Case No. G044138

IN THE 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.

APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF AND [PROPOSED] BRIEF OF *AMICI CURIAE* LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF REAL PARTY IN INTEREST COUNTY OF ORANGE'S RETURN TO PETITION FOR WRIT OF MANDATE

From the Superior Court of the State of California,
County of Orange, Case No. 30-2009-00121878

The Honorable James J. di Cesare, Judge
Department C-18

SHAWN HAGERTY, Bar No. 182435
BEST BEST & KRIEGER LLP
655 West Broadway, Suite 1500
San Diego, CA 92101
Telephone: (619) 525-1327
Facsimile: (619) 233-6118
Attorney for *AMICI CURIAE*
LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA STATE ASSOCIATION OF COUNTIES

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APPLICATION

Pursuant to Rule 8.200(c) of the California Rules of Court, the League of California Cities ("League") and the California State Association of Counties ("CSAC") (collectively "*Amici*") respectfully apply for permission from the presiding justice to file the *Amici Curiae* Brief contained herein.

The city and county members of *Amici* spend significant time and money developing and maintaining the types of computer mapping systems and other computer software at issue in this case. While the city and county members of *Amici* are committed to the disclosure of public records, they contend that through Government Code section 6254.9 the California Legislature has made a policy decision that computer mapping systems and other computer software are not themselves public records. Rather, the California Legislature has made a policy decision that such computer mapping systems and other computer software may be sold, leased or licensed by local agencies for commercial or noncommercial use. Because the judicial implementation of this Legislative policy decision is important to their members, *Amici* seek leave to file this Brief.

The League is an association of 474 California cities dedicated to protecting and restoring local control to provide for the public health, safety and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee,

which is comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that are of statewide—or nationwide—significance. The Committee has identified this case as being of such significance.

CSAC is a non-profit corporation with membership consisting of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsel's Association of California and is overseen by the Association's Litigation Overview Committee, comprised of County Counsels throughout the State. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a matter affecting all counties.

Amici have a direct interest in the legal issues presented in this case because their city and county members will be directly effected by the resolution of the question of whether the computer mapping systems and other computer software they develop are not public records or whether they must be provided at nominal cost in response to a request under the California Public Records Act. Such requests are common, and often result in lengthy disputes, such as the one here. *Amici* believe that judicial confirmation of the Legislative policy decision represented by Government Code section 6254.9 will help prevent future disputes over this very common question.

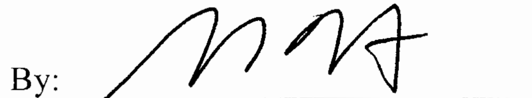
In addition, the proposed *Amici* Brief will assist the Court in

deciding the issue presented in the Petition by highlighting for the Court the statewide implications of the decision for the cities and counties that develop and maintain the types of computer mapping systems and other software at issue. The decision could not only significantly alter how individual cities and counties in California respond to requests for computer mapping systems but could also significantly impinge upon the ability of cities and counties to develop and maintain such software in the first place. Development and maintenance of computer mapping systems is expensive, and some cities and counties rely upon the provisions of Government Code section 6254.9 to help recoup some of these costs. Without the protection afforded by Government Code section 6254.9, some cities and counties could not develop and maintain their computer mapping systems at current levels. *Amici*'s statewide perspective on this statewide issue will assist the Court in deciding the Petition.

For these reasons, the *Amici* respectfully request leave to file the *Amici Curiae* Brief contained herein.

Dated: January 13, 2011

BEST BEST & KRIEGER LLP

By: 

SHAWN HAGERTY
Attorney for *Amici Curiae*
League of California Cities and
California State Association of
Counties

I.

INTRODUCTION AND STATEMENT OF THE CASE

This case presents an important issue of first impression regarding the application of Government Code section 6254.9[1] to a computer mapping system developed and maintained by Real Party in Interest the County of Orange ("County"). Section 6254.9 represents the California Legislature's policy decision that computer software, which is expressly defined to include computer mapping systems, developed by a state or local agency is not itself a public record. After significant briefing, oral argument and an evidentiary hearing, the trial court found that the Orange County Landbase (the "OC Landbase") maintained in a geographic information system ("GIS") file format was not a public record pursuant to Section 6254.9 because it was part of a computer mapping system. As this finding is supported by substantial evidence, the Legislature's policy decision reflected in Section 6254.9 should be implemented and the Petition should be denied.

The factual and procedural history of this case illustrates why judicial confirmation of the Legislature's policy decision reflected in Section 6254.9 is important to *Amici.* The OC Landbase is a parcel level digital basemap identifying over 640,000 parcels in Orange County with

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[1] All future statutory citations in this Brief are to the Government Code unless otherwise indicated.

geographic boundaries of parcels, assessor parcel numbers, street addresses, with links to text information such as the name and addresses of the owners of the parcels. (5 Petitioner's Appendix 1083, 1348 ("PA").) Over the past five years, the County has spent a total of $3,560,354 to maintain the OC Landbase, or an average of $712,071 annually. (2 PA 318, 408.)

Consistent with Section 6254.9, the County makes the OC Landbase available in a GIS file format upon the payment of a standard licensing fee and agreement to the license's restrictions on disclosure and distribution. (5 PA 1083, 1349-1350.) Through the licensing process, the County recoups approximately 26 percent of the annual maintenance costs of the OC Landbase. (2 PA 319, 414; 5 PA 1350.)

In 2009, Petitioner, Sierra Club, submitted a request under the California Public Records Act ("Public Records Act" or "Act") for the OC Landbase in a GIS file format. (Reporter's Transcript 35:14-24 ("RT"); Hrg. Exh. 9; See Stipulated Fact Nos. 8 and 16.) The County agreed to provide the OC Landbase in a GIS file format upon the Sierra Club's agreement to the County's licensing fee and restrictions on disclosure and distribution. (Stipulated Fact No. 19.) The County also agreed to produce non-GIS file formatted public records containing all the information stored in the OC Landbase, including copies of the original records used to create the OC Landbase. (RT 127:25-128:24, 133:20-25, 139:11-16; See Stipulated Fact Nos. 6, 8, 10, and 17.) Relying upon Section 6254.9,

however, the County refused the Sierra Club's Public Records Act request for the OC Landbase in a GIS file format.

The Sierra Club subsequently filed a petition for a writ of mandate to compel the County to disclose the OC Landbase in a GIS file format without requiring the license and license fee. (1 PA 4, 6, 11; 5 PA 1083, 1349.) After significant briefing, oral argument and an evidentiary hearing, the trial court found that the OC Landbase in a GIS file format was part of a computer mapping system and therefore not a public record pursuant to Section 6254.9. (RT 200, 4 PA 789-791; 5 PA 1083, 1348-1349; 2 RPA 119-121.)

Disputes similar to the one at issue in this case have played out or are currently playing out across California. In light of the prevalence of GIS and other computer mapping systems, it is important to have clarity on the application of Section 6254.9. Given the factual findings of the trial court, this Court should confirm the applicability of Section 6254.9 to computer mapping systems and implement the policy decision of the Legislature represented by this law. Such an opinion will assist cities and counties throughout California as they receive and respond to similar requests for their computer mapping systems.

II.

ARGUMENT

A. THIS CASE INVOLVES SIGNIFICANT POLICY QUESTIONS REGARDING HOW COMPUTER SOFTWARE, INCLUDING COMPUTER MAPPING SYSTEMS, DEVELOPED BY STATE OR LOCAL AGENCIES SHOULD BE FUNDED AND MADE AVAILABLE TO THE PUBLIC

Ever since cities and counties throughout California and the nation began to develop computer mapping systems and other computer software, significant policy questions have existed regarding the balance between the value to the public of free access to such systems and the significant costs associated with developing and maintaining them. (See Note, *Geographic Information Systems as a Decision Making Tool* (1991) 52 Ohio St. L.J. 351, 365; see also Comment, *The Legal Implications of Geographical Information Systems (GIS)* (2001) 11 Alb. L.J. Sci. & Tech. 359, 379.) As other *Amicus* will doubtless explain in great detail, it is undeniable that free access to these computer mapping systems provides significant commercial and noncommercial value. It is also undeniable that the systems are very expensive to develop and maintain. The key question, as is often the case, is who should pay to develop the systems in the first instance and under what circumstances such computer mapping systems should be released.

As explained in more detail below, the California Legislature has answered these policy questions through Section 6254.9, which provides that computer mapping systems are not public records and may be sold,

leased or licensed by the agencies who develop them. Section 6254.9 does not mandate that the components of a computer mapping system be licensed, but it provides local agencies with the policy alternative of licensing such systems and the components thereof, to recoup the costs of such system. Despite whatever else anyone might think of the merits of this policy decision, this is the policy determination of the California Legislature and it should be implemented, and the Petition should be denied.

B. SECTION 6254.9 REPRESENTS THE CALIFORNIA LEGISLATURE'S RESOLUTION OF THE POLICY QUESTIONS REGARDING THE TREATMENT OF COMPUTER SOFTWARE, INCLUDING COMPUTER MAPPING SYSTEMS, DEVELOPED BY STATE OR LOCAL AGENCIES FOR PURPOSES OF THE PUBLIC RECORDS ACT

California was one of the first states to address the policy questions related to how to treat computer mapping systems in the context of public record laws. In 1988, the California Legislature enacted, and the Governor signed, Assembly Bill No. 3265 ("AB 3265"). (Stats. 1988, ch. 447, § 1.) AB 3265 added Section 6254.9 and clarified that computer software, including computer mapping systems, are not public records. Both the plain language and the Legislative history of AB 3265 demonstrate an intent to exempt the type of computer mapping system at issue in this case from the definition of a public record. California's policy approach is also similar to the approach taken by many other states that have subsequently

addressed the issue. Each of these points are discussed in greater detail below.

1. The Plain Language of Section 6254.9

In statutory construction cases, a court's fundamental task is to ascertain the intent of the legislature so as to effectuate the purpose of the statute, beginning with an examination of the statutory language, and giving the words their usual and ordinary meaning. (State of California v. Altus Finance (2005) 36 Cal.4th 1284, 1295.) It is a cardinal rule that courts must "not presume that the Legislature performs idle acts, nor [can they] construe statutory provisions so as to render them superfluous." (Shoemaker v. Myers (1990) 52 Cal.3d 1, 22; see also City of Huntington Park v. Superior Court (1995) 34 Cal.App.4th 1293, 1300.)

Through Section 6254.9(a), the Legislature expressly provided that "[c]omputer software developed by a state or local agency is not itself a public record under this chapter." Rather than being a public record, Section 6254.9(a) provides that computer software may be sold, leased, or licensed for commercial or, notably, noncommercial use. The use of the phrase "commercial or noncommercial" is notable in that the Legislature intended this provision to apply to both private and public uses.

Had the Legislature stopped here, there might be some merit to the Sierra Club's attempt to define the term "computer software" by reference to dictionary definitions. Had the Legislature not itself defined the term,

reference to external sources may have been required to give the term "computer software" meaning.

However, the Legislature did not leave the term "computer software" undefined. In Section 6254.9(b), it expressly defined "computer software" to include "computer mapping systems, computer programs, and computer graphic systems." It is well-established that if the Legislature provides an express definition of a term, that definition ordinarily is binding on the courts. (Chen v. Franchise Tax Bd. (1988) 75 Cal.App.4th 1110, 1123.) While the Legislature's use of the word "includes" means that the Legislature's definition of computer software is not all inclusive (see Flanagan v. Flanagan (2002) 27 Cal.4th 766, 774), computer mapping systems are unequivocally computer software as defined in Section 6254.9(b). There is no other reasonable way to read the definition contained in Section 6254.9(b). Therefore, if, as the trial court found here, something constitutes a part of a computer mapping system, it is not a public record.

The remaining portions of Section 6254.9, although not at issue here, also reflect the Legislature's decision to balance the competing policy issues inherent in the disclosure of computer software, including computer mapping systems. Section 6254.9(c) addresses the possibility that state or local agencies that sell, lease or license computer mapping systems might face implied warranty claims regarding their systems. Subdivision (c)

protects against such claims. Section 6254.9(d) makes clear that documents that are merely stored on a computer remain public records. Finally, Section 6254.9(e) clarifies that the Legislature was only addressing the treatment and sale of computer software, including computer mapping systems, in the context of the Act, and not in the context of copyright law.

Taken as a whole, Section 6254.9 represents the Legislature's policy decisions regarding computer software, including computer mapping systems. A computer mapping system is not a public record, but may be sold, leased or licensed. While the Legislature could have made a different policy decision, the plain language of Section 6254.9 reflects the Legislature's policy choice to protect computer mapping systems from disclosure under the Act.

2. The Legislative History of Section 6254.9

Since the plain language of Section 6254.9 makes a computer mapping system exempt from disclosure under the Act, it may not be necessary to refer to external sources such as the Legislative history of AB 3265. Of course, if the statutory language permits more than one reasonable interpretation, courts may consider aids such as Legislative history. (Coalition of Concerned Communities, Inc. v. City of Los Angeles (2004) 34 Cal.4th 733, 737.) To the extent resort is made to the Legislative history, it supports the interpretation outlined above.

The Legislative history of AB 3265 confirms that the Legislature intended to exempt computer mapping systems from disclosure pursuant to requests made under the Act and to allow, instead, state or local agencies to help pay for those systems by selling, leasing or licensing them. Three components of the Legislative history illustrate this intent.

First, the Legislative history demonstrates that AB 3265 arose out of a proposal by the City of San Jose for the Legislature to protect computer programs, computer readable databases and computer graphic systems from disclosure under the Act. (PA 955-956, Assem. Com. on Gov. Org. Analysis of Assem. Bill No. 3265 (1987-1988 Reg. Sess.) as proposed Apr. 4, 1988.) The City of San Jose was, even in 1988, receiving numerous requests for its expensive and recently developed computer programs, including a computer mapping system known as the Automated Mapping System. (Id.) San Jose brought these issues to the Legislature, and urged that these systems be protected from disclosure under the Act. (Id.) Section 6254.9 is the Legislature's response to San Jose's request. (Id.) In other words, AB 3265 was designed to address and protect exactly the type of system as is at issue in this case.

Second, the Legislative history makes clear, to the extent there is any question about the issue, that the term "computer software" includes computer mapping systems. For example, the Legislative history contains several statements that the "bill specifically includes computer mapping

systems as computer software, thereby permitting their sale." (PA 976, Cal. Dept. Finance, Analysis of Assem. Bill No. 3265 (1987-1988 Reg. Sess.) as amended June 9, 1988.) This specific Legislative history undermines the Sierra Club's attempt to limit the reach of Section 6254.9 to "software" and to read "computer mapping systems" out of the law.

Third, the Legislative history demonstrates that the Legislature intended AB 3265 to allow state and local agencies to recoup some of the costs incurred in the development and maintenance of the computer mapping systems the bill was designed to protect. (Id. see also PA 1020-1022, Cal. Dept. Finance, Analysis of Assem. Bill No. 3265 (1987-1988 Reg. Sess.) as amended June 15, 1988.) As set forth in the Senate Committee on Governmental Organization's analysis of Assembly Bill No. 3265, "the purpose of this bill is to clarify that computer software is not itself a public record and to authorize a public agency to sell, lease, or license the software at a cost greater than the direct costs of duplication, as specified by the Public Records Act. The bill would permit the City of San Jose and other governmental agencies to recoup development costs of computer databases sold to the public." (PA 1020-1022, Cal. Dept. Finance, Analysis of Assem. Bill No. 3265 (1987-1988 Reg. Sess.) as amended June 15, 1988.) As noted by the Department of Finance, "the potential revenue generated by the sale of computer programs, graphics, and information databases could be substantial depending on the price of

the information, programs, or graphics, and the conditions of the sales or licensing agreement." Therefore, the Legislature knew that pursuant to Section 6254.9 local agencies could recoup the costs of development and maintenance of these systems through a licensing fee such as the one charged by the County. While there can be debate about whether this is good or bad policy, it is the policy the Legislature enacted through Section 6254.9.

Taken together, these examples from the Legislative history underscore the Legislative policy decision reflected in Section 6254.9 to exempt a computer mapping system from disclosure under the Act.

3. How Other States Have Answered the Policy Question

"In resolving questions of statutory construction, the decisions of other jurisdictions interpreting similarly worded statutes, although not controlling, can provide valuable insight." (In Re Joyner (1989) 48 Cal.3d 487, 492.) Many other states have adopted laws similar to Section 6254.9, and these laws help illustrate that California is not alone in the policy balance it struck. (See, e.g., 5 Ill. Comp. Stat. 140/7(1)(i); Iowa Code, § 22.2; Md. Code Ann., State Govt. § 10-904; Nev. Rev. Stat. Ann., § 239.054.)

Several states have promoted the development of GIS by adopting statutes similar to Section 6254.9, which exempt such computer mapping systems from state public record disclosure laws. The states of Illinois,

Iowa, Maryland, Nevada and North Carolina all have public records exemptions similar to Section 6254.9, which either exempt GIS from disclosure or allow governmental entities to charge fees to recoup their development and maintenance costs. (See 5 Ill. Comp. Stat. 140/7(1)(i) ["computer geographic systems" exempt from disclosure in Illinois]; Iowa Code, § 22.2 ["geographic computer database" exempt from disclosure in Iowa]; Md. Code Ann., State Govt. § 10-904 [governmental units may sell mapping system services and products to the general public for a fee that "reasonably reflects the cost of creating, developing and reproducing the product in whatever format is available" in Maryland]; Nev. Rev. Stat. Ann., § 239.054 [Nevada governmental entities may charge a fee for producing information from a "geographic information system" that covers the gathering and entry of data, as well as maintenance and updating of the database]' N.C. Gen. Stat., § 132-10 [North Carolina counties and cities may charge a fee as a condition to producing components of a geographical information systems].)

Reasonable minds may differ regarding whether the costs of developing and maintaining computer mapping systems should be borne by the taxpayers at large or whether the costs should be specifically borne by those parties that actually use such systems and develop derivative applications from such systems. However, despite the Sierra Club's endorsement of the former approach, it is well settled that courts may not

pass upon the wisdom, expediency or policy of a legislative act. (California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist. (1997) 14 Cal.4th 627, 633-634.) By adopting Section 6254.9, California's Legislature authorized public agencies to recoup the costs of developing and maintaining computer mapping systems. As the aforementioned authorities establish, California is not alone in adopting this approach to promoting the development of GIS systems by cities and counties for the benefit of the public.

C. SUBSEQUENT ACTIONS OF THE LEGISLATURE, THE COURTS AND THE ATTORNEY GENERAL HAVE NOT CHANGED THE POLICY DECISION REFLECTED IN SECTION 6254.9

Since its adoption in 1988, the policy balance struck by Section 6254.9 has not been altered by the Legislature or meaningfully interpreted by the courts. One piece of subsequent legislation, vetoed by the Governor, sheds some light on the Legislature's own understanding of the policy decision it made in 1988. (Request for Judicial Notice, Ex. 1., Assem. Bill No. 1293 (1997-1998 Reg. Sess.).) One Attorney General opinion, discussed below, has sought to interpret Section 6254.9 in a way that *Amici* believe is erroneous. (88 Ops.Cal.Atty.Gen. 153 (2005).) Regardless, the reality is that there have been no legislative or judicial actions that have changed the policy balance contained in Section 6254.9.

1. <u>**AB 1293**</u>

In 1997, the California Legislature, through AB 1293, enacted an alternative approach to the policy reflected in Section 6254.9. (Request for Judicial Notice, Ex. 1., Assem. Bill No. 1293 (1997-1998 Reg. Sess.).) Under this approach, the State, through grant funding, would have provided the money necessary to develop geographic information systems, but would have required that the electronic data developed or maintained with such grants be disclosed under the Public Records Act and placed in the public domain free of any restriction on use or copying. (Request for Judicial Notice, Ex. 1., Assem. Bill No. 1293 (1997-1998 Reg. Sess.).) While the Governor vetoed AB 1293, it is instructive of what the Legislature understood the policy approach reflected in Section 6254.9 to be.

Specifically, AB 1293 reflects the Legislature's baseline understanding that local agencies had the authority in 1997 to sell the GIS systems they were developing and maintaining. In fact, AB 1293 contains a finding that "[b]ecause of the high cost of creating and maintaining geographic information databases, many public agencies are seeking <u>greater</u> authority to sell the data." (Request for Judicial Notice, Ex. 1., Assem. Bill No. 1293 (1997-1998 Reg. Sess.) at § 1 [emphasis added].) AB 1293 reflects a view that the sale of such data was undermining the public and private access to data. To address this perceived problem, AB 1293 provided "an alternative source of funds for public agencies to create and

maintain geographic information databases without having to sell the public data." (Request for Judicial Notice, Ex. 1., Assem. Bill No. 1293 (1997-1998 Reg. Sess.) at § 1.)

Even more to the point, AB 1293 would have required that "any recipient of a grant make data developed or maintained with grant funds available to disclosure under the California Public Records Act . . . and . . . placed in the public domain free of any restriction on use or copy." (Request for Judicial Notice, Ex. 1., Assem. Bill No. 1293 (1997-1998 Reg. Sess.) at § 1.) It is hard to see why such a provision would have been necessary if such information were already a public record under the Act. The reasonable inference is that the Legislature understood that Section 6254.9 already provided that such system were not, in fact, public records.

AB 1293 passed through both houses of the Legislature but was vetoed by the Governor. (Request for Judicial Notice, Ex. 1., Assem. Bill No. 1293 (1997-1998 Reg. Sess.) as vetoed Oct. 10, 1997.) While it did not become law, it reflects the Legislature's own understanding of Section 6254.9, an understanding consistent with the trial court's decision here. Moreover, like Section 6254.9, AB 1293 illustrates the Legislature's careful and ongoing efforts to balance the public policy goals of providing means to fund the development and maintenance of GIS while also promoting public access.

2. <u>The AG Opinion</u>

The Sierra Club relies heavily on a 2005 Attorney General opinion that concluded that parcel boundary map data maintained by a county assessor in an electronic format is subject to public inspection and copying under the Act. (88 Ops.Cal.Atty.Gen. 153 (2005).) Although the opinions of the Attorney General are entitled to considerable weight, they are not binding upon the judiciary. (<u>City of Long Beach v. Department of Industrial Relations</u> (2004) 34 Cal.4th 942, 952). *Amici* believe that this Court should not defer to the opinion of the Attorney General for the reasons stated below.

First, the Attorney General's opinion is not based upon any factual record or factual analysis, and certainly was not based upon the type of evidentiary record that supports the trial court's factual findings here. Upon close inspection, all the opinion really concludes as a factual matter is that map data stored in electronic format is still just map data. (88 Ops.Cal.Atty.Gen. 153, 163.) The opinion contains no factual insight into the questions of GIS presented here. Where, as here, there is a well-developed factual record that supports the determination that the OC Landbase is part of a computer mapping system, the academic views of the Attorney General should not govern.

Second, the Attorney General's opinion violates the cardinal rule that one should not render words in a statute superfluous. (<u>See</u>, <u>e.g.</u>,

Moskal v. United States (1990) 498 U.S. 103, 109-110.) The Attorney General's opinion renders the term "computer mapping system" in Section 6254.9(b) entirely superfluous. The opinion reasons that the term computer mapping system "denotes unique computer *programs* to process such data using mapping functions – original programs that have been designed and produced by a public agency." (88 Ops.Cal.Atty.Gen. 153, 159 [Emphasis added].) The problem with this proposed interpretation is that Section 6254.9, subdivision (b), states that "computer software" includes "*computer mapping systems, computer programs*, and computer graphics systems," thus the statute already contains a separate reference to both "computer mapping systems" and "computer programs." By treating "computer mapping systems" as merely a type of "computer program," the Attorney General's opinion improperly renders the term "computer mapping system" mere surplusage.

Third, the Attorney General's opinion's ignores the plain language of Section 6254.9, which defines "computer software" *"[a]s used in section"* to include "computer mapping systems." (Emphasis added.) It is well-established that if the Legislature provides an express definition of a term, that definition ordinarily is binding on the courts. (People v. Foreman (2005) 126 Cal.App.4th 338, 342.) However, the Attorney General ignored Section 6254.9's express definition of "software," and instead, as the Sierra Club urges this Court to do, relied on external definitions of "computer

software" that did not purport to define this term as used in Section 6254.9. (See 88 Ops.Cal.Atty.Gen. 153, 159) In so doing, the Attorney General created an artificial distinction between a computer mapping system's "data" and "software" that is not contained in the statute, thus violating the rule that courts should not add to or alter the words of a statute to accomplish a purpose that does not appear on the statute's face. (Estate of Kramme (1978) 20 Cal.3d 567, 572.) By concluding that the term "computer mapping system" only refers to a "software" component, the Attorney General's opinion causes Section 6254.9's definition of "software" to be both circular and ambiguous. (88 Ops.Cal.Atty.Gen. 153, 158-159.)

For these reasons, the Attorney General's opinion should not be followed. It is neither based upon the type of robust factual analysis as conducted by the trial court here nor consistent with fundamental concepts of statutory construction.

3. The Santa Clara Case

The Sierra Club implies that the question before this Court has already been answered by County of Santa Clara v. Superior Court (2009) 170 Cal.App.4th 1301. In Santa Clara, the Sixth Appellate District held that Santa Clara County's GIS basemap was not exempt from disclosure under the Federal Critical Infrastructure Act of 2002 or the "catchall" exemption found in Section 6255 of the Act. (170 Cal.App.4th at pp. 1325,

1329-1330, mod. 2009 Cal.App.LEXIS 274 ("Santa Clara").) The Court in Santa Clara did not address, in any meaningful way, the language and application of Section 6254.9, and does not govern this case.

In fact, *Amici* here expressly urged the Court in Santa Clara to consider the application of Section 6254.9 to that case, but the Court expressly declined to do so. The Court stated in footnote 7 as follows:

> In this court, by contrast, the County's amici curiae urge an additional exemption, based on section 6254.9, which the County argued unsuccessfully below. Under that section, computer software – defined to include computer mapping systems – is not treated as a public record. (§ 6254.9, subds. (a), (b).)
>
> Since the point is raised only by amici curiae, we need not and do not consider it. "Amici curiae must take the case as they find it. Interjecting new issues at this point is inappropriate." (California Assn. for Safety Education v. Brown (1994) 30 Cal.App.4th 1264, 1275 [35 Cal. Rptr. 2d 404]; see also, e.g. Professional Engineers in California Government v. Kempton (2007) 40 Cal.4th 1016, 1047, fn. 12 [56 Cal. Rptr. 3d 814, 155 P.3d 226]. We therefore decline to address the exemption raised solely by the County's amici curiae here.

It is true that the Santa Clara Court did address Section 6254.9(e) in connection with the County's copyright claims. While addressing subdivision (e) of Section 6254.9, the Court did not address the substantive question presented here – the application of Section 6254.9(a) and (b). (Santa Clara, supra, 170 Cal.App.4th at pp. 1332-1334.) Since the Santa

Clara case did not consider the application of Section 6254.9(a) and (b), the case does not shed light on the meaning of those provisions. (Silverbrand v. County of Los Angeles (2009) 46 Cal.4th 106, 127 (noting that cases are not authority for propositions not considered).) Therefore, the case has no direct application here.

4. Section 6253.9

The Sierra Club contends that Section 6253.9 supports its claim that the OC Landbase is a disclosable public record. Section 6253.9 provides that information that constitutes an identifiable public record not exempt from disclosure pursuant to the Act that is in an electronic format must be made available in an electronic format when requested, subject to certain enumerated conditions.

By its very terms, however, Section 6253.9 incorporates, rather than abrogates, the provisions of Section 6254.9. Section 6253.9 applies to a "public record" that is "not exempt from disclosure" under the Act. Section 6254.9 provides that computer software, including computer mapping systems, are not public records under the Act. Thus, if something falls within the scope of 6254.9, it is not a public record subject to Section 6253.9.

Another way to say the same thing is that Section 6254.9 is a specific statutory provision dealing with computer software, which is defined to include computer mapping systems, while Section 6253.9

broadly applies to all disclosable public records. It is a cardinal rule that specific statutory provisions prevail over general ones relating to the same subject. (Pacific Lumber Co. v. State Water Resources Control Bd. (2006) 37 Cal.4th 921, 942.) Therefore, the specific provisions of Section 6254.9 prevail over the general provisions of Section 6253.9, and Section 6253.9 has no application here.

5. Proposition 59

The Sierra Club contends that Proposition 59 supports its position and somehow alters the policy decision reflected in Section 6254.9. Both the language of Proposition 59 and court decisions interpreting that measure undermine this contention. (Cal. Const., art. I, § 3(b)(5).)

The plain language of Proposition 59 makes clear that it has no effect on the language of Section 6254.9. (Cal. Const., art. I, § 3(b)(5); see also, e.g., Sutter's Place Inc. v. Superior Court (2008) 161 Cal.App.4th 1370, 1382 ("Sutter's Place").) Proposition 59 expressly states that "[t]his subdivision does not repeal or nullify, expressly or by implication, any constitutional or statutory exception to the right of access to public records . . . that is in effect on the effective date of this subdivision . . . .." (Sutter's Place, supra, 161 Cal.App.4th at p. 1380.) Proposition 59 was approved by the voters in November 2004, sixteen years after the adoption of Section 6254.9. Therefore, it has no effect on the language of Section 6254.9. This is especially true here because Section 6254.9 is not merely an exception –

it is a Legislative policy decision that computer software, including computer mapping systems, are not public records.

To the extent this point needs clarification, the courts have expressly held that Proposition 59 does not abrogate existing exemptions from disclosure. (Sutter's Place, supra, 161 Cal.App.4th at pp. 1380, 1382.) As the Sutter's Place court noted, "Proposition 59 is simply a constitutionalization of the CPRA." (Id. at p. 1382.) Therefore, Proposition 59 has no application here.

D. THE FACTUAL FINDINGS OF THE TRIAL COURT REGARDING THE APPLICATION OF 6254.9 TO THE OC LANDBASE ARE SUPPORTED BY SUBSTANTIAL EVIDENCE AND THE PETITION SHOULD BE DENIED

In the final analysis, this case really boils down to a factual (not legal) issue. At the trial court, this case properly turned upon the particular factual question of whether the OC Landbase was part of a computer mapping system. (PA 1349-1352, Statement of Decision at pp. 3-6.) If found to be a part of a computer mapping system, the OC Landbase would not constitute a public record in accordance with Section 6254.9. Rather, as the County had offered, the Sierra Club could pay a license fee to use the OC Landbase in a GIS file format. (PA 1350, Statement of Decision at p. 4.)

After significant briefing, oral argument and an evidentiary hearing, the trial court made very specific determinations. The term "computer

mapping system" is an early term for GIS. (PA 1349, Statement of Decision at p. 3.) GIS refers to "an integrated collection of computer software and data used to view and manage information about geographical places, analyze spatial relationships and model spatial processes." (PA 1349, Statement of Decision at p. 3.) The OC Landbase is a part of a Land Information System on "LIS," which is a type of GIS that deals with property parcel data. (PA 1349, Statement of Decision at p. 3.) The OC Landbase in a GIS file format is part of a computer mapping system. (PA 1349, Statement of Decision at p. 3.) To that end, the OC Landbase in GIS file format is not a public record, but falls within Section 6254.9's exception to the PRA's general rules of disclosure.

When, as here, the trial court in a Public Records Act case makes express or implied factual determinations, a reviewing court must accept those determinations if supported by substantial evidence. (Santa Clara, supra, 170 Cal.App.4th at p. 1323.) If a balancing test such as the one found in Section 6255 is at issue, the reviewing court should weigh the competing public interest factors de novo. (Id.) However, as the Supreme Court has explained, a reviewing court should accept as true the trial court's findings of the facts of the particular case, assuming those findings are supported by substantial evidence. (Michaelis, Montanari & Johnson v. Superior Court (2006) 38 Cal.4th 1065, 1072.)

No balancing test is at issue in this case, so there is no weighing of competing public interest factors to be done. The only question for this Court is whether the trial court's finding that the OC Landbase is part of a computer mapping system is supported by substantial evidence.

The record contains substantial evidence to support the trial court's decision. Both the County's expert and the Sierra Club's expert testified that GIS refers to an integrated collection of both software and data used to view and manage information about geographical places, analyze spatial relationships and model spatial processes. (RT 110-112, 193-195, 198-200.) There was evidence presented that computer mapping systems do not consist solely of software, but consist of both software and data. (RT 109-112, 133-134, 193-198; 4 PA 789-791; 5 PA 1306-1307, 1317, 1349; 1 RPA 75-76; 2 RPA 119-121.) On cross-examination, the Sierra Club's expert admitted that he had developed a policy which defined GIS as software, hardware and data, and that he described GIS as computer mapping to people outside the GIS profession. (PA Tab 20, 1317; RT 110-112; 10 RPA 76.) The parties stipulated that the OC Landbase refers to the County's parcel geographical data in a GIS file format.

Taken together this evidence and expert testimony provides substantial evidence to support the trial court's core factual finding that the OC Landbase in a GIS file format is part of a computer mapping system, and, as such falls within the scope of Section 6254.9.

Of course, the record contains evidence from which different conclusions might have been drawn. However, the only relevant question is whether there is substantial evidence supporting the factual finding the trial court actually made. (Santa Clara, supra, 170 Cal.App.4th at p. 1323.) Because there is such substantial evidence, the trial court's factual determination should be accepted and the Petition denied.

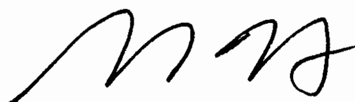
III.

CONCLUSION

For all the reasons set forth above, *Amici* request the Court to deny the Petition.

Dated: January 13, 2011

BEST BEST & KRIEGER LLP

By: 

SHAWN HAGERTY
Attorney for *Amici Curiae*
League of California Cities and
California State Association of
Counties

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I certify that this brief contains 5,576 words, not including tables or this certificate, according to the word count function of the word-processing program used to produce this brief. Therefore, the number of words in the brief complies with the requirements of California Rules of Court rule 8.204(c)(1).

Dated:______________________ ____________________________

Shawn Hagerty
Attorney for *Amici Curiae*
League of California Cities and
California State Association of
Counties

PROOF OF SERVICE

I am employed in the County of San Diego, State of California. I am over the age of 18 and not a party to the within action. My business address is 655 West Broadway, Suite 1500, San Diego, CA 92101.

On Jan. 13, 2011, I served the foregoing document described as: **APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF AND [PROPOSED] BRIEF OF *AMICI CURIAE* LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA STATE ASSOCIATION OF COUNTIES IN SUPPORT OF REAL PARTY IN INTEREST COUNTY OF ORANGE'S RETURN TO PETITION FOR WRIT OF MANDATE; MOTION REQUESTING JUDICIAL NOTICE** on each interested party, as follows:

SEE ATTACHED SERVICE LIST

☑ **By United States mail.** I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses listed below (specify one):

☑ Placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

☑ **By overnight delivery.** I enclosed the documents in an envelope or package provided by an overnight delivery carrier and addressed to the persons at the addresses listed below. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

Executed on January 13, 2011, at San Diego, California.

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

Cindy Cekander

SERVICE LIST
Sierra Club v. Superior Court of the State of California, County of Orange, Court of Appeal Case Number G044138

Sabrina D. Venskus, SBN 219153 Venskus & Associates, P.C. 21 South California Street, Suite 204 Ventura, CA 93001 Telephone: (805) 641-0247 Facsimile: 9213) 482-4246 Email: venskus@lawsv.com **(via Federal Express)**	Counsel for Petitioner The Sierra Club (one copy)
Office of the County Counsel 333 West Santa Ana Boulevard, Suite 407 Santa Ana, CA 92702 **(via Federal Express)**	Counsel for Real Party in Interest County of Orange (one copy)
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