COURT OF APPEAL, STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION ONE

DON'T CELL OUR PARKS Petitioner and Appellant, **CITY OF SAN DIEGO,** Respondent and Respondent, **VERIZON WIRELESS,** Real Party in Interest and Respondent	)	Appeal No. D071863 S.D. Super. Ct. Case No. 2015-26359

Appeal from the Judgment of the San Diego Superior Court
Honorable Judith F. Hayes Presiding

PETITION FOR REHEARING

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I.

INTRODUCTION AND SUMMARY OF ARGUMENT

Appellant Don't Cell Our Parks ("DCOP") petitions this Court for rehearing to reverse its opinion filed March 15, 2018 ("Opinion") pursuant to California Rules of Court ("CRC"), Rule 8.268, subdivision (b).

A rehearing in this case is also allowed by Government Code section 68081 for issues not raised or briefed by either party, but for which the Opinion made findings that were critical in determining the disposition of the appeal.

Further, for the following reasons in Sections III & IV below, a petition for rehearing should be granted and supplemental briefing permitted on important issues that, if considered and corrected, would change the disposition of the Opinion of this Court.

The errors of the Opinion, taken both individually and collectively, are respectfully considered to serve as an injustice in this case, and there are reasons to seriously doubt that the appeal was correctly decided. Under these circumstances, California caselaw has long recognized a right to rehearing to preserve the rights of parties, just rulings, and the sanctity of courts. (*Cf. In re Estate of Jessup*, (1889) 81 Cal. 408, 471-472; *disapproved* on other grounds as stated in *Estate of Lund*, (1945) 26 Cal.2d 472, 492-493.)

II.

PROCEDURAL HISTORY

This appeal was originally fully briefed by the parties on November 9, 201,7 as of the filing date of appellant DCOP's reply brief. Supplemental briefing was concurrently filed by the parties on December 21, 2017 after this Court requested, on November 17, 2017, that certain issue be further addressed. On February 15, 2017, the case was argued and submittal for decision. On March 15, 2018 this Court issued the Opinion which forms the basis for this petition for rehearing. With a court holiday falling on March 30, 2018, this petition is timely made within the 15 days that said Opinion was filed.

III.

REQUEST FOR REHEARING BASED ON UNSUPPORTED IRRELEVANT, AND IMPROPERLY EXTENDED FACTS

DCOP respectfully submits, and petitions this Court, that the below facts and factual issues that were defined, considered, or determined by the Court in the Opinion as dispositive or material facts, are either incorrect or unsupported by the administrative and appellate records for this project, case, and cause. These erroneously considered facts and factual issues adversely affected the outcome in this case, therefore this petition for rehearing is necessary to correct said dispositive facts and factual issues.

A. The Opinion Erred by Ignoring Testimony of Substantial and Fair Argument Evidence by Park Users of Physical Changes to Their Natural Setting Community Park, with Incumbent Adverse Aesthetics Impacts

Focusing away from undeniable physical changes and a new utility structure constructed in a predominantly natural park setting, the Opinion found that "local residents opposed the Project based on primarily aesthetic reasons, with health issues being a secondary concern." (Opinion at p. 22) The Opinion dismisses all potential adverse potential impact testimony (involving both physical and visual park displacement and impact areas) on the basis that "the subjective preferences of local residents do not constitute substantial evidence upon which the City can properly deny Verizon's application." (*Id.*) In other words, the Court dismissed all evidence of potential impacts on the basis that it is merely subjective evidence.

Aesthetics of a park are remarkably important. Even the Court's offered ordinary dictionary definition of a park recognizes this as: "an area of land, usually in a largely natural state, for the enjoyment of the public.". (Opinion at p. 16, citing Random House dictionary.) Under both CEQA and wireless utility tower (WCF) considerations, aesthetics matter.

CEQA defines "environment" to include "**physical conditions** which exist within the area which will be **affected by a proposed project**, including

land, air, water, minerals, flora, fauna, noise, objects of historic or **aesthetic significance**." (Pub. Res. Code § 21060.5; *Sprint PCS Assets L.L.C. v. City of Palos Verdes Estates* 583 F.3d 716, 723 (9th Cir. 2009) ["The experience of traveling along a picturesque street is different from the experience of traveling through the shadows of a WCF, and we see nothing exceptional in the City's determination that the former is less discomforting, less troubling, less annoying, and less distressing than the latter."].)

Here, in addition to the Court's holding that discounted *subjective* aesthetics, there is evidence from numerous park users and local residents about the *physical interference* arising from Project's location and construction of facilities that will impact the enjoyment of areas affirmatively used and frequented at Ridgewood Park.

A substantial amount of pictorial and narrative testimony evidence about the **physical changes** of the natural and park environment amount to credible substantial and fair argument evidence of potential physical and aesthetic environmental impacts that CEQA and the City Charter intend to protect. (AR 77, 69-85, 278-279, 509-510, 531-533, 539-544, 545-551, 15506-1510, 1479-1481, 1568-1580, 1620-1628, 1648-1659, 1161-1668, 1750-1751, 1756-1771, 1818-1832, 1913-1932, 2014-2016, 2045-2050, 2061-2134)

Interference, as demonstrated by both pictorial and narrative evidence, shows displacement and physical changes occurring from the large metal

structure being placed in the middle of a picnic area, 10 feet from the tables. This picnic area is one of only a few picnic areas in Ridgewood Park. However, this is not simply a numeric loss; it is an impact and loss of the primary park edge and canyon rim area – an area providing a major park purpose and attribute with the open and natural setting connected to the nature preserve to the south. There will now be a building and metal utility antenna (faux tree) located so as to obstruct the views of the preserve and interfere with the free movement of people between the park and the preserve trails. The utility tower structure is being located in the center of the picnic and exercise area, and adjacent to the shaded grassy park, walking path, and nature trail areas at the edge of the park that a substantial number of people ordinarily use for multiple different activities. (E.g. AR 545-551, 1506-1510, 1913-1923, 2062-2134)

The Opinion improperly rejects and refuses to consider evidence, clearly authorized and important evidence in CEQA and administrative mandamus cases, instead concluding that views and aesthetics are subjective, and further minimizes evidence of physical losses. (*Cf.* Opinion at pp. 20-21 ["[b]ecause both facilities will be set back from the field, they will not interfere with park uses."]) Thus, the Opinion erroneously holds that losses to the open grass playfield area would be maintained – inferring that it is most important.

Rehearing is necessary and proper to properly consider both *physical interference* and *aesthetic impacts* arising from the Project, as to each of the public use areas in Ridgewood Park, not just selective ones.

B. The Opinion Erred by Holding that Testimony of Park Users Regarding Aesthetics Cannot be Considered

Similar and related to actual physical changes and losses within the primary natural and scenic tree grove use area of the park, the Opinion found that: "On this record, the subjective preferences of local residents do not constitute substantial evidence upon which the City can properly deny Verizon's application." (Opinion at p. 22) This determination is erroneous.

Personal observations about community character/aesthetics impacts have been ruled acceptable as long as adequate foundation (and factual support) is present. (*Ocean View Estates Homeowners Association v. Montecito Water District*, (2004) 116 Cal.App.4th 396, 402 [testimony by neighbors that project will have adverse aesthetic impacts involves subjective, nontechnical matter about which neighbors are qualified to provide personal opinion based on personal observations]; *Pocket Protectors v. City of Sacramento*, (2004) 124 Cal.App.4th 903, 932, 937 [opinion of area residents relating to project design and aesthetic impacts may constitute substantial evidence if that opinion is based on direct observation, because no special expertise is required on that topic.]) "Where scenic views or environmentally

sensitive areas are concerned, aesthetic considerations are not discounted as environmental impacts merely because they involve subjective judgments." (*Bowman v. City of Berkeley*, (2004) 122 Cal.App.4th 572, 592)

Here, the evidence goes beyond unverified subjective impressions about the aesthetics of a project. Here, testimony and evidence included substantial evidence of the locations and reasons why a faux metal tree would not only physically change the park, but would also be noticeably unaesthetic and look *fake* in a natural park, as well as block views along and beside the walking path and trails. (*Ocean View Estates*, 116 Cal.App.4th 396, 402)

Here, actual residents and park users testified (with proper pictorial and narrative foundation) as to places they use, along with the physical aesthetic conditions that will be changed. This amounts to proper fair argument and substantial evidence that if properly considered by this Court on rehearing would change the outcome of the Opinion.

C. The Opinion Failed to Consider DCOP's Briefing and Citation to Facts That the Purpose of Verizon's Application and Project was Expressly Intended to Serve Private Commercial Wireless Subscribers in Nearby Residential Neighborhoods, not Ridgewood Park

The Opinion did not consider DCOP's citation to undisputed evidence that the sole studied purpose and intention of the Project in Ridgewood Park was to provide commercial services (limited to Verizon customers) to surrounding residential neighborhoods. (Open Brief at 52-53 [citing AR 177; accord AR

2036-2038; *see also* AR 2154 [diagram of Verizon's residential customer complaint areas]]; *see also* Reply Brief at 13 [citing AR 177, 370, 776 [¶7]].)

By not considering the project's primary defined purpose, the Court did not, and could not, properly review and examine the project within the context of exiting law.

This type of public project or community utility service, no matter how worthy, may not be built on dedicated park land if it is not directly intended (or purposed) to contribute to the use and enjoyment of the dedicated park, and is not intended to be used by the public as a whole. (Open Brief at 52, citing (*San Vicente Nursery School v. City of Los Angeles*, (1956) 147 Cal.App.2d 79, 85, quoting *Williams v. Gallatin*, 229 N.Y. 248 (1920); *Roberts v. Palos Verdes Estates*, (1949) 93 Cal.App.2d 545, 548)

Rehearing is necessary and proper to consider and reconcile the purpose and intent of the project (as applied for and studied). Neither the Project applications and submitted studies considered or examined E911 wireless coverage in Ridgewood Park or otherwise. Similarly, based on the manner that the cell tower was designed, sized, located and configured, the Court's holding is not supported that the application was (more than incidentally) intended to be a park purpose. (Opinion at p. 17 [holding that people should be allowed to read e-books and play video games in the park].)

When considering the coverage concerns of Verizon's commercial customers outside (or even within) Ridgewood Park, the record and project

documents clearly show that the project studies and application materials did not (1) apply for, (2) examine, or (3) alternatively consider providing, configuring, or installing different or small-scale facilities for siting Verizon utilities to service (its) users in the park.

The reference and holding of the Opinion that "[c]olor maps show that wireless communication coverage in the Park and surrounding areas is poor, but would be excellent after installation of the Project[]" (Opinion at pp. 2-3), does not convert a nonpark project to a park-serving project or purpose.

With the Project application and purpose being service for nearby residential areas, the Court's factual "park improvement" finding and holding is materially irrelevant, as supported by the administrative and appellate records. (*See* Open Brief at 52-53 [citing AR 177 ["the express purpose of the Project is "the intended coverage objective is primarily for the single family residential area around Paseo Montril and La Tortola as well as the open space along the Peñasquitos Canyon hiking trails."]; accord AR 2036-2038; *see also* AR 2154 [diagram of Verizon's residential customer complaint areas]; Reply Brief at 13.)

D. The Record is Deficient of Any Evidence that There is a Gap in 911 Service; Rehearing is Needed, as the Parties Never Substantially Briefed or Argued the Issue of Emergency Telephone Services

There is no evidence in the record that emergency 911 service (E911) was studied, nor was the project application based on *any* need or purpose of

providing emergency 911 cellular service. (Open Brief at 52-53 [citing AR 177; accord AR 2036-2038; *see also* AR 2154 [diagram of Verizon's residential customer complaint areas]; *see also* Reply Brief at 13 [citing AR 177, 370, 776 [¶7]].)

There is no relevant or legal connection for the trial court's finding, as adopted in the Opinion, that "the Project would fill a substantial gap in Verizon's cell service so that area customers will have improved . . . **911 service**." (Opinion at p. 5.) Such a finding is not based on any objective study of 911 service in Ridgewood Park, but instead is based on misrepresented, bait-and-switch, and *ex post facto* wordplay by City and real party Verizon. City and Verizon's joint trial and appellate briefs both maintained that the Project would "fill a substantial gap in Verizon's service so that area customers will have improved cell service capabilities and emergency (E911) service." (E.g., Respondent's Brief at 13.) By this argument, Respondents created a fiction that *if Verizon customers did not have a strong signal then they must not be able to obtain or have a strong signal for 911 service*. (*See* Opinion at p. 17, citing to trial brief's factual findings of City and Verizon's purported facts related to 911 service.) This Court should not accept or endorse this strawman and unsupported *ex post facto* argument.

The issue of E911 coverage issue was never *studied* or set forth as a purpose of the Verizon application, and DCOP has never fully addressed it to date. Thus, the record is substantially devoid of both the need for, or existing available E911 coverage. On rehearing, this Court should not only reconcile the

substance and truth of Verizon's project and application, but it should also dismiss the E911 project purpose as conjured and false, especially in light of the fact and law that under the federal Wireless Communications and Public Safety Act of 1999 (911 Act) *all carriers* have been required to connect all 911 emergency calls regardless of whether the caller is a customer of a competing network. (47 C.F.R. § 20.18.)

The request for 911 coverage by a basketball coach at a planning group meeting is a further *non-sequitur* and does not amount to a deficiency, purpose, application, or anything close to a study or actual needs assessment for 911 service, deficiencies, or purpose. (Opinion at p. 17, AR 1958) A statement by a basketball coach neither creates, nor supports, a project purpose that never existed. Most obviously, it is the application, study, and stated "Site Justification" prepared and presented to the City by Verizon that controls.

The application and "Site Justification" presented to city council mentioned nothing about improving wireless coverage for, or incidental to, park purposes. (AR 2161) The project's purpose was succinctly explained by city staff to the planning commission at the final determination hearing that "**[t]he proposed coverage in this instance is focused on the surrounding residential use**." (AR 517)

Contrary to the expressly stated purpose and justification for the project, the Opinion holds that the project WCF utility amounts to, and serves as, a park purpose because service there will be *improved* for reading, emergency services,

or other wireless activities. (Opinion at p. 17 ["the Project is consistent with park or recreation purposes as it will clearly benefit park visitors by providing enhanced wireless communication coverage."].)

The Opinion's findings of "incidental" park benefit and 911 services is based on City and Verizon's *ex post facto* excuse to rationalize the location and construction of the private-serving facility in the public dedicated park.

These unreconciled facts and laws, alleging purpose and intent to serve the park and *improve* emergency service, demonstrate how the application and construction of a large WCF utility in the small neighborhood park, was for the purpose of a private residential community and adjacent canyon, not for park-related or park purposes.

IV.

REQUEST FOR REHEARING BASED ON ERRORS OR LAW

A. Rehearing is Warranted Because the Court did Not Address DCOP's Arguments Defining the Term "Use" and Identifying the Correct Charter Restriction; The Opinion Conflicts with Findings and Rulings in Multiple Fourth District and Other California Appellate and Supreme Court Decisions

The Opinion converts the park *purposes and use* question to an administrative and discretionary decision of the City to allow degrees of "interference" rather than following substantial case law and City attorney

opinions that measure park uses and purposes based on the *nature of the activity*.

Above ground utilities, even overhead powerlines, have traditionally and consistently been unlawful park developments or uses. This is indicated in the park dedication ordinance 18771, where the City "reserve[d] the right to establish underground public service easements through and across [the Park]..." (Opinion at p. 3), not for above ground utilities, and not for utilities to be developed and placed in the park. As noted in the Opinion, SDMC section 141.0420 addresses WCF's and provides, in relevant part, that a proposed WCF in a dedicated park "shall be placed underground unless the Park and Recreation Director determines that an above-ground equipment enclosure would not violate Charter section 55." (Opinion at p. 20.) If interpreted consistently with City's historical Charter Section 55 analysis and protections, an above ground utility is almost certain to violate Charter Section 55, and as cited by DCOP in its Reply Brief:

> In 1994, a memorandum of law issued by the city attorney addressed the same dedicated park prohibition and directly opined that no utility could be located in a dedicated park unless such a station was wholly "located **underground**, so as to be **invisible** and **not detractive** from proper park uses."

(Reply Brief at 36, citing AR 2319 *see also* excluded material the Opinion declined to consider reflecting City's views that overhead utility wires were also prohibited. (*Cf.* Opinion at p. 12, fn. 5 [City's supplemental briefing excluded unfavorable City Attorney Memoranda].)

In sum, the Opinion creates an inconsistency by giving deference to City, while at the same time refusing to consider many years of City's interpretation contrary to its actions in this case, (*cf.*, Opinion at pp. 21-22, citing *Yamaha*, 19 Cal.4th at p. 7), juxtaposed with multiple many city attorney memoranda in the administrative record cited and argued by DCOP. (Reply Brief at 12, citing AR 2308-2309, 2311-2315, 2316-2317, 2318-2319, 2380-2381, 2403-2408, and 2409-2416.

Based on the issues and errors set forth below, a rehearing is necessary to consider the questions of what is, and is not, a Charter restriction, and how Charter restrictions are correctly interpreted under statutory law. Conflicts with existing case law in the Fourth Appellate District and other California Appellate District decisions should be reconciled.

1. The Opinion did not Correctly Identify and Apply the Plain Language Restrictive Clause of Charter Section 55; Correct Identification and Interpretation of the Plain Language of the "Use and Purposes" Restrictions in Dedicated Parks Would Lead to a Different Result

The primary legal error in the Opinion is that it incorrectly identifies the restrictive clause of Charter Section 55[1] as being a *wholly changed* use.

[1] Paragraph 2 of Charter Section 55: "All real property owned in fee by the City heretofore or hereafter formally dedicated in perpetuity by ordinance of the Council or by statute of the State Legislature for park, recreation or cemetery purposes shall not be used for any but park, recreation or cemetery purposes[.]"

(Opinion at p. 13 [finding "[w]hether an addition to a dedicated park constitutes a 'changed use'" as the determinative restriction]; *see also* Opinion at p. 13, fn. 6 [referring to the Charter restriction as the "changed use restriction."].) In reaching this interpretation, the Court necessarily eliminates and omits the word "purpose" in the subject Charter limitation. DCOP respectfully submits that had the Opinion correctly identified and interpreted the correct clause of the Charter Section 55 restriction, the Court would have reached a disposition that the Verizon utility project violates the Charter. This alleged error compounded and enabled additional legal errors that are discussed below.

2. The Opinion Fails to Follow a Cardinal Rule of Statutory Interpretation – Where the Statutory Language in Dispute is Clear and Unambiguous, There is No Need for Statutory Construction and a Court Should Not Engage in it by Harmonizing and Interpreting Something Different from What it Says

On rehearing, DCOP seeks to correct the defect of the Opinion that does not apply the well-established rule, cited by DCOP in its Reply Brief (at pp. 20-21) by citing *County of Santa Barbara v. Connell*, (1999) 72 Cal.App.4th 175, 180: "Where the statutory language in dispute is clear and unambiguous, there is no need for construction and the judiciary should not indulge in it." (*Id.*, citing *California Federal Savings & Loan Association v. City of Los Angeles*, (1995) 11 Cal.4th 342, 349.)

In contravention of this rule, on pages 12 and 13 of the Opinion, the Court employs a construction exercise intending to *harmonize* the first and second paragraphs of Charter Section 55 by giving the City substantial management authority and discretion to determine whether the City believes it is properly using or purposing a park. (Opinion at p. 13 ["Here, the trial court agreed with respondents' arguments that the City had the discretion to determine whether a particular park use would change the use or purpose of a park. Our review of Charter 55 supports this conclusion."].)

As set forth in the case *DeYoung v. City of San Diego*, 147 Cal. App. 3d 11, "harmonization" is a rule and methodology of statutory construction. (*Id.* at p. 18.)[2] Rehearing is appropriate to determine whether the Fourth District is now overruling *County of Santa Barbara* and abandoning the judicial rule and policy of not engaging in statutory construction where there is no ambiguity in the plain language of a statute.

3. The Opinion did not Consider or Harmonize the Third Paragraph of Charter Section 55 to Correctly Determine the Meaning of "Use" as Stated in the Charter Section 55 Restriction

Assuming it was necessary to engage in statutory construction, the Opinion incorrectly harmonizes Charter Section 55. On rehearing, DCOP

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[2] *DeYoung* was heavily cited and analyzed by both parties (Reply Brief at 28, 29, 31, 33, 34, 36, 37; Respondent's Brief at 20, 21, 25), but is not referenced in the Opinion.

seeks to address and resolve the statutory rule of harmonization and its purpose to avoid *seemingly conflicting* separate statutory provisions. (*See McLaughlin v. State Bd. of Education*, (1999) 75 Cal.App.4th 196, 210; (*Moyer v. Workmen's Comp. Appeals Bd.*, (1973) 10 Cal.3d 222, 229-231.) Here, the Opinion erred by failing to consider key points of DCOP's analysis of the three paragraphs that constitute Charter Section 55. (Open Brief at 14-15 & 45-53 [Section VI.A.1]; Reply Brief at 33-34.)

First, the Opinion fails to properly reconcile DCOP's argument that the first paragraph of Charter Section 55 deals with that fact that voters have directed that certain city officials shall manage and regulate all parks, and that such regulation took the form of *general management*.[3] (Open Brief at 14; Reply Brief at 18, 20-24.)

Second, the Opinion misconstrues the relevant second paragraph of Charter Section 55 – which directly applies to the improper and prohibited "use" of a dedicated park (as a Charter limitation). The Opinion holds that only if a use *changed* the nature of a dedicated park to a non-dedicated park (e.g., conversion of the underlying land use designation) would voter approval

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[3] General Management would include such activities as setting park hours, rules for park visitors (*e.g.* no alcohol), hiring landscape services and so forth. This is consistent with the language of the first paragraph of Charter Section 55 which "provide[s] penalties for violations thereof" and that: "The Manager is charged with the enforcement of such regulations." (AR 2462)

be required. Otherwise, the City has substantial unchecked latitude to decide what use and purposes it wants to develop in dedicated parks.[4] (Opinion at pp. 13-14 ["The City is then charged with exercising its management and control authority to determine whether a proposed addition to a dedicated park would change its use or purpose and thus require voter approval."].) This finding of the Opinion creates an inconsistency and conflicts with paragraph three of Charter Section 55, which expressly excepts, from the Charter Section 55 restriction, the construction of streets and highways "over, through and across City fee-owned land which has heretofore or hereafter been formally dedicated in perpetuity by ordinance or statute for park, recreation and cemetery purposes." (AR 2463)

The third paragraph of Charter Section 55 only makes sense where the term "use," in the second paragraph of Charter Section 55, applies to a use of dedicated parkland that *does not change the nature* of the dedicated park. On rehearing, DCOP respectfully seeks an opportunity to correct the alleged erroneous harmonization of Charter Section 55 in a manner that does not result in statutory construction that waters-down and substantially eliminates the purpose and effect of an express Charter restriction.

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[4] This is especially problematic where environmental review and degree-of-impact considerations are exempted from CEQA, as they were in this case.

4. The Opinion's Definition of "Use" in Relation to Parks Directly Conflicts with at Least Four Prior Appellate Decisions Briefed by DCOP

a. The Opinion Errs as a Matter of Law by Distinguishing Only the Facts of Mulvey and Hall; DCOP Briefed and Argued the Controlling Legal Determinations of Those Cases

The Opinion distinguishes the cases of *Hall v. Fairchild-Gilmore-Wilton Co.*, (1924) 66 Cal.App. 615 (Reply Brief. at 11, 18, 22, 23, 24, 25, 26, 27, 30, 35, 40 [citing *Hall* at pp. 622-623, 624-625]) and *Mulvey v. Wangenheim*, (1913) 23 Cal.App.268, (Reply Brief at 11, 23, 24, 35, 40 [citing *Mulvey* at pp. 271-272]), by holding that these cases involved issues of *road construction as a nonpark use*, noting that these cases were decided before the 1941 Charter amendment allowing the City authority to permit the construction of roads through parks without a two-thirds vote. (Opinion at pp. 15-16.)

It is true that if either *Mulvey* or *Hall* were decided *today*, those cases would have held that the express exception in paragraph three of Charter Section 55 permitted the construction of roads in each respective case. But DCOP did not cite the above cases for the proposition that the current Charter would restrict the use of portions of dedicated parks for roads. Rather, DCOP relied on the legal principle and reasoning, admitted in the Opinion, that "DCOP cites *Mulvey v. Wangenheim* (1913) 23 Cal.App. 268 (*Mulvey*) and

Hall v. Fairchild-Gilmore-Wilton Co. (1924) 66 Cal.App. 615 (*Hall*) for the proposition that diversion of any portion of a dedicated park for nonpark use or nonrecreation is improper under Charter 55." (Opinion at p. 15.)

DCOP contends the Opinion fails to follow rules of basic jurisprudence about "subtle yet elementary precept of the common law. . . that the law is in the holding, i.e., in the application of doctrine and precedent on the facts of the case." (*Blain v. Doctor's Co.*, (1990) 222 Cal.App.3d 1048, 1061-1062.)[5] This is not a case of *casus omissi* where there is difficulty in ascertaining the intent of the legislature. (*Cf. Merced Irrigation Dist. v. Superior Court*, (2017) 7 Cal.App.5th 916, 925.)

Rather, as the Opinion states, this case can be determined on the plain language of Charter Section 55 (Opinion at p. 12), and thus the legal reasoning of *Mulvey* and *Hall* remain directly on point.

Here, the restriction against nonpark and nonrecreational use in park lands (for dedicated parks) was substantially the same and has remained unchanged since the 1931 Charter. (Opinion at p. 8.) The Opinion errs by ignoring the "specific rule of statutory interpretation [that] when the Legislature amends a statute, we presume it was fully aware of the prior judicial construction." (*White v. Ultramar*, (1999) 21 Cal.4th 563, 572.)

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[5] DCOP cited this rule in *Blain v. Doctor's Co.* for another purpose in its Reply Brief (p. 53), and this Court is reminded again here of this important rule.

The voters enacted the restriction in the Charter with knowledge that the diversion of any part of the park for a nonpark and nonrecreational use would be forbidden without a two-thirds voter assent. Voters further made a conscious decision to amend the Charter to expressly permit the **use** of roads built over and through dedicated parks. However, the amendment permitting roads in no way abrogated the prior-existing legal purpose, reason, or effect in Charter Section 55, and voters never repudiated the legal determinations in *Mulvey* and *Hall* that the Charter restriction prohibited an unlawful *use* of dedicated parkland defined *as diversion of any portion* of a dedicated park for a nonrecreational use. (*See* Reply Brief at 11, citing *Mulvey v. Wangenheim*, (1913) 23 Cal.App. 268, 271.)

The Court's reasoning in abrogating the holdings in *Mulvey* and *Hall*, based on the degree of road diversion, is substantially *dicta* as the issue of roads in dedicated parks that is not before this Court. To the extent the Opinion intentionally (or unintentionally) infers and extenuates the exception for roads to above-ground utilities, such a comparison and rationalization is in error because there is no exception in Charter Section 55 for above-ground utilities.

b. The Opinion Conflicts with the Holdings of Roberts v. Palos Verdes Estates, (1949) 93 Cal.App.2d 545; and San Vicente Nursery School v. City of Los Angeles, (1956) 147 Cal.App.2d 79 – While Failing to Consider DCOP's Arguments and Citation to These Decisions.

DCOP cited to the above cases in support of the rulings in *Mulvey* and *Hall*, namely for the proposition that diversions of any portion of dedicated parks for any "object" no matter how worthy, is a violation of the public dedication of land for exclusive park use. (Reply Brief at 35, citing *San Vicente Nursery School v. City of Los Angeles*, (1956) 147 Cal.App.2d 79, 85 and *Roberts v. Palos Verdes Estates*, (1949) 93 Cal.App.2d 545, 548.)

The *object* and *objective* of the development (here a utility) has always been the legal issue and consideration of the propriety of development projects in parks. (*Kelly v. Hayward*, (1923) 192 Cal.242, 244 [the California Supreme Court found the construction of a *town hall* unlawful as a park use; the court did not determine the case based on the size of the building, nor whether the town hall would incidentally allow better administration of the park].) Here, based on many decades of the City's own interpretations, above-ground utilities are not permissible developments or uses in dedicated parks. (*See* Open Brief at 58-59 & 59, fn. 13; Reply Brief at 12, fn. 1 & 36.)

The Opinion also serves to substantially amend state law by creating new standards whereby (1) it is the *amount* of a changed use or purpose that is the measure (i.e., level of interference), and (2) an *incidental* benefit, separate

and apart from the primary stated reason and objective of the nonpark development, may now both control the definition and determination of what is a permissible park activity or use. One example of this being changed or expanded law, as may be applicable to facts here, might allow a sewage treatment facility serving the community be placed in a dedicated park on the basis that it would *incidentally* (or even directly) better serve the toilets in the park. DCOP contends the correct examination of underlying facts and legal determination should be – was the utility applied for, and practically intended, scoped, and appropriately configured, as a park project in a manner and purpose to serve the park.[6]

B. Rehearing is Warranted Because the Court did not Address DCOP's Arguments That a Class 3 Exemption Must Fall Within one of the Enumerated Categories in CEQA Guidelines § 15303, Subdivisions (a)-(f), and that None of the Categories in a Class 3 Exemption include a "Utility"; The Opinion Erred as a Matter of Law by Expanding the Class 3 Exemption Category

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[6] The California Supreme Court identified the danger of chipping away at dedicated uses of public land piece by piece: ". . .if the present board of trustees has discretion to utilize a portion of this block for town buildings, some future board might claim that under their discretion a corporation yard and rock-pile for the employment of prisoners, and other very useful adjuncts to the administration of the economic affairs of the town, might be located thereupon, until the entire space was fully so occupied." (*Kelly v. Hayward*, *supra*, 192 Cal. at p. 244)

The Opinion correctly holds that a court reviews *de novo* "'whether, as a matter of law, the [activity meets] the definition of a categorically exempt project.'" (Opinion at p. 24, citing *San Lorenzo Valley Community Advocates for Responsible Education v. San Lorenzo Valley Unified School District*, (2006) 139 Cal.App.4th 1356, 1386, italics omitted.) DCOP also acknowledges the statement of law in the Opinion that categorical exemptions are to be narrowly construed (Opinion at p. 24, citing *Save Our Carmel River v. Monterey Peninsula Water Management Dist.* (2006) 141 Cal.App.4th 677, 697 [categorical exemptions are narrowly construed to "to afford the fullest possible environmental protection."].)[7]

However, despite these accepted legal precepts, the Opinion found that a Category 3 exemption applied to a stand-alone utility tower facility in a dedicated park and residential zone, even though "none of the examples of the exemption are directly applicable . . ." (Opinion at p. 27.) The Opinion then justified the finding by mixing and matching multiple different categorical types of small projects set forth in CEQA Guidelines section 15303, including

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[7] As argued in DCOP's Opening Brief, strict construction of categorical exemptions "also comports with the statutory directive that exemptions may be provided only for projects which have been determined not to have a significant environmental effect…" (Open Brief at 40-41, quoting *City of Amador v. El Dorado City Water Agency*, (1999) 76 Cal.App.4th 931, 966.)

comparing the stand-alone utility project to "single-family residence, store, motel, office or restaurant." (Opinion at p. 27.)

DCOP contends the Opinion fails to consider arguments by DCOP that *none* of the individual category *types of project* listed under the Class 3 exemption apply to a stand-alone utility. (See endnote discussion following CEQA Guidelines § 15303.)

The *size* of a new stand-alone utility, occupying a 534 square foot[8] area in a protected park, is not encompassed and is legally irrelevant from any of the residential, commercial, or utility extension structures as found in the Class 3 CEQA regulation (14 Cal. Code Reg. § 15303) or the cases *San Francisco Beautiful v. City and County of San Francisco* (2014) 226 Cal.App.4th 1012 and *Robinson v. City and County of San Francisco* (2012) 208 Cal.App.4th 950. (*Cf.* Opinion at p. 27; Open Brief at 63-64.)

The holding of the Opinion also conflicts with the case *Voices for Rural Living v. El Dorado Irrigation Dist.*, (2012) 209 Cal.App.4th 1096, which DCOP cited and argued in its Opening Brief, that the utility extensions provision of CEQA Guidelines § 15303, subdivision (d) applies when the project consists of a small urban infill construction project "and **the utility and electrical work [is] necessary to service that project**." (Open Brief at

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[8] This 534 square feet is the size of the on-the-ground footprint or pad and does not consider the full volume and effect of constructing a fake metal tree utility structure at the end of a scenic canyon park.

62-63, citing *Voices for Rural Living* at p. 1109, emphasis added.) Here the Opinion has impermissibly created a *new* type of categorical exemption under a Class 3 Exemption – for stand-alone utilities – which is not contained anywhere in CEQA Guidelines section 15303.

The CEQA exemptions consider the appropriateness of certain *types* of buildings as applied to certain designated zones. (CEQA Guidelines § 15303) Here, Ridgewood Park is located in a single-family residential zone and has the zoning of RS-1-14 (residential, single-family) and thus only Section 15303 subdivisions (a) "One single-family residence, or a second dwelling unit in a **residential zone**," (d) "Water main, sewage, electrical, gas and other **utility extensions**, including street improvements of reasonable length, to serve such construction," in this case, for serving a **single-family residence**, or (e) "Accessory (appurtenant) structures including garages, carports, patios, swimming pools, and fences," could possibly apply. Only subdivision (c) of Section 15303 mentions the *size* of construction, and it only applies in a commercial zone ("commercial buildings...on sites zoned for such use"). The park is not in a commercial zone, so the issue is not present and is thus irrelevant in this case. Whether or not an exemption might apply, the *size* of the structure does not matter; it is the *type* of building being located within a residential zone. A cell tower is not a single-family residence or dwelling unit, nor is it appurtenant to, nor is it equipment for a single-family residence.

The Opinion further did not consider the arguments by DCOP that *new* categories of exemptions may not be created by blending multiple exemption categories under CEQA Guidelines section 15303. (Open Brief at 60-64; *see also* Reply Brief at 46-50].) If the Opinion had considered DCOP's "blending argument" it would have been necessary to resolve the conflict with *Cal. Farm Bureau Federation v. Cal. Wildlife Conservation Bd.*, (2006) 143 Cal.App.4th 173, in which the court utilized the maxims *noscitur a sociis* and *ejusdem generis* to narrowly read, prevent expansion, and divine the regulatory intent of CEQA Guidelines section 15313 (Class 13). (*Cal. Farm Bureau Federation* at pp. 189-190.) The same legal reasoning applies here to the Class 3 exemption pursuant to CEQA Guidelines section 15303.

Because the Opinion failed to distinguish between stated regulatory "utility extensions" and unstated stand-alone utility facilities, and further suggests and promotes a "blending analysis" to find the Project exempt,[9] the Opinion is erroneous and has confused the law.

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[9] DCOP did not challenge or question the ability of multiple CEQA categorical exemptions possibly being applied to the same project. Rather, DCOP challenged, as impermissible, the blending of enumerated and strictly construed types of "new structures." (*See* Reply Brief at 49)

C. Rehearing is Warranted Because the Mixed Factual and Legal Errors Regarding the Exception for Class 3 Exemptions for Projects in Sensitive or Critical Environment Resources under CEQA Guidelines Section 15300.2, Subdivision (a)

The Opinion made both factual and legal errors in rejecting DCOP's exception argument pursuant to CEQA Guidelines Section 15300.2, subdivision (a).

First, the Opinion erroneously holds that "DCOP presented no evidence that the Park is a location 'designated' as an 'environmental resource of hazardous or critical concern' by any federal, state or local agency. The lack of such a designation defeats application of this exception." (Opinion at p. 32.)

This is incorrect for multiple reasons. First, DCOP cited City's own Council Policy 600-43 § B.1.d, that environmental review would be conducted ("should occur") for all discretionary actions allowing WCF in public parks (AR 2374). Further, DCOP cited to Council Policy 700-17, section entitled "Background" that: "Park lands are an **invaluable resource** for citizens of the City of San Diego. It is important to protect these lands from being converted to nonrecreational uses. Such protection is best provided in the form of dedication or designation." (Open Brief at 18, citing AR 2321.) The determination that park lands are an "invaluable resource," along with a succinct resolution formalizing such dedication, is a determination that the

dedicated Ridgewood Park meets the CEQA definition and designation as being a protect resource of "**critical concern.**"

Second, the City admits that the project site involved **designated** environmentally sensitive lands as clearly set forth in DCOP's Opening Brief:

> The Planning Commission confirmed that grading and trenching for the Project would result in "direct impacts to environmentally sensitive lands." (AR 327) Satellite images provided by the applicant Verizon show that the Project site is located contiguous with the open space of the Penasquitos Canyon Nature Park. (AR 2140) City admits the sensitive environmental siting as demonstrated by its required and adopted ESL findings. (AR 327-330)

(Open Brief at 27)

Third, and most importantly, the City Charter dedicated park status of the project site (Ridgewood Park) is one of the citizens' most restricted and protected critical resource. (See Charter Section 55, and as designated by Ordinance No. 18771 [dedicated in perpetuity for park and recreational purposes].) Such a critical and environmentally sensitive **designated** site is certainly the type of non-exemptible land areas contemplated under CEQA Guidelines Section 15300.2, subdivision (a). State regulators did not intend, nor could they have envisioned, for CEQA exceptions to be automatically granted, for commercial or residential or utility developments, in Charter designated and protected parks.

Based on the above, the Ridgewood Park environmental setting and park and ESL dedications, "designations" and determinations of

being a *designated and protected resource* are precisely those environmental resources of critical concern contemplated by CEQA Guidelines § 15300.2, subdivision (a).

Here, as in *Salmon Protection & Watershed Network v. County of Marin*, (2004) 125 Cal.App.4th 1098,[10] both agencies would have to concede that the projects are within areas of "critical concern" based on their own designations. (*Id.* at 1106.)

Thus, the Opinion is in conflict with both Guidelines § 15300.2, subdivision (a) and *Salmon Protection & Watershed Network*, and a rehearing is warranted to resolve the conflicts.

V.

CONCLUSION

For the above reasons, based on the above legal and factual irregularities in the March 15, 2018 Opinion, DCOP requests a rehearing to correct the above issues and effectuate a reversal of the trial court's decision.

Respectfully Submitted,

Dated: April 2, 2018

CRAIG A. SHERMAN, A PROFESSIONAL LAW CORPORATION

/s/Craig Sherman .
Craig A. Sherman, Esq.
Attorney for Appellant
DON'T CELL OUR PARKS

[10] *Salmon Protection & Watershed Network* was extensively discussed by DCOP. (Open Brief at 65, Reply Brief at 50, 51, 53.)

VI.

CERTIFICATION OF WORD COUNT COMPLIANCE

Counsel of record for appellant, Craig A. Sherman, hereby certifies that pursuant to California Rules of Court, Rule 8.204, subd. (c), that the above *PETITION FOR REHEARING* has been produced using 13-point Roman type, and contains 6,498 words (including footnotes, headings, and citations), which is less than the 14,000 words permitted by this rule, as counted by the word counter of the computer program used to prepare the brief.

Dated: April 2, 2018

CRAIG A. SHERMAN, A PROFESSIONAL LAW CORPORATION

/s/ Craig A. Sherman .
Craig A. Sherman, Esq.
Attorney for Appellant
DON'T CELL OUR PARKS

COURT OF APPEAL, STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION ONE

PROOF OF SERVICE

Don't Cell Our Parks v. City of San Diego
Court of Appeal Case No. D071863

San Diego Superior Court Case No.: 37-2015-26359

I, PAUL BEST, declare that:

I was at least 18 years of age and not a party to the case; I am employed in the County of San Diego, California. My business address is 1901 First Avenue, Suite 219, San Diego, California, 92101.

On April 2, 2018, I served true copies of the following document(s) described as:

PETITION FOR REHEARNG

on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

In the following manner:

☒ **BY ELECTRONIC SERVICE:** By complying with California Rule of Court 8.71, I caused a true and correct copy of the document(s) to be served via TrueFiling at the email addresses listed.

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

Executed on April 2, 2018 at San Diego, California.

Paul Best

SERVICE LIST

Don't Cell Our Parks v. City of San Diego
Court of Appeal Case No. D071863

San Diego Superior Court Case No.: 37-2015-26385

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