Case No.: S194708

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

SIERRA CLUB,

Petitioner,

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA, COUNTY OF ORANGE,

Respondent.

COUNTY OF ORANGE,

Real Party in Interest.

AFTER A DECISION BY THE COURT OF APPEAL,
FOURTH APPELLATE DISTRICT, DIVISION THREE, CASE NO. G044138
(195 CAL.APP.4TH 1537, 125 CAL.RPTR.3D 913)
SUPERIOR COURT FOR THE COUNTY OF ORANGE
HONORABLE JAMES J. DI CESARE
ORANGE COUNTY SUPERIOR COURT CASE NO. 30-2009-00121878

APPLICATION TO FILE AMICUS CURIAE BRIEF AND [PROPOSED] BRIEF OF CALIFORNIA ASSESSORS' ASSOCIATION ON BEHALF OF REAL PARTY IN INTEREST

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APPLICATION FOR PERMISSION TO FILE AMICUS CURIAE BRIEF

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Pursuant to Rule 8.520(f) of the California Rules of Court, the California Assessors' Association respectfully requests permission to file the amicus curiae brief that accompanies this application.

The California Assessors' Association ("CAA") is a statewide non-profit professional association for the Assessors representing each of California's 58 counties. CAA was formed in 1902 and is dedicated to improving California assessment procedures and laws for the public good. CAA has identified this case as being of significance to County Assessors throughout the state, including those Assessors who maintain or use geographic information system ("GIS") file formats for assessment purposes, including parcel boundary map data.

CAA and its constituent members have a direct and substantial interest in the outcome of this case because County Assessors routinely use GIS-type computer mapping systems to perform appraisal analysis. CAA believes that its proposed amicus brief will assist the Court in deciding the issue presented in this case – namely, whether Government Code section

6254.9 exempts from disclosure under the California Public Records Act a computer mapping system that includes data in a GIS file format – by highlighting for the Court the potential implications that a reversal of the Court of Appeal's published decision in favor of real party in interest County of Orange could have for County Assessors throughout the State of California.

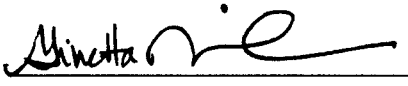
CAA recognizes the importance of access to and disclosure of public records. The California Legislature has made a policy decision, however, that computer mapping systems of the type at issue in this case do not constitute public records and therefore are not subject to disclosure. CAA submits that recognition of Section 6254.9's narrow exemption for computer mapping systems, including the data stored therein in a GIS file format, does not affect whether the information must be disclosed in alternative, non-GIS file formats. A conclusion to the contrary would mean that information could become a public record simply by virtue of where and how it is stored, in contravention of Revenue & Taxation Code provisions protecting sensitive and confidential data used by Assessors. This, in turn, could result in Assessors becoming hesitant to use or improve these GIS systems, thus reducing efficiency and potentially stymieing the use of GIS systems in public service. Finally, such a holding also would run counter to Revenue and Taxation Code provisions allowing for cost recovery related to Assessor-held information.

For the reasons stated in this application, CAA respectfully requests leave to file the amicus curiae brief that accompanies this application. The undersigned attorney has examined the briefs of the parties and is familiar with the issues involved in this case. The proposed brief was authored by Ginetta L. Giovinco of the law firm Richards, Watson & Gershon, a professional corporation. Counsel of record for real party in interest County of Orange reviewed and provided information used in this brief, as did staff in the Orange County Assessor Department in their capacity as members of CAA. No party, person, or entity made a monetary contribution to fund the preparation of the brief.

Dated: March 6, 2012

Respectfully submitted,

RICHARDS, WATSON & GERSHON
A Professional Corporation
GINETTA L. GIOVINCO



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AMICUS BRIEF

I. INTRODUCTION AND INTEREST OF AMICUS CURIAE

This case addresses the issue of whether Government Code section 6254.9 exempts data in a geographic information system ("GIS") file format from disclosure under the California Public Records Act, Government Code § 6250, *et seq*. Government Code section 6254.9 provides that "[c]omputer software developed by a state or local agency is not itself a public record under this chapter." (Gov't Code § 6254.9(a).) As used in that Government Code section, "'computer software' includes computer mapping systems, computer programs, and computer graphics systems." (Gov't Code § 6254.9(b).)

In its published opinion (195 Cal.App.4th 1537 (2011)) ("Opinion"), the Court of Appeal (Fourth District, Division Three) affirmed the trial court's ruling that real party in interest County of Orange's parcel-level digital basemap, which identifies over 640,000 parcels in Orange County with geographic boundaries of parcels, Assessor Parcel Numbers, and street addresses (the "OC Landbase"), is excluded from disclosure by Government Code section 6254.9. The Court of Appeal concluded that the OC Landbase properly is characterized as a computer mapping system excluded from disclosure "because it is a basemap that constitutes an integral part of a computer mapping system, not simply because it contains

some geographic data." (Opinion at 1554.) The Court of Appeal further recognized that development of such a system "is time-consuming and costly and the Legislature has made a policy decision that local governments should be allowed to recoup some of their development costs." (Opinion at 1549.)[1]

The Opinion is based on a careful reading of the legislative history of Government Code section 6254.9 and appropriate deference to the policy decision that the California Legislature made in determining that these computer mapping systems are not public records.

The California Assessors' Association ("CAA"), a 110-year old statewide non-profit professional association for the Assessors in each of California's 58 counties, respectfully urges the Court to reject petitioner Sierra Club's contention that the OC Landbase, and by extension other integrated computer software and data programs, constitutes a public record. Reversal of the Opinion could have serious ramifications for County Assessors throughout the state, including those Assessors who

---

[1] Local governments would not be able to recoup this same level of costs were these systems defined as public records. Under Government Code section 6253.9(a)(2), public entities are limited in what they can charge for copies of electronic public records: the "cost of duplication shall be limited to the direct cost of producing a copy of a record in an electronic format." In contrast, Government Code section 6254.9(a) expressly permits public agencies to "sell, lease, or license" computer software, as defined in that section of the Public Records Act, for computer mapping systems that are excluded from disclosure. This allows public agencies to recover more of the actual costs of compiling, maintaining, and updating their computer software and mapping systems.

maintain or use computer mapping systems or GIS for assessment purposes. Specifically:

1. If, as petitioner contends, there is no difference between GIS file formatted records and the data stored therein, then confidential, statutorily-protected information could be considered a public record simply because it is stored in a computer mapping system. This would, in effect, create public records where the Legislature explicitly sought to protect the confidential information to which Assessors have access and use in discharging their duties.

2. A reversal of the Court of Appeal's Opinion could have unintended, adverse policy impacts. Overturning the Opinion could have the unintended consequence of *discouraging* County Assessors from striving to improve their databases, based on a concern that confidential data may be released. This would create a disincentive for the continued evolution of GIS systems and Assessors' efforts to improve their efficiency in serving the public.

3. A holding that GIS files themselves are public records would be irreconcilable with provisions of the Revenue and Taxation Code regarding access to, and cost recovery for, Assessor records. These provisions evidence a legislative intent to allow for cost recovery mechanisms for Assessor information that is of the character ordinarily found in GIS files. A determination that GIS files do not fall within the

definition of "computer mapping systems" set forth in Government Code section 6254.9(b) would result in an inconsistency between the Government Code and the portions of the Revenue and Taxation Code which expressly permit cost recovery for access to these files.

CAA thus respectfully urges the Court to affirm the Court of Appeal's Opinion holding that the OC Landbase is excluded from disclosure as a public record pursuant to Government Code section 6254.9.

II. FACTS AND PROCEDURAL HISTORY

Rather than restate the facts and procedural history in detail, CAA adopts the description of the facts and case history set forth in real party in interest County of Orange's Answer Brief on the Merits.

III. ARGUMENT

A. The Opinion Properly Defers to the Legislature's Policy Decision in Enacting Government Code Section 6254.9

The issue of where the balance lies between free public access to computer mapping systems and computer software on the one hand, and the costs to be borne by the public entities that develop and maintain these systems on the other hand, is a question that the California Legislature answered in crafting Government Code section 6254.9. The Legislature has determined that computer mapping systems are not public records and, therefore, as expressly stated in Government Code section 6254.9(a), public agencies may "sell, lease, or license" the computer software. This allows

public entities to recoup a larger portion of what are often significant costs involved in compiling and maintaining these systems.

In its Opinion, the Court of Appeal recognized that the Legislature has made this policy determination and thus the court appropriately deferred to it. After extensively detailing and analyzing the legislative history of Government Code section 6254.9 (Opinion at 1545-1549), the court also concluded that the term "computer mapping system" was intended to include the types of GIS files contained in the OC Landbase. (Opinion at 1549.) Thus, the OC Landbase falls within the ambit of the Section 6254.9 exclusion from the Public Records Act.

The Legislature's intent is clear from the history of this statute and, as the Court of Appeal did, this Court should defer to the Legislature's policymaking role and decision that computer mapping systems are not public records as defined in the Public Records Act.

B. Reversal Could Result in the Unintended Consequence of Statutorily Protected Confidential Data Being Considered a Public Record

County Assessors often deal with records and information that are confidential and not subject to public disclosure. For example, Revenue and Taxation Code section 451 holds that "[a]ll information requested by the assessor or furnished in the property statement shall be held secret by the assessor. The statement is not a public document and is not open to inspection, except as provided in Section 408." (Rev. & Tax. Code § 451.)

Similarly, Revenue and Taxation Code section 481 states:

> "All information requested by the assessor or the board pursuant to this article or furnished in the change of ownership statement *shall be held in secret by the assessor* and the board. All information furnished in either the preliminary change in ownership statement or the change in ownership statement *shall be held secret* by those authorized by law to receive or have access to this information. These statements are not public documents and are not open to inspection, except as provided by Section 408."

(Rev. & Tax. Code § 481; emphasis added.)

As a result of the sensitive nature of this information, much of the information held by Assessors is subject to unique statutory exemptions designed to protect the privacy of the public and to facilitate the performance of the Assessor's statutory duties. (*See*, *e.g.*, Rev.& Tax Code §§ 408, 408.2, and 451.) These records, containing confidential information relating to a taxpayer's business affairs or property and obtained by the Assessor during the course of his duties, are generally precluded from disclosure absent a court order.

Assessors throughout the State often use GIS in the performance of their statutory duties and may store this confidential information within such systems. Thus, some County Assessors' GIS systems include much

more than just parcel boundary data, including records which contain statutorily-protected confidential information that is exempt from disclosure as a public record. By confusing GIS file-formatted records, which allow a computer mapping system to view and manage information about geographical places, analyze spatial relationships, and model spatial processes, with the data stored therein, petitioner threatens to undermine the statutory protections found within these exemptions.

Petitioner insists that there is no distinction between a GIS file formatted record and the information stored therein for the purpose of interpreting and applying Section 6254.9's computer mapping system exemption. (Petitioner's Reply Brief, p. 19; *see also* Petitioner's Opening Brief, p. 31.) Petitioner thus attempts to justify production of the GIS formatted files as public records by asserting that "depending on how one reads §6254.9, either the GIS data requested by the Sierra Club is excluded from public record stats or its not. If it is excluded, none of the information need be provided at all, electronically or otherwise." (Petitioner's Opening Brief, p. 31.)

Petitioner's all-or-nothing approach is contrary to the plain language of Government Code section 6254.9(d), which makes clear that the storage of information within a computer mapping system is not intended to prevent disclosure of what are otherwise public records: "Nothing in this section is intended to affect the public record status of information merely

because it is stored in a computer. Public records stored in a computer shall be disclosed as required by this chapter." Gov. Code, § 6254.9(d).)

If petitioner's premise that the electronic location of information controls whether it need be disclosed as a public record (an argument that is directly contrary to the actual language of the statute), then information that Assessors are required, as discussed above, to keep confidential, could be deemed subject to disclosure simply because the information has been stored within a computer mapping system. This would eviscerate the statutory protection that the Legislature intended to place on sensitive information which citizens furnish so that Assessors properly may carry out their duties. Furthermore, to the extent that the Public Records Act requires that "an exact copy shall be provided unless impracticable to do so" (Gov't Code § 6253(b)), County Assessors potentially would not even have the option of attempting to remove confidential data that is maintained in the same computer mapping systems as otherwise disclosable public information.

In short, because some County Assessors may include both confidential and public data in their computer mapping systems, an interpretation, as endorsed by petitioner, that the GIS formatted data is not exempt under Section 6254.9 could lead to the unintended consequence of statutorily protected confidential information being considered a public record. This possibility does not square with the Legislature's intent to

protect various types of data collected and maintained by Assessors, and strongly counsels against departing from the Court of Appeal's conclusion that data in a GIS file format like the OC Landbase are excluded from the definition of public records.

C. Reversal Could Have Unintended Adverse Effects on Public Policy

Beyond the serious difficulties that petitioner's reading of Government Code section 6254.9 presents with respect to statutory interpretation and the need to protect sensitive data from being deemed a public record, reversal of the Opinion also could have unintended adverse effects on public policy. Interpreting the legislative intent behind Section 6254.9 to conclude that computer mapping systems are public records could have the perverse result of *discouraging* County Assessors from further developing and relying on these systems. Indeed, the possibility that confidential information may be disclosed could create an incentive for County Assessors to refrain from including information in the systems or developing more useful mapping systems. Although the future evolution of computer mapping systems cannot be fully known, it is safe to assume that advances in technology will create the potential for more powerful tools that can increase efficiency and better serve the public. But, County Assessors may be hesitant to take advantage of these systems if the possibility exists that confidential data will be subject to release as well.

Ironically, then, petitioner's demand that computer mapping systems containing GIS format files be treated as public records could be the very thing that serves to defeat increased efficiency in government and better public service.

D. Petitioner's Position Cannot be Harmonized With Provisions of the Revenue and Taxation Code

Petitioner's assertion that GIS files included in a computer mapping system are public records cannot be harmonized with the Revenue and Taxation Code's specific dictates on access to, and cost recovery for, Assessor records. This further supports the conclusion that petitioner's interpretation of Government Code section 6254.9 is incorrect.

Revenue and Taxation Code section 408(a) provides generally that Assessor records not required to be kept or prepared by law are *not* public documents and shall *not* be open to public inspection. Section 408(a) thus serves as a categorical exemption to the Public Records Act. (*See* Gov't. Code § 6254(k); *Statewide Homeowners, Inc. v. Williams*, 30 Cal.App.3d 567, 569-70 (1973).) Accordingly, only a certain limited number of Assessor records (*e.g.*, paper maps, the annual assessment role, exemption claims) are considered "public records" for Public Records Act purposes. (*Statewide Homeowners*, *supra*, at 569-570.)

An exception to this general rule is "property characteristics information," which includes much of the information that Assessors

include in a GIS file, such as year of construction of improvements, number of dwelling units on the property, and zoning classifications. (Rev. & Tax Code § 408.3(a).) While "property characteristics information" is considered a public record, the Legislature has determined "[n]otwithstanding Section 6257 of the Government Code" that "the actual cost of developing and providing the information be paid by the party receiving the information." (Rev. & Tax Code § 408.3(c).) Thus, the "actual cost of providing the information is not limited to duplication or production costs, but may include recovery of developmental and indirect costs, as overhead, personnel, supply, material, office, storage, and computer costs." (*Id.*) Consequently, the Legislature has determined, by way of Revenue and Taxation Code section 408.3, that Assessors should recover their costs of developing information that might normally be found in a GIS file.

Further support for this legislative determination is found in Revenue and Taxation Code section 409. Under this section, counties can charge a fee, again "[n]otwithstanding Section 6257 of the Government Code," for Assessor information that is not considered a public record. (Rev. & Tax. Code § 409(a).) The fee is designed to cover the actual cost of developing and providing the information and includes the recovery of indirect costs such as computer costs, just as in Revenue and Taxation Code section 408.3(c).

Viewing together the specific provisions of the Revenue and Taxation Code pertaining to cost recovery for Assessor records and the computer mapping software exemption under the Public Records Act, a clear pattern emerges: the Legislature intended for counties to have the ability to recoup the costs of developing and providing property information, particularly where that information is in an electronic format.

Petitioner's argument regarding the nature of GIS formatted files effectively precludes any effective cost recovery for the development of a GIS landbase because the landbase would be a public record subject to production for only a de minimis charge. This position is thus inconsistent not only with legislative intent but with the plain language of sections 408.3 and 409 of the Revenue and Taxation Code. The better view, which harmonizes the intent of Government Code section 6254.9 with the letter of Revenue and Taxation Code sections 408.3 and 409, is to allow counties to recover the costs of providing computer mapping software records.

IV. CONCLUSION

For all of the reasons set forth above, CAA requests that the Court affirm the decision of the Court of Appeal.

Dated: March 6, 2012

Respectfully submitted,

RICHARDS, WATSON & GERSHON
A Professional Corporation
GINETTA L. GIOVINCO

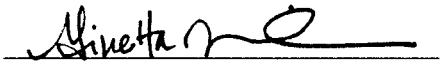
GINETTA L. GIOVINCO
Attorneys for Amicus Curiae,
California Assessors' Association

CERTIFICATE OF CONFORMITY

In accordance with Rule 8.204(c)(1) of the California Rules of Court, this certifies that the California Assessors' Association's Amicus Curiae Brief proposed to be filed in the case *Sierra Club v. Superior Court of the State of California (County of Orange)* does not exceed 14,000 words, including footnotes and excluding the title page, table of contents, table of authorities, and certificate of conformity. According to the word count function on the word processing program used, this brief contains 3,224 words.

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

Executed on March 6, 2012.



Ginetta L. Giovinco

PROOF OF SERVICE

I, Clotilde Bigornia, declare:

I am a resident of the state of California and over the age of eighteen years and not a party to the within action. My business address is 355 South Grand Avenue, 40th Floor, Los Angeles, California 90071-3101. On March 6, 2012, I served the within document(s) described as:

APPLICATION TO FILE AMICUS CURIAE BRIEF AND [PROPOSED] BRIEF OF CALIFORNIA ASSESSORS' ASSOCIATION ON BEHALF OF REAL PARTY IN INTEREST

on the interested parties in this action as stated below:

Sabrina D. Venskus Venskus & Associates, P.C. 21 South California Street, Suite 204 Ventura, CA 93001	Attorneys for Petitioner THE SIERRA CLUB
Mark D. Servino Deputy County Counsel 333 West Santa Ana Blvd., Suite 407 Santa Ana, CA 92702	Attorneys for Real Party in Interest COUNTY OF ORANGE
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Honorable James J. Di Cesare Orange County Superior Court Department C-18 700 Civic Center Drive West Santa Ana, CA 90702	

[X] (BY OVERNIGHT DELIVERY) By placing the document(s) listed above in a sealed envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a FEDEX agent for delivery, or deposited in a FEDEX box or other facility regularly maintained by FEDEX, in an envelope or package designated by the express service carrier, with delivery fees paid or provided for, addressed to the person(s) at the address(es) set forth below.

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

Executed on March 6, 2012, at Los Angeles, California.

Clotilde Bigornia