No. E078106

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT DIVISION TWO

NORTHGATE GONZALEZ, LLC, WILSON HOLDINGS, L.P. and LOS ALTOS XXVII, L.P.,

Plaintiffs and Respondents

v.

REALM REAL ESTATE, LLC and MAGNOLIA PARTNERSHIP, LLC,

Defendant and Appellant

APPEAL FROM THE SUPERIOR COURT OF RIVERSIDE COUNTY HON. CHAD FIRETAG · NO. CVRI2104149

CALIFORNIA RENTER'S LEGAL ADVOCACY AND EDUCATION FUND AND YIMBY LAW'S APPLICATION FOR PERMISSION TO FILE AND AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANTS

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APPLICATION FOR LEAVE TO FILE

The California Renters Legal Advocacy and Education Fund ("CaRLA") and YIMBY Law (collectively, "Applicants") request permission to file their amicus curiae brief, combined below, in support of Appellants Realm Real Estate, LLC and Magnolia Partnership, LLC. (See Cal. Rules of Court, rule 8.200(c)(1), (4).) CaRLA represents the interests of California's renters by holding local governments accountable for their obligations to promote the production of housing. YIMBY Law's purpose is to make housing in California more accessible and affordable. Both Applicants have an interest in alleviating the State's housing shortage by advocating against barriers to housing growth, particularly in cases that may have significant statewide impacts on housing production. As Applicants will show below, this case threatens such an impact. (See *id.*, rule 8.200(c)(2).)

Applicants' brief was drafted by Dylan Casey, legal counsel for CaRLA, and Keith Diggs, legal counsel for YIMBY Law. Both Applicants are 501(c)(3) nonprofits. No party or counsel for a party in the pending case authored the proposed amicus curiae

brief in whole or in part, directly or indirectly, or made any monetary contribution to fund its preparation. (See Cal. Rules of Court, rule 8.200(c)(3).)

Applicants' brief will assist the Court by showing that housing, and multifamily infill housing in particular, is a matter of vital statewide importance that the Legislature recognizes as such and that merits consideration in balancing the harms of a preliminary injunction. Applicants' brief will also cite caselaw affirming that nonexclusive easements, such as the one at issue here, are not to be interpreted as use restrictions. Applicants hope that their brief will guide the Court away from setting a dangerous precedent that would undercut much of the Legislature's recent work in removing legal barriers to housing development. (See *id.*, rule 8.200(c)(2).) Applicants therefore request their application be granted.

Dated: October 10, 2022 Respectfully submitted,



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PROPOSED AMICUS CURIAE BRIEF

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AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANTS

If affirmed, the trial court's decision in this case will cost 450 families their would-be homes. It will also set a dangerous precedent on easement law that could impede the construction of thousands more similarly situated developments throughout California. Applicants urge the Court to REVERSE the decision below.

This brief will first show that high-density infill housing, such as the Appellants' proposal here, is a legal "priority of the highest order" and that an injunction against infill housing harms the public interest. Second, we emphasize that Respondents' easement is *nonexclusive*, and that the trial court's misapplication of easement law, if ratified here, would weaponize all similar easements as a significant barrier to infill housing throughout the State.

A. State Law Prioritizes High-Density Infill Housing, and the Injunction Granted Below Harms this Public Interest.

"The state faces a serious housing crisis, due . . . to decades

of underproduction of housing of all types . . . . A key factor in addressing this crisis is to significantly increase housing production in all cities and counties across the state." (Gov't Code § 65584.08(a)(1).) Developments like Magnolia Flats are exactly the kind of development that can help solve the state's housing crisis, and the Legislature has made such development "a priority of the highest order." (*Id.* § 65580(a).) But the decision below ignores the harm that its preliminary injunction imposes on this vital public interest.

1. The Legislature has made promoting developments like Magnolia Flats a statewide priority.

State law prioritizes housing production across the board. (*E.g.*, Health & Saf. Code § 50001 ["[H]ousing is of vital statewide importance."]; Gov't Code § 54220(a) [same]; *id.* § 65580(a) [same]; *id.* § 65589.4(g) [same]; *id.* § 65589.5(a)(2)(K)–(L) [Legislature's intent "in 1982 and [ever] since [has been] to significantly increase the approval and construction of new housing for all economic segments," and State policy "afford[s] the fullest possible weight to the interest of . . . housing"]; *id.*

§ 65589.7(f) ["[T]he lack of affordable housing is a matter of vital statewide importance."].) California courts have followed suit, agreeing that housing is a "matter of statewide concern" and preempting charter cities' home-rule authority where it conflicts with this statewide priority. (See *CaRLA v. City of San Mateo* (2021) 68 Cal.App.5th 820, 846–51 [Housing Accountability Act]; *Anderson v. City of San Jose* (2019) 42 Cal.App.5th 683, 698–718 [Surplus Land Act].)

The Legislature began prioritizing housing as early as 1980 (Stats. 1980 ch. 1143 § 3), and has not relented in making it legal for available sites such as Magnolia Flats to contribute to housing growth. Crucially, Magnolia Flats' 450 entitled units are being counted towards Riverside's State-mandated need allocation for the current planning cycle. (See City of Riverside Housing Element, PDF p.161; see also Cal. Dep't Hous. & Cmty. Dev., Housing Element Review & Compliance Report [indicating recent certification of Riverside's housing element].) Failing to realize these 450 new homes would set back the city's progress towards

reaching its housing goals for the next eight years.

Moreover, the Legislature views infill housing *specifically* as an indispensable part of the housing solution for California. Recent enactments have made it legal to repurpose single-family properties for accessory dwelling units, duplexes, and lot splits. (Gov't Code §§ 65852.2, 65852.21.) Recognizing that infill housing in nearly always environmentally sustainable, the state provides an exemption from the California Environmental Quality Act for infill housing development. (Cal. Pub. Res. Code § 21159.24; 14 Cal. Code Regs. § 15195.) Other state laws provide increased density (Gov't Code §§ 65915 *et seq.*) or streamlined approval (*id.* § 65913.4) for multifamily and affordable housing developments. As part of each local government's housing planning responsibilities, cities and counties are tasked with "[p]romoting infill development and socioeconomic equity." (Gov't Code, § 65584.)

Looking forward, commercial properties such as Magnolia Flats will play an even greater role. The Legislature has now

singled out commercial sites' potential for housing. The Affordable Housing and High Road Jobs Act of 2022 legalizes multifamily development on commercially zoned properties throughout the state. (Assem. Bill No. 2011 (2021–2022 Reg. Sess.).) This law overrides local development standards to allow for streamlined, ministerial approval of multifamily housing development on sites "where office, retail, or parking are principally permitted use." (*Ibid.*)

As just shown, Magnolia Flats proposes exactly the kind of multifamily infill housing that the Legislature has made a "priority of the highest order." (Gov't Code § 65580(a).) As the trial court recognized, "the City [of Riverside] approved this project." (Order on the Plaintiff's Motion for Preliminary Injunction (Oct. 20, 2021) at p. 5.) and an underhoused public needs it. The next section will show that the trial court failed to consider this public interest in balancing the harms of its preliminary injunction.

2. The trial court ignored the public interest in housing development when it granted the injunction below.

The trial court's "balance of harms" gives too-short shrift to the fact that its injunction will "stall additional housing within the City." (Order on the Plaintiff's Motion for Preliminary Injunction (Oct. 20, 2021) at p. 7.) The injunction has now stalled that housing for a year. This Court has previously held that the balance of harms analysis "requires consideration of . . . the degree of adverse effect on the public interest or interests of third parties the granting of the injunction will cause." (*Vo v. City of Garden Grove* (2004) 115 Cal.App.4th 425, 435.) As demonstrated in the previous section, infill housing such as the Appellant proposes to build is recognized by the Legislature as a matter of "vital statewide importance," and *four hundred and fifty families* stand to benefit from the housing stock Appellants' project will add. This harm imposed by enjoining such projects is not at all abstract for millions of underhoused and cost-burdened Californians. Surely, one strip-mall owner's ingress and egress rights can be maintained without a broad injunction against 450

families' would-be homes.

Infill housing development is emphasized in statewide policymaking for a number of important reasons. First, infill housing can increase the overall housing supply, and diversity the types of housing available in already-developed areas. Diversity and abundance of housing contributes to neighborhood stability, and provides increased access to high-resource areas for families at all income levels. (Arnab Chakraborty and Andrew McMillan, *Is Housing Diversity Good for Community Stability? Evidence from the Housing Crisis*, Journal of Planning Education and Research, 42(2), 150–161; Daniel Shoag, *Removing Barriers to Accessing High Productivity Places*, Brookings Institution (January 2019).) Second, infill housing is the only way to increase housing availability in areas close to job centers. Locating new housing close to jobs reduces length and necessity of long auto-dependent commutes, along with the associated greenhouse gas emissions and other air pollution. (Marlon G. Boarnet, Hsin-Ping Hsu, Susan Handy, *Impact of Jobs-Housing Balance on*

Passenger Vehicle Use and Greenhouse Gas Emissions,

(September 2014).) Lastly, allowing for infill development in and around single-family neighborhoods can help to break down historic patterns of segregation. (Myron Orfield, *Land use and Housing Policies to Reduce Concentrated Poverty and Racial Segregation*, 33 Fordham Urb. L.J. 877 (2006).)

Multifamily infill housing such as Magnolia Flats promotes all of these equity, environmental, and economic concerns, and the public has (and the Legislature has expressed) a clear interest in seeing such projects develop. This cannot happen when projects are stymied by injunctions such as the one that issued below.

We urge the Court to advance the public interest by reversing the preliminary injunction. As the next part will show, the injunction does violence to California easement law as well.

B. The Trial Court's Decision Wrongly Transforms a Nonexclusive Easement into a Use Restriction, and Threatens to Weaponize Other Nonexclusive Easements Against New Housing Throughout the State.

Neither the court below nor the parties appear to have

stressed the fact that the easement at issue is "nonexclusive." (See Order on the Plaintiff's Motion for Preliminary Injunction (Oct. 20, 2021) at p. 5; FPA ¶ 1.) But this is an important distinction in California's easement law. "[E]xclusive easements are generally not favored by the courts" because they "effect[ively] strip[] the servient estate owner of the right to use the land for certain purposes." (*Romero v. Shih* (2022) 78 Cal.App.5th 326, 349.) This is why "[t]he general rule is clearly established that *despite the granting of an easement*, the owner of the servient tenement may make *any use of the land that does not interfere unreasonably* with the easement." (*Id.*, p.348 [italics added]; accord, *e.g.*, *City of Pasadena v. Cal.–Mich. Land & Water Co.* (1941) 17 Cal.2d 576, 579, 581 [holding that a nonexclusive water-pipe easement does not preclude a competitor's water pipes within the easement]; *Scruby v. Vintage Grapevine, Inc.* (1995) 37 Cal.App.4th 697, 702–03, 706 [holding that a nonexclusive ingress/egress easement does not preclude grapevines and water tanks within the easement].)

Romero is a good example of easement justice being done. In 1985, the common owner of two neighboring properties initiated, but failed to perfect, a lot-line adjustment to accommodate a driveway on the eastern lot. The "certificate of compliance was never executed," and the "lot-line adjustment was [n]ever recorded." (78 Cal.App.5th, p.332.) But the driveway was built, decades passed, property changed hands, and in 2014 both lots were bought by new owners who all believed that the driveway belonged to the eastern lot. Only later did the new owners learn that the driveway was legally on the western lot, and the western lot's owners became litigious. (See *id.*, pp.334–44.) The *Romero* court went out of its way to reverse the grant of an exclusive implied easement, exclusive easements being strongly disfavored, even as the court affirmed an equitable easement in favor of the eastern lot's innocent owners. (See *id.* pp.347–61.)

We cite *Romero* not because its facts are analogous, but because it states easement law well. (See *ibid.*) Easement cases

like *Romero*, *Pasadena*, and *Scruby* recognize that the real world is messy and always changing, and do not support the trial court's rigid approach below. (See Order on the Plaintiff's Motion for Preliminary Injunction (Oct. 20, 2021), pp.4–7.) As this Court itself recently stated: "[E]ach [easement] case[] is unique in some respects. Nevertheless, we discern a theme that runs through them: You can't stand in the way of progress." *(Riverside Cnty. Transp. Comm'n v. S. Cal. Gas Co*. (2020) 54 Cal.App.5th 823, 829.)

Applicants here agree that the FPA at issue was granted to create ingress/egress rights and "*not* to restrict uses." (Aplts.' Br., p.32.) We won't duplicate Appellants' analysis. What we fear, and urge the Court to reject, is a dangerous precedent that will transform similar nonexclusive easements throughout California into yet another weapon for neighboring property owners to deploy against the missing homes that underhoused Californians need.

Property restrictions are already a common obstacle to the

development of housing. For example, residential subdivision properties are often restricted by declarations of covenants, conditions and restrictions (CC&Rs). As subdivisions age, these restrictions can impede housing growth by prohibiting infill housing options such as accessory dwellings of duplexes.

The Legislature has recognized this issue as widespread and significant enough to warrant intervention. Assembly Bill 670, enacted in 2020, prohibits the enforcement of CC&Rs that unreasonably restrict or effectively prohibit an accessory dwelling on a property. (Civ. Code § 4751.) Similarly, State law allows affordable housing developers to invalidate property restrictions that limit "the number, size, or location of the residences that may be built on the property . . . ." (Civ. Code § 714.6(a).)

If California is to achieve its goals of creating millions of new homes over the next decade, many future developments will face a similar challenge to the one at issue here. A vague property restriction should not stand in the way of the Magnolia Flats development, just as other restrictions should not add to the many

barriers to meeting California's housing needs.

CONCLUSION

CaRLA and YIMBY Law appreciate the opportunity to provide this perspective to the Court. Applicants hope the Court will consider the potential effects of this decision on the production of housing in California, and REVERSE the decision below so as to avoid the resultant inequities.

Dated: October 10, 2022 Respectfully submitted,

By: 
Dylan Casey

By: 
Keith Diggs

Counsel for Amici Curiae

CERTIFICATE OF WORD COUNT

[Cal. Rules of Court, Rule 8.204(c)]

Pursuant to Rule 8.204(c) of the California Rules of Court, I hereby certify that this **[PROPOSED] AMICUS CURIAE BRIEF** contains 3214 words, according to the word counting function of the word processing software used to prepare this brief.

Executed on October 10, 2022, at Hacienda Heights, California.



Dylan Casey

Northgate Gonzalez, LLC et al. v. Realm Real Estate, LLC et al., Court of Appeal, Fourth Appellate District, Division 2, Case No. **E078106**

PROOF OF SERVICE

I am a resident of the United States, employed in the City of Oakland, County of Alameda. My business address is 360 Grand Avenue, #323, Oakland, CA 94610. I am over the age of 18 years and not a party to the above-entitled action.

On October 10, 2022, a true copy of the CALIFORNIA RENTER'S LEGAL ADVOCACY AND EDUCATION FUND AND YIMBY LAW'S APPLICATION FOR PERMISSION TO FILE AND AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANTS, was electronically filed with the Court of Appeal, Fourth Appellate District, Division 2, through TrueFiling.com.

Notice of this filing will be served to those below via TrueFiling.

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I declare under penalty of perjury that the foregoing is true and correct and that this Proof of Service was executed this 10th day of October 2022, at Hacienda Heights, CA.



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