S245855

IN THE SUPREME COURT OF CALIFORNIA

THE KENNEDY COMMISSION, ET AL.
Petitioners,

vs.

CITY OF HUNTINGTON BEACH
AND THE CITY COUNCIL OF HUNTINGTON BEACH
Respondents.

After a Published Decision by the Court of Appeal,
Fourth Appellate District, Division Two, Case No. E065358

On Appeal from the Superior Court of California,
County of Orange Case No. 30-2015-00801675
Honorable Michael J. Stern, Judge

ANSWER TO PETITION FOR REVIEW

Michael E. Gates, City Attorney, SBN 258446
Michael J. Vigliotta, Chief Assistant City Attorney, SBN 207630
HUNTINGTON BEACH CITY ATTORNEY'S OFFICE
2000 Main Street, 4th Floor
Huntington Beach, California 92648
T: 714/536-5555
F: 714/374-1590

Attorneys for Respondents,
City of Huntington Beach and the City Council of Huntington Beach

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (continued)

Page(s)

RULES

INTRODUCTION

The Court of Appeal in this case correctly applied unambiguous State law to a City of Huntington Beach 2015 zoning amendment that was consistent with legal precedent. State law clearly exempts Charter Cities from the requirement that a Specific Plan be consistent with a General Plan. This zoning question on this issue before the Court of Appeal was not novel, and there is no split in authorities or inconsistent decisions among the Courts of Appeal about the treatment of the State's zoning law on Charter Cities like Huntington Beach. Indeed, absent a change in the State law, the reversal the Kennedy Commission requests would violate State law.

In its instant Petition for Review, the Kennedy Commission improperly seeks to capture this Supreme Court's attention by claiming that the underlying case and the subsequent Appeal will somehow unravel California's *affordable housing* scheme, thereby adversely affecting so many in need of low-income housing. This is a ruse and completely not true. [1]

To be clear, the Kennedy Commission seeks Supreme Court reversal ***on a fabricated affordable housing concern that was never an aspect of the Court of Appeal decision in this case***. The City ***has never argued to any court*** that it is exempt from Housing Element Law because it is a Charter City – never.[2]

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[1] Assuming for the moment that the Kennedy Commission now has an affordable housing grievance with the City of Huntington Beach, the Kennedy Commission is at liberty to file that lawsuit. State law provides that remedy if a city fails to meet its State affordable housing mandates. To date, the Kennedy Commission has not filed such a lawsuit.

[2] Although not germane, the City of Huntington Beach (like every other city in the State) is constantly working to meet its lower-income affordable housing needs. While the City has always been diligent, the pace at which the City is making progress to satisfy its affordable housing has been

A plain read of the Court of Appeal decision (and underlying record) in this case demonstrates that the Appeal decided a very narrow local control issue, i.e., the application of the "consistency doctrine" to Charter Cities," [3] and nothing more. And because the Court of Appeal has already arrived at the correct conclusion, and there is no split in the authorities on this issue, review here by the Supreme Court is unnecessary.

Briefly for context, the City Council's 2015 amendment to a City Specific Plan (which is the underlying basis for this controversy), concerned a certain, small geographic area of the City.[4] This Specific Plan was designed as an incentive to redevelop a blighted area along the thoroughfare of Beach Blvd. This particular Specific Plan will be referred to as the Beach Edinger Corridors Specific Plan ("BECSP"), *infra*, when discussed in greater detail.

This Specific Plan was created by the City to provide for a "streamlined" process making it easier for permitting and approval for future commercial and residential development projects within the Specific Plan's geographic boundaries. It was designed to save developers (including affordable housing developers) time and money by condensing the typical timetable for obtaining permits, and obviating the need for certain discretionary approvals by the City Council, which normally takes place on a project-by-project basis and could take months for approval.

Any developer seeking to develop, either inside or outside the Specific Plan area, ***has always been able to develop a proposed project by conducting necessary environmental impact reviews, obtaining permits,***

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stymied by the Kennedy Commission litigation.

[3] This "consistency doctrine" and its Government Code authorities will be discussed in much greater detail, *infra*.

[4] The City of Huntington Beach spans 26 square miles, this Specific Plan, known as the Beach Edinger Corridors Specific Plan ("BECSP"), is only a small portion of the City's 26 square mile geography.

and appealing to City Council for discretionary approvals, or, using other State laws[5] to bypass the City's normal zoning approval process. The City's 2015 amendments to the Specific Plan at issue did not change that fact. This is a very important point and the reason the City characterizes the Kennedy Commission's instant claims as a "ruse."

Although not germane to any of the legal issues presented to the Court of Appeal, the Kennedy Commission improperly argues that because the City made zoning amendments to its Specific Plan in 2015, housing, and in particular affordable housing, has been "shut down" in the entire City. This is absolutely false. In fact, the development affordable housing or other housing development within the Specific Plan after the City made its 2015 Specific Plan amendments remains as available as ever.

As an example, if the Kennedy Commission were to submit an affordable housing project to the City today, that affordable housing project could be approved and built within the Specific Plan with a similar condensed timeframe and with the similar limited cost utilizing California's Density Bonus Laws. Any claim that affordable housing development is "shut down" by the City through its 2015 Specific Plan amendments, and therefore depriving low-income residents of homes, is completely disingenuous and categorically false.[6]

Turning to another key point, the Kennedy Commission's Petition for Review seeks a *judicial remedy* to a *legislative matter*.[7] That is to say,

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[5] As an example, California State Density Bonus laws allow and encourage developers of affordable housing to develop anywhere in the State.

[6] In fact, the City of Huntington Beach Planning Commission recently approved a residential housing project providing affordable housing utilizing the California Density Bonus law, which essentially guarantees approval. More and more affordable housing is being built in the City, in spite of the claims made by the Kennedy Commission to the contrary.

[7] The Kennedy Commission argued to the Court of Appeal that the

the Kennedy Commission is ultimately requesting this Supreme Court upend years of well-settled law and necessarily impose a Government Code mandate[8] on Charter Cities *that have always been specifically exempted from such mandate in the Government Code, as explained by controlling case law*.

While there are certain Government Code sections concerning Planning and Land Use (California Government Code Title 7) that expressly *apply* to Charter Cities (for example, a Charter City must have a housing element), there are a number of Government Code sections (including the ones at issue in this case) that have been specifically carved out by the California Legislature as ***not** applicable* to Charter Cities. The legislative intent regarding the selective application of Title 7 to Charter Cities is clear to preserve local control over certain planning and land use decisions and procedures.

As will be discussed *infra,* the State Legislature and California Courts consistently recognize the principle that State law cannot frustrate, hinder, or disregard certain local zoning decisions. One such example is that a Charter City is not required to assure that a Specific Plan is consistent with its General Plan ("consistency doctrine"). (Government Code sections 65454 and 65860.) The exemption in State Law from the "consistency doctrine" does not depend on "why" a Specific Plan or Zoning Code are inconsistent with the General Plan. (Government Code Sections 65454 and 65860). The law simply provides that Charter Cities are categorically exempt – period.

"consistency doctrine" *does* or *should* apply to Charter Cities; but, this would require a substantial change to the plain language of the California Government Code.

[8] Regarding the "consistency doctrine."

The Court of Appeal in this case recognized this principle and applied well-settled case law, and decided in favor of the City of Huntington Beach. Because the law is settled, on this issue, the recourse available to the Kennedy Commission a *legislative "fix,"* i.e., to take its concern to Sacramento to effect a *change in the law*; not to ask the courts, like this Supreme Court, to misapply the law, disregard the law, or make a legislative change by judicial fiat.

For all these reasons, the City respectfully requests that this Supreme Court deny the Kennedy Commission's Petition for Review.

STATEMENT OF THE CASE

The Court of Appeal decision focused on one issue: does a Charter City have to comply with the "consistency doctrine" set forth in California State Planning and Zoning Law? The Courts of Appeal have consistently answered this question, "no." (See leading cases *Garat v. City of Riverside* (1991) 2 Cal.App.4th 259 and *Verdugo Woodlands Homeowner Assn. and Residents v. City of Glendale* (1986) 179 Cal.App.3d. 696, holding simply that Charter Cities are not required to follow the "consistency doctrine").

The plain language of the Government Code exempts Charter Cities from the requirement that a Specific Plan must be consistent with a General Plan. The exemptions from the "consistency doctrine" provided to Charter Cities in Sections 65454 and 65860 of the Government Code are not available depending on a certain zoning scheme or context, the law simply provides that Charter Cities are categorically exempt from the application of the "consistency doctrine" – period. The Kennedy Commission simply does not like the law.

California Law requires all General Law and Charter Cities in California adopt a General Plan, which is a city's land use planning document. A General Plan contains seven mandatory elements. A Housing

Element is one of those seven elements that Charter Cities must adopt. Housing Elements exist, and are required as a matter of State law, to advance certain local policies. On these points, there is no dispute.

The City of Huntington Beach prepared the Housing Element as part of its General Plan for the 2013–2021 planning period. The City Council adopted the Housing Element in September 2013, and the California Department of Housing and Community Development ("HCD") certified the Housing Element in November 2013.

During this time period, the City also created a Specific Plan known as the Beach Edinger Corridors Specific Plan ("BECSP"). The BECSP allowed for "streamlined," reduced zoning regulations and in many cases non-discretionary approval of development projects. Shortly after adopting the BECSP, excessive, rapid overdevelopment took place within the BECSP area. This rapid overdevelopment led to resident and City Council concerns about the number of new, high density projects, loss of scenic views, increased traffic congestion, insufficient parking at the developed sites, pedestrian safety in the areas immediately around the developed sites, insufficient building setbacks, loss of neighborhood character, etc., occurring within the BECSP. In response, in 2015, the City Council began to re-examine the BECSP zoning specifications.

In February 2015, the City Council conducted numerous public meetings to consider options to amend the BECSP to address the health, safety, and welfare concerns in the subject area. These considerations were made in accordance with the City's goals of revitalizing the aging BECSP corridor and providing housing.

In July 2015, the City informed the Kennedy Commission of the proposed BECSP amendments that had developed. After careful consideration and numerous public meetings, the City introduced proposed zoning amendments to the BECSP. The Kennedy Commission submitted

comments to the City on the proposed amendments. HCD also submitted comments to the City on the proposed amendments.

After extensive study and discussion by the Planning Commission and City Council, the City Council amended the BECSP on May 4, 2015, by implementing the proposed zoning text amendments ("May 2015 BECSP Amendment"). The May 2015 BECSP Amendment modified, *inter alia*, the amount of development in the BECSP and standards for building height, building and development setbacks, the amount of parking provided for by the developments, development standards for auto dealers, and assembly use restrictions in commercial spaces, among other amendments.

In conjunction with amending the BECSP, the City began the process to amend its Housing Element to rectify any loss in housing sites the May 2015 BECSP Amendment could create.[9] Rather than waiting for the City to complete the amendments to its Housing Element, on July 31, 2015, the Kennedy Commission quickly filed suit against the City, challenging the May 2015 BECSP Amendment through the six Causes of Action. Of note here, the First Cause of Action was for a Writ of Mandate under Code of Civil Procedure Section 1085 for Failure to Act Consistently with the Housing Element (California Government Code §§ 65454, 65580, 65583, 65587, 65860). These California statutes that the Kennedy Commission chose to file suit under are *significant*. The Superior Court exclusively relied upon Sections 65454 and 65860 to issue its (errant) ruling. As explained in the Court of Appeal decision, neither of these Sections apply to Charter Cities like Huntington Beach.

On January 20, 2016, the Superior Court erroneously entered a Judgment and Writ of Mandate in favor of the Kennedy Commission. The

[9] City staff was unsure what Amendments to the BECSP would ultimately be approved. It could not amend its Housing Element until the May 2015 BECSP Amendment was adopted.

Judgment stated that the Court has determined that the May 2015 BECSP Amendment "is void *ab initio* and the underlying 2013 Housing Element remains in substantial compliance with State law." The Writ of Mandate commanded the City: "to cease enforcing, administering or implementing the BECSP Amendment."

The Fourth District Court of Appeal issued a published decision reversing that Superior Court ruling essentially stating that ***the Superior Court's reliance on Government Code § 65454 was in error because Huntington Beach is a Charter City***. (*Kennedy Commission v. City of Huntington Beach*).[10] Subsequent to the Court of Appeal's final decision, the Kennedy Commission sought rehearing by the Court of Appeal and was denied. On December 18, 2017, the Kennedy Commission served its Petition for Supreme Court Review on the City.

LEGAL ARGUMENT

California Rule of Court 8.500(b) specifies several situations where the Supreme Court may order review of a Court of Appeal decision. None apply here. The question before the Court of Appeal was whether the State's "consistency doctrine" applies to the City's adoption and implementation of the May 2015 BECSP Amendment. The law is settled that the answer is "no," i.e., Charter Cities are not subject to the "consistency" requirement that a Specific Plan necessarily must be consistent with a General Plan.

This Supreme Court's guidance is not necessary in this case because there is no lack of uniformity of decisions among the Courts of Appeal, to wit, there are no splits among authorities. (Cal Rules of Ct 8.500(b)(1).) The Court of Appeal in his case simply applied the previous line of

[10] The Court of Appeal's opinion was final on November 30, 2017. Citations to the opinion are denoted as "Slip. Op."

controlling cases: *Verdugo Woodlands Homeowner Assn. and Residents v. City of Glendale* (1986) 179 Cal.App.3d. 696, and *Garat v. City of Riverside* (1991) 2 Cal.App.4th 259 holding that a Charter City's Specific Plan (and Zoning) do not have to be consistent with the provisions of the Charter City's General Plan. (*Garat v. City of Riverside* (1991) 2 Cal.App.4th 259, 280 (1991), disapproved for unrelated reasons by *Morehart v. City of Santa Barbara* (1994) 7 Cal.4th 725.)

There is no important or controverted question of law of general applicability presented to this Supreme Court, whether affirming or reversing.

Finally, the Court of Appeal decision in this case is sound and well-reasoned, such that review is not required. Accordingly, this Supreme Court should deny review.

A. Charter Cities Have Constitutionally Protected Autonomy And Control As It Relates To Regulating "Municipal Affairs" – Local Zoning Is Counted Among The Many "Municipal Affairs"

Article XI, Section 5, subdivision (a) of the California Constitution reads:

> "It shall be competent in any city charter to provide that the city governed thereunder may make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws."

Charter cities like Huntington Beach enjoy constitutional freedom to govern "municipal affairs." ***Land use and zoning decisions have been consistently have been treated as a municipal affairs*** and as such, ***charter cities are exempt from various provisions of the California Government Code, Planning and Zoning Law unless the city's charter or Municipal/Zoning Code indicates otherwise***. (*City of Irvine v. Irvine*

Citizens Against Overdevelopment, (1994) 25 Cal.App.4th 868, 874.) Zoning and Planning laws leave it largely to each locality to balance competing values of flexibility and stability in the planning process. (*DeVita v. Cty. of Napa* (1995) 9 Cal.4th 763.)

As the Court of Appeal correctly concluded, the City of Huntington Beach Charter provides "home rule" authority with regard to zoning and land use issues. Article XI, section 3(a) of the California Constitution authorizes the adoption of a city charter and provides such a charter has the force and effect of state law. Article XI, section 5(a), the home rule provision, affirmatively grants to charter cities supremacy over municipal affairs.

Likewise, the Court of Appeal concluded that the City of Huntington Beach did not adopt the "consistency doctrine" by implication in its Zoning Code. Citing to *Verdugo infra*, the Court of Appeal held that the exemption [from the "consistency doctrine"] in section 65803 must be strictly construed. ***"[I]n the face of clear statutory language exempting charter cities from 'the provisions of this chapter' ['Zoning Regulations'], we cannot say that by implication, the state law concerning consistency may be imposed on City or may be deemed to have been adopted by City when it adopted the state-mandated general plan***. Plaintiffs' argument, therefore, must fail in this court." (*Verdugo*, at p. 704.) (Slip. Op. 24-25)

B. California Government Code Sections 65454 And 65860 ("Consistency Doctrine") Do Not Apply To Charter Cities

The application of the "consistency doctrine" is treated differently by the State Law to General Law cities versus Charter Cities.

Inapposite to this case, generally, zoning and land use decisions of **non-chartered**, *General Law*, cities must be consistent with a city's General Plan, (the "consistency doctrine.") (Govt. Code, §§ 65454, 65860; see also specifically a "General Law" city case, *Lesher Communication v.*

City of Walnut Creek (1990) 52 Cal.3d 531, (which the Superior Court in this case erroneously[11] relied upon;) see also *Garat, supra*, 2 Cal.App.4th at p.304, fn. 34 ["*Lesher* concerned a situation in which the validity of a zoning ordinance was challenged on the ground that the ordinance was void *ab initio* because it conflicted at the time of its adoption with a general law city's General Plan"] [italics in original; underlining added].)

The Kennedy Commission once again attempts to mislead this Supreme Court by insisting on a misapplication of the *Lesher* case to the City of Huntington Beach. (Slip Op. p. 22-23) The application of the *Lesher* case to Huntington Beach, a Charter City, is erroneous and leads to the wrong conclusion. This error was corrected by the Court of Appeal decision (to reverse the Superior Court decision).

Section 65454 is contained in Title 7 (Planning and Land Use), Chapter 3 (Local Planning) of the Government Code. Chapter 3 includes Government Code Section 65700, subdivision (a), which specifically provides in pertinent part that: "The provisions of this chapter [Chapter 3] shall not apply to a charter city, except to the extent that the same may be adopted by charter or ordinance of the city." (Govt. Code § 65700 [underlining added].)

Likewise, Section 65860 is contained in Title 7 (Planning and Land Use), Chapter 4 (Zoning Regulations) of the Government Code. Chapter 4 includes Government Code Section 65803, which specifically provides that: "Except as otherwise provided,[12] this chapter [Chapter 4] shall not

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[11] "Erroneously" because *Lesher* involved a General Law city, while in this case, Huntington Beach is a Charter City.

[12] There is an exception to the exemption for Charter Cities as follows, which does ***not apply*** to Huntington Beach: "Notwithstanding Section 65803, this Section shall apply in a charter city of 2,000,000 or more population…" (Govt. Code § 65860, subd. (d).) The City's population is fewer than 200,000.

apply to a charter city, except to the extent that the same may be adopted by charter or ordinance of the city." (Govt. Code § 65803 [underlining added].) The City of Huntington Beach Charter does not require a Specific Plan be consistent with the General Plan. As a Charter City, Huntington Beach is not bound by these State statutes to meet, satisfy, or follow this "consistency doctrine."

Most importantly, all of the courts (including the Court of Appeal in this case) addressing this issue have come to the same conclusion. For instance, in *Verdugo Woodlands Homeowners Association and Residents Association v. City of Glendale* (1986) 179 Cal.App.3d 696, the Court of Appeal addressed the issue of whether a city's zoning must be consistent with the city's General Plan as applied to a Charter City. Distinguishing Charter Cities from General Law Cities, the Court of Appeal held that Government Code Section 65803 exempts Charter Cities from the provisions of the State zoning law. (*Id*., at p. 703.) "[S]tate zoning regulations do *not* apply to any of the charter cities in the state *except* Los Angeles." (*Id*.)

The analysis applied by the Court of Appeal to the City of Riverside in the *Garat* case is the same analysis that was applied by the Court of Appeal to Huntington Beach in this case. The "consistency doctrine" does not apply to Charter Cities (unless said Charter City expressly elects to relinquish that local control by adopting the State's law through codification of the same in its Charter or Ordinances). This is not new law, the Court of Appeal decision in this case merely reaffirms and follows *Garat* and *Verdugo*.

CONCLUSION

Based upon the foregoing facts and authorities, this Supreme Court should deny the Kennedy Commission's request for Supreme Court review.

Without a change in the State law, which would require a legislative action by California's State Legislature, there is nothing this Supreme Court may do to reverse the Court of Appeal decision in this case. What the Kennedy Commission is really seeking is a legislative change. More importantly, there is no split in authorities or differences among Courts of Appeal on the zoning question at issue, so there is nothing for the Supreme Court to resolve. This zoning issue involving the "consistency doctrine" application to Charter Cities was put to rest long ago, and this Court of Appeal decision followed well-settled, long-standing law in rendering its decision in this case.

DATED: December 26, 2017

Respectfully submitted,

OFFICE OF THE CITY ATTORNEY
Michael E. Gates, City Attorney

By: ___/s/_____
MICHAEL E. GATES, City Attorney
Attorney for Respondents
CITY OF HUNTINGTON BEACH
and THE CITY COUNCIL OF
HUNTINGTON BEACH

CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.504(d), I certify that this Answer to Petition for Review is proportionately spaced and has a typeface of 13 points or more. Excluding the caption page, tables of contents and authorities, signature block, and this certificate, it contains 3290 words.

DATED: December 26, 2017 /s/
MICHAEL E. GATES

PROOF OF SERVICE

The Kennedy Commission v. City of Huntington Beach, et al.
Supreme Court Case No. S245855
Court of Appeal, Fourth Appellate District, Division Two, Case No. E065358, Orange County Superior Court Case No. 30-2015-00801675

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is 2000 Main Street, Huntington Beach, CA 92648.

On December 26, 2017, I electronically filed the foregoing **ANSWER TO PETITION FOR REVIEW** with the Clerk of the Supreme Court by using the TrueFiling system and electronically served the following parties via TrueFiling:

SEE SERVICE LIST

AND BY OVERNIGHT MAIL – UPS to the addresses below:

Supreme Court of California
350 McAllister Street
San Francisco, CA 94102-4797

Court of Appeal of the State of California, Fourth Appellate District
Division Two
3389 Twelfth Street
Riverside, CA 92501

Superior Court Clerk
Orange County
700 Civic Center Drive West
Santa Ana, CA 92702

Superior Court Clerk
Los Angeles County
111 N. Hill Street
Los Angeles, CA 90012

Office of the Attorney General
1300 "I" Street
Sacramento, CA 95814

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

Executed on December 26, 2017, in Huntington Beach, California.

/s/
Thuy Vi

SERVICE LIST

Roman Ernest Darmer
Walter C. Waidelich
Jones Day
3161 Michelson Drive, Suite 800
Irvine, CA 92612

Craig D. Castellanet
Public Interest Law Project
449 Fifteenth Street, Suite 301
Oakland, CA 94612-2038

Sarah J. Gregory
Legal Aid Society of Orange County
2101 N. Tustin Avenue
Santa Ana, CA 92702

Ugochi Anaebere-Nicholson
Public Law Center
601 W. Civic Center Drive
Santa Ana, CA 92701