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September 17, 2019

Presiding Justice Elwood Lui and the Associate Justices
Division 2, Second Appellate District
Ronald Reagan State Building
300 S. Spring Street
2nd Floor, North Tower
Los Angeles, CA 90013

RE: **REQUEST FOR PUBLICATION**

AIDS Healthcare Foundation v. City of Los Angeles, Case No. B292816
(LACSC Case No. BS161771)

Honorable Justices:

On behalf of the California State Association of Counties and the League of California Cities, we respectfully request publication of the August 29, 2019, decision in *AIDS Healthcare Foundation v. City of Los Angeles*, Case No. B292816 ("Opinion"), pursuant to the California Rules of Court, rule 8.1120 and the standards for certification in California Rules of Court, rule 8.1105(c).

I. The California State Association of Counties and the League of Cities' Interests in Publication

The California State Association of Counties (CSAC) is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of County Counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

The League of California Cities (the League) is an association of 478 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 have statewide or nationwide significance. The Committee has identified this case as having such significance.

Due to the exceptionally well-reasoned guidance the Opinion provides and for the reasons explained below, publication will significantly assist CSAC and the League's members, as well as other stakeholders in city and county land use processes. California cities and counties routinely encounter these issues, and CSAC and the League urge publication.

II. Standards for Certification

The Opinion meets multiple standards for publication contained in California Rules of Court, rule 8.1105(c). The Opinion "explains . . . an existing rule of law"; "[a]dvances a new interpretation, clarification, . . . or construction of a provision of a constitution [or] statute"; and "[i]nvolves a legal issue of continuing public interest."

A. The Opinion's discussion of due process and *ex parte* communications warrants publication.

In the *quasi*-adjudicatory land use approval hearings that occur nearly constantly throughout this State, cities and counties are tasked with holding hearings that take into account not just the due process rights of neighbors, but the rights of all members of the public to be heard on matters of public concern. As the Opinion observes, the format of land use approval hearings, unlike some administrative hearings, does not resemble a court trial. Because legal precedent in administrative law addresses a spectrum – ranging from informal to extremely formal, from land use permitting to, for example, discipline or enforcement – the Opinion is helpful in its explanation why, in the land use approval context, there is no constitutional need to "transmogrify the administrative proceedings for approving projects and zoning changes into proceedings with all the trappings of a criminal trial." (Opinion at p. 36.) The Opinion provides a learned explanation of why these approval hearings, which frequently entail both quasi-adjudicatory and legislative matters, do not require a level of formality that would be foreign to the public that wishes to be heard. The entire discussion is of great and practical public interest.

The Court's recognition that disclosed ex parte communications are not sufficient on their own to trigger a fishing expedition into bias involves a very common set of circumstances, of continuing and recurring interest to California cities and counties. In rejecting this particular request for broad discovery, the Opinion's application of the rule against extra-record discovery into mental processes clarifies the law by applying the rule to appointed planning commissioners. (*Cf. City of Fairfield v. Superior Court* (1975) 14 Cal.3d 768 [elected legislators].) If the Opinion is published, it will help to address incorrect arguments that this important rule does not apply to appointed bodies. Local self-government depends upon these largely volunteer bodies (*e.g.*, planning commissions, business license commissions, civil service commissions, environmental review boards, historic preservation boards, rent control boards, police oversight boards, utility commissions, and so on).

The Opinion also addresses other issues that have not been substantively addressed in prior opinions, including the Court's rejection of the claim that providing an adequate opportunity to respond to ex parte communications necessarily entails something akin to a "verbatim" disclosure (Opinion at p. 33), and the rejection of the impractical claim that due process in a public hearing requires that equal time be given to an opposing person or group (Opinion at p. 34). As the Opinion notes, both of these are arguments that arise from a misconstrued level of formality required to achieve notice and an opportunity to be heard.

We note that the statutory "fair hearing" requirements for local government land use approval hearings are governed by a fairly generic, non-land use provision that only requires fairness in administrative matters (Code of Civ. Proc., § 1094.5, subdivision (b)). Published judicial guidance on matters not squarely addressed by other authority is valuable and of continuing public interest in this context. The due process discussion in the Opinion meets the standards for publication on multiple bases, and we respectfully urge the Court to publish the Opinion.

B. The Opinion's CEQA discussion of mitigation measures and prejudice warrants publication.

The Opinion's discussion of the California Environmental Quality Act (CEQA) also warrants publication. While there have been several decisions that distinguish between conditions of approval and formal "mitigation measures," no case directly distinguishes environmentally motivated legislation from legally required "mitigation measures." By emphasizing and policing the distinction, the Opinion's discussion would help protect the integrity of the CEQA and legislative processes, thereby helping to avoid unintended consequences and unnecessary ambiguities. With respect to prejudice, the Opinion correctly rejects a technical claim that the project was not approved in the correct order where the merits of the lower body's decision were before the City Council on appeal. The Court's emphasis on the need for an actual showing of prejudice in this context implements the Legislature's intent in Public Resources Code section 21005 and would be instructive for litigants on all sides. The Opinion correctly distinguishes cases finding *per se* prejudice, and also provides informative procedural reasoning. The CEQA discussion in the Opinion "[a]dvances a … clarification, . . . or construction of a provision of a constitution [or] statute" and also "involves a legal issue of continuing public interest" within the meaning of rules 8.1105(c)(4) and (6) of the California Rules of Court.

C. The Opinion helpfully clarifies the application of the standard of review in matters of continuing public interest.

The Opinion provides guidance both on judicial review of a city charter, and judicial review of city ordinances. The Opinion properly emphasizes the need for deference in the context of the de novo review of decisions of zoning administrators' interpretations of ambiguous ordinances. (Opinion at p. 20.) Zoning zdministrators across the state are charged with interpreting ambiguous zoning ordinances, and are necessarily interested in the Court's rejection of each of the arguments made by Petitioner and Appellant. The discussion "explains, with reasons given," existing law, within the meaning of Rule 8.1105(c)(3). In addition, the full

Opinion warrants publication because the legislative discussion provides context for the remainder of the Opinion.

III. Conclusion

The Opinion is clear, well-written, and detailed. The Opinion covers issues of continuing importance to California's public agencies, litigants, and the public, in areas of law that need greater clarity. CSAC and the League therefore respectfully request that the Court order full publication of the Opinion.

Very truly yours,

/s/

Verne Ball
Deputy County Counsel

PROOF OF SERVICE BY MAIL

(Code Civ. Proc. §§ 1013a(3) and 2015.5)

I am employed in the County of Sonoma, California; I am over the age of 18 years and not a party to the within action; my business address is 575 Administration Dr., Rm. 105A, Santa Rosa, California. I am readily familiar with my employer's business practice for collection and processing of correspondence for mailing with the United States Postal Service.

On September 17, 2019, following ordinary business practice, I served the **REQUEST FOR PUBLICATION** on the parties in said case, by submitting via TrueFiling to the email addresses provided for electronic filing, on that date at my place of business, that same day in the ordinary course of business, addressed as follows:

See Service List:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this declaration was executed on September 17, 2019, at Santa Rosa, California.

/s/
Amber Kennedy