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November 4, 2015

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Honorable Tani Cantil-Sakauye, Chief Justice,
and Honorable Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-4797

Re: Castro v. City of Thousand Oaks
Case No. : S229662
Our File No. : 9999.009

**League of California Cities' and California State Association of
Counties' Amici Letter Brief in Support of Review
(Petition for Review Filed October 9, 2015)**

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

1. Introduction

The League of California Cities and the California State Association of Counties submit this letter brief in support of the Petition for Review filed by the City of Thousand Oaks seeking review of a published decision by Division Six of the Second District Court of Appeal. The Court of Appeal's opinion interprets Government Code section 830.6, the statutory design immunity. Section 830.6

Honorable Tani Cantil-Sakauye, Chief Justice,
and Honorable Associate Justices
November 4, 2015
Page 2

immunizes public entities from liability for injuries caused by plans or designs for public property construction or improvements, if the plan or design was approved before construction and there is substantial evidence the plan or design was reasonable. The statute allows public entities to delegate the authority to approve a plan or design to a public employee. The Court of Appeal's decision limits that authority. The limit is not supported by either the statute's language or by case law. If allowed to stand, those limits will impede the ability of cities and counties throughout California to delegate discretionary approval authority to their employees -- including employees with the expertise and experience to make technical decisions about construction and design issues. Those limits will also force more design improvements, however minor, to be taken to governing bodies for approval. That will slow down construction of public improvements, impede the bodies' ability to make other crucial decisions, and ultimately limit the ability of cities and counties to improve their property for the benefit of their citizens. And the *Castro* court's grounds for doing so conflict with other published California decisions.

The League of California Cities and the California State Association of Counties respectfully asks this Court to grant review of, and reverse, the *Castro* decision. In the alternative, they ask that the Court grant review and either hold further action pending the decision in *Hampton v. County of San Diego* (S213132); or (if *Hampton* is decided before the Court rules on the *Castro* petition) remand the *Castro* case to the Court of Appeal with directions to reconsider its decision in light of the *Hampton* decision.

2. Amici's Interest

The League of California Cities (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, 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.

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 is a matter with the potential to affect all California counties.

3. Facts

This case arises out of a 2011 vehicle versus pedestrian accident at a crosswalk at the intersection of Live Oak Street and Thousand Oaks Boulevard in the City of Thousand Oaks, California. The plaintiffs alleged that the City (in addition to the driver) caused the accident because its placement, construction, design, and approval of the crosswalk at that intersection --including the traffic control devices -- were unreasonable, unsafe, and not within safety standards.

Before the accident, the City made improvements to the intersection, including the crosswalk markings and signage. The City Council approved the designs for most of these improvements before construction.

The exception relevant to this lawsuit was a pedestrian-activated push button that controlled flashing beacons on a pole at the intersection. This system was approved before installation by the City's Traffic Engineering Division Manager at the time, John

Honorable Tani Cantil-Sakauye, Chief Justice,
and Honorable Associate Justices
November 4, 2015
Page 4

Helliwell. The Traffic Engineering Division is a division within the Department of Public Works.

Article 2 of the Thousand Oaks Municipal Code spells out the authority to place official traffic control devices on City streets. Under section 4-3.203 of the Ordinance, the City Engineer shall place and maintain all official traffic control devices authorized by the City Council. In addition, subdivision (b) of section 4-3.203 provided that “The City Engineer shall place and maintain, or cause to be placed and maintained, all other traffic control devices where, in the opinion of the City Engineer, such official traffic control devices are necessary to protect public safety.”

Jay Spurgin, the City Engineer at the time the improvements were constructed, declared that at that time, Traffic Engineering Division Manager John Helliwell had discretionary authority to recommend, design, and use the installation and design configuration of flashing beacons like the ones at issue. If the expenditure was within the department’s financial discretion, it could be approved within the department and did not need to go before the City Council for approval.

Helliwell authorized his assistant to order the signal heads and push buttons for the beacons from a vendor. The vendor’s quote for the beacons and push buttons included photos of the equipment. Helliwell declared that because the expenditure for the beacons was under the necessary minimum for City Council approval, and because it was within his discretionary authority for the Department of Public Works, he was authorized to have the equipment ordered without City Council approval. The beacons and push buttons were installed at the intersection, one on each side of Thousand Oaks Boulevard, before the accident.

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4. Trial Court and Appellate Court Decisions

The City obtained summary judgment based on Government Code section 830.6 design immunity. The Court of Appeal reversed summary judgment.

The Court of Appeal ruled that the flashing beacons were not covered by design immunity. (*Castro* Opinion, pp. 5-6.) The Court concluded that the authority granted the City Engineer under section 4-3.203(b)'s to "place and maintain, or cause to be placed and maintained" traffic control devices he believes necessary did not amount to "discretionary authority to 'approve' the plan or design for a traffic control device." (*Id.*, p. 5.) The Court rejected the declarations of Spurgin and Helliwell concerning the delegation of authority to approve the placement of the pushbuttons and beacons, because "this is a legal issue, not a public works issue." (*Ibid.*) It also rejected the evidence that the Department had authority to install devices without City Council approval when the cost was under the necessary minimum. The Court held that, "Design immunity is not conferred if the proposed construction addition is below a certain dollar limit." (*Ibid.*) Acknowledging that the City Engineer had authority to purchase and install traffic control devices, the Court held that this authority was not discretionary authority to approve a warning beacon design before the equipment is installed. (*Id.* at pp. 5-6.)

The Court of Appeal further reasoned:

"City's reliance on its municipal code for design immunity, if credited, would erase years of California jurisprudence. . . . Were we to credit City's theory, every governmental entity would draft a similar code section and this would create design immunity by municipal code section. All that would be required would be a declaration by an engineer approving his or her own safety idea. To us, this seems a stretch which tears the legal fabric. There still must be an

actual plan or design, i.e. something other than an oral ‘after the fact’ statement that: ‘I had authority and I approved my own safety idea.’” (*Id.*, p. 6.)

5. Discussion

As the City of Thousand Oak’s Petition for Review explains at pages 13-14, multiple municipalities throughout California have adopted the same method as Thousand Oaks for handling installation of traffic control devices: They delegate the authority to do so to their employees, via their municipal codes. Ruling that doing so deprives the municipalities of design immunity for their employees’ discretionary approval of those plans and designs will expose those cities to the very liability the Legislature intended to abrogate by passing Government Code section 830.6: Liability for injuries caused by discretionary planning and design decisions. (*Cameron v. State of California* (1972) 7 Cal.3d 318, 326; accord, *Cornette v. Department of Transp.* (2001) 26 Cal.4th 63, 69.)

Doing so is a change in the law. The Court of Appeal did not identify the “years of California jurisprudence” that would be “erase[d]” if cities were permitted to rely on their municipal codes to delegate design authority. (*Opp.*, p. 6.) Neither did it identify anything in the “legal fabric” that forbids giving public employees the discretionary authority to approve their own decisions for purposes of design immunity. (*Ibid.*) To the contrary, both concepts fit comfortably within the jurisprudence of design immunity. The law supports authorizing public employees, via municipal code, to make discretionary design decisions. It also supports extending design immunity to those discretionary decisions, including employees’ approval of their own design ideas.

The language of Government Code section 830.6 does not support the appellate court’s limitations. The statute’s discussion of employee approval merely requires that the plan or design must have

“been approved in advance of the construction or improvement by . . . some . . . employee exercising discretionary authority to give such approval” or that the plan or design be “prepared in conformity with standards previously so approved” The statute’s language does not impose any particular requirements on the approval, except that the employee have the power to exercise discretion in approving the design, plan, or standards, and do so before construction. Nothing in the statute forbids municipalities from delegating their employees discretionary authority to select and approve traffic control devices or other improvements. Nor does the statute forbid giving an employee the power to approve his or her own decisions.

Turning to case law, other published decisions on design immunity do not share the *Castro* Court of Appeal’s disdain for delegation by municipal code or ordinance. To the contrary, previous published decisions specifically look to “the law fixing the public entity’s internal distribution of powers” to determine whether “some . . . officer exercises discretionary approval authority for the purpose of section 830.6.” (*Johnston v. County of Yolo* (1969) 274 Cal.App.2d 46, 52.) The courts therefore look to a municipality’s code or ordinances to decide which employees have been delegated discretionary authority for approval. (E.g., *Thomson v. City of Glendale* (1976) 61 Cal.App.3d 378, 384.)

Further, other published decisions do consider the declarations or testimony of public officers and employees in deciding whether the employee who approved a plan or design had authority to do so. In *Thomson, supra*, the court looked to the testimony of the defendant city’s department of public works in deciding whether the employee who approved the placement of a handrail had authority to do so. (*Id.*, 61 Cal.App.3d at p. 384.)

And other courts do not share the *Castro* court’s concern about public employees approving their own design and planning decisions. Instead, *Uyeno v. State of California* (1991) 234 Cal.App.3d 1371,

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abrogated on other grounds by *Cornette, supra*, 26 Cal.4th 63, held such approvals sufficient for design immunity:

“ Section 830.6 requires only that the project be approved by an ‘employee exercising discretionary authority to give such approval.’ There is no requirement that the approving employee be someone other than person who prepares the plan or design.” (*Uyeno, supra*, at p. 1380.)

Uyeno, like *Castro*, dealt with a vehicle-versus-pedestrian case that took place at a crosswalk, in which the plaintiff alleged that the traffic control device at issue (the intersection’s traffic lights) gave pedestrians a false sense of security. (*Id.*, 234 Cal.App.3d at p. 1375.) The *Uyeno* court ruled that under section 830.6, the state was immune from liability for a signal operator’s approval of his own decision setting a traffic light timing sequence. (*Id.* at pp. 1378-1379.)

Similarly, *Hefner v. County of Sacramento* (1988) 197 Cal.App.3d 1007, 1014, abrogated on other grounds by *Cornette, supra*, 26 Cal.4th 63 applied design immunity to the decision of a civil engineer employed by the defendant county’s Department of Public Works regarding placement of an intersection limit line, approved by the engineer’s supervisor. The county was entitled to immunity, even though the limit line placement, like the beacons here, was not specified by the plan for the intersection.

The *Castro* court’s concern that delegating public employees the authority to select and approve traffic control devices “would be a stretch that tears the legal fabric” (Opinion, p. 6) was therefore unfounded. Instead, it is the *Castro* opinion that tears the legal fabric established by previous case law.

The consequences of doing so are plain for California municipalities that, like Thousand Oaks, delegate discretionary authority to employees to place traffic devices and make similar design/plan decisions, via their municipal codes or ordinances. Traffic control devices can be a fertile source of liability. Persons

Honorable Tani Cantil-Sakauye, Chief Justice,
and Honorable Associate Justices
November 4, 2015
Page 9

injured by vehicles at intersections may blame the traffic signals. The drivers who are sued may cross-complain against the municipality, seeking to assess fault. If cities, counties, and other public entities are stripped of design immunity for traffic device decisions their employees make, then they will be forced to submit every device placement decision to the governing body for approval.

Municipalities will therefore lose one of the main advantages delegation of approval provides: allowing public employees with expertise and experience to make technical decisions about placement of traffic signals. The traffic engineer who has been trained in traffic safety device placement will bring skills to the table that a member of a local legislative body may not have, even when guided by staff.

Further, bringing every device placement decision to city councils and county boards of supervisors for approval threatens to slow down decisions on placing, upgrading, and changing traffic control devices -- devices designed to protect the public. That does not benefit the public.

Finally, the Court of Appeal's interpretation of Government Code section 830.6 deprives municipalities of the very benefit the Legislature intended to provide them by allowing them to delegate employees discretionary approval authority. Statutes should not be read in a way that thwarts the Legislature's intent in passing that statute.

For all these reasons, the League and CSAC respectfully request that the Court grant review of *Castro*.

6. The Pending Hampton Case

This Court currently has under submission another case interpreting Government Code section 830.6: *Hampton v. County of San Diego*, S213132, argued and submitted October 6, 2015.

Honorable Tani Cantil-Sakauye, Chief Justice,
and Honorable Associate Justices
November 4, 2015
Page 10

Hampton also deals with the issue of public employees' discretionary authority to approve a plan or design. If the Court grants review of *Castro* before it renders a decision in *Hampton*, the Court may wish to grant review and hold further action pending the *Hampton* decision. (Cal. Rules of Court, rule 8.512(d)(2).) Alternatively, if *Hampton* is decided before review is granted, and addresses issues of delegation of discretionary authority, the Court may wish to grant review, and transfer the case to the Court of Appeal for further consideration in light of the decision in *Hampton*. (Cal. Rules of Court, rule 8.528(b).)

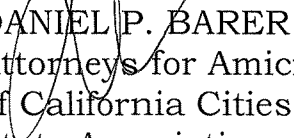
Whether or not the Court decides to follow either of these strategies, the League and CSAC urge the Court to review the *Castro* decision.

7. Conclusion

The Court of Appeal's decision in *Castro* conflicts with existing law. It conflicts with the Legislature's intent in immunizing the design and planning decisions of public employees. (Gov. Code, § 830.6.) And it conflicts with the policy of allowing municipalities to better serve their constituents by delegating design and planning approval authority to those employees with the relevant knowledge and expertise to make informed decisions. California's cities and counties respectfully ask this Court to review *Castro*.

Respectfully submitted,

POLLAK, VIDA & FISHER


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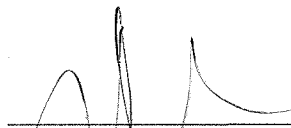
Jennifer Henning, California State Association of Counties (*via email only*)

CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that the attached letter is produced using 13-point Roman type including footnotes and contains approximately 2,610 words. Counsel relies on the word count of the computer program used to prepare this brief.

DATED: November 4, 2015

POLLAK, VIDA & FISHER



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PROOF OF SERVICE
STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

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 11150 West Olympic Boulevard, Suite 980, Los Angeles, California 90064-1839.

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