IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. S238563

UNION OF MEDICAL MARIJUANA PATIENTS, INC.,
Plaintiff and Appellant,

v.

CITY OF SAN DIEGO,
Defendant and Respondent,

CALIFORNIA COASTAL COMMISSION,
Real Party in Interest.

Court of Appeal of California
Fourth District, Division One
D068185

Superior Court of California
San Diego County
37-2014-00013481-CU-TT-CTL
Joel R. Wohlfeil

Appellant's Reply Brief

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases:

Statutes:

Other:

APPELLANT'S REPLY BRIEF

I. Introduction

This case presents the Court with the following question: Is the City of San Diego's enactment of the zoning ordinance at issue in this case, City of San Diego Ordinance No. O-20356 ("Ordinance"), a "project" under the California Environmental Quality Act ("CEQA")? Respondent claims it is not, despite the clear language of Pub. Resources Code § 21080(a) that CEQA "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 . . . ."

Respondent raises numerous issues in its Answering Brief that may be relevant in other contexts, such as questions relating to substantial evidence (which are relevant only to the question of whether the City should have adopted a negative declaration per Pub. Resources Code § 21080(c) or prepared an environmental impact report under Pub. Resources Code § 21080(d)),[1] and relies

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[1] (c) If a lead agency determines that a proposed project, not otherwise exempt from this division, would not have a significant effect on the environment, the lead agency shall adopt a negative declaration to that effect. The negative declaration shall be prepared for the proposed project in either of the following circumstances:
(1) There is no substantial evidence, in light of the whole record before the lead agency, that the project may have a significant effect on the environment.
(2) An initial study identifies potentially significant effects on the environment, but (A) revisions in the project plans or proposals made by, or agreed to by, the applicant before the proposed negative declaration and initial study are released for public

on cases which involved proposals covered by statutory exemptions not applicable here or Court of Appeal cases which are contrary to later California Supreme Court authority.

Respondent also argues that the Ordinance is not a project under Pub. Resources Code § 21065 because it is not an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, despite the obvious fact that the opening and patronage of dispensaries is a foreseeable result of an ordinance which makes the operation of such dispensaries a newly permitted use.

II. The Ordinance is a Project under CEQA

A. The Ordinance qualifies as a project because it is likely to cause reasonably foreseeable indirect physical changes in the environment.

Respondent appears to have misapprehended the nature of Appellant's argument regarding the categorical approach this Court adopted in Muzzy Ranch in determining whether a discretionary activity is a "project" under CEQA. Appellant is not

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review would avoid the effects or mitigate the effects to a point where clearly no significant effect on the environment would occur, and (B) there is no substantial evidence, in light of the whole record before the lead agency, that the project, as revised, may have a significant effect on the environment.
(d) If there is substantial evidence, in light of the whole record before the lead agency, that the project may have a significant effect on the environment, an environmental impact report shall be prepared.

arguing for a definition of the term that would permit "the use of CEQA to challenge projects on [a] nonenvironmental basis" [Answer Brief, p. 24, *quoting* Respondent's RJN, Exh. "A," 0005] as Respondent seems to imply. The current case is hardly one like the example in the legislative history cited by Respondent at the bottom of page 24 of its Answer Brief, namely, "lawsuits instigated by trade unions for the purpose of forcing the use of union labor." [*Ibid.*] As explained throughout Appellant's Opening Brief and throughout this Reply Brief, there are numerous potential physical impacts that can reasonably be seen to be not only possible, but almost certain to flow from the adoption of the ordinance. And the legislative history quoted by Respondents specifically acknowledges that "where physical impacts can be shown to exist," even a lawsuit instigated for the purpose of forcing the use of union labor would be appropriate. [*Ibid.*]

B. The examples in Section 21080(a) satisfy Section 21065.

What Respondent seems to be missing is that this Court, in *Muzzy Ranch Co. v. Solano Cnty. Airport Land Use Comm'n* (2007) 41 Cal.4th 372, and the Court of Appeal, in *Rominger v. Cnty. of Colusa* (2014) 229 Cal.App.4th 556, concluded that the *sorts* of activities listed in Section 21080(a) always have the potential for at least some indirect physical impacts to the environment. This Court said in *Muzzy Ranch* that the question was "whether the Commission's adoption of the TALUP was the ***sort of activity*** that may cause a direct physical change in the

environment or a reasonably foreseeable indirect physical change in the environment . . . ." *Muzzy Ranch Co. v. Solano Cnty. Airport Land Use Comm'n, supra,* at p. 382. This Court's rationale in *Muzzy Ranch* bears repeating:

> That the enactment or amendment of a general plan is subject to environmental review under CEQA is well established. "Although [they are] not explicitly mentioned in the CEQA statutes, general plans 'embody fundamental land use decisions that guide the future growth and development of cities and counties,' and ***amendments of these plans 'have a potential for resulting in ultimate physical changes in the environment.'*** General plan adoption and amendment are therefore properly defined in the CEQA guidelines as projects subject to environmental review."

Muzzy Ranch Co. v. Solano Cnty. Airport Land Use Comm'n, supra, 41 Cal.4th at p. 385 (emphasis added; internal citations omitted).

Respondent has failed to provide any example of a zoning ordinance, zoning variance, conditional use permit or tentative subdivision map that would not have at least some reasonably foreseeable physical impact on the environment. While there might be such an instance, in an extremely rare case, such a case would be a prime example of the purpose of the common sense exemption.[2]

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[2] The Respondent's citation to *Union of Med. Marijuana Patients, Inc. v. City of Upland* (2016) 245 Cal.App.4th 1265 is not apposite to the present case for two reasons. First, the case was decided on the following basis: "A municipal ordinance that merely restates or ratifies existing law does not constitute a

Rominger also makes it clear, in a passage actually quoted in the Respondent's Answering Brief, that the subdivision in question in that case, like the general plan amendments discussed in *Muzzy Ranch* above and the zoning ordinance in the case before this Court, do have the potential for environmental impacts: "It virtually goes without saying that the purpose of subdividing property is to facilitate its use and development." *Rominger v. Cnty. of Colusa, supra,* 229 Cal.App.4th at p. 702. It also goes without saying that the purpose of amending a zoning law to add a new permissible use in a certain area is to facilitate that land use in the specified zone. Why the Respondent believes that its quotation from *Rominger* on page 22 of its Answering Brief, "with the potential for greater or different use comes the potential for environmental impacts from that use" (*Ibid.*) would not be equally applicable to the Ordinance at issue in this case is puzzling, to say the least. Regardless of the Respondent's claim that zoning ordinances "do not necessarily make a particular property more usable"[3] (Answering Brief, p. 22), the one at issue here most certainly did.

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project." *Id.* at p. 1273. Furthermore, the challenged ordinance was not a zoning ordinance, a fact which the court was required to address by noting that the original ordinance being restated was not entirely a zoning ordinance either. *See Id.* at p. 1274 ("We are not persuaded the 2007 ordinance was exclusively a zoning ordinance that regulated only land use.")

[3] Sometimes zoning ordinances make a particular property less usable, but that does not mean it will have no environmental impacts. That is precisely what results in displaced development.

C. Agencies must at least consider potential environmental impacts when an activity of the sort listed in Section 21080(a) is undertaken.

What Respondent is really asking this Court to do is to bless the practice of undertaking activities without so much as a thought as to whether that activity might impact the environment. This would violate the fundamental purpose of CEQA, to ensure "that environmental considerations play a significant role in governmental decision-making" *Friends of Mammoth v. Bd. of Supervisors* (1972) 8 Cal.3d 247, 263; accord, *Fullerton Joint Union High Sch. Dist. v. State Bd. of Educ.* (1982) 32 Cal.3d 779, 797.

In *Davidon Homes v. City of San Jose* (1997) 54 Cal.App.4th 106, the City of San Jose attempted to avoid engaging in any environmental consideration on the basis of

> a conclusory recital in the preamble of the Ordinance that the project was exempt under section 15061, subdivision (b)(3) [the common sense exemption]. There [was] no indication that any preliminary environmental review was conducted before the exemption decision was made. The agency produced no evidence to support its decision and [the court found] no mention of CEQA in the various staff reports. ***A determination which has the effect of dispensing with further environmental review at the earliest possible stage requires something more.*** We conclude the agency's exemption determination must be supported by evidence in the record demonstrating that the agency considered possible environmental impacts in reaching its decision.

Davidon Homes v. City of San Jose, supra, 54 Cal.App.4th at pp. 116–17.

This Court, in *Muzzy Ranch,* cited with approval and relied on this conclusion in *Davidon.* It is true that *Davidon* involved the common sense exemption. But if *Davidon's* statement highlighted in the immediately preceding passage were true with respect to the common sense exemption, it would be even more applicable to the determination as to whether an activity is a project, which occurs at an even earlier stage than what *Davidon* refers to as "the earliest possible stage." It would make no sense to impose a lesser standard on the resolution of the preliminary question of whether the activity is a project, since doing so would render meaningless the standard announced in *Davidon* and approved of in *Muzzy Ranch.* Agencies unable to muster evidence or craft an analysis sufficient to support the application of the common sense exemption could instead simply take the tack the Respondent has taken here and claim that they could exercise their discretion to determine that the activity was not a project, without any factual or logical basis for that conclusion. Such a standard would accomplish little other than to burden the courts with having to review those decisions *de novo* to determine whether they were correct legal conclusions, something that would be even more burdensome on the courts in the absence of any record or analysis to consider.

D. Section 21065 does not override Section 21080(a).

The Respondent, on page 17 of its Answering Brief, discusses the maxim that the particular provision in a statutory scheme should control over a more general one. However, in this case, it is the specific actions listed in Section 21080(a) ("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") that are more specific than the general provision in Section 21065 regarding activities "which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment." As the Respondent correctly indicates, "when a general and particular provision are inconsistent, the latter is paramount to the former." (Answering Brief, p. 17, citing Code Civ. Proc., § 1859.) Furthermore, the Respondent also refers to the need to harmonize legislation so as to give effect to all provisions. *Ibid.* Here, the way to do so is to recognize, as this Court previously did in *Muzzy Ranch*, that the specific examples in Section 21080(a) all inevitably involve potential environmental impacts.[4]

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[4] Respondent's argument at pages 17–18 of its Answering Brief, that the "including but not limited to" list of examples in Section 21080(a) qualifies or clarifies only the adjectival phrase "proposed to be carried out or approved by public agencies" makes no sense. The examples are all nouns. The only predicate to which they could possibly relate is the nominal phrase "discretionary project."
Respondent's argument that the opening qualification in Section 21080(a), "except as otherwise provided in this division" also does

Respondent also argues,

> The tier one analysis serves an important "gate-keeper" role that prevents agencies from preparing meaningless EIRs. If the analysis proceeds to tier two, then theoretically there are identifiable impacts to assess. The tier two common sense exemption only applies if the agency can state with certainty that there is no possibility that the impacts will be significant.

[Answering Brief, p. 27.] First of all, CEQA contains numerous mechanisms to prevent agencies from preparing meaningless EIR's. Obviously, if it can be seen with certainty that there will be no significant environmental impacts from an activity, then the common sense exemption avoids the meaningless EIR. But if there are potential environmental impacts, the agency needs to conduct at least some sort of review to see whether such potential impacts may be significant. If, after an appropriate review, there

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nothing to defeat appellant's positions. Respondent has ignored the larger context of the phrase, "Except as otherwise provided in this division, this division shall apply to . . . ." There is nothing in Section 21065 that provides any exception to the application of CEQA.

Footnote 7 of *Wal-Mart Stores, Inc. v. City of Turlock* (2006) 138 Cal.App.4th 273, 286 (*disapproved of on other grounds by Hernandez v. City of Hanford* (2007) 41 Cal.4th 279) may be interesting, but it is pure *dicta* for numerous reasons already discussed in Appellant's Opening Brief. The discussion in the footnote does, however, point out that if the construction urged by the Respondents here were adopted, the main significance of subdivision (a) of Section 21080 would be limiting the applicability of CEQA to discretionary projects. This would hardly be consistent with the policy of giving effect to all of the provisions in a statute.

is no substantial evidence, in light of the whole record, that the project may have a significant effect on the environment, the agency can adopt a negative declaration and avoid a meaningless EIR. But the determination required by CEQA cannot be simply left to the uninformed opinion of the agency when the action is one of those listed in Section 12080(a) that so obviously are likely to have a physical impact on the environment.

The City's approach, in attempting to forestall environmental review until individual applications are made for specific facilities, clearly would amount to piecemealing and is contrary to the requirement, discussed in Appellant's Opening Brief, that the project be analyzed at the earliest possible opportunity, and particularly when deferral would result in loss of available mitigation measures.

Perhaps most telling, however, is the Respondent's own acknowledgement, on page 27 of its Answering brief, which concedes, "Individual facilities, depending on their location and other factors, may result in significant environmental impacts."[5] Even the Respondent admits that such impacts are reasonably foreseeable.

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[5] Respondent also acknowledges that "the City likely would be unable to meet the common sense exemption standard." [Answering Brief, p. 27.] It does not follow, however, that the Respondent would be required to prepare an EIR. The project may qualify for a Negative Declaration or a Mitigated Negative Declaration. The Respondent is simply trying to evade its responsibilities to look into the potential environmental impacts that may flow from the adoption of the Ordinance by pretending that it is unable to foresee any physical impacts on the environment. CEQA does not permit such an approach.

E. The Ordinance may cause non-speculative, reasonably foreseeable indirect physical changes in the environment.

The cases cited by the Answering Brief to claim that the environmental impacts of the ordinance are too speculative and that insufficient information exists for them to be considered are **inapplicable**. The Ordinance allows a new land use with known environmental impacts to specified areas within the City, complete with a pre-determined set of set-back and other restrictions.

The Solana County Airport Land Use Commission made the same argument in *Muzzy Ranch*: "The Commission contends that, as a matter of law, it had no duty to consider [the alleged environmental impacts] because such [impacts were] inherently too speculative to be considered a reasonably foreseeable effect . . . ." *Muzzy Ranch Co. v. Solano Cnty. Airport Land Use Comm'n*, *supra*, 41 Cal.4th at p. 382. This Court rejected that argument. Citing *Fullerton Joint Union High Sch. Dist. v. State Bd. of Educ.* (1982) 32 Cal.3d 779, 797, this Court noted that the fact that an activity was "an essential step leading to potential environmental impacts" was sufficient to make the activity a project. *Muzzy Ranch Co. v. Solano Cnty. Airport Land Use Comm'n*, *supra*, at p. 383. The *Fullerton* case involved the secession of the Yorba Linda school district from the Fullerton High School District. This Court held that because the secession would likely require the construction of a new high school in Yorba Linda and might result in abandonment of some facilities in the remaining portion of the Fullerton HSD, it did constitute a project. *Fullerton Joint Union High Sch. Dist. v. State Bd. of Educ.*, *supra*, at p. 794. This

ruling was made despite the fact that "[s]pecific plans [had] not yet been formulated for construction of a new high school in Yorba Linda or for changes in the education program in the remaining portion of the Fullerton HSD." *Hernandez v. City of Hanford, supra*, 41 Cal.4th at p. 797.

The Answering Brief cites *Chung v. City of Monterrey Park* (2012) 210 Cal.App.4th 394, 405–06, and *Kaufman & Broad-South Bay, Inc. v. Morgan Hill USD* (1992) 9 Cal.App.4th 464, 475–76, as examples of "similar" cases in which CEQA review was premature, but neither of those cases dealt with ordinances which regulated land use (zoning ordinances) like the Ordinance. *Chung* dealt with a ballot measure establishing a competitive bidding process for municipal waste contractors, and did not regulate land use in any way. *Chung v. City of Monterrey Park, supra*, at pp. 405-06. In *Chung*, the potentially different choice of contractor under the new bidding process would be the **only** theoretical cause of future environmental impacts (and that future decision would likely constitute a project under CEQA). *Ibid.* Likewise, *Kaufman* dealt with a measure that would raise funds for school construction, by creating a special property tax district in a yet-to-be-developed area, but did not actually decide when, where, and how any piece of land should be used. *Id.* at pp. 475-76. All of the alleged potential impacts of the ordinance in *Kaufman* would be considered whenever the City decided to use the funds raised, authorize construction of a school, or rezone the parcels. *Ibid.*

The Ordinance does not merely authorize the City to hire consultants to create a medical marijuana zoning scheme, it decides which land uses can go where. Allowing the operation of

facilities, and putting them in some areas and not others "may" cause reasonably foreseeable physical changes in the environment.

Whether it be the establishment of *new* facilities or the relocation of *pre-existing* facilities, the cultivation of medical marijuana, an inherently agricultural activity, has the potential to result in reasonably foreseeable indirect physical changes in the environment. The issue of cultivation comes into play because one of express purposes of Senate Bill 420, the Medical Marijuana Program Act (MMPA), was to allow medical marijuana patients and primary caregivers to associate within the State of California in order "collectively or cooperatively cultivate marijuana for medical purposes." AR 25; Health & Saf. Code, § 11362.775, subd. (a) (emphasis added.) Simply put, medical marijuana facilities are, by their very nature, involved in the *cultivation* of marijuana as well as its distribution. The mere act of cultivation is enough to deem the Ordinance a "project" under CEQA, regardless of its significance.

Respondent argues there is no evidence in the AR that shows a causal link between the Ordinance and an increase in *home* marijuana cultivation. However, Petitioner is primarily concerned with the environmental impacts of cultivation as a *general matter* – not just cultivation in a home setting.

Petitioner provided the City with ample evidence regarding the consequences of cultivation of medical marijuana. Petitioner provided the City with a copy of a study entitled "*The Carbon Footprint of Indoor Cannabis Production*" ("Indoor Cultivation Study") published in *The International Journal of the Political, Economic, Planning, Environmental and Social Aspects Energy*,

which detailed the environmental impacts of indoor cannabis cultivation. (AR 1670–1679.) The following are highlights from the study:

> One average kilogram of cannabis is associated with 4600 kg of carbon dioxide emissions (greenhouse-gas pollution) to the atmosphere, a very significant carbon footprint, or that of 3 million average U.S. cars when aggregated across all national production. (AR 1666.)
>
> Indoor cannabis production utilizes highly energy intensive processes to control environmental conditions during cultivation. (AR 1666.)
>
> Indoor cultivation also results in elevated moisture levels that can cause extensive damage to buildings as well as electrical fires caused by wiring out of compliance with safety codes. (AR 1666.)
>
> Indoor carbon dioxide levels are often raised to 4-times natural levels to boost plant growth when cannabis is cultivated indoors. (AR 1666.)
>
> Indoor cannabis production results in electricity use equivalent to that of 2 million average U.S. homes. This corresponds to 1% of national electricity consumption. (AR 1666.)
>
> In California, the top-producing state, indoor cultivation is responsible for about 3% of all electricity use or 9% of household use. This corresponds to greenhouse-gas emissions equal to those from 1 million cars. (AR 1666.)

> Accelerated electricity demand growth has been observed in areas reputed to have extensive indoor Cannabis cultivation. For example, after the legalization of medical marijuana in 1996, Humboldt County experienced a 50% rise in per-capita residential electricity use compared to other parts of the state. (AR 1666–1667.)
>
> Shifting cultivation outdoors can nearly eliminate energy use for the cultivation process. However, outdoor cultivation creates its own environmental impacts. These include deforestation; destruction of wetlands, runoff of soil, pesticides, insecticides, rodenticides and human waste; abandoned solid waste; and unpermitted impounding and withdrawals of surface water. These practices can compromise water quality, fisheries and other ecosystem services. (AR 1667.) However, outdoor cultivation can compromise security an important factor in analyzing likely environmental impacts. (AR 1667.)

Petitioner also provided Respondent with the following facts regarding the medical marijuana patient population in the City and their medical needs:

There are an approximately 26,451 patients in the City of San Diego. (AR 1661.)

If patients use just 1 ounce of marijuana per month, then 19,838 pounds of cannabis per year would need to be cultivated to meet patient needs in the City. (AR 1663.)

There are reasonably foreseeable environmental consequences associated with the cultivation of medical marijuana that implicate, among other things, agriculture, air quality, water quality, traffic, and land use, that the City failed to consider. (AR

1667.) The establishment of new individual cultivation sites and the relocation of existing cultivation sites, many of which may be located indoors, have the potential to result in at least *some* physical changes to the environment. (AR 1667.) For example, increases in electrical and water consumption are reasonably foreseeable. (AR 1667.) Further, waste plant material (a potentially hazardous waste) associated with cultivation is a very real environmental concern. (AR 1667.)

While the studies provided by Appellant in the course of the administrative proceedings were admittedly for industrial medical marijuana cultivation, it is entirely foreseeable that even less-intensive cultivation efforts undertaken by facilities would create at least *some change* in the physical environment. This is enough for the Ordinance to be deemed a "project" under CEQA.

1. The Ordinance contains regulatory components that mandate certain physical changes to the environment

Respondent argues that there is no reasonably foreseeable construction activity associated with the Ordinance because it is "far more likely that a permittee would simply occupy an existing retail space." Respondent's Answer Brief on the Merits ("AB"), at page 4. However, if a Coop chooses to occupy an existing retail space, it is reasonably foreseeable that at least *some* construction activity will occur to accommodate the new use. For example, facilities may need to install a sign, construct new walls, paint the walls, install security systems, etc. In fact, the Ordinance

mandates that each Coop install special lighting, signage and security systems. Section 141.0614 of the Ordinance sets forth the following "regulations" for facilities:

> (c) Lighting shall be provided to illuminate the interior of the medical marijuana consumer cooperative, façade, and the immediate surrounding area, including any accessory uses, parking lots, and adjoining sidewalks. Lighting shall be hooded or oriented so as to deflect light away from adjacent properties.
>
> (d) Security shall be provided at the medical marijuana consumer cooperative which shall include operable cameras, alarms and a security guard. The security guard shall be licensed by the State of California and be present on the premises during business hours. The security guard should only be engaged in activities related to providing security for the facility, except on an incidental basis.
>
> (e) Signs shall be posted on the outside of the medical marijuana consumer cooperative and shall only contain the name of the business, limited to two colors.
>
> (f) The name and contact phone number of an operator or manager shall be posted in a location visible from outside of the medical marijuana consumer cooperative in character size at least two inches in height."

AR 34–35. The Ordinance itself mandates that certain physical changes to the environment are required in order to comply with the regulations adopted for the new facilities. The significance of those impacts is not relevant at this juncture. The City admits