IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION THREE

LATINOS UNIDOS DEL VALLE DE NAPA Y SOLANO *et al.*, Plaintiffs and Appellants, v. COUNTY OF NAPA, Defendant and Respondent.	Case No. A135094 (Napa County Superior Court Case No. 26-50568)

On Appeal From Napa County Superior Court
The Honorable Raymond A. Guadagni

APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF DEFENDANT AND RESPONDENT COUNTY OF NAPA; PROPOSED AMICUS CURIAE BRIEF OF THE CALIFORNIA STATE ASSOCIATION OF COUNTIES AND LEAGUE OF CALIFORNIA CITIES IN SUPPORT OF DEFENDANT AND RESPONDENT COUNTY OF NAPA

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Amicus Curiae, California State Association of Counties ("CSAC") and the League of California Cities ("League"), respectfully move this Court, pursuant to California Rules of Court, rule 8.520(f), for leave to file the attached brief in support of defendant and respondent County of Napa, submitted with this motion.

INTEREST OF AMICUS CURIAE

CSAC is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, 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 League of California Cities is an association of 469 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, which comprises 24 city attorneys from all regions of the State. The 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.

CSAC and the League's member counties and cities possess land use planning authority over the majority of land in this State. Their respective governing bodies exercise legislative discretion in enacting general plans and related ordinances based on the evidence presented to them, and based on their determinations about the best way to meet the needs of their communities. This type of legislative discretion is at the heart of our local government system, and CSAC and the League therefore have an interest in ensuring any court review of such decisions respects the autonomy of City Councils and Boards of Supervisors in their governing roles.

SUBJECT OF PROPOSED AMICUS BRIEF

Counsel for CSAC and the League is familiar with the party briefing and does not seek to repeat the parties' arguments in their proposed brief. Instead, the proposed amicus brief will provide additional information on three issues presented by this case: (1) the proper standard of review in a housing element challenge; (2) whether evidence outside of the record of proceedings relevant to that review; and (3) what level of specificity is required to exhaust administrative remedies for purposes of challenging adoption of a bonus density ordinance. The proposed amicus brief provides

additional case authority on these fundamental issues, all of which must be decided before the merits of Plaintiffs' claims can be considered.

For the foregoing reasons, CSAC and the League respectfully request that the Court accept the accompanying amicus curiae brief.

Dated: Respectfully submitted,

By: _____
JENNIFER B. HENNING
Attorney for Amicus Curiae
California State Association of Counties
and League of California Cities

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INTRODUCTION

A housing element is a legislative enactment. As part of a city's or county's general plan, it is intended to provide a basis for local government decision-making and to serve as a tool for identifying the land use needs of a community. Except for mandating the adoption of the general plan and specifying the elements to be included, the Legislature has not pre-empted the decision-making power of cities and counties to adopt land use policies based on their own determinations about the needs and appropriate uses of land in their communities. (*Devita v. County of Napa* (1995) 9 Cal.4th 763, 783.) While the housing element law specifies the information and criteria that must be considered by a local agency when developing its housing element (Gov. Code, § 65580 et seq.), the final determinations are legislative in nature and are therefore afforded deference by the court.

The heart of this case involves disagreements with decisions made by the Napa County Board of Supervisors in adopting its housing element. But while Unidos del Valle de Napa y Solano and Messrs. Olvera, Manzo and Deharo ("Plaintiffs") might have different views on the policy decisions adopted by the Board, their burden in this lawsuit is to show that the Board's actions were arbitrary and capricious, or completely lacking in evidentiary support. Failing that significant showing, the housing element and density bonus ordinance must be upheld.

The California State Association of Counties (CSAC)[1] and the League of California Cities (League)[2] support the arguments made by the County of Napa in this case, but submit this amicus brief to focus on three issues that have significance to cities and counties statewide:

(1) How the arbitrary and capricious standard should be applied in a challenge to a housing element approval;

(2) What evidence may be considered in determining whether a local agency acts in an arbitrary and capricious manner in adopting its housing element; and

(3) What level of specificity is required in order to exhaust administrative remedies when challenging adoption of an ordinance (in this case, a density bonus ordinance).

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[1] The California State Association of Counties (CSAC) is a non-profit corporation. The membership consists of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, 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.

[2] The League of California Cities is an association of 469 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, which comprises 24 city attorneys from all regions of the State. The 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.

When closely evaluating each of these issues, it is apparent that plaintiffs have not met their burden in proving the acts of the County Board of Supervisors unlawful, and as such, the trial court's decision upholding the housing element and density bonus ordinance should be affirmed.

ARGUMENT

I. ADOPTION OF A HOUSING ELEMENT IS A LEGISLATIVE ACTION SUBJECT TO AN ARBITRARY AND CAPRICIOUS STANDARD OF REVIEW.

The essence of Plaintiffs' challenge to the housing element is that certain findings made by the Napa County Board of Supervisors do not justify their conclusions about where affordable housing could be placed within the County. Plaintiffs do not make any attempt in their briefs to explain how the County's decisions were arbitrary and capricious. Instead, Plaintiffs' briefs describe the evidence in the record and argues that the evidence does not support the conclusions reached by the County. Though not stated directly, Plaintiffs are in effect asking this Court to apply the evidence in the record to reach different conclusions than those made by the Board. This *Topanga*-style of judicial review is not appropriate for legislative determinations and should be rejected.[3]

[3] *Topanga Association for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, involved a challenge to a variance under Code of Civil Procedure section 1094.5. The Court scrutinized the record to see if the agency's findings supported its decision. (*Id.* at p.514.) The Court contrasted an agency's legislative functions from the administrative ones at . . .

A. Adoption of a housing element is a legislative act subject to traditional mandamus under Code of Civil Procedure section 1085.

It is a fundamental principle that a local body acts in a legislative capacity when establishing a basic principle or policy. (*Ensign Bickford Realty Corp. v. City Council of the City of Livermore* (1977) 68 Cal.App.3d 467, 474.) California planning law declares adoption or revision of a housing element to be a legislative act. (Gov. Code, §§ 65301.5, 65850; *Fonseca v. City of Gilroy* (2007) 148 Cal.App.4th 1174, 1208.) It is subject to traditional mandamus under Code of Civil Procedure section 1085 (Gov. Code, § 65009, subd. (c); *A Local and Regional Monitor v. City of Los Angeles* (1993) 16 Cal.App.4th 630, 649), whereas the exclusive method for challenging an administrative decision is an administrative mandamus under Code of Civil Procedure section 1094.5. (*State of California v. Superior Court (Veta Co.)* (1974) 12 Cal.3d 237, 249; *Guilbert v. Regents of the University of California* (1979) 93 Cal.App.3d 233, 244-45.)

The distinction between the two mandamus actions is significant. Review of a legislative action is not like an ordinary evidentiary trial. The adequacy of a legislative decision is reviewed as a matter of law, but under

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(…continued)
issue in a variance determination, noting that the Court's use of a more "vigorous and meaningful" review of administrative decisions than legislative ones facilitates "the intended division of decision-making labor." (*Id.* at p. 517.)

traditional mandamus review the court is prohibited from examining the merits of a decision, since that is exclusively within the purview of the legislative body. (*Hernandez v. City of Encinitas* (1994) 28 Cal.App.4th 1048, 1059; *Las Virgenes Homeowners Federation v. County of Los Angeles* (1986) 177 Cal.App.3d 300, 305.) Review under section 1085 is therefore more deferential to agency decision-making. (*American Coatings Assn. v. South Coast Air Quality Management Dist.* (2012) 54 Cal.App.4th 446, 461.)

B. Legislative actions are subject to an arbitrary and capricious standard under which the court may not second-guess the decisions of the legislative body.

Because of the separation of powers, courts cannot interfere with legislative decisions, but may only overturn such decisions if they are arbitrary, capricious, or wholly lacking in evidentiary support, or in some circumstances, procedurally unfair. (*Baldwin v. City of Los Angeles* (1999) 70 Cal.App.4th 819, 836; *Fullerton Joint Union High School Dist. v. State Bd. of Education* (1982) 32 Cal.3d 779, 786.) Courts may not substitute their judgment for the judgment of the local agency. (*Associated Homebuilders, Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 604.)

This principle has consistently been applied to the local adoption of housing elements. The courts have concluded that they will not inquire into the wisdom of the agency's actions, but will just examine whether there is a basis in the record to support them. (*Fonseca*, *supra*, 148 Cal.App.4th at p.

1208.) Indeed, the Legislature has specified that the court's function is to determine whether the housing element substantially complies with Government Code sections 65580-65589.8, but not to examine the wisdom or merits of the local government's determination of policy. (*Black Property Owners Assn. v. City of Berkeley* (1994) 22 Cal.App.4th 974, 980.)

In the context of adoption of a plan with required statutory elements, "an agency adopts generally applicable rules through an administrative process in which the demarcation between facts, reasoning, policy and discretion is quite vague." (*American Coatings Assn. v. South Coast Air Quality Management Dist., supra*, 54 Cal.App.4th at 461 [reviewing a challenge to adoption of an air quality management plan].) So while the courts look for substantial compliance with the statutory requirements of the plan, the purpose of the review is to ensure that the agency has considered all relevant factors, and demonstrated a rational connection between the factors, the choices made, and the purpose of the statute. (*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 577.)

Though the court evaluates the record de novo in undertaking its review of a housing element, legislative determinations and conclusions are presumed to be valid. (*Garat v. City of Riverside* (1991) 2 Cal.App.4th 259, 292-93 (overruled on other grounds).) The burden is on the challenger

to demonstrate that the plan is inadequate because the agency acted arbitrarily and capriciously, or without any evidentiary basis. (*Id.* at p. 293; *American v. City of Pomona* (1985) 170 Cal.App.3d 305, 309-10.)

In their reply brief, Plaintiffs assert that the County's description of this well-established method for reviewing legislative decisions by a local agency is a novel, "check the boxes" approach in which the court does nothing more than establish that all of the required components of the plan are present. (Reply at p. 27.) Yet plaintiffs cite to no case that requires the court to undertake a different review than the one described in the preceding paragraphs.

Plaintiffs correctly note that whether a housing element substantially complies with statutory requirements is a question of law that requires a court's independent judgment. (Reply at p. 26, citing *Fonseca, supra,* 148 Cal.App.4th 1174, 1191.) But *Fonseca* also recognizes that the review "merely involves a determination of whether the housing element includes the statutory requirements. (*Id.* at p. 1185 [citing *Buena Vista Gardens Apartments Assn. v. City of San Diego Planning Dept.* (1985) 175 Cal.App.3d 289, 298, 306 for the proposition that courts look "only to ensure that the requirements of § 65583 are met, not whether the programs adopted are adequate to meet their objectives or are the programs the court thinks ought to be there"].)

The case law in this area helps illustrate how the standard works in practice. For example, in *Camp v. Board of Supervisors* (1981) 123 Cal.App.3d 334, the Court of Appeal undertook a de novo review of adoption of the housing element, and concluded that a pamphlet with an out of date housing inventory did not meet the statutory requirements. (*Id.* at p. 350-351.) By contrast, in *Buena Vista Gardens*, *supra*, 175 Cal.App.3d 289, the court upheld the housing element after determining it met the statutory requirements, even though the court also found it could have included more detail, and that programs other than the one adopted may have been more effective. (*Id.* at p.298.)

So as stated in the case law cited by both parties, in reviewing a housing element challenge, the court conducts a de novo review using its independent judgment on whether the element satisfies all statutory requirements regarding the analysis of sites suitable for affordable housing, and confirms that the analysis used by the local agency is not arbitrary and capricious. (Reply at pp. 26-29; Respondent's Brief at p. 4.)

C. Plaintiffs' arguments challenging the wisdom of policy determinations or seeking more information than required by statute should be rejected.

Both the County and the trial court applied the well-established law that the court's role is to ensure the required components of the housing element are met, but only to reject policy determinations if they are arbitrary and capricious. Yet the substance of Plaintiffs' arguments would

in fact push this Court beyond the review outlined in these cases by making judgments on the merits of the County's policy decisions, not because the County acted in any arbitrary and capricious way, but because Plaintiffs disagree with the County's determinations.

For example, Plaintiffs disagree with the County on the environmental constraints at some of the sites the County designated for affordable housing in its plan, though the information on that issue they allege is required goes far beyond the requirements in Government Code section 65583.2. (Opening Brief at p. 66; Reply at pp. 31-34.) They disagree with the County that certain non-vacant sites are appropriate, arguing that Government Code section 65583.2, subdivision (g) requires the County to "demonstrate" developability. (Opening Brief at p. 76; Reply at p. 34.) That section, however, merely requires that the potential for development be specified using delineated criteria to explain the potential. In a final example, Plaintiffs differ with the County on the best use of the County's local affordable housing funds (Opening Brief at p. 74-75), but do not make any effort to explain why the County's actions are arbitrary or capricious.[4]

[4] In fact, the words "arbitrary and capricious" do not appear anywhere in Appellants' opening brief, not even in the section describing the standard for review.

Perhaps there are additional details that could have been included in the County's housing element, and perhaps there are more effective programs for meeting the County's goals. But that is not the question before this Court. Instead, in respect of the fact that the legislative function of developing local housing policy lies in the hands of local agencies, this Court's role is to ensure the analysis satisfies statutory requirements and is not arbitrary and capricious or without evidentiary basis.

As was the case in *Black Property Owners*, the "real quarrel is with the merits of [the agency's] conclusions" rather than substantial compliance with the statute. (*Black Property Owners*, *supra*, 22 Cal.App.4th 974, 982.) Unfortunately for Plaintiffs, the remedy they seek is not available in regard to legislative determinations. Any attempts by Plaintiffs to obtain a *Topanga*-style review is an unwarranted intrusion on the County's legislative authority and must be rejected.

II. TRIAL COURT PROPERLY EXCLUDED EVIDENCE OUTSIDE OF THE ORDERED RECORD OF PROCEEDINGS.

Plaintiffs challenge the trial court's decision to limit the evidence in their housing element actions to what is contained in the record of proceedings. The trial court was correct. As explained above, the court's review is limited to whether the statutorily-required components are included in the housing element and whether the agency was arbitrary and capricious in its legislative determinations. Evidence outside the record is

not relevant for either of those determinations. Whether the required components of a housing element are present is determined by reviewing the document itself, and whether the legislative body acted in an arbitrary and capricious manner can only be measured by what the Board knew at the time the housing element was adopted.

As to compliance with statutory requirements, the housing element as adopted by the legislative body either includes all of the requisite components or it does not. If it does comply with the statute, it is not relevant whether more detail could have been included in the housing element. (*Buena Vista Gardens, supra,* 175 Cal.App.3d at p.298.) If it does not comply, that will be determined on the basis of the document itself; evidence outside of the record does not aid the court in that determination.

The other part of the court's review process asks whether the legislative body was arbitrary and capricious in its analysis or policy determinations, or whether its actions are not supported by the evidence. There, too, it is well-established that the court reviews the agency's decisions as reflected in the record before it. (*Toyota of Visalia, Inc. v. New Motor Vehicle Bd.* (1987) 188 Cal.App.3d 872, 881.) This rule clearly applies in traditional mandate proceedings challenging legislative decisions. (*Western States Petroleum Assn. v. Superior Court, supra,* 9 Cal.4th 559, 574 [citing Kostka & Zischke, Practice Under the Cal. Environmental

Quality Act (Cont.Ed.Bar 1993) §23.51, pp. 962-963, which notes an "unbroken" line of non-CEQA cases holding extra-record evidence is not admissible to challenge quasi-legislative administrative decisions.) In reviewing the action of a legislative body, evidence of a decisionmaker's thought process or mental process is not admissible. (*City of Fairfield v. Superior Court* (1975) 14 Cal.3d 768, 772-73; *State of California v. Superior Court* (1974) 12 Cal.3d 237, 257-58.)

Although much of the case law with detailed discussions of limiting review to the record occurs in the CEQA context, there is no reason to apply a different standard here. (*Western Petroleum, supra,* 9 Cal.4th at. 575 [though CEQA and non-CEQA cases are governed by different review standards (prejudicial abuse of discretion vs. arbitrary and capricious) there is no reason why different rules of evidence should apply].) Discovery should not exceed the record in a challenge that is based on the arbitrary and capricious standard because what is relevant in that analysis is what the agency knew at the time its action was taken. (*Id.* at p. 576.)

III. PLAINTIFFS' EXHAUSTION OF ADMINISTRATIVE REMEDIES LACKED THE SPECIFICITY REQUIRED TO GIVE THE COUNTY NOTICE OF ALLEGED DEFICIENCIES IN ITS DENSITY BONUS ORDINANCE.

As noted in the County's Respondent's brief, what is at issue in Plaintiffs' effort to exhaust administrative remedies relative to the County's density bonus ordinance is an email from plaintiffs' counsel that: (1)

provided "suggestions" on the proposed ordinance; (2) included a sample ordinance from another jurisdiction; and (3) attached an article with a "helpful overview" of the issue, along with the preface that counsel "didn't agree with some of it." (Respondent's Brief at pp. 70-71.) The question for this court is whether such efforts are specific enough to apprise the County of Plaintiffs' particular concerns about the ordinance.

Ample case law states the general rule that failure to exhaust administrative remedies is a bar to relief in California courts. (*See Sierra Club v. San Joaquin Local Agency Formation Com.* (1999) 21 Cal.4th 489, 495-496.) The purpose of the exhaustion requirement is to provide an agency with the opportunity to decide matters within its expertise prior to judicial review, and to lighten the burden of overworked courts in cases where would-be plaintiffs may obtain the relief sought directly from the local agency without the need for court action. (*Napa Citizens for Honest Government v. Napa County Bd. of Supervisors* (2001) 91 Cal.App.4th 342, 384; *Citizens for Open Government v. City of Lodi* (2006) 144 Cal.App.4th 865, 874.)

Generalized comments, bland references and unelaborated objections are not sufficient to exhaust administrative remedies. (*Coalition for Student Action v. City of Fullerton* (1984) 153 Cal.App.3d 1194, 1197-1198; *Citizens for Responsible Equitable Environmental Development v. City of San Diego* (2011) 196 Cal.App.4th 515, 528 ("CREED").) The

doctrine is designed to provide an agency with "articulated factual issues and legal theories before its actions are subjected to judicial review." (*Coalition for Student Action, supra,* 153 Cal.App.3d at p. 1198.) It is plaintiffs' burden to demonstrate that the issues raised in the trial court were first raised at the administrative level. (*Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 535.)

The manner in which the evidence is presented to the agency also matters. It must be "fairly presented," which means presented in a manner that gives the agency the chance to respond. (*Banker's Hill, Hillcrest, Park West Community Preservation Group v. City of San Diego* (2006) 139 Cal.App.4th 249, 282; *Coalition for Student Action, supra,* 153 Cal.App.3d 1194-1196-1197.) Burying information in documents without any elaboration cannot be said to exhaust administrative remedies. (*CREED, supra,* 196 Cal.App.4th at p. 528.)

The trial court correctly applied these standards in determining that only one of Plaintiffs' challenges to the ordinance was properly raised to the County.[5] The County cannot be expected to know whether

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[5] On the merits of the challenge to the density bonus ordinance, CSAC and the League are in complete agreement with the County of Napa's view that the State density bonus laws do not preempt the County's local density bonus ordinance. Indeed, as fully argued in the County's brief, a local agency has discretion to determine whether inclusionary units under its local ordinance can be used or applied toward securing a State density

. . .

"suggestions" amount to objections, and on what grounds. It cannot determine which aspects of an article reflects Plaintiffs' concerns when counsel advises that he does not agree with all of the article, but does not specify which provisions apply. And without any elaboration, there is no way for the County to know which provisions of a sample ordinance are intended to correct perceived flaws in the County's own proposed ordinance. Finding exhaustion of administrative remedies on these generalized, unelaborated submissions to the County is counter to the purposes of the doctrine and should be rejected.

CONCLUSION

In order to preserve the separation of judicial and legislative functions, it is critical that this Court not engage in an analysis of the merits of the County's decision, or whether additional, though not required, information might have been helpful in the process. Instead, the Court must independently review the record to ensure the housing elements contains all necessary components, and then strike it down only if the Plaintiffs meet their burden to show the County acted arbitrarily and capriciously. The process does not require evidence outside of the record. These principles, when properly applied, warrant upholding the housing

(…continued)
bonus. (Respondent's Brief, pp. 73-80.) Those arguments will not be repeated here.

element. Finally, Plaintiffs must fairly and clearly present their objections to the County's ordinances prior to judicial action, and their failure to do so precludes this Court's review of those issues here. The trial court's decision should therefore be affirmed.

Dated: _____

Respectfully Submitted,

_____

Jennifer B. Henning, SBN 193915

Attorney for Amicus Curiae
California State Association of Counties
and League of California Cities

CERTIFICATION OF COMPLIANCE WITH

CALIFORNIA RULES OF COURT, RULE 8.204(c)(1)

I hereby certify that this brief has been prepared using proportionately double-spaced 13 point Times New Roman typeface. According to the word count feature in my Microsoft Word software, this brief contains 3,555 words.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this ___ day of March, 2013 in Sacramento, California.

Respectfully submitted,

By: _____
JENNIFER B. HENNING
Attorney for Amici Curiae