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May 25, 2023

VIA TRUEFILING AND U.S. MAIL

Chief Justice Patricia Guerrero
& Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102

Re: *Hamilton & High, LLC v. City of Palo Alto*, No. H049425
Amicus Curiae Letter in Support of Petition for Review

To the Honorable Chief Justice Patricia Guerrero and Honorable Associate Justices of the California Supreme Court:

Pursuant to California Rules of Court, rule 8.500(g), please accept this letter on behalf of the League of California Cities, California State Association of Counties, California Special Districts Association, California Association of Sanitation Agencies and Association of California Water Agencies. These Government Associations write to support the City of Palo Alto's petition for review of the Sixth District Court of Appeal's opinion in *Hamilton and High, LLC v. City of Palo Alto*, No. H049425 (the "Opinion"), now published at 89 Cal.App.5th 528.

The City's Petition for Review presents questions of critical importance to all local governments in California: whether fees paid by developers in lieu of otherwise-mandatory development standards are subject to the Mitigation Fee Act and when a suit for a refund of such fees must be filed. Resolution of these questions will determine the extent to which local governments will continue to make available to developers the option of paying such fees, rather than simply mandating strict compliance with local zoning requirements. It will also impact the ways in which local governments plan and construct infrastructure funded by those fees. The Government Associations agree with the City that the Opinion both reached the wrong

result and created substantial uncertainty and risk regarding local zoning authority and infrastructure finance.

The Government Associations thus respectfully request that this Court grant review to resolve the questions posed by the City's Petition for Review.

Interest of Amici Curiae[1]

The League of California Cities is an association of 477 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. It 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.

The California State Association of Counties is a non-profit corporation. The membership consists of the 58 California counties. It 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, 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.

The California Special Districts Association is a non-profit corporation with a membership of more than 900 special districts throughout California that was formed to promote good governance and to improve core local services through professional development, advocacy, and other services for all types of independent special districts. Independent special districts provide a wide variety of public services to urban, suburban, and rural communities, including irrigation, water, sanitation, recreation and parks,

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[1] No counsel for a party wrote this letter in whole or in part, and no counsel for a party or party made a monetary contribution intended to fund the preparation or submission of this letter. No person other than the Amici *Curiae*, their members, or their counsel made a monetary contribution to fund the preparation or submission of this letter.

cemetery, fire protection, police protection, library, utilities, harbor, healthcare, and community-service districts. The Association is advised by its Legal Advisory Working Group, comprised of 25 attorneys from all regions of the state with an interest in legal issues related to special districts. It monitors litigation of concern to special districts and identifies those cases that are of statewide significance. It has identified this as such a case.

California Association of Sanitation Agencies is a nonprofit mutual benefit corporation organized and existing under the laws of the State of California. It is comprised of over 130 local public agencies throughout the state, including cities, sanitation districts, sanitary districts, community services districts, sewer districts, county water districts, California water districts, and municipal utility districts. Its member agencies provide wastewater collection, treatment, water recycling, renewable energy, and biosolids management services to millions of California residents, businesses, industries, and institutions. It is advised by its Attorneys Committee, and engages in litigation of statewide significance that has the potential to yield significant benefits to, or to avoid burdens upon, a large number of member agencies.

The Association of California Water Agencies is a California nonprofit public benefit corporation comprised of over 430 water agencies, including cities, municipal water districts, irrigation districts, county water districts, California water districts, and special purpose public agencies. Its Legal Affairs Committee is composed of attorneys from each of its regional divisions throughout the State. The Committee monitors litigation of significance to the Association's members and has determined this is such a case.

Why Review Should Be Granted

The Opinion extends the Mitigation Fee Act beyond its intended scope in a way that is inconsistent with precedent, contrary to legislative intent, and creates substantial harm to local development and governance.

This Court should grant review to consider and resolve both the critical distinction between mandatory mitigation fees governed by the Mitigation Fee Act, on the one hand, and optional in-lieu fees developers pay to avoid obligations local zoning would otherwise impose on their developments, on

the other. By overlooking that distinction and by allowing developers to set their own deadline for seeking refunds of fees paid, the Opinion upends existing standards of land-use regulation, creates substantial uncertainty for local governments in planning and development of infrastructure, and strongly incentivizes local governments to eliminate the development-friendly, economically efficient options that in-lieu fees offer. This result may serve the short-term interests of Hamilton & High LLC in *this* case. Carried forward, however, the rule of decision adopted below is not in the general public interest or even in the more narrow interests of developers.

Prior to the Opinion below, California law was reasonably well settled: in-lieu fees are a common part of many zoning restrictions and are accordingly neither subject to constitutional takings analysis under the *Nollan/Dolan* standard nor restricted by the Mitigation Fee Act's related standards. (*See* Petition, pp. 24-31, discussing *Barratt American Inc. v. City of Rancho Cucamonga* (2005) 37 Cal.4th 685, 699; *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854, 866-867, 886; *California Building Industry Assn. v. City of San Jose* (2014) 61 Cal.4th 435, 442-444, 460-461; *616 Croft Avenue, LLC v. City of West Hollywood* (2016) 3 Cal.App.5th 621, 628-630; *California Building Industry Assn. v. San Joaquin Valley Air Pollution Control Dist.* (2009) 178 Cal.App.4th 120, 131.)

616 Croft succinctly summarizes this Court's precedent and the state of the law as it existed before the Opinion below. As it explains, the Act applies to monetary "*exactions*" designed to mitigate the impacts of development, akin to those governed by *Nollan/Dolan* takings analysis. (*616 Croft*, at p. 628, italics added.) Reviewing this Court's precedent, *616 Croft* holds land-use regulations are not "exactions" subject to either *Nollan/Dolan* or the Mitigation Fee Act, and the same is true of fees developers choose to pay in lieu of complying with those regulations. (*Id.* at pp. 628-630) And, as a result, "the Mitigation Fee Act does not apply to" such fees. (*Id.* at p. 630.)

The Opinion below abandons that analysis. Where existing case law recognized that in-lieu fees are a voluntary option for avoiding otherwise mandatory development standards, rather than "exactions," the Opinion concludes an in-lieu fee, though voluntary, is an exaction if payment is a

development condition.[2] (Opinion, p. 27 ["Here . . . the City's approval of the project at 135 Hamilton Avenue was conditioned on payment of the in-lieu parking fee."]; *id.*, pp. 1, 19, 23-24, 26-27.) This analysis, however, ignores the regulatory nature of the relevant land-use laws, the voluntary nature of the in-lieu fee, and the fact that the fees at issue in the earlier cases discussed above were also conditions of development. The Opinion thus upends existing understanding of the Mitigation Fee Act's scope, arguably bringing all development conditions within the Act's ambit, with likely chaotic consequences.

Many local governments—and by extension developers—have come to rely upon their authority to utilize in-lieu fees as a means to create greater flexibility in development, while ensuring that the policy aims of local regulation are met. (See Petition, pp. 16, 29; Tim Iglesias, *Maximizing Inclusionary Zoning's Contributions to Both Affordable Housing and Residential Integration* (2015) 54 Washburn L.J. 585, 590-591.) The laws establishing those fees have served to provide an *option* for developers to fulfill the requirements of local regulation in the way *those developers* believe is most economically efficient, either by conforming their own development to applicable zoning or by paying a fee to fund municipal infrastructure that achieves the same regulatory aims. And they provide local governments a powerful tool to advance their regulatory interests, especially for example as to needs for housing development and water resources. (See *National Longitudinal Land Use Survey*, Urban Institute Data Catalog (2020) https://datacatalog.urban.org/dataset/national-longitudinal-land-use-survey-nllus [finding that roughly two-thirds of U.S. municipalities used in-lieu fees as an option to achieve affordable housing aims]; Jennifer L. Harder, *Demand Offsets: Water Neutral Development in California* (2014) 46 McGeorge L. Rev. 103, 113 [summarizing the use of in-lieu fees by various municipalities to secure water-neutral development]; see also Jesse O'Sullivan, *Increasing the Effectiveness of California's Density Bonus Law* (2019) 47 Real Est. L.J. 386,

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[2] In this case, the payment of the in-lieu fee was not actually a development condition. As the City explains, the condition was *compliance with the City's zoning ordinance*, which required development of parking. (See Petition, p. 17, discussion 4 AA 886–887.) Payment of the in-lieu fee was merely an option for fulfilling that zoning requirement. (*Ibid.*) Thus, even the Court of Appeal's own analysis does not bear scrutiny.

414-415.) The result has been an almost literally uncountable number of developments permitted and built on a developer's agreement to pay in-lieu fees and thus fund development of municipal infrastructure, in order to avoid the cost and difficulty of accommodating development standards on site.

At the same time, local governments are likely to have assumed, based on then-existing precedent, that they did not need to provide five-year reporting for the in-lieu fees received. The Opinion thus exposes all of those agencies to refund demands from developers that the agencies had no previous reason to anticipate or opportunity to guard against.

It is also notable that the developers demanding refunds will have benefitted from the option to pay fees, rather than conform their developments to local zoning, yet now stand to receive extraordinary windfalls for no reason other than the fact that the Opinion unexpectedly expanding the scope of fees subject to the Act. As a consequence, these unexpected refunds will not only deprive local governments of anticipated funding, they are likely to result in land uses that violate local zoning. Again, these developments were built pursuant to relaxed standards made possible only by the developer's choice to pay in-lieu fees. Yet a sudden and unexpected refund of fees paid will eliminate funding for the public infrastructure that would otherwise have ensured local regulatory aims. This result is entirely inconsistent with the general provision for refund of unused mitigation fees, which fees are pure, unilateral conditions of development, untethered from changes in development standards and applicable zoning. (See, e.g., *616 Croft*, *supra*, 3 Cal.App.5th at pp. 628-629 [defining in-lieu fees in terms of the voluntary exchange of money for elimination of development standards under local zoning and defining fees under the Act in terms of their mandatory nature and distinction from local zoning standards]; cf. Gov. Code, § 66000, subd. (b).)

This legal maelstrom is made all the more hazardous by the Opinion's unsupported, common-law creation of claim and denial requirements, making the accrual of claims unpredictable. Under the Court of Appeal's analysis, the time within which a refund suit may be filed is dictated by the time in which a property owner makes a refund demand. Yet, as the City notes, the Act establishes no such demand process and, as a result, sets no limit on the time in which the demand must be made. (Petition, pp. 42-43.) Neither does

the Opinion set such a limit, leaving property owners to decide when to initiate refund processes and leaving local governments open to surprise suits, even years after an alleged failure to make required findings.

Moreover, while the Opinion's immediate risks are obviously directed at local agencies, their fiscal stability, and their ability to regulate land uses, the consequences are certain to fall on future development. Even supposing that the Mitigation Fee Act's requirements may extend to in-lieu fees, local governments may fail to fulfill those requirements, either because complete compliance is impossible (see Petition, pp. 31-36, discussing *Richmond v. Shasta County Community Services Dist.* (2004) 32 Cal.4th 409), or even through pure inadvertence. The risk of refund claims could constrain or imperil local policy objectives by requiring local agencies to refund monies intended to be used to offset the impacts created by new development.

Many local governments are thus very likely to eliminate their in-lieu fees as the only means to absolutely eliminate the risks of financial forfeiture and regulatory disruption posed by the Opinion. This is plainly not in the long-term interest of the public at large or the development community, as eliminating economically efficient development tools can only drive up development costs.

Nothing in the Mitigation Fee Act appears intended to make development more expensive. Moreover, at a time in our State's history when the need for development—especially housing development—has reached critical urgency, such an anti-development incentive should not be adopted without legislative direction or, at a minimum, this Court's consideration.

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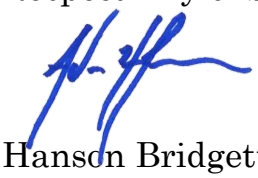
This Court should grant review to ensure that the Opinion does not improperly extend the Act or municipal liability beyond what the Legislature intended.

Respectfully submitted,



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cc: All parties (via TrueFiling)

PROOF OF SERVICE

Hamilton and High, LLC, et al. v. City of Palo Alto, et al.
Supreme Court Case No. S279718
Court of Appeal, Sixth Appellate District, Case No. H049425
Santa Clara Superior Court Case No. 20CV366967

STATE OF CALIFORNIA, COUNTY OF SACRAMENTO

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Sacramento, State of California. My business address is 500 Capitol Mall, Suite 1500, Sacramento, CA 95814.

On May 25, 2023, I served true copies of the following document described as Government Association Amicus Letter in Support of Petition for Review on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Hanson Bridgett LLP' practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

BY ELECTRONIC FILING: By submitting an electronic version of the document to TrueFiling, who provides e-serving to all indicated recipients through email.

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

Executed on May 25, 2023, at Sacramento, California.

Emily P. Griffing

SERVICE LIST
Hamilton and High, LLC, et al. v. City of Palo Alto, et al.
Supreme Court Case No. S279718
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