In The Court of Appeal, State of California

FIRST APPELLATE DISTRICT, DIVISION 3
Case No. A148865

MISSION BAY ALLIANCE, *et al.*,
Plaintiffs and Appellants,

v.

OFFICE OF COMMUNITY INVESTMENT AND INFRASTRUCTURE (OCII), *et. al.*

Defendants and Respondents,

GSW ARENA LLC *et al.*

Real Parties in Interest and Respondents

Appeal From the Superior Court for the County of San Francisco,

Superior Court Case No. CPF-16-514892
Consolidated Case No. CPF-16-514811
The Honorable Garrett L. Wong presiding

APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF CENTER FOR BIOLOGICAL DIVERSITY, COALITION FOR CLEAN AIR, COMMUNITIES FOR A BETTER ENVIRONMENT, AND SUNSET COALITION IN SUPPORT OF MISSION BAY ALLIANCE

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APPLICATION OF CENTER FOR BIOLOGICAL DIVERSITY, COALITION FOR CLEAN AIR, COMMUNITIES FOR A BETTER ENVIRONMENT, AND SUNSET COALITION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

TO THE HONORABLE ADMINISTRATIVE PRESIDING JUSTICE WILLIAM R. MCGUINESS AND HONORABLE ASSOCIATE JUSTICES:

Pursuant to Rule 8.200 of the California Rules of Court, Center for Biological Diversity, Coalition for Clean Air, Communities for a Better Environment, and Sunset Coalition respectfully request leave to file an amicus curiae brief in this appeal.

The Applicants and Their Interests

Amici Curiae Center for Biological Diversity, Coalition for Clean Air, Communities for a Better Environment, and Sunset Coalition support the position of Mission Bay Alliance, Jennifer Wade, and SaveMuni as set forth in the Appellants' Opening Brief filed on August 24, 2016.

Interests of Center for Biological Diversity

The Center for Biological Diversity (the Center) is a non-profit organization dedicated to protecting diverse native species and habitats through science, policy, education, and environmental law. The Center has more than 48,000 members worldwide, including numerous members in California, and has offices in Oakland, Los Angeles, and Joshua Tree, California as well as offices in Arizona, New Mexico, Oregon, Vermont, and Washington, D.C.

In California, the Center has been a party in numerous CEQA lawsuits where land use activities threaten the Center's conservation interests. The Center has a particular interest in ensuring that the impacts of these activities are fully disclosed and accurately evaluated. The Center was also lead petitioner in the recent case *Center for Biological Diversity v. California Dept. of Fish and Wildlife*

(2015) 62 Cal.4th 204. This case is cited extensively in the parties' briefs in this matter, and is discussed below.

Interests of Coalition for Clean Air:

Coalition for Clean Air (CCA) is a statewide nonprofit organization, with offices in Los Angeles and Sacramento, that has advocated for improved air quality throughout California since 1971. CCA is the only statewide organization exclusively dedicated to improving air quality in California. CCA has participated in California Environmental Quality Act (CEQA) litigation in several cases including in the San Joaquin Valley regarding the need for a thorough assessment of air quality impacts. CCA has recommended greenhouse gas mitigation measures in numerous contexts.

Interests of Communities for a Better Environment:

Communities for a Better Environment (CBE) is a California non-profit environmental health and justice organization with offices in Richmond, Oakland, Wilmington and Huntington Park. CBE's mission is to achieve environmental health and justice for communities of color and working-class communities. CBE strives to accomplish its mission by organizing in traditionally disempowered communities, by facilitating public participation in administrative decision-making processes, and by ensuring implementation of laws like CEQA, which protect public participation, public health and the environment. For more than 35 years, CBE has advocated for meaningful implementation of state environmental laws that provide for a public voice, because meaningful public participation in environmental decisions is the *sine qua non* of environmental justice. To that end, CBE has litigated several precedent-setting CEQA cases, including *Communities for a Better Env't v. S. Coast Air Quality Mgmt. Dist.* (2010) 48 Cal. 4th 310; *Communities for a Better Env't v. City of Richmond* (2010) 184 Cal.App.4th 70; and *Communities for a Better Env't v. California Resources Agency* (2002) 103 Cal.App.4th 941a (as modified at 103 Cal.App.4th 98). CBE members are particularly concerned about CEQA analysis of GHG impacts, and have supported

California's regulation of climate change pollution while holding agencies accountable to CEQA's mandates. For example, CBE and its allies litigated *Assoc. of Irritated Res., CBE, et al. v. CARB* (San Francisco Superior Court case no. CPF-09-509562), successfully securing a 2011 writ requiring alternatives analysis of greenhouse gas regulations.

Interests of Sunset Coalition:

The Sunset Coalition (the Coalition) was formed to focus attention on an unprecedented number of large development projects that threaten to impact Sunset Boulevard in Los Angeles. The Coalition, founded by concerned residents and organizations, now includes the thousands of individual residents within and between the Pacific Palisades and Brentwood areas of Los Angeles, as well as groups including Residential Neighbors of Archer, Brentwood Residents Coalition, Brentwood Hills Homeowners Association, Bel Air Skycrest Property Owners' Association, and Bundy Canyon Association.

The Coalition is especially concerned because the City of Los Angeles, much like Respondents in the present case, has asserted that it need not apply current Office of Environmental Health Hazard Assessment (OEHHA) guidelines. Just as Respondents assert (ROB, p. 77), the City of Los Angeles has claimed OEHHA developed guidance exclusively for the Toxic Hot Spots program rather than for use in CEQA health risk analysis. In proceedings in Los Angeles Superior Court, the trial court has ruled that Los Angeles was not obligated to apply OEHHA's updated guidelines. (*Sunset Coalition v. City of Los Angeles,* Los Angeles Superior Court case no. BS17811.) The judgment in that case is not yet final.

All *Amici* are additionally interested in ensuring tiering as allowed by CEQA for environmental review is properly used. Because public agencies frequently use this technique of environmental analysis, its improper use can lead to unreported environmental impacts that are not mitigated. As in the present

case, major disruptions of long-standing and settled plans could be implemented without an adequate understanding of the effects of those disruptions.

Amici advocate for a necessary adherence and scrupulous observance of the mandates of the California Environmental Quality Act because any precedent set by the Project in this case may be followed by future projects throughout the State, with better or worse consequences for the environment and public accountability.

Rules of Court, Rule 8.200 (c)

This amici brief was authored by Chatten-Brown & Carstens LLP on behalf of *Amici*, whom they have previously represented.

Respectfully submitted,

October 3, 2016

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I. INTRODUCTION

Informed public participation, governmental accountability, and mitigation of project impacts are central goals of the California Environmental Quality Act (CEQA) process:

> "The fundamental goals of environmental review under CEQA are information, participation, mitigation, and accountability." (*Lincoln Place Tenants Assn. v. City of Los Angeles* (2007) 155 Cal.App.4th 425, 443–444 … (*Lincoln Place II*).) As the California Supreme Court has explained: "If CEQA is scrupulously followed, the public will know the basis on which its responsible officials either approve or reject environmentally significant action, and the public, being duly informed, can respond accordingly to action with which it disagrees. [Citations.] The EIR process protects not only the environment but also informed self-government." (*Laurel Heights Improvement Assn. v. Regents of the University of California* (1988) 47 Cal.3d 376, 392 ….)

(*Sierra Club v. Cty. of San Diego* (2015) 231 Cal. App. 4th 1152, 1164.)

These goals apply to all projects for which environmental review is required. Certification of the proposed Golden State Warriors Event Center and Mixed-Use Development Project ("Project") as an "Environmental Leadership Project" does not render CEQA's fundamental purposes inapplicable. Indeed, the City of San Francisco (City), its agencies, and GSW Arena LLC (collectively, Respondents) recognize that the "sole consequence" of a leadership designation should be an expedited litigation schedule. (Respondents' Opposition Brief (ROB), p. 20.)

The serious deficiencies in the Environmental Impact Report (EIR) prepared for the Project underscore the importance of upholding CEQA's requirements for thorough environmental review. CEQA requires an adequate analysis of air pollutant emissions associated with the Project that may affect climate change at a global level and can have significant health impacts at a local level. CEQA also requires thorough analysis of impacts caused by the Project's

significant departure from the settled redevelopment plan for the area—impacts not adequately addressed by prior environmental review.

Despite being designated an "Environmental Leadership Project," this Project would produce Greenhouse Gases (GHGs) emissions greatly in excess of a threshold of significance set in 2010 by the Bay Area Air Quality Management District (BAAQMD) to address climate change.[1] One of the BAAQMD thresholds provides that projects emitting more than 1,100 metric tons per year of carbon dioxide-equivalent greenhouse gas emissions (CO_2e) will normally be considered to have significant climate impacts. (Administrative Record (AR) 24164 [2010 threshold].) While the Project proponent purports to comply with BAAQMD's alternative threshold of significance by committing to implement the Project in accordance with the City's GHG Strategy, the EIR neither shows that compliance will lead to actual reductions of greenhouse gas emissions, nor demonstrates that mitigation measures will significantly reduce the emissions. Environmental documents must include all feasible mitigation measures to reduce significant environmental impacts, and those measures must be specific and enforceable. (Cal. Code Regs. Tit. 14 (Guidelines), § 15126.4 subd. (a)(1) and (2).)

While the EIR reports GHG emissions would occur, it fails to include *any* information regarding the magnitude of those emissions. Instead the EIR asserts

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[1] This threshold was set pursuant to a public review process as contemplated in Guidelines section 15047. (AR 24160.) A "'threshold of significance' for a given environmental effect is simply that level at which the Lead Agency finds the effects of the project to be significant." (Office of Planning and Research, *Thresholds of Significance: Criteria for Defining Environmental Significance* CEQA Technical Advice Series, September 1994), p. 4.) *Amici* note that the legislation providing expedited litigation for "environmental leadership projects" applies only for projects "certified as LEED silver or better" by the US Green Building Council. (Pub. Resources Code § 21180 subd. (b)(1).) Ironically, such certifications can only be obtained *after* construction of the project is completed. Thus, it is by no means certain that the Project will in fact obtain such certification.

there will be no additional emissions (hereinafter referenced as "net zero emissions") based on assertions that the Project will comply with the City's GHG Strategy and will obtain offsets. (AR 1419 ["project would not result in any net additional GHG emissions"].) This does not allow for informed public participation in the environmental review process because it fails to inform the reviewing public of the extent of the Project's impacts and how they will be mitigated by compliance with the Strategy. Such information was necessary to determine whether proposed mitigation measures will achieve the projected reductions; whether they are enforceable; and whether other mitigation measures could have further reduced those impacts.

With regard to localized air pollution that affects public health, the EIR relies upon outdated scientific data to assess impacts to residents and workers in the area surrounding the project. At a local level, preventing the emission of air toxics and various "critieria pollutants" (such as carbon monoxide and hydrocarbons) in urban environments is vital to the health of all residents of California. This is especially true where there are many sensitive receptors in the area, including people who are already ill in the medical facilities and especially in the children's hospital, as well as children, seniors and others residing in the area. Here, however, instead of using breathing rates for sensitive receptors based upon current Office of Environmental Health Hazard Assessment (OEHHA) guidance, Respondents chose instead to rely on 2003 OEHHA Guidance and 2010 BAAQMD guidance (AR 4498, 4503), which are less protective of human health.

The impacts associated with the Project are far more extensive than were anticipated in the redevelopment plan that was approved for the area, which Respondent Office of Community Investment and Infrastructure (OCII) is responsible for implementing. The Project's EIR must disclose, analyze, and mitigate the Project's conflicts with the Mission Bay South Redevelopment Plan, rather than assuming the Project fits within the contours of the plan.

Amici urge this Court to reverse the trial court's decision.

II. THE EIR LACKED SUFFICIENT INFORMATION REGARDING GREENHOUSE GAS EMISSIONS AND THEIR REDUCTION.

A. Greenhouse Gas Emission Reduction is Vital.

Climate change has been characterized as "the most pressing environmental challenge of our time," and addressing this issue will require urgent and substantial reductions in greenhouse gas emissions. (*Massachusetts v. E.P.A.* (2007) 549 U.S. 497, 505.) As the California Supreme Court noted:

> In California's landmark legislation addressing global climate change, the California Global Warming Solutions Act of 2006. . . . hereafter referred to by its common shorthand name, A.B. 32, *our Legislature emphatically established as state policy the achievement of a substantial reduction in the emissions of gases contributing to global warming*.

(*Center for Biological Diversity v. California Dept. of Fish and Wildlife* (2015) 62 Cal.4th 204, p. 215, emphasis added.) The California Legislature recently reaffirmed and strengthened this emphatic state policy by adopting SB 32, which sets the goal of reducing statewide emissions at least 40% below 1990 levels by 2030. (Health & Saf. Code § 38566.)

The Governor certified this Project as an AB 900 Leadership Project. As such, it should include transparent greenhouse gas emission analysis and proper mitigation, reflecting the Legislature's intent that Leadership Projects demonstrate cutting-edge, innovative techniques for reducing emissions. (See Pub. Resources Code § 21178, subds. (d), (g).) Instead, the EIR takes shortcuts in analysis and disclosure to reach the conclusion that the Project will not have significant greenhouse gas impacts. While this conclusion might conceivably be true, the EIR fails to provide evidence to support it. This violates CEQA. (*Center for Biological Diversity, supra,* 62 Cal 4th at p. 227 ["From the information in the administrative record, we cannot say that conclusion is wrong, but neither can we discern the contours of a logical argument that it is right."])

B. The Public Was Not Informed of the Full Magnitude of Greenhouse Gas Impacts and the Lack of Analysis Violates CEQA.

1. CEQA Guidelines for Determining a Project's Significance Encourage a Quantitative Analysis, and in Any Case a Significance Determination Must Be Based Upon Substantial Evidence.

Public agencies must make a good faith effort to measure greenhouse gas emissions. (*Center for Biological Diversity, supra,* 62 Cal.4th at p. 217; Guidelines section 15064.4 subd. (a).) The CEQA Guidelines state:

> A lead agency should make a good-faith effort, *based to the extent possible* on scientific and *factual data*, to describe, calculate or estimate the amount of greenhouse gas emissions resulting from a project.

(Guidelines section 15064.4 subd. (a), *emphasis added.*)

Contrary to this mandate, the EIR here failed to provide the basis for its analysis in the form of a numeric disclosure of projected emissions from the Project, which in turn would have to be analyzed with respect to existing emissions, and the emissions reductions expected with the implementation of mitigation measures. The EIR provided *no quantification* of greenhouse gas emissions at all. (AR 1419.) Instead, it merely stated the Project "would contribute to annual long-term increases in GHGs as a result of increased vehicle trips (mobile sources) as well as event-related. . . . operations." (AR 1419.) Nonetheless, the EIR claimed that "CARB has determined that the project would not result in any net additional GHG emissions due in part to the voluntary purchase of carbon credits by the project sponsor." (AR 1419.) This disclosure to the public and decision-makers is uninformative because it provides no basis for evaluating whether the Project's mitigation measures are sufficient to ensure that no "net additional" emissions will occur.

Without a quantification of projected emissions and the reductions due to specific mitigation measures, it is impossible for the public and decision-makers to understand the extent to which the Project relies on reducing emissions as opposed to offsetting emissions through the purchase of carbon credits. This, in turn, makes it impossible to assess whether the purchase of offsets will be effective. Carbon credit purchase agreements should be regarded as mitigation fee programs, in which a project's contribution to a cumulative environmental impact can be compensated by payments to a common fund. (*Anderson First Coalition v. City of Anderson* (2005) 130 Cal.App.4th 1173, 1188.) Thus EIRs must demonstrate both that an adequate program exists and that mitigation fees will be effective. (*Ibid.* ["To be adequate, these mitigation fees ... must be part of a reasonable plan of actual mitigation that the relevant agency commits itself to implementing."].) Without quantification of emissions, it is not possible for the public to verify how many carbon credits will be needed to reach the goal of zero net emissions, and thus impossible for the EIR to demonstrate that adequate quantities of carbon credits can be obtained from functioning offset programs.

This Project will promote the frequent and extensive movement of large numbers of people for sports games, concerts, and many other major events (AR 1108-1109 ["The total number of daily person trips generated on a weekday event day with a basketball game would be 58,538 person trips."]) This will almost certainly result in large discharges of GHGs. It is critical that this Project fully implement the goals of local and State greenhouse gas emission reduction programs.

The EIR also fails to substantiate its assertion that the Project will comply with the City's GHG Strategy. (See Appellants' Opening Brief (AOB), p. 55.) Respondents explain that the GHG Strategy includes a quantitative citywide inventory and reduction targets that are monitored. (ROB, p. 67.) However, the EIR does not provide any comparison of current Project area emissions with future projected emissions or disclose the actual reductions anticipated from greenhouse

gas mitigation measures identified in the GHG Strategy. As a result, the EIR's conclusion that the Project's greenhouse gas emissions will not be significant lacks support. The analytical gap left by the EIR's failure to establish, through substantial evidence and reasoned explanation, a connection between mitigation measures imposed and reductions asserted, deprives the EIR of its "'sufficiency as an informative document.'" (*Center for Biological Diversity, supra*, 62 Cal.4th at p. 227, citing *Laurel Heights Improvement Assn. v. Regents of University of California, supra,* 47 Cal.3d at p. 392.)

Respondents argue that the EIR complies with CEQA because Guidelines section 15064.4 subdivision (a)(2) authorizes an agency, at its discretion, to "rely on a qualitative analysis or performance based standards." (Opp., p. 65.) However, such discretion is not without bounds. Especially in light of the requirement that an agency make a "good-faith effort, based to the extent possible on. . .factual data," (Guidelines § 15064.4 subd. (a)), it is necessary to prepare a detailed analysis of projected emissions before an agency may claim a large project would have net zero or no additional GHG emissions compared to the existing environment. Guidelines section 15146 requires that the degree of specificity required in an analysis will correspond to the degree of specificity involved in the underlying project. Where an agency claims the calculations of GHG emissions add up to a net of zero, claiming no net emissions at all, the agency must "show its work" in detail in the EIR to support that calculation.

Furthermore, even if performance standards are applied, an analysis must be prepared if "there is substantial evidence that the possible effects of a particular project are still cumulatively considerable notwithstanding compliance with the adopted regulations or requirements." (Guidelines § 15064.4 subd. (b)(3).) Although this section of the Guidelines provides that the presence of such evidence requires the preparation of an EIR, and here an EIR was prepared, obviously when an EIR is required, such an analysis should be included when there is substantial evidence that the possible effects of a particular project are still

cumulatively considerable. Here, such evidence exists because the Project will create at least 19,095 tons of GHG emissions each year (AR 78066), which far exceeds one of BAAQMD's alternative significance thresholds of 1,100 tons per year (AR 24164).

Given the urgent need to address climate change, well-informed decisions about future development that generates extensive emissions are critical. CEQA provides the framework for disclosing this information to support the decision-making process, but only if its information disclosure requirements are scrupulously observed.

2. The Project Proponent's Application for CEQA Streamlining Omitted Key Components of the Project.

Appellants correctly point out that the "Application for CEQA Streamlining" (Application) for the Project failed to identify GHG emissions from the office and retail towers that are part of the proposed Project, as it only counted emissions from the Arena itself. (AOB, p. 54, fn. 20.) The Application gives the square footage for each component of the Project, including 580,000 square feet of office space. (AR 78007, 78059.) In calculating GHG emissions, however, the Application includes only the Event Center and 25,000 square foot GSW headquarters (AR 78061 and 78014), and excludes 580,000 square feet of office and 125,000 square feet of retail. Emissions from this amount of office and retail space would likely be extensive. For instance, assuming that emissions would be similar to those from the 25,000 square feet of office space associated with the GSW headquarters, which will emit 104 tons of GHG emissions each year (AR 78066), 580,000 square feet of office uses would generate approximately 2,000 tons of additional emissions each year. By referring to the Application that addressed only impacts from the arena and not the office and retail towers that would be built with it (AR 78066), to the extent the EIR disclosed GHG emissions at all, it failed to disclose the totality of the emissions.

A public agency may not analyze only one portion of a project's impact. (*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 714-717.) In *Kings County*, the City of Hanford analyzed some of the emissions from a cogeneration plant, but failed to analyze the secondary emissions that would be generated by transportation to and from the plant. (*Id.* at 717.) Because the project required the delivery of coal for fuel, the resulting emissions from truck or train traffic were related to the project and could not be ignored when determining whether air emissions met existing standards. The court found this method of analysis failed to address the complete impacts of the entire project on air quality. (*Id.* at 724.)

The *Kings County* case is especially relevant to the present case because GHG emissions have been recognized as a cumulative impact by the Supreme Court. (*Center for Biological Diversity, supra,* 62 Cal.4th at p. 230.) Where, as here, a serious, existing cumulative impact is exacerbated by a proposed project, it is especially critical that all the project's impacts be identified, analyzed, and mitigated to the extent possible.

Respondents rely upon the certification by California Air Resources Board (CARB) pursuant to AB 900 in denying the need for more detailed analysis of greenhouse gas emissions and mitigation measures. (ROB, pp. 70-71 [Governor's GHG finding of no net additional GHG emission is "not subject to judicial review"].) The Governor's certification cannot supplant CEQA's requirements for information disclosure in an EIR. AB 900 was intended to expedite judicial review of certified projects. (Pub. Resources Code § 21185.) It was not intended to reduce the quality of the informational disclosure within the environmental review documents prepared for such projects. (Pub. Resources Code § 21178, subds. (b) and (c) [CEQA "requires that the environmental impacts of development projects be identified and mitigated. . . .The act also guarantees the public an opportunity to review and comment on the environmental impacts of a

project and to participate meaningfully in the development of mitigation measures for potentially significant environmental impacts."])

The AB 900 certification explicitly omitted GHG emissions from non-GSW office and retail uses under the theory that they "were consistent with, and therefore covered by, the prior environmental analysis (Mission Bay FSEIR)." (AB 129321.) However, the Mission Bay EIR completely omitted analysis of GHG emissions. (AR 13858-13907 [air quality section contains no treatment of CO_2 emissions.]) The Mission Bay EIR, certified in 1998, was adopted long before enactment of AB 32 in 2006 or promulgation of Guidelines section 15064.4 in 2010. There was no coverage of GHG emissions in the Mission Bay EIR.

The Project EIR's reliance on CARB's evaluation of the Application for the Project also rests on a "baseline" comparison long recognized as impermissible under CEQA. In its evaluation, the Air Resources Board stated that

> [t]his proposed facility would include a 750,000 square foot (18,064 seat) event center and practice facility, GSW headquarters/offices (25,000 square feet), parking and loading (234,411 square feet), non-GSW office space (580,000 square feet), retail uses (125,000 square feet), and open space. It was determined by the Applicant and the lead agency that the non-GSW office (580,000 square feet) and retail (125,000 square feet) uses were consistent with, and therefore covered by, the prior environmental analysis (Mission Bay FSEIR) and are already entitled for development consistent with the Mission Bay Redevelopment Plan Area. For this reason, GHG emissions that could be attributable to the *previously entitled development of office and retail space are treated as part of the baseline (no project) scenario* and also as part of the proposed project scenario. In other words, the *GHG emissions from the non-GSW office and retail uses* would be automatically offset and *are not included in this evaluation*.

(AR 129321, emphasis added.)

To the extent the EIR incorporated this determination—which assumed a portion of the Project which had been permitted but not yet built was part of the baseline—it violated CEQA. The baseline for environmental analysis is normally existing environmental conditions at the time analysis begins. (CEQA Guidelines § 15125, subd. (a).) A comparison to "real conditions on the ground," rather than

hypothetical conditions contained in a permit or entitlement, enables the public and decision-makers to understand the actual, physical change in the environment that the project will cause. (*Save Our Peninsula Committee v. Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 121.) In contrast, "[a]n approach using hypothetical allowable conditions as the baseline results in 'illusory' comparisons that 'can only mislead the public as to the reality of the impacts and subvert full consideration of the actual environmental impacts,' a result at direct odds with CEQA's intent." (*Communities For A Better Env't v. S. Coast Air Quality Mgmt. Dist*., (2010) 48 Cal. 4th 310, 322; accord *Woodward Park Homeowners Ass'n, Inc. v. City of Fresno* (2007) 150 Cal.App.4th 683, 707 ["If an EIR for a construction project on vacant land uses something other than vacant land as its baseline, the EIR will report only a portion of the impacts the project will have."]) The Air Resources Board's analysis did not comport with these principles. To the extent the EIR relied on and incorporated the Board's analysis, therefore, the EIR violated CEQA.

Amici understand that the AB 900 determination is not judicially reviewable (Pub. Resources Code § 21184, subd. (b)(1)) and do not claim that the certification must be set aside. Rather, *Amici* point out only that the certification did not calculate or consider all of the Project's emissions and thus cannot serve as a valid evidentiary basis for the EIR's conclusion that the entire Project will result in no additional emissions. In this case, the Project applicant's assertions regarding the Project's emissions in its Application do not include all of the greenhouse gas emissions that could be expected from the Project. To the extent that the EIR's conclusions regarding the significance of the Project's greenhouse gas emissions rely on the AB 900 certification, those conclusions lack support.

C. The EIR Failed to Adduce Quantitative Evidence to Support its Conclusion that the Project's Emissions Will Be "Net Zero."

The Supreme Court in *Center for Biological Diversity* explained that there are a number of potential methods of determining the significance of GHG emissions available. (*Center for Biological Diversity, supra*, 62 Cal.4th at pp. 229-230.) While comparison to a numeric threshold is not the exclusive permissible method of determining significance, a claim of net zero emissions must necessarily be predicated on meaningful calculations of the amounts of emissions that exist, that are projected, and that would be reduced with mitigation measures. (*Center for Biological Diversity*, *supra*, at p. 221 ["Guidelines section 15064.4 states a lead agency 'should consider,' among other factors, '[t]he extent to which the project may increase or reduce greenhouse gas emissions as compared to the existing environmental setting.' (*id*., subd. (b)(1).)" (*Center for Biological Diversity, supra,* 62 Cal.4th at 221.)

Although the term "should" as used in Guidelines section 15064.4, subdivision (b)(1) is not mandatory, it connotes guidance that must be followed unless there are strong and valid reasons for departure. (Guidelines § 15005, subd. (b) ["'Should' identifies guidance provided by the Secretary for Resources based on policy considerations contained in CEQA, in the legislative history of the statute, or in federal court decisions which California courts can be expected to follow. Public agencies are advised to follow this guidance in the absence of compelling, countervailing considerations."])

Relevant cases indicate that a numerical description of existing emissions, projected emissions, and the reduction achievable by implementation of mitigation measures is required when a project proponent or agency claims a project will achieve some specific reduction in GHGs. Indeed, the EIR's conclusion here that the Project's impacts will be less than significant rests, at least in part, on the

assertion that the Project's "net" emissions will be *zero*—in other words, on a *quantitative* threshold. (AR 1420.) Where an agency

> chooses to rely completely on a single quantitative method to justify a no-significance finding, *CEQA demands the agency research and document the quantitative parameters essential to that method*. Otherwise, decision makers and the public are left with only an unsubstantiated assertion that the impacts—here, the cumulative impact of the project on global warming—will not be significant.

(*Center for Biological Diversity*, *supra*, 62 Cal.4th at p. 228, emphasis added.) Here, the EIR's assertion that the Project's "net" emissions will be zero—an assertion essential to its significance determination (AR 1420-1421)—is not supported by adequate analysis or evidence.

Where a public agency claims a project would reduce emissions by a particular amount as compared to existing or "business as usual" emissions, a quantitative analysis is required to show how those emissions would be reduced by the proposed project or its mitigation measures. (*Friends of Oroville v. City of Oroville* (2013) 219 Cal.App.4th 832.) In *Friends of Oroville*, the petitioner challenged the City's approval of an EIR for a project to replace an existing Walmart with a Walmart "supercenter" on several grounds, including the EIR's alleged failure to properly address the significance of the project's GHG emissions. (*Id.* at p. 834.) Specifically, the petitioner argued that substantial evidence did not support the EIR's finding that the project emissions will be less than significant after mitigation, and the court agreed. (*Id.* at 839.)

The court in *Oroville* examined the requirements of Guidelines section 15064.4. (*Oroville, supra*, 219 Cal.App.4th at p. 839.) The City of Oroville sought guidance in the AB 32 Scoping Plan, the State ARB's informal/voluntary "Early Action Measures," the Attorney General's web list "CEQA Mitigations for Global Warming Impacts," and a 2008 white paper from the California Air Pollution Control Officers Association, among other documents. (*Id.* at 840.)

Among other findings, the EIR concluded that the project would emit close to 15,000 metric tons of carbon dioxide equivalent (CO_2e) per year, about 68% of which would come from vehicles. (*Id.* at 841.) The EIR concluded these emissions would not hinder AB 32 goals.

The court held that while the use of the AB 32 threshold was allowable, the City of Oroville applied it erroneously. For example, the City of Oroville failed to estimate emissions from the existing Walmart, making evaluation of the scale of increased emissions from the proposed supercenter "difficult if not futile." (*Oroville, supra*, 219 Cal.App.4th at p. 842.) It quantified the emissions of the *proposed* project at 14,817 metric tons of carbon dioxide equivalents per year and identified percentages of emissions contributed by particular sources. For example—much like the Project at issue here, where mobile sources constitute 80-90% of GHG emissions (AR 78066)—vehicles were identified as the source of 68 percent of the supercenter's anticipated greenhouse gas emissions. (*Id*. at 843.) Therefore, the court concluded calculations could and should have been made for the existing store. Critically, and exactly like the EIR in the present case, *the City did not estimate the effects of mitigation measures on GHG emissions*. (*Id.* at 842-843.)

Evidence that the EIR's claim of net zero or actual reduction of emissions compared to the existing environment, and that the claimed reductions would be achieved by implementation of specific, enforceable mitigation measures, is woefully lacking in the current case. Instead, the EIR failed to provide any quantitative emissions estimates to the public or decision-makers that would allow confirmation of its claim that the project would result in net zero GHG emissions.

D. Quantification of Existing Emissions, Projected Emissions, and Emissions Projected After Implementation of Mitigation Measures Can Readily Be Done and Has Been Done for Other Stadium and Leadership Projects.

Environmental documents for other stadium and Leadership Projects have quantified existing emissions, projected emissions, and the effectiveness of mitigation measures on reducing those emissions, so it is clearly feasible to do so.

In 2011, the Legislature adopted special procedures for an AEG-proposed stadium in Los Angeles. (See Pub. Resources Code § 21168.6.5) Nonetheless, the EIR for the project estimated that GHG emissions would total 34,864 metric tons per year. (Request for Judicial Notice, Exh. A, p. 8 ["Convention and Event Center Project Draft EIR", SCH. No. 2011031049, April 5, 2012, p. IV.F.2-31, available at http://planning.lacity.org/eir/ConventionCntr/DEIR//files/IV.F.2%20Air%20QualityClimate%20Change.pdf].) The EIR also estimated existing emissions at 20,673 metric tons CO_2e per year. (Request for Judicial Notice, Exh. A, p. 7 [EIR page IV.F.2-9].) Significantly, and in critical contrast with Respondents' procedure in this case, the EIR ascribed specific, numerical reductions in GHG emissions to the implementation of particular mitigation measures. (Request for Judicial Notice, Exh. A, p. 8 [page IV.F.2-31.)

Another Leadership Project with an EIR that disclosed and analyzed project GHG emissions in quantitative detail is the 8150 Sunset Project, a five building retail, commercial, and residential project proposed in the City of Los Angeles. The project proponent submitted it as a Leadership Project on January 31, 2014. (https://www.opr.ca.gov/s_californiajobs.php.) This project's EIR included baseline conditions in Appendix E.1, project mobile source GHG emissions in appendix E.12, and GHG emissions associated with alternatives in Appendix E.18. (Request for Judicial Notice, Exh. B, pp. 11-12, 14, and 16 [EIR, Appendix E,

posted at http://planning.lacity.org/eir/8150Sunset/deir/DEIR/Technical_ Appendices/Appendix_E-Greenhouse_Gas_Emissions.pdf .)

The EIR for the Project at issue in this case thus represents a striking departure from the current practice of providing numerical estimates of existing and projected emissions, and the reductions anticipated from mitigation, in large projects including stadium and AB 900 Leadership Project EIRs. If similar disclosure is not required for this Project, the current trend in favor of disclosure of emissions calculations for large projects may be eroded, as other public agencies may reduce the level of disclosure in environmental review of similar projects. Thus, the public and decision-makers would no longer be able to meaningfully evaluate whether such projects advance or interfere with the crucial goals of AB 32 and SB 32 to maximize reduction of greenhouse gas emissions throughout the state.

III. THE PUBLIC SHOULD HAVE BEEN INFORMED OF THE MAGNITUDE OF PUBLIC HEALTH IMPACTS FROM TOXIC AIR EMISSIONS BASED UPON THE BEST SCIENCE AVAILABLE

The EIR erroneously used a toxic air emission health impact analysis that included outdated facts about breathing rates of children when assessing impacts from toxic air contaminants. Breathing rates for sensitive populations, such as children, must be accurately assessed and disclosed as an underpinning to further analysis and mitigation. A public agency must "use its best efforts to find out and disclose all that it reasonably can." (Guidelines, § 15144.) Where scientifically accurate information about human health impacts is available and called to the attention of the agency in a timely way, as it was in this case (AR 57741, 57756-57759, 67088-67090, 69362-63), the agency should respond by incorporating that information into its analysis rather than manufacturing reasons to continue to rely on outdated facts.

A. OEHHA'S Guidance Reflects the Most Accurate, Current Data on Sensitive Receptor Breathing Rates.

The Arena EIR reports that the exposure parameters are based on 2003 guidance from the California Environmental Protection Agency's Office of Environmental Health Hazard Assessment (OEHHA) and 2010 guidance from BAAQMD. (AR 4498, 4503.) OEHHA is tasked with developing accurate exposure parameters pursuant to a mandate from the Children's Environmental Health Protection Act. (AR 30974-30975.) OEHHA adopted a new version of the Air Toxics Hot Spots Program Guidance Manual for the Preparation of Risk Assessments (Guidance Manual). (AR 58102, 57984.)

The exposure parameters in the new Guidance Manual reflect the best current scientific assessment of the existing environment when it comes to evaluating air pollution impacts that affect children's health. These exposure parameters include daily breathing rate, exposure time, exposure frequency, exposure duration, averaging time, and intake factor for inhalation. (AR 2891, 4499.)

Without an accurate baseline assessment of the existing environment, an EIR is deficient because the true impact of the project cannot be ascertained. (*Cadiz Land Co. v. Rail Cycle* (2000) 83 Cal.App.4th 74, 87 ["Without accurate and complete information pertaining to the setting of the project and surrounding uses, it cannot be found that the FEIR adequately investigated and discussed the environmental impacts of the development project."]; *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 952 ["Before the impacts of a project can be assessed and mitigation measures considered, an EIR must describe the existing environment. It is only against this baseline that any significant environmental effects can be determined."]) The proper baseline for analysis of environmental impacts is "what [is] actually happening," not what might happen or should be happening. (*Citizens for East Shore Parks v. State Lands Commission* (2011) 202 Cal.App.4th 549, 558.)

OEHHA's updated guidelines represent the most scientifically accurate facts about the "environmental setting" or "affected environment." It is significant that, as Appellants state, the EIR does not dispute the greater accuracy of the new OEHHA guidance; in fact, the EIR admits that BAAQMD intends to use the revised guidance in the future. (AR 3701 [OEHHA "striving to implement the recommended changes."]) This strongly indicates that the new, more accurate information from OEHHA could and should have been used, given that it was readily available to the agency.

Use of the most accurate information possible is especially necessary because public health is at stake. The South Coast Air Quality Management District estimated that a six-month construction project for a typical one-acre office project could cause a significant health impact. (See Request for Judicial Notice, Exhibit C, p. 26 [SCAQMD Staff Presentation, Potential Impacts of New OEHHA Risk Guidelines on SCAQMD Programs, Agenda Item 8b.) (*Available at* http://www.aqmd.gov/docs/default-source/Agendas/Governing-Board/2014/may-specsess-8b.pdf].) An analysis using currently recommended differential breathing rates would show a material increase in excess cancers for children and adults at the Hearst Tower and child receptors at the UCSF Hospital using as compared to the risks determined using the out-of-date breathing rates. For example, risk for a child resident of the Hearst Tower from project related sources would increase 71%, from 18 to 31 excess cancers, if current information on breathing rates is considered. (AR 67089.)

As Appellant Mission Bay Alliance points out (see AOB, p. 64), *Berkeley Keep Jets Over the Bay Committee v. Board of Port Com'rs* (2001) 91 Cal.App.4th 1344 is directly on point regarding the use of the most current, scientifically accurate information available. In that case the court set aside an analysis of Toxic Air Contaminants based on outdated CARB guidance about speciation profiles (a comprehensive profile of the organic species of gases contained in jet exhaust) after comments pointed out this flaw and the agency in

the EIR declined to provide corrected analysis. (*Id.*, at p. 1367.) Thus, the agency's errors in *Berkeley Jets* included using scientifically outdated information despite expert comments pointing out error and attempting to discredit best current science by arguing it had not yet been published. (*Id.*) The EIR for this Project committed the same errors. As a result of these deficiencies, the EIR's toxic air contaminant analysis is deficient and must be redone.

B. OEHHA Guidance Is Not So New or Unproven that Agencies May Disregard It in Conducting Analysis.

A commenter expressed "concern that the health risk impacts estimated in the SEIR may be underestimated because the analysis did not employ increased breathing rate assumptions recently published by the state of California's Office of Health Hazard Assessment (OEHHA)." (AR 3701.) In response the EIR stated that "BAAQMD's existing health risk assessment methodology protocols are appropriate for evaluating potential incremental health risk [from] the project" because BAAQMD has not yet incorporated OEHHA's updated guidance. (AR 3701.) As Appellants point out, this reflects a misunderstanding of the law. (See AOB, pp. 63-65.) Whether or not local air districts have prepared recommendations for new methods of analysis, by relying upon information that the public agency knows is outdated in assessing impacts, the agency fails to make a good faith effort at full disclosure as required by CEQA. The implication that the updated children's breathing rates need not be used because they somehow were not well understood or established is wrong. Contrary to this view, OEHHA recommended the higher children's breathing rates in guidance issued in 2012, well before the 2014 Notice of Preparation for the EIR. (AR 57757; AR 58097-58098, 58101-58102.)

Respondents assert OEHHA's guidance was not "designed as a CEQA methodology." (ROB, p. 77.) This argument is misleading. Agencies use health risk assessment exposure parameters, including breathing rates, that are taken from the OEHHA health risk assessment Guidelines for the Air Toxics Hot Spots

Program or BAAQMD Air Toxics guidance, which is itself based entirely on the OEHHA Hot Spots guidance. (AR 44989-4501, 77999-78004.) Thus, the agency should use *current* OEHHA guidance.

Without full disclosure of air pollution impacts, the mitigation measures for those impacts are given short shrift. The EIR should evaluate all feasible mitigation measures to reduce impacts to sensitive receptors such as the nearby hospitals where local air emissions will cause significant health effects from on-site or off-site emissions. (*Los Angeles Unified School Dist. v. City of Los Angeles* (1997) 58 Cal. App. 4th 1019, 1030 [EIR deficient for failing to evaluate whether air conditioning or filters would mitigate significant localized air quality impacts].)

IV. THE CITY'S IMPROPER USE OF TIERING RESULTED IN THE EIR OMITTING REVIEW OF THE PROJECT'S SIGNIFICANT IMPACTS TO LAND USE.

A. Stable Land Use Plans are Key to Comprehensive and Orderly Development.

Cities adopt land use plans to facilitate orderly development and prevent conflicts arising from incompatible land uses. The general plan is regarded as the "constitution for future development…located at the top of the hierarchy of local government law regulating land use." (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 773, internal citations omitted.) The State Planning and Zoning Law requires future development to be consistent with the general plan and vertical consistency between a City's general plan, specific plans, zoning regulations, and future developments.

Proposed projects that are inconsistent with adopted land use plans threaten the goal of comprehensive planning. The Supreme Court recognized this nearly 30 years ago:

> [T]he keystone of regional planning is consistency—between the general plan, its internal elements, subordinate ordinances, and all

> derivative land-use decisions. Case-by-case reconsideration of regional land-use policies, in the context of a project-specific EIR, is the very antithesis of that goal.

(*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 572–73.) Accordingly, CEQA requires an environmental review document to disclose to decisionmakers and the public "any inconsistencies between the proposed project and applicable general plans, specific plans, and regional plans." (CEQA Guidelines § 15125 subd. (d).)

B. CEQA Permits Tiering When a Subsequent Project is Consistent with a Prior Land Use Plan That Has Undergone Environmental Review.

CEQA encourages the use of tiering[2] to prevent unnecesary duplication in environmental review. (Pub. Resources Code § 21093.) "Once a general project impact has been analyzed in a broad first-tier EIR," an agency may rely upon that EIR in "later, more specific environmental analysis documents." (Pub. Resources Code § 21083.3.) Tiering is not permissible unless the subsequent project's impact has *already* been disclosed, analyzed, and mitigated in a previously-certified EIR. Thus, a lead agency may only tier from a prior land use plan EIR when a subsequent project is consistent with the adopted land use plan analyzed in the prior EIR. (CEQA Guidelines § 15183 subd. (d).)

Furthermore, the agency may not rely on a prior land use plan EIR to disclose, analyze, or mitigate impacts that: (1) are particular to the subsequent project; (2) were not analyzed as significant effects in the prior EIR; (3) are potentially significant off-site impacts and cumulative impacts that were not

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[2] "Tiering" is "the coverage of general matters and environmental effects in an environmental impact report prepared for a policy, plan, program, or ordinance followed by narrower or site-specific environmental impact reports which incorporate by reference the discussion in any prior environmental impact report and which concentrate on the environmental effects which (a) are capable of being mitigated, or (b) were not analyzed as significant effects on the environment in the prior environmental impact report." (Pub. Resources Code § 21068.5.)

discussed in the prior EIR; or (4) are more severe than discussed in the prior EIR. (CEQA Guidelines § 15183 subd. (b).) When a subsequent project is inconsistent with the project analyzed in the prior EIR, or when the subsequent project falls outside the scope of the prior environmental review, a new environmental document is required.

C. The Arena Project Represents a Significant Departure from the Mission Bay South Redevelopment Plan.

Respondents argue they may rely upon the tiering provisions applicable to program EIRs. (AR 3308-3316.) However, the current Project was not previously analyzed. In 1997, the former San Francisco Redevelopment Agency proposed the Mission Bay South Redevelopment Plan ("Plan") for the area south of Mission Creek and the Mission Bay North Redevelopment Plan for the area north of Mission Creek. The Redevelopment Agency prepared an Environmental Impact Report to analyze foreseeable development under the plans. The Plan was adopted, and its EIR was certified in 1998. The City acknowledges that the Arena Project was not then contemplated or subjected to environmental review. (AR 3315, 8686-87.)

Until this proposal, development around the Project site has proceeded according to the Plan, resulting in the construction of the UCSF research campus and childrens's hospital, as well as the conversion of the area into a biotech hub with a pedestrian-friendly street grid. (AOB p. 28.)

The Arena Project violates the limits set by the Plan, which is akin to a zoning ordinance. (AOB pp. 30-32.) With 480,000 square feet of retail space, the arena complex use, which is a retail use (AOB, p. 30, BOA 1406), far exceeds the 179,000 square feet of retail permitted. (*Ibid*.) The Plan explicitly states, "in no instance will any variation be granted that will change the land uses of this Plan." (AR 15419.)

The Plan did not contemplate intensive uses, such as the Arena Project, that generate significant and unavoidable traffic and noise impacts. Instead, the

Plan was designed to create a quiet, pedestrian-friendly UCSF Research campus and the compatible development of biotech resarch facilties and labs. With its extensive retail component, several times the limit set by the Redevelopment Plan, the Arena Project contradicts the Plan's emphasis on pedestrian-friendly "vara" blocks, which are the cornerstone of the Plan's community vision. A vara block is considered the ideal sized block for a walkable city. A vara block measures approximately 275 feet by 413 feet. (AR 51124.) The Arena, on the other hand, imposes large structures across several blocks. (AR 15434.) Indeed, the Initial Study prepared for the Arena Project admits that the events planned under the Project "would alter the overall land use character for the project site from that analyzed in the [Mission Bay Redevelopment Plan EIR].") (AR 1720.)

Because the Arena Project exceeds the square footage limits set by the Mission Bay South Redevelopment Plan, is inconsistent with the type of walkable communities envisioned in the Plan, and was not even contemplated at the time of the EIR on the Plan, the Plan EIR cannot provide the basis for tiering for the Project's adverse impacts on the environment. Therefore, pursuant to CEQA Guidelines section 15183, the Project's land use impacts had to be addressed in the EIR for the Project itself.

Despite admitting that the Project falls outside the scope of the Plan EIR, and despite the Project's clear violation of the limits of the Plan, the City relied on the Plan EIR to analyze and mitigate the Arena Project's land use impacts. (AR 51109-15.) The potential for impacts was dismissed in the Initial Study, resulting in an Arena Project EIR that omitted analyis of the Project's land use impacts. The City's approach is unlawful because the Arena Project EIR's failed to disclose, analyze, and mitigate the Project's violation of the Mission Bay South Redevelopment Plan's limits on retail uses.

V. CONCLUSION

Amici advocate for a necessary adherence and scrupulous observance of the mandates of the California Environmental Quality Act. This Court's enforcement of environmental law as to this prominent Project, including its interpretation of the Supreme Court's ruling in *Center for Biological Diversity v. California Dept. of Fish and Wildlife* (2015) 62 Cal.4th 204 will be watched throughout the state with consequences for the environment and public accountability.

DATE: October 3, 2016

Respectfully submitted,
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CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, rules 8.204 (c)(1), I hereby certify that this Application For Permission To File Amicus Curiae Brief And Amicus Curiae Brief Of Center For Biological Diversity, Coalition For Clean Air, Communities For A Better Environment, And Sunset Coalition In Support Of Mission Bay Alliance is proportionally spaced, has a typeface of 13-point, proportionally-spaced font and contains 9,138 words, according to the word counting function of the word processing program used to prepare this brief.

Executed on this 3rd day of October, 2016, at Hermosa Beach, California

Douglas Carstens

PROOF OF SERVICE

I am employed by Chatten-Brown & Carstens LLP in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 2200 Pacific Coast Highway, Ste. 318, Hermosa Beach, CA 90254 . On October 3, 2016, I served the within documents:

APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF OF CENTER FOR BIOLOGICAL DIVERSITY, COALITION FOR CLEAN AIR, COMMUNITIES FOR A BETTER ENVIRONMENT, AND SUNSET COALITION IN SUPPORT OF MISSION BAY ALLIANCE

☐ **VIA UNITED STATES MAIL.** I am readily familiar with this business' practice for collection and processing of correspondence for mailing with the United States Postal Service. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid. I enclosed the above-referenced document(s) in a sealed envelope or package addressed to the person(s) at the address(es) as set forth below, and following ordinary business practices I placed the package for collection and mailing on the date and at the place of business set forth above.

☐ **VIA OVERNIGHT DELIVERY.** I enclosed the above-referenced document(s) in an envelope or package designated by an overnight delivery carrier with delivery fees paid or provided for and addressed to the person(s) at the address(es) listed below. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

☐ **VIA FACSIMILE TRANSMISSION.** Based on an agreement of the parties to accept service by fax transmission, I faxed the above-referenced document(s) to the persons at the fax number(s) listed below. No error was reported by the fax machine that I used. A copy of the record of the fax transmission is attached.

☒ **VIA ELECTRONIC SERVICE THROUGH TRUEFILING.** Based on a court order or an agreement of the parties to accept service by electronic transmission through TrueFiling, I caused the above-referenced document(s) to be sent to the person(s) at the electronic address(es) listed below.

I declare that I am employed in the office of a member of the bar of this court whose direction the service was made. I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on October 3, 2016, at Hermosa Beach, California 90254.

Cynthia Kellman

Mission Bay Alliance, et al. v. OCII, et al.
First Appellate District, Division 3, Case No. A148865
(SF County Case No. CPF-16-514892 (Cons. Case No. CPF-16-514811))

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