Nos. A159320 and A159658

In the Court of Appeal, State of California

FIRST APPELLATE DISTRICT, DIVISION FOUR

CALIFORNIA RENTERS LEGAL ADVOCACY AND EDUCATION FUND, et al.
Petitioners and Appellants

vs.

CITY OF SAN MATEO, et al.,
Defendants and Respondents.

Appeal From the Judgment of the Superior Court of the State of California
County of San Mateo. Case No. 18CIV02105
Honorable George A. Miram, Judge Presiding

APPLICATION TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICUS LEAGUE OF CALIFORNIA CITIES

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

There are no entities or persons that must be listed in this certificate under California Rules of Court, rule 8.208.

DATED: March 31, 2021

COLANTUONO, HIGHSMITH & WHATLEY, PC

/s/ Matthew T. Summers

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APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF

To the Honorable Presiding Justice Stuart R. Pollak and Associate Justices of the Court of Appeal of the State of California, First Appellate District, Division Four:

Under California Rules of Court, rule 8.200(c), the League of California Cities ("Cal Cities") respectfully requests permission to file the attached amicus curiae brief. This application is timely made within 14 days of the reply brief on the merits.

Counsel for Cal Cities have reviewed the parties' briefs and believe additional briefing would assist the Court. Cal Cities represents the interests of California cities, who are subject to the streamlined approval requirements for certain housing projects the Housing Accountability Act requires. Cal Cities can present a helpful perspective on applying these requirements to cities statewide, and, specifically, to charter cities. Cal Cities has also reviewed the arguments advanced by proposed Amici California State Association of Counties and agrees with those arguments but will not repeat them in the interest of judicial efficiency.

Cal Cities urge this Court to affirm the trial court decision and reject attempts to read Government Code section 65589.5, subdivision (f)(4) so broadly as to prohibit cities from adopting and interpreting their own zoning codes and related local development standards. This Court can resolve this case on pure statutory interpretation questions briefed by the parties. Else, if it is inclined

to evaluate the additional constitutional questions, Cal Cities urge the Court to affirm cities' longstanding constitutional protections against legislative attempts to delegate their municipal functions to private parties. Finally, Cal Cities emphasizes the well-rooted rule that local governments are the best arbiter of local land use and planning decisions, and that state preemption of zoning power, particularly that of charter cities, must be express and only if the statute is narrowly tailored to accomplish a statewide interest. Such preemption is lacking here, as there is not statewide interest in legal interpretations of local land use regulations and the law is untailored, let alone narrowly tailored.

IDENTITY OF AMICUS CURIAE AND STATEMENT OF INTEREST

Cal Cities is an association of 476 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. Cal Cities is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the state. The Committee monitors litigation of concern to municipalities and identifies cases of state or national significance. The Committee has identified this case as having such significance.

Cal Cities has a substantial interest because the cities it represents are land use regulators, charged with planning and zoning for housing, commercial, and other land uses across

California, within legal bounds, to promote and maintain the health, safety, and welfare of their constituents. Cities are best suited to determine how to accomplish state affordable housing goals in their jurisdictions, and where and under what standards housing, commercial buildings, and other land uses should be established.

In compliance with subdivision (c)(3) of Rule 8.200, the undersigned counsel represent that they authored Cal Cities' brief in its entirety on a pro bono basis; that their firm is paying for the entire cost of preparing and submitting the brief; and that no party to this action, or any other person, authored the brief or made any monetary contribution to help fund the preparation and submission.

CONCLUSION

Cal Cities respectfully requests the Court to grant it leave to file the attached brief.

DATED: March 31, 2021

COLANTUONO, HIGHSMITH & WHATLEY, PC

/s/ Matthew T. Summers

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I. INTRODUCTION

Under the California Constitution, cities have plenary power to adopt general plans, zoning ordinances, and other land use regulations. The Legislature adopted and regularly amends the Housing Accountability Act, Government Code section 65589.5[1], to promote housing. In adopting the Act, the Legislature cannot exceed its constitutional powers.

The merits briefs frame this case, arising out of the Act's application to a proposed ten-unit market-rate development in the City of San Mateo — the denial of which the trial court affirmed — on statutory and constitutional grounds. Appellants joined by the Attorney General in intervention ask this Court to instead resolve the statewide housing crisis by finding that a legal interpretation by a city of its own zoning code is inferior to the legal interpretation of a local land use regulation advanced by any private party. This is a gross misalignment of decades of statutory interpretation and separation of powers. Cal Cities urge this Court to affirm the trial court's ruling that section 65589.5, subdivision (f)(4) is unconstitutional as an unlawful delegation of municipal functions and a violation of charter cities' home-rule powers. San Mateo asks

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[1] Further unspecified section references are to the Government Code. Further unspecified subdivision references are to Government Code section 65589.5.

this Court to resolve the matter entirely on statutory interpretation questions, by concluding that the City's Multi-Family Design Guidelines are objective zoning standards and the proposed project did not comply, leaving the constitutional questions for another case.

The League of California Cities ("Cal Cities") writes to urge this Court to affirm the trial court's judgment. This Court can affirm just on the statutory grounds advanced by San Mateo, or affirm on the narrow ground that the Act's subdivision (f)(4) applies only to factual determinations. Alternatively, Cal Cities urges this Court to affirm the trial court's judgment that Appellants and Intervenor's broad reading of subdivision (f)(4) is as a matter of law unconstitutional. Cal Cities expressly limits its scrutiny to subdivision (f)(4), not the entire Act. This distinction is important. Cal Cities is supportive of legislative efforts to address housing statewide policy, however, the limits of the Legislature's place and the role cities, both general and charter cities, in formulating and interpreting local policy must be respected. The Legislature's attempt to usurp cities' power to determine legal interpretations of their own zoning codes and development standards is flatly unconstitutional.

Adopting zoning ordinances, general plans, and other local land use regulations is a municipal function, under long-standing statutory and case law. This plenary power and core municipal

function extends to adopting legal interpretations of general plans, zoning ordinances, and other land use regulations. To hold otherwise, as advanced by Appellants and Intervenor in their broad reading of subdivision (f)(4) as requiring any legal interpretation by any private party to prevail, effects an unconstitutional delegation of municipal functions, in violation of Article XI, section 11 of our Constitution. The Legislature cannot delegate the power to adopt, nor to determine the legal interpretation of, zoning codes and development standards to private parties and away from cities.

Similarly, Cal Cities urges the Court to affirm the trial court's judgment that the broad reading of subdivision (f)(4) proffered by Appellant elevates a private party's legal interpretation of a zoning code or development standard above the city's own interpretation and is therefore unconstitutional as applied to charter cities. This interpretation fails in the face of charter cities' home-rule authority. Under the four-part test of preemption of charter city legislation our Supreme Court established in *California Fed. Savings & Loan Assn. v. City of Los Angeles* (1991) 54 Cal.3d 1. 17, such application of subdivision (f)(4) is on its face unconstitutional. First, land use regulation adoption and interpretation is plainly a municipal function. Second, while there is no conflict between the statute and charter city land use regulation if read narrowly (i.e., that subdivision (f)(4) applies only to factual determinations), there is a conflict with Appellants and Intervenor's construction as it allows a

private party's legal interpretation of a city's own laws and development standards to control over the city's determination. Third, even if there is a statewide concern regarding housing policy in the general sense, there is no legitimate statewide concern in legal interpretations of local land use regulations adopted pursuant to such general housing policy direction. Fourth, the statute is not narrowly tailored to achieve the legitimate goals and powers of the Legislature. As a fundamental matter, the Legislature cannot override charter cities' constitutional powers over land use regulations, including the power to adopt and interpret their own codes.

II. FACTS, PROCEDURAL HISTORY, AND STANDARDS OF REVIEW

Cal Cities joins in, and incorporates by reference, the statements of facts, procedural history, and standards of review as stated in the City of San Mateo's Respondents' Brief in Response to Appellants' Opening Brief. (See Respondents' Brief in Response to Appellants' Opening Brief, pp. 14–24 [Statement of Facts], p. 24–29 [Procedural History], pp. 34–39 [Standard of Review].)

Cal Cities notes with concern the substantial briefing by Appellants and Intervenors claiming that cities, including San Mateo, are the *sole cause* of the state's housing crisis. (See, e.g.

Appellants' Reply Brief, pp. 13–15[2]; Intervenor's Reply Brief, pp. 10–12.) This argument fails to consider any of the other myriad causes, e.g. high land costs, high materials and labor costs, the construction labor shortage, wildfires having destroyed significant housing — shifting huge demand to areas ill-equipped to handle it, lack of sufficient employment for persons to afford housing, lack of access to credit, and an ineffective social services system. (See Respondents' Brief in response to Appellants' Opening Brief, pp. 30–34.) Appellants also ignore San Mateo's own housing record supportive of housing opportunities, as detailed by San Mateo in its briefing. (See Respondents' Brief in Response to Appellants' Opening Brief, p. 30–34.) Appellants' arguments, rooted largely in various cited opinion papers and academic reports, are irrelevant to the key legal questions before this Court, including whether subdivision (f)(4), as broadly read by Appellants, is constitutional.

[2] Particularly concerning, and quite misplaced, is Appellants' false insinuation that San Mateo acts with racial animus in adopting and interpreting its current zoning and development standards. (Appellants' Reply Brief, p. 9.)

III. HOUSING ACCOUNTABILITY ACT SUBDIVISION (F)(4), AS INTERPRETED BY APPELLANTS, IS AN UNCONSTITUTIONAL DELEGATION OF CITY'S POWER OVER MUNICIPAL FUNCTIONS

This Court can resolve this case solely on the statutory issues briefed by the City. If the Court reaches the constitutional questions, then Cal Cities urges this Court to affirm the trial court's decision that Government Code section 65589.5, subdivision (f)(4), as interpreted by the appellants, is an unconstitutional delegation of municipal functions.

By appellants' reading of subdivision (f)(4), any determination by a private party or body regarding the meaning and legal interpretation of a city's general plan, zoning ordinance, or local standards stands as substantial evidence and essentially becomes the ruling on the issue — regardless of the city's interpretation of its own code. Under appellants' construction of subdivision (f)(4), any self-interested party's interpretation overrides the determination of the legislative body authorized by the Constitution to make such determinations — e.g., here whether the Multi-Family Design Guidelines' Stepback Requirement is an objective standard and whether the proposed project complied with it on undisputed facts. This is an unconstitutional delegation of municipal functions because it delegates to private parties the city's power to adopt and then interpret its own general plan, zoning ordinance, and local

standards — all core municipal functions. (See e.g., *City of Riverside v. Inland Empire Patients Health and Wellness Center, Inc.* (2013) 56 Cal.4th 729, 737–738 [cities have broad police powers to determine and regulate permitted land uses]; *City of Walnut Creek v. County of Contra Costa* (1980) 101 Cal.App.3d 1012, 1021 [local legislative body who adopted legislation charged, subject to judicial review, with interpreting it].)

A. LEGISLATURE CANNOT DELEGATE MUNICIPAL FUNCTIONS

Article XI, section 11, subdivision (a) of our Constitution prohibits the Legislature from delegating municipal functions to any private person or body. (Cal. Const., art. XI, § 11, subd. (a).) Section 11(a) prevents the Legislature from delegating municipal functions to unelected, private persons and bodies, ensuring that the voters remain in control of local government and its functions. The state's voters enacted this provision, originally numbered as Section 13 of Article XI, as "a restraint on the state legislature's right to interfere with municipal affairs." (*Adams v. Wolff* (1948) 84 Cal.App.2d 435, 442.) The section should protect a city's power to regulate "purely local affairs." (*People ex rel. Younger v. County of El Dorado* (1970) 5 Cal.3d 480, 494 ["Younger"].) "The whole object of the provision was to prevent the state Legislature from interfering with local governments by the appointment of its own special

commissions for the control of purely local matters." (*In re Pfahler* (1906) 150 Cal. 71, 87.)

B. CORE MUNICIPAL FUNCTIONS INCLUDE WRITING AND INTERPRETING LOCAL LAWS, GENERAL PLANS, AND RELATED STANDARDS

Nothing is more local than determining the adoption and meaning of a city's own General Plan, zoning ordinance, and related standards. (*Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1151 [land use regulation within local governments' constitutional police power].) Here, even in the Act, the Legislature confirmed in section 65589.5, subdivision (f)(1), as admitted by both Appellants and Intervenor, cities' power to adopt objective zoning and land use standards, and the adoption and interpretation of those standards is a municipal function, exclusively within a city's power. (Cal. Const., art. XI, § 7.)

Whether a matter is a "local affair" and a "municipal function" is tested by whether the function at issue can be performed by a single city or requires a regional or statewide approach. (*Wilson v. City of San Bernardino* (1960) 186 Cal.App.2d 603, 609.) The Legislature can lawfully delegate these broader, regional functions to regional public bodies. (*Younger, supra,* 5 Cal.3d at p. 501–502 [validating Tahoe Regional Planning Compact and its creation of the Tahoe Regional Planning Agency, charged with

certain land use controls across the Lake Tahoe watershed].) Further applying this test, a court held a municipal water district could be formed, and could impose taxes, in an area that includes an incorporated city because regional water supply was not a local, municipal affair. (*Wilson, supra,* 186 Cal.App.2d at p. 610.) Similarly, the Supreme Court upheld the Metropolitan Water District's formation against an unlawful delegation challenge, finding supra-regional water supply a regional power, not a purely local affair. (*City of Pasadena v. Chamberlain* (1928) 204 Cal. 653, 666.)

The California Constitution vests cities with general police powers to "make and enforce within [their] limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." (Cal. Const., art. XI, § 7.) This power includes zoning — the power to regulate land use, given local conditions and needs. It cannot credibly be questioned that zoning is a municipal function. (See *Village of Euclid v. Ambler Realty Co.* (1926) 272 U.S. 365 [upholding zoning against Lochner-era freedom of contract challenge].) California cities hold broad authority to frame local land use regulations under the police power conferred by the Constitution and as regulated within constitutional limits by the Planning and Zoning Law, Government Code § 65000 et seq. (Cal. Const., art XI, §7; *Schroeder v. Municipal Court* (1977) 73 Cal.App.3d 841, 848 [breadth of police power]; *Federation of Hillside & Canyon Associations v. City of Los Angeles* (2004) 126 Cal.App.4th 1180, 1195

[deferential review of land use legislation].) Cities' constitutional power to regulate land use is well established. (E.g., *City of Riverside, supra,* 56 Cal.4th at p. 737–738 [acknowledging broad police power to determine permitted land uses].) Land use regulation is a municipal affair, protected against unlawful delegation by the Legislature to any private person or body.

The state Planning and Zoning Law expressly confirms that each city must adopt a general plan, containing various mandatory elements. (Gov't Code, § 65300; *DeVita v. County of Napa* (1995) 9 Cal.4th 763, [general plans can be amended by initiative]; *Committee of Seven Thousand v. Superior Court* (1988) 45 Cal.3d 491, 504 [identifying general plan referenda are "purely local concerns"].) The required land use element must designate "the proposed general distribution and general location and extent of the uses of the land for housing, business, industry, open space, including agriculture, natural resources, recreation, and enjoyment of scenic beauty, education, public buildings and grounds, solid and liquid waste disposal facilities, greenways, as defined in Section 816.52 of the Civil Code, and other categories of public and private uses of land." (Gov't Code, § 65302, subd. (a).) Each of these requirements by the Legislature is appropriate as a statewide legislative function. Each city however must then decide *how* to achieve these statewide goals by determining which land uses are right for each area of that city.

The required housing element must go further and contain specifics on how the city intends to zone adequate sites, at sufficient density, to accommodate the city's share of the regional housing needs allocation. (Gov't Code, § 65580, et seq.) It is again up to *that* city to then adopt a zoning ordinance consistent with state law and the city's general plan, including its land use and housing elements. (Gov't Code, § 65860.) The city's determination of how to zone its own land and how to accommodate its share of regional housing needs is unquestionably a municipal function. This extends to a city's decisions to adopt guidelines or other development standards, however denominated, as San Mateo did with the Multi-Family Design Guidelines. A city's actions to interpret its own codes do not require a regional approach, and do not involve extra-jurisdictional application, they are purely "municipal functions" protected against unlawful delegation to private parties or other agencies. (*Wilson, supra,* 186 Cal.App.2d at p. 609.)

Once made, a city's interpretations of its own codes are subject to judicial review. Judicial review is, however, cabined by the deference required to a city's interpretations of its own codes — a legal question regarding the meaning of local law. (*Anderson First Coalition v. City of Anderson* (2005) 130 Cal.App.4th 1173, 1193 [citation omitted].) Questions of local law, of the meaning of a city's own general plan, zoning code, and other ordinances and development standards, are reviewed deferentially, reflecting these

as municipal functions — "an agency's view of the meaning and scope of its own zoning ordinance is entitled to great weight unless it is clearly erroneous or unauthorized." (*Ibid.*) This reflects a long-standing understanding that a local agency is best positioned to determine what it meant in adopting and implementing land use controls. (*Harrington v. City of Davis* (2017) 16 Cal.App.5th 420, 434 ["a city's interpretation of its own ordinance is entitled to deference in our independent review of the meaning or application of the law"] [citations omitted].) This is a routine application of *Yamaha* deference. (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 10–11 [deferential review of lawgivers interpretation of its own regulations].)

The Legislature repeatedly declined the opportunity in its many amendments of the Housing Accountability Act ("HAA") to change these fundamental principles of law. The Legislature adopted, and has amended, the HAA several times to promote housing, and specifically affordable housing, as briefed at length by Appellants and Intervenors. In doing so, however, the Legislature has never amended the fundamental principle that zoning — including adoption, amendment, and interpretation decisions — are local land use decisions left to each city as municipal functions. It could not do so, even had it intended to do so, because the state's voters conferred the power to regulate municipal affairs, such as

land use regulations, solely on each city. (Cal. Const., art. XI, § 7, § 11, subd. (a).)

C. SUBDIVISION (F)(4), AS INTERPRETED BY APPELLANTS, IS AN UNCONSTITUTIONAL DELEGATION OF CITY'S POWER TO WRITE AND TO INTERPRET LOCAL LAWS, GENERAL PLANS, AND STANDARDS

As interpreted by appellants, subdivision (f)(4) grants the power to any reasonable private person — applicant, developer, resident coalition, city staffer, or even a council member who has lost a vote— the power to force a reviewing court to accept their interpretation of a city zoning code or development standard, regardless of the city council majority's legal interpretation of that code or standard. Read this way, subdivision (f)(4) is an unconstitutional delegation of municipal functions to private persons or bodies. Despite the apparent claims made by appellants and intervenors, the trial court's decision was limited to finding subdivision (f)(4) as read by appellants to apply to legal interpretations of a city's own zoning code an unconstitutional delegation of municipal functions — not the entire Housing Accountability Act. Amicus writes to urge this Court to affirm the trial court's narrow ruling on this basis, striking down subdivision (f)(4) as read that way. Else, this Court might narrow subdivision (f)(4)'s to apply solely to factual determinations, not

legal interpretations as to the meaning of a city's code or development standards.

Subdivision (f)(4) requires that a qualifying housing development project be deemed compliant with a city's applicable general plans, zoning ordinance, and other objective standards if any substantial evidence in the record would allow a reasonable person to conclude the project compliant. This is a reversal of the usual substantial evidence standard that governs land use decisions.

Under the usual substantial evidence standard of administrative mandate, a city's decision stands if supported by substantial evidence, regardless of contrary evidence. (*Jones v. City Council* (1971) 17 Cal.app.3d 724, 728 ["the court's inquiry was limited to ascertaining whether there was before the planning commission and the city council any substantial evidence, contradicted or uncontradicted, to support their findings"]; *Weinstein v. County of Los Angeles* (2015) 237 Cal.App.4th 944, 965 ["Our inquiry is whether the record shows a reasonable basis for the action of the legislative body, and if the reasonableness of the decision is fairly debatable, the legislative determination will not be disturbed."] [citation omitted].) To prevail, a petitioner must identify all aspects of evidence that may support the agency's decision, then demonstrate that none actually do. Neither the trial court, nor the court of appeal, can substitute their own deductions or factual findings, and, on review, must view the evidence in the light most

favorable to the agency. (*Los Angeles Police Protective League v. City of Los Angeles* (2014) 232 Cal.App.4th 136, 140–141.)

Under the reversed substantial evidence standard imposed by subdivision (f)(4), a city must approve a housing development project if any substantial evidence supports a determination that the project complies with the city's general plan, zoning code, and other objective standards, unless separate findings that the project has an unmitigable adverse impact on public health or safety can be made, per subdivision (j). The reversal comes as subdivision (f)(4) requires project approval if any evidence supports compliance, as opposed to the usual standard that substantial evidence supporting the city's decision, whether denial or approval, means the city's decision stands. If limited solely to factual determinations, as San Mateo suggests, then this reversed standard could survive this non-delegation doctrine challenge.

For the foregoing reasons, Appellants' broad reading of subdivision (f)(4) goes too far and effects an unconstitutional delegation of municipal function because it allows any private person to effectively determine what a city's zoning ordinance or development standards mean and to then force a reviewing court to adopt that legal interpretation. These are core municipal functions and cannot be delegated by the Legislature to any private persons or bodies or city actors short of a full city council or planning commission majority.

D. APPELLANTS AND INTERVENOR'S ARGUMENTS OFFERED TO SAVE THEIR OVERLY BROAD INTERPRETATION OF SUBDIVISION (F)(4) FAIL

Appellants' claim that the legal interpretation of San Mateo's development standards that would allow the project to be approved was offered by a city staff person and by a member of the city council who voted with the unsuccessful side is sufficient to create a lawful delegation fails. The city staff person and the unsuccessful council member, while public actors, are not the public entity solely charged with adopting and interpreting zoning ordinances and related development standards — the city itself. Appellants cite no cases validating a similar delegation of a municipal function to a city staff person or a city council member who has lost the vote — and none exist.

The cases which upheld the Legislature's delegation of functions to public entities other than the city have held that the functions were not municipal functions, not true here, and that the delegation was to another public entity, also not true here. In *City of Pasadena*, the supra-municipal function was the development of a water supply for the entire southern California region, drawing water from up and down California and in from Arizona. (*City of Pasadena, supra,* 204 Cal. at p. 666.) In *Younger*, the supra-municipal function was the development and adoption of land management and planning requirements for the entire Lake Tahoe watershed,

spanning several counties in two states. (*Younger, supra,* 5 Cal.3d at p. 501–502.) Neither considered the pure municipal function at issue here — the adoption and interpretation of local land use regulations and objective development standards. Instead, while the housing crisis is felt widely throughout the state, the development and legal interpretations of local land use regulations remains a municipal function, as confirmed by subdivision (f)(1).

Subdivision (f)(4)'s delegation of the municipal function adopting and interpreting a city's zoning code and related development standards is unlawful, even without the statute specifying to whom that power is delegated, because the power is delegated away from the city. Appellants and Intervenor rely on *City of Torrance v. Superior Court* (1976) 16 Cal.3d 195, to argue that a delegation is only unlawful if there is an identifiable private party to which the unlawful delegation was made. This claim is unsupported. In *City of Torrance*, the Supreme Court held that a statute requiring cities to complete certain eminent domain proceedings, after having gone beyond an identified step, was not an unlawful delegation because the city retained the original choice to decide whether to pursue eminent domain and retained the later choice of what to do with the property once acquired. (*City of Torrance, supra,* 16 Cal.3d at p. 209.) Unlawful delegation of core municipal functions does not require specifying to whom the power is delegated. Even if such a threshold requirement exists for an

unlawful delegation claim, it is met here because the Housing Accountability Act effectively identifies the parties to whom the Legislature has attempted to delegate the city's law-making municipal function by specifying the parties specially entitled to sue to challenge a city's action as violating the Act, namely the applicant, a person who would be eligible for residency, and a housing organization. (Gov't Code, § 65589.5, subd. (k)(1)(A)(i).)

i. SETTING A STANDARD OF REVIEW CANNOT OVERRIDE CITIES' CONSTITUTIONAL POWERS TO ADOPT AND INTERPRET THEIR OWN CODE.

Subdivision (f)(4), as read broadly by Appellants and Intervenor, is not just another standard of review, to be used by courts to evaluate competing arguments. Appellants and Intervenor's claims that the Legislature has simply tipped the scale of judicial review, as is otherwise lawful, fail to appreciate the effect of subdivision (f)(4) as they argue it should be broadly applied. The Legislature has the power to adopt standards of review. (See, e.g. Code Civ. Proc., §§ 1086 [traditional writ standard of review], 1094.5, subd. (b) [administrative writ standard of review].) Providing that the legal interpretation of an applicant, staff person, or a public official on the losing side of the vote would control over the legal interpretation adopted by the city goes well beyond adjusting standards of review to effectively force adoption of that interpretation. To adopt this perspective unlawfully delegates the

municipal function of interpreting a city's own code to an applicant, staff person, or unsuccessful council member.

The parties' discussion of the California Environmental Quality Act's ("CEQA") "fair argument" standard, requiring a lead agency to prepare an environmental impact report if any person can make a "fair argument" based on substantial evidence that the project may have a significant environmental impact is illustrative. (14 Cal. Code Regs, § 15064, subd. (f)(1).) The "fair argument" standard sets a standard of review for factual questions raised about development projects and what level of environmental review to require, under state law. (See, *Laurel Heights Improvement Assn. v. Regents of University of California* (1993) 6 Cal.4th 1112, 1135 [the "fair argument" test has been applied *only* to whether to prepare an original EIR or a negative declaration"] [emphasis in original].) The "fair argument" standard is used by reviewing courts to assess a city's application of state law, while subdivision (f)(4) assesses a city's application of its local laws. The Legislature's adoption of this CEQA standard of review usurped no municipal function because it did not compel the adoption of a particular legal interpretation of a city's own zoning code and development standards. By contrast, appellants' interpretation of subdivision (f)(4) would mean any legal interpretation of a city's own zoning code and development standards, for which a private party can provide substantial evidence, must be adopted regardless of whether that is the

interpretation adopted by the city. Adopting and interpreting zoning codes is a municipal function, reserved to the city, and protected from unlawful delegation by the Legislature to private persons.

In setting a standard of review, however, the Legislature cannot usurp a municipal function, here the adoption and interpretation of a city's own zoning ordinance and related development standards, and delegate that power to a private party. A city's interpretation of its own code is a municipal function. (*Friends of Davis v. City of Davis* (2000) 83 Cal.App.4th 1004, 1015.) The Legislature has the power to change the level of deference, as it did in adopting the independent judgment standard for certain administrative writ matters. (Code Civ. Proc., § 1094.5, subd. (c).) As read broadly by Appellants and Intervenor, subdivision (f)(4) goes beyond shifting the presumptions in litigation to instead compel any legal interpretation of a city's zoning ordinance and related development standards for which any private person can produce supporting substantial evidence to control over a city's contrary interpretation of its own codes. This is an unconstitutional delegation of municipal functions.

IV. SUBDIVISION (F)(4) CANNOT PREEMPT CHARTER CITIES AS TO LEGAL INTERPRETATIONS OF CITY ZONING CODES AND RELATED DEVELOPMENT STANDARDS

The Legislature adopted the Housing Accountability Act to promote housing and, in doing so, preserved charter cities' constitutional powers to adopt their own general plans, zoning ordinances, and development standards. (Gov't Code, § 65589.5.) This Court need not reach this constitutional question if it determines that, as San Mateo contends, subdivision (f)(4)'s reversed substantial evidence standard applies solely to factual determinations. However, Appellants' broader reading of subdivision (f)(4), requiring a city and a reviewing court to accept any legal interpretation of a city's zoning ordinance and related development standards for which any private person can produce supporting substantial evidence, is separately unconstitutional as applied to charter cities.

The constitution grants charter cities paramount power over municipal affairs, including land use regulation, and grants exceptions solely to promote statewide interests if narrowly tailored. To evaluate this, the court applies the familiar *California Federal Savings* four-part test. Plainly, the Legislature cannot override

charter cities' constitutional powers over land use regulations, including the power to adopt and interpret their own codes.

A. CONSTITUTION GRANTS CHARTER CITIES PARAMOUNT HOME-RULE POWER OVER MUNICIPAL AFFAIRS

Article XI, section 7 of the California Constitution authorizes cities to "make and enforce within [their] limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." Charter cities have even broader powers to regulate municipal affairs, free from state interference. Article XI, section 5, subdivision (a) of our Constitution states:

> It shall be competent in any city charter to provide that the city governed may make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws. City charters adopted pursuant to this Constitution shall supersede any existing charter, and **with respect to municipal affairs shall supersede all laws inconsistent therewith**.

(Emphasis added.)

Our Constitution guarantees charter cities, like San Mateo, exclusive "home rule" authority regarding their "municipal affairs." (*State*

Bldg. and Const. Trades Council of Cal. AFL-CIO v. City of Vista (2012) 54 Cal.4th 547, 555 ["Charter cities are specifically authorized by our state Constitution to govern themselves, free of state legislative intrusion, as to those matters deemed municipal affairs."].) Not long after the 1896 adoption of what is now article XI, section 5, our Supreme Court declared "the provisions of a charter … so far as 'municipal affairs' are concerned, supreme, and beyond the reach of legislative enactment." (*Ex parte Braun* (1903) 141 Cal. 204, 207.)

Charter city control of municipal affairs reflects our Constitution's recognition that local officials best understand what each municipality needs for its own governance. Home rule "was intended to give municipalities the sole right to regulate, control, and govern their internal conduct independent of general laws, and this internal regulation and control by municipalities form those 'municipal affairs' spoken of in the constitution." (*Fragley v. Phelan* (1899) 126 Cal. 383, 387.) A century later, the Supreme Court reaffirmed the plenary power of charter cities over municipal affairs, except on matters of statewide concern, i.e., those in which "the state has a more substantial interest in the subject than the charter city." (*California Fed. Savings & Loan Assn. v. City of Los Angeles* (1991) 54 Cal.3d 1. 17, 18.)

Zoning and the ability to determine which land use are right where within a city is plainly a "municipal affair." (See *Village of Euclid, supra,* 272 U.S. 365.) Cities' constitutional power to regulate

land use is well-established. (Cal. Const., art XI, §7; see, e.g., *City of Riverside, supra,* 56 Cal.4th at p. 737–738.) Appellants and Intervenor's extensive discussion of the state's housing crisis, and apparent attempt to pin it on a single city, with, as briefed by San Mateo, a record of approving housing, and more broadly on all cities is misplaced.[3] (See Respondents' Brief in Response to Appellants' Opening Brief, p. 30–34.)

Setting aside the multi-faceted causes of the state's housing crisis, including the severe funding droughts for housing projects, caused in part by the state's elimination of redevelopment agencies, and the high costs of land and construction services, and the Legislature's inability to make meaningful progress on solving those funding challenges, the Legislature is still bound by the constitution. Land use regulation is a constitutionally protected municipal function, absent an overriding statewide concern and a narrowly tailored statute that can withstand review under the *California Fed. Savings* standard, described below. None exists here under the Housing Accountability Act, and charter cities, such as San Mateo, retain their constitutional powers to adopt and interpret their own zoning codes and related development standards.

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[3] Further, nothing concerns affordable housing, as the project is entirely market-rate housing. (Respondents' Brief in Response to Appellants' Opening Brief, p. 14.)

B. STATE MAY PREEMPT CHARTER CITIES ONLY AS TO MATTERS OF STATEWIDE CONCERN

While it is true that the Legislature has authority to preempt charter cities' home rule powers, it may do so only if it articulates a statewide concern justifying a uniform rule fit for application from Los Angeles to Lassen County and does so in the most narrowly tailored manner possible. (*California Fed. Savings, supra,* 54 Cal. 3d at p. 17.) Distilling a century of decisional law, our Supreme Court held the distinction between municipal affairs and matters of statewide concern is a legal question. (*Ibid*.)

> "By requiring, as a condition of state legislative supremacy, a dimension demonstrably transcending identifiable municipal interests, the phrase ["statewide concern"] resists the invasion of areas of intramural concern only, preserving core values of charter city government."

(*Ibid*.)

California Fed. Savings established a four-part test for that question, requiring the following for a statute to preempt charter city regulation:

1. The city charter or ordinance regulates a "municipal affair;"

2. There is an actual conflict between the city regulation and state law;
3. The state law addresses a statewide concern; and
4. The state law is reasonably related and narrowly tailored to resolve the statewide concern.

(*California Fed. Savings, supra*, 54 Cal.3d at pp. 16–24.)

> If ... the court is persuaded that the subject of the state statute is one of statewide concern and that the statute is reasonably related to its resolution [and not unduly broad in its sweep], then the conflicting charter city measure ceases to be a 'municipal affair' pro tanto and the Legislature is not prohibited by article XI, section 5(a), from addressing the statewide dimension by its own tailored enactments.

(*California Fed. Savings, supra*, 54 Cal.3d at p. 17.)

California Fed. Savings applied that test to conclude that a state income tax on federally chartered thrifts preempted a charter city's local business license tax, finding a statewide concern in uniform taxation of such banks and the preemption narrowly tailored as it applied only to banks and state-chartered thrifts. (*California Fed. Savings, supra*, 54 Cal.3d at pp. 24–25.)

C. LAND USE REGULATION IS A MUNICIPAL AFFAIR

Land use regulation is a municipal affair. (See *DeVita, supra,* 9 Cal.4th at p. 774.) Like any municipal affair, however, preemptive state law is permitted on statewide concerns. (E.g. Gov't Code, § 65860, subd. (d) [charter city zoning must conform to its general plan].) Determining where within a city housing should be placed, as opposed to other land uses, and determining what kinds of regulations should be imposed on proposed development projects, are quintessentially a municipal affair. Zoning exists to separate conflicting land uses, to specify locations appropriate for each, and for the:

> promotion of the health and security from injury of children and others by separating dwelling houses from territory devoted to trade and industry; suppression and prevention of disorder; facilitating the extinguishment of fires, and the enforcement of street traffic regulations and other general welfare ordinances; aiding the health and safety of the community, by excluding from residential areas the confusion and danger of fire, contagion, and disorder, which in greater or less degree attach to the location of stores, shops, and factories.

(*Village of Euclid, supra,* 272 U.S. at p. 391.)

It cannot reasonably be questioned that a charter city's regulation of land uses are within its home rule authority. (E.g., *DeVita, supra,* 9 Cal.4th at p. 782 ["The Legislature, in its zoning and planning legislation, has recognized the primacy of local control over land use."]; *IT Corp. v. Solano County Bd. of Supervisors* (1991) 1 Cal.4th 81, 89 ["The Legislature has specified certain minimum standards for local zoning regulations (Gov. Code, § 65850 et seq.) but has carefully expressed its intent to retain the maximum degree of local control."].) This remains true even, given the statewide housing crisis, as acknowledged by the Legislature in the Act, in its provisions recognizing cities' power to adopt the objective development standard. (Gov't Code, § 65589.5, subd. (f)(1).) As Amicus has regularly asserted in its legislative and legal advocacy, the solution to the housing crisis is as multi-pronged as the causes of the crisis.

Appellants and Intervenor lay the blame for the entire housing crisis solely at the feet of cities. This overly simplistic view of the issue ignores that the lack of the ability to afford housing has additional causes rooted in lack of sufficient employment, lack of access to credit, and an ineffective social services system to address issues giving rise to homelessness. This view also ignores the work done by cities, like San Mateo, to help solve the problem. Appellants ignore San Mateo's extensive housing promotion efforts, and ignore Cal Cities and its collective efforts together with all cities to help

solve the housing crisis by securing additional funding and other support for housing. Cities, and particularly charter cities, are constitutionally charged to lay the groundwork for housing by planning and zoning for new and expanded housing opportunities, but in doing so, retain their constitutional powers to ensure that the new housing is built in accord with each community's development standards.

D. CHARTER CITIES' PLENARY POWER TO REGULATE LAND USE CONFLICTS WITH APPELLANTS' BROAD READING OF SUBDIVISION (F)(4)

The second prong of the *California Fed. Savings and Loan Assn.* test asks whether state statute actually conflicts with a charter city's regulation, encouraging courts to avoid the constitutional issue if statutory construction can reasonably do so. To the extent difficult choices between competing claims of municipal and state governments can be forestalled in this sensitive area of constitutional law, they ought to be; courts can avoid making such unnecessary choices by carefully insuring that the purported conflict is a genuine one, unresolvable short of choosing between one and the other. (*California Fed. Savings, supra*, 54 Cal.3d at pp. 16–17.)

This Court can avoid a conflict with charter city home rule power by reading subdivision (f)(4) narrowly, as only applicable to factual determinations supported by substantial evidence. Doing so

is also supported by the constitutional-doubt canon. The constitutional-doubt canon applies only when two viable interpretations of a statute exist and just one raises "grave and doubtful constitutional questions." (*Siskiyou County Farm Bureau v. Department of Fish and Wildlife* (2015) 237 Cal.App.4th 411, 445.) Central to its application is that one interpretation poses constitutional questions of "grave" or "serious and doubtful" and the other does not. (See *People v. Anderson* (1987) 43 Cal.3d 1104, 1146–1147 [rejecting application of canon because statutes not ambiguous and constitutional questions raised by one interpretation not grave] [superseded by statute as stated in *People v. Mil* (2012) 53 Cal.4th 400, 408].) Applied here, if this Court reads subdivision (f)(4) solely to factual determinations, then this Court avoids the serious constitutional questions, both above, and now on whether the statute is preempted by charter city home rule powers. This Court could affirm the trial court's narrow ruling on this basis.

Otherwise, Appellants and Intervenor's broad reading of subdivision (f)(4) directly conflicts with charter city home rule powers. The constitution endows charter cities with the power to zone land, and to adopt general plans, zoning ordinances, and related development standards. (Cal. Const., art. XI, §§ 5, 7.) This constitutional power extends to the power to interpret those zoning regulations, including to make the legal interpretations of development standards. (See, e.g. *City of Walnut Creek, supra,* 101

Cal.App.3d at p. 1021 ["The construction placed on a piece of legislation by the enacting body is of very persuasive significance. Also, construction of a statute by officials charged with its administration must be given great weight."] [citations omitted].

Friends of Davis v. City of Davis for example, applied this "fundamental rule that interpretation of the meaning and scope of a local ordinance is, in the first instance, committed to the local agency" to uphold Davis' interpretation of its design review ordinance as applied to commercial land uses. ((2000) 83 Cal.App.4th 1004, 1015.) The same is true here, as San Mateo, another charter city, is constitutionally vested with the power to interpret its own development standards. As construed by Appellants, the City's legal interpretation of its own development standards must give way to a contrary interpretation, under subdivision (f)(4)'s effective grant of the power to make legal interpretations of zoning regulations to private actors. This shows there is a conflict between the charter city's local land use regulations and a broad reading of subdivision (f)(4), requiring analysis of the next two steps in the *California Fed. Savings and Loan Assn.* test.

E. LEGAL INTERPRETATION OF LOCAL LAND USE REGULATION IS NOT A MATTER OF STATEWIDE CONCERN

If this Court reaches the third prong of this preemption analysis, Amicus argues there is no statewide concern in legal interpretations of charter cities' general plans, zoning ordinances, and related development standards. Whether a statewide concern exists is a question of law for the court. (*California Fed. Savings & Loan Assn., supra,* 54 Cal. 3d at p. 17.) To preempt a charter city's plenary powers by a conflicting statute, "there must be a convincing basis for state control — a basis that justifies the state's interference in what would otherwise be a merely local affair." (*Vista, supra,* 54 Cal.4th at p. 560 [internal quotations omitted].) A legislative declaration a matter is a statewide concern is entitled to "great weight," but is not determinative. (*Id.* at p. 24, n. 21.) This Court can give weight to the Legislature's repeated declarations it adopted the Housing Accountability Act, including subdivision (g), to promote housing, not to entirely usurp cities' local land use regulatory powers — and take it at its word.

Adopting and interpreting land use regulations are quintessential municipal affairs. The housing statutes undoubtedly raise some matters of statewide concern, such as the housing element and regional housing needs allocation process statutes. However, our Supreme Court has warned against categorical

treatment of the boundary of state and local control, requiring case-specific analysis sensitive to context:

> In performing that constitutional task, courts should avoid the error of "compartmentalization," that is, of cordoning off an entire area of governmental activity as either a "municipal affair" or one of statewide concern. … [¶]To approach the dichotomy of "municipal affairs/statewide concern" as one signifying reciprocally exclusive and compartmented domains would, as one commentator has observed, "ultimately all but destroy municipal home rule.

(*California Fed. Savings, supra*, 54 Cal.3d at pp. 17–18.) The Legislature's declaration in subdivision (g) that the Housing Accountability Act shall apply to charter cities does not end the matter, as that assertion must be tested for each potentially preemptive provision against charter cities' constitutional powers. (Gov't Code, § 65589.5, subd. (g).)

The Legislature has asserted a statewide interest in providing sufficient housing to meet the determined statewide and regional housing needs, and in each city adopting a housing element and conforming zoning code that zone for the city's share of that housing need. (See, e.g. Gov't Code, § 65589.5, subd. (a).) But the Legislature also preserved, as it must, charter cities' home rule power to

determine what rules and requirements will govern proposed housing developments. (Gov't Code, § 65589.5, subd. (f)(1).)

The power to adopt zoning ordinances and related development standards includes the power to adopt legal interpretations as to their meaning. These are archetypical municipal affairs. (*Village of Euclid, supra,* 272 U.S. at p. 391 ["the exclusion of buildings devoted to business, trade, etc., from residential districts, bears a rational relation to the health and safety of the community"]; *Penn-Co v. Board of Supervisors* (1984) 158 Cal.App.3d 1072, 1084 ["The decision to allow a conditional use permit is an issue of vital public interest. It affects the quality of life of everyone in the area of the proposed use."].) There is no statewide interest in determining legal interpretations of zoning ordinances and other local land use regulations. There is also no credible statewide interest in adopting a construction of subdivision (f)(4) that elevates legal interpretations of a zoning standard by an applicant or a staff person above the legal interpretation adopted by a charter city. Or, at very least, the Legislature has identified none.

F. SUBDIVISION (F)(4) IS NOT NARROWLY TAILORED

If this Court reaches the fourth *California Fed. Savings*' prong – narrow tailoring of a preemptive statute to an identified matter of statewide concern — the broad reading of subdivision (f)(4) advanced by Appellants and Intervenor fails. As plainly articulated

by the trial court, nothing in subdivision (f)(4) is tailored, let alone narrowly tailored, to meet the claimed statewide concern in legal interpretation of local land use regulations.

Subdivision (f)(4) is not limited to only those few cities who have failed to adopt a housing element that provides sufficient zoning to meet their share of the regional housing needs allocation. Nor is it limited to only those cities who have not, in an applicable housing element cycle, yet had developers build their share of the regional housing needs allocation for a particular income category. Nor is it even is limited to affordable housing or high density projects. Nothing in Appellants' broad reading of subdivision (f)(4) is narrowly tailored and the broad reading is a unconstitutional failed preemption of charter cities' power to adopt, amend, and develop legal interpretations of their own land use regulations.

Instead, the overly ambitious interpretation of subdivision (f)(4) proposed by Appellants and Intervenors would have the Court pre-empt local land use authority by substituting the city's determination with the mere presence of substantial evidence being in the record by which a reasonable person may conclude that a project is consistent, complaint or in conformity with such local codes. Regardless of the Legislature's goals when initially adopting the statute back in 1982, or how relevant such goals remain to more recent amendments in 2020, the legislative action of reallocating duties applicable to all cities in a manner not narrowly tailored to

address only those cities that are failing to meet housing goals is the Legislature going beyond what it is constitutionally permitted to do. Accordingly, subsection (f)(4) is either unconstitutional or cannot be read to the breadth that Appellants and Intervenors ascribe it.

V. CONCLUSION

Cal Cities respectfully asks this Court to affirm the trial court judgment for the City of San Mateo. This Court can resolve the matter entirely on the statutory grounds advanced by San Mateo, or avoid the constitutional questions raised by affirming because the Housing Accountability Act's Government Code section 65589.5, subdivision (f)(4) applies only to factual determinations.

Else, Cal Cities urges this Court to affirm the trial court's judgment that Appellants and Intervenor's broad reading of subdivision (f)(4) is unconstitutional. A broad reading of Subdivision (f)(4) is an unconstitutional delegation of municipal functions because it delegates to private parties, including applicants, staff persons, and even elected officials who have lost a vote, the power to adopt binding legal interpretations of a city's land use regulations. Cal Cities also urges this Court to reaffirm that charter cities' constitutional home rule powers continue to encompass land use regulation, to include making legal interpretations of their own zoning codes and development standards. No statewide concern justifies abrogation of that core home rule power.

For all these reasons, Cal Cities urges this Court to affirm the trial court's ruling denying the writ sought by Appellants and Intervenor.

DATED: March 31, 2021

COLANTUONO, HIGHSMITH & WHATLEY, PC

/s/ Matthew T. Summers

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CERTIFICATE OF COMPLIANCE WITH CALIFORNIA RULES OF COURT, RULE 8.204

We certify that, under rule 8.204(c)(1) of the California Rules of Court, this Amicus Brief is produced using 13-point type and contains 7,819 words including footnotes, but excluding the application for leave to file, tables and this Certificate, fewer than the 14,000 words permitted by the rule. In preparing this Certification, we relied upon the word count generated by Microsoft Word 365 MSO.

DATED: March 31, 2021

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PROOF OF SERVICE

California Renters Legal Advocacy and Education Fund, et al. vs. City of San Mateo, et al.
First District Court of Appeal, Division Four,
Case Nos. A159320 and A159658
San Mateo County Superior Court Case No. 18CIV02105

I, Georgia K. Gray, declare:

I am employed in the County of Nevada, State of California. I am over the age of 18 and not a party to the within action. My business address is 420 Sierra College Drive, Suite 140, Grass Valley, California 95945-5091. My email address is: GGray@chwlaw.us. On March 31, 2021, I served the document(s) described as **APPLICATION TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICUS LEAGUE OF CALIFORNIA CITIES** on the interested parties in this action addressed as follows:

SEE ATTACHED LIST FOR METHOD OF SERVICE

☒ **BY MAIL:** By placing a true copy thereof enclosed in a sealed envelope. The envelope was mailed with postage thereon fully prepaid. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid at Grass Valley, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after service of deposit for mailing in affidavit.

☒ **BY E-MAIL OR ELECTRONIC TRANSMISSION**: Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, by causing the documents to be sent to the persons at the e-mail addresses listed on the service list on March 31, 2021, from the court authorized e-filing service at TrueFiling.com. No electronic message or other indication that the

transmission was unsuccessful was received within a reasonable time after the transmission.

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

Executed on March 31, 2021, at Grass Valley, California.

Georgia K. Gray

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