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LLP

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February 12, 2020

Hon. Tracie L. Brown  
Hon. Stuart R. Pollak, Presiding Justice  
Hon. Jon B. Streeter  
California Court of Appeal, First Appellate District, Division Four  
350 McAllister Street  
San Francisco, CA 94102-7421

Re: Request for Publication: *Community Venture Partners v. Marin County Open Space District*  
First Appellate District, Case No. A154867  
Marin County Superior, Court Case No. CIV1701913

Dear Justices Brown, Pollak, and Streeter:

Pursuant to California Rules of Court, Rule 8.1120, subdivision (a), Remy Moose Manley LLP (“RMM”) respectfully requests publication of the entire opinion issued by this Court in *Community Venture Partners v. Marin County Open Space District* (Case No. A154867), filed on January 24, 2020 (the “Opinion”). This letter sets forth our interest in publication and the reasons the Opinion meets the standards for publication under California Rules of Court, Rule 8.1105, subdivision (c).

If published, the Opinion would make an important contribution to jurisprudence under the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.) and the CEQA Guidelines (Cal. Code Regs., tit. 14, § 15000 et seq., hereinafter “CEQA Guidelines” or “Guidelines”). Notably, the Opinion clarifies when an agency must prepare a supplemental environmental impact report under Public Resources Code section 21166, versus when it must conduct a separate environmental analysis that “tiers” off a previous EIR under Public Resources Code section 21094. The Opinion also applies the principles set forth in the California Supreme Court Opinion, *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116 (hereinafter “*Save Tara*”), to a set of facts significantly different from previously published opinions. For these reasons and others, which are explained in detail below, the Opinion warrants publication.

A. Remy Moose Manley LLP has an interest in the Opinion’s publication.  
(Cal. Rules of Court, Rule 8.1120, subd. (a)(2).)

RMM submits this request for publication on its own behalf because the Firm has an interest in the interpretation and application of CEQA and the Guidelines.

Established in 1982, the firm is a law partnership focusing on land use and environmental law. A substantial portion of the firm's practice involves CEQA issues. We therefore have a keen interest in the development of CEQA case law. We also have numerous public agency and private clients who look to us for guidance on complex CEQA issues. Our clients include agencies that are called upon to conduct environmental review for a wide range of projects including the kind at issue in the Opinion. Our firm has also been counsel of record, or counsel for amicus curiae, in over 50 published decisions involving issues arising under CEQA. Additionally, RMM's treatise titled *Guide to the California Environmental Quality Act*, which was first published in 1987, has been cited in numerous Court of Appeal decisions as well as a number of California Supreme Court decisions. We know from experience that the kinds of issues addressed in the Opinion are being raised repeatedly all over California in land use disputes. The firm and our clients therefore have a strong interest in ensuring that the law is applied fairly and uniformly statewide. As discussed below, the Opinion, if published, would provide helpful guidance on the application of important CEQA principles, as well as provide clarification on frequently litigated issues.

**B. The Opinion should be published because it explains and applies the legal principles set forth by the California Supreme Court in *Save Tara* to a set of facts significantly different from previous published opinions. (Cal. Rules of Court, 8.1105, subd. (c)(2).)**

The Opinion should be published because it applies the holding of the California Supreme Court's 2008 decision in *Save Tara*, *supra*, 45 Cal.4th 116, to a set of facts that significantly differ from previously published opinions. In *Save Tara*, the Supreme Court held that the City's approval of a development agreement for a private project violated CEQA because the City committed itself to the project before conducting environmental review. (Opinion, p. 10-11, citing *Save Tara*, *supra*, 45 Cal.4th at pp. 138-139.) As the Opinion explains, the principles articulated in *Save Tara* apply equally to public projects. While several other published cases have applied the *Save Tara* principles to private projects, this Opinion is one of the few that directly applies them to a public project.

The Opinion also explains and clarifies when an agency improperly "pre-commits" to a project before conducting environmental review under *Save Tara*. As the court is aware of, Appellants argued—and the trial court agreed—that the District approved the project in November 2016, prior to performing environmental review under CEQA, based on a staff memo that utilized the term "approved" in describing the Project. The Opinion holds that, given the circumstances, the memo's use of the term "approved" did not constitute an "approval" under CEQA. Specifically, the Opinion explains that the District expressly conditioned the Project's approval upon CEQA review and that the staff memo only provided a summary of recommendations—it did not approve the Project or commit the District to a definite course of action that foreclosed alternatives or mitigation measures. (Opinion, pp. 12-13.) Importantly, the Opinion clarifies that staff recommendations or strategy memos fall short of the type of "approval" that the Supreme Court found violative of CEQA in *Save Tara*.

The Opinion is worthy of publication, as it provides public agencies with clarification on what actions constitute an “approval,” and will help representative legal counsel when advising their agency clients against similar challenges.

C. The Opinion should also be published because it clarifies the application of Public Resources Code sections 21166 and 21094, which involve legal areas of continuing public interest. (Cal. Rules of Court, Rule 8.1105, subds. (c)(3), (4), (6), and (7).)

The Opinion provides a strong contribution to CEQA case law by explaining the difference between subsequent environmental review under Public Resources Code section 21166, and tiered environmental review under Public Resources Code section 21094. Importantly, the Opinion clarifies that section 21094, which provides for “tiered” environmental impact reports for later projects, only applies if the agency concludes that a project is not subject to supplemental environmental review under section 21166. As the Opinion correctly notes, prior opinions have confused this proposition. (Opinion, p. 18, citing *Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307, 1319.) In addition, the Opinion correctly distinguishes the oft-confused holding in *Sierra Club, supra*, 6 Cal.App.4th 1307, which has historically been misapplied for the assertion that an agency must begin its supplemental environmental review analysis under section 21094, before it may proceed under section 21166.

It is our experience that agencies continually grapple with the issues addressed in the Opinion, particularly relating to subsequent environmental review under CEQA. Because agency determinations regarding subsequent review continue to be frequently challenged and litigated, the Opinion’s analysis and conclusions on these topics are of continuing public interest and, if the Opinion is published, would help further the law in this area.

D. The Opinion should also be published because it succinctly refines the types of environmental impacts that an EIR must consider. (Cal. Rules of Court, Rule 8.1105, subd. (c)(3), (4), (6), and (7).)

Finally, the Opinion corrects the trial court’s error holding that CEQA required the District to evaluate the potential increased risk of bike accidents from the Project. Significantly, the Opinion distinguishes NEPA case law cited by Appellants and explains that psychological and social impacts stemming from concerns relating to an increased risk of bike accidents do not require analysis under CEQA. (Opinion, p. 26.) This Court’s holding provides critical, much-needed support to agencies that face litigation based on a potential project’s impacts to “human safety” in similar contexts. (Opinion, pp. 24–26 [rejecting the “user conflict” effect that petitioners urged the District to study].) The Opinion confirms that agencies need only analyze foreseeable impacts to the *physical* environment—analysis of social or economic effects, absent additional environmental effects, is not required under CEQA. (Opinion, p. 26.) The Opinion’s

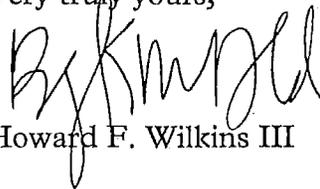
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guidance on the issue is worthy of publication, as it provides further explanation and clarification on the types of environmental impacts that an agency must consider under CEQA.

E. Conclusion

For the above-cited reasons, RMM respectfully requests the Court publish its Opinion in *Community Venture Partners v. Marin Open Space District*. The Opinion meets several of the standards for publication set forth in California Rules of Court, Rule 8.1105, subdivision (c), and the Opinion addresses important CEQA issues and new authority in a clear, careful, and reasoned manner. Therefore, the Opinion would make a significant contribution to the legal literature and would provide useful guidance to lead agencies, litigants, and trial courts.

Very truly yours,



FOR: Howard F. Wilkins III

cc: See Attached Service list

Document received by the CA 1st District Court of Appeal.

*Community Venture Partners v. Marin County Open Space District*  
1<sup>st</sup> Appellate District, Case No. A154867  
(Marin County Superior, Court Case No. CIV1701913)

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**PROOF OF SERVICE AND SERVICE LIST**

I, Kathryn A. Ramirez, am employed in the City and County of Sacramento. My business address is 555 Capitol Mall, Suite 800, Sacramento, CA 95814, and my email address is [kramirez@rmmenvirolaw.com](mailto:kramirez@rmmenvirolaw.com). I am over the age of 18 years and I am not a party to the above-entitled action.

On February 12, 2020, I served the following:

**REQUEST FOR PUBLICATION**

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

Community Venture Partners <i>Petitioner and Respondent</i>	Michael Ward Graf 227 Behrens Street El Cerrito, CA 94530
Marin County Open Space District <i>Defendant and Appellant</i>	Brandon William Halter Marin County Counsel 3501 Civic Center Drive, Room 275 San Rafael, CA 94903

I declare under penalty of perjury that the foregoing is true and correct. Executed this 12<sup>th</sup> day of February 2020, at Sacramento, California.

  
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Kathryn A. Ramirez