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Our File No. 4043.0002

August 24, 2020

BY ELECTRONIC FILING

Honorable Chief Justice Cantil-Sakauye
And Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, California 91402

Re: **Request for Depublication of *Honchariw v. County of Stanislaus* (2020) 51 Cal.App.5th 243 (Case No. F077815) (Filed June 25, 2020)**

Honorable Justices:

Introduction. The League of California Cities (the "League") respectfully requests depublication of *Honchariw v. County of Stanislaus* (2020) 51 Cal.App.5th 243 [2020 WL 3478663] (filed June 25, 2020, F077815) (*Honchariw*). Litigated by a pro per, the case creates uncertainty as to the short statute of limitations the Legislature found necessary to serve California's interest in certainty for developers and communities as to land use entitlements for housing and other construction vital to our economy and quality of life. *Honchariw* holds that a short, 90-day statute of limitations on disputes as to the **validity** of conditions of the approval of subdivision maps does not apply to disputes as to the **interpretation** of such conditions. Almost any dispute can be framed as one of competing interpretations, resulting — practically — in no statute of limitations at all and certainly not the short one the Legislature provided.

Statement of Interest. The League is an association of 478 California cities united in promoting the general welfare of cities and their residents. The League is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the state. The Committee monitors litigation of concern to municipalities and identifies those cases of state or national significance. The Committee has identified this case as having such significance. *Honchariw* creates uncertainty over Government Code section

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66499.37's[1] limitation period, uncertainty earlier precedent carefully avoided, recognizing the statutory goal of certainty to facilitate development, particularly of housing. (E.g., *Soderling v. City of Santa Monica* (1983) 142 Cal.App.3d 501, 508 (*Soderling*) [explaining legislative intent]; cf. *Anderson v. City of San Jose* (2019) 42 Cal.App.5th 683, 711 [paucity of sites for affordable housing well-documented, statewide concern].)

Depublication Standard. Depublication is appropriate if this "[C]ourt considers the result to be correct, but regards a portion of its reasoning to be wrong or misleading" and "if left to stand as citable precedent [it] may result in building ultimately reversible error into a large number of trials." (Grodin, *The Depublication Practice of the California Supreme Court* (1984) 72 Cal. L. Rev. 514, 520, 522.) Indeed, when an opinion presents such a risk of "compounding error," this Court commonly exercises this power. (*Id*. at p. 522; e.g., *Cynthia D. v. Superior Court* (1993) 5 Cal.4th 242, 254, fn. 9, [majority acknowledging analysis adapted from a depublished Court of Appeal decision]; see also *People v. Saunders* (1993) 5 Cal.4th 580, 607–608 (dis. opn. of Kennard, J.) [majority's reasoning consistent with several depublished decisions]; *cf*. *Schmier*, *supra*, 78 Cal.App.4th at 708 ["expense, unfairness to many litigants, and chaos in precedent research" among factors considered in certifying opinion for publication].)

The Opinion Undermines the Prompt Certainty the Legislature Intended. Section 66499.37 reflects a Legislative policy that Map Act decisions promptly become final:

> Any action or proceeding to attack, review, set aside, void, or annul the **decision** of an advisory agency, appeal board, or legislative body concerning a subdivision, or of any of the proceedings, acts, or determinations taken, done, or made prior to the decision, **or to determine the reasonableness, legality, or validity of any condition attached thereto**, including, but not limited to, the approval of a tentative map or final map, shall not be maintained by any person unless the action or proceeding is commenced and service of summons effected **within 90 days** after the date of the decision. Thereafter all persons are barred from any action or proceeding or any defense of invalidity or unreasonableness

[1] Unspecified references to "sections" are to the Government Code.

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> of the decision or of the proceedings, acts, or determinations. The proceeding shall take precedence over all matters of the calendar of the court except criminal, probate, eminent domain, forcible entry, and unlawful detainer proceedings.

(Gov. Code, § 66499.37.)

Section 66499.37 is intended to ensure challenges to legislative or administrative decisions under the Map Act are resolved promptly because delay increases development and, therefore, housing costs. (*Hunt v. County of Shasta* (1990) 225 Cal.App.3d 432, 442.) As this Court explained in *Hensler v. City of Glendale* (1994) 8 Cal.4th 1, 27 (*Hensler*): "[t]he purpose of statutes and rules which … create relatively short limitation periods for" actions which attack land use decisions "is to permit and promote sound fiscal planning by state and local governmental entities." Yet *Honchariw* defeats this purpose, finding the State's overriding goal is, **not** promptness or certainty, but to protect developers from subsequent agency action. (2020 WL 3478663 at *7.)

The Opinion Muddles the Statute of Limitations. Courts have consistently interpreted Section 66499.37 as imposing a **strict** 90-day limitations period **broadly** applied to any suit — no matter the nature, label or form of relief sought — challenging a decision under the Map Act. (*Hensler*, *supra*, 8 Cal.4th at pp. 26–27.) "Decisions" triggering accrual have been broadly construed, too, as Section 66499.37 places "no limitation whatsoever on the types of decisions that [it applies to], but instead broadly encompasses any decision of a local legislative or advisory body 'concerning a subdivision.'" (*Aiuto v. City and County of San Francisco* (2011) 201 Cal.App.4th 1347, 1357 (*Aiuto*).) Such construction is necessary to ensure stability and predictability in land use regulation, which would be subverted if different rules for different types of subdivision-related decisions were allowed. *Honchariw* allows, under the guise of "interpretation" disputes, challenges to aspects of subdivision decisions years after map approval. (*Id* at pp. 1360–1361.)

The Opinion Construes Narrowly What the Legislature Intended to be Construed Broadly. Courts have observed, too, that — unlike many other statutes of limitation —Section 64499.37 must be construed broadly. (*Maginn v. City of Glendale* (1999) 72 Cal.App.4th 1102, 1109–1110 (*Maginn*).) Courts may not develop common law exceptions to statutes of limitation which statutory language reflects intent to displace.

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(*Ibid*.) *Maginn* applied this rule to conclude Section 66499.37's limitations period may not be equitably tolled and substantial compliance does not suffice, given the policy of the Map Act that disputes under it "be resolved as quickly as possible consistent with due process." (*Id*. at pp. 1109–1110.) *Aiuto* rejected interpretation of Section 66499.37, applying it narrowly to "decisions" with a "temporal" quality. (201 Cal.App.4th at p. 1360.) Yet *Honchariw* nevertheless applies the common law rule of delayed discovery (or accrual) without engaging myriad earlier decisions holding this rule cannot apply to Section 66499.37. (2020 WL 3478663 at * 8; contra: *Maginn*, *supra*, 72 Cal.App.4th at p. 1109; see also *Reid v. City of San Diego* (2018) 24 Cal.App.5th 343, 361–362 [continuous accrual not applicable when statute "provides a limitation period triggered by a specified event"].)

The Opinion Allows Perennial Challenge to Map Conditions. *Honchariw* permits perpetual accrual, extending Section 66499.37's limitations period indefinitely, undermining the Legislature's intent and unsettling what had been predictable and consistent law. It concludes, without discussion of precedent interpreting Section 66499.37 or analyzing the statute's text, that a Map Act claim accrues under Section 66499.37 when it is "clear what interpretation the agency has adopted and that the interpretation is the agency's final position … ." (*Honchariw*, *supra*, 2020 WL3478663 at p. * *5*.) This might be warranted in an unusual case in which an Agency's later action is fundamentally at odds with the earlier approvals. (E.g., *Anthony v. Snyder* (2004) 116 Cal.App.4th 643, 664 [imposing additional conditions for final approval after an agency has finally acted may be challenged].) But here, Stanislaus County took the entirely reasonable position that a condition of approval requiring fire hydrants for the development of residential lots requires that those hydrants function — that they be supplied with adequate water to serve their purpose. (See *Soderling v. City of Santa Monica* (1983) 142 Cal.App.3d 501, 505–506 [even if not specified as a condition to a tentative subdivision map, "fulfillment of all the tentative maps conditions is, from the outset, a condition of final map approval"].)

Equally troubling is the Court's unsupported finding that several emails from the County's staff, including two from its public works department, constituted "final" decisions triggering anew the running of section 66499.37's statute of limitations. Without citation to any County administrative policy or other authority, the Court essentially ruled that Honchariw was not required to exhaust any administrative

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remedies or appeals in order to secure a "final" decision from the ultimate decision-making authority over such matters, instead, presuming without factual basis that "further negotiations or attempts at clarification [were] unnecessary or would be futile."

Finding a bona fide dispute over the interpretation of the condition and that the pro per litigant did not have a cause of action until County staff disputed the plaintiff's self-serving interpretation, *Honchariw* eviscerates Section 66499.37. If this is a bona dispute over "interpretation," then anyone unhappy with one or more of the scores of conditions frequently accompanying subdivision approvals — a developer, an agency under new political leadership, a neighbor, or a competitor — can halt any project at any time before it is completed. This is not the intent of Section 66499.37. (See *Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1245 ["court's role in construing a statute is to 'ascertain the intent of the Legislature so as to effectuate the purpose of the law'"].) *Honchariw* does not analyze legislative intent, despite ample precedent, including of this Court, concluding Section 66499.37 must be construed strictly and broadly to achieve the Legislature's objective to resolve all claims directly or indirectly touching upon a subdivision as expeditiously as due process permits. (E.g., *Timberidge Enterprises, Inc. v. City of Santa Rosa* (1978) 86 Cal.App.3d 873, 886.)

Honchariw suggests negotiations with agency staff before or after the denial of a final map are "acts" upon which a Map Act claim may accrue so long as they fall within 90 days of filing suit. The reasoning is flawed. The statute requires service of summons, not just filing, within the 90-day limitations period. (*Maginn*, *supra*, 72 Cal.App.4th at p. 1108.) This requirement is made plain by the statutory text, but *Honchariw*'s imprecise language conceals the distinction.

The statute's language plainly states, too, that Map Act claims accrue upon a "**decision**" of "an advisory agency, appeal board, or legislative body." (*People ex re. Brown v. Tehama County Bd. of Supervisors* (2007) 149 Cal.App.4th 422, 430). Agency staff are not mentioned, and precedent narrowly construes this language to commence the 90-day time for suit with the last "discretionary" decision of "an advisory agency, appeal board, or legislative body." (Cal. Subdivision Map Act and the Development Process (Cont.Ed.Bar. 2nd ed. April 2019), § 13.4, citing *Soderling v. City of Santa Monica* (1983) 142 Cal.App.3d 501; *City of W. Hollywood v. Beverly Towers, Inc.* (1991) 52 Cal. 3d

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1184; *Great W. Sav. & Loan Ass'n v. City of Los Angeles* (1973) 31 Cal. App.3d 403.) *Honchariw* does not engage this precedent either.

Honchariw ultimately worked backwards to save the pro-per, developer plaintiff's claim, devising a rule that allows litigants to extend the life of Map Act claims through "negotiations" with agency staff, equating such discussions as agency acts from which a Map Act claim may accrue. (2020 WL 3478663 at * 8.) The uncertainty this engenders is self-evident; *Honchariw* does not even identify which of two emails triggered the plaintiff's claim, just that any correspondence he received within 90 days of filing suit can be challenged. (*Id*. at * 7.) Other courts rejected this reasoning as absurd in light of the legislative purpose. (*Hunt v. County of Shasta* (1990) 225 Cal.App.3d 432, 442–443 (*Hunt*) [rule that would allow § 66499.37 to run anew based on reconsideration of final subdivision map would provide a limitless period for challenge].)

Honchariw seems an effort to do equity to a pro per litigant seeking to develop four rural lots served by a small community services district with an inadequate water supply. In doing so, it muddles the law. Plaintiff Honchariw has his law degree from Harvard Law School and was admitted to the Bar in 1973 and practices from Tiburon. Stanislaus County seems to be a development site for him, not a home. He is a prolific pro se litigant and this dispute has generated no fewer than six appeals to the Fifth District since 2010, four of them leading to published decisions, one to an unsuccessful petition for review here.

- *Honchariw v. County of Stanislaus* (2020) 51 Cal.App.5th 243 [the Opinion of which depublication is sought];
- *Honchariw v. County of Stanislaus* (2015) 238 Cal.App.4th 1 (review den. Aug. 19, 2015);
- *Honchariw v. County of Stanislaus* (2015) 237 Cal.App.4th 388 (republished as *ibid*.);
- *Honchariw v. County of Stanislaus* (2013) 218 Cal.App.4th 1019*;*
- *Honchariw v. County of Stanislaus* (2011) 200 Cal.App.4th 1066.

The 2011 entry in this catalog has already been critiqued by another Court of Appeal. (*Kalnel Gardens, LLC v. City of Los Angeles* (2016) 3 Cal.App.5th 927, 943 fn. 8 [Rubin, J.].) Honchariw also sued his lender in pro per, leading to an unpublished 2009 decision of the First District. (Case No. A119527). Federal litigation has been part of this saga, too, reaching our highest court:

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- *Honchariw v. County of Stanislaus, Cal.* (2019) 139 S. Ct. 2772 [remanding to 9th Circuit for renewed decision in light of *Knick v. Township of Scott* (2019) 588 U.S. ___, 139 S.Ct. 2162];
- *Honchariw v. County of Stanislaus* (9th Cir. 2019) 77 Fed.Appx. 411 [further remanding to E.D. Cal.];
- *Honchariw v. County of Stanislaus* (9th Cir. 2018) 715 Fed.Appx. 760 [affirming dismissal of takings and due process claims];
- *Honchariw v. County of Stanislaus* (E.D. Cal. 2016), 2016 WL 6723957 [unpublished decision dismissing without leave to amend (O'Neill, J.)].

The last thing this dispute needs, it seems, is a relaxation of statutes of limitation. Yet *Honchariw* found such a need and in so doing undermines a stable area of law uninformed by precedent or statutory intent. Nor does it articulate any workable limiting principle. (Contra: *Aiuto, supra,* 201 Cal.App.4th at p. 1360 ["we believe the adoption of a requirement that subdivision-related decisions must 'have a temporal aspect to them' in order to trigger the 90–day time limitation period of Section 66499.37 would **destabilize what is currently a very predictable and consistent area of the law**. Future claimants and local land use authorities would be left to guess what time periods courts would apply to hundreds of subdivision-related discussions arguably subject to Section 66499.37"], emphasis added.)

Conclusion. Depublication is warranted because *Honchariw* will multiply litigation, drive up development and housing costs and defeat Section 66499.37's purpose. It is very easy to cast many disputes between a subdivider and a city or county as disputing the interpretation of a condition of approval, the governing ordinances or some other regulation, long after the City Council or Board of Supervisors has approved a subdivision map. Indeed, as can be seen from the facts here — a condition requiring fire hydrants is argued to require only installation of non-functioning hydrants without adequate water supply, triggering under *Honchariw* a new statute of limitations. If such a condition can give rise to a belated claim, what might not?

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For all the foregoing reasons the League of California Cities respectfully urges this Court to depublish *Honchariw*.

Respectfully submitted,

Michael G. Colantuono
(SBN 143551)

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Enclosures: Proof of Service

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CERTIFICATE OF SERVICE

Nicholas Honchariw v. County of Stanislaus
Case No. F077815

At the time of service I was over 18 years of age and not a party to this action. My business address is 790 E. Colorado Blvd., Suite 850, Pasadena, California 91101. On August 24, 2020, I served the following document entitled:

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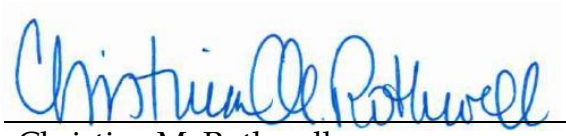
☒ **BY MAIL**: By placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Pasadena, California addressed as identified on the service list attached..

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

Executed on **August 24, 2020,** at Pasadena, California.



Christina M. Rothwell

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SERVICE LIST
Nicholas Honchariw v. County of Stanislaus
Case No. F077815

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