Court of Appeal Civil No. G044138
(Orange County Superior Court
Case No. 30-2009-00121878-CU-WM-CJC)

COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION THREE

SIERRA CLUB,
Petitioner,

vs.

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

COUNTY OF ORANGE,
Real Party in Interest

Appeal from a Judgment of the Superior Court for Orange County
The Honorable James J. Di Cesare, Judge
Department C-18 – (657) 622-5218

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF ACADEMIC RESEARCHERS IN PUBLIC HEALTH, URBAN PLANNING AND ENVIRONMENTAL JUSTICE AMICI CURIAE IN SUPPORT OF THE SIERRA CLUB'S PETITION FOR EXTRAORDINARY WRIT

M. Rhead Enion, Cal. Bar No. 272098
UCLA School of Law
405 Hilgard Avenue
Los Angeles, California 90095
Telephone: (310) 206-2392
Facsimile: (310) 206-1234

Counsel for Amici Curiae
Academic Researchers in Public Health, Urban Planning and
Environmental Justice

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

OTHER AUTHORITIES

APPLICATION AND STATEMENT OF INTEREST OF AMICI CURIAE

Amici curiae Professors Paul Bunje, J.R. DeShazo, Rachel Morello-Frosch, Paul Ong, Manuel Pastor, James L. Sadd, and research librarian Kristine Kasianovitz make this application to file the accompanying brief in this case pursuant to California Rules of Court, Rule 8.520, subd. (f).

Amici are academic researchers who depend on continued access to public record data produced by the State of California and other public bodies in their research and advocacy efforts. Amici use Geographic Information System formatted data ("GIS data") obtained from counties and the State of California for research and advocacy in public health, environmental justice and urban planning.

Parcel boundary data are particularly useful for urban planning because it links specific attributes of the property—such as number of rooms in the house, age of the structure, and square footage—with geographic location and shape of the parcel. These historical data, which include changes in use and property value, are invaluable in identifying trends in economic development. Digital parcel data, when combined with other data sources, can be used in studies of gentrification, air pollution in underserved communities, and siting of proposed landfill projects.

For example, in a study for the California Air Resources Board,[1] amici Manuel Pastor, Rachel Morello-Frosch and James Sadd conducted a statewide analysis of the association between ambient pollution exposures and birth outcomes. They developed a screening method to identify areas of concern due to the cumulative impacts of hazard proximity, air pollution, exposure and estimated health risk, and social vulnerability. That study used GIS land parcel data in combination with Census data and locations of potentially hazardous facilities in order to highlight neighborhoods that, due to cumulative impacts of hazardous land uses, may require enhanced regulatory attention.

Amicus Professor Paul Bunje is the executive director of the UCLA Center for Climate Change Solutions and managing director of the Los Angeles Regional Collaborative for Climate Action and Sustainability. He uses GIS data in his work to inform urban planners on necessary responses and adaptations to climate change challenges. He also uses GIS data to assess patterns of energy production and use in relation to land use patterns and economic activity. Access to GIS data such as parcel information is critical for his work at determining existing energy use patterns and for

[1] An electronic copy of the study, *Air Pollution and Environmental Justice: Integrating Indicators of Cumulative Impact and Socio-Economic Vulnerability into Regulatory Decision-Making*, is available on the Air Resources Board's website: http://www.arb.ca.gov/research/apr/past/04-308.pdf.

evaluating potential changes to the energy system that might impact greenhouse gas emissions.

Amicus Professor J.R. DeShazo is the director of the Luskin Center for Innovation and the Lewis Center for Regional Studies at University of California Los Angeles. He is an associate professor and co-chair of the Department of Public Policy in the School of Public Affairs at UCLA. He uses georeferenced digital parcel data to study urban planning and development, such as mapping density shifts, identifying underserved communities for access to parks, transit, internet, hospitals and daycare, and locating gang territories in communities. Recently, he created a Los Angeles solar rooftop map that used parcel data to identify properties with high solar energy potential. When submitting grant proposals for urban planning research in the Los Angeles basin, Professor DeShazo faces a significant disadvantage compared to competing proposals because of the need to budget nearly $400,000 to acquire Orange County's digital parcel data.

Amicus Kristine Kasianovitz is a librarian at the University of California Los Angeles Charles E. Young Research Library. She appears before this Court in her personal interest only, and does not represent the views of UCLA. Kasianovitz supports the work of academics throughout UCLA by collecting a variety of GIS data for use in research and classes. Kasianovitz works directly with local government agencies to acquire GIS

data for the UCLA spatial data repository, including GIS parcel data from County Assessors throughout California. In the past, Orange County has refused to provide its GIS parcel data to UCLA at a cost comparable to that of other California counties and therefore, Orange County remains a blank spot in much of UCLA's academic research.

Amicus Professor Rachel Morello-Frosch researches the causes and consequences of environmental disparities and health inequalities at University of California, Berkeley. She seeks to address the debilitating combination of high exposure to environmental hazards and increased vulnerability to toxic pollution—due to poverty, malnutrition, and discrimination—experienced by communities of color and the poor. Her work on the impacts of industrial, commercial, and transportation land use on the health of specific neighborhoods requires access to GIS parcel data throughout California.

Amicus Professor Paul Ong researches Urban Planning, Social Welfare and Asian American Studies at UCLA. He uses land parcel and other GIS data to study the effect of neighborhood economies on welfare and work, minority community economic development, and the healthcare worker labor market. Professor Ong has previously advised the U.S. Bureau of the Census and the South Coast Air Quality Management District.

Amicus Professor Manuel Pastor is the director of University of Southern California's Program for Environmental and Regional Equity (PERE) and director of USC's Center for the Study of Immigrant Integration (CSII). His research on economic, environmental and social conditions facing low-income communities in the United States requires access to a wide variety of GIS data, particularly data at the regional and parcel level.

Amicus Professor James L. Sadd teaches physical geology at Occidental College. In his courses, students evaluate geologic and environmental data using computer modeling, GIS, GPS and other technologies. Professor Sadd evaluates patterns of human exposure to various urban environmental hazards, for which access to GIS parcel data is an invaluable resource.

This amicus curiae brief will assist this Court's decision in several respects. First, amici have experience working with counties throughout California to obtain and work with georeferenced parcel data similar to that at issue in this case. Second, amici use such data to further academic research and advocacy efforts in a wide variety of public health and environmental health concerns, in policy areas beyond the purview of Petitioner Sierra Club. Third, this brief treats the legislative history and caselaw interpreting Gov. Code section 6254.9 differently from the parties,

and discusses specific errors made by the trial court that have received little discussion by the parties.

Accordingly, amici respectfully ask this Court to grant their application for permission to file this brief.

Dated: January 13, 2011 By: _____

M. Rhead Enion

Counsel for Academic Researchers in Public Health, Urban Planning and Environmental Justice Amici

AMICI CURIAE BRIEF

I. INTRODUCTION

In 1990, Orange County entered into an agreement with Southern California Gas Company (the "Gas Company") in which Orange County provided the Gas Company with public parcel data so that the Gas Company could build a "Digital Land Base Map of Orange County." (Agreement between the County of Orange and Southern California Gas Company dated June 26, 1990, 2 PA Tab 6 at 356.) Orange County received a non-exclusive license to use the digital data set, and the Gas Company retained ownership and control of the digital data set. In December 1993, the Gas Company and Orange County signed a second agreement concerning maintenance, ownership and distribution of this digital data set—now defined as the "Landbase"—in which Orange County received sole distribution rights and the Gas Company received 50% royalty of the net sales revenues. (Agreement between the County of Orange and Southern California Gas Company dated Dec. 19, 1993, 2 PA Tab 6 at 363.) Despite not earning a profit from licensing the Landbase at least from FY2004-05 onwards (Spreadsheet prepared by Gordo Pardee, 2 PA Tab 6 at 410), Orange County chose to purchase all rights to the Landbase from the Gas Company in 2007, effectively terminating the 1993 royalty agreement (Agenda Staff Report, 2 PA Tab 6 at 376). Apparently,

the Orange County Board of Supervisors believed that by purchasing the Landbase, it could "determine the cost and terms charged to other users . . . or provide the Landbase mapping system to users at no cost." (*Id.* at 374.)

In 2007, 2008 and 2009, the Sierra Club requested an electronic copy of the data in the Landbase from Orange County per the California Public Records Act ("PRA" or the "Act"). (G.C. §§ 6250–6276.48; June 21, 2007 letter form Sierra Club, 1 PA Tab 1 at 16; Feb. 9, 2009 letter from Sierra Club's attorney, 1 PA Tab 1 at 69.) When Orange County denied that request, Sierra Club sought a writ of mandate from the trial court. The trial court denied the Sierra Club's petition, based on the erroneous legal conclusion that the Landbase data are part of a "computer mapping system" that is exempt from disclosure per section 6254.9 of the Public Records Act.

The issue before this Court, then, is whether the statutory language of section 6254.9 recognizes a distinction between exempt software and non-exempt data. Typically, software programs are what one uses to manipulate, view, or process data. Software has strong copyright protections as a creative work; data, in the form of facts, are not copyrightable (although databases may retain weak copyright protection). In this case, Orange County has conceded that its Landbase contains only data, not software programs. (Stipulated Facts 15 & 20, 5 PA Tab 18 at 1083.)

Orange County cannot create a fund raising mechanism out of its statutory duty to maintain publicly available parcel records, and its attempt to avoid disclosure under the Public Records Act by hiding georeferenced data under the guise of a supposedly exempt "Landbase" should be rejected by this Court. In addition, the decision of the trial court below contains reversible errors. First, the trial court decision ignored binding precedent[2] of *County of Santa Clara v. Superior Court* (2009), 170 Cal.App.4th 1301 [89 Cal.Rptr.3d 374], in which the Sixth District Court of Appeal found, after considering the section 6254.9 exemption, that an almost identical county GIS basemap must be disclosed under the Act. Second, the trial court decision misapprehends certain technological terms crucial to the ruling in this case: it erroneously suggests that Sierra Club's request for data requires execution of licensed software and that non-GIS formatted data are equivalent to GIS formatted data.

II. ORANGE COUNTY'S ATTEMPT TO TRANSFORM ITS STATUTORY DUTY TO MAINTAIN PARCEL RECORDS INTO A FUND-RAISING MECHANISM VIOLATES PUBLIC POLICY AND IS INCONSISTENT WITH THE UNIFORM PUBLIC RECORDS ACT

At its heart, this case is about Orange County's fervent desire to continue licensing its GIS land parcel database at high fees to for-profit

[2] See *Cuccia v. Superior Court* (2007) 153 Cal.App.4th 347, 353 [62 Cal. Rptr. 3d 796] ["[T]he decisions of every division of the District Court of Appeal are binding on all superior courts of this state."].

entities, local agencies and California residents. A few local governments, such as Orange County, Santa Clara County and the City of San Jose, have tried—and failed—to charge excessive fees for their public parcel records databases for years.

In 1988, the City of San Jose tried to amend the Public Records Act to exempt "computer readable data bases" by sponsoring AB 3265. (Legislative History, 4 PA Tab 17 at 942, 955.) This effort failed when the language was modified to read "computer mapping system" after the Office of Information Technology objected that "data bases are organized files of record information subject to public record laws."[3] (Legislative History, 4 PA Tab 17 at 1020.) In 2005, the California Attorney General ruled that digital parcel map databases were subject to disclosure under the Public Records Act. (88 Ops.Cal.Atty.Gen. 153 (2005), 1 PA Tab 3 at 172–83.) Then in 2007, Santa Clara County lost when the Superior Court ordered it to disclose its GIS basemap under the Act. (*Cal. First Amendment Coalition v. County of Santa Clara* (Super. Ct. Santa Clara County, 2007, No. 072630), 1 PA Tab 3 at 217.) After the Attorney General and initial *Santa Clara* opinions, Orange County turned to the legislature to sponsor a

[3] The trial court mentions this change in its decision, but, perplexingly, continues to quote from analysis that clearly refers to the earlier term, "computer readable data bases" with no discussion of how the change in terminology may have underscored the Legislature's intent to avoid exempting computer databases from disclosure under the Public Records Act. (Statement of Decision, 5 PA Tab 26 at 1359.)

bill (AB 1978, Solorio, 2008) that would have defined "computer mapping system" in PRA section 6254.9(b) in a more favorable manner. (Joseph, *This Map is Lost on Many*, O.C. Register (Apr. 7, 2008) p. A3.[4]) No one else in the California Legislature was convinced, and the bill failed. Shortly thereafter, the California Court of Appeal, Sixth District, issued its opinion in *Santa Clara*, which reaffirmed the disclosure requirement for GIS databases under the Public Records Act. (*Santa Clara*, 170 Cal.App.4th. 1301.)

Now Orange County has moved to the courts, in a case that is quite similar to Santa Clara County's litigation before it. But this time, Orange County has convinced the trial court that the California Legislature meant to protect its GIS database: "The County has shown through the legislative history of Section 6254.9 that the intent behind the exemption was to authorize local agencies to recoup the considerable expense invested in developing and maintaining a computer mapping system, including the information stored therein in a computer format that can be analyzed or viewed by such a system." (Statement of Decision, 5 PA Tab 26 at 1360.)

The trial court errs in its legislative interpretation. The legislature knows how to express its intention, and chose not to exempt GIS data from public records requests when it chose, first, to delete the phrase "computer

[4] An electronic version of this article is available at: http://www.ocregister.com/articles/county-189842-public-computer.html.

readable data bases" from the Public Records Act, and second, not to pass AB 1978 years later. And as discussed below, the legislative intent of the Act is to promote disclosure of public records, even records that have been digitized to a computer format. In California, this public interest for disclosure is not easily overcome by assertions of copyright, licensing requirements, or funding needs by state or local agencies.

A. Orange County Assessor has a statutory duty to compile and maintain land parcel data.

The OC Landbase at issue in this case is comprised of land records and spatial data, including over 640,000 parcels with boundaries, addresses and assessor's parcel numbers. (Stipulated Fact 15, 5 PA Tab 18 at 1083.) The Orange County assessor is required by law to prepare and maintain such parcel boundary maps and data. (Revenue and Taxation Code §§ 408 and 327(a); 88 Ops.Cal.Atty.Gen. 153 (2005), 1 PA Tab 3 at 182.) As the Attorney General opinion acknowledged, the *format* of such data is at the assessor's discretion, but PRA section 6254.9 does not turn on whether the assessor had discretion to choose an electronic format, but only whether the assessor in fact *has* public record data in electronic format.

B. Any copyright or licensing interest Orange County claims in the Landbase cannot overcome the Legislature's clear intent to make public records available through the Public Records Act.

Over the years, Orange County has asserted copyright and licensing control over its Landbase, through its agreements with the Gas Company

and its end-users. (Agreements between the County of Orange and Southern California Gas Company, 2 PA Tab 6 at 358, 365, 377; License Agreement, 2 PA Tab 6 at 395:21–22.) Although Orange County does not raise copyright directly in this case, copyright nevertheless underlies Orange County's claim for two reasons. First, Orange County believes it is entitled to restrict public access to the digitized versions of public parcel records because it has spent resources entering that data into its Landbase; Orange County in fact asserts copyright control over that digitized data. (License Agreement, 2 PA Tab 6 at 395:21–22; July 2, 2007 response to Sierra Club letter, 1 PA Tab 1 at 33.) Second, the California Legislature sought to protect agencies' copyrights in *software programs* when it enacted the section 6254.9 exemption to the PRA. (Senate Digest: AB 3265, 4 PA Tab 17 at 1028 ["A public agency may sell, license or lease its software . . . ."]; *id.* at 1029 ["The bill draws a distinction between computer software and computer-stored information."].)

Copyright for database structures, unlike software programs, is thin at best. (See, e.g., *Harper House, Inc. v. Thomas Nelson, Inc.* (9th Cir. 1989) 889 F.2d 197, 205; *Greenbie v. Noble* (S.D.N.Y. 1957) 151 F.Supp. 45, 66 ["There is no copyright of facts, news or history."].) It is particularly thin when the database is built from facts contained in public records. Orange County's Landbase is built from land parcel data that, as

Part II.A notes, Orange County is statutorily obligated to maintain as public records.

A private corporation in the jurisdiction of the Seventh Circuit once tried to do almost precisely what Orange County is attempting here. Wisconsin municipalities held license agreements with a company called Assessment Data, whereby municipal tax assessors would input real estate data into Assessment Data's computer database. (*Assessment Technologies of Wisconsin, LLC v. WireData, Inc.* (7th Cir. 2003) 350 F.3d 640, 641.) WIREdata sought to obtain the compiled data using Wisconsin's open-records law, which contains a copyright exemption.

Judge Posner did not mince words:

> This case is about the attempt of a copyright owner to use copyright law to block access to data that not only are neither copyrightable nor copyrighted . . . . The owner is trying to secrete the data in its copyrighted program . . . . It would be appalling if such an attempt could succeed.

(*Id.* at 641–42.) Similarly, in the instant case Sierra Club wishes to access the compiled electronic data—neither copyrightable nor copyrighted—of Orange County's assessor using California's Public Records Act. Here, Orange County is playing the part of the for-profit Assessment Technologies, even though as a county agency, Orange County should be acting in the public interest. And the public interest in California is clear: disclosure cannot be frustrated by an assertion of copyright protection in a

GIS basemap. (*Santa Clara*, 170 Cal.App.4th at 1335–36; see also *Microdecisions, Inc. v. Skinner* (D. Fla. 2004) 889 So.2d 871, 875 [finding that a similar Florida public records law gives "no authority to assert copyright protection in the GIS maps, which are public records"].) By pretending that its GIS database is equivalent to a software program, Orange County hides publicly available information behind a veil of public records exemption and copyright misuse.

C. Orange County did not develop any software, which is a requirement for the § 6254.9 exemption to apply.

Public Records Act section 6254.9(a) explicitly applies only to "[c]omputer software *developed by a state or local agency*" [emphasis added]. In Orange County's description, its Landbase consists of "land records (paper maps, written deeds, ...)" that the Gas Company converted into digital form. (Orange County Landbase FAQ, 1 PA Tab 3 at 166.) These land records (at least in paper format) are facts that Orange County admits are public records (at least in paper format) that do not fall within section 6254.9(a). (See, e.g., Declaration of Robert Jelinek, 2 PA Tab 6 at 308:22 ["The information in the Landbase is compiled from official public records . . . ."].) That the Gas Company digitized these land records does not change their public record status. (See PRA § 6254.9(d) ["Nothing in this section is intended to affect the public record status of information because it is stored in a computer."].) And to claim that paper format land

records are transformed into "computer software developed by a state or local agency" when digitized is to claim that all paper records fall under the section 6254.9(a) exemption whenever they are scanned or otherwise input into a computer.

The Orange County Landbase does not contain any "software." (Stipulated Facts 15 & 20, 5 PA Tab 18 at 1083.) It is true that Orange County uses software to analyze, manipulate and display the GIS parcel data contained in its Landbase. Specifically, the County uses Oracle RDBMS and ArcGIS, licensed from Oracle Corporation and ESRI, respectively, along with other software. (Response to Special Interrogatory No. 3, 3 PA Tab 13 at 568; Declaration of Bruce Joffe, 3 PA Tab 13 at 528:16–18.) The County did not *develop* this software,[5] but merely *uses* third-party software to analyze its parcel data.

Therefore, Orange County has "developed" nothing when it allowed the Gas Company to digitize its publicly available parcel records. Orange County admits that the Landbase lacks executable software, and digitizing

[5] Orange County did develop two minor programs in-house: one to assist with migrating the Landbase data from the old MGDM structure to the new Oracle structure and a second "[u]sed to associate Landbase Parcel features with Attribute data." (County of Orange's Response to Special Interrogatories, Set No. One, 3 PA Tab 13 at 568:24–569:7.) Neither program is necessary to view, manipulate or display the GIS parcel data and neither program is provided to licensees of the Landbase. (See How to Import OCLIS Data, 3 PA Tab 13 at 583; *id.* at 585; *infra* Part IV.A.) Orange County has not claimed any privilege or exemption with regard to these two specific programs independent of the Landbase and Sierra Club does not request access to either program.

paper format land records is not equivalent to "developing" software. It is thus difficult to see how the Landbase could qualify as exempt given the clear limitation in section 6254.9(a) that only "computer software developed by a state or local agency" qualifies for the exemption at issue.

D. GIS parcel data at issue here have a wide use in public health, urban planning and environmental justice issues that further California's stated goals in its PRA.

California has a strong history of public access to government information. "A statute . . . shall be broadly construed if it furthers the people's right of access, and narrowly construed if it limits the right of access." (Cal. Const., art. 1, § 3, subd. (b)(1)(2); see also *Bd. of Trustees of Cal. State Univ. v. Superior Court* (2005) 132 Cal.App.4th 889, 896 [34 Cal.Rptr.3d 82].) The California Public Records Act "declares that access to information . . . is a fundamental and necessary right of every person in this state." (PRA § 6250.) The GIS parcel data at issue here, compiled from various public records of the Orange County assessor, have myriad uses by academic researchers and non-profit entities that will further California's public health, urban planning and environmental justice efforts.

Amici to this brief use third-party software and their own, independently developed software, to analyze, manipulate and visualize land parcel data in combination with other GIS layers. For example, amicus J.R. DeShazo and the UCLA Luskin Center used the Los Angeles

land parcel database in combination with data on tree shading and solar availability to estimate the feasibility of distributed solar energy installations in Los Angeles. (DeShazo & Matulka, Bringing Solar Energy to Los Angeles (2010) appx. 1, p. 38.[6]) Amicus Kris Kasianovitz has assisted classes at UCLA in using GIS parcel data in combination with databases on pollution and economic status to study the impacts of urban planning on neighborhood environmental and public heath. Linking GIS formatted land parcel data with data on pollution sources and census data is a common and valuable research tool in the environmental justice community.

E. Orange County has other means to raise funds for its continued maintenance of the Landbase.

Orange County repeatedly claims that without licensing fees, it could not continue to maintain and update its Landbase. (See, e.g., County of Orange Return at 19.) Besides being speculation with little legal significance (cf. *Santa Clara*, 170 Cal.App.4th at 1326 [giving financial considerations of Santa Clara County "little weight"]), this claim lacks factual basis.

First, the fee for every other California county's GIS land parcel data charges is orders of magnitude less than the $375,000 fee that Orange

[6] A copy of this report is available at http://issuu.com/uclapubaffairs/docs/labc_ucla_solarfit_study.

County charges. (Declaration of Bruce Joffe, 3 PA Tab 13 at 533:17–26 [explaining that 47 counties charge less than $300, others charge between $650 and $12,000].) Furthermore, academic researchers and non-profit groups like Sierra Club have little interest in *individual* parcel data, but rather use data from *all* parcels in combination to address community-level concerns. Thus, pricing schemes based on per-parcel access to data are particularly problematic for entities who wish to conduct research in the public interest.

Second, Orange County is not precluded from charging for its *services*. Orange County could charge for the use of its licensed third-party software to respond to requests to analyze and manipulate its digitized land parcel data. For example, Orange County currently charges for the printing of parcel maps created by licensed third-party software that analyzes data in its Landbase.

Third, Orange County already only recoups approximately 26% of its costs from licensing its Landbase. (Orange County Return at 19.) When Orange County purchased the Landbase from the Gas Company in 2007, its Board of Supervisors recognized that General Fund monies may be required to offset lost revenues from sales of the Landbase,[7] and considered providing the Landbase "to users at no cost." (Agenda Staff Report, 2 PA

[7] In fact, Orange County never made a profit on its Landbase between FY2004-05 and FY2008-09. (PA-000406.)

Tab 6 at 374.) Rates charged depend on the specific entity and license agreement; Orange County Fire Authority, for example, pays only $75,000 annually for access to the Landbase. (Declaration of Bruce Joffe, 3 PA Tab 13 at 532:3–5.) This unprofitable pricing scheme belies Orange County's insistence that it must use its statutory duty to maintain parcel records as a fund-raising scheme.

Finally, other funding schemes could be implemented. Besides drawing from its General Fund, Orange County could, for example, charge a fee on parcel sales to recoup the costs of maintaining the Landbase. (Joseph, *supra*, at A3 [noting that Bruce Joffe suggested a $5 property transfer fee, as is done in Oregon and Pennsylvania].)

III. THE TRIAL COURT ERRED BY NOT FINDING *SANTA CLARA* DISPOSITIVE

In considering *Santa Clara*, the trial court here determined that: "The argument in the Santa Clara case was based on national security, and yet the information sought had been provided to others, which made the security argument unpersuasive. Here, no security interest is being advanced. As such, the Santa Clara decision is not controlling in this action." (Statement of Decision, 5 PA Tab 26 at 1354 [citation omitted].)

The trial court decision takes an overly cramped reading of *Santa Clara*, ignoring certain controlling parts of the appellate decision in *Santa Clara* that should be dispositive in this parallel dispute. Specifically, the

appellate court in *Santa Clara* held that (1) copyright under the PRA is limited to computer software; and (2) the County could not impose copyright or end-user licensing restrictions on its GIS basemap. *A fortiori*, the *Santa Clara* court found the GIS basemap to not be software, just as the Landbase at issue here[8] is not software. This Court should hold similarly, consistent with the Sixth District's well-reasoned decision.

A. In *Santa Clara*, the appellate court held that the Public Records Act recognizes the availability of copyright protection only for software.

In the appellate and trial courts, Santa Clara County argued that it could demand end-user agreements for its allegedly copyrightable GIS basemap. (*Santa Clara*, 170 Cal.App.4th at 1330.) Similarly, Orange County has repeatedly asserted copyright in its GIS Landbase and required end-user license agreements. (*Supra* Part II.B.) The appellate court rejected that argument, specifically examining the trial court's reasoning and the entirety of section 6254.9, including subsections (a) and (b). (See, e.g., *Santa Clara*, 170 Cal.App.4th at 1330 ["Section 6254.9 permits the

[8] The GIS basemap at issue in *Santa Clara* is nearly identical in form and function to that of the Orange County Landbase at issue here. (Compare, e.g., *Santa Clara*, 170 Cal.App.4th at 1310 n.1 ["Among the essential elements of the GIS basemap are 'parcels, streets, assessor parcel information, jurisdictional boundaries, orthophotos [aerial photographs], and buildings."] with Stipulated Fact 15, 5 PA Tab 18 at 1083 ["The OC Landbase at issue in this case is comprised of land records and spatial data, including over 640,000 parcels with boundaries, addresses and assessor's parcel numbers."].)

nondisclosure of computer software, defined to include computer mapping systems. (§ 6254.9, subds. (a), (b).)"].)

From the principle that restrictions on disclosure should be narrowly construed (*id.* at 1332 [citing Cal. Const., art. 1, § 3, subd. (b)(1)(d)]), it follows that section 6254.9(e) merely recognized copyright protection for software but did not affirmatively grant authority to obtain and hold copyrights (*id.* at 1332.). Legislative intent need not be considered, because section 6254.9 unambiguously demonstrated legislative intent to acknowledge copyright protection for software only. (*Id.* at 1334.) "In sum, while section 6254.9 recognizes the availability of copyright protection for software in a proper case, it provides no statutory authority for asserting any other copyright interest." (*Id.* at 1334.) That other copyright interest would be, for example, copyright in a database structure, asserted both by Santa Clara and Orange Counties. (See *infra* Part II.B.) While a county may hold copyright in the structure of a database, such copyright protection cannot serve to exempt the database from disclosure according to Section 6254.9.

B. In *Santa Clara*, the appellate court held that the County could not impose copyright or end-user licensing restrictions on its GIS basemap.

Just as the Florida Legislature mandated disclosure in their public records act, thereby overriding an agency's copyright claim

(*Microdecisions,* 889 So.2d at 875), the California Legislature has also expressly mandated disclosure at the cost of reproduction in the Public Records Act, which "overrides a government agency's ability to claim a copyright in its work unless the legislature has expressly authorized a public records exemption." (*Santa Clara*, 170 Cal.App.4th at 1335 [quoting *Microdecisions*, 889 S.2d at 876].) To avoid undercutting the policy of disclosure enshrined in the PRA and the California Constitution, the County can neither use end-user agreements nor copyright to prevent unrestricted disclosure. (*Id.* at 1335.) "The CPRA contains no provisions either for copyrighting the GIS basemap or for conditioning its release on an end-user or licensing agreement by the requester." (*Id.* at 1335–36.)

C. The Sixth District Court of Appeal's reasoning in *Santa Clara* necessarily leads to the conclusion that the GIS basemap could not be software, because the appellate court held that the County could not assert a copyright interest in the GIS basemap and must disclose the basemap under the Public Records Act.

As described above, the *Santa Clara* court made two holdings relevant to this dispute. First, the court found that the statutory language of section 6254.9 allows a county to assert an exemption for software only. This exemption is based in recognition of copyright protection for software. Second, the court found that a county could not assert copyright protection for its GIS parcel database under section 6254.9. Therefore, a county is

required to disclose its GIS parcel database in electronic format, according to the PRA. (*Id.* at 1336.)

The disputed section 6254.9(b) states that "'computer software' includes computer mapping systems." Orange County attempts to define its Landbase as a computer mapping system and thus as software, referencing this disputed section. (County of Orange Return at 25.) But the *Santa Clara* court, in its thorough analysis, recognized that section 6254.9 exempts "software" because of specific copyright protection for that software. Yet the *Santa Clara* court went on to find that the Santa Clara County GIS basemap—almost identical in form and function to the Orange County Landbase—could not partake of that software exemption because the county could not assert copyright protection for its basemap to prevent disclosure under section 6254.9. (*Id.* at 1335–36.) Therefore, by finding that copyright in a georeferenced parcel database could not be used to prevent disclosure under section 6254.9, the *Santa Clara* court necessarily concluded that neither the Santa Clara County GIS basemap nor the Orange County Landbase could be equivalent to a "computer mapping system."[9]

[9] In the record, Santa Clara County stated, as Orange County does here, that its 'GIS Basemap' is a "computer mapping system." (*Santa Clara*, 170 Cal.App.4th at 1309 n.1.) However, the point was only raised by *amici* at the appellate level, and so the *Santa Clara* appellate court refused to consider it directly. (*Id.* at 1322 n.7.) Nevertheless, Santa Clara County's concession that its GIS Basemap was a public record was a legal conclusion that the appellate court chose not to overrule. In fact, the *Santa Clara* court noted that this "concession appears well-founded." (*Id.* at 1332 n.9.)

The trial court in this case erred by failing to recognize and properly apply this correct conclusion from the *Santa Clara* decision.

IV. THE TRIAL COURT MISCONSTRUES CERTAIN TECHNOLOGICAL TERMS THAT ARE ESSENTIAL TO A PROPER OUTCOME IN THIS CASE

The trial court in this case fundamentally misconstrues certain technological terms at issue, which leads the trial court to commit reversible legal errors by interpreting erroneous "facts" in its discussion of why the PRA section 6254.9 exemption supposedly applies to this case. The court mistakenly asserts that (1) Sierra Club's request for data requires execution of licensed software by the County and (2) non-GIS formatted data are equivalent to GIS formatted data. When interpreted correctly, both of these "facts" support the Sierra Club's position that the PRA exemption at issue cannot apply to disclosure of Orange County's Landbase. Without these erroneous assertions, the County cannot "demonstrate a clear overbalance on the side of confidentiality" and therefore the public interest in disclosure should prevail. (*Santa Clara*, 170 Cal.App.4th at 1329 [quoting *Michaelis, Montanari & Johnson v. Superior Court* (2006) 38 Cal.4th 1065, 1071 [44 Cal.Rptr.3d 663]].)

A. The trial court mistakenly asserts that the County must execute its licensed software in order to provide Sierra Club with the data requested.

In its Minute Order, the trial court stated that "the Sierra Club fails to recognize that its request for the OC Land base in GIS format cannot be accomplished without execution of the computer mapping system software which the County has a statutory right to license under GC 6254.9." (Minute Order, 5 PA Tab 21 at 1320.) Regardless of what "software" means under 6254.9, the trial court in its statement here uses the word "execution" to mean computer code that is run (executed) by a computer in order to analyze electronic data (here, GIS data). But when licensing its Landbase to other entities, Orange County specifically disclaims the use of any software, leaving it to those licensed entities to independently purchase software to analyze the data in the Landbase. (See How to Import OCLIS Data, 3 PA Tab 13 at 583 [requiring licensees to have a copy of the Oracle Database 10g software before they can import the data]; *id.* at 585 [noting that the Oracle software must be licensed and downloaded from Oracle's website]; License Agreement, 2 PA Tab 6 at 397:1–2 [disclaiming all liability for software used by licensee].)

Furthermore, Orange County and Sierra Club agree that the OC Landbase, as requested by Sierra Club and distributed to licensees, contains data only, not software. Sierra Club's request for the data in the Landbase is merely a request that Orange County copy that data to disk—equivalent

to copying a Microsoft Word file from a computer to an external disk. Therefore, Orange County need not execute any licensed software at issue in order to copy the data requested by the Sierra Club. The trial court's use of this mistaken assertion in support of nondisclosure is erroneous.

B. The trial court mistakenly asserts that GIS and non-GIS formatted records contain equivalent information.

In its Statement of Decision, the trial court asserts that "[s]ection 6254.9 creates an exemption for GIS file formatted data, but it nevertheless guarantees the public access to non-GIS formatted records *containing the information stored in a GIS*, which this Court finds that the County has agreed to produce without a license." (Statement of Decision, 5 PA Tab 25 at 1356 [emphasis added].) The trial court here is referencing Orange County's offer to produce non-GIS format records—assessment rolls, parcel maps, transfer deeds, etc.—in either Adobe PDF electronic format or as paper printouts. (Stipulated Fact 17, 5 PA Tab 18 at 1083.) First, Orange County's offer to produce non-GIS format records without a license is legally irrelevant, given that PRA section 6253.9(a) requires disclosure in the electronic format requested, when available.

Second, because GIS formatted data contain information not available in non-GIS formatted data, it is simply erroneous to equate the two formats, as the trial court has done. Essentially, "GIS format" means that the data include spatial coordinates of geographic features; "non-GIS

format" lack this spatial data. (Declaration of Bruce Joffe, 3 PA Tab 13 at 527:19–22.) When the Gas Company digitized Orange County's parcel records, the Gas Company or Orange County added spatial coordinates to the records, using associated maps and addresses from the records. This admittedly time-consuming, "sweat-of-the-brow" exercise resulted in digitized files that are not merely scanned electronic copies—such as an Adobe PDF—of the paper parcel records. Specifically, these digital spatial coordinates are not contained in (and not easily added to) the original non-GIS formatted data. No party claims that the non-GIS formatted records are equivalent in informational value to the GIS formatted records. Yet the trial court used this imagined informational parity as a basis to rule in favor of Orange County.

V. CONCLUSION

For years, Orange County has treated its digitized parcel data, for which it has a statutory obligation to maintain and make publicly available, as a commodity to sell to the highest bidder when the County should have been acting instead in the public interest. While Orange County certainly had no statutory obligation to keep the parcel information in digital format, it cannot use its voluntary decision as an excuse to neglect its statutory duty under the Revenue and Taxation Code and the Public Records Act to make such data available to the public.

Yet after failing to convince the California Legislature to add a definition of "computer mapping system" in the Public Records Act in order to encompass their GIS database, Orange County now chooses litigation instead of the public interest. Many academic researchers and non-profit advocacy organizations depend on access to this type of georeferenced parcel data to further California's interest in urban planning, public and environmental health, and environmental justice for all of California's residents.

For the reasons stated above, amici respectfully request that this Court hold that "computer mapping systems," as that term is used in PRA section 6254.9, does not include data such as the Orange County Landbase. This Court should order the Respondent Superior Court to vacate its August 3, 2010 Decision and Judgment and grant the Petitioner Sierra Club's motion for writ of mandate compelling Orange County to produce the OC Landbase in the GIS file format requested by the Sierra Club for the direct cost of copying the files onto a CD or DVD.

Dated: January 13, 2011 Respectfully Submitted,

By: _____

M. Rhead Enion

Counsel for Academic Researchers in Public Health, Urban Planning and Environmental Justice Amici

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Rule of Court 8.204(c)(1), the attached Amicus Brief was produced on a computer and the total word count of this brief, including footnotes, is 6571 words, as determined by the word count of the Microsoft Word program used to produce this brief, excluding this certificate and the tables of contents and authorities.

I also certify that no counsel for a party participated in the drafting of this brief, and no person other than the amici curiae listed in the brief contributed monetarily or substantively to it.

Dated: January 13, 2011 By: _____

M. Rhead Enion

Counsel for Academic Researchers in Public Health, Urban Planning and Environmental Justice Amici

DECLARATION OF SERVICE BY U.S. MAIL

I am employed in the County of Los Angeles, State of California. I am over the age of eighteen and am not a party to the within action; my business address is 405 Hilgard Avenue, Los Angeles, California 90095.

On January 13, 2011, I served the foregoing document described as:

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF ACADEMIC RESEARCHERS IN PUBLIC HEALTH, URBAN PLANNING AND ENVIRONMENTAL JUSTICE AMICI CURIAE IN SUPPORT OF THE SIERRA CLUB'S PETITION FOR EXTRAORDINARY WRIT

on the interested parties in this action, as addressed as follows:

For Petitioner Sierra Club:
Sabrina D. Venskus, SBN 219153
Venskus & Associates, P.C.
21 South California Street, Suite 204
Ventura, California 93001

For Real Party in Interest Orange County:
Orange County Counsel
333 West Santa Ana Boulevard, Suite 407
Santa Ana, California 92702

For Respondent Orange County Superior Court:
Clerk, Orange County Superior Court, Dept. C-18
700 Civic Center Drive West
Santa Ana, California 90702

Supreme Court of California
350 McAllister Street
San Francisco, California 94102
(4 copies)

[X] BY U.S. MAIL

I am "readily familiar" with firm's practice of collection and processing correspondence for U.S. Mail. It is deposited with the U.S. Mail on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

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

Executed on January 13, 2011, at Los Angeles, California.

_____

Jeanne Fontenot