[See fee exemption, Gov. Code, § 6103]

Case No. C084872

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, THIRD APPELLATE DISTRICT

GEORGETOWN PRESERVATION SOCIETY,
Plaintiff and Respondent,

v.

COUNTY OF EL DORADO, EL DORADO COUNTY BOARD OF SUPERVISORS
Defendants and Appellants,

SIMONCRE ABBIE, LLC
Real Party in Interest and Appellant.

LEAGUE OF CALIFORNIA CITIES' AND CALIFORNIA STATE ASSOCIATION OF COUNTIES' APPLICATION FOR LEAVE TO FILE AN AMICI BRIEF; AMICI CURIAE BRIEF IN SUPPORT OF DEFENDANTS AND APPELLANTS COUNTY OF EL DORADO, ET AL. AND REAL PARTY IN INTEREST AND APPELLANT SIMONCRE, LLC

Appeal from the Superior Court, County of El Dorado
Case No. PC20160205
Hon. Warren C. Stracener, Judge of the Superior Court

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APPLICATION FOR LEAVE TO FILE AN AMICI BRIEF IN SUPPORT OF APPELLANTS AND REAL PARTY IN INTEREST

Pursuant to Rule 8.200(c) of the California Rules of Court, the League of California Cities ("League") and the California State Association of Counties ("CSAC") respectfully request leave to file the accompanying amici brief in this proceeding in support of Defendants and Appellants County of El Dorado and El Dorado County Board of Supervisors and Real Party in Interest and Appellant SimonCRE Abbie, LLC.

This brief was drafted by Margaret Sohagi and R. Tyson Sohagi of The Sohagi Law Group, PLC on behalf of the amici, as counsel for the League and CSAC. No party or counsel for a party in the pending case authored the proposed amici brief in whole or in part, or made any monetary contribution intended to fund its preparation.

STATEMENT OF INTEREST AS AMICI CURIAE

The 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, which is 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.

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 case is a matter affecting all counties.

The issues of fundamental importance to the League and CSAC are (1) the standard of review applicable to a City's and County's General Plan consistency conclusions in the context of the California Environmental Quality Act (CEQA), and (2) ensuring that public agencies have sufficient analytical and factual support to weigh the validity of evidence submitted by non-experts on environmental issues.

CSAC and the League combined represent more than 500 jurisdictions and have a direct interest in the outcome of these issues, as they are the entities responsible for drafting, adopting, interpreting and implementing their own General Plans. The League's member cities and CSAC's member counties also frequently serve as "lead agencies" or "responsible agencies" under CEQA. In both of these roles, they are tasked with compliance and implementation of CEQA.

As entities that routinely deal with matters related to General Plan implementation and interpretation, as well as CEQA compliance, the League and CSAC are well-positioned

to offer insights on the questions facing the Court and believe their persective is worthy of the Court's consideration in deciding this matter. Wherefore, the League and CSAC respectfully request that the Court grant this application for leave to file the accompanying *Amici Curiae* brief.

Respectfully submitted,

DATE: April 4, 2018

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LEAGUE OF CALIFORNIA CITIES
CALIFORNIA STATE ASSOCIATION OF COUNTIES

[See fee exemption, Gov. Code, § 6103]

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I. INTRODUCTION

Amici Curiae the League of California Cities (the "League") and the California State Association of Counties ("CSAC") support the arguments advanced in Appellants' briefs that the trial court erred by applying the fair argument standard of review to the MND's general plan consistency conclusions.

This case concerns the deference due to locally-elected officials when they interpret and apply policies in locally-adopted plans. Case law uniformly holds that the deferential "abuse of discretion" standard applies to claims challenging such decisions, whether those claims are raised in the context Planning and Zoning law allegations, or indirectly through CEQA. This deference recognizes that local agencies are constitutionally charged with adopting and applying local land-use policy (Cal. Const., art. XI, § 7); that local agencies have unique competence to do so; and that general plans invariably address a host of competing policies.

II. FACTUAL OVERVIEW AND THE TRIAL COURT'S DECISION

While this case is raised indirectly in the context of CEQA (Pub. Resources Code, §§ 21000 et seq.), rather than Planning and Zoning Law (Gov. Code, §§ 65000 et seq.), it involves a challenge to a General Plan consistency conclusion.

Respondent Georgetown Preservation Society ("GPS") argues in its Opposition brief that "Appellants have 'opened the door' to having this Court consider the Project's …

inconsistency with the County's General Plan and the violation of the State Planning and Zoning law." (Respondent's Opposition pp. 46-47.)

However, GPS misrepresents the holding in the trial Court's decision. GPS is partially correct that the trial court concluded that it "need not and does not reach the issue of whether or not petitioners have met the standard of review of planning and zoning law decisions." (AA 180.) However, GPS is incorrect that this is an issue raised in the context of Planning and Zoning law, or that Appellants have somehow "opened the door" to addressing this issue in the Court of Appeal. (Respondent's Brief, p. 46.) The trial court concluded that the "aesthetic and historic environmental quality impact factor *together with the plan inconsistency* [] supports a finding that an EIR was called for under the circumstances." (AA 180.) Furthermore, the trial court appears to have mistakenly applied the "fair argument" standard of review to this inconsistency conclusion. (AA 180.)

As outlined in greater detail below, a general plan consistency conclusion is a legal determination that is subject to the deferential abuse of discretion standard of review, not the fair argument standard.

III. GENERAL PLAN CONSISTENCY CONCLUSIONS ARE ENTTITLED TO SUBSTANTIAL DEFERENCE AND ARE NOT SUBJECT TO THE FAIR ARGUMENT STANDARD OF REVIEW

A. General Plan Consistency is a Legal Conclusion

CEQA's statutory scheme calls for an analysis of "significant effects on the environment of a project" (Pub. Resources Code, § 21002.1(a)), with the "environment" defined as "the *physical conditions* which exist within the area which will be affected by a proposed project." (Pub. Resources Code, § 21060.5.)

As discussed in a leading CEQA treatise "[a]n inconsistency between a proposed project and an applicable plan is a legal determination, not a physical impact on the environment. (See *Lighthouse Field Beach Rescue v. City of Santa Cruz* (2005) 131 Cal.App.4th 1170…)" (Kostka & Zischke, Practice Under the California Environmental Quality Act, (CEB, 2d Ed. March 2016 Update), p. 12-44, Section 12.34.) Therefore, a potential conflict with a General Plan is a legal determination and not subject to fair argument standard of review.

The Court of Appeal came to a similar conclusion in *Fund for Environmental Defense v. County of Orange* (1988) 204 Cal.App.3d 1538, 1550-1551 ("*County of Orange*"). In that case, the County of Orange approved a use permit and an EIR for a medical research complex in 1981. (*Id.* at 1542.)

Between 1981 and 1986, the area surrounding the project site was dedicated to the County and re-designated as "Wilderness Park." (*Id.* at 1542.) During that time period the original entitlements expired and the applicants subsequently filed a new application, relying upon a CEQA Addendum. (*Id.* at 1543.) Petitioner asserted that this change in the land use designation necessitated preparation of a supplemental EIR. (*Id.* at 1550.) However, the Court of Appeal rejected this argument, concluding that the change did not affect the physical environment, holding:

> Fund's argument is, at first blush, compelling. The bald fact that a project is suddenly surrounded by a wilderness park does sound like a substantial change. However, the record clearly demonstrates the change raises no new adverse effects that were not raised, analyzed and discussed in the original EIR…Even though the land bordering three sides of the site to the northeast and south of the site had changed hands from Rancho Mission Viejo to the county and had changed designation from open agricultural land to part of Caspers Wilderness Park, the land itself did not suddenly spring into a verdant forest. *It was precisely the same land as considered in the 1981 EIR, and the Nichols Institute project had the same impact on the land whether it was designated open agricultural land or wilderness park.* (*Id.* at 1550-1551.)

As discussed in Appellants' Opening Brief, the overlap between CEQA and General Plan consistency is often a result of guidance provided under CEQA Guidelines section 15125(d), which calls for discussion of "any inconsistencies between the proposed project and applicable general plans." However, the CEQA Guidelines are clear that this is not

considered a *significant effect on the environment*. Rather the Guidelines explain that this is an issue to be discussed in the "*Environmental Setting*." (CEQA Guidelines, § 15125(d).) Such consistency findings provided in the context of the environmental setting are therefore not an environmental significance conclusion.

General Plan consistency is also discussed in Appendix G of the CEQA Guidelines, which in turn is sometimes utilized as default significance criteria. However, such criteria are not mandatory. (CEQA Guidelines, § 15063(f); *Save Cuyama Valley v. County of County of Santa Barbara* (2013) 213 Cal.App.4th 1059, 1068.) The current land use criteria in Appendix G ask whether a project will "conflict with any applicable land use plan, policy, or regulation of an agency with jurisdiction over the project…adopted for the purpose of avoiding or mitigating an environmental effect."

However substantial revisions have been proposed to these land use criteria, to align them with CEQA's statutory mandates. Recognizing that CEQA's *statutory* directive is to analyze significant impacts to the "environment," i.e., "the *physical conditions* which exist within the area which will be affected by a proposed project" (Pub. Resources Code, § 21060.5), the State Office of Planning and Research ("OPR")[1]

[1] The State Office of Planning and Research ("OPR") is tasked with updating the CEQA Guidelines (CEQA Guidelines, § 15023) to comply with CEQA's statutory scheme under Public Resources Code, §§ 21000 et seq.

has proposed revising the Land Use questions in Appendix G, explaining that:

> "Appendix G currently asks whether a project conflicts with certain land use plans. The question largely mirrors section 15125(d), which requires an EIR to analyze any inconsistencies with any applicable plans. OPR proposed to revise that question in two ways in order to better focus the analysis. [¶] First, *OPR proposed to clarify that the focus of the analysis should not be on the 'conflict' with the plan, but instead, on any adverse environmental impact that might result from a conflict.* For example, destruction of habitat that results from development in conflict with a habitat conservation plan might lead to a significant environmental impact. The focus, however, should be on the impact on the environment, not on the conflict with the plan." (Emphasis added; "Proposed Updates to the CEQA Guidelines, November 2017.")[2]

As demonstrated above, General Plan consistency conclusions should not be considered commensurate with an environmental impact conclusion. The appropriate question is whether such a conflict results in an undisclosed physical environmental impact.

[2] OPR's "Proposed Updates to the CEQA Guidelines, November 2017" is available online at: http://opr.ca.gov/docs/20171127_Comprehensive_CEQA_Guidelines_Package_Nov_2017.pdf

B. The Fair Argument Standard of Review is Inapplicable to General Plan Consistency Conclusions

When General Plan consistency issues are raised in the context of CEQA, it is improper for the Court to apply the fair argument standard of review to such conclusions.

The fair argument standard originates from Public Resources Code section 21080(c), which states that a negative declaration shall be prepared where "there is no substantial evidence, in light of the whole record before the lead agency, that *the project may have a significant effect on the environment*."

The Court in *Banker's Hill v. City of San Diego* (2006) 139 Cal.App.4th 249 succinctly discussed the fair argument standard of review, stating ""[I]f a lead agency is presented with a fair argument that a *project may have a significant effect on the environment*, the lead agency shall prepare an EIR even though it may also be presented with other substantial evidence that the project will not have a significant effect." (*Id.* at 259-260.)

It is clear from this language that the fair argument standard only applies to the determination "that a project may *have a significant effect on the environment*." (*Id.*) It is however, not applicable to the MND's conclusions regarding a potential conflict with a land use plan, which is a legal issue, and raised in the context of the "environmental setting." (CEQA Guidelines, § 15125(d).)

As OPR recognized above, land use consistency conclusions must inherently involve a two-step process that asks (1) whether there is a General Plan conflict, and (2) whether there is "*any adverse environmental impact that might result from a conflict.*" It is the second question alone that is subject to the fair argument standard of review.

In fact, we are not aware of a situation in which a land use conflict resulted in disclosure of a significant physical environmental impact not already disclosed in the other resource sections of the EIR or MND. CEQA documents are already required to disclose the direct and indirect physical changes to the environment resulting from a project. (CEQA Guidelines, §§ 15064(d), 15126.2.) Even projects which involve purely regulatory or planning decisions must focus the environmental analysis upon the reasonably foreseeable physical development that would result from those regulatory changes. (CEQA Guidelines, § 15378 ["[w]here the lead agency could describe the project as either the adoption of a particular regulation… or as a development proposal…the lead agency shall describe the project as the development proposal for the purpose of environmental analysis."].)

C. The Courts Review an Agency's General Plan Consistency Conclusions for Abuse of Discretion

City and County land use authority stems from the California Constitution. (Cal. Const., art XI, § 7.) As discussed by the Supreme Court "[t]he amendment of a

general plan…is an act of formulating basic land use policy, for which localities have been constitutionally endowed with wide-ranging discretion…We have recognized that a city's or county's power to control its own land use decisions derives from this inherent police power, not from delegation of authority by the state." (*People v. McDonald* (1984) 37 Cal.3d 351, 377 overruled on other grounds in *People v. Mendoza* (2000) 23 Cal. 4th 896.) Consequently the Courts have also recognized that an agency's application of General Plan policies is also subject to substantial deference, which stems from the principles of separation of powers. As discussed by the Court of Appeal in *San Francisco Tomorrow v. City and County of San Francisco* (2014) 229 Cal.App.4th 498, 515 (Emphasis added):

> It is true that many cases explain that reviewing courts accord great deference to the agency's determination "'because the body which adopted the general plan policies in its legislative capacity has unique competence to interpret those policies when applying them in its adjudicatory capacity. [Citation.]"' [¶] However, the Board's role in implementing the General Plan, including its discretion to determine whether proposed projects are consistent with the General Plan, is at least as important. . . . *Such deference to the actions of the legislative body stems from well-settled principles of court respect for the separation of powers.* [Citation.]"

Public agencies all wrestle with the interpretation, implementation, and application of their land use policies on a daily basis. This provides city and county decision-makers

with a keen understanding of the interpretation and implementation of those policies. While all cities and counties are required to adopt General Plans, they each face a unique set of factual circumstances that require a balancing of policy directives, a fact expressly recognized under Government Code section 65300.7 [General Plans are broad policy documents designed to "accommodate local conditions and circumstances"] and Government Code section 65300.9:

> The Legislature recognizes that the capacity of California cities and counties to respond to state planning laws varies due to the legal differences between cities and counties, both charter and general law, and to differences among them in physical size and characteristics, population size and density, fiscal and administrative capabilities, land use and development issues, and human needs…*recognizing that each city and county is required to establish its own appropriate balance in the context of the local situation when allocating resources to meet these purposes.* (Emphasis added.)

General Plans incorporate a broad range of elements, which include a host of competing policy directives, including environmental issues, social issues, socio-economic issues, resource management issues, military issues, etc. (Gov. Code, § 65302.)

As discussed by the Supreme Court in *Lesher Communications, Inc. v. City of Walnut Creek* (1990) 52 Cal.3d 531, 541, the General Plan is "a statement of policy *to govern future regulations.*" (Emphasis added; see also Gov. Code, § 65400.) It is not itself intended to be a regulatory document,

requiring strict compliance with every broad planning concept described therein. As also discussed in the OPR General Plan Guidance, "given the long term nature of a general plan, its diagrams and text should be general enough to allow a degree of flexibility in decision-making as times change." (OPR General Plan Guidelines (2017),[3] p. 52.)

Given all of these factors, public agencies have been afforded a highly deferential standard of review regarding the interpretation and application of their General Plans, which are only overturned *if no reasonable person could have reached the same conclusion.* (See, e.g., *Save Our Peninsula Committee v. Monterey County Board of Supervisors* (2001) 87 Cal.App.4th 99, 142 ("*Save Our Peninsula*"); *San Franciscans Upholding the Downtown Plan v. City & County of San Francisco* (2002) 102 Cal.App.4th 656, 677; *Anderson First Coalition v. City of Anderson* (2005) 130 Cal.App.4th 1173, 1192 ("*Anderson First Coalition*").) This deferential standard of review has also been applied to the interpretation and application of zoning ordinances as well. (*Santa Clarita Organization for Planning the Environment v. City of Santa Clarita* (2011) 197 Cal.App.4th 1042, 1059, 1062 ("*SCOPE*"); *Save Our Heritage Organization v. City of San Diego* (2015) 237 Cal.App.4th 163, 178; *Anderson First Coalition, supra,* 130 Cal.App.4th 1173, 1193.)

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[3] Available at: http://www.opr.ca.gov/docs/OPR_COMPLETE_7.31.17.pdf

Respondent relies upon a narrow line of cases that have found a project inconsistent with a general plan, based upon noncompliance with a single General Plan policy, reviewed in a vacuum, which was allegedly fundamental, mandatory, and clear. (Respondents Brief, p. 49; citing *Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 783 ("*EHL*") [finding a project inconsistent based upon failing to achieve a specified vehicular Level of Service standard].)

EHL and its brethren, which arguably applied the arbitrary and capricious standard of review in name only, demonstrate the difficulties of applying a rigid standard of review to general plan consistency findings.

As noted in other Appellate Districts, "general and specific plans attempt to balance a range of competing interests. *It follows that it is nearly, if not absolutely, impossible for a project to be in perfect conformity with each and every policy set forth in the applicable plan.* An agency, therefore, has the discretion to approve a plan even though the plan is not consistent with all of a specific plan's policies." (*Sierra Club v. County of Napa* (2004) 121 Cal.App.4th 1490, 1510-1511; see also *Hines v. California Coastal Commission* (2010) 186 Cal.App.4th 830, 849-851 [Rejecting Argument that a Project was inconsistent with a Coastal Land Use Plan[4] because it did not fully conform with a wetland setback policy].)

[4] The Coastal Land Use Plan itself is a component of the General Plan. (Pub. Resources Code, § 30108.5.)

The court in *EHL* concluded the project was inconsistent with a General Plan policy that *it* considered to be "fundamental," due in part to use of the word "shall." (*EHL, supra,* 131 Cal.App.4th 777, 783.) However, as demonstrated in greater detail below, such a narrow focus upon the text of a singular policy, interpreted in isolation, may result in project denial—a result that might be inconsistent with a host of other competing policies of equal or greater importance.[5]

Indeed, planning and environmental concepts associated with vehicular circulation and transportation discussed in *EHL* have dramatically changed with time. Municipalities should be afforded the deference to interpret the strength of such policy directives "as times change" and in the context of other important General Plan policies and planning considerations.

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[5] In fact, in several instances the legislature has affirmatively required public agencies to expressly consider the effects of denial of a project, due to the serious negative environmental and policy implications. As discussed under Government Code section 65589.5(b), "[i]t is the policy of the state that a local government not reject or make infeasible housing development projects…without a thorough analysis of the economic, social, and environmental effects of [denial]."].) The Legislature further noted that denial of housing can result in "discrimination against low-income and minority households, lack of housing to support employment growth, imbalance in jobs and housing, reduced mobility, urban sprawl, excessive commuting, and air quality deterioration." (Gov. Code, § 65589.5(a)(1)(C).)

For example, while vehicular Level of Service ("LOS") and other traffic metrics discussed in *EHL* have historically been an important policy consideration, there has been a dramatic shift in recent years to move away from a singular focus on vehicular access, and the associated LOS methodology. In 2008, the Legislature modified Government Code section 65302(b)(2) [AB 1358] to require cities and counties to "plan for a balanced, multimodal transportation network *that meets the needs of all users of streets, roads, and highways*" including "bicyclists, children, persons with disabilities, motorists, movers of commercial goods, pedestrians, users of public transportation and seniors." Similarly, Government Code section 65088.4(a), adopted in 2013 [SB 743], declares:

> It is the intent of the Legislature to balance the need for level of service standards for traffic with the need to build infill housing and mixed use commercial developments within walking distance of mass transit facilities, downtowns, and town centers and to provide greater flexibility to local governments *to balance these sometimes competing needs*. (Emphasis added.)

Public agencies should be afforded the deference to consider the weight afforded to their existing policies, in the light of such changes and taking into consideration other policy considerations (e.g., other policies related to non-vehicular transportation and the policy implications associated with denial of the project).

As succinctly discussed in *Save Our Peninsula, supra,* 87 Cal.App.4th 99, 142, "[b]ecause policies in a general plan

reflect a range of competing interests, the governmental agency must be allowed to weigh and balance the plan's policies when applying them, and it has broad discretion to construe its policies in light of the plan's purposes." (*Id.*)

IV. LAYPERSON TESTIMONY MUST BE SUPPORTED BY FACTS AND CONSISTENT WITH CEQA'S LEGAL FRAMEWORK

There is a real concern on the part of lead agencies that CEQA is frequently abused when unsubstantiated layperson opinion is proffered without the requisite factual support to qualify as substantial evidence. Personal opinions of neighbors and non-experts, although deeply felt, are often highly subjective, and based upon improper factual and legal inferences, which, if not disclosed, preclude informed decision making.

Improper opinions are often based upon three broad categories of errors: (1) failure to have adequate expertise, (2) lack of factual foundation, and (3) improper application of CEQA's legal mandates. While layperson testimony may, in some instances, constitute substantial evidence, this does not excuse such individuals from disclosing the factual basis for reaching their conclusions, nor does it excuse them from applying CEQA's legal requirements in reaching such conclusions.

Regardless of the whether an individual is an expert or a layperson, substantial evidence is defined as "*facts*, reasonable assumptions *predicated upon facts*, and expert

opinion *supported by facts*." (Pub. Resources Code, § 21082.2(c); CEQA Guidelines, § 15384(b); Pub. Resources Code, § 21080(e)(1).)

Many individuals, including experts, will often misapply CEQA's statutory requirements, thereby resulting in improper significance conclusions. For example, the Supreme Court recently concluded that "CEQA generally does not require an analysis of how existing environmental conditions will impact a project's future users or residents." (*California Building Industry Assn. v. Bay Area Air Quality Management Dist.* (2015) 62 Cal.4th 369, 386 ("*CBIA*").) However, numerous experts in recent decisions have opined that a project would result in significant impacts based upon a misapplication of CEQA's legal requirements discussed in *CBIA*.

For example in *Clews Land and Livestock, LLC v. City of San Diego* (2017) 19 Cal.App.5th 161, 194, the court concluded that an expert's opinions were improper because they were based upon "the effect of the environment on the project (students and faculty at the school), rather than the effect of the project on the environment, and [found that the Expert's] remaining comments [were] conclusory, speculative, or otherwise unsupported." (See also *East Sacramento Partnership for a Livable City v. City of Sacramento* (2016) 5 Cal.App.5th 281, 295-296.)

Similarly, in *Citizens Commission to Save Our Village v. City of Claremont* (1995) 37 Cal.App.4th 1157, Petitioners asserted that an EIR needed to be prepared in lieu of the

Mitigated Negative Declaration (MND), because the project would result in significant impacts to a historic landscape plan. (*Id.* at 1169.) The Court found that there was no evidence that the landscape plan had ever been physically implemented. (*Id.* at 1170.) Given the lack of physical implementation, the Court of Appeal rejected the argument that there would be any adverse physical impacts to the existing environment. (*Id.* at 1172.)

Additionally in *Watsonville Pilots Association v. City of Watsonville* (2010) 183 Cal.App.4th 1059, Petitioners claimed the project would result in significant impacts due to existing groundwater overdraft issues. (*Id.* at 1090-1094.) However, the Court of Appeal concluded that Petitioner's conclusions were based upon a misapplication of CEQA's legal requirements, which necessitate impact conclusions based upon changes to the existing environment caused by the project. (*Id.* at 1094; CEQA Guidelines, § 15125(a), 15126.2(a).) The Court in *Watsonville* held that "The purpose of an EIR is to identify and discuss the impact of the proposed project on the existing environment…The FEIR was not required to resolve the [existing] overdraft problem, a feat that was far beyond its scope." (*Id.* at 1094.)

As in *Watsonville,* individuals without an understanding of CEQA's legal requirements will often reach improper significance conclusions based upon misunderstanding the legal scope of analysis. Without the factual and analytical

underpinning of a layperson's opinion, public agencies have no way of ascertaining the validity of such opinions.

This concern is particularly relevant when it comes to aesthetics and historic resources. Often individual members of the public will focus exclusively upon the aesthetics of the project being proposed, but completely ignore CEQA's legal methodology of comparing the proposed project to baseline conditions. (CEQA Guidelines, §§ 15125(a), 15126.2.) For example, a church in Pasadena recently elected to construct a modern addition to their pre-existing historic church. This addition to the church would be primarily constructed on an empty asphalt parking lot and adjacent playground. However, many of the members of the public faulted the aesthetics and historic analysis for failing to disclose significant impact because the project was not re-creating historic features which had been eliminated decades ago.[6]

[6] City of Pasadena All-Saints Episcopal Church Expansion Final EIR available online at: https://ww5.cityofpasadena.net/planning/wp-content/uploads/sites/56/2017/08/8.3-Revised-Section-4.3-3.78-MB.pdf (Page 8-23) ["While commenters also expressed concern about the need to create a garden behind the Maryland Hotel Wall and its relationship to its surroundings, the purpose of CEQA is not to fix issues which occur under existing conditions. While the Maryland Hotel Wall is considered a contributing component of the Historic District, the existing spatial relationship for the Maryland Hotel Wall to its immediate surroundings is not considered historic; all of the nearby buildings to which it was historically related having been demolished several decades ago. The existing setting does not currently include a garden, but rather the existing setting contains a playground, a storage building, and a trailer immediately to the east, a paved parking lot to

Footnote continued on next page

Such individuals failed to follow CEQA's legal requirement, i.e., that impacts must be based upon a comparison to existing conditions. In that case, this was a comparison to the existing asphalt parking lot and playground, which did not positively contribute to an existing aesthetic or historic resource.

Respondent also makes the general assertion that laypersons can offer testimony regarding aesthetics and existing traffic conditions, and have such testimony considered substantial evidence. (Respondent's Brief p. 23.) However, such general assertions are too broad.

Respondents are correct that the Court in *Citizens Ass'n for Sensible Development of Bishop v. County of Inyo* (1985) 172 Cal.App.3d 151, 173 ('*County of Inyo*") concluded that the owner of adjacent property, based upon personal observations, testify to existing traffic conditions. However, vehicular traffic analysis, including calculation of baseline traffic conditions requires expertise.

Vehicular traffic analysis has traditionally been based upon metrics known as Level of Service or "LOS," which in turn is based upon a ratio of volume to capacity (V/C). The volume of cars is based upon objective traffic counts, which typically occur over at least 24 hours, if not several days. Such counts are also required to occur on non-holiday

Footnote continued

the north, and the Rectory building to the South (the east side of the wall is not currently accessible to the public as shown in Figure 4.3-1b)."

weekdays, when local schools are in session, pursuant to the LA County Congestion Management Program ("CMP"),[7] which is statutorily incorporated into CEQA. (Gov. Code, § 65089(b)(4).) However this does not end this detailed calculation of baseline vehicular traffic. After collecting this raw data, an expert must still be tasked with calculating the baseline capacity in the V/C ratio. This capacity is typically based on Vehicles Per Lane (VPL), which is calculated based upon the number and type of lanes.[8] Only then can baseline vehicular traffic conditions be disclosed. The suggestion in Respondent's brief that layperson testimony can constitute substantial evidence of vehicular traffic baseline conditions is a gross overgeneralization.

While the Court in *County of Inyo* considered such traffic testimony as being "objective data" (*County of Inyo, supra,* 172 Cal.App.3d 151, 173), layperson opinions regarding baseline traffic conditions can be highly subjective. For example, in one Mixed Use Project an individual asserted "We already have more than enough traffic on Grant and Kingsdale."[9] However, in reality, the baseline conditions at

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[7] LA County 2010 CMP, Appendix A, Section A.4 ["traffic counts must exclude holidays…taken on days when local schools or colleges are in session."]

[8] As a side note, the author of this amicus has a B.S. in Mechanical Engineering from U.C. Berkeley and has reviewed and revised numerous traffic analyses over the last decade.

[9] Comment PC038-4: http://www.redondo.org/civicax/filebank/blobdload.aspx?BlobID=35503

that Intersection, *measured objectively*, were operating at the least congested Level of Service, LOS A."[10]

While in certain circumstances layperson testimony may be considered substantial evidence, that does not excuse such testimony from providing factual support, and sufficient evidence to show that their conclusions comport with CEQA's legal requirements.

Respectfully submitted,

DATE: April 4, 2018

THE SOHAGI LAW GROUP, PLC

R. Tyson Sohagi
Attorney for Amici Curiae
LEAGUE OF CALIFORNIA CITIES
CALIFORNIA STATE ASSOCIATION OF COUNTIES

[10] Draft EIR Table 3.13-10 (Intersection 20) available at: http://www.redondo.org/civicax/filebank/blobdload.aspx?BlobID=34526

CERTIFICATION OF WORD COUNT

The text of the BRIEF OF AMICI CURIAE consists of 4,587 words, including footnotes. The undersigned legal counsel has relied on the word count of the Microsoft Word 2013 Word processing program to generate this brief. (Cal. Rules of Court, Rule 8.204(c)(1).)

Respectfully submitted,

DATE: April 4, 2018

THE SOHAGI LAW GROUP, PLC

R. Tyson Sohagi
Attorneys for Amici Curiae
LEAGUE OF CALIFORNIA CITIES
CALIFORNIA STATE ASSOCIATION OF COUNTIES

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Georgetown Preservation Society
v. County of El Dorado, et al.; SimonCRE, LLC
IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, THIRD APPELLATE DISTRICT
Case No. C084872

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 11999 San Vicente Boulevard, Suite 150, Los Angeles, California 90049.

On April 4, 2018, I served true copies of the following document(s) described as **LEAGUE OF CALIFORNIA CITIES' AND CALIFORNIA STATE ASSOCIATION OF COUNTIES' APPLICATION FOR LEAVE TO FILE AN AMICI BRIEF; AMICI CURIAE BRIEF IN SUPPORT OF DEFENDANTS AND APPELLANTS COUNTY OF EL DORADO, ET AL. AND REAL PARTY IN INTEREST AND APPELLANT SIMONCRE. LLC** on the interested parties in this action as follows:

☒ BY OVERNIGHT DELIVERY: I enclosed said document(s) in an envelope or package provided by the overnight service carrier and addressed to the persons at the addresses listed in the Service List. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight service carrier or delivered such document(s) to a courier or driver authorized by the overnight service carrier to receive documents.

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

Executed on April 4, 2018, at Los Angeles, California.

Cheron J. McAleece
Printed Name


Signature

Georgetown Preservation Society
v. County of El Dorado, et al.; SimonCRE, LLC
IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, THIRD APPELLATE DISTRICT
Case No. C084872

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Hon. Warren C. Stracener **EL DORADO COUNTY SUPERIOR COURT – CAMERON PARK BRANCH** 495 Main Street Placerville, CA 95667	**TRIAL COURT JUDGE** VIA REGULAR MAIL

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