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December 12, 2017

VIA PERSONAL DELIVERY

City Council
City of Long Beach
333 West Ocean Boulevard
Long Beach, California 90802

Re: Revised Transit Occupancy Tax Sharing Agreement with American Life, Inc.; 100 East Ocean Boulevard Hotel Project

Dear Mayor Garcia and Honorable City Council Members:

This firm represents Long Beach Citizens for Fair Development ("LBCFD") with regard to the proposed hotel development project located at 100 East Ocean Boulevard. I am in receipt of the staff report for the proposed first amendment to the purchase and sale agreement, and revised transit occupancy tax sharing agreement. This letter is intended to inform the City of Long Beach ("City") that the amended purchase and sale agreement as well as the revised transit sharing agreement does not comply with the California Environment Quality Act ("CEQA"). As you know, the City has been sued by Citizens Against Downtown Long Beach Giveaways for non-compliance with the California Environment Quality Act with regard to the above-referenced project. This firm represents petitioner in that legal action. The same legal problems associated with the project continue to be present. These issues are outlined in the First Amended Petition for Writ of Mandate and Injunctive Relief that was filed in Los Angeles County Superior Court, a correct copy of which is attached as Exhibit 1. The causes of action brought against the City are (1) Violation of CEQA (e.g. unusual circumstances, unlawful pre-commitment, and piecemealing, and (2) Violation of Successor Agency Responsibilities.

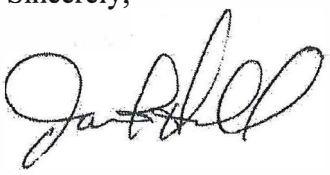
LBCFD brings the City's attention to the continued failure to comply with CEQA as well as other applicable laws and regulations. A further explanation as to the legal failings of the City are contained in the Opening Brief filed by the Petitioner in Los Angeles County Superior Court, true and correct copy of which is attached as Exhibit 2. Further explanation is contained in the Reply Brief also filed Los Angeles County Superior Court, a true and correct copy of which is

attached as Exhibit 3. LBCFD incorporates all of the arguments raised in the First Amended Petition for Writ of Mandate, the Opening Brief and in the Reply Brief and draws the City's attention to the arguments and failings outlined in these documents. LBCFD urges the City to pause and conduct the required environmental review before proceeding any further with this Project.

Finally, LBCFD vigorously objects to the characterization that the lawsuit played any role in the developer's desire to seek even more financial benefits from the City in terms of tax rebates and additional density for the project. The Petitioner in the legal action did not seek an injunction and nothing prevented the City or the developer from proceeding with the entitlement process or the environmental review. Staff is merely using this as an excuse to justify the proposed action and to scapegoat the Petitioner.

I may be contacted at 310-982-1760 or at jamie.hall@channellawgroup.com if you have any questions, comments or concerns.

Sincerely,



Jamie T. Hall

Exhibit 1

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Attorneys for Petitioner,
CITIZENS AGAINST DTLB GIVEAWAYS

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES – STANLEY MOSK COURTHOUSE

CITIZENS AGAINST DTLB GIVEAWAYS, an unincorporated association Petitioner, vs. CITY OF LONG BEACH, a municipal corporation, Respondent AMERICAN LIFE, INC. OF SEATTLE, WA and DOES 1-25 Real Parties in Interest	Case No.: BS 163217 Hon. James C. Chalfant Dept. 85 **FIRST AMENDED VERIFIED PETITION FOR WRIT OF MANADATE FOR DECLARATORY AND INJUNCTIVE RELIEF** [California Environmental Quality Act ("CEQA"), Public Resources Code, sections 2100 et seq.] **VIA FAX**

Petitioner, CITIZENS AGAINST DTLB GIVEAWAYS ("Petitioner"), alleges through this First Amended Verified Petition for Writ of Mandate for Declarative and Injunctive Relief ("First Amended Petition"), as follows:

INTRODUCTION

1. Petitioner challenges the pending approval by Respondent City of Long Beach ("City " or "Respondent") of the Notice of Exemption from CEQA ("Notice") and the related discretionary approvals for a proposed hotel development located at 100 East Ocean Boulevard, Long Beach, CA (the "Project") Project Title CE-16-070, Assessor Parcel Number 7278-007-928. As noted below, the Project is not exempt from the California Environmental Quality Act, Public Resources Code section 21000, et seq. ("CEQA").

2. Petitioner requests that this Court vacate, set aside, rescind and void all of the Project Approvals, actions, resolutions, ordinances, plan amendments and findings related to the Project. Petitioner requests that the Court require the City to conduct the appropriate environmental review for the project was required by CEQA. Petitioner seeks a Peremptory Writ of Mandate under California Code of Civil Procedure section 1094.5, directing Respondent to vacate, rescind and set aside all Project approvals.

3. Petitioner requests that this Court enjoin Respondent from entering into either an agreement to sell the Project or an agreement sharing any transient occupancy tax revenues associated with development of the property.

PARTIES

4. Petitioner, Citizens Against DTLB Giveaways ("CADG") is an unincorporated association dedicated to the protection of both the community and the environment in Long Beach. Petitioner and its respective members have a direct and substantial

beneficial interest in the ensuring that Respondent complies with laws relating to environmental protection. Petitioner and its respective members are adversely affected by Respondents' failure to comply with CEQA in planning on approving the project. Petitioner has standing to assert the claims raised in this petition because Petitioner and its members aesthetic and environmental interests are directly and adversely affected by Respondent's pending approval of the project.

5. Respondent, City of Long Beach, is a charter city incorporated under the laws of the state of California. The City is the lead agency under CEQA.

6. Petitioner is informed and believe and based thereon allege that American Life, Inc. of Seattle, WA is a corporation organized in Washington and operating in the State of California hereinafter referred to as "Developers."

7. Petitioner is ignorant of the true names and capacity of Real Parties sued herein as DOES 1-25, inclusive, and therefore sues these Real Parties by such fictitious names. Petitioner will amend this Petition to allege the true names and capacities of fictitiously named Real Parties in Interest.

JURISDICTION AND VENUE

8. This Court has jurisdiction over the writ action under section 1094.5 of the Code of Civil Procedure, sections 21168 and 21168.5 of the Public Resources Code.

9. Petitioner has standing to obtain a restraining order to prevent Respondent from selling the Project to Developers pursuant to Code of Civil Procedure § 526a in that Petitioner consists of citizens and residents of Long Beach who are liable to and have paid taxes to Petitioner in the previous year.

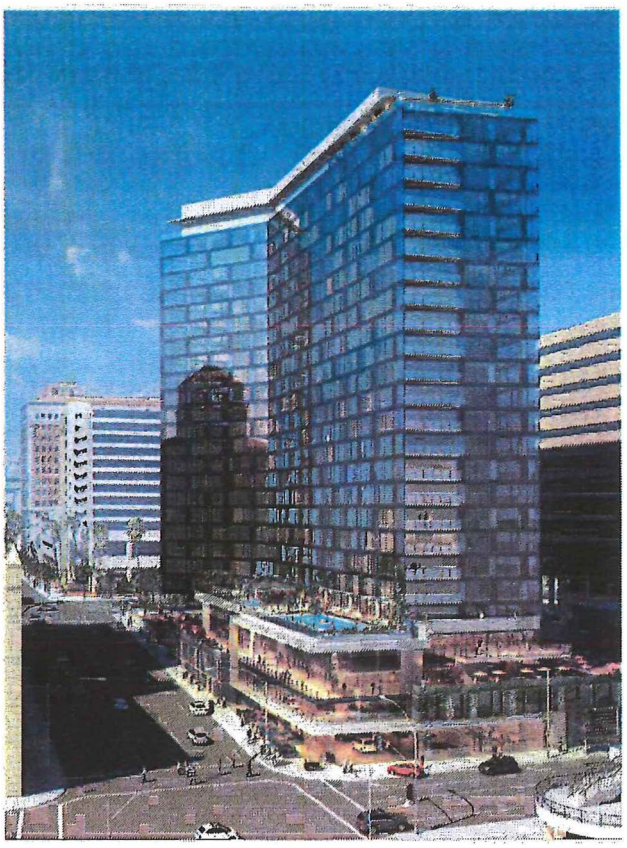
10. This Court also has jurisdiction over the writ action under section 1085 of the Civil Code of Procedure. Venue for this action properly lies in the Los Angeles Superior Court because Respondent and the Project are located in Los Angeles County.

PROJECT

11. The project is a hotel development project ("Project") that would replace what is now a vacant lot of 35,510 square feet located at 100 Ocean Boulevard in Long Beach, the site of the former Jergens Trust building which was torn down by the City in 1986 to make way for development. The project proposed to develop 427 hotel rooms in a 25-story building.

12. The Staff Report issued by the City for the Project, describes the Project in detail and includes both a photo-simulation and map depicting the Project as seen below.

Photo-Simulation of Project



PROJECT BACKGOUND, ENVIRONMENTAL WAIVER AND APPROVAL

13. The City approved the Project at a City Council meeting on May 17, 2016 and authorized the execution of a Purchase and Sale Agreement with the Developer. The City accepted the NOE, which concluded that the activity in question qualified for a Class 1 and 8 exemption.

14. At the May 17, 2016 City Council Meeting, the City Council members, Mayor and Vice Mayor were well aware that this Project was much more than just the simple sale of property; rather, it was an elaborate and major development that they had predetermined would be sold and developed without any interference.

15. Further, at the May 17, 2016 City Council Meeting, a member from Petitioner notified the City Council and Respondent that Petitioner intended on bringing a taxpayer's action objecting to the process in which the Project was sold to Developers and the proposed transient occupancy tax sharing agreement.

16. A Notice of Exemption ("NOE") for the Project was prematurely filed with the Los Angeles County Registrar Clerk Recorder on March 15, 2016 as document number 2016-062793.

17. The filing of the NOE on March 15, 2016 was premature because the City had not yet approved the project. The premature filing of a NOE does not start the running of the statute of limitations. *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 965.

18. In the NOE, the City sought to define the "Project" as the mere "Transfer of Ownership" of the property in an attempt to avoid conducting environmental review under CEQA.

19. However, the "Project" includes the proposed development, *not simply the transfer of real estate*. In fact, the Request for Proposal ("RFP") for the Project issued by the City specifically states that the City was seeking proposals for both the purchase and *development* of the property in question. On July 8, 2015, the City of Long Beach advertised RFP CM15-163. In the RFP, the City defined the scope of services as follows:

> "The City of Long Beach (City) invites interested parties to tender a Proposal for the purchase and development former Redevelopment Agency-owned property located at 100 East Ocean Boulevard (Site). A Site Map is included as Exhibit 1. The Site is located in Downtown Long Beach. Downtown Long Beach is one of Southern California's most unique waterfront urban destinations to live, work and play. Visitors can easily access Downtown via public transit and explore its many shops, restaurants and attractions by bike or on foot. Downtown Long Beach offers all the amenities of a major urban center within a clean, safe community and is enhanced by the temperate climate and breathtaking ocean views. The purpose of this RFP is to solicit qualifications and high rise mixed use proposals from qualified Buyer/Developers addressing a synergistic approach to development of the Site consistent with the goals and objectives of the Long Range Property Management Plan, the Strategy for Development, Greater Downtown Long Beach, and the former Redevelopment Agency with a focus on high density mixed use. Respondents must demonstrate superior experience, financial strength and organizational resources to develop the Site with an architecturally significant project appropriate to its urban setting."

20. In approving the purchase and sale agreement on May 17, 2016, the City unlawfully sought to piecemeal the Project in order to avoid compliance with CEQA.

CEQA'S SUBSTANTIVE AND PROCEDURAL REQUIRIEMENTS

21. Under CEQA lead agencies, such as Respondent, are required to prepare a complete and legally adequate EIR prior to approving any discretionary project that may have a significant adverse effect on the environment.

22. "CEQA broadly defines a 'Project' as 'an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and ... [¶] ... [¶] ... that involves the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies.' [Citation.] [¶] The statutory definition is augmented by the [CEQA] Guidelines [Cal.Code Regs., tit. 14, § 15000 et seq.], which define a 'project' as 'the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment....' " *Tuolumne County Citizens for Responsible Growth, Inc. v. City of Sonora* (2007) 155 Cal.App.4th 1214, 1222, 66 Cal.Rptr.3d 645 (Tuolumne County).

23. "The EIR is the primary means of achieving the Legislature's considered declaration that it is the policy of this state to 'take all action necessary to protect, rehabilitate, and enhance the environmental quality of the state.' [Citation.] The EIR is therefore 'the heart of CEQA.' [Citations.] An EIR is an 'environmental "alarm bell" whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return.' "4 *Laurel Heights*, supra, 47 Cal.3d at p. 392, 253 Cal.Rptr. 426, 764 P.2d 278.

24. "Consequently, like so many other matters in life, timing in EIR preparation is essential." *Berkeley Keep Jets Over the Bay Com. v. Board of Port Cmrs.* (2001) 91 Cal.App.4th 1344, 1358, 111 Cal.Rptr.2d 598 (Berkeley Jets). An EIR " 'should be prepared as early as feasible in the planning process to enable environmental considerations to influence project program and design and yet late enough to provide meaningful information for environmental assessment.' " *Laurel Heights,* supra, 47 Cal.3d at p. 395, 253 Cal.Rptr. 426, 764 P.2d 278. "[T]he later the environmental review process begins, the more bureaucratic and financial momentum there is behind a proposed project, thus providing a strong incentive to ignore environmental concerns that could be dealt with more easily at an early stage of the project. "Environmental review which comes too late runs the risk of being simply a burdensome reconsideration of decisions already made and becoming the sort of 'post hoc rationalization[ ] to support action already taken,' which our high court disapproved in [Laurel Heights]." *Berkeley Jets*, supra, 91 Cal.App.4th at p. 1359, 111 Cal.Rptr.2d 598.

25. Accordingly, "CEQA forbids 'piecemeal' review of the significant environmental impacts of a project." *Berkeley Jets*, supra, 91 Cal.App.4th at p. 1358, 111 Cal.Rptr.2d 598. Agencies cannot allow "environmental considerations [to] become submerged by chopping a large project into many little ones—each with a minimal potential impact on the environment—which cumulatively may have disastrous consequences." *Bozung*, supra, 13 Cal.3d at pp. 283–284, 118 Cal.Rptr. 249, 529 P.2d 1017 [EIR required when city annexed land for anticipated development].)

26. The California Supreme Court set forth a piecemealing test in *Laurel Heights* . "We hold that an EIR must include an analysis of the environmental effects of future expansion or other action if: (1) it is a reasonably foreseeable consequence of the initial project; and (2) the future expansion or action will be significant in that it will likely change the scope

or nature of the initial project or its environmental effects." *Laurel Heights*, supra, 47 Cal.3d at p. 396, 253 Cal.Rptr. 426, 764 P.2d 278.

27. There may be improper piecemealing when the purpose of the reviewed Project is to be the first step toward future development. See, e.g., *Laurel Heights*, supra, 47 Cal.3d at p. 398, 253 Cal.Rptr. 426, 764 P.2d 278 [university planned to occupy entire building eventually]; *Bozung*, supra, 13 Cal.3d at pp. 269–270, 118 Cal.Rptr. 249, 529 P.2d 1017 [city annexed land so it could rezone it for development]; *City of Carmel-by-the-Sea v. Board of Supervisors* (1986) 183 Cal.App.3d 229, 244, 227 Cal.Rptr. 899 [county rezoned land as "a necessary first step to approval of a specific development project"]; *City of Antioch v. City Council* (1986) 187 Cal.App.3d 1325, 1337, 232 Cal.Rptr. 507 (Antioch) [negative declaration wrongly issued; "the sole reason" city approved road and sewer construction was "to provide a catalyst for further development"]; see also id. at p. 1336, 232 Cal.Rptr. 507 ["[c]onstruction of the roadway and utilities cannot be considered in isolation from the development it presages"].

28. And there may be improper piecemealing when the reviewed project legally compels or practically presumes completion of another action. *Nelson v. County of Kern* (2010) 190 Cal.App.4th 252, 272, 118 Cal.Rptr.3d 736 [EIR for reclamation plan should have included mining operations that necessitated it]; Tuolumne County, supra, 155 Cal.App.4th at p. 1231, 66 Cal.Rptr.3d 645 [home improvement center "cannot be completed and opened legally without the completion of [a] road realignment"]; *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 732, 32 Cal.Rptr.2d 704 [EIR for residential development should have included sewer expansion that was a "crucial element[ ]" of development]; *Plan for Arcadia, Inc. v. Arcadia City Council* (1974) 42 Cal.App.3d 712, 726, 117 Cal.Rptr. 96 (Plan for Arcadia) [shopping center, parking lot, and adjacent road widening "should be regarded as a single project"].

REDEVELOPMENT HISTORY

29. Petitioner is informed and believes and based thereon alleges that Petitioner is the successor agency to the Redevelopment Agency of the City of Long Beach following the State of California's dissolution of the various redevelopment agencies throughout the State in 2012.

30. On or about February 2, 2015, the "Revised Long Range Property Management Plan" ("Long Range Plan"), prepared by Petitioner, as the "Successor Agency of the Redevelopment Agency of the City of Long Beach," was approved by the Oversight Board of the Successor Agency to the Redevelopment Agency of the City of Long Beach. Thereafter, on March 10, 2015, the State of California Department of Finance approved the Long Range Plan.

31. Pursuant to the terms of the Long Range Plan, the Project was a part of several properties referred to as "Future Development Properties" that "...were acquired in furtherance of the goals and objectives of the Downtown Long Beach Redevelopment Plan, the Strategic Guide, and supporting complementary plans and studies. In order to create economic opportunity, promote economic development on a local level and **generate tax revenues for all levels of government**, this [Long Range] Plan proposed the continuance of land use and construction policies set forth in the supporting plans and studies, contemplating uses that embrace and promote quality of life improvements that meet the specific needs of the individual communities." (Long Range Plan, p. 38 [emphasis added].) Furthermore, "[p]roceeds from the sale of the Future Development properties [including the Project] will be first used to pay for marketing, maintenance, repairs, escrow and commission costs. **Remaining proceeds will be distributed to the taxing agencies consistent with the approved compensation agreements**." (Id., p. 39 [emphasis added].)

32. According to the Long Range Plan, the Project "...has been undeveloped and underutilized for over 20 years and continues to be a visual impediment to the connectivity between the Downtown, the Convention and Entertainment Center, the Pike at Rainbow Harbor, and Shoreline Village. The acquisition through eminent domain in 2010 was specifically intended to control the redevelopment of the site in order to facilitate high-density residential development. The economic recession served to sideline efforts until residential demand increased. With economic recovery in plan, the site will be competitively bid through an RFP process, that is intended to ensure high-density development to maximize overall economic benefit to downtown and in accordance with the use of eminent domain." (Long Range Plan, pp. 41-42.)

33. According to the Long Range Plan, the Project was acquired on February 1, 2011, and was valued at the time of purchase at $6.5 million. (Long Range Plan, Rev. Exh. F, p. 2.) Also according to the Long Range Plan, based on an appraisal done on or about October 11, 2012, the estimated current value was $4,450,000. (*Ibid.*)

34. According to the letter prepared by Mr. Conway dated May 17, 2016 regarding his request that the City Council approved the Project ("Conway Letter"), from the RFP process that began on July 8, 2015, three (3) proposals were received on November 10, 2015. The proposal favored by Mr. Conway is the hotel proposed by Developers which Mr. Conway admits do not have sufficient financial backing to build and will fail without Respondent's participation in "closing the economic gap." In order to meet the $47 million shortfall between Project costs and expected revenue, Respondent intends to enter into a 20-year agreement sharing the transient occupancy tax ("TOT") generated by usage of the proposed hotel on a 50/50 basis. According to Mr. Conway, the TOT sharing agreement would result in $27 million paid to Respondent without any of the $27 million being paid to any other taxing agency, with $27 million also being kept by Developers, i.e., a gift of public funds.

35. Also according to the Conway Letter, from the $7 million sale price, the sum of $5,880,000 would be paid to the Los Angeles County Auditor-Controller for distribution to the effected taxing agencies with $1,234,800 being kept by Respondent along with the $27 million from the TOT sharing agreement.

FIRST CAUSE OF ACTION

(VIOLATION OF CEQA)

Project does not qualify for stated exemptions

36. Respondent erroneously determined that the Project was exempt from CEQA.

37. The NOE filed by the City stated as follows: "*This activity qualifies for a categorical exemption with Class 1 and Class 8 as the appropriate exemptions*." There is no supporting documentation for the claimed categorical exemptions.

38. Class 1 Exemption is the existing facilities exemption. Per CEQA guidelines regarding Class 1 exemptions for existing facilities "*The key consideration is whether the project involves negligible or no expansion of an existing use*." *Bloom v. McGurk* (1994) 26 Cal.App.4th 1307. The Project does not qualify for Class 1 exemption that the Respondent claims in the Notice. Respondent's own staff report states that the "*the Subject Property has remained vacant and underutilized*."

39. Class 8 exemption is for "Actions by Regulatory Agencies for Protection of the Environment. "Construction activities and relaxation of standards allowing environmental degradation are not included in this exemption." *International Longshoremen's and Warehousemen's Union v. Board of Supervisors*, (1981)

116 Cal. App. 3d 265. As the Project is a construction activity it does not qualify for a Class 8 CEQA exemption.

40. Respondent prejudicially abused its discretion when it determined that the Project was exempt from CEQA.

Unusual Impacts Render Proposed Exemption Inapplicable

41. Categorical exemptions are not absolute. An exemption should be denied if one of the exceptions listed in section 15300.2 of the CEQA Guidelines applies. Section 15300.2(c) provides for one such exception and states that if there is a "reasonable possibility" of a "significant effect on the environment due to unusual circumstances," then the categorical exception cannot apply. *Id.*

42. This is not a simple real estate transaction. This includes a proposal to build a large multi-purpose building as described in the Staff Report issued for the instant Project.

Improper Piecemealing

43. Applying the law outlined above to the facts of this case, it is clear that the City is unlawfully piecemealing the Project. Approval of the Purchase and Sale Agreement is clearly the first step toward future development and its approval practically presumes completion of the remainder of the Project.

44. Further, as outlined in the Staff Report, there is clearly enough meaningfully information to address the environmental impacts of the Project. The development concept has been clearly disclosed and is quite detailed. CEQA requires the City to conduct environmental review as early as feasible and the City cannot defer environmental analysis until after the Purchase and Sale Agreement has been approved. This would amount to unlawful piecemealing.

Unlawful Pre-commitment

45. Beginning CEQA review too late can mean a lead agency no longer comes to a project with an open mind, and that opportunities to implement feasible alternatives and mitigation measures will have been lost. In such a case, an agency has "pre-committed" to the project. Pre-commitment can occur under various circumstances, for example, conducting CEQA review after the agency has already made up its mind to go forward with a project; or when the agency has made such an investment of staff time and resources that the momentum for the project becomes so great that, as a practical matter, the agency's evaluation of alternatives is limited; or potentially when the agency has approved certain action which moves the project forward even though it technically reserves the right to reconsider its commitment to the entire project. Pre-commitment to a project has been repeatedly condemned by the California Supreme Court as rendering the CEQA review process as little more than a post hoc rationalization for a decision already made and defeating the fundamental purposes of CEQA. *See Save Tara v. City of West Hollywood* (2008) 45 Cal. 4th 116. Pre-commitment has the potential to bias the results of the environmental review process. *Bozung v. Local Agency Formation Commission of Ventura County* (1975) 13 Cal. 3d 263.

46. Here, the City's approval of the Purchase and Sale Agreement coupled with the detailed development concept received by the Developer has effectively precluded alternatives and mitigation measures that CEQA would otherwise required to be considered, including the alternative of not going forward with the project. The City specifically evaluated and rejected alternatives to the development concept put forth by the Developer in the course of reviewing the proposals that had been submitted through a RFP process developed by the City for the sale of former Redevelopment Agency properties. The City received three (3) proposals, which were reviewed by a panel.

47. Furthermore, because the City has made such an investment of staff time and resources in the RFP process for the Project and stands to make a significant amount of money if the property is sold, the momentum towards approval of the Project is so great that, as a practical matter, the City's evaluation of alternatives will necessarily be limited if CEQA review is deferred until after the Purchase and Sale Agreement is approved. In sum, the City has unlawfully pre-committed to the Project in violation of CEQA.

SECOND CAUSE OF ACTION

(DECLARATORY RELIEF)

48. Petitioner re-alleges and incorporated by reference the preceding paragraphs in their entirety, as though fully set forth herein.

49. Petitioner request as judicial declaration the Respondents' actions alleged in this Petition have violated and will violate CEQA. Such a declaration is necessary at this time in order that Petitioner and Respondent may ascertain their rights and duties.

50. Petitioner has no plain, speedy or adequate remedy in the ordinary course of law.

THIRD CAUSE OF ACTION

(INJUNCTIVE RELIEF)

51. Petitioner re-alleges and incorporated by reference the preceding paragraphs in their entirety, as though fully set forth herein.

52. Respondents are threatening to proceed with development and construction of the Project in the near future. This action will bring irreparable harm to the petitioner and all other who reside, work or own property within the proximity of the project. A temporary restraining order and preliminary and permanent injunction should issue restraining Respondent form taking and further action related to the project.

FOURTH CAUSE OF ACTION

(VIOLATION OF SUCCESSOR AGENCY RESPONSIBILITIES)

53. Petitioner re-alleges and incorporated by reference the preceding paragraphs in their entirety, as though fully set forth herein.

54. Pursuant to Health & Safety Code § 34117, subdivision (e), Respondent, as the successor agency to the Redevelopment Agency for the City of Long Beach, is required to, inter alia, "[d]ispose of assets and properties of the former redevelopment agency as directed by the oversight board; provided, however, that the oversight board may instead direct the successor agency to transfer ownership of certain assets pursuant to subdivision (a) of Section 34181. The disposal is to be done expeditiously and in a manner aimed at maximizing value. Proceeds from asset sales and related funds that are no longer needed for approved development projects or to otherwise wind down the affairs of the agency, each as determined by the oversight board, shall be transferred to the county auditor-controller for distribution as property tax proceeds under Section 34188. The requirements of this subdivision shall not apply to a successor agency that has been issued a finding of completion by the department pursuant to Section 34179.7." (Health & Saf. Code, § 34177, subd. (e).)

55. Respondent has breached its duties under Health & Safety Code § 34177, subdivision (e), by proceeding with the Project as proposed at the May 17, 2016 City Council meeting in at least each of the following ways:

    a. Failing to sell the Project at the highest price offered in the RFP process;

    b. Instead of maximizing the sale price of the Project as required by the law to generate revenue payable to taxing agencies other than Respondent, Respondent entry into the proposed agreements with Developers (1) reduces the amount of money payable to the affected taxing agencies and (2) allows Developers to use

the Property in a manner that generates TOT that is only payable to Respondent and no other taxing agencies, but also allows Developers to share in that revenue;

c. Failing to dispose of the Project in an expeditious manner and without maximizing value; and

d. Allowing a use of the Project that is not high-density residential use as provided for in the previously-approved Long Range Plan.

56. Accordingly, Petitioner seeks a writ of mandate enjoining Respondent from entering into an agreement with Developers to sell the Project to Developers and an agreement sharing the TOT revenue from the Project with Developers.

PRAYER FOR RELIEF

WHEREFORE, Petitioner prays for relief as follows:

1. For alternative and peremptory writs of mandate, commanding Respondent to

   a. Vacate and set aside approvals of the project.

   b. Vacate and set aside the Notice of Exemption from CEQA for the project.

   c. Prepare and certify a legally adequate environmental clearance document for the Project.

2. For a stay, temporary restraining order, preliminary injunction, and permanent injunction prohibiting any actions by Respondent until Respondent has complied with all applicable state, federal and local laws and the requirements of CEQA.

3. For a stay, temporary restraining order, preliminary injunction, and permanent injunction enjoining Respondent from entering into an agreement with Developers to either sell the Project or an agreement sharing TOT revenue from the Project.

4. For costs of the suit.

5. For attorneys' fees pursuant to Code of Civil Procedure section 1021.5 and

6. For such other and further relief as the Court deems just and proper.

Dated: August 12, 2016

By:_____
Charles McLurkin
CHANNEL LAW GROUP, LLP
Attorneys for Petitioner

Exhibit 2

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Citizens Against DTLG Giveaways

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

CITIZENS AGAINST DTLB GIVEAWAYS, an unincorporated association,

Petitioner,

v.

CITY OF LONG BEACH, a municipal corporation,

Respondent.

AMERICAN LIFE, INC. OF SEATTLE, WA and DOES 1-25,

Real Parties in Interest.

No. BS163217

PETITIONER'S OPENING BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS UNDER THE CALIFORNIA ENVIRONMENTAL QUALITY ACT

Date:	September 14, 2017
Time:	9:30 AM
Dept.:	85
Judge:	Hon. James C. Chalfant
Date Action Filed:	June 22, 2016

TABLE OF CONTENTS

POINTS AND AUTHORITIES

INTRODUCTION

This action challenges the approval by Respondent City of Long Beach ("City" or "Respondent") of a Purchase and Sale Agreement ("Sale Contract") and the related approval of a Notice of Exemption ("NOE") (together, the "Approvals") for a large hotel development located at 100 Ocean Boulevard (the "Project"). This case raises the question of how to define the "project" under the California Environmental Quality Act ("CEQA") and at what stage environmental review should occur. Additionally, the court will be asked to review whether the City of Long Beach ('City") was authorized to sale a former development agency asset for less than the highest bid and for a use not established in the Revised Long Range Property Management Plan ("Plan"). As described below, the City failed to fully disclose, meaningfully analyze, and adequately mitigate the impacts of its decision to approve the Project, thus violating the California Environmental Quality Act ("CEQA")[1], Public Resources Code § 21000, et seq., and the CEQA Guidelines.[2] The City also violated its responsibilities as a successor agency by entering in to a contract to use the Property for hotel purposes, exercising eminent domain for non-public uses, failing to make required statutory findings, and by not "maximize value" when it sold the property. Petitioner thus respectfully requests that this Court issue a writ of mandate directing the City to set aside its approval of the Project, as well as an injunction preventing the City from taking any steps to implement the Project, until the City has fully complied with CEQA and other applicable laws of this state.

STATEMENT OF FACTS

The project is a hotel development ("Project") that would replace what is now a vacant lot of 35,510 square feet located at 100 Ocean Boulevard in Long Beach, the site of the former Jergens Trust building which was torn down by the City in 1986 to make way for development. (4 AR 6–7.)

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1 Public Resources Code §§ 21000 et seq.

2 All further undesignated statutory references are to the Public Resources Code. The "CEQA Guidelines" referenced herein are codified at title 14, California Code of Regulations, § 15000 et. seq.

The project proposes to develop 427 hotel rooms in a 25-story building. (4 AR 8–9.) The Staff Report issued by the City for the Project, describes the Project in detail and includes both a photo-simulation and map depicting the Project. (6 AR 15.)

The parcel in question was purchased by the Redevelopment Agency of the City of Long Beach ("RDA") in 2011 through eminent domain. (4 AR 7). After redevelopment agencies were dissolved in 2012, the City, acting as the successor agency to the RDA, was required to divest its real property assets. (22 AR 2265). A "Revised Long Range Property Management Plan" was then prepared to achieve this objective and approved by the State of California Department of Finance. (27 AR 2309). The City issued Request for Proposal CM15–16 ("RFP") in order to sell the parcel. (4 AR 7). The City received three proposals, which were reviewed by a committee. (4 AR 7). The committee recommended that the property be sold to American Life, Inc. of Seattle, WA ("Developer" or "Real Party") for $7 million to be used a hotel. (4 AR 8–9). The recommendation was brought to City Council and staff recommended that the City enter into a purchase and sale agreement with Developer as well as enter into a Transit Occupancy Tax ("TOT") Sharing Agreement. (4 AR 10).

The City approved the Sale Contract and related NOE at a City Council meeting on May 17, 2016. (21 AR 2245–2247.) The City Council also approved the TOT Agreement. (21 AR 2245–2247). The NOE adopted by the City concluded that the activity in question qualified for a Class 1 and 8 exemption. (2 AR 2.) At the May 17, 2016 City Council Meeting, a member from Petitioner notified the City Council and Respondent that Petitioner intended on bringing a taxpayer's action objecting to the process in which the Project was sold to Developers and the proposed transient occupancy tax sharing agreement. (22 AR 2280–2281.) This member also objected to the purported exemption of the Project from CEQA and explained to the City Council why the two exemptions were not applicable thereby exhausting his administrative remedies.[3] (22 AR 2280–2283).

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[3] Petitioner stated the following: "The basis of this suit is the improper process of how the City is selling property, especially the Environmental Impact Review Waiver. Your Class I and Class VIII waivers do not suit this project at all. Class I waiver says there's no development to be done. How could you use a Class I waiver when you've got an empty lot? Class VIII waiver is specifically for legislative items and is accepted [sic[for any construction process. So your one-page exemption from CEQA is not valid, and that's what we're suing you against amongst other causes of action." (22 AR 281–2282 [Transcript of May 17, 2016, City Council meeting.)

A Notice of Exemption ("NOE") for the Project was filed with the Los Angeles County Registrar Clerk Recorder on March 15, 2016 as document number 2016–062793.[4] (2 AR 2–3.) A subsequent NOE was filed on August 2, 2016 as document number 2016–191959 (1 AR 1). Both NOEs narrowly defined the "Project" as the mere "Transfer of Ownership" of the property. (1 AR 1, 2 AR 2–3.) This action was filed on June 22, 2016.

STANDARD OF REVIEW

The EIR is the "heart of CEQA," an environmental "alarm bell" designed to alert the public and their governmental representatives of environmental changes "before they have reached ecological points of no return." *Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal.* (1988) 47 Cal.3d 376, 392 *(Laurel Heights I)*. An EIR is not "a mere set of technical hurdles" for agencies to overcome, but rather functions to ensure that "government officials who decide to build or approve a project do so with a full understanding of the environmental consequences and, equally important, that the public is assured those consequences have been taken into account." *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 449 *(Vineyard)*. In this sense, the EIR is a "document of accountability" that "protects not only the environment but also informed self government." *Laurel Heights I, supra*, at p. 392. To this end, "[a]n EIR must include detail sufficient to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project." *Id.* at p. 405.

In reviewing the City's compliance with CEQA, this Court must determine whether the agency prejudicially abused its discretion. § 21168.5. Abuse of discretion is established if the agency "has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence." § 21168.5; *East Peninsula Educ. Council, Inc. v. Palos Verdes Peninsula Unified Sch. Dist.* (1989) 210 Cal.App.3d 155, 165. "Judicial review of these two types of error

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[4] Petitioner contends that the filing of the NOE on March 15, 2016 was premature because the City had not yet approved the project. The premature filing of a NOE does not start the running of the statute of limitations. *Cnty. of Amador v. El Dorado Cnty. Water Agency* (1999) 76 Cal.App.4th 931, 965.

differs significantly." *Vineyard, supra*, 40 Cal.4th at p. 435. Claims of improper procedure — including claims that an agency has failed to include the information required by CEQA in an EIR — are reviewed de novo, while only an agency's factual determinations are reviewed for substantial evidence. *Ibid.*; see *also Cmties. for a Better Env't v. City of Richmond* (2010) 184 Cal.App.4th 70, 82–83. Courts should "scrupulously enforc[e] all legislatively mandated CEQA requirements." *Ebbetts Pass Forest Watch v. California Dep't of Forestry & Fire Prot.* (2008) 43 Cal.App.4th 936, 944. Noncompliance with the information disclosure provisions of CEQA, "which precludes relevant information from being presented to the public agency," and noncompliance with the "substantive requirements" of CEQA may be found by a reviewing court to be a prejudicial abuse of discretion whether or not a different outcome would have resulted if the agency had complied. § 21005. With regard to the non-CEA causes of action, Petitioner submits that the abuse of discretion standard embodied within Code of Civil Procedure section 1094.5 is applicable. Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence. § 1094.5, subd. (b).

ARGUMENT

I. The City Violated the California Enviornmental Quality Act

A. The Project Does Not Qualify for the Stated Exemptions from CEQA

Respondent erroneously determined that the Project was exempt from CEQA. The NOE filed by the City stated as follows: "*This activity qualifies for a categorical exemption with Class 1 and Class 8 as the appropriate exemptions*." (2 AR 2). There is no supporting documentation for the claimed categorical exemptions. The Class 1 Exemption is the existing facilities exemption. Per CEQA guidelines regarding Class 1 exemptions for existing facilities, "*The key consideration is whether the project involves negligible or no expansion of an existing use*." *Bloom v. McGurk* (1994) 26 Cal.App.4th 1307. The Project does not qualify for the Class 1 exemption. Respondent's own staff report states that the "*the Subject Property has remained vacant and underutilized*." (4 AR 7 [Staff Report].) The class 8 exemption is for "Actions by Regulatory Agencies for Protection of the

Environment." *International Longshoremen's and Warehousemen's Union v. Bd. of Supervisors* (1981) 116 Cal.App.3d 265. However, "[c]onstruction activities and relaxation of standards allowing environmental degradation are not included in this exemption." *Ibid.* As the Project is a construction activity, it does not qualify for a Class 8 CEQA exemption. Respondent prejudicially abused its discretion when it determined that the Project was exempt from CEQA.

B. The City's Actions in Deeming the Project Exempt from CEQA Amount to Piecemealing

The City's contention that the project is eligible for an exemption from CEQA is premised entirely on the argument that the "project" is not the construction of a hotel, but the mere sale of real property. (1 AR 1.). The question for court is – what is the "project" in this instance? Should it be narrowly construed (as suggested by the City) or broadly construed to include the construction project itself? The law is clear on this topic. "CEQA broadly defines a 'Project' as 'an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and ... [¶] ... [¶] ... that involves the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies.' [Citation.] [¶] The statutory definition is augmented by the [CEQA] Guidelines [Cal.Code Regs., tit. 14, § 15000 et seq.], which define a 'project' as '**the whole of an action,** which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment....' " *Tuolumne Cnty. Citizens for Responsible Growth, Inc. v. City of Sonora* (2007) 155 Cal.App.4th 1214, 1222. What the City has sought to do in this instance is "piecemeal" the project. "CEQA forbids 'piecemeal' review of the significant environmental impacts of a project." *Berkeley Keep Jets Over the Bay Com. v. Bd. of Port Cmrs.* (2001) 91 Cal.App.4th 1344, 1358. Agencies cannot allow "environmental considerations [to] become submerged by chopping a large project into many little ones—each with a minimal potential impact on the environment—which cumulatively may have disastrous consequences." *Bozung v. Local Agency Formation Comm'n of Ventura Cnty.* (1975) 13 Cal.3d 263, 283–284 [EIR required when city annexed land for anticipated development].) The timing of an EIR's preparation is essential. *Berkeley Keep Jets Over the Bay Com. v. Bd. of Port*

Cmrs., *supra*, at p. 1358. An EIR "'should be prepared as early as feasible in the planning process to enable environmental considerations to influence project program and design and yet late enough to provide meaningful information for environmental assessment.'" *Laurel Heights I*, *supra*, 47 Cal.3d at p. 395. "[T]he later the environmental review process begins, the more bureaucratic and financial momentum there is behind a proposed project, thus providing a strong incentive to ignore environmental concerns that could be dealt with more easily at an early stage of the project. "Environmental review which comes too late runs the risk of being simply a burdensome reconsideration of decisions already made and becoming the sort of 'post hoc rationalization[ ] to support action already taken,' which our high court disapproved in [Laurel Heights]." *Berkeley Keep Jets Over the Bay Com. v. Bd. of Port Cmrs.*, *supra*, at p. 1359.

The California Supreme Court set forth a piecemealing test in *Laurel Heights*. "We hold that an EIR must include an analysis of the environmental effects of future expansion or other action if: (1) it is a reasonably foreseeable consequence of the initial project; and (2) the future expansion or action will be significant in that it will likely change the scope or nature of the initial project or its environmental effects." *Laurel Heights I*, *supra*, 47 Cal.3d at p. 396.

There may be improper piecemealing when the purpose of the reviewed Project is to be the first step toward future development. See, e.g., *Laurel Heights I*, *supra*, 47 Cal.3d at p. 398 [university planned to occupy entire building eventually]; *Bozung v. Local Agency Formation Comm'n of Ventura Cnty.*, *supra*, 13 Cal.3d at pp. 269–270 [city annexed land so it could rezone it for development]; *City of Carmel-by-the-Sea v. Bd. of Supervisors* (1986) 183 Cal.App.3d 229, 244 [county rezoned land as "a necessary first step to approval of a specific development project"]; *City of Antioch v. City Council* (1986) 187 Cal.App.3d 1325, 1337 [negative declaration wrongly issued; "the sole reason" city approved road and sewer construction was "to provide a catalyst for further development"]; see also *id.* at p. 1336 ["[c]onstruction of the roadway and utilities cannot be considered in isolation from the development it presages"].

And there may be improper piecemealing when the reviewed project legally compels or practically presumes completion of another action. *Nelson v. Cnty. of Kern* (2010) 190 Cal.App.4th

TABLE OF AUTHORITIES

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252 [EIR for reclamation plan should have included mining operations that necessitated it]; *Tuolumne Cnty. Citizens for Responsible Growth, Inc. v. City of Sonora*, *supra*, 155 Cal.App.4th at p. 1231 [home improvement center "cannot be completed and opened legally without the completion of [a] road realignment"]; *San Joaquin Raptor/Wildlife Rescue Ctr. v. Cnty. of Stanislaus* (1994) 27 Cal.App.4th 713, 732 [EIR for residential development should have included sewer expansion that was a "crucial element[ ]" of development]; *Plan for Arcadia, Inc. v. Arcadia City Council* (1974) 42 Cal.App.3d 712, 726 [shopping center, parking lot, and adjacent road widening "should be regarded as a single project"].

Applying the law outlined above to the facts of this case, it is clear that the City is unlawfully piecemealing the Project. Approval of the Agreement is clearly the first step toward future development and its approval practically presumes completion of the remainder of the Project. Further, as outlined in the Staff Report, there is clearly enough meaningfully information to address the environmental impacts of the Project. (4 AR 13). The development concept has been clearly disclosed and is quite detailed. (4 AR 13). At the May 17, 2016 City Council Meeting, the City Council members, Mayor and Vice Mayor were well aware that this Project was much more than just the simple sale of property; rather, it was an elaborate and major development that they had predetermined would be sold and developed without any interference. (22 AR 2276). In fact, the Request for Proposal ("RFP") for the Project issued by the City specifically states that the City was seeking proposals for both the purchase and *development* of the property in question. (31 AR 2314.) On July 8, 2015, the City of Long Beach advertised RFP CM15–163. (31 AR 2314.) In the RFP, the City defined the scope of services as follows:

> "The City of Long Beach (City) invites interested parties to tender a Proposal for the purchase and development former Redevelopment Agency-owned property located at 100 East Ocean Boulevard (Site). A Site Map is included as Exhibit 1. The Site is located in Downtown Long Beach. Downtown Long Beach is one of Southern California's most unique waterfront urban destinations to live, work and play. Visitors can easily access Downtown via public transit and explore its many shops, restaurants and attractions by bike or on foot. Downtown Long Beach offers all the amenities of a major urban center within a clean, safe community and is enhanced by the temperate climate and breathtaking ocean views. The purpose of this RFP is to solicit qualifications and high rise mixed use proposals from qualified Buyer/Developers addressing a synergistic approach to development of the Site consistent with the goals and objectives of the Long Range Property Management Plan, the Strategy for

> Development, Greater Downtown Long Beach, and the former Redevelopment Agency with a focus on high density mixed use. Respondents must demonstrate superior experience, financial strength and organizational resources to develop the Site with an architecturally significant project appropriate to its urban setting."

(32 AR 2317.)

CEQA requires the City to conduct environmental review as early as feasible and the City cannot defer environmental analysis until after the Purchase and Sale Agreement has been approved. This would amount to unlawful piecemealing.

C. By Approving the Sale Contract Without Environmental Review, the City has Pre-Committed to the Project

In a related vein, the City has also unlawfully "pre-committed" to the Project by bypassing environmental review at this stage. Beginning CEQA review too late can mean a lead agency no longer comes to a project with an open mind, and that opportunities to implement feasible alternatives and mitigation measures will have been lost. In such a case, an agency has "pre-committed" to the project. Pre-commitment can occur under various circumstances, for example, conducting CEQA review after the agency has already made up its mind to go forward with a project; or when the agency has made such an investment of staff time and resources that the momentum for the project becomes so great that, as a practical matter, the agency's evaluation of alternatives is limited; or potentially when the agency has approved certain action which moves the project forward even though it technically reserves the right to reconsider its commitment to the entire project. Pre-commitment to a project has been repeatedly condemned by the California Supreme Court as rendering the CEQA review process as little more than a post hoc rationalization for a decision already made and defeating the fundamental purposes of CEQA. *See Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116. Pre-commitment has the potential to bias the results of the environmental review process. *Bozung v. Local Agency Formation Comm'n of Ventura Cnty.*, *supra*, 13 Cal.3d 263.

Here, the City's approval of the Purchase and Sale Agreement coupled with the detailed development concept received by the Developer has effectively precluded alternatives and mitigation

measures that CEQA would otherwise required to be considered, including the alternative of not going forward with the project. The City specifically evaluated and rejected alternatives to the development concept put forth by the Developer in the course of reviewing the proposals that had been submitted through a RFP process developed by the City for the sale of former Redevelopment Agency properties. The City received three (3) proposals, which were reviewed by a panel. (4 AR 7).

Furthermore, because the City has made such an investment of staff time and resources in the RFP process for the Project and stands to make a significant amount of money if the property is sold, the momentum towards approval of the Project is so great that, as a practical matter, the City's evaluation of alternatives will necessarily be limited if CEQA review is deferred until after the Purchase and Sale Agreement is approved. As a result, the City has unlawfully pre-committed to the Project in violation of CEQA.

II. The City Violated its Responsibilities as a Successor Agency

A. The City Did Not "Maximize Value" as Required by Law

In approving the Project, the City has violated legal duties imposed upon it as the "successor agency" to the Redevelopment Agency of the City of Long Beach. Pursuant to Health and Safety Code section 34117, subdivision (e), Respondent, as the successor agency to the Redevelopment Agency for the City of Long Beach, is required to, inter alia,

> "[d]ispose of assets and properties of the former redevelopment agency as directed by the oversight board; provided, however, that the oversight board may instead direct the successor agency to transfer ownership of certain assets pursuant to subdivision (a) of Section 34181. **The disposal is to be done expeditiously and in a manner aimed at maximizing value.** Proceeds from asset sales and related funds that are no longer needed for approved development projects or to otherwise wind down the affairs of the agency, each as determined by the oversight board, shall be transferred to the county auditor-controller for distribution as property tax proceeds under Section 34188. The requirements of this subdivision shall not apply to a successor agency that has been issued a finding of completion by the department pursuant to Section 34179.7."

(Health & Saf. Code, § 34177, subd. (e) [emphasis added].) The City's oversight board has a similar responsibility of maximizing value. Health and Safety Code section 34181, subdivision (a), states that

"[t]he oversight board shall direct the successor agency to do all of the following: (a)(1) Dispose of all assets and properties of the former redevelopment agency… Disposal shall be done expeditiously and in a manner aimed at **maximizing value.**" (§ 34181, subd. (a)(1) [emphasis added].)

On or about February 2, 2015, the "Revised Long Range Property Management Plan" ("Plan"), prepared by the City as the "Successor Agency of the Redevelopment Agency of the City of Long Beach," was approved by the Oversight Board of the Successor Agency to the Redevelopment Agency of the City of Long Beach. (14 AR 51 [Plan].) Thereafter, on March 10, 2015, the State of California Department of Finance approved the Plan. (*Ibid.*)

The Plan states that the Property was a part of several properties referred to as "Future Development Properties" that:

> "…were acquired in furtherance of the goals and objectives of the Downtown Long Beach Redevelopment Plan, the Strategic Guide, and supporting complementary plans and studies. In order to create economic opportunity, promote economic development on a local level and **generate tax revenues for all levels of government**, this Plan proposed the continuance of land use and construction policies set forth in the supporting plans and studies, contemplating uses that embrace and promote quality of life improvements that meet the specific needs of the individual communities."

(14 AR 88 [Plan, p. 36, emphasis added].) Furthermore, "[p]roceeds from the sale of the Future Development properties [including the Property] will be first used to pay for marketing, maintenance, repairs, escrow and commission costs. **Remaining proceeds will be distributed to the taxing agencies consistent with the approved compensation agreements.**" (14 AR 87 [Plan, p. 37, emphasis added].)

According to the Plan, the Property:

> "…has been undeveloped and underutilized for over 20 years and continues to be a visual impediment to the connectivity between the Downtown, the Convention and Entertainment Center, the Pike at Rainbow Harbor, and Shoreline Village. **The acquisition through eminent domain in 2010 was specifically intended to control the redevelopment of the site in order to facilitate high-density residential development.** The economic recession served to sideline efforts until residential demand increased. **With economic recovery in plan, the site will be competitively bid through an RFP process, that is intended to ensure high-density development to maximize overall economic benefit to downtown and in accordance with the use of eminent domain.**"

(14 AR 89–90 [Plan, pp. 39–40, emphases added].)

According to the Plan, the Property was acquired on February 1, 2011, and was valued at the time of purchase at $6.5 million. (15 AR 493 [Plan, Rev. Exh. F, p. 2].) In addition, the Plan states that, based on an appraisal done on or about October 11, 2012, the estimated current value was $4,450,000. (*Ibid.*) The City has not amended the Plan in accordance with Health and Safety Code section 33450 to change the intended use of the Property stated therein.

The City considered three (3) proposals for use of the Property. One proposal would have paid the City $12.9 million to purchase the Property with intended residential, office, restaurant, retail, and hotel uses. (48 AR 3158 [Victory Yards Narrative/Technical Proposal].) Another proposal would have paid the City $13 million plus yearly CPI index increases to rent the Property from the City for 65 years (with an option to purchase) with intended public, hotel, and retail uses. (47 AR 3038 [Ensemble Real Estate Investments Narrative/Technical Proposal].)

The Developer's proposal, however, is to pay the City only $7 million for the Property, and use it for a large hotel. (4 AR 8–9 [May 17, 2016, staff report, pp. 1, 3–4].) Moreover, the Developer and the City acknowledge that Developer will likely have a $47 million shortfall based on anticipated project costs and revenue. (4 AR 10 [May 17, 2016, staff report, p. 5].) As a result, the City wants to split the transient occupancy tax ("TOT") with the Developer so that the Developer receives $27 million. (*Ibid.*) City staff acknowledged that the Developer's proposal was not the highest price offered for the Property. (22 AR 2267 [Transcript of May 17, 2016, City Council meeting, p. 7:10–12].)

In addition, from the $7 million sale price, the sum of $5,880,000 would be paid to the Los Angeles County Auditor-Controller for distribution to the effected taxing agencies with $1,234,800 being kept by the City (based on 21% of the net proceeds) along with the $27 million from the TOT sharing agreement. (4 AR 12 [May 17, 2016, staff report, p. 7].) Applying the same math to the $12.9 million and $13 million proposals, the Los Angeles County Auditor-Controller would have received $10,191,000 and $10,270,000 plus applicable CPI index increases, or almost 150% of what the Developer's proposal would provide to the Los Angeles County Auditor-Controller. Thus, instead of

maximizing value as required by Health and Safety Code section 34117, subdivision (e), the City is reducing the value for the Los Angeles County Auditor-Controller and its constituent tax payers. On top of reducing the value and reducing the tax payers' burden, the City is giving away $27 million in TOT revenue to the Developer. While the proposal might be beneficial to the City, its duties as a "successor agency" require the City to maximize the value of the Property itself for the benefit of the tax payers in Los Angeles County, not just those living in Long Beach.

B. The City Sold the Property for a Use Not Authorized by the Plan

The underlying contract for sale of the Property to the Developer violates Health and Safety Code section 33437, subdivision (a), because the Developer intends to use the Property for a purpose other than what was stated in the Plan. Health and Safety Code section 33437 states in relevant part as follows: "[a]n agency shall obligate … purchasers of property acquired in a redevelopment project to: [¶] Use the property for the purpose designated in the redevelopment plans." (§ 33437, subd. (a).) The Developer's intended use of the Property, however, is not consistent with the Plan. Instead of using the Property for high-density residential use, the Developer intends to use the Property as a hotel. (4 AR 8–9 [May 17, 2016, staff report, pp. 3–4].) A hotel is not high-density residential use. A hotel is a private business that is expressly not residential.

C. The City Acquired the Property Via Eminent Domain for a Non Public Use

Moreover, the use of the Property as a hotel is not "in accordance with the use of eminent domain." Petitioner recognizes that the City claims that the public is benefitted by the proposed hotel use because of the related economic development for the City and the City's agreement to split the TOT revenue with the Developer. The problem with that argument is two-fold.

First, both of the other proposals included hotel use that would have generated TOT. (48 AR 3158 [Victory Yards Narrative/Technical Proposal]; 47 AR 3038 [Ensemble Real Estate Investments Narrative/Technical Proposal].) Thus, either other proposal which would have maximized the value to the Los Angeles County Auditor-Controller and provided the City with TOT revenue.

Second, the Project primarily benefits the Developer's private enterprise, not a public use. Where the particular facts show a coexistence of public and private benefits, the determination of whether a public use has been established depends on whether the public benefits are of a primary rather than a merely incidental character. (*Stratford Irr. Dist. v. Empire Water Co.* (1943) 58 Cal.App.2d 616, 621.) The primary purpose cannot be to promote a private enterprise (*Cnty. of San Mateo v. Coburn* (1900) 130 Cal. 631, 634) or to accomplish a purpose the primary nature of which is not public (*Gravelly Ford Canal Co. v. Pope & Talbot Land Co.* (1918) 36 Cal.App. 556, 559) under the pretext that it is (*City & Cnty. of San Francisco v. Ross* (1955) 44 Cal.2d 52, 59.)

Here, the Developer is unable to move forward with the Project unless the City allows the Developer to keep $27 million in TOT revenue. (4 AR 8–10 [May 17, 2016, staff report, pp. 3–5].) By subsidizing the Developer who is apparently otherwise financially unable to construct the Project or operate a hotel on the Property, the City is unquestionably promoting the interests of the Developer over any public interest (putting aside the failure of the Project to have a high-density residential use).

D. The Terms of the Sale Contract are Inconsistent with the Plan

Moreover, the terms of the sale contract do not satisfy the Health & Safety Code requirement of using the Property consistent with the Plan. Petitioner recognizes that the sale contract includes a term by which the Developer is required to "… carry out construction of the improvements on the Property in conformity with all applicable laws…" (68 AR 3748 [Purchase and Sale Agreement and Escrow Instructions ("Sale Contract"), p. 17, ¶ 8.2(d)].) However, that provision directly conflicts with the "Buyer's Proposed Use" of a hotel found in Paragraph 1.2 of the Sale Contract. (68 AR 3732 [Sale Contract, p. 1, ¶ 1.2].) Because the City is not obligating the Developer to use the Property for the purpose designated in the Plan, the Sale Contract violates Health and Safety Code section 33437, subdivision (a).

E. The City Failed to Make the Statutorily Required Findings

The City's sale of the Property to the Developer is prohibited by Government Code section 52201, subdivision (b), because the document authorizing the sale does not contain statutorily-required findings. Government Code section 52201, subdivision (b), provides in relevant part:

> "The resolution approving the … sale … shall contain a finding that the … sale … will assist in the creation of economic opportunity. For the sale … of property, the resolution shall also contain one of the following findings: [¶] (1) The consideration is not less than the fair market value at its highest and best use. [¶] (2) The consideration is not less than the fair reuse value at the use and with the covenants and conditions and development costs authorized by the sale…."

(Gov. Code, § 52201, subd. (b).)

Here, there was no formal resolution. Instead, the City merely adopted City Staff's "recommendation" to approve the Project with some conditions. (21 AR 2245–2247 [City Council Finished Agenda and Minutes for May 17, 2016, meeting].) The "recommendation" and the City Council's "conditions" do not contain a finding either that (1) the consideration that will be paid to the City is not less than the fair market value of the Property at its highest and best use or (2) the consideration is not less than the fair reuse value at the use and with the covenants and conditions and development costs authorized by the sale." (*Ibid.*) Because the document authorizing the City's sale of the Property to the Developer does not contain these findings, the proposed sale violates Government Code section 52201.

III. Petitioner is Entitled to Injunctive Relief

Upon finding that an agency has failed to comply with CEQA, "the court must enter an order mandating that the agency set aside its decision and take any necessary action to achieve compliance." *City of Redlands v. Cnty. of San Bernardino* (2002) 96 Cal.App.4th 398, 414–15, § 21168.9, subd. (a)(1). Moreover, where any project activity would "prejudice the consideration or implementation of

particular mitigation measures or alternatives to the project," the order must mandate that the agency suspend activities that "could result in an adverse change or alteration to the physical environment" pending full compliance with CEQA. § 21168.9, subd. (b).

Injunctive relief is a valid remedy in a mandamus proceeding. *Laurel Heights I, supra*, 47 Cal.3d at p. 423. In *San Joaquin Raptor/Wildlife Rescue Ctr. v. Cnty. of Stanislaus, supra*, 27 Cal.App.4th 713, for example, the court enjoined all project activity "to protect the site from adverse and possibly irreparable alteration" pending full compliance with CEQA and "to ensure adequate consideration of alternative sites and additional mitigation measures" in a revised EIR. Notably, the court enjoined not only construction, but also preliminary activities such as surveying, because allowing the project to proceed pending preparation of an adequate EIR would build momentum toward re-approval, jeopardizing consideration of alternatives and mitigation measures. *Id.* at p. 742. These same factors require injunctive relief here, should the Court find in Petitioner's favor. As demonstrated above, the record shows that the Project failed to comport with CEQA's mandates. The City must be enjoined from taking any steps to implement the Project pending full CEQA compliance in order to preserve mitigation measures and alternatives. Further, Petitioner requests that this Court enjoin Respondent from entering into either an agreement to sell the Project or an agreement sharing any transient occupancy tax revenues associated with development of the property.

CONCLUSION

For the foregoing reasons, approval of the Sale Contract and adoption of the Notice of Exemption should be set aside, and the City and Real Party should be enjoined from taking any steps to implement the Project until the City has fully complied with CEQA.

Channel Law Group, LLP

Respectfully submitted,

Dated: July 10, 2017

By: Charles McLurkin -CT

Charles J. McLurkin

Exhibit 3

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES – STANLEY MOSK COURTHOUSE

CITIZENS AGAINST DTLB GIVEAWAYS, an unincorporated association,

Petitioner,

vs.

CITY OF LONG BEACH, a municipal corporation,

Respondent.

AMERICAN LIFE, INC. OF SEATTLE, WA and DOES 1-25,

Real Parties in Interest

Case No.: BS 163217

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS UNDER THE CALIFORNIA ENVIRONMENTAL QUALITY ACT

[California Environmental Quality Act ("CEQA"), Public Resources Code, sections 2100 et seq.]

Date: September 14, 2017
Time: 9:30 a.m.
Dept.: 85
Judge: Hon. James C. Chalfant

Petitioner Citizens Against DTLB Giveaways ("Petitioner") respectfully submits the following reply to Respondent City of Long Beach's ("City") Opposition to Petition for Writ of Mandate ("Opp." or "Opposition").

DISCUSSION

I. PETITIONER'S REPRESENTATIVE, WITHOUT COUNSEL, ADEQUATELY EXHAUSTED ITS ADMINISTRATIVE REMEDIES BEFORE CITY COUNCIL

Respondent's Opposition contends that all of Petitioner's claims are barred for failure to exhaust his administrative remedies. Opp. at p 9:1-10:15. This simply is not the case as the Petitioner's representative adequately identified the issues for purposes of administrative exhaustion.

Respondent acknowledges, as it must, that a representative of Petitioner (Warren Blesofsky) did address City Council at the May 17, 2016 City Council Meeting and opposed the Project on numerous grounds. Opp. at p. 9:18. Rather than assert no objections being made, Respondent contends that Petitioner did not object to the Project with enough specificity as to the issues and/or reasons for his objection. Opp. at p. 9:8-16. Respondent cites *Hagopian v. State* (2014) 223 Cal.App.4th 349, 371 in support of its contention of issue exhaustion. Opp. at p. 9:6-16; 10:12-14. Indeed, the Opposition from page 9:3-13 is taken verbatim from *Hagopian* with the exception of the citations being omitted. *Id.*

One of the cites omitted from the *Hagopian* cite is *Mani Brothers Real Estate Group v. City of Los Angeles* (2007) 153 Cal.App.4th 1385. Like *Hagopian*, the *Mani Brothers*' court states that the "'exact issue' must have been presented to the administrative agency to satisfy the exhaustion requirement." 153 Cal.App.4th 1385, 1394. However, in the very next sentence, the *Mani Brothers*' court holds: "However, **'less specificity is required to preserve an issue for appeal in an administrative proceeding than in a judicial proceeding' because, although not the case here, parties in such proceedings generally are not represented by counsel.**" 153 Cal.App.4th 1385, 1395 (emphasis added).

It is not necessary to identify the source that provides the basis for the objection as long as the agency is informed of the relevant facts and issues. *Center for Biological Diversity v. County of San Bernardino* (2010) 185 Cal.App.4th 866, 890. The issue must simply be raised in some form. *Save Our Residential Environment v. City of West Hollywood* (1992) 9 Cal.App.4th 1745, 1750; *Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo* (1985) 172 Cal.App.3d 151, 163.

It is undisputed that Petitioner's representative, Warren Blesofsky was not represented by counsel at the May 17, 2016 City Council Meeting. AR 2280. Further, while Respondent refers to his time before City Council as "rambling comments," Mr. Blesofsky, a lay person, was able to articulate his position adequately

to apprise City Council of his reasons for opposing the Project. AR 2280-2283. Petitioner properly apprised the City of the basis for the following challenges and therefore exhausted all available administrative remedies.

- **The City violated CEQA**: Petitioner laid out his position of the City's CEQA violation in that it was necessary to prepare an EIR *prior to an approval* of the Project.[1] AR 2281-2282. Petitioner went on to explain why the Class I and Class VIII exemptions did not apply. AR 2281-2282. There was no requirement to raise a "pre-commitment" argument when the City was relying on a categorical exemption. The City's position, in effect, conceded that its actions were a project at the time.
- **The City violated its responsibilities and duties as a successor agency:** Petitioner specifically raised that his organization was formed for the purpose of holding the City accountable for the problems in the City's successor to the RDA and the lead agency in the sale and that the City's process for selling the property was improper. AR 2280-2281.
- **City's actions as violative of Petitioners' rights as taxpayers**: Petitioner asserted at the May 17, 2016 City Council meeting that the City was giving away $25 million in occupancy taxes to the developer of the Project and how the developer's contention it will lose money did not have merit. AR 2282-2283.

II. THE CITY VIOLATED CEQA

The precise question before the court with regard to CEQA has been distilled to the following: "*Does the City's action authorizing the City Manager to execute a final Purchase and Sale Agreement and a final Transit Occupancy Tax Sharing Agreement amount to an "approval" that must be preceded by preparation of an EIR*"? Generally, under CEQA, a public agency must prepare an EIR on any project the agency proposes to "carry out or approve" if that project may have significant environmental effects. Public Resources Act Section 21100(a), Section 21151(a)

a. The City Council's Action Committed it to the Project

The key to analyzing whether the action taken by the City Council in this case represented a project under CEQA is to focus on the action actually taken by the Council. The motion approved was:

> to conclude the public hearing regarding an economic subsidy, a doc specifications number RFP-CM-15-163 for the purchase and development opportunity at 100 East Ocean Boulevard and authorize the City

[1] Mr. Blesofsky indicated at the public hearing that he had filed a lawsuit against the City that very day. Mr. Blesofky subsequently dismissed this lawsuit (Case No. BS 162535) upon the realization that it was prematurely filed because the City Council had not yet voted on either the TOT Agreement or PSA. Petitioner requests judicial notice of this legal proceeding pursuant to Evidence Code Section 452(d).

> manager or designee to execute any and all documents necessary, including a purchase and sale agreement and Transient Occupancy Sharing Agreement for the sale and development of the subject property for a mixed use hotel and business center . . . .

[AR 2273-74.] Despite the claims by Respondent that the Purchase and Sale Agreement was expressly conditioned on CEQA compliance, and reserved to the City discretion related thereto (Opp. 5:12-15), the action taken by the City Council did not require those provisions. (There was no copy of such Purchase and Sale Agreement included in the documents in the package for that item on the agenda for the City Council hearing, a fact specifically noted by Petitioner in his comments at the hearing [AR2280], nor does the motion adopted by the City Council, quoted above, bind the City Manager to any particular form of agreement or otherwise contain any of such reservations.)

In fact, prior to the vote, the City Attorney asked for the following clarification on the motion: "I'm assuming that you're also making the motion to declare the City owned property surplus and accept a category [sic] exemption CE-16-070 as in the staff report?" Vice Mayor Lowenthal, who made the motion, replied, "Yes." [AR2275.] What this shows is that, in actuality, the City Council specifically voted to approve the project **with the understanding that no EIR would be prepared**. Generic statements in background materials about CEQA compliance and in an agreement that, for all that can be discerned from the record, did not even exist at the time the City Council approved the sale, do not overcome the fact that what actually occurred was exactly what the Supreme Court found to be a critical flaw in the City of West Hollywood's argument in *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 141 (holding that delegation of the council's authority was itself an impermissible attempt to approve the project without prior CEQA review).:

Another factor the Supreme Court relied on in *Save Tara* was that both the draft agreement approved by the city council and the final agreement executed by the city manager "forthrightly stated their purpose was to 'cause the reuse and redevelopment of'" the property. 45 Cal.4th at p. 140. The motion approved by the Long Beach City Council was to "authorize the City manager or designee to execute any and all documents necessary, including a purchase and sale agreement and Transient Occupancy Sharing Agreement **for the sale and development of the subject property for a mixed use hotel and business center** . . . ." [AR2274.]

Save Tara specifically rejects the notion that generic requirements for CEQA compliance are sufficient when there is a delegation of authority to the city manager as was done in this case. *See* 45 Cal.4th at p. 140–

41. The City Council in the present case did not even condition its approval on CEQA compliance nor did it impose a requirement that the city manager reasonably determine that CEQA requirements had been met.

Furthermore, in *Save Tara*, the Court referred to statements by the city manager to HUD that the city had approved the project and would commit financial aid and the mayor's announcements that the property would be used for the project and similar statements in the City's Newsletter as evidence of a commitment. 45 Cal.4th at p. 141. In the present case, while there were such statements in the transcript of the hearing, the motion approved by the City Council itself, a more probative source, provides the analogous evidence. There is nothing in the motion that reserves for the City the right to back out of the TOT Agreement.

This is precisely the sort of case that the Supreme Court in *Save Tara* was describing when it noted:

> A public entity that, in theory, retains legal discretion to reject a proposed project may, by executing a *detailed and definite* agreement with the private developer and by *lending its political and financial assistance* to the project, have as a practical matter committed itself to the project. When an agency has not only expressed its inclination to favor a project, but has increased the political stakes by publicly defending it over objections, putting its official weight behind it, devoting substantial public resources to it, and *announcing a detailed agreement to go forward with the project*, the agency will not be easily deterred from taking whatever steps remain toward the project's final approval.

45 Cal.4th at p. 135. While the Court did go on to say that "not just any agency agreement concerning a project that has been 'described in sufficient detail' will constitute commitment under CEQA" (45 Cal.4th at p. 136), it continued, "The test is whether the agency has in essence committed itself to a 'definite course of action regarding the project.'" 45 Cal.4th at p. 142. The motion adopted by the Long Beach City Council clearly meets that standard.

That the grant of authority to the Long Beach City Manager to execute not just one, but two definitive agreements "for the sale and development of the subject property for a mixed use hotel and business center" [AR2274] are such a commitment is further shown by the examples given by the Supreme Court in *Save Tara* of the types of agency agreements that do **not** constitute such a commitment, such as "preliminary assistance," "government consent or assistance to get off the ground" and "mere interest in, or inclination to support, a project . . . . If having high esteem for a project before preparing an environmental impact statement (EIR) nullifies the process, few public projects would withstand judicial scrutiny, since it is inevitable that the agency proposing a project will be favorably disposed to it." 45 Cal.4th at p. 136-37 (internal citations omitted).

One of the key factors that frequently is emphasized in determining whether an approval constitutes a

"project" is whether, as a practical matter, the agency has foreclosed any meaningful options to going forward with the project. See 45 Cal.4th at p. 139, quoting Remy et al., Guide to the Cal. Environmental Quality Act (CEQA) (11th ed.2006) at p. 71 (if so, the agency has approved the project). In this case, the action taken by the City Council has clearly foreclosed the options presented by rejecting the alternative proposals presented in response to the RFP. The capital that would have been devoted to development of those alternatives is unlikely to sit idle until the final terms of the project have been set in stone.

The Court in *Save Tara* also stated that "In applying this principle to conditional development agreements, courts should look not only to the terms of the agreement but to the surrounding circumstances . . . . In this analysis, the contract's conditioning of final approval on CEQA compliance is relevant but not determinative." *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 139 (emphasis added).

Among the relevant surrounding circumstances are that the City selection of the hotel alternative has, as a practical matter, foreclosed the other alternatives presented via the RFP process; the City Council has taken final action to approve the financial subsidy for the developer to facilitate the hotel Project; revenue and other political considerations make it unlikely that the City will resort to another alternative; the developer submitted sufficiently detailed plans to the City to allow for meaningful environmental review (see below); City staff and elected officials heaped praise on the Project and wholeheartedly endorsed the developer; and most importantly, as noted above, the City Council took all action needed from it to authorize final, definitive agreements for the sale of the property for the specifically contemplated development purpose.

The City now claims it will conduct an Environmental Impact Report ("EIR") for the proposed hotel. Opp. at p. 5. An alternatives analysis is a core component of an EIR. Public Resources Code Section 21002.1(a). In this case, the City has effectively already eliminated the available alternatives. By rejecting the other proposals in the RFP, the City has foreclosed available alternatives and mitigation measures.

While it may not be determinative standing alone, the fact is the City will be motivated to approve the hotel Project, as opposed to an alternative use such as multi-family housing, because the City will receive transit occupancy tax revenue. In addition, the hotel Alternative creates long-term employment benefits that other alternatives, such as housing, would not. This fact cannot be easily ignored in a political environment where public agencies are in desperate need for revenue to fund government services and are under pressure to create jobs.

Like *Save Tara,* there is a financial agreement in place with the developer, which was designed to facilitate the Project. Indeed, the developer convinced the City that the proposed hotel would not be financially feasible without a proposed tax break. AR 10.

The developer's proposal was much more than "conceptual." In fact, the developer submitted lengthy 80-page proposal to the City. AR 2915-2922. The "Development Proposal" submitted by the developer (which is Chapter 3 of the Response to RFP located at AR 2945-2957) includes a tremendous amount of detail about the proposed hotel, including Floor Plans (AR 2946-2948), Site Plans (AR 2950-51), a Parking Analysis (AR 2952), Building Design Features, (AR 2953), a Jobs Report (AR 2954), and a Development Schedule (AR 2957). The Staff Report provides a synopsis of the information contained in the proposal.[2] Additionally, photo-simulations of the proposed hotel were included for the City's review. (AR 2944). Finally, the developer prepared a "job report" for the City outlining the economic impact of the Project and submitted no less than two economic reports to justify the proposed TOT Sharing Agreement. AR 3518-3564.

The Supreme Court in *Save Tara* specifically noted that when a proposal is "well enough defined 'to provide meaningful information for environmental assessment'" environmental review is required. *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 139. The court went on to say that "when the prospect of agency commitment mandates environmental analysis of a large-scale project at a relatively early planning stage, before all the project parameters and alternatives are reasonably foreseeable, the agency may assess the project's potential effects with corresponding generality. In this case, the Project is well enough defined to provide for meaningful environmental analysis as demonstrated by the developers detailed response to the City's RFP. Further, as explained in *Save Tara,* even if the development concept still lacked a certain degree of detail, the City could have conducted an environmental review even at a "relatively early planning stage" with the potential environmental effects assessed with "corresponding generality."

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[2] The Staff Report issued by the City defines the "Project" follows: The Buyer/Developer proposes to develop approximately 427 hotel rooms, 19,000 square feet of pre-function space and meeting rooms, 8,000 square feet of restaurant space, and 28,000 square feet of guest amenities including a pool and sun deck (Project). The Project, as proposed, is 20 floors above the elevation of Ocean Boulevard, with an additional five floors above the Seaside Way elevation. The attached conceptual rendering is a perspective looking north from the intersection of Pine and Seaside Way. Additional layout plans are also attached (collectively, Exhibit B)." AR 8.

b. The Cases Cited by The City are Factually Distinguishable

The cases cited by the Respondent are clearly distinguishable. *Cedar Fair, L.P. v. City of Santa Clara* (2011) 194 Cal.App.4th 115 involved a mere "Term Sheet" intended to be a "framework for the good faith negotiations of binding definitive agreements." 194 Cal.App.4th at p. 1168. The court in that case noted that "the term sheet is different from the conditional development agreements set forth in *Save Tara*, which conditionally committed the City of West Hollywood to take concrete actions toward realizing the development project. In contrast, the Stadium Term Sheet merely 'memorialize[s] the preliminary terms' and only mandates that the parties use the term sheet as the 'general framework' for 'good faith negotiations.'" 194 Cal.App.4th at p. 1170. Long Beach committed to a final agreement, not merely a term sheet.

Similarly, *Delaware Tetra Technologies, Inc. v. County of San Bernardino* (2016) 247 Cal.App.4th 352 involved only a Memorandum of Understanding, not authorization to enter into a final binding agreement. Like the term sheet in *Cedar Fair*,

> The Memorandum establishe[d] a process for completing the Plan, and provide[d] that after the Plan is completed and approved, the County retain[ed] full discretion to consider the final EIR and then to approve the Project, disapprove it, or require additional mitigation measures or alternatives.

247 Cal.App.4th at p. 361. The Long Beach City Council's action was nothing of the sort.

The Respondent also cites *Neighbors For Fair Planning v. City and County of San Francisco* (2013) 217 Cal.App.4th 540 for the proposition that "commitment of staff resources to a project--and even advocacy of a project by staff or councilmembers--is not evidence of pre-approval (Opp. 12:15-17) and includes the following quotation: "If having high esteem for a project before preparing an [EIR] nullifies the process, few public projects would withstand judicial scrutiny, since it is inevitable that the agency proposing a project will be favorably disposed toward it." 217 Cal.App.4th at p. 557 (quoted at Opp. 12:17-19). This concept is irrelevant in a case where the City Council itself has taken final action to allow the City Manager to execute a definitive agreement to sell property for a particular development purpose.

Bridges v. Mt. San Jacinto Community College District (2017) 14 Cal.App.5th 104 is also factually distinguishable. The court of appeal specifically noted that "unlike in *Save Tara*, no funds have been committed to the project and there is not even a developer (let alone 'detailed' development plans) in the picture yet." *Id.* In this case, there is a concrete, specific development proposal with fairly detailed plans that have been submitted, the City has entered into a TOT sharing agreement to make this specific development

financially possible, and there is a developer that has been chosen for the Project.

III. THE CITY VIOLATED ITS RESPONSIBILITIES AS SUCCESSOR AGENCY

Although the City of Long Beach is named as the "Respondent" in this matter, the City argues that Petitioner "...has failed to name the entity responsible for complying with [the Health & Safety Code] as a party to this case." (Opposition, p. 15.) This argument is disingenuous and expects the Court to ignore the obvious. According to the City, "[o]n January 17, 2012, the City Council of the City of Long Beach designated the City of Long Beach has [*sic*] Successor Agency to the Redevelopment Agency of the City of Long Beach." (14 AR 54 [Long Ranch Property Management Plan (the "Plan")].) Since the City is the Successor Agency responsible for Health & Safety Code compliance, and the City is named as the "respondent" in this matter, the entity responsible for such compliance has been named as a party to this case.

The City argues that this Court lacks jurisdiction to prevent the City from approving the Project because certain actions brought under the Health & Safety Code must be brought in the Sacramento County Superior Court. Aside from missing the point of this action, the City appears to misunderstand the difference between jurisdiction and venue, and be confused about venue laws. As a preliminary matter, this action is not an action contesting any act taken or determinations or decisions made pursuant to the various Redevelopment Agency dissolution laws. Petitioner is not contesting the Plan, its contents, the acquisition of the Property, the designation of the City as the successor agency, or the Redevelopment Agency dissolution laws themselves. Rather, this action is aimed at the City's failures to fulfill its duties under the Plan.

Additionally, even if the Court were to characterize this action as the kind argued by the City, there is no doubt that this Court has jurisdiction. Both Health & Safety Code sections 34189.3 and 34168 reference an action being brought in the Superior Court. (Health & Saf. Code, §§ 34189.3, 34168.) This Court is a Superior Court, not the Court of Appeals or Supreme Court. The City really complains about venue. But, venue rules are not jurisdictional. This means that if the action is filed in an "improper" court, and no objection is raised, that court can render an enforceable judgment. (*Barquis v. Merchants Collection Ass'n* (1972) 7 Cal.3d 94, 121-122.) The City failed to file a motion to transfer venue within 30 days of service of the Petition and it estopped from now contesting venue at the time of trial. (See Code Civ. Proc., § 396b [a motion for transfer on the ground that the action was filed in an "improper" court must be made within the time permitted to plead].)

Furthermore, the City is wrong on venue. To determine whether an action is local or transitory, the court looks to the "main relief" sought. Where the main relief sought is personal, the action is transitory. Where the main relief relates to rights in real property, the action is local. (*Brown v. Superior Court (C.C. Myers, Inc.)* (1984) 37 Cal.3d 477, 482, fn. 5.) This action has to do with the Property and the City's proposed transactions related thereto. There can be little doubt that the main relief sought in this action relates to rights in real property. Moreover, Code of Civil Procedure section 394 determines the venue for actions or proceeding against a city to be in the county where the city is located. (Code Civ. Proc., § 394, subd. (a).) Inasmuch as the City is located in Los Angeles County and this is an action against the City, this Court is the proper venue for this action.

The City contends that it met its obligations of maximizing value from the disposition of the Property, *statutorily* manifested in Health & Safety Code sections 34177 and 34181 and *contractually* manifested in the Plan (which embraced the statutory obligations), because the disposition results in the best outcome for the City. The City acknowledges that the Property was intended for high-density residential use, i.e., not just a hotel, but argues that the Plan somehow allowed the City to ignore that requirement if it would provide economic benefit to downtown Long Beach. Petitioner agrees that the Project might be good for the City, but that misses the point and ignores the City's obligation to maximize value for the taxing agencies, not just downtown Long Beach. As the successor agency, the City owed the taxing agencies a duty to maximize the sale value to generate tax revenues for all levels of government, not just the City. (14 AR 88 [Plan].) As evidenced further by the City's arguments in the Opposition, the City's focus was on the economic benefit to the City, not on generating revenue for the taxing agencies.

The City further argues that because the Strategic Guide (not the Plan) considered that a hotel might be a permitted use, then any hotel use is permitted. (Opposition, p. 17.) Again, the City misses the point. The other two proposals both had Plan-consistent residential and hotel uses (47 AR 3038; 48 AR 3158), but would have resulted in over $10 million more in taxable revenue for the taxing agencies. It is not the hotel use that is the problem. Rather, it is the hotel use that both reduces the revenue to the taxing agencies by $10 million and requires the City to give away $27 million in tax revenue to the Developer that is the problem. That the outcome is good for Long Beach does not overcome that problem.

Further evidencing the City's disconnection from the real issues in this action is the Opposition's section

regarding eminent domain law. There is no doubt that the Property was acquired by eminent domain (14 AR 89-90 [Plan]), and Petitioner does not challenge the City's acquisition of the Property through eminent domain. But, since acquisition, the Property simply sat unused. The City cannot simply acquire property through eminent domain, do nothing, and then allow the property to be used for a private purpose. (*City and County of San Francisco v. Ross* (1955) 44 Cal.2d 52, 59.) By subsidizing the Developer who is apparently otherwise financially unable to construct the Project or operate a hotel on the Property, the City is unquestionably promoting the interests of the Developer over any public interest (putting aside the failure of the Project to have a high-density residential use).

Finally, the City argues that Government Code section 52201 is inapplicable because the disposition of the Property is consistent with the Plan. As shows in the Opening Brief, the sale of the Property to the Developer is not consistent with the Plan. That is because the Project does not result in the maximum taxing revenue possible from the three different proposals. Rather, the chosen proposal results in the least amount of taxable revenue to the taxing agencies, although it does benefit the City itself. Because the proposed transaction is not consistent with the Plan, Petitioner considered what other authority might permit the City's self-serving transaction. Because Government Code section 52201 might also apply, Petitioner included a discussion of that statute in the Opening Brief. That all legal issues are considered is not a "kitchen sink" approach. It is, instead, an anticipation of whatever excuses the City might make for its failure to comply with the Plan and/or the law. However, from the City's argument, it appears to concede that it has not complied with Government Code section 52201. Thus, since the proposed transaction does not comport with the Plan and the City has otherwise failed to comply with Government Code section 52201, the City has no legal authority to proceed with the proposed transaction.

CONCLUSION

For the aforementioned reasons, the Petition should be granted.

Respectfully submitted,

DATED: September 5, 2017

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