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September 23, 2015

VIA FEDERAL EXPRESS

The Honorable Judith L. Haller, Acting Presiding Justice
The Honorable Cynthia Aaron, Associate Justice
The Honorable Joan Irion, Associate Justice
California Court of Appeal, Fourth Appellate District, Division One
750 B Street, Suite 300
San Diego, CA 92101

Re: Request for Publication of *North County Advocates v. City of Carlsbad* (Case No. D066488)

Dear Justices Haller, Aaron, and Irion:

Pursuant to California Rules of Court, Rule 8.1120, subdivision (a), we respectfully request publication of Sections I, II, III, & IV of the opinion issued by this Court in *North County Advocates v. City of Carlsbad* (Case No. D066488), filed on September 10, 2015 (the "Opinion"). 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 Opinion meets the standards for publication set forth in California Rules of Court, Rule 8.1105, subdivision (c).

As described in more detail below, the Opinion provides important guidance for lead agencies, including cities, on compliance with the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.) ("CEQA"). The Opinion thoroughly discusses CEQA's requirements regarding the selection of an "historic" baseline for environmental analysis and then applies those requirements to the unique circumstances of the case. The Opinion thereby provides guidance that would be helpful to lead agencies during the environmental review process, and to trial courts tasked with reviewing the agencies' decisions. The Opinion, therefore, warrants publication because it applies an existing rule of law to a set of facts significantly different from those stated in published opinions and involves a legal issue of continuing public interest. (Cal. Rules of Court, Rule 8.1105, subds. (c)(2), (4), (6) & (7).)

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

We submit this request for publication on behalf of the League. The League of California Cities is an association of 474 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.

The League and all its member cities have a keen interest in the development of CEQA case law, given the statute's direct and significant impact on land-use decision-making. (Cal. Const., art. XI, § 7 [cities have land use "police power"].) In particular, the League has a strong interest in the publication of the Opinion's baseline analysis. As discussed below, the continued development of case law addressing this issue assists California cities and other lead agencies in complying with CEQA.

II. The Opinion should be partially published because it applies existing rules to a set of facts significantly different from those stated in published opinions. (Cal. Rules of Court, Rule 8.1105, subds. (c)(2), (c)(4), (c)(7).)

The Opinion should be partially published because it clarifies important CEQA principles by applying existing rules to a significantly different set of facts. (Cal. Rules of Court, Rule 8.1105, subd. (c)(2); see also Rule 8.1105, subds. (c)(4) [the Opinion advances a new clarification or construction of existing law], (c)(7) [the Opinion contributes to legal literature].) Specifically, Section II of the Opinion clarifies situations in which a lead agency may properly deviate from using "existing conditions" as a baseline for environmental analysis in an environmental impact report ("EIR"). As the Opinion notes, published cases give somewhat contradictory advice about the selection of a "historic" baseline that deviates from the existing conditions standard. (Opinion, pp. 11-14.) Additionally, Section I provides a concise description of relevant CEQA principles and the standard of review, while Sections III and IV provide helpful discussions of the adequacy of mitigation and the adequacy of responses to comments. Therefore, lead agencies, project applicants, litigants, and the courts would benefit from the additional guidance provided in the Opinion.

As the Opinion explains, an agency's decision to deviate from existing conditions for determining a baseline cannot be disturbed by a reviewing court if substantial evidence supports the agency's "'determination that an existing conditions impacts analysis would provide little or no relevant information or would be misleading as to the project's true impacts.'" (Opinion, p. 9 [citing *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439, 457].) Because the determination of whether a public agency abused its discretion in selecting a historic baseline cannot be viewed in the abstract, but rather depends on the circumstances of a particular case, the League believes it is important for published opinions to conduct this analysis in a variety of factual contexts in order to provide useful examples and guidance for agencies and trial courts. The Court's thorough analysis and application of the law under the circumstances of this case provides such assistance.

Importantly, Section II of the Opinion provides an example of the proper use of a historic baseline with circumstances that are relevant to most urban areas and significantly different from those in published opinions to date. In *Communities for a Better Environment v. South Coast Air Quality Management District* (2010) 48 Cal.4th 310, 322, the California Supreme Court disapproved of the air district's selection "as the project's baseline for nitrogen oxide emissions the amount the boilers would emit if they operated at the maximum level allowed under ConocoPhillips's existing permits," because "ConocoPhillips had never operated them at that level" in the past. (Opinion, p. 12.) The Court in *Communities for a Better Environment* explained that the deviation from the normal rule was impermissible because the district's selected baseline was hypothetical and based on maximum permitted operating conditions that were not the norm and had never before occurred at the facility. (Opinion p. 12.) In contrast, the Court of Appeal in *Cherry Valley Pass Acres & Neighbors v. City of Beaumont* (2010) 190 Cal.App.4th 316, 340, upheld the City of Beaumont's use of a historic baseline derived from fluctuating historical water use of past agricultural operations on the project site. (Opinion, p 13.)

Here the Court upheld the City of Carlsbad's selection of a traffic baseline that assumed full occupancy of the shopping center as opposed to the "existing conditions" of the shopping center with recent key vacancies. (Opinion, pp. 13-15.) The Court found that the baseline derived from the "fluctuating occupancy" of the shopping center over the past few decades was more like the baseline derived from historical water use in *Cherry Valley Pass Acres* than the entirely hypothetical baseline in *Communities for a Better Environment.* (Opinion, p. 15.) Concluding that substantial evidence of actual historical operations of the shopping center space over a 30-year period supported the

City's selection of a historic baseline, the Court distinguished *Communities for a Better Environment.* (Opinion, p. 15.) The Opinion thus fills a gap in the jurisprudence and provides guidance on the proper use of an historic baseline by lead agencies for certain common types of urban land use projects with potentially fluctuating impacts in the future. This guidance is particularly helpful as local economies recover from the recession and vacant or underutilized urban areas are redeveloped.

Also helpful are the portions of Opinion addressing whether substantial evidence supported the City's selected traffic mitigation measure (Section III) and whether the City adequately responded to comments on the Draft EIR (Section IV). Regarding the first issue, the Opinion explains that substantial evidence supports the City's selection of the measure requiring a fair share payment toward adaptive-response signals on three affected street segments because "it is undisputed that this measure will mitigate the indirect cumulative impacts . . . to less-than-significant levels and that the project will have no direct or indirect significant impacts on the bridge." (Opinion, p. 21.) Regarding the second issue, the Opinion notably explains that the City's response to 2012 comments on the Draft EIR about the issue of bridge-widening had been adequate, and that the City was not required to specifically respond to all assertions contained in 2009 preliminary comments on the Transportation Study that had been attached to the 2012 comments for reference purposes. (Opinion, p. 24.) Because these determinations also require a largely fact-based analysis, the Court's analysis under the factual context of the case would provide a helpful example and guidance for lead agencies and trial courts.

For the reasons stated above, Sections I through IV of the Opinion should be published.

III. The Opinion should be published because it involves a legal issue of continuing public interest. (Cal. Rules of Court, Rule 8.1105, subd. (c)(6).)

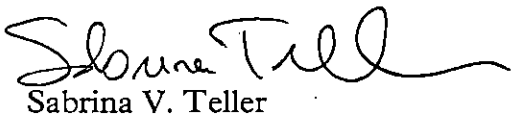
CEQA is a critical element of the State's environmental review and protection framework. The Opinion provides further clarification of and support for flexibility in using an historic baseline for impact analysis where conditions on the project site, such as water use or occupancy of commercial space, have fluctuated in the past. As the economy recovers, the circumstances in this case are likely to become more common, especially in urban areas where occupancy of commercial space and traffic conditions have fluctuated over the past few decades – or the past few years as a direct result of the Great Recession. Because lead agency determinations regarding the selection of the appropriate baseline for environmental analysis in an EIR, the adequacy of mitigation, and the adequacy of responses to comments on an EIR continue to be frequently challenged and litigated, the

Opinion's analysis and conclusions are of continuing public interest and, if published, would provide useful guidance on these important CEQA issues.

IV. Conclusion

For the reasons stated above, we respectfully request that the Court certify Sections I, II, III, & IV of the Opinion for publication. Those sections of the Opinion meet several of the standards for publication set forth in California Rules of Court, Rule 8.1105, subdivision (c), and the Opinion would be a valuable addition to the limited case law on the issue of how to appropriately use an historic baseline. Alternatively, if the Court is not inclined to publish Sections I, III, & IV, we respectfully request that the Court at least certify Section II of the Opinion for publication because that section would be of particular assistance to lead agencies, project applicants, litigants, and the courts if published.

Very truly yours,



Sabrina V. Teller

cc: All counsel of record (attached proof of service)

North County Advocates v. City of Carlsbad
Fourth District Court of Appeal, Division One Case No. D066488
(San Diego County Superior Court Case No. 37-2013-00061990-CU-WM-NC)

PROOF OF SERVICE

I, Rachel Jackson, am a citizen of the United States, employed in the City and County of Sacramento. My business address is 555 Capitol Mall, Suite 800, Sacramento, California. My email address is rjackson@rmmenvirolaw.com. 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 September 23, 2015, 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 listed below

☐ 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

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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 23rd day of September 2015, at Sacramento, California.

Rachel N. Jackson

North County Advocates v. City of Carlsbad
Fourth District Court of Appeal, Division One Case No. D066488
(San Diego County Superior Court Case No. 37-2013-00061990-CU-WM-NC)

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