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File No. 09998.00244

February 3, 2020

The Honorable Tani Gorre Cantil-Sakauye, Chief Justice
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-4797

Re: *Anderson v. City of San Jose*, Sixth Appellate District, Case No. H045271

To the Honorable Chief Justice and Associate Justices of the California Supreme Court:

Pursuant to California Rules of Court, Rule 8.500(g), the League of California Cities (the "League")[1] respectfully submits this letter as amicus curiae in support of the Petition for Review in *Anderson v. City of San Jose* (Sixth Appellate District, Case No. H045271) filed by the City of San Jose.

This case is of significance to California cities and Supreme Court review is necessary here to settle an important question of law. (See Cal. Rules of Court, Rule 8.500(b)(1).) The Constitution's "home rule" provision affirmatively grants charter cities supremacy over "municipal affairs." (Cal. Const., Art. XI, §5(a).[2]) The Court of Appeal correctly confirmed in its opinion (the "Opinion") that the disposal of city-owned surplus property is a "municipal affair" within the meaning of the home rule provision of the State Constitution. (Slip Op. at pp. 10-12.) After reaching this conclusion, the Court of Appeal should have concluded that such

[1] The League of California Cities is an association of 478 California cities dedicated to protecting and restoring local control to provide for the 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.

[2] Article XI, section 5(a) of the California Constitution provides: "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."

disposal was not subject to state legislative control.[3] Its failure to do so was in error. The Court of Appeal was faced with Policy 7-13[4] and the Act. The Act "advances state land use policy objectives by mandating a uniform approach to the disposition of local government land that is no longer needed for government use." (Slip. Op. at pp. 1-2.) The Court justifies the application of this "uniform approach" to a charter city by concluding that the statute "addresses the shortage of sites available for affordable housing development as a matter of statewide concern." (*Id.* at p. 1.) Yet, Policy 7-13 also addresses the "housing crisis in the area" and sought to "reinforce the importance of promoting affordable housing within the City."

The Court may not justify a "uniform approach" to the disposal of surplus municipal sites by re-categorizing the statute as a vehicle for "land use policy." (*Id.* at p. 1.) Further, the Opinion's conclusion that the Surplus Land Act is "reasonably related" to resolving that concern and "narrowly tailored" to avoid unnecessary interference in local governance [*Id.* at p. 32-34] fails to analyze the interaction between the City of San Jose's housing element and other City land use policies that address the availability of affordable housing sites. As will be explained below, these conclusions are inconsistent with this Court's jurisprudence, and therefore, this Court should grant review to resolve this inconsistency and provide clarity to California cities.

The Opinion Deviated from this Court's Precedent in* City of Vista *and Incorrectly Identified the Question at Issue

In *City of Vista, supra*, this Court cautioned that, in performing the "ad hoc" inquiry of whether a state law addresses a matter of statewide concern, 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." (54 Cal.4th at p. 557.) This is not only because what constitutes a "statewide concern" may change over time, but also because something that might constitute a statewide concern in one context may not constitute a statewide concern in another context. (*Id.* at pp. 557-558.)

For state law to control, "there must be something more than an abstract state interest, as it is always possible to articulate some state interest in even the most local of matters." (*Id.* at p. 560.) "Rather, there must be 'a convincing basis' for the state's action—a basis that 'justif[ies]'

[3] *See State Bldg. & Constr. Trades Council of California v. City of Vista* (2012) 54 Cal. 4th 547, 556 ("*City of Vista*") ("Here, we reaffirm our view—first expressed 80 years ago [citation omitted]—that the wage levels of contract workers constructing locally funded public works are a municipal affair (that is, exempt from state regulation), and that these wage levels are not a statewide concern (that is, subject to state legislative control).)

[4] The City of San Jose adopted Policy 7-13, a "Policy for the Sale of Surplus Property with Provisions Relating to Affordable Housing" with a stated purpose to "strengthen the ability for affordable housing developers to acquire surplus land" and to reinforce the "importance of promoting affordable housing within the City in addition to open space, and the development of educational institutions."

the state's interference in what would otherwise be a merely local affair." (*Id.*) In other words, how does the Act actually achieve the state's interest in affordable housing in a way that is superior to the City's Policy 7-13, the provisions of its state-mandated housing element, and its other land use and zoning policies?

Thus, in *City of Vista*, this Court clarified that the question presented was not "whether the state government has an abstract interest in labor conditions and vocational training" but "whether the state can require a charter city to exercise its purchasing power in the construction market in a way that supports regional wages and subsidizes vocational training, while increasing the charter city's costs." (*Id.* at p. 584.)

Here, rather than correctly framing the issue as whether the state can require a charter city to dispose of its property in a way that supports the state's goal of increasing affordable housing, the Opinion deviated from *City of Vista* and engaged in the very "compartmentalization" that this honorable court cautioned against. By framing the issue as whether a "shortage of sites available for affordable housing development" is a matter of statewide concern [Slip Op. at. p. 19], the Court of Appeal justified its reliance on a separate body of law—state housing law—to bolster its erroneous conclusion that the housing-related restrictions in the Surplus Land Act are also a matter of statewide concern. (*Id.* at pp. 21-25.) But this risks turning "affordable housing" into a kind of talisman, whose mere mention in a statutory regime will lead inexorably to a finding of statewide concern, no matter the case.[5]

The Opinion Misapplied* City of Vista*'s Teaching that Narrow Statutes Imposing Substantive Limits on Cities Generally do not Implicate Issues of Statewide Concern

The Opinion blurs the distinction discussed in *City of Vista* between statutes that are procedural and general, as compared to statutes that are substantive and narrow. In its preemption case law, this Court has drawn an "important distinction between state procedural laws governing the affairs of local governmental entities (which by their nature impinge less on local affairs) and state laws dictating the substance of a public . . . issue (which impinge much more on local affairs)." (*City of Vista, supra,* 54 Cal.4th at pp. 564-565.) Likewise, this Court's jurisprudence has "suggested that a state law of broad general application is more likely to address a statewide concern than one that is narrow and particularized in its application." (*Id.* at p. 565.)

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[5] This reframing is particularly important as will be demonstrated below relating to the fourth prong of the analytical framework set forth *California Fed. Savings & Loan Assn. v. City of Los Angeles (1991) 54 Cal.3d 1*: Is the law reasonably related to resolution of that concern? If the "concern" is mis-framed, the analysis in the fourth prong will also be flawed.

The Opinion purports to follow the *City of Vista's* "general and procedural" versus "narrow and substantive" distinction. It concludes that the Surplus Land Act has "broad reach" because it applies to any "local government entity empowered to acquire and hold real property." (Slip Op. at p. 27.) Under this reasoning, however, any statute that applies to all local government entities would be classified as general. Although the decision states that the Act is "neither entirely procedural nor substantive," the Court comes down on the side of procedural. (*Id.* at pp. 27-28.) This conclusion ignores the fact that the Act's substantive limitations are extreme. For example, the Act mandates that if the City sells surplus land and the new owner ever proposes to use the land for the development of ten or more residential units, then the owner (or its successor-in-interest) must provide at least 15% of the total number of units developed on the land at costs or rents affordable to lower-income households. (Gov't Code, § 54233.)

In *City of Vista*, this Court explained that the "the state law at issue is not a minimum wage law of broad general application; rather, the law at issue here has a far narrower application, as it pertains only to the public works projects of public agencies. In addition, it imposes substantive obligations on charter cities, not merely generally applicable procedural standards." (*City of Vista, supra,* 54 Cal.4th at p. 565.) The Surplus Land Act is not a housing law of broad application; rather, it applies narrowly only to surplus land owned by governmental entities. Further, the Act imposes substantive limits on the ability of cities to dispose of their own property by placing restrictions on how that property may be used once it is sold.

The Opinion Failed to Sufficiently Analyze Whether the Surplus Land Act is "Reasonably Related" to Address the Shortage of Sites for Affordable Housing and "Narrowly Tailored" to Limit Incursion into a City's Municipal Interest

After this Court found no statewide concern in *City of Vista,* there was no occasion to go on and consider the fourth prong of the "home rule" analysis. This case is an ideal vehicle for this Court to provide clarity to cities on the parameters of this fourth prong. The fourth prong requires a court to decide whether the statute is "'reasonably related to…resolution'" of the identified state concern and is "and is narrowly tailored to avoid unnecessary interference in local governance." (*City of Vista, supra,* 54 Cal.4th at p. 556.)

The Opinion concluded that "[t]he Act applies broadly to local government entities empowered to hold real property but is tailored in subject: it addresses only surplus land held by a local government entity" and emphasized that the decision as to whether the land is surplus rests with the local government entity. (Slip. Op. at pp. 32-33.) Yet the inquiry is not whether the Act is tailored to its subject. The inquiry is whether the Act is reasonably related to *resolution* of the identified statewide concern. (*City of Vista, supra,* 54 Cal.4th at p. 556.)

The Opinion failed to explain how the Act will resolve the shortage of affordable housing sites in a way that Policy 7-13 will not such that the incursion into this municipal affair is

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justified. The Opinion provided little reasoning to support its conclusion that this fourth prong was met. It stated, in a conclusory fashion, that the provisions of the Surplus Land Act are "no broader" in sweep than the state interest in reducing the statewide shortage of sites available for affordable housing development. (Slip Op. at p. 34.) However, the Opinion failed to consider whether application of the Act to the City of San Jose was in fact necessary.

California's Housing Element law recognizes that "the availability of housing is of vital statewide importance and that decent housing and a suitable living environment is a priority of the highest order." (Gov't Code, § 65580.) The law requires the City of San Jose, and every other city and county in California, to adopt a housing element as part of its general plan that includes an inventory of land suitable for residential development that can be developed for housing within the planning period and that are sufficient to provide for the jurisdiction's share of the regional housing need for all income levels. (Gov't Code, § 65583.2.) The City of San Jose's housing element includes an inventory of sites available for affordable housing development that is adequate to accommodate its share of the regional need for affordable housing. Certification of the City's housing element by the Department of Housing and Community Development means the City properly identified adequate sites for affordable housing. If the City already has adequate sites, then the Surplus Land Act is interfering with a municipal affair without a reasonable relationship to its purpose.[6]

For the reasons stated above and in the Petition for Review, the League respectfully requests that the Court grant the Petition for Review and provide the necessary guidance as to the ability of a charter city, pursuant to its Constitutionally-derived home rule authority, to set its own priorities for the disposition of surplus property.

Respectfully submitted,

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[6] Consideration should also be given to other land use policies of the City of San Jose that promote affordable housing such as the City's inclusionary housing ordinance. (See *California Bldg. Industry Assn. v. City of San Jose* (2015) 61 Cal.4th 435.)

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PROOF OF SERVICE

Anderson, et al. v. City of San José
Supreme Court of the State of California Case Number S260013
Sixth Appellate District Court of Appeal Case Number H045271
Santa Clara County Superior Court Case Number 16-CV-297950

At the time of service I was over 18 years of age and not a party to this action. My business address is 300 S. Grand Avenue, Ste. 25th Floor, Los Angeles, California 90017. My email address is: susan.segovia@bbklaw.com.

On February 4, 2020, I served the following document described as:
AMICUS CURIAE IN SUPPORT OF PETITION FOR REVIEW
on all interested parties in this action in the manner designated below at the address(es) set forth in the service list attached hereto:

[X] BY MAIL - I deposited such envelope in the mail at Los Angeles, California, with first class postage thereon fully prepaid. I am readily familiar with the business practice for collection and processing of correspondence for mailing. Under that practice, it is deposited with the United States Postal Service on that same day, at Los Angeles, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postage cancellation date or postage meter date is more than one (1) day after the date of deposit for mailing in affidavit; and/or

[X] EFS/TrueFiling (TrueFiling) – I caused service through the Court's electronic filing system by filing the document(s) via TrueFiling (Pursuant to California Rules of Court, rule 8.72, and Sixth District Court of Appeal Local Rule 2).

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

I declare under penalty of perjury that the foregoing is true and correct. Executed on February 4, 2020, at Los Angeles, California.

/s/ Susan Segovia

Susan Segovia

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PROOF OF SERVICE

Anderson, et al. v. City of San José

Supreme Court of the State of California Case Number S260013

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