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June 25, 2021

VIA TRUEFILING

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

Re: **Ruegg & Ellsworth, et al. v. City of Berkeley, et al. (Case No. S269012) — Amicus Letter in Support of Petition for Review (Cal. Rules of Court, rule 8.500(g).)**

Honorable Chief Justice Cantil-Sakauye and Associate Justices:

Introduction. The League of California Cities ("Cal Cities") respectfully ask this Court to grant the City of Berkeley's petition for review. Cal Cities is concerned the Opinion gives short shrift to charter cities long-standing home rule powers over their own municipal affairs. The Opinion erred by finding the Senate Bill 35's ministerial approval requirement for certain qualifying housing projects was sufficiently reasonably related and narrowly tailored to promote the statewide interest in affordable housing production and override the City of Berkeley's landmark preservation and commercial zoning laws. While there is a clear statewide interest in affordable housing production, any state law that conflicts with a charter city's municipal ordinance can only preempt the local law if the state law is reasonably related to that statewide interest and narrowly tailored to avoid unnecessary interference in municipal affairs. (*California Fed. Savings & Loan Assn. v. City of Los Angeles* (1991) 54 Cal.3d 1, 16–24.) The Opinion flips this test on its head and reverses this long-recognized balance by concluding that Senate Bill 35 is to be read broadly to promote affordable housing, then concludes this broad reading justifies interference into all municipal affairs — never testing the "reasonably related" and "narrowly tailored" elements required to override a charter city's home rule powers, particular on landmark preservation and commercial land use regulation.

Interest of Amicus. Cal Cities is an association of 476 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. Cal Cities 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 cases of state or national significance. The Committee has identified this case as having such significance.

Cal Cities has a substantial interest because the cities it represents are land use regulators, charged with planning and zoning for housing, commercial, and other land uses across California, within legal bounds, to promote and maintain the health, safety, and welfare of their constituents. Cities are best suited to determine how to accomplish state affordable housing goals in their jurisdictions, and where and under what standards housing, commercial buildings, and other land uses should be established. Cities are also the best level of government to determine how to preserve landmarks and other vital historic and cultural resources while meeting their affordable housing promotion and zoning goals. The Opinion undermines their ability to meet statewide housing goals without sacrificing cultural resources local landmarks, or destroying traditional commercial land use regulation and its inherent protections for a community.

Argument. Article XI, section 7 of the California Constitution authorizes cities to "make and enforce within [their] limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." Charter cities have even broader powers to regulate municipal affairs, free from state interference. Article XI, section 5, subdivision (a) of our Constitution states:

> 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**. (Emphasis added.)

Importantly, while general law cities derive their power to incorporate from the state, charter cities derive their police powers from the people, acting to form as a charter city through the State Constitution.

Our Constitution guarantees charter cities, like Berkeley, exclusive "home rule" authority regarding their "municipal affairs." (*State Bldg. and Const. Trades Council of Cal. AFL-CIO v. City of Vista* (2012) 54 Cal.4th 547, 555 ["Charter cities are specifically authorized by our state Constitution to govern themselves, free of state legislative intrusion, as to those matters deemed municipal affairs."].) Home rule "was intended to give municipalities the sole right to regulate, control, and govern their internal conduct independent of general laws, and this internal regulation and control by municipalities form those 'municipal affairs' spoken of in the constitution." (*Fragley v. Phelan* (1899) 126 Cal. 383, 387.) Charter city control of municipal affairs reflects our Constitution's recognition that local officials of each charter city best understand what that municipality needs for its own governance.

The Legislature may preempt charter cities' home rule powers *only* if it articulates a statewide concern justifying a uniform rule fit for application to the vast range of municipalities from San Diego to Modoc County. Distilling a century of decisional law, our Supreme Court held the distinction between municipal affairs and matters of statewide concern is a legal question. (*California Fed. Savings, supra*, 54 Cal.3d at p. 17.) *California Fed. Savings* established a four-part test for that question, requiring the following for a statute to preempt charter city regulation:

1. The city charter or ordinance regulates a "municipal affair;"
2. There is an actual conflict between the city regulation and state law;
3. The state law addresses a statewide concern; and
4. The state law is reasonably related and narrowly tailored to resolve the statewide concern.

(*Id.* at pp. 16–24.) This Opinion ignores the guidance provided by the Supreme Court concerning the determination of local and state affairs, that, "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." (*Id.* at p. 17.) The Opinion weakens the balance established by prior precedent and elevates Senate Bill 35 to essentially allow any project that can qualify under its purview as allowed, despite

local regulation of non-housing portions of a multi-use project. This further ignores the basis on which the test of the Court in *California Fed. Savings* rests, that "When a court invalidates a charter city measure in favor of a conflicting state statute, the result does not necessarily rest on the conclusion that the subject matter of the former is not appropriate for municipal regulation. It means, rather, that under the historical circumstances presented, the state has a more substantial interest in the subject than the charter city." (*Id.* at p. 18.)

Zoning — the power to regulate land use, given local conditions and needs — is plainly a "municipal affair." (See *Village of Euclid v. Ambler Realty Co.* (1926) 272 U.S. 365 [upholding zoning against *Lochner*-era freedom of contract challenge].) California cities hold broad authority to frame local land use regulations under the police power conferred by the Constitution. (Cal. Const., art XI, §7; *Schroeder v. Municipal Court* (1977) 73 Cal.App.3d 841, 848 [breadth of police power]; *Federation of Hillside & Canyon Associations v. City of Los Angeles* (2004) 126 Cal.App.4th 1180, 1195 [deferential review of land use legislation].) Cities' constitutional power to regulate land use is well-established. (E.g., *City of Riverside v. Inland Empire Patients Health and Wellness Center, Inc.* (2013) 56 Cal.4th 729, 737–738 [acknowledging broad police power to determine permitted land uses]; *Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1151 [land use regulation within local governments' constitutional police power].)

Nothing within zoning is more plainly a municipal affair than local landmark preservation or commercial land use regulation. Truly, it cannot reasonably be questioned that a charter city's regulation of commercial land uses are within its home rule authority. (E.g., *DeVita v. County of Napa* (1995) 9 Cal.4th 763, 782 ["The Legislature, in its zoning and planning legislation, has recognized the primacy of local control over land use."]; *IT Corp. v. Solano County Bd. of Supervisors* (1991) 1 Cal.4th 81, 89 ["The Legislature has specified certain minimum standards for local zoning regulations (Gov. Code, § 65850 et seq.) but has carefully expressed its intent to retain the maximum degree of local control."].)

On the second prong of the *California Fed. Savings* test, as framed by the Opinion there is an actual conflict between Berkeley's local landmark and cultural resources preservation and commercial zoning laws and Senate Bill 35. Cal Cities contends that the Opinion goes too far to apply Senate Bill 35 to override commercial land use regulations, as nothing in the bill's text nor legislative history demonstrate any intent to override local commercial zoning laws. Courts construe statutes under familiar canons.

They neither add nor subtract language, but interpret the statutes as the Legislature wrote them. (Cal. Code Civ. Proc., § 1858; *Oden v. Board of Admin.* (1994) 23 Cal.App.4th 194, 201 ["Statutory interpretation begins with the text and will end there if a plain reading renders a plain meaning: a meaning without ambiguity, uncertainty, contradiction, or absurdity."].)

Senate Bill 35 requires a streamlined, ministerial approval of qualifying "multifamily housing development," if:

(1) the proposed multifamily housing development is: (i) sufficiently affordable, and (ii) meets objective planning and design review standards;

(2) the proposed site is (i) zoned for residential or mixed-uses and (ii) within or adjacent to an urban area; and

(3) the city: (i) failed to issue sufficient building permits for its share of the regional housing needs assessment, pro-rated to that point in the reporting period, or (ii) failed to submit its annual Housing Element report.

(Gov't Code, § 65913.4.) The statute includes various exemptions, including the landmark and historic structures exemption briefed by the parties. The express reference to a "site … zoned for mixed-uses" shows the Legislature knew the concept, but it did not define "multifamily housing development" to include such uses, though it might have. (E.g., *LeFrancois v. Goel* (2005) 35 Cal.4th 1094, 1105 [*expressio unius* canon].)

The threshold Senate Bill 35 test is that the development must be a "multifamily housing development." The statute does not further define this term — distinct from the Housing Accountability Act and its use of the term "housing development project," defined to include both residential and mixed-use projects. (Gov't Code, § 65589.5, subd. (h)(2).) When the Legislature intends to include both types, it knows how to do so. Here, in Senate Bill 35, it did not do so. "If the language of the statute is not ambiguous, the plain meaning controls and resort to extrinsic sources to determine the Legislature's intent is unnecessary." (*Ste. Marie v. Riverside County Regional Park and Open-Space Dist.* (2009) 46 Cal.4th 282, 288.) The plain meaning of "multifamily housing development" is a development composed of multiple residential units, such as an apartment or condominium complex, as distinct from several single-family residences or a mix of residential and commercial uses on a single parcel — i.e., mixed-use

development like that disputed here. The plain meaning of "multifamily housing development" does not encompass commercial land uses. To argue otherwise is to add words the Legislature did not, and to disregard the limited role the Legislature gave to "mixed-use development" in this statute — reaching land a city designates for mixed use. The statute's second use of "mixed-use development" is to the same effect — speaking to sites, not developments. (Gov. Code, § 65913.4, subd. (a)(6)(E) [referring to formerly hazardous sites "cleared … for residential use or residential mixed uses"].)

No provision of this detailed and amended statute indicates the Legislature intended to address commercial land uses or mixed-use developments. Despite this, the Opinion finds Senate Bill 35 meant to protect multi-family housing developments containing both housing and commercial land uses and held that Senate Bill 35 and the City's municipal code conflicted. The Opinion erred to do so when the statute can be read as the Legislature did, as affordable housing protection.

Simply put, the Legislature has not stated that mixed-use development which incorporates multi-family housing should be streamlined the same way a single focus multi-family housing project should. If allowed to stand, the Opinion would allow the Senate Bill 35 streamlined process to apply to any project with plainly-recognized impacts requiring mitigation to be cloaked as a mixed-use project, e.g., sports stadium with residential units incorporated into design built on environmentally sensitive land. This is not what the Legislature intended, and is not the logical conclusion of one-hundred years of jurisprudence regarding home rule jurisprudence

To be clear, Cal Cities agrees, on the third prong, that affordable housing is a statewide issue. However, commercial land use regulation is a quintessential municipal affair. That some housing statutes are matters of statewide concern, such as the Housing Element and Regional Housing Needs Allocation process, does not extend to mean that commercial land use regulation is a matter similarly requiring statewide uniformity. Instead, deciding which commercial land uses are appropriate in and near residential development, and under what regulations and procedures, are archetypical municipal affairs. (*Village of Euclid, supra,* 272 U.S. at p. 391 ["the exclusion of buildings devoted to business, trade, etc., from residential districts, bears a rational relation to the health and safety of the community"]; *Penn-Co v. Board of Supervisors* (1984) 158 Cal.App.3d 1072, 1084 ["The decision to allow a conditional use permit is an issue of vital public interest. It affects the quality of life of everyone in the area of the proposed use."].) There is no

statewide interest in exempting retail and other commercial land uses from otherwise lawful city regulation. Or, at very least, the Legislature has identified none.

The Opinion further erred on the fourth prong of the *California Fed. Savings* test — the state law must be reasonably related and narrowly tailored to resolve the statewide concern. (*California Fed. Savings, supra*, 54 Cal.3d at p. 17.) The Opinion concludes dismissing the entire City of Berkeley's discretionary review process for development projects on designated landmark sites is narrowly tailored. The Opinion similarly finds a reasonable relationship between forcing ministerial approval of the commercial component of the proposed mixed-use project and the legislation's focus on affordable housing preservation. Neither element of the Opinion is well-supported, and this Court's review is required.

Further, and perhaps most gallingly, the Opinion betrays a lack of understanding of effective realities in land use permitting processes. Finding that Senate Bill 35 is a narrowly tailored invasion of charter city's commercial land use regulatory powers because a city retains the power to enforce a conditional use permit requirement at the tenant improvement stage is error. In a typical mixed-use development project, the commercial land use, or a limited range thereof — e.g., retail, restaurant, bar, offices, hotel — is baked into the design of the development project from the beginning. If, as the Opinion would require, the City must permit a qualified mixed-use project within Senate Bill 35's reach ministerially, then the City is effectively forced to approve, up front, both the commercial and residential land uses. The Opinion's reference to the City's ability to still require a conditional use permit for that later tenant misses the point, as the selected single or perhaps one of a few commercial land uses will be baked into the then-already-built building or project and the City would lack any effective power to impose reasonable mitigation requirements or conditions that might depend on the specific end use, e.g., on hours of operation, emissions, parking, lighting, security. The Opinion's attempt to read Senate Bill 35's invasion into local commercial land use regulation as narrowly tailored is error requiring review. While the legislative attempts to address the current housing demand are admirable, applying Senate Bill 35 in this context, and the extent that the Opinion would allow, both improperly invades protected areas of local land use regulation and erodes the balance this Court has established for lower courts to evaluate whether a matter is of statewide concern.

Conclusion. Cal Cities affirms there is a clear statewide interest in affordable housing production. However, promoting this interest cannot come at any cost. Cal

Cities urges this Court to reaffirm that charter cities' constitutional home rule powers continue to encompass landmark preservation and commercial land use regulation. The manner in which the Legislature has crafted Senate Bill 35 does not rise to a statewide concern nor justifies an across-the-board abrogation of these core home rule powers.

Cal Cities respectfully asks this Court to grant the City of Berkeley's petition for review.

Sincerely,

/s/ Matthew T. Summers

MTS:mts

Michael G. Colantuono
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PROOF OF SERVICE
Ruegg & Ellsworth, et al. v. City of Berkeley et al.
First Appellate District, Division Two, No. A159218
Alameda County Superior Court No. RG18930003

I, Maria O. Minassian, 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 Boulevard, Suite 850, Pasadena, California 91101-2109. My email address is: mobaminassian@chwlaw.us. On June 25, 2021, I served the document(s) described as **RUEGG & ELLSWORTH, ET AL. V. CITY OF BERKELEY, ET AL. (CASE NO. S269012) —AMICUS LETTER IN SUPPORT OF PETITION FOR REVIEW** on the interested parties in this action addressed as follows:

☒ **BY E-MAIL OR ELECTRONIC TRANSMISSION**: Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, by causing the documents to be sent to the persons at the e-mail addresses listed on the service list on June 25, 2021, from the court authorized e-filing service at TrueFiling.com. No electronic message or other indication that the transmission was unsuccessful was received within a reasonable time after the transmission.

☒ **BY MAIL:** The envelope was mailed with postage thereon fully prepaid. 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 at Pasadena, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if the postal cancellation date or postage meter date is more than one day after service 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 June 25, 2021, at Pasadena, California.

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