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October 25, 2013

Justices Mauro, Raye, and Robie
California Court of Appeal
Third Appellate District
914 Capitol Mall, 4th Floor
Sacramento, CA 95814

Re: Request for Publication of *South County Citizens for Smart Growth v. County of Nevada* (October 8, 2013; Case No. C067764)

Dear Justices Mauro, Raye, and Robie:

On behalf of the League of California Cities (the "League") and the California State Association of Counties ("CSAC"), we request that the Court of Appeal 3rd Appellate District publish the opinion in *South County Citizens for Smart Growth v. County of Nevada* (October 8, 2013; Case No. C067764 [the "Opinion"]) pursuant to Rule 8.1120(a) of the California Rules of Court ("CRC").

I. INTEREST

The League is an association of 467 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 have 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.

II. STANDARDS FOR PUBLICATION

The continued development of case law addressing California Environmental Quality Act ("CEQA") issues assists cities, counties, and other public agencies in complying with CEQA while avoiding the expenditure of public money on unnecessary, premature, or legally inadequate CEQA review. As described in greater detail below, we believe the Opinion meets the standards for publication pursuant to CRC, Rule 8.1105(c).

A. Staff-Recommended Alternative was not "Significant New Information" Requiring Recirculation Under CEQA Guidelines § 15088.5(a)(3) and CEQA Findings did not Need to be Adopted for this Alternative

As this Court is aware, after completion of the Final EIR, County staff and the Planning Commission recommended adoption of an alternative that was a variation of Alternative 4 in the Draft EIR ("staff alternative"). (Slip Opinion at page 4.) In response to this recommendation, the project applicant submitted two alternatives to address the concerns raised by the County, one of which ("revised project") was subsequently recommended by staff and the Planning Commission, and approved by the Board of Supervisors. (Slip Opinion at pages 5-6.)

Appellants alleged the County should have "prepared and recirculated a revised draft EIR with the staff alternative [pursuant to CEQA Guidelines § 15088.5(a)(3)]" and prepared CEQA Findings to address the staff alternative pursuant to CEQA Guidelines § 15091(a)(3). (Slip Opinion at pages 12, 16.)

This Court, however, disagreed with appellants and concluded that "(1) the County did not err in failing to prepare and recirculate a revised draft EIR adding the staff alternative, because the staff alternative was not 'significant new information' within the meaning of the CEQA Guidelines; [and] (2) the County was not required to make findings regarding the feasibility of the staff alternative..." (Slip Opinion at page 2.)

In reaching these conclusions, the Court provided a highly detailed discussion of CEQA's alternative selection process (Slip Opinion at pages 8-11), and a discussion of the standard of review/burden of proof related to recirculation under CEQA Guidelines § 15088.5(a)(3). (Slip Opinion at page 13). The Opinion also provided an in depth analysis of (1) whether the staff alternative was "considerably different from other alternatives previously analyzed," (2) whether the staff alternative would "clearly lessen the significant environmental impacts of the [proposed] project...," and (3) whether the

County needed to prepare CEQA Findings for the staff alternative. (Slip Opinion at pages 13-20.)

Few CEQA cases have addressed the standard of review for recirculation with the level of detail provided in the Opinion. Even fewer cases have addressed the application of CEQA Guidelines § 15088.5(a)(3). The only published decision addressing whether recirculation was required for a revised project is *Western Placer Citizens for an Agricultural and Rural Environment v. County of Placer* (2006) 144 Cal.App.4th 890 ("*Western Placer*"). *Western Placer* did not, however, focus on the standard of review. Rather, the case focused on whether "...the EIR has to be revised to include the changes made to the project before the County determined whether the changes were significant enough to require recirculation." (*Id.* at 898-903.) While the case did provide some discussion of whether the revised project should be considered "significant new information," appellant's arguments focused primarily on whether the revised project would result in increased environmental impacts. (*Id.* at 903-906.) The Court did not address what constitutes a "considerably different" alternative nor did it address whether a public agency must make CEQA findings related to revised alternatives proffered after the Final EIR.

The League and CSAC, therefore, believe the Opinion's application of CEQA Guidelines § 15088.5(a)(3) meets the standards for publication under CRC, Rule 8.1105(c)(2) ["Applies an existing rule of law to a set of facts significantly different from those stated in published opinions"]; CRC, Rule 8.1105(c)(3) ["...explains...with reasons given, an existing rule of law"]; and CRC, Rule 8.1105(c)(4) ["advances a new interpretation, clarification...of a...statute"]. The Opinion's detailed discussion of CEQA's alternative selection process and burden of proof for recirculation also meets the standard for publication under CRC Rule 8.1105(c)(7) ["Makes a significant contribution to legal literature by reviewing...the development of...judicial history of a...statute, or other written law."].

The Opinion also "[i]nvolves a legal issue of continuing public interest." As this Court discussed in the Opinion, public agencies will often go through a preliminary scoping process to narrow down potentially feasible alternatives in the Draft EIR. (Slip Opinion at page 8.) While members of the public will often raise a number of concerns during the Draft EIR comment period, many of these concerns are addressed through responses to comments incorporated into the Final EIR. However, after completion of the Draft or Final EIR, public agencies will often further refine one of these alternatives to address any outstanding concerns of the public, the applicant, decision makers, or potential petitioners. As discussed by this Court in *Clover Valley Foundation v. City of*

Rocklin (2011) 197 Cal.App.4th 200, 206, CEQA contemplates this type of iterative process to address the concerns of the public.

CEQA alternatives are frequently refined after receiving comments on the Draft EIR. For example, the City of Pasadena provided a modified alternative in the Final EIR for the All Saints Church Master Plan ("Alternative 7"). This modified alternative shortened the length of one of the proposed building to create a courtyard and avoided proximity to a historic wall; two of the remaining areas of concern to the public after the recirculation of the Draft EIR.[1] It was this alternative that was ultimately adopted by the City. Similarly, Los Angeles World Airports refined an alternative in a Final EIR to address outstanding concerns of the public (it was this refined alternative that was adopted by the Airport); this refined alternative provided alternate construction staging areas for the development of a new international terminal.[2] This Court's interpretation of "considerably different" under CEQA Guidelines § 15088.5(a)(3) will assist cities and counties under similar circumstances.

Public agencies also continue to grapple with alternatives suggested after completion of the Final EIR (typically suggested at the hearing to consider approval of the project). For example, at Pasadena's Design Commission hearing on the All Saints Master Plan, a member of the public submitted a new alternative (after preparation of the Final EIR), without explanation of how it would reduce or avoid an impact. Given the uncertainty in case law at the time, the City provided an in depth analysis explaining why the alternative would not reduce or avoid an impact and why it was inappropriate from a planning perspective.[3] (See also *Save Laguna Street Campus v. City and County of San*

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[1] City of Pasadena, All Saints Church Master Plan Final EIR (2012), General Response 3 – Revised Configuration of Building A ("Alternative 7") (page 8-10). The Final EIR also included an analysis of how the refined alternative's impacts would be the same or reduced in comparison to the proposed project. Available at: http://cityofpasadena.net/WorkArea/DownloadAsset.aspx?id=6442462187

[2] Los Angeles World Airports, Bradley West Final EIR (2009), Topical Response TR-BWP-ST-1 (page 2-1). The Final EIR also included an analysis of how the refined alternative's impacts would be the same or reduced in comparison to the proposed project. Available at: http://www.ourlax.org/pdf/LAXBradleyWestProjectFEIRVolume8_2.pdf

[3] Pasadena Agenda Report, April 16, 2012, Item 20, pages 10 through 13. Available at: http://ww2.cityofpasadena.net/councilagendas/2012%20agendas/Apr_16_12/AR%2020.pdf

Francisco (1st Dist., May 25, 2010, Case No A124531) 2010 WL 2059470 [Nonpublished; Court rejected argument that the EIR must be recirculated to address the "Modified Preservation Alternative" proposed by Appellants seven months after the close of the Draft EIR comment period and after completion of the Final EIR.].)

Publication of the Opinion would clarify that public agencies do not need to incorporate findings to address these last minute suggestions, and that petitioners bear the burden of proving their suggestion would "...clearly lessen the significant environmental impacts of the [proposed] project" rather than relying upon generic assertions, such as those provided in this case (i.e., that additional open space will clearly lessen environmental impacts). (Slip Opinion at page 16.)

B. Traffic Analysis Should be Based Upon Existing Conditions Rather Than Roadway Designations

In Section III of the Opinion, the Court addressed Appellant's allegation that "...the County violated CEQA by relying on future traffic improvements that have not been approved yet in order to declare the revised project's traffic impacts less than significant." (Slip Opinion at pages 20-24.)

This Court concluded that "...the County did not rely on future traffic improvements, but instead relied on the current actual use of the road in question, rather than its current traffic designation." (Slip Opinion at pages 2, 20-24.)

Similar issues have arisen when preparing an EIR for a General Plan. In *Environmental Planning & Info. Council v. County of El Dorado* (1982) 131 Cal.App.3d 350 ("*El Dorado*"), this Court held:

> [T]he dispositive issue on this appeal is whether the requirements of CEQA are satisfied when the EIRs prepared for use in considering amendments to the county general plan compare the environmental impacts of the proposed amendments to the existing plan rather than to the existing environment. We hold that the EIRs must report on the impact of the proposed plans on the existing environment. (*Id.* at 352.)

In reaching its conclusions on the adequacy of the traffic analysis in the Opinion, this Court "[a]pplies an existing rule of law to a set of facts significantly different from those stated in published opinions." (CRC, Rule 8.1105(c)(2).) The Opinion applies the general rule provided in *El Dorado* to a project level traffic analysis.

For all of the reasons described above, we therefore respectfully request that the Court of Appeal publish the Opinion.

Very truly yours,

R. TYSON SOHAGI (SBN 254235)
On Behalf of the League of California Cities and the California State Association of Counties

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South County Citizens for Smart Growth v. County of Nevada, et al.
Third District Court of Appeal, Case No. C067764
(Nevada County Superior Court Case No. 75402)

PROOF OF SERVICE

I am a citizen of the United States, employed in the City and County of Sacramento. My business address is 455 Capitol Mall, Suite 210, Sacramento; California 95814. 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 October 28, 2013, I served the following:

REQUEST FOR PUBLICATION
[California Rule of Court 8.1120(a)]

✓ 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 follows; or

___ 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:

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury that the foregoing is true and correct and that this Proof of Service was executed this 28th day of October, 2013, at Sacramento, California.

B. Thorne

Bonnie Thorne

South County Citizens for Smart Growth v. County of Nevada, et al.
Third District Court of Appeal, Case No. C067764
(Nevada County Superior Court Case No. 75402)

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