Case No. A133109

IN THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT

SALMON PROTECTION AND WATERSHED NETWORK,

Petitioner and Respondent,

v.

COUNTY OF MARIN and SUPERVISORS OF MARIN COUNTY,

Respondents.

CHARLES CHALMERS, ROBERT "TAYLOR" HAMBLETT, KAREN MARIE HAMBLETT, JAMES J. BROWN, AMELIA N. BROWN, ANDREW GIACOMINI, NATALIE GIACOMINI, DONNA MCGUINN, ALLEN NEWMAN, DENNIS POGGIO, LARRY POOR, JASON MARDEN, TAMMY MARDEN, AND STEPHAN MALONEY FAMILY TRUST,

Intervenors and Appellants.

APPLICATION BY THE LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA STATE ASSOCIATION OF COUNTIES TO FILE AMICUS CURIAE BRIEF & AMICUS CURIAE BRIEF IN SUPPORT OF COUNTY OF MARIN AND SUPERVISORS OF MARIN COUNTY

Appeal fr m the Superior Court of the State of California, County of Marin
Case No. 1004866
Honorable Lynn Duryee, Department L, Presiding

CHRISTIAN L. MARSH, SBN 209442
ANDREW M. SKANCHY, SBN 240461
DOWNEY BRAND LLP
333 Bush Street, Suite 1400
San Francisco, California 94104
Telephone: (415) 848-4800
Facsimile: (415) 848-4831
Email: cmarsh@downeybrand.com
Email: askanchy@downeybrand.com

Attorneys for Amici Curiae,
LEAGUE OF CALIFORNIA CITIES and CALIFORNIA STATE ASSOCIATION OF COUNTIES

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CHRISTIAN L. MARSH, SBN 209442
ANDREW M. SKANCHY, SBN 240461
DOWNEY BRAND LLP
333 Bush Street, Suite 1400
San Francisco, California 94104
Telephone: (415) 848-4800
Facsimile: (415) 848-4831
Email: cmarsh@downeybrand.com
Email: askanchy@downeybrand.com

Attorneys for Amici Curiae,
LEAGUE OF CALIFORNIA CITIES and CALIFORNIA STATE ASSOCIATION OF COUNTIES

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APPLICATION TO FILE *AMICUS CURIAE* BRIEF

To the Honorable William R. McGuiness, Presiding Justice:

The California League of Cities ("League") and California State Association of Counties ("CSAC") request leave to file an *amicus curiae* brief in the appeal of this case in support of the County of Marin and Supervisors of Marin County (collectively, the "County").[1]

The League is an association of 469 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, which is comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that are of statewide or nationwide significance. The Committee has identified this case as being of such significance.

CSAC is a non-profit corporation. Its membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee,

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[1] By seeking leave to file this *amicus curiae* brief, neither the League nor CSAC proffer any opinion as to the merits of the underlying petition for writ of mandate by the Salmon Protection and Watershed Network ("SPAWN") against the County—only the ability of the two parties to mutually agree to explore settlement before commencing the action.

comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

As public entities that often serve as lead agencies responsible for California Environmental Quality Act ("CEQA") compliance, the League, CSAC, and their members have a direct interest in judicial interpretation of CEQA and whether tolling agreements may validly extend CEQA's statute of limitations. Additionally, because League and CSAC members frequently serve as CEQA lead agencies, the League and CSAC are uniquely situated to provide this Court with insight regarding the practical and policy implications of the CEQA issues in this case. Tolling agreements are commonly used by League and CSAC members to promote settlement and quick resolution of disputes when faced with potential CEQA challenges. The continued ability of League and CSAC members to rely on tolling agreements as a method to avoid litigation in CEQA cases is of special interest to them. Therefore, the League and CSAC respectfully request leave to file the following *amicus curiae* brief in the above-named action.

I. INTRODUCTION

In late 2007, the County and SPAWN entered into the first of a series of tolling agreements to prevent expiration of CEQA's statute of limitations while they worked in a cooperative manner to resolve a dispute

regarding the adequacy of the CEQA analysis prepared in connection with adoption of the County's General Plan Update. During the pendency of the tolling agreements, the County and SPAWN engaged in settlement negotiations and were able to narrow the disputed issues. Despite their best efforts, settlement proved elusive and SPAWN filed suit in late 2010.

Appellants[2] are now challenging the timeliness of SPAWN's suit, alleging that the tolling agreement was invalid under CEQA and contrary to public policy.[3] The League and CSAC disagree. California courts have long permitted parties to toll and thus waive statute of limitations defenses. The Legislature, when it enacted CEQA and its short limitations periods, expressed no intent to prohibit the use of tolling agreements. Indeed,

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[2] The Appellants are Charles Chalmers, Robert "Taylor" Hamblett, Karen Marie Hamblett, James J. Brown, Amelia N. Brown, Andrew Giacomini, Natalie Giacomini, Donna McGuinn, Allan Newman, Dennis Poggio, Larry Poor, Jason Marden, Tammy Marden, and the Stephen Maloney Family Trust.

[3] Appellants also assert that the tolling agreement violates the Planning and Zoning Law's 90-day statute of limitations, which applies generally to "the decision of a legislative body to adopt or amend a general or specific plan." (Gov. Code § 65009(c)(1)(A).) However, in the underlying suit, SPAWN has only challenged the adequacy of the County's *CEQA analysis* prepared *in connection with* the County's General Plan Update, (Brief of Respondent SPAWN, at 6), not the County's approval of the General Plan Update based on any Planning and Zoning Law claims. Thus, the only statute of limitations applicable to this litigation, and the one focused on in this *amicus curiae* brief, is CEQA's 30-day statute of limitations. (*See Committee For A Progressive Gilroy v. State Water Resources Control Bd.* (1987) 192 Cal.App.3d 847, 859 ("the CEQA statute of limitations applies when review is sought on CEQA grounds").)

tolling agreements promote the very policies embodied in CEQA that Appellants are now seeking to protect—efficient and timely resolution of CEQA disputes. CSAC and League member agencies across California have, for years, relied on tolling agreements to aid in prompt resolution of land use disputes. If this vital tool is removed, many tolling agreements now in effect will be invalid and project opponents will feel compelled to immediately protect their rights and enter time-consuming and costly litigation. Accordingly, the League and CSAC respectfully request that this Court sustain the Trial Court's determination that CEQA's statute of limitations may be tolled.

II. STATEMENT OF FACTS

The League and Association join in the statement of facts filed by the County and SPAWN.

III. ARGUMENT

A. California Law Permits Tolling Agreements In Civil Cases And The Legislature Did Not Repeal This Authority In Enacting CEQA

In 1951, the California Legislature enacted Section 360.5 of the Code of Civil Procedure, expressly permitting parties to enter into tolling agreements to waive a statute of limitations defense when "the waiver is in

writing and signed by the person obligated." (Code Civ. Proc. § 360.5.)[4] Long before the Legislature enacted Section 360.5, however, California's courts had upheld the practice of parties entering tolling agreements in order to secure for themselves the time necessary to attempt to negotiate settlements before the potential plaintiffs commenced civil actions in court. (*See State Loan etc. Co. v. Cochran* (1900) 130 Cal. 245, 252 ("it has always been recognized law that if, pending the running of the statue, the time of payment is extended by the creditor with the assent of the debtor, the statute does not run during the time of the suspension"); *Brownrigg v. DeFrees* (1925) 196 Cal. 534, 539-542 (upholding contract to toll the statute of limitations).) In one early Supreme Court case, *Dexter v. Pierson* (1931) 214 Cal. 247, even an agreement to permanently waive the statute of limitations as a defense was upheld. (*Id.*, at 250-251.)

Similarly, the principles of estoppel and waiver also support the permissibility of tolling agreements. For example, a party "may be estopped to rely on the statute [of limitations]; where the delay in

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[4] Intervenors argue that Section 360.5 only applies to the limitations provisions within Title 2 of the Code of Civil Procedure. Section 360.5, however, does not restrict the use of waiver or tolling for statutes of limitations found *outside* Title 2; rather, it simply mandates that tolling agreements for statutes of limitations found within Title 2 be in writing and not exceed four years. (*See Cadle Co. v. World Wide Hospitality Furniture, Inc.* (2006) 144 Cal.App.4th 504, 514 n.8 (applying section 360.5's tolling provisions to a statute of limitations not found in CCP Title 2).) Section 360.5 presupposes a party's general authority to enter tolling agreements and waive a statute of limitations.

commencing an action is induced by the conduct of the defendant ...." (*Santa Clara County v. Vargas* (1977) 71 Cal.App.3d 510, 524.)

California courts generally treat statutes of limitations as a matter of personal privilege and, therefore, subject to waiver. (*See Brownrigg v. DeFrees* (1925) 196 Cal. 534, 541 ("the privilege conferred by the statute of limitations is not a right protected under the rule of public policy, but is a mere personal right for the benefit of the individual which may be waived"); *Bell v. Traveler Indemnity Co.* (1963) 213 Cal.App.2d 541, 547 (statute of limitations defense is subject to waiver as "personal privilege" of defendant); *Clark v. City of Los Angeles* (1960) 187 Cal.App.2d 792, 801 (right to assert the statute of limitations defense "was a personal right" that may be waived).) The reason for treating the statute of limitations as an individual right is simple: a statute of limitations "is for the benefit and repose of individuals, and not to secure general objects of policy or morals. Its protection may, therefore, be waived in legal form, by those who are entitled to it." (*Atlas Finance Corp. v. Kenny* (1945) 68 Cal.App.2d 504, 515.) As a personal privilege and individual right, CEQA's statute of limitations falls directly under Civil Code section 3510's declaration that "[a]ny one may waive the advantage of a law intended solely for his benefit." (Civil Code § 3513.) Thus, while CEQA's requirements for analysis of environmental impacts is very much a public process, this fact does not change the long-standing judicial principle that a statute of

limitations, including CEQA's, is the personal privilege and individual right of the litigants, making it subject to waiver by the parties to the action.

Notably, not all legal privileges are subject to waiver. When the Legislature has desired to prevent the waiver of statutory rights, it has enacted language that clearly prevents such waivers. (*See e.g.*, Comm. Code § 9602 (debtor "may not waive" right to notice of collateral sale prior to default); Civil Code § 1738.8 (protections for artists who consign their work cannot be waived); Civil Code 1790.1 (any waiver of warranty provisions required "shall be unenforceable and void").)[5] Even section 360.5 has been amended by the Legislature to restrict tolling (i.e., a temporary waiver) under certain circumstances. (*See* 3 Witkin, Cal. Procedure (5th ed. 2008) Actions, § 468 ("The Statute was amended in 1953 to clarify the language and specifically excluded from its coverage written waivers to a county to secure payment of indigent aid or repayment of money fraudulently or illegally obtained").)

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[5] The Legislature is also keenly aware of how to create a statute of repose, which generally may not be tolled. (*See e.g.*, Code of Civil Proc. § 337.1 (four-year statute of repose for certain defects); Code of Civ. Proc. § 337.15 (ten-year statute of repose for latent defects); Code of Civ. Proc. 366.2 (one-year statute of repose for actions against decedents); *see also Giest v. Sequoia Ventures, Inc.* (2000) 83 Cal.App.4th 300, 305 ("A statute of repose is thus harsher than a statute of limitations in that it cuts off a right of action after a specified period of time, irrespective of accrual or even notice that a legal right has been invaded.").)

"[W]hen the Legislature has carefully employed a term in one place and has excluded it in another, it should not be implied where excluded." (*Wasatch Property Management v. Degrate* (2005) 35 Cal.4th 1111, 1118; *Gray Cary Ware & Friedenrich v. Vigilant Ins. Co.* (2004) 114 Cal.App.4th 1185, 1190 ("it is our role to ascertain the meaning of the words used, not to insert what has been omitted or otherwise rewrite the law to conform to an intention that has not been expressed").) The Legislature has demonstrated its ability to clarify whether statutory rights may be waived. It has employed restrictions on waiver of statutory rights in numerous places, and has even carefully crafted restrictions on tolling agreements directly in Section 360.5. In contrast, the Legislature has never imposed any restrictions on tolling the statute of limitations in CEQA cases. Because CEQA itself does not restrict the use of tolling agreements, the parties' ability to do so should not be disturbed. (*See Hambrecht & Quist Venture Partners v. Am. Med. Int'l, Inc.* (1995) 38 Cal.App.4th 1532, 1548 ("except as restricted by statute, California courts accord contracting parties substantial freedom to modify the length of the statute of limitations.").)

Courts "must assume that the Legislature knew how to create an exception if it wished to do so ...." (*California Fed. Savings & Loan Assn. v. City of Los Angeles* (1995) 11 Cal.4th 342, 349.) If the Legislature intended to carve out an exception to prevent tolling agreements under CEQA, it could have done so. Indeed, in light of section 360.5, and judicial

interpretations of estoppel and waiver, the Legislature knew that, unless otherwise enacted, CEQA's statute of limitations would be subject to tolling. (*See People v. Harrison* (1989) 48 Cal.3d 321, 329 (the Legislature "is deemed to be aware of statutes and judicial decisions already in existence, and to have enacted or amended a statute in light thereof").) Therefore, a constraint on tolling CEQA's statute of limitations should not be implied by the Court where it has been excluded by the Legislature. Absent specific Legislative intent to the contrary, this Court should not disturb the time-honored practice of tolling agreements.

B. Tolling Agreements Promote The Prompt Resolution Of CEQA Claims

It is undisputed that CEQA's short statute of limitations evinces the Legislature's intent to promote the "prompt resolution" of CEQA cases so as to achieve "finality and certainty in land use planning decisions." (Intervenors' Opening Br., at 1-2 (quoting *Stockton Citizens for Sensible Planning v. City of Stockton* (2010) 48 Cal.4th 481, 488).) Indeed, Intervenors have made this policy the cornerstone of their briefs, and claim that tolling agreements "vitiate," rather than promote these policies of finality and certainty. (Opening Br., at 1-2.) But Intervenors' argument rests on a false premise.

Stockton Citizens for Sensible Planning, the central case relied on by Intervenors, ironically did not result in the "prompt resolution" of the

subject land use decisions, and to this day—almost eight years later—the matter is still embroiled in litigation over unresolved claims. (*See Stockton Citizens for Sensible Planning v. City of Stockton* (2010) 48 Cal.4th 481, 494) (original petition filed on July 24, 2004, but the California Supreme Court did not resolve the CEQA claims until April 1, 2010; the planning and zoning claims were left unresolved); *Stockton Citizens for Sensible Planning v. City of Stockton*, 3rd App. Dist. Case No. C067164 (filed Jan. 21, 2011) (petitioners' planning and zoning law claims still pending on appeal).)[6] Published decisions are replete with examples of litigation delaying, rather than promptly resolving land use decisions. (*See e.g., Environmental Protection Information Center v. California Department of Forestry and Fire Protection* (2008) 44 Cal.4th 459, 477 (Supreme Court decision issued on CEQA case more than nine years after original action filed).)

Tolling agreements, on the other hand, are routinely entered into by cities and counties in order to promote early settlement *before* litigation is even necessary. Thus, the notion that tolling agreements can only delay finality and certainty in land use decisions is false—tolling agreements are another tool to help promote prompt resolution of these cases.

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[6] *Available at* http://appellatecases.courtinfo.ca.gov/search/case/mainCaseScreen.cfm?dist=3&doc_id=1968281&doc_no=C067164 (visited Jan. 31, 2012).

Consequently, tolling agreements do not "vitiate" the Legislature's intent in enacting Section 21167. On the contrary, tolling agreements may actually do more to promote the prompt resolution of cases than any statute of limitations, however short.

Further, courts have long favored settlement discussions between disputing parties as a means of promoting judicial economy and efficient use of judicial resources. (*Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma, Inc.* (1986) 42 Cal.3d 1157, 1166 ("[s]ettlements of disputes have long been favored by the courts"); *Marks v. Superior Court* (2002) 27 Cal.4th 176, 197 (remanding case for proper settlement "in the interests of judicial economy"); *Seider v. 1551 Greenfield Owners Assn.* (1980) 108 Cal.App.3d 895, 905 ("The courts look with favor upon settlements, where there is no fraud.").) CEQA itself expressly promotes settlement outside of the courtroom. (Pub. Res. Code § 21167.8 (mandatory post-filing settlement meeting); § 21167.9 (allowing mediation under Government Code section 66030 for land use disputes involving CEQA); § 21167.10 (mandatory tolling for pre-filing mediation).) The Legislature and the courts are unequivocal in their support for settlement as a preferred outcome to legal disputes, including those involving CEQA.

Because CEQA's statute of limitations is only 30 days, absent tolling agreements, there is very little opportunity for productive settlement

discussions to occur before a lawsuit is filed. Accordingly, without the use of tolling agreements, virtually every CEQA dispute would be forced into litigation, requiring public agencies to quickly prepare for and expend considerable (and rather scarce) resources to litigate nearly every CEQA dispute, instead of engaging in more efficient and productive good faith settlement discussion with potential challengers. Therefore, the public's interest in promptly resolving land use disputes and in assuring finality and certainty in land use decisions is best served by allowing parties to enter into tolling agreements where there are reasonable prospects of avoiding litigation altogether.

IV. CONCLUSION

Tolling agreements may properly extend CEQA's statute of limitations. This approach is consistent with California law and public policy. Accordingly, the League and CSAC respectfully request that this Court uphold the continued use of tolling agreements in CEQA cases.

DATED: January 31, 2012

DOWNEY BRAND LLP

By: _____
ANDREW M. SKANCHY

Attorneys for Amici Curiae,
LEAGUE OF CALIFORNIA CITIES and
CALIFORNIA STATE ASSOCIATION OF
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CERTIFICATE OF WORD COUNT

I, Andrew M. Skanchy, do hereby certify that this *amicus curiae* brief contains 2,348 words. I used the word count function of my word-processing software to derive this number.

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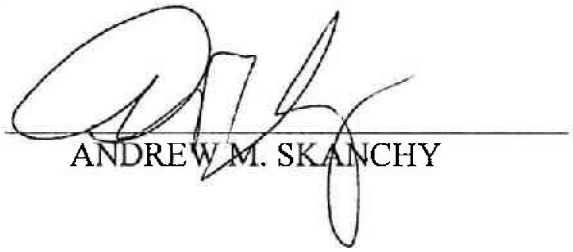

ANDREW M. SKANCHY

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Supreme Court of California
350 McAllister Street
San Francisco, CA 94102
first.district@jud.ca.gov

BY OVERNIGHT DELIVERY:
Clerk
Marin County Superior Court
Hon. Lynn Duryee, Dept. L
3501 Civic Center Drive
San Rafael, CA 94903
(415) 444-7040

BY OVERNIGHT MAIL:
Charles D. Chalmers
851 Irwin Street, Suite 200
San Rafael, CA 94901
Phone: (415) 860-8134
Attorney for Intervenor-Appellants

BY OVERNIGHT MAIL:
Nancy S. Grisham
Office of the County Counsel
County of Marin
3501 Civic Center Drive
San Rafael, CA 94903
Phone: (415) 499-6117
Attorneys for Respondents County of Marin and Supervisors of Marin County

BY OVERNIGHT MAIL:
James G. Moose
Remy, Thomas, Moose and Manley, LLP
455 Capitol Mall, Suite 210
Sacramento, CA 95814
Phone: (916) 443-2745
Attorneys for Respondents County of Marin and Supervisors of Marin County

BY OVERNIGHT MAIL:
Deborah A. Sivas
Mills Legal Clinic at Stanford Law School – Crown Quadrangle
559 Nathan Abbott Way
Stanford, CA 94305-8610
Attorneys for Salmon Protection and Watershed Network

BY OVERNIGHT MAIL:
Michael W. Graf
Law Offices
227 Behrens Street
El Cerrito, CA 94530
(510) 525-7222
Attorneys for Salmon Protection and Watershed Network

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Peggy Krause

Peggy Krause