Civil No. S214061

IN THE SUPREME COURT OF CALIFORNIA

FRIENDS OF THE COLLEGE OF SAN MATEO GARDENS,

Plaintiff and Respondent

v.

SAN MATEO COUNTY COMMUNITY COLLEGE DISTRICT, *et al.*,

Defendants and Appellants.

After a Decision by the Court of Appeal
First Appellate District, Division One
Civil Number A135892

Affirming the Ruling by the Honorable Clifford Cretan San Mateo County Superior Court Case No. CIV 508656

SUPPLEMENTAL BRIEF

Susan Brandt-Hawley / SBN 75907
Brandt-Hawley Law Group
P.O. Box 1659
Glen Ellen, CA 95442
707.938.3900, fax 707.938.3200
susanbh@preservationlawyers.com

Attorney for Respondent
Friends of the College of San Mateo Gardens

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Introduction

The California Legislature enacted CEQA section 21166 solely to apply to supplemental review "[*w*]*hen an [EIR] has been prepared* ..." in order to avoid delay *in the EIR process.* (Pub. Resources Code, § 21166, italics added; *see, e.g.,* Joint Request for Judicial Notice (RJN), 2:150-152, 300, *passim.*)

The Friends of the College of San Mateo Gardens ask this Court to rule that section 21166 does not apply to negative declarations, by its plain language that is consistent with CEQA's salutary purposes and, further, that the Guidelines' implementation of section 21166 to include negative declarations and addenda in sections 15162 and 15164 exceeds CEQA's statutory authority.

The Guidelines' application of the substantial evidence standard to section 21166 was generated solely by *Bowman v. City of Petaluma* (1986) 226 Cal.App.3d 1467 (*Bowman*), to which Friends do not object. The Guidelines' expansive interpretation of section 21166 to encompass negative declarations was solely in response to *Benton v. Board of Supervisors* (1991) 226 Cal.App.3d 1467 (*Benton*), to which Friends strongly object. The fact that the subject guidelines have been implemented for over two decades is irrelevant.

As Friends have briefed and argued, the Court of Appeal's judgment should be affirmed on multiple grounds. The record confirms that demolition of the horticulture complex and gardens at the College of San Mateo would have potentially significant environmental effects. An EIR must be prepared to analyze impacts and to identify feasible alternatives for campus parking needs.

Discussion

(1) Under California Environmental Quality Act (CEQA) Guidelines section 15162, what standard of judicial review applies to an agency's determination that no environmental impact report (EIR) is required as a result of proposed modifications to a project that was initially approved by negative declaration or mitigated negative declaration? (See generally *Benton v. Board of Supervisors* (1991) 226 Cal.App.3d 1467, 1479-1482.)

The Court's first question regarding Guidelines section 15162 identifies the problem created by *Benton*. It is well-settled that CEQA requires agencies to apply the 'fair argument' standard and to prepare an EIR for projects that may have any significant environmental impact. (Pub. Resources Code, §§ 21082.2, 21100, 21151; Guidelines, § 15064, subd.(f); *No Oil, Inc. v. City of Los*

Angeles (1974) 13 Cal.3d 68, p.75.)

Section 15162 mistakenly directs that agencies may rely on the deferential 'substantial evidence' standard when making a threshold decision as to whether or not they must certify a "supplemental EIR" after "an EIR has been certified *or* negative declaration adopted for a project ..." (Guidelines, § 15162, italics added.)

Guidelines section 15162 was adopted solely in response to *Benton, supra*, 226 Cal.App.3d 1467, which considered an approved winery that chose to relocate. (*Id.*, pp. 1482-1483.) The Court upheld a second negative declaration addressing the environmental impacts of the changed location, reasoning that:

> In a case in which an initial EIR has been certified, section 21166 comes into play precisely because in-depth review of the project has already occurred, the time for challenging the sufficiency of the original CEQA document has long since expired, and the question ... is whether circumstances have changed enough to justify repeating a substantial portion of the process. [Citations.] These same principles apply with even greater force in a case such as this, in which the initial environmental review resulted in the issuance of a negative declaration, rather than an EIR. *If a limited review of a modified project is proper when the initial environmental document was an EIR, it stands to reason that no greater*

> *review should be required of a project that initially raised so few environmental questions that an EIR was not required, but a negative declaration was found to satisfy the environmental review requirements of CEQA.* To interpret CEQA as requiring a greater level of review for a modification of a project on which a negative declaration has been adopted and a lesser degree of review of a modified project on which an EIR was initially required would be absurd.

(*Id.*, pp. 1488-1489, italics added.) The rulemaking file shows neither discussion nor controversy over the amendment to apply *Benton*'s reasoning, above, to section 15162. (RJN, 4:563, *passim.*)

(2) Does CEQA Guidelines section 15162, as applied to projects initially approved by negative declaration or mitigated negative declaration rather than EIR, constitute a valid interpretation of the governing statute? (Compare *Bowman v. City of Petaluma* (1986) 185 Cal.App.3d 1065, 1073-1074 with *Benton* at pp. 1479-1480.)

The short answer is "no." Friends urge the Court to rule that Guidelines section 15162 (*and 15164*)'s application to negative declarations and addenda is *not* a valid interpretation or proper implementation of Public Resources Code section 21166.

Respectfully, at the outset of this discussion it is important to

keep in mind the other question accepted by this Court for review: the applicable standard of review when an initial project has been addressed in a prior EIR. When is a related project considered 'new' versus 'supplemental' to the prior project? Importantly, that question *does not apply* to negative declarations, because whether a project is 'new' or 'supplemental' does not change the application of the fair argument standard to a negative declaration — whether the second or tenth negative declaration.

But to the extent that this Court's ruling may address projects that follow a related project *for which an EIR was prepared and certified, Bowman*'s substantial evidence standard applies to 'supplemental' projects but not 'new' projects. *And whether a project is new or supplemental presents an issue of law*, as addressed in the Answer brief, Amicus Response Brief, Errata, and at oral argument.

Section 21166 Legislative History. The legislative history for the supplemental EIR provisions of section 21166 informs the comparison of *Benton and Bowman.*

In construing a statute, the language chosen by the legislature controls. (*E.g., Mejia v. Reed* (2003) 31 Cal.4th 657, p. 663.) If the language "is clear and unambiguous our inquiry ends. There is no

need for judicial construction and a court may not indulge in it." (*Diamond Multimedia Systems, Inc. v. Superior Court* (1999) 19 Cal.4th 1036, p. 1047.) The parties have nonetheless provided legislative history for the Court's reference. It turns out that the history is consistent with the Friends' interpretation of the plain language of the statute; Friends' discussion need not be extensive.

Section 21166 was amended via Assembly Bill 884 in 1977, providing in relevant part:

> When an environmental impact report has been prepared for a project pursuant to this division, no subsequent *or supplemental* environmental impact report shall be required *by the lead agency or by any responsible agency,* unless ....

(RJN, 2:152, italics in original.) The same bill codified a new section 21080.1, referencing *both* EIRs *and* negative declarations:

> The lead agency shall have the responsibility for determining whether an [EIR] or a negative declaration shall be required for any project subject to [CEQA] ...

(RJN, 2:149.) Similarly, AB 844 included new section 21080.3 (a) that addressed both EIRs and negative declarations:

> Prior to determining whether an [EIR] or negative declaration is required for a project, the lead agency shall consult with all responsible agencies.

(RJN, 2:149; *see also* new §§ 21100.2 (2:150), 21151.5 (2:151.)

Friends' point is that the Legislature addressed both EIRs *and* negative declarations in the same comprehensive CEQA bill, AB 844, and while section 21166 was amended it was *not* changed to encompass negative declarations. The Legislature well knew the difference between EIRs and negative declarations in passing AB 844, and its actions were consistent with the underlying intent for codifying section 21166: to reduce delay *in the EIR process.*

Negative declarations entail no such delay — and also provide much less environmental protection. After an initial EIR has been prepared with an in-depth review of a proposed project, the benefits of further environmental analysis are trumped by the competing interests in concluding the project's CEQA process. Indeed, "[t]he purpose of this bill is to streamline and expedite procedures governing *environmental impact reports.*" (*E.g.* RJN, 2:300.)

The legislative history is consistent with the plain language of section 21166, applying solely to the preparation of supplemental and subsequent EIRs and not to negative declarations.

Comparison of *Benton* and *Bowman*. Sections 15162 and 15164 (the latter improperly allowing an addendum to a negative declaration or EIR without any public notice) both rely on an interpretation of section 21166 as if it encompasses a project related to a prior project approved on the basis of a negative declaration.

The *Bowman* case involved a project initially approved on the basis of an EIR. A change was proposed to the project's traffic configuration. (*Bowman, supra,* 185 Cal.App.3d 1065, p. 1070.) The Court applied the substantial evidence standard to the question of whether a supplemental EIR would be required:

> [S]ection 21166 comes into play precisely because in-depth review has already occurred ... and the question is whether circumstances have changed enough to justify repeating a substantial portion of the process. Thus, while section 21151 is intended to create a 'low threshold requirement for preparation of an EIR' [citation] section 21166 indicates a quite different intent, namely, to restrict the powers of agencies 'by prohibiting [them] from requiring a subsequent or supplemental environmental impact report' unless the stated conditions are met.

(*Id.*, pp. 1073-1074.) The parties *agree* with *Bowman*'s assessment that the fair argument standard does not apply to supplemental

projects (*unlike* the Gardens project) that are within the scope of section 21166. Friends do not seek this Court's criticism of *Bowman* or invalidation of Guideline section 15162 in the application of the substantial evidence standard to subsequent and supplemental EIRs.

However, *Benton* should be overturned. Its expansion of *Bowman*'s substantial evidence standard to "subsequent negative declarations" is unauthorized by CEQA. It is self-evident that an agency may lawfully approve an initial negative declaration on a minimal administrative record, while by the time of a supplemental project approval the record may contain substantial evidence supporting a fair argument of significant environmental impacts. At that point there has been no in-depth environmental review to trigger a truncated process allowed by section 21166 *after* an EIR.

Nothing in the plain language or legislative history of section 21166 indicates legislative intent to undo CEQA's mandate requiring preparation of an EIR for any project "which may have a significant effect on the environment." (Pub. Resources Code, § 21151, subd.(a).)

The Friends appreciate the Court's interest in the input of the Natural Resources Agency regarding its adoption of Guideline section 15162 (and, by extension, 15164). Friends understand, and

the rulemaking file proves, that the Office of Planning and Research expanded the application of section 21166 to negative declarations in response to *Benton*, which was itself unauthorized. (RJN, 4:563.) As in *California Building Industry Ass'n v. Bay Area Air Quality Management Dist* (2015) 62 Cal.4th 369, 390 (*CBIA*), the guideline's expansion is "clearly erroneous and unauthorized under CEQA."

Conclusion

Friends respectfully request that this Court affirm the judgment, without remand. Friends further request the Court's determination that Guideline sections 15162 and 15164 are clearly erroneous and unauthorized under CEQA.

Counsel's Certificate of Word Count per **Word**:mac2011: 1945

June 15, 2016

Respectfully submitted,

Susan Brandt-Hawley
Attorney for Respondent
Friends of the College
of San Mateo Gardens

Friends of the College of San Mateo Gardens v. San Mateo County Community College Dist., et al.
Supreme Court No. S214061

PROOF OF SERVICE

I am a citizen of the United States and a resident of the County of Sonoma. I am over the age of eighteen years and not a party to this action. My business address is P.O. Box 1659, Glen Ellen, California 95442.

On June 15, 2016, I served one true copy of,

SUPPLEMENTAL BRIEF

✓ By placing a true copy thereof enclosed in a sealed envelope with prepaid postage, in the United States mail in Glen Ellen, California, to addresses listed below.

See attached Service List

I declare under penalty of perjury that the foregoing is true and correct and is executed on June 15, 2016, at Glen Ellen, California.

Jeanie Stapleton

Friends of the College of San Mateo Gardens v. San Mateo County Community College Dist.
Supreme Court No. S214061

SERVICE LIST

Sabrina Teller
James Moose
Remy Moose Manley LLP
555 Capitol Mall, Suite 800
Sacramento, CA 95814
Attorney for Defendant and Appellants

Jeffrey P. Reusch
Deputy Attorney General
California Department of Justice
1300 I Street / P.O. Box 944255
Sacramento CA 94244-2550
Attorney for Defendant and Appellants

Andrew B. Sabey
Linda C. Klein
Cox Castle & Nicholson LLP
555 California Street, 10th Floor
San Francisco, CA 94104
Attorneys for California Building Industry Association, Amicus curiae
Building Industry Association of the Bay Area, Amicus curiae
California Business Properties Association, Amicus curiae

Joanna Lynn Meldrum
Amanda Jean Monchamp
Holland & Knight LLP
50 California St Ste 2800
San Francisco, CA 94111
Attorneys for The Regents of the University of California, Amicus curiae

Michael Ward Graf
Law Offices of Michael W. Graf
227 Behrens Street
El Cerrito, CA 94530
Attorneys for High Sierra Rural Alliance, Amicus curiae

SERVICE LIST, continued

Jan Chatten-Brown
Amy Christine Minteer
Chatten-Brown & Carstens
2200 Pacific Coast Highway, Suite 318
Hermosa Beach, CA 90254
Attorneys for California Preservation Foundation, Amicus curiae

Christian Lucier Marsh
Downey Brand LLP
333 Bush Street, Suite 1400
San Francisco, CA 94104
Attorney for The League of California Cities, Amicus curiae,
California State Association of Counties, Amicus curiae,
Association of California Water Agencies, Amicus curiae

Sara Hedgpeth-Harris
Law Office of Sara Hedgpeth-Harris, Inc.
2125 Kern Street, Suite 301
Fresno, CA 93721
Attorney for Association of Irritated Residents, Amicus curiae,
Madera Oversight Coalition, Amicus curiae,
Revive the San Joaquin, Amicus curiae,
Sierra Club, Amicus curiae

San Mateo County Superior Court
Attn: Clerk of the Court
Main Courthouse – Hall of Justice
400 County Center
Redwood City CA 94063-1655

California Court of Appeal
First Appellate District, Division 1
Attention: Clerk of the Court
350 Mc Allister Street
San Francisco CA 94102-3800