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May 19, 2014

VIA FEDERAL EXPRESS

The Honorable Ignazio J. Ruvolo, Presiding Justice
The Honorable Maria P. Rivera, Associate Justice
The Honorable Jim Humes, Associate Justice
California Court of Appeal, First Appellate District, Division Four
350 McAllister Street
San Francisco, CA 94102-7421

Re: Request for Publication re: *San Francisco Beautiful, et al. v. City & County of San Francisco, et al.* (Case No. A136546)

Dear Justices Ruvolo, Rivera, and Humes:

Pursuant to California Rules of Court, Rule 8.1120, subdivision (a), we respectfully request publication of the opinion issued by this Court in *San Francisco Beautiful, et al. v. City and County of San Francisco, et al.* (Case No. A136546), filed on April 30, 2014 (the "Opinion").

We submit this letter on behalf of the League of California Cities (the "League") and the California State Association of Counties ("CSAC").[1] This letter describes the League and CSAC'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).

In addition to satisfying the standards for publication, the League and CSAC believe that the Opinion contains sound legal principles that, if enshrined in case law, would benefit all Californians. As described in more detail below, the Opinion provides important guidance regarding compliance with the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.) ("CEQA"). The Court's discussion regarding the application of the categorical exemption set forth in CEQA Guidelines[2] section 15303 (the "Class 3 exemption") is particularly helpful because it clarifies key provisions of that section and interprets the exemption in a way that will help local agencies more easily

[1] / The parties to the appeal have not authored this letter in whole or in part, nor have the parties to the appeal made any monetary contribution for the preparation of this letter.

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

determine whether they can apply the exemption to certain projects. The Opinion is also useful on a broader level because it discusses potential environmental impacts in the context of a developed urban setting and analyzes the type of evidence that would be sufficient to trigger the need for further environmental review for a project in that type of setting. The Court's discussion regarding evidence of potential aesthetic impacts is especially thorough and useful. When considering how to proceed under CEQA for proposed projects in urban settings, including utility projects similar to the one at issue in the Opinion, agencies throughout the State are constantly grappling with the same issues addressed in the Opinion. Therefore, the Opinion warrants publication because it advances a new clarification of existing law, and involves a legal issue of continuing public interest.

I. The League and CSAC have an interest in publication of the Opinion. (California Rules of Court, Rule 8.1120, subdivision (a)(2).)

The League is an association of 472 California cities dedicated to providing 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 is a matter affecting all counties.

Because all cities and counties in California are routinely required to navigate CEQA prior to considering approval of proposed discretionary projects within their jurisdictions, the appellate courts' interpretation of CEQA and the CEQA Guidelines is of great importance to the League and CSAC and the cities and counties they represent. The League and CSAC have an especially keen interest in cases that clarify a city or county's obligations and responsibilities with respect to various CEQA requirements, including the legal requirements regarding the application of the categorical exemptions provided in the CEQA Guidelines. Similarly, the League and CSAC have an equal interest regarding the application of the exceptions to the categorical exemptions which can remove a project from an exempt class. The continued development of case law addressing these issues assists all cities and counties (and all agencies) in California in complying with CEQA while avoiding the expenditure of public money and other resources on misguided or legally inadequate CEQA review.

II. The Opinion should be published because it explains an existing rule of law; advances a new interpretation, clarification, or construction of existing law; and applies an existing rule of law to a set of facts significantly different from those stated in published opinions. (California Rules of Court, Rule 8.1105, subdivision (c)(2), (3), (4).)

The Opinion should be published because it provides useful guidance regarding the application of the "Class 3" categorical exemption in CEQA Guidelines section 15303. As explained in the Opinion, a categorical exemption is based on a finding by the Resources Agency that a class or category of projects does not have a significant effect on the environment. (CEQA Guidelines, § 15300; Opinion, p. 5.) "Class 3" of the categorical exemptions "consists of [1]construction and location of limited numbers of new, small facilities or structures; [2]installation of small new equipment and facilities in small structures; and [3]the conversion of existing small structures from one use to another where only minor modifications are made in the exterior of the structure." (CEQA Guidelines, § 15303; Opinion, p. 5.)

The Opinion is particularly helpful in clarifying the application of clause [2] of the Class 3 exemption. Importantly, the Opinion holds that, contrary to the petitioner's argument in the case, the terms of second clause of the Class 3 exemption "do not limit the 'installation of small new equipment and facilities' to installation in *existing* small structures." (Opinion, p. 7, italics original.) Rather, the Opinion explains that the exemption can apply even when the project under consideration involves the installation of new structures, as long as the other requirements of the exemption are met. (*Ibid.*) Although we agree that this is, as described in the Opinion, a "common-sense" interpretation of the provision, such interpretation has never been clearly explained in any previously published opinion. While there are cases discussing the Class 3 exemption, those cases offer little guidance on this particular issue. For example, although the First District upheld the use of the Class 3 exemption in *Surfrider Foundation v. California Coastal Commission* (1994) 26 Cal.App.4th 151, for the installation of new parking fee devices at state parks, that case does not discuss which clause of the exemption was being applied and does not directly address the argument that the exemption should be limited to existing structures. Indeed, the Court's discussion of the exemption in that case was minimal and is of only limited value because the application of the exemption was not disputed. (*Id.* at p. 156 ["[T]here is a 'categorical' exemption from CEQA for construction of small structures. [Citations.] It is undisputed that the fee collection devices are small structures within the meaning of this exemption."].) To our knowledge, the Opinion, if published, would be the first case to specifically address this important point.

The Court's discussion of *Robinson v. City and County of San Francisco* (2012) 208 Cal.App.4th 950, is also helpful in this regard. (Opinion, p. 7.) The Opinion explains that although *Robinson* involved the application of the Class 3 exemption to a project that involved existing structures, the language used in that case does not suggest that projects that do not involve existing structures cannot also qualify for the exemption.

(Opinion, p. 7.) Because it explains the limits of *Robinson* and plainly explains the terms of clause [2] of the Class 3 exemption, the Opinion removes any perceived ambiguity in the language and would help agencies in determining whether to apply the exemption to qualifying projects that do not involve existing structures, when the agency may otherwise be reluctant to do so in the absence of direct guidance on the subject. This clarification will also help ensure consistency among the trial courts in their review of an agency's decision to apply the exemption.

In addition to clarifying the terms of the Class 3 exemption, the Opinion also offers guidance regarding when a project may be removed from an exempt class of projects based on an exception to the exemptions. (See CEQA Guidelines, § 15300.2.) Two of the exceptions most commonly invoked by project challengers - the "unusual circumstances" exception (CEQA Guidelines, § 15300.2, subd. (c)) and the "cumulative impacts" exception (CEQA Guidelines, § 15300.2, subd. (b)) - are thoroughly discussed and analyzed in the Opinion. (Opinion, pp. 5, 8-19.) The discussion of these exceptions provides a cogent explanation and further clarification regarding their application.

First, in its discussion of whether the project falls within the "unusual circumstances" exception[3], the Opinion provides important direction regarding evaluation of potential environmental effects in the context of a highly developed urban setting. The "unusual circumstances" exception provides 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).) The discussion in this section of the Opinion is particularly helpful because it describes the standards for evaluating evidence of potential aesthetic impacts, which would be useful even beyond the "unusual circumstances" exception analysis.[4] Aesthetic impacts are frequently controversial and are asserted by project opponents to be significant impacts triggering the need for further environmental

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[3] / Although certain issues related to the "unusual circumstances" exception are currently pending before the California Supreme Court in *Berkeley Hillside Preservation v. City of Berkeley*, S201116, rev. granted May 23, 2012, the Opinion's discussion of the exception is nonetheless helpful and appropriate for publication regardless of the outcome in that case. As noted in the Opinion, the Court did not need to try to resolve the issues pending before the Supreme Court to decide the present case; nor did it attempt to do so. (See Opinion, pp. 9, 11.)

[4] / This discussion would be helpful any time an agency is required to consider the threshold question of whether a project may have a significant environmental effect (e.g. when considering whether to prepare an EIR in the first instance). (See Pub. Resources Code, §§ 21080, subd. (d), 21100, subd. (a), 21151, subd. (a); see also *Pocket Protectors v. City Of Sacramento* (2004) 124 Cal.App.4th 903 [substantial evidence of potential aesthetic impacts required an EIR to be prepared].)

review. These types of issues are often difficult for an agency to evaluate or quantify to the public's satisfaction due to their subjective nature. As the Opinion makes clear, the relevant inquiry when evaluating the potential for aesthetic impacts is "whether a project would substantially degrade the *existing* visual character or quality of the site or its surroundings." (Opinion, p. 13, italics original.) The Opinion then provides a very thorough discussion and comparison of relevant case law where the significance of aesthetic impacts is analyzed in different settings and contexts. (Opinion, pp. 13-17.) The portion of the Opinion that distinguishes cases in which residents' opinions on a project's aesthetic effects were held to be substantial evidence of a significant impact is especially helpful because it highlights and clarifies the difference between "fact-based evidence" and the subjective opinions of project opponents. (Opinion, pp. 16-17.) The difference between mere opinion and fact-based evidence of aesthetic impacts is an important distinction and the Opinion's discussion clarifying this point would be a helpful addition to CEQA case law on the subject.

Moreover, the Opinion should be published because it involves a set of facts significantly different from those stated in any published opinion. Since determining whether a project would have aesthetic impacts is a fact-based inquiry, we believe that it is important for published opinions to conduct this analysis in a variety of factual contexts in order to provide useful samples and guidance for agencies and trial courts. The Court's thorough analysis of the evidence and the potential for aesthetic impacts in the circumstances of this case provides such assistance.

The guidance provided in the Opinion regarding the "cumulative impacts" exception is also helpful. This exception provides that "[a]ll exemptions . . . are inapplicable when the cumulative impacts of successive projects of the same type in the same place, over time is significant." (CEQA Guidelines, § 15300.2, subd. (b).) The Opinion highlights the limits in this exception by explaining that the city did not have to consider the cumulative impact of all similar equipment to be installed throughout the entire city because the Guidelines limit the cumulative impacts exception to successive projects of the same type in the same place. (Opinion, pp. 17-18.) For the purposes of the utility boxes at issue in the case, the Court found the "same place" meant the individual locations where the boxes would be placed. This is an important point because, as the Opinion notes, without the limitation the exception would swallow the rule and the utility of the Class 3 exemption would be vitiated. (Opinion, p. 13.) As similar utility projects are considered throughout the State, the Opinion will help agencies, the public, and reviewing courts better understand whether and how the cumulative impacts exception might apply.

Lastly, the Opinion's discussion regarding whether components of the project were actually mitigation measures, also provides good guidance. The discussion of this subject soundly reaffirms important CEQA principles and provides a clear and succinct statement of the law on this issue.

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

CEQA is a critical element of the State's environmental protection framework. Agencies and litigants alike require guidance on the various requirements under CEQA to ensure all parties fully comply with the law. The use of categorical exemptions is an important tool for implementing projects that typically do not have a significant effect on the environment. In our experience, however, agencies may be reluctant to rely on potentially applicable exemptions, even for well-qualified projects, because their use is frequently challenged by project opponents. Instead, agencies often resort to more extensive and costly environmental review, even for projects that arguably qualify for an exemption. Further, as especially noteworthy here, project opponents frequently strive to direct agencies away from using categorical exemptions by alleging significant aesthetic impacts where the potential for such impacts is disputed or non-existent. Because the use of categorical exemptions continues to be litigated, and aesthetic impacts are often the most controversial issue in urban settings, the analysis and conclusions in the Opinion are of continuing public interest, and publication would help to further develop the law in this area.

Moreover, while there has been much public discussion in recent months about the need to make CEQA less costly and burdensome and debate regarding whether CEQA exemptions should be expanded continues, providing published guidance regarding the functioning of existing CEQA exemptions would be a constructive step to help make CEQA work better. The guidance in the Opinion would help agencies implement qualified projects while minimizing unnecessary costs and litigation risks.

IV. Conclusion

The League and CSAC believe the Opinion meets several of the standards for publication set forth in California Rules of Court, Rule 8.1105, subdivision (c). On behalf of League and CSAC, we respectfully request that the Court certify the Opinion for publication. As explained above, the Opinion addresses important CEQA issues in a clear, careful, and reasoned manner. Therefore, the Opinion would make a significant contribution to the legal literature and would provide useful guidance to lead agencies, litigants, and trial courts.

Very truly yours,

Sabrina V. Teller

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

San Francisco Beautiful, et al. v. City & County of San Francisco, et al.
First Appellate District Case No. A136546
(San Francisco County Superior Court Case No. CPF11511535)

PROOF OF SERVICE

I, Matthew Tabarangao, 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 mtabarangao@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 May 19, 2014, I served the following:

REQUEST FOR PUBLICATION

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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

☐ 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:

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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 on this 19th day of May, 2014, at Sacramento, California.

Matthew Tabarangao

San Francisco Beautiful, et al. v. City & County of San Francisco, et al.
First Appellate District Case No. A136546
(San Francisco County Superior Court Case No. CPF11511535)

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