No. B222696

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
DIVISION 8

THE URBAN WILDLANDS GROUP, et al.,

Plaintiffs/Petitioners and Respondents,

v.

CITY OF LOS ANGELES, et al.,

Defendants/Respondents,

NO KILL ADVOCACY CENTER and STRAY CAT ALLIANCE,

Proposed Intervenors and Appellants.

APPEAL FROM THE LOS ANGELES COUNTY SUPERIOR COURT
HON. THOMAS I. MCKNEW, JR., JUDGE
CASE NO. BS 115483

APPELLANTS' OPENING BRIEF

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CERTIFICATE OF INTERESTED ENTITIES OR PARTIES

[Cal. Rules of Court, Rule 8.208]

There are no interested entities or persons to list in this certificate pursuant to Rule of Court 8.208(e).

Dated: June 4, 2010

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APPELLANTS' OPENING BRIEF

INTRODUCTION

Appellants No Kill Advocacy Center and Stray Cat Alliance are two private, nonprofit animal protection organizations that engage and encourage others to engage in the practice of "Trap-Neuter-Return" or "TNR," which involves humanely trapping feral cats—cats that cannot be socialized to live with humans and cannot be kept as pets— sterilizing the cats, and releasing them back to their habitats. The purpose of TNR is to reduce feral cat populations humanely, by preventing the cats from reproducing, instead of impounding and killing the cats, which is the method typically used by animal shelters and results in the deaths of thousands of cats across the nation every year, including in the City of Los Angeles.

No Kill Advocacy Center and Stray Cat Alliance appeal from the trial court's denial of their application for leave to intervene in an action brought by Respondents The Urban Wildlands Group, Endangered Habitats League, Los Angeles Audubon Society, Palos Verdes/South Bay Audubon Society, Santa Monica Bay Audubon Society, and American Bird Conservancy (collectively, "the Environmental Groups") against the City of Los Angeles, the City of Los Angeles Board of Animal Services Commissioners, and the City of Los Angeles Department of Animal Services (collectively, "the City of Los Angeles" or "the City") pursuant to the California Environmental Quality Act (CEQA), Pub. Resources Code, § 21000, et seq.

In that action, the Environmental Groups sought and obtained an injunction prohibiting the City from engaging in various activities minimally supportive of TNR and TNR groups that the City has engaged in since as far back as the early 1990s, including making discount coupons

that the City provides for spay/neuter surgeries for dogs and cats as an incentive for City residents to sterilize their animals available for use on feral cats; disseminating information to the public about TNR; referring complaints about feral cats to TNR groups; and releasing impounded feral cats to TNR groups when requested so that the cats can be returned to their environment rather than killed in the shelters. Although the City has engaged in these activities for a long time, it also has continued to impound and kill thousands of feral cats.

No Kill Advocacy Center and Stray Cat Alliance sought to intervene less than two months after learning about the Environmental Groups' lawsuit and the trial court's grant of the injunction, after they discovered that the City did not intend to appeal. Nonetheless, the trial court denied them leave to intervene, finding their application was untimely. Based on the law and the undisputed facts, this was an abuse of the trial court's discretion.

The trial court's denial of intervention should be reversed because it cannot be sustained on any alternative basis. No Kill Advocacy Center and Stray Cat Alliance satisfied all of the other statutory conditions for intervention. They showed that they have a direct and immediate interest in the case, because the injunction impedes their ability to conduct their TNR efforts and achieve their objective of reducing shelter killing of feral cats. They also showed that their intervention will not enlarge the issues, which would remain limited to whether CEQA is applicable and whether the injunction is valid. Finally, they showed that the reasons for intervention outweighed the Environmental Groups' opposition.

The Environmental Groups presented no argument that they would be prejudiced by intervention. Nor could they have done so, since the injunction is continuing and is, therefore, subject to attack at any time by any aggrieved party.

On the other hand, denial of intervention will cause significant prejudice. It will force No Kill Advocacy Center and Stray Cat Alliance to bring an independent action to invalidate the injunction based on precisely the same facts and legal issues involved in this case, either as a petition for writ of mandate or a complaint for declaratory relief. No Kill Advocacy Center and Stray Cat Alliance will not be deterred from having a court hear and decide their challenge to the validity of the injunction, including their argument that CEQA simply does not apply here because there is no possibility that the City's minimal support for TNR —which *reduces* existing feral cat populations —could significantly harm the environment, and their argument that the injunction infringes on both the City's right to free speech and the public's right to be informed. No Kill Advocacy Center and Stray Cat Alliance also may have to sue the City to compel it to release impounded feral cats to them and to other nonprofit TNR groups, as is required by state law, with which the injunction directly conflicts.

Requiring No Kill Advocacy Center and Stray Cat Alliance to bring these independent actions would subvert the very purpose of the intervention statute, to obviate delays and prevent a multiplicity of actions arising from the same facts, while protecting the interests of those affected by the judgment. Accordingly, this Court should reverse the trial court's order denying intervention.

In addition, this Court has and should exercise its discretion to treat this appeal as an appeal from a motion to vacate the injunction; permit the parties to brief the merits of the issues whether CEQA applies to the City's activities, whether the Environmental Groups' CEQA claim is time-barred, and whether the injunction is otherwise invalid, and then decide the merits and vacate the injunction. All of these issues can be decided as a matter of law based on the documentary evidence in the record. Remanding this case to the trial court will only cause further unnecessary and avoidable delay.

The trial court has already considered the issues and (erroneously) decided them in favor of granting the injunction. A second appeal after any remand is, therefore, a virtual certainty. In the interests of justice and judicial economy, the Court should resolve this case now, once and for all.

STATEMENT OF THE CASE

A. Factual Background.

1. In 1998, The California Legislature Adopts A Policy Of Reducing Shelter "Euthanasia" Of Homeless Animals Through Increased Spaying And Neutering.

It is a sad fact that animal shelters throughout the nation, including the six animal shelters run by the City of Los Angeles, use killing of animals — which they euphemistically call "euthanasia" — as their primary means of controlling animal populations. (AA410.)[1] About four million dogs and cats die in the nation's shelters every year, including roughly 20,000 in City of Los Angeles shelters alone. (*Ibid.*) More than 90% of the dogs and cats who lose their lives in these shelters are healthy or treatable, and many are young, including newborn puppies and kittens.[2] (*Ibid.*)

Recognizing the moral and ethical implications of such rampant, state-sanctioned killing, the California Legislature in 1998 expressly adopted a statewide policy that no adoptable (healthy) or treatable animal should be "euthanized." (Civ. Code, § 1834.4; Food & Agr. Code, § 17005; Pen. Code, § 599d; see also Stats. 1998, ch. 747, §1 [recognizing

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[1] "AA" refers to the Appellants' Appendix filed concurrently with this brief.

[2] Webster's Dictionary defines "euthanasia" as "the act or practice of killing or permitting the death of hopelessly sick or injured individuals (as persons or domestic animals) in a relatively painless way for reasons of mercy." (Merriam Webster's Collegiate Dictionary (10th ed. 1995), at p.401.) Killing healthy or treatable animals for the purpose of reducing their species population numbers does not meet the definition of "euthanasia."

that "needlessly euthanized dogs and cats" are "a problem of great public concern"]; *People v. Youngblood* (2001) 91 Cal.App.4th 66, 73.)

In lieu of killing, the Legislature also determined to reduce animal birth rates through increased spaying and neutering. (Stats. 1998, ch. 747, §1 ["It is the intent of the Legislature, by enacting this act, to reduce the number of unwanted dogs and cats in California. In order to reduce the number of stray dogs and cats on the streets, and the number euthanized in shelters each year, the birth rate must be reduced. . . . The single most effective prevention of overpopulation among dogs and cats is spaying and neutering"].)

Pursuant to this policy, state law now requires shelters and animal rescue organizations to spay/neuter animals before adopting them out to the public, and imposes fines on owners of impounded dogs or cats that are not spayed or neutered. (Food & Agr. Code, §§30503, 30804.7, 31751.3, 31751.7.) In addition, state law imposes various other requirements on animal shelters designed to increase animal adoptions and reduce shelter killing, including, among other things: mandating minimum holding periods for impounded animals; regulating shelter hours of operation so that impounded animals are sufficiently accessible to the public for redemption or adoption; and forbidding the killing of any impounded animal whose release has been requested by a nonprofit animal rescue organization, unless the animal is irremediably suffering from a serious and untreatable injury or disease. (E.g., Food & Agr. Code, §§ 17006, 31108, 31752,.)

2. The New State Law Specifically Requires Animal Shelters To Release Impounded Feral Cats To Nonprofit Animal Rescue Groups That Request Them, Instead Of "Euthanizing" The Cats.

In adopting the new state policy, the Legislature paid specific attention to the problem of feral cats. (Food & Agr. Code, § 31752.5.)

Feral cats are the wild offspring of lost or abandoned household cats. (AA410.) They live on the streets in every city throughout the nation, but they are unsocialized to people and extremely fearful of and resistant to human contact. (*Ibid.*; Food & Agr. Code, § 31752.5(a)(1) & (b) [finding and declaring that "[d]omestic cats temperaments range from completely docile indoor pets to completely unsocialized outdoor cats that avoid all contact with humans," and defining "feral cat" as "a cat . . . whose usual and consistent temperament is extreme fear and resistance to contact with people"].) Because they do not make good pets, thousands of feral cats, as well as scared tame cats who can appear feral and are often mistaken as such, are impounded and killed every year in animal shelters across the country. (AA410; see Food & Agr. Code, § 31752.5(a)(2) & (5) [recognizing that "frightened or injured tame cats may appear to be feral" and that "it is not always easy to distinguish a feral cat from a frightened tame cat"].)

To reduce the high rate of shelter killing of feral cats, and of tame cats mistaken for ferals, the Legislature specifically applied to feral cats the general requirement that no impounded stray cat may be killed if a nonprofit animal rescue organization requests the cat and agrees to the spaying and neutering of the cat if the cat has not already been spayed or neutered. (Food & Agr. Code, § 31752.5(c).)

3. The City Of Los Angeles Minimally Supports Private Efforts To Trap-Neuter-Return ("TNR") Feral Cats.

Trap-Neuter-Return ("TNR") is a humane alternative to the widespread shelter killing of feral cats that—like California's policy—aims to reduce feral cat populations by preventing the cats from reproducing instead of impounding and killing them. (AA411.) TNR involves trapping feral cats in humane traps, spaying or neutering them, tipping their ears to identify them as sterilized, and then releasing them to their habitats. (*Ibid.*)

In virtually every community (if not in every community) that engages in any amount of TNR (including in the City of Los Angeles), the hands-on work is done, not by public animal shelters, but on a grassroots basis by volunteers working with private nonprofit animal protection groups, or by individual members of the public who encounter feral cats, do not want to take the cats to animal shelters where the cats will be killed, and who learn — often through their local animal shelters — about the non-lethal TNR alternative and about how to contact TNR groups for assistance with performing TNR. (AA411.)

For more than a decade (at least), the City of Los Angeles has recognized and minimally supported private TNR efforts in several ways. For example:

- Since the early 1990s, the City has distributed discount coupons or vouchers for free spay/neutering of feral cats (AR2108-2112, 2117-2123, 2093-2094; AA267-279; see also AA199, fn. 1 [Environmental Groups conceding that the City's "first feral cat pilot program may have been attempted in the 1990s"]);[3]

- Since at least 1997, the City has rented out cat traps and issued trapping permits for the purpose of capturing feral cats so they can be spay/neutered (AA261);[4]

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[3] "AR" refers to the Administrative Record that has been lodged with this Court. The City's coupons and vouchers are not *only* for feral cats. They can be used to sterilize any dog or cat, including feral cats. There is no special coupon for feral cats. (AA113; see also Motion to Augment, Ex. A, pp.12, 25-26, 30-31.)

[4] Again, the traps and trapping permits are not provided *only* for TNR purposes. The City also rents out traps and issues permits in cases of emergency (such as if a cat is ill or injured); to cat owners who want to trap their own cats for purposes such as relocation or spay/neutering; and to "non-owners upon a signed statement testifying to property damage or potential or real harm to family pets." (AA261.) Although the Environmental Groups offered declarations (to which the City properly objected (AA351)) attesting that, in a couple of instances, City personnel refused to issue trapping permits to individuals intending to trap feral cats merely because they perceived the cats as a nuisance and wanted to bring

- Since 1998, the City has been *required* by state law not to kill but to release impounded feral cats to nonprofit animal rescue groups, including groups that engage in TNR, whenever the groups request the cats from the City's shelters (except for cats irremediably suffering from a serious and untreatable injury or disease) (Food & Agr. Code, §§31752(b), 31752.5(c));

- For years, the City has been educating its residents about TNR, including referring them to TNR groups for assistance with feral cats. (AA112 [indicating that the City has been providing information to the public about alternative ways to deal with feral cats since as early 1992]; AA268-269 [indicating, in 2004, that the City has been publicizing its discount coupons for spay/neutering feral cats, distributing the coupons through TNR groups, referring residents to TNR groups, and otherwise disseminating information about TNR]; AA225-226 [June 2007 print-out from City's Department of Animal Services website, stating that "Animal Services supports TNR . . . as the only viable, humane, non-lethal method for solving our community's feral cat problem," and providing links to TNR groups that "assist with all aspects of feral cat sterilizations"]; AA228-229 [June 2007 print-out from City's Department of Animal Services website elaborating on the reasons Animal Services supports TNR, and providing links to articles about TNR and TNR groups, including Appellant Stray Cat Alliance]).

4. In 2005-2006, The City Approves The Concept Of Adopting A City TNR Policy, But When The Environmental Groups Complain, The City Postpones Any Action Until After An Environmental Review Can Be Conducted.

In June 2005, the City's Department of Animal Services ("Animal Services") made specific findings that (1) a large population of feral cats exists in the City; (2) "it is impractical, inhumane and not cost-effective to

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them to the City shelters for impoundment (AA293-308), the documentary evidence in the administrative record is clear that the City also routinely issues trapping permits for "nuisance ferals," and impounds and kills ferals (AR1-1665, 2074-2083). In fact, the vast majority of the trapping permits that the City issues are for "nuisance ferals." (*Ibid.*)

attempt to exterminate" all these feral cats; (3) many organizations and individuals engage in TNR within the City; and (4) TNR "is the most effective way to address this problem [of feral cats] and to achieve, in time, the goal of No More Homeless Cats and Saving Animals' Lives." (AA92.) Based on these findings, Animal Services recommended that the City adopt a formal TNR policy, and submitted "a draft of the preliminary TNR policy for discussion." (*Ibid.*)

The draft policy outlined a City TNR program consisting of several components, some of which the City had already been doing for years, including: distributing discount coupons for spay/neutering of feral cats; renting out traps and issuing trapping permits for use for TNR; informing the public about TNR, including through the Animal Services website; and referring residents complaining about feral cats to TNR groups. (AA93-94; see also Motion to Augment, Ex. A, p.13.)

Although the City had been engaging in these activities for a long time, the draft TNR policy recommended that the City intensify its efforts by, for example, increasing the amount of the discount provided by the spay/neuter coupons; utilizing new methods for getting the word out about TNR (such as by creating educational materials to be included with all Department of Water and Power bills and with all City employee paychecks); and actively seeking out TNR groups to take feral cats that are brought to the City shelters and return the cats to their environment. (AA94.)

Other proposed program components included in the draft TNR policy were entirely new, including: devoting full-time Animal Services personnel to act as "TNR Liason[s]"; exempting TNR groups from regular trapping permit requirements; utilizing the City's spay/neuter clinics to sterilize feral cats at no cost; and amending the municipal code to eliminate any possible impediment to performing TNR. (AA93-95.)

The City was receptive to the concept of adopting TNR as an official policy and directed Animal Services to work to further define what a City TNR program would entail. (AA97-98.) However, in March 2006, the Environmental Groups again wrote to the City, urging it to "undertake appropriate environmental review." (AA107.) Thereafter, in June 2006, the City determined that, before implementing any TNR program, "the environmental impact, *if any*" that might result from the program had to be considered, in order to comply with CEQA. (AA99, emphasis added; see also AA100 [stating that "an initial review of the project and its environmental effects must be conducted" and, "[d]epending on the potential effect, a further and more substantive review *may* be required"].) Thus, although the City approved of adopting a TNR policy "in concept," it postponed final decision such a policy, the parameters of any TNR program, or implementation of any program until after the appropriate level of environmental review could be conducted.[5] (AA99-100.)

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[5] CEQA establishes three levels of environmental review. (*San Lorenzo Community Advocates for Responsible Education v. San Lorenzo Valley Unified School District* (2006) 139 Cal.App.4th 1356, 1372.) The first level involves only a preliminary review (which can be informal and nonpublic) to determine if CEQA applies at all. (*Id.* at pp. 1372, 1386) CEQA only applies if the proposed activity meets the statutory definition of a "project" and does not qualify for one of CEQA's exemptions (*id.*, at p.1373), including the "common sense" exemption applicable "[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 Railroad v. Tuolumne Park and Recreation District* (2007) 147 Cal.App.4th 643, 662.) If CEQA does not apply, either because the proposed activity is not a project or the project is exempt, no further environmental review is necessary. (*San Lorenzo, supra,* 139 Cal.App.4th at pp.1373, 1386.)

5. Between 2007 and 2008, The Environmental Groups Repeatedly Complain That The City Has *De Facto* Implemented A TNR Policy Without Conducting An Environmental Review As Purportedly Required By CEQA, And They Threaten Litigation. The City Consistently Maintains That It Has Not Implemented A TNR Policy Or Violated CEQA.

In July 2007, the Environmental Groups wrote to the City once more, this time through their attorney, Babak Naficy, who represents them in the present case. (AA 54-55, 101-102.) In this letter, the Environmental Groups asserted that "the City is indirectly implementing TNR through third party non-governmental organizations ('NGOs'). . . . Members of the public seeking the assistance of Animal Services for removing feral cats are provided with coupons for free cat sterilization and referred to NGOs who perform the service. The sterilized cats are then returned to the environment. [¶] This process unofficially but effectively implements TNR through private conduits without the benefit of environmental review as required by CEQA. . . [and] subjects [the City] to legal liability for violation of CEQA." (AA54, 101.)

In August and September 2007, the Environmental Groups, through Mr. Naficy, followed up with a request under the Public Records Act, Gov. Code, § 6250, et seq., for information pertaining to the City's alleged TNR program. (AA103, 104.) The City responded on September 28, 2007, denying that it had a TNR program but producing documents responsive to some of Mr. Naficy's specific requests. (AA104-106.)

On December 26, 2007, Mr. Naficy sent the City a notice of the Environmental Groups' intent to sue under CEQA. (AA107-108.) He wrote that the Environmental Groups "are now forced to commence immediate legal action to enjoin the City's current unlawful implementation of TNR and to prevent the City from further implementing

TNR . . . without adequate environmental review as required by CEQA." (AA108.)

The City responded to the threat of litigation, explaining that it "has not implemented a TNR project" but was "presently considering how to define the scope of any proposed TNR project and the appropriate CEQA clearance that it would require." (AA109.)

On February 6, 2008, Mr. Naficy again wrote to the City, stating that the Environmental Groups "are convinced that despite [its] official denial, the [City] has been de facto implementing a TNR policy." (AA110.) The letter demanded that, "to avoid litigation, the [City] must STOP. . . advertising and promoting TNR on the [Animal Services] website," "advising members of the public to deal with feral cats by contacting a TNR group," "issuing coupons for free veterinary services for feral cats that will be returned to unconfined conditions," and "assisting TNR groups through . . . referrals" — all activities that the City had been undertaking for years, in some cases since at least the early 1990s. (AA110-111.)

On February 28, 2008, the City responded point by point to the Environmental Groups' demands, carefully explaining why the demands were unreasonable and unwarranted, or based on false information. (AA112-114.)

B. Procedural Background.

1. In June 2008, The Environmental Groups Sue, Seeking A Writ Of Mandate And Permanent Injunction Requiring The City To Discontinue Any Support For TNR And TNR Groups Until Completing An Environmental Review Of The City's Alleged TNR "Program."

Dissatisfied with the City's response, the Environmental Groups, on June 25, 2008, filed a petition for peremptory writ of mandate and complaint for declaratory and injunctive relief against the City. (AA1-15.) They alleged that the City had implemented a TNR program without first

conducting an environmental review, as purportedly required under CEQA. (AA2.) They sought a declaratory judgment that the City violated CEQA by implementing its alleged TNR program, and a writ of mandate and permanent injunction commanding the City to cease implementing the program and prohibiting the City from taking any action in furtherance of the program until completing an environmental review. (AA14.)

2. The Trial Court Denies The City's Motion For Judgment On The Pleadings Based On The Bar Of CEQA's 180-Day Statute Of Limitations.

In January 2009, the City moved for judgment on the pleadings, contending that the Environmental Groups' single cause of action for violation of CEQA was barred by CEQA's 180-day statute of limitations. (AA40-49, 117-126.) The City argued that, even assuming that it has implemented a TNR program, the facts as alleged in the petition and complaint show that the Environmental Groups knew about the alleged implementation since at least July 2007, when Mr. Naficy wrote to the City to complain about it. (AA47, 118.) The City also pointed out that the Environmental Groups filed their petition and complaint on June 25, 2008, 181 days after sending their notice of intent to sue to the City on December 27, 2007.[6] (AA41, 48.)

The trial court denied the City's motion. (AA132-136.)

3. Although The Environmental Groups Present No Evidence That The City Has Violated CEQA, The Trial Court, In December 2009, Grants The Writ Of Mandate And Permanent Injunction.

The parties filed their briefs on the merits between September and November 2009. (AA191-217, 309-328, 357-373.) In their brief, the

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[6] The evidence in the record actually shows that the Environmental Groups knew the City was distributing coupons for feral cat sterilizations since at least 2004 (AA33-335), and it should be presumed they knew long before then, because the City distributed the coupons openly since 1991.

Environmental Groups argued that, because the City purportedly had agreed that CEQA requires that an environmental review be conducted before a TNR program can be implemented, "the only dispute in the case is whether the [City] has been de facto implementing a Trap/Neuter/Return ("TNR") policy for feral cats." (AA194; see also AA203.) The Environmental Groups then spent the remainder of their brief attempting to show that the City has implemented a TNR program by engaging in some of the activities that were included as components of the TNR program proposed in 2005, such as providing discount coupons for feral cat sterilizations, promoting TNR on its website, and referring people who complain about feral cats to TNR groups. (AA203-214.)

The City objected that the Environmental Groups failed to present any argument or evidence of an actionable CEQA violation. (AA309-327.) It explained: "[T]he city does not agree that environmental review is required or necessary . . . in order to implement a city T.N.R. program. . . . We haven't determined the scope of that program. When we do, we'll determine what environmental review is necessary." (Motion to Augment, Ex. A, at p.22; see also *id.*, p.11 [arguing that the City "hasn't decided on what type of program that it will adopt," that it "fully intends, once it defines the project scope, to consider what level of environmental review is necessary," and that it is possible a CEQA exemption will apply]; *id.*, at p.12 [trial court recognizing that City plans to "determine whether or not there are environmental issues and to consider whether or not there is an exemption"].)

As for its current activities in connection with TNR—including providing discount coupons for spay/neutering of feral cats, informing the public about TNR, and referring feral cat complaints to TNR groups—the City argued those activities are not the type of activities for which CEQA requires environmental review. (AA309-327; see also Motion to Augment,

Ex. A, p.3 [requesting that the trial court issue a statement of decision addressing "whether or not the activities complained of are a CEQA project for which environmental review is required"].) The City pointed out that CEQA only applies to activities that have a potential to cause significant harm to the physical environment. (Motion to Augment, Ex. A, p.9.) TNR, the City explained, has no such potential because it only involves spaying and neutering feral cats that already exist (and breed) in the environment, not introducing cats to the environment. (*Id.* at pp.9-10; see *Lighthouse Field Beach Rescue v. City of Santa Cruz* (2005) 131 Cal.App.4th 1170, 1205-1207 [finding no substantial evidence that City's revised general plan, permitting off-leash dog use at beach, might have a significant effect on the environment (including habitats and wildlife) when "measured against the existing environmental baseline," because off-leash dog use was already occurring, despite prohibition in previous general plan].)

Finally, the City renewed its statute of limitations argument, contending that the Environmental Groups have known about the City's current activities in connection with TNR not just since July 2007, as the petition and complaint reveal, but for *years* before then. (AA319; Motion to Augment, Ex. A., pp14-18.) To support its contention that its current approach to dealing with feral cats and TNR is longstanding and has not changed, the City pointed to evidence that between 2001 and 2008, the number of feral cats that have been killed in the City's shelters has remained constant. (AA321, citing AR2074-2083.)

During the hearing, the trial court demonstrated both hostility to the City's position and a misunderstanding of the facts. (E.g., Motion to Augment, Ex. A, pp.6-7 ["you put feral cats in the wild, they endanger wildlife. That is an environmental concern. And I don't understand why the City isn't concerned, quite frankly, I don't even understand why you're here"]; *id.*, at p.9 ["if you don't see that environmental assessment was in

order, we can talk . . . until the proverbial cats come in"].) When the Assistant City Attorney attempted to explain that feral cats are part of the exiting environmental baseline, not a consequence of TNR, the trial court retorted, "[W]hen you take them out of the wild . . . and do not consider alternatives such as euthanizing them and return them back to the wild, I would be embarrassed to stand there and argue there is no environmental effect. . . . Please, spare me."[7] (*Id.*, at p.10.) The trial court went so far as to accuse the City of trying to "skirt the environmental laws." (*Id.*, at p.25.) It derisively summed up the City's position as, "You don't have a program but you do have a program that's been going on for decades. I got it." (*Id.*, at p.38.)

On December 4, 2009, the trial court entered an order granting the Environmental Groups' writ petition and request for injunctive relief. (AA385-391.)

4. No Kill Advocacy Center And Stray Cat Alliance Learn Of The Trial Court's Ruling Through A News Article And Immediately Seek Legal Counsel To Assess Their Options.

Appellant No Kill Advocacy Center is a national nonprofit charitable organization dedicated solely to advocating for a "No Kill" method of animal control. (AA410.) It considers the rampant killing of animals in animal shelters across the country a national tragedy, and is committed to promoting the implementation of its "No Kill Equation" — a proven and effective means of non-lethal animal control — in every animal shelter in the country, including the Los Angeles City shelters. (*Ibid.*)

A crucial component of No Kill Advocacy Center's "No Kill Equation" involves controlling feral cat populations through TNR. (AA410.) On a weekly basis, No Kill Advocacy Center provides advisory

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[7] Actually, the City does not take feral cats "out of the wild." That work is done by private parties.

services about TNR to private animal protection groups and individuals throughout the country, including in the City of Los Angeles. (AA411.) These groups and individuals rely on No Kill Advocacy Center's assistance in carrying out their TNR efforts. (*Ibid.*)

Appellant Stray Cat Alliance is dedicated solely to advocating and caring for the stray and feral cats living in the Los Angeles area. (AA411.) As part of its mission, Stray Cat Alliance aims to reduce the number of stray and feral cats killed in the City of Los Angeles animal shelters. (*Ibid.*) To that end, Stray Cat Alliance's more than 200 volunteer members regularly engage in TNR throughout the City of Los Angeles, and they encourage and teach members of the public coming into contact with feral cats to do the same. (*Ibid.*) If any sterilized ferals (identified as such by their tipped ears) are impounded in the Los Angeles City shelters, these cat rescuers also claim the cats from the shelters, whenever possible, and release the cats back to their habitats, thus saving the cats' lives and further reducing shelter killing. (AA412.)

By conservative estimate, Stray Cat Alliance has been responsible for sterilizing and preventing the deaths of thousands of stray and feral cats in the Los Angeles area every year since the organization was formed in 1999. (AA412.) To accomplish its work, Stray Cat Alliance relies on the Los Angeles City shelters to refer to the group members of the public who inquire about how to deal with feral cats. (*Ibid.*)

On or about December 9, 2009, a few days after the trial court granted the Environmental Groups' writ petition and request for injunctive relief, Nathan Winograd, the executive director of No Kill Advocacy Center and a member of the board of directors of Stray Cat Alliance, read a news article describing the trial court's action. (AA413.) Immediately thereafter, No Kill Advocacy Center and Stray Cat Alliance sought pro bono counsel to advise them on what legal action they might take in

response, including filing an amicus curiae brief in support of the City's expected appeal from the adverse judgment. (*Ibid.*)

5. In January 2010, The Trial Court Enters A Final Judgment And Permanent Injunction Consistent With Its Prior Ruling, Barring The City From, Among Other Things, Releasing Impounded Feral Cats To TNR Groups Or Informing The Public About TNR. The City Immediately Complies With The Injunction.

On January 5, 2010, the trial court entered a final judgment and permanent injunction consistent with the court's December 4, 2009, order. (AA392-397.) The injunction prohibited the City from, among other things:

- Providing any discount for spay/neuter surgeries for feral cats (which the City had been doing since 1991);

- Releasing feral cats from shelters to TNR groups (which the City had been doing in compliance with state law since 1998, and on a discretionary basis even before that);

- Providing information about or links to TNR groups, seminars, or workshops on the City's website (which the City had been doing for years, and in violation of the City's free speech rights and the public's right to be informed);

- Developing or distributing literature about TNR or conducting public outreach on TNR (which the City had been doing for years and, in violation of the City's free speech rights and the public's right to be informed);

- Referring complaints about feral cats to TNR groups (which the City had been doing for years, and in violation of the City's free speech rights and the public's right to be informed);

- Refusing to issue traps for nuisance feral cats or to accept trapped feral cats for impoundment (which the City never did).

(AA394-395.)

The trial court retained jurisdiction of the matter to "enabl[e] any party . . . to apply to the court at any time . . . for the modification of any of the injunctive provisions hereof, . . . [or] for relief herefrom." (AA396.)

The City immediately began to comply with the injunction. It removed all links to TNR groups, including to Stray Cat Alliance, from its Animal Services website (but retained links to other groups, including to some of the Environmental Groups, who advocate that no cats should ever be permitted outdoors). (Motion for Calendar Preference, Winograd Decl., pp.5-6.) The City also removed from all six of its animal shelters all copies of *The Pet Press*, a privately-produced monthly publication about animal rescue that has been distributed in the City's shelters, along with other private animal rescue materials, for many years. (*Id.*, p.6.) Presumably, the City removed *The Pet Press* from its shelters because each issue of *The Pet Press* contains contact information for TNR groups, including for Stray Cat Alliance (in addition to contact information for other kinds of animal rescue groups), and some issues also include articles on TNR (along with articles on other animal-related topics). (*Ibid.*) The City also stopped referring complaints about feral cats to TNR groups; indeed, since the injunction issued, Stray Cat Alliance has not received a single referral from the City. (*Id.*, at p.4.)

6. In February 2010, After Learning That The City May Not Appeal, Appellants File An *Ex Parte* Application For Leave To Intervene.

Through communications with representatives of the City, No Kill Advocacy Center and Stray Cat Alliance eventually learned that the City had not decided whether to appeal, and might not do so. (AA413.) On February 8, 2010, they formally engaged pro bono counsel to assist them. (AA413.) After consulting with counsel, they determined that, because the City would not commit to appealing, they had to intervene and become

parties to the action or risk losing the opportunity to present their arguments about the illegality of the injunction to an appellate court. (*Ibid.*) Accordingly, on February 17, 2010, they filed an *ex parte* application for leave to intervene for the purposes of moving the trial court to vacate or at least modify the injunction to comply with applicable law, and, if necessary, appealing from the judgment and injunction. (AA398-429.)

The intervention application stated that, if permitted to intervene, No Kill Advocacy Center and Stray Cat Alliance would demonstrate that the injunction is not justified by CEQA, because (1) the City's limited support for the TNR efforts of private TNR groups does not amount to adoption or implementation of a municipal TNR program that is subject to CEQA; (2) even if the City's support for private TNR efforts is a "program" subject to CEQA, no environmental review is required prior to implementing the "program" because the "program" — which *decreases* free-roaming cat populations — cannot possibly have a significant negative effect on the environment (obviously, fewer feral cats means *less* potential preying on birds and other wildlife); and (3) the Environmental Groups' CEQA complaint is time barred anyway because the City engaged in the activities constituting the alleged "program" for years (and in some cases decades) before the Environmental Groups filed their lawsuit. (AA402.) In addition, the intervention application asserted that the injunction is unlawful because it infringes on free speech and violates California law concerning the treatment of impounded animals — specifically, the requirement that shelters not kill impounded feral cats whose release has been requested by a nonprofit rescue group. (*Ibid*; see pp. 6, 7, *ante*.)

7. The Environmental Groups Oppose The Intervention Application, Claiming It Is Untimely And That Intervention Would Impermissibly Enlarge The Issues In The Case. The Trial Court Denies The Intervention Application Solely Because It Is Allegedly Untimely.

On February 18, 2010, the Environmental Groups filed a written opposition to the intervention application, arguing that the application was untimely, that it should not be heard on an *ex parte* basis, and that intervention would impermissibly expand the issues in the case. (AA430-434.) The Environmental Groups did not contest that No Kill Advocacy Center and Stray Cat Alliance have a direct and immediate interest in the action and have been harmed by the injunction. Nor did the Environmental Groups present any argument that they would be prejudiced if intervention were granted.

The trial court denied the intervention application solely based on the court's determination that it was untimely. (AA438.)

8. The Environmental Groups And The City Stipulate To A Modification Of The Injunction That Removes Some, But Not All, Of The Problematic Restrictions On The City.

On March 10, 2010, the trial court entered an order modifying the injunction pursuant to a stipulation by the Environmental Groups and the City. (AA443-449.) The modified injunction permits the City to release impounded feral cats to TNR groups if the groups agree in writing that the cats will not be returned to the trapping location. (AA445.) The modified injunction also permits the City to distribute "pet publications that include articles or writings on a wide range of pet topics even if the publication includes advertisements or articles on TNR." (AA446.) Apparently, this was an attempt to overcome the free speech issues raised in the intervention application, and while it did at least temporarily end the unconstitutional suppression of *The Pet Press*'s speech, it did nothing to address the

injunction's infringement of *the City's* right to free speech and the public's right to be informed. (See *Keller v. State Bar of California* (1990) 496 U.S. 1, 12 [recognizing government's right of free speech]; *Miller v. California Com. on Status of Women* (1984) 151 Cal.App.3d 693, 700 [Same].)

9. The City Fails To Appeal.

The deadline for the City to appeal from the judgment and injunction passed on March 6 2010. (Cal. Rules of Court, rule 8.104.) The City did not appeal.

STATEMENT OF APPEALABILITY

The trial court issued its order denying intervention on February 18, 2010. (AA438.) No Kill Advocacy Center and Stray Cat Alliance filed a timely notice of appeal on March 1, 2010. (AA439-440; Cal. Rules of Court, rule 8.104.)

"It is well established that an order denying a motion to intervene is appealable 'because it finally and adversely determines the moving party's right to proceed in the action.'" (*Siena Court Homeowners Assoc. v. Green Valley Corp.* (2008) 164 Cal.App.4th 1416, 1422, quoting *Hodge v. Kirkpatrick Development, Inc.* (2005) 130 Cal.App.4th 540, 547; see also *Noya v. A.W. Coulter Trucking* (2006) 143 Cal.App.4th 838, 841 [despite *ex parte* nature of motion to intervene, where plaintiffs filed response and trial court ruled on merits in denying motion, order was appealable].)

LEGAL DISCUSSION

I. THIS COURT SHOULD REVERSE THE TRIAL COURT'S DENIAL OF INTERVENTION.

A. Appellate Courts Do Not Hesitate To Reverse Trial Court Denials Of Motions To Intervene As Abuse Of Discretion When It Is Clear The Statutory Conditions For Intervention Have Been Satisfied.

Intervention is governed by Code of Civil Procedure section 387. Subdivision (a) of section 387 provides, in pertinent part: "Upon timely application, any person, who has an interest in the matter in litigation, or in the success of either of the parties, or an interest against both, may intervene in the action or proceeding." (Code Civ. Proc., § 387(a).)

"The purpose of allowing intervention is to promote fairness by involving all parties potentially affected by the judgment," "obviate delays[,] and prevent a multiplicity of suits arising out of the same facts." (*Simpson Redwood Co. v. State of California* (1987) 196 Cal.App.3d 1192, 1199, 1202; see also *Mary R. v. B. & R. Corp.* (1983) 149 Cal.App.3d 308, 314; *People ex rel Rominger v. County of Trinity* (1983) 147 Cal.App.3d 655, 660 (*Rominger*).)

To qualify for intervention under section 387(a), a proposed intervenor must file a timely application for leave to intervene and demonstrate that: (1) the proposed intervenor has a direct and immediate interest in the action; (2) intervention will not enlarge the issues in the litigation; and (3) the reasons for intervention outweigh any opposition by the existing parties. (*Lindelli v. Town of San Anselmo* (2006) 139 Cal.App.4th 1499, 1504; *US Ecology, Inc. v. State of California* (2001) 92 Cal.App.4th 113, 139.)

The trial court has discretion to determine whether these statutory requirements for intervention have been met. (*Simpson Redwood, supra,*

196 Cal.App.3d at p.1199.) However, in exercising its discretion, the trial court must liberally construe section 387(a) in favor of *allowing* intervention. (*Ibid.*)

Where the trial court fails to do so, or where on the undisputed facts "'the discretion of the trial court could legally be exercised in only one way,'" appellate courts have not hesitated to reverse the denial of intervention as abuse of discretion. (*Fireman's Fund Ins. Co. v. Gerlach* (1976) 56 Cal.App.3d 299, 305 (*Gerlach*); see also, e.g., *County of San Bernardino v. Harsh California Corp.* (1959) 52 Cal.2d 341, 346; *Lindelli, supra,* 139 Cal.App.4th at pp.1512, 1518; *Simpson Redwood, supra,* 196 Cal.App.3d at p.1204; *Rominger, supra,* 147 Cal.App.3d at p.665; *Reliance Ins. Co. v. Superior Court* (2000) 84 Cal.App.4th 383, 388; *Truck Ins. Exchg. v. Superior Court* (1997) 60 Cal.App.4th 342, 351; *Mar v. Sakti Int'l Corp.* (1992) 9 Cal.App.4th 1780, 1785-1786; *In re Marriage of Kerr* (1986) 185 Cal.App.3d 130, 133-134; *Mallick v. Superior Court* (1979) 89 Cal.App.3d 434, 439; *Timberidge Enterprises, Inc. v. City of Santa Rosa* (1978) 86 Cal.App.3d 873, 882, 887; *Bustop v. Superior Court* (1977) 69 Cal.App.3d 66, 69-73; *Morton Regent Enterprises, Inc. v. Leadtec California, Inc.* (1977) 74 Cal.App.3d 842, 846, 850; *Ryerson v. Riverside Cement Co.* (1968) 266 Cal.App.2d 789, 796, *Linder v. Vogue Investments, Inc.* (1966) 239 Cal.App.2d 338, 340-346; *In re Mercantile Guaranty Co.* (1965) 238 Cal.App.2d 426, 434-438.)

That is the case here. On the undisputed facts, No Kill Advocacy Center and Stray Cat Alliance met all the conditions for intervention. Contrary to the trial court's conclusion, their intervention application—filed just two months after they first learned of the litigation—was timely. (See pp. 26-36, *post.*) They also showed that they have a direct and immediate interest in the action, that their intervention will not enlarge the issues in the case, and that the reasons for their intervention outweigh the Environmental

Groups' opposition. (See pp. 36-46, *post.*) Under these circumstances, "'the discretion of the trial court could be legally exercised in only one way,'" and the trial court abused its discretion when it denied leave to intervene. (*Gerlach, supra,* 56 Cal.App.3d at p.305.)

B. The Trial Court Abused Its Discretion In Denying Leave To Intervene Because, On The Undisputed Facts, The Intervention Application Was Timely.

1. No Kill Advocacy Center And Stray Cat Alliance Sought To Intervene Within A Reasonable Time And Without Unreasonable Delay After Learning Of The Suit.

Section 387 (a) mandates a "timely" application for intervention. (Code Civ. Proc., § 387(a).) An intervention application is "timely" within the meaning of the statute if it is filed "within a reasonable time" and without "unreasonable delay after knowledge of the suit." (*Sanders v. Pac. Gas & Elec. Co.* (1975) 53 Cal.App.3d 661, 668.) Consequently, intervention may be granted "at any time, *even after judgment,*" so long as the proposed intervenor has not unreasonably delayed filing its application. (*Mallick, supra,* 89 Cal.App.3d at p.437, emphasis added [finding trial court abused its discretion in denying intervention despite fact that motion to intervene was filed after entry of judgment].)

As the court of appeal observed in *Mallick*, the former version of section 387(a) limited intervention to "any time before trial," but the statute was amended in 1977 to remove this limitation, replacing it with the requirement of a "timely application." (*Mallick, supra*, 89 Cal.App.3d at p.437.) This change evinces a specific legislative intent to permit intervention even after judgment has been entered, so long as the proposed intervenor acts with diligence in moving to intervene after learning of the suit.

Here, the undisputed *competent* evidence shows that No Kill Advocacy Center and Stray Cat Alliance did not know about this litigation until after the trial court granted the writ of mandate and injunction in early December 2009. (AA413.) They first learned of the litigation when Mr. Winograd read a news article about the court's action. (*Ibid.*) Thereafter, they immediately sought legal counsel to advise them of their options, including the possibility of filing an amicus brief in support of the City's expected appeal. (*Ibid.*) After discussions with the City revealed that the City was considering not pursuing an appeal, they determined that they had to intervene and become parties to the action to preserve the opportunity to have the matter heard by an appellate court. (*Ibid* .) Accordingly, in February 2010, just two months after first learning of the suit, they formally retained counsel to represent them and filed their application for leave to intervene. (*Ibid* .)

Nothing in the record suggests this two-month time lapse–during which No Kill Advocacy Center and Stray Cat Alliance were seeking counsel, discovering what if anything the City intended to do concerning the injunction, and evaluating what legal options they could and should pursue–was in any way unreasonable.

The only other purported "evidence" in the record on the timeliness of the intervention application is an *unauthenticated* July 2009 email string allegedly exchanged between Christi Metropole (Stray Cat Alliance's executive director) and an unknown person named "Mary," in which "Mary" made a vague reference to the Environmental Groups' case against the City. (AA435-436.) Because it is unauthenticated, this email string is inadmissible and cannot be considered. (See Evid. Code, §1401(a).)

In any event, the email string only establishes that "*Mary*" knew about the litigation and vaguely mentioned it to Ms. Metropole during a discussion about another subject—a complaint about some cats in Beverly

Hills. (AA435-436.) Ms. Metropole's alleged response pertained only to the fact that one of the cats had given birth to kittens, and to whether the then General Manager of Animal Services correctly represented the law on TNR to a Beverly Hills judge (*not* the judge in the Environmental Groups' case). (*Ibid.*) Ms. Metropole said nothing about the Environmental Groups' suit, suggesting that she did not even notice "Mary's" cryptic comment or understand what "Mary" was talking about.[8] (*Ibid.*)

Even if Ms. Metropole did notice and understand "Mary's" comment, the email string does not establish that she had sufficient knowledge about the details of the litigation to put her on notice of a possible need for Stray Cat Alliance to intervene. In July 2009, when the email exchange allegedly occurred, the City presumably was adequately defending against the CEQA challenge. Ms. Metropole certainly could reasonably have assumed as much. The need for intervention did not arise until after the trial court ruled against the City and the City indicated that it might not appeal. (See *Morton Regent Enterprises, supra,* 74 Cal.App.3d at pp.848-850 [reversing trial court's denial of surety's intervention application filed after entry of default judgment, finding the application was timely even though surety knew of the suit from its inception, because surety reasonably assumed bonded party would appear and defend the action]; *Linder, supra*, 239 Cal.App.2d at pp.339-346 [reversing trial court's denial of intervention motion filed after entry of default judgment, where the proposed intervenor diligently sought leave to intervene after learning that the action was not being defended]; see also *Sanders, supra*, 53 Cal.App.3d at pp.666-669 [finding Attorney General's intervention during trial was proper, despite his knowledge of the action a full year

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[8] The views of the law concerning TNR expressed in the email string are irrelevant. Ms. Metropole is not an attorney and there is no evidence that "Mary" is either.

earlier, because he moved to intervene promptly after learning about amendment to complaint that implicated State's interest]; *Lindelli, supra*, 139 Cal.App.4th at p.1512 [finding intervention request was timely where law firm moved to intervene once it became clear that its clients would not authorize a motion for attorney fees].)

Indeed, had No Kill Advocacy Center and Stray Cat Alliance sought to intervene before any question was raised about the City's commitment to defending the case, the trial court arguably might have been justified in denying their application on the ground that the City was adequately representing their interests. (See *Faus v. Pacific Electric Rwy. Co.* (1955) 134 Cal.App.2d 352, 358, fn. 3 [affirming denial of intervention to County of Los Angeles, where County Counsel was "actively in charge of the litigation" on behalf of defendant City of San Marino, whose interests were aligned with County's, and could "be expected to zealously safeguard County interests"].)

In their opposition to the intervention application, the Environmental Groups argued the application was untimely even if No Kill Advocacy Center and Stray Cat Alliance learned of the litigation for the first time in December 2009, because the application purportedly should have been filed before entry of the final judgment on January 5, 2010. (AA432.) The Environmental Groups reasoned that, if No Kill Advocacy Center and Stray Cat Alliance had sought to intervene in December 2009, "they could have properly raised their concerns before the Court issued the injunction." (*Ibid.*)

There is no evidence, however, that No Kill Advocacy Center and Stray Cat Alliance knew in December 2009 about the City's reluctance to appeal. According to the evidence, they discovered that the City might not appeal through discussions with the City that occurred sometime *after* Mr. Winograd read the news article about the trial court's December 2009 order

and before they formally engaged counsel to represent them and filed their intervention application in February 2010. (AA413.)

Moreover, by the time No Kill Advocacy Center and Stray Cat Alliance learned of the litigation in December 2009, the trial court already had decided that a CEQA violation had occurred and had granted the writ of mandate and request for injunctive relief. (AA385-391.) All that remained was the formality of entering the judgment and issuing the injunction pursuant to the court's order. Nothing in the record suggests the trial court would have been any more inclined to permit intervention and reconsider its conclusion about the alleged CEQA violation before January 5, 2010 than it was a few weeks later, in February 2010, simply because before January 5, the judgment had not been formally entered and the injunction had not formally issued yet.

It also is unreasonable to presume that the three or so weeks that elapsed between when Mr. Winograd read the news article about the trial court's ruling in December 2009 and the entry of the final judgment on January 5, 2010, was sufficient time for No Kill Advocacy Center and Stray Cat Alliance to engage counsel, and for their counsel to: acquire and review the evidentiary record; evaluate the merits of the Environmental Groups' CEQA claim in light of that record; determine that the trial court erred in finding that the City violated CEQA and that the injunction was unlawful for other reasons as well; consider what options were available for challenging the injunction; communicate with the City and learn of the City's uncertainty about filing an appeal; conclude that intervention was necessary; and draft and file the intervention application and proposed complaint in intervention.

Significantly, the Environmental Groups were aware of the City's alleged TNR activities since at least May 2004, when they wrote to the City threatening to complain about the City's distribution of discount coupons

for the sterilization of feral cats. (AA333-335.) Yet they did not file their petition for writ of mandate until June 2008 (AA1-15), and they argued below that this four-year delay was reasonable and their petition was timely (AA64-78). In comparison, the two months that No Kill Advocacy Center and Stray Cat Alliance took to file their intervention application after learning of the Environmental Groups' suit and the trial court's decision cannot possibly be considered an "unreasonable delay."[9] (*Sanders, supra,* 53 Cal.App.3d at p.668.)

2. The Timing Of The Intervention Application Caused No Prejudice To The Existing Parties.

Regardless of precisely when No Kill Advocacy Center and Stray Cat Alliance first learned of the Environmental Groups' suit and of the necessity for intervention, the timing of their application was an inappropriate ground for denying them leave to intervene for the additional reason that it caused no prejudice to the existing parties. As explained in *Truck Ins. Exchg v. Superior Court, supra,* 60 Cal.App.4th 342 (*Truck*), "timeliness is hardly a reason to bar intervention when . . . the real parties in interest have not shown any prejudice." (*Id.* at p.351; see also 4 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 225, p.299 [unreasonable delay not a proper basis for denying intervention "even though the intervenor is aware of the action and the issues months or perhaps years before the case comes to trial," if the existing parties suffer no prejudice from the delay];

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[9] Notably, the Environmental Groups were represented by counsel, Mr. Naficy, since at least July 2007, when Mr. Naficy first wrote to the City on their behalf to complain about the City's purported implementation of a TNR program (AA54-55, 101-102), yet they still maintained that they reasonably took another full year, until June 2008, to file their CEQA action (AA64-78.) No Kill Advocacy Center and Stray Cat Alliance, on the other hand, only sought counsel after Mr. Winograd read about the court's decision in December 2008 (AA413), and they filed their intervention application within two months thereafter (AA398).

see also *Mary R., supra,* 149 Cal.App.3d at p.313 [finding no factual basis to support trial court's denial of intervention on the ground that proposed intervenor moved to intervene three months after learning of the contested order, where evidence did not indicate parties positions had changed during the three-month "delay"].)

In their opposition to the intervention application, the Environmental Groups argued only that the intervention application was purportedly untimely and intervention would allegedly enlarge the issues in the case. (AA430-434.) They did not even attempt to argue that the timing of the application would prejudice the existing parties. Nor could they legitimately have done so.

The City certainly would not have been prejudiced because No Kill Advocacy Center and Stray Cat Alliance sought to intervene on the City's side, to obtain a dissolution or at least a modification of the restrictions the injunction placed on the City, including through an appeal to which the City was uncertain it could devote its limited resources.

The Environmental Groups would not have been prejudiced for the same reason that the plaintiffs in *Truck, supra,* 60 Cal.App.4th 342, were not prejudiced. There, two co-insurers, Transco Syndicate No. 1 (Transco) and Alpine Insurance Company (Alpine) sued their insured, RCS Equities, Inc. (RCS)—a roofing contractor—for rescission of their policies of insurance based on fraudulent misrepresentation. (*Id.* at p.345.) The rescission action commenced in January 1993. (*Ibid.*) Truck, a third co-insurer of RCS during the same period, sought to intervene in the rescission action more than four years later, in May 1997, to assert the validity of the Transco and Alpine policies and its right to equitable contribution from Transco and Alpine in connection with various construction defect lawsuits that had been filed against RCS. (*Ibid.*) In the meantime, the Franchise Tax Board had suspended RCS for failing to file tax returns, RCS had not

been revived, and it had not made a general appearance in the rescission action. (*Ibid.*) When Truck moved to intervene, Transco and Alpine were "on the eve of obtaining a default judgment." (*Id.* at p.350.) They opposed Truck's intervention application, contending the application was untimely because Truck knew about the rescission action since August 1995, almost two years earlier. (*Id.* at p.345.) The trial court denied the application. (*Ibid.*)

Determining that the denial was an abuse of the trial court's discretion, the Court of Appeal held: "Even though [Transco and Alpine] were on the eve of obtaining a default judgment, their rights have not been materially impaired by any delay attributable to Truck's filing of its application to intervene." (*Truck, supra*, 60 Cal.App.4th at pp.350-351.) "[I]t is not clear how [Truck's] delay [in moving to intervene] has unjustly impaired their ability to proceed." (*Id.* at p.351.) Permitting Truck to intervene simply will "put[] Transco and Alpine to their proof [and] bar them from unilaterally obtaining a judicial determination that their policies are rescinded." (*Id.* at p.349.) "The intervention certainly will not foreclose the possibility that they will prevail but will force them to prove their case." (*Ibid.*) "[T]imeliness is hardly a reason to bar intervention when . . . [Transco and Alpine] have not shown any prejudice other than being required to prove their case."(*Id.* at p.351.)

Similarly, here, the Environmental Groups' rights have not been materially impaired by any delay in the filing of the intervention application. The City had an absolute right to appeal, and its failure to do so is no different than RCS's failure to appear in *Truck*. Permitting No Kill Advocacy Center and Stray Cat Alliance to intervene and appeal in the City's stead simply will prevent the Environmental Groups from avoiding appellate review of the trial court's decision. Timeliness is not a reason to bar intervention when the Environmental Groups have shown no prejudice

other than being required to defend their CEQA claim before an appellate court. (See *Truck, supra*, 60 Cal.App.4th at p.351; see also pp. 38-39, *post* [discussing how the City's failure to appeal demonstrates, not just the lack of prejudice from the timing of intervention, but, affirmatively, that intervention is proper].)

3. A Continuing Injunction Can Be Challenged At Any Time.

The intervention application was timely for the additional reason that an injunction like the one at issue here, being of a continuing nature, is subject to dissolution or modification upon a proper showing *at any time*. (*United States v. Swift & Co.* (1932) 286 U.S. 106, 114 [holding that a "continuing decree of injunction directed to events to come is subject always to adaptation as events may shape the need"]; *Union Interchange, Inc. v. Savage* (1959) 52 Cal.2d 601, 604-605 [same].) Indeed, the trial court specifically retained jurisdiction to "enabl[e] any party...to apply to the court at any time" for modification of or relief from the injunction. (AA396.)

In *Sontag Chain Stores Co. v. Superior Court* (1941) 18 Cal.2d 92, labor unions that had been enjoined from picketing at the petitioner's place of business moved to vacate the injunction several months after it had become final, on the ground that the trial court had incorrectly applied the law to the facts before it in issuing the injunction. (*Id.* at pp.93-94.) The petitioner asserted that because the decree of injunction was a final judgment, the trial court lacked jurisdiction to vacate or modify it for a mere error of law. (*Ibid.*) The Supreme Court disagreed, explaining:

> The decree, although purporting on its face to be permanent, is in essence of an executory or continuing nature. . . . Such a decree, it has uniformly been held, is always subject, upon a proper showing, to dissolution or modification by the court which rendered it. Its action is

> determined . . . with a view to administering justice between the litigants, and it has the power to modify or vacate its decree when the ends of justice will be thereby served.

(*Id.* at pp.94-95; accord *New Tech Developments v. Bank of Nova Scotia* (1987) 191 Cal.App.3d 1065, 1071-1073 [recognizing that "the usual remedies against a void or erroneous injunctive order are moving to dissolve or modify the injunction or to appeal it," and a trial court can and should dissolve an injunction that was initially issued contrary to law, because "[t]he ends of justice are not served if the aggrieved parties cannot obtain relief from an improperly issued [] injunction"].)

Like the labor unions in *Sontag*, the City here could have moved to vacate or modify the injunction at any time, even *after* February 17, 2010, when No Kill Advocacy Center and Stray Cat Alliance moved to intervene. Since the City could have moved for dissolution or modification of the injunction even *after* February 17, then, as a matter of law, it could not have been untimely for No Kill Advocacy Center and Stray Cat Alliance to seek to intervene *on* February 17, for the purpose of making that same motion.

In fact, as nonparties detrimentally affected by the injunction (see pp. 36-39, *post*), No Kill Advocacy Center and Stray Cat Alliance *themselves* had the right to move to vacate or modify the injunction at any time and then appeal if the trial court denied their motion (See *People ex rel. Reisig v. Broderick Boys* (2007) 149 Cal.App.4th 1506, 1516-1518 [nonparties aggrieved by injunction may achieve party status by moving to vacate injunction, thereby attaining standing to seek review of injunction through an appeal from denial of motion to vacate]; see also pp. 46-48, *post*). By their intervention application, they sought to do just that, so the application was unquestionably timely. (See *Mary R., supra*, 149 Cal.App.3d at pp.317-318 [holding trial court erroneously denied as

untimely a third party's request to modify sealing order entered in a previously settled action, because "a sealing or confidentiality order in a civil case is always subject to continuing review and modification, if not termination"].)

C. The Trial Court's Denial Of Intervention Cannot Be Sustained On Any Alternative Basis Because, On The Undisputed Facts, All The Remaining Statutory Conditions For Intervention Were Satisfied.

Although an appellate court will affirm a trial court order on any basis supported by the record, even if the trial court based its decision on a different, and incorrect, legal ground (*Blumhorst v. Jewish Family Services* of Los Angeles (2005) 126 Cal.App.4th 993, 999), here, there is no alternative basis for affirming the trial court's denial of intervention. On the undisputed facts, the intervention application was not just timely, but also satisfied all the remaining statutory conditions for intervention. (See p. 24, *ante* [listing conditions].)

1. No Kill Advocacy Center And Stray Cat Alliance Have A Direct and Immediate Interest In The Action, Which The Environmental Groups Did Not Even Attempt To Dispute.

Section 387(a) by its terms only permits intervention by "any person[] who has an interest in the matter in litigation, or in the success of either of the parties, or an interest against both." (Code Civ. Proc., § 387(a).) Not every interest in the outcome of litigation satisfies this requirement. (*Continental Vinyl Products Corp. v. Mead Corp.* (1972) 27 Cal.App.3d 543, 549.) A proposed intervenor's interest "must be direct and immediate rather than consequential." (*Rominger, supra*, 147 Cal.App.3d at p.660.)

An interest is direct and immediate if the proposed intervenor "'will either gain or lose by the direct legal operation and effect of the

judgment.'" (*Gerlach, supra*, 56 Cal.App.3d at p.303, quoting *Jersey Maid Milk Products Co. v. Brock* (1939) 13 Cal.2d 661, 663.) However, "in order that a party be permitted to intervene it is not necessary that his interest in the action be such that he will *inevitably* be affected by the judgment. It is enough that there be a substantial *probability* that his interests will be so affected." (*Timberidge Enterprises, supra*, 86 Cal.App.3d at p.881, original emphasis.) Furthermore, "the intervener need not claim a pecuniary interest nor a specific legal or equitable interest in the subject matter of the litigation." (*Simpson Redwood, supra*, 196 Cal.App.3d at p.1200.)

No Kill Advocacy Center and Stray Cat Alliance have the requisite direct and immediate interest here. Indeed, in their opposition to the intervention application, the Environmental Groups made no attempt to dispute this. (AA43-434.) Nor could they have done so.

As discussed above (at pp. 17-19), No Kill Advocacy Center and Stray Cat Alliance are private, nonprofit animal protection groups dedicated to reducing the City shelters' high rate of killing of feral cats, and of tame cats mistaken for ferals, through the humane alternative of TNR. (AA410-412.) They regularly engage in TNR throughout the City and encourage and teach others to do the same. (AA410-411.) The injunction directly compromises their ability to conduct their activities and achieve their objective by prohibiting the City from releasing impounded feral cats to TNR groups, referring individuals inquiring about how to deal with feral cats to TNR groups, or even informing or educating the public about TNR as an alternative to impoundment and inevitable "euthanasia" of feral cats (AA412.) In so impeding private TNR efforts, the injunction increases the number of feral cats that are impounded in the City's shelters and results in the needless deaths of those cats, thereby thwarting No Kill Advocacy and

Stray Cat Alliance from accomplishing their mission to reduce shelter killing of feral cats. (AA412-413.)

Thus, No Kill Advocacy Center and Stray Cat Alliance stand to lose from the direct legal operation and effect of the injunction. (See *Gerlach, supra*, 56 Cal.App.3d at p.303.) At the very least, there is a substantial probability that their interests are being and will continue to be negatively affected by the injunction for as long as it remains in force. (See *Timberidge Enterprises, supra*, 86 Cal.App.3d at p.881.) Given the injunction's impact on them, No Kill Advocacy Center and Stray Cat Alliance have a direct and immediate interest in proving that, contrary to the Environmental Groups' contention and the trial court's decision, the injunction is unjustified and illegal. (See *Simpson Redwood, supra*, 196 Cal.App.2d at pp.1200-1202 [in quiet title action between a lumber company and the State over State park property, environmental group, which was formed and exited for the purpose of conserving the property in its natural state, should have been permitted to intervene based on its "cognizable interest in perpetuating its role and furthering its avowed policies"].)

Even if No Kill Advocacy Center and Stray Cat Alliance's interest in the litigation were not adequate by itself to justify their intervention (which it is), what might otherwise be an insufficient interest may become a direct and immediate interest where an existing party refuses or fails to prosecute or defend the action "to the fullest extent possible." (*Continental Vinyl, supra,* 27 Cal.App.3d at pp.551-552; accord *Gerlach, supra*, 56 Cal.App.3d at p.304; see also *Kobernick v. Shaw* (1977) 70 Cal.App.3d 914, 918-920.) Here, the City has declined to appeal from the issuance of the injunction, is complying with the terms of the injunction, and from all appearances has no intention of moving the trial court to vacate or modify the injunction. (Motion for Calendar Preference, Winograd Decl., pp.5-6.) Under these

circumstances, No Kill Advocacy Center and Stray Cat Alliance indisputably have a direct and immediate interest in intervening to challenge the injunction in the City's place.

2. Intervention Will Not Enlarge The Issues In The Action.

The next requirement for intervention under section 387(a) is a showing that the intervention will not enlarge the issues in the underlying action by introducing new "claims or contentions which have their proper forum elsewhere." (*Le Pleux v. Applegate* (1958) 164 Cal.App.2d 9, 11; see also *Continental Vinyl, supra,* 27 Cal.App.3d at p.552 ["The interest [of the proposed intervenor] must be one 'which is proper to be determined in the action in which the intervention is sought'"].) A third party cannot, through intervention, interject collateral matters into the case, thus prolonging, confusing or disrupting the existing lawsuit or changing the positions of the original parties. (*Ibid.*; *Simpson Redwood, supra*, 196 Cal.App.3d at pp.1202-1203; *Rominger, supra,* 147 Cal.App.3d at p.661 ["intervenors may not enlarge the issues so as to litigate matters not raised by the original parties"].)

By their intervention, No Kill Advocacy Center and Stray Cat Alliance do not seek to introduce any collateral matters into this case or to litigate any matters not already in issue. The Environmental Groups' petition alleges that the City violated CEQA by purportedly implementing a City TNR program without first conducting an environmental review. (AA14.) Through their petition, the Environmental Groups sought the injunction that the trial court ultimately issued, with its attendant restrictions on the City. (*Ibid.*) The City opposed the Environmental Groups' claim and argued that the requested injunction was improper. (E.g., AA309-327.) No Kill Advocacy Center and Stray Cat Alliance

simply seek to intervene on the City's side, to likewise oppose the Environmental Groups' CEQA claim and the propriety of the injunction. Their intervention will not "impermissibly broaden the scope of the litigation." (*Rominger, supra*, 147 Cal.App.3d at p.664.) The issues in the case will remain exactly the same—whether the City violated CEQA and whether the injunction is proper. (See *Timberidge Enterprises, supra*, 86 Cal.App.3d at p.882 [finding no enlargement of issues where, after intervention, "[t]he issues drawn by the complaint, and the [defendant] City's answer thereto, remained the same"]; *Lindelli, supra*, 139 Cal.App.4th at p.1512 [finding no enlargement of issues by attorneys' intervention for the purpose of obtaining their attorney fees because "Petitioners sought attorney fees in their petition and the propriety of intervention should be measured by the petition"].)[10]

The Environmental Groups argued below that intervention will enlarge the issues because, by allegedly "devot[ing] much breath to espousing the alleged virtues of TNR" in their intervention application, No Kill Advocacy Center and Stray Cat Alliance "demonstrate[d] their

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[10] See also *Simpson Redwood, supra*, 196 Cal.App.3d at pp.1202-1203 [finding no enlargement of issues, even where proposed intervenor intended to introduce new causes of action, because resolution of the new claims would center on the same facts involved in the existing claims between the original parties]; *Belt Casualty Co. v. Furman* (1933) 218 Cal. 359, 362-363 [finding no enlargement of issues, even though the action was in equity and the proposed intervenors intended to seek a money judgment through distinct contract claims, where intervenors would immediately become entitled to recovery "in the event the contentions with which they are aligned in the main action are sustained"]; cf. *Siena Court, supra,* 164 Cal.App.4th at p.1429 [finding intervention would enlarge issues in construction defect action based on construction contract between plaintiff and defendant, where proposed intervenor intended to seek portion of any recovery by plaintiff based on its separate agreement with plaintiff concerning joint use and management of property, thus necessarily raising new contractual issues].

intention to use this case as a platform to promote TNR," and "to try to justify the City's [alleged] failure to comply with CEQA" and "the lifting of the injunction based on [TNR's] asserted virtues." (AA433.) This argument is simply false.

A virtually identical argument was made and rejected in *Rominger, supra*, 147 Cal.App.3d 655, where the Sierra Club sought to intervene in an action brought by the State of California against the County of Trinity. (*Id.* at pp.658, 664-665.) The State's complaint sought declaratory and injunctive relief, alleging that a County ordinance controlling the use of phenoxy herbicides and pesticides was preempted by State law. (*Id.* at p.659.) The County answered the complaint, asserting that the ordinance was valid. (*Ibid.*) The Sierra Club sought "to unite with the defendant County in resisting the claims of the State," alleging that it had members who stood to be harmed because they used forest lands within the County that would be sprayed with phenoxy herbicides and pesticides if the ban imposed by the County ordinance were lifted. (*Id.* at pp.660-661.) The State opposed the Sierra Club's intervention, arguing that "the question of the environmental effects of pesticide use would impermissibly broaden the scope of the litigation." (*Id.*, at p.664.)

The Court of Appeal rejected the State's contention and reversed the trial court's denial of intervention, holding: "The Sierra Club does not make assertions as to the adverse effects of pesticides for the purpose of introducing new issues for litigation, but only for the purpose of establishing its interest in the litigation. In its complaint in intervention, the Sierra Club raises no new legal or factual issues to be decided by the trial court. The only issue before the trial court is the validity of the County pesticide ordinances in the face of State pesticide regulations. The relative

merits of the ordinances and regulations have no bearing on that issue." (*Rominger, supra*, 147 Cal.App.3d at pp.664-665.)

Similarly, here, No Kill Advocacy Center and Stray Cat Alliance made assertions about TNR and their TNR activities, not "to promote TNR" or to introduce any new issue pertaining to the "virtues" of TNR, but to demonstrate, as they were required to do, that they have a direct and immediate interest in this action and are being harmed by the injunction. (AA404-408.) Their allegations about TNR also are relevant to the question whether TNR has any potential to significantly harm the environment, a critical question in evaluating the Environmental Groups' claim that CEQA has been violated. (See p. 11, fn. 5, *ante*.) These allegations do not interject any new issue into the case.

The Environmental Groups further argued below that the City allegedly conceded that CEQA review is required before a City TNR program can be implemented. (AA433.) Therefore, the Environmental Groups asserted, No Kill Advocacy Center and Stray Cat Alliance's stated intention to demonstrate that the City's purported TNR program does not require CEQA review because it has no potential to significantly harm the environment necessarily will enlarge the issues. (*Ibid.*) There are at least two problems with this argument.

First, the very basis for the action the Environmental Groups brought is that, allegedly, the City violated CEQA by implementing a TNR program without conducting an environmental review. That the City may not have put the Environmental Groups fully to their proof does not mean that No Kill Advocacy Center and Stray Cat Alliance will expand the issues by showing that no environmental review was required by CEQA. The City's alleged (and wrong) concession about the necessity of environmental review simply shows why No Kill Advocacy Center and Stray Cat

Alliance's intervention is critical for a fair and correct adjudication of this case.

Second, regardless whether the City conceded (wrongly) that an environmental review is required before a City TNR program can be implemented, the City *never* conceded that an environmental review is required before the City could engage in the limited support for TNR that the City offered here and that the Environmental Groups have incorrectly characterized as a "program" subject to CEQA.[11] The City consistently maintained that it had *not* engaged in any activity that triggered the necessity for an environmental review. (AA24, 320-322.) It was the Environmental Groups, not the City, who mistakenly believed that the only issue remaining in the case after the City's supposed concession was whether the City, despite its denials, had *de facto* implemented a TNR program. (AA194.) The City specifically objected to the Environmental Groups' exclusive focus on this issue and their failure to present any argument or evidence concerning the City's alleged CEQA violation. (AA313, 325.)

All No Kill Advocacy and Stray Cat Alliance intend to do is support the City's position that its activities, whether construed as a "program" or not, are not the type of activities for which CEQA requires environmental review. This is the central issue raised by the Environmental Groups' petition. As such, intervention will not impermissibly enlarge the issues..

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[11] The City actually did not concede that a TNR program must be preceded by an environmental review. It only "conceded" that, once the parameters of a TNR program are identified, an analysis will need to be conducted to determine what, *if any*, environmental review is necessary. The City specifically stated that CEQA may be inapplicable and a CEQA exemption might apply. (See p. 15, *ante*.)

3. The Reasons For Intervention Outweigh The Environmental Groups' Opposition.

The final condition for intervention under section 387(a) is that the proposed intervenor's reasons for intervention must outweigh the opposition of the existing parties." (*Lindelli, supra*, 139 Cal.App.4th at p.1504.) When a proposed intervenor shares a "common cause with the defendant" and intervention will not cause "prejudice to the rights of either plaintiff or defendant," this condition is satisfied and intervention is proper. (*County of San Bernardino v. Harsh, supra,* 52 Cal.2d at p.346.)

No Kill Advocacy Center and Stray Cat Alliance share a common cause with the City; namely, to defeat the Environmental Groups' CEQA claim and preserve the City's ability to support the work of community groups and individuals to reduce the rate of killing in the City's animal shelters. No conceivable prejudice could accrue to the City if No Kill Advocacy Center and Stray Cat Alliance were permitted to intervene and obtain appellate review of the propriety of the injunction— action the City apparently has decided not to take for itself due to resource allocation issues. Not surprisingly, then, the City did not oppose the intervention application.

Although the Environmental Groups did oppose the application (AA430-434), they did not even attempt to argue that their reasons for opposing outweighed the substantial interest No Kill Advocacy Center and Stray Cat Alliance have in intervening. The Environmental Groups did not address No Kill Advocacy Center's and Stray Cat Alliance's interest in intervening at all. This, too, is not surprising, because the Environmental Groups cannot legitimately claim prejudice simply from having to defend the injunction and the merits of their CEQA claim in further proceedings, either in the trial court and/or on appeal, which the City rightfully could have initiated. (See *Lindelli, supra*, 139 Cal.App.4th at p.1512 [finding the

reasons for intervention outweighed any opposition where petitioners did not object to intervention and "respondents point[ed] to no prejudice from intervention, other than that they may be required to pay a fee award they otherwise would avoid, which is not the type of interest that can justify denying intervention"]; *Truck, supra*, 60 Cal.App.4th at pp.350-351 [finding fact that intervention would frustrate plaintiffs' attempt to obtain a default judgment does not justify denial of intervention].)

On the other side of the equation, denial of intervention in this case "subvert[s] the salutary purposes of section 387[a] . . . to obviate delays and prevent a multiplicity of suits arising from the same facts, while protecting the interests of those affected by the judgment." (*Simpson Redwood, supra*, 196 Cal.App.3d at p.1203.) If intervention is denied, No Kill Advocacy Center and Stray Cat Alliance will be forced to bring a separate action to invalidate the injunction based on the very same facts and legal issues involved here. (See *Veterans' Industries, Inc. v. Lynch* (1970) 8 Cal.App.3d 902, 925 [recognizing mandate proceeding as alternative avenue of relief for party denied intervention]; *People ex rel Reisig v. Broderick Boys, supra*, 149 Cal.App.4th at p.1516 [recognizing nonparty aggrieved by injunction may attack the injunction through a declaratory relief action].) Requiring them to pursue the same remedy they seek here through an independent lawsuit would be both "dilatory and cumbersome," precisely the result section 387(a) is designed to avoid. (*Sontag, supra*, 18 Cal.2d at p.96.)

For all of these reasons, the trial court's denial of intervention was an abuse of discretion. Contrary to the trial court's conclusion, No Kill Advocacy Center and Stray Cat Alliance moved to intervene within a reasonable time and without unreasonable delay after learning of the litigation, and the timing of their application prejudiced no one, particularly because the continuing injunction is subject to attack at any time. The trial

court's decision cannot be sustained on any alternative basis because all the other conditions for intervention under section 387(a) have been satisfied as well: No Kill Advocacy Center and Stray Cat Alliance demonstrated that they have a direct and immediate interest in the litigation, their intervention will not enlarge the issues, and the reasons for their intervention outweigh the Environmental Groups' opposition. Since, on the uncontradicted facts, "'the discretion of the trial court could be legally exercised in only one way,'" this Court should reverse the order denying leave to intervene. (*Gerlach, supra*, 56 Cal.App.3d at p.305.)

II. THE COURT SHOULD TREAT THIS APPEAL AS AN APPEAL FROM A DENIAL OF A MOTION TO VACATE AND ALLOW THE PARTIES TO BRIEF THE MERITS.

As mentioned above (at pp. 35-36), nonparties aggrieved by an injunction—or, for that matter, by any judgment or other decree—may intervene to attack the injunction, judgment or decree *either* by filing a statutory motion to intervene under section 387(a), *or* by filing a motion to vacate the injunction, judgment or decree. (*County of Alameda v. Carleson* (1971) 5 Cal.3d 730, 736-737; *In re Paul W.* (2007) 151 Cal.App.4th 37, 55-58; *Plaza Hollister Limited Partnership v. County of San Benito* (1999) 72 Cal.App.4th 1, 16; *People ex rel Reisig v. Broderick Boys, supra*, 149 Cal.App.4th at pp.1516-1518.)

Code of Civil Procedure section 663 provides that "[a] judgment or decree . . . may, upon motion of the party aggrieved, be set aside and vacated by the same court, and another and different judgment entered," if there was an "[i]ncorrect or erroneous legal basis for the decision, not consistent with or not supported by the facts." (Code Cov. Proc., § 663.) "A motion to vacate under section 663 is a remedy to be used when a trial court draws incorrect conclusions of law or renders an erroneous judgment

on the basis of uncontroverted evidence." (*Simac Design, Inc. v. Al Aciati* (1979) 92 Cal.App.3d 146, 153.)

Under section 663, a "party aggrieved" includes a stranger to the action who is injuriously affected by the judgment or decree. (*Aries Development Co. v. California Coastal Zone Conservation Comm.* (1975) 48 Cal.App.3d 534, 541; *Plaza Hollister, supra,* 72 Cal.App.4th at p.15.) By filing a motion to vacate under section 663, the aggrieved stranger becomes a party of record in the action, and if the motion to vacate is denied, he may have the validity of the judgment or decree reviewed by appealing from the order denying the motion. (*County of Alameda v. Carleson, supra,* 5 Cal.3d at p.736; *Aries Development, supra,* 48 Cal.App.3d at p. 541; *Ryerson, supra*, 266 Cal.App.3d at p.795.)

An appellate court has discretion to construe an appeal from an order denying leave to intervene under section 387(a) as an appeal from an order denying a motion to vacate under section 663—even if the motion to intervene does not expressly invoke section 663—when it is clear from the motion to intervene and the proposed complaint in intervention that intervention is premised on the legal invalidity of the judgment or decree, and no disputed factual issues need to be resolved. (*Ryerson, supra*, 266 Cal.App.3d at p.795.)

This allows the appellate court to review the validity of the judgment or decree and avoid the delay entailed in requiring the proposed intervenor to make another motion in the trial court expressly under section 663, likely to be followed by another appeal from the denial of that motion. (See *Mary R., supra*, 149 Cal.App.3d at pp.314-318 [deciding merits of issue raised by proposed intervenor—whether trial court's sealing and confidentiality orders were proper—on appeal from denial of intervention]; *Lindelli, supra*, 139 Cal.App.4th at p.1518 [deciding merits of law firm's claim of

entitlement to attorney fees in appeal from denial of law firm's motion to intervene].)

This Court should exercise its discretion here to construe this appeal from the denial of intervention as an appeal from the denial of a motion to vacate the trial court's injunction; allow the parties to brief the merits of the issue whether the trial court committed legal error in issuing the injunction (restrictions on brief length preclude inclusion of the merits arguments in this brief); and decide whether the injunction is invalid.

The intervention application and proposed complaint in intervention are clear that No Kill Advocacy Center and Stray Cat Alliance seek to intervene because the trial court incorrectly determined that CEQA justifies the injunction; the injunction is unlawful because it violates free speech and conflicts with state law requiring the release of impounded feral cats to rescue groups; and the injunction is causing unjustified harm to No Kill Advocacy Center and Stray Cat Alliance's efforts to employ and promote TNR as a means of reducing the number of feral cats killed in the City's shelters. (AA398-423.) All of these issues can be decided as a matter of law based on undisputed facts discernible from the documentary evidence. Remanding the case to the trial court so that No Kill Advocacy Center and Stray Cat Alliance can file a motion to vacate the injunction will only cause further unnecessary delay, particularly because the hostility the trial court showed to the City's position suggests another appeal is almost certain to follow. The interests of justice and judicial economy would be served if the question of the validity of the injunction were resolved finally and expeditiously by this Court. So would the interests of cats who are needlessly and illegally being killed in the City's shelters every day that the injunction remains in force—cats whose lives could have been saved but for the injunction's restrictions.

CONCLUSION

For the foregoing reasons, No Kill Advocacy Center and Stray Cat Alliance respectfully request that this Court reverse the order denying them leave to intervene, permit the parties to submit briefs on the merits of the validity of the injunction, determine that the injunction is invalid, and vacate the judgment and injunction.

Dated: June 4, 2010

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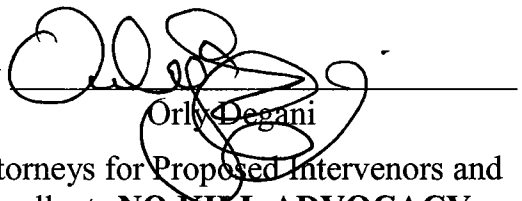
By 
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CERTIFICATE OF COMPLIANCE

[Cal. Rules of Court, Rule 8.204(c)]

This brief consists of 13,614 words as counted by the Microsoft Word version 2002 word processing program used to generate the brief.

Dated: June 4, 2010

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By _____
Orly Degani

Attorneys for Proposed Intervenors and Appellants **NO KILL ADVOCACY CENTER and STRAY CAT ALLIANCE**

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 2029 Century Park East, Suite 2400, Los Angeles, California 90067. On June 4, 2010, I served the foregoing document(s) described as: **APPELLANTS' OPENING BRIEF** on the interested party(ies) below, using the following means:

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Attorneys for Defendants/Respondents City of Los Angeles, et al.

Clerk of the Court
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

McKnew, Hon. Thomas
Los Angeles Superior Court
12720 Norwalk Blvd., Dept. H
Norwalk, CA 90650

[Electronic service]

☒ **BY OVERNIGHT DELIVERY** I enclosed the document(s) in an envelope or package provided by an overnight delivery carrier and addressed to the respective address(es) of the party(ies) stated above. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

☒ **(STATE)** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on June 4, 2010, at Los Angeles, California.

Yvonne Shawver
[Print Name of Person Executing Proof]

[Signature]