

February 18, 2015

Hon. Stuart R. Pollak, Acting P.J.
Hon. Peter J. Siggins, Associate Justice
Hon. Martin J. Jenkins, Associate Justice
Court of Appeal
First Appellate District, Division 3
350 McAllister Street
San Francisco, CA 94102

Re: Request for Publication of *City of Berkeley v. 1080 Delaware LLC*,
Case No. A142162

Dear Justices Pollak, Siggins, and Jenkins:

The League of California Cities ("League") respectfully requests that the Court publish its opinion in *City of Berkeley v. 1080 Delaware, LLC* (Jan. 30, 2015), Appeal No. A142162 (the "Opinion"). The Opinion satisfies the standards for publication under California Rules of Court, rule 8.1105(c).

1. Interest of the League of California Cities

The League is an association of 472 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.

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.

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(Rules of Court, rule 8.1105(c) (“An opinion ... should be certified for publication” if it satisfies any one of nine criteria).)¹ Here, the Opinion satisfies criteria nos. 1, 2 and 6.

First, this Court’s opinion establishes a new rule of law. (Rule 8.1105(c)(1).)

Cities across the State have adopted various forms of inclusionary housing legislation as a means to support the development of affordable housing, as this Court noted in the Opinion. Some cities have required, as a condition of project approval, a certain percentage of for-sale units to be set aside for affordable housing. (See, e.g., *Sterling Park, L.P. v. City of Palo Alto* (2013) 57 Cal.4th 1193, 1196 (discussing Palo Alto’s requirements for owner-occupied units).) Others have required that a certain percentage of for-rent units be set aside for affordable housing. (See, e.g., *Palmer/Sixth Street Properties, L.P. v. City of Los Angeles* (2009) 175 Cal.App.4th 1396, 1400-01.) As to the latter, the Second District Court of Appeal ruled in *Palmer* that inclusionary housing legislation that governs rental housing is preempted by the Costa-Hawkins Act.

Before the 2009 decision in *Palmer*, the City of Berkeley conditionally approved a residential project with affordable rental housing restrictions (as did other California cities). No court has issued a published decision addressing whether (1) such a “pre-*Palmer* approval” controls,² or (2) whether the *Palmer* decision precludes enforcement

¹ 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.]

² For the purposes of this letter, a “pre-*Palmer* approval” refers to a land use approval which, like the subject approval, imposed an affordable housing requirement on the rental of housing, and the statute of limitations to challenge the approval has expired.

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of such a condition of approval irrespective of whether (a) the project approval predated *Palmer*, and (b) any challenge to the project approval is time barred, or if there was a timely challenge, the challenge either failed or did not address the subject condition of approval. Thus, the Opinion establishes a new rule of law, satisfying subdivision (c)(1) of rule 8.1105.

Second, the Opinion applies an existing rule of law to facts that are significantly different than those in published opinions. (Rule 8.1105(c)(2).)

As the Opinion explains, the courts have held that the exclusive remedy to challenge a condition of approval is by petition for writ of administrative mandate filed within the 90-day period provided by statute. However, the precedents do not appear to address the fact pattern at issue here, where a would be challenger did not file suit within 90 days of approval and thereafter seeks to be relieved of the condition based on a subsequently published opinion. Thus, the Opinion satisfies subdivision (c)(2) of rule 8.1105.

Third, this Court's opinion involves a legal issue of continuing public interest. (Rule 8.1105(c)(6).)

Knowing whether (1) a pre-*Palmer* approval is enforceable, or (2) the owner could seek a ruling relieving it of any obligation to comply with such a condition, is of great interest to California cities (and is surely of great interest to cities' constituents, residential property owners, residential renters, advocacy groups and others). Without the benefit of the Opinion, other owners with pre-*Palmer* approvals may similarly assert that the approval may not be enforced. Such assertions could have several unfortunate consequences, including without limitation:

- Cities, property owners and interested persons may waste their respective resources debating, and even litigating, issues which are resolved in this Opinion but for which they would have the benefit of this Court's decision.
- The courts' resources could be unnecessarily wasted through such litigation.
- Some cities may acquiesce to owners' demands to avoid their pre-*Palmer* approval obligations rather than face the prospect of expensive litigation, which would be an unjust result to cities as well as well as to qualified renters.

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Thus, this Court's opinion satisfies subdivision (c)(6) of rule 8.1105.

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

3. Conclusion

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

Respectfully submitted,

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