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IN THE

SUPREME COURT OF CALIFORNIA

UNION OF MEDICAL MARIJUANA PATIENTS, Plaintiff and Appellant, v. CITY OF SAN DIEGO, Defendant and Respondent, CALIFORNIA COASTAL COMMISSION, Real Party in Interest,	**Fourth District Court of Appeal, Division One Case No. D068185** San Diego Superior Court Case No. 37-2014-00013481-CU-TT-CTL

ANSWER BRIEF ON THE MERITS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page No(s).

Cases

Statutes

Other Authorities

I.

INTRODUCTION

Petitioner brings this case under the California Environmental Quality Act (CEQA) to challenge the City of San Diego's (City) ordinance O-20356, which establishes a permitting process for medical marijuana facilities (Ordinance). Petitioner alleges the Ordinance is a "project" subject to CEQA because it places a limit on the total number of facilities, and that this limit will cause impacts associated with traffic and indoor cultivation. Petitioner alleges the Ordinance "requires thousands of patients to drive across the City to obtain their medicine" and "will result in a proliferation of small indoor cultivation sites[.]" (*See* Clerk's Transcript (CT), p. 6 (¶ 17) and p. 8 (¶ 20).)

Petitioner's arguments fail because they rely on the incorrect premise that the Ordinance *restricts* a patient's access to marijuana; there is no substantial evidence in the record to support this assumption. Instead, the Ordinance *expands* patients' access to marijuana. At the time the City adopted the Ordinance, there were NO legal facilities in the City. The Ordinance provides the means to legally permit a facility. The Ordinance does *nothing* to restrict a patient's access to marijuana: it does not prohibit or address currently existing illegal facilities or other means by which patients presently obtain marijuana—whether legal or illegal. The Ordinance only creates an additional means to obtain marijuana. So it is incorrect and speculative to assume the Ordinance will cause patients to drive farther or cultivate marijuana in their homes.

Because there are no reasonably foreseeable impacts, the City appropriately determined the Ordinance was not a "project" and therefore not subject to CEQA; it "does not have the potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable

indirect physical change in the environment[.]" (AR 28:439 (*citing* CEQA Guidelines, § 15060(c)(3) and 15378).) "An activity that is not a 'project' as defined in the Public Resources Code (see § 21065) and the CEQA Guidelines (see § 15378) is not subject to CEQA. (CEQA Guidelines, § 15060, subd. (c)(3).)" (*Muzzy Ranch Co. v Solano County Airport Land Use Commission* (2007) 41 Cal.4th 372, 380.)

Agencies are not required to assess speculative impacts. Courts have long held that such a review would be meaningless, and that agencies should assess environmental impacts when there is enough information to analyze. The Ordinance mandates that the approval of any marijuana facility requires a discretionary permit, and thereby ensures that the City will perform CEQA analysis when there is enough information (location, size, design, etc.) to perform a meaningful review. Only then will the City be able to assess direct and reasonably foreseeable indirect physical changes in the environment. Therefore, the City will perform CEQA review at the appropriate time.

Petitioner also argues Public Resources Code Section 21080(a) should be read such that all activities referenced therein are subject to CEQA as a matter of law (*i.e.,* without regard to whether the activity meets the definition of "project" in Public Resources Code Section 21065). Petitioner's position is inconsistent with the text of Section 21065 and Section 21080(a), is inconsistent with the Legislative History for Section 21065, and is inconsistent with the case law, which makes clear that activities not meeting the requirements of Section 21065 are "not subject to CEQA." (*Muzzy Ranch, supra,* 41 Cal.4th at p. 380.)

The Court may also elect to dismiss this appeal as moot. Recently enacted Senate Bill 94 exempts these types of marijuana zoning ordinances from CEQA review for the next approximately two years. Accordingly, a

court cannot issue the remedy (*i.e.*, CEQA compliance) Petitioner seeks in this action.

For these reasons, as more fully explained below, the City respectfully requests that the Court affirm the trial court's and Court of Appeal's decision to deny the Petition or, alternatively, dismiss the appeal as moot.

II.

STATEMENT OF THE CASE

A. The City Council's Adoption of the Ordinance and its CEQA Determination

In a widely-attended, noticed public hearing on April 22, 2013, City Council directed the Mayor and City Attorney to develop an ordinance to allow medical marijuana facilities. (Administrative Record (AR) 16:229 and 231.)[1] Thereafter, on December 5, 2013, the Planning Commission held a noticed public hearing to discuss the proposed Ordinance. (AR 27:293-435.) The item lasted over two and a half hours, and several members of the public attended and spoke. (*Ibid.*)

The Ordinance came before City Council in a noticed public hearing on February 25, 2014. (AR 32:472.) The Court can view the hearing on the City's website at http://granicus.sandiego.gov/ViewPublisher.php?view_id=3. After nearly three hours of discussion and public testimony, City Council voted 8-1 to amend and approve the Ordinance. (AR 31:469-470; AR 32:472-627.) Final adoption required a second, noticed public hearing, which occurred on March 11, 2014. (AR 36:648-656.)

[1] The first number refers to the tab. The second number refers to the page number. If there is no second number, then the cite is to the tab only.

Prior to the adoption of the Ordinance, medical marijuana facilities were not allowed in the City. The Ordinance does nothing to address illegally operating marijuana facilities. It only creates a process to allow facilities to operate legally. The Ordinance makes amendments to the City's Land Development Code to allow "medical marijuana consumer cooperatives" to operate in specified commercial and industrial zones with a Conditional Use Permit. (AR 42:682.) Medical marijuana consumer cooperatives are defined as "a facility where marijuana is transferred to qualified patients or primary caregivers in accordance with the Compassionate Use Act of 1996 and the Medical Marijuana Program Act, set forth in California Health and Safety Code section 11362.5 through 11362.83." (AR 4:26.)

Contrary to Petitioner's contention that "[t]he City did not limit the definition of a 'Medical Marijuana Consumer Cooperative' to conventional 'storefront medical marijuana dispensaries,'" (Court of Appeal Opening Brief, p. 11) "[t]he intent of the Ordinance is to regulate commercial retail type facilities." (AR 42:682.) Under the Ordinance, "[t]here may not be more than four medical marijuana consumer cooperatives per City Council District." (AR 42:682.)

Prior to adopting the Ordinance, the City made the following CEQA determination:

> The ... Ordinance is not subject to [CEQA] pursuant to CEQA Guidelines Section 15060(c)(3), in that it is not a Project as defined by CEQA Guidelines Section 15378. Adoption of the ordinance does not have the potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment. Future projects subject to the ordinance will require a discretionary permit and CEQA review, and will be analyzed at the appropriate time in accordance with CEQA.

(AR 28:439.)

B. The Trial and Appellate Court Decisions

At the trial court, the parties briefed two issues: whether Petitioner, as a Los Angeles organization, had standing to challenge an ordinance adopted in San Diego; and whether the adoption of the Ordinance constituted a "project" under CEQA. The trial court, the Honorable Joel R. Wohlfeil presiding, heard argument on March 6, 2015.

On March 9, 2015, Judge Wohlfeil issued a ruling rejecting the City's standing argument,[2] and denying the Petition on the grounds that there was no evidence in the administrative record that would support the existence of a "reasonably foreseeable indirect physical change in the environment" per Public Resources Code section 21065. (CT 110, first para.)

On May 1, 2015, the City filed a Notice of Entry of Judgment (CT 145-157.) On May 18, 2015, Petitioner filed a notice of appeal. (CT 158-159.) On October 14, 2016, the Fourth District Court of Appeal affirmed the trial court's judgment. The Supreme Court granted review on January 11, 2017.

III.

STANDARD OF REVIEW

"When considering a petition for traditional mandamus seeking relief under CEQA from an agency's action, the trial court reviews the agency's action for abuse of discretion." (*Friends of the Sierra Railroad v. Tuolumne Park and Recreation District* (2007) 147 Cal.App.4th 643, 652.) "Abuse of discretion is established if the agency has not proceeded in a

[2] The City does not dispute this issue on appeal.

manner required by law or if the determination or decision is not supported by substantial evidence." (*Ibid.*)

"Substantial evidence" is defined as "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." (CEQA Guidelines, § 15384(a).) "Substantial evidence shall include facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts." (CEQA Guidelines, § 15384(b).) "The phrase 'reasonable assumption predicated upon fact' means a reasonable inference drawn from fact." (*Wal-Mart Stores, Inc. v. City of Turlock* (2006) 138 Cal.App.4th 273, 285, fn. 6 (disapproved on other grounds in *Hernandez v. City of Hanford* (2007) 41 Cal.4th 279, 297).) "Argument, speculation, unsubstantiated opinion or narrative, evidence which is clearly erroneous or inaccurate, or evidence of social or economic impacts which do not contribute to or are not caused by physical impacts on the environment does not constitute substantial evidence." (CEQA Guidelines, § 15384(a).)

"In dealing with an agency's conclusion that the action in question was not a project within the meaning of CEQA, … the trial court can employ its own analysis of undisputed facts in the record and decide the question as a matter of law without deference to the agency's decision." (*Friends of the Sierra, supra,* 147 Cal.App.4th at p. 652.) "Whether an activity is a project is an issue of law that can be decided on undisputed data in the record on appeal." (*Muzzy Ranch, supra,* 41 Cal.4th at p. 382.) For example, in *Friends of the Sierra,* the court determined that there was no substantial evidence in the record showing a reasonably foreseeable impact and that the "no project" determination was therefore appropriate. (*Friends of the Sierra, supra,* 147 Cal.App.4th at p. 662.)

"In a CEQA case, as in other mandamus cases, [the appellate court's] review of the administrative record for error is the same as the trial court's; [the appellate courts] review the agency's action, not the trial court's decision." (*Muzzy Ranch, supra,* 41 Cal.4th at p. 381.)

IV.

ARGUMENT

A. CEQA applies only to "projects": activities that may cause a direct or reasonably foreseeable indirect physical change in the environment; CEQA does not apply where impacts are speculative.

The issue in this case is whether the Ordinance qualifies as a "project" under CEQA. In 1994, following the decision *Kaufman & Broad-South Bay, Inc. v. Morgan Hill USD* (1992) 9 Cal.App.4th 464, the Legislature amended the CEQA definition of "project" so that CEQA applies only to "an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment[.]" Pub. Res. Code § 21065 (*see also* Historical and Statutory Notes).[3] "An activity that is not a 'project' as defined by the Public Resources Code (see § 21065) and the CEQA Guidelines (see § 15378) *is not subject to CEQA.* (CEQA Guidelines, §15060(c)(3).)" (*Chung v. City of Monterey Park* (2012) 210 Cal.App.4th 394, 401-02 (emphasis added) (*quoting Muzzy Ranch, supra,* 41 Cal.4th at p. 380).)

The CEQA Guidelines explain that "[a] direct physical change in the environment is a physical change in the environment which is caused by and immediately related to the project." (CEQA Guidelines, § 15064(d)(1).) Petitioner does not and cannot allege that the Ordinance would cause any

[3] Prior to the *Kaufman* decision, the "direct … or … reasonably foreseeable indirect physical change" requirement was in the CEQA Guidelines (section 15378), but not in the Public Resources Code.

direct change to the environment. Instead, Petitioner argues only the existence of indirect physical changes. Therefore, this brief focuses on the definition of a "project" related to a reasonably foreseeable indirect physical change in the environment.

"An indirect physical change in the environment is a physical change in the environment which is not immediately related to the project, but which is caused indirectly by the project." (CEQA Guidelines, § 15064(d)(2).) "An indirect physical change is to be considered *only if that change is a reasonably foreseeable impact which may be caused by the project.* ***A change which is speculative or unlikely to occur is not reasonably foreseeable."*** (CEQA Guidelines, § 15064(d)(3) (emphasis added).) "The question whether alleged physical changes are reasonably foreseeable requires an examination of the evidence presented in the administrative record." (*Wal-Mart Stores, Inc., supra,* 138 Cal.App.4th at p. 291.)

For example, in *Chung,* the court held that a ballot measure requiring competitive bidding for future trash service contracts is not a "project" and therefore not subject to CEQA because the impacts were not reasonably foreseeable. (*Chung, supra,* 210 Cal.App.4th at p. 405-06.) The petitioner in *Chung* similarly argued that the ballot measure—which allowed the city to hire additional service providers—would result in traffic impacts, additional greenhouse gas emissions, and other environmental impacts. (*Id.* at p. 405.) The court rejected the claim because the impacts were speculative. (*Id.* at p. 406.) Relying on *Kaufman,* the court found environmental review at that juncture "would be meaningless. There is simply not enough specific information ... to warrant review at this time." (*Id.* at p. 406.)

Kaufman likewise supports the City's position. In *Kaufman,* the court found the formation of a facilities district—a means for raising funds for acquisition and construction of school sites—was not a "project" under CEQA because the location of potential future school sites was speculative, and there was insufficient information for meaningful environmental assessment. (*Kaufman, supra,* 9 Cal.App.4th at p. 475-76.)

Like *Chung* and *Kaufman,* the record in this case does not support a conclusion that the subject activity is a "project" subject to CEQA.

B. CEQA should occur when there is meaningful information to assess.

A related issue under CEQA is timing. "Choosing the precise time for CEQA compliance involves a balancing of competing factors." (*See* CEQA Guidelines, § 15004(b).) Environmental documents should be prepared as early as feasible "yet late enough to provide meaningful information for environmental assessment." (*Ibid.*)

Friends of the Sierra Railroad (2007) 147 Cal.App.4th 643 is instructive. In that case, the petitioner challenged the district's sale of land containing a historic railroad, arguing it was reasonably foreseeable that the sale would result in development of the property and resultant impact on the historical resource. The court agreed that development was reasonably foreseeable and that the development could impact the historical resource. (*Id.* at p. 656.) Notwithstanding, the court held the approval of the sale was not a "project" as defined by CEQA because a meaningful CEQA review was not yet possible. (*Id.* at p. 657.) The court reasoned:

> In spite of these possibilities, we conclude that this case more closely resembles those prior cases in which no CEQA project was found or where CEQA review was premature than those in which there was a project or review was not premature. The reasonably foreseeable likelihood of *some* development on the [] property, combined with the possibility

> that the development could impact the historical resource included within the larger property, does not trigger CEQA review. CEQA review has to happen far enough down the road toward an environmental impact to allow meaningful consideration in the review process of alternatives that could mitigate the impact.

(*Ibid.*, footnote omitted (emphasis in original).)

The Fourth District Court of Appeal ruled similarly in *Pala Band of Mission Indians v. County of San Diego* (1998) 68 Cal.App.4th 556. The petitioner challenged a siting element that was part of the county's integrated waste management plan because the county did not analyze the impacts related to the potential landfill sites referenced in the siting element. Like the City in the present case, the county asserted that environmental review of the sites would be speculative, and that the county would perform environmental review at the time it decides to move forward with a particular site. (*Id.* at p. 569.) The court agreed that environmental review at this stage "would be premature in that any analysis of potential environmental impacts would be wholly speculative." (*Id.* at p. 576.)

C. The City complied with CEQA.

Consistent with the above statutory and case law authority, the City determined the Ordinance is not a "project" because it will not result in a direct or reasonably foreseeable indirect physical change in the environment. (AR 28:439.) The Ordinance amends the City's Land Development Code to allow qualifying medical marijuana facilities in certain commercial and industrial zones throughout the City. The City created a discretionary process for the issuance of permits under the Ordinance, which means CEQA review must be performed before the issuance of any individual permit. (AR 28:439.)

D. Public Resources Code Section 21080(a) does not negate the causation requirement of Public Resources Code Section 21065.

Petitioner argues that, pursuant to Public Resources Code Section 21080(a), a zoning ordinance is a "project" as a matter of law without regard to whether it meets the elements of Section[4] 21065. Petitioner misreads Section 21080(a). The Legislature did not intend for Section 21080(a) to restrict the requirements of Section 21065.

Providing a general statement of the law for CEQA, Section 20180(a) reads:

> Except as otherwise provided in this division, this division shall apply to discretionary projects proposed to be carried out or approved by public agencies, including, but not limited to, the enactment and amendment of zoning ordinances, the issuance of zoning variances, the issuance of conditional use permits, and the approval of tentative subdivision maps unless the project is exempt from this division.

Section 20165 defines "project." The "project" definition has two elements. The first element (referenced herein as the "causation element") relates to whether the activity causes a change in the environment, and the second element (referenced herein as the "categorical element") relates to the type or category of activity. Section 21065 defines "project" as (1) "an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment," and (2) which is any of the following:

> (a) An activity directly undertaken by any public agency.

---

[4] All generic references to "Section" is a reference to the Public Resources Code.

(b) An activity undertaken by a person which is supported, in whole or in part through contracts, grants, subsidies, loans, or other forms of assistance from one or more public agencies.

(c) An activity that involves the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies.

(Pub. Res. Code § 21065.)

The rules of statutory interpretation provide: "a court must look first to the words of the statute themselves, giving to the language its usual, ordinary import and according significance, if possible, to every word, phrase and sentence in pursuance of the legislative purpose. A construction making some words surplusage is to be avoided." (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1386-1387.) Similarly, the rules require that "where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all." (Code of Civ. Proc. § 1858.)

Also, "when a general and particular provision are inconsistent, the latter is paramount to the former. So a particular intent will control a general one that is inconsistent with it." (Code of Civ. Proc. § 1859; *see also San Francisco Taxpayers Assn. v. Board of Supervisors* (1992) 2 Cal.4th 571, 577 ("A specific provision relating to a particular subject will govern in respect to that subject, as against a general provision ....").)

Petitioner's argument assumes that the phrase "including, but not limited to, the enactment and amendment of zoning ordinances ..." in Section 21080(a) qualifies "***discretionary projects*** proposed to be carried out or approved by public agencies" as opposed to qualifying/clarifying

only the latter part of that phrase (*i.e.*, "proposed to be carried out or approved by public agencies").

Under Petitioner's interpretation, the listed examples are "projects" subject to CEQA without regard to whether the activity meets both elements of the "project" definition in Section 21065. This interpretation should be rejected because it assumes a causation analysis is not warranted for these activities, which makes the causation element of Section 21065 superfluous.

The City advocates for the latter interpretation, whereby the listed examples address and clarify only the type of activity subject to CEQA (*i.e.*, addressing only the categorical element of Section 21065). This interpretation gives significance to Section 21065's causation element and thereby harmonizes the two sections. Also, this latter interpretation is consistent with CEQA Guideline section 15378, which reads:

> (a) "Project" means the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and that is any of the following:
>
> (1) An activity directly undertaken by any public agency including but not limited to public works construction and related activities clearing or grading of land, improvements to existing public structures, enactment and amendment of zoning ordinances, and the adoption and amendment of local General Plans or elements thereof pursuant to Government Code Sections 65100–65700.
>
> (2) An activity undertaken by a person which is supported in whole or in part through public agency contacts, grants, subsidies, loans, or other forms of assistance from one or more public agencies.

> (3) An activity involving the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies.

CEQA Guidelines, § 15378(a). Under this Guideline section, the "amendment of zoning ordinances" example clearly qualifies/clarifies only the categorical element of "project," and not the term "project" in its entirety.

The City's interpretation is consistent with the Legislature's intent that Section 21080(a) is not to be construed in a way that limits the effect of other sections within CEQA. That intent is demonstrated by Section 21080(a)'s opening qualification: "[e]xcept as otherwise provided in this division …."[5] This qualification harmonizes the two Sections by making clear that Section 21080(a) is not intended to interfere with any requirement of Section 21065.

To the extent Sections 21065 and 21080(a) can be read as being inconsistent, the rules of statutory construction require a reading that gives effect to Section 21065. Section 21080(a) is a general statement of the law; it uses the term "project," but does not define it. Section 21065 defines the term and provides far more specificity. Therefore, Section 21065 "is paramount" to Section 21080. (Code of Civ. Proc. § 1859.)

E. The caselaw does not support Petitioner's position that a zoning ordinance is a "project" as a matter of law.

Petitioner argues that *Muzzy Ranch Co. v. Solano County Airport Land Use Commission* (2007) 41 Cal.4th 372 supports its argument that an amendment to a zoning ordinance is a "project" as a matter of law. *Muzzy*

[5] "division" refers to division 13 of the Public Resources Code, which contains the full text of CEQA.

Ranch does not support this position; instead, the Supreme Court made clear that *both* elements of Section 21065 must be met, and that the causation element requires a case specific analysis based on undisputed data in the record on appeal. (*Muzzy Ranch, supra,* 41 Cal.4th at p. 382.)

In *Muzzy Ranch,* the Supreme Court analyzed whether the commission's adoption of the Travis Air Force Base Land Use Compatibility Plan (TALUP) qualified as a "project" under Public Resources Code Section 21065. The categorical element was easily met in that case because the adoption of the TALUP is clearly "an activity directly undertaken by [a] public agency[,]" which is the first of the three categories set forth in Section 21065. (*Muzzy Ranch, supra,* 41 Cal.4th at p. 381-382.) The Court then analyzed the causation element at length. (*Id.* at p. 382 ("The question is whether the Commission's adoption of the TALUP is the sort of activity that may cause a direct physical change or a reasonably foreseeable indirect physical change in the environment (Pub. Resources Code, § 21065) so as to constitute a project.").)

Specifically at issue was whether the TALUP caused a reasonably foreseeable indirect physical change in the environment as a result of displaced residential development. The TALUP restricted residential development within a 600 square mile zone to those levels currently permitted under existing general plans and zoning regulations. (*Id.* at p. 379.) Importantly, the TALUP prohibited persons from seeking general plan or zone amendments to allow increased residential development. (*Ibid.*) Thus, whereas zoning "is subject to change[,] and amendment of a general plan is not a rare occurrence[,]" the TALUP restricted any such amendment. (*Id.* at p. 383.) The Court stated that the TALUP was not merely advisory, but that it carries significant, binding regulatory consequences for local government in Solano County. (*Id.* at p. 384.)

The Court noted that, because of the State's high-priority requirement of making housing available, and the State's ever increasing population, a government agency may reasonably anticipate that its placement of a ban on residential development in one area may have the consequence of displacing residential development to other areas. (*Id.* at p. 382-83.) The Court therefore concluded that the activity would cause a reasonably foreseeable change in the environment.

The Supreme Court analyzed the "project" issue exclusively under Section 21065 and specifically addressed the causation element. There is no reference to Section 21080(a) in the opinion. Thus, this case does not stand for the proposition that a zone amendment qualifies as a "project" as a matter of law; instead, the case shows that the causation element must be addressed.

Petitioner also relies on *Rominger v. County of Colusa* (2014) 229 Cal.App.4th 690, in which the Third District Court of Appeal addressed whether the county appropriately approved a mitigated negative declaration (MND) related to a subdivision to create 16 parcels out of four on approximately 159 acres of land zoned for agricultural and light industrial use. (*Id.* at p. 695-96.) After the county prepared a revised initial study, which concluded that the project would potentially have significant environmental impacts related to air quality, cultural resources, and hydrology/water quality that could be mitigated, the county prepared a MND. (*Id.* at p. 697.)

Notwithstanding the initial study conclusions, the county argued that the subdivision was not a "project," and the court disagreed. The court held that the subdivision qualified as a project because it is a governmental activity listed on Section 21080(a), noting that "[i]t virtually goes without