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January 3, 2017

REQUEST FOR DEPUBLICATION

Hon. Tani Gorre Cantil-Sakauye, Chief Justice
And Associate Justices of the California Supreme Court
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

Re: Request for Depublication:
East Sacramento Partnership for a Livable City v. City of Sacramento (November 7, 2016) 5 Cal.App.5th 281, *as modified on denial of reh'g* (December 6, 2016)
(Supreme Court Case No. S238842; Third Appellate District Case No. C079614)

Dear Honorable Chief Justice and Associate Justices of the Supreme Court:

Pursuant to Rule 8.1125(a) of the California Rules of Court, the League of California Cities ("the League") respectfully requests that the Supreme Court of California depublish in part[1] the opinion issued by the Court of Appeal in the above-captioned case ("*East Sacramento Partnership*"). Partial depublication is warranted, because the Court of Appeal's evaluation of California Environmental Quality Act ("CEQA") compliance in Part I.E.2 of the opinion will create unwarranted confusion regarding the standard of review applicable to a lead CEQA agency's determination concerning selection and application of thresholds of significance when evaluating a project's environmental impacts.

STATEMENT OF INTEREST

The League of California Cities is an association of 475 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, 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.

[1] Although Rule 8.1125(a) does not specifically address partial depublication of an appellate opinion, the Rule does not prohibit such an action by this Court or limit this Court's authority to order partial depublication pursuant to section 14 of Article VI of the California Constitution. *See* Rule 8.1100.

The Court of Appeal's opinion in *East Sacramento Partnership* is susceptible to two interpretations: either it reflects application of the (incorrect) "fair argument" standard of review to a lead agency's decision to adopt and apply thresholds of significance in an environmental impact report ("EIR"), or it is intended to reflect application of the (correct) substantial evidence standard, but does so in a confusing and misleading way. Regardless of which interpretation is correct, if the relevant portion of the opinion is not depublished, the discretion of lead agencies—including the League's member cities—to develop and apply general plan and other adopted policies as thresholds of significance in EIRs could be severely limited. This effect will not be limited to the context of traffic impacts, but will extend to other types of impacts that are often the subject of comprehensive local policies—including noise, aesthetics, water supply, and greenhouse gases. Even where municipalities have expended considerable time and resources on developing such policies with the expectation—supported by prior CEQA case law—that they may be used as significance thresholds in EIRs, these entities will now face substantial litigation risk unless they develop entirely separate thresholds and impact analyses based on extensive analysis. This goes beyond the strictures of CEQA and will inappropriately increase the burden and cost of CEQA compliance for municipalities and other lead agencies.

BACKGROUND

On April 29, 2014, the City—acting as the lead agency under CEQA—certified an environmental impact report ("EIR") for a 328-unit residential development ("Project") on an approximately 49-acre infill site located in East Sacramento. A neighborhood group, East Sacramento Partnership for a Livable City ("ESPLC"), filed a petition for writ of mandate challenging the development and alleging a number of CEQA violations. The trial court denied the petition in its entirety. On appeal, ESPLC raised five alleged violations of the California Environmental Quality Act ("CEQA"), of which the Court of Appeal found merit in only one: that the City's use of a general plan policy as a threshold of significance resulted in an inadequate analysis of the Project's traffic impacts.

The general plan policy at issue—Mobility Element Policy M 1.2.2—allows for flexible Level of Service ("LOS") standards depending on geographic area. It allows LOS F conditions (i.e., congested, "stop and go" traffic) in the "core area" during peak hours, but generally requires that LOS E (roadway at traffic capacity) be maintained in multi-modal districts and LOS D (roadway approaching capacity) be maintained in all other areas. Using this policy as a threshold of significance, the EIR found no significant traffic impacts existed in the core area, even though several intersections in that area would operate at LOS F (under cumulative plus project conditions) and similar changes to LOS conditions outside the downtown-midtown area were deemed to be significant impacts that required mitigation.

The Court of Appeal held that the EIR's traffic impacts analysis was deficient because compliance with this general plan policy did not, by itself, demonstrate that there will be no significant traffic impact in the core area. Based on this ruling, the appellate court reversed the trial court's denial of ESPLC's writ petition and remanded the case for issuance of a writ

directing the City to set aside its certification of the final EIR. The court's analysis of this issue is set forth at Part I.E.2 of the opinion. *See East Sacramento Partnership*, 5 Cal.App.5th at 299-303.

DEPUBLICATION OF A PORTION OF THE DECISION IS WARRANTED

Part I.E.2 of the opinion provides internally contradictory language regarding the appropriate standard of review under CEQA, leading to a confusing evaluation of the City's selection and application of the significance threshold for traffic impacts. The Court of Appeal initially announces the proper standard of review concerning agency approval of an EIR: whether the decision is supported by substantial evidence, with reasonable doubts resolved in favor of the agency. *See East Sacramento Partnership*, 5 Cal.App.5th at 289. However, it then appears to review the City's selection and application of significance thresholds for the traffic impact analysis under the much less deferential "fair argument" standard, in disregard of a clear line of CEQA decisional precedent. *See id.* at 299-303. By conflating these two standards, the Court of Appeal's decision creates uncertainty that is not warranted and undermines the previously clear guidance of the courts regarding the appropriate level of deference afforded to lead agencies that expend significant resources preparing, evaluating, and certifying EIRs.

Initially, Part I.E.2 of the Third District's opinion does not explicitly announce the legal standard for reviewing the City's analysis of traffic impacts, but instead, alludes to the "fair argument" standard, which does not apply in reviewing a lead agency's EIR analysis. *Laurel Heights Improvement Assn. v. Regents of University of California* (1993) 6 Cal.4th 1112, 1135 ("[T]he 'fair argument' test has been applied *only* to the decision whether to prepare an original EIR or a negative declaration."). The "fair argument" standard was first articulated by the California Supreme Court in *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 75, where the Court provided that "[CEQA] requires the preparation of an EIR whenever it can be *fairly argued* on the basis of substantial evidence that the project may have significant environmental impact." (emphasis added). A project may have a significant effect on the environment whenever there is a reasonable possibility that a significant effect will occur. *Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155, 172. This low threshold for preparation of an EIR reflects CEQA's policy to provide the fullest possible protection to the environment. *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 309-10. But application of the fair argument standard ends after the lead agency opts to prepare an EIR.

Where the lead agency has elected to prepare an EIR, as the City has done here, a reviewing court should "accord greater deference to the agency's substantive factual conclusions." *Ebbetts Pass Forest Watch v. California Dept. of Forestry And Fire Protection* (2008) 43 Cal.4th 936, 944. As such, a court should not disturb the lead agency's decision unless the lead agency's "determination or decision is not supported by substantial evidence." *National Parks and Conservation Ass'n v. County of Riverside* (1999) 71 Cal.App.4th 1341, 1352 ("*National Parks*").

Further, the "substantial evidence" standard applies not only in reviewing the adequacy of an EIR's impacts analysis, but also to the lead agency's selection of significance thresholds for use in that analysis. Notably, lead agencies are provided considerable discretion to fashion appropriate thresholds of significance because "[t]here is no 'gold standard" for determining whether a given impact may be significant." *Protect The Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1107. Indeed '"an ironclad definition of significant effect is not always possible because the significance of an activity may vary with the setting. [A]n activity which may not be significant in an urban area may be significant in a rural area."' *Id.* (quoting Guidelines, § 15064, subd. (b)). For this reason, the CEQA guidelines explicitly grant lead agencies "discretion to develop their own thresholds of significance." *Save Cuyama Valley v. County of Santa Barbara* (2013) 213 Cal.App.4th 1059, 1068 (citing CEQA Guidelines, § 15064, subd. (d)); *San Francisco Baykeeper, Inc. v. California State Lands Commission* (2015) 242 Cal.App.4th 202, 227-228 (agencies have discretion to develop and apply their own thresholds); *Oakland Heritage Alliance v. City of Oakland* (2011) 195 Cal.App.4th 884, 896-899 (agencies may apply thresholds adopted by regulation or by using standards developed for a particular project). Formulating a standard of significance "requires the agency to make a policy judgment about how to distinguish adverse impacts deemed significant from those deemed not significant." Kostka & Zischke, *Practice Under the California Environmental Quality Act*, (2d ed. March 2016) § 13.8. Further, in selecting and applying significance thresholds, lead agencies enjoy the same heightened "substantial evidence" deference afforded to the lead agency's preparation and certification of an EIR. *National Parks*, 71 Cal.App.4th at 1358-59 (holding that the county had a "substantial basis" for accepting the EIR's use of different "thresholds of noise significance for different areas" of a park).

Here, a general plan policy was selected by the City as the threshold of significance for traffic impacts. Courts reviewing CEQA documents have consistently acknowledged a city's discretion in formulating its general plan: "[a] general plan must try to accommodate a wide range of competing interests ... and to present a clear and comprehensive set of principles to guide development decisions. Once a general plan is in place, it is the province of elected city officials to examine the specifics of a proposed project to determine whether it would be 'in harmony' with the policies stated in the plan. [Citation.] It is, emphatically, *not* the role of the courts to micromanage these development decisions." *Naraghi Lakes Neighborhood Preservation Association v. City of Modesto* (2016) 1 Cal.App.5th 9, 18 (quoting *Sequoyah Hills Homeowners Assn. v. City of Oakland* (1993) 23 Cal.App.4th 704, 719). Further, a city's "conclusion that a particular project is consistent with the relevant general plan carries a strong presumption of regularity that can be overcome only by a showing of abuse of discretion." *Napa Citizens for Honest Government v. Napa County Bd. of Supervisors* (2001) 91 Cal.App.4th 342, 357.

Rather than appropriately deferring to the City's decision concerning application of its general plan standard as a traffic impact significance threshold, and applying the substantial evidence standard, the Court of Appeal appears to instead apply the fair argument standard to

invalidate the traffic impact analysis in the EIR. In doing so, the Court relied on appellate decisions that solely concerned judicial review of a lead agency's initial determination to prepare a negative declaration, not an EIR. *East Sacramento Partnership*, 5 Cal.App.5th at 301 (citing: *City of Antioch v. City Council* (1986) 187 Cal.App.3d 1325; *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359; *Keep Our Mountains Quiet v. County of Santa Clara* (2015) 236 Cal.App.4th 714). The Court of Appeal could not cite any authority for application of the fair argument standard to an EIR, because the decisional authority is clear that such review must be conducted under the substantial evidence standard.

In explaining its decision on this point (and following its receipt—and denial—of a petition for rehearing), the Court of Appeal stated that it had not been provided with an explanation as to "why the rule [regarding application of the fair argument standard] differs with the context." *East Sacramento Partnership*, 5 Cal.App.5th at 301. This statement simply ignores the extensive appellate precedent setting forth the basis for substantial evidence review of EIRs. That authority recognizes the appropriateness of the fair argument standard for negative declarations, which do not contain the thorough review and analysis of potential environmental impacts that are contained in EIRs, but confirms that courts must provide more deference to lead agencies who expend the time and resources to prepare an EIR.

In sum, Part I.E.2 of the Court of Appeal's opinion appears to reflect an incorrect application of the "fair argument" standard of review to a lead agency's decision to adopt and apply thresholds of significance in an EIR. However, even if it was the appellate court's intent to apply the substantial evidence standard, the analysis and discussion is confusing. Moreover, this language will be interpreted by parties challenging EIRs in the future as authorizing application of the fair argument standard in this context, despite the clear prior appellate authority to the contrary. This will create significant and unwarranted uncertainty for League members and other lead agencies who routinely prepare and certify EIRs under the assumption that the courts will apply the substantial evidence standard on review.

CONCLUSION

For the reasons specified above, the League respectfully requests that this Court order that Part I.E.2 of the opinion be depublished.

Very truly yours,

DOWNEY BRAND LLP

Donald E. Sobelman

Christian L. Marsh

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Downey Brand LLP, 455 Market Street, Suite 1500, San Francisco, California 94105. On January 3, 2017, I served the within document(s):

REQUEST FOR DEPUBLICATION

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Executed on January 3, 2017, at San Francisco, California.

Candy Windsor

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