RUTAN
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September 11, 2009

Hon. Arthur G. Scotland, Presiding Justice
and Associate Justices
Court of Appeal, State of California
Third Appellate District
621 Capitol Mall, 10th Floor
Sacramento, CA 95814-4719

Re: *Tracy First v. City of Tracy, et al, Appellate Case No. C059227*
Request for Publication

Dear Presiding Justice Scotland and Associate Justices:

On Behalf of the League of California Cities[1] ("League") and pursuant to California Rules of Court rule 8.1120(a)(2), I write to request further publication of the Opinion issued in the above-referenced matter on August 27, 2009. The Opinion was certified for partial publication, excluding parts II through IV. The League specifically requests that the Court certify for publication Section IV of the Opinion on the basis that it addresses a much confronted issue of important public policy and meets the standards for publication contained California Rule of Court rule 8.1105(c), subparts (2), (4) & (6).

The primary burden of implementing the California Environmental Quality Act ("CEQA"), Public Resources Code Section 21000, *et seq.*, falls squarely on the shoulders of local agencies such as the 480 members of the League. In carrying out that duty, one of the thorniest issues that lead agencies face is the identification and mitigation of significant environmental impacts beyond the lead agencies' jurisdiction. The California Supreme Court in *City of Marina v. Board of Trustees of California State University* (2006) 39 Cal.4th 341, 359, made it clear that lead agencies could not ignore impacts simply because they were outside their jurisdiction. However, it did not address the all-too-common scenario in which the entity that has jurisdiction over the impacted area has no intention or plan to take any action that would

[1] The League of California Cities is an association of 480 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that are of statewide - or nationwide - significance. The Committee has identified Section IV of this case as being of such significance.

mitigate the impacts. In the *City of Marina* case, the Fort Ord Reuse Authority had an existing plan to make improvements that would mitigate the impacts caused by the reuse of the former military base. The plan assumed that the California State University Monterey Bay ("CSUMB") portion of the former base would be contributing its fair share toward those improvement, but the CSUMB Trustees simply chose not to participate in the program based in part upon jurisdictional grounds stemming from a constitutional provision relating to state-owned property.

The Trustees' refusal to participate in mitigation in the City of Marina Case is somewhat unusual. The factual scenario in the *First Tracy* case, however, is much more typical of what agencies throughout the state face--the lead agency was asked by a neighboring jurisdiction to simply impose a "fair share" payment obligation even though that neighboring jurisdiction had no plan in place for the improvement to be constructed and there was no assurance that the payment would actually be used to mitigate the impacts of the project at issue. If lead agencies in this situation acquiesce to the request of the neighboring jurisdiction, they open themselves to several legal challenges. First and foremost, persons wishing to challenge the project will be able to argue that the payment does not constitute a valid mitigation measure according to the rule articulated in *Anderson First Coalition v. City of Anderson* (2005) 130 Cal.App.4th 1173. To add insult to injury, the project applicant may claim the payment is invalid based upon a lack of nexus or that its imposition violates the Mitigation Fee Act, Government Code section 66000 *et seq*[2].

These issues, coupled with the fact that CEQA itself does not provide independent authority to impose mitigation measures, has lead to considerable uncertainty for lead agencies struggling with extra-territorial impacts where there is no accompanying extra-territorial mitigation program. Section IV of the *Tracy First* Opinion is the first appellate decision to squarely address this constantly reoccurring issue and provide much needed guidance to not only lead agencies, but also the agencies whose resources might be impacted by the projects approved by those lead agencies.

From a practical standpoint, it has been particularly difficult for lead agencies to address this issue in situations where a project has crossed the "threshold of significance" established by the agency with jurisdiction over an intersection or roadway, but still has a miniscule percentage of the "fair share" responsibility for the improvement (I commonly see 1% or 2% fair share figures). If the agency that controls the intersection or roadway has no plan in place to build the improvement or to collect the funding needed for the improvement (e.g., no Development Impact Fee covering the improvement), lead agencies struggle as to how to formulate mitigation. Should it require a bond for 2% of the improvement costs? How should it account for increasing costs? Should the bond be released at some point in the future if there is no movement toward

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[2] The Mitigation Fee Act requires, among other things, the return of funds not used for the purpose for which they were collected.

planning the improvement? Will there be a duty to refund any fees actually paid if the improvements are not constructed within some reasonable time frame? (*See, e.g.,* Gov't Code § 66001(d), (e)). The *Tracy First* Opinion clarifies that where the agency with jurisdiction over the impacted resource has no short term or long term plan to make improvements that would mitigate the project's impact, it is reasonable to find the mitigation infeasible.

This has been an area of great confusion for lead agencies throughout the state, and the clarification provided by the Opinion in this case would be helpful to the agencies faced with this issue.

Very truly yours,

RUTAN & TUCKER, LLP

M. Katherine Jenson
On Behalf of the League of California Cities

MKJ:lr

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cc: Counsel of Record (per Proof of Service)

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed by the law office of Rutan & Tucker, LLP in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is 611 Anton Boulevard, Fourteenth Floor, Costa Mesa, California 92626-1931.

On September 11, 2009, I served on the interested parties in said action the within:

REQUEST FOR PUBLICATION

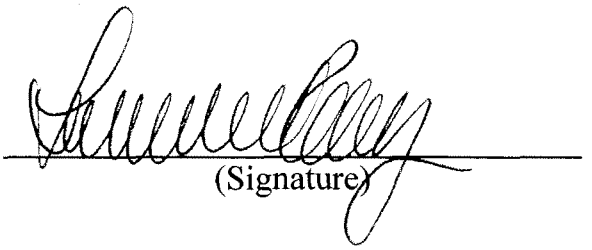
by placing a true copy thereof in sealed envelope(s) addressed as stated on the attached mailing list.

In the course of my employment with Rutan & Tucker, LLP, I have, through first-hand personal observation, become readily familiar with Rutan & Tucker, LLP's practice of collection and processing correspondence for mailing with the United States Postal Service. Under that practice I deposited such envelope(s) in an out-box for collection by other personnel of Rutan & Tucker, LLP, and for ultimate posting and placement with the U.S. Postal Service on that same day in the ordinary course of business. If the customary business practices of Rutan & Tucker, LLP with regard to collection and processing of correspondence and mailing were followed, and I am confident that they were, such envelope(s) were posted and placed in the United States mail at Costa Mesa, California, that same date. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

Executed on September 11, 2009, at Costa Mesa, California.

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

Lauren Ramey
(Type or print name)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