No. _____

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PARCHESTER VILLAGE NEIGHBORHOOD COUNCIL, et al.,	)	Court of Appeal First Appellate District Civil No. A123859
Plaintiffs and Respondents,	)	(Contra Costa County Super. Ct. No. MSC07-01090
v.	)	
CITY OF RICHMOND, et al.,	)	
Defendants and Appellants.	)	

PETITION FOR REVIEW OF THE OPINION OF THE COURT OF APPEAL FOR THE FIRST APPELLATE DISTRICT

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PETITION FOR REVIEW

To the Honorable Chief Justice of the California Supreme Court, and the Associate Justices of the Supreme Court of California:

Petitioners Parchester Village Neighborhood Council, Citizens for East Shore Parks, Sustainability, Parks, Recycling and Wildlife Defense Fund, and Whitney Dotson ("petitioners")[1] respectfully petition for review of the published Opinion of the Court of Appeal, First Appellate District, filed February 24, 2010 and modified March 25, 2010. Appendix ("App.") hereto at pp. 1-20.

ISSUES PRESENTED AND GROUNDS FOR REVIEW

This Petition for Review presents two issues under the California Environmental Quality Act ("CEQA"), Public Resources Code section 21000 *et seq.* The first issue arises out of a conflict in the state's case law regarding the applicability of CEQA to agency commitments contained in municipal services agreements facilitating the construction of Indian gaming facilities. The second issue addresses the proper timing and scope of CEQA review. Each issue warrants review under Rule 8.500(b)(1) of the California Rules of Court, as follows:

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[1]Petitioners prevailed in the trial court and thus were respondents in the Court of Appeal.

(1) **Does a City's Commitment to Approve/Construct Specific Improvements In a Legally-Binding Municipal Services Agreement Constitute a Project Under CEQA?**

CEQA is triggered when a governmental agency approves or undertakes a discretionary project. Pub. Res. Code § 21080(a). The term "project" is defined in CEQA as any "activity which may cause a direct physical change in the environment, or reasonably foreseeable indirect physical change in the environment." *Id.* § 21065.

Appellant[2] City of Richmond's (the "City's") Municipal Services Agreement ("MSA") with the Scotts Valley Band of Pomo Indians ("Band") detailed specific commitments by the City, including commitments to approve and/or provide certain road and fire station improvements. The Opinion holds that, despite these specific commitments by the City, the MSA does not constitute a project under CEQA. App. 9, 19-20.

The Court of Appeal's ruling misapplies CEQA's definition of project and directly conflicts with *County of Amador v. City of Plymouth* (2007) 149 Cal.App.4th 1089 ("*Amador*"), wherein the Third District Court of Appeal correctly ruled that (1) a city's commitments within a Municipal

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[2]The City lost at trial and thus was the appellant in the Court of Appeal.

Service Agreement to approve or construct specific municipal facilities for a casino are subject to CEQA review, and (2) commitments substantially similar to those made by the City here – specifically, commitments to undertake casino-related street and fire station improvements, to support the casino's approval by federal and state agencies, and to foreclose certain alternatives and mitigations – required CEQA review before the city could enter into the agreement. *Amador* at 1095.

Petitioners respectfully ask this Court to address this split in the case law, which, if left unaddressed, will leave cities across the state without adequate direction as to the level of on-the-ground commitments they are permitted to undertake prior to CEQA review when negotiating municipal service agreements with Indian tribes. This issue is a matter of state-wide importance, as Indian casinos are proliferating throughout California, in rural and urban areas alike. Guidance from this Court will allow city and tribal officials to avoid striking deals that improperly pre-commit cities to projects prior to CEQA review. It will decrease litigation related to these increasingly prevalent casino-related municipal services agreements. It will also secure long overdue, highly desirable uniformity in the state's CEQA case law respecting agency approvals of casino support agreements.

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(2) **Does a City Violate CEQA by Committing to Support a Project Prior to Conducting CEQA Review?**

The Opinion upholds the City's decision to approve an MSA without first conducting CEQA review even though the MSA commits the City to specific improvements. App. 17. CEQA, however, forbids agencies from delaying environmental review until *after* the decision to go forward with the project has already been made. As this Court has stressed, post-decisional CEQA analyses represent "nothing more than *post hoc* rationalizations to support action already taken" and therefore fail to foster informed decisionmaking as required by CEQA. *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 130 ("*Save Tara*"), *quoting Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 394 ("*Laurel Heights*"). Stated another way, CEQA review of a project must be undertaken early so as to "serve the purpose of sounding an environmental alarm bell before the project has taken on overwhelming bureaucratic and financial momentum." *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 441 ("*Vineyard Area Citizens*") (quotations and citations omitted).

By signing the MSA, the City committed to approving multiple specific roadway and firehouse improvements and also committed to supporting the Project throughout its federal and state approval processes.

Appellants' Appendix ("AA") 203; Administrative Record ("AR") 640. Unless the City is required to conduct its CEQA review now, before the Casino's facilities are sited and construction commitments are made, the Project will have taken on an insurmountable level of bureaucratic and financial momentum, foreclosing alternatives and mitigation options. In short, delayed analysis will be nothing more than a *post hoc* rationalization of the City's decision, as memorialized in the MSA, to approve and support the Project. For those reasons, the City's premature commitment to the Project violates CEQA.

Petitioners seek review because the Opinion conflicts with settled case law, including *Laurel Heights*, *supra, Vineyard Area Citizens*, *supra*, and several decisions of the courts of appeal, and because it presents an important question of law regarding the proper timing and scope of CEQA review.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

This case seeks environmental justice for the small, low-income minority community of Parchester Village in north Richmond. Ignored by a City Council bent on trading environmental protections for the lure of gambling revenues, petitioners – who include that minority community's

neighborhood association, one of the association's most prominent citizens, and two regional conservation groups – filed this action. AA 230-32, 288. They did so to compel the City to conduct required environmental reviews *before* entering into a Municipal Services Agreement obliging the City to provide specified municipal services to, and supply political support for, the proposed "Sugar Bowl" casino on county land just across the Richmond Parkway from the Parchester Village community. The City violated the law by deferring all environmental reviews until *after* it had already contractually obligated itself to commission various specified public improvements, including expansions of several streets and thoroughfares, and construction of expanded fire response facilities (the "improvements").

A. The Project Setting

The Band is seeking approval from the federal Bureau of Indian Affairs ("BIA") to convert approximately 30 acres of land within Contra Costa County that is almost completely surrounded by the City of Richmond, into Indian trust-land for the sole purpose of operating a Class III Indian Gaming facility ("the Casino Project"). AA 022, 179. The Casino Project would sit in an urban and industrial area that is "located in a predominantly minority and heavily disadvantaged neighborhood" including Parchester Village. AA 050. The Casino Project's planned

Richmond location is far removed from the Band's terminated Rancheria in Lake County, California. AA 093.

The land that is the subject of the Band's fee-to-trust application with the BIA (the "Property") is bounded by Richmond Parkway on the west and northwest, Parr Boulevard on the south, and other private property to the east. AR 031. The Property is contiguous with the City boundary on the north, and just a few blocks from the City boundaries to the east, south and west. Access to the Project would be provided through major improvements to Richmond Parkway, Castro Street, Parr Boulevard, San Pablo Avenue and Goodrick Boulevard, located both within and adjacent to the City's boundaries. AA 028-031.

B. The Municipal Services Agreement

Because "significant law enforcement, fire protection, emergency service responders, and public works will be required by the Tribe's development, construction, operation, and maintenance of the Project," and because the "City [wa]s willing to provide the[se] governmental services to the Tribe" in exchange for payments totaling more than $329 million over the next 20 years, the Tribe and City signed a "Municipal Services Agreement" (the "MSA") obligating the City to provide these services at that price. AA 180, 193-97; AR 617, 630-634.

The MSA includes a warranty by the City that it "constitutes a legal, valid and binding obligation of the City." AA 207; AR 644. If the City defaults on its obligations by failing "to provide the services the City has assumed and agreed to perform" in the MSA, the Band may bring "a claim for specific performance against the City." AA 216; AR 653. The MSA commits the City to providing vital services, such as law enforcement and fire suppression, that the Band's Casino Project requires in order to operate safely. *E.g.*, AA 182-85; AR 619-622. It also commits the City to construct fire station improvements and permit a variety of specific traffic improvements which are equally vital to the Casino's safe operation. AA 185-87, 191-93. The MSA also contemplates that other public agencies and utilities will provide services to the Band. AA 182-193. In exchange, the Band will pay the City over $329,000,000. AA 193-97.

Finally, the MSA requires the City to formally request that the Secretary of Interior accept title to the Property in trust for gaming purposes, and to lobby the State and Federal governments on the Band's behalf, as detailed below. AA 203.

C. The City's Road Improvement Commitments

The MSA includes specific commitments to the construction of ten transportation improvements. Most of these improvements are located

within the City's boundaries.[3] For example, the City has committed to undertake the addition of a through-lane to Richmond Parkway, at its intersection with Goodrick Avenue. AA 192. The City has also committed to repave Goodrick Avenue and has approved the installation of a Class II

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[3]The Court of Appeal failed to give proper deference to the trial court's factual findings regarding the jurisdictional location of the improvements. Contrary to the Court of Appeal's unprompted findings (at trial, physical jurisdiction was not at issue), more than "a minor portion" of the road improvements fall within the City's boundaries. App. 20 (modifying App. 17). In fact, as discussed above and below, there are numerous traffic improvements within the City's geographic jurisdiction that the City has committed to undertake.

"Where findings of fact are challenged on a civil appeal, [appellate courts] are bound by the 'elementary, but often over-looked principle of law, that the power of an appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted,' to support the findings below. [Citation.] [Appellate courts] must therefore view the evidence in the light most favorable to the prevailing party, giving [that party] the benefit of every reasonable inference and resolving all conflicts in its favor." *Jessup Farms v. Baldwin* (1983) 33 Cal.3d 639, 660 (ellipsis omitted). This standard "applies to both express and implied findings of fact made by the superior court." *SFPP, L.P. v. Burlington Northern & Santa Fe Ry. Co.* (2004) 121 Cal.App.4th 452, 462.

The appellate court failed to defer to the trial court's finding that the improvements were within the City's jurisdiction. *See* AA 249-51 (trial court: "there is no dispute that there has been an activity directly undertaken by the City in its approval of the MSA. [¶ . . . [The MSA] has [the] City committing to a range of fire improvements . . . ; [and] a list of traffic improvements . . . . [¶] These activities have a potential for resulting in a direct . . . or a reasonably foreseeable indirect physical change in the environment.") No evidence, substantial or otherwise, contradicts this jurisdictional finding, and it was clear error for the Court of Appeal to disregard it.

bike lane on it. AA 193. These improvements fall within the City's boundaries. AR 031. Moreover, the Casino Project's cumulative impacts will "cause significant unavoidable traffic impacts" that will make it "necessary" to install both an additional left turn lane and a "'free' right turn" at the I-580/Richmond Parkway interchange near the Richmond-San Rafael Bridge. AA 192. This interchange is also within City limits. AA 192; AR 031. In sum, the MSA commits both the Band and City to the construction of a number of substantial and specific transportation improvements.

D. The City's Fire Protection Improvement Commitments

The MSA mandates that the City undertake specific fire protection improvements. AA 186; AR 623. Within 30 days of the Band's completion of its "Operational Plan," the City and Band "shall . . . negotiat[e]" a "Fire Protection and Emergency Response Agreement" ("FPERA") that "provide[s] . . . fire protection and emergency response services" to the Casino Project. AA 185. The negotiated FPERA "shall provide for fire protection improvements," which are to be "completed and operational by the Commencement Date." AA 186; AR 623.[4] The FPERA "shall contain"

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[4] The Commencement Date is the date on which the Casino Project "is open for the conduct of gaming by the general public pursuant to and in accordance with the [Indian Gaming Regulatory Act]. . . ." AA 196; AR

plans for improvements to Station 68, as well as *either* (1) the construction of a new fire station within 1.5 miles of the Project; (2) the upgrade of one or more existing stations; or (3) consolidation and relocation of existing stations to within the 1.5 mile radius of the Casino Project. AA 186; AR 031 (map of fire station locations).[5] Here, too, the City has specifically committed to undertaking particular fire protection improvements. At the same time, the MSA foreclosed other options, such as (1) opposing the Casino, (2) advocating relocation of the Casino, or (3) adopting a different mix (and locations) of mitigation measures. Either way, the City painted the public into a corner without first conducting any CEQA review of the Project's impacts, alternatives and mitigations.

E. The City's Endorsement of the Casino Project

The BIA has the power to accept land into trust for the purposes of Indian gaming under section 20 of the Indian Gaming Regulatory Act ("IGRA"). 25 U.S.C. § 2719. The Band requested that the Secretary accept the land into trust as restored lands under section 20(b)(1)(B)(iii) of IGRA. AA 059 (Fee-to-Trust Application); AR 006. Under the MSA, the City agreed to request, not that the lands be treated as "restored" under section

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633.

[5] Station 62 is the only existing City fire station within 1.5 miles of the Project. AR 031.

20(b)(1)(B)(iii), but rather, that the lands be treated as the subject of "a settlement of a land claim" under section 20(b)(1)(B)(i) – a wholly different procedure. AA 203 (MSA § 6.1(a).). Specifically, the City contracted to "request" that: (1) the Secretary of the Interior accept the Property into trust; (2) "the California Congressional Delegation openly and publicly support and facilitate" the Band's acquisition of title; (3) the members of the State Legislature representing the City "openly and publicly support and facilitate" the fee-to-trust transfer; and (4) the Governor "openly and publicly support and facilitate" the fee-to-trust transfer and negotiate a Compact with the Band that would allow for Class III gaming. AA 203 (MSA); AR 640.[6]

F. The Project Approval History

On May 10, 2006, the Band and City entered into an Agreement to Negotiate the terms of a contemplated Municipal Services Agreement. AR 097. During the MSA negotiations between the City and the Band, the City used the carrot of MSA approval to exact considerable control over the Band's Casino Project. *Compare, e.g.,* AR 179 (Band "agree[d] to initially

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[6] Although the Band's Fee-to-Trust application requests gaming under 25 U.S.C. § 2719(b)(1)(B)(iii), the City is obligated by the MSA to make its requests on behalf of the Band for BIA to accept the transfer pursuant to 25 U.S.C. § 2719(b)(1)(B)(i), an entirely different (and contrasting) pathway.

hire 33% of its operational, non-management positions from a pool of Richmond residents"; City was concerned about absence of provision for *maintaining* this ratio) *with* AA 177 (Band later agreed to "maintain" a "40% standard").

On November 14, 2006, the City Manager's Office presented to the City Council a report summarizing the background and terms of the MSA. AA 175-78. At that time, the Casino Project totaled over 1,300,000 square feet. AA 176; AR 502. On November 21, 2006, the City Council approved the MSA by a 6-3 vote. AR 578.

II. LITIGATION HISTORY

A. The Trial Court Proceedings

Petitioners filed their original Verified Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief on May 21, 2007. AA 228-242.[7] Petitioners alleged that the project approvals violated CEQA. AA 235. Thereafter, the City lodged its Administrative Record, the Band filed its Motion to Quash and to Dismiss based on its sovereign immunity, which petitioners did not oppose,[8] and the City filed its Response. AA 284-88. Petitioners and the City then filed their opening, opposition and reply

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[7]The Opinion erroneously states that the Verified Petition was filed over two months later, on "July 26, 2007." App. 3.

[8]The Band was dismissed on October 23, 2007. AA 285.

trial memoranda. AA 243-246.

Prior to the merits hearing on August 20, 2008, the Superior Court, the Honorable Barbara Zuniga presiding, issued its Tentative Ruling granting the petition. AA 249-251. The Superior Court ruled that "there is no dispute that there has been an activity directly undertaken by City in its approval of MSA. . . . MSA has an emphasis on funding mechanisms, but it also has City committing to a range of fire improvements i.e.: new fire station/upgrade/or relocating fire station; a list of traffic improvements i.e.: additional northbound land on Richmond Parkway, a left-turn lane on the westbound Parr Blvd. approach to Richmond Parkway, additional through lanes on Parr Blvd.[,] a Richmond Parkway-San Pablo Avenue interchange, and a Class II bike lane along Goodrich Ave. between Parr Blvd. and Richmond Parkway; as well as an official endorsement of the Tribe's fee-to-trust application." AA 250.

Judge Zuniga held further that "these activities have a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment." *Id.* Judge Zuniga noted that "MSA does mention future compliance with CEQA if required, however options are contractually limited and do not permit the no-option alternative required by CEQA." Judge Zuniga

concluded: "Accordingly, [the] Court finds City should have complied with CEQA before entering into any Municipal Services Agreement." *Id.* See also, App. 5.

On November 7, 2008, the Superior Court entered the Judgment proposed by petitioners. AA 263-264.

The City filed its notice of appeal on January 8, 2008. AA 274-276.

B. The Court of Appeal Proceedings

The First District Court of Appeal filed its Opinion on February 24, 2010, certifying it for publication. App. 1-18. The Opinion reverses the Superior Court's ruling that the City violated CEQA in approving and adopting the MSA, reasoning that the City's MSA was merely a "funding mechanism" (App. 13-15) and that the specific improvements it required were not subject to CEQA (App. 15-16, 19-20).

Petitioners filed their Petition for Rehearing on March 11, 2010. On March 25, 2010, the Court filed its Order Modifying Opinion And Denying Rehearing, which was also Certified for Publication. App. 19-20.

The Order Modifying Opinion And Denying Rehearing concedes that the Opinion's initial finding that none of the traffic improvements were within City boundaries was incorrect. Nonetheless, it states that the traffic improvements, when "[t]aken in isolation, . . . d[id] not appear" to

"constitute[] a 'project.'" App. 20 (modifying App. 17). The Court provided no analysis to support its bare conclusion. *Id.*

III. ARGUMENT

A. The Opinion Conflicts with Settled Law By Applying an Incorrect Definition of "Project"

The MSA mandates the performance of numerous specific roadway and firehouse improvements, as detailed above. AA 186, 192 (MSA); AR 031 (map); *see also* App. 20 (modifying App. 17). The City, by committing to these improvements, has bound itself to undertake actions that will lead to physical changes to the environment. Yet, the Opinion brushes aside the MSA's explicit physical commitments. App. 19 (modifying App. 16, n. 14, fire stations), App. 20 (modifying App. 17, road improvements). The Opinion fails to find the City had jurisdiction over the improvements, even as it acknowledges that some will occur within the City limits, concluding erroneously that these improvements "d[id] not appear" to "constitute[] a 'project.'" App. 18, 20 (modifying App. 17).

Despite the City's commitment to the improvements, the Opinion holds that the MSA merely constituted a funding mechanism. App. 11, 14. This holding conflicts with the CEQA Guidelines [14 C.C.R. § 1501 *et seq.* ("Guidelines")], section 15378, and the holding of *Amador v. City of Plymouth* (2007) 149 Cal.App.4th 1089. The Guidelines state that agency

actions that create "government funding mechanisms . . . *which do not involve any commitment* to any specific project which may result in potentially significant physical impact on the environment" are not CEQA projects. Guidelines § 15378(b)(4) (emphasis added). As noted in *Amador*, the converse holds equally true: an MSA's specific commitments render it a project subject to CEQA. *Amador, supra,* 149 Cal.App.4th at 1102-1103. The MSA here includes several such commitments.

In *Amador*, a city committed to specific actions under an agreement similar to the present MSA. *Amador, supra*, 149 Cal.App.4th at 1097-1099. That agreement provided that the city would remodel an existing fire station. *Id.* at 1107. In order to adequately address the emergency response needs, the city committed to completing this remodel by the date the casino would open to the public. *Id.* It also agreed to vacate a portion of a public road. *Id.* 1106-1107. The court held that these commitments were sufficient to mandate CEQA review of the agreement. *Id.* at 1107 (traffic impacts are subject to CEQA review), 1109 ("commitments to directly undertake an activity that may cause a physical change in the environment" are subject to CEQA review).

Consistent with the holding of *Amador*, the improvements required by the MSA here likewise mandate CEQA review. As in *Amador*, here the

City has committed to fire station improvements that must be completed prior to the opening of the Casino Project. AA 186; AR 623. These improvements include the remodel of Station 68, and the completion of either a new fire station, "consolidation and relocation of existing fire stations to a location within a radius of one and one-half miles from the Project" or substantial upgrades to one or more existing fire stations. *Id.* The City's failure to complete these improvements prior to the opening of the Casino Project would cause the City to default on the MSA, triggering the Band's right under the MSA to "specific performance against the City." AA 216; AR 653.

Also as in *Amador*, the City has committed to specific changes to roads under its jurisdiction without considering the environmental effects of these changes. AA 191-192; AR 628-629. The improvements to Richmond Parkway and Goodrick Avenue necessarily will create direct physical changes to the environment. AA 192. Under *Amador*, the City's commitment to these actions triggers CEQA review. *Amador*, *supra,* 149 Cal.App.4th at 1108, *see also* Guidelines § 15378(a).

The Opinion attempts to distinguish the MSA, finding it to be similar to the agreement in *Citizens to Enforce CEQA v. City of Rohnert Park* (2005) 31 Cal.App.4th 1549 ("*Rohnert Park*"). App 11. But in doing so,

the Opinion stretches *Rohnert Park* far beyond, and in conflict with, its actual holding. In *Rohnert Park*, the Court ruled that an agreement between a City and Tribe was not a project precisely because it did *not* "obligate the City to undertake a specified construction project." *Rohnert Park, supra*, 131 Cal.App.4th at 1601. Indeed, according to the *Rohnert Park* Court, "[t]he only topics addressed in the MOU are the ways in which the Tribe agrees to mitigate potential impacts of its casino project." *Id.* at 1600. The agreement did not set a "time for development," and merely established a source of funding. *Id.* In these ways, the agreement fell within the Guidelines' funding mechanism definition.

By contrast here, the MSA commits the City to specific fire station improvements that must be completed prior to the opening of the Casino Project, including the remodeling of Station 68, and the completion of either (1) a new fire station, (2) consolidated and relocated fire stations, or (3) substantial upgrades to one or more existing fire stations. AA 186; AR 623. Further, the MSA commits the City to undertake specific traffic improvements to roads under its jurisdiction without considering the environmental effects of those physical changes in the environment. AA 191-192; AR 628-629.

The Opinion also relies on *Kaufman & Broad-South Bay, Inc. v.*

Morgan Hill Unified School District (1992) 9 Cal.App.4th 464 ("*Kaufman & Broad*"), to support its contention that the MSA is a funding mechanism not subject to CEQA. But in doing so, the Opinion interprets *Kaufman & Broad* in a manner directly contrary to its actual holding. In *Kaufman & Broad*, a developer challenged a school district's formation of a community facilities district as an action subject to CEQA. There, the court found that the action would not trigger any specific school improvements, or even indirectly stimulate growth that might create a need for such improvements. *Id.* at 474. Whether specific educational facilities might eventually be developed would depend on whether such a need arose, not on the formation of the funding district. *Id.* Hence "the causal link between the action (formation of CFD 1) and the alleged environmental impacts (construction of new schools) [was] missing." *Id.*

As noted in *Amador,* the creation of such a funding district "made no direct physical change to the environment and made no reasonably foreseeable indirect physical change to the environment." *Amador, supra*, 149 Cal.App.4th at 1108. By contrast here, the MSA itself requires specific improvements that will cause "physical change to the environment."

The Opinion's holding that no CEQA review was required (App. 13) despite its acknowledgment that the MSA includes specific commitments

for improvements that will cause physical changes in the environment cannot be reconciled with the rulings in *Amador*, *Kaufman & Broad* and *Rohnert Park*. The MSA's commitments to the road and fire station improvements extend far beyond the funding agreements addressed in *Kaufman & Broad* and *Rohnert Park*. As noted, the City has committed to complete its fire station improvements by the Casino's opening and has committed to making the road improvements within its jurisdiction. AA 31, 186, 191-93. Clearly, these commitments require direct physical changes to the environment.[9]

Further, the Opinion conflicts with this Court's ruling in *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116 ("*Save Tara*"). In *Save Tara,* this Court held that an EIR was required before the City of West Hollywood could execute conditional agreements conveying city-owned building to developers for conversion to low-income senior housing despite the fact that the agreements were expressly conditioned on compliance with CEQA. This Court agreed with the lower court's conclusion that the EIR

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[9]The Opinion's statements that the MSA requires "no timeline for construction of physical improvements" and has no obligation for "the City to undertake any specified construction project" (App. 13.) cannot be reconciled with the facts that (1) firehouse improvements were required prior to the Casino's opening (AA 186; App. 15) and (2) transportation improvements were required if the Casino's traffic impacts were not otherwise mitigated after federal approval (AA 191-93; App. 17).

review process "'is intended to be part of the decisionmaking process itself, and not an examination, *after the decision has been made*, of the possible environmental consequences of the decision.'" *Save Tara*, 45 Cal.4th at 126 quoting the lower appellate court.

Reasoning that "an agency has no discretion to define approval so as to make its commitment to a project precede the required preparation of an EIR," this Court discounted the CEQA compliance conditions included in the city's conveyance agreements. 45 Cal.4th at 132. As this Court explained, "if the agreement, viewed in light of all the surrounding circumstances, commits the public agency as a practical matter to the project, the simple insertion of a CEQA compliance condition will not save the agreement from being considered an approval requiring prior environmental review." *Id.*

Similarly here, the MSA plainly commits the City to the Casino Project, in over one dozen significant respects. First, the MSA not only forbids the City from opposing the Project, but obligates the City to specifically *endorse* the Project by requesting the Secretary of the Interior, the California Congressional Delegation, the California State Legislature and the Governor of California to "openly and publicly support and facilitate the United States' acquisition of title to the Property in trust for

the benefit of the Tribe for gaming purposes" and "negotiate a Compact with the Tribe" allowing construction of the Project. AA 203.

Second, the MSA obligates the City to remodel Fire Station 68. AA 186; AR 623. Third, the MSA requires the City to complete either (1) a new fire station, (2) consolidated and relocated fire stations, or (3) substantial upgrades to one or more existing fire stations. *Id.*

Fourth, the MSA commits the City to require the Band to "add a left-turn lane on the west-bound Parr Boulevard approach to the Richmond Parkway, provide two west-bound through lanes between the main entrance to the Gaming Facility and Richmond Parkway[,] . . . widen Parr Boulevard to three lanes in the west-bound approach to the Richmond Parkway intersection, and make associated modifications to the traffic signal" at that location. AA 191-192.

Fifth, the MSA commits the City to require the Band to pay for a "'free' right turn for the right-turn movement from I-580 west-bound off-ramp to north-bound Richmond Parkway and widening the left-turn lane from south-bound Castro Street to the West-bound I-580 on-ramp from one to two lanes (including possible widening of part of the ramp to receive the two lanes before merging back into one lane)." AA 192.

Sixth, the MSA requires the City to require the Band to "pay its

proportionate share of an additional north-bound through lane on Richmond Parkway at Goodrick Ave. to meet LOS [Level of Service] standards at rush hour and of repaving of Goodrick Ave. between Richmond Parkway and Parr Blvd." AA 192.

Seventh, the MSA requires the City to require the Band to "pay its proportionate share of the Richmond Parkway – San Pablo Avenue Interchange Project listed in Contra Costa County's Transportation Plan . . . or . . . other feasible . . . improvements . . . to maintain adequate traffic operations at that intersection." *Id.*

Eighth, the MSA requires the City to require the Band to "contribute its proportionate share to the second phase of the Richmond Parkway Transit Center Parking and Access Improvements project." *Id.*

Ninth, the MSA requires the City to require the Band to "provide shuttle service from the proposed Richmond Parkway Transit Center to the Gaming Facility." *Id.* Tenth, the MSA requires the City to require the Band to "provide shuttle service from the Richmond BART Station to the Gaming Facility." *Id.*

Eleventh, the MSA requires the City to require the Tribe to "provide sidewalks along the Project's Parr Blvd. frontage." AA 193.

Twelfth, the MSA requires the City to require the Band to "provide

bicycle racks" and "install striping to establish a Class II bike lane along" Goodrick Avenue between Parr Blvd. and Richmond Parkway. AA 193.

Thirteen, the MSA requires the City to provide comprehensive law enforcement services in conjunction with both non-tribal and Tribal law enforcement agencies both on the Casino Property and throughout the surrounding area. AA 182-185.

In return for its support, coordination and provision of these improvements and services, the City will receive $329,000,000. AA 203. These across-the-board commitments to support and service the Casino constitute precisely the "surrounding circumstances" which, under *Save Tara*, "commit[] the public agency as a practical matter to the project." *Save Tara, supra*, 45 Cal.4th at 132.

The Opinion likewise conflicts with *Concerned McCloud Citizens v. McCloud Community Services District* (2007) 147 Cal.App.4th 181 ("*McCloud*"). In *McCloud*, a community services district executed an agreement with a commercial springwater bottler for exclusive rights to bottle and sell water from the district's sources, contingent on, among other things, the district and the bottler "'completing, during the Contingency Period, proceedings under CEQA in connection with the Project.'" *McCloud, supra*, 147 Cal.App.4th at 188; *Save Tara, supra*, 45 Cal.4th at

133. The *McCloud* Court held that no EIR was required before the district executed the contingent bottling agreement because CEQA documentation was required before the project received is discretionary permits.

The agreement scrutinized in *McCloud* did not mandate specific physical changes in the environment before CEQA review. As this Court explained, the *McCloud* Court "relied in part on the agreement's lack of information as to the springs that would exploited, the site of the bottling plant, how the water would be transported, and other details essential to environmental analysis of the project. Without that information," the Court concluded, "'preparation of an EIR would be premature.'" *Save Tara*, *supra*, 45 Cal.4th at 133.

By contrast in the case at bar, the site and size of the Casino are known, the streets that will provide access to the Casino are known and, indeed, the Bureau of Indian Affairs had already prepared a Draft Environmental Impact Statement under NEPA for the Casino, demonstrating clearly that the Casino and its impacts were sufficiently well defined to permit environmental analysis under CEQA's federal counterpart. Although prior to the MSA certain details concerning mitigation measures such as traffic improvements and fire suppression facilities remained to be clarified, the Casino Project was obviously

sufficiently certain to permit the City to conduct a comprehensive environmental review of those traffic, fire and other facilities and services that the MSA requires the City to provide.

Indeed, requiring any greater prior certainty as to the scope and extent of such facilities and services would completely defeat the Legislature's intent that "the EIR review process . . . 'be part of the decisionmaking process itself, and not an examination, *after the decision has been made*, of the possible environmental consequences of the decision.'" *Save Tara*, *supra*, 45 Cal.4th at 126.

As this Court pointed out in *Save Tara*, "[a]ny question as to whether a particular point in the development process is too early for preparation of an EIR 'is resolved by the pragmatic inquiry whether there is enough information about the project to permit a meaningful environmental assessment. If the answer is yes, the EIR review process must be initiated.'" *Id.*, quoting the court of appeal's ruling.

Accordingly, not only does the Opinion find no support in *McCloud*, the latter ruling as clarified by this Court in *Save Tara* directly conflicts with the Opinion's failure to require an EIR despite the existence of more than "enough information about the project to permit a meaningful environmental assessment." *Save Tara*, *supra*, 45 Cal.4th at 133 and 126.

The Opinion is also contrary to *Citizens for Responsible Government v. City of Albany* (1997) 56 Cal.App.4th 1199 ("*Albany*"). In *Albany*, the court determined that an agreement between a developer and a city violated CEQA despite its terms contemplating subsequent environmental review. *Albany*, *supra*, at 1219-1221. Under the agreement, the city removed its ability to consider a full range of mitigation measures or reasonable alternatives by designating specific mitigations within the agreement. *Albany, supra*, at 1221-1222. Further, the city precluded the consideration of the no project alternative by promising to perform under the agreement, limiting the City's discretion. *Id.* at 1221-1223.

Like the development agreement in *Albany*, and unlike the agreement in *McCloud*, the MSA has already committed the City to construct substantial specific improvements by a prescribed deadline. For example, the City must complete its fire station improvements by the Casino Project's opening. AA 186. Should the City fail to meet its obligations under the MSA, it will be in default and subject to the Band's right to demand specific performance. AA 216. For this reason, the no project alternative has been removed from the table, violating CEQA.

In all of the cases in which the courts determined that the agreement constituted only a "funding mechanism" or other preliminary arrangement,

no commitments to concrete, ground-disturbing activities were made. *Rohnert Park, supra*, 131 Cal.App.4th at 1601; *Kaufman & Broad, supra*, supra 147 Cal.App.4th at 188-197. Thus no "project" under CEQA was involved. Here, however, as the modified Opinion acknowledges, certain commitments to conduct or approve ground-disturbing activities were contained in the MSA. But the Court here nonetheless allowed the City to make such commitments without undertaking CEQA review. Thus, its Opinion conflicts with all of the municipal service agreement cases discussed above. Most significantly, it conflicts with *Amador*'s requirement for CEQA review prior to commitments to ground-disturbing activities.

For each of these reasons the Opinion conflicts with settled law. Accordingly, this Court should grant review of the Opinion. Doing so will provide guidance to municipal agencies and the public they serve as to the line between mere funding mechanisms and commitments to physical improvements that change the environment and therefore require CEQA review.

B. The Opinion Conflicts With Settled Law By Upholding the City's Decision to Delay Environmental Review of the Project Until After the Signing of the MSA

Under the Opinion, the City's CEQA review is indefinitely deferred.

Consequently, when, if ever, the City eventually considers CEQA review for any Project approvals still remaining, its analysis will be fatally biased by the commitments it already made in the MSA. For this reason, the Opinion's holding that review should be deferred conflicts with CEQA, for CEQA disallows environmental review of a project that is "nothing more than *post hoc* rationalizations to support action already taken." *Save Tara*, 45 Cal.4th at 130, *quoting Laurel Heights*, *supra*, 47 Cal.3d at 394.

CEQA analysis of a project must take place at the earliest point feasible in the approval process, lest the project take on an "overwhelming bureaucratic and financial momentum" that would improperly prejudice future decisionmakers. *Vineyard Area Citizens*, *supra*, 40 Cal.4th at 441; Guidelines § 15004(b). CEQA also requires agencies to consider the environmental impacts of "the whole of [the] action" so as to ensure "that environmental considerations do not become submerged by chopping a large project into many little ones – each with a minimal potential impact on the environment – which cumulatively may have disastrous consequences." Guidelines § 15378(a); *Bozung v. Local Agency Formation Com.* (1975) 13 Cal.3d 263, 283-284.

Despite these clearly defined CEQA precepts, the City put off CEQA review and entered into the MSA, wherein it pledged to undertake the

specific traffic and fire station improvements discussed above and committed to supporting the Casino Project throughout the approval process, without ever considering the off-site effects of the Casino Project as a "whole." Guidelines § 15378(a). The Opinion enables this subversion of CEQA by encouraging agencies to pre-commit to a piecemealed and truncated environmental analysis.

Under CEQA, the City must act as lead agency for purposes of environmental review of all off-site[10] impacts of the Casino Project. According to the Guidelines, where more than one agency exercises substantial CEQA authority over a project, the agency with "general governmental powers, such as a city or county" must take the role of lead agency. Guidelines § 15051(b)(1). The Casino Project here will have extensive impacts on the City – as clearly evidenced by the $329 million offered by the casino proponents for mitigation of those impacts in the MSA. AA 203. Further, the City has already taken action related to the Casino and will consequently be designated the lead agency. Guidelines § 15051(c) (where more than one public agency with general governmental

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[10] The Bureau of Indian Affairs' ("BIA's") Environmental Impact Statement ("EIS") prepared pursuant to the National Environmental Policy Act, 42 U.S.C. § 4321 *et seq.* ("NEPA"), is directed to on-site impacts; a thorough analysis of *off-site impacts* will still be required under CEQA. Guidelines § 15221 (explaining the procedures for preparing an CEQA-compliant document when NEPA review has already been conducted).

powers is involved in the project, "the agency which will act first on the project in question shall be the lead agency").

Accordingly, the City must evaluate the "whole" of the Casino Project's impacts in an appropriately-scoped environmental review, which will necessarily include *all* off-site improvements and consequent impacts in one comprehensive environmental document. *Bozung*, *supra*, 13 Cal.3d at 283-284; *Plan for Arcadia*, *supra*, 42 Cal.App.3d at 726; Guidelines § 15378(a), (c). In undertaking this review, the City will be aided by the input of responsible agencies, such as those other public service providers mentioned above in section I(B), pursuant to Guidelines section 15096. With the input of these agencies as to Project impacts within their jurisdiction, the City must evaluate the entirety of the Project's off-site impacts in a single document. This formal consultation process exists because CEQA's requirements "cannot be avoided by chopping up proposed projects into bite-size pieces which, individually considered, might be found to have no significant effect on the environment or to be only ministerial." *Plan for Arcadia, Inc. v. City Council of Arcadia* (1974) 42 Cal.App.3d 712, 726.

For these reasons, the EIR would be required to address the environmental impacts of all of the improvements described in the MSA,

incorporating those to be undertaken by the City as well as other state and local public agencies, including the road-widening and signalization projects within the City's jurisdiction; the creation of shuttle services from the Richmond BART station and the proposed Richmond Parkway Transit Center to the Casino; the addition of bike lanes on Goodrick Avenue, and the City's plan (presumably with Caltrans' input) to widen on- and off-ramps on I-580; the provision of sewer and storm water services by the West Contra Costa County Sanitary District (AA 187); the provision of water by the East Bay Municipal Utilities District (AA 189); and the many other potential improvements that will be required to accommodate the Casino Project and its significant traffic, aesthetic, public services, and safety impacts on the surrounding neighborhoods including petitioners'.

But because the City has already committed to supporting the Casino Project and the particular set of mitigation measures required in the MSA, it will not be able to conduct an unbiased review of the whole of the Casino Project's offsite impacts, or, indeed, of *any* of the particular future actions to be undertaken pursuant to the MSA. The City's concrete present commitments to approve and/or construct the road and fire station improvements coupled with its promise to support and facilitate the development of the Casino Project in the future will improperly preempt the

City's discretion and constrain its review of the environmental impacts of such actions–reducing the analysis of impacts to "'nothing more than *post hoc* rationalizations to support action already taken.'" *Save Tara,* 45 Cal.4th at 130, *quoting Laurel Heights*, 47 Cal.3d at 394.

This Court has specifically rejected similar commitments made by other local agencies prior to CEQA review. As noted previously, in *Save Tara*, this Court rejected the City of West Hollywood's agreement to allow a private developer to convert a city landmark into senior housing despite the agreement's condition that all applicable CEQA requirements be satisfied. Indeed, there "the parties expressly recognized City retained complete discretion over . . . any actions necessary to comply with CEQA and that the agreement imposes no duty on City to approve . . . any documents prepared pursuant to CEQA." *Save Tara*, *supra*, 45 Cal.4th at 126 (internal quotations omitted). Although the text of the agreement thus appeared to defer city approval until after environmental review, the city's actions and statements indicated that the project would proceed regardless of the outcome of the review. *Id.* at 125, 135. The Court stated that limiting the definition of CEQA approval to "unconditional agreements that irrevocably vest development rights would ignore" the risks of financial and political momentum overriding environmental concerns. *Id.* at 135.

Here, notwithstanding the Opinion's contrary holding, the City has clearly "commit[ed itself] to a definite course of action in regard to" the MSA. *Id.* at 139. As discussed above, the explicit purpose of the MSA is to meet the Band's need for public services by paying the "willing" City of Richmond "to provide the[se] governmental services. . . ." AA 180. The City also is required to officially endorse the Band's pending trust transfer application. AA 203. Furthermore, as also discussed above, the MSA (1) specifically commits the City to providing specified law enforcement, fire protection, and emergency response services, (2) obligates the City to permit numerous discrete physical road and public service improvements, and (3) empowers the Band to enforce these obligations with a lawsuit for specific performance. AA 182-86, 192-93, 216. In exchange, the City will be paid over $329,000,000. AA 193-97. These many specific commitments to a definite course of action cannot be trumped by the MSA's single sentence providing that the City is actually not committing itself to any particular course of action. AA 204.

A similar situation was presented in *Riverwatch v. Olivenhain Municipal Water District* (2009) 170 Cal.App.4th 1186 ("*Riverwatch*"), where the court found that

> [a]lthough the Agreement contained a provision regarding CEQA responsibility, that provision did not, in any reasonable

> construction, provide that [the public agency] retained its complete discretion under CEQA (as a responsible agency) to consider a final EIR . . . and *thereafter approve or disapprove its part of the [] project* pursuant to the Agreement or to require mitigation measures or alternatives to its part of the project.

Riverwatch, supra, 170 Cal.App.4th at 1212, emphasis added.

Like the municipal agencies in *Riverwatch* and *Save Tara,* the City's commitment here to undertake the improvements and provide public services in exchange for hundreds of millions of dollars, prevents it from implementing the No Project Alternative required by Guidelines section 15126.6(e). Because the actions the City must take under the MSA are *not* made contingent on the City's CEQA review (unlike the agreement in *Save Tara,* which conditioned the property conveyance on the City's satisfaction of its CEQA obligations), the MSA even *more* clearly commits the City to a "definite course of action" than did the agreement set aside in *Save Tara. Save Tara,* 45 Cal.4th at 139, 140.

Even if the MSA were more ambiguous, the "City's 'apprehensive citizenry' could be forgiven if they were skeptical as to whether the city . . . would give adverse impacts disclosed in [a future] EIR full consideration," given that $329,000,000 is on the line. *Id.* Finally, the MSA also limits the City's ability to consider a full range of alternatives by committing the City to undertake the particularly specified improvements (rather than, for

example, undertaking *different* road improvements or fire station upgrades or relocations, neither of which would be permitted under the MSA). AA 186, 192-93.

In sum, because the City has committed itself to supporting the construction of the Casino, the Opinion's deference to the City's promised future review falls short. App.13-14. Its future review of the "whole" of the project's impacts will constitute "nothing more than *post hoc* rationalizations to support action already taken." Guidelines § 15378(a); *Save Tara,* 45 Cal.4th at 130. As such, the City's pre-commitment to approve the Project violates CEQA. Since the Opinion upholds this MSA despite its lack of CEQA review, this Court should grant review.

CONCLUSION

The Opinion conflicts with settled CEQA law in two substantial respects. First, it fails to require CEQA review for a Municipal Services Agreement even though it commits the City to numerous specific roadway, fire station and other improvements that will cause physical changes to the environment. Existing CEQA caselaw, by contrast, recognizes that such specific commitments for improvements that cause physical changes in the environment trigger the need for CEQA review.

Second, the Opinion overlooks the City's CEQA duty as lead agency

to examine the Casino Project's off-site impacts at the earliest feasible point in the decision-making process. By impermissibly deferring CEQA review until after the MSA's mandated improvements have been approved, the Opinion paints the City – and the public – into a corner, sharply constraining the City's future exercise of CEQA discretion and transforming the CEQA process into "nothing more than *post hoc* rationalizations to support action already taken." *Save Tara*, *supra*, 45 Cal.4th at 130, quoting *Laurel Heights*, *supra*, 47 Cal.3d at 394.

For each of these reasons, this Court should grant review.

Dated: April 5, 2010

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Appellants' **PETITION FOR REVIEW OF OPINION OF THE COURT OF APPEAL FOR THE FIRST APPELLATE DISTRICT,** pursuant to Rule 8.204 subdivisions (b)(4) and (c)(1), California Rules of Court, is in at least 13-point proportional type and contains 8,073 words.

Dated: April 5, 2010

Respectfully submitted,

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