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Via Electronic Service

Kevin J. Lane, Clerk
Court of Appeal, Fourth Appellate District, Division One
750 B Street, Suite 300
San Diego, CA 92101

Re: Save Civita Because Sudberry Won't v. City of San Diego
Case No. D077591
San Diego Super. Ct. No. 37-2017-00045044-CU-TT-CTL

Dear Mr. Lane:

Please find Defendant/Respondent City of San Diego's ("City") supplemental letter brief in response to the September 3, 2021 request for supplemental briefing on the two questions posed by the Court of Appeal.

1. Were the City's certification of the EIR and approval of the amendments to planning documents in this case quasi-*adjudicatory* decisions, reviewable pursuant to Public Resources Code section 21168 and Code of Civil Procedure section 1094.5 or quasi-*legislative* decisions, reviewable pursuant to Public Resources Code section 21168.5 and Code of Civil Procedure section 1085?

City's Response: The certification of the final EIR ("FEIR") and the approval of the amendment to the Serra Mesa Community Plan ("SMCP") and related zoning were quasi-legislative in nature reviewable pursuant to Public Resources Code section 21168.5 and Code of Civil Procedure section 1085 because they required the City Council "to assess a broad spectrum of community costs and benefits which cannot be limited to facts peculiar to the individual case."

See Save Lafayette Trees v. East Bay Regional Park District (2021) 28 Cal.Rptr.3d 679, 705 (quotation and citation omitted).

A. The Certification of a Final EIR and Amendment to Planning Documents Are Legislative Acts

An administrative decision may be challenged for failure to comply with CEQA with either a petition for writ of administrative mandamus (Code Civ. Proc. § 1094.5) or traditional mandamus (Code Civ. Proc. § 1085). Administrative mandamus is appropriate to seek review of "adjudicatory" or "quasi-judicial" decisions under Public Resources Code section 22168 while traditional mandamus is appropriate for review of "legislative" or "quasi-legislative" actions under Public Resources Code section 21168.5. *See Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 566-567. A quasi-legislative action must be challenged by traditional mandamus even if the administrative agency was required to conduct a hearing and take evidence. *Id.* at 567-568. It is the nature of the proceeding, rather than the requirement to hold a hearing that determines whether Code of Civil Procedure section 1085 or Code of Civil Procedure section 1094.5 applies. *See id.*

The certification of a final EIR and the approval of amendments to planning documents and related zoning constitute legislative and quasi-legislative decisions. *See Madera Oversight Coalition v. County of Madera* (2011) 199 Cal.App.4th 48, 75 (certification of EIR and adoption of specific plan and related zoning "legislative and quasi-legislative decisions"), disapproved of on other grounds in *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439; *Del Mar Terrace Conservancy, Inc. v. City Council* (1992) 10 Cal.App.4th 712, 720 (certification of EIR and amendment of land use plans quasi-legislative in nature and reviewable by "ordinary mandamus"), disapproved of on other grounds in *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559; *Preservation Action Council v. City of San Jose* (2006) 141 Cal.App.4th 1336, 1552 (quoting Pub. Res. Code § 21168.5 as standard of judicial review for certification of EIR); *Citizens Opposing a Dangerous Environment v. County of Kern* (2014) 228 Cal.App.4th 360, 364 fn. 5 (certification of EIR is legislative in character and reviewed as petition for writ of traditional mandamus under Pub. Res. Code § 21168.5). "The adoption of the general plan or any part or element thereof or the adoption of any amendment to such plan or any part or

element thereof is a legislative act which shall be reviewable pursuant to Section 1085 of the Code of Civil Procedure." Cal. Gov. Code § 65301.5; *Westsiders Opposed to Overdevelopment v. City of Los Angeles* (2018) 27 Cal.App.5th 1079, 1085; *see Yost v. Thomas* (1984) 36 Cal.3d 561, 570 ("[T]he amendment of a general plan is . . . a legislative act . . ." and "the rezoning of land is a legislative act."). "California precedent has settled the principle that zoning ordinances, whatever the size of parcel affected, are legislative acts." *Arnel Dev. Co. v. City of Costa Mesa* (1980) 28 Cal.3d 511, 514.

The FEIR analyzed the potential impacts of the SMCP Amendment Roadway Connection Project, which involved the approval of the location of a new roadway connector ("Project"). AR51:3921, 3941, 3993. Following a public hearing on the Project, the City Council certified the FEIR. AR36:403. While the City held a hearing prior to the certification of the FEIR, this did not convert the legislative function of certifying the FEIR into a "quasi-judicial function". It is "the nature of the decision made, not the attributes of the proceeding held before that decision that determines whether the process is quasi-judicial" or quasi-legislative. *Beverly Hills United School Dist. v. Los Angeles County Metropolitan Transportation Authority* (2015) 241 Cal.App.4th 627, 671 (citing *Oceanside Marina Towers Assn. v. Oceanside Community Development Com.* (1986) 187 Cal.App.3d 735, 746 fn. 8); *see Western States*, Cal.4th at 567-568. Given the legislative nature of the decision, the City Council hearing on the FEIR was "held for the purpose of informing the law makers regarding relevant facts and policy considerations", not for the protection of individual property rights. *See Save Lafayette Trees,* 280 Cal.Rptr.3d at 703 (quotation and citation omitted); AR86.1:6857.1-6962.1. Similar to the certification of the FEIR, the required notice and public hearing held prior to the amendment of the SMCP and the related zoning also served to inform the City Council on issues that would impact the public, and did not convert these legislative acts into a quasi-judicial function. *See id.*; Cal. Gov. Code §§ 65355, 65856.

The City is aware of no law pursuant to which the City was required to hold an evidentiary hearing and make factual determinations based on the administrative record in taking legislative action to certify the FEIR or approve the amendments to the planning documents. Prior to the certification of a final EIR, CEQA does not require the lead agency to conduct an evidentiary hearing or make any specific findings. *See* 14 Cal. Code Regs. § 15090(a)(1)-(3); Cal. Pub. Res.

Code § 21082.1(c)(3). The lack of any requirement for an evidentiary hearing is further demonstrated by the fact that a failure to even certify a final EIR does not necessarily compel a court to invalidate a project approval. *See Save San Francisco Bay Ass'n v. San Francisco Bay Conserv. & Dev. Comm.* (1992) 10 Cal.App.4th 908, 935 (failure to certify final EIR may be considered technical error). The San Diego Municipal Code also does not mandate any evidentiary hearings or findings, requiring only a certification that the final document has been completed in compliance with CEQA and the CEQA Guidelines, and that the information contained in the final document reflect the independent judgment of the City of San Diego as lead agency. San Diego Municipal Code § 128.0311(a)(1)-(2). The San Diego Municipal Code does not require evidentiary hearings or factual determinations for amendments to land use plans or the adoption of zoning or rezoning. *See* San Diego Municipal Code §§ 122.0101-122.0105 (adoption/amendment of land use plans); §§ 123.0101-123.0108 (process for zoning/rezoning); § 122.0509 (Process Five procedures applicable to land use plan amendments and zoning/rezoning).

B. Decisions Concerning the Location of Public Improvements Are Legislative

The California Supreme Court and the courts of appeal have held that the decisions of public entities as to the location of public improvements, including streets, are legislative in character. *See, e.g., Wheelwright v. County of Marin* (1970) 2 Cal.3d 448, 458; *Sagaser v. McCarthy* (1986) 176 Cal.App.3d 288, 312; *Oceanside Marina Towers Assn.*, 187 Cal.App.3d at 746. The rationale is that the public entity's considerations relevant to siting the public improvement are not limited to facts unique to the immediately affected locale but also must include and weight the "benefits accruing to the public generally as a result of the improvement." *Id.*

In certifying the FEIR and amending the SMCP and related zoning to allow for the Project, the City Council made similar decisions as to the location of the roadway connector. *See* AR51:3921, 3941, 3993. These decisions were not limited to a consideration of nearby property owners or interested parties, such as Appellant, and did not require the City Council to determine facts specific to property rights or interests in an adjudicative fashion. Instead, it required the City Council to make policy decisions based on a broad range of direct and indirect

factors and considerations that would affect the larger community of the City of San Diego. *See Save Lafayette Trees,* 280 Cal.Rptr.3d at 705; *Oceanside Marina Towers Assn.,* 187 Cal.App.3d at 746. These decisions were "unquestionably" quasi-legislative and reviewable pursuant to Public Resources Code section 21168.5 and Code of Civil Procedure section 1085.

C. The City Council Was Not Required to Determine Facts in Relation to Specific Property Rights or Interests in an Adjudicative Fashion

The decisions made by City Council were not adjudicative and can be distinguished from the facts in the "quasi-adjudicative" cases discussed in *Save Lafayette Trees*. *See Save Lafayette Trees,* 280 Cal.Rptr.3d at 702-703 (discussing *Horn v. County of Ventura* (1979) 24 Cal.3d 605, 614 (subdivision approval); *Scott v. City of Indian Wells* (1972) 6 Cal.3d 541 (conditional use permit); *Calvert v. County of Yuba* (2006) 145 Cal.App.4th 613 (vested right determination)). Each of these cases concerned "government conduct . . . affecting relatively few" and involved approvals that required the application of general standards to specific parcels of property or interests, and that were determined "by facts peculiar to the individual case". *See Save Lafayette Trees,* 280 Cal.Rptr.3d at 703.

Unlike those circumstances, the certification of the FEIR and the approval of the amendments to the SMCP planning documents concerned a roadway connector that provided a multi-modal connector between two communities and, among other goals, was intended to improve regional access and navigational efficiency, improve emergency access and evacuation routes, and resolve the inconsistency between two community plans. *See* AR51:2992, 2997, 3001, 3422; AR2352:36394-36399. In deciding whether to approve the Project, the City Council had to weigh a variety of policy considerations that would affect the public welfare and to assess a "broad spectrum of community costs and benefits." *See Save Lafayette Trees,* 280 Cal.Rptr.3d at 704-705; *Oceanside Marina Towers Assn.,* 187 Cal.App.3d at 746-747; AR86.1:6944.1 ("But I have to take into consideration the city as a whole and the greater good. And the greater good in this case means to approve this road connector and get traffic flowing a little bit better in Mission Valley."). The decisions were not limited to a consideration of the interests or rights of any nearby property owners or particular groups like Appellant, who does not claim the deprivation of any significant or substantial property interest.

2. Would a determination that the City was acting in a quasi-*legislative* capacity foreclose appellant's procedural due process claim?

City's Response: A determination that the City was acting in a quasi-legislative capacity would foreclose Appellant's procedural due process claim because quasi-legislative acts are not subject to procedural due process requirements. *See Beck Development Co. v. Southern Pacific Transportation Co.* (1996) 44 Cal.App.4th 1160, 1188.

As discussed above, the certification of the FEIR and the amendment to SMCP and related zoning are legislative in nature. The law is clear: procedural due process requirements are not applicable to legislative and quasi-legislative acts. *See, e.g., id.*; *San Diego Bldg. Contractors Assn. v. City Council* (1974) 13 Cal.3d 205, 211; *Horn*, 24 Cal.3d at 612 (citing cases). "[T]he rules against prejudgment of adjudicatory facts do not apply to quasi-legislative decisions." *Beverly Hills United School Dist.*, 241 Cal.App.4th at 671 (citing *Wilson v. Hidden Valley Mun. Water Dist.* (1967) 256 Cal.App.2d 271, 286-287).

Given the quasi-legislative nature of the certification of the FEIR and the amendment to the SMCP planning documents, the requirements of procedural due process do not apply to the City Council's decisions. The public was not entitled to a "fair hearing" because the process was not adjudicatory in nature and Councilmember Sherman's alleged conduct prior to the City Council's decision is irrelevant. This is fatal to Appellant's contention that the City violated the public's right to due process and a fair hearing, and compels this Court to deny Appellant's procedural due process claim.

Respectfully submitted,

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By
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