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October 18, 2013

VIA FEDERAL EXPRESS

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

Re: *California Building Industry Association v Bay Area Air Quality Management District*, S213478. Letter in support of Petition for Review.

Honorable Justices of the California Supreme Court:

Pursuant to California Rule of Court 8.500(g), this letter is submitted on behalf of the organizations described below as amici curiae in support of the petition for review in this case.

Amici curiae have in common a critically important goal: that affordable housing be made available to all Californians. The Center for Creative Land Recycling is a nonprofit organization focused on creating sustainable communities and encouraging environmentally conscious and socially responsible development through land recycling. First Community Housing is a nonprofit public benefit corporation that designs, develops and manages affordable housing for low-income households, including families, senior citizens, and special needs populations. Christian Church Homes, the largest nonprofit, low-income senior housing program in Northern California, builds and manages affordable housing communities for low-income seniors. Burbank Housing is a nonprofit organization that builds and manages family and senior rental housing and creates home ownership opportunities, including for people with special needs. BRIDGE Housing Corporation, one of California's largest non-profit developers, is also dedicated to providing high-quality affordable housing for California's families and seniors. Nonprofit Housing Association of Northern California, an organization with 700 members, advocates for favorable conditions for affordable housing development, including housing legislation and development of land use policy.

Each of these organizations has a strong interest in ensuring that CEQA is interpreted in a way that ensures prompt and effective compliance while avoiding the unnecessary burdens created when CEQA reviews are expanded to cover issues outside the purview of the statute.

Uncertain, ambiguous or unnecessary CEQA requirements prolong the entitlement process, encourage lawsuits that delay projects and act as a drain on public and private resources, without any corresponding environmental benefit.

These organizations filed an amicus curie brief with the court of appeal urging the court to address the important question whether BAAQMD's significance thresholds and CEQA Guidelines conflict with CEQA to the extent they purport to require analysis of impacts of pollution from existing emissions sources on proposed projects. The appellate court ultimately found it unnecessary to reach that issue but, in the process, engaged in a lengthy discussion that strongly implied that cases holding that CEQA does not require evaluation of the impacts of the environment on a proposed project were either wrongly decided or are no longer good law.

I. REASONS THE PETITION SHOULD BE GRANTED.

Review of the court of appeal's decision is necessary to settle important questions of law. The first involves the legal question of what scope of impact review is required by CEQA. The court of appeal opinion creates significant confusion and uncertainty about whether CEQA extends beyond a proposed project's impacts on the environment and requires that the impacts of the environment on the project also be examined. The opinion also adds to the confusion and uncertainty about the specific application of this legal question in this case: whether the impacts of air pollution *on* a project must be considered as an environmental impact *of* that project. This too is a matter of substantial public interest and concern.

II. THE COURT OF APPEAL OPINION CREATES CONFUSION AND UNCERTAINTY REGARDING THE SCOPE OF REVIEW REQUIRED BY CEQA.

This case implicates a critically important question of broad public concern: Whether environmental impact assessments under CEQA must evaluate not only all of a project's impacts on the environment, but also all of the environment's impacts on the project.

Four courts of appeal have held that CEQA is confined to the impacts of proposed projects on the environment, and does not extend to the impacts of the environment on proposed projects. *Ballona Wetlands Land Trust v. City of Los Angeles*, 201 Cal.App.4th 455, 473 (2011); *South Orange County Wastewater Authority v. City of Dana Point*, 196 Cal.App.4th 1604, 1614–1618 (2011); *City of Long Beach v. Los Angeles Unified School District*, 176 Cal. App. 4th 889, 905 (2009); *Baird v. County of Contra Costa*, 31 Cal.App.4th 1464, 1468 (1995). The opinion here, however, clouds what should be a clear answer to the question whether CEQA covers the environment's impact on projects by including a lengthy discussion of these cases that plainly suggests they were wrongly decided or are no longer applicable.

It may be true, as BAAQMD contends, that the opinion does not create a formal conflict with the other decisions. After examining those decisions, and providing its analysis of them, the

court stated that it did not need to decide the question whether CEQA extends to the environment's impacts on a proposed project. The result is that while the decision may not create a formal conflict, it unquestionably fosters uncertainty in the law. For example, West Publishing Company has already attached a yellow flag to the four cases discussed above as a result of their treatment by the court of appeal in this case. According to West's explanation of its KeyCite system, a "yellow flag in cases warns that the case has some negative history but hasn't been reversed or overruled."[1] This is the sole decision cited as the basis for questioning the ongoing validity of these cases.

The uncertainty this decision creates will have a far-reaching effect. CEQA is carried out by nonlawyers -- public agency staff, environmental professionals, planners, technical consultants, and others who are not attorneys, but nevertheless have front-line responsibility for translating CEQA's complex requirements into legally adequate environmental documents. The take-home message they will receive from the decision is that the court of appeal upheld the BAAQMD thresholds and guidelines even though they treat the effect of existing air pollution *on* a proposed project as though that pollution were an environmental impact *due to* the project. Untutored in the subtle distinctions between decisional law and dicta, they are likely to conclude that the court reviewed, considered and disagreed with the cases holding that CEQA does not extend to the impacts of the environment on proposed projects. At a minimum, they will interpret the court's decision as a determination that BAAQMD's threshold and guidelines comport with CEQA, and therefore that CEQA must require analysis of the environment's impact on a proposed project. Despite BAAQMD's protestations to the contrary, the court's ambiguous treatment of the issue undoubtedly will foster uncertainty in the law about the critical question of whether CEQA mandates that the impacts of the environment on a project must be assessed whenever a project's environmental impacts are reviewed.

The question whether CEQA dictates assessment of the environment's impacts on a project is of critical importance to the development of affordable housing, particularly smaller development projects in urban areas. Often, such projects can qualify for one of the exemptions adopted to encourage such development because they will not result in any significant environmental impacts. *See* Guideline 15332; Pub Res Code §§21159.21, 21159.24, 21155, 21083.3. *See e.g., Banker's Hill, Hillcrest, Park W. Community Preservation Group v City of San Diego* (2006) 139 Cal.App.4th 249; *Wollmer v City of Berkeley* (2011) 193 Cal.App.4th 1329. In many other situations, such projects can be designed and conditioned in a way that will avoid impacts that might otherwise occur allowing them to proceed based on a mitigated negative declaration. *See, e.g., Baldwin v City of Los Angeles* (1999) 70 Cal.App.4th 819; *Citizens for Responsible Dev. v City of W. Hollywood* (1995) 39 Cal.App.4th 490; *Bowman v City of Berkeley* (2004) 122 Cal.App.4th 572; *Park Area Neighbors v Town of Fairfax* (1994) 29 Cal.App.4th 1442. However, a claim that the environment might have a significant effect on the

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[1](See Westlaw KeyCite citation research services, available at: http://text.westlaw.com/welcome/wlto/help/default.aspx?fn=_top&rs=ACCS8.05&rp=%2Fwelcome%2Fwlto%2Fhelp%2Fdefault.aspx&helpkey=KeyCite&vr=2.0).

project, if treated as a required component of review under CEQA, can preclude an agency from relying on these methods for simplifying CEQA review, even though the project will not have a significant impact on the environment.

Furthermore, claims that the environment will adversely affect a project are all too often used as a sword in efforts to block projects that are opposed by neighboring interests for reasons other than protection the natural environment. *See, e.g., Baird v County of Contra Costa, supra* (action brought by neighboring landowners to challenge expansion of residential addiction treatment facility based on asserted impacts of existing contamination on facility residents); *South Orange County Wastewater Auth. v City of Dana Point, supra* (action brought by wastewater authority to challenge residential project based on asserted impacts of odor and noise from its own wastewater treatment plant); *City of Long Beach v. Los Angeles Unified School District, supra* (action brought by City of Long Beach to challenge siting of LAUSD school within the city which included multiple claims relating to impacts of the environment on the project).

III. WHETHER IMPACTS OF AIR POLLUTION UPON A PROJECT MUST BE TREATED AS AN IMPACT OF THE PROJECT IS A MATTER OF SUBSTANTIAL PUBLIC INTEREST AND CONCERN.

The conflict between BAAQMD's significance thresholds and guidelines and established case law has resulted in pervasive confusion and uncertainty among Bay Area lead agencies and the environmental professionals and planners that work with them about how to comply with CEQA. In reliance on this court of appeal decision, BAAQMD will continue to instruct agencies to treat the impacts of existing air pollution on proposed projects as an impact of the proposed project under CEQA (requiring mitigation), despite the conflict with the case law.

As numerous Bay Area agencies pointed out to BAAQMD before it adopted its thresholds, the requirement that agencies apply CEQA to analyze and mitigate impacts of existing sources of air pollution on future residents deters infill development, discourages development adjacent to transit hubs and inhibits development of affordable housing. Most such development projects are located in urban cores, near freeways or busy roadways and other sources of air pollution. Any such projects must make economic sense within the constraints imposed. The significant costs and inherent inaccuracies involved in trying to quantify long-term air quality risks on a specific residential project through the CEQA process make the District's ad hoc, project-by-project approach akin to requiring each housing project to develop its own site-specific seismic hazard map; they create a level of uncertainty regarding the scope and expense of CEQA review that serves as a powerful disincentive to proponents of infill projects, especially affordable housing projects that already operate at the margins of economic feasibility. Lead agencies have other, more appropriate tools for ensuring that new developments do not expose new residents to health risks. Zoning ordinances, such as San Francisco's Article 38, can identify areas of air quality concern and either prohibit development that brings sensitive

receptors into those areas or require developers of such projects to implement certain mitigation measures to protect the health of future residents.

BAAQMD's assertion (Answer at p.2) that Bay Area agencies need not use the thresholds if they believe they exceed CEQA's requirements is no answer. As a practical matter, agencies are constrained to comply with BAAQMD's thresholds and guidelines notwithstanding their inconsistency with CEQA. BAAQMD, acting as the regional agency that regulates air pollution, adopted them as the standard for CEQA compliance, asserting they "are consistent with the principles and jurisprudence of CEQA law." (AR 1:3). Given BAAQMD's position, local agencies are unsure about what CEQA does and does not require, and are justifiably concerned that failure to conform to BAAQMD's standards would expose them to legal risk. They are fully aware that any agency that ventures to ignore them would do so at its peril given the strong presumption in favor of thresholds of significance adopted by such agencies. *See, e.g., Rialto Citizens for Responsible Growth v City of Rialto* (2012) 208 Cal.App.4th 899.

The court of appeal's treatment of this issue has made the quandary worse. Local agencies must struggle with whether to toe the line established by BAAQMD and treat the effects of existing air pollution on proposed projects as environmental impacts of the project, or follow the case law, which states that such analysis is not required under CEQA. The dilemma is particularly acute when the project is conceived to advance policies favoring affordable housing or infill and transit-oriented development. The decision whether or not to follow the BAAQMD's CEQA thresholds and guidelines can mean the difference between a successful affordable, infill or transit-oriented project and no project at all. If this decision stands, most agencies faced with the choice of either using the BAAQMD's thresholds and guidelines, or following established caselaw, will opt for what now appears to be the safe harbor. Review by this Court is urgently needed to resolve what is now a de facto conflict in the law and provide clear direction to public agencies on the proper scope of CEQA review.

Sincerely,

Stephen L. Kostka

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and employed in San Francisco County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is Four Embarcadero Center, Suite 2400, San Francisco, California 94111-4131. I am readily familiar with this firm's practice for collection and processing of correspondence for mailing with the United States Postal Service. On October 18, 2013, I placed with this firm at the above address for deposit with the United States Postal Service a true and correct copy of the within document(s):

LETTER IN SUPPORT OF PETITION FOR REVIEW

in a sealed envelope, postage fully paid, addressed as follows:

SEE ATTACHED LIST

Following ordinary business practices, the envelope was sealed and placed for collection and mailing on this date, and would, in the ordinary course of business, be deposited with the United States Postal Service on this date.

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

Executed on October 18, 2013, at San Francisco, California.

Michelle L. Rodriguez

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