Civil No. A164987
[*Alameda Superior Court Case No. RG21102761*

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION THREE

SAVE LIVERMORE DOWNTOWN, *Appellant,*

v.

CITY OF LIVERMORE, LIVERMORE CITY COUNCIL,
Respondents,

EDEN HOUSING, *Respondent and Real Party in Interest,*

APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF CALIFORNIA, COUNTY OF ALAMEDA
Honorable FRANK ROESCH, Judge

APPLICATION FOR LEAVE TO FILE AMICUS BRIEF ON BEHALF OF THE LEAGUE OF CALIFORNIA CITIES; PROPOSED AMICUS BRIEF IN SUPPORT OF RESPONDENTS

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

The League of California Cities ("Cal Cities") knows of no person or entity that has an interest in the outcome of this proceeding within the meaning of Rule 8.208(e) of the California Rules of Court.

DATED: November 8, 2022 GOLDFARB & LIPMAN LLP

By: /s/ James Diamond
JAMES T. DIAMOND, JR.
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

APPLICATION TO FILE AMICUS BRIEF

Pursuant to rule 8.200, subdivision (c) of the California Rules of Court, the League of California Cities ("Cal Cities") respectfully requests permission to file an amicus curiae brief in support of Respondents City of Livermore and the Livermore City Council (collectively the "City") and Eden Housing, Inc. ("Respondents"). This application is timely made within 14 days after the filing of Appellant Save Livermore Downtown's (the "Appellant") reply brief on the merits. No party or counsel for a party in this proceeding authored the proposed amicus brief in any part, and no such party or counsel, nor any other person or entity other than the amicus curiae, made any monetary contribution intended to fund the proposed briefs preparation or submission. (See Cal. Rules of Court, rule 8.200, subd. (c)3).)

IDENTITY AND INTEREST OF AMICUS CURIAE

Cal Cities is an association of 479 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 those cases that have statewide or nationwide significance.

Cal Cities' Committee has determined that this case raises important issues that affect all cities. Specifically, the Appellant's contentions concerning the standard of judicial review and its

piecemeal (and often mistaken) focus on various design standards without addressing the City's overall findings of the Project at issue's consistency with its Downtown Specific Plan implicate the constitutionally allocated authority of cities and counties.

Additionally, the Appellant's California Environmental Quality Act (CEQA) claims exemplify a growing practice of litigation abuse that Cal Cities finds concerning. As Cal Cities' members strive to meet their communities' mounting housing needs, opponents of housing development seek to delay or halt such efforts through misuse of the state's environmental laws. Cal Cities believes this Court's decision on the Appellant's CEQA claims may implicate future CEQA disputes and ultimately, the law's identity as either an obstructive tool for anti-housing groups or a powerful tool for proponents of affordable housing.

AMICUS CURIAE CAN ASSIST THE COURT IN DECIDING THIS MATTER

The standard of review that judges apply when considering local land-use decisions has been oft repeated and is discussed in the parties' briefs. However, its roots in constitutional and statutory grants of authority have not been well articulated in a published opinion in many years, and the parties have not had space in their briefs to consider that history in detail. By explicating those roots, Amicus Cal Cities can help the Court resolve the present dispute with an eye toward confirming appropriate deference to local governments and separation of powers.

In recent years, numerous studies, law review articles, journalistic reports, and even California appellate court decisions have increasingly documented the misuse and abuse of CEQA litigation by opponents of housing development. These sources outline the historical goals of the environmental law and frame the scrupulous lens through which all CEQA claims should be scrutinized. By summarizing the most relevant literature, authorities, and examples on this topic and assessing Appellant's CEQA claims within this context, Amicus Cal Cities can assist the Court's analysis of the merits of said claims.

BRIEF OF AMICUS CURIAE

I. INTRODUCTION

In this case, the City interpreted its own Downtown Specific Plan and related planning documents and concluded that an affordable housing project consisting of 130 new affordable residential units in the downtown district (the "Housing Project") complied with the City's Specific Plan. The trial court agreed, stating that it was "not a close case." Appellant, ignoring the City's findings that the Housing Project was compatible and consistent with key policies of its Downtown Specific Plan, contends instead that this Court should reverse the trial court based on asserted inconsistencies with certain development standards, design guidelines, and landscaping requirements. The City and its co-respondent Eden Housing, Inc., debunk Appellant's

contentions in their Respondent's Brief.

Amicus Cal Cities herein addresses Appellant's failures to acknowledge the deference owed to the City's elected policy makers by supplanting those policy makers' judgment with its own, as well as the Appellant's attempt to decide this case based on the wrong question. Appellant's position of addressing a number of asserted inconsistencies, and not the actual issue of whether the project is compatible with the Specific Plan, has been squarely rejected by the courts: "The question is not whether there is a direct conflict between some mandatory provision of a general plan and some aspect of a project, but whether the project is compatible with, and does not frustrate, the general plan's goals and policies." (*Bankers Hill 150 v. City of San Diego* (2022) 74 Cal.App.5th 755, 776, citing *Napa Citizens for Honest Government v. Napa County Bd. of Supervisors* (2001) 91 Cal.App.4th 342, 378.) Here, the City found that the Housing Project accomplishes one of the Downtown Specific Plan's key policies to redevelop catalyst sites downtown, as well as implementing the Specific Plan's policy of promoting a pedestrian-oriented downtown. (AR_00544.) The City's consistency determination should be upheld.

In approving the Housing Project, the City also determined that the Housing Project was exempt from CEQA environmental review pursuant to Government Code section 65457 (projects consistent with a specific plan) and pursuant

to CEQA Guidelines section 15332 (infill project). Again, the trial court sided with the City, going so far as to say that Appellant's "CEQA arguments are almost utterly without merit…." Nonetheless, Appellant contends that this Court should reverse the trial court on the basis that the City was required to prepare a new Environmental Impact Report (EIR) due to "new evidence" that contamination levels at the Project Site might be greater than originally assumed by the 2009 SEIR or more recent addenda thereto.

Amicus Cal Cities herein addresses how Appellant's CEQA claims exemplify a trend by special interest groups to weaponize CEQA lawsuits in an attempt to delay or deter housing development. A growing body of literature documents how recently established opposition groups with little to no record of environmental advocacy have initiated CEQA litigation challenging development of tens of thousands of units of much-needed housing in the state. Appellant Save Livermore Downtown (SLD) falls squarely within these descriptions, having no experience with environmental advocacy but rather having been formed for the sole purpose of challenging this Housing Project.

Perhaps most indicative of Appellant's misplaced motives is the fact that Appellant does not even claim the Housing Project will negatively impact the environment. Rather, Appellant argues that the City was required to analyze how existing environmental conditions at the site of

the Housing Project would affect construction workers and future residents. Appellant makes this argument even though it is well-established law 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 District* (2015) 62 Cal.4th 369, 386.) Prior courts have warned that CEQA must not be allowed to become a tool for the obstruction of housing development or an instrument for the delay of social, economic and recreational advancements. (*See, e.g.*, *Citizens of Goleta Valley* (1990) 52 Cal.3d 553, 576; *Tiburon Open Space Committee v. County of Marin* (2022) 78 Cal.App.5th 700, 782.) This Court should heed those warnings and uphold the City's CEQA exemption determination.

The trial court got it right, and this Court should affirm the judgment, and affirm (1) the judicial deference owed to local governments in the reasonable interpretation and implementation of their own land-use and planning policies, and (2) the role of CEQA as a tool for identifying and mitigating legitimate environmental impacts rather than as a tool to obstruct development of needed infill affordable housing..

II. FACTUAL AND PROCEDURAL BACKGROUND

Amicus Cal Cities hereby adopts and incorporates by reference the Statement of Facts section of the City's Respondent's Brief, pages 9-16, as well as the City's citations to

the administrative record in its discussion of the Downtown Specific Plan consistency at pages 25-39 of its brief and its discussion of CEQA review at pages 39-53 of its brief.

III. DISCUSSION

A. Legal Background: Land-use authority rests first and foremost with local governments and does not require perfect conformity with general and specific plans.

Land-use decisions must be consistent with the general plan (and any specific plan adopted to further the objectives of the general plan). *(San Francisco Tomorrow v. City and County of San Francisco* (2014) 229 Cal.App.4th 498, 508 *(San Francisco Tomorrow);* Gov. Code, § 65860, subd. (a) [requiring consistency between zoning ordinances and general plans]; *(Sierra Club v. County of Napa* (2004) 121 Cal.App.4th 1490, 1510 (*Sierra Club*). This requirement, known as the consistency doctrine, has been described as the "linchpin of California's land-use and development laws; it is the principle which infused the concept of planned growth with the force of law." *(Corona-Norco Unified Sch. Dist. v. City of Corona* (1993) 17 Cal.App.4th 985, 994.)

Consistency does not require perfect conformity with the general or specific plan, however. (See *Pfeiffer v. City of Sunnyvale City Council* (2011) 200 Cal.App.4th 1552, 1563 *(Pfeiffer)* ["[I]t 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"].) It is enough that the proposed project will be compatible with the objectives, policies, general land uses, and programs specified in the applicable plan. *(Id.)* An agency, therefore, even has discretion to approve a plan when the plan is not consistent with all of a specific plan's policies. *(Sierra Club*, 121 Cal.App.4th at 1511.) Thus, a project is consistent if it will further the objectives of the general plan rather than obstruct their obtainment. *(Orange Citizens for Parks & Recreation v. Superior Court* (2016) 2 Cal.5th 141, 153 *(Orange Citizens).)*

B. Courts have uniformly provided "great deference" to agencies' consistency determinations, unless "a reasonable person could not have reached the same conclusion."

In rendering a decision on a land-use proposal, an administrative agency must make findings sufficient "to bridge the analytic gap between the raw evidence and ultimate decision or order." *(Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515.) Requiring an agency to state "legally relevant sub-conclusions supportive of its ultimate decision" facilitates well-reasoned administrative decisions and judicial review of such decisions. *(Id.* at pp. 514-516.)

However, as long as an agency fulfills that obligation, courts must generally defer to its reasonable conclusions, including any determinations of consistency with its own general plan. *(Sacramentans for Fair Planning v. City of*

Sacramento (2019) 37 Cal.App.5th 698, 707; see also *Anderson First Coalition v. City of Anderson* (2007) 130 Cal.App.4th 1173, 1192 [holding governmental agency has broad discretion "especially regarding general plan policies, which reflect competing interests"]; *San Franciscans Upholding the Downtown Plan v. City & County of San Francisco* (2002) 102 Cal.App.4th 656, 677-78 [acknowledging any agency's "unique competence to interpret [its own] policies when applying them in its adjudicatory capacity"]; *Save Our Peninsula Comm. v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 142 *(Save Our Peninsula* Comm.) [according "great deference to the agency's determination" of consistency].)

Consistent with this standard, courts overturn agency findings only upon finding that an agency abused its discretion by (1) not proceeding in a manner required by law, (2) failing to support its decision with findings, or (3) making findings not supported by substantial evidence. *(Napa Citizens for Honest Government v. Napa County Bd. of Supervisors* (2001) 91 Cal.App.4th 342, 357.) Put differently, courts must defer to a "procedurally proper consistency finding unless no *reasonable person* could have reached the same conclusion." (*Orange Citizens, supra,* 2 Cal.5th at p. 155, italics added; accord *No Oil, Inc. v. City of Los Angeles* (1987) 196 Cal.App.3d 223, 243 [reviewing consistency finding to determine "only if, based on the evidence before City Council, a reasonable person could not have reached the same conclusion"]; *Greenebaum v. City of*

Los Angeles (1984) 153 Cal.App.3d 391 [same].)

Thus, reviewing a consistency determination, the court may neither substitute its view for that of a city council, nor reweigh conflicting evidence presented to that body. *(Sequoyah Hills Homeowners Assn. v. City of Oakland* (1993) 23 Cal.App.4th 704, 717 *(Sequoyah Hills Homeowners Assn.); Friends of Lagoon Valley v. City of Vacaville* (2007) 154 Cal.App.4th 807, 816.) Rather, a reviewing court's role "is simply to decide whether the city officials considered the applicable policies and the extent to which the proposed project conforms with those policies." *(Pfeiffer, supra,* 200 Cal.App.4th at p. 1563.)

C. Appellant's reliance on purported inconsistencies with provisions of the Downtown Specific Plan should be rejected, and this Court should affirm in order to ensure against future misapplication of the consistency doctrine.

As noted above, the proper rules for determining whether a project is consistent with an agency's general and specific plan are well settled. As the court in *Bankers Hill* instructed:

> To be consistent with a general plan, a project "must be 'compatible with' the objectives, policies, general land uses, and programs specified in the general plan." *(Napa Citizens*, at p. 378, 110 Cal.Rptr.2d 579.) "The question is not whether there is a direct conflict between some mandatory provision of a general plan and some aspect

> of a project, but whether the project is compatible with, and does not frustrate, the general plan's goals and policies." (*Ibid*.) The requirement that a project be consistent with a general plan does not require the project to rigidly conform to the general plan. (citation). "State law does not require perfect conformity between a proposed project and the applicable general plan." (citation.) "[G]eneral 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.... It is enough that the proposed project will be compatible with the objectives, policies, general land uses and programs specified in the applicable plan." (citations.)

Rather than address the actual policies and goals of the Downtown Specific Plan, Appellant instead focuses on a number of the guidelines, standards and landscaping requirements of the plan, for example window size and configuration, what "primary" means in connection with where the main entrance to the housing complex should be, and which Respondent must build the required park. Respondents addressed and countered these, and other non-policy contentions made by Appellant, in their Respondent's Brief. Respondents set forth substantial evidence at pages 25-39 of their brief fully supporting their consistency determinations, to each of which a reasonable person could have reached the same determinations. These determin-

ations should therefore be upheld under applicable, well settled case law authorities. (*See e.g. Old E. Davis Neighborhood Ass'n v. City of Davis* (2021) 73 Cal.App.5th 895, 911 ["In sum, we conclude substantial evidence supports the City's approval in that we fail to find that 'a reasonable person could not have reached the same conclusion' based on the evidence before the City."].)

Respondents also, however, pointed out two specific policies that the Housing Project accomplished, which are ignored by Appellant. As noted above, it is those goals and policies that Appellant was required to rebut, not "some mandatory provisions" or "some aspects" of the project. Appellant's failure to show that the Housing Project is incompatible with the Downtown Specific Plan's goals and policies is fatal to its case, under the well-established case law authorities cited above.

Two cases in which the courts held that a project was directly contrary to *the specific policy* of the agency's general plan, on which Appellant mistakenly relies, demonstrate the showing an opponent to a project must make – the project must be specifically contrary to the goals and policy of the general and/or specific plan. (*Orange Citizens*, 2 Cal.5th at 156-157 [project to permit low-density residential development is not consistent with general plan policy map that unambiguously designated the property as open space, and the specific plan that designated the property for use

either as a golf course or open space]; *Fams. Unafraid to Uphold Rural El Dorado Cty. v. El Dorado Cty. Bd. of Supervisors* (1998) 62 Cal.App.4th 1332, 1340-1341 [project to permit low density residential development is not consistent with mandatory general plan policy restricting development to certain areas].) The Housing Project is entirely consistent with the policies of the Downtown Specific Plan, and Appellant does not make any showing otherwise. The City did not abuse its discretion in approving the Housing Project, and the judgment should therefore be affirmed.

Finally on this issue, there is the critical fact that the Housing Accountability Act (Government Code Section 65589.5; the "HAA") applies to the Housing Project. The HAA was enacted, and recently strengthened by amendment, to encourage the creation of housing to alleviate a crisis housing shortage in the state. Subdivisions (d) and (j) of Section 65589.5, in particular, place strict limitations on agency discretion to deny an affordable housing project such as the Housing Project at issue in this case. To deny "housing for very low, low- or moderate income households," which includes any project where at least 20 percent of the units are rented for lower income households (Government Code section 65589.5(h)(3)), a city must make one of the findings contained in Section 65589.5(d). Appellants make no effort to show that any one of those findings was applicable to the

Housing Project. The public policy of the HAA, and every agency in the state's duty under the HAA to encourage the creation of housing, provides another strong policy argument for the affirmance of the City's approval of the Housing Project.

For all these reasons, Respondents submit that this Court should affirm the judgment of the trial court that the City correctly found that the Housing Project was consistent with the Downtown Specific Plan.

D. Appellant's Lawsuit Exemplifies Abuse of California Environmental Quality Act (CEQA) Litigation Intended to Halt Housing Development

"CEQA was meant to serve noble purposes, but it can be manipulated to be a formidable tool of obstruction, particularly against proposed projects that will increase housing density." (*Tiburon Open Space Committee v. County of Marin* (2022) 78 Cal.App.5th 700, 782.) Appellant's CEQA claims in the instant case exemplify the manner in which CEQA litigation may be used to delay, halt or obstruct desperately needed affordable housing like the Housing Project.

It is no secret that California is facing one of the largest housing shortages in the country. Recent studies estimate that California's housing deficit is approximately 820,000 units. (Freddie Mac, *The Housing Supply Shortage: State of the States 1-7* (2020), https://www.freddiemac.com/

fmac-resources/research/pdf/202002-Insight-12.pdf). The shortage can be attributed to any number of factors, including the abuse of CEQA lawsuits. In 2020 alone, CEQA litigation challenged 47,999 housing units, equal to nearly one-half of the housing units that received building permits. (Jennifer Hernandez, *Anti-Housing CEQA Lawsuits Filed in 2020 Challenge Nearly 50% of California's 100,000 Annual Housing Production* (Center for Jobs and the Economy, 2022), at p.1.) Thousands more units were targets in CEQA lawsuits challenging upzoning of existing neighborhoods, particularly near transit. (*Id.*)

CEQA was enacted to ensure that public agencies in the state evaluate the environmental impacts of proposed projects and consider feasible alternatives and mitigation measures to reduce or avoid significant impacts. CEQA's protections are aimed at "preventing environmental damage, while providing a decent home and satisfying environment for every California." (Pub. Res. Code § 21000(g).) The "heart of CEQA" is the Environmental Impact Report (EIR) that must be prepared where there is a fair argument that the project could negatively impact the environment. (*Citizens of Goleta Valley v. Bd. of Supervisors* (1990) 52 Cal.3d 553, 564.) Even excluding any litigation, the nonpartisan California Legislative Analyst's Office estimates that local agencies take, on average, around two and a half years to approve housing projects that require an EIR. (Mac Taylor,

California's High Housing Costs: Causes and Consequences (March 17, 2015), at p. 18.)

Even if a housing project is determined to be exempt from CEQA review, a CEQA challenge may be filed. Twenty-five percent of CEQA lawsuits target new housing units, and 100 percent of the CEQA housing lawsuits in the nine San Francisco Bay Area counties targeted infill housing, specifically. (Jennifer Hernandez, *California Environmental Quality Act Lawsuits and California's Housing Crisis*, 24 Hastings Env't L.J. 21, 29 (2018).)

CEQA lawsuits have become a powerful tool for those hoping to delay or prevent housing development in their communities. (Noah DeWitt, *A Twisted Fate: How California's Premier Environmental Law Has Worsened the State's Housing Crisis, and How To Fix It*, 49 Pepp. L. Rev. 413, 427 (2022).) "Litigation to judgment in trial court may take anywhere from eight months to two years." (Chris Carr, et al., *The CEQA Gauntlet: How the California Environmental Quality Act Caused the State's Construction Crisis and How to Reform It* (Pacific Research Institute (February 2022) at pg. 12.) The most common remedy where the court rules that an agency's CEQA review was insufficient is to "vacate the agency's project approval and require more CEQA study." (Jennifer Hernandez, et al., *In the Name of the Environment: How Litigation Abuse Under the California Environmental Quality Act Undermines*

California's Environmental, Social Equity and Economic Priorities – and Proposed Reforms to Protect the Environment from CEQA Litigation Abuse (Holland & Knight LP (2015) at p. 21.)

In some instances, CEQA plaintiffs ask the court to "issue a 'stay' of the efficacy of the project approval, or an injunction, to prevent project construction from commencing." (Carr *et al*. at p. 12.) Orders delaying construction "can spook lenders and investors, as well as make it difficult for the project developer to meet contractual obligations." (*Id.* at 12; *see also* Hernandez, 24 Hastings Env't L.J. at 43 ["Because of the uncertainty in CEQA's requirements, the time (3 to 5 years, with some examples extending to 9 and 10 years) required to complete the trial and appellate court proceedings, and the extreme consequences of an adverse judicial outcome that vacates project approvals, once a CEQA lawsuit is filed it becomes very difficult for a public or private project to access project financing (bank loans or equity investors) or grant funding."]) For developers facing CEQA challenges, "there are typically two options available: pay the money and go through the full CEQA process or give up the project completely." (DeWitt, *supra*, 49 Pepp. L. Rev at 434.)

Examples of these tactics abound. For example, the City of Solana Beach approved a 10-unit affordable housing project in 2014. (cc.) The approval came not only after the

developer had already agreed to shrink the size of the project from 18 to 10 units, but also nearly four years after she had proposed the project. (*Id.*) After approval, the association for the condominium complex across the street sued, in part, on CEQA grounds. (*Id.*) The association ultimately lost the case and an appeal after two and a half years of litigation. (*Id.*) By the time the lawsuit was resolved, the cost to construct each apartment had increased by 62 percent, from $414,000 to $1.1 million dollars. (*Id.*) Despite winning some low-income tax credits, by 2021 the project still had not broken ground due to a $1 million financing gap. (*Id.*) So, while the condominium owners lost the case, they succeeded in preventing construction of affordable housing they claim does not belong in their community. (*Id.*)

Another example involves a 20-unit affordable housing project proposed by Habitat for Humanity Greater San Francisco ("Habitat") in downtown Redwood City. (Ben Bradford, *Is California's legacy environmental law protecting the state's beauty or blocking affordable housing?*, CalMatters, June 23, 2020, https://calmatters.org/environment/2018/07/is-californias-legacy-environmental-law-protecting-the-states-beauty-or-blocking-affordable-housing/.) The project was an urban infill project situated on an empty lot and located near major public transit lines. (*Id.*) Prior to approval, Habitat was forced to shrink the proposal to less than half the size of its

initial proposal. (*Id.*) Even after the city council approved the smaller project, an attorney working out of a home behind the proposed project site filed a CEQA lawsuit, claiming the city had failed to evaluate the project's impacts on traffic and scenic vistas. (*Id.*) The attorney was an admittedly serial CEQA litigant, having threatened CEQA litigation against other nearby projects including a 91-unit condominium project that was finally abandoned. (*Id.*) While the lawsuit was ultimately resolved and the project built, the cost of the project increased from $13 million to $17 million during the pendency of the case. (*Id.*)

These are just a few examples, though the patterns are clear and repeat throughout the state, including in SLD's claims against Livermore. As one report aptly summarized: "Over the years, CEQA has slowly but steadily transformed into a Boschian hellscape that provides project opponents with countless opportunities to delay or derail important projects, often for reasons that have nothing to do with environmental concerns." (Carr, et al. at pg. 6.) In fact, CEQA litigants are rarely established environmental groups with legitimate concerns about the environment and experience defending those interests. A 2015 report found that only 13 percent of appellants in CEQA lawsuits were established environmental advocacy organizations, such as the Sierra Club and Communities for a Better Environment. (Jennifer Hernandez, et al., *In the Name of the Environment*, at pg. 23.)

Instead, the organizations undertaking these CEQA lawsuits increasingly serve as fronts for local NIMBY groups. "[N]ewly minted, unincorporated groups with environmental-sounding names filed nearly half of CEQA lawsuits." (Hernandez, *supra*, 24 Hastings Env't L.J. 21 at 24.)

The instant case is a prime example of the abuse of CEQA litigation. Appellant SLD is an organization comprised of residents and businesspeople in and around Livermore. (Resp.'s Joint Opp. Brief, p. 15.) SLD's members have led other efforts challenging housing development in the City, including supporting a referendum to repeal and an initiative to amend the City's Downtown Plan that originally established the housing goals for the area in which the Housing Project is located. (*Id.* at p. 16.) Appellant's own description notes only that it is a nonprofit unincorporated association. (App.'s Opening Brief, pg. 22). SLD's website makes no mention of an environmental mission or purpose; in fact, the website does not even mention the environmental concerns that are the basis of Appellant's CEQA claims in the instant litigation. (*See, generally,* Save Livermore Downtown, https://www.savelivermoredowntown.com [last visited Oct. 26, 2022].)

As approved, the Housing Project at issue in this case will provide 130 affordable residential units in two, four-story buildings. (Resp.'s Joint Opp. Brief, p. 9.) The units will be affordable to individuals and families with incomes of 20 to

60 percent of the Area Median Income in Alameda County. (*Id.* at pg. 10.) The Project would be located on a 2.5-acre infill site ("Project Site") that has been planned for affordable housing as far back as 2009. (*Id.*) Prior to the approval of the Project, the City undertook several phases of environmental review over the course of approximately 11 years. (*Id.* at p. 10-14.) At the time of consideration of the Housing Project, the "City Council also considered ongoing regulatory oversight from the [Regional Water Quality Control Board] and various site assessments regarding *existing* soil, groundwater, and soil vapor contamination on the Project Site, consistent with the 2009 SEIR's mitigation measures." (*Id.* at pg. 14-15.). Both the nature of the Project (an in-fill affordable housing project) being challenged and the characteristics of the Appellant (a recently-formed, unincorporated organization with no history of environmental advocacy) epitomize the abusive manner in which CEQA litigation has been used.

Perhaps the most compelling evidence that SLD is motivated by personal preferences rather than by legitimate environmental concerns is the fact that SLD does not even claim the Housing Project will negatively impact the environment. Rather, Appellant's CEQA claims rely on the argument that the "soil and groundwater contamination at the Project Site is far more severe than what was assumed in the City's previous environmental review documents." (App.'s

Reply Brief, p. 37) Appellant argues that because it contends the contamination at the Project Site is greater than what was originally believed, the City was required to do additional environmental review. (App.'s Opening Brief, pg. 71-72.) In arguing this point, SLD reveals its lack of experience working with CEQA.

"The purpose of CEQA is to protect the environment from proposed projects, not to protect proposed projects from the existing environment." (*Baird v. Contra Costa County* (1992) 32 Cal.App.4th 1464, 1468.) As such, "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 District* (2015) 62 Cal.4th 369, 386.) Potential health risks to workers and residents of a proposed project due to existing environmental conditions, such as historic soil contamination, "do not constitute substantial adverse effects [of the project] on human beings." (*Parker Shattuck Neighbors v. Berkeley City Council* (2013) 222 Cal.App.4th 768, 782.) In evaluating the soil contamination issue in the 2009 SEIR and in the subsequent addenda, the City "went beyond the requirements of CEQA to discuss this issue, and should not be penalized for being more comprehensive than CEQA demands." (*Tiburon Open Space Committee, supra*, 78 Cal.App.5th at 778.) Yet, despite these weak and untenable arguments, Eden Housing, the Housing Project's sponsor,

was forced to return awarded tax credits because of the ongoing litigation. Appellant's meritless CEQA claims have already threatened Eden's ability to acquire financing for the Housing Project; this Court should not allow either the City or Eden to be further penalized for undertaking more environmental review than was required of them.

Finally, CEQA lawsuits harm, rather than protect, the environment. CEQA has "evolved into a legal tool most often used against the higher density urban housing, transit, and renewable energy projects, which are all critical components of California's climate priorities and California's ongoing efforts to remain a global leader on climate policy." (Hernandez, *supra*, 24 Hastings Env't L. J. at 24.) These findings align with the state supreme court's warning in *Citizens of Goleta Valley*: "We have caution[ed] that rules regulating the protection of the environment must not be subverted into an instrument for the oppression and delay of social, economic, or recreational development and advancement." (*Citizens of Goleta Valley, supra*, 52 Cal.3d at 576; *see also Center for Biological Diversity v. Department of Fish & Wildlife* (2015) 62 Cal.4th 204, 254-55 [Chin, J. dissenting].) While this warning has gone largely unheeded since the time of that decision nearly three decades ago now, it is not too late for this court to prevent SLD from subverting CEQA into a tool obstructing the development of 130 critically-needed affordable housing units in the City of

Livermore by upholding the City's approval of the Housing Project.

CONCLUSION

Repudiating deference to a local agency's determination of plan consistency is contrary to notions of broad constitutionally granted police power for cities and counties, the legislative intent to allow California cities and counties to weigh competing interests in its land-use decision making, and the fundamental principles of separation of powers. As such, this Court should affirm the trial court's decision and reject Appellant's contentions in this case in order to ensure appropriate deference to agency expertise in determining whether specific development projects, like the Housing Project, are consistent with specific plans and related policies.

Finally, upholding the City's well-considered and detailed CEQA findings, along with this Court's expedited briefing schedule, will send a message that CEQA claims based on non-

environmental concerns cannot be used to kill housing developments.

November 8, 2022 GOLDFARB & LIPMAN, LLP

By: /s/ James Diamond
JAMES T. DIAMOND, JR.
Attorneys for the LEAGUE OF CALIFORNIA CITIES

CERTIFICATE OF CONFORMITY

In accordance with this Court's order under Rule 8.204(c)(5) of the California Rules of Court, I certify under penalty of perjury that the Amicus Curiae Brief of the LEAGUE OF CALIFORNIA CITIES does not exceed 14,000 words, including footnotes and uses a 13-point Century Schoolbook font, exclusive of tables of contents and authorities, the cover page, the signature blocks and this Certificate. According to the word count function on the word processing program I used, this brief contains 5,262 words, exclusive of tables of contents and authorities, the cover page, the signature block and this certificate.

Executed on November 8, 2022, at Oakland, California.

/s/ James Diamond

JAMES T. DIAMOND, JR.

CERTIFICATE OF SERVICE

Save Livermore Downtown v. City of Livermore, et al.
Court of Appeal Case No. A164987
Alameda Superior Court Consolidated Case No. RG21102761

I, Laura L. Luz, certify and declare as follows:

I am over the age of 18 years, and not a party to this action. My business address is 1300 Clay Street, Eleventh Floor, City Center Plaza, Oakland, California 94612. My business email address is lluz@goldfarblipman.com. On November 8, 2022, I served the document described as:

APPLICATION FOR LEAVE TO FILE AMICUS BRIEF ON BEHALF OF THE LEAGUE OF CALIFORNIA CITIES; PROPOSED AMICUS BRIEF

on the interested parties in this action as follows:

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

Executed on November 8, 2022, at Kentfield, California.

Laura L. Luz

STATE OF CALIFORNIA California Court of Appeal, First Appellate District	***PROOF OF SERVICE*** **STATE OF CALIFORNIA** California Court of Appeal, First Appellate District

Case Name: **Save Livermore Downtown v. City of Livermore et al.**
Case Number: **A164987**
Lower Court Case Number: **RG21102761**

1. At the time of service I was at least 18 years of age and not a party to this legal action.

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

11/8/2022

Date

/s/James Diamond

Signature

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Last Name, First Name (PNum)

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