Colantuono & Levin, PC
11406 Pleasant Valley Road
Penn Valley, CA 95946-9001
Main: (530) 432-7357
FAX: (530) 432-7356
WWW.CLLAW.US

Michael G. Colantuono
MColantuono@CLLAW.US
(530) 432-7359

August 13, 2010

VIA FEDEX

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

Re: *Homebuilders Ass'n of Tulare / Kings Counties v. City of Lemoore City Council, et al*., Cal. S. Ct. Case No. S184580, 5th Dist. Ct. of Appeal Case No. F057671, ___ Cal. App. 4th ___, 2010 WL 2686039 (as amended by order denying rehearing filed July 8, 2010); Opposition to Request for Depublication of California Building Industry Association

Honorable Justices:

Introduction. I write pursuant to Rule 8.1125(b) of the California Rules of Court to oppose the August 5, 2010 request of the California Building Industry Association (CBIA) that this Court order depublication of the above-referenced opinion ("Request for Depublication" or "Request"). While there is substantial local government interest in this case, the short 10-day period to file opposition to a request for depublication did not permit me to obtain authorization to file on behalf of any of the local government organizations I have represented as *amicus* counsel in other, similar matters in this Court. Accordingly, I file on my own behalf.

Interest of Amicus. I have an active practice representing California cities, counties, and special districts on matters involving local government revenues. I have argued three cases in this Court on those issues: *Richmond v. Shasta CSD* (2004) 32 Cal.4th 409 (water connection fee not subject to Prop. 218), *Bonander v. Town of Tiburon* (2009) 46 Cal.4th 646 (statute of limitations for 1915 Act assessment challenge), and *Greene v. Marin County Flood Control & Water Cons. Dist.*, 49 Cal.4th 277 (2010) (property-owner ballots on property-related fees under Prop. 218 not subject to ballot secrecy). I am co-counsel in a fourth case now awaiting argument in this Court: *Ardon v. City of Los Angeles*, Case No. S174507 (availability of class action challenge to local taxes and fees). My colleagues and I frequently train public officials and represent the League of California Cities, the California State Association of Counties, the California Special Districts Association and other local government associations as *amicus*

counsel in the appellate courts of this state. We are therefore well versed in California's law governing local revenues and well positioned to comment on the challenged Opinion's satisfaction of the standards for publication stated in Rule 8.1105.

The Opinion. This case makes several noteworthy contributions to the law of local government fees. First, it resolves tension in two lines of appellate authority regarding the burden to produce evidence and the burden of persuasion in a fee case not governed by Proposition 218.[1] It explains that a respondent agency bears the burden to produce record evidence to support its fee but not the burden of persuasion. The Court of Appeal clarified and augmented that discussion in its July 8, 2010 order denying rehearing.

Second, the Court helpfully demonstrates that a fee imposed under the Mitigation Fee Act, Government Code Sections 66000 et seq., (commonly referred to as an "A.B. 1600 fee," after the statute which adopted it) can be justified by local government standards for ratios of facilities to population and need not be based on a capital improvement plan identifying specific facilities which will benefit identified developments, thus clarifying the legal basis for a common practice and implementing the statutory language.

Third, the decision clarifies that the Quimby Act, a provision of the Subdivision Map Act which allows local governments to exact dedications of land for local parks to serve the subdivision from which the land is exacted, does not preempt A.B. 1600 fees for other park and recreation facilities.

Fourth, the decision rejects the claim that an A.B. 1600 fee could not be used to buy trash trucks and bins because service fees could fund this service, finding that local governments have discretion as to how to adjust the benefits and burdens of development and economic activity within the communities they serve.

Nor is the decision as unbalanced, as the Request for Depublication suggests. The Court also ruled that an A.B. 1600 fee may not be used to reimburse the City's general fund for its investment in existing fire facilities where the City's fee study showed existing facilities to be sufficient to serve projected development.

The Alleged Errors in the Decision are Not Well Taken. The Request for Depublication states in cursory fashion 10 alleged errors in the Opinion. Those points can be rebutted in equally cursory fashion:

[1] Prop. 218 excludes from its scope "existing laws relating to the imposition of fees or charges as a condition of property development." California Constitution, Article XIII D, Section 1(b).

1. *San Remo Hotel v. City and County of San Francisco* (2002) 27 Cal.4th 643, 670-71 supports, rather than undermines, the Opinion. The very pages of the case the Request cites state:

> 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 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 such political controls. (Emphasis added.)

2. The Opinion does not neglect the statutory requirement that the framers of an A.B. 1600 fee identify the purpose and proposed use of development fees, as the Request alleges. Government Code Section 66001(A). Indeed, the statute states the action establishing an A.B. 1600 fee shall:

> Identify the use to which the fee is to be put. If the use is financing public facilities, the facilities shall be identified. That identification **may, but need not,** be made by reference to a capital improvement plan as specified in Section 65403 or 66002, **may be made in applicable general or specific plan requirements**, or may be made in other public documents that identify the public facilities for which the fee is charged. Government Code Section 66001 (a)(2). (Emphasis added.)

Thus, the Opinion's conclusion that Lemoore properly identified the facilities and services to be funded with respect to application plan requirements does not absolve the City of its statutory duty.

3. The portion of the statute quoted in point two above is also sufficient to rebut the Request's third claim that the Opinion allows the City to fail to identify the public facilities to be funded – there is express statutory authority to do so via "applicable or specific plan requirements" as was the case here. *Id*.

4. Likewise, the Opinion allows the City to "identify" the facilities to be funded by fees via plan requirements, as the statute expressly permits. *Id*.

5. Again, while the development industry objects to a "standards based" approach to identifying the deficit in public facilities needed to serve development and prefers the capital facilities plan approach, the Legislature expressly declined to require that approach. *Id*. The CBIA's complaints should be addressed to the Legislature.

6. *Silicon Valley Taxpayers Ass'n v. Santa Clara County Open Space Authority* (2008) 44 Cal.4th 431 has no application here. That decision establishes the standard of judicial review of quasi-legislative decisions as to the special benefit that flows from a public facility or program of services to be funded by an assessment under Proposition 218 and the apportion of the assessment cost in proportion to the special benefit enjoyed by each property owner. As noted above, development fees of the sort involved here are expressly excluded from the scope of Proposition 218. California Constitution, Article XIII D, Section 1(b).

7. As the Opinion meticulously explains, the authority of a local government to exact land from a subdivision to provide a local park for the occupants of that subdivision under the Quimby Act, Government Code Section 66477, is distinct from its authority under the Mitigation Fee Act, Government Code Section 66000. Opinion at Section 3(b). Obviously, a park system commonly includes both local parks and subregional and regional facilities. Few cities can afford, or feel the need for, a swimming pool in every neighborhood park, but a community may adopt standards requiring regional swimming pools. To provide land for a neighborhood park is not to pay a developer's fair share of the need for a regional pool created by his development. As the Opinion explains, provided that an A.B. 1600 fee for park and recreation facilities and services does not duplicate the cost and benefit from a Quimby fee program, the fees are not mutually exclusive. *Id*. To hold otherwise would defeat the purpose of A.B. 1600 – to empower cities and counties to require development to bear **all** the cost of public facilities needed to serve it.

8. The Request is not correct in claiming that the cost to operate public facilities may not be included in an A.B. 1600. The definition of a "facility" that may be financed by an A.B. 1600 fee includes such costs: "'Public facilities' includes public improvements, **public services**, and community amenities." Government Code Section 66000(d) (emphasis added). Obviously if A.B. 1600 fees could only be used to provide physical improvements and amenities, the words "public services" would not appear in this crucial definition. Accordingly, the Opinion does not err by refusing to read them out of the statute.

9. Nor does the Opinion misstate the standard of review. As noted in point 1 above, the *San Remo* decision supports, rather than undermines, the Opinion. As noted in point 6 above, the standard of review articulated in *Silicon Valley* has no application here.

10. The Opinion helpfully resolves tension between two lines of cases considering the burden of local government to produce evidence to support a challenged fee and the burden of one who would have the judicial branch strike down local fee legislation to bear the burden of persuasion. July 8, 2010 Order Amending Opinion and Denying Rehearing. Any decision resolving conflict in the case law can be argued to be inconsistent with one or another of the two competing lines of authority. That fact alone demonstrates the need to **publish** the Opinion rather than a basis for reversing the Court of Appeals considered decision to do so, which it renewed on denial of rehearing.

The Opinion Meets the Standards for Publication. The challenged Opinion meets nearly every one of the standards for publication set forth in Rule 8.1105(c). The case applies the existing rules of A.B. 1600 to a set of facts significantly different from those stated in published opinions and explains and clarifies the power of a city or county to rely on service standards rather than a capital facilities plan to justify a fee. Rule 8.1105(c)(2), (3) & (4). It addresses an apparent conflict in the law regarding the burdens of production and persuasion in fee cases. Rule 8.1105(c)(5). It involves a legal issue of continuing public interest as evidenced by the Request for Depublication by the CBIA and by this *amicus* response from the perspective of the local government community. Rule 8.1105(c)(6). It makes a significant, positive contribution to the legal literature by reviewing and advancing the development of the case law construing and applying A.B. 1600 and it is accompanied by a separate dissent that gives depth to its analysis and provides a starting point for analysis of future cases. Rule 8.1105(c)(7) & (9).

Conclusion. For the reasons stated above, *amicus* respectfully requests this Court deny the Request for Depublication.

Very truly yours,

Michael G. Colantuono, SBN 143551
Colantuono & Levin, PC

MGC:mgc

Enclosure: Proof of Service