S269012

In the
SUPREME COURT OF CALIFORNIA

CITY OF BERKELEY and CITY OF BERKELEY DEPARTMENT OF PLANNING AND DEVELOPMENT
Petitioners, Defendants, and Respondents,
&
CONFEDERATED VILLAGES OF LISJAN and CONFEDERATED VILLAGES OF LISJAN, INC.,
Petitioners, Defendant-Intervenors and Respondents,
v.
RUEGG & ELLSWORTH and FRANK SPENGER COMPANY
Respondents, Plaintiffs, Petitioners, and Appellants.

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

Farimah Faiz Brown (201227)
CITY ATTORNEY
Christopher D. Jensen (235108)
ASSISTANT CITY ATTORNEY
CITY OF BERKELEY
2180 Milvia Street, Fourth Floor
Berkeley, CA 94704

John Briscoe (53223)
Lawrence S. Bazel (114641)
*Peter Prows (257819)
BRISCOE IVESTER & BAZEL LLP
235 Montgomery Street, Suite 935
San Francisco, CA 94104
(415) 402-2700

Kevin D. Siegel (194787)
Megan A. Burke (267986)
Deepa Sharma (313183)
BURKE, WILLIAMS & SORENSEN, LLP
1901 Harrison Street, Suite 900
Oakland, CA 94612
(510) 273-8780

Attorneys for Petitioners, Defendants, and Respondents
CITY OF BERKELEY and CITY OF BERKELEY DEPARTMENT OF PLANNING AND DEVELOPMENT

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I. INTRODUCTION

Developers do not seriously dispute that the decision below creates or deepens four conflicts with other decisions of this Court and the Court of Appeal.

On the first issue—mandamus—Developers make the key admission that mandamus may "not lie to compel the performance of any act which would be void, illegal or contrary to public policy." (Answer at 25, quoting *Torres v. City of Montebello* (2015) 234 Cal.App.4th 382, 403.) Developers also correctly note that the Legislature amended SB35 to prohibit ministerial approval of any project on a site with a listed "tribal cultural resource". (Answer at 17, quoting Gov. Code § 65913.4(b)(4)[(A)].) Developers point to an exception for projects that had already been "approved" prior to the amendment (*id.* at 17, quoting Gov. Code § 65913.4(b)(8)), but there is no dispute that the project proposed for a listed tribal cultural site here has not been approved yet. Even so, the Court of Appeal applied the law "in effect at the time [the application] was denied" (Op. at 35), rather than the current law that prohibits ministerial approval, to now require Berkeley to grant ministerial approval. The decision below is in direct conflict with *Torres* and a previously unbroken line of at least thirteen other published decisions.

On the second issue—when a constitutionally protected right to develop vests—Developers misconstrue Berkeley's

argument and cite additional authority from this Court that conflicts with the rule applied by the decision below. Berkeley's argument was not, as Developers insist, that "the Legislature may never create a statutory property right to develop affordable housing" (Answer at 27), but was that no "vested right to build" exists before "a building permit is issued" (Petition at 22, quoting *Avco Community Developers, Inc. v. South Coast Regional Com'n* (1976) 17 Cal.3d 785, 793). *City of West Hollywood v. Beverly Towers* (1991), cited by Developers, read *Avco* just as Berkeley does: there is no "vested right to proceed without complying with the laws in effect at the time the building permit was issued, including the laws that were enacted after the application for the permit". (52 Cal.3d 1184, 1192.) The decision below deepens the conflict with *Avco*.

On the third issue—constitutional home rule—Developers do not dispute that the decision below quoted one test (that intrusions into charter cities' municipal affairs must be "narrowly tailored") but interpreted it to mean exactly the opposite (that this intrusion should be "interpreted" to its "fullest" extent), in conflict with decisions of this Court.

On the fourth issue—the legal definition of "structure"—Developers do not dispute that the decision below applied a different and narrower definition than that applied in the two other published cases to consider the issue.

Developers argue this case is not a good vehicle for review. They assert that the law has now changed, and thus the issues will never be litigated again. But the first two issues presented in the petition are all about what the courts, public agencies, and developers should do when the law changes during the permitting and litigation process. The law has changed before while permit applications in other cases were pending, and the law will change for other permits in the future. Review of the issue of what to do when the law changes is proper here.

Developers argue that the first issue in the petition was waived or forfeited below. But the impropriety of mandamus in light of the Legislature's amendment to SB35 was squarely raised below. (CVL's Supplemental Brief at 29 ("prayer for an order mandating that the City issue the ministerial permit is moot because the courts cannot grant that relief").) This is a pure legal issue on an important issue of public policy that this Court may review regardless of the positions taken below. Developers concede that mandamus may not compel "any act which would be void, illegal or contrary to public policy." (Answer at 25, quoting *Torres*, 234 Cal.App.4th at 403.) Nothing a party might state in an appellate brief could grant the courts the power to order a public agency to perform an illegal act such as the Court of Appeal has ordered here.

Finally, Developers applaud themselves for winning the support of a tribal representative during the normal discretionary review process. (Answer at 8.) But Developers have now repudiated that process, even after the Legislature amended SB35 to make clear that projects like this that would impact a listed tribal cultural resource require discretionary, not ministerial, review. If Developers truly were committed to the mitigation measures proposed during the discretionary-review process, they would not be fighting so hard in this case to be completely excused from all mitigation requirements. Before Developers excavate the site and demolish the listed tribal cultural resources there, Developers should be subject to the well-established discretionary and environmental review process through which legally enforceable measures can be *required* to prevent or mitigate otherwise irreversible impacts to historic resources.

The petition for review should be granted.

II. THE DECISION BELOW CREATES OR DEEPENS FOUR CONFLICTS

A. There is no dispute that compelling Berkeley to grant Developers' application would violate current law, in conflict with the rule that mandamus must not violate current law.

In its petition, Berkeley showed that: (i) the project here is proposed for a site with a listed tribal cultural resource; (ii) Berkeley denied ministerial approval of the project and the trial

court ruled for Berkeley; (iii) while Developers' appeal was pending, the Legislature amended SB35 to prohibit granting ministerial approval to any unapproved project proposed for a site containing a listed "tribal cultural resource" (Gov. Code § 65913.4(b)(4)(A)); but (iv) the Court of Appeal applied the law "in effect at the time [the application] was denied" (Op. at 35) and ordered that mandamus issue to compel Berkeley to grant ministerial approval to the project. The petition also showed that the Court of Appeal's holding is in direct conflict with an unbroken line of at least thirteen decisions—including *Torres* and *West Coast Advertising Company v. San Francisco* (1967) 256 Cal.App.2d 357—which have held that mandamus must apply the law in effect when the appellate court issues its judgment rather than the law in effect when the agency originally made its decision.

In their answer, Developers do not seriously dispute any of these showings. On the third showing—the effect of the amendments to SB35—Developers admit that "mandamus will not lie to compel the performance of any act which would be void, illegal or contrary to public policy." (Answer at 25, quoting *Torres*, 234 Cal.App.4th at 403.) Developers assert that the mandamus ordered by the decision below does not conflict with this rule because "the approval of an SB 35 application submitted

before the 2020 amendment does *not* violate the law or public policy." (Answer at 25.) Developers are wrong.

In support of their assertion that approval of Developers' application now would not violate current law, Developers point to an exception to the amendment to SB35 for "any project that has been *approved*" before the amendment. (Answer at 24, quoting Gov. Code § 65913.4(b)(8), emphasis added.) But Developers' project here was not approved before the amendment: the amendment was enacted during the appeal of the trial court's ruling affirming Berkeley's *denial* of the application.

Developers later implicitly concede that the unambiguous text of this amendment does not support their position, but that the Legislature nevertheless "did not *intend* for AB 831 to apply to applications that should have been approved but were wrongfully denied." (Answer at 27, emphasis added.) If the Legislature had intended the amendment to apply not just to applications "approved" by its effective date, as the unambiguous text of the amendment provides, but also to applications that "should have been approved but were wrongfully denied" by the effective date, it would have said so. This Court should decline Developers' invitation to rewrite the unambiguous text of this statute.

The holding of the decision below would force Berkeley to violate the unambiguous text of current law, in direct conflict

with the previously unbroken line of published authority cited in the petition that mandamus operates in the present and may not be used to require violations of current law.

The petition for review should be granted.

B. Developers do not dispute that the rule applied by the decision below, on when property rights to develop vest, conflicts with *Avco*.

In its petition, Berkeley showed that the decision below built on a series of relatively recent decisions by the Court of Appeal, which rely on out-of-state and federal authority to hold that agencies can violate the Constitution when they incorrectly deny development permits, by applying the rule that "a constitutionally protected property interest" vests when a property owner applies for a development permit "the agency lacks discretion to withhold". (Op. at 35-36, internal citations and quotation marks omitted; *see* Petition at 20-21 (discussing *Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152 & *Lockaway Storage v. County of Alameda* (2013) 216 Cal.App.4th 161).) Berkeley's petition also showed that the decision below, by building on those cases, deepened a split with this Court's decision in *Avco*, and all those other cases that have followed it, that no "vested right to build" exists before "a building permit is issued" and that, before then, the developer may be held to "the laws applicable at the time". (Petition at 22-23, quoting *Avco Community Developers, Inc. v. South Coast Regional Com'n*

(1976) 17 Cal.3d 785, 793; *see* Petition at 23 (discussing statutory avenues Legislature has created to mitigate *Avco* rule, such as vesting tentative maps and development agreements).)

Developers do not dispute that, by relying on out-of-state and federal cases on when a property right to develop vests, these cases are in tension with the rule from the U.S. Supreme Court that property rights are defined by "*state* law". (*Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, 1030, emphasis added, citations and quotation marks omitted).)[1]

Developers instead attack a strawman. They characterize Berkeley as asserting that *Avco* held that "the Legislature may never create a statutory property right to develop affordable housing." (Answer at 27.) But Berkeley did not assert that. Berkeley accurately quoted *Avco* as holding that, under California law, no "vested right to build" exists before "a building permit is issued". (Petition at 22, quoting *Avco* at 793.) *City of West Hollywood v. Beverly Towers* (1991), which Developers cite, read *Avco* the same way: there is no "vested right to proceed without complying with the laws in effect at the time the building permit was issued, including the laws that were enacted after the

[1] On the vested-rights issue, the Answer (at p. 27) does cite this Court's decision in *Skelly v. State Personnel Board* (1975), but that decision dealt with public employment vests in California, not vested rights to develop. (15 Cal.3d 194.) This Court's decision in *Avco* specifically governs the latter issue.

application for the permit". (52 Cal.3d 1184, 1192, discussing *Avco*.)[2]

Developers insist there is no conflict between the decision below and these cases because they each turned on "different facts". (Answer at 27.) They do not turn on different facts, but on different rules of law. *Avco* articulated one rule of law on when a property right to develop vests, while the decision below articulated a different rule of law on when that same property right to develop vests. Because the decision below articulated a different rule of law than this Court on the same issue, there is a clear conflict.

Developers do not dispute that advancing the date when property rights to develop vest has the potential to expose public agencies and perhaps even the courts to significant new constitutional-tort and attorney-fee claims when they decide against developers. (*See* Petition at 23-25, discussing *Lockaway Storage* and *Stop the Beach Renourishment, Inc*.) To mitigate that risk, and resolve the split of authority deepened by the decision below, review should be granted.

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[2] *City of West Hollywood* addressed an already-built project and was concerned "only with landowners … who secured every necessary permit for a [condominium] conversion project that required *no further construction*, and thus no additional government approvals." (*Id.* at 1193, emphasis added.) But here, construction has not yet begun and no building permits have been obtained.

C. Developers do not dispute that, on the constitutional home-rule issue, the decision below rewrote the Supreme Court's rule.

In its petition, Berkeley showed that, while the Court of Appeal below stated it was applying this Court's four-part test for when the State's general laws may intrude into a charter city's municipal affairs, it actually applied a new test that rewrote and invalidated the fourth element. (Petition at 27-28.) In their answer, Developers do not dispute that the decision below recited the "narrowly tailored" test before turning that test on its head: interpreting the statute to its "fullest" extent to overrule constitutional home rule. (*See* Answer at 28.)

By glossing over the fourth element and rewriting this Court's test to mean exactly the opposite of what that test requires, the decision below creates a conflict in the law on a constitutional issue that merits review.

D. Developers do not dispute that the decision below applied a narrow legal definition of "structure" that conflicts with the broad legal definition applied in two other cases.

In the petition, Berkeley showed that the dictionary definitions used by the decision below to interpret the otherwise undefined word "structure" in SB35 were materially different than the dictionary definitions used by two other published decisions to interpret the otherwise undefined word "structure" in another statute. (Petition at 28-31, discussing *Wilson v. Handley*

(2002) 97 Cal.App.4th 1301, 1306 & *Vanderpol v. Starr* (2011) 194 Cal.App.4th 385, 393-394.)

In their answer, Developers say nothing about the different dictionary definitions of "structure" applied in other cases, and effectively concede the point. Instead, Developers quote how the Court of Appeal applied its dictionary definition to some of the evidence. (Answer at 29.) They make no effort to show that the result would have been the same if the Court of Appeal here had used a different definition of "structure". Most likely, the result would have been different because, according to Dr. Lightfoot and his colleagues in the UC Berkeley Department of Anthropology in their amici letter, the Shellmound comprises "the foundations of the oldest historic structure in the San Francisco Bay Area".[3]

Review should be granted to secure uniformity of definition of this common statutory term.

III. THIS CASE IS A GOOD VEHICLE TO RESOLVE THESE FOUR CONFLICTS

Developers argue this case is not a good vehicle for review because the Legislature repeatedly amended the law between when Developers first applied for their permit and the time the Court of Appeal issued its judgment. (Answer at 20.) But the potentially outcome-determinative changes the Legislature made

[3] In their letter, Dr. Lightfood and his colleagues loosely analogize the Shellmound to the Basilica di Santa Tecla below the Duomo of Milan.

to SB35 while this case was pending make it a particularly good vehicle to resolve the first two issues presented, each of which *depends* on a clear change in the law.

The first issue—the scope of a court's authority to order mandamus when the Legislature makes material changes in the law—is an important issue with obvious separation-of-powers implications for all three branches of government. The changes to the law here make this case a good vehicle to resolve that issue: SB35's recent amendments to clearly exclude ministerial approval for projects proposed for sites with listed tribal cultural resources (Gov. Code § 65913.4(b)(4)(A)) make it critical whether mandamus should apply the law in effect at the time of the permit application (as the Court of Appeal here held) or the law in effect at the time of the Court of Appeal's judgment (as an unbroken line of authorities had previously held).

On the second issue in the petition, public agencies, developers, and the courts need to know when constitutionally protected rights to develop vest, both to avoid unintentionally incurring liabilities running to the millions of dollars and also to avoid approving permits that should not be approved out of a fear of incurring huge liabilities. Because the Court of Appeal applied a different rule on when constitutionally protected property rights to develop vest than did *Avco*, this case is a good vehicle to resolve a deepening split in authority on this issue.

Developers strenuously argue that the mandamus issue was waived or forfeited in the Court of Appeal. (Answer at 22-24.) Developers are wrong. The impropriety of mandamus in light of the Legislature's amendment to SB35 was squarely raised below. (CVL's Supplemental Brief at 29 ("prayer for an order mandating that the City issue the ministerial permit is moot because the courts cannot grant that relief").)

Regardless of what was argued below, this Court may consider a "pure question of law"—especially on "important issues of public policy". (*Sea & Sage Audubon Society, Inc. v. Planning Com.* (1983) 34 Cal.3d 412, 417.) Developers concede here that "mandamus will not lie to compel the performance of any act which would be void, illegal or contrary to public policy." (Answer at 25, quoting *Torres*, 234 Cal.App.4th at 403.) The mandamus issue presented in the petition—whether courts may use mandamus to order an agency to violate the law—is a paradigmatic question of law on an important issue of public policy. Nothing stated in the appellate briefs below would make mandamus proper to compel an illegal act here. The first issue presented by the petition presents a good vehicle to resolve this issue.

IV. CONCLUSION

This petition for review should be granted.

DATED: June 28, 2021

BRISCOE IVESTER & BAZEL LLP

By: Peter S. Prows

Attorneys for Petitioners, Defendants, and Respondents CITY OF BERKELEY and CITY OF BERKELEY DEPARTMENT OF PLANNING AND DEVELOPMENT

CERTIFICATE OF WORD COUNT

The text of this petition consists of 2947 words as counted by Microsoft Word, not including the caption, tables, signature block, or this certificate.

DATED: June 28, 2021 Peter S. Prows