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15 Company, LLC and Anna Maria Dettmer, As
16 Trustee Of The AMD Family Trust

17 SUPERIOR COURT OF THE STATE OF CALIFORNIA

18 COUNTY OF CONTRA COSTA

19 SONJA TRAUSS, and SAN FRANCISCO
20 BAY AREA RENTERS FEDERATION ,

21 Petitioners,

22 vs.

23 CITY OF LAFAYETTE, A MUNICIPAL
24 COMMUNITY, and DOES 1-25,

25 Respondents.

26 O'BRIEN LAND COMPANY, LLC and
27 ANNA MARIA DETTMER, AS TRUSTEE
28 OF THE AMD FAMILY TRUST,

Real Parties in Interest,

Case No. MSN 15-2077

**REPLY IN SUPPORT OF DEMURRER
BY REAL PARTIES IN INTEREST
O'BRIEN LAND COMPANY, LLC AND
ANNA MARIA DETTMER, AS TRUSTEE
OF THE AMD FAMILY TRUST, TO
PETITIONERS' SECOND AMENDED
PETITION FOR WRIT OF
ADMINISTRATIVE MANDAMUS**

**ASSIGNED FOR ALL PURPOSES TO
THE HONORABLE JUDITH CRADDICK,
DEPT. 9**

Judge: Honorable Judith S. Craddick
Date: July 20, 2016
Time: 9:00 a.m.
Dept.: 9

Action Filed: December 8, 2015
Trial Date: None Set

1 **I. INTRODUCTION**

2 This Reply is respectfully submitted by the Real Parties in Interest (Real Parties) and
3 joined in by Respondent City of Lafayette (City). Real Parties and City have shown that the
4 following facts are clear from the face of the Petitioner’s Second Amended Petition (“SAP”):

5 1. The Housing Accountability Act (HAA) applies *only* when (i) a city formally
6 “disapproves” a housing project; or when (ii) a city formally “approves” a housing project upon
7 the condition that the project be developed at a lower density than proposed. (Cal. Gov’t Code
8 Section 65589.5(j))¹

9 2. The HAA requires that the disapproval/approval of a housing project application is
10 required to be accomplished by a *formal vote and decision* on the subject project by the city.
11 (Section 65589.5(h)(5)(A).)

12 3. In this case, the City never “disapproved” the Apartment Project application, nor did it
13 “approve” the Apartment Project application on the condition that it be developed with a lower
14 density. The City never even got close to a formal vote and decision on the Apartment Project.
15 Instead, the Real Parties proposed a completely new project (the Single-Family Project). The City
16 and Real Parties processed a General Plan Amendment and all the applications for the Single-
17 Family Project, which the City ultimately approved.

18 *The Petitioners in their Opposition concede all these facts.* However, Petitioners’
19 Opposition asks this Court to amend the HAA to apply to circumstances beyond the statutory
20 requirements. Petitioners claim, contrary the HAA’s provisions, that a formal vote and decision is
21 not required, and ask this Court to expand the HAA to prohibit a landowner from submitting and
22 processing a different application. Petitioners desire that third parties be allowed to file suits
23 against a city and landowner prior to any actual decision on a housing project – placing the courts
24 in the position of guessing whether the city might have approved/denied the project, had a formal
25 vote been taken.

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¹ All statutory references are to the California Government Code, unless otherwise indicated.

1 Petitioners cite no authority for this novel position. Instead, Petitioners claim that the
2 HAA should be extended to this case because the City purportedly “forced” and “strong-armed”
3 the Real Parties to propose a different project. The face of the Petitioners’ SAP and its Exhibits
4 clearly contradict such claim. The SAP and Exhibits establish that: (i) the Real Parties voluntarily
5 suspended the Apartment Project application (and that Project was never disapproved, approved,
6 or voted on by the City); (ii) the Real Parties voluntarily submitted applications for a General Plan
7 Amendment and related approvals for a new and separate Single-Family Project; and (iii) such
8 applications were approved and were not conditioned on a reduction in density.

9 In addition, the claims in the SAP are untimely. It is undisputed that *Petitioners failed to*
10 *timely challenge the General Plan Amendment*, missing the mandatory filing service deadline by
11 one day. Controlling law is clear: missing such service, even by one day, is fatal. The City’s
12 General Plan Amendment underpins the Petitioners’ action, but is immune from challenge. The
13 current, unchallenged General Plan designation for the subject property is for single-family use
14 only. As such, the Petitioners’ action is clearly barred by the statute of limitations.

15 These same legal conclusions extend to Petitioners’ related causes of action under Section
16 65008 (Discrimination), and for Declaratory Relief. Petitioners’ Opposition does nothing to
17 change these legal conclusions.

18 For these reasons, the Real Parties in Interest and City respectfully request that the
19 Demurrer be sustained as to all three of Petitioners’ Causes of Action.

20 II. ARGUMENT

21 A. **The HAA Does Not Apply: the City did not “Disapprove” a Project, nor** 22 **“Approve” a Project on the Condition that it be Developed at a Lower Density**

23 Petitioners claim that the City’s approval of the Single-Family Project violated Section
24 65589.5(j) by, in effect, approving the Apartment Project at a lower density. However, the facts as
25 plead in the SAP and its Exhibits demonstrate that the City never voted on the Apartment Project
26 application. The City approved the separate Single-Family Project application that was actually
27 proposed by the Real Parties – and approved it at the density requested, not on the condition that it
28 be developed at a lower density.

1 The HAA only applies where the City (i) votes to disapprove a qualifying housing project,
2 or (ii) approves the qualifying housing project on the condition that it be developed with a lower
3 density (Section 65589.5(j)). The HAA spells out the need for a formal vote:

4 “Disapprove the development project” includes any instance in which a local
5 agency does either of the following:

6 (A) *Votes on a proposed housing development project application and the
7 application is disapproved.* (Emphasis added) (Section 65589.5(h)(5(A).)

8 As stated in the Demurrer, the SAP states on its face that the Apartment Project was never
9 voted on or considered for approval/disapproval by the City. Instead, the SAP confirms that the
10 Real Parties agreed to “suspend” processing of the Apartment Project, and to process a General
11 Plan Amendment and related applications for the Single-Family Project. The General Plan
12 Amendment was never legally challenged, and the City approved the Single-Family Project at the
13 density sought by the Real Parties.

14 In response, Petitioners state: “The only reason that the [apartment] project was not
15 approved was because of outspoken NIMBYS.” (Opp. Brief at p. 14; 17-18.) The problem with
16 Petitioners’ position is that *the Apartment Project application was never “disapproved” or
17 “approved”* – it never went to a vote. Petitioners ask this Court to speculate that *if the City voted
18 on the Apartment Project*, the City would have denied it because of public opposition. The HAA
19 does not allow for such speculation. The HAA instead requires a formal vote on the application.

20 **B. Petitioners Statements Regarding the Lack of Housing in California Are Not
21 Relevant to This Matter.**

22 Petitioners ask numerous rhetorical questions of this Court, and set forth numerous claims
23 regarding the lack of affordable housing throughout the state. (Opp. Brief at pp. 1-3.) Petitioners
24 ask this Court whether “property rights are extinct in the San Francisco Bay Area.” Petitioners
25 state that this case “asks fundamental questions about our democracy.” (Opp. Brief at p. 1; 27.)

26 Petitioners’ background statements are misplaced and not relevant in this case. Here, the
27 landowner stopped pursuing the Apartment Project application (and as a consequence the City has
28 not approved or denied such project). Instead, the landowner voluntarily elected to submit an
entirely different project (the Single-Family Project). The Single-Family Project is so different that

1 a General Plan Amendment, rezoning, and different applications were required to obtain the land
2 use entitlements. Petitioners attempt to use the HAA to compel a landowner to build an apartment
3 project that the owner put on hold, rather than the project that the landowner opted to pursue and
4 got approved – a result never contemplated by the HAA.

5 The following example is illustrative: A landowner applies for approval of an apartment
6 project with a city. Prior to approval or disapproval of that application, the market for apartments
7 collapses, and the landowner elects to file a new application for an office park on the site. Under
8 the Petitioners’ analysis, housing rights groups can sue the city and the landowner for failing to
9 “follow through” and build the apartment project – *even over the landowner’s desire to build*
10 *offices*. Petitioners would request this court to “force” the landowner to construct and manage an
11 apartment project against the desires and financial ability of the landowner.

12 Such an absurd result is not allowed by the HAA. As stated, the HAA applies only when:
13 (i) the landowner submits an application for a housing project; and (ii) the city formally votes to
14 deny or conditionally approve that specific application. Of course, such vote did not happen here.

15 **C. Petitioners Improperly Claim that the City Forced the Landowner to Submit a**
16 **General Plan Amendment.**

17 Petitioners further claim, without citation to the record, that the City “forced” or “strong-
18 armed” the landowner into submitting a General Plan Amendment and other applications for the
19 Single-Family Project. (Opp. Brief at p. 2;. 2.) Petitioners falsely claim, again without citation,
20 that both the City and Real Parties “do not deny” Petitioners’ claims in this regard. (Opp. Brief at
21 p. 10; 23-24.) Respectfully, Petitioners are wrong.

22 As repeatedly stated throughout the Demurrer, the Real Parties in Interest *voluntarily*
23 elected to suspend processing of the Apartment Project, and to pursue the Single-Family Project.
24 (See Demurrer, MPA, at p. 1; 18-22; p. 7; 6-28.) Petitioners’ SAP on its face confirms that the
25 landowners and developers voluntarily elected to (i) suspend the processing of the Apartment
26 Project application, and (ii) submit applications for a General Plan Amendment for the Single-
27 Family Project. The Process Agreement states:

1 The Parties [City and O'Brien/Dettmer] desire to consider a project alternative to
2 the Apartment Project that consists of 44-45 single-family detached homes and
public parkland and parking amenities . . .

3 By this Agreement, the intent of the Parties is to: (i) set forth a process for
4 consideration of the Project Alternative [the Single-Family Project]; . . . (ii)
"suspend the Apartment Project pending the consideration of the Project
Alternative . . .] (SAP at Exhibit A, p. 1, RECITALS C and E.)

5 From and after the execution of this Agreement, Applicants shall prepare the
6 development application required for consideration of the [Single- Family] Project
Alternative. (SAP at Exhibit A, p. 2, Sec. 3.1)

7 The Process Agreement was reviewed and considered in open, public hearings. There can
8 be no clearer statement on the record confirming the voluntary nature of this process. If the
9 Petitioners believed the Process Agreement was improper, Petitioners could have timely
10 challenged the Process Agreement. They did not. As stated in the Demurrer, "facts appearing in
11 exhibits attached to the complaint (the Process Agreement attached to the SAP at *Exhibit A*) will
12 be accepted as true, and if contrary to the allegations in the pleading, will be given precedence."
13 (*Dodd. v. Citizens Bank of Costa Mesa*, 222 Cal. App. 3d 1624, 1627 (1990).)

14 Here, the Real Parties made a voluntary decision to apply for a different project, requiring
15 a General Plan Amendment. This is not a case of "form over substance." The two referenced
16 projects are substantively different. The two projects are governed by different provisions of the
17 City's General Plan and zoning ordinances. The Apartment Project is a high density multi-family
18 project. The Single-Family Project is a low density, single-family project with parks, trails, a dog
19 park and related community amenities.

20 **D. Approval of the Single-Family Project Was Not a Denial of the Apartment**
21 **Project Under the HAA.**

22 The HAA requires that the City (i) disapprove the Apartment Project; or (ii) conditionally
23 approved the Apartment Project, by formal vote. Petitioners claim that the City in effect "denied"
24 the Apartment Project for purposes of the HAA, at the time the City approved the General Plan
25 Amendment and related approvals for the Single-Family Project.

26 As stated in the Demurrer and herein above, *the HAA at section 65589.5(h)(5)(A) requires*
27 *that the City formally vote on the proposed affordable housing project application.* Petitioners
28 improperly claim that the City need not vote on the Apartment Project, and that instead the

1 Petitioners can file a lawsuit following the City’s vote on any subsequent development project (the
2 Single-Family Project). Such claim ignores the plain meaning of section 65589.5(h)(5)(A).

3 Petitioners alternatively claim that the Apartment Project and the Single-Family Project are
4 “one project.” This issue was addressed in the Demurrer, however, Petitioners state that the City’s
5 use of a Supplemental Environmental Impact Report (SEIR) for the Single-Family Project, rather
6 than another form of environmental review under the California Environmental Quality Act
7 (CEQA), shows that the two projects are in fact “one project” for purposes of separate
8 development application statutes (Government Code Sec. 65931). This is not the case. Under
9 CEQA, the sole purpose of an EIR is to provide *information* to local agencies and the general
10 public *regarding potential environmental impacts of a project*. (Pub. Res. Code Section 21061.)
11 Here, given the environmental review earlier generated for the Apartment Project, the City chose
12 to utilize that analysis where appropriate and prepare a Supplemental EIR; although other forms of
13 EIRs could have been chosen. The preparation of a Supplemental EIR does not “change” the form
14 and character of the separate Single-Family Project under Government Code Section 65931.

15 Petitioners further assert in passing that pursuant to Section 65589.5(h)(5)(B) the City
16 “disapproved” the project under the terms of the Permit Streamlining Act (Opp. Brief at p.7; 1-3).
17 This assertion is incorrect. As shown herein, the City and Real Parties formally agreed to
18 extensions of time and the Real Parties agreed to “suspend” the Apartment Project applications.

19 **E. Petitioners Improperly Attempt to Apply Exceptions to the Statute of**
20 **Limitations**

21 As stated above, the Petitioners claim that the City, in approving the General Plan
22 Amendment and related applications for the Single-Family Project, in effect “denied” the
23 Apartment Project for purposes of the HAA.

24 As stated in the Demurrer, Petitioners’ claim is clearly barred by the applicable statute of
25 limitations. Government Code section 65009(c)(1)(a) requires an action challenging the General
26 Plan Amendment to be *filed and served* within 90 days of the decision. The service deadline is
27 absolute. The stated purpose for the strict requirement is intended precisely for this case: “to
28 provide certainty for property owners and local governments regarding decisions made pursuant to

1 this division.” (65009(a)(3). Given the strict, statutory mandate, *even a one day delay in service*
2 *requires dismissal under section 65009(c)(1). (Wager v. City of Pasadena (2000) 78 Cal.App.4th*
3 *943,950.)* Here, Petitioners filed their original Petition on the 90th day, but served the challenge
4 one day later (the 91st day), which was/is fatal under *Wagner*.

5 Petitioners Opposition recognizes this statute of limitations, and that service was one day
6 late under Section 65009(c)(1). (Opp. Brief at p. 11; 14-17.) However, Petitioners’ Opposition
7 attempts to recast the claims in ways *not referenced or alleged in the SAP*, so as to claim an
8 exception to the statute of limitations.

9 Petitioners rely on Section 65009(d)(1), which creates exceptions to the strict 90-day rule
10 under specific circumstances not applicable to this case. Section 65009(d)(1)(A) and (B) require
11 that an action meets each of two requirements. The second requirement is as follows:

12 It is brought with respect to the adoption or revision of a housing element pursuant
13 to Article 10.6 . . . *actions taken pursuant to Section 65863.6, or Chapter 4.2 . . .* or
14 to challenge the adequacy of an ordinance adopted pursuant to Section 656915.
[Emphasis added.] (Section 65009(d)(1)(B).)

15 The HAA is contained at Section 65589.5 of the Government Code, and is not within the
16 purview of the exceptions in 65009(d)(1)(B). Petitioners claim that the SAP was brought as an
17 action pursuant to Section 65863.6 – even though Section 65863.6 is not referenced or alleged in
18 the SAP. (Opp. Brief at pp. 11 -13.)

19 Section 65863.6 requires certain findings when a city/county adopts an ordinance limiting
20 the number of housing units which may be constructed on an annual basis. Section 65863.6 is set
21 forth below in its entirety:

22 In carrying out the provisions of this chapter, each county and city shall
23 consider the effect of ordinances adopted pursuant to this chapter on the
24 housing needs of the region in which the local jurisdiction is situated and
25 balance these needs against the public service needs of its residents and
26 available fiscal and financial resources. *Any ordinance adopted pursuant to*
27 *this chapter which, by its terms, limits the number of housing units which*
28 *may be constructed on an annual basis shall contain findings as to the public*
health, safety , and welfare of the city or county to be promoted by the
adoption of the ordinance which justify reducing the housing opportunities of
the region. (Emphasis added.)

1 Tellingly, Petitioners leave out the emphasized portion of the above Section. (Opp. Brief at
2 p. 11; 27-28; 12; 1-2.) The language omitted by Petitioners requires a city to make findings *only*
3 *with regard to an ordinance limiting the number of housing units constructed on an annual basis.*
4 In this case, the City’s General Plan Amendment did not, by its terms, limit the number of housing
5 units which can be constructed on an annual basis, and the referenced findings under Section
6 65863.6 are not required.

7 Petitioners nevertheless state that the SAP states a claim under section 65863.6, because
8 the City did not consider the impacts of the General Plan amendment and related approvals “on the
9 housing needs of the Bay Area.” The City did not have to do so, because it did not adopt an annual
10 housing cap. Moreover, the SAP makes no mention of Section 65863.6. Petitioners’ sole citations
11 for their new claim is to the SAP at: (i) paragraphs 4-5, and 49-50; and (ii) paragraphs 6, 31-34,
12 and 38. (Opp. Brief at p. 12, ln. 6.) *However, those cited paragraphs do not reference section*
13 *65863.6, and do not attempt to make a claim thereunder.*

14 The SAP at paragraphs 4-5 merely reference background public hearings for the Apartment
15 Project. Paragraphs 49-50 (under Section 65008) claim that the City’s General Plan Amendment
16 and related applications discriminate against moderate-income persons, and that the Process
17 Agreement was a “subterfuge.” The SAP at paragraph 6 merely sets forth the City Manager’s
18 statements to the public regarding the Single-Family Project. The SAP at paragraphs 31-34 lay out
19 the same statements, and reference the Process Agreement. The SAP at paragraph 38 references
20 the General Plan Amendment and rezoning applications for the site. Clearly, none of these claims
21 in the SAP are brought pursuant to Section 65863.6.

22 Petitioners further state, for the first time, that the SAP states a claim under Government
23 Code Sections 65913, 65913.1, and 65913.2. Again, *none of these Sections, or claims thereunder,*
24 *are referenced in the Petitioners’ SAP.*

25 Petitioners rely on *Haro v. City of Solana Beach* (2011) 195 Cal.App.4th 542, at 551, as
26 support for their claimed exception to the strict 90-day statute of limitations. The facts in *Haro*
27 are clearly distinguishable, and the decision is favorable to the City/Real Parties’ position. In
28 *Haro*, the plaintiffs gave express written notice that they were challenging the validity of the

1 City’s housing element pursuant to 65009(d)(1)(B) (allowing an exception for challenges to a
2 city’s housing element). The court in *Haro* stated that (i) under Section 65009, actions to
3 challenge governmental planning and zoning are generally governed by the (strict) 90-day
4 limitations period; however, (ii) even assuming plaintiffs are correct in claiming the exception, the
5 plaintiffs missed the applicable alternative statute of limitations.

6 In this case, of course, the SAP does not challenge the housing element, and unlike the
7 plaintiffs in *Haro*, the Petitioners did not make any challenges that qualify under Section
8 65009(d)(1)(B). As such, the narrow exceptions of 65009(d)(1) do not apply.

9 We note further that, even if one assumes (for purposes of the Demurrer) that Petitioners’
10 SAP can now be read to reference a challenge that qualifies for an exception under Section
11 65009(d)(1), the Petitioners in any event were required to give *prior and specific notice to the city*.

12 A cause of action brought pursuant to this subdivision shall not be maintained until
13 60 days have expired following notice to the city . . . by the party bringing the cause
14 of action . . . specifying the deficiencies of the general plan, specific plan, zoning
15 ordinance, or other action . . . A cause of action brought pursuant to this
16 subdivision shall accrue 60 days after notice filed or the legislative body takes a
17 final action in response to the notice, whichever is first. (Section 65009(d)(3)(A).)

18 Section 65009(d)(3)(A) sets forth a specific “notice and filing” procedure, which was not
19 followed in this case. Section 65009(d)(3)(A) first requires specific notice to the City specifying
20 the claim and specific deficiencies of the general plan or zoning ordinance. After such notice, a
21 cause of action accrues in 60 days, provided the City has not responded to the notice. Thereafter, a
22 lawsuit must be filed within 180 days. (Section 65009(d)(2)(C).)

23 The reason for the required notice and filing procedure *is to allow the City time to correct*
24 *the specific action taken*. Of course, Petitioners did not follow the notice and filing procedure in
25 this case. The Petitioners never gave notice as required by 65009(d)(3). To this date, Petitioners
26 still have not given such notice; and have not filed a legal challenge pursuant to such notice.

27 Petitioners now claim that the general comments of the Petitioners at the hearings on
28 August 8 and 10, 2015, and/or that Petitioners email comments generally protesting the Project,
constitute the required notice. The referenced general comments and emails do not set forth a
challenge under Section 65863.6 and related statutes referenced by Petitioners, and do not give the

1 specific notice required by Section 65009(d)(3)(A). Petitioners alternatively claim that their
2 original Petition constitute the required notice. (Opp. Brief at p. 13; 1-16). The original Petition
3 challenges the City’s actions solely under the HAA (Section 65589.5) and Section 65008. The
4 Petition does not reference/challenge the General Plan Amendment for purposes of Section
5 65009(d)(1)(B) and Section 65009(d)(3)(A); and the subsequent Petitions do not constitute a
6 “lawsuit” filed within 180 days after a cause of action accrues under Section 65009(d)(2)(C).

7 **F. Same Considerations Apply to Discrimination/Declaratory Relief Statutes**

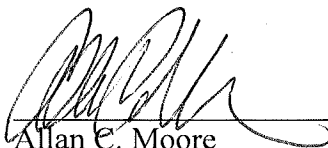
8 Finally, as stated in the Demurrer, the same considerations regarding applicability of the
9 HAA, and the 90-day statute of limitations, apply to the SAP’s Second and Third Causes of
10 Action (under Section 65008 and for declaratory relief). There was no discrimination here,
11 because the City did not consider, approve, or disapprove, the Apartment Project application.
12 Further, Petitioners’ Section 65008 and declaratory relief claims needed to be filed within 90 days
13 of when the General Plan Amendment was approved. As stated, Petitioners failed to timely serve
14 the challenge to the General Plan Amendment within 90 days pursuant to Section 65009(c)(1).

15 **III. CONCLUSION**

16 The HAA only applies where there the City (i) disapproves a housing project application;
17 or (ii) approves the application conditioned on a lower density. (Section 65589.5(j).) Such City
18 decision must be made by a formal vote (Section 65589.5(h)(5(A).) Here, there was no vote or
19 decision on the Apartment Project application by the City. For these reasons, and the fact that the
20 suit was not timely filed and served, the SAP has not stated a claim for relief under the HAA,
21 Section 65008, or for declaratory relief. As such, the Demurrer should be sustained.

22
23 DATED: July 13, 2016

WENDEL, ROSEN, BLACK & DEAN LLP

24
25 By: 
26 Allan E. Moore
27 Attorneys for Real Party in Interest O’Brien Land
28 Company, LLC and Anna Maria Dettmer, As
Trustee Of The AMD Family Trust

1 **PROOF OF SERVICE**

2 **STATE OF CALIFORNIA, COUNTY OF ALAMEDA**

3 At the time of service, I was over 18 years of age and not a party to this action. I am
4 employed in the County of Alameda, State of California. My business address is 1111 Broadway,
24th Floor, Oakland, CA 94607-4036.

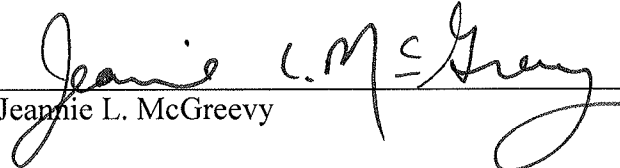
5 On July 13, 2016, I served true copies of the following document(s) described as **REPLY IN**
6 **SUPPORT OF DEMURRER BY REAL PARTIES IN INTEREST O'BRIEN LAND**
7 **COMPANY, LLC AND ANNA MARIA DETTMER, AS TRUSTEE OF THE AMD**
8 **FAMILY TRUST, TO PETITIONERS' SECOND AMENDED PETITION FOR WRIT OF**
9 **ADMINISTRATIVE MANDAMUS** on the interested parties in this action as follows:

10 **SEE ATTACHED SERVICE LIST**

11 **BY OVERNIGHT DELIVERY:** I enclosed said document(s) in an envelope or package
12 provided by the overnight service carrier and addressed to the persons at the addresses listed in the
13 Service List. I placed the envelope or package for collection and overnight delivery at an office or
14 a regularly utilized drop box of the overnight service carrier or delivered such document(s) to a
15 courier or driver authorized by the overnight service carrier to receive documents.

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

18 Executed on July 13, 2016, at Oakland, California.

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Jeannie L. McGreevy

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SERVICE LIST
Trauss v. City of Lafayette
MSN15-2077

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