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March 25, 2013

VIA FEDERAL EXPRESS

The Honorable William R. McGuiness, Administrative Presiding Justice
The Honorable Stuart R. Pollak, Associate Justice
The Honorable Martin J. Jenkins, Associate Justice

California Court of Appeal, First Appellate District, Division Three
350 McAllister Street
San Francisco, CA 94102-7421

Re: Request for Publication
Concerned Dublin Citizens v. City of Dublin
(First District Court of Appeal Case No. A135790)

Dear Justices McGuiness, Pollak, and Jenkins:

Pursuant to California Rules of Court, rule 8.1120, subdivision (a), we respectfully request publication of the opinion issued by this court in *Concerned Dublin Citizens v. City of Dublin* (Case No. A135790), filed on March 7, 2013 (the Opinion).

We submit this letter on behalf of the California State Association of Counties ("CSAC") and the League of California Cities ("League"). This letter sets forth the interests of CSAC and the League in publication of the Opinion, as well as the reasons why CSAC and the League believe the Opinion meets the standards for publication set forth in California Rules of Court, Rule 8.1105, subdivision (c), and contains sound legal principles that, if enshrined in case law, would benefit the State of California as a whole.[1]

As described in more detail below, the Opinion provides important guidance regarding the application of Government Code section 65457, which, though located outside of the collection of statutes comprising the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.), creates an important tool for streamlining environmental review under CEQA. Found within a set of statutes within the Government Code relating to the preparation of "specific plans" (see §§ 65450-65457), section 65457 creates a qualified statutory exemption for residential projects that are consistent with a specific plan for which an environmental impact report ("EIR") was previously certified. Currently, there are *no* reported decisions interpreting and applying this statute. If published, the Opinion would be the first. As is explained below, CSAC

[1] / The parties to the appeal have neither authored any part of this letter nor made a monetary contribution for the preparation of this letter. Rather, this letter was prepared on a pro bono basis.

and the League believe the Opinion warrants publication because it (1) construes and interprets a statute not previously addressed in a reported decision, and (2) involves a legal issue of continuing public interest. (California Rules of Court, Rule 8.1105, subdivisions (c)(4) and (c)(6).) At a point in political time when newspapers, websites, and airwaves are filled with calls for making CEQA less burdensome to a struggling California economy, there would be real benefit in having judicial guidance with respect to a statutory CEQA streamlining provision that, though on the books for years, has never been interpreted and applied in a reported decision of an appellate court.

1. CSAC and the League have an Interest in Publication of the Opinion (California Rules of Court, Rule 8.1120, subdivision (a)(2)).

CSAC is a non-profit corporation. Its 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 is an association of 469 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 having such significance.

CSAC and the League have an interest in the development of case law under CEQA and related bodies of law such as the Planning and Zoning Law (Gov. Code, § 6500 et seq.), as counties and cities are both charged with complying with those complicated sets of laws. In particular, CSAC and the League have interests both in encouraging large landowners or groups of landowners to embrace the specific plan as an effective tool for comprehensive planning, and in ensuring that, once approved specific plans are in place, the construction of housing within specific plan areas can proceed with a minimum of unnecessary costs, bureaucratic paperwork, and litigation risks.

2. The Opinion should be published because it advances a new interpretation or construction of an existing statute never previously interpreted in case law (California Rules of Court, Rule 8.1105, subdivisions (c)(4)).

As is the case with many statutes, section 65457 contains technical language and cross-references that are not easily understood by lay readers, or even many lawyers. There would thus be a real benefit in having a published appellate decision if for no other reason that the Opinion uses plain English to guide readers through the statute and

explain the individual requirements. There is considerable value, for example, in just the one following sentence from the Opinion: "[T]o qualify for the 65457 exemption, the project must be for residential development, it must implement and be consistent with a specific plan for which an environmental impact report previously has been certified, and the qualification described in the final sentence must not apply, i.e., either a supplemental EIR must not be required by Public Resources Code section 21166 or such a supplemental EIR must already have been prepared and certified. (Opinion, pp. 8-9.)

Of particular importance is the Opinion's guidance regarding the meaning of the otherwise undefined term "residential development." In the absence of a statutory definition, the court's understanding of the term will (if the Opinion is published) become the only detailed guidance available on the subject. The Opinion explains that, for purposes of section 65457, a "residential development project" is one that contains "100 % residential units or the usual incidents of residential units, such as yards, parks, or *other uses authorized as permitted uses within a residential zoning district.*" (Opinion, p. 11 [italics added].) In this formulation, the highlighted language is something that a reader of the statutory language would not have known; and agencies believing in the validity of such an interpretation would have to take on the risk of an adverse court decision by following that interpretation in the absence of an advance judicial blessing. Thus, under the Opinion, while a qualifying project must be predominantly residential and not a classic "mixed use" project, a qualifying project may still include features that are ancillary to residential development, such as parks and other uses permitted in a residential zone (e.g., a fitness center serving residential uses).

The Opinion is also helpful in clarifying that the determination of whether a project is "residential" is based on the actual uses that are proposed and approved, as opposed to uses that in theory could be proposed in the future under zoning designations that allow non-residential uses. (Opinion, pp. 12-13.) This distinction is important because, if enshrined in a published precedent, it would permit cities and counties to employ the exemption without concern about a meritless challenge on that basis. The Opinion is well-reasoned insofar as it concludes that, if a developer who has obtained the benefit of the exemption someday wants to change the approved use for part of the area subject to a specific plan from a residential use to some other kind of use, the developer would likely need to seek further discretionary approval (and new environmental review) from the affected city or county. (*Ibid.*)

Another very helpful aspect of the Opinion is its discussion regarding the respondent city's use of a "program EIR" for its specific plan. (Opinion, pp. 14-16.) Nothing in either section 65457 or section 15182 of the CEQA Guidelines[2], which parallels section 65457, speak to the kinds of EIRs that may be used in this context. The Opinion's linkage between section 65457 and CEQA Guidelines section 15168 is very

[2] / The CEQA Guidelines are found in Title 14 of the California Code of Regulations, commencing with section 15000.

instructive. With publication of the Opinion, cities and counties could be confident in preparing program-level EIRs for specific plans, thereby gaining for themselves the advantages of program EIRs even for the *non*-residential uses within specific plans. Under the Opinion, a city or county could subject such proposed non-residential uses to the process for determining whether particular site-specific activities are "within the scope of the project covered by the program EIR." (See CEQA Guidelines, § 15168, subd. (c)(2).) This process would allow an agency to use "a written checklist or similar device" (*id.*, subd. (c)(4))to determine whether the program EIR adequately addressed the environmental effects of a non-residential proposal to develop a portion of the land area subject to an approved specific plan.

Yet another helpful aspect of the Opinion is its conclusion that the 2002 EIR for the specific plan at issue need not be updated to address climate change, as concerns about this planetary phenomenon go back to at least the early 1990s. Although a very similar conclusion was reached in an existing precedent, *Citizens for Responsible Equitable Environmental Development v. City of San Diego* (2011) 196 Cal.App.4th 515, 532, the Opinion usefully rejects the petitioner's attempt to distinguish that case, and in doing so contributes to the further development of legal principles articulated in that earlier precedent.

For all of these reasons, CSAC and the League respectfully submit that the Opinion qualifies for publication under subdivision (c)(4) of Rule 8.1105 of the California Rules of Court. The Opinion offers a new and well-reasoned interpretation of many aspects of a statute that has never before been addressed in case law. Publication of the Opinion would provide useful guidance to cities, counties, property owners, nonprofits, and citizens throughout California.

3. The Opinion involves a legal issue of continuing public interest. (California Rules of Court, Rule 8.1105, subdivision (c)(6).)

As people who follow California politics and economic developments are generally aware, there is much discussion these days about the need to "reform" or "modernize" CEQA to make it less costly and burdensome. Although CSAC and the League would like to see changes to CEQA that leave intact its laudable central policy objectives of requiring public agencies to grapple with significant environmental effects and mitigate them where feasible (see Pub. Resources Code, § 21002), both entities readily concede that CEQA compliance often entails redundant, duplicative analysis that, while costly, seldom leads to increased environmental protection. During an era in which the Legislature is actively struggling with such issues, the courts can take constructive steps to make *existing* law work better -- such as explaining how existing CEQA streamlining procedures are intended to function.

Section 65457 is an especially important statute in this context because of the planning benefits associated with the preparation of specific plans. Unlike development

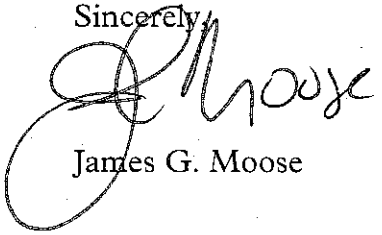
approved on a subdivision-by-subdivision basis, development initially authorized through specific plans is likely to reflect better land use planning. This is true because specific plans are designed to ensure the provision of adequate *infrastructure* to support new homes, businesses, and retail uses. (See Gov. Code, § 65451, subd. (a)(2).) To the extent that landowners and public agencies are able to proceed with specific plans – in part because the benefits of section 65457 become better understood and more familiar – the likely results will be improved land use planning and reduced costs and time spent for landowners building housing within specific plan areas. The State as a whole would benefit from such a trend.

In short, the Opinion involves a legal issue of continuing public interest – the need to make CEQA work better – and is worthy of publication on that ground alone pursuant to California Rules of Court, Rule 8.1105, subdivision (c)(6).

4. Conclusion

In summary, CSAC and the League believe that the Opinion meets the standards for publication set forth in California Rules of Court, Rule 8.1105, subdivision (c). As explained above, the Opinion, if published, would be the first reported appellate decision interpreting a key CEQA streamlining section and would provide practitioners with very helpful guidance on the meaning of key aspects of the statute.

Sincerely,



James G. Moose

cc: All counsel of record

Concerned Dublin Citizens v. City of Dublin
(First District Court of Appeal Case No. A135790)

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 Moose 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 March 25, 2013, 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; or

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

Concerned Dublin Citizens v. City of Dublin
(First District Court of Appeal Case No. A135790)

PROOF OF SERVICE

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I declare under penalty of perjury that the foregoing is true and correct and that this Proof of Service was executed this 25th day of March, 2013, at Sacramento, California.

Rachel N. Jackson