Case No. 16-55840

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GREEN EDUCATION FOUNDATION,
Plaintiff and Appellant

vs.

CITY OF CAMARILLO,
Defendant and Appellee

On appeal from the United States District Court for the
Central District of California, Case No. 2:16-cv-02050
The Honorable Manuel L. Real, United States District Judge

BRIEF OF AMICUS CURIAE LEAGUE OF CALIFORNIA CITIES IN SUPPORT OF AFFIRMANCE OF DISTRICT COURT'S GRANTING OF MOTION TO DISMISS PER FED. R. CIV. PRO. 12(b)(6)

Derek P. Cole (State Bar No. 204250)
dcole@cotalawfirm.com
COTA COLE LLP
2261 Lava Ridge Court
Roseville, CA 95661
Telephone: (916) 780-9009
Facsimile: (916) 780-9050

Attorneys for Amicus Curiae
League of California Cities

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Amicus Curiae League of California Cities hereby states that it is a governmental entity and that Rule 26.1 does not apply.

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I. INTRODUCTION AND STATEMENT OF INTEREST

The League of California Cities ("League") is an association of 475 California cities united in promoting open government and home rule to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life in California communities. The League is advised by its Legal Advocacy Committee, which is composed of 24 city attorneys representing all regions of the State. The committee monitors appellate litigation affecting municipalities and identifies those cases, such as the instant matter, that are of statewide significance.

As its Legal Advocacy Committee has determined, the League and its member cities have a substantial interest in the outcome of this case. Many cities have zoning ordinances regulating unattended donation boxes ("UDBs") and a ruling from this Court will directly impact these cities. In particular, these cities may be subject to premature and unnecessary litigation due to lawsuits by parties speculatively claiming their constitutional rights have been violated despite their failure to submit of meaningful permit applications. As the League explains within, the claims of Appellant Green Education Foundation ("Appellant") are plainly unripe due to Appellant's failure to request permits from Appellee City of Camarillo ("Camarillo") for the UDBs it wishes to place in that city. The League believes the Appellant's position in this appeal significantly departs from this Court's well-established precedent requiring the submission of land use

applications as a condition for seeking relief in federal court under 42 U.S.C. section 1983. The League wishes to convey to this Court the importance of continuing to extend the deference it has given to California cities and counties in local land use matters.

The League sought and received the consent of the parties to file this brief. No party in this action authored this brief in whole or in part. Nor did any party or person contribute money toward the research, drafting, or preparation of this brief, which was authored entirely on a pro bono basis by the undersigned counsel.

II. ARGUMENT

A. INTRODUCTION

The League agrees with the City's conclusion that Appellant's freedom of speech and equal protection claims fail for all of the reasons set forth by Camarillo in its Answering Brief. The League has reviewed Camarillo's Answering Brief and concurs in both the ripeness and substantive constitutional arguments it makes. The League will not duplicate those arguments here but rather submits this amicus brief to further explain the sound policy reasons for this court to reject Appellant's constitutional claims as unripe.

The League is concerned that the Appellant's position, if accepted, would invite parties like Appellant to decide for themselves how California cities would administer their zoning and land use regulations in matters that potentially affect

constitutional rights. As the League explains within, this position is fundamentally at odds with the longstanding deference this Court and other federal courts have shown to municipalities in land use matters. In such cases, federal courts, out of respect for the policy of federalism, have generally required that plaintiffs seek and obtain a definitive local agency decision before seeking relief in federal court. This case does not present grounds for departing from that wise policy.

B. THE CENTRAL ROLE OF LOCAL CONTROL IN CALIFORNIA LAND USE REGULATION

At the outset, the League believes it is important to describe the significance of local decision-making within the comprehensive scheme California law provides for regulating land use. Because of the wide range in the demographical, socioeconomic, geographical, and environmental conditions affecting California's 482 cities and 58 counties, the overarching policy of state land use law is to promote local control. California's numerous cities and counties all have enacted planning documents and ordinances to regulate their many and diverse land uses and to promote orderly growth of their developable lands. In the League's view, an understanding of the regulatory structure in which these agencies operate should inform the Court's analysis of the issues in this appeal.

California's statutory scheme for regulating growth and development is set forth in the State Planning and Zoning Law (Cal. Gov't Code § 65000 et seq.).

This act declares as its overall objective the need to "preserv[e] and use [land] in ways which are economically and socially desirable in an attempt to improve the quality of life in California." Cal. Govt. Code § 65030. The act recognizes that most decisions regarding the future growth of the state "will continue to be made at the local level" and, for this reason, declares that local decisions concerning growth "should be guided by an effective planning process." Cal. Govt. Code § 65030.1.

To effectuate this policy, California law requires every city to enact a "comprehensive, long-term general plan" to govern land use and growth within its jurisdiction. Cal. Gov't Code § 65300. The general plan has been called both the charter and the constitution for local land use decisions. *City of Santa Ana v. Garden Grove* (1979) 100 Cal.App.3d 521, 532; *Lesher Commun., Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531, 540. The general plan "sits atop the hierarchy of local government law regulating land use." *Neighborhood Action Group For the Fifth District v. County of Calaveras* (1984) 156 Cal.App.3d 1176, 1183. It specifies the broad policies and goals the city seeks to implement in regulating growth and development, both presently and into the future.

Immediately subordinate to the general plan is the zoning ordinance. Cal. Gov't Code § 65860. Among other things, a zoning ordinance regulates "the use of buildings, structures, and land as between industry, business, residences, open

space, including agriculture, recreation, enjoyment of scenic beauty, use of natural resources, and other purposes." Cal. Gov't Code § 65850. The zoning ordinance regulates these competing uses in two ways. It permits some land uses as a matter of right so long as they comply with standards the ordinance prescribes. And, as relevant here, "[o]ther sensitive land uses require discretionary administrative approval pursuant to criteria in the zoning ordinance. They require a conditional use permit." *Neighborhood Action Group*, *supra*, 156 Cal.App.3d at 1183 (internal citations omitted).

Within this scheme, the conditional use permit affords local agencies great flexibility to ensure compatibility among neighboring land uses. *Upton v. Gray* (1969) 269 Cal.App.2d 352, 357. As California courts have recognized, "[t]he reason for discretionary treatment is that these are uses which 'cannot be said to be always compatible in some zones while always incompatible in others….'" *Neighborhood Action Group, supra,* 156 Cal.App.3d at 1183. Thus, the "traditional purpose of the conditional use permit is to enable a municipality to exercise some measure of control over the extent of certain uses …which, although desirable in limited numbers, could have a detrimental effect on the community in large numbers." *Van Sicklen v. Browne* (1971) 15 Cal.App.3d 122, 126. Given the competing interests involved, California courts have recognized that decisions regarding conditional use permits implicate "questions of policy and wisdom

concerning matters of municipal affairs" that are appropriately reserved for local legislative bodies. *Wheeler v. Gregg* (1949) 90 Cal.App.2d 348, 361. This is because "[t]he 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." *Penn-Co v. Board of Supervisors of Monterey County* (1984) 158 Cal. App. 3d 1072, 1084.

In short, the policy of local control is paramount in California land use regulation. And the ability to regulate land uses through conditional use permits is a key tool by which state law authorizes cities and counties to exercise such control.

In administering their zoning and permitting requirements, California cities and counties are also expressly authorized to charge applicants reasonable fees for processing their land use applications. This authority is codified in the state's Mitigation Fee Act (Cal. Gov't Code § 66000 et seq.) For the type of fees at issue in this appeal, this act prohibits cities and counties from charging more than the reasonable costs they incur in reviewing proposed applications. See Cal. Gov't Code § 66014 (providing that a fee charged for a use permit application may not "exceed the estimated reasonable cost of providing the service for which the fee is charged"). Before adopting such fees, cities and counties must conduct "nexus studies" to identify the labor, materials, and other costs they expect to incur and to

ensure the costs are fairly distributed among applications. The fees must then be approved at a noticed public hearing. Cal. Gov't Code 66016(a). The California Supreme Court has affirmed that fees approved under this process meet the Fifth Amendment standards required by the United States Supreme Court's rulings in *Nollan v. California Coastal Commission* (1987) 483 U.S. 825 and *Dolan v. City of Tigard* (1994) 512 U.S. 374. *See Ehrlich v. City of Culver City* (1996) 12 Cal. 4th 854, 859-60.

C. THIS COURT'S LONGSTANDING DEFERENCE TO LOCAL LAND USE ADMINISTRATION IN CALIFORNIA

Because local permitting decisions in California implicate important concerns, policies, and competing interests unique to the cities and counties that must make them, this Court's past decisions have accorded a healthy deference to local zoning administration. This has especially been the case when parties have sought to bypass established procedures for submitting and receiving decisions regarding their proposed land uses. In these situations, this Court has rightly declined to speculate about how California cities or counties would interpret or apply their zoning ordinances in the absence of a clear and substantive application.

Thus, following the United States Supreme Court's decision in *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City* (1985) 473 U.S. 172, which dealt with ripeness requirements in the context of takings claims,

this Court held that a plaintiff must make at least one meaningful land use application before filing an action under 42 U.S.C. section 1983 alleging violation of substantive due process. *Kinzli v. City of Santa Cruz*, 818 F.2d 1449, 1456 (9th Cir. 1987). This Court has also extended the one-meaningful-application requirement to claims asserting violation of procedural due process rights. *Lake Nacimiento Ranch Co. v. San Luis Obispo County*, 841 F.2d 872 (9th Cir. 1987). And it has further done so for land use claims asserting violations of equal protection. *Herrington v. County of Sonoma*, 857 F.2d 567, 569 (9th Cir. 1988).

This Court's extension of the one-meaningful-application rule to constitutional challenges beyond taking claims is consistent with the approach of a number of its sister circuits. As these circuits have recognized, federal courts do not have the expertise or capacity to decide the unique and multifaceted policy and factual questions that are presented by local land use matters. Expressing what, at its core, is a healthy respect for federalism, these circuits have strongly inveighed against usurping the roles of states—and their municipalities—to regulate matters that are of purely local concern.

Expounding on this rationale, the Fourth Circuit Court of Appeals has stated:

> Resolving the routine land-use disputes that inevitably and constantly arise among developers, local residents, and municipal officials is simply not the business of the federal courts…. "Federal judges lack the knowledge of and sensitivity to local conditions necessary to a proper balancing of the complex factors" that are inherent in

> municipal land-use decisions. Further, allowing "every allegedly arbitrary denial by a town or city of a local license or permit" to be challenged under [section] 1983 would "swell[] our already overburdened federal court system beyond capacity." Accordingly, federal courts should be extremely reluctant to upset the delicate political balance at play in local land-use disputes. Section 1983 does not empower us to sit as a super-planning commission or a zoning board of appeals, and it does not constitutionalize every ''run of the mill dispute between a developer and a town planning agency.'' In most instances, therefore, decisions regarding the application of subdivision regulations, zoning ordinances, and other local land-use controls properly rest with the community that is ultimately-and intimately-affected.

Gardner v. City of Baltimore Mayor and City Council, 969 F.2d 63, 67–68 (4th Cir. 1992). Likewise, the First Circuit Court of Appeals has explained:

> [T]he conventional planning dispute—at least when not tainted with fundamental procedural irregularity, racial animus, or the like—which takes place within the framework of an admittedly valid state subdivision scheme is a matter primarily of concern to the state and does not implicate the Constitution…. A federal court, after all, "should not ... sit as a zoning board of appeals." Every appeal by a disappointed developer from an adverse ruling by a local Massachusetts planning board necessarily involves some claim that the board exceeded, abused or "distorted" its legal authority in some manner, often for some allegedly perverse (from the developer's point of view) reason. It is not enough simply to give these state law claims constitutional labels such as "due process" or "equal protection" in order to raise a substantial federal question under section 1983.

Creative Environments, Inc. v. Estabrook, 680 F.2d 822, 833 (1st Cir. 1982).

Requiring aggrieved parties to exhaust their claims through at least one meaningful application is not the only way in which this Circuit has respected the land use administration of California cities and counties. This Court has also

emphasized the importance that aggrieved parties pursue state-law remedies whenever they challenge local permitting decisions. *See Lake Nacimiento Ranch Co., supra*, 841 F.2d 872, 879. Even in cases in which parties claim agency decisions violate the federal constitution, California courts generally have not excused such parties from first seeking relief under California's mandamus statutes. *See* Cal. Code Civ. Proc, § 1085 (codifying what is known as "traditional" mandamus); *id*., §§ 1094.5-1094.6 (setting forth the standards for "administrative" mandamus); *Briggs v. City of Rolling Hills Estates* (1995) 40 Cal.App.4th 637, 645 (finding plaintiff's federal claims under 42 U.S.C. § 1983 regarding conditions imposed on a conditional use permit to be precluded because of his failure to challenge city decision by mandamus). As California courts have explained, "[m]andamus proceedings allow courts to flesh out the issues and factual components of the dispute…." *Mola Development Corp. v. City of Seal Beach* (1997) 57 Cal.App.4th 405, 411. Giving deference to the remedies available under California law, this Court has not shown sympathy to plaintiffs who bypass mandamus and choose instead to seek relief in federal court under Section 1983. *Makdessian v. City of Mountain View*, 152 Fed.Appx. 642, 645 (9th Cir. 2005); s*ee also Miller v. County of Santa Cruz,* 39 F.3d 1030, 1034–35 (9th Cir. 1994) (holding that a plaintiff's failure to seek mandamus for quasi-judicial

decision precluded him from asserting claims under 42 U.S.C. § 1983 based on the same operative facts).

The League believes this Court's past decisions on these subjects are instructive as to how this Court should rule in this appeal. As next explained, because of the nature of and land use impacts associated with the UDBs the Appellant proposes to place within Camarillo, this Court has good reason to extend the one-meaningful-application requirement to the claims at issue. Camarillo's right to review a proper application from the Appellant is equally deserving of the respect this Court's prior rulings have given to California local agencies.

D. THE APPELLANT'S CLAIMS ARE NOT RIPE

The Appellant's constitutional claims in this appeal are plainly unripe. Solely from its informal communications with Camarillo's planning officials and city attorney, the Appellant has decided for itself how Camarillo would apply its zoning regulations to its proposed UDBs. Yet, as the above discussion evidences, this Court and its sister circuits have made clear that parties in land use matters may not invoke federal jurisdiction based on such suppositions. This Court should have little difficulty extending its precedent to find that the District Court's dismissal below was proper.

The United States Constitution limits jurisdiction in federal cases to "cases" and "controversies." U.S. Const., Art. III, § 2. A plaintiff's standing to sue in

federal court is governed both by the requirements of Article III and certain "prudential" considerations. *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979). The constitutional requirements are that the plaintiff have suffered an injury in fact, there is a causal connection between that injury and the conduct complained of, and it is likely the injury will be redressed by a favorable court decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61. The plaintiff bears the burden of establishing each of these requirements. *Ibid*.

Ripeness, although technically a prudential consideration, often "coincides squarely with" and is considered "indistinguishable" from Article III's injury-in-fact requirement. *Thomas v. Anchorage Equal Rights Com'n*, 220 F.3d 1134,1138 (9th Cir. 2000)(en banc). As noted above, this Circuit's decisions in Lake *Nacimiento*, *Kinzli*, and *Herrington* have recognized that alleged constitutional violations concerning land use rights are not ripe unless the plaintiff has submitted, and the defendant agency has acted upon, at least one meaningful application. Although those cases involved due process and equal protection claims,[1] precedents from other federal courts amply establish that the requirement applies to

[1] This Court has extended the one-meaningful-application requirement to a subject closely related to First Amendment rights in *Guatay Christian Fellowship v. County of San Diego*, 670 F.3d 957, 980 (9th Cir. 2011). There, it held that a church's claims under the Religious Land Use and Institutionalized Persons Act were unripe due to the church's failure to apply for a use permit.

First Amendment claims as well. *See Murphy v. New Milford Zoning Com'n* 402 F.3d 342, 350 (2d Cir. 2005) (homeowners who hosted large prayer group meetings at their personal residence did not seek variance before bringing suit); *Congregation Rabbinical College of Tartikov, Inc. v. Village of Pomona,* 915 F.Supp.2d 574, 599 (S.D.N.Y. 2013) (First Amendment claims associated with right to construct rabbinical college were not ripe because of lack of application); *Digital Properties, Inc. v. City of Plantation,* 121 F.3d 586, 590 (11th Cir. 1997) (First Amendment claim regarding proposed adult book store failed due to lack of actual city decision); *Tini Bikinis-Saginaw, LLC v. Saginaw Charter Tp.*, 836 F.Supp.2d 504, 518 (E.D. Mich. 2011) (free speech claim of party who wished to establish "bikini bar" held not ripe due to absence of city decision regarding use).

In the League's view, a ruling in favor of Camarillo would constitute a straightforward application of this Court's (and other federal courts') prior rulings. The League acknowledges that the UDBs the Appellant proposes to place within Camarillo implicate Appellant's free speech rights under the First Amendment. But at this juncture, the League agrees with Camarillo that the Appellant has failed to submit any meaningful application that would enable the Court to consider whether the impact on such rights is anything other than speculative.

Camarillo's Zoning Code offers the Appellant a number of options for placing UDBs within city limits. (See Appellee's Responding Brief, 6-7.)

Depending on the size of the proposed bins and the zoning district where the bins would be located, the Appellant could apply for a basic permit, planned development permit, conditional use permit, or temporary use permit. The UDBs could be permitted as "recycling facilities," which the City has interpreted to include textiles, books, and household materials like Appellant proposes to collect for its charitable purposes. (*Id.*, 5-6.) This is accordingly not a case in which a city's municipal code is silent on the subject of a proposed use and in which there are no clear standards by which the proposed use could be considered.

Especially noteworthy to the League is the size and proposed construction of the UDBs the Appellant proposes to place, as depicted on page 1 of the Appellant's Opening Brief. As depicted there, the proposed bins would take up as much as four parking spaces of an existing parking lot, and would likely require at least one additional parking space for regular retrieval of the donated materials by the UDB operator. Here, Camarillo's concern that the Appellant has failed to identify specific locations for the bins it proposes to place is well justified. As a matter of common practice, most city zoning codes require that shopping centers, professional office buildings, and other public establishments provide a certain number of parking spaces depending on the nature of their uses and the daily vehicle trips they can be expected to generate. For Camarillo or any city faced with a proposal for placement of a UDB, a natural question that would arise is

whether the placement of the UDB would cause the shopping center, office building, or other establishment to fall below the minimum number of parking spaces required. The specific location of UDB within a parking lot is also a matter that would be of concern. If a city were to permit a UDB, it logically would want to ensure that public access to the bin would not unduly disrupt the circulation pattern within a parking lot or interfere with ingress or egress onto public streets.

A city considering a UDB application would also want to have confirmation the operator will take reasonable measures to secure the proposed bin and its surroundings. As part of an application review, a city would likely impose measures requiring the UDB operator to make sure the contents of the bin are protected from theft, vandalism, or loitering. And for large UDBs with the dimensions and construction like that which the Appellant proposes, a city may additionally want to make certain the UDB would be adequately anchored and protected from severe weather. Such regulations would, among other things, assure that the UDB would not have negative aesthetic impacts on neighboring properties or create attractive nuisances.

Given these and many other impacts UDBs could have at their locations and on their surroundings, it is manifestly reasonable to require that UDB sponsors seek permission under applicable zoning requirements before asserting violations of their First Amendment rights in federal court. Especially in a case like this, in

which the UDB sponsor has a number of avenues under the zoning code for furthering its charitable enterprise within the city, the sponsor should not be allowed to invoke federal jurisdiction based solely on speculation as to how the city might act. Zoning necessarily limits the rights of all those who wish to use land for a desired purpose. Even when those limitations have been claimed to transgress on constitutional rights, this Court and federal courts generally—as noted above—have declined to interfere with local zoning administration absent a clear indication that agencies are resolved to apply their codes in an unconstitutional manner. Camarillo's desire to review the Appellant's proposed UDBs through its formal application processes is no less deserving of the same treatment.

Camarillo's right to charge its standard application fees is also deserving of respect. While the United State Supreme Court has recognized that municipal ordinances imposing excessive fees on free speech rights are invalid, it has recognized the right of municipalities to impose fees as "regulatory measure[s] to defray the expense of policing the activities in question." *Murdock v. Pennsylvania*, 319 U.S. 105, 113-14 (1943). The Supreme Court has elaborated that regulatory fees affecting expressional rights may be charged if they serve "legitimate state interests." *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 137 (1992); *see also American Target Advertising, Inc. v. Giani*, 199 F.3d

1241, 1248-49 (10th Cir. 2000) (fee charged to fundraisers was narrowly tailored to prevent against fraud and limited to reasonable administration costs). Because any permit fees Camarillo charges have been established in accordance with the Mitigation Fee Act, and are by law limited to the City's reasonable cost of administration, the Appellant cannot evade the requirement to submit a meaningful application based solely on the asserted impact on its charitable operations.

In sum, this Court has firm ground to affirm the District Court's dismissal for lack of ripeness. Camarillo's request that the Appellant submit an application and pay the associated application fee for any UDBs it wishes to place within city limits is reasonable and well in accordance with this Court's prior rulings.

The League is concerned that a contrary ruling from this Court would invite parties like Appellant to self-decide—and often incorrectly—how cities might apply their zoning ordinances to other land use matters that arguably affect constitutional rights. Such a ruling would be contrary to the policy of federalism that underlies this Court's decisions in *Lake Nacimiento*, *Kinzli*, and *Herrington*, as well as many other rulings of federal courts, and would undermine judicial efficiency. This Court should reject the Appellant's invitation to depart from the longstanding deference it has shown to the right of California cities and counties to regulate land use.

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II. CONCLUSION

For the reasons described above, and for all of the reasons set forth in Camarillo's Answering Brief, the League joins with the City of Camarillo in requesting that the dismissal below be affirmed.

Respectfully submitted,

Dated: January 26, 2017

COTA COLE LLP

By: /s/ *Derek P. Cole*
Derek P. Cole
Attorneys for Amicus Curiae
League of California Cities

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Fed. R. App. P. 32 (a)(7)(C) and Ninth Circuit Rule 32-1, the above brief is proportionately spaced, has a typeface of 14 points or more, and contains 4,356 words, which is within the word limitation imposed for amicus briefs per Fed. R. App. P. 29(d).

Dated: January 26, 2017

COTA COLE LLP

By: /s/ *Derek P. Cole*
Derek P. Cole
Attorneys for Amicus Curiae
League of California Cities

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on January 26, 2017. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

By: /s/ *Derek P. Cole*

Derek P. Cole
Cota Cole LLP
2261 Lava Ridge Court
Roseville, CA 95661
(916) 780-9009
dcole@cotalawfirm.com

Attorneys for Amicus Curiae
League of California Cities