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August 13, 2010

The Honorable Chief Justice Ronald M. George
The Honorable Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

Re: ***Embassy LLC v. City of Santa Monica***
Supreme Court No.: S184765
Court of Appeal No.: B217622
Request for Depublication (Cal. Rules of Court, rule 8.1125(a))

Dear Chief Justice George and Hon. Justices of the California Supreme Court:

On behalf of the League of California Cities, we respectfully request that the Court depublish *Embassy LLC et al. v. City of Santa Monica et al.* (*"Embassy")* 185 Cal. App. 4th 771 (Second Appellate District, June 14, 2010) (the "Opinion") pursuant to Rule 8.1125 of the California Rules of Court, if the City of Santa Monica's pending petition for review, filed July 26, 2010, is not granted.

The Opinion does not meet the standards for publication of Rule 8.1105(c). It modifies basic principles for challenging public contracts but gives no reasons for doing so, making sweeping changes with virtually no analysis.

In particular, the Court of Appeal allowed the Plaintiffs to challenge, by writ of mandate, the consideration provided for a contract with the City of Santa Monica by writ of mandate without *any* reference to the underlying contract. *Embassy,* 185 Cal. App. 4th at 774 n.3. In fact, the Opinion holds that the lawsuit was not even an action on a contract. *Id.* at 779. The Opinion further holds that the *Plaintiff's* claim accrued only when the Plaintiffs sought to breach the contract, *even though the same claim could have been made on the day that the Plaintiffs entered into the contract.* If applied to municipal contracts in the generality, the Opinion could allow the provisions of any municipal contract to be challenged without reference to the underlying agreement or to the statutory or public policy interests at issue and could effectively result in *no* limitations period for such challenges, contrary to numerous decisions of this Court.

But these conclusions are reached without analysis. The Court of Appeals simply concludes baldly that "this is not an action on a contract. It is a mandamus proceeding." *Id.* A decision that allows contractual provisions to be challenged by writ of mandate without reference to the underlying contract and without any limitations period should

not be published when it provides no analysis. "When . . . a decision treats an issue in a 'summary and conclusory' manner, and is 'virtually devoid of reasoning,' its authoritative status is undermined (citation omitted)." *McHugh v. Santa Monica Rent Control Board* (1989) 49 Cal.3d 348, 358.

I. Interests of Amicus

The League of California Cities 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 being of such significance.

II. The Opinion Should be Depublished Because It Allows a Contractual Provision to be Voided by Writ of Mandate With No Apparent Limitations Period and Without Reference to the Underlying Contract, Yet Provides No Analysis of These Issues

The contract in question in *Embassy* was a settlement agreement entered into in 2000 by the Plaintiffs and the City of Santa Monica to settle a dispute about the permitted uses of the Plaintiff's property. The Plaintiffs offered to waive certain statutory rights under the Ellis Act (Gov't Code § 7060 et seq.) to settle the dispute, and their offer was memorialized in the settlement agreement. When Plaintiffs decided, eight years later, that the Ellis Act waiver was no longer in their best interests, they petitioned for writ of mandate to void the waiver that they had offered.

In the Opinion, the Court of Appeals:

- Found the Ellis Act waiver to be unenforceable but refused to take judicial notice of the settlement agreement itself. *Embassy,* 185 Cal. App. 4th at 774 n.3, 777.

- Allowed the Plaintiffs to accrue their cause of action merely by seeking to overturn the waiver and filing for writ of mandate, effectively giving future plaintiffs absolute power to control the time of accrual of their cause of action. *Id.* at 779.

If applied to municipal contracts in the generality, the Opinion could allow the provisions of any municipal contract to be challenged without reference to the underlying agreement or to the statutory or public policy interests at issue and could effectively result in *no* limitations period for public contracts. But the Opinion contains no rationale for these sweeping changes, nor does it reference contrary authority of this Court.

A. The Opinion Should Be Depublished Because It Allows a Term of a Public Agency Contract to be Voided Without Consideration of the Contract, Yet Provides No Analysis of the Issue.

Even though the effect of the Opinion is to render unenforceable the term of a settlement agreement, the Court of Appeal refused to take judicial notice of the underlying settlement agreement, holding that the case was not an action on a contract. *Id.* at 774 n.3, 779. Nowhere does the Opinion analyze the implications of this ruling.

First, the contested provision cannot be properly analyzed without reference to the contract. As the City of Santa Monica has ably argued, where there is no express ban on waiver in a statute, important public policy considerations are implicated in determining whether a provision may be waived, which require reference to the underlying purpose of the contract. Moreover, the Opinion's failure to review the contested provision in the context of the entire contract could conceivably allow parties to mount wholesale challenges to public contracts by writ actions, without reference to the underlying agreements. Because only the actions of public agencies may be attacked by writ of mandate, the Opinion could have the effect of impairing the stability of public agency contracts in general.

In addition, the Court's refusal to review the settlement agreement at issue in Santa Monica leaves its status in limbo. The Opinion does not resolve whether the entire settlement agreement is void, whether Santa Monica must sue for breach or rescission, or whether the contract remains intact, with only the unenforceable portion removed.

The only consideration of these issues by the Court of Appeals is this: "this is not an action on a contract. It is a mandamus proceeding." *Id.* at 779.

B. The Opinion Should be Depublished Because It Allows an Almost Unlimited Limitations Period for Challenges to Public Agency Contracts, Yet Provides No Analysis of the Issue.

On its face, the Opinion appears to deal with the validity of the term of a written settlement agreement. The limitations period for an action on such a written document is four years. Civ. Proc. Code § 337. Since the settlement agreement was entered into in 2000, the Plaintiffs' failure to file suit until 2008 seems clearly barred by the statute of limitations. Yet, in discussing this issue, the Court of Appeal held only that,

> ". . . there could have been no mandamus proceeding, and no cause of action, until [Plaintiffs] sought to remove their tenant units from the rental market." *Embassy,* 185 Cal. App. 4th at 779.

This sweeping holding would permit any party who is unhappy with an agreed-upon term of a city contract to accrue a new cause of action to challenge the contract at any time, even decades later, simply by invoking some justification for breach (as did the Plaintiffs here, when they

asked to invoke their Ellis Act rights in breach of their agreed-upon waiver) and then petitioning the court for a writ of mandate. In *Embassy*, this result is particularly egregious because Plaintiffs could have filed the same claims *as soon as the contract was signed.*

When a contract is breached, a cause of action normally accrues for the *non-defaulting* party. But in the Opinion, the Court of Appeals allowed a new cause of action to accrue for the *defaulting* party.

In *Travis v. County of Santa Cruz* (2004), 33 Cal. 4th 757, this Court rejected Travis's claim that there is no limitations period for challenges by mandate to local ordinances inconsistent with State law. Travis filed a petition for writ of mandate and argued that local ordinances become null and void immediately upon becoming inconsistent with State law so that a writ is timely at any time – analogous to the claim made here by Plaintiffs, who argued that their petition was timely because the contractual provision was void.

In rejecting the claim that there was *no* limitations period for challenging such an ordinance, this Court stated:

> "Plaintiffs cite no authority for this approach, and we have discovered none. Nor does it appeal as a matter of logic. A preempted ordinance, while it may lack any legal effect or force, does not cease to exist; if it did cease to exist, any challenge to it would have no object. Plaintiffs here, for example, could not sensibly pray for an order that the County amend or repeal the Ordinance or stop enforcing it, if the Ordinance no longer existed. . .[T]he statute of limitations governing the claim that an ordinance has been preempted by a later enacted state law. . . applies despite the further contention that preemption rendered the ordinance void." *Id.* at 775-76.

Ignoring precedent, the Opinion concludes the opposite: a writ of mandate was timely at any time because the Ellis Act waiver was void. But like the ordinance challenged in *Travis,* the Ellis Act waiver did not cease to exist, or there would have been no point in challenging it. Consequently, the four-year statute of limitations for action on a contract should have applied despite Plaintiffs' contention that the Ellis Act waiver was void. The Opinion, however, does not even cite relevant authority, nor does it even acknowledge the implications of its holding.

As the Ninth Circuit commented, in rejecting a challenge to a settlement agreement on 'takings' grounds filed five years after the agreement was final:

> "To allow [plaintiff] to challenge the settlement agreement five years after its execution, based on a subsequent change in the law, would inject needless uncertainty and an utter lack of finality to settlement agreements of this kind." *Leroy Land Devel. v. Tahoe Regional Planning Agency,* 939 F.2d 696, 698 (9th Cir. 1991).

Allowing an Opinion so lacking in analysis to stand as a published decision would "inject needless uncertainty and an utter lack of finality" into public agency contracts.

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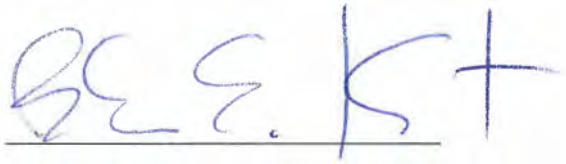
For these reasons, the League of California Cities respectfully requests that this Court depublish *Embassy LLC v. City of Santa Monica*.

Dated: August 13, 2010

Respectfully submitted,

LEAGUE OF CALIFORNIA CITIES

By: 

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PROOF OF SERVICE BY MAIL

Embassy LLC v. City of Santa Monica
California Supreme Court Case No.: S184765
Court of Appeal Case No.: B217622

I, Renee A. Ricasata, 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, Ninth Floor, City Center Plaza, Oakland, California 94612, which is located in the county where the mailing described below took place.

I am readily familiar with the business practice at my place of business for collection and processing of correspondence for mailing with the United States Postal Service. Correspondence so collected and processed is deposited with the United States Postal Service that same day in the ordinary course of business.

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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 August 13, 2010.

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