COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION THREE

Case No. G051058

CENTER FOR BIOLOGICAL DIVERYSITY, et al.,

Petitioners and Appellants,

v.

COUNTY OF SAN BERNARDINO, et al.,

Respondents

NATIONAL PARKS CONSERVATION ASSOCIATION,

Plaintiff and Appellant,

v.

COUNTY OF SAN BERNARDINO, et al.

Respondents

Appeal From the Superior Court of Orange County, California
Superior Court Case No. 30-2012-00612947-CU-TT-CXC
Judge: Honorable Gail A. Andler, Judge

APPLICATION FOR LEAVE TO FILE AMICUS BRIEF AND PROPOSED BRIEF IN SUPPORT OF RESPONDENTS

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courts in amicus curiae briefs in cases involving issues of concern to its members.

Building Industry Legal Defense Foundation

The Building Industry Legal Defense Foundation ("BILD") is the premier legal advocate for the building and construction industry in California. BILD is a non-profit mutual benefit corporation and wholly-controlled affiliate of the Building Industry Association of Southern California, Inc., which has approximately 1,200 member companies. BILD's purposes are to initiate or support litigation or agency action designed to improve the business climate for the building industry; to monitor legal developments and legislation critical to the building industry; and to educate the industry, public officials, and the public of legal and policy issues critical to sustaining the building industry.

Building Industry Association of the Bay Area

The Building Industry Association of the Bay Area ("BIA/BA") is a non-profit association representing building, developers, and others involved in the residential construction industry in the San Francisco Bay Area. BIA/BA advocates for its members' interests, including before the courts in amicus curiae briefs in cases involving issues important to the residential construction industry.

letters in cases, like this one, involving issues of paramount concern to the business community.

Southern California District Council of Laborers

The Southern California District Council of Laborers ("Labor Council") is a labor union representing over 20,000 skilled construction workers in Southern California. The Labor Council is party to collective bargaining agreements establishing fair wages and safe working conditions for its members with over 1,200 construction companies. These companies employ the Labor Council's members on construction projects of all types and sizes, including almost every major infrastructure project built in the last 60 years in Southern California. To ensure that there are sufficient skilled workers for the future of the construction industry in California, the Labor Council and its signatory employers maintain a State approved apprenticeship program that currently trains over 1,200 apprentices. The mission of the Labor Council is to increase work opportunities for its signatory contractors and members, provide good paying jobs that contribute to the economy in the area, and ensure the continued rebuilding of California's infrastructure.

II. INTEREST OF PROPOSED AMICI

Amici's members are all in building-related industries regulated or affected by CEQA. Amici bring to the Court their perspective on the broader importance of Appellants' claim that the wrong "lead agency"

contradiction between these two appellants reveals an important flaw in its argument—even if a petitioner could establish some technical error in having the designated lead agency, as opposed to a different agency, act as lead agency, it does not automatically negate the legal adequacy of the EIR that was prepared or the public process that was conducted. Moreover, Appellants' assertions that the lead agency issue necessarily implicates concerns about informed decision making or public participation has no weight when the two agencies with a claim to be lead agency were both integrally involved in the process and both had to approve the EIR.

The process of preparing and certifying an EIR can be lengthy, especially for large, complex projects. Attacking the determination of the lead agency at the conclusion of that process threatens more delay. CEQA litigation has been described as a "guerrilla war of attrition" where project opponents try to wear down project applicants. *County of Orange v. Superior Court* (2003) 113 Cal.App.4th 1, 12. This is particularly deleterious to Amici, but also to public agencies' projects because "in the CEQA context, time is money..." *Id.* The Legislature has sought to prevent the high cost caused by delays by ensuring that CEQA approval process, as well as litigation, proceeds quickly. *Id.* Otherwise, delay becomes an end in itself for opponents especially where, as here, they insist that the entire EIR process be redone from scratch. The Legislature has specifically declared "that there currently is a housing crisis in California and it is essential to

their respective counsel made any monetary contribution towards or in support of the preparation of this brief. Proposed Amici's counsel did contribute time to prepare this brief.

V. CONCLUSION

Amici respectfully request that this Court accept the filing of the attached brief.

Dated: August 25, 2015

Cox, Castle & Nicholson LLP

By: _____

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Pursuant to California Rules of Court 8.520, subdivision (f)(1), proposed amici curiae California Building Industry Association, California Business Properties Association, Building Industry Legal Defense Foundation, Building Industry Association of the Bay Area, California Chamber of Commerce and Southern California District Council of Laborers (collectively, "Amici") wish to address the key California Environmental Quality Act (CEQA) issue raised in this case.

I. INTRODUCTION

Amici recognize that the instant case arises out of a major water supply project and involves unique facts, but believe that the rules Appellants have urged this Court to adopt would have adverse implications across projects throughout the state. In particular, Amici note that in the context of a public-private partnership, there is no precedent for asserting that the public agency member of that partnership is not the lead agency for purposes of conducting CEQA review. Builders and developers are increasingly encouraged to explore variations on public-private partnerships with public agencies, which often lack sufficient funding to undertake projects on their own. The notion that the public agency partner can be disqualified as the lead agency for the very project it has undertaken with a private applicant is jarring. It also appears at odds with the plain text of CEQA, and in particular, the CEQA Guidelines, which set out a clear means to identify the lead agency and to resolve any controversy when

While CEQA provides for the situation where two competing potential lead agencies have been unable to resolve their disputes despite the Guidelines and despite the Office of Planning and Research (OPR) acting as a mediator, that is not the case here. Here, the local agencies reached a mutual resolution precisely as envisioned by the Guidelines § 15051(d) ["...the public agencies may by agreement designate an agency as the lead agency."] Indeed, the County of San Bernardino, which Appellants assert should have been the lead agency, ended up as a responsible agency. Where, as here, the responsible agency had to determine in its own exercise of discretion, whether the EIR was sufficient for its approvals in compliance with required CEQA procedures, and did so, the premise that there would have been more informed decision making and more public participation if the order of the agency's consideration of the EIR were reversed, i.e., the County was lead agency and SMWD a responsible agency, is baseless.

Moreover, if there were any dispute about the lead agency role, and the competing agencies reach an accord pursuant to section 15051(d), the courts should be wary of second-guessing that exercise of two agencies' discretion. Otherwise, challenging the designation of lead agency will become a new play in project opponents' playbooks and will create still more uncertainty for project applicants throughout the state.

can satisfy those criteria and subsection (d) dispute resolution provision cannot be reached if that is the case. The language of subsection (d) clearly contemplates that more than one agency can meet the criteria in (a) –(c), and the language is (c) states that it is possible for two agencies to have an "equal" claim.

Agencies are within their discretion to reach Section 15051(d) in good faith and to resolve their competing claims to be the lead agency. This sort of compromise should be applauded, not attacked.

B. The Caselaw Does Not Support Appellants' Proposed Rule That A Failure to Proceed Results In Automatic Prejudice And Requires A New EIR

Even if a agency were not the proper lead agency under Guidelines section 150151(d), the rule Appellants urge this Court to adopt – that such a selection requires that the EIR be redone from scratch by the "proper" lead agency – is not supported by the case law. Amici are concerned that Appellants urge an unduly broad reading *Planning and Conservation League v. Department of Water Resources* (2000) 83 Cal.App.4th 892 ("*PCL*"). That case is patently distinguishable, and an unduly broad application of its holding could usher in a new era where challenges to lead agency status become more commonplace as just another CEQA claim.

Amici are concerned that if this Court finds that the public agency in a public-private partnership is not a proper lead agency, that would throw into doubt any private party's ability to rely on its public agency partner to act in that role whenever project opponents can muster the charge that another public agency would have been more appropriate. Because of the increasing complexities of how large projects may be structured, it should not matter if the lead agency may ultimately manage the project through another agency created for the project. For example, in *Cedar Fair, L.P. v. City of Santa Clara* (2011) 194 Cal.App.4th 1150, 1168 the city was the lead agency for this public- private partnership even though the stadium itself would be owned by a joint powers authority of which the city would be one member. [1]

Even if there were some error here, prejudice is not presumed from an alleged CEQA violation as Appellants claim, it must be shown. Pub. Res. Code § 21005(b) ("there is no presumption that error is prejudicial.") Appellants take different positions on this point, but neither is consistent

[1] Under such circumstances, a lead agency cannot be considered to have jumped the gun by preparing an EIR before all agreements between the private applicant and the public agency partner (and among public agencies by way of the JPA) were prepared. As illustrated by *Cedar Fair*, that construct runs afoul of fundamental CEQA requirements that the EIR be prepared as early as possible and before the public agency has entered into binding agreements. *Save Tara* at 136 ("postponing EIR preparation until after a binding agreement for development has been reached would tend to undermine CEQA's goal of transparency in environmental decisionmaking.")

Sierra Club v. State Board of Forestry (1994) 7 Cal.4th 1215, 1237 found actual prejudice based on the specific facts.

Hence, if the selection of the allegedly improper lead agency did not "preclude informed decision making and informed public participation," [*Neighbors for Smart Rail* at 463], Amici submit that the proper rule is that no prejudice occurred and the EIR need not be redone. This is contrary to CBD's position that it does not matter if the lead agency prepared a legally adequate EIR and conducted a legally adequate EIR circulation and certification process. The Supreme Court in *Neighbors* and the Court in *Rominger*, among others, would conclude that the agency preparing the CEQA-compliant EIR does not automatically thwart informed decision making and public participation. The mere fact that one agency should have been the lead instead of another, without substantiation, does not automatically result in prejudice. Amici submit that is particularly true where the alternative agency for lead acted as a responsible agency and independently decided on the sufficiency of the EIR, and concluded that it was sufficient and did not need to be redone. See Guidelines §§ 15052, 15096(e) [responsible agency must challenge lead agency's EIR if it concludes EIR not adequate for responsible agency's use]. As applied here, if SMWD "regularly performed its obligations under CEQA," as CBD states (Reply at 12), that seems to rebut a presumption of prejudice. Presuming, as opposed to proving, prejudice for a CEQA compliant EIR is

Thus, Amici urge this Court to reject the challenge to SMWD's lead agency status. The private participant in a public-private partnership should be able to rely on its partner to act as the public agency on these projects, which are often large, complicated undertakings that will touch many jurisdictions and interest groups. Indeed, the larger and more complex the project, the more likely it will cause impacts outside the jurisdiction of the approving agency. That should not be used as a device to stymie approval.

III. CONCLUSION

Amici respectfully request that this Court affirm that the public agency approving a project it is implementing, whether or not it is formally a public-private partnership, is a proper lead agency for CEQA purposes.

Dated: August 25, 2015

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