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April 13, 2017

Hon. Judith McConnell, Administrative P.J.  
Hon. Gilbert Nares, Associate Justice  
Hon. Judith L. Haller, Associate Justice  
California Court of Appeal  
Fourth Appellate District, Division One  
750 B Street, Suite 300  
San Diego, California 92101

Re: Request for Publication of *Citizens for Beach Rights v. City of San Diego*,  
Case No. D069638, Filed March 28, 2017.

Dear Justices McConnell, Nares and Haller:

The League of California Cities ("League") and the California State Association of Counties ("CSAC") respectfully request that the Court publish its opinion in *Citizens for Beach Rights v. City of San Diego* (filed March 28, 2017), Appeal No. D069638 ("Opinion"). The Opinion satisfies the standards for publication under California Rules of Court, rule 8.1105(c).

**1. Interest of the League and CSAC**

The League 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 is advised by its Legal Advocacy Committee ("League Committee"), which is comprised of 24 city attorneys representing all regions of the State. The League Committee monitors litigation of concern to municipalities and identifies cases that are of statewide or nationwide significance. The League Committee has identified this case as having such significance.

CSAC is a non-profit association of 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California, and overseen by a Litigation Overview Committee comprised of county counsels throughout the state. The Litigation Overview Committee monitors

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litigation of concern to counties statewide, and has identified this case as having such significance.

## **2. The Opinion Satisfies Rule 8.1105(c)**

California Rules of Court, rule 8.1105(c), sets forth a liberal standard for publication. It encourages publication of opinions that meet any one of nine criteria. (Rules of Court, rule 8.1105(c) ["An opinion ... should be certified for publication" if it satisfies any one of nine criteria].)<sup>1</sup> The Opinion satisfies criteria nos. 2 and 6.

First, the Opinion applies an existing rule of law to facts that are significantly different than those in existing published opinions. (Rules of Court, rule 8.1105(c)(2).) The appellate courts have applied the 90-day statute of limitations of Government Code section 65009(c)(1)(E) in a variety of different fact patterns. (See, e.g., *Travis v. County of Santa Cruz* (2004) 33 Cal.4th 757, 767-68 [plaintiff timely challenged conditions imposed on second unit permits under 90-day statute of limitations of section 65009(c)(1)(E)]; *Stockton Citizens for Sensible Planning v. City of Stockton* (2012) 210 Cal.App.4th 1484, 1493 [challenge to Community Development Department Director's letter approving construction of Wal-Mart Supercenter barred by 90-day statute of limitations of section 65009(c)(1)(E)]; *Honig v. San Francisco Planning Dept.* (2005) 127 Cal.App.4th 520, 524-25, 527-28 [purported challenge to building permit was barred by plaintiff's failure to timely challenge underlying approval of variance within 90 days, pursuant to section 65009(c)(1)(E)].) However, no published opinion has addressed the

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<sup>1</sup> Rule 8.1105(c) provides that an opinion should be published if it:

- (1) Establishes a new rule of law; (2) Applies an existing rule of law to a set of facts significantly different from those stated in published opinions; (3) Modifies, explains, or criticizes with reasons given, an existing rule of law; (4) Advances a new interpretation, clarification, criticism, or construction of a provision of a constitution, statute, ordinance, or court rule; (5) Addresses or creates an apparent conflict in the law; (6) Involves a legal issue of continuing public interest; (7) Makes a significant contribution to legal literature by reviewing either the development of a common law rule or the legislative or judicial history of a provision of a constitution, statute, or other written law; (8) Invokes a previously overlooked rule of law, or reaffirms a principle of law not applied in a recently reported decision; or (9) Is accompanied by a separate opinion concurring or dissenting on a legal issue, and publication of the majority and separate opinions would make a significant contribution to the development of the law. [paragraph breaks omitted.]

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argument plaintiff presented in this matter – that Section 65009 does not apply to a final development approval because the plaintiff contends an underlying, requisite permit has expired. In rejecting that argument, the Opinion establishes that the 90-day statute of limitations of section 65009(c)(1)(E) applies to a public agency's determination that the applicant is entitled to proceed with the subject project.

Second, this Court's opinion involves a legal issue of continuing public interest. (Rules of Court, rule 8.1105(c)(6).) The short limitations period of section 65009(c)(1) is "intended to provide certainty for property owners and local governments regarding" local planning and zoning decisions. (Gov. Code § 65009, subdivs. (a)(2) & (a)(3).) But this legislative purpose can only be achieved when all interested parties – public entities and property owners alike – have certainty regarding precisely when the 90-day limitations period commences to run. Ambiguity on the commencement of the limitations period has numerous unfortunate consequences, including without limitation:

- Public entities, property owners, and interested persons may waste their respective resources debating, and even litigating, issues for which this Court's Opinion would provide useful guidance.
- Judicial resources could be unnecessarily wasted through such litigation.
- The resources of tax-payer funded public entities could be unnecessarily wasted in such litigation.
- The "chilling effect" on projects that lawsuits challenging local zoning and planning decisions would not, contrary to the Legislature's express intent, be "alleviate[d]." (See Gov. Code § 65009, subdiv. (a)(2).)

In sum, multiple grounds support the publication of the Opinion.



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**3. Conclusion**

Based on the foregoing, the League and CSAC believe that the Opinion meets the standards for publication set forth in California Rules of Court, rule 8.1105(c), and respectfully urge this Court to order the Opinion published.

Sincerely,

Burke, Williams & Sorensen, LLP



Kevin D. Siegel



Nicholas J. Muscolino

KDS:cs

**STATE OF CALIFORNIA**

Court of Appeal, Fourth Appellate District Division 1

**PROOF OF  
SERVICE**

(Court of Appeal)

Case Name: **Citizens for Beach Rights v. City of San Diego**

Court of Appeal Case Number: **D069638**

Superior Court Case Number: **37-2015-00028857-CU-WM-CTL**

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