California Renters Legal Advocacy and Education Fund

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March 21, 2019

Honorable Tani G. Cantil-Sakauye, Chief Justice
and Associate Justices of the California Supreme Court
350 McAllister Street
San Francisco, CA 94102-4797

Re: *McCorkle Eastside Neighborhood Group v. City of St. Helena* (First Appellate District Case No. A153238): Opposition to Request for Depublication

Dear Honorable Chief Justice Cantil-Sakauye and Associate Justices of the California Supreme Court:

CaRLA is a 501(c)3 non-profit corporation whose mission is to restore a legal environment in which California builds housing equal to its needs, which we pursue through public impact litigation and providing educational programs to California city officials and their staff.

We write in support of the California Chapter of the American Planning Association ("APA California") to oppose the March 11, 2019 request for depublication of *McCorkle Eastside Neighborhood Group v. City of St. Helena* (2018) 31 Cal.App.5th 80 (the "Opinion") submitted by Patrick Soluri of the Soluri Meserve law firm. The Opinion provides helpful guidance to local agencies, planners, and other land use practitioners in regard to the type of discretion needed to invoke environmental review under the California Environmental Quality Act ("CEQA") and thus should remain a published opinion.

We agree with APA California that the *McCorkle* Opinion has statewide significance for planning practice in California because of its implications for removing ill-placed constraints or unnecessary delays to housing production. Several organizations requested the publication of the Opinion and no one opposed the publication request. The Opinion was ordered published on January 10, 2019.

Mr. Soluri, the author of the lone depublication request, acknowledges that his request is "not premised on the validity of the Opinion itself." Instead Mr. Soluri claims that the Opinion's precedential value "is greatly outweighed by its likelihood of misuse" and further claims that the Opinion "creates significant problems with implementation."

Neither of these reasons are accurate nor do they state valid grounds for depublication of the Opinion.

The *McCorkle* Opinion involves a CEQA challenge to the City of St. Helena's approval of a design review permit for an 8-unit housing project. In accordance with state housing policies, the City of St. Helena had amended its general plan and zoning ordinance to eliminate the conditional use permit requirement for multifamily dwelling units within high density residential districts, like the project. As such, design review was the only discretionary approval needed from the city for the project. In *McCorkle*, the First District Court of Appeal affirmed a trial court ruling that the City of St. Helena did not err in exempting the project from CEQA given that the scope of discretion under the city's design review ordinance did not give it the ability to shape the project in a way that was responsive to environmental concerns. The court accordingly held that St. Helena "properly found that its discretion was limited to design review . . . and also found, appropriately, that the issues addressed during design review did not require the separate invocation of CEQA." (31 Cal.App.5th at 94.) The Opinion serves as a useful reminder that simply having some discretion over a project does not necessarily mean that the controlling ordinance or law affords an agency the authority or ability to address environmental concerns so as to invoke CEQA.

As the Court knows, California Rules of Court, Rule 8.1105(c) sets forth a liberal standard for publication of an appellate court opinion. Specifically, an opinion should be certified for publication if it satisfies any one of nine criteria. In our letter requesting publication, we explained that the Opinion merited publication for either of two grounds: (1) it applies an existing rule of law to facts that are significantly different than those in published opinions [Rule 8.1105(c)(2)], and (2) it involves a legal issue of continuing public interest [Rule 8.1105(c)(4)].

Under CEQA, the "touchstone" for determining whether an agency may prepare an environmental impact report ("EIR") is "whether the approval process involved allow[s] the [agency] to shape the project in any way that could respond to any of the concerns which might be identified in an environmental impact report." (*Friends of Westwood, Inc. v. City of Los Angeles* (1987) 191 Cal.App.3d 259, 266-267.) In a subsequent CEQA review fact situation, the Fourth Appellate District rejected a CEQA challenge to a design review approval for a large mixed-use project because the ordinance did not allow mitigation for climate change within the scope of discretionary design review. (*San Diego Navy Broadway Complex Coalition v. City of San Diego* (2010) 185 Cal.App.4th

924.)[1] The Opinion applies that rule to different facts: approval of a small housing development and consideration of the applicability of CEQA in the first instance rather than in the subsequent CEQA review context. Thus, the Opinion satisfies subdivision (c)(2) of Rule 8.1105 and should remain published.

The Opinion also involves a legal issue of continuing public interest. In response to California's housing crisis, both the State Legislature and the Governor have sought to streamline local approval of housing developments, including affordable housing. (*See*, *e.g.*, Government Code §§ 65913.4, 65863, 65589.5; and Health & Safety Code § 50470(b)(1)(A).)[2] This Court too has referred to the lack of affordable housing as reaching "epic proportions in many of the state's localities." (*California Building Industry Assn. v. City of San Jose* (2015) 61 Cal.4th 435, 441.) One mechanism to streamline housing production is to limit project-specific review to design issues only, as was done in St. Helena in direct accordance with State directives. The Opinion cites the precise content of St. Helena's design review ordinance. Other agencies will benefit from the publication of these factors so as to compare their design review ordinances against them and take action to adjust their level of discretion or not, as desired, to address environmental concerns.

Nothing in Mr. Soluri's letter rebuts or refutes APA California's position that the Opinion merits publication pursuant to Rule 8.1105(c)(2) and (c)(6). Instead, Mr. Soluri claims that the Opinion should be depublished citing concerns related to the "likelihood of misuse" and "problems with implementation." Neither of these relate to the publication criteria set forth in Rule 8.1105. Even if they did, the claims are not supported by valid factual or policy arguments and thus fail on their merits.

Because an agency <u>always</u> remains in control of the discretion it has over any use under its own ordinances, there is no potential for misuse. This principle is reflected in the Opinion as well as in the CEQA statute and guidelines. *See McCorkle*, 31 Cal.App.5th at 92:

> A city is not, pursuant to general law, required to have a design review ordinance. Accordingly where, as here, a city chooses to impose such an

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[1] *Friends of Davis v. City of Davis* (2000) 83 Cal.App.4th 1004, also arose in a subsequent CEQA review context, and involved whether an agency's design review ordinance extended to approval of a particular retail client. The court ruled that it did not.

[2] (*See also* "It's a big deal: Newsom's housing budget explained: Governor is making housing a priority and putting cities on notice," The Mercury News, January 13, 2019 [news article explains that Governor's 2019-2020 budget includes $1.7 billion in funds for a variety of affordable housing projects and programs in accordance with his campaign promise to build 3.5 million new housing units over the next 7 years].)

> additional level of review, it is for the city to determine the scope that such review will entail. . . . In this case, the City Council found the design review ordinances prevented it from disapproving the project for non-design related matters. This was correct.

(*See also* Public Resources Code § 21004, CEQA Guidelines § 15040, and *Friends of Davis*, *supra*.) Mr. Soluri's claim that the Opinion will "unduly constrain" the discretion of cities and counties thus is simply not true.

By comparison, there is a great potential for misuse if the Opinion does not remain published. Specifically, there is a high likelihood that project opponents will continue to assert that an EIR is needed for projects like the 8-unit housing development at issue in *McCorkle* despite the lack of environmental impacts and the agency's inability to address environmental concerns. Such projects, providing much needed housing and other public benefits, will be unnecessarily delayed and/or subjected to increased costs. Moreover, depublication will cause parties to continue to debate and litigate issues that are resolved by this Opinion, thus taxing scarce judicial resources.

The alleged concerns with practical implementation are also not well taken. Again, a local agency always remains in control of the discretion it wishes to possess over certain uses under its planning and zoning enactments. For sensitive uses, it can (and often does) prohibit the use altogether or, at minimum, require a conditional use permit. Alternatively, it could structure its zoning and/or design review ordinances to encompass environmental concerns. But when an agency purposefully wishes to confine its review to design-related factors only, as was the case in St. Helena, the agency does not have the type of discretion that triggers CEQA.

Finally, Mr. Soluri's claim that environmental issues may be overlooked without some local level of CEQA review is not accurate. His example of a development project seeking to fill wetlands would likely not be located on land planned and zoned for development. Even if it were, the underlying CEQA document for the agency's general plan and/or zoning code would need to address those impacts. Moreover, an agency can through it ordinances retain broader discretion over development projects that have impacts to sensitive resources such as wetlands. Further, additional approvals from other state and/or federal agencies (and associated environmental review) would be needed in order to fill wetlands and/or develop the other uses Mr. Soluri cites in his letter requesting depublication.

For the reasons set forth in detail in the Opposition to Depublication filed in this matter by the American Planning Association, CARLA urges this Court to deny the depublication request.

Respectfully submitted,

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California Renters Legal Advocacy and Education Fund