In the
SUPREME COURT OF CALIFORNIA

RUEGG & ELLSWORTH, et al.
Petitioners, Plaintiffs and Appellants,

vs.

CITY OF BERKELEY; et al.,
Respondents
and
CONFEDERATED VILLAGES OF LISJAN, et al.
Intervenors and Respondents.

After a Published Decision by the Court of Appeal,
First Appellate District, Division Two, Case No. A159218,
Reversing a Judgment of the Superior Court of Alameda County,
Case No. RG18930003, Hon. Frank Roesch presiding

REPLY TO ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

The Answer to Petition for Review filed by Developers Ruegg & Ellsworth and Frank Spenger Company (Plaintiffs and Appellants below and referred to herein as "Developers") makes a number of inaccurate statements about Intervenors and Respondents Confederated Villages of Lisjan and Confederated Villages of Lisjan, Inc. ("CVL") and its Petition for Review.

II. REPLY TO DEVELOPERS' STATEMENT OF FACTS

Developers contend, nonsensically, that CVL invokes the "interests of a third-party Native American tribe that is not before the Court." (Answer, 9-10.) This assertion is apparently based on the implied misrepresentation that the Ohlone people had (or have) only one representative, in the person of Mr. Andrew Galvan. Developers cite no evidence for this suggestion. In fact, the record refutes it. Many in the Ohlone community expressed their concern that Mr. Galvan does not represent the Ohlone. (See e.g., AR 10677.)

Also, CVL, separately from Mr. Galvan, objected to development of the site from the beginning, submitting extensive comments on the Draft Environmental Impact Report ("Draft EIR") prepared for Developers initial project application. (AR 2413; 8788; 11107; 11241; 11401.) In 2017, CVL requested formal "tribal consultation" with the City pursuant to Pub. Res. Code section 21080.3.2 (AB 52). (AR 8773; 8776; 8777.) The City denied that formal consultation was required under AB 52, but nevertheless engaged in consultation with CVL. (AR 8801; 8436-38; 8803-04; 8938.)

Also, while CVL was not a recognized tribe at the time Developers' initial project application, the California Native American Heritage Commission has since recognized CVL and included CVL on its "consultation" list.[1]

In addition, with respect to Plaintiffs' request for ministerial approval of their second project pursuant to SB 35, CVL's counsel submitted three "briefs" to the City arguing that (1) SB 35 does not preempt the City's obligation to exercise its discretionary legal authority conferred by Berkeley Municipal Code (BMC) protections for City designated landmarks, and (2) the project does not qualify for SB 35 review because it requires the demolition of a historic structure placed on a national, state, or local historic register as provided in Gov. Code section 65913.4(a)(7)(C) (Subparagraph C). (AR 6395; 7433; 7442.)

Developers also suggest that because Mr. Galvan accepted the methodologies employed in preparing the 2014 Archeo-Tec Report, that these methods were reliable. But Developers cite no evidence that Mr. Galvan is qualified to judge the reliability of these methods. In contrast, the most authoritative archeologist to conduct archeological work at the site, Registered Professional Archaeologist Dr. Christopher Dore, testified that the testing done to date is not reliable. (AR 6627-28.)[2]

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[1]Motion and Request for Judicial Notice in Support of Intervenors' Respondents' Supplemental Brief ("CVL RJN"), Ex 1; Appellants' Motion, Ex 1,, p. 25 [Gov. Code § 65913.4(b)(1)(A)(ii)]; Pub. Res. Code § 21080.3.1.

[2]See also, AR 6403-29; 11429-11441.

III. WHY THE COURT SHOULD GRANT REVIEW

A. The Opinion conflicts with many cases holding that unapproved development projects comply with current law.

Developers argue that CVL "forfeited" the issue presented for review relating to the retroactive effect of AB 831 on the disposition of this appeal. (Answer 18, 22.) Developers are wrong because CVL argued that AB 831 precludes issuance of the mandate relief that Developers seek.[3] Indeed, the "mandamus must operate in the present" case law represents a specific application—in mandamus cases—of the retroactive legal effect of a statute.

Also, the case law cited by CVL in support of its retroactivity argument in the Court of Appeal includes *Avco Community Developers, Inc. v. South Coast Regional Com. (Avco)* (1976) 17 Cal.3d 785, 795.[4] *Avco* holds that "a builder must comply with the laws which are in effect at the time a building permit is issued, including the laws which were enacted after application for the permit," citing *Brougher v. Board of Public Works* (1928) 205 Cal. 426, 435; *Russian Hill Improvement Assn.*

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[3]For example, CVL argued below that "Appellants' prayer for an order mandating that the City issue the ministerial permit is moot because the courts cannot grant that relief because the required consultation has not occurred," citing *Lincoln Place Tenants Assn. v. City of Los Angeles* (2007) 155 Cal.App.4th 425, 454 ["a case becomes moot when a court ruling can have no practical effect or cannot provide the parties with effective relief"]. (Intervenors' Respondents' Supplemental Brief, 29.)

[4]Intervenors' Respondents' Supplemental Brief, 17.

v. Board of Permit Appeals (1967) 66 Cal.2d 34, 39. (Intervenors' Respondents' Brief, 17.) Thus, CVL raised the retroactive effect of AB 831 on the disposition of this appeal regardless of which line of cases one uses to analyze the question.

It is also noteworthy that after suggesting there is a difference between the retroactivity arguments that CVL made in the Court of Appeal and the "mandamus must operate in the present" case law cited in its Petition, Developers argue there is no such difference because, in Developers' view, mandamus does not operate in the present where the Legislature did not intend to apply a new law retroactively. (Answer, 25, 27.)

Developers overlook the fact that current law dictates that in construing the Legislature's intent, the Court must presume the Legislature was aware that "mandamus must operate in the present" and chose not to disturb or change the application of that law to projects that were not approved under SB 35 when AB 831 was adopted.

In addition, Developers' use of the term "forfeit" is incorrect because this Court may grant of review of issues even if they were not raised in the Court of Appeal. (CRC 8.500(c).)

Developers argue that the retroactivity issue will not arise again because Developers "are aware of no other case in that procedural posture." (Answer, 22.) This view of the conflict the Opinion creates in the appellate case law is too narrow. The Opinion requires the City to approve a permit that cannot be approved under current law, in direct conflict with prior case law. This conflict *in the law* will persist regardless of whether a case

with similar facts may arise under SB 35.

The Court should grant review to settle the conflict in the appellate case law created by the Opinion.

B. The Court of Appeal's ruling regarding the standard of review is in conflict with many appellate decisions.

Developers argue that the issue CVL presents for review regarding the standard of review will not arise again because in future SB 35 cases, "the court will simply apply the amended statutory standard under § 65913.4(c)(3)." (Answer, 21, citing Opn. 20.) Developers' view of the conflict the Opinion creates in the appellate case law regarding the standard of review is, however, too narrowly focused on future cases involving SB 35. The consequences of the Opinion's ruling are much broader.

The Opinion's standard of review ruling would require that courts hearing *all traditional mandamus actions challenging agency determinations of fact* must analyze the statute governing the agency decision for legislative intent to require deviation from the well-established rule that agency factual determinations are reviewed for whether they are "devoid of evidentiary support." (See e.g., *Golden Drugs Co., Inc. v. Maxwell-Jolly* (2009) 179 Cal.App.4th 1455, 1466-67, 1470-71). This represents a wholesale change in the law governing traditional mandamus.

Also, every statute has a purpose. The Opinion would require that courts determine the standard of review in all traditional mandamus actions challenging agency determinations of fact based on the court's perception of the urgency of the

statute's purpose. This mode of analysis would lead inevitably to unpredictable and arbitrary results.

Agencies and participants in agency proceedings should know the applicable standard of review that applies to their decisions before they make them. Up until now, they have. This decision upends that status quo.

Moreover, as discussed in CVL's Petition, the Opinion relies for its inspiration on *San Francisco Fire Fighters Local 798 v. City and County of San Francisco* (2006) 38 Cal.4th 653, 669 (*Fire Fighters*) (Opn. 20-21); but does so mistakenly because the agency decision in *Fire Fighters* did not involve a determination of fact ordinarily reviewed for "any evidentiary support." (*Fire Fighters*, 38 Cal.4th at 674.) In fact, *Fire Fighters* says nothing about changing the standard of review of an agency determination of fact in a traditional mandamus action. This Court should intervene to clarify the limited reach of the analysis in *Fire Fighters* so the trial courts and courts of appeal do not overly complicate a settled rule of law.

In addition, Developers and the Court of Appeal accepted Dr. Pastron's research, as set forth in the 2014 Archeo-Tec report as gospel. But as noted above, Dr. Dore testified that the testing done to date is not reliable. (AR 6627-28.) It is well-settled that the City has discretion to choose between competing expert opinions in making its factual determinations. (*Association of Irritated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, 1397 ["the decisionmaker is 'permitted to give more weight to some of the evidence and to favor the opinions and estimates of

some of the experts over the others.' [Citations.]"].) Dr. Dore's criticisms of Archeo-Tec's 2014 conclusion are substantial evidence supporting the City's determination that the project would demolish a historic structure. The Court of Appeal, however, in direct conflict with established case law, made itself the final arbiter of the reliability of Dr. Pastron's methods. The Court of Appeal also made itself the final interpreter of what Dr. Pastron's excavations revealed. In both respects, the Opinion usurps the City's well-established role in the process of agency decision-making.

C. The Opinion's ruling that the West Berkeley Shellmound is not a "historic structure" conflicts with other decisions of this Court and the Court of Appeal.

Developers argue that the issue CVL presented regarding the definition of the term "historic structure" will not recur due to the adoption of AB 831, which prevents ministerial review of projects on sites with "tribal cultural resources." However, Developers' view this issue too narrowly, because the Opinion's reasons for not reading the term "historic structure" in SB 35 *in pari materia* with other laws that protect historic resources—reasons that conflict with other appellate case law—may recur in relation to many other statutes.

> It is a basic canon of statutory construction that statutes in pari materia should be construed together so that all parts of the statutory scheme are given effect. [citations omitted] Two "'[s]tatutes are considered to be in pari materia when they relate to the same person or thing, to the same class of

> person[s or] things, or have the same purpose or object.'"

(*Lexin v. Superior Court* (2010) 47 Cal.4th 1050, 1090–1091; see also, *Old Homestead Bakery v. Marsh* (1925) 75 Cal.App. 247, 258 ["Statutes in pari materia are those which relate to the same person or thing, or to the same class of persons or things"].) Thus, there are three bases for reading statutes *in pari materia*: when they (1) relate to the same person or thing; (2) relate to the same class of persons or things; or (3) have the same purpose or object. Here, the Opinion looks only at the purposes of the statutes (Opn 26-32), and ignores the fact that SB 35 and historic preservation laws relate to the same "class of things", i.e., historic structures that are or should be entitled to protection from damage or destruction.[5]

Also, where many laws use the same term for different purposes, only the laws that use the term for the same purpose are read *in pari materia*. (*Jameson Petroleum Co. v. State* (1936) 11 Cal.App.2d 677, 680 [construing terms "real estate" and "real property" as used for tax purposes *in pari materia* with the use of these terms for tax purposes in other statutes, but not with the use of these terms for other purposes in other statutes]; accord, *Trabue Pittman Corp. v. Los Angeles County* (1946) 29 Cal.2d 385,

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[5]For example, the State Historical Building Code defines "a qualified historical building or structure" as: any structure *or property*, collection of structures, *and their related sites* deemed of importance to the history, architecture, or culture of an area by an appropriate local or state governmental jurisdiction. (Health & Safety Code § 18955, italics added.)

393 ["for purposes of taxation the definitions of real property in the revenue and taxation laws of the state control whether they conform to definitions used for other purposes or not"].) Here, the term "historic structure" is used in SB 35 for the same ultimate purposes as the terms is used in historic preservation laws and should be given the same meaning, which includes "areas" and "sites."

The Opinion's application of the *in pari materia* canon of statutory construction is in conflict with these appellate decisions. The Court should grant review to resolve this conflict.

IV. CONCLUSION

The Court should grant review.

Date: June 28, 2021

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WORD COUNT CERTIFICATION

I, Thomas N. Lippe, counsel for Intervenors and Respondents, hereby certify that the word count of this Petition for Review is 2,125 words according to the word processing program (*i.e.*, Corel Wordperfect) used to prepare the brief.

Dated: June 28, 2021

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