No. A159218

In the Court of Appeal, State of California

FIRST APPELLATE DISTRICT, DIVISION TWO

RUEGG & ELLSWORTH, et al.
Plaintiffs and Appellants

vs.

CITY OF BERKELEY, et al.,
Defendants and Respondents.

Appeal From the Judgment of the Superior Court of the State of California
County of Alameda. Case No. RG18930003
Honorable Frank Roesch, Judge Presiding

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

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

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

DATED: November 4, 2020

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APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF

To the Honorable Presiding Justice J. Anthony Kline and Associate Justices of the Court of Appeal of the State of California, First Appellate District, Division Two:

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

Counsel for the League have reviewed the parties' briefs and believe additional briefing would assist the Court. The League represents the interests of California cities, many of which are subject to the streamlined approval requirements for certain affordable housing projects Senate Bill 35 and its many amendments requires. The League can present a helpful perspective on the application of these requirements to cities statewide, and, as for commercial land uses, to charter cities.

The League urges this Court to affirm the trial court decision and reject attempts to read Senate Bill 35 well beyond its text or intent. The League supports the longstanding standards governing review in traditional mandamus, and urges the Court to affirm here, rejecting unsupported readings of the statute. The statute neither protects commercial land uses nor upends long-settled case law governing standards of review in traditional writ review. Finally, the League emphasizes the well-rooted rule that local governments are

the best arbiter of local land use and planning decisions, and that state preemption of zoning power, particularly that of charter cities and their voters, must be express. Such preemption is lacking here, as Senate Bill 35 does not apply to local regulation of commercial land uses.

IDENTITY OF AMICUS CURIAE AND STATEMENT OF INTEREST

The League is an association of 476 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, comprised of 24 city attorneys from all regions of the state. The Committee monitors litigation of concern to municipalities and identifies cases of state or national significance. The Committee has identified this case as having such significance.

The League has a substantial interest because the cities it represents are land use regulators, charged with planning and zoning for housing, commercial, and other land uses across California, within legal bounds, to promote and maintain the health, safety, and welfare of their constituents. City voters and City Councils are best suited to determine how to accomplish state affordable housing goals in their jurisdictions, and where and under what standards housing, commercial buildings, and other land uses should be established.

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

CONCLUSION

The League respectfully requests the Court to grant it leave to file the attached brief.

DATED: November 4, 2020

COLANTUONO, HIGHSMITH & WHATLEY, PC

/s/ Matthew T. Summers

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I. INTRODUCTION

The Legislature adopted Senate Bill 35 to facilitate the construction of affordable housing — not opportunities for commercial land uses. The League urges this Court to affirm the trial court's rejection of Appellants' attempts to expand the statute well beyond that goal. Senate Bill 35 requires streamlined, ministerial approval for certain qualifying "multifamily housing developments." The statute does not extend to commercial land uses. Indeed, if it did, serious question would arise as to whether the legislation can preempt the home rule authority of charter cities like Berkeley.

The statute's text, legislative history, and amendments all confirm that the Legislature did not intend to preempt charter cities' home rule authority to regulate commercial land uses. Nothing evidences legislative intent to preempt charter city regulation of commercial land use. Under the four-part test of preemption of charter city legislation our Supreme Court established in *California Fed. Savings & Loan Assn. v. City of Los Angeles* (1991) 54 Cal.3d 1. 17 (*California Fed. Savings*), such application of Senate Bill 35 is unwarranted. First, land use regulation is a quintessential municipal affair. Second, there is no conflict between the statute and charter city regulation of commercial land use, as the law does not require streamlined approval of commercial development. Third, commercial land use regulation is not a statewide concern, unlike

affordable housing. At least, the Legislature has not declared it to be so. Finally, as the Legislature enacted Senate Bill 35 to promote affordable housing, not to preempt local regulation of commercial land uses, there is no need to determine whether the statute has been narrowly tailored to accomplish the Legislature's stated goal. Indeed, construing it as the developer does here would require the Court to find the statute not narrowly tailored.

Separately, the League urges this Court to confirm that Senate Bill 35, as amended to date, did not change the long-established standard of review in traditional mandamus. Senate Bill 35 requires **planners**, upon finding an application ineligible for streamlined approval because it does not meet objective planning standards, to justify that decision in writing. This does not change a **trial court's** scope of review.

II. FACTS, PROCEDURAL HISTORY, AND STANDARDS OF REVIEW

The League joins in, and hereby incorporates by reference, the statements of facts, procedural history, and standards of review as stated in the City of Berkeley's Respondent Brief. (See Respondents' Brief, pp. 15–20 [Statement of Facts], p. 21 [Procedural History], pp. 22-38 [Standards of Review].)

III. CONSTITUTION GRANTS CHARTER CITIES PARAMOUNT POWER OVER MUNICIPAL AFFAIRS

A. HOME RULE POWER

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

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

Our Constitution guarantees charter cities, like Berkeley, exclusive "home rule" authority regarding their "municipal affairs." (*State Bldg. and Const. Trades Council of Cal. AFL-CIO v. City of Vista* (2012)

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

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

Zoning — the power to regulate land use in light of local conditions and needs — is plainly a "municipal affair." (See *Village of Euclid v. Ambler Realty Co.* (1926) 272 U.S. 365 [upholding zoning against *Lochner*-era freedom of contract challenge].) California cities

hold broad authority to frame local land use regulations under the police power conferred by the Constitution and as regulated (to the extent of the State's authority to do so as to charter cities) by the Planning and Zoning Law, Government Code § 65000 et seq. (Cal. Const., art XI, §7; *Schroeder v. Municipal Court* (1977) 73 Cal.App.3d 841, 848 [breadth of police power]; *Federation of Hillside & Canyon Associations v. City of Los Angeles* (2004) 126 Cal.App.4th 1180, 1195 [deferential review of land use legislation].) Cities' constitutional power to regulate land use is well-established. (E.g., *City of Riverside v. Inland Empire Patients Health and Wellness Center, Inc.* (2013) 56 Cal.4th 729, 737–738 [acknowledging broad police power to determine permitted land uses]; *Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1151 [land use regulation within local governments' constitutional police power].) Thus, land use regulation is a municipal affair, subject to charter city control, absent an overriding statewide concern that can withstand review under the *California Fed. Savings* standard, described below.

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

The Legislature has authority to preempt charter cities' home rule powers only if it articulates a statewide concern justifying a uniform rule fit for application from Los Angeles to Lassen County. (*California Fed. Savings, supra,* 54 Cal. 3d at p. 17.) Distilling a century of decisional law, our Supreme Court held the distinction between

municipal affairs and matters of statewide concern is a legal question. (*Ibid*.)

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

(*Ibid*.)

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

1. The city charter or ordinance regulates a "municipal affair;"
2. There is an actual conflict between the city regulation and state law;
3. The state law addresses a statewide concern; and
4. The state law is reasonably related and narrowly tailored to resolve the statewide concern.

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

> If ... the court is persuaded that the subject of the state statute is one of statewide concern and that the statute is reasonably related to its resolution [and not

> unduly broad in its sweep], then the conflicting charter city measure ceases to be a 'municipal affair' pro tanto and the Legislature is not prohibited by article XI, section 5(a), from addressing the statewide dimension by its own tailored enactments.

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

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

IV. SENATE BILL 35 DOES NOT PREEMPT CHARTER CITIES AS TO COMMERCIAL LAND USE REGULATION

The Legislature adopted Senate Bill 35 in 2017 to "facilitate and expedite the approval and construction of affordable housing." (Gov't Code, § 65582.1.) The statute does not preempt commercial land uses from home rule authority. Its text, legislative history, and subsequent amendments all confirm the Legislature did not intend to address commercial land use. Indeed, in Senate Bill 35 the Legislature required streamlined processing for "multifamily housing developments," a term limited to housing developments, then separately and distinctly provided additional protections

through the Housing Accountability Act for "housing development projects," a term defined to include residential and mixed-use projects. (Cf. Gov't Code, § 65913.4, subd. (a)(1) with Gov't Code § 65589.5, subd. (h)(2)(B).)

Applying *California Fed. Savings*' test, there is no basis to conclude Senate Bill 35 preempts charter city control over commercial land uses. First, commercial land use regulation is a quintessential municipal affair. Second, there is no conflict between the statute and charter city regulation of commercial land use as Senate Bill 35 does not govern such land uses. Third, there is no statewide concern regarding regulating commercial land uses, distinct from affordable housing; or, at least, the Legislature has not articulated such a concern. The Legislature did not, nor can it, override charter cities constitutional, plenary powers over commercial land use regulation. There is no need to reach the fourth prong of the test (narrow tailoring) as the developers' reliance on Senate Bill 35 does not survive the earlier steps in analysis.

A. COMMERCIAL LAND USE REGULATION IS A MUNICIPAL AFFAIR

Land use regulation is a municipal affair. (See *DeVita v. County of Napa* (1995) 9 Cal.4th 763, 774.) Like any municipal affair, however, preemptive state law is permitted as to statewide concerns. (E.g. Gov't Code, § 65860, subd. (d) [charter city zoning must conform to its general plan].)

Commercial land use regulations, too, are a municipal affair. Zoning exists to separate conflicting land uses, to specify locations appropriate for each, and for the:

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

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

It cannot reasonably be questioned that a charter city's regulation of commercial land uses are within its home rule authority. (E.g., *DeVita, supra,* 9 Cal.4th at p. 782 ["The Legislature, in its zoning and planning legislation, has recognized the primacy of local control over land use."]; *IT Corp. v. Solano County Bd. of Supervisors* (1991) 1 Cal.4th 81, 89 ["The Legislature has specified certain minimum standards for local zoning regulations (Gov. Code, § 65850 et seq.) but has carefully expressed its intent to retain the maximum degree of local control."].)

B. CHARTER CITIES' PLENARY POWER TO REGULATE COMMERCIAL LAND USE DOES NOT CONFLICT WITH SENATE BILL 35

The second prong of the *California Fed. Savings and Loan Assn.* test asks whether state statute actually conflicts with a charter city's regulation, encouraging courts to avoid the constitutional issue if statutory construction can reasonably do so.

> To the extent difficult choices between competing claims of municipal and state governments can be forestalled in this sensitive area of constitutional law, they ought to be; courts can avoid making such unnecessary choices by carefully insuring that the purported conflict is in fact a genuine one, unresolvable short of choosing between one and the other.

(*California Fed. Savings, supra*, 54 Cal.3d at pp. 16–17.)

Appellants' contention Senate Bill 35 preempts charter city powers over commercial land use regulations fails this prong, as nothing in Senate Bill 35's text, legislative history, or amendments preempts local commercial land use regulations, as distinct from protecting affordable housing. Had the Legislature intended to reach mixed use developments in this detailed and heavily amended statute, it would have done so. It did as to other areas of housing law. (E.g., Stats. 2019, ch. 654, § 12 adopting Gov. Code, § 65950, subd. (c)(2) effective Jan. 1, 2025 [defining "development project" for

purposes of Permit Streamlining Act to include mixed-use developments which devote less than half the total square footage to neighborhood commercial uses].)

i. SENATE BILL 35 IS INTENDED TO PROMOTE AFFORDABLE HOUSING, NOT MIXED USE

The Legislature adopted Senate Bill 35 in 2017 as part of a broader legislative package of fifteen bills all intended to promote affordable housing. (Stats. 2017, ch. 366.) The Legislature included a clear statement of purpose in Senate Bill 35's uncodified Section 4:

> The Legislature finds and declares that ensuring access to affordable housing is a matter of statewide concern, and not a municipal affair. Therefore, the changes made by this act are applicable to a charter city, a charter county, and a charter city and county.

(Stats. 2017, ch. 366, § 4.) This section is plain — the Legislature's intent was to protect affordable housing, not commercial land uses.

This language, of course, sufficient to satisfy *California Fed. Savings*' second prong solely as to the regulation of affordable housing — as it confirms the existence of express conflict between Senate Bill 35 and local regulation of affordable housing. But the next step is a purely legal question — whether the statute also preempts local regulation of commercial land uses — the exclusive province of the courts. (*California Fed. Savings, supra,* 54 Cal.3d at p. 17 ["As applied to state and charter city enactments in actual conflict,

"municipal affair" and "statewide concern" represent, Janus-like, ultimate legal conclusions rather than factual descriptions."].)The Legislature's stated goal was only to promote "affordable housing," saying nothing about commercial land uses, or mixed use developments of commercial parcels.

ii. SENATE BILL 35'S TEXT DOES NOT ADDRESS COMMERCIAL LAND USES

Courts construe statutes under familiar canons. They neither add nor subtract language, but interpret the statutes as the Legislature wrote them. (Cal. Code Civ. Proc., § 1858; *Oden v. Board of Admin.* (1994) 23 Cal.App.4th 194, 201 ["Statutory interpretation begins with the text and will end there if a plain reading renders a plain meaning: a meaning without ambiguity, uncertainty, contradiction, or absurdity."].)

Senate Bill 35 requires a streamlined, ministerial approval of qualifying "multifamily housing development," if:

(1) the proposed multifamily housing development is: (i) sufficiently affordable, and (ii) meets objective planning and design review standards;

(2) the proposed site is (i) zoned for residential or mixed-uses and (ii) within or adjacent to an urban area; and

(3) the city: (i) failed to issue sufficient building permits for its share of the regional housing needs assessment, pro-rated

to that point in the reporting period, or (ii) failed to submit its annual Housing Element report.

(Gov't Code, § 65913.4.) The statute includes various exemptions, including the historic structures exemption briefed by the parties. The express reference to a "site … zoned for mixed-uses" shows the Legislature was aware of the concept, but it did not define "multifamily housing development" to include such uses, though it might have. (E.g., *LeFrancois v. Goel* (2005) 35 Cal.4th 1094, 1105 [*expressio unius* canon].)

The threshold test is that the development must be a "multifamily housing development." The statute does not further define this term — quite distinct from the Housing Accountability Act and its use of the term "housing development project," expressly defined to include both residential and mixed-use projects. (Gov't Code, § 65589.5, subd. (h)(2).) When the Legislature intends to include both types, it knows how to do so. Here, in Senate Bill 35, it did not do so. "If the language of the statute is not ambiguous, the plain meaning controls and resort to extrinsic sources to determine the Legislature's intent is unnecessary." (*Ste. Marie v. Riverside County Regional Park and Open-Space Dist.* (2009) 46 Cal.4th 282, 288.) The plain meaning of "multifamily housing development" is a development composed of multiple residential units, such as an apartment or condominium complex, as distinct from several single-family residences or a mix of residential and commercial uses on a

single parcel — i.e., mixed-use development like that disputed here. The plain meaning of "multifamily housing development" does not encompass commercial land uses. To argue otherwise is to add words the Legislature did not, and to disregard the limited role the Legislature gave to "mixed-use development" in this statute — reaching land a city designates for mixed use. The statute's second use of "mixed-use development" is to the same effect — speaking to sites, not developments. (Gov. Code, § 65913.4, subd. (a)(6)(E) [referring to formerly hazardous sites "cleared … for residential use or residential mixed uses"].)

No provision of this detailed and amended statute indicates the Legislature intended to address commercial land uses or mixed-use developments. Were it to do so, some detail would be needed, comparable to the detail provided in the lengthy Government Code section 65913.4, subdivisions (a) through (o) — 8,744 words covering 36 pages when formatted as is this brief. What is a "mixed-use development"? Two apartments above a factory? Over a grocery store? Tucked in a shopping mall? Appellant developers here cannot say because the Legislature did not say and, of course, this court cannot supply what the Legislature did not.

Appellants' contention the statute's two uses of the phrase "mixed-use" reflects Legislative intent to protect mixed-use developments is misplaced. As noted above, these two references go to sites, not the development proposal. The essential question here is

whether Appellants propose a "multifamily housing development" for the Spenger's parking lot and they cannot persuade that they do. First, the statute applies only to "multifamily housing development." Nothing in the text indicates the Legislature defined the term to include mixed use developments, although it did refer to sites zoned for such developments as within the reach of the law. (Gov't Code, § 65913.4, subd. (a)(2)(C).)

Second, had the Legislature intended to include mixed residential and commercial developments, it would have said so, as other housing laws do. (E.g., Stats. 2019, ch. 654, § 12 adopting Gov. Code, § 65950(c)(2) effective Jan. 1, 2025.) Charter city preemption requires plain — not merely inferred — conflict between local legislation and state statute claimed to be of statewide concern, and such conflict cannot be supported by mere inference. (*California Fed. Savings & Loan Assn.*, *supra*, 54 Cal.3d at pp. 16–17.) No plain conflict exists here. The Housing Accountability Act expressly defines "housing development project" to include both residential and mixed-use development projects. (Gov't Code, § 65589.5, subd. (h)(2).) Here, in Senate Bill 35, the Legislature did not so define multifamily housing development. The Legislature knew how to make this point and did not make it in Senate Bill 35.

Appellants import this term from the Housing Accountability Act into Senate Bill 35, inserting a cross-reference the Legislature did not. Yet, the prolix Government Code section 65913.4 is replete with

express cross-references to other statutes, including 40 of them in just its subdivision (a). Why would such a meticulously interwoven set of housing statutes leave to mere inference the inclusion of mixed use projects not mentioned here, but expressly mentioned elsewhere?

Indeed, nothing in Senate Bill 35 states that the term "multifamily housing development" means "housing development project" as defined in the Housing Accountability Act. Moreover, the canons bar Appellants' reading. Each word in a statute must be given meaning. (*People v. Valencia* (2017) 3 Cal.5th 347, 357–358.) Comparing the two terms, Senate Bill 35 adds the word "multifamily," evidencing Legislative intent that Senate Bill 35 reduce local control only as to multifamily housing projects. To give the two terms the same meaning impermissibly deletes "multifamily" and adds "project" to Senate Bill 35. (*McCarther v. Pacific Telesis Group* (2010) 48 Cal.4th 104, 110 ["A construction making some words surplusage is to be avoided."]; see *Ste. Marie, supra,* 46 Cal.4th at p. 289 [distinguishing between requirements applied to "dedicated" park land versus "actually dedicated" park land, giving full effect to the qualifier].)

Last, Senate Bill 35 uses "commercial land uses" only to define "urban uses," itself used as part of the required site characteristics. (Gov't Code, § 65913.4, subds. (a)(2) [sites include those used for urban uses], (k)(12) [defining urban uses].) Thus, the Legislature

required only that a project be adjacent to "urban uses" as defined, and not that the project be an urban use or otherwise include "commercial uses." This, too, confirms the Legislature intended to preempt only affordable housing, and not commercial or mixed-use projects, from local land use controls.

iii. LEGISLATIVE HISTORY CONFIRMS SENATE BILL 35 IS NOT INTENDED TO REACH COMMERCIAL LAND USES

Nothing in Senate Bill 35's legislative history evidences intent to apply to the regulation of commercial land uses. Instead, it shows the Legislature intended to insulate affordable housing from local regulation. (E.g., Joint Appendix 637-650, Assembly Floor Analysis, Senate Bill 35 as amended September 1, 2017, Summary § 17 [intended to "facilitate and expedite the approval of affordable housing"]; Joint Appendix 1185-1188, Senate Committee on Appropriations Analysis, May 22, 2017 Hearing of Senate Bill 35 as amended April 4, 2017 ["Senate Bill 35 would establish a streamlined, ministerial review process for multifamily infill affordable housing developments that meet certain conditions."].)

iv. RECENT AMENDMENTS MODIFIED SB 35'S SITE REQUIREMENTS WITHOUT EVIDENCING INTENT TO PREEMPT COMMERCIAL USE REGULATIONS

The Legislature has amended the pivotal portion of Senate Bill 35, Government Code section 65913.4, several times. None of these amendments have changed the threshold requirement — a protected project must be a "multifamily housing development" — nor defined that term to include commercial uses. Instead, the amendments have expanded required site characteristics and made other changes unrelated to commercial land use. 2018's Senate Bill 765 declared intent that section 65913.4 be interpreted broadly to promote "increased **housing** supply." (Stats. 2018, ch. 840, § 2 [emphasis added].) 2019's Assembly Bill 101 changed the required site characteristics, but added nothing as to commercial land uses. (Stats. 2019, ch. 159, § 8.) 2019's Assembly Bill 1485 further adjusted required site characteristics, adding nothing as to commercial or mixed use projects. (Stats. 2019, ch. 663, § 1.) Most recently, 2020's Assembly Bill 831 adjusted the statute's procedural requirements, including the tribal cultural resources protection requirements the parties have briefed. (Stats. 2020, ch. 194.) It too says nothing to protect commercial and mixed-use proposals.

Taken together, nothing in the text, legislative history, or subsequent amendments to Senate Bill 35 evidences legislative intent to exempt commercial or mixed-use developments from local land

use regulation. Accordingly, there is no conflict between home rule powers to regulate commercial land uses and Senate Bill 35's protections for specified affordable housing developments. Thus, the trial court's ruling withstands review without resort to the third and fourth of *California Fed. Savings*' four prongs.

C. COMMERCIAL LAND USE REGULATION IS NOT A MATTER OF STATEWIDE CONCERN

If this Court reaches the third prong of this preemption analysis, Amicus argues commercial land use regulation is not a matter of statewide concern. Whether a statewide concern exists is a question of law for the court. (*California Fed. Savings & Loan Assn., supra,* 54 Cal. 3d at p. 17.) To preempt a charter city's plenary powers by a conflicting statute, "there must be a convincing basis for state control — a basis that justifies the state's interference in what would otherwise be a merely local affair." (*Vista, supra,* 54 Cal.4th at p. 560 [internal quotations omitted].) A legislative declaration a matter is a statewide concern is entitled to "great weight," but is not determinative. (*Id.* at p. 24, n. 21.) This Court can give weight to the Legislature's repeated declarations it adopted Senate Bill 35 to promote affordable housing, not commercial or mixed-use developments — and take it at its word.

Commercial land use regulation is a quintessential municipal affair. That some housing statutes are matters of statewide concern, such as the Housing Element and Regional Housing Needs

Allocation process, does not extend to commercial land uses. For our Supreme Court warned against categorical treatment of the boundary of state and local control, requiring case-specific analysis sensitive to context:

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

(*California Fed. Savings, supra*, 54 Cal.3d at pp. 17–18.)

Deciding which commercial land uses are appropriate in and near residential development, and under what regulations and procedures, are archetypical municipal affairs. (*Village of Euclid, supra,* 272 U.S. at p. 391 ["the exclusion of buildings devoted to business, trade, etc., from residential districts, bears a rational relation to the health and safety of the community"]; *Penn-Co v. Board of Supervisors* (1984) 158 Cal.App.3d 1072, 1084 ["The decision to allow a conditional use permit is an issue of vital public interest. It affects the quality of life of everyone in the area of the proposed use."].) There is no statewide interest in promoting or prempting

retail and other commercial land uses from otherwise lawful city regulation. Or, at very least, the Legislature has identified none.

There is no need to apply *California Fed. Savings*' fourth prong – narrow tailoring of a preemptive statute to an identified matter of statewide concern because no preemption is intended, and no statewide concern is articulated, as to local control of mixed-use land developments.

V. SENATE BILL 35 MAINTAINS THE STANDARD OF REVIEW OF LAND USE DECISIONS

If the Court concludes, as Amicus urges it should, that the disputed project is not entitled to the ministerial review Senate Bill 35 affords multifamily housing developments, it need not reach the second issue presented on appeal. If it does, however, Amicus urges this Court to maintain existing statutory and case law standards for traditional mandate review of local land use decision-making, leaving to the Legislature the difficult task of adjusting those standards should it see the need.

The standard of review in traditional mandate is familiar. A traditional writ of mandate will issue: (1) to compel performance of a clear, present and ministerial duty owed by a respondent, (2) if Petitioner has a beneficial interest in the outcome of the proceeding, and (3) if other remedies are inadequate. (Code Civ. Proc., §§ 1085–1086.) A ministerial duty arises "[w]here a statute or ordinance clearly defines the specific duties or course of conduct that a

governing body must take." (*Lazan v. County of Riverside* (2006) 140 Cal. App 4th 453, 460 [citations omitted].) A court determines whether agency action "was arbitrary, capricious or entirely lacking in evidentiary support, contrary to established public policy, unlawful or procedurally unfair." (*California Public Records Research, Inc. v. County of Alameda* (2019) 37 Cal.App.5th 800, 806.)

The central question is whether the agency abused its discretion. (*Ridgecrest Charter School v. Sierra Sands Unified School Dist.* (2005) 130 Cal. App. 4th 986, 1003.)

> Although mandate will not lie to control a public agency's discretion, that is to say, force the exercise of discretion in a particular manner, it will lie to correct abuses of discretion. [Citation.] In determining whether an agency has abused its discretion, the court may not substitute its judgment for that of the agency, and if reasonable minds may disagree as to the wisdom of the agency's action, its determination must be upheld.

(*Helena F. v. West Contra Costa Unified School Dist.* (1996) 49 Cal.App.4th 1793, 1799.)

A. TRADITIONAL WRIT REVIEW REQUIRES DEFERENCE TO CITY FACT-FINDING

In traditional writ review, the trial and appellate courts apply the same standard — asking whether agency action "was arbitrary,

capricious or entirely lacking in evidentiary support." (*Sacks v. City of Oakland* (2010) 190 Cal.App.4th 1070, 1082.) Only when considering questions of law do courts apply de novo review. (*Ibid.*)

Questions of local law, of the meaning of a city's own General Plan, zoning code, and other ordinances, are reviewed deferentially — "an agency's view of the meaning and scope of its own zoning ordinance is entitled to great weight unless it is clearly erroneous or unauthorized." (*Anderson First Coalition v. City of Anderson* (2005) 130 Cal.App.4th 1173, 1193 [citation omitted].) This reflects a long-standing understanding that a local agency is best positioned to determine what its voters or elected officials meant in adopting and implementing land use controls. (*Harrington v. City of Davis* (2017) 16 Cal.App.5th 420, 434 ["a city's interpretation of its own ordinance is entitled to deference in our independent review of the meaning or application of the law"] [citations omitted]; *City of Walnut Creek v. County of Contra Costa* (1980) 101 Cal.App.3d 1012, 1021 ["The construction placed on a piece of legislation by the enacting body is of very persuasive significance. Also, construction of a statute by officials charged with its administration must be given great weight."] [citations omitted].) This is a routine application of *Yamaha* deference. (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 10–11 [deferential review of lawgivers interpretation of its own regulations].)

Friends of Davis v. City of Davis, for example, applied this "fundamental rule that interpretation of the meaning and scope of a local ordinance is, in the first instance, committed to the local agency" to uphold Davis' interpretation of its design review ordinance as applied to commercial land uses. ((2000) 83 Cal.App.4th 1004, 1015.)

In traditional writ review, a trial court defers to the local agency's fact-finding, finding an abuse of discretion justifying a writ only if a decision is entirely lacking in evidentiary support. (*American Board of Cosmetic Surgery v. Medical Board of California* (2008) 162 Cal.App.4th 534, 547–548.)

This standard, applied in mandate under Code of Civil Code Procedure section 1085, is more deferential than substantial evidence review in administrative mandate. (*McGill v. Regents of University of California* (1996) 44 Cal.App4th 1776, 1786 ["A court must ensure that an agency has adequately considered all relevant factors, and has demonstrated a rational connection between those factors, the choice made, and the purposes of the enabling statute."].)

Even under the less deferential substantial evidence standard of administrative mandate, a decision stands if supported by substantial evidence, regardless of contrary evidence. (*Jones v. City Council* (1971) 17 Cal.app.3d 724, 728 ["the court's inquiry was limited to ascertaining whether there was before the planning commission and the city council any substantial evidence,

contradicted or uncontradicted, to support their findings"]; *Weinstein v. County of Los Angeles* (2015) 237 Cal.App.4th 944, 965 ["Our inquiry is whether the record shows a reasonable basis for the action of the legislative body, and if the reasonableness of the decision is fairly debatable, the legislative determination will not be disturbed."] [citation omitted].) To prevail, a petitioner must identify all aspects of evidence that may support the agency's decision, then demonstrate that none actually do. Neither the trial court, nor the court of appeal, can substitute their own deductions or factual findings, and, on review, must view the evidence in the light most favorable to the agency. (*Los Angeles Police Protective League v. City of Los Angeles* (2014) 232 Cal.App.4th 136, 140–141.)

B. SENATE BILL 35 CHANGED ONLY THE REQUIRED EVIDENCE THAT OBJECTIVE PLANNING STANDARDS HAVE NOT BEEN MET AS TO PROJECTS WITHIN ITS REACH

Senate Bill 35 did not change these long-standing principles of administrative law. The Legislature adopted the bill to promote affordable housing, but did not abrogate, let alone amend, Code of Civil Procedure section 1085 and the well-developed case law interpreting the standards governing traditional mandate. (Stats. 2017, ch. 366, § 4.) The Legislature adopted Senate Bill 35 and its protection for certain affordable housing projects, mindful that city decisions would be reviewed under then-extant administrative

law. In requiring local governments to review applications subject to Senate Bill 35 as ministerial projects, the Legislature demonstrated an intent that traditional mandate principles would govern judicial review. If the Legislature meant something else, it would have said so and it is not for Appellants or this Court to provide what the Legislature did not.

As it read when Berkeley made the decision disputed here, Senate Bill 35 contained no language regarding evidentiary showings or judicial review of fact-finding. Instead, as Government Code section 65913.4, subdivision (b)(1) then read, it required a city planner to document any objective planning standards a project did not meet, and explain the failure in writing, within a specified time. (Stats. 2017, ch. 366, § 3.) In its present form, section 65913.4, subdivision (c) maintains this requirement. This provision did not amend the standard of review in traditional mandate and the well-developed case law applying it. And, of course, the Legislature is understood to maintain law of which it has notice and does not change. (E.g., *People v. Giordano* (2007) 42 Cal.4th 644, 659 [Legislature has imputed knowledge of existing law]; *Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1149–1150 ["it is not to be presumed that the legislature in the enactment of statutes intends to overthrow long-established principles of law unless such intention is made clearly to appear either by express declaration or by necessary implication."].) The requirement for a

written explanation of which objective planning standards were not met, and how, is not a new evidentiary standard of judicial review. Rather, it is a requirement for a city planner to explain her decision to the applicant, in writing, with citations to the zoning codes.

Requiring planners to explain their decisions is nothing new, and does not amend evidentiary standards of judicial review. Long-settled law requires city councils, planning commissions, and planners to explain their decisions in writing to explain their reasoning. As for decisions subject to administrative mandamus review, decisionmakers must make "findings to bridge the analytic gap between the raw evidence and ultimate decision or order" to facilitate judicial review. (*Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515.) Although decisions under Senate Bill 35 are reviewed in traditional mandate, the requirement for a written decision, with citations to ordinances, breaks no new ground.

Amicus urges this Court to confirm the Legislature's action for what it was —a requirement that local governments provide project applicants with a written decision with citations to objective planning and zoning standards when excluding a project from Senate Bill 35's reach. Amicus urges the Court to reject Appellants reading of Senate Bill 35 to reach well beyond its word. Nothing in Senate Bill 35, as it read when Berkeley made the decision on review

here, sought to amend standards of judicial review in traditional mandate.

Again, deference to local government decision making is appropriate here for the reasons that animate the home rule doctrine and *Yamaha* deference. Each local government is the best arbiter of what its voters or elected officials meant by the land use legislation they adopted. They are well suited to determine, subject to mandate review, the "objective planning standards" to which Senate Bill 35 requires the projects it reaches to satisfy. (*Save Our Peninsula Committee v. Monterey County Board of Supervisors* (2001) 87 Cal.App.4th 99, 142 ["the body which adopted the general plan policies in its legislative capacity has unique competence to interpret those policies when applying them in its adjudicatory capacity"].)

The Legislature, in requiring cities and counties to apply only "objective planning standards," plainly prohibited cities from applying such subjective rules as might require "neighborhood compatibility." However, by the same text, it left to local governments the responsibility to interpret their own zoning codes to identify the "objective planning standards" they may still apply to protected multifamily housing proposals. Some cities have adopted guidance documents, identifying the portions of their zoning codes that constitute "objective planning standards." (E.g. City of San Francisco, "Affordable Housing Streamlined Approval Pursuant to Senate Bill 35 and Planning Director Bulletin #5" [available at

https://sfplanning.org/sites/default/files/forms/SB35_SupplementalApplication.pdf (last visited November 1, 2020)].) But the Legislature did not see fit to require this in Senate Bill 35. (Cf. Gov. Code, § 65940 [requiring agency to "compile one or more lists that shall specify in detail the information that will be required from any applicant for a development project" under Permit Streamlining Act].) Such local legislative determinations are entitled to deference, under existing statutes and case law that Senate Bill 35 did not disturb and is therefore understood to maintain.

Further, Amicus urges this Court to reject Appellants' attempt to read Senate Bill 35's later amendments — subsequent to the City's decision on review here — to amend the standard of judicial review in traditional mandate. Nothing in those amendments demonstrates intent to do so.

Instead, 2019's Assembly Bill 1485's new subdivision of section 65913.4 strengthens the earlier requirement for a city planner to demonstrate a project's lack of compliance with "objective planning standards" to justify excluding it from Senate Bill 35's protection:

> For purposes of this section, a development is consistent with the objective planning standards specified in subdivision (a) if there is substantial evidence that would allow a reasonable person to conclude that the

development is consistent with the objective planning standards.

(Gov't Code, § 65913.4, subd. (c)(3) [added by AB 1485, Stats. 2019, ch. 663 as a new subsection (b)(3), before a subsequent amendment renumbered the subsections].) This new requirement changes the initial evidentiary requirement for city planners to justify decisions to exclude projects from Senate Bill 35's reach. It does not speak to the standard of judicial review in traditional mandate review of those decisions except to require that such evidence be of record.

Moreover, the subsequently adopted provision requiring a planner to show "substantial evidence" by which a "reasonable person" would conclude an "objective planning standard" is just that — a requirement for planners that courts may enforce. It is not a change to the standard of judicial review under Code of Civil procedure section 1085. After this amendment took effect January 1, 2020, planners must not only provide a disappointed applicant a written finding that "objective planning standards" are not met, but they must cite the codes and draw the connection between the facts and those codes in reasonable fashion. Further, if an application shows substantial evidence a project does complies with all "objective planning standards," the planner must so find, even if there is also substantial evidence to the contrary. The new requirement changes the presumptions governing the planner's gatekeeping determination whether a project does, or does not,

qualify for ministerial review under Senate Bill 35. Under long-established law, that factual determination is entitled to judicial deference. The amendment says nothing of judicial review nor of amending the required standard of review under Code of Civil Procedure section 1085.

Senate Bill 35 does not make planners of judges. Local government must find the facts, apply relevant "objective planning standards," and apply — or deny — Senate Bill 35's ministerial review process. But the evidentiary standard tilts the playing field in favor of affordable housing developments, requiring a finding that all "objective planning standards" have been met if a low threshold of evidence supports that conclusion. Each of these local planning and zoning determinations rightly continues to be subject to significant deference, particularly as to factual determinations, upon judicial review for the reasons stated above and because the Legislature did not say more than it did. Given the sheer bulk of this statute and the Legislature's close attention to detail, had the Legislature intended to alter standards of judicial review under Code of Civil Procedure section 1085, it surely would have found room to say so. It did not.

VI. CONCLUSION

The League respectfully asks this Court to affirm the trial court judgment for the City of Berkeley. The Legislature adopted Senate Bill 35, and its many subsequent amendments to Government

Code section 65913.4, to promote affordable housing. By its terms, SB 35 does not extend to commercial or mixed-use developments. Thus, the League urges this Court to reaffirm that charter cities' constitutional home rule powers continue to encompass regulation of commercial land use. No statewide concern justifies abrogation of home rule power outside the subject the Legislature addressed — affordable housing in multifamily developments.

Nor is there evidence the Legislature intended to revisit the standard of judicial review in traditional mandate. Although the legislation requires an evidentiary showing in administrative processes to exclude a multifamily housing from the streamlined procedure required by the bill, there is no evidence the Legislature sought to regulate how courts' review such decisions.

For all these reasons, the League urges this Court to affirm the trial court's ruling denying the writ the Appellant developer seeks.

DATED: November 4, 2020

COLANTUONO, HIGHSMITH & WHATLEY, PC

/s/ Matthew T. Summers

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CERTIFICATE OF COMPLIANCE WITH CALIFORNIA RULES OF COURT, RULE 8.204

We hereby certify that, under rule 8.204(c)(1) of the California Rules of Court, this Amicus Brief is produced using 13-point type and contains 6,827 words including footnotes, but excluding the application for leave to file, tables and this Certificate, fewer than the 14,000 words permitted by the rule. In preparing this Certification, we relied upon the word count generated by Microsoft Word 365 MSO.

DATED: November 4, 2020

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PROOF OF SERVICE
Ruegg & Ellsworth, et al. v. City of Berkeley et al.
First Appellate District, Division Two, No. A159218
Alameda County Superior Court No. RG18930003

I, Sofia Escalante, declare:

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 790 E. Colorado Boulevard, Suite 850, Pasadena, California 91101-2109. My email address is: sescalante@chwlaw.us. On November 4, 2020, I served the document(s) described as **APPLICATION TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICUS LEAGUE OF CALIFORNIA CITIES** on the interested parties in this action addressed as follows:

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☒ **BY E-MAIL OR ELECTRONIC TRANSMISSION**: Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, by causing the documents to be sent to the persons at the e-mail addresses listed on the service list on November 4, 2020, from the court authorized e-filing service at TrueFiling.com. No electronic message or other indication that the transmission was unsuccessful was received within a reasonable time after the transmission.

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

Executed on November 4, 2020, at Pasadena, California.

/s/ Sofia Escalante

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Sofia Escalante