

Daniel Freedman
dff@jmbm.com

1900 Avenue of the Stars, 7th Floor
Los Angeles, California 90067-4308
(310) 203-8080 (310) 203-0567 Fax
www.jmbm.com

January 23, 2024

BY EMAIL ONLY

Vincent Bertoni, AICP
Director of Planning
Department of City Planning
City of Los Angeles
200 N. Spring Street
Los Angeles, CA 90012-4801
E-Mail: Vincent.Bertoni@lacity.org

Re: Council File 24-0051
Department of City Planning Case No. ADM-2023-4682-DB-VHCA-ED1
Project Address: 11418-11424 West Missouri Avenue

Dear Department of City Planning:

Our office represents LA Affordable Communities LLC, the applicant for the above referenced project. As you may recall, the project proposes a 100 percent affordable residential development, containing 43 rental units and one manager's unit. (the "Project"). The Department of City Planning approved the Project on December 12, 2023, and issued a Letter of Compliance finding the Project qualified for ministerial processing pursuant to the City's Executive Directive-1 program ("ED-1") (Letter of Compliance, Pg. 1.) On or about December 27, 2023, the Department of City Planning accepted an appeal from "Missouri Avenue Neighbors" seeking to challenge the Project's statutory exemption from the California Environmental Quality Act ("CEQA"). On January 12, 2024, our office submitted a letter objecting to the City's processing of the appeal on the grounds that the action is not subject to an appeal under Los Angeles Municipal Code § 11.5.13, and that the Department's acceptance of this appeal constitutes an abuse of discretion. We submit this supplemental letter to provide additional support for our position, and to again demand the City reject this appeal and lift the pending stay on the Project approval.

Although the Los Angeles Municipal Code ("LAMC") has since been amended, the appeal at issue here was accepted and processed pursuant to LAMC § 11.5.13(C), which provided that CEQA appeals may be brought "*[w]hen any decision maker ... determines that [a] Project... is not subject to CEQA...*" (emphasis added). Based on the this simple but meaningful requirement, the appeal at issue here should not have been accepted for two critical reasons. First, as explained in our prior correspondence, the Letter of Compliance was not a CEQA "determination" that may be appealed. In other words, in issuing the Letter of Compliance, the Department of City Planning did not make a determination that the Project was exempt from CEQA, it merely determined that

the project was ministerial in nature. This is not the same thing as a CEQA *determination*, where facts and project details are weighed to determine how CEQA may or may not apply, it is merely a statement that the project qualifies for ministerial processing. For some context, this is the same type of review that occurs when the Department of Building and Safety issues a building permit or when the City approves an emergency project after a disaster. Accordingly, if the City permits a CEQA appeal of this action, it will be required to permit CEQA appeals of all building permits and all emergency projects, and both will trigger the LAMC's stay provisions. Nevertheless - and putting aside the broader and obviously untenable ramifications of finding to the contrary - the fact is that there was no CEQA determination made in the Letter of Compliance, and therefore there is nothing to be appealed under CEQA.

Second, even assuming *arguendo* that such a "determination" was made, it still is not appealable under LAMC 11.5.13 or PRC § 21151(c) because the determination did not conclude that the project "*is not subject to CEQA*." As stated in the Letter of Compliance, City Planning concluded that, although the project was subject to CEQA, it was statutorily exempt and therefore no further environmental review was required. This is not a finding that the Project "*is not subject to CEQA*" which permits an appeal under CEQA. The City very-well understands this distinction, and expressed it in its own briefing to the trial court in the case *United Neighborhoods for Los Angeles ("UNLA") v. City of Los Angeles* (Case NO BS174353)(**Exhibit A**). In that case, petitioner UNLA argued it should have been provided a CEQA appeal of a City CEQA exemption determination made in connection with certain sidewalk repairs and tree removals. Relying on *San Diegans for Open Government v. City of San Diego* (2016) 6 Cal. App. 5th 995 – the case cited in our prior January 12, 2024, letter – the City explained that the petitioner was not entitled to a CEQA appeal because "an exemption determination, by definition, is a finding that CEQA *does* apply." (emphasis original) Accordingly, as the City never found that CEQA *does not apply* to the project, the City insisted that the petitioner in that case "was not entitled to [a CEQA] appeal [or a CEQA appeal] hearing...." This is precisely the situation at issue in this instance. To the extent the Letter of Compliance is a CEQA determination, it was not a determination that the "Project is not subject to CEQA," but instead, a determination that the project is *exempt*. This is why the appeal should never have been accepted, and is also why the appeal should be rejected without a hearing.

Finally, it should also be noted that the appeal itself also is not an appeal of the Project's CEQA determination, it is a facial challenge of the ED-1 program in its entirety. The appeal does not specify how the determination erred with respect to this Project, only that the statutory exemption does not apply because "ED1 was not ratified by the City Council... and is, therefore, invalid." (See Appeal Justification, Pg. 1.) This is not an appeal of the Project's CEQA determination, it is a facial challenge to the ED1 program as a whole. Accordingly, the appellant has failed to include a valid justification in support of the appeal itself, and for this reason alone, the appeal should be summarily rejected for being both incomplete and barred by the applicable statute of limitations.

Vincent Bertoni, AICP
January 23, 2024
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Thank you for your assistance and cooperation.

Very truly yours,

A handwritten signature in dark ink, appearing to read 'D. Freedman', with a large, stylized 'D' and a long, sweeping horizontal line extending to the right.

DANIEL FREEDMAN of
Jeffer Mangels Butler & Mitchell LLP

Attachments

CC: City of Los Angeles, City Clerk
Armeen Neshat, Deputy Director, Affordable Housing Production, Office of the Mayor
Kathryn Phelan, Deputy City Attorney, Office of the City Attorney
Kevin Keller, Executive Officer, Department of City Planning
Jeff Khau, Planning Deputy, Council District 11
Sonja Strauss, Executive Director, YIMBY Law
Garbiel Pena-Lora, Senior Housing Policy Specialist, Housing Policy Division, HCD
Lisa Frank, Senior Housing Policy Specialist, HCD

Exhibit A

2019 WL 11343344 (Cal.Super.) (Trial Motion, Memorandum and Affidavit)
Superior Court of California.
Los Angeles County

UNITED NEIGHBORHOODS FOR LOS ANGELES and Eastside Nature Alliance, Petitioners/Plaintiffs,
v.
THE CITY OF LOS ANGELES, Respondent/Defendant,
Mark Willits, Judy Griffin, Brent Pilgreen, and Communities Actively Living Independent
& Free, on behalf of themselves and all others, and Roes 1 - Real Parties In Interest.

No. BS174353.
April 3, 2019.

Respondent City of Los Angeles' Trial Brief

Michael N. Feuer, City Attorney (111529x), Timothy McWilliams, Ass't City Atty (167769), Robert M. Mahlowitz, Deputy City Atty (160125), 200 North Main Street, City Hall East Room 701, Los Angeles, California 90012-4131, Telephone: (213) 978-8205, robert.mahlowitz@lacity. org, for respondents/Defendants, City of Los Angeles and Los Angeles Department of Transportation.

Linda M. Dardarian, Andrew P. Lee, Ginger L. Grimes, Goldstein, Borgen, Dardarian & Ho, 300 Lakeside Drive, Suite 1000, Oakland, CA 94612, ldardarian@gbdhlegal.com, alee@gbdhlegal.com, gggrimes@gbdhlegal.com, for Proposed Intervenor Real Party In Interest Mark Willits, et al. v. City of L.A.- Usdc Case No. 10Cv05782.

Hon. Richard L. Fruin.

Dept 15

Date: April 26, 2019

Time: 8:30 A.M.

Respondent and Defendant City of Los Angeles (“City”) submits the following opening trial brief in this action filed by Petitioners and Plaintiffs United Neighborhoods for Los Angeles and Eastside Nature Alliance (collectively “UNLA.”) The City's brief and opposition is supported by the concurrently-filed Declarations of Robert M. Mahlowitz, Julie Sauter, and Robert Vega and documents attached thereto, the concurrently-filed request for judicial notice, and the court's record of matters previously filed in this action.

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I. INTRODUCTION

As UNLA's preliminary injunction motion shows, UNLA believes City policy should encourage greater tree preservation.¹ UNLA, therefore, improperly seeks to impose their views upon the public through a groundless lawsuit demanding the City cease repairing public sidewalks damaged by tree root intrusion, disrupting maintenance work funded at more than \$30 million a year and the work of an entire division of the City's Bureau of Engineering. ("BOE.") UNLA's efforts to impose its policy preferences upon the public should be debated through the political process and not via the judiciary.

At the most basic level, UNLA's lawsuit is defective because it seeks to enjoin governmental organization, rather than a governmental action. Throughout, UNLA's trial brief requests the court enjoin the City's "Sidewalk Repair Program" - but UNLA nowhere defines such a program or alleges when it was adopted. That is because it is not a project, but a general term long used to describe the City's governmental organization and administration of sidewalks. (*E.g.*, declaration of Julie Sauter ["Sauter"] ¶ 4.) It is no more a CEQA project than is the City's governmental management of sewers, street lights, streets, or other public infrastructure. This lawsuit, then, improperly challenges and seeks to enjoin governmental administration, rather than a specific governmental approval.

Moreover, CEQA statutes of limitation bar UNLA from challenging any of the specific approvals their petition or trial brief does identify. Their petition identifies four approvals: (1) The City Council's 2015 approval of the *Willits* settlement agreement (2AP ¶ 45 & Exh D);² and (2) three 2018 approvals of individual sidewalk repair projects (*Id.* ¶¶ 55, 56.) UNLA's trial brief raises an additional approval, one not identified in their petition -- a March 2016 report adopted by City Council calling for new sidewalk repair policies. (TB 7:4-13 & Auth. 18-24.) UNLA did not file a timely CEQA challenge to any of these approvals and identifies no other project for which it did so.

UNLA's trial brief expressly recognizes its claims are time barred, but asserts CEQA's statutes of limitation should be set aside in favor of the longer limitations period applicable to declaratory relief actions pursuant to  *Californians for Native Salmon Etc. Ass'n v. Dep't of Forestry* (1990) 221 Cal.App.3d 1419 (pattern of unlawful, unwritten policy.) (TB 15:15-25.) UNLA seeks to apply *Native Salmon*, asserting the City has adopted an unwritten policy of repairing sidewalks in violation of CEQA. (TB 17-18.) The Council's environmental review and approval of the three 2018 sidewalk repairs - which UNLA did not challenge within CEQA's limitations period - is the sole evidence UNLA presents of this alleged "policy." *Native Salmon* has never been applied to nullify CEQA's statutes of limitations, and should not be so applied here, where a timely-filed CEQA challenge was available to UNLA. Contrary to UNLA's contentions, the City did nothing to moot the viability of any claim. Further, evidence of three approvals is insufficient to demonstrate a "pattern or practice" of anything by a preponderance of the evidence, and the City's approvals were lawful. UNLA's *Native Salmon* sidewalk repair claims are without merit.

In the end, it is apparent that what UNLA seeks is an advisory opinion barring the City from conducting individual environmental review of sidewalk repairs. (Trial Brief ["TB"] 13:21-22; 2AP ¶ 81.) UNLA asserts that City may not continue to review individual repair projects because the City is considering new sidewalk policies and released a July 2017 initial study calling for an environmental impact report to review these potential, new projects. (See *id* and 17:28-18:5.) No law exists requiring the City to cease sidewalk repair review under existing policies while the City studies new potential policies. The City has complied with all CEQA requirements and UNLA has not and cannot demonstrate otherwise.

Separately, UNLA asserts *Native Salmon* to allege the City has adopted an unwritten policy in violation of Public Resources Code section 21151(c), of completing sidewalk repairs before providing City Council CEQA appeals of categorical exemption determinations. (TB 18-19.) This claim, too, is without merit.  Section 21151(c) does not provide a right to appeal a categorical exemption determination, thus the City was not required to provide the hearings UNLA demanded. UNLA's sole evidence of appeals, Respondent City of Los Angeles Trial Brief moreover, are of UNLA's three 2018 sidewalk repair approval appeals. Again, the City's response to three administrative appeals is insufficient to document an unwritten policy of any kind. These appeals, additionally, show the opposite of what UNLA alleges. In one case, the City undertook a sidewalk repair before the Council heard UNLA's appeal; in the other two cases, repairs did not precede UNLA's appeal hearings. Even so, all three appeals provided meaningful environmental review. Finally, because all of the appeals UNLA demands have been held, and UNLA has not challenged the Council's final CEQA determinations, UNLA has deprived this court of any remedy to address their incorrect  Section 21151(c) contentions. UNLA's failure to timely file a CEQA claim bars their relief, not any action by the City to "moot" their claim, as UNLA contends. (See TB 13:12-17.)

Lastly, the Petitioners hold no due process property rights in the sidewalks or trees and CEQA confers no hearing rights. Moreover, the City provided hearings that provided due process, even though none were required. UNLA's petition should be denied.

II. STATEMENT OF FACTS

A. The City's Longstanding Sidewalk and Street Tree Replacement Policies

The City's sidewalk construction standards were last revised June 25, 2014. (Robert Vega Declaration ("Vega"), ¶ 3 & Exh A [Standard Plan S-440-0].) The City's street tree ordinance, identified at 2AP paragraph 37, was last revised in 1980 and authorizes the Board of Public Works ("BPW") to issue discretionary permits for tree removals in the public right of way (See LAMC § 62.170 [AUTH.402³]). The petition also alleges the BPW adopted street tree policies on June 17, 2015. (2AP ¶ 39; shown at AUTH.395-399.) The evidence documents the City conducts sidewalk repairs and issues street tree replacement permits pursuant to long-standing, unchanged regulations and written policies.

**B. The 2015 *Willits* Settlement Commits the City to 30 Years
of Sidewalk Repair Funding but not to any Specific Repair**

In the 2010 lawsuit entitled, *Willits v. City of Los Angeles*, Central District of California Case No. CV-10-5782-CBM-RZ (“*Willits* Action”) a class action lawsuit alleged the City's sidewalk maintenance violated the Americans with Disabilities Act. (AUTH. 103-138.) At an April 1, 2015 public meeting, the City Council approved the *Willits* settlement agreement. (AUTH10-18; Robert M. Mahlowitz Declaration [“RMM”], Exh. 4 [minutes].) The agreement provides: (1) \$1.367 billion of funding over a 30-year period to administrate, maintain and repair sidewalks (AUTH.262); (2) the City retains discretion to determine which repairs to approve (AUTH.262:21-24); and (3) a descriptive methodology to determine the order in which to consider projects (AUTH.266-269.) The settlement does not identify any site or location of a required repair. (See AUTH.241-294.)

No evidence exists of any CEQA challenge to the settlement during the 512 days between the Council's April 1, 2015 approval and the district court's August 25, 2016 approval on behalf of the *Willits* class. (AUTH.234-294.) Even before the district court's action, the City began spending the allocated repair money - using the term “Sidewalk Repair Program” in the funding approval to describe sidewalk operations *both before and after* approving the settlement. (RMM Exh. 1 [“The 2015-16 Adopted Budget continues the prior 2014-15 Sidewalk Repair Program with \$31 million to be spent between both fiscal years”]; AUTH.540-47 [2015/16 sidewalk repair list].) The City undertook these repairs pursuant to the existing sidewalk construction standards and tree replacement ordinance discussed above, as it continues to do.

**C. UNLA Presents Evidence of only Three 2018 Sidewalk Repairs, and has not
Challenged the City Council's Final CEQA Determinations for those Repairs**

Although tree replacements are not broken out, the evidence shows that after adopting the *Willits* settlement funding in 2015, the City was able to repair at least 609 sidewalks through fiscal year 2016/17. (AUTH.540-571 [Settlement Agreement Compliance Report].) UNLA presents evidence concerning the City's approval of only three repairs: Spaulding Avenue, Cherokee Avenue, and West 48th Street. (¶¶ 67-70) (“The Three 2018 Repairs.”) UNLA's 2AP, moreover, challenges solely superseded BPW determinations for each project, rather than the Council's three final CEQA actions. (*Id.*)

The evidence presented concerning the Three 2018 Repairs is as follows: (a) the BPW engaged in individual environmental review for each project and found each exempt from the requirements of CEQA pursuant to City CEQA Guidelines;⁴ (b) UNLA appealed each determination to the City Council;⁵ (c) on October 17, 2018, the Council provided those CEQA appeal hearings;⁶ (d) the Council took final action October 31, 2018, replacing the BPW's actions and adopting three new CEQA determinations - exemptions pursuant to CEQA Guideline 15301⁷ for repair of public infrastructure, finding no Guideline 15300.2 exception applied;⁸ and (e) the City filed notices of exemption (“NOE”) on October 31, 2018⁹ and November 1, 2018.¹⁰ Because UNLA did not amend the 2AP or otherwise file a legal challenge to the Council's final CEQA determinations, their right to do so is now time-barred. (See Law & Argument, C below.)

UNLA also asserts the City's processing of their BPW appeals demonstrates an unwritten, illegal policy to complete projects before providing Council review of CEQA determinations. (TB 18-19.) UNLA identifies evidence of only three appeals, and in two of those cases, no project proceeded prior to appeal. (Cherokee and 48th Street.) (Vega ¶¶ 4-5.)

**D. For More than 20 Years, the City has Administrated and Organized
the Public Sidewalks Utilizing the “Sidewalk Repair Program” Label**

Not mentioned in any petition, UNLA's trial brief for the first time challenges the Council's March 29, 2016, action adopting a report of two Council-subcommittees entitled, "REPORT relative to development of a Citywide Sidewalk Repair Program." ("March 2016 Report.") (TB 6-7; AUTH. 18-24.) Because the writ petition does not challenge the March 2016 Report, it is not part of the Administrative Record of this appeal, and is not the proper subject of UNLA's lawsuit. Nonetheless, UNLA's trial brief appears to assert the City violated CEQA by failing to conduct environmental review before approving the Report - which UNLA equates to the City's "Sidewalk Repair Program." (See TB 7:4-12 & AUTH. 18-24.) The Report is not a CEQA project, and if it were, UNLA did not challenge it within CEQA's limitations period. (See Law & Argument, Part B (2) below.)

Nor is "Sidewalk Repair Program" the label of any particular project, CEQA or otherwise. The City has historically used the term "Sidewalk Repair Program" to describe governmental activities related to sidewalk repair and maintenance. (Sauter ¶ 4.) This includes funding, policy development, environmental review, public outreach, engineering, and construction work. (*Id.*) References to "Sidewalk Repair Program" are seen in public records going back 20 years, predating the *Willits* settlement. (RMM Exh. 2 [2002, 2004 and 2008 SRP usage].) Although the City did not fund repairs during the Great Recession, its procedures and policies governing such work remained in place. Currently, the City also utilizes the term "Willits SRP" referring to the same governmental sidewalk oversight funded by *Willits* settlement funds. (Sauter ¶ 4.)

The March 2016 Report seeks information and future development of policies from a number of City departments, but does not commit the City to implement anything. UNLA's petition does not challenge those Report concepts that subsequently lead to new policies first mentioned by UNLA in their trial brief. (See TB 7:13-25.) These issues, thus, are not relevant to UNLA's pending CEQA action. Two of the March 2016 Report requests for information, however, provide insight into how UNLA's CEQA petition goes astray.

The Report instructs the Bureau of Street Services to develop recommendations to simplify and streamline City tree replacement policies and procedures. (AUTH.21-22 ¶ 21.) It also authorized a project-level EIR and asked the BOE to report back on required resources and an EIR timeline. (AUTH.21 ¶ 20.) UNLA asserts that because the BOE has begun environmental review of potential new policies, the City may no longer conduct environmental review of any sidewalk repair pursuant to its longstanding sidewalk construction and tree replacement policies. (See TB 13:21-22.) The contention has no basis in law and makes no sense, as it would grind existing governmental administration of a particular subject matter to a halt whenever an agency began environmental review of possible new, not-approved policies concerning those same matters.

E. The City is Preparing an EIR Concerning Possible *Changes* to its Tree Removal Ordinance and a Programmatic Approach to CEQA Review

The 2AP argues that a July 2017 initial study ("IS") announced the City's intent to conduct environmental review of the March 2016 Report. (TB 7:4-7.) The argument is wrong. As noted, the March 2016 Report did not adopt new policies, and is not under CEQA review. Instead, the July 2017 IS addresses environmental review of only two of the potential policy changes discussed by the Report - a change to the tree replacement ordinance and development of a potential streamlined, programmatic environmental clearance of most sidewalk repairs, as detailed next.

The IS describes the City's current approach to sidewalk repairs under the heading, "Safe Sidewalks LA Program." (AR 1298.) As the Three 2018 Repairs show, the City currently conducts independent CEQA review of each sidewalk repair.¹¹ The IS states that the City's repair practices include meeting the City's *Willits* settlement obligations, which must be provided for an additional 26 years, thus must be addressed by the draft EIR considering sidewalk repair policy changes. (AR1295-1298.) The IS then describes the project to be reviewed as follows: "The proposed Project would *continue, amend, and expand* implementation of Safe Sidewalks LA over the next 30 years to meet the provisions of the approved Settlement Agreement." (AR 1299.)

The IS states that the projects under review are changes to City practices that could streamline sidewalk repair approvals by adopting a new tree replacement ordinance and by crafting a programmatic CEQA clearance for sidewalk repairs. (AR 1300) "Proposed language for a draft Sidewalk Repair Program ordinance or policy related to street trees would be included in the

draft EIR for public and agency review and comment.”) The programmatic nature of the draft EIR now being prepared is further shown by the two typical sidewalk repair scenarios the IS describes as the subject of review. (AR 1301 [“The following two prototypical construction scenarios were developed for the purposes of the environmental impact analysis.”]) The City, however, has not yet developed, approved, or implemented a programmatic approach to CEQA review. The City currently acts pursuant to existing practices, regulations, and policies, and the preponderance of evidence shows that practice is to conduct proper CEQA review before approving a repair.

III. STANDARDS OF REVIEW

UNLA's trial brief does not identify the standards of review applicable to their claims, merely reciting general standards of writ review. (TB 13.) They do not identify any standard applicable to their declaratory relief contentions. Here, although the BPW's CEQA determinations were mooted by the Council's subsequent NOE determinations which UNLA's petition does not challenge, UNLA's petition continues to assert the BPW's determinations for the Three 2018 Repairs were improper because a CEQA exception applied.¹² A petitioner bears the burden of producing evidence supporting a claimed CEQA exception.

( *Berkeley Hillside Pres. v. City of Berkeley* (2015) 60 Cal.4th 1086, 1110.) Adoption of a CEQA exemption may be set aside only if a petitioner identifies evidence that the agency did not proceed in the manner required by law, or by proving that substantial evidence fails to support the agency's findings. ( *Id.* pp. 1109-10.) Substantial evidence means there must be enough relevant information and reasonable inferences that a fair argument can be made to support a conclusion, even though other conclusions might be reached. ( *Communities for a Better Environment v. Richmond* (2010) 184 Cal.App.4th 70.)

Other than review of the BPW's Three 2018 Repair approvals, resolution of UNLA's action requires application of law to facts. Facts must be established in all civil actions by a preponderance of the evidence. (See, e.g. Evid. Code § 115; *Wollersheim v. Church of Scientology* (1999) 69 Cal.App.4th 1012, 1015.) A plaintiff bears the burden of proof to establish facts necessary to declaratory relief. ( *Mulligan v. Wilson* (1949) 94 Cal.App.2d 286, 292.) Therefore, UNLA bears the burden of identifying by a preponderance of evidence, all facts necessary to declaratory relief.

Finally, the trial court applies its independent judgement to resolve questions of law concerning facts established by a preponderance of the evidence. (See  *McAllister v. California Coastal Com.* (2008) 169 Cal.App.4th 912, 921-922 [the trial court exercises independent judgment on pure questions of law, including the interpretation of statutes and judicial precedent].) Here, this includes determining whether CEQA's statute of limitations bar UNLA's claims, and which City actions triggered CEQA compliance. (See  *Save Tara v. City of W. Hollywood* (2008) 45 Cal.4th 116, 131.) Whether *Native Salmon* applies also presents a legal question subject to the Court's independent judgment based on facts demonstrated by a preponderance of the evidence.

IV. LAW AND ARGUMENT

A. UNLA does not Define the Challenged “Sidewalk Repair Program”

UNLA fails to identify the CEQA project they seek to enjoin. The 2AP is UNLA's operative petition. It asserts the City is carrying out a “Sidewalk Repair Program” before completing CEQA review. (2AP ¶ 1.) The 2AP, however, nowhere defines “Sidewalk Repair Program.” Sifting through UNLA's vague contentions, it appears they supply two alternate SRP definitions. First, the 2AP and UNLA's trial brief argue the Council's approval of the *Willits* settlement initiated the “Sidewalk Repair Program.” (2AP ¶¶ 45-47, TB 17:24-28.) Second, although not identified in the 2AP, the trial brief defines the March 2016 Report as the SRP. (TB 7:3-9 & 15:4-13.) Neither, however, constitutes a CEQA project, and even if one did, a CEQA challenge to either is time-barred. (See Part B below.)

As explained, the phrase “Sidewalk Repair Program” has long been used generally to refer to governmental organization and administration, concerning a myriad of topics. (Sauter ¶ 4.) Currently, it refers to work paid for with funds the City agreed to budget in the *Willits* settlement. (*Id.*) BOE's website is consistent, describing its Sidewalk Division as,

responsible for implementing, administering and managing the City's Sidewalk Repair Program, which was initiated in response to the *Willits v. City of Los Angeles Settlement Agreement*. The Sidewalk Division provides design, construction management, and program management services in compliance with the Settlement Agreement.

(RMM Exh 3.) UNLA has not challenged a CEQA project, but governance itself.

1. Governmental Organization or Funding with no Potential to Change the Environment is not a CEQA Project

CEQA applies to “discretionary projects proposed to be approved or carried out by public agencies.” (PRC § 21080(a).) A CEQA project is, “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.” (Guideline 15378(a).) “The creation of government funding mechanisms or other government fiscal activities, which do not involve any commitment to any specific project which may result in a potentially significant physical impact on the environment,” are not a CEQA projects. (Guideline 15387(b) (4).) “Organizational or administrative activities of governments that will not result in direct or indirect physical changes in the environment,” are not CEQA projects. (Guideline 15387(b)(5).) An activity the Public Resources Code and the Guidelines do not define as a project is not subject to CEQA. (Guideline 15060(c)(3); *Muzzy Ranch Co. v. Solano C'ty Airport Land Use Com.* (2007) 41 Cal.4th 372, 380.)

Environmental review must be conducted before an agency approves a CEQA project. (PRC § 21080(a); Guideline 15004; *Save Tara, supra*, 45 Cal.4th 116.) The term “approve” means a public agency's decision that, “commits the agency to a definite course of action in regard to a project.” (Guideline 15352(a).) Thus, no CEQA approval occurs if an agency retains discretion to adopt an alternative, impose mitigation measures, or disapprove a project once CEQA review is completed. (See *Sustainable Transportation Advocates of Santa Barbara v. Santa Barbara C.A.G.* (2009) 179 Cal.App.4th 113, 119.) Here, the *Willits* settlement and the March 2016 Report were not CEQA projects, so did not require CEQA review.

2. The *Willits* Settlement Provides Funding Only and does not Foreclose Mitigation or Commit the City to any Specific Repair

The *Willits* settlement is not a CEQA project because it establishes funding only. In *Sustainable Transportation, supra*, 179 Cal.App.4th at 119, the court found that a County ordinance approving specific transportation project funding did not constitute a CEQA project because the project list was general, and “the lack of details and specifications allows flexibility to meet mitigation measures set forth in a subsequent” environmental review. (*Id.*, p. 120.) The *Willits* settlement is similarly lacking detail and is flexible. It does not require repair of any specific sidewalk or detail how any sidewalk will be repaired. It does not preclude mitigation before any repair is approved. It, therefore, is a funding mechanism presenting no potentially significant impacts, and is not subject to CEQA.

3. The March 2016 Report is not a CEQA Project, but shows Organization and Administration of Government

Likewise, the March 2016 Report, raised for the first time in UNLA's trial brief, is also not a CEQA project. Rather, it is a collection of organizational or administrative activities of government that will not result in direct or indirect physical changes in the environment. (See Guideline 15387(b)(4).) As detailed above, the Report represents a collection of directives to identify further information and policies. It approved nothing more than expenditure of staff time, thus monetary resources, to further investigate future policies. One of those activities is review of a possible streamlined programmatic environmental clearance of future sidewalk repairs and a change to the existing tree ordinance, for which environmental review is underway. The City has not adopted these new potential policies, thus repairs are not proceeding according to them.

B. UNLA Failed to Timely Challenge any Possible CEQA Project

Public Resources Code section 21167(a) requires any action asserting a public agency has approved a CEQA project without an attempt to comply with CEQA to be filed, "within 180 days from the date of the public agency's decision to carry out or approve the project." Guideline 15112(c)(2) sets a 35-day statute of limitations to challenge a properly-filed notice of exemption. In  *Stockton Citizens for Sensible Planning v. City of Stockton* (2010) 48 Cal.4th 481, 426, the Supreme Court held that CEQA was drafted with an express purpose, "to ensure extremely prompt resolution of lawsuits claiming noncompliance with the Act." The Court relied on, "the Legislature's clear determination that the public interest is not served unless CEQA challenges are promptly filed and diligently prosecuted." (*Id.*) Concerning challenge to an NOE, the *Stockton* Court held,

The express statutory language of [Public Resources Code] section 21167(d) -- the most reliable indicator of the Legislature's intent -- strongly confirms that litigation challenging the validity of an agency's determination to allow a project to proceed under a CEQA exemption *must be timely*, and that *the shortest applicable period of timeliness is measured from the date on which an NOE setting forth that determination is filed*.

(*Id.*, pp. 427-28[emphasis added].) The Court held the longer, 180-day CEQA deadline begins upon public notice of the challenged action. (*Id.*) Importantly, the *Stockton* Court confirmed that a petitioner may not assert that, "the merits of a CEQA challenge are a legitimate basis for determining when the CEQA limitations period has begun and ended." (*Id.* p. 433.) Here, UNLA's concern for trees does not excuse their failure to comply with applicable CEQA deadlines - some of which expired while this action was pending when UNLA failed to challenge the Council's final CEQA actions for the Three 2018 Repairs.

1. If the Court Finds the *Willits* Settlement was a CEQA Project, any Legal Challenge to it is Time-Barred

As detailed above, the City Council approved the *Willits* settlement at its April 1, 2015 public meeting. (RMM Exh 4 [minutes]; AUTH. 10-17 [approval].) A city council's action at an open public meeting triggers CEQA's 180-day limitations period.

( *County of Del Norte v. Crescent City* (1999) 71 Cal.App.4th 965, 980.) The Mayor issued a press release the same day. (RMM Exh 5.) In March and April 2016, the settlement was widely publicized in newspapers such as the Los Angeles Times and in newspapers in eight other languages, at least four times in each, over a one-month period. (RMM Exh. 6.) Only after this extensive publication did the federal district court, on August 2, 2016, approve the *Willits* settlement to resolve the class claims. (AUTH.234-294.) All of these events occurred more than 180-days before UNLA filed its July 18, 2018 writ action. UNLA's efforts to upset any settlement requirement extends beyond the City, and would disrupt the reasonable expectations of the entire *Willits* class.

2. CEQA Challenge of the March 2016 Report is Time Barred

Any CEQA challenge to the March 2016 Report as an alleged CEQA project is, likewise, time-barred by CEQA's 180-day statute of limitations. To the extent the Report is the "Sidewalk Repair Program" UNLA challenges, their CEQA claims are too late.

3. UNLA did not Timely Challenge the Council's Final Notices of Exemption Adopted for the Three 2018 Repairs

The 2AP, the filing of which this court approved October 16, 2018, challenges BPW environmental determinations for the Three 2018 Repairs. (See 2AP, ¶¶ 56, 59 & 61.) As detailed above, the BPW determined each repair was exempt from the requirements of CEQA, the Council considered UNLA's appeals of each determination, the Council then superseded the BPW's determinations with new, final CEQA exemption determinations, and, finally, the City filed NOEs for each by November 1, 2018. (Facts, Part C.) UNLA, thus, drafted the 2AP and it was approved for filing before the City made final CEQA determinations concerning the Three 2018 Repairs. Because UNLA did not amend the 2AP to challenge the City's final CEQA determinations, CEQA's applicable 35-day statute of limitations now bars any challenge. (See Guideline 15112(c)(2).) As a result, UNLA's petition challenges superseded BPW determinations which presents no justiciable claim. UNLA presents no timely challenge to any City CEQA determination.

C. The City's CEQA Exemption Determinations were Proper

Even had UNLA timely challenged the Council's final CEQA determinations for the Three 2018 Repairs, such challenges would fail because the determinations were proper. The Council found each repair was exempt from the requirements of CEQA pursuant to Guideline 15301, for the repair and maintenance of existing facilities including sidewalks with negligible expansion of use because no exception applied.¹³ Here, UNLA fails to meet their burden to demonstrate any applicable Section 15300.2 exception bars application of this CEQA exemption. (See  *Berkeley Hillside*, *supra*, 60 Cal.4th at 1105.) Nor do they present any fact showing that repair of sidewalks expands their use.

Although not clearly alleged, UNLA's trial brief appears to assert that the cumulative impact exception at Section 15300.2(b) prevents the City from ever relying on the Existing Facilities CEQA exemption. (TB 17:19-24.)¹⁴ Section 15300.2 (b) provides that an exemption may not be used, "when the cumulative impact of successive *projects of the same type* in the *same place*, over time is significant." UNLA contends the exception applies because the July 2017 IS identifies potential cumulative impacts for study. (TB 17:28-18:3.) UNLA's argument is wrong.¹⁵ Their contention confuses the term "cumulative impact" defined at Section 15300.2(b) applicable to CEQA exemptions, with the term "cumulative impacts" defined by Section 15355 and applicable to an EIR analysis. Section 15300.2(b) addresses solely the impact of the same type of project *in the same place over time*. In contrast, an EIR evaluates broad cumulative impacts defined as follows:

"Cumulative impacts" refer to two or more individual effects which, when considered together, are *considerable or which compound or increase other environmental impacts*.

(Section 15355) Section 15350, however, provides that defined terms such as Section 15355's definition, do not apply where, "a term is otherwise defined in a particular section." The cumulative impact exception at 15300.2(b) provides its own definition of cumulative impact - meaning the broad Section 15355 definition does not govern CEQA exception analysis. To the extent reported decisions cite both definitions, the distinction between these definitions was not at issue, thus not discussed or decided. The meaning of "cumulative impact" applicable to CEQA exemptions is substantially narrower than a "cumulative impacts" analysis applicable to the preparation of an IS or EIR.

In  *Robinson v. City & Cty. of S.F.* (2012) 208 Cal.App.4th 950, 958-59, the Court applied this narrower 15300.2(b) cumulative impact exception and held it is limited to review of impacts in the same area limited by the range of human sensory perception. The *Robinson* petitioners alleged that a categorical exemption could not apply to approval of 40 telecommunications facilities

installed on utility poles throughout San Francisco. (Id. at p. 953.) The Court found, “the locations of the installations included in the project were ‘widely dispersed’; they were ‘distributed throughout the city and ... not concentrated in one particular area’,” thus did not present cumulative impacts. (Id. at p. 959.) Guideline 15300.2(b), the Court explained, concerns solely impacts in the same vicinity because review of impacts of similar projects throughout a city would void all categorical exemptions involving similar projects, writing,

This limitation makes sense, because without a limitation as to the location of the projects whose cumulative impact must be considered, agencies deciding whether the exception applies to a project would be required, in every instance, to consider the cumulative environmental impact of all successive similar projects in their jurisdictions, at least, and perhaps regionally or even statewide. If this were the case, the exception would swallow the rule

(Id., p. 958.) Likewise, in *S.F. Beautiful v. City of S.F.* (2014) 226 Cal.App.4th 1012, the Court found the cumulative impact exception did not apply to a project to install 726 utility boxes throughout San Francisco's sidewalks. UNLA here proposes precisely the improper application of Guideline 15300.2(b) rejected by the courts - asserting that the impacts of sidewalk repairs and tree replacements throughout the City preclude any CEQA exemption for the repair of an individual public sidewalk.

Moreover, UNLA identifies no evidence showing sidewalk projects will occur in the vicinity of each other. No relative locational information is presented showing the distance between the Three 2018 Repairs, or of any repairs. No evidence exists of impacts in the same area as limited by the range of human sensory perception, as is required to trigger CEQA's cumulative impact exemption. Finally, the IS study UNLA points to shows only matters being studied, not evidence of any finding that an actual significant impact exists. (See AR 1369.) Likewise, the IS does not discuss the location of repair sites. UNLA presents no evidence demonstrating any improper City's environmental determination.

D. UNLA's *Native Salmon* Declaratory Relief Contentions are Defective A declaratory relief claim may challenge a law itself, but is not available to enforce a law, which should proceed as a writ claim. (*Tejon Real Estate, LLC v. City of Los Angeles* (2014) 223 Cal.App.4th 149, 154-155.) UNLA's contentions that the City did not properly apply CEQA law, therefore, should proceed as writ claims. Because UNLA did not comply with any CEQA statute of limitations, however, UNLA asks this trial court to set aside these important CEQA deadlines in favor of the longer limitations period governing declaratory relief claims pursuant to a narrow, judicially-identified exception allowing a declaratory relief challenge to application of an unwritten law demonstrated by evidence of a large pattern of similar governmental actions. (TB 15:15-17.)

To support this contention, UNLA asserts *Native Salmon*, supra, 221 Cal.App.3d at 1419, applied by the appellate court only a handful of times in the two decades since decided. *Native Salmon* does not apply here.

The *Native Salmon* Court allowed the petitioner to proceed with its timely-filed writ challenge to a Forestry Department project pursuant to declaratory relief law after the Department withdrew the project, mooted the writ claim. (Id., at 1424.) Because the *Native Salmon* writ petition described 65 instances of prior similar alleged conduct, showing it was likely to recur, and the Department could avoid review by mooted writ challenges, the Court recognized an exception allowing the case to proceed. (Id., pp. 1524-31.) Here, in contrast, UNLA did not timely file any claim and the City did nothing to moot any claim. Had UNLA timely filed a CEQA claim, it would be adjudicated. No appellate court has applied *Native Salmon* to nullify CEQA's purposefully-short limitations periods, and the facts here do not support extending *Native Salmon* to nullify the Legislature's directives.

Further, the few appellate courts that have since applied *Native Salmon* to permit claims to proceed involved large numbers of alleged similar acts. (See  *Venice Town Council v. City of L.A.* (1996) 47 Cal.App.4th 1547, 1559 [271 alleged Mello Roos law applications]; *Clovis Unified School Dist. v. Chiang* (2010) 188 Cal.App.4th 794, 800 [improper auditing of seven school districts across a 5-year period];  *East Bay M. U.D. v. Cal. Dep't of Forestry* (1996) 43 Cal.App.4th 1113, 1124 [39 similar timber harvesting plans].) Here, UNLA presents evidence of only of three sidewalk repair approvals -- insufficient to establish a *Native Salmon* pattern, practice or unwritten policy.

1. UNLA does not Demonstrate an Unwritten Policy, an Unlawful Policy, or any Reason to Void CEQA Statutes of Limitations

UNLA's 5th Cause of Action seeks to enjoin the City from engaging in an alleged "pattern and practice" of issuing improper CEQA categorical exemptions for sidewalk repairs. (2AP ¶¶ 81-82.) Petitioners have not demonstrated any unlawful conduct, any pattern of conduct, and no basis to proceed with a *Native Salmon* claim.

a. No Reason Exists to Nullify CEQA Statutes of Limitations

UNLA asserts CEQA statutes of limitations are not relevant here. (TB 15:15-17.) Their contention is an over-simplified, incorrect reading of *Native Salmon* case law. The procedural posture of *Native Salmon* and handful of reported cases that have since allowed such claims is not presented here. The *Native Salmon* petitioner filed a timely writ, but its claim was mooted when the respondent agency withdrew the challenged project. (See,  221 Cal.App.3d at 1423-25.) An action becomes moot when "the question addressed was at one time a live issue in the case," but has been deprived of life "because of events occurring after the judicial process was initiated."  *Younger v. Superior Court* (1978) 21 Cal.3d 102, 120.

Here, in contrast to the facts in *Native Salmon*, the City did not moot a timely CEQA writ action. Nor did the City do anything to prevent UNLA from filing such an action. UNLA chose not to amend their 2AP to challenge the Council's final CEQA determinations. Had UNLA timely challenged the Council's CEQA determinations of the Three 2018 Repairs, this court would have jurisdiction to directly determine whether the City actions were proper. If applicable via future assertion of issue preclusion,

UNLA's potentially-recurring contentions would be finally resolved. (See   *Lucido v. Superior Court* (1990) 51 Cal.3d 335, 341 ["issue preclusion precludes relitigation of issues argued and decided in prior proceedings."]) UNLA seeks to apply *Native Salmon* as a remedy for its own failures to timely file CEQA claims, not because their contentions could not otherwise be reached, as was the case in *Native Salmon*.

CEQA's statutes of limitations were drawn to ensure exceptionally rapid resolution of CEQA questions, as explained above. *Native Salmon* has never been applied to set aside CEQA's purposefully-short, legislatively-mandated filing requirements. Here, UNLA could have, but did not pursue their claims within CEQA limitations periods, thus, no reason exists to extend *Native Salmon* in a new and unnecessary direction.

b. Three CEQA Actions does not Establish an Unofficial Policy

As stated above, the appellate decisions allowing *Native Salmon* claims to proceed involved a significant number of similar governmental acts - 65 Forestry Department actions, 271 Mello Roos permits, 39 timber plans, and 5-years of Controller actions applied to seven school districts. Here, evidence of three CEQA determinations is insufficient to demonstrate a *Native Salmon* unwritten policy or practice - legal or otherwise.

c. UNLA does not Show any Unlawful CEQA approval

UNLA also fails to document any CEQA violation. As noted, UNLA's 2AP challenges only the BPW's superseded CEQA determinations, which presents no active controversy. Application of CEQA's statute of limitations means the City's determinations are deemed lawful. Further, had UNLA actually challenged the Council's final determinations, the Council's actions were lawful. (See Law and Argument, Part C.)

2. The City Provided the CEQA Exemption Determination Appeals UNLA Demanded even though CEQA Required None

UNLA also asserts an unwritten policy exists in violation of  Public Resources Code section 21151(c)'s requirement that appeals of certain CEQA determinations be provided to an elected agency body. (TB 18-19.) UNLA is wrong, legally and factually.

a. Section 21151(c) did not Require any Appeals be Provided

 Section 21151(c) does not apply to every type of CEQA determination, and UNLA fails to address the statute's language or case law interpreting it.  Section 21151(c) states, "If a nonelected decisionmaking body of a local lead agency certifies an environmental impact report, approves a negative declaration or mitigated negative declaration, *or determines that a project is not subject to this division*, that certification, approval, or determination may be appealed to the agency's elected decision-making body, if any." (emphasis added.) Here, UNLA appealed BPW CEQA exemption determinations for the Three 2018 Repairs. (AR 74, 510, 1048 [determinations].) Because an EIR, ND or MND is not involved,  Section 21151(c) applied only if UNLA appealed a City determination, "that a project is not subject to this division." The BPW made no such determination. In *San Diegans for Open Gov't v. City of San Diego* (2016) 6 Cal.App.5th 995, 1004-5, the Court found  Section 21151(c) did not govern a planning commission determination that a new project's environmental impacts were covered by a prior EIR. (*Id.*) The Court found Section 2115 (c) requires an appeal only of an EIR, ND, or MND certification or a determination that an action is not a CEQA project, as Guideline 15060(c)(1)-(3) defines "project." (*Id.*, p. 1004.) Here, the BPW's CEQA exemption determinations were not subject to appeal under  Section 21151(c) because an exemption determination, by definition, is a finding that CEQA *does* apply. The BPW found the repairs were CEQA projects, but exempt from review beyond Guideline 15300.2, thus,  Section 21151(c) does not apply. UNLA was not entitled to appeal hearings.

b. No Evidence Demonstrates an Improper Appeal Process

Moreover, even though not required, the Council heard UNLA's appeals. UNLA complains because the City completed the Spaulding repair before the considering that one appeal. (TB 19:5-8.) However, the Council did not undertake the Cherokee or 48th Street repairs before hearing UNLA's appeals. (Vega ¶¶ 4 & 5.) Because these three appeals constitute the sole evidence on this question, the only pattern UNLA documents is that the Council engaged in CEQA review before repairs were made in the majority of cases. UNLA has not identified one example of conduct they - wrongly -- claim was unlawful.

The Spaulding appeal, moreover, was proper even if owed (which it was not.) The Spaulding appeal hearing was meaningful because environmental mitigation was available when the hearing occurred. During a CEQA writ challenge, the CEQA claim is not mooted even if the underlying challenged project is completed while the case proceeds, so long as mitigation remains possible. (See  *California Oak Found. v. Regs. Univ. of CA* (2010) 188 Cal.App.4th 227, 280 at n. 31 [live oak tree removal did not moot CEQA challenge because biological mitigation remained].) Here, additional biological mitigation was still possible

when the Council heard the Spaulding appeal, including requiring larger or more replacement trees. The City provided proper hearings, even though none were required.

c. UNLA Abandoned any Relief by not Challenging the Council's Final Spaulding CEQA Determination

Lastly, because the Council has already held the Spaulding CEQA hearing UNLA demands, and UNLA has not filed a challenge of the Council's final CEQA determination, UNLA has deprived the court of any possible relief. Any appeal has occurred. And, CEQA's 35-day statute of limitations bars UNLA from asserting the Council wrongly adopted an NOE to decide UNLA's appeal. Their  Section 21151(c) claim must be denied.

E. Petitioners Posses No Due Process Rights and No Illegal Conduct is Shown

Finally, UNLA cannot state a due process claim. Due process requires notice and opportunity to be heard before governmental deprivation of a significant property interest. (See  *Horn v. County of Ventura* (1979) 24 Cal.3d 605, 612-613.) Here, Petitioners hold no due process rights because they are associations and identify no property held by a member impacted by a sidewalk repair site or tree removal location. (See 2AP at ¶¶ 5 & 6.) Nor has UNLA identified any other legal right to a public hearing. As explained,  Section 21151(c) required no Council appeal hearings here. CEQA itself does not require public hearings. (See,  *Robinson, supra*, 208 Cal.App.4th at 963-963 at n. 8 ["CEQA itself does not require that an agency give notice or hold a hearing before deciding a project is categorically exempt under CEQA."]) And, although the Brown Act causes a city council's CEQA actions to occur at a noticed public meeting, the Brown Act does not require public hearings except in specific circumstances here not at issue. (See, e.g.,  Gov. Code § 54953.) Finally, even though not entitled to them, the record demonstrates UNLA was provided hearings and the right to confront and present evidence, and they did so, meeting any possible standard that could apply. (See, e.g., AR 276-277 & 289-307.)

Lastly, with no unlawful City conduct shown, UNLA's fourth cause of action for violation of Code of Civil Procedure section 526(a), fails on its face.

V. CONCLUSION

The City requests this court deny UNLA's writ petition and complaint.

Dated: April 3, 2019

Michael N. Feuer, City Attorney

Timothy McWilliams, Assistant City Attorney

Robert M. Mahlowitz, Deputy City Attorney

By <<signature>>

Robert Mahlowitz, Deputy City Attorney

Attorneys for Respondent/Defendant

City of Los Angeles

Footnotes

- 1 UNLA argues the City should adopt Seattle, Santa Monica, Sacramento, or Austin policies. (9/21/2018 PI motion, 1:19-25; Latta Declaration filed 9/21/2018, ¶ 22.)
- 2 “2AP” refers to UNLA's Second Amended Petition, the operative petition at trial.
- 3 AUTH refers to pages within two volumes of “Authenticated Records Pursuant to Stipulation of Parties,” Petitioners agreed to file with the Court.
- 4 AR74 (Spaulding), AR510-511 (Cherokee), & AR1048 (48th Street.)
- 5 AR95-103 (Spaulding), 516-733 (Cherokee), & AR1052-67 (48th Street.)
- 6 AR309-310 (Spaulding), AR856-57 (Cherokee), & AR 1172-73 (48th Street.)
- 7 “CEQA Guideline” or “Guideline” refers throughout to Title 14 California Code of Regulations, section 15000 *et. seq.*
- 8 AR370-71 (Spaulding), AR922-23 (Cherokee), & AR1231-32 (48th Street.)
- 9 AR399-401 (Spaulding) & AR945-47 (Cherokee.)
- 10 AR1260-62 (48th Street.)
- 11 CEQA reviews: AR 188-94 & 200 (Spaulding); AR 795-808 & 814 (Cherokee); and AR 1132-38 & 1144 (48th Street).
- 12 2AP at ¶ 56 and AR 97-100 (Spaulding); ¶ 59 and AR 523-524 (Cherokee); ¶ 60 and AR 1060-1061 (48th Street).
- 13 See AR 107-265, 309-310, 349-3989 (Spaulding) AR 746-839, 856-858, and 897-949 (Cherokee), and AR 1082-1165, 1172-73, and 1212-1264 (48th Street.)
- 14 UNLA's trial brief uses the language of 15300.2 (b) and does not discuss any other 15300.2 CEQA exemption.
- 15 UNLA's citation to *Berkeley Hillside Pres. v. City of Berkeley* (2012) 2013 CalApp.4th 656, in support of this contention is improper (TB 17), as the opinion was reversed and superseded. (See *Berkeley Hillside, supra*, 60 Cal.4 at 1086.)