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Supreme Court of California
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Supreme Court Case No. S279242

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

MAKE UC A GOOD NEIGHBOR, et al.,
Petitioners and Appellants

v.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al.,
Respondents,

v.

RESOURCES FOR COMMUNITY DEVELOPMENT,
Real Party in Interest.

After a Published Opinion of the Court of Appeal
First Appellate District, Division Five,
Case No. A165451

Appeal from July 29, 2022, Order and August 2, 2022 Order and Judgment of the Alameda Superior Court; Case No. RG21110142 (Consolidated for Purposes of Trial Only with Case Nos. RG21109910, RG21110157, 21CV000995 and 21CV001919)

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF RESPONDENTS; PROPOSED BRIEF OF THE CITY OF BERKELEY

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APPLICATION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE

TO THE HONORABLE CHIEF JUSTICE:

Proposed amicus curiae City of Berkeley ("City") respectfully requests leave to file the accompanying brief in this case pursuant to California Rules of Court, rule 8.520(f), in support of Respondents The Regents of the University of California ("Regents"), et al.

The City of Berkeley is a charter city duly organized and existing under Government Code sections 34000, et seq. It is also home to the University of California, Berkeley ("UC Berkeley"). As such, the City is keenly aware of the need for additional student housing. The lack of University housing has had ripple effects throughout the community for years. Not only does it lead to significant disadvantages for UC Berkeley students—ranging from unaffordable off-campus housing to overcrowded living conditions to student homelessness—but it also places significant strain on the City's housing market for other residents, increasing housing prices and displacing long-time members of the community. According to the Terner Center for Housing Innovation at UC Berkeley, "Racial disparities in the region's migration patterns are pronounced: Hispanics and Blacks make up a disproportionately large

share of low-income out-movers, and are more likely than others to move to the more affordable parts of California." (Issi Romem and Elizabeth Kneebone, "Disparity in Departure: Who Leaves the Bay Area and Where Do They Go?" (October 30, 2018) available at: <https://ternercenter.berkeley.edu/wp-content/uploads/pdfs/Disparity_in_Departure.pdf> as of Sept. 20, 2023). The impacts of this housing strain are felt most acutely by the City's historically disadvantaged, minority communities.

The City is also aware of the desperate need for supportive housing for the region's unhoused residents. According to recent counts, there are nearly 1,000 people living without shelter in the City of Berkeley. (EveryOne Home, Berkeley 2022 Point in Time Count (2022) <https://everyonehome.org/wp-content/uploads/ 2022/05/Berkeley-PIT-2022-Infographic-Report.pdf> [as of Sept. 12, 2023].) When asked, approximately 43% of these unhoused residents indicated that they suffered from "psychiatric or emotional conditions," while 26% indicated they had substance abuse issues. (*Id*.) To address these issues, the City has prioritized "[c]reat[ion of] affordable housing and housing support services for our most vulnerable community members" in its long-term planning. (*See* City of Berkeley 2018–2019 Strategic Plan (2018) p. 3

<https://berkeleyca.gov/sites/default/files/2022-01/Berkeley-Strategic-Plan.pdf> [as of Sept. 12, 2023].)

Given these conditions, the City strongly supports the Regents' plan to build more than 1,000 units of student housing and more than 100 units of permanent supportive housing for unhoused residents on the UC Berkeley campus. The City worked with the Regents to ensure that this development would serve the interests of students and the community, especially its unhoused members. In fact, the City committed nearly $14.4 million to the construction of the supportive housing project. (City of Berkeley Resolution No. 70,135-N.S.) The City views this investment as particularly important because permanent supportive housing, which combines wraparound services with stable, permanent housing for unhoused people, has been proven to end homelessness. The City is also working in partnership with the Regents to provide temporary housing for unhoused residents who previously resided on the project site, which is known as People's Park. All of these important public policy goals will be undermined if the Regents' plan to add student and permanent supportive housing on the People's Park site is unable to proceed.

Pursuant to California Rules of Court, rule 8.520(f)(4), the City confirms that no party or counsel for any party in this appeal authored

this brief in whole or in part. No one other than amicus, and its counsel of record, made any monetary contribution intended to fund the preparation or submission of the brief.

Because amicus will be affected by this Court's decision and may assist the Court by providing the City's perspective, amicus respectfully requests that this Court grant this application for leave to file an amicus curiae brief.

DATED: September 21, 2023

By: /s/ Farimah Faiz Brown
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Attorneys for Proposed Amicus Curiae City of Berkeley

AMICUS CURIAE BRIEF

I. Introduction

On September 7, 2023, the State added several new provisions to the California Environmental Quality Act ("CEQA") that resolve one of the main issues in this case: whether "social" noise generated by occupants of residential housing projects and their guests can be a "significant effect on the environment" requiring analysis and mitigation under CEQA. (See Assem. Bill 1307, (2023–2024 Reg. Sess.) §§ 1–2 [adding Public Resources Code sections 21085 and 21085.2].) The answer, according to Assembly Bill 1307, is "no." (*Id.*)[1]

This legislation is not only helpful in resolving this case; it is also entirely consistent with existing provisions of CEQA and long-standing case law interpreting it. The purpose of CEQA is to require public agencies to consider, minimize, and mitigate the *environmental* impacts of their actions. Economic and social changes need not be addressed. And speculation (e.g., about whether new residents will be noisy or quiet, or tidy or untidy) is prohibited.

Given this legal authority, old and new, it is clear that the Court of

[1] Assembly Bill 1307 also added a provision to CEQA declaring that an institution of public higher education is not required to consider alternatives to the location of residential or mixed-use housing projects in certain circumstances, which appears to address the other main issue in this case. (*See* Assem. Bill 1307, (2023–2024 Reg. Sess.) § 2 [adding Public Resources Code sections 21085.2(b)].)

Appeal erred in overturning the Regents' certification of the environmental impact report ("EIR") for the People's Park housing project. The Court of Appeal ruled that the EIR failed to analyze how much noise the occupants and their guests might make in the surrounding community. But as the Regents have argued, requiring public agencies to analyze these "social" noise impacts—and then to mitigate, condition, or reject much-needed infill housing projects on the theory that the occupants might be noisy—would infect CEQA's technical and science-based process with bias, speculation, and uncertainty.

Amicus curiae City of Berkeley ("City") is well-aware of the perils and potential costs of such a requirement. As a city that faces a severe affordable housing shortage, is largely built-out, and is routinely asked to approve higher-density housing in established residential communities, the City would be directly impacted by a new rule requiring CEQA analysis of social noise. Such a rule could not be implemented with any clarity in this case or in future situations. And even more problematically, such a rule would undoubtedly invite neighborhood speculation and fear-mongering, based solely on prejudice, about whether the new residents would be noisier than current residents.

It was clear the legislature did not intend for CEQA to erect such

roadblocks to infill development (which, as a practical matter, is the only type of development impacted by "social" noise) even before Governor Newsom signed AB 1307 into law. In fact, numerous provisions of CEQA *encourage* infill development within already-developed areas like Berkeley to protect the environmental resources in undeveloped rural areas. (See *infra* at pp. 9-11.)

For all these reasons, the City urges the Court to follow the clear guidance recently established by AB 1307 and reverse the Court of Appeal.

II. CEQA does not require the Regents to analyze and mitigate potential "social" noise associated with the development of much-needed student and supportive housing.

The question in this case is whether CEQA[2] requires public agencies to consider, analyze and mitigate potential project impacts caused by perceived social traits of the people who will inhabit the project. The Court of Appeal answered this question in the affirmative, opening the door to an entirely new realm of analysis—and entirely new bases for legal challenge under CEQA.

As the Regents explain in their briefs, requiring this new analysis

[2] CEQA is codified at Public Resources Code section 21000 et seq. The Guidelines for the Implementation of the California Environmental Quality Act are found at California Code of Regulations, title 14, section 15000 et seq.

could dramatically impact the process for approving not only this particular project, but all projects designed to house groups of people that have historically been excluded from a community due to racism, classism, and other prejudice. It does not require much imagination to envision the comment letters the City and others will receive when processing future affordable housing projects, group homes, senior facilities, daycare centers, rehabilitation facilities, etc., if this ruling is allowed to stand. Not only could these comments slow down the development process substantially, but they may also require special "mitigation" for such impacts, making these much-needed projects ever more expensive to develop. (See Pub. Resources Code, §§ 21002 ["public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures"], 21002.1 [requiring lead agencies to consider the effects of all project activities and to mitigate any significant effects wherever feasible], 21061; see also Cal. Code Regs., tit. 14, § 15126.4, subd. (a)(1) [requiring EIRs to discuss potential mitigation for each significant impact identified and select the best mitigation strategy feasible].)

CEQA does not require this result. The purpose of CEQA is to require public agencies to consider, minimize, and mitigate the

environmental impacts of their actions. (See, e.g., Pub. Resources Code, §§ 21100 [EIRs are required for projects that "may have a significant effect on the environment"], 21151.) Economic and social changes, on the other hand, are not required to be addressed under CEQA. (See, e.g., Cal. Code Regs., tit. 14, §§ 15064, subd. (e) ["[e]conomic and social changes resulting from a project shall not be treated as significant effects on the environment"], 15382 ["[a]n economic or social change by itself shall not be considered a significant effect on the environment"]; *Preserve Poway v. City of Poway* (2016) 245 Cal.App.4th 560, 577 [199 Cal.Rptr.3d 600] [CEQA does not require analysis of a project's impacts on "community character"].) Speculation (e.g., about whether new residents will be noisy or quiet, tidy or untidy, etc.) is prohibited. (Cal. Code Regs., tit. 14, §§ 15145 ["If, after thorough investigation, a lead agency finds that a particular impact is too speculative for evaluation, the agency should note its conclusion and terminate discussion of the impact."], 15064, subd. (d)(3) ["An indirect physical change is to be considered only if that change is a reasonably foreseeable impact which may be caused by the project. A change which is speculative or unlikely to occur is not reasonably foreseeable."].)

Moreover, numerous provisions of CEQA are designed to encourage

infill development, which, by definition, is the only type of development that could possibly have "social" noise impacts.[3] CEQA defines an "infill site" as a site in an urbanized area that has been previously developed for urban uses or is surrounded by urban uses. (See, e.g., Pub. Resources Code § 21061.3 [defining "infill site[s]"]; Cal. Code Regs., tit. 14, §15332 [defining infill projects]). Only these projects—that is, those within an urbanized environment—could possibly have "social noise" impacts. And far from discouraging such projects, CEQA includes a slew of provisions designed to facilitate them, from allowing streamlined environmental review to exempting such projects altogether. For instance, various CEQA provisions allow agencies to conduct an abbreviated review process for infill projects because the environmental review that already occurred for the urbanized area was sufficient to consider most of the environmental impacts of the infill project. (See, e.g., Pub. Resources Code, § 21083.3 [where a parcel has already been zoned to a particular density, EIRs for new development must only discuss new, project-specific or parcel-specific impacts]; Cal. Code Regs., tit. 14, §15183, subd.

[3] A recent court ruling relating to student housing in central Los Angeles—the country's second-largest city—illustrates the ramifications of a "social noise" standard on infill development in urban locations. (See Matt Brown, "Noise Pollution Precedent set by People's Park case blocks housing in LA," *The Daily Californian* (Aug. 15, 2023), available at: https://dailycal.org/2023/08/15/noise-pollution-precedent-set-by-peoples-park-case-blocks-housing-in-la)

(a) ["projects which are consistent with the development density established by existing zoning, community plan, or general plan policies for which an EIR was certified" only require further review for project-specific significant effects]; Pub. Resources Code, § 21094.5 [infill projects already covered by an EIR certified for a planning level decision must only address new, project-specific significant effects or substantial new information]; Cal. Code Regs., tit. 14, § 15183.3 [streamlining review for infill projects where the potential effects of infill development have already been addressed in planning-level decisions].)

Other provisions even provide that, for certain types of common infill projects or common environmental effects resulting from such projects, no review is required at all. For instance, Public Resources Code section 21099 provides that aesthetic and parking impacts of a residential or mixed-use project on an infill site within a transit priority area categorically may not be considered to cause significant impacts on the environment under CEQA. CEQA also provides an express exemption allowing for certain qualified infill projects to be exempt from environmental review entirely. (See Cal. Code Regs., tit. 14, § 15195 [exempting qualified infill projects from CEQA review]; Pub. Resources Code § 21159.24 [exempting qualified infill projects from further

environmental review]; Pub. Resources Code § 21159.25 [listing requirements for infill sites to be exempted from further environmental review].)

Given these provisions, it would make little sense to interpret CEQA as requiring *more* noise analysis and mitigation for infill projects designed to house people in existing communities than for projects that would build new housing in undeveloped areas.

III. The Court of Appeal's "social noise" analysis is misguided because it relates to *off-campus*, *non-University* housing.

The Court of Appeal's decision to expand CEQA to require analysis of noise impacts associated with student parties is especially misguided for another key reason: it assessed noise arising from off-campus, unsupervised housing, which is precisely the opposite of the housing proposed by the project in question.

As the Regents have noted, the purpose of the People's Park project is to reduce the need for students to live (and socialize) in non-University housing. Many of the noise complaints cited by the Court of Appeal occurred in such housing. (See, e.g., *Make UC a Good Neighbor v. Regents of the University of California* (2023) 88 Cal.App.5th 656, 686 [304 Cal.Rptr.3d 834] ["noise from student parties is a problem in Berkeley's residential neighborhoods near the campus"]; *id*. ["In 2007, the City of

Berkeley found that parties in residential areas 'frequently become loud and unruly,' cause 'excessive noise,' and constitute a public nuisance"].) In fact, the apparent cause of past noise complaints is not University housing, but off-campus "mini-dorms," i.e., large, single family homes in residential neighborhoods rented to numerous students with no oversight from the University.

The City is well aware of the issues surrounding these mini-dorms, and adopted an ordinance regulating them due to their potential neighborhood impacts. (See generally Berkeley Mun. Code, ch. 13.42.) But the project at issue in this case is designed to address the reason these problematic "mini-dorms" sprung up in residential neighborhoods in the first place: the lack of sufficient on-campus, University-owned, student housing. (*See* Berkeley Mun. Code, § 13.42.010(A).) Unlike these "mini-dorms," the student housing proposed for People's Park would be supervised, with on-site Resident Assistants, Resident Directors, and a Residential Code of Conduct with a formal Residential Conduct Process for remedying violations.

Thus, in addition to being inconsistent with the purpose of CEQA, the Court of Appeal's decision also appears to mistake the remedy for the cause of the neighborhood impacts alleged in the case.

IV. Conclusion

For all of these reasons, the Court of Appeal's decision should be reversed and the trial court's decision to uphold the Regents' certification of the EIR and approval of the LRDP and People's Park project should be affirmed.

DATED: September 21, 2023

By: /s/ Farimah Faiz Brown

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CERTIFICATE OF COMPLIANCE

(California Rules of Court, rule 8.204(c)(1))

I hereby certify, pursuant to rule 8.204(c)(1) of the California Rules of Court, the enclosed brief of amicus curiae City of Berkeley contains 2,600 words, not including tables of contents and authorities, the signature block, and this certificate, as counted by Microsoft Word, the computer program used to prepare this brief.

DATED: September 21, 2023

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Court:	Supreme Court of the State of California
Case No.:	S279242

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Supreme Court of California

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Supreme Court of California

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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.

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