Case No. A171983

**COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FIRST APPELLATE DISTRICT**

**DIVISION THREE**

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TOWN OF TIBURON,

*Defendant and Appellant*,

vs.

THE COMMITTEE FOR TIBURON LLC

*Plaintiff and Respondent*.

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On Appeal from the Superior Court of the State of California
County of Marin, Case No. CV0000086
Honorable Judge Sheila Lichtblau

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# APPLICATION OF THE LEAGUE OF CALIFORNIA CITIES AND THE CALIFORNIA STATE ASSOCIATION OF COUNTIES TO FILE *AMICI CURIAE* BRIEF IN SUPPORT OF APPELLANT TOWN OF TIBURON; AND PROPOSED BRIEF OF *AMICI CURIAE*

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**AND CALIFORNIA STATE ASSOCIATION OF COUNTIES**

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TO BE FILED IN THE COURT OF APPEAL APP-008

| COURT OF APPEAL OF CALIFORNIA | FIRST APPELLATE DISTRICT, DIVISION THREE | COURT OF APPEAL CASE NUMBER: A171983 |
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SUPERIOR COURT CASE NUMBER: CV0000086

DEFENDANT/
APPELLANT: TOWN OF TIBURON
RESPONDENT/
REAL PARTY IN INTEREST: THE COMMITTEE FOR TIBURON LLC

## CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

*(Check one):* ☒ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE

**Notice: Please read rules 8.208 and 8.488 before completing this form. You may use this form for the initial certificate in an appeal when you file your brief or a prebriefing motion, application, or opposition to such a motion or application in the Court of Appeal, and when you file a petition for an extraordinary writ. You may also use this form as a supplemental certificate when you learn of changed or additional information that must be disclosed.**

1. This form is being submitted on behalf of the following party (*name* ): League of California Cities and California State Association of Counties

2. a. ☒ There are no interested entities or persons that must be listed in this certificate under rule 8.208.

   b. ☐ Interested entities or persons required to be listed under rule 8.208 are as follows:

| Full name of interested entity or person | Nature of interest *(Explain):* |
|---|---|
| (1) | |
| (2) | |
| (3) | |
| (4) | |
| (5) | |

☐ Continued on attachment 2.

**The undersigned certifies that the above-listed persons or entities (corporations, partnerships, firms, or any other association, but not including government entities or their agencies) have either (1) an ownership interest of 10 percent or more in the party if it is an entity; or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves, as defined in rule 8.208(e)(2).**

Date: August 22, 2025

Matthew D. Francois
(TYPE OR PRINT NAME)

▶ _____
(SIGNATURE OF APPELLANT OR ATTORNEY)

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## APPLICATION FOR PERMISSION TO FILE AMICI CURIAE BRIEF

TO THE HONORABLE PRESIDING JUSTICE OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FIRST APPELLATE DISTRICT, DIVISION THREE:

The League of California Cities ("Cal Cities") and the California State Association of Counties ("CSAC") request permission, pursuant to Rule 8.200(c) of the California Rules of Court, to file the attached amici curiae brief in support of the Appellant and Defendant Town of Tiburon (the "Town").

Cal Cities 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. Cal Cities is advised by its Legal Advisory Committee, comprised of 25 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.

Cal Cities, CSAC, and their member cities and counties have a substantial interest in the outcome of this case because it raises important questions concerning the scope of a review of a program environmental impact report ("EIR"), a first-tier EIR, under the California Environmental Quality Act ("CEQA"). A program EIR is routinely prepared by cities and counties when considering the environmental impacts of a broad planning action like a general plan or a constituent element thereof such a housing element.

In this case the Trial Court found that the Town's program EIR for its general plan and housing element was inadequate for failing to consider the project-level, site-specific impacts of one of 17 sites in its housing sites inventory—Site H. No application had been submitted for Site H or for any of the other sites included in the inventory. The inventory is simply an identification of sites that *can* accommodate an agency's housing needs. It is not an approval or commitment to development on any sites of the inventory.

As such, the Trial Court erred in finding that site-specific CEQA review was required. If allowed to stand, cities and counties would find it difficult, if not impossible, to timely adopt housing elements and/or updates to their general plans. Those agencies would be ineligible for certain state and regional funding programs and at risk of losing local land use control, a right enshrined by the State Constitution. They would also have to incur the costs of speculative CEQA review for private

development projects when no application or detailed plans have been submitted by property owners to enable and facilitate meaningful environmental review of them.

The attached brief will provide the Court with useful information regarding the potential impact to California cities and counties should the judgment below be affirmed. Cal Cities and CSAC believe that their perspective on the issues identified above will assist the Court in its resolution of this appeal. The undersigned counsel has carefully examined the briefs submitted by the parties and represents that this brief by Cal Cities and CSAC, while consonant with the Town's arguments, will highlight important points that warrant further consideration. Accordingly, Cal Cities and CSAC respectfully request that this Court grant this application and accept this brief for filing.

In compliance with subdivision (c)(3) of Rule 8.200, the undersigned counsel represents that he authored this brief in its entirety on a pro bono basis; that his firm is paying for the entire cost of preparing and submitting this brief; and that no party to this action, or any other person, authored the brief or made any monetary contribution to help fund the submission of this brief.

Dated: August 22, 2025

Respectfully submitted,

RUTAN &TUCKER, LLP

By: 

Matthew D. Francois
Counsel for *Amici Curiae*

## I. INTRODUCTION

This case involves a challenge under the California Environmental Quality Act ("CEQA") to the Town of Tiburon's ("Town") mandatory update to its Housing Element. The Trial Court faulted the Town for not including a site-specific environmental impact analysis of Site H, one of 17 potential, future housing sites identified in the mandatory housing sites inventory. The Trial Court made three fundamental errors in granting writ relief.

First, the court failed to apply and adhere to the "highly deferential" substantial evidence standards when it ruled that the first-tier program environmental impact report ("EIR") should have analyzed Site H at a site-specific level of detail. The court mistakenly treated this as question of law and ignored authority explicitly allowing an agency to defer site-specific analysis until an actual development application has been submitted.

Second, the court mischaracterized the significance of Site H being included in the sites inventory. The mere inclusion of the site in the sites inventory did not approve or commit the agency to development of this site. Instead, it simply identified the site as a possible future site for housing development. After the EIR was certified, the State asked for additional details to confirm the viability of Site H for housing. This did not trigger or justify the need for site-specific analysis under CEQA.

Third, even if the Town did err, Respondents failed to show that the error was prejudicial. Here, the EIR analyzed the

significant environmental impacts of plan build-out (including of Site H) and imposed mitigation measures to address those impacts to the extent feasible. Respondent has not shown how site-specific analysis of Site H would have produced any substantially different information.

Even if the error were prejudicial, the Trial Court should have issued a narrower remedy, leaving the Town's adopted and State-certified Housing Element in place and ordering that no development occur on Site H until site-specific CEQA review has been performed on that site.

Amici respectfully urge this Court to reverse the Trial Court's ruling and/or remand to the Trial Court with directions to issue a narrower remedy.

## II. ARGUMENT

### A. Substantial evidence supports the scope of review of the Town's program EIR.

The Town here appropriately prepared a program EIR for its General Plan Update, including an update to its Housing Element. In doing so, the Town followed the established practice of many other jurisdictions throughout the State that prepared a program EIR for their housing element updates. Substantial evidence supports the Town's determination that site-specific review of Site H was not ripe for review, nor was it feasible to prepare such review given that no application for development of Site H had been submitted.

### 1. The Trial Court applied the wrong standard of review.

As a preliminary matter, the Trial Court erred in ruling that the question regarding the scope of the first-tier EIR is governed by the legal failure to proceed standard instead of the factual substantial evidence standard. (*See* Trial Court Ruling, p. 15 at 3 Joint Appendix ("JA") 708: "The Court finds that CEQA was not scrupulously followed in this case and that Tiburon failed to proceed in the manner prescribed by law when the EIR failed to include feasible analysis of the reasonably foreseeable impacts of approving Site H for development of an additional 93-118 units.")[1]

On this precise question, the Court of Appeal in *Cleveland National Forest Foundation v. San Diego Assn. of Governments* (2017) 17 Cal.App.5th 413, 440, ruled that the issue is reviewed under a substantial evidence standard. Noted CEQA commentors agree that an agency's determination as to whether it is feasible to provide specific information in a program EIR "must be supported by substantial evidence." (Kostka & Zischke, Practice Under the California Environmental Quality Act (C.E.B. 2025) § 10.14.B.)

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[1] In support of its ruling, the Trial Court cited to and relied on cases involving *project* EIRs. (3 JA 703-704.) Respondent too cites *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, where a project EIR failed to discuss the health issues associated with air quality impacts, a requirement under CEQA case law. The scope of review of a project EIR is not relevant or instructive as to the scope of review of the program EIR at issue here.

The substantial evidence standard is "highly deferential" to the agency, with a reviewing court "indulg[ing] all reasonable inferences from the evidence that would support the agency's determinations and resolv[ing] all conflicts in the evidence in favor of the agency's decision." (*Residents Against Specific Plan 380 v. County of Riverside* (2017) 9 Cal.App.5th 941, 960 citing *California Native Plant Society v. City of Santa Cruz* (2009) 177 Cal.App.4th 957, 984 and *Save Our Peninsula Committee v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 117.) Substantial evidence includes facts, a reasonable assumption predicated upon fact, or expert opinion supported by fact. (Pub. Res. Code § 21080(e)(1).) It does not include argument, speculation, unsubstantiated opinion or narrative, or evidence that is clearly inaccurate or erroneous. (Pub. Res. Code § 21080(e)(2).) Substantial evidence has also been defined as "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached." (CEQA Guidelines § 15384(a); *see also Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 393 ["A court may not set aside an agency's approval of an EIR on the ground that an opposite conclusion would have been equally or more reasonable"].)

Here, substantial evidence supports the Town's determination that it was neither ripe nor feasible to conduct site-specific review of Site H because no application or plans to develop that site had been submitted to the Town.

### 2. The Town's program EIR was not required to analyze the site-specific impacts of potential future development of Site H.

Under CEQA, there are two basic types of EIRs: a program EIR and a project EIR. While related, the two types of EIR serve different purposes. A program EIR is the macro view, and a project EIR is the micro view.

A program EIR (also known as a first-tier EIR) allows an agency to consider broad area-wide and regional effects and propose broad policy alternatives and program-wide mitigation measures to address those effects. (*See*, *e.g.*, CEQA Guidelines §§ 15168(b)(4), 15152(a), 15385; *see also* CEQA Guidelines § 15146(b) [an EIR prepared for a general plan "should focus on the secondary effects" of the plan and "need not be as detailed as an EIR on the specific construction projects that might follow"] and Kostka & Zischke, Practice Under the California Environmental Quality Act (C.E.B. 2025) § 10.18 [as a first-tier EIR, a program EIR "addresses impacts and mitigation measures that apply to the program as a whole, and may reserve detailed evaluation of the impacts of specific program activities that are difficult to assess early on to a later, more focused review as those activities are considered for approval."].)

In contrast, a project EIR is prepared for a specific development project once an application and detailed plans have been submitted for that project so that it can be analyzed at a site-specific level. If and when future development projects are proposed, the site-specific impacts of such projects would be

considered in a separate project-level CEQA document. (CEQA Guidelines 15152(c); *see also* CEQA Guidelines § 15146(a) ["An EIR on a construction project will necessarily be more detailed in the specific effects of the project than will be an EIR on the adoption of a local general plan . . . because the effects of the construction can be predicted with greater accuracy."].)

CEQA specifically encourages agencies to tier CEQA review from a program EIR for a general plan to a project EIR for a specific development project. (CEQA Guidelines § 15152(b); *see also* CEQA Guidelines § 15385(a).) While tiering does not excuse the agency from considering the reasonably foreseeable impacts of the program considered in the first-tier EIR, "the level of detail contained in the first tier EIR need not be greater than that of the program, plan, policy, or ordinance being analyzed." (CEQA Guidelines § 15152(b); *see also* CEQA Guidelines § 15146 ["The degree of specificity required in an EIR will correspond to the degree of specificity involved in the underlying activity which is described in the EIR."].)

The CEQA Guidelines recognize that "the development of detailed, site-specific information may not be feasible" and "can be deferred" in an "EIR for a large-scale planning approval, such as a general plan or component thereof . . .." (CEQA Guidelines § 15152(c).) As such, lead agencies are explicitly authorized to leave detailed analyses to later second-tier EIRs prepared for projects that implement the plan or policy. (*Ibid.*) Deferral of such analysis is appropriate provided that it does not prevent adequate identification of significant effects of the planning

approval at hand. (*Ibid.*)

Here, the program EIR prepared by the Town for its General Plan Update appropriately analyzed the impacts of build-out of its General Plan at a programmatic level based on the potential maximum number of residential units and non-residential square footage. Specifically, as to residential uses, the program EIR considered the broad level and secondary impacts of developing 916 units throughout the Town, including a potential of up to 118 units on Site H. It considered all of the required environmental resource categories and disclosed the level of impacts for each topic. Feasible mitigation measures were imposed to avoid or lessen significant impacts. Substantial evidence supported the Town's scope of review and conclusions. No more is required by CEQA.

Agencies throughout the State uniformly and routinely prepare program EIRs for general plans, including constituent elements, such as housing elements. If CEQA required a project-level analysis of a broad program, such as a general plan with potentially thousands of housing units and millions of square feet of commercial development, an agency could choose not to update its general plan or undertake associated rezoning actions. This would be contrary to good planning principles and result in the planning document being stale and not reflecting current state law policies, including those pertaining to reducing vehicle miles traveled and greenhouse gas emissions. Further, if the law required a site-specific analysis of each housing site in a housing element, an agency would not be able to complete the statutorily-

mandated process in a timely or reasonable manner.

None of the cases cited to or relied on by the Trial Court or Respondent involved a general plan or housing element update. This demonstrates that the Trial Court's ruling and Respondent's arguments are unsupported by law or precedent. If allowed to stand, the Trial Court ruling requiring site-specific analysis of even one site (let alone multiple ones) in a program EIR could effectively bring long-range comprehensive planning in the State to a stand-still. Such necessary planning efforts could be delayed for years and costs would be increased exponentially. For instance, an EIR for a single project can take a year or more to prepare and can cost hundreds of thousands of dollars due to the need to retain expert technical consultants. This would all be for no valid purpose. When and if a specific development project is proposed (such as on Site H), it will undergo its own CEQA review.

### B. HCD's review of a Housing Element site for suitability does not mandate site-specific review under CEQA.

As Respondent acknowledges: "HCD has a different focus than CEQA: HCD reviews a site's 'development potential' and 'physical constraints' not how the development might impact the environment." (Respondent's Brief, p. 75.) Amici agree with this statement. Unfortunately, the Trial Court conflated the two separate and distinct processes in ruling that the sites inventory required by State Housing Element Law somehow mandated a more detailed project-specific level of review under CEQA. No

legal authority supports this position.

On a regular cycle, each agency throughout the State is assigned a regional housing needs allocation ("RHNA") by the relevant council of governments. For the Bay Area, that entity is known as the Association of Bay Area Governments ("ABAG"). In December 2021, ABAG assigned the Town 639 units as its RHNA. This consisted of 193 very low, 110 low, 93 moderate, and 243 above-moderate income units. In addition, each agency is advised by the State Department of Housing & Community Development ("HCD") to create a buffer of at least 15 to 30 percent more units than required, especially to accommodate the lower income RHNA.[2]

Once it has been assigned its RHNA, the agency must update its housing element to identify sites that could accommodate that housing need. Specifically, the agency's housing element must include an inventory of land "suitable and available for residential development" throughout the community, including "vacant sites and sites having realistic and demonstrated potential for redevelopment during the planning period to meet the locality's housing need for a designated income level . . .." (Gov. Code § 65583(a)(3).) The inventory must include "an analysis of the relationship of zoning and public facilities and services to these sites," and "an analysis of the relationship of the sites identified in the land inventory to the jurisdiction's duty to affirmatively further fair housing." (*Ibid.*; *see also* Gov. Code

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[2] *See* https://www.hcd.ca.gov/community-development/housing-element/docs/sites_inventory_memo_final06102020.pdf

§ 65580(f) [designating and maintaining a supply of land and adequate sites suitable and available for the development of housing to meet a local agency's housing need for all income levels is essential to achieving the state's housing goals]; Gov. Code § 65583 [housing element must identify adequate sites for housing and make adequate provision for existing and projected needs of all economic segments of a community]; Gov. Code § 65583.2(a) [inventory of land suitable for residential development shall be used to identify sites throughout the community that can be developed for housing within the planning period and that are sufficient to provide for the jurisdiction's share of the regional housing need for all income levels].)

To demonstrate that the inventory includes suitable land to meet the jurisdiction's housing needs, it must include all of the following information: (1) a listing of properties by assessor parcel number, (2) the size of each property and the general plan designation and zoning of each property, (3) for nonvacant sites, a description of the existing use of each property, (4) a general description of any environmental constraints to the development of housing within the jurisdiction, (5) a description of existing or planned water, sewer, and other dry utilities supply, including the availability and access to distribution facilities, (6) sites identified as available for housing for above moderate-income households in areas not served by public sewer systems, and (7) a reference map that shows the location of the site included in the inventory. (Gov. Code § 65583.2(b).) Based on this information, a city or county must "determine whether each site in the inventory

can accommodate the development of some portion of its share of the regional housing need by income level during the planning period" and "shall specify for each site the number of units that can realistically be accommodated on that site and whether the site is adequate to accommodate lower income housing, moderate-income housing, or above moderate-income housing." (Gov. Code § 65583.2(c).)

Unlike most local land use planning and zoning actions which simply require approval by the local legislative body, a housing element does not take legal effect until it has been thoroughly reviewed by the State HCD and certified to be in substantial compliance with State Housing Element Law. (Gov. Code § 65585.03.) At least 90 days prior to adoption of a revision of its housing element, or at least 60 days prior to the adoption of a subsequent amendment to its element, the agency must submit a draft of the amendment or element revision to HCD for its review. (Gov. Code § 65585(b)(1)(A).) Before submitting such drafts to HCD for review they must be circulated for public review and comment, with appropriate comments incorporated into the HCD-submitted draft. (*Ibid.*)

HCD must report its written findings to the local agency within 90 days of its receipt of the first draft submittal and 60 days of its receipt of a subsequent draft submittal. (Gov. Code § 65585(b)(1)(C).) Before adopting a housing element, the local agency must consider and incorporate HCD's findings. (Gov. Code § 65585(e).) Here, that pre-adoption process led to the Town including Site H in its sites inventory.

It is only *after* a housing element has been adopted by the local agency and the associated CEQA document certified that it is submitted to HCD for further review and potential certification. (Gov. Code § 65585(f).) Especially during this last housing element cycle, it was rare for an agency's adopted housing element to be certified without further revisions directed by HCD. Instead, most agencies, including the Town, had to revise their housing elements multiple times based on HCD feedback to provide additional analysis to support inclusion of certain sites in the inventory, and in some cases, substitute new sites for previously-identified sites. (Gov. Code § 65585(f).)

Many other agencies went through a similar process as the Town, in large part due to the substantial increase in their RHNA—for the Town an eight-fold increase—and the relatively new requirement to affirmatively further fair housing ("AFFH"). In accordance with the AFFH requirement, even if an agency meets its numerical RHNA amount, HCD can still direct it to add and/or disperse units throughout the jurisdiction so as to not concentrate development in one area and thus further fair housing. (Gov. Code § 65584(e) [defining affirmatively further fair housing as "taking meaningful actions" to "address significant disparities in housing needs and in access to opportunity, replacing segregated living patterns with truly integrated and balanced living patterns, transforming racially and ethnically concentrated areas of poverty into areas of opportunity, and fostering and maintaining compliance with civil rights and fair housing laws."].) Amici understand that Site H

was added to the Town's sites inventory in response to HCD's comments related to AFFH.

As a result of the local-state overlay and back-and-forth process with HCD, it would be virtually impossible for site-specific review of sites in an inventory prior to HCD certifying it (which happens only *after* adoption and EIR certification) because the list of sites often can and will change. When and if the list changes, a new site-specific EIR would need to be prepared per the Trial Court's ruling. That would be anathema to CEQA's tiering and streamlining provisions (discussed above) as well as the Supreme Court's observations that "[t]he purpose of CEQA is not to generate paper, but to compel government at all levels to make decisions with environmental consequences in mind" and that CEQA "must not be subverted into an instrument for the oppression and delay of social, economic, or recreational development and advancement." (*Bozung v. Local Agency Formation Commission* (1975) 13 Cal.3d 263, 283; *Citizens of Goleta Valley v. Board of Supervisor* (1990) 52 Cal.3d 553, 576.)

Moreover, nothing in State Housing Element Law subjects the sites inventory to detailed, site-specific environmental analysis under CEQA.[3] It is simply a constraints analysis to demonstrate that the requisite number of housing units can potentially be met during the 8-year planning cycle. Site H was included as one of 17 sites in the sites inventory the Town

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[3] Respondent claims it does, but tellingly cites no authorities in support of its position. (*See*, *e.g.*, Respondent's Brief, pp. 42, 62-63.)

identified as suitable and available for residential development to meet its RHNA. Demonstrating that a site is suitable and available for potential future residential development does not approve that housing development project nor does it obligate the Town to consider the site-specific impacts of it. (*See*, *e.g.*, CEQA Guidelines § 15352 [defining "approval" for CEQA purposes as "the decision by a public agency which commits the agency to a definite course of action in regard to a project" and noting that for private projects approval occurs upon the issuance of a permit or other entitlement for use of the project.].)

The Trial Court found that inclusion of Site H in the sites inventory "pave[d] the way" for development of that site. (3 JA 706.) That is not correct. Site H could not be approved for housing without the Town granting discretionary approvals for such development. Such discretionary approvals trigger CEQA. (Pub. Res. Code § 21080(a).) Because no application for development of Site H had been submitted, the Town appropriately deferred such site-specific analysis until when and if such an application were to be submitted.

Should the Trial Court's judgment stand, it would be very difficult for cities to timely certify a program level EIR for a housing element, when after certification there are ongoing discussions with HCD about certain sites in the housing element and the feasibility of development on those sites when a neighbor complains directly to HCD. Such unnecessary and unripe site-specific review would greatly delay and impact an agency

from timely adopting a housing element and undertaking the critical steps necessary to implement it.

### C. Even if the Town should have included site-specific analysis of Site H in the program EIR it was not prejudicial and the remedy was not narrowly tailored to the alleged CEQA violation.

#### 1. Any error was not prejudicial because the Town analyzed and addressed the environmental impacts of plan build-out.

A petitioner must affirmatively show prejudice to prevail, as "there is no presumption that error is prejudicial." (PRC § 21005(b).) A CEQA error is not prejudicial if it does not preclude "informed decisionmaking and informed public participation." (*Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439, 463 [error is not prejudicial unless it "deprive[s] the public and decision makers of substantial relevant information about the project's likely adverse impacts"]; *accord*, PRC § 21005 [an abuse of discretion may be prejudicial if "noncompliance with the information disclosure provisions of [CEQA] . . . precludes relevant information from being presented to the public agency."].)

In *Neighbors for Smart Rail*, *supra*, the California Supreme Court ruled that an agency's improper omission of an existing conditions baseline and exclusive reliance on a future conditions baseline for traffic impacts did not result in prejudicial error.

The court reasoned that the future traffic analysis found no significant impacts, thereby demonstrating that the same analysis performed against existing traffic conditions would not have produced any substantially different information. As such, the court concluded that the EIR did not deprive agency decision-makers or the public of substantial information relevant to approving the project. (57 Cal.4th at 464-465.)

In *Save Cuyama Valley v. County of Santa Barbara* (2013) 213 Cal.App.4th 1059, 1073-74, the Second Appellate District similarly found that an EIR's erroneous conclusion that a project's groundwater impact would be less than significant was not prejudicial because the agency committed to mitigation which would ensure that the impact was, in fact, less than significant. (*Accord*, *Mount Shasta Biological Ecology Center v. County of Siskiyou* (2012) 210 Cal.App.4th 184, 226 [fact that an EIR may have understated a project's water usage was not prejudicial due to lack of evidence that increased water usage would result in a significant impact].)

Here, the Town's program EIR analyzed and mitigated to the extent feasible all significant impacts associated with plan build-out, including development of Site H with up to 118 units. The analysis addressed all environmental resource categories and identified the level of significance for each topic. There is no evidence that site-specific analysis of Site H would have produced any substantially different information. Moreover, no development will be allowed to occur on Site H unless and until the Town performs site-specific environmental review. As such,

to the extent there was error, it was not prejudicial since it did not deprive the public and decision-makers of substantial relevant information about the project's likely adverse impacts.

**2. The Trial Court's remedy was not narrowly tailored to the alleged CEQA violation.**

Even if this Court were to agree that the Town violated CEQA by not including site-specific analysis of Site H in the program EIR for the General Plan and that the error was prejudicial, those perceived discrete errors would not justify a writ of mandate setting aside the Town's Housing Element. The equitable remedy would be to suspend future Site H activities that may result in a change to the physical environment pending further compliance with CEQA.

In any court order finding an agency has not complied with CEQA, Public Resources Code Section 21168.9(b) directs the agency to "include ***only those mandates*** necessary to achieve compliance" with CEQA "and ***only those specific project activities*** in noncompliance" with CEQA. (emphasis added.) Indeed, a court can set aside an agency's decision "in whole ***or in part***," order a suspension of "***any*** or all" specific project activities, and mandate that the agency "take specific action" to bring its action into compliance with CEQA. (Pub. Res. Code § 21168.9(a) [emphasis added].)

Any such order "***shall be limited to that . . . specific project activity***" found to be in noncompliance with CEQA if the court finds: (1) the specific project activity is severable, (2) severance will not prejudice complete and full compliance with

CEQA, and (3) the court has not found the remainder of the project to be in noncompliance with CEQA. (Pub. Res. Code § 21168.9(b) [emphasis added].) "The trial court shall retain jurisdiction over the agency's proceedings by way of a return to the writ until the court has determined that the public agency has complied with" CEQA. (*Id.*)

In *Laurel Heights Improvement Association v. Regents of University of California* (1988) 47 Cal.3d 376, the California Supreme Court ruled that a project EIR violated CEQA by failing to analyze the environmental impacts of the future use of an existing building and by failing to analyze adequate project alternatives. (*Id.* at p. 424.) The Supreme Court determined that those "defects in the EIR relate[d] only to future activity, which the EIR failed to address, and to feasible alternatives." (*Ibid.*) Thus, rather than vacating the agency's approval, the Supreme Court, after duly considering equitable principles, held that the agency "may continue operations that have already begun at Laurel Heights as of the date this opinion is filed but that [the agency] may not expand existing operations at Laurel Heights or begin additional operations there, whether or not identified in the present EIR, until a new EIR is certified and the project reapproved." (*Ibid.*)

In *Golden Gate Land Holdings LLC v. East Bay Regional Park District* (2013) 215 Cal.App.4th 353, a park district commenced condemnation proceedings to acquire property to be used for park and recreation purposes. The district found the action to be exempt from CEQA and adopted a resolution of

necessity. The trial court ruled that the project was not exempt from CEQA but permitted the district to leave the resolution of necessity intact, suspending activity related to project acquisition until the agency prepared an EIR. The court of appeal upheld the trial court's remedy, reasoning that there was "no evidence that, by continuing its eminent domain proceedings, the District was going to be prejudiced in its consideration or implementation of particular mitigation measures or alternatives to the proposed improvements or that the eminent domain proceedings could result in an adverse change or alteration to the physical environment." (*Id.* at p. 378.)

In *Center for Biological Diversity v. Dept. of Fish & Wildlife* (2017) 17 Cal.App.5th 1245, the court of appeal affirmed the trial court's decision to decertify only parts of an EIR and to allow certain project approvals to remain in place, pending the agency's compliance with CEQA. The court of appeal reasoned that "[a]llowing for the partial decertification of an EIR effectuates the statute's purpose . . . to give the trial courts some flexibility in tailoring a remedy to fit a specific CEQA violation." (*Id.* at p. 1247.) The court further noted that the trial court "has the authority to leave some project approvals in place when decertifying portions of an EIR, so long as it appropriately finds the portions severable under section 21168.9, subdivision (b)." (*Id.* at p. 1256.) "Thus, if the court finds that it will not prejudice full compliance with CEQA to leave some project approvals in place, it must leave them unaffected." (*Id.* at p. 1255.)

Here, the Trial Court issued a writ directing the Town to

(1) set aside and decertify the Final EIR with respect to Site H, (2) set aside the General Plan and Housing Element with respect to Site H, and (3) to the extent the Town seeks to move forward with Site H as a potential site to "redraft and recirculate for review and public comment a focused EIR which analyzes the reasonably foreseeable impacts that development of up to 118 additional residential units on Site H would have, to the extent feasible." (3 JA 708.)

Amici understand that the Town's inclusion of Site H in its sites inventory was critical to HCD's determination that the Town's Housing Element was in substantial compliance with State Housing Element Law. Absent Site H, HCD could act to de-certify the Town's Housing Element. The consequences of not having a certified housing element are severe: an agency could become ineligible for state and regional funding programs, be placed on an accelerated housing element cycle, and/or face legal challenges. (Gov. Code §§ 65585(j), (l), 65588(e)(4)(C)(i), 65913.4, and 65589.11.)

Specifically, the Town would be ineligible to receive state funds that require a compliant housing element, including those pertaining to affordable housing, infill infrastructure, and transportation improvements. The Town could face additional financial and legal ramifications. HCD may notify the Office of the Attorney General, which may bring suit for violations of Housing Element Law. Further, state law provides for court-imposed penalties for ongoing non-compliance. For instance, Government Code Section 65585(l)(1) establishes a minimum fine

of $10,000 per month, and a maximum fine of $100,000 per month. If a jurisdiction remains noncompliant, a court can multiply those penalties by a factor of six. (Gov. Code § 65585(l)(3).)

Other potential ramifications could include the loss of local land use authority to a court-appointed agent. Along those lines, jurisdictions without a substantially compliant housing element cannot rely on inconsistency with zoning and general plan standards as a basis to deny a housing project containing a specified percentage of lower income housing units. (Gov. Code § 655895.5(d)(5) and (h)(11).)

In light of the potentially drastic consequences of not having a certified housing element, equitable principles dictate a narrower remedy. Instead of setting aside the Town-adopted and State-certified Housing Element as to Site H, the Court should order that no development occur on Site H until site-specific CEQA review has been performed on that site. This result is fully consistent with Public Resources Code Section 21168.9 in that (1) the specific project activity is severable, (2) severance will not prejudice complete and full compliance with CEQA, and (3) the court did not find the remainder of the project to be in noncompliance with CEQA.

## III. CONCLUSION

For the reasons above, Cal Cities and CSAC urge the Court to reverse the judgment of the Trial Court below. Alternatively, Amici urge the Court to remand the matter to the Trial Court to issue a narrower remedy focused on potential future Site H

development and leaving the Town's State-certified Housing Element in place.

Dated: August 22, 2025

Respectfully submitted,

RUTAN &TUCKER, LLP

By: _____

Matthew D. Francois
Counsel for *Amici Curiae*

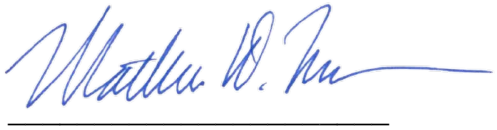
## CERTIFICATE OF COMPLIANCE

Counsel of Record hereby certifies that pursuant to Rule 8.204(c)(1) of the California Rules of Court, the enclosed Application of the League of California Cities and the California State Association of Counties to file *Amici Curiae* Brief in Support of Appellant Town of Tiburon; and Proposed Brief of *Amici Curiae* is produced using 13-point Century Schoolbook type including footnotes and contains approximately 5,913 words, which is less than the total words permitted by the rules of court. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: August 22, 2025

Respectfully submitted,

RUTAN &TUCKER, LLP

By: 

Matthew D. Francois
Counsel for Amici Curiae

## PROOF OF SERVICE

**STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO**

I am employed by the law office of Rutan & Tucker, LLP in the County of San Francisco, State of California. I am over the age of 18 and not a party to the within action. My business address is 455 Market Street, Suite 1400, San Francisco, CA 94105. My electronic notification address is mrespicio@rutan.com.

On August 22, 2025, I served on the interested parties in said action the within:

**APPLICATION OF THE LEAGUE OF CALIFORNIA CITIES AND THE CALIFORNIA STATE ASSOCIATION OF COUNTIES TO FILE *AMICI CURIAE* BRIEF IN SUPPORT OF APPELLANT TOWN OF TIBURON; AND PROPOSED BRIEF OF *AMICI CURIAE***

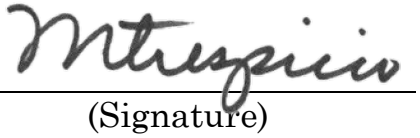
as stated below:

(BY ELECTRONIC-MAIL): I caused the document to be served via the TrueFiling System, which will send electronic service of the document to the recipients at the e-mail addresses set forth on the Service List

Executed on August 22, 2025, at San Francisco, California.

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

Maryknol Respicio
(Type or print name)


(Signature)

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