No. H041088

In the Court of Appeal of the State of California
Sixth Appellate District,

SAN JOSE UNIFIED SCHOOL DISTRICT and BRETT BYMASTER,

Plaintiffs-Respondents,

vs.

SANTA CLARA COUNTY OFFICE OF EDUCATION; BOARD OF TRUSTEES OF THE SANTA CLARA COUNTY OFFICE OF EDUCATION; ROCKETSHIP EDUCATION; and ROCKETSHIP EIGHT CHARTER SCHOOL,

Defendants-Appellants.

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF; AND AMICUS CURIAE BRIEF OF LEAGUE OF CALIFORNIA CITIES

Appeal from the Superior Court of the State of California, County of Santa Clara, Case Nos. 113CV241695 and 113CV241932, The Honorable Franklin E. Bondonno, Judge Presiding

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TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, Sixth APPELLATE DISTRICT, DIVISION	Court of Appeal Case Number: H041088
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APPELLANT/PETITIONER: Santa Clara County Office of Education, et al. RESPONDENT/REAL PARTY IN INTEREST: San Jose Unified School Dist. et al.	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS (Check one): ☑ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE	

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1. This form is being submitted on behalf of the following party (*name*): League of California Cities

2. a. ☑ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. ☐ Interested entities or persons required to be listed under rule 8.208 are as follows:

	Full name of interested entity or person	Nature of interest (Explain):
(1)		
(2)		
(3)		
(4)		
(5)		

☐ Continued on attachment 2.

The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).

Date: October 16, 2015

Raymond A. Cardozo
(TYPE OR PRINT NAME)

▶ _____
(SIGNATURE OF PARTY OR ATTORNEY)

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

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APPLICATION TO FILE AMICUS CURIAE BRIEF

I. INTRODUCTION

Pursuant to California Rules of Court, Rule 8.200(c), *amicus curiae* the League of California Cities ("the League") respectfully requests leave to file the accompanying brief of *amicus curiae*. The brief urges the Court to adhere to the plain language of the statute at issue to avoid reaching a result unintended by the Legislature and detrimental to the League's members. This application is timely made within 14 days after the filing of the reply brief on the merits.

II. INTEREST OF THE *AMICUS CURIAE*

The League is an association of 474 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 is comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

This case implicates important constitutional separation-of-powers principles. For over 85 years, the courts have recognized their constitutional duty to defer to the legislative judgments made by local elected legislative bodies—here the San Jose City Council—about the

wisdom of local planning and zoning regulations. Given the importance of respecting the prerogative of local legislative bodies to make land use decisions, a court should not lightly infer that other entities have the power to grant exemptions from those decisions and should instead recognize such power only if the Legislature has granted it in unambiguous statutory text.

This appeal places at issue this important principle of statutory construction and judicial restraint, and it is important to the League and the municipalities that it serves that the principle be faithfully followed. Thus, although the League is neutral on the general subject of the wisdom or efficacy of charter schools or traditional school districts and their proper governance, the League opposes any statutory interpretation in which the power to grant an exemption from local zoning is claimed to arise by inference from a statute that does not grant such an exemption in clear text. Because the appellants urge such an interpretation, the League requests leave to submit the accompanying amicus curiae brief—not to "oppose" appellants, or to "support" respondents—but for the purpose of explaining why faithful adherence to the statutory text is essential to avoid undue encroachment on the delicate balancing determinations that are the province of local legislative bodies.

The League and its members have a substantial interest in this case as they will be directly impacted by its outcome. Accordingly, *Amicus's* perspective on this matter is worthy of the Court's consideration and will assist the Court in reaching its decision.

Amicus's counsel have examined the briefs on file in this case, are

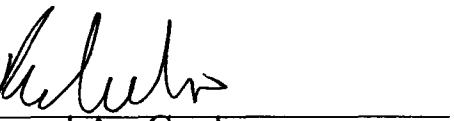
familiar with the issues involved and the scope of their presentation, and do not duplicate that briefing. Proposed *Amicus* confirms, pursuant to California Rule of Court 8.200(c)(3), that no one and no party other than Proposed *Amicus,* and its counsel of record, made any contribution of any kind to assist in preparation of this brief or made any monetary contribution to fund the preparation of the brief.

III. CONCLUSION

The League respectfully requests that the Court accept the accompanying brief for filing in this case.

DATED: October 16, 2015

REED SMITH LLP

By 
Raymond A. Cardozo
Kevin M. Hara

Attorneys for *Amicus Curiae League of California Cities*

AMICUS CURIAE BRIEF IN SUPPORT OF AFFIRMANCE OF THE TRIAL COURT'S RULINGS

I. INTRODUCTION

The issues in this case are of concern to all California cities and counties whose City Councils and Boards of Supervisors are elected to enact legislation—planning and zoning ordinances—to address local land use concerns. Under settled constitutional separation of powers principles, courts defer to the legislative judgments of elected City Councils and Boards of Supervisors on local land use policies. The authority conferred on these local legislative bodies is plenary so that each locality can address creatively the evolving needs of their community.

As a natural corollary to this settled rule, courts cannot lightly infer that bodies *other* than City Councils and Boards of Supervisors have the power to grant zoning exemptions unless that power is specified in unambiguous statutory text. Just like undue judicial intrusion would impair the ability of local legislative bodies to flexibly balance the competing interests that are bound up in zoning determinations, granting exemption power to other bodies that lack statutory authority would likewise constitute an impermissible infringement on the local legislative body's plenary authority.

The Government Code provision at issue here, Section 53094(b), states on its face that it grants "school districts" the power to grant exemptions from

local zoning ordinances.[1] Section 53094(b) nowhere refers to "county boards of education." That omission is significant because, as respondents note in their brief, the Legislature elsewhere has repeatedly specified that county boards of education shall be deemed "school districts" for purposes of specified statutes that are not at issue in this case. (RB at 16-22.)

Thus, this case squarely implicates the principle that prohibits a court from "inferring" that another entity has the power to grant an exemption from the zoning power reserved to local legislative bodies, and the important separation of powers principles that underlie this rule. The League discusses below the important policies that are served by faithful adherence to the principle of judicial restraint and strict adherence to the statutory text.

II. ARGUMENT

A. Constitutional Separation of Powers Principles Limit the Court's Review of Cities' And Counties' Legislative Judgments.

Nearly 65 years ago, the California Supreme Court recognized that cities' legislative judgments are accorded the broadest possible deference:

> [W]e must keep in mind the fact that the courts are examining the act of a coordinate branch of the government -- the legislative -- in a field in which it has paramount authority, and not reviewing the decision of a lower tribunal or of a fact-finding body. Courts have nothing to do with the wisdom of laws or regulations, and the legislative power must be upheld unless manifestly abused so as to infringe on constitutional guaranties.... [U]nder the doctrine of separation of powers

[1] The text of the statute is discussed in the parties' briefs and is not repeated here in the interest of judicial economy. (Respondents' Brief "RB" at 22-23).

> neither the trial nor appellate courts are authorized to "review" legislative determinations. The only function of the courts is to determine whether the exercise of legislative power has exceeded constitutional limitations. As applied to the case at hand, the function of this court is to determine whether the record shows a reasonable basis for the action of the zoning authorities, and, if the reasonableness of the ordinance is fairly debatable, the legislative determination will not be disturbed.

(Lockard v. City of Los Angeles (1949) 33 Cal.2d 453, 461-462 *("Lockard");* see also *Santa Monica Beach v. Superior Court* (1999) 19 Cal.4th 952, 962 *("Santa Monica Beach").)*

This principle applies with particular force to land use and zoning ordinances, and is a fundamental right under California law. *(*Cal. Const., art. III, § 3. ("The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution.")*)* The California Constitution vests cities and counties with broad "police power" to adopt planning, subdivision and zoning ordinances. *(*Cal. Const., art. XI, § 7; *Big Creek Lumber Co. v. County of Santa Cruz (2006)* 38 Cal.4th 1139, 1151 ("*Big Creek*"); *IT Corp. v. Solano County Bd. of Supervisors* (1991) 1 Cal.4th 81, 89; *Delta Wetlands Properties v. County of San Joaquin* (2004) 121 Cal.App.4th 128, 148; *Leavenworth Properties v. City and County of San Francisco* (1987) 189 Cal.App.3d 986, 990-991 *("Leavenworth").)*

When a City Council or a Board of Supervisors enacts a zoning ordinance, it acts in a legislative capacity, and every intendment is in favor of such ordinances. *(Big Creek, supra,* 38 Cal.4th 1139, 1152, citing *Lockard, supra,* 33 Ca1.2d 453, 460; *Orinda Homeowners Committee v.*

Board of Supervisors (1970) 11 Cal.App.3d 768, 775 *("Orinda").)* A land use ordinance adopted by a City Council has the same force and effect within that city's jurisdictional limits as does a statute adopted by the State Legislature. (*City of Santa Paula v. Narula* (2003) 114 Cal.App.4th 485, 492 (ruling that "The City's ordinance [was] a law," which "'ha[d] the same force within its corporate limits as a statute passed by the Legislature [itself] throughout the state.'").)

"More than a half-century ago, ... this court explained that '[i]t is well settled that a municipality may divide land into districts and prescribe regulations governing the uses permitted therein, and that zoning ordinances, when reasonable in object and not arbitrary in operation, constitute a justifiable exercise of police power."' (*Hernandez v. City of Hanford* (2007) 41 Cal. 4th 279, 296.*)* This authority is not a "circumscribed prerogative," but is "plenary" and "elastic" in order that local officials can creatively address the evolving needs and concerns of their communities. (*Candid Enterprises, Inc. v. Grossmont Union High School Dist.* (1985) 39 Cal.3d 878, 882 (explaining that a city's use of zoning power is subject only to territorial limits and otherwise "is as broad as the police power exercised by the Legislature itself.") ("*Candid*")*; Fisher v. City of Berkeley* (1984) 37 Cal. 3d 644, 676 ("*Fisher*")*; Miller v. Board of Public Works* (1925) 195 Cal. 477, 484-485 ("*Miller*").*)*

As our Supreme Court explained, judicial deference to local exercises of the police power enables local legislative bodies the freedom to try to address evolving social issues by experimenting with new and different solutions:

> It is apparent that the police power is not a circumscribed prerogative, but is elastic and, in keeping with the growth of knowledge and the belief in the popular mind of the need for its application, capable of expansion to meet existing conditions of modern life and thereby keep pace with the social, economic, moral, and intellectual evolution of the human race.

(*Miller*, 195 Cal. at 484-485; accord *Candid, supra,* 39 Cal.3d 878, 882; *Fisher, supra,* 37 Cal. 3d 644, 676.)

This principle of judicial deference recognizes that judicial intrusion would undermine the necessary flexibility and freedom that are constitutionally granted to local legislative bodies to consider the entire range of interests implicated in any given legislative decision. (See *id.*) It follows that the intrusion of any other statutorily unauthorized entity—like a county board of education—would also undermine the prerogative granted to local legislative bodies.

B. Expanding The Statutory Authority To Grant Zoning Exemptions Would Usurp Legislative Power And Disrupt City Planning

Another well-established tenet of statutory construction is that the use of a term in one statue and its absence in another means that the Legislature's omission was intentional. (*Wasatch Property Management v. Degrate* (2005) 35 Cal. 4th 1111, 1118 (declining to interpret a term missing from a statute in a similar provision, stating "'[W]hen the Legislature has carefully employed a term in one place and has excluded it in another, it should not be implied where excluded.'"); *Brown v. Kelly Broadcasting Co*. (1989) 48 Cal.3d 711, 725.) Therefore, where, as here, the Legislature has declined to include a specific term in a statute, a court should not add it by implication. (*Fischer v. Los Angeles Unified School Dist*. (1999) 70 Cal. App. 4th 87, 97 (ruling that

an "omission mean[t] that the Legislature intended to exclude" a power in a statute, because a "fundamental rule of statutory construction is that the expression of certain things in a statute necessarily involves exclusion of other things not expressed.").)

The Legislature expressly defined a "school district" as encompassing a county board of education in specified instances in specific statutes, but did not include such a definition in Section 53094(b). The omission is telling. Section 53094(b) provides limited authority, for specifically defined entities—school districts—to grant exemptions from local zoning laws for good reason. As discussed above, in enacting zoning laws, the Legislature "has declared its 'intention to provide only a minimum of limitation in order that counties and cities may exercise the maximum degree of control over local zoning matters.'" (*Big Creek*, *supra*, 38 Cal.4th at 1159.) The practical import of this statutory framework providing a "maximum degree" of local control to counties and cities requires strict adherence to exemptions from that local zoning power. Otherwise, the result would be a haphazard system of local land use through which multiple entities wielding broad police power could readily conflict on fundamental matters of municipal planning.

Here, the statute at issue allows "school districts," and not county boards of education, to exempt themselves from local zoning ordinances for particular property uses. While the League acknowledges the importance of both the public and charter school systems, and recognizes that school districts and county boards of education both provide valuable governance and oversight of education in California, the statute plainly differentiates between the two bodies. To allow a county board of education to circumvent the clear

language of Government Code 53094(b) would be unauthorized by long-standing precedent, a threat to organized city planning, and a detriment to the public welfare. If there are too many entities with the authority to override a local zoning ordinance, an already complex task of appropriately designating particular areas of the city as school zones becomes prohibitively more difficult, with, for example, an undesirable result such as two elementary schools on the same block. In short, an increased number of entities exerting control over local land use significantly enhances the risk that conflicts will occur, disrupting city development, causing discord in the affected community, and consuming valuable time and resources.

This case illustrates the problems that arise when there is an impermissible exertion of statutory power by a party not authorized to use it.[2] The trial court correctly exercised judicial restraint in order to avoid the proverbial problem of having "too many cooks in the kitchen," and properly confined Section 53094(b)'s zoning exemption to its plainly stated text: "school districts."

III. CONCLUSION

For the foregoing reasons, the League respectfully requests that this Court construe Government Code section 53094(b) according to its plain terms, thereby granting the authority to make zoning exemptions solely to

[2] Further, it is significant that here, there were in fact proper procedures for seeking relief from zoning measures, by seeking a General Plan Amendment from the City of San Jose, and that Appellants sought such an Amendment, but represented to the trial court that a zoning exemption would be faster. (RB at 33). Therefore, the statutory zoning exemption is not the only means available to change the proposed use of property. (*Id.*)

"school districts." The Court should decline to "infer" that county boards of education—which are not mentioned in the statute's text—also may exercise such power. The latter construction would invade the plenary authority of local legislative bodies over land use decisions, and would do so impermissibly since our Legislature has not clearly specified that county boards of education have such authority.

DATED: October 16, 2015

REED SMITH LLP

By _____
Raymond A. Cardozo
Kevin M. Hara

Attorneys for *Amicus Curiae League of California Cities*

CERTIFICATE OF COMPLIANCE
CALIFORNIA RULES OF COURT 8.204(c)

Pursuant to California Rules of Court 8.204(c), I certify that the foregoing AMICI CURIAE BRIEF of LEAGUE OF CALIFORNIA CITIES and CALIFORNIA STATE ASSOCIATION OF COUNTIES was produced on a computer and contains 1,942 words, including footnotes but excluding certificate, application, tables, and signature block, according to the word count of the computer program used to prepare the brief.

Executed on October 16, 2015 at San Francisco, California

Raymond A. Cardozo

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is REED SMITH LLP, 101 Second Street, Suite 1800, San Francisco, California 94105-3659. On October 16, 2015, I served the following document(s) by the method indicated below:

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☐ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California addressed as set forth below. I am readily familiar with the firm's practice of collection and processing of correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after the date of deposit for mailing in this Declaration.

See Attached Service List

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on October 16, 2015, at San Francisco, California.

Myra Taylor

San Jose Unified School District et al. v. Santa Clara County Office of Education et al.

Cal. Court of Appeal, Sixth App. Dist., Case Number H041088

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