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March 11, 2019

Presiding Justice Jim Humes
Associate Justice Sandra L. Margulies
Hon. Kathleen Kelly
California Court of Appeal
First Appellate District, Division One
350 McAllister Street
San Francisco, CA 94102-7421

Re: *SOMCAN et al. v. City and County of San Francisco et al.*
(First Dist. Court of Appeal, Case No. A151521)
Request for Publication

Dear Presiding Justice Humes, Associate Justice Margulies, and Honorable Judge Kelly:

On February 22, 2019, this Court issued an unpublished opinion in this case (the "Opinion"). On behalf of the League of California Cities, we request that the Court order publication of the Opinion.

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 of Cities 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 believes that the Opinion meets the criteria for publication under California Rules of Court, Rule 8.1105, subdivision (c). There are four reasons why this is so.

First, the Opinion cites, describes and applies the standard of review adopted by the California Supreme Court in *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502 (*Sierra Club*) for cases under the California Environmental Quality Act ("CEQA") involving a challenge to the adequacy of an environmental impact report ("EIR"). The Supreme Court issued its decision on December 24, 2018, so the ink is barely dry on the decision. The Opinion represents the first time a Court of Appeal has wrestled with the application of the Supreme Court's articulation of the standard of review to a particular

EIR. The Supreme Court's decision has received considerable notoriety among those lawyers, staff, consultants and community members who focus on the CEQA process. We are all eager for examples of how the standard of review will be applied going forward. The Opinion provides such an example.

Second, the Opinion is a useful counterpoint to *Washoe Meadows Community v. Department of Parks & Recreation* (2017) 17 Cal.App.5th 277. In that case, the Court of Appeal ruled that an EIR was inadequate because it identified only various project alternatives, and did not identify any one of those alternatives as the particular project under review. The case has been cited for the proposition that an agency cannot build any flexibility into the EIR's project description. As the Opinion makes clear, that reads too much into the *Washoe Meadows* decision. There is nothing inherently wrong with building flexibility into the project under consideration, so long as the EIR is clear about the nature of that flexibility, analyzes the full range of impacts that may result depending on how the project builds out, and provides the information in a manner that is neither confusing nor misleading. The project at issue in the Opinion provides an example of an EIR that incorporated such flexibility. Indeed, given increased interest in mixed-use development in urban settings, such flexibility is essential. For projects of this sort, agencies and developers may not know, at the time CEQA analysis is performed, the precise demand that will exist for residential, commercial or office development months or years later. Under those circumstances, developers may want some flexibility in determining the precise mix of uses that are actually constructed. So long as the EIR is clear and comprehensive, and analyzes the scenario under which the greatest impacts will occur, there is no reason why the CEQA process should serve as a straightjacket. The Opinion demonstrates that an EIR, properly prepared, can provide the flexibility that such mixed-use projects often require.

Third, the Opinion addresses a claim that frequently arises in CEQA cases, but that has been touched upon in surprisingly few published decisions: the charge that development is "rampant," and that the EIR has failed to account for the overall effects of such runaway development. The Opinion makes clear that such claims focus on the agency's chosen methodology in evaluating cumulative impacts, an issue that remains subject to review under the "substantial evidence" standard under the *Sierra Club* decision. (Opinion, p. 14.) The Opinion also states that, in assembling a list of related projects, the agency has discretion to determine an appropriate cut-off time, and to determine the appropriate geographic scope of its analysis, again subject to substantial evidence review. (Opinion, pp. 15-16.)

Fourth, the Opinion makes clear that, even following *Sierra Club*, the lead agency retains discretion to determine such methodological issues as the appropriate geographic

scope of its traffic analysis. In particular, the Opinion provides that, so long as the EIR describes the agency's methodology, and the methodology does not appear to be designed to artificially constrain the analysis, deference is warranted. (Opinion, pp. 20-21.) We agree. In particular, we do not think the courts should be put in the position of designing the traffic study for a project. Rather, the Court's role is to determine whether the agency has made a good faith effort, and properly explained its approach. That is a particularly useful application of the *Sierra Club* standard of review.

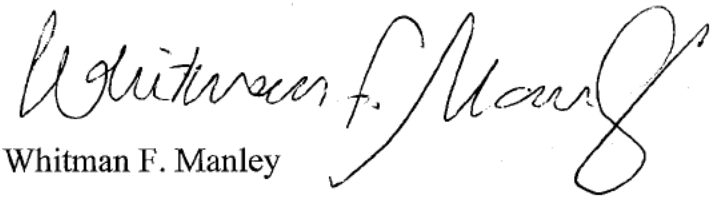
In sum, the Opinion "[a]pplies an existing rule of law to a set of facts significantly different from those stated in published opinions." (Rules of Court, Rule 8.1105, subd. (c)(2).) Most fundamentally, that is because, before December 24, 2018, the standard of review applicable to EIR challenges was uncertain. *Sierra Club* establishes the standard of review, and the Opinion applies it in a variety of contexts. In that respect, the Opinion will have significant value to those engaged in CEQA practice. In addition, the Opinion clarifies that, even following the Court of Appeal's decision in *Washoe Meadows*, there is nothing inherently amiss with building flexibility into the project description for a mixed-use project, a "legal issue of continuing public interest." (Rules of Court, Rule 8.1105, subd. (c)(6).)

The Opinion's remaining subjects – addressing claims that include wind, open space, shadow and zoning – appear to be particularly relevant and interesting to those involved in projects in San Francisco. We have no view on whether these issues merit publication.

This letter was prepared by Whitman F. Manley of Remy Moose Manley, LLP on behalf of the League of Cities. No party or counsel for a party in this case authored this letter in whole or in part, directly or indirectly, or made any monetary contribution intended to fund its preparation. This letter was prepared by Mr. Manley on behalf of the League of Cities on a pro bono basis.

Thank you for considering this request.

Very truly yours,



Whitman F. Manley

cc: Proof of Service attached

SOMCAN et al. v. City and County of San Francisco, et al.
1st Appellate District, Division 1, Case No. A151521

PROOF OF SERVICE

I, Michele L. Nickell, am employed in the County of Sacramento. My business address is 555 Capitol Mall, Suite 800, Sacramento, CA 95814, and email address is mnickell@rmmenvirolaw.com. I am over the age of 18 years and not a party to the above-entitled action.

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On March 11, 2019, I served the following:

LETTER REGARDING REQUEST FOR PUBLICATION

☒ **BY ELECTRONIC TRANSMISSION (TrueFiling)** by causing a true copy thereof to be electronically delivered to the following person(s) or representative(s) at the email address(es) listed below. I did not receive any electronic message or other indication that the transmission was unsuccessful.

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I declare under penalty of perjury that the foregoing is true and correct. Executed this 11th day of March 2019, at Sacramento, California.

Michele L. Nickell