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

File No. 12367.011

Re: Homebuilders Association of Tulare/Kings Counties v. City of Lemoore City Council, et al.
Supreme Court No. S184580
Fifth District No. F057671

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

On behalf of the City of Lemoore and its City Council in its Official Capacity (collectively, "City"), this letter will respond to the request of the California Building Industry Association ("CBIA") to depublish the Appellate Opinion ("Opinion") in the matter above referenced. City has a proper interest in opposing depublication in that City was respondent in the Court of Appeal and has filed an Answer in this Court requesting that Homebuilders Association of Tulare/Kings Counties, Inc.'s ("HBA") Petition for Review be denied. City also has a proper interest in that it will in the future remain subject to the Mitigation Fee Act ("MFA") at California Government Code sections 66000 et seq. and to the Quimby Act at California Government Code section 66477 (all statutory references are to the California Government Code unless otherwise indicated) and wishes in the future to rely on the clear construction of these Acts set forth in the Opinion as the law of the State of California.

GROUNDS FOR PUBLICATION

Under California Rules of Court, Rule 8.1105(c)(4)(6)(7), the Opinion was and is properly published in that it provides a clarification and construction of both the MFA and the Quimby Act, involves issues of continuing public interest, and makes a significant contribution to judicial literature. The Opinion clearly establishes the following. First, the adoption of impact fees under the MFA is a quasi-legislative act.

Second, judicial review of the adoption of impact fees under the MFA is limited to an examination of the proceedings before the local agency to determine whether its action was (a) arbitrary, capricious, or entirely lacking in evidentiary support; (b) whether the agency adequately considered all relevant factors and demonstrated a rational connection between those factors, the choice made, and the purpose of the MFA; and (c), whether the agency used a valid method for imposing the fee, one that established a reasonable relationship between the fee charged and the burden posed by the development. See Opinion, published at 185 Cal. App. 4th 554, 561 (2010).

Third, consistent with the MFA's requirement that the local agency provide a record sufficient to enable the court to do this review, the Opinion places the burden for production of the record on the agency and, once that burden is met, places the burden of proof to show the record is deficient on the challenger. *Id.* at 562-563.

Fourth, given the impracticality of plan-based identification of impact fees that may be in effect for years, given the language in the MFA that allows identification of the fees by type, and given the MFA's annual and five year accounting requirements to insure fees are used for the purpose for which they were adopted, the Opinion correctly holds that plan or project-based identification of the fees is not required and the fees may be based on maintaining the existing level of service.

Fifth, the Opinion is clear that the Quimby Act, by its terms, does not apply to recreational impact fees that are adopted on a city-wide basis because these fees address needs other than "neighborhood or community park or recreational facilities to serve the subdivision." *Id.* at 567.

Sixth, the Opinion clarifies when the adoption of the Quimby acreage standard of 5 acres per 1000 will not conflict with a general plan policy adopted years before referencing Quimby's 3 acre per 1000 standard. *Id.* at 568-569.

Seventh, the Opinion makes it clear that the MFA allows cities to adopt impact fees for the initial capital cost of new equipment and vehicles where the need for them is reasonably related to the burden of new residential development. *Id.* at 570.

Finally, the Opinion provides guidance as to legally sufficient compliance with the MFA's accounting requirements. *Id.* at 573-575.

CBIA erroneously contends that the Opinion "injects new inconsistencies and confusion into an already complex area of the law." (P. 3 of CBIA letter requesting depublication.) In fact, on issues of obvious continuing public interest and with scholarly analysis, the Opinion injects crystal clarity where it was sorely needed in light of the extensive misconstruction and misapplication of prior law that CBIA and HBA erroneously claims should have been followed. Relying more on overwrought rhetoric than reasoned analysis, CBIA does not bother to attempt to refute (which it could not

do in any event) that the Opinion clearly meets the requirements for publication of Rule 8.1105(c)(4), (6) and (7), but instead asks this Court to obliterate the Opinion's statewide application so that CBIA and its constituents will remain at liberty to urge other courts to rely on outdated and inapposite authority to invalidate impact fees. It is not in the public interest to leave this complex area of the law unguided by the Opinion.

A. Depublication Will Introduce Needless Confusion

1. The Standard of Review and Burden of Proof Should Not be Left in a State of Confusion

HBA never raised below a contention that the challenged fees violated the takings clauses in the Fifth Amendment to the United States Constitution and in Article 1, section 19 of the California Constitution. CBIA cannot now raise this claim. *Younger v. State of California*, 137 Cal. App. 3d 806, 813-814 (1982); *E.L. White, Inc. v. City of Huntington Beach*, 21 Cal. 3d 497 (1978). But even if, *arguendo*, the taking issue was properly before the Court, the Opinion states the correct standard of review and correct assignment of the burden of proof. The Opinion correctly cited *San Remo Hotel v. City and County of San Francisco*, 27 Cal. 4th 643, 671 (2002) for the proposition that impact fees are generally accorded substantial judicial deference. 185 Cal. App. 4th at 563. In *San Remo Hotel*, the owners of the San Remo Hotel challenged an ordinance requiring them to pay a housing replacement in-lieu fee as a condition to a permit to convert their residential hotel to a tourist hotel. The owners asserted that the ordinance was subject to heightened scrutiny under *Ehrlich v. City of Culver City, 12 Cal. 4th 854 (1996)*.[1] Distinguishing *Ehrlich*, this Court observed that the generally applicable ordinance in *San Remo Hotel* stood in "sharp contrast" to the ad hoc condition in *Ehrlich* that was imposed entirely at the discretion of the city council and staff, without legislative mandate and without a legislatively-set formula to calculate the size of the fee. *Supra*, 27 Cal. 4th at 669-670. Heightened scrutiny of the fee in *Ehrlich* was necessary to insure that the developer was not subjected to arbitrary extortion. But for the ordinance challenged in *San Remo Hotel*, this Court stated at 670-671:

> "We decline plaintiffs' invitation to extend heightened takings scrutiny to all development fees, adhering instead to the distinction we drew in *Ehrlich, supra*, 12 Cal. 4th 854, *Landgate, supra*, 17 Cal. 4th 1006, and *Santa Monica Beach, supra*, 19 Cal. 4th 952, between ad hoc exactions

[1] Because the takings issue (or any other constitutional issue) was not timely presented below, the lower courts have had no occasion to consider whether *Ehrlich's* holding that, for purposes of the ad hoc fee there involved, the MFA's "reasonable relationship" requirement merged with the takings standard of review enunciated in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), would apply to any of the issues in this case. However, as noted above the Opinion's statement of the standard of review and the burden of proof under the MFA is entirely consistent with the State and Federal constitutions.

> and legislatively mandated, formulaic mitigation fees. While legislatively mandated fees do present some danger of improper leveraging, such generally applicable legislation is subject to the ordinary restraints of the democratic political process. A city council that charged extortionate fees for all property development, unjustifiable by mitigation needs, would likely face widespread and well-financed opposition at the next election. Ad hoc individual monetary exactions deserve special judicial scrutiny mainly because, affecting fewer citizens and evading systematic assessment, they are more likely to escape political controls."

The challenged resolutions and ordinance in this case are enactments of general applicability with formulaic mitigation fees. As such, each is entitled to substantial judicial deference when be tested against the takings clause. The fees must bear a reasonable relationship, in both purpose and amount, to the impact of the development. *San Remo Hotel, supra,* at 671; *The San Remo Hotel L.P. v. San Francisco City and County,* 364 F. 3d 1088, 1098-1099 (9th Cir. 2004). To establish a taking, the challenger "**bears the burden of proving** that the regulation 'constitutes an arbitrary regulation of property rights.'" *Santa Monica Beach, LTD., v. Superior Court,* 19 Cal. 4th 952, 966 (1999) (Citations omitted and emphasis added). Judicial review of a local agency's quasi-legislative acts by ordinary mandamus is limited to whether the action was arbitrary, capricious or entirely lacking in evidentiary support. *Id.* The Opinion's standard of review is consistent with this Court's determinations in *San Remo Hotel, supra,* and *Santa Monica Beach, LTD., supra.*

Silicon Valley Taxpayers' Association, Inc. v. Santa Clara County Open Space Authority, 44 Cal. 4th 431 (2008), is inapposite. Silicon Valley Taxpayer's Association involved a challenge to an assessment proposed by an assessment district based on Proposition 218. Proposition 218 expressly excepted existing laws relating to the imposition of development fees. See Cal. Const. Art. XIII D, section 1. The MFA and Government Code section 66477 (insofar as the latter allows a fee in-lieu of land dedication—Proposition 218 does not apply to land dedication as the Proposition addresses only monetary exactions, fees or charges) are and were such laws. See also, *Apartment Association of Los Angeles County v. City of Los Angeles,* 24 Cal. 4th 830, 839 (2001) (noting that the Legislative Analyst's analysis for the November 1996 ballot pamphlet for Proposition 218 stated development fees were excluded from the constraints of the Proposition).

CBIA's assertion that *San Francisco Fire Fighters Local 789 v. City and County of San Francisco,* 38 Cal. 4th 653 (2006), supports application of a higher standard of review is without merit. Unlike that case, the Opinion did not address whether a city's administrative regulation that construed the MFA was authorized by the MFA, but instead reviewed whether City complied with the MFA's statutory procedures already in place. Here, the Court of Appeal construed the MFA, not City's construction of the MFA. The Opinion properly construed the requirements of the MFA's statutory provisions in deciding that, as correctly construed, City's' compliance with those requirements was

legally sufficient. California Code of Civil Procedure section 1094.5 case law and cases predating the MFA and/or addressing nonmonetary exactions are inapposite and needlessly confusing in this context.

2. Whether the Standard-Based Methodology is Lawful Should Not Be Left in Confusion

As the Opinion points out, it is logical and reasonable for City to determine that additional residential population will place additional burdens on existing facilities and services requiring new facilities and services. 185 Cal. App. 4th at 565. Although the City Council and City staff presumptively know the City's capacity needs through the annual budgeting process, the Colgan Report typically specifically discussed the adequacy of existing capacity to serve existing and future residents. See, e.g., West Side Fire Protection Impact Fee (CT 1676), Police Impact Fee (CT 971-972), Municipal Facilities Fee (CT 1094), Park Land Acquisition and Quimby Land Dedication In-lieu Fees (Trial Ex. A, 203-204), Refuse Vehicles and Containers Fee (Trial Ex. A, 231). It is thus erroneous for CBIA to assert that City did not demonstrate that it considered the capacity of existing facilities. HBA and CBIA have not met HBA's burden of proof to establish that the Colgan Report and City's resolutions were deficient in this regard.

The City must establish and produce a record containing evidence sufficient to demonstrate there is a reasonable relationship between the need for the facility and the burden imposed by the development. By virtue of the MFA statutory scheme itself, CBIA or its members are at liberty to attack the sufficiency of this record in the first instance before the local agency during the record's development and then in court if they remain dissatisfied, and if the local agency meets its initial burden of production of a legally adequate record, challengers can then attack the record itself to try to prove that the evidence in the record is insufficient to meet the standard of review. The Opinion clearly articulates the legal principles governing how the reasonableness of a city's determination is to be judged.

3. There Should be No Confusion that the Capital Cost of Equipment and Vehicles is a Proper Subject of Impact Fees

CBIA ignores the broad definition of "public facilities" in sections 66000(d), 66001(g), and 66002(c). Although the broad definition of "public facilities" to include "public services" seems to indicate that a development fee for operation and maintenance of essential city services would be permissible [*California Land Use Practice*, Cal. Cont. Ed. Bar § 18.51, pp. 887-889 (2008)], the Police, Fire Protection and Municipal impact fees, insofar as they are to be used for vehicles and equipment, were based on capital cost, i.e., the current replacement costs or depreciated values of existing equipment. (CT Vol. 6, 1608:21-1609:4; CT Vol. 5, 1458:6-10; CT Vol. 5, 1472:6-10; CT Vol. 5, 1482:19-22; CT Vol. 5, 1492:20-23; CT Vol. 6, 1531:7-13; CT Vol. 6, 1541:2-8; Trial Ex. A, Bates pp. 00412-00413, 00199, 00427.) The Refuse Vehicles and Containers Fee is based on costs directly related to City's capital cost for the acquisition of new vehicles

and containers. (CT Vol. 7, 2095:21-22; Trial Ex. A, Bates p. 00231-00232.) HBA failed to show that these charges were included in the monthly services charges and the record supports that these charges were not included in the monthly services charges. (CT Vol. 7, 2095:23-2096:1; Trial Ex. B, p. 21.) Section 66001(g) states that impact fees can be adopted for "costs attributable to the increased demand for public facilities reasonably related to the development project in order to (1) refurbish existing facilities to maintain the existing level of service or (2) achieve an adopted level of service that is consistent with the general plan." Section 66001(g) reinforces legislative intent that cities be allowed flexibility and reasonable discretion in interpreting "public facilities" and "public services" in light of a city's needs. The Opinion correctly concludes that these terms are unquestionably broad enough to include the capital cost of vehicles and equipment needed for the provision of essential city services.

4. There Should be No Confusion that the Quimby Act Does Not Apply to City-Wide Recreational Facilities

As originally adopted in Business & Professions Code Section 11546, the Quimby Act did not include the language now in section 66477(a)(3) restricting the use of the dedicated land or fees in lieu to "neighborhood or community park or recreational facilities to serve the subdivision," but instead more broadly allowed use "for the purpose of providing park or recreational facilities to serve the subdivision." See *Associated Home Builders v. Walnut Creek*, 4 Cal. 3d 633, 636 (1971), in which this Court read the statute broadly in accordance with its original language. (*Id.* at 646-647, n. 5.) Since that time, the Legislature amended Section 66477 to read as it does today and did when the challenged fees and Ordinance were adopted. In the meantime, in 1987 the Legislature adopted the MFA. The MFA expressly excluded the Quimby Act fee in lieu of land dedication from the fees which the MFA authorized and to which the MFA applied. Section 66000(b). However, the MFA expressly permitted fees to be adopted for "Parks and recreational facilities." Section 66002(c)(7). There is, thus, express legislative authorization in the MFA for local regulation of parks and recreational facilities independent of the Quimby Act. Express preemption of a recreational facility fee cannot be found unless the fee is one that is "specified" [see section 66000(b)] in Section 66477; implied preemption will not be found where there is express legislative intent to permit local regulation. *County of Casmalia Resources v. County of Santa Barbara*, 195 Cal. App. 3d 827, 837 (1987). Given the limited scope of the Quimby Act, the Park Land Acquisition and Community/Recreation Impact Fees are not preempted.

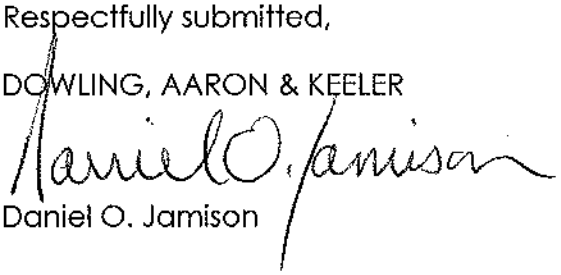
Since the Park Land Acquisition Fee in Resolution No. 2006-46 is expressly limited to NonQuimby residential development (Trial Ex. A, Bates p. 00201), the Quimby Act does not preempt this fee. The clarity of the Opinion of these points should not be disturbed.

CONCLUSION

The public interest in clarity and certainty in the law governing issues of continuing public concern calls for rejection of CBIA's attempt, for its own perceived advantages, to maintain disorder where the Opinion has established order. The Opinion should remain published.

Respectfully submitted,

DOWLING, AARON & KEELER



Daniel O. Jamison

DOJ:geh

cc: Jeff Briltz, Lemoore City Manager

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PROOF OF SERVICE

STATE OF CALIFORNIA)
) **SS**
COUNTY OF FRESNO)

I am a citizen of the United States and a resident of the County aforesaid; I am over the age of eighteen (18) years and not a party to the within-entitled action. My business address is 8080 North Palm Avenue, Third Floor, Fresno, CA 93711. On August 12, 2010, I served the within document:

☒ **BY MAIL:** By placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Fresno, California, addressed as set forth below.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on August 12, 2010, at Fresno, California

GEORGE HEWETT