Remy Thomas
Moose & Manley LLP

455 Capitol Mall, Suite 210
Sacramento, CA 95814

Andrea K. Leisy
aleisy@rtmmlaw.com

June 7, 2011

VIA FEDERAL EXPRESS

The Honorable Judith D. McConnell, Presiding Justice
The Honorable Gilbert P. Nares, Associate Justice
The Honorable Terry Byron O'Rourke, Associate Justice
California Court of Appeal, Fourth Appellate District, Division One
750 B Street, Suite 300
San Diego, CA 92101

Re: Request for Publication: *Citizens for Responsible Equitable Environmental Development v. City of San Diego*, Case No. D057524

Dear Justices McConnell, Nares, and O'Rourke:

Pursuant to California Rules of Court, rule 8.1120(a), we respectfully request publication of the opinion issued by this Court in *Citizens for Responsible Equitable Environmental Development v. City of San Diego* (May 19, 2011, D057524) (the "Opinion"). We believe the decision meets the standards for publication and contains sound legal principles that, if made available as citable precedent, would benefit Californians.

We submit this letter on behalf of the League of California Cities ("League"). This letter sets forth the League's interest in publication and the reasons the League believes the Opinion meets the standards for publication set forth in California Rules of Court, rule 8.1105, subdivision (c).

The parties to the appeal have not authored this letter in whole or in part, nor have the parties to the appeal made a monetary contribution for the preparation of this letter.

The Opinion examines the exhaustion of administrative remedies doctrine in the context of actions brought under the California Environmental Quality Act ("CEQA"). (Pub. Resources Code, § 21000 *et seq.*) Significantly, the Opinion clarifies the scope of an agency's responsibilities in reviewing documents submitted during public comment periods, and discusses the proper way to bring factual issues and legal theories to the agency's attention during CEQA processes. The Court's analysis also addresses other legal issues of continuing public interest -- the effects of greenhouse gas emissions on climate

change, and the procedural and substantive requirements for water supply assessments -- and makes significant contributions to the legal literature on these topics. Therefore, pursuant to rules 8.1105(c)(2), (c)(4), and (c)(6), of the California Rules of Court, the Opinion warrants publication.

I. The League Has an Interest in Publication of the Opinion. (California Rules of Court, Rule 8.1120, subdivision (a)(2).)

We submit this request for publication on behalf of the League. The League of California Cities is an association of 476 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 this case as being of such significance.

The League has a keen interest in the development of CEQA case law. CEQA has a direct and significant impact on land-use decision-making by cities throughout the State. In particular, the League has a strong interest in the publication of the Opinion's analysis of the requirement to exhaust administrative remedies in CEQA contexts. As discussed below, the continued development of case law addressing this issue assists California cities in complying with CEQA.

II. The Opinion advances a new interpretation, clarification, criticism, or construction of a provision of a constitution, statute, ordinance, or court rule (California Rules of Court, Rule 8.1105, subdivision (c)(4)) and involves a legal issue of continuing public interest (California Rules of Court, Rule 8.1105, subdivision (c)(6))

The Opinion gives important guidance regarding Public Resources Code section 21166 (section 21166) and CEQA Guidelines section 15162, subdivision (a), which instruct agencies regarding when a supplemental environmental impact report ("SEIR") is required.

First, the Opinion clarifies that new information must be properly presented to the agency before the information can come within the meaning of Public Resources Code section 21166, potentially requiring that agency to prepare a SEIR. In particular, the Opinion definitively states that an agency is not responsible for scouring thousands of pages of material, submitted in what is often termed a "document dump" at a final hearing on the project just before the agency is poised to act, to discern what objections are being raised against a proposed project: "The City cannot be expected to pore through thousands of documents to find something that arguably supports CREED's belief the project should

not go forward." (Opinion, at p. 14.) This clarification is particularly important in light of the common tactic of withholding meaningful comments on the adequacy of the agency's CEQA review until the eleventh hour, and then presenting those comments on the day of the final hearing on a project.[1] The goal of this tactic is to ensure the agency will not have a substantive response unless it continues the hearing, causing substantial delay and additional expense to the agency and project proponents. It also assures that the agency has little opportunity to adequately understand and respond to project opponents' objections. Although the Opinion's underlying facts involve an SEIR, the court's finding that an agency is not responsible for reviewing thousands of pages of material submitted in a document dump is relevant to all CEQA proceedings. In sum, the court's ruling makes clear that the purpose of the exhaustion doctrine is not just to "preserve an appeal," but rather, to give the agency a fair "opportunity to receive and respond to articulated factual and legal issues before its actions are subjected to judicial review." (Opinion, at pp. 14, 15.) In this sense, it is not merely a procedural hurdle, but a substantive mandate.

Second, the Opinion interprets Public Resources Code section 21166 to preclude challenges that are based on new information about a well-established phenomenon. Once an EIR has been certified, CEQA strongly favors finality; Section 21166 authorizes reopening the CEQA process in only very limited circumstances. With respect to "new information," CEQA provides that the alleged new information must be truly new; it is information that was not known, *and could not have been known,* at the time the original EIR was certified. Here, the phenomenon of global warming, without detail, was cited by the petitioner as a ground for reopening the CEQA process under section 21166. The court disagreed, explaining that this phenomenon had been recognized for years before the original EIR was certified, and that the citation to the phenomenon alone was not new information sufficiently strong to overcome a presumption against requiring a subsequent or supplemental EIR. (Opinion, at pp. 18-20.) In particular, the Opinion notes that basic information about the effect of greenhouse gas (GHG) emissions on climate change was known decades before the 1994 EIR was certified, and thus, the information CREED submitted was not new information. This application of section 21166 to arguments related to climate change is significantly different from discussions of section 21166 in other cases. (See *Bowman v. City of Petaluma* (1986) 185 Cal.App.3d 1065 [discussing traffic impacts and traffic noise effects]; see also *River Valley Preservation Project v. Metropolitan Transit Development Bd.* (1995) 37 Cal.App.4th 154 [holding that a SEIR was not required just because an increase in size of the berm in a light rail transit project may

---

[1] / See e.g., *San Diego Navy Broadway Complex Coalition v. City of San Diego* (2010) 185 Cal.App.4th 924, 932, fn. 9 [while not deciding the issue on appeal, explaining that the trial court had admonished a party for "[s]imply including these issues in a PowerPoint presentation that was handed out to the City Council members . . . and providing a disk with approximately 6,700 pages of material" because these materials did not sufficiently give the city notice of relevant issues].)

increase the flood flow]; see also *Sierra Club v. Gilroy City Council* (1990) 222 Cal.App.3d 30, 45 [finding impacts of the proposed project on Tiger Salamanders were adequately analyzed in the FEIR despite claims that new information about the presence of the salamanders on the project site was available].)

The Opinion therefore gives cities clear and much-needed guidance about the scope of their responsibilities under CEQA in regards to responding to public comments. Furthermore, under the findings of this Opinion, petitioners will be less likely to engage in unnecessary tactics that cause additional delay and expense to cities.

The Opinion also contains important discussions about greenhouse gas emissions and climate change in the context of CEQA documents, which continue to generate significant public interest. In *San Diego Navy Broadway Complex Coalition*, *supra*, 185 Cal.App.4th 924, the court noted that claims related to the effect of GHG emissions on climate change had been dismissed by the trial court because they were inadequately presented to the city council. (*Id.* at p. 931.) No currently published opinion has established if and when, in the context of changes to a previously approved project or previously certified CEQA document, effects on climate change may be raised to challenge the approval of a changed version of a previously approved project. Both public agencies and concerned citizen groups need better guidance regarding how arguments about the effect of GHG emissions on climate change can be properly presented in CEQA proceedings and how such effects can be properly analyzed in EIRs. The petitioner in this case assumed that any reference to this issue, without tying it to the impacts of the project, would trigger the need for subsequent review under section 21166. The Opinion holds otherwise, providing a helpful overview of the topic and includes useful quotes from *Massachusetts v. E.P.A.* (2007) 549 U.S. 497, and *City of Los Angeles v. National Highway Traffic Safety Admin.* (D.C. Cir. 1990) 912 F.2d 478.

III. The Opinion should be published because it applies an existing rule of law to a set of facts significantly different from those stated in published opinions. (California Rules of Court, Rule 8.1105, subdivision (c)(2).)

a. Water Code section 10910

The Opinion is the first reported case to apply Water Code section10910, subdivision (g), to a situation where the water supplier and the lead agency are the same entity. Importantly, the Opinion states that, unlike circumstances where the water supplier is an independent water agency, the statute does not require approval of a water supply assessment (WSA) at the outset of the CEQA process when the water supplier and lead agency are the same entity. (See *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 433; see also *California Water Impact Network v. Newhall County Water Dist.* (2008) 161 Cal.App.4th 1464, 1481.) In such a situation, the

court recognized, the agency can properly consider and approve the documents simultaneously for efficiency's sake. This is also the first time a case analyzes the use of a WSA prepared under Water Code section 10910 in a supplemental or subsequent EIR.

b. Public Resources Code section 21177

The Opinion also applies Public Resources Code section 21177, subdivision (a), to an instance where the factual issue of drought was raised during administrative proceedings by someone unrelated to the party bringing the CEQA challenge, but the issue was raised in another context and not presented in a manner that gave the agency notice of the legal theories related to drought that Petitioner would advance in judicial proceedings to contest the agency's CEQA decisions.

Specifically, the petitioner asserted that an SEIR was required instead of the addendum to the 1994 final EIR ("FEIR") that the city decided to adopt. The petitioner never mentioned any concerns related to drought, but rather, only cited to defects in the procedures by which the water supply analysis was adopted. A former councilmember objected to the project on the grounds that the 1994 EIR did not expressly address drought, although the councilmember never argued that a new SEIR needed to be prepared to address this issue. The petitioner argued during the court proceedings that the existence of drought conditions triggered review. After chiding the petitioner for failing to fairly present all of the relevant evidence in question, including evidence that there was sufficient water to serve the project even in multiple dry years, the court concluded that these facts simply did not sufficiently advise the agency of the issue to satisfy the exhaustion doctrine. In other words, the City was not given a fair opportunity to respond to the allegation that an SEIR was required based on these facts. Although other cases have discussed the exhaustion of administrative remedies doctrine in CEQA contexts, the facts presented were significantly different from those in the Opinion. Thus, the Opinion should be published because it applies an existing rule of law to a set of facts significantly different from those stated in published opinions. (California Rules of Court, Rule 8.1105, subdivision (c)(2).)

In *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, for instance, the court addressed the issue of timing related to the requirement to exhaust administrative remedies. (*Id.* at p. 1201.) In that case, the court concluded that exhaustion after certification of the EIR was authorized in certain limited circumstances. To wit: Since the city "improperly segregated environmental review from project approval" by placing certification of the EIR on the nonpublic consent calendar and "separately agendizing project approval . . . as public hearing items," the city had to consider any CEQA objections made at the project approval hearing even though these objections were made after the EIR had been certified and the public comment period had ended. (*Id.* at pp. 1200-1201.)

In *R. Brian Hines v. California Coastal Commission* (2010) 186 Cal.App.4th 830, the court found that the appellants had failed to exhaust administrative remedies because neither they nor any other person had raised the issue of whether CEQA categorical exemptions were applicable during the public hearings on the project. (*Id.* at pp. 852, 855.) Consequently, the CEQA claim that the agency had improperly applied a categorical exemption was barred. (*Ibid.*) Similarly, in *Coalition for Student Action v. City of Fullerton* (1984) 153 Cal.App.3d 1194, the court found that a "few bland and general references to environmental matters" did not satisfy the requirement to exhaust administrative remedies. (*Id.* at p. 1198.)

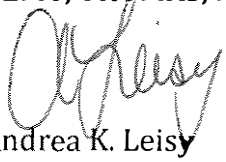
In *Center for Biological Diversity v. County of San Bernardino* (2010) 185 Cal.App.4th 866, the court found that the CEQA challengers exhausted their administrative remedies pertaining to a WSA, where the agency received numerous comments regarding whether the FEIR adequately addressed water supply issues, even if precise citations to the Water Code and WSA requirements were not included. (*Id.* at pp. 889-890.) The court explained that identifying the "precise statute at issue" was unnecessary "so long as the agency [wa]s apprised of the relevant facts and issues." (*Ibid.*)

Unlike the cases cited above and other cases reaching similar issues, the Opinion does not involve the timing of objections, the absence of any relevant comments on the issue at hand, or the perceived failure to cite a precise statute. Instead, the Opinion makes an important distinction between the factual issues raised during a public comment period from the legal theories that may be advanced in a CEQA challenge using those factual issues. As a result, this Opinion fills a gap in published opinions and provides guidance for both trial courts and public agencies that may need to grapple with this issue in the future.

IV. Conclusion

The League believes the Opinion meets several of the standards for publication set forth in California Rules of Court, rule 8.1105(c). On behalf of the League, we therefore respectfully request that the Court certify the Opinion in *Citizens for Responsible Equitable Environmental Development v. City of San Diego* for publication.

Very truly yours,
REMY, THOMAS, MOOSE & MANLEY, LLP



Andrea K. Leisy

cc: All counsel of record
Proof of service attached

Citizens for Responsible Equitable Environmental Development v. City of San Diego
4th DCA Case No. D057524
(San Diego County Superior Court No.: 37-2009-00085307-CU-MC-CTL)

PROOF OF SERVICE

I am a citizen of the United States, employed in the City and County of Sacramento. My business address is 455 Capitol Mall, Suite 210, Sacramento, California 95814. I am over the age of 18 years and not a party to the above-entitled action.

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

On June 7, 2011, I served the following:

REQUEST FOR PUBLICATION

☑ On the parties in this action by causing a true copy thereof to be placed in a sealed envelope with postage thereon fully prepaid in the designated area for outgoing mail addressed as follows; or

☐ On the parties in this action by causing a true copy thereof to be delivered via Federal Express to the following person(s) or their representative at the address(es) listed below; or

☐ On the parties in this action by causing a true copy thereof to be delivered by facsimile machine number (916) 443-9017 to the following person(s) or their representative at the address(es) and facsimile number(s) listed below:

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury that the foregoing is true and correct and that this Proof of Service was executed this 7th day of June, 2011, at Sacramento, California.

Rachel N. Jackson

Citizens for Responsible Equitable Environmental Development v. City of San Diego
4th DCA Case No. D057524
(San Diego County Superior Court No.: 37-2009-00085307-CU-MC-CTL)

PROOF OF SERVICE
SERVICE LIST

Mekaela Marie Gladden
Briggs Law Corp
99 East "C" Street, Suite 111
Upland, California 91786

Attorneys for Petitioner and Appellant
Citizens for Responsible Equitable Environmental Development

VIA U.S. MAIL

Heather L. Stroud
Office of the City Attorney
1200 Third Avenue, Suite 1620
San Diego, California 92101

Attorneys for Respondent
City of San Diego

VIA U.S. MAIL

Jeffrey William Forrest
Sheppard Mullin Richter & Hampton LLP
501 W. Broadway, 19th Floor
San Diego, California 92101

Attorneys for Real Party in Interest and Respondent
Pardee Homes

VIA U.S. MAIL