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Case No. S213478

IN THE SUPREME COURT OF CALIFORNIA

CALIFORNIA BUILDING INDUSTRY ASSOCIATION, et al.
Plaintiff and Respondent,
v.
BAY AREA AIR QUALITY MANAGEMENT DISTRICT
Defendant and Appellant.

After a Decision by the Court Of Appeal
First Appellate District, Division One
Case No. A135335 & A136212

Appeal from the Alameda County Superior Court, Case No. RG10548693
The Honorable Frank Roesch, Judge Presiding

DEFENDANT AND APPELLANT BAY AREA AIR QUALITY MANAGEMENT DISTRICT'S ANSWER TO PETITION FOR REVIEW

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INTRODUCTION

The Bay Area Air Quality Management District ("Air District") is a regional agency charged with protecting air quality in the nine-county San Francisco Bay Area. Governed by a 22-member Board of Directors that consists of members from county boards of supervisors, mayors, and city council members, the Air District has primary responsibility for controlling air pollution from stationary sources in the Bay Area. Health & Safety Code §§ 40000, 40200, 40220.5, 40221, 40221.5. The Air District does not regulate land use, but does develop guidance to assist other agencies in evaluating the air quality impacts of development that these agencies must analyze under the California Environmental Quality Act ("CEQA"). Administrative Record Vol. 5, p. 1156; Vol. 23, p. 5192-5264 (1999 thresholds issued by District) (hereafter "AR vol:p").

Consistent with this role and in response to requests from local governments for additional CEQA guidance—particularly with respect to greenhouse gas emissions—in June 2010, the Air District adopted recommended thresholds of significance ("Thresholds"). AR 1:1-4; 5:1156-59. The Thresholds do not alter CEQA's underlying mandates or in any way modify agencies' preexisting duty to analyze the significance of a project's air quality impacts under CEQA. Rather, the Thresholds, like all thresholds of significance, simply provide a measure by which agencies can assess whether the environmental impacts of a project are significant. 14

Cal. Code Regs. (CEQA "Guidelines") § 15064.7(a). They are, in effect, a tool to expedite environmental review by "promot[ing] consistency, efficiency, and predictability" in the CEQA process. *Communities for a Better Env't v. California Resources Agency* (2002) 103 Cal.App.4th 98, 110-11 (citation omitted).

Thresholds of significance are not binding, and under state law, agencies—including the Air District itself—may not rely on them without considering all record evidence regarding a particular project's significant impacts. *Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1108-09 ("thresholds cannot be used to determine automatically whether a given effect will or will not be significant"). Lead agencies must retain their duty and discretion to independently determine the significance of impacts under CEQA. AR 28:6232; Guidelines § 15064.7(c).

The Air District developed the Thresholds over the course of a year and a half long public review process that included workshops, public meetings of the full District Board, and written responses to comments on the proposed thresholds. AR 1:1-3, 3:567, 558-61. Through this extensive public process, the Air District was able to address the concerns of many stakeholders. *See* AR 5:1043, 1044-46, 1058, 1120-21. In the end, only one entity, the California Building Industry Association ("BIA"), filed suit challenging the Thresholds.

BIA's petition for review raises two primary issues. First, whether certain Thresholds adopted to address exposure to toxic air contaminants are invalid on their face. Second, whether the adoption of these non-binding Thresholds for conducting environmental review is itself a project requiring environmental review under CEQA. The Court of Appeal correctly rejected both claims and review should be denied.

DISCUSSION

I. THERE ARE NO GROUNDS FOR SUPREME COURT REVIEW.

Review should be denied for the simple reason that this case presents neither an important question of law nor a necessity to secure uniformity of decision. *See* Cal. Rule of Court 8.500(b). First, the Court of Appeal's decision does not create uncertainty in the law with respect to an agency's obligation to consider the environmental impacts associated with locating new development in hazardous areas. BIA notes that a handful of appellate cases have concluded that CEQA does not require agencies to consider the impacts of the existing environment on a proposed project. Petition for Review ("Petition") at 19-22. However, the Court of Appeal here found it did not need to reach that issue to resolve the merits of BIA's facial challenge to the Thresholds. Opinion at 25. Accordingly, the Court of Appeal's decision does not create a conflict with other districts or foster uncertainty in the law.

BIA also fails to demonstrate that the Court of Appeal's holding that adoption of the Thresholds was not a project under CEQA involves any new or important question of law.[1] To the contrary, the Court of Appeal applied long-standing CEQA law to find that there was no evidence in the record that the Thresholds might cause a reasonably foreseeable change in the environment—the guiding standard for determining whether an agency's action qualifies as a "project" subject to environmental review under CEQA. In reaching this holding, the Court of Appeal did not adopt a new evidentiary standard or create a new exemption from CEQA, as BIA claims. It simply applied established law to the facts of this case. As an alternative basis for its holding, the Court reached the common sense conclusion that where CEQA itself specifies the requirements for adoption of thresholds of significance under CEQA, courts should not impose additional procedural requirements.

Because BIA has failed to identify any basis for Supreme Court review, the petition should be denied.

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[1] Although BIA touts the level of interest in this case as evidence of its importance (Petition at 17-18), not a single amicus argued that adoption of the Thresholds should be considered a project under CEQA.

II. THE COURT'S DISCUSSION OF THE TAC RECEPTOR THRESHOLDS DOES NOT CREATE ANY UNCERTAINTY IN THE LAW.

Toxic Air Contaminant (or "TAC") is a general term for a set of airborne pollutants that can cause serious human health hazards. AR 9:2096. TACs are emitted by a wide variety of sources, including vehicles and industrial plants, and their effects are generally local in nature. *Id.* In 1999, the Air District published thresholds recognizing that a project would normally have a significant impact if it would bring new residents to an area where an existing source of TACs would expose project residents to an excess cancer risk of 10 in a million (often referred to the "TAC Receptor Threshold"). AR 23:5213. The Air District did not change this standard in the 2010 Thresholds that BIA challenges here. AR 1:6. Rather, it added a new standard for risks from fine particulate matter ($PM_{2.5}$) and for cumulative TAC risks. *Id.* It also added a Threshold for plan-level projects (*e.g.*, general plans). AR 1:7.

BIA challenged the TAC Receptor Thresholds on their face on the ground that they were unauthorized by CEQA. As the Court of Appeal correctly noted, in a facial challenge, BIA bears the burden of demonstrating that these Thresholds would be unauthorized in the vast majority of cases. Opinion at 25, citing *Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084. This burden applies whether an action is challenged on constitutional or statutory grounds. *T.H. v. San Diego Unified School Dist.*

(2004) 122 Cal.App.4th 1267, 1281 (holding, in context of facial claim that administrative regulation violated both state law and the constitution, that "[a] facial challenge is 'the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the [law] would be valid.'") (citation omitted); *Sierra Club v. Napa County Bd. of Sup'rs* (2012) 205 Cal.App.4th 162, 173-74 (applying same standard in challenge to local ordinance as inconsistent with state law).

Applying this well-established rule of law, the Court of Appeal held that BIA's facial challenge to the TAC Receptor Thresholds failed because, even under BIA's interpretation of CEQA, the Thresholds may be appropriately applied in a variety of situations. Opinion at 25-26. For example, an agency might rely on the Thresholds to assess the impacts of locating a school near a freeway as is already required by CEQA. Pub. Res. Code § 21151.8 (requiring analysis of impacts of locating schools near sources of TACs). An agency might also use the Thresholds to determine whether a new development project will have a significant impact on public health because it also contributes to existing emissions of TACs. Pub. Res. Code § 21083(b)(2) (requiring agencies to assess significant cumulative impacts); Guidelines § 15355 (b) (defining cumulative impacts to include "past, present, and reasonably foreseeable probably future projects").

BIA's quibble with how the TAC Receptor Thresholds might be applied in these scenarios fails to recognize that the Thresholds are simply

tools to be used at the discretion of the public agency conducting environmental review. Thus, there is no need for this Court to adjudicate the legal validity of the Air District's non-binding recommendations; if agencies believe the TAC Receptor Thresholds are contrary to CEQA, they need not use them. To the extent that agencies may use the recommended Thresholds in the future, determining whether an agency appropriately applied them is best made in the context of a specific project with concrete information about potential environmental impacts.

Finally, BIA goes to great lengths to manufacture a conflict between the holding of the Court of Appeal and those of other appellate districts. However, the Court of Appeal held only that the TAC Receptor Thresholds are not invalid on their face. Although the Court did discuss four cases that have addressed whether CEQA requires an analysis of the impacts of locating new development in areas subject to existing environmental hazards, it expressly declined to "decide whether *Baird*, *Long Beach*, *SOCWA*, and *Ballona* were correctly decided." Opinion at 25. Accordingly, the Opinion does not create uncertainty regarding existing appellate opinion on the issue and does not present an issue for Supreme Court review.

III. THE COURT'S DETERMINATION THAT APPROVAL OF THRESHOLDS OF SIGNIFICANCE IS NOT A PROJECT DOES NOT CREATE NEW LAW OR IMPLICATE AN IMPORTANT LEGAL ISSUE.

A. The Court of Appeal Did Not Create A New Exemption from CEQA.

The Court of Appeal identified two alternative grounds for its holding that adoption of the Thresholds was not a project subject to environmental review under CEQA. First, the Court found that the Thresholds were adopted pursuant to CEQA Guidelines section 15064.7, which specifies the requirements for adoption of generally applicable thresholds of significance. Because the Guidelines do not require environmental review prior to the adoption of thresholds, the Court would not interpret them to impose such an additional requirement. Opinion at 12.

BIA claims this holding results in the creation of an "implied exemption" from CEQA. In fact, the opposite is true. Here, the Court of Appeal avoided creating an additional implied requirement for the adoption of thresholds of significance that does not appear in the Guidelines themselves. This result is consistent with Public Resources Code section 21083.1, which explicitly provides that when interpreting CEQA, "courts . . . shall not interpret . . . the state guidelines . . . in a manner which imposes procedural or substantive requirements beyond those explicitly stated in this division or in the state guidelines." Pub. Res. Code § 21083.1.

BIA's attempt to create a conflict between the Court of Appeal's opinion and this Court's opinion in *Mountain Lion Foundation v. Fish and Game Com.* (1997) 16 Cal.4th 105 is also misplaced. In that case the Fish and Game Commission argued that the delisting provisions of the California Endangered Species Act ("CESA") created an implied exemption from CEQA. This Court rejected the claim that compliance with CESA was sufficient to satisfy the requirements of CEQA. *Id.* at 135-37. Here, by contrast, the Court of Appeal did not find that compliance with another statutory scheme is sufficient to satisfy the requirements of CEQA. Instead, the Court determined that compliance with the explicit requirements of CEQA itself—specifically the requirements of CEQA Guidelines section 15064.7—is sufficient to satisfy the requirements of CEQA. Such a result is logical, consistent with the admonition in Public Resources Code section 21083.1 that courts should not impose obligations beyond those expressly stated in the Guidelines or statute, and does not merit Supreme Court review.

B. The Court Properly Rejected BIA's Claim that the Thresholds Would Displace Development As Speculative and Unsupported by Any Evidence.

As an alternative ground for rejecting BIA's claim that adoption of the Thresholds is a project under CEQA, the Court of Appeal applied the long-standing statutory definition: agency action is a project only where it may result in a reasonably foreseeable change in the environment. Opinion

at 15 (citing Pub. Res. Code § 21065). Applying this test, the Court found that adoption of the Thresholds was not a project because BIA had failed to identify substantial evidence in the record that the Thresholds might result in a change in the environment. There is nothing uniquely important about the Court of Appeal's application of this rule that would merit Supreme Court review.

Contrary to BIA's claim, the Court of Appeal did not establish a heightened evidentiary standard that applies where a party argues that agency action may result in a change in the environment due to the displacement of development. BIA argued that adoption of the Thresholds would cause a change in the environment because they would increase the burden of environmental review for certain infill development projects, which BIA claimed would then cause developers to abandon infill projects and move them to the suburbs. In rejecting this claim as speculative, the Court of Appeal identified the obvious flaw in BIA's case:

> [r]epresentatives of agencies who were concerned about the Thresholds might have had the expertise necessary to say that certain infill projects would be more costly or even infeasible, but no actual evidence was presented to show that developers of housing in densely populated cities such as San Francisco or Oakland would move their projects to the suburban fringes or rural areas.

Opinion at 18.

This determination is consistent with the definition of substantial evidence in CEQA, which requires "facts, reasonable assumptions

predicated upon facts, and expert opinion supported by facts." Guidelines 15384 (b). The Court of Appeal did not require evidence of specific projects that would be moved, as claimed by BIA, but it did demand at least some factual basis for the claim. As the Court of Appeal correctly noted, BIA has never been able to make that factual connection between its claim that the Thresholds might make environmental review more expensive for some projects and the ultimate conclusion that infill developers would therefore move their developments to the suburbs.

The Court of Appeal also identified the critical distinction between the present case and *Muzzy Ranch Co. v. Solano County Airport Land Use Com.* (2007) 41 Cal.4th 372, where this Court found that adoption of an airport land use plan prohibiting development was a project subject to CEQA because it might result in displaced development. In reaching that conclusion, this Court found that the plan was a project precisely because it "carries significant, binding regulatory consequences for local government." 41 Cal.App.4th at 384.

The Thresholds, by contrast, are not binding, and they do not prohibit development in any location. At most, they set a standard for environmental review that other public agencies can use (or not) to evaluate the significance of proposed developments. As the Court of Appeal noted, making the connection between adoption of the Thresholds and the ultimate environmental impact posited by BIA would take at least ten steps

requiring multiple assumptions at each step of the way. Opinion at 16. The Court then correctly determined that this long and speculative chain of events was "too attenuated . . . to be *reasonably foreseeable.*" *Id.* This unremarkable holding is consistent with a long line of decisions and presents no occasion for Supreme Court review. *Fullerton Joint Union High School Dist. v. State Bd. of Educ.* (1982) 32 Cal.3d 779, 795 (action must be "a necessary step in a chain of events which would culminate in physical impact on the environment"), disapproved on other grounds; *Kaufman & Broad-South Bay, Inc. v. Morgan Hill Unified School Dist.* (1992) 9 Cal.App.4th 464, 474 (agency action must be "*essential* step in a chain of events leading to change in the physical environment") (emphasis in original); *Friends of the Sierra Railroad v. Tuolumne Park and Recreation Dist.* (2007) 147 Cal.App.4th 643, 663, 664 (agency action is not a project if it is "too many steps removed from any actual impact"); *Wal-Mart Stores, Inc. v. City of Turlock* (2006) 138 Cal.App.4th 273, 298 (petitioner must "present[ ] evidence" that potential impact is "reasonably foreseeable"), disapproved on other grounds; Pub. Res. Code § 21080(e)(1) (evidence consists of "fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact").

CONCLUSION

Because this case does not address any issue that merits Supreme Court review, the petition should be denied.

DATED: October 3, 2013 Respectfully submitted,

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CERTIFICATE OF WORD COUNT

I certify that this answer, exclusive of this certificate and the tables of contents and authorities, contains 2,969 words according to the word count function of the word-processing program used to produce the brief. The number of words in this answer complies with the requirements of Rule 8.504(d)(1) of the California Rules of Court.

DATED: October 3, 2013

SHUTE, MIHALY &
WEINBERGER LLP

By: _____
ELLISON FOLK

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PROOF OF SERVICE

California Building Industry Association, et al. v. Bay Area Air Quality Management District

Supreme Court of California - Case No. S213478

At the time of service, I was over 18 years of age and **not a party to this action.** I am employed in the City and County of San Francisco, State of California. My business address is 396 Hayes Street, San Francisco, CA 94102.

On October 4, 2013, I served true copies of the following document(s) described as:

ANSWER TO PETITION FOR REVIEW

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

Executed on October 4, 2013, at San Francisco, California.

Sara L. Breckenridge

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Supreme Court of California - Case No. S213478

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