IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

DIVISION 2

TARGET CORPORATION et al. Appellants. v. CITIZENS COALITION LOS ANGELES et al., Respondents.	Court of Appeal No. B283480 Superior Court Nos. BS162678 BS140889 BS140930

Appeal from a Judgment of the Superior Court, County of Los Angeles
Honorable Richard C. Fruin

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND [PROPOSED] BRIEF OF LEAGUE OF CALIFORNIA CITIES IN SUPPORT OF THE CITY OF LOS ANGELES

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IN THE SECOND APPELLATE DISTRICT, DIVISION 2, OF THE STATE OF CALIFORNIA

Case No. B283480

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

This is the initial certificate of interested entities or persons submitted on behalf of Amicus Curiae League of California Cities in the case number listed above.

The undersigned certifies that there are no interested entities or persons that must be listed in this certificate under California Rules of Court, rule 8.208.

Dated: May 18, 2018

BEST BEST & KRIEGER LLP

By: Michelle Ouellette

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APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF THE CITY OF LOS ANGELES

Pursuant to Rule 8.200 subdivision (c)(1) of the California Rules of Court, the League of California Cities ("League") respectfully applies for permission to file an Amicus Curiae Brief in support of Respondent and Appellant, the City of Los Angeles.

The League is an association of 474 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State. This Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

The League has a direct interest in ensuring the proper application of the Supreme Court's decision in *Friends of the College of San Mateo Gardens v. San Mateo County Community College Dist.* (2016) 1 Cal.5th 937, which held that a lead agency's determination as to whether to prepare a subsequent or supplemental environmental impact report ("EIR") must be reviewed under the highly deferential substantial evidence standard. Here, the City found that substantial evidence

supported its determination, under Public Resources Code section 21166 and CEQA Guidelines[1] section 15162, that no supplemental or subsequent EIR was required for rezoning of a parcel because (1) the impacts from the project authorized by the rezoning had not changed from those analyzed in the originally certified EIR for the project, and (2) none of the circumstances requiring subsequent environmental review had occurred. But, contrary to *San Mateo*, the Trial Court, while acknowledging that the project had not changed from what was analyzed in the original certified EIR, ignored the City's substantial evidence-based determinations, ruling that based on its calculation of the evidence, it believed it was "reasonably foreseeable" that future applicants would seek the same rezoning, and thus brand-new CEQA review was required.

Any decision by this Court that could lead to the loss of the substantial evidence standard for rezoning decisions based on previously certified EIRs, and the imposition of the speculative and burdensome task of determining the reasonably foreseeable impacts of projects on sites that are not within the scope of the rezoning, will have a significant direct and indirect impact on all of the League's member cities. The perspective of the League on this important, statewide issue will assist the Court in deciding

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[1] California Code of Regulations, Title 14, Chapter 3.

the appeal.

Further, the League has a direct interest in ensuring that Courts uphold the well-established rule that zoning ordinances, when reasonable in purpose and not arbitrary in operation, constitute a legitimate exercise of the police power. Given this, the rezoning at issue here was not improper "spot-zoning," as it is not unreasonable or arbitrary, but rather, as found by the City, provides a significant public benefit. Any decision that the rezoning was improper will have a direct and significantly impact on all of the League's member cities, as it would, arguably, preclude cities from exercising their police powers to benefit the public through zoning. The perspective of the League on this important, statewide issue will assist the Court in deciding the appeal.

Counsel for the League has examined the briefs on file in this case, are familiar with the issues and the scope of their presentation, and do not seek to duplicate those briefs. Per California Rules of Court, rule 8.200, subdivision (c)(3), no counsel for any party has authored the Proposed Amicus Brief in whole or in part, and no such counsel, party, or other entity made a monetary contribution intended to fund the preparation or submission of this Brief.

For these reasons, the League respectfully requests leave to file the Amicus Curiae Brief contained herein.

Dated: May18, 2018

BEST BEST & KRIEGER LLP

By: 

MICHELLE OUELLETTE
SARAH E. OWSOWITZ
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I.

INTRODUCTION

Amicus Curiae League of California Cities ("League") files this amicus brief in support of Appellant and Respondent, the City of Los Angeles ("City"). In chief, this brief addresses the Trial Court's failure to follow the directives of *Friends of the College of San Mateo Gardens v. San Mateo County Community College Dist.* (2016) 1 Cal.5th 937, 944, a Supreme Court decision that required the Trial Court to apply the deferential substantial evidence standard of review when evaluating the City's determination to proceed via an addendum under the California Environmental Quality Act ("CEQA") for the rezoning of a parcel for a large-scale retail store that has already been the subject of a certified EIR. As the League's member cities all regularly serve as lead agencies pursuant to CEQA and all adopt zoning ordinances, any decision by this Court that, arguably, leads to the loss of the substantial evidence standard for rezoning decisions based on previously certified EIRs will directly and significantly impact all of the League's member cities.

This brief also addresses petitioners' claim, not reached by the Trial Court, that the City's approval of the rezoning constituted impermissible "spot zoning," a claim that is inconsistent with the well-established rule that zoning

ordinances, with a reasonable purpose and not arbitrary in operation, constitute a legitimate exercise of the police power. As the League's member cities all adopt zoning ordinances, any decision by this Court that, arguably, precludes cities from exercising their police power by adopting targeted zoning for the public benefit, will directly and significantly impact all of the League's member cities.

For these reasons, as more fully explained below, the League respectfully requests that this Court reverse the Trial Court's decision by (1) affirming the Supreme Court's directive that judicial review of a city's rezoning of a parcel that was previously the subject of a certified EIR must be conducted under the substantial evidence standard, and (2) ruling that benefiting the public through targeted zoning is a permissible exercise of a city's police power.

II.

FACTUAL AND PROCEDURAL BACKGROUND

The League hereby adopts, and does not repeat, the Statement of Facts contained at pages 12 through 16 of the City's Opening Brief.

III.

LEGAL DISCUSSION

A. The Supreme Court Mandates That A Lead Agency's Determination Regarding Subsequent Environmental Review Must Be Upheld If It Is Supported By Substantial Evidence.

In *Friends of the College of San Mateo Gardens v. San Mateo County Community College Dist.* (2016) 1 Cal.5th 937, 944 (*San Mateo*), the Supreme Court considered what level of subsequent environmental review a lead agency must perform prior to approving a change to a project that was the subject of a previously certified EIR. The choice was between reviewing the agency's decision under the substantial evidence standard of review or making a threshold determination as to whether, as a matter of law, the modification of the project constitutes a new project. The Supreme Court ruled, unequivocally, that judicial review of a lead agency's decision regarding subsequent environmental review must be conducted under the deferential substantial evidence standard. (*Id.* at p. 952.)

1. A lead agency may not require preparation of a subsequent or supplemental EIR unless one of the conditions in Public Resources Code section 21166 and CEQA Guidelines section 15162 exists.

In conducting its review, the *San Mateo* Court began by affirming that a lead agency **may not** require preparation of a subsequent or supplemental EIR unless one of the conditions in

Public Resources Code section 21166 and 14 Cal. Code of Regulations ("CEQA Guidelines") section 15162 exists. "Once a project has been subject to environmental review and received approval, [Public Resources Code] section 21166 and CEQA Guidelines section 15162 limit the circumstances under which a subsequent or supplemental EIR must be prepared. These limitations are designed to balance CEQA's central purpose of promoting consideration of the environmental consequences of public decisions with interests in finality and efficiency." (*San Mateo, supra*, 1 Cal.5th at p. 949, citing *Bowman v. City of Petaluma* (1986) 185 Cal.App.3d 1065, 1074.)

Specifically, when changes are proposed to a previously approved project that was originally reviewed under an EIR, section 21166 provides that "no subsequent or supplemental [EIR] shall be required" unless at least one or more of the following occurs: (1) "[s]ubstantial changes are proposed in the project which will require major revisions of the [EIR] report," (2) there are "[s]ubstantial changes" to the project's circumstances that will require major revisions to the [EIR], or (3) new information becomes available. (Pub. Resources Code, § 21166; see also CEQA Guidelines, § 15162.) The CEQA Guidelines further provide that an agency "**shall**" prepare an addendum to a previously certified EIR "if some changes or additions are necessary but none of the conditions described in Section 15162

calling for preparation of a subsequent EIR have occurred." (CEQA Guidelines, § 15164, subd. (a).)

2. Under *San Mateo*, courts must conduct a two-step review process to determine whether substantial evidence supports a lead agency's decision regarding subsequent environmental review.

The *San Mateo* Court overturned the holding in *Save Our Neighborhood v. Lishman* (2006) 140 Cal.App.4th 1288, 1297 that concluded that a court reviewing a change to a project must first satisfy itself, applying its independent judgment, that the project remains the same project as before, rather than an entirely new project, before proceeding to evaluate whether the change calls for a subsequent or supplemental EIR, an analysis that is sometimes referred to as the "new project test." (*San Mateo, supra,* 1 Cal.5th at pp. 950, 951.) The Supreme Court expressly rejected this "new project test," holding, instead, that courts must apply a two-step process when determining whether substantial evidence supports a lead agency's decision regarding subsequent environmental review. (*Id.* at p. 952.) In describing the first step, the Supreme Court observed that an

> agency's [] obligations 'turn[] on the value of the new information to the still pending decisionmaking process.' [Citation omitted.] **If the original environmental document retains some informational value despite the proposed changes, then the agency**

> **proceeds to decide under CEQA's subsequent review provisions whether project changes will require major revisions to the original environmental document** because of the involvement of new, previously unconsidered significant environmental effects.

(*Ibid.*, citation omitted, emphasis added.)

Whether changes to a project require major revisions to the original EIR "is a predominantly factual question. It is thus a question for the agency to answer in the first instance, drawing on its particular expertise. [Citation omitted]." (*San Mateo, supra*, 1 Cal.5th at p. 953.) Given the lead agency's need to conduct a factual inquiry, the Supreme Court held that the first step in judicial review is "**to decide whether the agency's determination is supported by substantial evidence; the court's job 'is not to weigh conflicting evidence and determine who has the better argument.'**" (*Ibid,* emphasis added.)[2]

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[2] "Under that relatively deferential standard of review, the reviewing court's role in considering [] evidence differs from the agency's. Agencies must weigh the evidence and determine which way the scales tip, while courts conducting [traditional] substantial evidence ... review generally do not. Instead, reviewing courts, after resolving all evidentiary conflicts in the agency's favor and indulging in all legitimate and reasonable inferences to uphold the agency's finding, must affirm that

The Supreme Court cautioned that:

> **We expect occasions when a court finds no substantial evidence to support an agency's decision to proceed under CEQA's subsequent review provisions will be rare, and rightly so**; a court should tread with extraordinary care before reversing an agency's determination, whether implicit or explicit, that its initial environmental document retains some relevance to the decisionmaking process.

(*San Mateo, supra*, 1 Cal.5th at p. 953, citing *Moss v. County of Humboldt* (2008) 162 Cal.App.4th 1041, 1052, fn. 6, internal quotations omitted, emphasis added.)

Next, the Supreme Court detailed the second step, to determine:

> whether the agency has properly determined *how* to comply with its obligations under those provisions. In particular, where, [] the agency has determined that project changes will not require "major revisions" to its initial environmental document, such that no subsequent or supplemental EIR is required, **the reviewing court must**

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finding if there is any substantial evidence, contradicted or uncontradicted, to support it." (*Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1114, citing *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 576, internal quotations omitted, citations omitted.)

> **then proceed to ask whether substantial evidence supports that determination.**

(*San Mateo*, *supra*, 1 Cal.5th at p. 953, emphasis added.)

3. The Trial Court failed to apply the two-step, substantial evidence-based review process required by *San Mateo*.

Here, the Trial Court erred by following the "new project test" that was rejected in *San Mateo*. We know this because the Trial Court's ruling draws from, and **even quotes**, the rejected reasoning of *Save Our Neighborhood*. In *San Mateo*, the Supreme Court observed that:

> Drawing on the reasoning of *Save Our Neighborhood*, plaintiff argues that implicit in the statutory and regulatory scheme is a threshold inquiry that determines whether the subsequent review provisions properly apply in the first place. Because section 21166 and CEQA Guidelines section 15162 both refer to substantial changes to "a project"—and not, as the *Save Our Neighborhood* court observed, changes to "a new project proposed for a site where a similar project was previously approved"—a court reviewing an agency's proposed approval of project changes must first satisfy itself that the project remains the same project as before, rather than an entirely new project, before proceeding to evaluate whether the changes call for a subsequent or

> supplemental EIR under CEQA's subsequent review provisions. [] Plaintiff further argues that whether an agency's proposal qualifies as a new project is a question of law for courts to decide based on their independent judgment. The premise of plaintiff's argument is sound, but its conclusions are not.

(*San Mateo*, *supra*, 1 Cal.5th, at p. 950, citing *Save Our Neighborhood*, *supra*, 140 Cal.App.4th at p. 1297.) The Record confirms that the Trial Court's description of *San Mateo* is actually a quote from the rejected reasoning in *Save Our Neighborhood*: "The Court said: '[A]n agency's proposed approval of project changes must first satisfy itself that the project remains the same as before...'" (Appellants' Appendix ("AA"), 654.)

Following the rejected reasoning of *Save Our Neighborhood*, the Trial Court conducted its own *de novo* review as to whether the proposed rezoning of the project parcel constituted a new project requiring new CEQA review, making its own assessment of whether it considered the rezoning to be a new project, rather than – as mandated by *San Mateo* – deferring to the substantial evidence in the record that supported the City's findings. (AA, 654-655.) But, as *San Mateo* states, the Trial Court's job was "**not** to weigh conflicting evidence and determine who has the better argument.'" (*San Mateo*, *supra*, 1 Cal.5th at p. 953, emphasis added.) The Trial Court therefore erred in

failing to apply the standard of review mandated by *San Mateo*.

The Trial Court compounded its error by declaring that it believed Petitioners' claim that the rezoning would cause reasonably foreseeable indirect environmental impacts resulting from other sites potentially being similarly rezoned. But again, under *San Mateo*, courts must apply the deferential substantial evidence standard of review when reviewing an agency's determination, meaning that the Trial Court was not permitted to weigh conflicting evidence and determine, based on its independent judgment, who had the better argument. Here, the City approved the rezoning in order to complete a project that was the subject of a previously certified EIR. Because the rezoning changed **only** the vehicle for approving the project (from a set of variances to a zoning ordinance), and because the physical project analyzed in the original EIR remained **exactly** the same, the City found that it was not permitted to require preparation of a subsequent or supplemental EIR under Public Resources Code section 21166 and CEQA Guidelines section 15162. This is substantial evidence in support of the City's determination to which, under *San Mateo*, the Trial Court should have deferred.

Further, any holding that the City was required to conduct CEQA review as to the speculative impact of other sites potentially being similarly rezoned at some unknowable point in

the future would not only violate CEQA but could also significantly impact cities across the State. CEQA does not require speculation. When the agency finds that an assessment of a project's indirect effects would be speculative because it would require an analysis of hypothetical conditions, it is not obligated to evaluate the effect. (*Anderson First Coalition v. City of Anderson* (2005) 130 Cal.App.4th 1173, 1186 [city not required to analyze the impacts of urban decay after determining that such impacts were speculative].) Indeed, an EIR need not evaluate the possibility that a project might be expanded when there is no evidence in the record that the expansion and the impacts that might result are reasonably foreseeable. (*Save Round Valley Alliance v. County of Inyo* (2007) 157 Cal.App.4th 1437, 1451.)

Such a holding would also leave cities uncertain as to whether they can adopt new zoning without also assuming that the proposed zone for a given area could someday potentially apply all across the city, leaving them to only guess the potential impacts of such future zoning! This absurd result could gravely impair all local planning in the State. It would also lead to extreme waste of public resources, as agencies would have to conduct meaningless environmental review on speculative scenarios.

Indeed, given that every property may, someday in the

future, be subject to any number of applications to change its zoning to any number of designations, there will be no way to inform the public and decision-makers regarding the potential future impacts of an infinite number of potential future zone changes. Trying to guess what the next future zoning change might be and analyze these speculative environmental impacts will not only lead to waste and a lack of reliable information for the public and decision-makers, it will also impede and impair cities regular zoning processes. The confusion and delay this would cause could potentially lead to the inability to timely meet such important statewide goals as adopting zoning to secure adequate housing for the states growing population.

B. Cities' Police Powers Authorize Them To Adopt Zoning Ordinances Based On A Finding That Such Zoning Is In The Public Interest.

The Trial Court did not decide the spot zoning issue. However, Petitioners have argued that the Trial Court's judgment should be affirmed on grounds that the rezoning of the project parcel constituted impermissible spot zoning. Such a holding would be in error.

The League's interest here is two-fold. First, the League has a direct interest in ensuring that courts uphold the well-established rule that zoning ordinances, when reasonable in purpose and not arbitrary in operation, constitute a legitimate exercise of the police power. The rezoning at issue here was not

unreasonable or arbitrary, but rather provided a significant public benefit by creating a flexible planning instrument that allowed the City to achieve long-range planning objectives through adaptation to changed circumstances. Any decision that the rezoning was improper will have a direct and significant impact on all of the League's member cities, as it would, arguably, preclude them from exercising their police powers to benefit the public through zoning.

Second, California courts have historically limited spot zoning to situations in which "a small parcel is restricted and given less rights that the surrounding property," and the court in *Foothill Communities Coalition v. County of Orange* (2014) 222 Cal.App.4th 1302, 1311-1314 held that "spot zoning" is merely a shorthand for a land use arrangement that may be permissible if the rezoning is in the public interest. Again, any decision that the rezoning was improper "spot-zoning" will have a direct and significant impact on all of the League's member cities, as it would, arguably, targeted zoning for the public's benefit.

IV.

CONCLUSION

For the forgoing reasons, the League respectfully requests this Court to reverse the Trial Court's decision on the basis that (1) substantial evidence supports the City's determination regarding subsequent CEQA review for the rezoning of the

project parcel, and (2) targeted zoning for the public benefit is within the City's police powers.

Dated: May 18, 2018

BEST BEST & KRIEGER LLP

By: _____

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CERTIFICATION OF COMPLIANCE

I certify that the text of this brief consists of 2,698 words as counted by the Microsoft Word word-processing program used to generate this brief.

Dated: May 18, 2018

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PROOF OF SERVICE

I am a citizen of the United States and employed in Riverside County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is Best Best & Krieger LLP, 3390 University Avenue, 5th Floor, Riverside, CA 92501.

On May 23, 2018, I served a copy of the within document(s): **APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND [PROPOSED] BRIEF OF LEAGUE OF CALIFORNIA CITIES IN SUPPORT OF THE CITY OF LOS ANGELES**

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VIA U.S. MAIL

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Executed on May 23, 2018, at Riverside, California.

MONICA CASTANON