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May 25, 2022

VIA ELECTRONIC MAIL ONLY

Mr. Jorge E. Navarrete
Court Administrator and Clerk of the Supreme Court
SUPREME COURT OF CALIFORNIA
350 McAllister Street
San Francisco, CA 94102-7303

Re: **REQUEST FOR DE-PUBLICATION OF *SAVE THE HILL GROUP V. CITY OF LIVERMORE***
(Filed March 30, 2022, First Appellate District, Division Five, Case No. A161573)

Dear Honorable Justices:

On behalf of the California State Association of Counties ("CSAC") and League of California Cities ("League"), we respectfully request that the Court de-publish the appellate opinion ("Opinion") issued by Division Five of the First District Court of Appeal in *Save the Hill Group v. City of Livermore*, Case No. A161573, filed on March 30, 2022. This request is made pursuant to California Rules of Court (CRC), Rule 8.1125.

I. INTERESTS OF THE PARTIES

A. The League of California Cities

The League of California Cities ("Cal Cities") is an association of 479 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. Cal Cities is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

B. California State Association of Counties (CSAC)

CSAC is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

II. FACTS

The City of Livermore ("City") approved the housing project after a nearly decade-long process. (Opinion p. 2.) The project is located on 31.7 acres of land in an area known as the Garaventa Hills, and was reduced from 76 to 44 homes to address public concerns. A Revised Final Environmental Impact Report ("EIR" or "RFEIR") was prepared under the California Environmental Quality Act. ("CEQA"; Opinion p. 2-4.)

III. SUMMARY

The Opinion should be de-published because it confuses and conflates two distinct legal issues under CEQA, and improperly treats them as a singular issue. The Opinion conflates (1) what is required to be assumed as reasonably foreseeable growth under the No Project Alternative and the alternative environmental analysis (CEQA Guidelines, §§ 15126.6(d), (e)), with (2) the requirements for CEQA's infeasibility findings (CEQA Guidelines, § 15091(a)(3)). Similar confusion arose in *Cal. Native Plant Society v. City of Santa Cruz* (2009) 177 Cal.App.4th 957, 981, 989-999 ["*CNPS*"]:

> The issue of feasibility arises at two different junctures: (1) in the assessment of alternatives [*except the No Project*] in the EIR, and (2) during the agency's later consideration of whether to approve the project…But differing factors comes into play at each stage… For the first phase—inclusion in the EIR—the standard is whether the alternative is potentially feasible… By contrast, at the second phase—the final decision on project approval— the decision-making body evaluates whether the alternatives are actually feasible. (See Guidelines, § 15091, subd. (a)(3).) At that juncture, the decision-makers may reject as infeasible alternatives that were identified in the EIR as potentially feasible. (*Id.* at 981. *Internal cites omitted*.)

Because the Opinion conflates these legal issues, the Opinion's factual overview is similarly unclear and inconsistent. As outlined below, (1) the Opinion simultaneously and inconsistently describes the No Project Alternative as assuming no development, while also faulting it for assuming development based upon the residential zoning. (Section IV.A.) The Opinion also makes numerous incorrect legal conclusions which are completely untethered to CEQA's well established body of case law, (2) the Opinion's conclusions on the timing and procedure for the adoption of infeasibility findings are in direct conflict with well-established case law (Section IV.B), (3) the Opinion will induce public agencies to prematurely reject alternatives in violation of the Supreme Court's holding in *Save Tara* on unlawful pre-commitment (Section IV.C), (4) the Opinion erroneously requires findings of infeasibility for alternatives when the project has no significant and unavoidable impacts (Section IV.D), (5) the Opinion implicitly and incorrectly concludes that an inability to meet project objectives is not grounds for rejecting the No Project Alternative without any legal analysis (Section IV.E), (6) the Opinion ignores that the No Project Alternative can be "based on current plans…," i.e., the existing residential zoning (Section IV.F), and (7) the Opinion fails to address case law on off-site alternatives (Section IV.G).

While we believe the Opinion reached incorrect conclusions, it also provides no legal rationale for its conclusions, which conflict with well-established case law. Given this lack of connection to existing precedent and the potential for the ruling to induce agencies to violate other requirements under CEQA, it should be de-published.

A. Overview of CEQA's Requirements for the No Project Alternative

CEQA requires inclusion and analysis of a "range of reasonable alternatives to the project," including the No Project Alternative. (CEQA Guidelines, § 15126.6.) The analysis of alternatives is only required to include "a matrix displaying the major characteristics and significant environmental effects of each alternative…but in less detail than the significant effects of the project as proposed." (CEQA Guidelines, § 15126.6(d).)

As the Opinion acknowledges, the No Project Alternative includes "what would be reasonably expected to occur in the foreseeable future if the project were not approved, based on current plans…" (Opinion p. 15; CEQA Guidelines, § 15126.6(e)(2).) However, the No Project

Alternative is required to be included and analyzed in the EIR, *regardless of its feasibility or its ability to meet project objectives.* (CEQA Guidelines, § 15126.6(e).) In fact, the concept of feasibility is not relevant to the No Project Alternative during any part of the Draft or Final EIR process, as it is already pre-selected for inclusion.

During the EIR process, "potential feasibility" is only relevant *to the selection* of the other build alternatives; i.e., those alternatives capable of "attain[ing] most of the basic objectives of the project." (CEQA Guidelines, § 15126.6(a).) Even then, "potential feasibility" is only a relevant factor when deciding whether to *include* an alternative in the Draft EIR's alternatives comparison; it is not part of the ultimate decision-making process, as discussed above in *CNPS.*

Furthermore, project level EIRs are not required to second guess programmatic planning decisions, such as the underlying land use designations/zoning at issue in the Opinion. (See *Citizens v. Goleta Valley v. Board of Supervisors of Santa Barbara County* (1990) 52 Cal.3d 553, 571-573 [The Court held that the analysis of alternative locations in a project level EIR "would have been in contravention to the legislative goal of long-term, comprehensive planning…case-by-case reconsideration of regional land-use policies, in the context of a project specific EIR, is the very antithesis of that goal.") The ability to second guess *residential* zoning decisions has been made even more difficult due to statutory limitations imposed by the legislature to address the state's housing crisis. (See Section IV.F(1) below.)

A court's review of the description of the No Project Alternative is reviewed for "substantial evidence." (*Central Delta Water Agency v. Department of Water Resources* (2021) 69 Cal.App.5th 170, 196 ["*Central Delta Water Agency*"].) That court acknowledged where the No Project Alternative description is challenged, it applies the "substantial evidence test." Under that standard the court's "task is extraordinarily limited and focus is narrow. Did the EIR adequately describe the existing conditions *and offer a plausible vision of the foreseeable future*." (*Id.* at 196.) As the current Opinion notes, under the substantial evidence test, "the reviewing court 'may not set aside an agency's approval of an EIR on the ground that an opposite conclusion would have been equally or more reasonable'…our task is not to weigh conflicting evidence and determine who has the better argument." (Opinion p. 8.) While this standard is generically discussed in the Opinion, it is never actually applied to the analysis.

B. Overview of CEQA's Infeasibility Finding Requirements

CEQA's finding requirements are governed by CEQA Guidelines § 15091, which makes it clear that such findings are adopted concurrent with project approval, *not the EIR.* More specifically that section provides that "No Public agency shall approve or carry out a project for which an EIR has been certified…unless the public agency makes one or more written findings for each of those significant effects…" The three potential findings include (1) changes have been incorporated into the project to void or substantially lessen those effects, (2) changes are within the responsibility of another agency, and (3) infeasibility findings. (CEQA Guidelines, § 15091(a)(1) - (3).)

A robust body of case law, which was completely ignored in the Opinion, has explained that "An EIR is an *environmental* impact report. As such, it is an informational document, *not one that must include ultimate determinations of economic feasibility…nowhere does the statute mandate that the EIR itself also contain an analysis of the feasibility of the various project alternatives or mitigation measures that it identifies.*" (*Emphasis added*; *San Franciscans Upholding the Downtown Plan v. City & County of San Francisco* (2002) 102 Cal.App.4th 656, 689-690; see also *Sierra Club v. County of Napa* (2004) 121 Cal.App.4th 1490 ["In short, Sierra Club may be correct

that the public was not part of the debate of the economic feasibility of the project, but as we read CEQA, it does not require the public to be a part of that debate…"]; *The Flanders Foundation v. City of Carmel-by-the-Sea* (2012) 202 Cal.App.4th 603, 617-619 ["the City was not required to include the report's economic feasibility analysis in the FEIR so long as it was included in the administrative record."].)

CEQA findings are related to significant environmental impacts, *not specific alternatives*, as assumed in the Opinion. As further discussed in *CNPS* "Where an EIR has identified significant environmental effects that have not been mitigated or avoided, the agency may not approve the project unless it first finds that "[s]pecific economic, legal, social, technological, or other considerations ... make infeasible the mitigation measures or alternatives identified in the environmental impact report." (§ 21081, subd. (a)(3); Guidelines, § 15091, subd. (a)(3).)" (*CNPS, supra*, 177 Cal.App.4th at 982.)

Even where findings of infeasibility are required, "An alternative 'may be found infeasible on the ground it is inconsistent with project objectives…" (*CNPS, supra*, 177 Cal.App.4th at 1001.) Such CEQA findings are made at the time the agency decides to "approve or carry out a project." (CEQA Guidelines, § 15091(a); *CNPS, supra*, 177 Cal.App.4th at 999.)

IV. THE OPINION'S DISCUSSION OF THE NO PROJECT ALTERNATIVE FAILS TO ADDRESS RELEVANT LAW AND CONFLATES ISSUES

A. The Opinion Conflates the Environmental Analysis of the No Project Alternative with Analysis of Infeasibility

The Opinion conflates the EIR's description and environmental analysis of the No Project Alternative, with findings of infeasibility. The Opinion "conclude[s] Save the Hill has raised a challenge to the *adequacy of the RFEIR's analysis* of the 'no project' alternative that is…meritorious." (Opinion at 2.)

However, the alleged faulty "analysis" referenced therein, is not a reference to the EIR's alternative analysis contemplated under CEQA Guidelines section 15126.6(d), i.e., "a matrix displaying the major characteristics and significant environmental effects of each alternative." Rather, the Opinion make it very clear that it is faulting the *RFEIR's* analysis of the *feasibility of the No Project Alternative*. More specifically, the Opinion states:

> Save the Hill contends the City violated CEQA by certifying an RFEIR that failed to…*evaluate the possibility of preserving Garaventa Hills*. (Op. p. 5.)
>
> We thus turn to the merits of Save the Hill's claim that the RFEIR's no project alternative discussion was inadequate, *as it failed it disclose and analyze information regarding the availability of funding sources that could have been used to purchase and permanently conserve the Project Site*. (Op. pp. 14-15.)
>
> *The RFEIR ultimately rejects* the no-project alternative because: (1) it would not meet the Project Objectives of completing implementation of the Maralisa Planned Development…(2) it is "*not necessarily feasible* to assume the site would remain undeveloped in the longer term" because the site is zoned for residential development." (Op. p. 16.)

It is not the purpose of the EIR to approve or reject alternatives, nor is the EIR required to discuss the feasibility of alternatives carried forward for environmental review. (Compare CEQA Guidelines, § 15126.6(d) to § 15091(a).) As discussed in *CNPS*, the potential feasibility of

alternatives at the EIR stage is only relevant when determining what alternatives *to include in the EIR for environmental analysis*. However, unlike *CNPS,* feasibility plays no role related to inclusion of the No Project Alternative in the EIR, which must be included as a matter of law, regardless of potential feasibility. (CEQA Guidelines, § 15126.6(e).) As discussed below in Section IV.B, every case that we are aware of that has addressed the issue of the timing of infeasibility findings has rejected the Opinion's holding that this information needs to be included in the EIR.

The conflation of legal issues in the Opinion, has also resulted in inconsistent factual information. The Opinion initially describes the No Project Alternative as "assum[ing] the proposed Project is not approved *and the site would remain in an undeveloped state, with no development of roadways or residences*." (Opinion p. 16.) However, the Opinion subsequently faults the No Project Alternative for taking the position that "conservation of the Garaventa Hills would not be a reasonably foreseeable consequence of implementing the no project alternative because the Project Site is already zoned for residential development and there is no known willing buyer…the Project's Site's zoning is not unalterable." (Opinion p. 18.)

This factual uncertainty onto itself warrants de-publication. Did the EIR's environmental analysis assume the No Project included no development, or did the EIR's analysis assume reasonably foreseeable growth based upon the existing zoning? The reader has no way of knowing. Even if the EIR did assume a No Project Alternative, consistent with the existing residential zoning, the CEQA Guidelines expressly allow such assumptions "*based on current plans*" i.e., the existing residential zoning. (CEQA Guidelines, § 15126.6(e); Section IV.F below.)

B. The Opinion's Conclusions on the Timing for Infeasibility Findings are in Direct Conflict with Well Established Case Law

The Opinion faults the EIR for its alleged failure to *"disclose and analyze information regarding the availability of funding sources that could have been used to purchase and permanently conserve the Project Site*." (Opinion pp. 14-15.)

Every case that we are aware of that has directly addressed the procedure for adopting infeasibility findings has concluded that "*nowhere does the statute mandate that the EIR itself also contain an analysis of the feasibility of the various project alternatives or mitigation measures that it identifies.*" (*San Franciscans Upholding the Downtown Plan v. City & County of San Francisco, supra,* 102 Cal.App.4th 656, 689-690; *Sierra Club v. County of Napa, supra,* 121 Cal.App.4th 1490 ["In short, Sierra Club may be correct that the public was not part of the debate of the economic feasibility of the project, but as we read CEQA, it does not require the public to be a part of that debate…"]; *The Flanders Foundation v. City of Carme-by-the-Sea, supra,* 202 Cal.App.4th 603, 617-619 ["the City was not required to include the report's economic feasibility analysis in the FEIR so long as it was included in the administrative record."].)

The Opinion does not address or distinguish any of these cases. For this reason alone, the Opinion should be de-published. If allowed to stand, it creates a potential new tree of case law, completely untethered to decades of CEQA jurisprudence, which may induce other violations of CEQA (Section IV.C). While divergent opinions in other circumstances can be healthy, such opinions must acknowledge and distinguish existing case law, not ignore it.

C. The Opinion's Will Induce Public Agencies to Prematurely Reject Alternatives and Violate This Court's Holding in *Save Tara*

The Opinion has concluded that the EIR was invalid for failure to reach an infeasibility conclusion on the No Project Alternative. More specifically, the Opinion upholds the trial court ruling "finding the RFEIR's determination of infeasibility for the no-project alternative inadequate." (Opinion p. 5.) However, there is nothing to suggest that this holding would be specific to the No Project Alternative alone, versus the other "build" alternatives. The court reached this conclusion relying upon the general proposition "an EIR which does not produce adequate information regarding alternatives cannot achieve the dual purposes served by the EIR, which is to enable the reviewing agency to make an informed decision and to make the decisionmaker's reasoning accessible to the public." (Opinion p. 15.) Taking the Opinion to its logical conclusions, public agencies will now be required to include formal feasibility/infeasibility findings as part of the *EIR's* alternatives analysis, rather than the project approval process.

This type of analysis and conclusions will most assuredly lead to allegations of improper pre-commitment under CEQA. (*Save Tara v. City of West Hollywood* (2008) 45 Cal. 4th 116 ("*Save Tara*").) In *Save Tara* this Court faulted the City of West Hollywood because it "had already rejected the alternative uses of 1343 Laurel suggested in public comments." (*Id.* at 125.) This Court held that "agencies must not 'take any action' that significantly further a project 'in a manner *that forecloses alternatives* or mitigation measures that would ordinarily be part of CEQA review of that public project." (*Id.* at 138.) This Court further instructed that unlawful precommitment can occur under CEQA where "the agency has committed itself to the project …*so as to effectively preclude any alternative* or mitigation measures that CEQA would otherwise require to be considered, *including the alternative of not going forward with the project."*

Other cases had also found violations of CEQA because "the City had thus 'contracted away its power *to consider the full range of alternatives* and mitigation measures required by CEQA' and had precluded consideration of a 'no project' option.'" (Emphasis added; *Save Tara, supra,* at 138 quoting *Concerned McCloud Citizens v. McCloud Community Services Dist.* (2007) 147 Cal.App.4th 181, 196 ["agreement not project approval because, inter alia, it 'did not restrict the District's discretion to consider any and all mitigation measures, *including the 'no project' alternative*."].)

Yet if this newly created rule survives, public agencies will now be required to find alternatives infeasible or feasible at the Draft EIR stage, which will directly contradict this Court's holding in *Save Tara*. As noted above, in Section IV.B, this is also in direct conflict with the line of cases which states that actual feasibility is determined at the project approval phase of the CEQA process, *not the EIR phase*. Given the lack of consideration of the consequences of this Opinion and the potential to conflict with this Court's ruling in *Save Tara*, the Opinion should be de-published.

D. The Opinion Erroneously Requires Infeasibility Findings for Alternatives When There are no Significant and Unavoidable Impacts

The Opinion upheld the agency's conclusions that biological/hydrological impacts were reduced to less than significant with mitigation. (Opinion pp. 25, 26, 29.) While left unstated in the Opinion, the City adopted findings that every impact was reduced to less than significant.[1]

[1] More specifically, the adopted CEQA Findings state "No significant and unavoidable impacts were identified under the proposed Project. All Project impacts are either less than significant or can be reduced to those levels through implementation of the mitigation contained in this Draft EIR.

Where all impacts are mitigated to less than significant, no findings of infeasibility for project alternatives are required under Section 15091(a)(3). Instead, the agency adopts findings under CEQA Guidelines section 15091(a)(1) that changes or alterations (i.e., mitigation measures) have been incorporated into the project to reduce impacts to less than significant. As inversely stated in *CNPS*: "Where an EIR has identified significant environmental effects *that have not been mitigated or avoided*, the agency may not approve the project unless it first finds that "[s]pecific economic, legal, social, technological, or other considerations … make infeasible the mitigation measures or alternatives identified in the environmental impact report." (*CNPS, supra,* at 982.)

Nevertheless, the Opinion still faults "the RFEIR's failure to adequately flesh out the feasibility of not going forward with the Project." (Opinion p. 10.) As a matter of law, no infeasibility findings are required in this situation. No Impacts were considered significant after adoption of findings under CEQA Guidelines section 15091(a)(1). The Opinion's implicit conclusion that such findings are required, without legal analysis, further warrants de-publication.

E. The Opinion Implicitly and Erroneously Concludes that an Inability to Meet Project Objectives is Not Grounds for Rejection of Alternatives

As the Opinion notes, the No Project Alternative was ultimately rejected because (1) "it would not meet the Project's objectives," and (2) it is "not necessarily feasible to assume the site would remain undeveloped in the long term." (Opinion p. 16.)

Even assuming, arguendo, that infeasibility findings were necessary (irrespective of the lack of significant impacts), the Opinion does not explain why an inability to meet the project objectives is an insufficient rationale for rejecting the No Project Alternative. As discussed in *CNPS* "An alternative 'may be found infeasible on the ground it is inconsistent with project objectives…" (*CNPS, supra,* at 1001; see also *Los Angeles Conservancy v. City of West Hollywood* (2017) 18 Cal.App.5h 1031, 1041-1043 ["a public agency may find that an alternative is "infeasible" if it determines, based upon the balancing of the statutory factors, *that an alternative cannot meet project objectives* or 'is impractical or undesirable from a policy standpoint.'"]; *Rialto Citizens for Responsible Growth v. City of Rialto* (2012) 208 Cal.App.4th 899, 948-949.) As the Court in *West Hollywood* stated "An agency's finding of infeasibility for this purpose is 'entitled to great deference' and 'presumed correct.'" (*City of West Hollywood* at 1042.)

The implicit assumption is that the failure to meet project objectives is an insufficient basis for infeasibility findings. The Opinion's failure to directly address this point, or provide any legal rationale for overturning long standing precedent, warrants de-publication.

F. The Opinion's Failure to Address the Consequences of the Existing Zoning on the No Project Alternative Description

The Opinion also acknowledges that "the Project Site is zoned for residential development" but faults the No Project Alternative for taking the position that "conservation of the Garaventa Hills would not be reasonably foreseeable consequence of implementing the no project alternative because the Project Site is already zoned for residential development and there is no known willing buyer…the Project's Site's zoning is not unalterable." (Opinion p. 18.)

Because of the low impact of the proposed Project, differences between it and the Alternatives are marginal and limited to reductions in already less than significant impacts." (AR001547.)

Even if the EIR did assume the No Project Alternative would include development consistent with residential zoning, the CEQA Guidelines expressly contemplate a No Project Alternative "*based on current plans*," i.e., the existing residential zoning (CEQA Guidelines, § 15126.6(e); See also *Citizens v. Goleta Valley v. Board of Supervisors of Santa Barbara County* (1990) 52 Cal.3d 553, 571-573 ["To be sure, the general plan is not immutable, far from it, but it may not be trifled with lightly."].) While the Opinion is correct that zoning is generally subject to amendment (see subsection IV.F(1) below), the fact that it can be amended in the abstract is legally irrelevant to the description of the no project alternative. By admission of the Opinion, the No Project Alternative can be based upon "current plans." (Opinion p. 15.) The Opinion makes no attempt to explain the rationale for its conclusion that it must assume unspecified future zoning.

Furthermore, what is or is not included in the description of the No Project Alternative is subject to the substantial evidence standard. As the Court in *Central Delta Water Agency* explained "Did the EIR adequately describe the existing conditions and offer a plausible vision of the foreseeable future." (*Central Delta Water Agency, supra,* at 196.) As the Opinion tacitly acknowledges, a "reviewing court 'may not set aside an agency's approval of an EIR on the ground that an opposite conclusion would have been equally or more reasonable'…our task is not to weigh conflicting evidence and determine who has the better argument." (Opinion p. 8.)

While generally acknowledging this standard, the Opinion does not apply it to the facts of the case. The Opinion correctly notes that "the Project Site's zoning designation is not unalterable," however, that does not compel the conclusion that the No Project Alternative must ignore the existing zoning. Indeed, the CEQA Guidelines suggest the opposite is typically correct; i.e., that the no project assumes the "*current plans*." (CEQA Guidelines, § 15126.6(e).)

The courts are supposed to afford "great weight" to the CEQA Guidelines. (*Laurel Heights Improvement Association v. Regents of Univ. of Cal.* (1988) 47 Cal.3d 376, 391, fn2.) While the Opinion acknowledged the general standards for the description of the No Project Alternative, it cast aside this guidance and well-established case law, without providing any legal rationale. This too warrants de-publication.

1. The Opinion's Suggestion that the City Can Amend the Site's Residential Zoning Ignores State Housing Law

The Opinion assumes that the site can be preserved for open space in lieu of housing, stating "the use of zoning to facilitate the available of private recreational facilities to the residents of [a city] is within the scope of the city's police power." (Opinion p. 18.) However, this statement ignores the realities of modern housing law, which presume approval of housing, and place the burden on public agencies for denial. (Gov. Code, § 65589.5(c)(2)(L).)

The Housing Accountability Act prohibits the denial of housing projects unless "[t]here is no feasible method to satisfactorily mitigate or avoid the adverse impact." (Gov. Code, § 65589.5(j).) Similar findings are required under state housing element law, which require, as a condition precedent to a reduction in residential density, that the agency find: (1) the denial/reduction is consistent with the adopted general plan, and (2) the remaining sites identified in the housing element are adequate to accommodate the jurisdiction's share of the regional housing need. (Gov. Code, § 65863.)

Indeed, recent amendments under the Housing Crisis Act generally preclude amendments to residential development regulations which result in a less intensive residential use in comparison to the regulations in place on January 1, 2018. (S.B. 330; Gov. Code, § 66300(b)(l)(A).) See also

California Renters Legal Advocacy and Education Fund v. City of San Mateo (2021) 68 Cal.App.5th 820 [the City's denial of a housing project was based upon impermissible subjective design standards.]; *Ruegg & Ellsworth v. City of Berkeley* (2021) 63 Cal.App.5th 277 [City's denial of a housing project was impermissible.]; *Honchariw v. County of Stanislaus* (2011) 200 Cal.App.4th 1066 [Agency improperly denied housing under the Housing Accountability Act,].)

Public agencies are also required to consider a "thorough analysis of the economic, social, and environmental effects of [denial of a residential project]." (Gov. Code, § 65589.5(b).) As the Legislature concluded, "[t]he lack of housing, including emergency shelters, is a critical problem that threatens the economic, environmental, and social quality of life in California. Among the consequences of those actions are…*reduced mobility*, *urban sprawl*, *excessive commuting*, and *air quality deterioration*." (Gov. Code, § 65589.5(a)(1)(C).) As also acknowledged by this Court "the future residents and occupants of development enabled by Project approval would exist and live somewhere else if this Project is not approved." (*Center for Biological Diversity v. Dept. of Fish & Wildlife* (2015) 62 Cal.4th 204, 257; See also *Tiburon Open Space Committee v. County of Marin* (2022 Case No. A159860), Opinion pp. 105-108.)

The Project's EIR contains no significant and unavoidable impacts; this would likely preclude a finding for denial under Government Code section 65589.5(j). Similarly, SB 330 generally precludes legislative amendments which result in a less intensive residential use in comparison to the regulations in place in 2018. (Gov. Code, § 66300(b)(l)(A).) Even if zoning amendments were feasible, denial would simply shift impacts to another location, resulting in urban sprawl, with its increased environmental impacts.

G. The Opinion's Failure to Address Case Law on Off-Site Locations

As noted in Section IV.F, a No Project Alternative that includes no residential development at the project site, is not a true "no development" alternative in California. Rather, it simply shifts development to another location. The Opinion generally acknowledged this concept, noting that Petitioner's asked "whether Lafferty owned other land in the City 'more suitable for building' whether the owner 'could sell the *development credits to another builder in a more suitable area*" so that habitat [at the project site] would be saved of [sic] forever.'" (Opinion p. 11.)

Indeed, as this Court has acknowledged "the future residents and occupants of development enabled by Project approval would exist and live somewhere else if this Project is not approved." "CEQA is not intended as a population control measure." (*Center for Biological Diversity v. Dept. of Fish & Wildlife* (2015) 62 Cal.4th 204, 257.) State housing law would likely also require the City to immediately up-zone another location for residential uses. (Gov. Code, §§ 66300(b)(l)(A) and (h)(2)(i) [requiring concurrent up-zoning in another location for a reduction in residential development.].)

Despite these realities, the decision makes no effort to address the well-established body of law on alternative sites, which is cited in the CEQA Guidelines itself. (CEQA Guidelines, § 15126.6(f)(1) and (2); citing *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553; *Save Our Residential Environment v. City of West Hollywood* (1992) 9 Cal.App.4th 1745, 1753, fn. 1.) As discussed in CEQA Guidelines section 15126.6(f)(2)(A) "the key question and first step in the analysis *is whether any of the significant effects of the project would be avoided or substantially lessened* by putting the project in another location." As discussed above in Section IV.D, there are no significant and unavoidable impacts, consequently, such an alternative is not

warranted under CEQA. The Opinion's failure to address these issues, and the well-established body of law on off-site alternatives further warrants de-publication.

V. THE OPINION'S ANALYSIS OF EXHAUSTION SIMILARLY CONFLATES SEPARATE AND DISTINCT LEGAL ISSUES

As noted above, the Opinion conflates the requirements for an environmental analysis of the No Project Alternative, with CEQA's infeasibility findings. These errors permeate the Opinion, including the analysis of exhaustion. (Opinion pp. 8-14.) The court found that Appellant had exhausted its administrative remedies related to the challenges to the No Project Alternative. However, the Opinion makes it clear that this is a challenge the "the RFEIR's failure to adequately flesh out *the feasibility* of not going forward with the Project." (Opinion pp. 10-13.)

Consequently, the focus of the Opinion's exhaustion analysis is predicated on exhaustion of the incorrect legal argument. I.e. the court found that Petitioner exhausted administrative remedies for challenging the CEQA infeasibility findings under CEQA Guidelines section 15091(a)(3). However, as noted above, there is no requirement for that discussion to be included in the EIR.

The court's analysis of exhaustion should have been focused on whether Petitioners properly challenged the *description* or environmental analysis of the No Project Alternative, i.e., CEQA Guidelines section 15126.6(d) ["a matrix displaying the major characteristics and significant environmental effects of each alternative…but in less detail than the significant effects of the project as proposed."].) Given that the Opinion's analysis of exhaustion also conflates separate and distinct legal issues, it too should be de-published.

VI. CONCLUSION

The Opinion should be de-published because it confuses and conflates distinct legal issues under CEQA. If allowed to stand, it creates a potential new tree of CEQA case law, completely untethered to decades of jurisprudence at the root of CEQA. It also runs the risk of inducing public agencies to unlawfully and prematurely reject alternatives in violation of this Court's holding in *Save Tara*. The Opinion also makes a number of other legal errors which directly contradict well established law and make it ill-suited as citable precedent. For these reasons, CSAC and the League respectfully request that the Court order that the opinion of Division Five of the First District Court of Appeal in this case be de-published.

Very truly yours,

R. TYSON SOHAGI
THE SOHAGI LAW GROUP, PLC

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PROOF OF SERVICE

Save the Hill v. City of Livermore
Case No. A161573

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 11999 San Vicente Boulevard, Suite 150, Los Angeles, CA 90049-5136.

On May 25, 2022, I served true copies of the following document(s) described as **REQUEST FOR DE-PUBLICATION** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY ELECTRONIC SERVICE: I electronically filed the document(s) with the Clerk of the Court by using the TrueFiling system. Participants in the case who are registered users will be served by the TrueFiling system. Participants in the case who are not registered users will be served by mail or by other means permitted by the court rules.

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

Executed on May 25, 2022, at Los Angeles, California.

Cheron J. McAleece

SERVICE LIST
Save the Hill v. City of Livermore
Case No. A161573

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