)–(d), italics added.) Those are the only mandatory elements of a project description. (*California Oak Foundation v. Regents of University of California* (2010) 188 Cal.App.4th 227, 269–270 (*California Oak Foundation*).

The project description must encompass the "whole of an action." (CEQA Guidelines, § 15378, subd. (a).) Thus, the project cannot omit integral project components. (*San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 654–657 [sewer treatment facility];

City of Santee v. County of San Diego (1989) 214 Cal.App.3d 1438, 1452–1455 [jail expansion].) The project description must also be "accurate, stable and finite." (*County of Inyo I, supra*, 71 Cal.App.3d at p.193.)

Here, the project description addresses the "whole of [the] action." Neither the petitioners nor the trial court point to some aspect of the Millennium Project that has been omitted from the project description. Their qualm is instead with the flexibility built into the project itself: the petitioners argued, and the trial court agreed, that under CEQA the project description had to be fixed and rigid.

The degree of specificity required "will correspond to the degree of specificity involved in the underlying activity described in the EIR." (CEQA Guidelines, § 15146.) The level of analysis in an EIR project description is subject to the "'rule of reason.'" (*Rialto Citizens, supra*, 208 Cal.App.4th at p. 925, citing *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 406–407.)

The adequacy of a project description must be considered in light of CEQA's primary and overriding purpose: to disclose and mitigate environmental impacts. (CEQA Guidelines, §§ 15121, subd. (a) [EIR is an informational document whose purpose is to "inform the public agency decisionmakers and the public generally of the significant environmental effects of a project"], 15143 [an "EIR shall focus on the significant effects on the environment"], 15003, subd. (c) [an EIR's purpose is to inform

decisionmakers and the public about environmental impacts], Pub. Resource Code, §§ 21000, subd. (g) [the Legislature's intent in enacting CEQA is "so that major consideration is given to preventing environmental damage"], 21002 [CEQA's substantive mandate is to identify significant environmental impacts, mitigation measures, and alternatives].)

An EIR should not contain extensive detail beyond that which is necessary to understand and evaluate the project's *environmental effects*. In other words, a project description may omit details, if those details do not bear on the project's impact on the environment. *Dry Creek*, cited in the Decision, is instructive on this point. (CT 12:2763 [cited erroneously as "*Dray Creek*"].) The *Dry Creek* court upheld the EIR's description of a water diversion channel and associated features incorporated into a proposal to expand an existing mine. (*Dry Creek*, *supra*, 70 Cal.App.4th at pp. 28–36.) The EIR described the features and included figures and maps (*id.* at pp. 28–30), and analyzed the project's impacts. (*Id.* at pp. 31–33.) The court rejected the petitioner's assertion that additional technical plans were required in the project description. (*Id.* at p. 36.) Rather, such "'extensive detail'" would have gone "'beyond that needed for evaluation and review of the environmental impact.'" (*Id.* at p. 36; see also *Maintain Our Desert Environment v. Town of Apple Valley* (2004) 124 Cal.App.4th 430, 443–444 (*MODE*) [project description not required to disclose tenant name because identity of the end user was not relevant to the project's

environmental impact]; *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1207–1208 [concurring with *MODE,* but differentiating between identity of end user and type of business, because the latter could result in impacts].) The court rejected the petitioner's argument that there were no assurances that the features would function as intended. (70 Cal.App.4th at pp. 33–34; see also *California Oak Foundation, supra,* 188 Cal.App.4th at p. 271 [project description adequate, "particularly in light of [CEQA's] admonishment that such a description should not 'supply extensive detail beyond that needed for evaluation and review of [a project's] environmental impact,'" citing CEQA Guidelines, § 15124].)

In this case, the EIR's project description spanned 50 pages. The EIR described the LUEP, the Ordinance, the Q-Conditions, and Development Regulations, and disclosed those aspects of the Millennium Project that were fixed, and those that were flexible. Information disclosed included the mix of uses, a trip generation cap, and maximum development envelope. (AR 4105–4254, 18574–18635, 13789–13790, 11644–11695.) The project description thus provided sufficient information to the public and decision makers to understand the project's impacts. (*Dry Creek, supra,* 70 Cal.App.4th at p. 36 ["Appellants have not established that the general description [of the project features] in the EIR coupled with

approval of final designs after the project is approved violated any CEQA mandate"].) Nothing more was required.

3. The trial court misinterpreted and misapplied *Treasure Island.*

The Millennium Project EIR closely resembles the project-level EIR upheld in *Treasure Island.* (CT 12:2765.) *Treasure Island* stands for the proposition that a project description is adequate if it makes an "extensive effort to provide meaningful information about the project, while providing for flexibility needed to respond to changing conditions and unforeseen events that could possibly impact the Project's final design." (227 Cal.App.4th at p. 1053.) Although the Decision relied heavily on *Treasure Island* and reiterated this rule, the Decision then announced its own interpretation of *Treasure Island,* stating: "Where a construction project is not limited by external conditions that create great uncertainty, there is no reason for a project developer not to be specific about project details." (CT 12:2768.) This language is found nowhere in *Treasure Island* and the trial court cites no other authority. Instead, the Decision creates a new rule found nowhere in the statute or guidelines, in contravention of Public Resources Code section 21083.1.

In *Treasure Island,* project opponents challenged the city's certification of a project-level EIR for a mixed-use development on San Francisco's Treasure Island. Over a 20-year period, the Treasure Island

project would develop 8,000 residential units; 140,000 square feet of commercial and retail space; 100,000 square feet of office space; 500 hotel rooms; and 300 acres of parks. The project would also preserve and restore historic buildings on the site. (227 Cal.App.4th at p. 1044.) The project created a special use district ("SUD") and, implementing the SUD, the "Treasure Island and Yerba Buena Island Design for Development" ("D4D") guidelines. (*Id.* at p. 1053.) These documents established parameters for development on the island: zoning throughout the project area; permitted uses; detailed design standards; and standards for building height, bulk, and massing. (*Ibid.*) The project contained certain "fixed" elements and also deferred detailed descriptions of other more "conceptual" design elements including "shapes of new buildings or specific landscape designs." (*Ibid.*) The entitlements also created "'flex zones' – zoning districts in which a limited number of towers (taller buildings) may be located, subject to the maximum height limit in that zoning district." (*Ibid.*)

The petitioner challenged the EIR's project description as "unstable and erratic," characterizing the project as "a 20-year long-range development plan that is nothing more than a 'conceptual land use map'.... that lacks the 'accurate, finite and stable' project-level details necessary to fully analyze potentially significant impacts." (*Treasure Island, supra*, 227 Cal.App.4th at p. 1052.)

The court rejected this characterization. A project description is adequate when it demonstrates "an extensive effort to provide meaningful information about the project, while providing for flexibility needed to respond to changing conditions and unforeseen events that could possibly impact the Project's final design." (*Treasure Island, supra*, 227 Cal.App.4th at p.1053.) "However, the EIR cannot be faulted for not providing detail that, due to the nature of the Project, simply does not now exist." (*Id.* at p. 1054.)

Against this backdrop, the SUD and D4D provided sufficient information to enable the city to analyze the project's impacts. The zoning rules provided some "limited flexibility" regarding building siting but maintained "tight controls on absolute building heights and development patterns." (*Treasure Island, supra*, 227 Cal.App.4th at pp. 1053–1054.) The EIR assumed and analyzed environmental impacts that would occur under "maximum development." (*Id.* at p. 1053.) The fact that some details were deferred concerning street design and layout did not render the EIR inadequate. "Viewed as an informational document, the EIR's Project Description provided sufficient information about the Project to allow the public and reviewing agencies to evaluate and review its environmental impacts, and also provided the required 'main features' of the Project." (*Id.* at p. 1055, citing *Dry Creek, supra*, 70 Cal.App.4th at p. 28.) The court rejected the claim that a project description must "anticipate every

permutation or analyze every possibility," or resolve "all hypothetical details prior to approving an EIR." (*Ibid.*, citing *Oakland Heritage Alliance v. City of Oakland* (2011) 195 Cal.App.4th 884, 909–910 [upholding EIR for mixed-use development; EIR sufficient when the applicant commits to conducting subsequent "site-specific investigations" to formulate the final structural designs]; *City of Antioch v. City Council* (1986) 187 Cal.App.3d 1325, 1336–1337 [demanding that an EIR "describe in detail each and every conceivable development scenario" is unreasonable and unrealistic; a description can be flexible to accommodate different projects with different levels of specificity].)

Similarly, in *California Oak Foundation*, the court rejected demands for a more rigid description of a long-term, multi-component project. (*California Oak Foundation, supra*, 188 Cal.App.4th at pp. 269–272.) The EIR challenged in that case described several "integrated" development projects on the campus (new structures, an athletic center, and parking). The petitioners argued that the project description was inadequate. The court rejected this claim, stating that EIRs "'must be "sufficiently flexible to encompass vastly different projects with varying levels of specificity."'" (*Id.* at p. 269.)

Finally, in *AquAlliance v. U.S. Bureau of Reclamation* (E.D. Cal. 2018) 287 F.Supp.3d 969 (*AquAlliance*), the agency prepared a joint EIR / Environmental Impact Statement (EIR/EIS) for a project to approve a long-

term water transfer program from upstream of the Sacramento/San Joaquin Delta to south Delta buyers. (*Id.* at pp. 985–986.) The petitioners argued that the project description was inadequate under CEQA because it did not describe the timing, amount, and location of water transfers, or the amount of "carriage water" (water to be left in waterways). In the petitioners' view, without such details, the project description was too vague to allow the agencies to analyze the project. (*Id.* at pp. 997–1006.) The court disagreed, finding the project description consistent with *Treasure Island.* The EIR/EIS identified potential buyers and sellers, the maximum volume of potential transfers by year and by seller in acre feet, the timing of transfers (transfer window), geographic areas of analysis, and the maximum volume of water that may be taken out of the Delta, in both critical and dry years. (*Id.* at pp. 999.) The project description was adequate because "as *Treasure Island* explains, it is perfectly permissible for a CEQA document to evaluate the upper end of a range of impacts, while leaving undescribed some 'detail that, due to the nature of the Project, simply does not now exist.'" (*Id.* at p. 1000.) That further information "does not now exist" was due in part because the market needs of potential buyers had not yet ripened into specific proposals.

The same logic applies here. The entitlements approved by the City for the Millennium Project establish fixed parameters that development cannot exceed. (AR 4105–4106 [1,166,970 square feet of development,

including residential units, hotel, retail, offices, and continued use of historic buildings, with 12 to 15-year buildout; parameters on massing, height, street walls; 6:1 FAR; and density limits].) The EIR described these parameters, and analyzed the environmental impacts assuming that the maximum level of development would occur. The EIR's analysis established further caps on the level of development, most notably the requirement that development cannot generate more than 1,498 vehicle trips per day. (AR 13789–13790.) In the same way that the SUD and D4D at issue in *Treasure Island* provided flexibility, so do the Millennium Project entitlements. As in *AquAlliance*, some uncertainty remains because there is no way to predict with certainty how the project will be implemented over its 12- to 15-year build-out period against the backdrop market uncertainty.

In all three cases, the EIR analyzed the upper limits of potential impacts, and adopted mitigation measures in accordance with these upper limits.

Here, the trial court distinguished *Treasure Island* on the ground that such flexibility is permissible only where "external conditions … create great uncertainty." (Compare CT 12:2767 with *Treasure Island*, *supra*, 227 Cal.App.4th at p. 1053.) The Decision cites no authority for this proposition, other than *Treasure Island* itself. In fact, such a rule cannot be teased out of the *Treasure Island* decision (or, indeed, any other decision).

While the timing of the development and the need for hazardous materials remediation were discussed by the *Treasure Island* court, the Decision improperly extrapolated and repackaged these facts into a holding that cannot be gleaned from the decision itself.

Even if there were such a rule, the need to respond to an uncertain and fluctuating market *is* an external condition that justifies building flexibility into project approvals. The trial court dismissed market conditions as an "excuse" for not providing as much detail as the trial court would have liked. (CT 12:2767.) Whether such flexibility is warranted is a decision that should be left to local agencies, rather than the courts. (See *AquAlliance*, *supra*, 287 F.Supp.3d at pp. 999–1000 [rejecting demand for additional project details in light of the difficulty of predicting with precision the details of whether and how water transfer agreements would be consummated].)

In this case, the Millennium Project is expected to build out over a 12 to 15-year period. (AR 4105–4106.) The City was persuaded that the applicant needed flexibility to respond to shifts in the real estate market over such a lengthy period and its decision is entitled to deference. To paraphrase another decision, "[t]hat might not satisfy [petitioners]; it might not have satisfied another city council. But it satisfied this one, and their decision is within the law. No legal authority is cited, and it seems to us [petitioners] [are] again asking that we arrogate to ourselves a policy

decision which is properly the mandate of the City. We cannot." (*Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1266.)

4. *Washoe Meadows* is distinguishable.

The trial court issued its ruling in April 2015. In November 2017, the Court of Appeal issued its decision in *Washoe Meadows Community v. Department of Parks and Recreation* (2017) 17 Cal.App.5th 277 (*Washoe Meadows*). There, the court held that an EIR's project description for a proposal to restore and reconfigure an existing golf course was not accurate, finite and stable, and that the error was prejudicial. (*Id.* at pp. 281, 290.) In reaching this decision, the court cited *Treasure Island* with approval, while distinguishing its facts. (*Id.* at p. 289.)

On appeal, the petitioners rely heavily on the *Washoe Meadows* decision. (Respondent's Opening Brief, pp. 65–68.) The decision is inapposite.

In *Washoe Meadows*, the Draft EIR contained "five dramatically different" alternatives. (17 Cal.App.5th at p. 290.) The Final EIR ultimately selected a "proposed preferred alternative." (*Id.* at p. 283.) The problem with this approach was that the Draft EIR "did not describe a project at all." (*Id.* at 288.) This approach violated CEQA because the public was not able to ascertain and comment on the specific project that the agency had proposed. (*Ibid.*) The court contrasted the EIR at issue in *Treasure Island* with the EIR prepared by the department:

> The project in *Treasure Island* was clearly identified as a new mixed-use community which would include residences, commercial space, parks, playgrounds, trails and open space; although the standards for this development were comprehensive, some details regarding the configuration and design of certain buildings had been left for further review. (*Id.*, pp. 1044, 1053, 174 Cal.Rptr.3d 363.) The court concluded that even if some of the details had not been decided upon when the EIR was approved, "the basic characteristics of the Project under consideration ... remained accurate, stable and finite throughout the EIR process." (*Id.* at p. 1055, 174 Cal.Rptr.3d 363.) The DEIR in this case was not simply lacking in details that could not be reasonably supplied as yet; rather, it failed to identify the project being proposed.
>
> (*Id.* at p. 289.)

Here, by contrast, the public was not denied an opportunity to meaningfully comment on the Millennium Project. The Draft EIR contained a 50-page, "Project Description" chapter, clearly identifying what project the applicant had proposed. (AR 4105–4254). The description of the project remained consistent throughout the environmental review process. Furthermore, in a separate chapter, conspicuously labeled "Alternatives to the Project," the Draft EIR described the five alternatives to the Project. (AR 5162–5312; see also CEQA Guidelines, § 15126.6 [analysis of alternatives].) Thus, the error cited by the court in *Washoe Meadows* – the failure to identify the proposed project – did not arise in this case; there was no cause for confusion about the nature of the project as proposed by the applicant. To be sure, the entitlements provided the applicant with a measure of flexibility regarding how the Millennium Project would actually

build out. As noted above, however, flexibility is not the same thing as instability.

5. The City retains authority to perform supplemental review where conditions warrant.

The Decision found fault in the project description because it is a project-level EIR, and because the City may not perform supplemental review in approving specific development proposals. (CT 12:2767–2768.) These concerns are unfounded. The agency must always perform supplemental review where further discretionary approvals are required, and changes to the project or surrounding circumstances suggest that new or substantially more severe impacts may arise. The Millennium Project EIR changes none of that.

CEQA and the Guidelines provide various methods for subsequent environmental review after an EIR has been certified. (CEQA Guidelines, § 15162 [subsequent EIRs], 15163 [supplemental EIRs], 15164 [addendum], 15168 [program EIR], 15165 [proceeding under multiple or phased projects], 15167 [staged EIR].) Subsequent review of an EIR may be required, when based on "substantial evidence in light of the whole record," substantial changes to the project would require major revisions to the EIR, there are substantial changes in circumstances, or where there is "[n]ew information of substantial importance" concerning impacts, alternatives, and mitigation measures. (Pub. Resources Code, § 21166; CEQA

Guidelines, § 15162, subd. (a); see also CEQA Guidelines, §§ 15163 [a supplement to an EIR may be prepared instead of a subsequent EIR under those same circumstances], 15164 [addenda to EIRs and negative declarations].) These requirements exist regardless of whether a project-level EIR specifically calls them out.

In *AquAlliance*, the court's decision rested in part on its determination that the EIR/EIS was programmatic, and that further environmental review would be conducted on specific water transfer proposals. However, unlike here, water transfer proposals *require* further discretionary approval from the federal agency. (*AquAlliance*, *supra*, 287 F.Supp.3d at pp. 1001–1002.) This distinction does not make *AquAlliance* inapt, nor does it suggest that either a programmatic EIR or subsequent review is required here. (See CT 12:2767–2768.)

In this case, for the Millennium Project, if development proposals stay within the limits of flexibility established by the city's entitlements, then the Planning Director's review will focus on the proposal's adherence to the objective standards set forth in those entitlements. Under those circumstances, the Planning Director's decision will be ministerial, and will not trigger CEQA review. But there is nothing wrong with that. The Millennium Project EIR analyzed the impacts of the greatest amount of development that can occur under the entitlements, and identified the impacts that would result. (See generally, AR 18574–18635 [Development

Regulations]; AR 13789–13790 [LUEP], 11644–11695 [Ordinance and Q-Conditions]; AR 4105–4254 [EIR project description].) If a development proposal is consistent with these entitlements, then the EIR will have already flagged the impacts that would result. Nothing was hidden from public scrutiny.

Agencies often make decisions that limit their discretion with respect to latter approvals, and the courts consistently honor those decisions. (E.g., *San Diego Navy Broadway Complex Coalition v. City of San Diego* (2010) 185 Cal.App.4th 924, 938–939 [because development agreement limited city's discretion with respect to project consistent with agreement, city did not need to perform supplemental review to study issues outside that discretion]; *Health First v. March Joint Powers Authority* (2009) 174 Cal.App.4th 1135, 1144 [under operative plan, design review process was ministerial and therefore did not trigger CEQA].)

The fact that the Millennium Project EIR was a "project EIR," rather than a "program EIR," is irrelevant. The *Treasure Island* court emphasized that labelling an EIR "programmatic" (anticipating further environmental review) or "project-level" (where supplemental review would occur if necessary) was not dispositive. Rather, an EIR's adequacy is judged by its contents, not by its label. (*Treasure Island, supra*, 227 Cal.App.4th at p. 1052; accord *Cleveland National Forest Foundation v. San Diego Assn. of Governments* (2017) 17 Cal.App.5th 413, 426 [contents, not label, are

determinative]; *California Oak Foundation, supra*, 188 Cal.App.4th at p. 271, fn. 25.) Indeed, as the Treasure Island court summarized, "[t]he obligation to conduct supplemental review under section 21166 applies regardless of whether the project under consideration has undergone previous project-specific environmental review, or is being carried out under a plan for which the agency has previously certified a program EIR." (227 Cal.App.4th at p. 1051.)

The trial court cited statements in *Treasure Island* to the effect that, in that case, the city committed to perform supplemental review under certain circumstances. (CT 12:2767.) The trial court misread the case. In *Treasure Island*, the EIR noted that supplemental review would be performed if, for example, the presence of hazardous substances meant that residential zoning would have to move from one area to another. (227 Cal.App.4th at p. 1061.) But the same is true here. If the applicant applies to the City to amend the Millennium Project entitlements, then whether to approve such an application will involve discretion, and therefore trigger the obligation to perform supplemental review. That does not change the fact that, as in *Treasure Island*, some latter approvals that are consistent with the entitlements may require only ministerial permits, in which case the obligation to perform supplemental review will not arise.

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B. The Millennium Project exemplifies the type of mixed-use development that cities must encourage in order to achieve multiple legislative and policy goals related to housing and climate change.

Whether the Millennium Project ought to have been approved, modified or disapproved, was a policy decision for the City. In the League of Cities' view, the exercise of that discretion by those elected to make such decisions is entitled to deference.

The League of Cities also notes, however, that the City's decision to approve the Millennium Project exemplifies a significant shift in California land use planning towards mixed-use, infill, transit-oriented development. (See Fulton & Shigley, Dudley Declaration, Ex. A, pp. 10–11.) This shift is consistent with numerous statutes that encourage GHG emission reductions from the transportation sector, promote dense development to address California's housing shortage, streamline environmental review, and reflect the recognition that cities must promote redevelopment of urbanized areas. The League of Cities is concerned that, if this Court adopts the trial court's reasoning, it will erect needless barriers to this shift.

1. The Legislature has recognized that infill development must be encouraged in order to achieve environmental goals.

Infill development builds housing and mixed-use developments on underutilized parcels (e.g., parking lots or low-density residential). (Fulton & Shigley, Dudley Declaration, Ex. A, pp. 11–12.) Transit oriented development is "a particular type of infill development that is oriented

around high-frequency transit service." (*Id.* at p. 13.) With "high-quality transit service … it is possible to take advantage of the benefits of infill development even more." (*Ibid.*)

In the Los Angeles region, a TOD is an area "where the County encourages infill development, pedestrian-friendly and community-serving uses near transit stops. The goal is to encourage walking, bicycling, and transit use." (Los Angeles County, Department of Regional Planning, *Transit Oriented Districts*, <http://planning.lacounty.gov/tod> (as of Dec. 4, 2018), Dudley Declaration, Ex. B, p. 16.)

The Millennium Project is in a City-designated TOD, within a block of the Red Line and serviced by Metro Local bus lines and a Metro Rapid Line. (AR 4217.) The public "transportation option gives people more flexibility in the use of their cars and, in turn, allows a greater concentration and mix of land uses in close proximity to one another." (Fulton & Shigley, Dudley Declaration, Ex. A, p. 14.)

California GHG and climate change legislation have driven this shift in land-use planning towards denser, infill development. A key statute is Senate Bill ("SB") 375 (Stats. 2008, ch. 728). (Fulton & Shigley, Dudley Declaration, Ex. A, p. 10 [SB 375 "will only increase the pressure to move in the direction of infill development"].) In enacting SB 375, the Legislature found that "[t]he transportation sector contributes over 40 percent of [GHG] emissions in the State of California." (Stats. 2008, ch.

728, § 1, subd. (a).) "Without improved land use and transportation policy, California will not be able to achieve" the GHG reduction targets of Assembly Bill ("AB") 32 (1990 levels by 2020). (*Id.* at subd. (c).) To achieve this target, SB 375 mandates that Metropolitan Planning Organizations (MPOs) adopt a sustainable communities strategy ("SCS") as part of their regional transportation plans ("RTPs"). (Gov. Code, § 65080, subds. (a), (b).) The SCS must state targets for decreasing GHG emissions from cars and light trucks. (Gov. Code, § 65080, subd. (b)(2)(A).)

The League of Cities has a specific role to play under SB 375 in setting these targets and determining how to accomplish them. League of Cities members are required to be represented on the State Air Resources Board Regional Targets Advisory Committee. (Gov. Code, § 65080, subd. (b)(2)(A) (i).) The committee is charged with "recommend[ing] factors to be considered and methodologies to be used" and "may consider any relevant issues" including "the magnitude of [GHG] reduction benefits from a variety of land use and transportation strategies." (*Ibid.*) An SCS must contain a financing element that quantifies expenditures for mass transit, commuter rail, and intercity rail expansion, rehabilitation, maintenance and operations, and for pedestrian and bicycle facilities. (Gov. Code, § 65080, subd. (b)(4)(B)(v), (vi), (vii).)

In drafting SB 375, the Legislature clearly understood the role that CEQA review plays in land use planning, and how CEQA can

unintentionally impede infill development. "[Because] CEQA frowns on such [infill] city building because of the intense impacts on small areas.... [f]or the most part, it's easier to get a low-density suburban project through CEQA than it is a high-density, infill project. ¶ Yet, from a much broader perspective, bustling cities are easier on the environment than suburbs" because they use less water, do not encroach upon farmland or wildlife habitat, and can provide transportation options that reduce GHG emissions. (Fulton & Shigley, Dudley Declaration, Ex. A, p. 8.)

Acknowledging this tension, SB 375 amended CEQA, adding Chapter 4.2. (Pub. Resources Code, §§ 21155 – 21155.3) and section 21159.28. These amendments exempt certain mixed-use, transit-priority projects from CEQA review and streamline others, if they meet certain criteria. (Pub. Resources Code, §§ 21155, 21155.1, 21155.2, 21159.28.) Criteria include proximity to public transit, consistency with "the general use designation, density, building intensity, and applicable policies specified for the area" under an adopted SCS. (Pub. Resources Code, § 21155, subds. (a), (b).) In particular, SB 375 provides that, for qualifying residential and mixed-use projects, environmental review does not have to analyze growth-inducing impacts or project-specific or cumulative impacts from cars and light trucks. (Pub. Resources Code, § 21159.28, subd. (a); see also Pub. Resources Code, § 21155.4.)

Similarly, the Legislature enacted SB 743 (Stats. 2013, ch. 386) in order to "[m]ore appropriately balance the needs of congestion management with statewide goals related to infill development, promotion of public health through active transportation, and reduction of greenhouse gas emissions." (Stats. 2013, ch. 386, § 1, subd. (b)(2).) Implementing SB 743, the California Resources Agency has proposed amendments to the CEQA Guidelines to change the metric for analyzing transportation impacts from level of service ("LOS") to vehicles miles travelled ("VMT"), and to redefine what constitutes a significant transportation impact. (Proposed CEQA Guidelines, § 15064.3, Final 2018 version, Dudley Declaration, Ex. C, pp. 18–20.) As the proposed new CEQA Guidelines state, VMT is generally "the most appropriate measure of transportation impacts." (Proposed CEQA Guidelines, § 15064.3, subd. (a), Dudley Declaration, Ex. C, p. 18.) "Generally, projects within one-half mile of either an existing major transit stop or a stop along an existing high quality transit corridor should be presumed to cause a less than significant transportation impact." (Proposed CEQA Guidelines, § 15064.3, subd. (b)(1), Dudley Declaration, Ex. C, p. 19.) In this fashion, the Resources Agency has recognized the legislative intent to promote infill projects based on their environmental benefits.

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2. Dense, mixed-use development is essential to achieving California's housing goals.

California cities are obliged to plan for the development of housing, while less and less raw land is available or desirable for residential homes. Nowhere is this more evident than in southern California and the San Francisco Bay Area, where "hundreds of older cities" have gone from "land-rich" to "land-poor" while population grows. (Fulton & Shigley, Dudley Declaration, Ex. A, pp. 10–11.) Longer life expectancy has also increased the need for housing; there is only one unit of housing available for every 26 senior Americans. (Steve Pociask, *California's Senior Housing Shortage Must Be Addressed,* San Bernardino County Sun (June 22, 2016), <https://www.sbsun.com/2016/06/22/californias-senior-housing-shortage-must-be-addressed-guest-commentary/>, Dudley Declaration, Ex. D, p. 22.) California lags behind other states in providing senior housing, with a housing penetration rate that is less than half the national average. (*Id.* at p. 23.) "One solution the [Legislative Analyst's Office] offers is building high-density housing." (*Id.* at p. 22.) Additionally, "[a] mixture of housing and other types of development, such as office and retail, is often the most efficient way to use available land resources." (Fulton & Shigley, Dudley Declaration, Ex. A, p. 10.)

Housing and climate change are intertwined. "Senate Bill 375 nudges planners in the right direction for the younger generations, toward

planning for apartments, condominiums, townhouses and flats in urban areas where job, educational and cultural opportunities are accessible by transit or a short drive." (Fulton & Shigley, Dudley Declaration, Ex. A, p. 9.) SB 375 influences where a local agency can place housing, with a preference for infill areas. While SB 375 does not supplant local land-use control, it does mandate that new housing be "consistent with the development pattern" of the SCS. (Gov. Code, § 65584.04, subd. (m)(i) [as amended, eff. Jan. 1, 2019].) Because a SCS must demonstrate how it will reduce GHG emissions, "local governments throughout the state should find themselves allocating more housing (i.e., a greater portion of their [Regional Housing Needs Allocation] numbers) to infill and around transportation corridors and less to the periphery of its jurisdiction." (John Darakjian, *SB 375: Promise, Compromise and the New Urban Landscape* (2009) 27 UCLA J. Envtl. Law & Policy 371, Dudley Declaration, Ex. E, p. 28.)

The State Planning and Zoning Law already contains policies that promote dense development. These policies include mandatory density bonuses (Gov. Code, § 65915); designating certain attached housing as a "by-right" use (Gov. Code, § 65589.4); and limits on multifamily housing moratoriums (Gov. Code, § 65858). The housing element of a general plan must contain "[a]n inventory of land suitable and available for residential development, including vacant sites … and an analysis of the relationship

of zoning and public facilities and services to these sites." (Gov. Code, § 65583, subd. (a)(3).) Regional councils of governments must also analyze "[t]he availability of land suitable for urban development or for conversion to residential use, the availability of underutilized land, and opportunities for infill development and increased residential densities." (Gov. Code, § 65584.04, subd. (e)(2)(B) [as amended, eff. Jan. 1, 2019].)

In 2017, in recognition of the State's critical housing shortage, the Legislature enacted a series of statutes aimed at encouraging dense, infill, mixed-use development. AB 73 (Stats. 2017, ch. 371) created housing sustainability districts. (Gov. Code, § 66200 et seq.) Residential development within qualifying sustainability districts may proceed with a ministerial permit, and other development with a conditional use permit. (Gov. Code, § 66201, subd. (b)(2).) An "eligible location" for a housing sustainability district is one that is "within one-half mile of public transit" or "by virtue of existing infrastructure, transportation access, existing underutilized facilities, or location, is highly suitable for residential or mixed-use." (Gov. Code, § 66200, subd. (e)(1), (2); see also Pub. Resources Code, § 21155.10, 21155.11.)

SB 540 (Stats. 2017, ch. 369) created "Workforce Housing Opportunity Zones." (Gov. Code, § 65620 et seq.) These zones must contain between 100 and 1,500 residential units. (Gov. Code, § 65621, subd (a)(1).) They can proceed under a specific plan, subject to CEQA review,

with streamlined review for projects that are consistent with the zone's standards. (Gov. Code, §§ 65621, subd. (a), 65622, subd. (a).)

These legislative initiatives make clear that California needs more residential housing, and lacks undeveloped land on which to build it. These initiatives also recognize that conventional sprawl, and the transportation patterns that result, cannot continue if the State is to reach its environmental goals. Dense, infill, transit-oriented, and mixed-use development are California's urban housing future. The Decision is out of step with this reality.

CONCLUSION

The trial court's rationale, if adopted by this Court, would preclude an applicant from seeking entitlements for mixed-use projects, unless the applicant commits to the precise mix of uses that will be built, and to the myriad of design details that such projects inevitably entail.

As explained above, however, an applicant seeking to develop a dense, mixed-use project may not know the exact balance of land-uses that will be embraced by the market over the decade or more that it will take for the project to build out. Faced with such uncertainty, an applicant may seek entitlements that provide a measure of flexibility regarding what the mix of uses will be, or exactly how the project will ultimately be implemented.

Whether a city should approve entitlements with such flexibility is, ultimately, a policy decision for local officials. Under those circumstances,

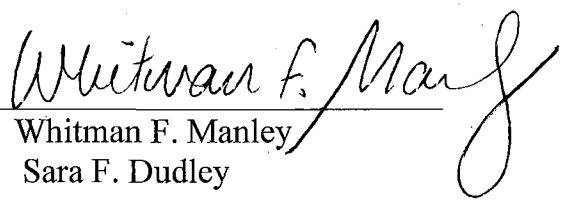
CEQA should not be applied in a manner that deprives local officials from exercising that discretion. Nothing in the statute or CEQA Guidelines compels the rigidity demanded by the trial court's ruling. Moreover, such a rule would hinder cities' efforts, endorsed by the Legislature, to promote urban, infill development.

The League of Cities requests that, in resolving this issue, this Court consider the concerns raised in this Brief.

Dated: December 13, 2018

Respectfully submitted,

REMY MOOSE MANLEY, LLP

By: 

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CERTIFICATE OF WORD COUNT

[Cal. Rules of Court, Rule 8.204(c)]

Pursuant to Rule 8.204(c) of the California Rules of Court, I hereby certify that this **[PROPOSED] AMICUS CURIAE BRIEF** contains 7,545 words, according to the word counting function of the word processing software used to prepare this brief.

Executed on December 13, 2018, at Sacramento, California.

Whitman F. Manley

WHITMAN F. MANLEY

StopTheMillenniumHollywood.com v. City of Los Angeles, et al.
2nd Appellate District, Division 3, Case No. B282319

PROOF OF SERVICE

I, Kathryn A. Ramirez, am employed in the City and County of Sacramento. My business address is 555 Capitol Mall, Suite 800, Sacramento, California, 95814, and my email address is kramirez@rmmenvirolaw.com. I am over the age of 18 years and I am not a party to the above-entitled action.

I am familiar with Remy Moose Manley, LLP's practice for collection and processing mail whereby mail is sealed, given the appropriate postage and placed in a designated mail collection area. Each day mail is collected and deposited in a USPS mailbox after the close of each business day.

On December 13, 2018, I served the following:

APPLICATION OF THE LEAGUE OF CALIFORNIA CITIES FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANTS CITY OF LOS ANGELES AND MILLENNIUM HOLLYWOOD LLC; [PROPOSED] AMICUS CURIAE BRIEF

☒ **VIA ELECTRONIC TRANSMISSION (TrueFiling)** by causing a true copy thereof to be electronically delivered to the following person(s) or representative(s) at the email address(es) listed below. I did not receive any electronic message or other indication that the transmission was unsuccessful.

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☒ **VIA FIRST CLASS MAIL** by causing a true copy thereof to be placed in a sealed envelope, with postage fully prepaid, addressed to the following person(s) or representative(s) as listed below, and placed for collection and mailing following ordinary business practices.

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I declare under penalty of perjury that the foregoing is true and correct. Executed this 13th day of December, 2018, at Sacramento, California.

Kathryn A. Ramirez