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Board of Animal Services Commissioners
City of Los Angeles
Los Angeles City Hall
200 North Spring St., Room 1060
Los Angeles, California 90012

Re: City of L.A. CEQA Review of TNR

Dear Commissioners:

On behalf of my client, No Kill Advocacy Center, I write in response to the Department of Animal Services' request for authorization to use $52,000 from the Animal Welfare Trust Fund to pay "for the preparation of an environmental clearance" regarding its proposed "Cat Program."

To be clear, we fully support the proposed Cat Program. However, the Department has been pursuing environmental clearance for this program since 2010. We believe the Department has already completed the bulk of the steps necessary for environmental clearance and there is no need to spend more time and resources on further study. Indeed, we are concerned that the Department does not specify the precise nature of the additional study to be conducted, explain why it believes this additional study is required, or provide any deadline for completion of the study. The environmental review process for this Cat Program has already been needlessly prolonged for more than two years. During this time, thousands of cats have inexcusably lost their lives in L.A. City shelters, at taxpayer expense, and many feral cat births have occurred that could have been avoided. We ask for your assistance in finally bringing this matter to its rightful conclusion and implementing the Cat Program without further delay.

A little background is in order. In June 2008, several bird conservancy groups filed a lawsuit against the City of Los Angeles and its Department of Animal Services (collectively, "the City"), alleging that the City had implemented a trap-neuter-return ("TNR") program for feral cats without first conducting a review of the potential environmental impact of the program, which the groups claimed was required by the California Environmental Quality Act (CEQA), Pub. Resources Code §§ 21000, et seq.

In fact, the City had no TNR "program." At most, it had a general policy of supporting private TNR efforts, including by (1) permitting discount coupons which the City issued as an incentive for residents to sterilize their animals to also be used for the sterilization of feral cats;

(2) renting out humane traps and issuing trapping permits for TNR purposes, among other permissible purposes; (3) releasing impounded feral cats to nonprofit TNR groups when requested so that, once sterilized, the cats could be returned to their environment rather than killed in the shelters; and (4) educating the public about TNR through referrals to TNR groups. The City had engaged in all of these activities for years, some since as far back as the early 1990s. In fact, the release of impounded cats, including feral cats, to nonprofit groups, including TNR groups, has been *required* by state law since 1998. Thus, even if the City's activities constituted a "program," any challenge to that program was barred by CEQA's 180-day statute of limitations.

Despite this, the trial judge sided with the bird conservancy groups and, on January 5, 2010, issued an injunction prohibiting the City from engaging in the following activities until completion of a CEQA review of TNR's potential effects on the environment: (1) providing any discount spay/neuter surgeries for feral cats (which the City had been doing since 1991); (2) releasing impounded feral cats to TNR groups (which the City had been doing as required by state law since 1998, and on a discretionary basis even before then); (3) providing information about TNR groups, seminars or workshops on the City Department of Animal Services' website, or referring complaints about feral cats to TNR groups, or developing literature or conducting public outreach about TNR (all of which the City had been doing for years); and (4) refusing to issue traps for "nuisance" ferals or to accept trapped feral cats for impoundment (which the City never did).

The City immediately complied with the injunction. It removed all links to TNR groups' websites and all information about TNR from the Department of Animal Services' website, and removed all literature concerning TNR from all six of its shelters (including issues of *The Pet Press*, a privately-produced monthly publication about animal rescue that provides contact information for TNR groups as well as other types of animal rescue groups, and occasionally contains articles about TNR, along with articles on other animal-related topics). Notably, however, the City retained on the Department's website links to groups which advocate that no cats should ever be allowed outdoors, including some of the plaintiffs in the lawsuit. The City also stopped referring complaints about feral cats or releasing impounded feral cats to TNR groups, and stopped making its community rooms available for use by TNR groups, while continuing to permit other types of groups to use those rooms.

After learning of the injunction, my client hired me to file a "friend of the court" brief supporting the City in the appeal that we assumed the City would pursue. We were surprised to learn from Mary Decker, the Deputy City Attorney handling the case, that the City might not appeal. We pointed out to Ms. Decker several glaring legal problems with the injunction, including that it violated free speech rights and state law mandating release of impounded

animals to nonprofit rescue groups. We told her that if resources were the issue, we were willing to take the laboring oar in the appellate briefing. The City could simply file a one-page notice of appeal and a very short opening brief, and we would present the bulk of the legal argument and analysis in our "friend of the court" brief. Ms. Decker was not persuaded.

To preserve the right to have an appellate court consider the legality of the injunction in the event the City decided not to appeal, we filed an application for leave to intervene in the lawsuit for the purpose of prosecuting the appeal ourselves. We were surprised again when Ms. Decker stipulated with the plaintiffs in the case to a modification of the injunction that attempted to correct some of the legal problems we had pointed out to her, apparently to make a challenge to the injunction more difficult. Nonetheless, even as modified, the injunction remained unlawful in various respects.

Unfortunately, and we believe wrongly, the trial judge denied our intervention application, finding it "untimely." In the meantime, the City's time to appeal expired and the City did not appeal, so we appealed from the denial of our intervention application. We were surprised once more when Ms. Decker, on behalf of the City, filed a brief in the court of appeal *opposing* our intervention, arguing that it would impose unnecessary litigation costs on the City (although the City could have chosen not to participate in our appeal), and would delay the City's efforts to comply with the injunction and conduct an environmental review of TNR (although the litigation and environmental review process could have been pursued simultaneously). We believe that partly because of Ms. Decker's opposition the court of appeal affirmed the denial of our intervention application. That was in February 2011. By that time, over a year had passed since the injunction issued. As a result of the court of appeals' rejection of our intervention application, the legality of the injunction has never been subjected to appellate review.

Having been stymied in court, we continued following the City's promised efforts to comply with the injunction's requirement to conduct an environmental review of the City's alleged (but actually non-existent) TNR "program." Because we were confident this review, which should have been unnecessary, would result in approval of the alleged TNR "program," we were anxious for the process to be completed as quickly as possible so that the injunction could be dissolved.

We advised the City that there are three levels of CEQA environmental review, and the first level involves only an informal preliminary review by the lead agency (here, the Department of Animal Services) to determine, without the necessity of taking public comment, whether CEQA applies at all; if the agency determines that CEQA does not apply, either because the proposed activity does not meet CEQA's definition of a "project" or because one of CEQA's exemptions applies, no further environmental review is necessary. *San Lorenzo Valley*

Community Advocates for Responsible Education v. San Lorenzo Valley Unified School Dist., 139 Cal. App. 4th 1356, 1372 (2006). The agency may file a notice of its exemption determination with the county clerk, but it is not required to do so.

We also advised the City that CEQA only applies to discretionary "projects" that "may have a significant effect on the environment," which means "a substantial or potentially substantial adverse change in the environment." *Martin v. City and County of San Francisco*, 135 Cal. App.4th 392, 401 (2005). CEQA also has a "common sense" exemption, which applies "[w]here it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment." *Friends of Sierra R.R. v. Tulolumne Park and Recreation Dist.*, 147 Cal. App. 4th 643, 662 (2007). Further, "CEQA is implicated only by adverse *changes* in the environment," not by adverse preexisting conditions. *Baird v. County of Contra Costa*, 32 Cal. App. 4th 1464, 1468 (1995) (original emphasis). The impacts of the proposed project must be "compared to the actual environmental conditions existing at the time of the CEQA analysis," not to hypothetical situations. *Communities for a Better Environment v. South Coast Air Quality Management Dist.*, 48 Cal. 4th 310, 321-22 (2010); *see Lighthouse Field Beach Rescue v. City of Santa Cruz*, 131 Cal. App. 4th 1170, 1205-07 (2005) (finding city's revised general plan permitting off-leash dogs on beach could not have significant effect on environment, where off-leash dog use was already occurring despite prohibition in city's original general plan).

Thus, we advised the City that the potential effects of TNR (or, more accurately, of the City's support for private TNR efforts, given that the City has never directly engaged in TNR and does not propose to do so) must be measured against the existing environmental baseline, which includes unsterilized feral cats breeding freely, not against a hypothetical environment free of feral cats. Because TNR prevents feral cats that already exist in the environment from breeding, TNR cannot possibly cause any harm to the environment, much less the type of "significant" harm that triggers CEQA, even if one assumes that feral cats harm the environment (any more than, say, squirrels, or even birds). Consequently, we advised the City, the Department of Animal Services could comply with the injunction by conducting an informal review and concluding that its support for TNR does not implicate CEQA. There was no need for a time-consuming and expensive full-blown environmental study. .

Despite our advice, the City, through Ms. Decker, insisted on hiring Envicraft, an environmental consulting firm, to assist with the environmental review process. We understand that Envicraft conducted a survey of stakeholders and an environmental analysis. In June 2011, we were informed that Envicraft had completed its work and prepared a report which would be released "soon."

Five more months passed without any further action by the City. Frustrated, we met in November 2011 with City Council Member Paul Koretz, who stated that he shared our frustration and promised to look into the matter and ensure forward progress within two weeks.

When, by early January 2012, we still saw no movement, we met with Mr. Koretz again. At this meeting, Mr. Koretz's deputy, Christopher Koontz, confirmed that Envicraft had completed its report and the report had been languishing in limbo for months. Mr. Koontz stated that all the City needed to complete the process was a letter from "a Ph.D" opining on whether TNR has the potential to harm the environment, so we offered to assist in obtaining such a letter. Again, Mr. Koretz indicated that he shared our frustration and promised to ensure that the remaining bureaucratic steps would be taken without further delay.

After our second meeting with Mr. Koretz, we remained in regular email contact with Mr. Koontz and another of Mr. Koretz's deputies, Jeffrey Ebenstein, who informed us that they were "speaking daily" with Brenda Barnette, General Manager of the Department of Animal Services, and "making progress." Per Mr. Koontz's request, we provided letters from two reputable and credentialed experts, Dr. Margaret Slater, DVM, Ph.D., and Dr. Gary Patronek, VMD, Ph.D, attesting that TNR does not have the potential to significantly harm the environment.

On January 31, 2012, Mr. Koontz emailed me that "they hope to make everything public in March and move toward 'adopting' the [City's revised T.N.R.] policy and environmental report" at that time. We were upset by the additional delay and attempted to schedule a follow up meeting with Mr. Koretz. On February 10, 2010, his assistant Sheila Kouhkan emailed me that he was booked for the next several weeks and that she would contact me as soon as there were some time slots available in his schedule. We did not hear from either her, Mr. Koontz, or Mr. Ebenstein again. Nor was anything "made public" until August 9, 2012, when Ms. Barnette presented her report to this Board, requesting authorization to use $52,000 from the Animal Welfare Trust Fund "to pay for preparation, circulation and finalization" of unspecified CEQA "documentation in support of [the Department's] 'Cat Program'."

In her report, Ms. Barnette redefines and clarifies the activities the Department seeks to engage in with respect to TNR. We understand that Jim Doty, Acting Manager of the Environmental Management Division of the City's Department of Engineering, the department responsible for ensuring the City's CEQA compliance, determined back in March 2012 that these proposed activities do not constitute a "program" subject to CEQA, and offered to provide the "few hours of labor" necessary "to prepare a Notice of Exemption and file it with the County Clerk." One would think that Mr. Doty's conclusion and offer would have brought an end to this needlessly protracted process, which has been ongoing for more than two years. One would think that that the City would finally take the position that it has complied with the injunction's

requirements, and that the Department of Animal Services would implement its proposed Cat Program. This seems particularly logical given our understanding that the Department has determined that, since the injunction issued and the City was forced to discontinue its prior policy of supporting the spay/neutering of all cats without regard to their status as owned or un-owned, tame or feral, indoor or outdoor, thousands more cats have been killed annually in the City's shelters than in the years before the injunction issued, at great taxpayer expense and against the statewide policy adopted by the California Legislature in 1998 in favor of *reducing* shelter killing. In fact, we understand that the Department has determined that there has been "almost a straight-line increase in neonate intake and killing coinciding with the injunction," and that the "outdated theory of killing animals to curtail population growth is not working in Los Angeles for cats."

But although one would think these unambiguous findings and conclusions would lead to immediate action by the City to finally end the prolonged process that has resulted in avoidable feral births and senselessly cost thousands of cats their lives, apparently what one would think would or should happen is not what actually happens in the City of Los Angeles. Instead, we understand that Deputy City Attorney Decker is now insisting that the City is estopped from taking the position that its policy regarding TNR is not a "program" subject to CEQA or that CEQA otherwise does not apply because, in March 2010, Ms. Decker, acting as counsel for the City, stipulated with the plaintiffs in the litigation against the City to the modification of the original injunction. Ms. Decker's position is baseless.

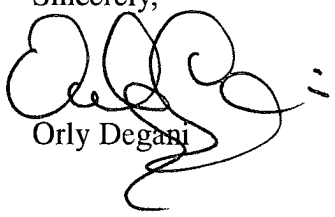
The City, through Ms. Decker, stipulated to a modification that attempted to remove two obviously unlawful aspects of the original injunction: (1) a prohibition on the City releasing impounded feral cats to nonprofit TNR rescue groups, which violated state law mandating the release of *any* impounded animal to *any* nonprofit rescue group that requests the animal; and (2) a prohibition on the City distributing any literature about TNR, which on its face applied to publications by private parties like *The Pet Press* that the City had for years made available to the public at its shelters, thus violating free speech rights.

By stipulating to modify the injunction to alter these clearly unlawful components, the City in no way agreed that the injunction is otherwise lawful, that the City had been engaged in a TNR "program" subject to CEQA before the injunction issued, or that CEQA otherwise applied to the City's prior activities in connection with TNR. The City consistently took the opposite position throughout the litigation. Certainly, by stipulating to the modification, the City in no way agreed that its current redefined and clarified policy regarding TNR, which did not even exist when the City entered into the stipulation in March 2010, falls within the ambit of CEQA. The City simply decided to comply with the injunction and perform the CEQA review that the court had mandated while attempting to avoid affirmatively violating the law. There is no legal

impediment to the City now taking the position arrived at by the City's Department of Engineering, the department tasked with ensuring the City's compliance with CEQA, that the City's revised and clarified policy does not implicate CEQA.

We urge you, the Board of Animal Commissioners, to end the insanity. The City has taken more than two years to accomplish what could and should have been done in a few days or hours, and now wants additional time (and money) to do who knows what more, taking who knows how much longer. Please, spare the cats. Mandate that the City prepare and file the Notice of Exemption that Mr. Doty offered to prepare months ago, without further delay. At a minimum, if you do permit the expenditure of additional time and money on further unnecessary environmental study, we urge you to require the Department of Animal Services to explain exactly what this further study will entail, and to impose a clear, definite, and *short* deadline by which the work must be completed and the Cat Program implemented. The cats dying in the City's shelters deserve at least that much.

Sincerely,



Orly Degani