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August 5, 2010

Our File Number: 01ZG-129927

The Honorable Ronald M. George
Chief Justice of California, and
The Honorable Associate Justices of the
California Supreme Court
350 McAllister Street, Room 1295
San Francisco, CA 94102

Re: ***Homebuilders Association of Tulare/Kings Counties v. City of Lemoore City Council, et al.***
Supreme Court No. S184580
[5th Civil No. F057671]

Request for Depublication of Appellate Decision

To the Honorable Ronald M. George, Chief Justice of California, and to the Honorable Associate Justices of the California Supreme Court:

The CALIFORNIA BUILDING INDUSTRY ASSOCIATION, as *amicus curiae,* has under separate cover requested that this Court grant the petition for review of the Court of Appeal decision in this case. However, in the alternative and only in the event that review is not granted, the California Building Industry Association does hereby respectfully request that this Court order that the Court of Appeal's decision in this matter be decertified and be ordered to be depublished, pursuant to CRC Rule 8.1125.

The Court of Appeal decision (the "decision") conflicts with existing authority in many significant areas, and creates new legal issues as to the application of the California Mitigation Fee Act (Government Code §§ 66000–66025) as well as the Quimby Act (Government Code § 66477). Many of these inconsistencies are pointed out and questioned in the separate opinion by Presiding Justice Ardaiz, which demonstrates how the lead opinion's misreading of the Mitigation Fee Act undermines the purposes of the Act, and would open the proverbial floodgates to even more widespread fee abuse: "Using that type of reasoning justifies a development fee for almost anything, …."

The appellate decision, if it remains published in its present form, will dramatically change the Mitigation Fee Act as well as established practices in setting and justifying reasonable development fees, and will undoubtedly create costly, if not stifling, new confusion on the part of local governments, the home building industry, and the court system as

to the applicable legal requirements essential to the establishment of valid development fees and exactions. It is therefore appropriate for the decision to be depublished, in the event the Court does not grant review.

Interest of California Building Industry Association

The California Building Industry Association ("CBIA") is a statewide nonprofit association with approximately 3,500 members active in all aspects of the housing and home-building industry throughout California. The Court of Appeal granted CBIA's request to appear as *amicus curiae* in support of the petition for rehearing following the issuance of the initial opinion below, and CBIA filed an *amicus* brief in support of rehearing on June 28, 2010. The Court of Appeal denied rehearing, but modified a portion of its initial opinion and certified it for publication on July 8, 2010.

Grounds for Depublication

In the event that the Supreme Court does not grant the petition for review, therefore, it is nevertheless appropriate if not necessary to order the depublication of this decision in order to avoid conflicts between this remarkably aberrant decision and existing judicial and legislative authority. In its letter supporting the petition for review (copy attached), the California Building Industry Association ("CBIA") identifies more than ten issues in which the appellate decision is in conflict with existing judicial precedent or statutes governing the enactment and review of development fees.

Among the conflicts raised by the appellate decision are the following:

(1) The decision is inconsistent with decisions of this Court requiring that legislatively established fees or exactions as conditions of development approval must be shown to be reasonably related to deleterious public impacts caused by new development (e.g., *San Remo Hotel v. City & County of San Francisco* (2002) 27 Cal.4th 643, 671);

(2) The decision purports to "interpret away" the statutory requirements of the Mitigation Fee Act (Government Code § § 66001, 66002, 66005) requiring that a local agency must identify the purpose and proposed use of development fees with sufficient specificity to demonstrate to the agency's decision-makers, the public, and the courts, that the proposed fees are reasonably related to needs created by new development;

(3) The decision conflicts with the text of the Mitigation Fee Act, in which the Legislature specifically requires that a local agency seeking to establish or increase development fees for the purpose of funding new public facilities "shall identify the facilities" in public documents (Government Code § 66001(a));

(4) The decision is inconsistent with rules of statutory interpretation as established by this Court and fails to apply those rules to the interpretation and application of the requirements of the Mitigation Fee Act, and fails to give the word "identify" its appropriate and judicially-recognized meaning (e.g., *People v. Weger* (1957) 251 Cal.App.2d 584, 598);

(5) The decision erroneously accepts the City's mischaracterization of its fee justification analysis as a "standards based" approach, without consideration of existing facility standards, or capacity or existing deficiencies, in violation of Government Code § 66001(g);

(6) The decision is inconsistent with this Court's decision in *Silicon Valley Taxpayers Ass'n. v. Santa Clara Open Space Authority* (2008) 44 Cal.4th 431, by approving the City's enactment of fee resolutions before deciding or identifying how the proceeds will be spent;

(7) The decision conflicts with other judicial precedent by deferring to the City's argument that its adopted General Plan standard of 3 acres of park land / 1000 residents is "consistent with" its new park fees based on requiring 5 acres / 1000 residents, in violation of the Quimby Act, and in conflict with principles of state law preemption by allowing the City to establish multiple park land fees.

(8) The decision approves the City's purported "justification" for its new development fees, even though several of those new fees improperly include costs of ordinary operation and maintenance, in violation of Government Code § 65913.8;

(9) The decision conflicts with decisions by this Court and by other appellate courts as to the appropriate standard of review for the disputed development fee resolutions (e.g., *San Remo Hotel v. City & County of San Francisco* (2002) 27 Cal.4th 643, 671; *Silicon Valley Taxpayers Ass'n. v. Santa Clara Open Space Authority* (2008) 44 Cal.4th 431.)

(10) The decision conflicts with, and declines to follow, a line of precedent going back at least 25 years in which the Supreme Court and the appellate courts have repeatedly recognized that the burden of proof is properly placed on the government agency seeking to impose development fees to demonstrate the validity of the fees and that the fees are reasonably related to appropriate governmental purposes (*Beaumont Investors v. Beaumont-Cherry Valley Water Dist.* (1985) 165 Cal.App.3d 227, 234).

Conclusion

The appellate opinion in this case stands in stark contrast with established case law, in derogation of this Court's holdings as to the constitutional and statutory requirements for development fees and exactions, as well as the Legislature's statutory requirements, and injects new inconsistencies and confusion into an already complex area of the law.

For each of the foregoing reasons, amicus CBIA respectfully requests that the Court order depublication of this decision. CRC Rule 8.1125[1]

Thank you for your consideration of these requests.

Very truly yours,

David P. Lanferman

for SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

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[1] As noted at the outset, CBIA has also, under separate cover, submitted *amicus* support for granting the petition for review of this case, and CBIA respectfully requests that depublication be ordered in the alternative and only if review is not granted.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

In Re: **SUPPORT FOR PETITION FOR REVIEW**
5th Civil No. F057671
Caption: ***Homebuilders Association of Tulare/Kings Counties, Inc. v. City of Lemoore; Lemoore City Council, et al.***
Kings County Superior Case No. 07-C0185
Filed: **IN THE COURT OF APPEAL, Fifth Appellate District**

I am employed in the County of San Francisco; I am over the age of eighteen years and not a party to the within entitled action; my business address is Four Embarcadero Center, 17th Floor, San Francisco, California 94111-4109.

On **August 5, 2010,** I served the following document(s) described as

REQUEST FOR DEPUBLICATION OF APPELLATE DECISION

on the interested party(ies) in this action by mailing a true copy thereof in a sealed envelope, addressed as follows:

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Honorable James LaPorte
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Court of the Court of Appeal
Fifth Appellate District
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☒ **BY MAIL:** I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid at San Francisco, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☐ **BY HAND DELIVERY:** I caused such envelope(s) to be delivered by hand to the office of the addressee(s).

☒ **STATE:** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on **August 5, 2010**, at San Francisco, California.

Jennie Chin