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REMY | MOOSE | MANLEY
LLP

James G. Moose
jmoose@rmmenvirolaw.com

June 24, 2016

Chief Justice Tani Cantil-Sakauye
And the Justices of the California Supreme Court
Supreme Court of the State of California
350 McAllister Street
San Francisco, California 94102

Re: **Request for Depublication—**
People for Proper Planning v. City of Palm Springs (April 22, 2016, E062725) __ Cal.Rptr.3d__ [2016 WL 3005719]

To the Honorable Chief Justice and the Justices of the Supreme Court:

We submit this letter on behalf of the League of California Cities ("League") and the California State Association of Counties ("CSAC"), respectfully requesting that, pursuant to rule 8.1125 of the California Rules of Court, this Court depublish *People for Proper Planning v. City of Palm Springs* (April 22, 2016, E062725) __ Cal.Rptr.3d__ [2016 WL 3005719] (*People for Proper Planning*). For reasons explained in detail below, the League and CSAC believe that depublication is necessary because, in issuing its decision, Division Two of the Fourth Appellate District ("Division Two") has ignored dispositive cases from this Court's jurisprudence under the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.), and, as a result, has misapplied established law and reached the wrong result.

More specifically, Division Two has ignored this Court's seminal decisions with respect to the issue of "baseline" and has reached a conclusion at odds with both *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439 (*Neighbors for Smart Rail*) and *Communities for a Better Environment v. South Coast Air Quality Management District* (2010) 48 Cal.4th 310 (*Communities for a Better Environment*). Further, Division Two initially disregarded this Court's decision in *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086 (*Berkeley Hillside*), which lays out the principles governing the "unusual circumstance exception" to the use of categorical exemptions under CEQA, and instead used a rule that was specifically rejected in that case. After receiving a letter requesting depublication, however, Division Two retroactively tweaked its opinion to seemingly adhere to *Berkeley Hillside*, but without any new substantive analysis of the correct rule's application to the facts of the case.

The League believes that depublication is necessary in order to prevent the Court of Appeal's erroneous and incomplete reasoning from creating confusion and error throughout the State.

I. The League and CSAC have an interest in the depublication of *People for Proper Planning*.

The League 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, 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 is a non-profit corporation. The 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 involves a matter affecting all counties.

The League and CSAC have an interest in the development of case law under CEQA. In particular, the League and CSAC have an interest in understanding the legal requirements for legally adequate environmental review documents, including environmental impact reports (EIRs), for various types of local land use decisions, including General Plan amendments of the type at issue in the *People for Proper Planning* case. The continued development of case law addressing these issues assists California cities and counties in complying with CEQA while avoiding the expenditure of public money on unnecessary, premature, or legally inadequate CEQA review.

II. Division Two's decision should be depublished because it erred in setting the Palm Springs General Plan as the baseline.

Division Two erroneously stated that "once the City adopted the General Plan in 2007, the General Plan itself provided the baseline for future projects." (*People for Proper Planning* at p. 5.) Because a General Plan represents a future vision of how a community should build out, this aspect of Division Two's decision is essentially a command that the respondent city use a "future baseline." This holding of the case misapplies well-established law by ignoring the fact that, as this Court has reiterated, the CEQA Guidelines provide that the baseline for environmental analysis is normally the "physical environmental conditions in the vicinity of the project as they exist at the time the notice of preparation is published... or the time environmental analysis is

commenced." (Cal. Code Regs., tit. 14, div. 6, ch. 3 ["CEQA Guidelines"], § 15125, subd. (a).)

In *Communities for a Better Environment, supra, 48 Cal.4th at pp. 320-323,* this Court built on prior Court of Appeal case law and CEQA Guidelines section 15125 and firmly established that existing conditions will normally constitute the baseline for impact assessment. This conclusion was reinforced in *Neighbors for Smart Rail, supra,* 57 Cal.4th at p. 448-457, which explored the limited circumstances in which a future baseline condition could be used in lieu of existing conditions. There, this Court concluded that "a departure from this norm can be justified by substantial evidence that an analysis based on existing conditions would tend to be misleading or without informational value to EIR users." (*Id.* at p. 445.)

In *People for Proper Planning,* Division Two acknowledged that existing conditions are normally used as the baseline, but failed to provide an explanation for the departure from the norm, as required by *Neighbors for Smart Rail.* (See *People for Proper Planning* at p. 5; *Neighbors for Smart Rail,* supra, 57 Cal.4th at p. 445.) In fact, the decision does not cite to either of this Court's two recent cases addressing baseline issues. Instead, Division Two relied on an appellate court case from 2001 that contemplated accounting for traffic impacts at the time of project approval as opposed to commencement of environmental review. (*People for Proper Planning* at p. 5, citing *Save Our Peninsula Committee v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 125–126.) Again, the Court of Appeal did not explain why that case would be controlling authority for dictating the use of a future baseline rather than an existing conditions baseline. As noted above, this Court has held that "projected future conditions" may *only* be used as the sole baseline when use of the existing conditions would be "uninformative" or "misleading." (*Neighbors for Smart Rail, supra,* 57 Cal.4th at p. 451-452.)

The decision in *People for Proper Planning* unjustifiably dictates that, on remand, the respondent city must rely on its 2007 General Plan, instead of the existing conditions, as the baseline. This was clear error absent the showings required by *Neighbors for Smart Rail.* "Use of hypothetical allowable conditions as the baseline...results in 'illusory' comparisons that 'can only mislead the public as to the reality of the impacts and subvert full consideration of the actual environmental impacts,' a result at direct odds with CEQA's intent." (*Communities for a Better Environment, supra,* 48 Cal.4th at p. 322.)

III. Division Two's decision should be depublished because of its unsubstantiated post hoc rationalization regarding the unusual circumstance exception under *Berkeley Hillside.*

As this Court explained near the beginning of its recent decision in *Berkeley Hillside,* CEQA

> establishes a comprehensive scheme to provide long-term protection to the environment. It prescribes review procedures a public agency must follow before approving or carrying out certain projects. For policy reasons, the Legislature has expressly exempted several categories of projects from review under CEQA. [Citations.] By statute, the Legislature has also directed the Secretary of the Natural Resources Agency (Secretary) to establish "a list of classes of projects that have been determined not to have a significant effect on the environment and that shall be exempt from" CEQA. [Citation.] "In response to that mandate," the Secretary "has found that certain "classes of projects . . . do not have a significant effect on the environment" and, in administrative regulations known as guidelines, has listed those classes and "declared [them] to be categorically exempt from the requirement for the preparation of environmental documents."
>
> (60 Cal.4th at pp. 1091-1092, brackets in original.)

The "unusual circumstances" *exception* to the use of categorical exemptions states that "[a] categorical exemption shall not be used for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances." (CEQA Guidelines, § 15300.2, subd. (c).) Prior to *Berkeley Hillside*, Courts of Appeal were divided on how to analyze whether or not an unusual circumstance exists. The specific question before this Court in *Berkeley Hillside* was whether a "fair argument" of significant environmental effects, without more, was itself an "unusual circumstance" defeating the use of an exemption, or whether, instead, the agency must also be faced with circumstances that, regardless of the severity of the environmental effects at issue, were truly "unusual" (e.g., with respect to project size or location).

This Court ended the debate among Courts of Appeal and concluded that "for the exception to apply, it is not alone enough that there is a reasonable possibility the project will have a significant environmental effect; instead, in the words of the Guideline, there must be 'a reasonable possibility that the activity will have a significant effect on the environment *due to unusual circumstances.*'" (*Berkeley Hillside*, *supra*, 60 Cal.4th at p. 1097 [original italics].)

The Court then went on to delve into specifics. The Court first held that the threshold question of whether the agency faced "unusual circumstances" (e.g., related to the size or location of the proposed project) should be reviewed by courts under the deferential substantial evidence standard. (*Id.* at p. 1114). Second, the Court held that where such unusual circumstances did exist, the next, related question is whether such circumstances caused a "reasonable possibility that the activity will have a significant effect on the environment." This second question should be reviewed under the less

deferential "fair argument" standard originally developed by this Court in its decision in *No Oil, Inc. v. City of Los Angeles* (1975) 13 Cal.3d 68, 75. (60 Cal.4th at p. 1114.) The Court then identified another, alternative instance in which the unusual circumstances exception also properly applies: where "a party establish[es] an unusual circumstance with evidence that the project *will* have a significant effect." (*Berkeley Hillside, supra,* 60 Cal.4th at p. 1105 [italics added].) The agency's determination on this point is also subject to the deferential "substantial evidence" standard of review. (*Id.* at p. 1114.)

When Division Two first published its opinion, it neither applied the correct two-pronged test from *Berkeley Hillside* nor even cited or acknowledged this Court's decision. Instead, Division Two appeared to have erroneously invalidated the city's use of a categorical exemption on the ground that the petitioners had "presented sufficient evidence supporting a fair argument that . . . [an amendment to the General Plan removing density minimums] will result in a significant impact on the environment . . . ." (*People for Proper Planning* at p. 4.) In reaching this conclusion, Division Two seemed to ignore the question of whether the project at issue involved unusual circumstances and instead applied the fair argument standard without any explanation or qualification, citing an outdated appellate case entitled, *Committee to Save Hollywoodland Specific Plan v. City of Los Angeles* (2008)161 Cal.App.4th 1168, 1185-1186. Division Two cited that case in support of its statement that "courts are divided on the question of whether the 'fair argument' standard ... or the substantial evidence test applies to . . . whether an exception to the exemption exists." (*Id.* at p. 8.) This was the precise question *Berkeley Hillside resolved* in favor of the very "bifurcated approach" that the Court of Appeal in *People for Proper Planning* inexplicably chose to ignore. (*Berkeley Hillside, supra,* 60 Cal.4th at p. 1115.) In *Berkeley Hillside,* this Court explained that there would be "no purpose or effect of the categorical exemption statutes if . . . a showing of a fair argument of a potential environmental effect precludes application of all categorical exemptions" – the exact approach relied upon in *People for Proper Planning.* (See *id.* at p. 1102.)

After receiving a letter requesting depublication for the reasons stated above, Division Two then slightly modified its opinion, stating the correct rule from *Berkeley Hillside* and disposing of its prior assertion that the case law is divided. The Court of Appeal also added a one sentence footnote stating that the respondent city had conceded there were unusual circumstances without any explanation of what *exactly* was unusual. Regardless of whether such a concession was made, the court also failed to explain its finding that the petitioner had presented sufficient evidence supporting a fair argument that the amendment will result in a significant impact on the environment. Division Two delved into a discussion about the amendment's possible effect on the city's ability to provide its fair share of regional housing needs, but never addressed *environmental* effects. Division Two thus made no attempt to address the kinds of factors that this Court found to be relevant to assessing whether circumstances were unusual (e.g., the

size and location of the project). (See *Berkeley Hillside*, *supra*, 60 Cal.4th at p. 1105; see also *Citizens for Environmental Responsibility v. State ex rel. 14th District Agricultural Assn.* (2015) 242 Cal.App.4th 555, 583-588 [comprehensive post-*Berkeley Hillside* discussion of case law on the unusual circumstance exception].)

The League and CSAC believe that, in *People for Proper Planning*, Division Two's initial disregard for this Court's dispositive precedent in *Berkeley Hillside*, coupled with its minor modifications that lack any substantive analysis, necessitate depublication. Notably, Division Two ignored *Berkeley Hillside* approximately one year ago, resulting in this Court's depublication of Division Two's decision in *Paulek v. Western Riverside County Regional Conservation Authority* (4th App. Dist., Case No. E059133 [2015], as modified July 17, 2015) (Cal. Supreme Court Case No. S228111). In light of this Court's depublication of the *Paulek* decision for Division Two's failure to follow *Berkeley Hillside*, the initial decision in *People for Proper Planning* was truly inexplicable. Although the Court of Appeal corrected the statement of law, it failed to analyze how *Berkeley Hillside* applied to this case.

IV. Conclusion

The League and CSAC respectfully request depublication of Division Two's *People for Proper Planning* decision. As described above, the decision ignored this Court's two leading cases on the issue of "baseline," and thus misapplied the law. Depublication is warranted for that reason alone. Although Division Two's final decision no longer simply ignores *Berkeley Hillside* as the original decision had done, the final decision barely acknowledges the decision and makes no attempt to explain how the principles announced therein applied to the facts of the case. Thus, although the final decision may or may not be *wrong* in its application of *Berkeley Hillside*, the decision adds nothing of value on the subject of the unusual circumstances exception, and leaves the reader guessing as to why circumstances in the case were unusual. Given that the baseline portion of the decision is clearly wrong, the League and CSAC respectfully urge the Court to order depublication of the case in its entirety.

Respectfully submitted,

James G. Moose

cc: see attached service list

People for Proper Planning v. *City of Palm Springs*
Supreme Court of the State of California

PROOF OF SERVICE

I, Judith A. Salas, 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 95814. My email address is jsalas@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 June 24, 2016, I served the following:

Letter to Chief Justice Tani Cantil-Aakauye
Re: Request for Depublication

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☐ 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

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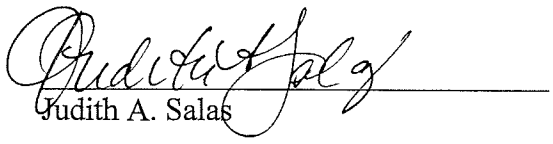
I declare under penalty of perjury that the foregoing is true and correct and that this Proof of Service was executed this 24th day of June, 2016, at Sacramento, California.



Judith A. Salas

People for Proper Planning v. *City of Palm Springs*
Supreme Court of the State of California

SERVICE LIST

Babak Naficy Law Offices of Babak Naficy 1504 Marsh Street San Luis Obispo, CA 93401	Attorneys for Plaintiff and Appellant People for Proper Planning **VIA U.S. MAIL**
David Allen DeBerry Woodruff Spradlin & Smart, APC 555 Anton Blvd., Suite 1200 Costa Mesa, CA 92626	Attorneys for Defendant and Respondent City of Palm Springs **VIA U.S. MAIL**
David Allen DeBerry Woodruff Spradlin & Smart, APC 555 Anton Blvd., Suite 1200 Costa Mesa, CA 92626	Attorneys for Defendant and Respondent City Council of City of Palm Springs **VIA U.S. MAIL**