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May 21, 2018

Hon., Acting Presiding Justice Streeter
Hon. Reardon
Hon. Schulman
First Appellate District
Division Four
350 McAllister Street
San Francisco, CA 94102

**Re: *Jensen v. City of Santa Rosa*, Case No. A144782, May 1, 2018
Request for Publication**

Honorable Justices:

On behalf of the Council of Infill Builders (the “Builders”), pursuant to California Rules of Court, Rule 8.1120, we respectfully ask that this Court consider publication of its May 1, 2018 opinion in *Jensen v. City of Santa Rosa* (the “Opinion”).

This letter explains the Builder’s interest in publication and why they seek publication under the standards for publication in California Rule of Court 8.1105(c). The Opinion qualifies for publication because it applies an area of law to a set of facts substantially different than other California Environmental Quality Act (CEQA) cases and addresses an issue of continuing public interest. (See California Rule of Court 8.1105(c)(2), (c)(6).)

A. The Interest of The Council of Infill Builders.

The Builders is a 501(c)(3) nonprofit corporation of real estate professionals committed to improving California through infill development. Infill development revitalizes neighborhoods and communities, provides transportation choices, creates viable close-knit mixed-use areas, reduces greenhouse gas emissions, and sustainably improves the overall economy. The Builders seek to educate the public about these benefits through research and outreach.

The Opinion is important to the Builder's members. These members, as the applicants and advocates for infill development projects, are directly affected by the interpretation and application of CEQA, as they are often subject to litigation under CEQA, specifically under the fair argument standard at issue in the Opinion.

In addition, this case is of direct relevance to the Builders because the Opinion relates to an infill development whereby the Real Party in Interest, Social Advocates for Youth, sought to reuse an existing, defunct hospital for a housing and "individual and family counseling, education and job training, a health and wellness center serving the community." This type of reuse of an infill development site is exactly what Builders' members seek to promote throughout California and are often thwarted by CEQA litigation by a small handful of neighbors, as is the case here.

B. The Opinion Meets the Requirements for Publication Because it Clarifies the Court's Review of a Negative Declaration and the Applicability of the Fair Argument Standard, Which Have Ongoing Public Interest.

1. The Opinion Clarifies the Fair Argument Standard of Review.

One aspect of the Opinion that applies existing law to a new set of facts and arguments relates to the Opinion's analysis of the standard of review. The Opinion makes an important statement rebutting the arguments raised by Appellants:

Appellants insist we must independently exercise our judgment in our review of the City's decision to issue a negative declaration. They argue application of the "fair argument" standard is a question of law, and deference to the agency's determination is not required. (*Stanislaus Audubon Society*, supra, 33 Cal.App.4th at p. 151.) But this is at best an oversimplification.

(Slip Op. at 7.) The argument that courts should apply the "question of law" standard is increasingly made by CEQA petitioners. While the Court's clarification of the standard of review is based on quotations of existing law, the Court's succinct summary is helpful to keep other petitioners from making this false argument and for other courts who are addressing this argument.

The Opinion helpfully proceeds to apply the standard of review in an accurate and clear manner. Because the Opinion applies existing law to a new argument regarding the standard of review and clarifies the law on a legal issue of continuing public interest, it therefore qualifies for publication under Rule of Court 8.1105(c)(2) and 8.1105(c)(6).

2. The Opinion Is the First to Apply the Fair Argument Test to Nonexpert Calculations of a Noise Impact.

The Opinion also includes an important holding about what constitutes substantial evidence and expert opinion and makes an important contribution to development of the law. Specifically, no existing case law addresses whether nonexpert comments on noise impacts are sufficient as substantial evidence of a fair argument that a project may have significant noise impacts.

The Opinion's clear explanation that calculations from a completely different project offered by the petitioners as substantial evidence of a noise impact were not scientific fact but were instead "essentially opinions rendered by nonexperts" is an important application of the law to a new set of facts. It clarifies the law on what does and does not constitute substantial evidence of a fair argument in the context of a negative declaration. Because the Opinion applies existing law to a new set of facts, the Opinion qualifies for publication under Rule of Court 8.1105(c)(2).

The standard for substantial evidence of a fair argument has been stretched and used aggressively by petitioners challenging many infill projects. Alleging opinion-based evidence is fact-based is alleged by many other petitioners thus the Opinion addresses a legal issue of continuing public interest under Rules of Court 8.1105(c)(6). The Builders respectfully request that *Jensen v. City of Santa Rosa* be published to ensure the standard articulated by the Court in this case is applied to other lead agencies that approve infill housing projects with no significant impacts under CEQA with a negative declaration.

Very truly yours,

MONCHAMP MELDRUM LLP



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