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Our File No. 10000.1200

March 17, 2017

VIA OVERNIGHT DELIVERY

The Honorable Chief Justice Tani Cantil-Sakauye and
Honorable Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-4712

Re: Amicus Curiae Letter in support of Petition for Review in *City of Malibu v. Kent, et al.*, Case No. S240239

To the Honorable Chief Justice and Associate Justices:

We write on behalf of the League of California Cities (the "League") to urge this Court, as a matter of statewide importance, to grant the petition for review filed by the City of Malibu in *City of Malibu v. Kent, et al.*, Case No. S240239. Although unpublished, this decision (the "Decision") presents a question of first impression with a broad impact on California cities; it allows the Department of Health Services to effectively strip cities and counties of their local zoning authority to regulate the location of drug and alcohol rehabilitation facilities that treat over six persons. State law limits preemption of local zoning law to residential facilities that serve six or fewer persons ("residential facilities"). (Health & Saf. Code, § 11834.23.) Despite that limit, the Decision authorizes the Department's licensing actions to gut local land use authority and dictate where larger facilities must be allowed to locate.

Specifically, Supreme Court review is warranted to correct the Court of Appeal's conclusion that the Department has no obligation to ensure the licenses it issues are the correct ones to preserve the local zoning control the Legislature secured. To be clear, the League does not urge review to contest preemption for facilities that serve six or fewer persons. But it does urge review so this Court can provide state-wide guidance on the scope of the preemption contemplated by the Legislature in Health & Safety Code

sections 118324.22 and 118324.23, which scope the Department's licensing decisions have far exceeded and which the Decision determined could continue unchecked.

I. The League of California Cities' Interest

The League of California Cities is an association of 475 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 with statewide or nationwide significance. The Committee has identified this case as having such significance.

II. The Preemption of Local Zoning Law for Integral Facilities is a Statewide Issue

The factual scenario presented to the Court is unfortunately all too common throughout the state. It results from the multi-billion dollar drug and alcohol rehabilitation business' preference to operate in residential zones. Indeed, the nickname "The Rehab Riviera" has sprung up to describe the stretch of such facilities along the coast from Malibu to San Clemente. (Rick McNeil, Colin Higgins, Leslie Barron, Rumble in the Riviera, Orange County Law., April 2016, at 36.) The phenomenon extends beyond Southern California. As but two examples, San Rafael and Sausalito have large rehabilitation complexes that operate, at least in part, under multiple licenses for six-bed facilities.

State statistics also illustrate the sheer number of facilities at issue. The Department maintains both a listing by county[1] and a state-wide alphabetical listing[2] of all non-medical alcoholism and drug abuse recovery or treatment facilities it licenses and/or certifies, including residential facilities of all sizes. Of the approximate 1,800

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[1] Department of Health Care Services Licensing and Certification Section Status Report (March 2017) <http://www.dhcs.ca.gov/provgovpart/Documents/Status_Report_March_2017.pdf> (as of March 14, 2017).

[2] Department of Health Care Services (DHCS) Licensed Residential Facilities and/or Certified Alcohol and Drug Programs, <https://www.healthdata.gov/dataset/department-health-care-services-dhcs-licensed-residential-facilities-andor-certified-alcohol> (as of March 14, 2017).

facilities listed, over half provide 24-hour residential non-medical alcohol and drug abuse rehabilitation services like the facility at issue in the Decision.

This proliferation of rehabilitation facilities has spurred the industry to pursue strategies to maximize the number of persons any given facility can serve and to minimize local regulation over that facility. Aware of the Legislature's decision to require that six-bed residential facilities be treated the same as "a family for the purposes of any law or zoning ordinance that relates to the residential use of property" (Health & Saf. Code, § 11834.23, subd. (a)), operators shoehorn their larger treatment facilities into this limited zoning exception. They do so by acquiring contiguous single family properties within residential zones, and when the Department issues them a license to operate a six-person facility on each individual lot, the operators actually operate them as a unified integral facility. Instead of treating up to six persons, they treat many multiples of six, and in this case 46. The Department knows of the issue, but turns a blind eye. The Decision concludes that the Department has no obligation to open its eyes to implement its licensing decisions consistent with state law. At its core, the Decision allows the Department to accomplish through licensing what the Legislature declined to do via statute. And because the Department is the primary licensing agency for such facilities state-wide, its licensing practices, and the local land use preemption that results, affect every city and county in California.

III. The Decision Approves the Department's Effective Conversion of Residential Zones into Institutional or Hospital Zones, Which Serves no Public Purpose

By narrowing preemption to apply solely to residential facilities for six and fewer persons, the Legislature balanced the need to increase the availability of quality treatment programs with a city and county's local zoning interests. Those local zoning interests are profound. California has long reserved to cities and counties local control of land use and zoning regulations. The Constitution enshrines this power: "A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." (Cal. Const., art. XI, § 7.) The state's zoning statutes similarly preserves such local control. "[T]he Legislature declares that in enacting this chapter it is 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." (Gov. Code, § 65800.) This Court has also recognized local agencies' fundamental control. "The power of cities and counties to zone land use in

accordance with local conditions is well entrenched." (*IT Corp. v. Solano County Bd. of Supervisors* (1991) 1 Cal.4th 81, 89.)

Seating land use control at the local level makes sense. The local government—not the state—is best suited to make the optimal land use decisions given its intimate familiarity with the varied geography, population distribution, development patterns and general plan unique to its jurisdiction. And it is through local land use policies that a city or county can logically plan for its future development, configuration and character. "[T]he Legislature has been sensitive to the fact that planning and zoning in the conventional sense have traditionally been deemed municipal affairs. It has thus made no attempt to deprive local governments (chartered city or otherwise) of their right to manage and control such matters, but rather has attempted to impinge upon local control only to the limited degree necessary to further legitimate state interests." (*City of Los Angeles v. State of California* (1982) 138 Cal.App.3d 526, 533.)

Section 11834.23, at issue here, represents one of the few instances in which the Legislature has impinged on local control, but only narrowly and only to advance the public purpose of encouraging "the development of sufficient numbers and types of alcoholism or drug abuse recovery or treatment facilities as are commensurate with local need." (Health & Saf. Code, § 11834.20.) The statute provides those treatment facilities that serve six or fewer persons shall be considered a residential use and a city or county can apply no zoning regulations to such use that are not also applied to other single-family residences in the same zone. (Health & Saf. Code, § 11834.23, subds. (a) and (e).) The statute's structure thus demonstrates the Legislature's intent to preserve local authority to establish and enforce zones in the first instance. Rather than requiring cities to change their local zoning designations to permit institutional integral facilities wherever the operator prefers to locate them, the statute instead requires the six-bed residential facility to fit within the existing single-family zoning use. But the creation and location of the underlying single-family zones remains fully within the city's control, as do the specific rules applied within that zone.

Thus the Legislature determined that if the rehabilitation program was structured to act like a family unit, then cities and counties must allow it to locate in zones approved for single-family use. And State preemption of local zoning makes sense for six-bed residential facilities that mimic a family-like environment. The smaller social groups in those facilities benefit from the residential neighborhood setting and the greater therapeutic value such a family-like social model affords. At the same time, siting such six-bed facilities within single-family residential zones should not change

the character of that pre-existing zone. (See *McCaffrey v. Preston* (1984) 154 Cal.App.3d 422, 432 [Discussing the Community Care Facilities Act, California Health and Safety Code §§ 1500 *et seq.*, "The selection of a maximum of six persons represents a legislative determination that this was the maximum number who could reside in a residential care facility and yet have that facility retain its homelike character and the neighborhood its single family residential character."].)

Not so for campus facilities that operate one large program across several buildings. That institutional or hospital-like use transforms the family-like environment surrounding it. Recognizing this, the Legislature did not preempt local zoning law applicable to those facilities as it did for the smaller six-bed facilities. Yet the Decision construed the limited preemption in section 11834.23 so broadly as to allow the Department not only to license integral facilities in single-family residential zones, but also to license facilities in structures that do not qualify as dwellings under the local ordinances. [Decision, pp. 24-25]. However, no public purpose supports allowing integral facilities in single family zones. The treatment structure in the institutional setting does not depend on being surrounded by single family homes. On the other hand, the character of the existing single-family zone is incompatible with hospital and institutional uses. Moreover, the conversion of multiple contiguous single-family homes into large scale rehabilitation treatment facilities does nothing more than reduce housing for those with no rehabilitation needs. In short, construing the preemption in section 11834.23 so broadly as to allow the Department unfettered discretion on which license it issues for a particular facility advances no public policy.

In ruling otherwise the Court of Appeal failed to narrowly interpret the limited express preemption the Legislature imposed. Although this case involves express preemption, case law analyzing implied preemption is instructive. In implied preemption, courts observe the general rule that "when there is a significant local interest to be served that may differ from one locality to another," the presumption favors local control. (*Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1149, as modified (Aug. 30, 2006), quoting *Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 707.) That same rationale applies to compel interpretation of express preemption narrowly when the field preempted is one traditionally subject to local control. (See *Big Creek Lumber Co., supra,* 38 Cal.4th at 1157 ["The Legislature's 'preemptive action in specific and expressly limited areas weighs against an inference that preemption by implication was intended elsewhere.' "] quoting *IT Corp. v. Solano County Bd. of Supervisors* (1991) 1 Cal.4th 81, 95.)

Thus, the Court of Appeal erred to conclude that the Department has no duty to ensure the correct license is issued to any given rehabilitation facility. It also erred when it found Malibu's rules regarding what constituted a legal residential use was irrelevant to the Department's licensing decision. Nowhere in the statutory scheme did the Legislature state its intent to substitute its judgment for the local agency's regarding what constitutes a legal dwelling for single-family use. Rather, the express limits of the preemption were that a city or county's existing zoning rules—including its definitions of legal dwelling units—must be applied to six-bed facilities just as if those facilities were single-family homes. If the local agency's zoning rules prohibit the use of a pool house as a single-family dwelling, so too may they prohibit the location of a rehabilitation facility in that same structure consistent with section 11834.23. The Decision merits review to correct its overreach into local zoning authority—a reach not supported by the statutes nor intended by the Legislature.

IV. Conclusion

If left unreviewed, the Department will continue to shirk its responsibility to issue the correct license, whether a six-bed residential facility or an integral facility, to alcohol and drug abuse rehabilitation facilities. And the continued issuance of improper licenses will result in preemption of local land use authority far beyond what the Legislature intended. For these reasons, the League urges this Court to grant review of the Decision to provide guidance on this issue for the Department and cities and counties throughout the state.

Very truly yours,

COLANTUONO, HIGHSMITH & WHATLEY, P.C.

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HOW:hw

PROOF OF SERVICE

City of Malibu v. Department of Health Care Services
Case No. S240239/B267162/BS154185

I, the undersigned, 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 Blvd., Suite 850, Pasadena, California 91101.

On **March 17, 2017**, I served the document(s) described as: **AMICUS CURIAE LETTER IN SUPPORT OF PETITION FOR REVIEW**, on the interested parties in this action as follows:

☒ By placing a true copy thereof enclosed in a sealed envelope addressed as follows:

SEE ATTACHED PROOF OF SERVICE LIST

BY MAIL: By placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Pasadena, California addressed as set forth below. I am readily familiar with the firm's practice of collection and processing 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 postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

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

Executed on **March 17, 2017**, at Pasadena, California.

Liliana R. Hernandez

PROOF OF SERVICE LIST

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Court of Appeal	**Clerk of the Court of Appeal** Second Appellate District, Division 7 Ronald Reagan State Building 300 S. Spring Street 2nd Floor, North Tower Los Angeles, CA 90013
Trial Court	Clerk of the Superior Court **Los Angeles Superior Court** Honorable James C. Chalfant Department 85 111 N. Hill Street Los Angeles, CA 90012