

SUPREME COURT COPY

Case No. S219783

**IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA**

SIERRA CLUB, REVIVE THE SAN JOAQUIN, and LEAGUE OF
WOMEN VOTERS OF FRESNO,

Plaintiffs and Appellants,

vs.

COUNTY OF FRESNO

Defendant and Respondent;

FRIANT RANCH, L.P.,

Real Party in Interest and Respondent.

SUPREME COURT
FILED

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After a Published Decision by the Court of Appeal, filed May 27, 2014
Fifth Appellate District Case No. F066798

Appeal from the Superior Court of California, County of Fresno
Case No. 11CECG00726

Honorable Rosendo A. Pena, Jr.

**APPLICATION BY THE CALIFORNIA BUILDING
INDUSTRY ASSOCIATION, ET AL. TO FILE AMICUS
CURIAE BRIEF AND AMICUS CURIAE BRIEF IN
SUPPORT OF REAL PARTY IN INTEREST**

BROWNSTEIN HYATT FARBER SCHRECK, LLP

*Lisabeth D. Rothman, SBN 107040 / Rajika L. Shah, SBN 232994

2049 Century Park East, Suite 3550

Los Angeles, California 90067

Telephone: 310.500.4600 / Facsimile: 310.500.4602

Emails: LRothman@bhfs.com / RShah@bhfs.com

Attorneys for Amici Curiae

CALIFORNIA BUILDING INDUSTRY ASSOCIATION, ET AL.

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I.
APPLICATION TO FILE AMICI CURIAE BRIEF AND
STATEMENT OF INTEREST OF AMICI CURIAE

TO THE HONORABLE CHIEF JUSTICE AND JUSTICES OF
THE SUPREME COURT:

Pursuant to California Rules of Court, Rule 8.200(c), the California Building Industry Association (CBIA) and Building Industry Legal Defense Foundation (BILD) ask for leave of court to file the attached amici curiae brief in support of Real Party in Interest and Respondent Friant Ranch, L.P.

Presented for this Court's decision is the appropriate standard of review under the California Environmental Quality Act (CEQA) evaluating whether an environmental impact report (EIR) contains sufficient analysis of a project, and the level of the specificity required for mitigation measures for an EIR that provides both programmatic and project level analysis. The appellate opinion [formerly published at 226 Cal.App.4th 704 (Opinion)] evaluated the sufficiency of the Program/Project EIR's air quality impacts under the legal "failure to proceed in the manner required by law" standard instead of the substantial evidence standard most other courts have employed. It also determined that the mitigation measure establishing guidelines for imposing specified mitigation on future project-specific submittals for non-residential development in the Specific and Community Plan areas, was not sufficiently specific and did not comply with CEQA. The Opinion did not consider the programmatic nature of the review, the fact that the EIR expressly contemplated future site specific submittals for the commercial area, and the applicability of the San Joaquin Valley Air Pollution Control District (Air District) indirect source rule (ISR) requirements which effectively dictated the minimal level of reduction in significant air quality impacts mitigation must achieve.

CEQA compliance for the unique features of large scale Specific and

Community Plan projects is of such importance that the leading organizations representing the interests of residential and commercial real estate have joined together to offer this amici curiae brief to this Court.

CBIA is a statewide non-profit trade association representing approximately 3,000 businesses – homebuilders, land developers, remodelers, subcontractors, architects, engineers, designers, and other industry professionals – that develop property all over California. CBIA's members are involved in all aspects of the planning, building, and construction industry, and work with local authorities in the planning stages of building projects, including CEQA compliance.

BILD is a non-profit mutual benefit corporation and wholly-controlled affiliate of the Building Industry Association of Southern California, Inc. (BIA/SC). BIA/SC, in turn, is a non-profit trade association representing nearly 1,000 member companies. The mission of BIA/SC is to promote and protect the building industry to ensure its members' success in providing homes for all Southern Californians. BILD's purposes are, among others, to monitor legal and regulatory developments and to intervene when appropriate to improve the legal climate for BIA/SC's members and the construction industry in Southern California.

Amici's interest in this matter is inextricably connected to the Opinion's impact on residential and commercial projects. These organizations recognize that despite the financial cost, ensuring environmental protection is an important consideration and part of the process by which mixed use commercial and residential projects are approved. Plaintiffs in CEQA cases often challenge the adequacy of an EIR based on discretionary factual decisions the lead agency is legally entitled to make. Contrary to law applied by most courts in the State including this Court, the Opinion did not apply the more deferential substantial evidence standard to evaluate the sufficiency of the

Program/Project EIR's air quality impacts analysis.

In addition, the Opinion did not take into account the level of specificity for mitigation in EIRs which are a combined Program and Project EIR, an issue initially addressed by this Court in the context of PEIRs in its decision in *In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings* (2008) 43 Cal.4th 1143. As master planning is increasingly utilized by cities and counties for large scale Specific Plan and Community Plan areas, combined PEIRs and Project level EIRs such as this one will be used to analyze impacts for large scale projects for which subsequent site specific CEQA analysis will occur in the future. Clarification regarding the level of detail required for such combined EIR documents is essential for the efficient and cost effective processing and development of these projects.

Litigation is now a common outcome of the project approval process throughout the state and frequently is used as a tactic to attempt to delay or jeopardize the implementation of residential and commercial projects. Accordingly, the issues presented for review are not limited to the facts of this case but directly impact amici and their members.

Amici respectfully submit that the Opinion applied the incorrect failure to proceed legal standard of review when it held that the EIR should have correlated air quality impacts with specific health impacts.

Likewise, the Opinion is incorrect when it held that a PEIR or combined Program/Project EIR must formulate specific detailed mitigation measures for future site specific commercial development without considering the nature of the EIR and the express intent that future site specific applications would be forthcoming. Because these holdings increase uncertainty in how to prepare CEQA compliant EIRs for large scale projects, if allowed to stand, they will result not only in a substantial increase in the cost of PEIRs, but also in legal challenges based on the

concomitant insufficiency of the analyses and mitigation.

This case presents an opportunity for the Court to provide much needed guidance in this area. CBIA and BILD believe the Court should address the issues by confirming the rule that judicial review of the sufficiency of an EIR is governed by the substantial evidence standard and that the more general analysis allowed in a combined Program/Project EIR can result in less detailed mitigation measures that nevertheless comply with CEQA.

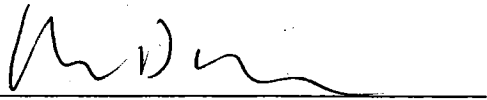
Pursuant to Rule 8.520(f)(4), the undersigned states that counsel contacted the law firm representing Friant Ranch, L.P. to obtain courtesy copies of the parties' appellate briefs filed in this Court and excerpts from the administrative record. Other than providing counsel with this material, amici certify that no party or counsel for a party authored the proposed Amicus Curiae Brief in whole or in part or made a monetary contribution to fund the preparation or submission of this Brief, and that such monetary contributions only came from the amici.

Accordingly, amici respectfully request that this Court consider their Statement of Interest and grant them permission to file the accompanying amici curiae brief to address these issues.

Dated: April 6, 2015

BROWNSTEIN HYATT FARBER
SCHRECK, LLP

By: _____


Lisabeth D. Rothman
Rajika L. Shah
Attorneys for Amici Curiae California
Building Industry Association and
Building Industry Legal Defense
Foundation

II.

BRIEF OF AMICI CURIAE

A. This Court Should Confirm the Existing Rule That the Substantial Evidence Test Is the Appropriate Standard of Review to Evaluate Whether the Amount of Information and Analysis in an EIR Complies with CEQA

All parties to this appeal agree that the fundamental purpose of CEQA is informational – to ensure that government agencies are fully informed about, and take feasible steps to minimize, any significant adverse environmental impacts of their proposed actions. (Pub. Resources Code §21000(g); *Friends of Mammoth v. Bd. of Supervisors* (1972) 8 Cal.3d 247, 254-56.) The EIR is “the heart of CEQA.” (*Citizens of Goleta Valley v. Bd. of Supervisors* (1990) 52 Cal.3d 553, 564 (*Goleta II*)). The EIR must identify significant environmental impacts that might foreseeably result from the proposed project, measures that could mitigate those impacts, and possible project alternatives for decision-makers, other agencies and the public to consider prior to project approval. (*In Re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings* (2008) 43 Cal.4th 1143, 1162 (*Bay-Delta*)).

The disagreement regarding the standard the court employs to determine the EIR’s compliance with CEQA has remained controverted despite this Court’s repeated efforts to elucidate it. The standards for reviewing the challenged quasi legislative decision approving the project’s Community Plan amendment and Specific Plan is governed by Public Resources Code sections 21168.5 and 21005. Section 21168.5 provides that judicial inquiry into the actions of state and local administrative and legislative bodies “shall extend only to whether there was a prejudicial abuse of discretion.” “Abuse of discretion” under section 21168.5 is established only if “the agency has not proceeded in a manner required by

law or if the determination or decision is not supported by substantial evidence” in light of the whole record.¹ (Pub. Resources Code §21168.5; *Laurel Heights Improvement Assn v. Regents of University of California* (1988) 47 Cal.3d 376, 392-93 & fn. 5 (*Laurel Heights I*.) Because court reviews the agency’s action, not the decision of the trial court, review on appeal is always de novo under either standard. (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 427 (*Vineyard*.)

This Court has assiduously attempted to distinguish between the de novo review entailed in evaluating the strictly legal question of whether the lead agency may have abused its discretion because it failed to proceed in the manner required by law, or whether the lead agency may have abused its discretion because its decision is not supported by substantial evidence. (*Vineyard*, 40 Cal.4th at 435.) While this Court has noted that both standards ultimately involve a legal determination, since the ultimate question of the substantiality of evidence is a legal one [*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 573 (*Western States*)], courts have consistently concluded that they must evaluate the adequacy of the information, analysis, and scope of review in the EIR under the more deferential substantial evidence test. Such deference is also key to CEQA’s goals for a complete but user friendly EIR.

The distinction is significant for amici for two reasons. First, the consequence of a court second guessing the lead agency’s exercise of discretion on such factual determinations will be the production of lengthy analyses; detailed, highly technical studies, etc. But such an approach is contrary to many CEQA policies and mandates:

¹ Section 21168 adopts the same “prejudicial abuse of discretion” standard from Code of Civil Procedure section 1094.5(b).

1) CEQA does not require an EIR be technically perfect but requires only “adequacy, completeness, and a good faith effort at full disclosure.” (CEQA Guidelines §15003(i))²;

2) The purpose of CEQA is not to generate paper but to compel agencies to make decisions with environmental consequences in mind. (Guidelines §15003(g); *Goleta II*, 52 Cal.3d at 564);

3) CEQA should not be subverted into an instrument for the oppression and delay of social, economic, or recreational development. (*Id.* §15003(j); *Goleta II*, 52 Cal.3d at 576.)

Second, the test adopted by the Opinion melds two distinct statutory requirements. The court must first ascertain if the lead agency abused its discretion by not complying with CEQA and only then must the court determine if that abuse of discretion was prejudicial. (Pub. Resources Code §§21168; 21168.5; 21005(a), (b).) To ascertain an EIR’s compliance with CEQA, courts engage in a three step review. First, the court must determine if the EIR contains all required information. Next, the court must ascertain if the EIR’s analysis and information is sufficient under the substantial evidence test. Finally, if the court determines the EIR did not comply with CEQA’s requirements under either of the first two steps, it must then determine if the CEQA violation constitutes a prejudicial abuse of discretion. For the following reasons, amici ask this Court to confirm that the substantial evidence test applies to evaluating the scope of the EIR’s content, and that evaluating whether a CEQA violation is prejudicial requires a separate analysis.

² While not binding, the Guidelines (Cal. Code. Regs., tit. 14., §§15000–15387) (Guidelines) adopted pursuant to CEQA [§21083] are entitled to great weight. (*Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439, 448, fn. 4.)

1. The Substantial Evidence Test Is the Standard for Evaluating the Scope of Information and Analysis in an EIR

When the alleged defects in a CEQA case are based on a dispute over the facts, the action or decision is reviewed under the deferential substantial evidence standard. (*Vineyard*, 40 Cal.4th at 435). The EIR must be upheld as long as there is substantial evidence – controverted or uncontroverted – in the record supporting it. (*Western States*, 9 Cal.4th at 571.) In applying the substantial evidence standard, the court must indulge all reasonable inferences from the evidence that would support the agency’s determinations and resolve all conflicts in the evidence in favor of the agency’s decision. (*Save Our Peninsula Committee v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 117 (*Save Our Peninsula*).

Substantial evidence in a CEQA case is “enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached.” (Guidelines §15384(a).) It includes “facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts.” (Pub. Resources Code §§21080(e)(1), 21082.2(c); Guidelines, §15384(b); *Barthelemy v. Chino Basin Municipal Water Dist.* (1995) 38 Cal.App.4th 1609, 1620.)

Based on the language of Public Resources Code sections 21168 and 21168.5, the substantial evidence standard of review is often framed as evaluating whether the agency’s determination, decision or findings is supported by substantial evidence. This is stated in a variety of ways in the case law. A court employing substantial evidence review “may not set aside an agency’s approval of an EIR on the ground that an opposite conclusion would have been equally or more reasonable, for, on factual questions, our task is not to weigh conflicting evidence and determine who has the better argument.” (*Vineyard*, 40 Cal.4th at 435; internal quotations

and citations omitted). The issue is whether there is any substantial evidence, contradicted or uncontradicted, that will support the agency's findings. (*Western States*, 9 Cal.4th at 571, citing *Crawford v. Southern Pacific Co.* (1935) 3 Cal.2d 427, 429). The court must indulge all reasonable inferences from the evidence that would support the agency's determinations and resolve all conflicts in the evidence in favor of the agency's decision. (*Id.*; *Save Our Peninsula*, 87 Cal.App.4th at 117; see *Sierra Club v. County of Napa* (2004) 121 Cal.App.4th 1490, 1497 ("the reviewing court must resolve reasonable doubts in favor of the administrative finding and decision"); accord *Laurel Heights I*, 47 Cal.3d at 393.) The administrative agency's obligation is to inform. (Guidelines, §15121(a).) That is why the court does not pass on the correctness of the environmental conclusions in a CEQA case, but only on the EIR's sufficiency as an informational document. (*Goleta II*, 52 Cal.3d at 564.)

But contrary to the Sierra Club's contention, the substantial evidence standard of review is not limited to evaluating whether the evidence supports the lead agency's findings. It applies to challenges to such things as "the scope of an EIR's analysis of a topic, the methodology used for studying an impact and the reliability or accuracy of the data upon which the EIR relied because these types of challenges involve factual questions." (*Banning Ranch Conservancy v. City of Newport Beach* (2012) 211 Cal.App.4th 1209, 1230 (*Banning Ranch*); *California Native Plant Society v. City of Santa Cruz* (2009) 177 Cal.App.4th 957, 986; *State Water Resources Control Bd. Cases* (2006) 136 Cal.App.4th 674, 795-96 (*State Water Resources Control Bd. Cases*); *National Parks & Conservation Assn. v. County of Riverside* (1999) 71 Cal.App.4th 1341, 1364-65 (*National Parks*); accord *Laurel Heights Improvement Assn. v. Regents of University of California* (1993) 6 Cal.4th 1112, 1135 (*Laurel Heights II*); see Guidelines, §15121; Guidelines §15151.)

Hence, courts have upheld the adequacy of EIRs **under the substantial evidence test** based upon agencies' determination of such issues as the methodology used [*Greenebaum v. City of Los Angeles* (1984) 153 Cal.App.3d 391, 412; *Residents Ad Hoc Stadium Com. v. Bd. of Trustees* (1979) 89 Cal.App.3d 274, 289], the sufficiency of the scope of evaluation of an environmental impact [*Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 530-31]; *No Slo Transit, Inc. v. City of Long Beach* (1987) 197 Cal.App.3d 241, 255]; baseline [*Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439, 467-68 (*Neighbors*); *Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 328 (*CBE*)]; mitigation [*Environmental Council of Sacramento v. City of Sacramento* (2006) 142 Cal.App.4th 1018, 1041 (*Environmental Council*)]; and growth-inducing impacts [*Greenebaum*, 153 Cal.App.3d at 401, 411].

To the extent that the Sierra Club and Opinion rely on select evidence from an Air District representative to conclude that the level of analysis of emissions and mitigation was deficient, their conclusion cannot be upheld, and in any event is governed by the substantial evidence test. One cannot simply cite to selected portions of the record – the entire administrative record must be reviewed to determine if the agency's decision is supported by substantial evidence. (*Laurel Heights II*, 6 Cal.4th at 1132-33). The EIR is presumed adequate, the burden of establishing abuse of discretion rests on the petitioner, and the reviewing court will not independently review the record to make up for a petitioner's failure to carry its burden. (*Neighbors*, 57 Cal.4th at 475.)

Key to the issue presented here though is that the substantial evidence test applies to judicial review of the amount and type of information contained in an EIR. (*Oakland Heritage Alliance v. City of Oakland* (2011) 195 Cal.App.4th 884, 900-903 (*Oakland Heritage*))

[whether EIR sufficiently analyzed and mitigated for seismic impacts evaluated under the substantial evidence test]; *Tracy First v. City of Tracy* (2009) 177 Cal.App.4th 912, 916, 930 [whether EIR adequately studied the energy impacts of a new store evaluated under the substantial evidence test]; *City of Long Beach v. Los Angeles Unified School Dist.* (2009) 176 Cal.App.4th 889, 898 [substantial evidence test applies to the scope of an EIR's analysis of a topic], Kostka & Zischke, *Practice Under the California Environmental Quality Act* (2d ed. 2014 (CEB)) (Kostka & Zischke), §23.34 at 23-42.) An EIR's assessment of environmental impacts need not be exhaustive, and need not include all information that may be available on the issue. (See *National Parks*, 71 Cal.App.4th 1341, 1365; accord *San Joaquin Raptor Rescue Ctr. v. County of Merced* (2007) 149 Cal.App.4th 645, 666.) These principles also speak to the factual basis for the EIR's scope of analysis which necessarily is evaluated under the substantial evidence standard.

That is why other courts have rejected the specific contention here – that the failure to include sufficient information is a failure to proceed in the manner required by law. Courts instead have concluded that judicial evaluation of the sufficiency of the information contained in the EIR is governed by the substantial evidence test. (See *Santa Monica Baykeeper v. City of Malibu* (2011) 193 Cal.App.4th 1538, 1546, 1558-59 [whether EIR adequately addressed the use of project's treated wastewater on park site assessed under substantial evidence standard]; *California Native Plant Society*, 177 Cal.App.4th at 984, 986-87.)

Utilizing the deferential substantial evidence standard for the sufficiency of information in an EIR is consistent with CEQA. CEQA Guidelines section 15204(a) specifically states that the adequacy of the EIR is based on “the **sufficiency** of the document in identifying and analyzing the [project's] possible impacts on the environment....” (Emphasis added.)

This Court has held that lead agencies, not the judiciary, have the resources and expertise to determine the methodologies, scope of analysis, type of analysis and amount of analysis required to evaluate project impacts. (*Laurel Heights I*, 47 Cal.3d at 393.) This Court also has determined that just because additional studies or analyses could be conducted does not provide a basis for challenging an EIR. (*Id.* at 410; *see also Gray v. County of Madera* (2008) 167 Cal.App.4th 1099, 1115.) Accordingly, amici respectfully submit that this Court should reverse the Opinion on this point and confirm the rule that the sufficiency of an EIR's analysis is reviewed under the substantial evidence standard.

2. The "Failure to Proceed" Standard of Review Does Not Apply

The second ground for abuse of discretion is if the agency failed to proceed in the manner required by law. As this Court explained in *Vineyard*, 40 Cal.4th at 435, courts analyze the two grounds for possible error differently. When the alleged error involves a claim of what can be predominately characterized as a failure to comply with CEQA's procedural requirements, judicial review of compliance with these requirements is a question of law examined de novo. The failure to follow proscribed procedures includes such things as the failure to conduct environmental review at the time required by CEQA [*Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 131]; the complete failure of an EIR to include a required analysis [*Laurel Heights I*, 47 Cal.3d at 398]; failure to utilize a legally prescribed threshold of significance [*Endangered Habitats League v. County of Orange* (2005) 131 Cal.App.4th 777,793], and a failure by an agency to prepare the correct CEQA document [*CBE*, 48 Cal.4th at 319]. Under this standard, factual predicates for compliance with legal requirements are reviewed under the more deferential substantial evidence standard. (*Ebbetts Pass Forest Watch v. Dept. of Forestry and*

Fire Protection (2008) 43 Cal.4th 936, 954.)

Both the Sierra Club and the Opinion argue that the language in Guidelines section 15126.2(a) converts the standard for analyzing a project's air quality impacts from substantial evidence to failure to proceed, but that is not the case. The pertinent language of that section requires that the EIR's "discussion should include relevant specifics of ...health and safety problems caused by physical changes...." Determining what is "relevant" depends on the context and ought to be left to the sound discretion of the lead agency as long as the determination is supported by substantial evidence. (*See, e.g.*, Guidelines §15064(b).) But the fact that the lead agency "should" discuss the specifics of health problems caused by the project does not mean that under all circumstances it "shall," *i.e.*, that it must. Guidelines section 15005(b) distinguishes between these terms. "Should" indicates "guidance" agencies are "advised to follow... in the absence of compelling, countervailing considerations." (Guidelines §15005(b).) "Shall" means that public agencies are required to follow the specific directive. (Guidelines §15005(a).)

A statement that the lead agency should discuss the relevant specifics of health problems does not provide a mandatory directive that compels the specific scope of analysis of correlating adverse health impacts – *e.g.*, the additional number of days of nonattainment of air quality standards and whether people with respiratory issues will need to wear filtering devices [Opinion at 744-745] – to specific levels of pollutants as the Opinion concluded. Procedural errors constituting legal errors subject to *de novo* review are necessarily limited to the procedures actually mandated by CEQA or its implementing regulations. (*See Pub. Resources Code §21083.1.*) In *South Orange County Wastewater Auth. v. City of Dana Point* (2011) 196 Cal. App. 4th 1604, 1617, the court noted that: "The Legislature has expressly forbidden courts to interpret CEQA or the