No. B301374

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT DIVISION FOUR

SOUTHWEST REGIONAL COUNCIL OF CARPENTERS, et al.

Petitioners and Respondents

v.

CITY OF LOS ANGELES, *et al.*

Respondents and Appellants

THE ICON AT PANORAMA, LLC

Real Party in Interest and Appellant

Appeal from a Judgment of the Los Angeles Superior Court,
Case No. BS175189, Hon. James C. Chalfant

APPLICATION OF THE LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA STATE ASSOCIATION OF COUNTIES FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANTS CITY OF LOS ANGELES AND THE ICON AT PANORAMA, LLC; [PROPOSED] AMICUS CURIAE BRIEF

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LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA STATE ASSOCIATION OF COUNTIES APPLICATION FOR LEAVE TO FILE AN AMICUS BRIEF

Pursuant to Rule 8.200, subdivision (c), of the California Rules of Court, the Applicants, League of California Cities ("League of Cities") and California State Association of Counties ("CSAC"), respectfully request leave to file an Amicus Curiae brief ("Brief") in this proceeding in support of Appellants City of Los Angeles and the Los Angeles City Council and Real Party in Interest The Icon at Panorama, LLC (collectively, "Appellants").

A. AUTHORSHIP AND FUNDING

This Brief was drafted by Whitman F. Manley and Nathan O. George of Remy Moose Manley, LLP on behalf of the League of Cities and CSAC as their counsel. No party or counsel for a party in the pending case authored the proposed Brief in whole or in part, directly or indirectly, or made any monetary contribution to fund its preparation. This Brief was prepared on a pro bono basis by Remy Moose Manley on behalf of the League of Cities and CSAC.

B. STATEMENT OF INTEREST

The League of Cities is an association of 476 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. The League of 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.

The California State Association of Counties ("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 Litigation Overview Committee

monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

C. ISSUES ON WHICH THE LEAGUE OF CITIES AND CSAC SEEK TO ASSIST THE COURT OF APPEAL

This matter raises important issues under the California Environmental Quality Act ("CEQA") (Pub. Resources Code, § 21000 et seq.), the State CEQA Guidelines (Cal. Code Regs., tit. 14, § 15000 et seq.) ("CEQA Guidelines" or "Guidelines"), and California planning and development law and policy.

Under CEQA, an environmental impact report ("EIR") must contain a general description of the proposed project that is accurate, finite, and stable. (CEQA Guidelines, § 15124, subd. (c); *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 199 (*County of Inyo*).)

In this case, the trial court found that the City's addition of "Alternative 5" to the Final EIR, and its approval of a Revised Project resembling Alternative 5, without recirculating the Draft EIR for additional review and comment, "deprived the public of a

meaningful opportunity to comment." The trial court did not, however, address this issue under guidance concerning whether and when the lead agency must recirculate a Draft EIR. Instead, the trial court concluded that the EIR's Project Description was unstable, in violation of *County of Inyo* and its progeny. (Joint Appendix ("JA") 341-343.)

The members of the League of Cities and CSAC routinely serve as lead agencies under CEQA. In that capacity, they are often called upon to consider whether changes to a project, or to the circumstances surrounding a project, arising after circulation of the Draft EIR require recirculation. Should the Court uphold the trial court's decision in this case, the members of the League of Cities and CSAC would be required to analyze such changes, not only for their potential to require recirculation, but also for their potential to render the EIR's Project Description "unstable."

Neither the trial court's decision, nor the cases cited by the trial court and Petitioners in support of the trial court's decision, provide objective criteria for determining the materiality of such

changes. If such a rule is adopted by the Court of Appeal, a lead agency will be subject to second guessing by a reviewing court, using a non-deferential *de novo* standard of review. Such a lead agency will have no way to know whether changes to a project have crossed an invisible line, such that the Project Description should be revised, and the Draft EIR recirculated for further review and comment. Faced with such uncertainty, lead agencies are bound to err on the side of undue caution, and to recirculate Draft EIRs under circumstances where that would otherwise not be required. The practical effect will be additional delay and expense for reasons wholly unrelated to a project's environmental effects. Such an outcome conflicts with established case law, with the statute, and with California Supreme Court precedent.

The first part of this brief discusses the implications of several aspects of the trial court's decision, if it were upheld, on future CEQA review and decisionmaking that the League of Cities and CSAC find particularly troubling. Specifically, the brief discusses the lack of objective guidance provided by the trial

court in determining "materiality" for purposes of Project Description stability. The brief also addresses the vagaries of analyzing the changes to a project as a threshold, metaphysical inquiry, divorced from the impacts on the physical environment caused by those changes, and the implied limitation on the ability of a proposed project to evolve during – indeed, in response to – information obtained during the course of the environmental review process.

The second part of this brief analogizes the trial court's "materially different" project test to recent developments in a related body of caselaw involving CEQA's supplemental review provisions under Public Resources Code section 21166. As explained below, the trial court's test shares many of the shortcomings of the "new project" test adopted in *Save Our Neighborhood v. Lishman* (2006) 140 Cal.App.4th 1288 (*Lishman*), including a lack of objective criteria for applying the test, a lack of deference to lead agency determinations concerning factual issues, and the imposition of new procedural or

substantive requirements beyond those expressly stated in CEQA and the CEQA Guidelines. The similarities with *Lishman* are particularly noteworthy because in 2016 the California Supreme Court expressly overturned *Lishman* and its unworkable "new project" test. The Supreme Court's logic applies with equal force here.

The League of Cities and CSAC believe that this Court may benefit from this perspective. The League of Cities and CSAC have drafted the accompanying Brief to complement, but not duplicate, the detailed arguments that have already been submitted to this Court by the parties to this case. The League of Cities and CSAC therefore respectfully request that this Court grant this application and order the accompanying Brief of Amicus Curiae to be filed.

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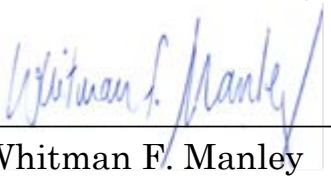
Dated: August 24, 2020

Respectfully submitted,

REMY MOOSE MANLEY, LLP

By: 

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INTRODUCTION

In this case, the trial court accepted Petitioners' characterization of their lawsuit as attacking an EIR's project description. Petitioners' tactical decision, and the trial court's acceptance of it, had two crucial consequences. First, it led the trial court to embark on an abstract analysis of whether the description of the project had evolved "materially" after the City had published the Draft EIR. Because the record showed that the Project had evolved, the trial court concluded that the project description was "unstable," and the public had been shut out of the CEQA process. Second, because the issue focused on the EIR's project description, the trial court characterized the issue as presenting a purely legal question, to be resolved by the court without deference to the lead agency, without regard to whether the project's evolution might cause new or more severe environmental effects, and under the assumption that if legal error occurred, it had to be prejudicial.

The trial court's ruling is troubling in both respects. That projects evolve while under review is a commonplace feature of the environmental review process. CEQA has a longstanding mechanism for determining whether, due to such evolution, the lead agency must re-open the process: the recirculation of a Draft EIR under Public Resources Code section 21092.1. Lead agencies understand and know how to apply these rules. It is equally well established that judicial review of recirculation claims involves the "substantial evidence" standard of review, under which the court defers to the lead agency's factual determinations about whether the impacts of the project's evolution require recirculation of the Draft EIR.

The trial court's ruling, if adopted by the Court, will allow artful petitioners an opening to side-step the large body of law concerning Draft EIR recirculation. Perversely, such a ruling would discourage lead agencies from allowing projects to evolve during the CEQA process, since the consequence of doing so would be to open themselves up to the claim – reviewed *de novo* – that the project description is "unstable." Such an outcome is

unwarranted. Indeed, the cases involving defective project descriptions involve circumstances that bear no relationship to the normal evolution of a project, as exemplified by this case.

The parties to this appeal know the record and are in the best position to provide their perspective on the evolution of the Project and its attendant environmental effects. The League of Cities and CSAC urge the Court, however, to refrain from injecting further uncertainty and legal exposure into an already complex process. If rules are clear, members of the League of Cities and CSAC will follow them. If rules – like the approach urged by Petitioners and adopted by the trial court – are unclear, then members of the League of Cities and CSAC will do their best, but the consequence will be further uncertainty, cost, delay, and disgruntlement with the environmental review process. Such an outcome is undesirable, unnecessary, and contrary to CEQA.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

A more detailed statement of factual and procedural history is in Appellants' Joint Opening Brief ("Appellants' Opening Brief") at pages 16-26. Rather than duplicate that effort, the

League of Cities and CSAC provide the following summary of factual and procedural history drawn principally from the trial court's statement of decision (JA 325-362) and relevant to the discussion herein.

On April 6, 2017, the City released a Draft EIR for public review. The Draft EIR described the development project ("Project") proposed by Real Party in Interest the Icon at Panorama, LLC ("Icon"). (JA 325, 332.) The Draft EIR described the Project as mixed-use development on 8.9 acres in the City, and proposed the construction of seven buildings, including approximately 200,000 square feet of commercial area and 422 residential units. (*Ibid*.) The Draft EIR also analyzed four alternatives to the Project: a "No Project" Alternative, a Reduced Project Alternative, an All Commercial Alternative, and a "By-Right" Alternative. All the Alternatives in the Draft EIR proposed fewer residential units than the Project. (JA 332-333.)

In response to comments received from the public, the City revised and recirculated a Revised Draft EIR ("RDEIR") on August 31, 2017. (JA 325.) On February 23, 2018, the City

released the Final EIR. The Final EIR included a new "Alternative 5." (JA 334.) Alternative 5, among other changes, proposed reducing the commercial development area from 200,000 square feet to 60,000 square feet, while increasing the residential development from 422 units to 675 units. (*Ibid.*) The Final EIR analyzed Alternative 5 and concluded that it would reduce traffic impacts associated with the Project and did not require recirculation under CEQA Guidelines section 15088.5. (See JA 334, 341.)

After the City published the Final EIR, and before the City considered the EIR and Project for certification and approval, Icon proposed further changes to the proposed Project (Revised Project). The Revised Project moved in the direction of Alternative 5. (JA 335.) The Revised Project proposed the same 60,000 square feet of commercial area but reduced the residential development to 623 units. (*Ibid.*) The City concluded that the Revised Project did not require recirculation (JA 341) and ultimately approved the Revised Project and certified the EIR. (JA 336-337.)

Petitioners filed suit on October 1, 2018. They alleged that the City's approval should be set aside based on violations of CEQA. (JA 325-326.) Among other challenges, Petitioners argued that the EIR failed to maintain a stable project description, because the final approval was "not described or analyzed in any prior CEQA document." (JA 337.) The City and Icon argued that adding Alternative 5 to the Final EIR and the City's consideration of the Revised Project after publication of the Final EIR were appropriately analyzed for their potential to require recirculation, and that no other analysis of "changes in the project" was required under CEQA. (JA 341.) The Parties agreed that Petitioners had waived any challenge under CEQA's recirculation provisions by failing to raise that issue in their opening trial brief. (*Ibid*.)

Instead, Petitioners argued that nothing in CEQA's recirculation provisions prevented them from challenging the adequacy of the Project Description based on the changes to the project arising after circulation of the Draft EIR. (JA 341, 343.)

The trial court agreed. (*Ibid*.) It found that the differences

between the Project described in the Draft EIR and the Revised Project were sufficiently material to render the Project Description unstable. (JA 347-348.) The trial court went on to find that, had the City circulated Alternative 5 for public review, that would have cured the inconsistency in the project description because Alternative 5 was "reasonably close" to the ultimate approval. (JA 348.) In response to the City's and Icon's argument that the changes to the Project were not "significant new information" requiring recirculation of the Draft EIR, the trial court held that the environmental effects of the changes were irrelevant to whether the Project Description became unstable due to the changes to the Project. (JA 347.)

The trial court concluded that the writ of mandate should be granted and a new or supplemental EIR prepared based on the unstable project description and the City's failure to adequately respond to comments. (JA 362.) The City and Icon appealed.

ARGUMENT

"The chief goal of CEQA is mitigation or avoidance of environmental harm." (*Laurel Heights Improvement Assn. v.*

Regents of University of California (1988) 47 Cal.3d 376, 403 (*Laurel Heights I*).)

Here, Appellant City of Los Angeles sought to fulfill this "chief goal" through the approval of a Revised Project based on further reductions to development proposed in an alternative (Alternative 5) analyzed in the Final EIR. Petitioners and Respondents Southwest Regional Council of Carpenters, et al. ("Petitioners") argue that this environmentally benign outcome somehow invalidates the EIR's Project Description. In Petitioners' view – with which the trial court agreed – a Draft EIR's project description chapter, as viewed at the *end* of the CEQA process, cannot be adequate unless it reflects the ultimate decision actually made by the lead agency decision maker. Petitioners contend that this principle holds true regardless of whether the project, as approved, would result in greater or lesser impacts than those disclosed in the Draft EIR.

CEQA, however, "does not handcuff decisionmakers" by forcing them to either approve (or deny) the original proposal or send the applicant back to the drawing board. (*South of Market*

Community Action Network v. City and County of San Francisco (2019) 33 Cal.App.5th 321, 336 (*South of Market*) ["The action approved need not be a blanket approval of the entire project described in the EIR. If that were the case, the informational value of the document would be sacrificed"].) Petitioners' view, moreover, would be needlessly wasteful. Yet, "[t]he purpose of CEQA is not to generate paper, but to compel government at all levels to make decisions with environmental consequences in mind." (CEQA Guidelines, § 15003, subd. (g), citing *Bozung v. Local Agency Formation Com.* (1975) 13 Cal.3d 263.)

Here, the trial court, in determining, as a matter of law, that the Revised Project approved was "materially different" from the Project Description in the EIR, created a new test for changes made to a project after circulation of the Draft EIR that lead agencies must consider in deciding whether to recirculate an EIR. (JA 348.) This new test is in addition to long-established standards for determining when recirculation of a Draft EIR is required due to "significant new information" giving rise to new or substantially more severe environmental effects. (CEQA

Guidelines, § 15088.5.) Were this Court to accept the trial court's rationale and uphold the decision below, lead agencies—including the members of the League of Cities and CSAC—would be required to determine whether changes made to a project after circulation of the Draft EIR are "significant" or "material" enough to render the Project Description in the EIR "unstable"(and thus require revision and recirculation of the Project Description) separately from analyzing whether those changes require recirculation under CEQA Guidelines section 15088.5. Moreover, the agency's decision on this inherently factual issue would be reviewed as a question of law, with no deference to the agency's conclusion. Neither the trial court's decision in this case, nor the cases cited by the trial court in support, provide agencies confronted with this question with any guideposts for determining when project changes crossover from insignificant to material, such that the Project Description in the EIR becomes invalid.

A. This Case Has the Potential to Inject Needless and Unwarranted Uncertainty into the CEQA Process.

1. CEQA requires lead agencies to analyze a private developer's entire proposal for potential environmental impacts.

When private development is subject to CEQA review, lead agencies (including the members of the League of Cities and CSAC) are required to analyze the potential environmental effects of the applicant's entire proposal. (See *Dry Creek Citizens v. County of Tulare* (1999) 70 Cal.App.4th 20, 26-27 (*Dry Creek Citizens*) [CEQA forbids "omit[ing] an integral component of a proposed project from the project description"]; see also *Laurel Heights I*, 47 Cal.3d at p. 398 [EIR's analysis must consider reasonably foreseeable future phases of proposed project]; *Whitman v. Board of Supervisors* (1979) 88 Cal.App.3d 397, 414-415 [because oil pipeline was part of the applicant's overall plan for project, it must be discussed in the EIR in "at least general terms"].)

Similarly, CEQA imposes a duty on lead agencies to explore "feasible alternatives or feasible mitigation measures" to reduce

the environmental effects of "*projects as proposed*." (Pub. Resources Code, § 21002, italics added; see also *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 566 ["an EIR for any project subject to CEQA review must consider a reasonable range of alternatives to the project, or to the location of the project, which: (1) offer substantial environmental advantages over the project proposal…"].)

Lead agencies necessarily use a private applicant's proposal as a starting point for the Project Description in the Draft EIR. (See CEQA Guidelines, § 15124.) The Project Description "must contain sufficient specific information about the project to allow the public and reviewing agencies to evaluate and review its environmental impacts." (*Dry Creek Citizens*, *supra*, 70 Cal.App.4th at p. 26; see also *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 192 (*County of Inyo*) ["A curtailed or distorted project description may stultify the objectives of the reporting process"].) As part of the public evaluation and review, the Draft EIR, including the Project Description, must be circulated for public comment for at least 30

days. (See Pub. Resources Code § 21091; CEQA Guidelines, §§ 15087, 15120, 15124.)

The courts have found an EIR to be inadequate where the project description fails to describe the "whole of the action" that has been proposed. (See, e.g., *Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo* (1985) 172 Cal.App.3d 151, 165; cf. *Laurel Heights I*, 47 Cal.3d at p. 398 [project description was improperly truncated because EIR did not describe and analyze latter phase of building occupancy, even though such occupancy was reasonably foreseeable and would change scope of impacts].)

The courts have also found CEQA violations where the project description obscures the nature of the project or its components or omits basic details about what has been proposed. (See *County of Inyo*, *supra*, 71 Cal.App.3d at p. 193 [agency repeatedly changed its description of what the project entailed]; *Washoe Meadows Community v. Department of Parks & Recreation* (2017) 17 Cal.App.5th 277, 287-290 (*Washoe Meadows*) [agency did not identify any single proposal, but only a

range of possibilities]; *stopthemillenniumhollywood.com v. City of Los Angeles* (2019) 39 Cal.App.5th 1, 17 [EIR's project description lacked information required by CEQA Guidelines section 15124].) Thus, lead agencies must ensure, from the beginning of the CEQA process, that an applicant's proposal is accurately and consistently described in the Project Description chapter and throughout the EIR.

2. CEQA allows and encourages project evolution but requires such changes to be reviewed for their potential to cause new or more significant impacts.

As the planning and environmental review process unfolds, changes in the project and circumstances often – indeed, almost invariably – arise. Such changes often arise after the lead agency has circulated the Draft EIR. Published cases offer scores of examples in which the agency's ultimate approval differs from the initial proposal, including changes to the scope or specific components of the project. (See, e.g., *Dusek v. Redevelopment Agency* (1985) 173 Cal.App.3d 1029, 1040-1041 (*Dusek*); *Sierra*

Club v. City of Orange (2008) 163 Cal.App.4th 523, 533 (*City of Orange*); *Citizens for a Sustainable Treasure Island v. City and County of San Francisco* (2014) 227 Cal.App.4th 1036, 1062-1063 (*Treasure Island*); *South of Market*, *supra*, 33 Cal.App.5th at p. 336; *South County Citizens for Smart Growth v. County of Nevada* (2013) 221 Cal.App.4th 316, 323-324 (*South County Citizens*); *Western Placer Citizens for an Agricultural & Rural Environment v. County of Placer* (2006) 144 Cal.App.4th 890, 894-895 (*Western Placer Citizens*); *Beverly Hills Unified School District v. Los Angeles County Metropolitan Transportation Authority* (2015) 241 Cal.App.4th 627, 644-647 (*BHUSD*).)

Whether changes to a project result in response to environmental impacts of the proposed project (e.g., *South County Citizens*, *supra*, 221 Cal.App.4th at pp. 323-324 [fast-food restaurants removed "due to their high traffic generation"]), or because of intervening circumstances (see *BHUSD*, *supra*, 241 Cal.App.4th at pp. 644-647 [one of two subway station options found infeasible after circulation of Draft EIR]), such changes do not retroactively invalidate an EIR's Project Description, or

require the lead agency and applicant to restart the CEQA process. As one Court of Appeal observed, "[w]e do not conclude the project description is inadequate because the ultimate approval adopted characteristics of one of the proposed alternatives; that in fact, is one of the key purposes of the CEQA process." (*South of Market*, *supra*, 33 Cal.App.5th at p. 336; see also *Western Placer Citizens*, at pp. 899-900.)

"CEQA allows, if not encourages, public agencies to revise projects in light of new information revealed during the CEQA process." (*Treasure Island*, *supra*, 227 Cal.App.4th at p. 1062.) Indeed, project changes made "in response to concerns raised in the [CEQA] review process show[] '…CEQA fulfilled its purpose.'" (*Ibid*., quoting *Western Placer Citizens*, *supra*, 144 Cal.App.4th at p. 905.) When "the public comment process [reveals] new and unforeseen insights about the project that will affect the final Project design," CEQA is functioning as it should. (*Treasure Island*, *supra*, 227 Cal.App.4th at p. 1062.)

CEQA, however, does not permit lead agencies to simply ignore the environmental implications of such changes. Rather,

CEQA requires lead agencies to determine whether such changes constitute "significant new information" which, if added to the EIR after the circulation period, would "deprive[] the public of a meaningful opportunity to comment upon a substantial adverse environmental effect of the project or a feasible way to mitigate or avoid such an effect (including a feasible project alternative) that the project's proponents have declined to implement." (CEQA Guidelines, § 15088.5, subd. (a); see Pub. Resources Code, § 21092.1.)

The CEQA Guidelines also provide objective criteria for a lead agency to use in determining whether recirculating the Draft EIR is required, with the agency's decision subject to judicial review. (CEQA Guidelines, § 15088.5, subd. (a)-(g).) Through the recirculation provisions, CEQA balances "the legislative goals of furthering public participation in the CEQA process and of not unduly prolonging the process so that the process deters development and advancement." (See *Laurel Heights Improvement Assn. v. Regents of University of California* (1993) 6 Cal.4th 1112, 1132 (*Laurel Heights II*).)

3. The trial court's "materially different" test on changes to a project arising during the CEQA review process is unprecedented and unwarranted.

The trial court found that the City abused its discretion by failing to circulate a Draft EIR that described Alternative 5, or some other alternative with a residential unit count "reasonably close to the 623 units approved in the Revised Project," as the project ultimately approved. (JA 348.) Despite identifying the error as the failure to circulate a Draft EIR, however, the trial court concluded that the City's recirculation analysis was irrelevant to whether the City abused its discretion here. Instead, the trial court concluded that a new or supplemental EIR[1] is the appropriate remedy for the failure to circulate a stable project

[1] A "supplemental EIR" is called for under Public Resources Code section 21166 when "major revisions" are required to a previously certified EIR. (See also CEQA Guidelines, § 15162.)

description. (JA 341, fn. 5; see also JA 362.)

If this Court were to uphold the decision below, lead agencies, including the members of the League of Cities and CSAC, would be required to analyze whether project changes are material enough to render the Project Description unstable, and, if so, to recirculate the Draft EIR with an updated the Project Description. That decision would be untethered to any evaluation of environmental effects. (See JA 348.) Moreover, the decision provides no objective guidance for lead agencies to consider in determining whether such changes are "material" for the purposes of the test, except to make clear that the potential environmental impacts of the changes are irrelevant to their materiality. (See JA 347-348.)

The trial court focused on the numeric differences between the proposed residential units: 422 in the Draft EIR's Project Description, 675 in the Final EIR's analysis of Alternative 5, and 623 in the approved Revised Project. The trial court also noted the change in the size of the project's commercial component: 200,000 square feet in the Draft EIR's Project Description and

60,000 square feet in the Final EIR's analysis of Alternative 5 and in the approved Revised Project. The trial court cited these differences in ruling that the changes were "material" or "significant" enough to render the Project Description unstable. (JA 325, 344, 347.) As discussed below however, those numbers, whether representing increases or decreases, are essentially meaningless for CEQA purposes when divorced from their potential environmental impacts. (See *Friends of the College of San Mateo Gardens v. San Mateo County Community College District* (2016) 1 Cal.5th 937, 951 (*San Mateo Gardens*) ["matters unrelated to the environmental consequences associated with the project" are irrelevant to whether changes trigger CEQA's subsequent review provisions].)

The trial court simply found these changes to be "material" as a matter of law, without explaining why. Without such guidance, and faced with the prospect of having their decisions reviewed as a matter of law, lead agencies will likely recirculate their Project Description chapters whenever such changes arise, out of an abundance of caution, simply because doing otherwise

requires divining a trial court's notion of "materiality" months or years after the decision has been made.

Such a test cannot be squared with CEQA's encouragement of project evolution to reduce environmental impacts. Similarly, the Supreme Court has held that "the legislature did not intend to promote endless rounds of revision and recirculation of EIRs. Recirculation was intended to be an exception, rather than the general rule." (*Laurel Heights II*, *supra*, 6 Cal.4th at p. 1132.) Application of the trial court's "materially different" project test, which lacks objective guidance for determining materiality, would inevitably lead to more rounds of recirculating a Draft EIR, contrary to the Supreme Court's decision in *Laurel Heights II*. [2]

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[2] Petitioners challenge whether the trial court even adopted such a test, noting that the phrase "materially different" appears only once in the trial court's ruling. (Respondents' Brief, pp. 34-36.) The problem with this argument, however, is that this phrase is the only time the trial court articulates the standard it used to determine whether the Project evolved too much. Take this phrase out of the trial court's decision, and there is no basis at all for determining where the blurry line exists between changes

The trial court's requirement that the analysis be performed without consideration of the potential environmental impacts of project changes runs counter to CEQA's purposes. Public Resources Code section 21002.1, subdivision (e) states, in pertinent part, that "[t]o provide more meaningful public disclosure, reduce the time and cost required to prepare an environmental impact report, and focus on potentially significant effects on the environment of a proposed project, lead agencies shall, in accordance with Section 21100, focus the discussion in the environmental impact report on those potential effects on the environment of a proposed project which the lead agency has determined are or may be significant." (See also CEQA Guidelines, § 15003, subd. (g).) Thus, lead agencies are directed by statute to focus the discussion in EIRs on potentially significant effects. In the context of the current case, "materiality" means that a change in the project may result in

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that render the project description "unstable," and those that merely reflect permissible evolution.

new or greater environmental effects; it does not mean some abstract notion of what a reviewing court may regard as "material."

4. Project changes occurring after the lead agency circulates a Draft EIR are meaningful under CEQA only in the context of potential to cause environmental impacts.

As noted above, the trial court's decision requires that project changes be measured without reference to their potential for environmental impacts when deciding whether the Project Description must be revised and recirculated. (JA 347-348.) But divorcing project changes from their potential environmental impacts leaves lead agencies without any meaningful metric to determine "materiality." As this Court has observed, "[d]rastic changes to a project might be viewed by some as transforming the project to a *new* project, while others may characterize the same drastic changes in a project as resulting in a dramatically *modified* project. Such labeling entails no specific guidelines and simply is not helpful to our analysis." (*Mani Brothers Real Estate*

Group v. City of Los Angeles (2007) 153 Cal.App.4th 1385, 1400 (*Mani Brothers*).)

This case provides an apt illustration of this principle. As Appellants note, Alternative 5 and the Revised Project essentially traded commercial development for residential development when compared to the original proposal. The net effect of this shift is a 12,000-square-foot reduction in total development. Moreover, the City analyzed the impacts of the Revised Project, and concluded that it reduces the number and severity of the Project's significant impacts. For this reason, the City concluded that the changes in the Project were not "material" and thus did not require a recirculated Draft EIR with an updated Project Description. (Appellants' Opening Brief, pp. 60-61.)

The trial court, on the other hand, focused separately on the increase in residential units and decrease in commercial area (422 residential units increased to 623 units, and 200,000 square feet of commercial area decreased to 60,000 square feet) and concluded that the numbers in the final approval were different enough from the original proposal in the Project Description

chapter of the Draft EIR to be "material" and require recirculation of the Project Description. (JA 347-348.)

Petitioners predictably agree with the trial court that recirculation was required [3] (Respondents' Brief, pp. 27-28), but focus only on the increase in residential units (*ibid*.) and argue that the changes rendered the Project Description "inaccurate" rather than "unstable" as the trial court held (Respondents' Brief, p. 30; see JA 348). Semantics aside, none of the proposed rationale for whether project changes are "material" provides objective criteria for making that determination. Thus, "[s]uch labeling entails no specific guidelines and simply is not helpful to our analysis." (*Mani Brothers*, *supra*, 153 Cal.App.4th at p. 1400.)

Nor do the cases cited by the trial court in support of its decision provide any objective criteria for determining materiality. (See JA 346-348, citing *County of Inyo*, *supra*, 71

[3] Petitioners also agree with the trial court that the analysis should be performed without reference to the potential environmental effects of the project changes. (Respondents' Brief, pp. 52-53.)

Cal.App.3d at pp. 197, 198, 199, and *Washoe Meadows*, *supra*, 17 Cal.App.5th at pp. 283, 288, 289.) Neither case involved changes made to a project after circulation of the Draft EIR.

In *County of Inyo*, the project definition chapter in the EIR described a groundwater pumping project as "a proposed increase of 51 [cubic feet per second, or "cfs"] in the long-term subsurface extraction rate and an increase of 65 cfs in the high-year rate, these increases being destined solely for 'unanticipated' uses within the Owens Valley." (71 Cal.App.3d at p. 189.) The environmental impact chapters in the EIR, however, analyzed groundwater extraction at much higher rates, with most of that water leaving the Owens Valley and heading to urban uses in southern California. (*Id*. at p. 190.) Additionally, the EIR analyzed the potential impacts of infrastructure improvements needed to convey the water southward. (*Ibid*.) The court held that it was improper for the Draft EIR to describe only a portion of the proposed actions, even if the EIR analyzed the environmental impacts of the whole proposal. (*Id*. at pp. 197-198.)

In *Washoe Meadows*, the Draft EIR presented the public

with five alternative projects, but "did not identify a preferred alternative," and stated that a project would be selected from the alternatives "or combination of features from multiple alternatives" after public input. (17 Cal.App.5th at p. 283.) The Court of Appeal concluded that the Draft EIR, by describing "a broad range of possible projects, rather than a preferred or actual project … [¶] … failed to identify the project being proposed." (*Id.* at pp. 288-289; see also *id.* at p. 288 ["'A range of alternatives simply cannot be a stable proposed project'"].) Thus, neither *Washoe Meadows* nor *County of Inyo* provide any objective guidance for determining the materiality of project changes made after a Draft EIR is circulated in relation to the stability of the EIR's Project Description.

As a Court of Appeal noted in another case, "[t]he closest CEQA comes to addressing this issue is when it discusses the requirement to recirculate an EIR." (*Western Placer Citizens*, *supra*, 144 Cal.App.4th at p. 899.) Using CEQA's recirculation provisions, a lead agency compares factual changes in a project or circumstances to the objective criteria included in the CEQA

Guidelines (CEQA Guidelines, § 15088.5), which in turn derive from the California Supreme Court's decision in *Laurel Heights II*, *supra*, 6 Cal.4th 1112. Reviewing courts use the same objective criteria in deciding whether an agency has abused its discretion in concluding that recirculation is not required. (See *Western Placer Citizens*, *supra*, 144 Cal.App.4th at pp. 900-901.) If the Court were to uphold the trial court's decision, lead agencies would be required to make metaphysical decisions about the "materiality" of project changes divorced from their potential environmental effects, which would be judicially reviewed as a matter of law. Such a test runs counter to CEQA's purposes.

5. The trial court's decision will discourage lead agencies from exercising their discretion to approve reduced-scale projects to mitigate a proposal's impacts.

In support of finding that an agency abuses its discretion as a matter of law when it approves a project "materially different" from the project described in the Draft EIR, the trial court repeatedly quoted the following passage from *Washoe Meadows*:

"[F]or a project to be stable, the DEIR, the FEIR, and the final approval must describe substantially the same project." (JA 339, 343, 347, quoting *Washoe Meadows*, *supra*, 17 Cal.App.5th at p. 288.) Shorn of context, the quoted language from *Washoe Meadows* appears to limit an agency's discretion to approve a project or alternative unless that approval is "substantially the same" as the project described and circulated in the Draft EIR. (JA 343-344.) Such a reading of *Washoe Meadows*, however, runs counter to the body of caselaw encouraging project evolution in response to environmental concerns. (See, e.g., *Western Placer Citizens*, *supra*, 144 Cal.App.4th at p. 905; *Treasure Island*, *supra*, 227 Cal.App.4th at p. 1062; *South of Market*, *supra*, 33 Cal.App.5th at p. 336.) Nothing in the *Washoe Meadows* decision suggests that the Court meant to abandon this body of caselaw.

The *Washoe Meadows* court was quoting a portion of the trial court's decision in that case. (17 Cal.App.5th at p. 288.) In full, the quote states that, "'for a project to be stable, the DEIR, the FEIR, and the final approval must describe substantially the same project. A DEIR that states the eventual proposed project

will be somewhere in a 'reasonable range of alternatives' is not describing a stable proposed project. A range of alternatives simply cannot be a stable proposed project.'" (*Ibid*.) Thus, the trial court in *Washoe Meadows* identified the problem as the Draft EIR's failure to identify *any* specific proposal and did not purport to limit the lead agency's authority to ultimately approve an alternative or modification of an alternative. The Court of Appeal agreed. "A description of a broad range of possible projects, rather than a preferred or actual project, presents the public with a moving target and requires a commenter to offer input on a wide range of alternatives that may not be in any way germane to the project ultimately approved." (*Ibid*.) Thus, *Washoe Meadows* does not limit a lead agency's authority to modify a project or alternative to address environmental concerns; rather, the case holds that a Draft EIR must identify a single proposal, and the description of that proposal must contain the information required by CEQA Guidelines section 15124. (See *ibid*.; see also *Dusek*, *supra*, 173 Cal.App.3d at pp. 1040-1041.)

Nevertheless, the trial court in this case seems to have read

Washoe Meadows to limit an agency's discretion, such that the agency can approve only a project that matches up with the project or alternatives described in the Draft EIR. (JA 347 [finding error where the "DEIR's Project description and alternatives … contemplated a project with 0 to 422 residential units and 391,000 to 584,000 square feet of commercial space [but] [t]he Revised Project's scope of 623 residential units and 60,000 square feet of commercial space was outside the range of any of the alternatives in the DEIR or RDEIR"].) In distinguishing *City of Orange*, *supra*, 163 Cal.App.4th at p. 547, and *South County Citizens*, *supra*, 221 Cal.App.4th at p. 329, the trial court specifically found that, in both of those cases, "the new information was a late added alternative *that was not selected*." (JA 347-348, italics added; see also Respondents' Brief at pp. 45-46, 47-49 [arguing that, because the alternatives added after circulation in *City of Orange* and *South County Citizens* were not approved, they did not require recirculation of the Project

Description].)[4]

Such a limitation, however, runs counter to CEQA. "A lead agency for a project has authority to require feasible changes in any or all activities involved in the project in order to substantially lessen or avoid significant effects on the environment…." (CEQA Guidelines, § 15041, subd. (a); see also Pub. Resources Code, § 21002.1, subd. (b) ["Each public agency shall mitigate or avoid the significant effects on the environment of projects that it carries out or approves whenever it is feasible to do so"].) The CEQA process is "intended to assist public

[4] While the "Staff Alternative" in *South County Citizens*, *supra*, was not ultimately approved, one of the applicants' alternatives introduced in response to the Staff Alternative—also after circulation of the Draft EIR—was. (221 Cal.App.4th at pp. 323-325.) The trial court here stated that *South County Citizens* found the Staff Alternative and approved project were not "significantly different than the other alternatives analyzed in the FEIR." (JA 348, citing 221 Cal.App.4th at pp. 330-331.) The court in *South County Citizens*, however, reached this conclusion applying CEQA's recirculation test, which is triggered when changes involve new or substantially more sever impacts and ways to mitigate or avoid them. (See *South County Citizens*, *supra*, 221 Cal.App.4th at pp. 328 [discussing recirculation test], 331 [application to facts].)

agencies in systematically identifying both the significant effects of proposed projects and the feasible alternatives or feasible mitigation measures which will avoid or substantially lessen such significant effects." (Pub. Resources Code, § 21002.) In keeping with this intent, those submitting comments on a Draft EIR are directed to identify additional alternatives for a lead agency to consider to lessen or avoid a proposed project's significant impacts. (Pub. Resources Code, § 21003.1, subd. (a); see CEQA Guidelines, §§15096, subd. (d) [responsible agencies "should focus" comments on a Draft EIR, in part, "on additional alternatives"], 15204, subd. (a) ["[c]omments are most helpful when they suggest additional specific alternatives … that would provide better ways to avoid or mitigate the significant environmental effects"].)

The lead agency, in turn, may respond to such suggestions by "[c]hanging a proposed project" to reduce its effects. (CEQA Guidelines, § 15002, subd. (h) ["Methods for Protecting the Environment"].) Indeed, "[t]he EIR by itself does not control the way in which a project can be built or carried out. Rather, when

an EIR shows that a project would cause substantial adverse changes in the environment, the governmental agency must respond to the information. …" (CEQA Guidelines, §15002, subd. (h).)

Despite this clear language allowing – indeed, directing – lead agencies to revise projects to address environmental concerns, the trial court found that the environmental consequences of project changes are irrelevant to determining whether such changes are "material." The trial court's ruling cannot be squared with these provisions. Indeed, the trial court's ruling has the perverse effect of *discouraging* a lead agency from considering a proposed alternative that would serve to reduce a project's significant environmental effects.

B. The Trial Court's "Materially Different" Test Is Analogous to the Now-Discredited "New Project" Test in Cases Involving Supplemental Review under Public Resources Code Section 21166.

In the trial court, Petitioners argued that the City's approval of the Revised Project without circulating it or

Alternative 5 for public comment created an unstable the Project Description. Petitioners also argued that this claim presents an issue of law, to which a reviewing court owes no deference to the agency's conclusion. The City, on the other hand, argued that the only issue was whether the addition of Alternative 5 to the Final EIR or the approval of the Revised Project triggered recirculation, which courts review under the deferential substantial evidence test. The parties agreed that Petitioners had waived any argument that recirculation was required by failing to raise it in their opening trial brief. (JA 337, 341.)

The trial court agreed with Petitioners that the City also needed to determine whether the changes made in the Revised Project required significant revisions to the Project Description, regardless of whether those changes could have any new or substantially more severe significant impacts and trigger recirculation. (JA 347-348.) The trial court found that "[t]he difference between the Revised Project's 623 residential units and 60,000 square feet of commercial space and the Project's 422 residential units and 200,000 square feet of commercial space"

rendered the Project Description unstable. (JA 347.) In support of that finding, the trial court emphasized CEQA's purpose of ensuring informed public participation. (*Ibid*.)

On appeal, the City argues that the trial court's decision imposes a new procedural requirement beyond those expressly stated in CEQA and the CEQA Guidelines. (Appellants' Opening Brief, pp. 30-32; see Pub. Resources Code, § 21083.1.) The League of Cities and CSAC agree, as the trial court cited no provisions of CEQA or the Guidelines in the decision for the "materially different" test applicable to project changes.[5] Indeed, the trial court went so far as to cite the absence of CEQA provisions foreclosing such a requirement as a basis for creating it. (JA 343.) As explained below, the trial court's approach has been discredited.

1. The Lishman decision and its "new project" threshold test has been abandoned as

[5] The League of Cities' and CSAC's own research has not revealed any provision of CEQA or the Guidelines that expressly states such a requirement.

untenable.

In *Save Our Neighborhood v. Lishman* (2006) 140 Cal.App.4th 1288 (*Lishman*), the Third District Court of Appeal announced a similar threshold test for lead agencies and reviewing courts to consider before deciding "whether changes in a project or its surrounding circumstances introduce new significant environmental impacts." (*Id.* at p. 1301.) There, a Mitigated Negative Declaration ("MND") had been prepared for a commercial development in the City of Placerville in 1997. (*Id.* at p. 1291.) Though the City adopted the MND and approved the project, it was never constructed. (*Ibid.*) In 2004, a new applicant proposed a similar commercial project on the same property, and the City prepared and approved an addendum to the 1997 MND, concluding that the environmental impacts of the 2004 proposal were studied and mitigated in the 1997 MND. (*Id.* at pp. 1292-1293.) The petitioner argued, and the Court of Appeal agreed, that "Guidelines [section] 15162 'does not even contemplate City's attempt to employ a previous environmental document covering a *different* project—be it 'related' or unrelated—for analysis of the

new project's new impacts.'" (*Id.* at p. 1297, italics original.) According to the *Lishman* court, the differences between the projects proposed in 1997 and 2004 established, as a matter of law, that the 2004 project was "a new project altogether" requiring the City proceed with environmental review in the first instance under Public Resources Code section 21151, rather than subsequent review under section 21166. (*Id.* at p. 1301.)

Subsequent attempts to apply *Lishman*'s "new project" test showed it to be unworkable. In *Mani Brothers*, *supra*, 153 Cal.App.4th 1385, for example, this Court found that "[t]his novel 'new project' test does not provide an objective or useful framework. Drastic changes to a project might be viewed by some as transforming the project to a *new* project, while others may characterize the same drastic changes in a project as resulting in a dramatically *modified* project. Such labeling entails no specific guidelines and simply is not helpful to our analysis." (*Id.* at p. 1400, italics original.)

Importantly, the *Mani Brothers* court also found that the "new project" test "inappropriately bypassed otherwise applicable

statutory and regulatory provisions (i.e., § 21166; Guidelines, § 15162) when it considered it 'a question of law for the court' whether the changed project was to be reviewed under section 21166 at all." (153 Cal.App.4th at p. 1400.) Lastly, the court held that "[m]ost significantly, holding that the court should decide as a matter of law if the later project is a revision of a previously approved project or an entirely new project, *without consideration of the environmental impacts of the later project*, violates the legislative mandate that 'courts ... shall not interpret this division or the state guidelines ... in a manner which imposes procedural or substantive requirements beyond those explicitly stated in this division or in the state guidelines.'" (*Id.* at p. 1401, quoting Pub. Resources Code § 21083.1, italics original.)

In *San Mateo Gardens*, *supra*, 1 Cal.5th 937, the California Supreme Court directly confronted the split in authority embodied in the *Lishman* and *Mani Brothers* decisions. The high court overruled *Lishman*, finding that "to ask whether proposed agency action constitutes a new project, purely in the abstract, misses the reason why the characterization matters in the first

place." (*San Mateo Gardens*, 1 Cal.5th at p. 951.) Though the court recognized that "[t]he central purpose of CEQA is to ensure that agencies and the public are adequately informed of the environmental effects of proposed agency action," it found that CEQA's subsequent review provisions "are accordingly designed to ensure that an agency that proposes changes to a previously approved project 'explore[s] environmental impacts not considered in the original environmental document.'" (*Ibid.*, quoting *Lishman*, *supra*, 140 Cal.App.4th at p. 1296.)

The Supreme Court went on to hold that "under CEQA, when there is a change in plans, circumstances, or available information after a project has received initial approval, the agency's environmental review obligations 'turn[ ] on the value of the new information to the still pending decisionmaking process.'" (*San Mateo Gardens*, *supra*, 1 Cal.5th at pp. 951-952, quoting *Marsh v. Oregon Natural Resources Council* (1989) 490 U.S. 360, 374.) Thus, the "threshold issue" of whether to engage in supplemental review "is a predominantly factual question. It is thus a question for the agency to answer in the first instance,

drawing on its particular expertise." (*San Mateo Gardens*, 1 Cal.5th at p. 953.)

San Mateo Gardens focused on an agency's obligation to perform supplemental review due to changes in a project or in surrounding circumstances, as required by Public Resources Code section 21166. (See CEQA Guidelines, §§ 15162-15164.) This case, by contrasts, focuses on whether changes to a project triggers the duty to recirculate a draft EIR under Public Resources Code section 21092.1. (See CEQA Guidelines, § 15088.5.) That, however, is a distinction without a difference. The trial court's decision here committed the same error as the now-discredited *Lishman* decision.

2. The "materially different" test adopted by the trial court in this case is logically indistinguishable from the Lishman court's discredited "new project" test.

As in *Lishman*, the trial court here found that changes to the project, despite their factual nature, should be measured for their significance or materiality, as a matter of law, wholly

divorced from their potential to cause new or more significant impacts. (JA 343-344; see *Lishman*, *supra*, 140 Cal.App.4th at p. 1301.) As in *Lishman*, the trial court's "materially different" test "does not provide an objective or useful framework" and "entails no specific guidelines" for agencies or courts to consider in determining whether project changes are materially different enough to invalidate the Project Description. (See *Mani Brothers*, *supra*, 153 Cal.App.4th at p. 1400.)

As the Supreme Court recognized, applying such labels to project changes in the abstract—that is, without consideration of their potential for environmental impacts—"misses the reason why the characterization matters in the first place." (*San Mateo Gardens*, *supra*, 1 Cal.5th at p. 951; see also *id*. at p. 951 [in "determining whether an agency may proceed under CEQA's subsequent review provisions" the inquiry does not turn on "matters unrelated to the environmental consequences associated with the project"].) As discussed above, whether couched in terms of "significance" or "materiality" CEQA already has a test for whether project changes or new alternatives require another

round of public review and comment: the recirculation test. (See *Western Placer Citizens*, *supra*, 144 Cal.App.4th at p. 899.)

Additionally, the trial court effectively "bypassed otherwise applicable statutory and regulatory provisions" – to wit, Public Resources Code section 21092.1 and CEQA Guidelines section 15088.5 – by finding that project changes arising after circulation of the Draft EIR must, as a matter of law, also be analyzed for their effect on the stability of the Project Description. (See *Mani Brothers*, *supra*, 153 Cal.App.4th at p. 1400.)

Like CEQA's subsequent review provisions, the recirculation provisions of the CEQA statute and Guidelines "are accordingly designed to ensure that an agency that proposes changes" to project after circulation of the Draft EIR for public comment "'explore[s] environmental impacts not considered in the original environmental document.'" (*San Mateo Gardens*, *supra*, 1 Cal.5th at p. 951, quoting *Lishman*, *supra*, 140 Cal.App.4th at p. 1296.) Indeed, CEQA's recirculation provisions are specifically intended to address situations where agencies make changes to projects *after* the public has weighed in on the

Draft EIR. (See CEQA Guidelines § 15088.5, subd. (a); *Laurel Heights II*, *supra*, 6 Cal.4th at p. 1132 [through Pub. Resources Code section 21092.1 "the legislature apparently intended to reaffirm the goal of meaningful public participation in the CEQA review process"].)

Petitioners argue that this case is different, and *San Mateo Gardens* is distinguishable, because the principles governing the evolution of a project differ depending on whether they occur before or after the lead agency certifies the EIR. (Respondents' Brief, pp. 40-42.) The distinction does not stand up to scrutiny. The parallels between recirculation requirements and supplemental review are unmistakable. Both are designed to address situations in which, after the lead agency presents its analysis, a project evolves. Public Resources Code section 21092.1 requires recirculation of a Draft EIR when "significant new information" becomes available before the EIR is certified. (See CEQA Guidelines, § 15088.5.) Public Resources Code section 21166, subdivision (a), requires supplemental review where "[s]ubstantial changes are proposed in the project which will

require major revisions of the environmental impact report." (See CEQA Guidelines, §§ 15162-15164.) The California Supreme Court has noted the similarity of these provisions. Indeed, in the leading case concerning the standards for recirculating a Draft EIR, the Supreme Court expressly looked to section 21166 for guidance, stating: "Section 21166 governs the analogous situation of preparation of a subsequent or supplemental EIR after a final EIR is certified. The terms 'significant,' 'new information,' and 'substantial change' are all found in section 21166 or its implementing guidelines. For these reasons, we believe it is appropriate to look to these sources for guidance in interpreting section 21092.1." (*Laurel Heights II*, *supra*, 6 Cal.4th at p. 1129.) Petitioners thus attempt to draw a distinction where none exists.

In both instances, the rules do not focus on the court's subjective notion of whether the "project" has changed too much. Rather, the rules focus on what CEQA is all about: whether the changes that have occurred are environmentally meaningful. Whether those changes occur after the lead agency published the Draft EIR (Pub. Resources Code, § 21092.1), or certifies the Final

EIR and approves the project (Pub. Resources Code, § 21166), is logically irrelevant. The focus ought to be on whether the changes will cause physical impacts, not on the court's "abstract evaluation" (*San Mateo Gardens*, *supra*, 1 Cal.5th at p. 944) or on "semantic label[s]." (*Treasure Island*, *supra*, 227 Cal.App.4th at p. 1048, quoting *California Oak Foundation v. Regents of University of California* (2010) 188 Cal.App.4th 227, 271, fn. 25.)

Here, the trial court found the City abused its discretion by failing to circulate for public review a Draft EIR that included either Alternative 5 or a revised Project Description. (JA 347-348.) Because the legislature intended CEQA's recirculation provisions to address such a situation, the trial court erred by treating the City's decision not to recirculate as anything other than a recirculation issue.

Lastly, and "[m]ost significantly," the trial court ruled that courts must decide, as a matter of law, whether project changes rise to the level of materiality, "*without consideration of the environmental impacts of the later project*." As in *Mani Brothers*, this approach "violates the legislative mandate [in Public

Resources Code section 21083.1." (*Mani Brothers*, *supra*, 153 Cal.App.4th at p. 1401, italics original; see also *Western Placer Citizens*, *supra*, 144 Cal.App.4th at p. 899 ["When interpreting CEQA, courts are not authorized to impose requirements not present in the statute"].) "According to the legislative history, the purpose of [section 21083.1] was to 'limit judicial expansion of CEQA requirements' and to 'reduce the uncertainty and litigation risks facing local governments and project applicants by providing a 'safe harbor' to local entities and developers who comply with the explicit requirements of the law.'" (*Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1107, citation omitted.) Thus, like *Lishman*'s "new project" test, the trial court's "materially different" test should be rejected as an improper and unnecessary expansion of CEQA's requirements.

CONCLUSION

The League of Cities and CSAC request that, in resolving this appeal, the Court establish rules concerning the evolution of a project during the CEQA process that are clear and objective, so that the members of the League of Cities and CSAC will be able

to follow them. The League of Cities and CSAC believe that the best way to do that is to apply longstanding rules governing recirculation of a Draft EIR. Those rules "fit" the facts as shown in the record.

The trial court erred in accepting Petitioners' artful recasting of their claims as involving the EIR's project description. The Court's resolution of this issue should turn on how it fits with the CEQA process as a whole, not on Petitioners' "strenuous" efforts to invoke an analytic framework involving a non-deferential standard of review. (*Treasure Island*, *supra*, 227 Cal.App.4th at p. 1046.) Here, the project evolved. CEQA has a mechanism for dealing with that inevitability: recirculation. There is no reason to supplant this mechanism with a new, vague rule.

The League of Cities and CSAC appreciate the opportunity to provide this perspective to the Court.

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Respectfully submitted,

Dated: August 24, 2020 REMY MOOSE MANLEY LLP

By: _____
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LEAGUE OF CALIFORNIA
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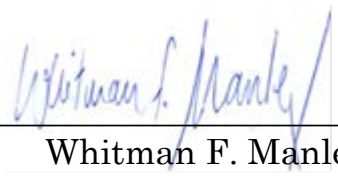
CERTIFICATE OF WORD COUNT

[Cal. Rules of Court, Rule 8.204(c)]

Pursuant to Rule 8.204(c) of the California Rules of Court, I hereby certify that this **[PROPOSED] AMICUS CURIAE BRIEF** contains 8,334 words, according to the word counting function of the word processing software used to prepare this brief.

Executed on August 24, 2020, at Sacramento, California.



Whitman F. Manley

Southwest Regional Council of Carpenters, et al v. City of Los Angeles, et al Court of Appeal Second Appellate District, Division 4, Case No. B301374
(Los Angeles Superior Court Case No. BS175189)

PROOF OF SERVICE

I, Michele L. Nickell, am a citizen of the United States and I am employed in the City and County of Sacramento. My business address is 555 Capitol Mall, Suite 800, Sacramento, California, 95814. My email address is mnickell@rmmenvirolaw.com. I am over the age of 18 years and I am not a party to the above-titled action.

On August 24, 2020, I served the following:

APPLICATION OF THE LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA STATE ASSOCIATION OF COUNTIES FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANTS CITY OF LOS ANGELES AND THE ICON AT PANORAMA, LLC; [PROPOSED] AMICUS CURIAE BRIEF

☒ **VIA TRUEFILING** by causing a true copy thereof to be electronically delivered to the following person(s) or representative(s) at the email address(es) listed below. I did not receive any electronic message or other indication that the transmission was unsuccessful.

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury that the foregoing is true and correct and that this Proof of Service was executed this 24th day of August 2020, at Sacramento, California.

Michele L. Nickell

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