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June 3, 2011

The Honorable Tani Gorre Cantil-Sakauye, Chief Justice of California,
and the Honorable Associate Justices of the California Supreme Court
350 McAllister Street, Room 1295
San Francisco, CA 94102

Re: *Trinity Park L.P. et al. v. City of Sunnyvale*
Case No. S193204 [193 Cal.App.4th 1014]
Opposition to Request for Depublication of Appellate Decision

Dear Chief Justice Cantil-Sakauye and Associate Justices:

OPPOSITION TO REQUEST FOR DEPUBLICATION

Pursuant to Rule 8.1125(b)(1) of the California Rules of Court, the City of Sunnyvale asks that the Court deny the request of the California Building Industry Association ("CBIA") for depublication of *Trinity Park L.P. v. City of Sunnyvale* (2011) 193 Cal.App.4th 1014, as set forth in the CBIA's letter of May 17, 2011 (the "Letter").

The Court of Appeal properly determined that its opinion in *Trinity Park*, as issued on March 24, 2011, meets the standards for publication set forth in Rule 8.1105(c). The Opinion clearly addresses and provides long-awaited guidance on an issue of continuing public interest and fully meets the criteria for publication. The Letter itself admits this: it makes clear that the Opinion involves a legal issue of continuing public interest and establishes a new rule of law, both grounds for publication of a decision, yet attempts to argue that the Opinion is not suitable for publication.

The Letter obscures the issue actually raised in the case and addressed in the Opinion: whether a developer may obtain City approvals, build homes, and, after completing and selling most of the homes, use the protest procedures provided by the Mitigation Fee Act to challenge a requirement to sell homes at affordable prices, long after the usual short 90-day statute of limitations to challenge the condition of approval had expired. (*See* Govt. Code §§ 66009(c), 66497.37.) The Opinion provides welcome direction to local governments and to developers regarding when the protest procedures permitted by Government Code §§ 66020 and 66021 may be used, and when they may not be used.

Contrary to the Letter's claims, there is no demonstrated error in the Opinion, nor does the Opinion "nullify" the statutory protest procedure. The Opinion merely limits the protest procedure to the purposes contemplated by the Legislature when it adopted the

Mitigation Fee Act, rather than allowing developers to protest, even after beginning construction, any and every condition that a local government agency might impose on a land use application.

Another lawsuit alleging substantially similar facts was previously filed against the City of Sunnyvale, and a related case is pending in the Sixth District. If the Opinion is depublished, nothing will prevent a party from filing a substantially similar lawsuit making the same claims against the City of Sunnyvale or other local governments, and all of the issues resolved in the Opinion will need to be re-decided by the courts.

THE INTERESTS OF THE CITY OF SUNNYVALE

The City of Sunnyvale (the "City") is a California charter city. Like all cities in California, Sunnyvale is required to use its powers "to make adequate provision for the housing needs of all economic segments of the community." (*See* Govt. Code § 65580(e).) For thirty years, Sunnyvale has required new residential developments to include some "below market-rate" housing to be sold at prices affordable to low or moderate income households. The requirement ensures that new affordable housing is produced in the City at the same time, in the same neighborhoods, and in the same styles as market-rate housing. When new residential developments are proposed, the City attaches a condition of approval that requires the affordable housing to be built. The City also reviews and approves numerous development applications under the Planning and Zoning Law and frequently attaches conditions to its approval of such applications.

The City's interests are to ensure that it can continue to enforce its affordable housing and planning conditions; that clear rules are established for use of the Mitigation Fee Act's protest procedures; and that it is not required to re-litigate the issues resolved by the Opinion.

THE OPINION ESTABLISHES A NEW RULE OF LAW (RULE 8.1105(c)(1))

Sections 66020 and 66021 of the Mitigation Fee Act allow protests of "fees, dedications, reservations, and other exactions" to be made within 90 days of the date that a local agency notifies a developer of the amount of the fees to be paid or description of the "exactions," and notifies the developer that the 90-day protest period has begun. If a city or county does not consider a condition of approval to be a "fee, dedication, reservation, or other exaction," it may not provide the required notice. Nothing in the statute defines "other exactions."

Use of these protest procedures may allow an applicant to evade the usual strict 90-day limitations period to challenge conditions of planning, zoning, and subdivision approval. (Govt. Code §§ 66009(c), 66497.37.) In *Trinity Park*, the petitioner made the audacious claim that the protest procedure could be used to challenge an affordable

housing condition years after the project was approved and after the rest of the development had been almost entirely built and sold.

Faced with a claim contrary to the Legislature's interest in "providing certainty for property owners and local governments" (Govt. Code § 65009(a)(3)), the Opinion, after a lengthy analysis, establishes a rule for when an exaction constitutes an "other exaction" for the purpose of the Mitigation Fee Act (*Trinity Park,* 193 Cal.App.4th at 1039.) In those cases, the protest procedures may be used. In other cases, the protest procedures may not be used.

Contrary to the Letter's assertion that the rule will "nullify" the protest procedures and "create new conflict, uncertainty, and confusion," the rule provides guidance to both local governments and developers regarding when the protest procedures apply (and governments must provide the 90-day notice) and when they do not (and a developer must file a challenge within 90 days of a decision).

THE OPINION APPLIES AN EXISTING RULE OF LAW TO A SET OF FACTS SIGNIFICANTLY DIFFERENT FROM THOSE STATED IN PUBLISHED OPINIONS (RULE 8.1105(c)(2))

Prior to publication of the Opinion, no published case had considered whether or not the protest procedures established by the Mitigation Fee Act applied to requirements to construct affordable housing. The Letter states that, in *Building Industry Ass'n of Central California v. City of Patterson* (2009) 171 Cal.App.4th 886, "affordable housing in lieu fees" imposed by the City of Patterson were paid under protest pursuant to Section 66020. However, nothing in *Patterson* discusses whether or not those fees were paid under protest pursuant to Section 66020. By contrast, the Opinion specifically discusses whether an affordable housing condition may be challenged under the Mitigation Fee Act and concludes that a requirement to sell homes at an affordable price is not an "other exaction" within the meaning of Sections 66020 and 66021. (*Trinity Park,* 193 Cal.App.4th at 1041.)

THE OPINION INVOLVES A LEGAL ISSUE OF CONTINUING PUBLIC INTEREST (RULE 8.1105(c)(6))

The Letter concedes that the Opinion involves a legal issue of continuing importance to the development community and to local government.

Amicus briefs in support of the City of Sunnyvale were filed in the Court of Appeal by representatives of the League of California Cities, the California State Association of Counties, Law Foundation of Silicon Valley, Affordable Housing Network of Santa Clara County, California Coalition for Rural Housing, Non-Profit Housing Association of Northern California, Public Interest Law Project, Southern California Association of Non-Profit Housing, and the San Diego Housing Federation. Notably, although the

Petitioner prepared a vigorous response to the amici, the CBIA did not participate as an amicus in the court below.

The Opinion is of particular importance to affordable housing advocates because it clarifies that the usual 90-day statutes of limitation imposed by the Planning and Zoning Law (Govt. Code § 65009(c)) and the Subdivision Map Act (Govt. Code § 66497.37) apply to affordable housing conditions and cannot be challenged pursuant to the protest procedures permitted by the Mitigation Fee Act (Govt. Code §§ 66020, 66021). It is also important to both local governments and the development community because it clarifies which conditions of approval must be challenged within 90 days after approval; and which conditions may utilize the protest procedures, requiring that local government provide the statutory notice to establish the limitations period. (*Trinity Park,* 193 Cal.App.4th at 1039.)

Finally, the Court of Appeals' decision to publish the Opinion is in the interest of judicial economy. The City of Sunnyvale was served with another complaint alleging substantially similar facts on September 3, 2010 (*Fair Oaks Place L.P. et al. v. City of Sunnyvale,* Santa Clara County Super. Ct. No. CV181697). While a settlement was reached in *Fair Oaks Place*, if the Opinion is de-published, nothing will prevent a substantially similar complaint from being filed against the City or another public agency by the same party or another party. A related case is also pending in the Sixth District, *Sterling Park et al. v. City of Palo Alto* (Sixth District H036663).[1] To prevent the need for the Court of Appeal to re-decide substantially the same issues, the Opinion should be able to be cited as precedent.

THE CBIA'S REASONS FOR REQUESTING DEPUBLICATION ARE NOT WELL FOUNDED

CBIA attempts to re-litigate the issues raised in the extensive briefing before the Court of Appeal, presenting a distorted view of the Opinion.

The Opinion does not conflict with prior decisions of this Supreme Court. The Letter's citation to *Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 19 n.9, is to a footnote explaining the Legislature's adoption of an earlier version of Section 66020; nothing in *Hensler* discusses the scope of that section, or the meaning of "other exactions." *Trinity Park* cites *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, regarding the Mitigation Fee Act and relies on *Ehrlich* for its holding that not all exactions are "development exactions" under the Mitigation Fee Act (*id.,* 12 Cal.4th at 886); the scope of the protest procedures and the meaning of "other exactions" were not at issue in *Ehrlich.* Lastly, there is no conflict between *Trinity Park* and *Barratt American Inc. v. City of Rancho Cucamonga* (2005) 37 Cal.4th 685, which concluded that the Section 66020 protest

[1] Classic Communities, Inc. is a party to all three cases: *Trinity Park, Fair Oaks Place,* and *Sterling Park.*

procedures could not be used to protest building permit fees – a conclusion irrelevant to the decision in *Trinity Park.*

The Opinion does not conflict with other appellate decisions. Neither *Bright Development v. City of Tracy* (1993) 20 Cal.App.4th 783, nor *Patterson* reviewed the scope of the protest procedures allowed by Sections 66020 and 66021; *Patterson* does not even discuss whether protest procedures were used by the developer. *Trinity Park* follows *Fogarty v. City of Chico* (2007) 148 Cal.App.4th 537, 543-44, for its holding that not all exactions imposed on a development project are "other exactions" for purposes of the Mitigation Fee Act (*Trinity Park,* 193 Cal.App.4th at 1040). And *Trinity Park* does not disagree with *Williams Communication LLC v. City of Riverside* (2003) 114 Cal.App.4th 642, although the Court of Appeals did rely on a different method of statutory construction. (*Trinity Park,* 193 Cal.App.4th at 1041-42.)

The Opinion is not inconsistent with canons of statutory construction. Contrary to the CBIA's assertions, the Court of Appeals did rely on the "plain language" of the relevant provisions of the Mitigation Fee Act. (*Trinity Park,* 193 Cal.App.4th at 1037.) Nothing requires a court to use a dictionary rather than relying on the "plain language" of the statute.

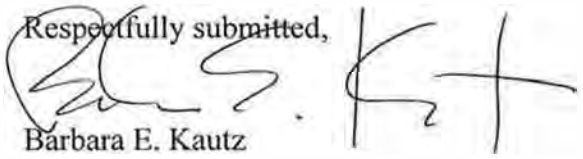
Finally, the Opinion is not inconsistent with the legislative history. CBIA simply disagrees with the Court of Appeal's detailed analysis of the legislative history of the relevant statutory provisions and seeks to proffer instead its own view of that history. However, nothing proffered by the CBIA explains the meaning of the term "other exactions."

CONCLUSION

By publishing the Opinion, the Court of Appeal ensured that cities and counties will know which conditions of approval may be challenged through the protest procedures of the Mitigation Fee Act and must be provided statutory notice to establish the limitations period. At the same time, developers will know which conditions of approval must be challenged within 90 days of a local government decision because they cannot be challenged through the Act's protest procedures. Supporters of affordable housing will know that affordable housing conditions cannot be challenged after a project is built. All parties involved in the development process – cities, counties, builders, and advocates of affordable housing – have benefitted from the Court of Appeal's clear explanation of when the Mitigation Fee Act's protest procedures can be used.

Accordingly, the City of Sunnyvale asks that this Court deny the CBIA's request for depublication of *Trinity Park*.

Respectfully submitted,



Barbara E. Kautz

PROOF OF SERVICE BY U.S. MAIL

Trinity Park L.P. and Classic Communities, Inc.. v. City of Sunnyvale
The Supreme Court of the State of California, Case No.: S193204

(6th Appellate District Civil No. H035573;
Santa Clara Superior Court Case No.: 1-09-CV-159525)

I, Cristy L. Houchins, certify and declare as follows:

I am over the age of 18 years, and not a party to this action. My business address is 1300 Clay Street, Eleventh Floor, City Center Plaza, Oakland, California 94612, which is located in the county where the mailing described below took place.

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- **OPPOSITION TO REQUEST FOR DEPUBLICATION,**

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I certify and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on June 3, 2011.

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