

CASE No. B284093
IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION: FOUR

FIX THE CITY, INC.

Petitioner/Plaintiff and Respondent and Cross-Appellant.

v.

CITY OF LOS ANGELES and LOS ANGELES CITY COUNCIL
Respondents/Defendants and Appellants and Cross-Respondent,

AG-SCH 8150 SUNSET BOULEVARD OWNER, L.P., a Delaware
Limited Partnership, and ROES 1 through 5, Inclusive,
Real Party in Interest and Appellant and Cross-Respondent.

APPELLANTS' PETITION FOR REHEARING TO CLARIFY DISPOSITION

On Appeal From the Superior Court for the State of California,
County of Los Angeles, Case No. BS166487, Hon. Amy D. Hogue

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I. INTRODUCTION

Appellants City of Los Angeles et al. (the “City”) and real party in interest AG-SCH 8150 Sunset Boulevard Owner, L.P (“Real Party”) respectfully request that the Court order a rehearing and/or modify the Disposition section at pages 79-80 of its opinion in this case filed March 23, 2018 (“Opinion”). While the City and Real Party do not ask the Court for a rehearing with respect to its substantive determinations on the arguments on appeal, a Petition for Rehearing with respect to the language of the Disposition is necessary to avoid confusion and prejudice to the parties.

First, the City and Real Party respectfully request that the Court correct an inadvertent error in the Opinion that identified Respondent Los Angeles Conservancy (“LAC”) as a prevailing Cross-Appellant in the case. (See, e.g., Slip Op. at 3, 21, 44.) There are two petitions for writ of mandate involved in this appeal and cross-appeal: one filed by LAC and another filed by Fix the City (“FTC”). The sole issue in LAC’s petition related to the City’s findings under the California Environmental Quality Act (“CEQA”) regarding the feasibility of preserving the Lytton Savings Building. In the Opinion, the Court of Appeal overturned the trial court’s decision granting LAC’s single-issue petition. (Slip Op. at 24-43.) The Opinion mistakenly attributes FTC’s cross-appeal, and the arguments made in its brief, to both FTC and LAC (Slip Op. at 3, 21, 44). The Disposition then does not distinguish between LAC’s and FTC’s petitions, thus appearing to award judgment in favor of LAC on issues it did not raise. Accordingly, the Disposition should be revised to clarify that LAC’s Petition was denied in full, and the City and Real Party are the prevailing parties in the LAC matter.

Second, the City and Real Party respectfully request that the Court modify the language of the peremptory writ addressing its conclusion that a

street vacation is required to change the public’s use of the dedicated right turn lane adjacent to the 8150 Sunset Project (“Project”). The Disposition issues a peremptory writ ordering the City to vacate the November 1, 2016 project approvals on the “*sole ground* that, with regard to that dedicated right hand turn lane, a street vacation hearing . . . must be held.” (Slip Op. at 80, italics added.) The order for the City to vacate the November 1 approvals is overly broad because, as discussed below, those approvals did not authorize any change to the intersection of Crescent Heights Boulevard and Sunset Boulevard, thus vacating those approvals is not necessary to effectuate the Court’s more narrow holding that a street vacation hearing must be held before the Project moves forward. Accordingly, the Disposition should be revised to preserve the status quo until the City conducts a street vacation hearing.

Third, the City and Real Party respectfully request the Court clarify the process the Court of Appeal intends for the preparation and return of the peremptory writ. The Disposition states that the Court of Appeal is issuing a peremptory writ of mandate directed at the City, but it is unclear if FTC is required to prepare a draft for submission to the court clerk or when or how the return of the writ should be completed by the City to the Court of Appeal. Accordingly, the Disposition should also be revised to clarify this process for the peremptory writ issued by the Court of Appeal.

For these reasons, as explained below, the City and Real Party respectfully request the Court to modify its Opinion to address these inadvertent errors and clarification concerns.

II. THE COURT SHOULD MODIFY THE OPINION TO CLARIFY THE DISPOSITION

A. Authority for Petition for Rehearing to Clarify the Disposition

“A petition for rehearing is the correct remedy to address material inaccuracies or omissions in a disposition.” (*Ducoing Mgmt. Inc. v. Super. Ct.* (2015) 234 Cal.App.4th 306, 314.) In addition, a rehearing may be granted to clarify “directions of a reviewing court [that] may be imperfect, or impractical of execution.” (*Kenney v. Kenney* (1954) 128 Cal.App.2d 128, 133; see also Eisenberg, Horvitz and Wiener, *California Practice Guide, Civil Appeals and Writs and Appeals* § 12:21 (The Rutter Group, November 2017 Update).) “Under those circumstances the aggrieved party has his remedy in a petition for rehearing.” (*Kenney, supra*, 128 Cal.App.2d at 128.)

B. The Disposition Should Be Corrected to State LAC’s Petition Has Been Denied in Full

The Opinion erroneously states that LAC cross-appealed the trial court’s decision and asserted several claims that were not part of LAC’s petition or arguments on appeal. (See, e.g., Slip Op. at 3-4, 21, 44.) The City and Real Party respectfully request the Court correct this inadvertent error.

This appeal involved two different cases brought by two different petitioners. In *Los Angeles Conservancy v. City of Los Angeles*, Case No. BS166487, LAC’s petition alleged a single cause of action, claiming the City’s findings rejecting the historic preservation alternatives did not comply with CEQA. In *Fix the City, Inc. v. City of Los Angeles*, Case No. BS166484, FTC’s petition also alleged the City violated CEQA when it rejected the historic preservation alternatives, as well as several other challenges to the City’s approvals for the Project that were not included in

LAC's petition. The trial court found for LAC and FTC on a single claim: their shared claim, and LAC's only claim, that the City's findings supporting its rejection of preservation alternatives did not comply with CEQA. (AJA749.) The City and Real Party appealed the part of the trial court decision addressing this claim. There was no other issue for LAC to cross-appeal.

Given that the Opinion rejected LAC's sole claim, the City and Real Party respectfully request the Court of Appeal correct its Opinion, and the Disposition in particular, to clarify that the Court has denied LAC's petition in full and the City and Real Party are the prevailing parties in that action.

The requested corrections (in bold) are provided below:

We deny the LAC petition for writ of mandate, **in full, and FTC's petition for writ of mandate, in part,** on that point, and we reinstate the City's findings of infeasibility as to alternatives 5, 6 and 7.

In FTC's cross-appeal, we reverse the trial court's denial of a writ of mandate insofar as the court did not require a street vacation hearing . . .

C. The Disposition Should Be Modified to Direct the City to Hold a Street Vacation Hearing

In the sole claim adjudicated in favor of FTC, the Court of Appeal held that the City was required to hold a street vacation hearing before proceeding with the Project. (Slip Op. at 57-66; *id.* at 66 [“Before moving forward with the Project, the City will have to initiate a street vacation hearing consistent with the requirements in the Streets and Highways Code”]; see also *id.* at 4 [describing FTC's contentions, including that “conversion to non-vehicle use of a traffic lane currently dedicated to right turns for vehicles traveling east on Sunset Boulevard onto southbound Crescent Heights Boulevard requires a street vacation hearing under the

Streets and Highway Code”].) The Disposition states “We issue a peremptory writ of mandate (1) remanding the case to the City, (2) ordering the City to vacate the November 1, 2016 approvals of the Project *on the sole ground that*, with regard to that dedicated right turn lane, a street vacation hearing consistent with Streets and Highways Code sections 8300, et. seq., must be held, and (3) ordering the City conduct [] such a hearing.” (Slip Op. at 80, italics added.) The portion of the writ ordering the City to vacate the November 1, 2016 approvals is overbroad because vacating those approvals is not necessary to ensure that the dedicated right turn lane will not be converted to non-vehicle public use before a street vacation hearing is held. The Court need only to direct the City to conduct a street vacation hearing in place of the City’s original plans for a “B” Permit. The City and Real Party thus respectfully request that the Disposition be revised to require the City to conduct a street vacation hearing.

This suggested approach is better suited to the nature of the dispute about the dedicated right turn lane. As the Opinion recognizes, the dispute between FTC and the City is about whether the separate, subsequent approval process necessary to authorize conversion of the dedicated right turn lane to non-vehicle use should be issuance of a “B” Permit or a street vacation hearing. (Slip Op. at 58-59) The Court resolves that dispute in favor of a street vacation hearing, and requires that the City hold that hearing. This direction does not, however, implicate the validity of the other approvals, several of which the Court reinstated and/or validated elsewhere in the Opinion. (See, e.g., Slip Op. at 3, 79.)

The portion of the Disposition ordering the City to vacate the Project approvals is accordingly overbroad, and would not be focused on the Court’s specific concern with the City’s authorization process for converting the dedicated right turn lane to non-vehicle use. Under such circumstances, it would be proper to modify the Disposition to limit the

scope of the writ to order only those actions by the City that are necessary to ensure compliance with the Streets and Highways Code. (See *International Ass'n of Fire Fighters, Local No. 1319, AFL-CIO v. City of Palo Alto* (1963) 60 Cal.2d 295, 302 [holding court “went too far” in issuing writ that set aside all city policies and modifying judgment to limit writ to only those policies that violated the specific codes at issue in the lawsuit]; see also *Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, 287 [holding, under CEQA, the writ “may only include the mandates necessary to achieve compliance” with the law and “must be limited to the portion of a determination, finding, or decision, or the specific project activities that do not comply” with the law].)

Narrowing the scope of the writ in this manner is also consistent with the Court’s emphasis that its ruling is “*on the sole ground that*, with regard to that dedicated right turn lane, a street vacation hearing . . . must be held.” (Slip Op. at 4, italics added.) The November 1, 2016 Project approvals (the Vesting Tentative Tract Map, Master Conditional Use Permit, and Site Plan Review) do not authorize the conversion of the dedicated right hand turn lane to non-vehicle use and need not be vacated. (AR1, 188-89, 29605, 29607.) The Vesting Tentative Tract Map only subdivides applicant’s property and clearly denotes that the traffic island and the public property that is proposed to be reconfigured are not a part of the proposed or approved tract map. (AR57446.) The Master Conditional Use Permit only authorizes the sale of alcohol on Real Party’s property. (AR29607-29612.) The Site Plan Review shows the approved locations for construction of the Project buildings on Real Party’s property. (AR29605-29607.) None of the approvals authorizes the street reconfiguration.

The EIR discusses the environmental impacts of converting the dedicated right turn lane as part of analyzing the Project as a whole, as is required under CEQA. (AR280, 753, 5615-5620.) But the EIR is only an

informational document – it does not authorize any action that might be taken with respect to the dedicated right turn lane. Indeed, the EIR identifies “Approvals and associated permits for the reconfiguration and maintenance of the adjacent City-owned traffic island area at the southwest corner of Sunset and Crescent Heights Boulevards” as part of the future approvals needed for the Project, after the EIR is certified. (AR294, 8555.) The narrowed language of the writ proposed below would ensure, consistent with the Court’s Opinion and the options contemplated in the EIR, that “[b]efore moving forward with the Project, the City will have to institute a street vacation hearing” (Slip Op. at 66.)

Vacating the approval of the Tentative Tract Map in its entirety would furthermore be inconsistent with the Court’s conclusion in its analysis of FTC’s challenge to the approval of the Tentative Tract Map, as the Court “affirm[ed] the trial court’s ruling upholding the approval of the Tentative Tract Map.” (Slip. Op. at 79.) The Disposition language should be refined so that the Opinion can be reasonably construed “in conjunction with the opinion as a whole” (*Ducoing Mgmt. Inc. v. Super. Ct.*, *supra*, 234 Cal.App.4th at 313, quoting *Ayyad v. Sprint Spectrum, L.P.* (2012) 210 Cal.App.4th 851, 859; see *In re Justin S.* (2007) 150 Cal.App.4th 1426, 1435 [“To the extent that the dispositional language used in our remittitur did not expressly state [our directions] . . . , the opinion as a whole compels that interpretation.”].) To accomplish this, the Disposition should avoid requiring the City to reapprove the Tentative Tract Map, or any of the other approvals, in the future.

In sum, full compliance with the Court’s Opinion can be achieved without disturbing the November 1 Project approvals in place. Accordingly, the City and Real Party respectfully request that the Court revise the Disposition as follows:

We issue a peremptory writ of mandate (1) remanding the case to the City; and (2) ordering the City to **conduct** vacate the November 1, 2016 approvals of the Project on the sole ground that, with regard to that dedicated right-turn lane, a street vacation hearing consistent with Streets and Highways Code sections 8300, et seq., must be held, and (3) ordering the City to conduct a such a hearing.¹

D. The Disposition Should Be Clarified as to the Process for the Peremptory Writ Issued by the Court of Appeal

In addition, the City and Real Party ask the Court to provide additional clarity as to the process for the peremptory writ. It is unclear from the Disposition if FTC is required to prepare a draft peremptory writ of mandate for the clerk of the Court of Appeal to issue, as is the practice at the trial court. It is also unclear what time frame is required for the return of the writ to the Court of Appeal.

III. CONCLUSION

For the reasons stated above, the City and 8150 Sunset respectfully request that the Court grant rehearing and/or clarify the Disposition to (1) fix the inadvertent error with respect to the identification LAC as a Cross-Appellant and prevailing party; (2) modify the scope of the writ to order the City to conduct a street vacation proceeding; and (3) clarify the process for the peremptory writ of mandate issued by the Court.

¹ The City and Real Party understand that, consistent with this Court's ruling, for the Project with the reconfiguration of Crescent Heights Blvd and Sunset Blvd to move forward, the City must conduct the necessary vacation hearings consistent with Streets & Highways Code, section 8300 *et seq.*

Respectfully submitted.

DATED: April 9, 2018

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CERTIFICATE OF WORD COUNT

The text of this Petition for Rehearing consists of 2,474 words as counted by the Microsoft Word software used to generate this Petition for Rehearing.

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ALAMEDA

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Alameda, State of California. My business address is 555 12th Street, Suite 1500, Oakland, CA 94607.

On April 9, 2018, I served true copies of the following document(s) described as **PETITION FOR REHEARING** on the interested parties in this action as follows:

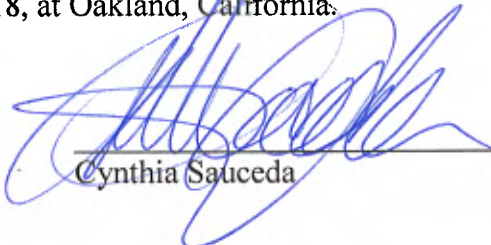
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on April 9, 2018, at Oakland, California.



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