2nd Civil No. H045271

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

IN AND FOR THE SIXTH APPELLATE DISTRICT

SARAH ANDERSON, JOANA CRUZ, URBAN HABITAT PROGRAM AND HOUSING CALIFORNIA, Plaintiffs/Appellants, v. CITY OF SAN JOSE AND SAN JOSE CITY COUNCIL, Defendants/Respondents.	Civil Case No. 16-CV-297950

On Appeal From the Superior Court of California,
County of Santa Clara
Honorable Theodore C. Zayner

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

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

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

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

Dated: October 5, 2018 BEST BEST & KRIEGER LLP

By: */s/* Amy E. Hoyt
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I.

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF THE CITY OF SAN JOSE AND THE CITY COUNCIL OF THE CITY OF SAN JOSE

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

The League is an association of 475 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the State. This Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

The issue in this appeal is whether the Surplus Land Act supersedes a charter city's authority under the Constitutionally-derived home rule provisions to govern municipal affairs. The League has a direct interest in ensuring that these home rule powers are respected. Any decision by this court that restricts home rule powers will have significant impacts on the League's member cities.

Counsel for the League have examined the briefs on file in this case; are familiar with the issues and the scope of their presentation; and do not seek to duplicate those briefs. No counsel for any party has authored the Proposed Amicus Brief in whole or in part, and no such counsel, party, or other entity made a monetary contribution intended to fund the preparation or submission of this Brief.

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

Dated: October 5, 2018 BEST BEST & KRIEGER LLP

By: */s/* Amy E. Hoyt
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II.

INTRODUCTION

Amicus Curiae League of California Cities (League) files this amicus brief in support of Respondents City of San Jose and the City Council of the City of San Jose (collectively, City).

The "home rule" powers of charter cities are firmly grounded in the California Constitution and reflect a strong preference in favor of local control. When applied in light of this preference, the analytical framework set out by the Supreme Court in *California Fed. Savings & Loan v. City of Los Angeles* (1991) 54 Cal.3d 1, 16-17 ("Cal. Fed.") shows that the Surplus Land Act does not supersede the City's home rule powers. This is so for two reasons.

First, the City's sale of its own surplus property is not a matter of statewide concern. Appellants argue that affordable housing is a statewide concern and thus the Surplus Land Act supersedes home rule. But Appellants paint with too broad a brush. Context matters when determining what is and is not an issue of statewide concern. Here, the context of the Surplus Land Act is the disposal of surplus property, and not land use or zoning. Whether affordable housing is a matter of statewide concern for purposes of zoning is not the issue. Rather, the issue is whether a charter city's disposal of its own property implicates statewide concerns. When placed in the correct context—as the trial court did—the answer is no.

Second, even assuming solely for argument's sake that the City's sale of its property is a matter of statewide concern, the City's home rule powers prevail because the Surplus Land Act is neither reasonably related nor narrowly tailored to resolving a statewide issue. The Act imposes substantial procedural and substantive burdens on cities. But due to the way the Act is structured, it is unlikely the Act will lead to increased production of affordable housing and so it is not reasonably related to that

goal. Further, by prioritizing housing affordable to low income residents, it crowds out other uses, such as housing affordable to residents with moderate incomes, schools, and parks. As such it is not narrowly tailored.

The League respectfully requests that this Court affirm the trial court's decision.

III.

FACTUAL AND PROCEDURAL BACKGROUND

The League adopts the Statement of the Case contained at pages 8 through 12 of the City's Opening Brief.

IV.

LEGAL DISCUSSION

A. The Evolution Of Home Rule In California Reveals A Strong Mandate In Favor Of Local Control

The home rule doctrine is premised on the California Constitution's strong preference for local control. In fact, the California Constitution has been amended repeatedly for the express purpose of strengthening local control.

Under the California Constitution of 1849, cities had little authority. They were "but subordinate subdivisions of the State Government." (*Johnson v. Bradley* (1992) 4 Cal.4th 389, 394 ("*Johnson*").) That changed with the Constitution of 1879. The 1879 amendments manifested the drafters' intent "'to emancipate municipal governments from the authority and control formerly exercised over them by the Legislature.'" (*Id*., quoting *People v. Hoge* (1880) 55 Cal. 612, 618.)

In 1896 the Constitution was again amended to strengthen local control. (*Johnson, supra,* at 395, citing VAN ALSTYNE, BACKGROUND STUDY RELATING TO ARTICLE XI, LOCAL GOVERNMENT, Cal. Const. Revision Com., Proposed Revision (1966) pp. 278–279 ("Background

Study").) In *Johnson,* the California Supreme Court explained that the 1896 amendment was intended to:

> enable municipalities to conduct their own business and control their own affairs to the fullest possible extent in their own way. . . . [It] was intended to give municipalities the sole right to regulate, control, and govern their internal conduct independent of general [i.e., state] laws.

(*Johnson, supra,* at 396 (internal quotation marks omitted).)

In response to case law holding that local laws could not be given effect if a city's charter was silent on a subject, the Constitution was amended again in 1914. The 1914 amendment granted charter cities the power "to make and enforce all laws and regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters." (*Id*. (internal quotation marks omitted).) This "amendment placed the [charter] cities even farther from the reach of general laws." (Amanda Meeker, *Local Government: An Overview of the History of Constitutional Provisions Dealing with Local Government*, in CALIFORNIA CONSTITUTION REVISION COMMISSION, CONSTITUTION REVISION: HISTORY AND PERSPECTIVE 90 (1996).) Though since reworded and renumbered, these provisions remain in substance the same today. (*Johnson, supra*, 4 Cal.4th at 397.)

Under current law, cities are classified as either "chartered cities" or "general law cities." (Gov. Code §§ 34100-34102.) The California Constitution specifically authorizes charter cities to "govern themselves, free of state legislative intrusion, as to those matters deemed municipal affairs." (*State Bldg. and Const. Trades Council of Cal., AFL-CIO v. City of Vista* (2012) 54 Cal.4th 547, 555 ("*Vista*").) A charter city "may make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters

. . . .Charters . . ., with respect to municipal affairs shall supersede all laws inconsistent therewith." (Cal. Const. art. XI, § 5, subd. (a).) This constitutional provision "is commonly referred to as the 'home rule' doctrine." (*O'Connell v. City of Stockton* (2007) 41 Cal.4th 1061, 1077.)

B. The Surplus Land Act Does Not Supersede Home Rule

In this case, as the trial court correctly determined, the Surplus Land Act does not supersede home rule. In *California Fed. Savings & Loan v. City of Los Angeles* (1991) 54 Cal.3d 1, 16-17 ("*Cal. Fed*."), the California Supreme identified a four part framework for determining when state law supersedes a charter city's home rule authority. *Cal. Fed.'s* framework asks: (1) does the city ordinance address an issue that is a "municipal affair;" (2) is there an actual conflict between the ordinance and state law; (3) does the state law address a matter of statewide concern; and (4) is the state law reasonably related and narrowly tailored to resolve the issue of statewide concern. (*Cal. Fed., supra,* 54 Cal.3d at 17.) This brief focuses on the third and fourth parts of this framework, arguing that the City's sale of its surplus property is not a matter statewide concern, and that the Surplus Land Act is not reasonably related and narrowly tailored.

1. <u>The City's sale of its property is not a matter of statewide concern</u>

The third part of *Cal. Fed.'s* analytical framework requires the court to decide whether the state law addresses a matter of "statewide concern." (*Vista, supra*, 54 Cal.4th at 556.)

a. Determining whether a law addresses a statewide concern requires an ad hoc inquiry

The "inherent ambiguity" in the terms "statewide concern" and "municipal affairs" "masks the difficult but inescapable duty of the court to, in the words of one authoritative commentator, 'allocate the governmental powers under consideration in the most sensible and

appropriate fashion as between local and state legislative bodies.'" (*Cal. Fed., supra*, 54 Cal.3d at 17., quoting Background Study, *supra*, at p. 239.) Like its counterpoint "municipal affairs," the phrase "statewide concern" is "nothing more than a conceptual formula employed in aid of the judicial mediation of jurisdictional disputes between charter cities and the Legislature." (*Id*.)

This is an ad hoc inquiry. The *Vista* Court cautioned that, in performing the inquiry, 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." (*Id*. at 18.) This is partly because what constitutes a "statewide concern" may change over time. (See *id*., citing *Pacific Telephone & Telegraph Co. v. City & County of San Francisco* (1959) 51 Cal.2d 766, 771 ("*Pacific Telephone*").) And also partly because something that might constitute a statewide concern in one context, may not constitute a statewide concern in another.

For example, the erection of a fence around a municipal reservoir was held to be a matter of statewide concern with respect to restrictions on eligibility for employment, but not with respect to the wages paid to those employed. (*City of Pasadena v. Charleville* (1932) 215 Cal. 384, 392, 398, overruled other grounds, *Purdy and Fitzpatrick v. State* (1969) 71 Cal.2d 566, 586.) Similarly, improvement of a state highway was held to be a matter of statewide concern for purposes of wages paid on the project [*Southern California Roads Co. v. McGuire* (1934) 2 Cal.2d 115, 121-122], but not with respect to the authority of a municipality to use local tax revenues to pay for it [*Perez v. City of San Jose* (1951) 107 Cal.App.2d 562, 564]. Each dispute should be treated as a "discrete area[] of conflict," and evaluated under the "circumstances presented." (*Pacific Telephone, supra*, 51 Cal.2d at 771.)

b. Whatever the state's interest in affordable housing generally, the state cannot commandeer the City's own property and dictate its subsequent use

Appellants claim that the amendments to the Surplus Land Act that require a charter city that wishes to sell its land to do so in a particular way that supports affordable housing for low-income families are a matter of statewide concern. In support, Appellants rely heavily on the state's Housing Element Law, which requires local governmental entities to plan for anticipated housing needs and award density bonuses to developers who voluntarily include affordable housing in their proposed development projects. Opening Brief, pp. 24-26. Appellants, however, fail to recognize that the Housing Element Law is aimed at local government as a land use regulator.

The Surplus Land Act amendments are another matter entirely. The Act's amendments are aimed at local government as a landowner—not as a land use regulator. The Act's amendments dictate how surplus government land is to be used in the event of a sale. The amendments require local agencies to prioritize housing over parks and schools, and specify that the affordable units produced as a result of sale satisfy a number of requirements relating to the number of units, the income of occupants, and how long the units must be offered. (Gov. Code §§ 54222(a), 54222.5, 54223, 54227, 54233.) Essentially the Surplus Land Act amendments seek to commandeer city property and put it to the specific use preferred by the Legislature.

This runs counter to the purposes for which the Constitution's home rule provisions were adopted. In analogous contexts, the courts have declined to find "statewide concern," and have instead upheld local authority related to:

- a city's transfer of park property for non-park use (*Simons v. City of Los Angeles* (1976) 63 Cal.App.3d 455, 466);

- the setting and payment of compensation for a city's full time, civil service employees (*Bishop v. City of San Jose* (1969) 1 Cal.3d 56, 64); and

- the manner in which a city may enter into a contract (*First Street Plaza Partners v. City of Los Angeles* (1998) 65 Cal.App.4th 650, 661).

Similarly here, the court should hold that the Surplus Land Act amendments are *not* a matter of statewide concern.

This conclusion is reinforced by another provision in the California Constitution. Article XI, Section 11 provides: "The Legislature may not delegate to a *private person or body* power to make, control, appropriate, supervise, or interfere with county or municipal corporation improvements, money, or *property*, or to levy taxes or assessments, or perform municipal functions." (Emphasis added.) By forcing a city, when it chooses to sell surplus property, to sell it to a particular kind of developer — a developer of housing affordable to low income residents — favored by the Legislature, the Surplus Lands Act is at odds with this constitutional provision as well.

2. <u>The Surplus Land Act is not reasonably related and narrowly tailored to the resolution of a statewide concern</u>

Even if a city's disposition of its surplus private property were a matter of statewide concern—a point the League does not concede—the Surplus Land Act is not reasonably related and narrowly tailored to resolve a statewide concern. As such, it does not supersede home rule.

a. The Surplus Land Act is not reasonably related to solving affordable housing concerns

A statute is reasonably related to the resolution of a matter of statewide concern where there is a fair relationship between the problem sought to be addressed and the proposed solution. (*Board of Supervisors v. Local Agency Formation Com.* (1992) 3 Cal.4th 903, 913.) The Surplus Lands Act would impose significant burdens on cities, forcing them to jump through a number of procedural hoops and, if a deal with a developer of affordable housing is struck, specifying important substantive aspects of the use of the property, including that there be a 15% set-aside for low income, as opposed to moderate income, residents. (Gov. Code Sections 54222(a), 54222.5, 54223, 54227, 54233.) But this, standing alone, does not satisfy the standard. A statute is reasonably related to resolving affordable housing issues if the statute *actually results* in the development of affordable housing units. By its terms, the Surplus Land Act is unlikely to accomplish this.

First, the Act does not require a city to sell or lease its surplus property to affordable housing developers. The Act simply requires a city to offer the surplus property to affordable housing developers first. (Gov. Code sections 54222(a); 54222.5.) Under the Act, after offering the property to affordable housing developers first, the city is free to sell the property to any purchaser—affordable housing developer or not. (See, Gov. Code section 54223 (allowing city to openly market and sell its surplus property after 90 days).

Second, the Act includes several exceptions to its provisions. Government Code section 54221(e) and 54222 exempt some surplus property. And section 54226 expressly states that it does not limit a city's ability to sell or lease its surplus property at or below fair market value.

Third, a city's failure to comply with the Act does not invalidate a sale or transfer. (Gov. Code section 54230.5.)

Given the numerous exemptions and absence of any remedy for violation, it is unlikely that the Act impacts the production of affordable housing in any meaningful way at all, much less resolves the issue. Requiring the City to comply with its terms would make a lot of work for the City, but likely to no meaningful end. For that reason, the Surplus Land Act is not reasonably related to the production of affordable housing.

b. The Surplus Land Act is not narrowly tailored to solving affordable housing issues

A statute is narrowly tailored if the legislature has chosen the least restrictive means to further the articulated interest. (*Board of Supervisors v. Local Agency Formation Com., supra,* 3 Cal.4th at 913.) The statute must target and eliminate no more than the exact source of the evil it seeks to remedy. (*Id*.).

The Surplus Land Act has for some time required local agencies offering surplus property for sale to notify certain entities who have requested it, including schools, parks, and affordable housing. (Gov. Code Section 54222.) But rather than leave it at that, the Surplus Land Act amendments prioritize affordable housing over these other uses, and impose additional substantive requirements regarding number of units, occupants, and time on offer. (Gov. Code Sections 54222(a), 54222.5.) The Act is not narrowly tailored.

V.

CONCLUSION

The League does not dispute that affordable housing is an important concern. But that does not justify denying the City its constitutional home rule authority regarding how that concern should be addressed in connection with the City's sale of its own surplus property. Part of the

City's affordable housing program — San Jose's inclusionary zoning ordinance — was upheld by the Supreme Court against a challenge by the building industry just a few years ago. (*California Bldg. Indus. Ass'n v. City of San Jose* (2015) 61 Cal.4th 435, 479.) It is ironic that the City, wrongly accused in that case as having gone too far in promoting affordable housing, is now accused in this one of doing too little. The League respectfully requests that the City's home rule authority be upheld, and the trial court's judgment in favor the City be affirmed.

Dated: October 5, 2018 BEST BEST & KRIEGER LLP

By: */s/* Amy E. Hoyt
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CERTIFICATION OF COMPLIANCE

I certify that the text of this brief consists of 2,999 words as counted by the Microsoft Word word-processing program used to generate this brief.

Dated: October 5, 2018 BEST BEST & KRIEGER LLP

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PROOF OF SERVICE

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

On October 5, 2018, I served a copy of the within document(s):

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Judge of the Superior Court

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Executed on October 5, 2018, at Riverside, California.

/s/
MONICA CASTANON