B218347

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

CITY OF ALHAMBRA, et al.,
Plaintiffs and Appellants,

vs.

COUNTY OF LOS ANGELES, et al.,
Defendants and Respondents;

Appeal from the Superior Court of the State of California
for the County of Los Angeles
Case No. BS 116375
Honorable James Chalfant, Presiding
[By C.C.P. § 638 Reference to the Hon. Dzintra Janavs (Ret.)]

APPLICATION OF THE LEAGUE OF CALIFORNIA CITIES TO FILE *AMICUS* BRIEF IN SUPPORT OF APPELLANTS CITY OF ALHAMBRA, ET AL.; PROPOSED BRIEF OF *AMICUS CURIAE*

Benjamin P. Fay, SBN: 178856
Rick W. Jarvis, SBN: 154479
JARVIS, FAY, DOPORTO & GIBSON, LLP
475 14th Street, Suite 260
Oakland, California 94612
Telephone: (510) 238-1400

Attorneys for *Amicus Curiae*
LEAGUE OF CALIFORNIA CITIES

TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, SECOND APPELLATE DISTRICT, DIVISION THREE	Court of Appeal Case Number: B218347
ATTORNEY OR PARTY WITHOUT ATTORNEY (*Name, State Bar number, and address*): Benjamin P. Fay, SBN: 178856 Jarvis, Fay, Doporto & Gibson, LLP 475 14th Street, Suite 260 Oakland, CA 94612 TELEPHONE NO.: (510) 238-1400 FAX NO. (*Optional*): (510) 238-1404 E-MAIL ADDRESS (*Optional*): bfay@jarvisfay.com ATTORNEY FOR (*Name*): Amicus Curiae League of California Cities	Superior Court Case Number: BS 116375 *FOR COURT USE ONLY*
APPELLANT/PETITIONER: CITY OF ALHAMBRA, et al. RESPONDENT/REAL PARTY IN INTEREST: COUNTY OF LOS ANGELES, et al.	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS (*Check one*): ☑ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE	

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1. This form is being submitted on behalf of the following party (*name*): Amicus Curiae League of California Cities

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:

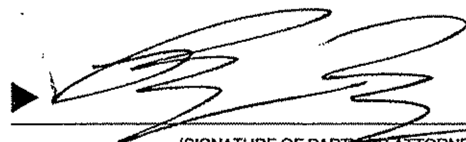
	Full name of interested entity or person	Nature of interest (*Explain*):
(1)		
(2)		
(3)		
(4)		
(5)		

☐ 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: March 22, 2010

Benjamin P. Fay
(TYPE OR PRINT NAME)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475 14th Street, Suite 260
Oakland, California 94612
Telephone: (510) 238-1400

Attorneys for *Amicus Curiae*
LEAGUE OF CALIFORNIA CITIES

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APPLICATION FOR PERMISSION TO FILE *AMICUS CURIAE* BRIEF

TO THE HONORABLE PRESIDING JUSTICE OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND DISTRICT:

The League of California Cities, pursuant to Rule 8.200, subdivision (c), of the California Rules of Court, respectfully requests permission to file the accompanying *amicus curiae* brief in support of the Appellant cities.

The League of California Cities (the "League") is an association of 474 California cities united in promoting the general welfare of cities and their residents. The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys representing all 16 divisions of the League from all parts of the state. The committee monitors appellate litigation affecting municipalities and identifies those cases, such as the matter at hand, that are of statewide significance.

The League and its member cities have a substantial interest in the outcome of this case. In this case the County of Los Angeles ("the County") advocates a method of calculating the Property Tax Administration Fee ("PTAF") that it charges to cities for assessing, collecting, and allocating their property taxes that greatly increases the amount of the fee. For the 47 cities in this lawsuit, this method of calculating the PTAF has led to an annual increase of approximately $5 million in the PTAF the County charges these cities. (Joint Appendix, vol. 1, p. 49.) It appears, moreover, that other counties are also using this method, and that they justify it in part by relying on guidelines prepared by the California State Association of County Auditors ("County Auditors' Association"). The Legislature has directed that these guidelines be put through the public review process of the Administrative Procedure Act, but that has not been done. Nevertheless, the county auditors continue to rely on these guidelines. This matter is therefore

one of great interest to the cities of California.

Furthermore, in its Respondent's brief, the County claims that the League participated in and collaborated with the preparation of the guidelines prepared by the County Auditors' Association that the County claims support its legal position. The fact is, the League did not collaborate in the preparation of these guidelines, and has never endorsed them. The League thus finds it necessary to submit this amicus brief to set the record straight.

The League believes its perspective on this matter is important for the Court to consider and will assist the Court in deciding this matter. The League's counsel has examined the briefs on file in this case and is familiar with the issues involved and the scope of their presentation.

We believe there is a need for additional briefing on this issue, and hereby request that leave be granted to allow the filing of the accompanying *amicus curiae* brief.

No party or counsel for a party in this appeal authored any part of the accompanying *amicus curiae* brief or made any monetary contribution to fund the preparation of the brief. No person or entity other than the League and its attorneys in this matter made any monetary contribution to fund the preparation of the brief.

Dated: March 22, 2010

JARVIS, FAY, DOPORTO
& GIBSON, LLP

By:
Benjamin P. Fay
Attorneys for *Amicus Curiae*
LEAGUE OF CALIFORNIA CITIES

AMICUS CURIAE BRIEF

I. INTRODUCTION

This case is a dispute between the County of Los Angeles ("the County") and 47 cities over the calculation of the Property Tax Administration Fee ("PTAF") that the County charges the cities for the assessment, collection, and allocation of property taxes collected from within those cities. The County supports its position in part by pointing to two sentences contained in an appendix to guidelines prepared by the California State Association of County Auditors ("County Auditors' Association"). To give these guidelines more credence, the County claims that the League of California Cities ("the League") participated in and collaborated with the preparation of these guidelines. This claim is completely untrue. The League did not collaborate with the County Auditors' Association in the preparation of these guidelines. Rather, the League was only provided an opportunity to comment on a draft version of those guidelines, which draft did not even contain the language upon which the County now relies.

In any event, these guidelines are not entitled to any weight, as they have not been properly adopted or subjected to public review. In order to achieve greater uniformity in the process of property tax allocation across the state, the Legislature has directed that these guidelines be subjected to the public review process of the Administrative Procedure Act ("APA"). But this public review has not occurred. Consequently, these guidelines essentially constitute "underground regulations" which are followed by the counties, notwithstanding their collective failure to subject these guidelines to the legislatively-mandated public review process of the APA.

The counties' job of assessing, collecting, and allocating property taxes is difficult and complex. This job also contains an inherent conflict of interest, because the counties themselves are recipients of these property

taxes. Indeed, according to the County's brief, counties receive on average 22% of the property taxes (as compared to the 14% received by cities). (Respondent's Brief, pp. 18, 20.) While the League appreciates the difficulty inherent in the county auditors' responsibilities, the League also believes that this inherent conflict makes it necessary for the Court to make a careful review of the auditors' decisions, especially when those decisions are based upon guidelines which have not been properly adopted in compliance with the APA.

II. ARGUMENT

A. The League of California Cities did not collaborate in the preparation of the County Auditors' guidelines, and it never endorsed them.

As is briefed at great length in the Appellants' and Respondent's briefs, this case concerns the calculation of the PTAF for cities. The issue turns on whether funds allocated to cities from the Educational Revenue Augmentation Fund ("ERAF") under two allocation procedures called the "Triple Flip" and the "VLF Backfill" should be included in the calculation of the PTAF. Several times in its Respondent's Brief, the County refers to certain guidelines, the "SB 1096 Guidelines," that were prepared by the California State Association of County Auditors. (Respondent's Brief, pp. 3, 5 (fn. 4), 22-23.) The County cites these guidelines because there are two sentences in small print at the bottom of a chart in the appendix of these guidelines that support the County's theory. (Joint Appendix, vol. 1, p. 95.) In an attempt to give these sentences credibility and to avoid the sentences appearing to be no more than self-serving statements of the county auditors, the County claims that these guidelines were prepared "with the participation of" the League (Respondent's Brief, pp. 3, 5 fn. 4) and "in collaboration with" the League (Respondent's Brief, p. 22). Such claims, however, are misleading and untrue.

The County does not cite any evidence in the record to support its claim that the League participated in or collaborated with the preparation of these guidelines. Although the County submitted several declarations in opposition to the Cities' writ petition (see, e.g., Joint Appendix, vol. 2, pp. 436-62), none of these declarations aver that the League "collaborated" or "participated" in the preparation of these guidelines. The guidelines contain a vague statement of appreciation for "the assistance" of several "organizations who lent their time and immeasurable help," which includes the League. (Joint Appendix, vol. 1, p. 59.) But this is not evidence establishing that the League actually participated in or collaborated with the preparation of these guidelines, or even saw these guidelines or this specific language before the guidelines were finalized.

In fact, the guidelines were drafted by county auditors and county tax managers. (See Joint Appendix, vol. 1, p. 58.) Given the opportunity, the League would show that the League's only involvement was that it was sent a draft of the guidelines for comment, and that this draft did not include the appendix that contains the two sentences that support the County's theory in this case. The League never saw the appendix until after the guidelines were published, and therefore the League had no opportunity to comment on these sentences. The League certainly did not "collaborate with" or "participate in" the creation of these sentences.[1]

Moreover, the League never endorsed the guidelines. Only the Board of the League could have endorsed the guidelines on behalf of the League. For that to occur, the guidelines would first have had to be considered by one

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[1]Not being a party to this action, the League has not had the opportunity to actually introduce evidence supporting these facts. However, the League recites them here to explain it indignation at the County's claims that the League collaborated with the County Auditors Association in the creation of these guidelines.

of the League's policy committees and then have been forwarded to the Board. The SB 1086 Guidelines did not go through that process, and they were never endorsed by the League.

Furthermore, the County concedes, as it must, that the actions of the League could not bind the cities to the guidelines, even if it had tried to do so. "Although Appellants all have representation on the League of Cities, Respondents do **not** contend that the League of Cities' involvement in the development of these Guidelines somehow estops Appellants from bringing their claims here." (Respondent's Brief, p. 22, fn. 12.) This concession, however, leaves us with the following question: If the County knows that even if the League had participated in the creation of these guidelines that the cities would still not be bound to follow the guidelines, why does the County repeatedly allege, without evidence, that the League participated in the creation of the guidelines? The County weakly asserts that "Respondents simply offer these Guidelines to highlight the disciplined and rational basis upon which they have proceeded." (Respondent's Brief, p. 22, fn. 12.) But this does not explain why the County keeps asserting that the League helped prepare these guidelines. The probable answer must be that the County wants to create the impression that the cities agreed to the County's theory, and then went back on their agreement. But, as we have shown, this is a baseless argument, and as the County concedes, it is a legally irrelevant argument. It should therefore be completely ignored by the Court.

B. The County Auditors' Guidelines do not have any legal status because they have not been promulgated through the Administrative Procedure Act.

The Administrative Procedure Act ("the APA") prohibits a state agency from issuing guidelines or a regulation interpreting a statute unless the agency follows the procedures of the APA. (Gov. Code § 11340.5) A guideline or regulation that is not promulgated following the procedures of

the APA is invalid. (*Morning Star Co. v. State Board of Equalization* (2006) 38 Cal.4th 324, 333.)

Generally, the APA only applies to state agencies, and therefore would not apply to guidelines prepared by a non-state agency, such as the California State Association of County Auditors. However, in 2001 the Legislature amended section 96.1 of the Revenue and Taxation Code to provide that the guidelines prepared by the County Auditors' Association for the application of the property tax allocation laws should be adopted by either the State Controller or the State Department of Finance and promulgated through the APA process. Section 96.1 of the Revenue and Taxation Code states:

> "Guidelines for legislation implementation issued and determined necessary by the State Association of County Auditors, and when adopted as regulations by either the Controller or the Department of Finance pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code [the Administrative Procedure Act], shall be considered an authoritative source deemed correct until some future clarification by legislation or court decision." (§ 96.1, subd.(c)(1).)

The legislative history of this amendment shows that its purpose was to provide more financial stability across the state by ensuring that the property tax allocation laws are uniformly interpreted and applied.[2] The Assembly Floor Analysis of the "Concurrence in Senate Amendments" explained that "this bill intends to provide a measure of financial stability for

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[2]Recent litigation regarding the allocation of property taxes indicates that unfortunately the Legislature has not achieved its goal of regularizing the application of the property tax allocation statutes. See, e.g., *Los Angeles Unified School District v. County of Los Angeles* (2010) 181 Cal.App.4th 414; *City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859; *City of Scotts Valley v. County of Santa Cruz* (A126357, app. pending); *City of Clovis v. County of Fresno* (pending in Fresno County Superior Court, Case No. 08CECG03535).

recipients of property tax distributions by: a) recognizing guidelines for allocating property tax developed by county auditors and approved by state officials; . . . ."[3] The "Enrolled Bill Memorandum to Governor" stated:

> "By providing binding statewide property tax allocation guidelines for county auditors to follow and by capping settlements for reallocations or adjustments when errors come to light, this bill helps to reduce county auditor allocation errors and increases financial stability for property tax revenue recipients."[4]

The Legislature was therefore quite clear: uniform property tax allocation guidelines are needed, and these should be prepared by the State Association of County Auditors, adopted by either the State Controller or the State Department of Finance, and promulgated through the APA. (Rev. & Tax. Code § 96.1, subd.(c)(1).) This process, however, has not been followed. The SB 1096 Guidelines that the County relies on in this case are not in the California Code of Regulations, and they have not been put through the

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[3]Assem. Committee on Local Government, Assembly Floor Analysis, Concurrence in Senate Amendments of Assem. Bill No. 169 (Wiggins) (2001-02 Reg. Sess.) as amended July 19, 2001, p. 2. The League finds itself in a difficult position with this piece of legislative history. Although it is a proper document of legislative history (see *Stewart v. Seward* (2007) 148 Cal.App.4th 1513, 1520) and could be introduced by a party with a motion for judicial notice under rule 8.252 of the Rules of Court, the League is not a party and therefore cannot bring such a motion. Furthermore, this document is not one that could be attached to a brief under rule 8.204, subdivision (d), of the Rules of Court. Therefore the League sees no appropriate way to put this document before the Court, but is prepared to submit a properly authenticated copy should the Court request it.

[4]Enrolled Bill Memorandum to Governor, Assem. Bill No. 169 (Wiggins) (2001-02 Reg. Sess.) September 12, 2001, p. 1. For use of an enrolled bill report to the governor as legislative history see *Southland Mechanical Constructors Corp. v. Nixen* (1981) 119 Cal.App.3d 417, 428; see also *Bell v. Superior Court* (1989) 215 Cal.App.3d 1103, 1109, fn. 2. See prior footnote regarding the League's predicament concerning the introduction of legislative history.

public process of the APA. Consequently, these guidelines are, in effect, "underground regulations" that were adopted without following the rulemaking procedures of the APA, and as a result are not entitled to any deference. (*Capen v. Shewry* (2007) 155 Cal.App.4th 378, 386; see Gov. Code. § 11340.5.) Nevertheless, the declarations submitted by the Office of the Auditor-Controller of the County of Los Angeles show that the County followed these guidelines when making the PTAF calculations that are at issue in this case. (Joint Appendix, v. 2, pp. 449-50, 461-62.)

III. CONCLUSION

For the forgoing reasons, the League urges the Court to closely examine the County's calculation of the PTAF and not to give any deference to the unofficial guidelines of the County Auditors' Association.

Dated: March 22, 2010

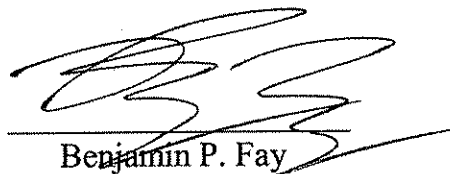
JARVIS, FAY, DOPORTO
& GIBSON, LLP

By: ____________________
Benjamin P. Fay
Attorneys for *Amicus Curiae*
LEAGUE OF CALIFORNIA CITIES

WORD COUNT CERTIFICATION

I certify that this brief contains a total of 2451 words as indicated by the word count feature of the Microsoft Word computer program used to prepare it.

Dated: March 22, 2010



Benjamin P. Fay

J:\Clients\140 [League of California Cities]\004 [City of Alhambra v. County of Los Angeles]\Plead\Amicus brief (final).doc

DECLARATION OF SERVICE

I, the undersigned, declare as follows:

I am a citizen of the United States and employed in the County of Alameda; I am over the age of eighteen years and not a party to the within entitled action; my business address is Jarvis, Fay, Doporto & Gibson, LLP, 475 - 14th Street, Suite 260, Oakland, California 94612.

On March 22, 2010, I served the within

APPLICATION OF THE LEAGUE OF CALIFORNIA CITIES TO FILE *AMICUS* BRIEF IN SUPPORT OF APPELLANTS CITY OF ALHAMBRA, ET AL.; PROPOSED BRIEF OF *AMICUS CURIAE*

on the parties in this action, by placing a true copy thereof in a sealed envelope, each envelope addressed as follows:

Scott Bertzyk Greenberg, Traurig, LLP 2450 Colorado Avenue, Suite 400E Santa Monica, CA 90404	*Attorneys for Respondents COUNTY OF LOS ANGELES, et al.*
Raymond Griffith Fortner Jr. Office of the County Counsel 648 Hall of Administration 500 West Temple Street Los Angeles, CA 90012-2713	*Attorneys for Respondents COUNTY OF LOS ANGELES, et al.*
Thomas M. Tyrrell Office of the County Counsel 500 West Temple Street Los Angeles, CA 90012-2713	*Attorneys for Respondents COUNTY OF LOS ANGELES, et al.*
Michael G. Colantuono Holly O. Whatley Colantuono & Levin, PC 300 S. Grand Avenue, 27th Floor Los Angeles, CA 90071-3137	*Attorneys for Appellants CITY OF ALHAMBRA, et al.*

Los Angeles County Superior Court 111 N. Hill Street Los Angeles, CA 90012	
Supreme Court of California 350 McAllister Street San Francisco, CA 94102	**4 copies**
Hon. Dzintra Janavs c/o ADR Services, Inc. 1900 Avenue of the Stars, Suite 250 Los Angeles, CA 90067	Courtesy copy

I caused each such envelope, with postage thereon fully prepaid, to be placed in the United States mail to be mailed by First Class mail at Oakland, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on March 22, 2010, at Oakland, California.

Jennifer Oberholzer