**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

# RESPONDENT'S CONSOLIDATED REPLY TO SUPPLEMENTAL BRIEFS

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## Introduction

CEQA Guidelines sections 15162 and 15164 are "clearly erroneous and unauthorized under CEQA," the applicable standard this Court applied in *California Building Industry Association v. Bay Area Air Quality Management District* (2015) 62 Cal.4th 369, p. 390 (*CBIA*). Neither the appellants, the Resources Agency, nor the Governor's Office of Planning and Research ("OPR") can justify an interpretation of Public Resources Code ("CEQA" [§§ 21000 *et seq.*]) section 21166 that applies to negative declarations.

The plain language of section 21166 is not ambiguous: it solely applies *to EIRs*. The legislative history is equally straightforward: the goal was to reduce unnecessary delays *in the EIR process*.

Harmonization of section 21166 with multiple sections of CEQA that require *preparation of an EIR* for any project that "may have a significant impact on the environment" is seamless. (CEQA, §§ 21082.2, subd.(d), 21100, subd.(a), 21151, subd.(a).) There is good reason why CEQA does not support application of the substantial evidence standard to a proposed supplemental or subsequent negative declaration; the deferential standard of review only makes sense *after* an initial in-depth EIR is prepared.

Many decades of consistent case law apply the unique low-threshold 'fair argument' standard to any discretionary public agency decision to approve a project with potentially significant impacts, consistent with *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, p.75. Whenever there has not yet been an in-depth environmental review, the EIR process is always favored.

While disagreeing on the above points, the parties agree that:

- The CEQA Guidelines adopted the substantial evidence standard of review applicable to EIRs in order to implement section 21166, in response to *Bowman v. City of Petaluma* (1986) 226 Cal.App.3d 1467 (*Bowman*). (*E.g.*, RJN, 5:562.)

- The Guidelines' interpretation of section 21166 to apply the substantial evidence standard to supplemental negative declarations was a response to *Benton v. Board of Supervisors* (1991) 226 Cal.App.3d 1467 (*Benton*).[1] (RJN, 5:563.)

- *No* legislative history allows directly or by implication any possible application of section 21166 to negative declarations.

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[1] Friends' supplemental brief inadvertently overstated the influence of *Benton* at the outset, but then made clear that the problem with *Benton* was expansion of the reach of the substantial evidence standard of review (first asserted in the *Bowman* case) to proposed supplemental negative declarations. (Friends' Supplemental Brief, p. 9.) Whether a negative declaration suffices for a discretionary project approval is decided via the 'fair argument' standard of review, according to evidence then in the record.

Without plain words or legislative history supporting their position, appellants, the Resources Agency, and OPR primarily rely on the passage of time to infer a legislative intent to expand CEQA section 21166 to encompass negative declarations. They also urge the Court to defer to the discretion of the Resources Agency and OPR to promulgate the CEQA Guidelines.

However, this Court has cogently ruled that a CEQA Guideline, like any other administrative regulation, "may not exceed the scope of authority granted by or be inconsistent with the statute pursuant to which it is promulgated. [citations]." (*Friends of Sierra Madre v. City of Sierra Madre* (2001) 25 Cal.4th 165, p. 189; *see also CBIA, supra*, 62 Cal.4th 369, p. 390.)

Because section 21166 never has and does not encompass negative declarations, Guidelines sections 15162 and 15164 exceed their statutory authority in applying the substantial evidence standard to consider supplemental negative declarations and to addenda approved without public notice.

## Discussion

The brevity of this reply directly correlates to the clarity of the questions posed by the Court. The cases, statutes, regulations, and discussion in the opposing supplemental briefs are largely irrelevant. It is uncontroverted that the Resources Agency and OPR are charged with the important and difficult task of promulgating regulations to implement CEQA. It is also uncontroverted that CEQA Guidelines are not valid when clearly erroneous and unauthorized under CEQA, however long they may have been in place. And, as noted above, it is also uncontroverted that the legislative history of section 21166 provides no evidence of an intention to expand beyond plain words.

### A. Legislative History Unambiguously Sets Out Standards for Supplemental and Subsequent EIRs That Do not apply to Negative Declarations

The initial codification of section 21166 occurred in 1972, via Assembly Bill 889. (Joint Request for Judicial Notice (RJN), 1:5.) The bill also provided that "... if, on the basis of an initial study, [an agency] finds and determines that a proposed project will not have a significant effect on the environment, the environmental impact report prescribed by this division shall not be required."

(RJN, 1:4.) That section, 21108, was describing what would later be called a negative declaration.

Five years later, in 1977, the Legislature substantially amended CEQA with "provisions governing the review and approval by public agencies of development projects." (RJN, 2:145.) Assembly Bill 884 codified new sections to the Public Resources Code to implement negative declarations, including sections 21080.1, 21080.3, and 21100.2. (RJN, 2:149, 150.)

In amending section 21166 at the same time, the Legislature adopted language to include supplemental EIRs to the statute's original application to subsequent EIRs, *expanding* the reach of the statute. (RJN, 2:152.) But the Legislature did *not* add negative declarations to the expanded section 21166. There is no evidenced intent to include negative declarations or to otherwise expand section 21166 in a manner that would eviscerate CEQA's mandate that an EIR must be prepared for any project that may have a potentially significant environmental impact.

### B. There are Significant Differences Between CEQA Processes for Negative Declarations and EIRs

The distinctions between the CEQA review of negative declarations and EIRs are substantial. The EIR process for projects that may have a significant environmental impact provides in-depth review and can span many months.

A negative declaration must generally contain a brief project description, the location of the project (preferably on a map), the name of the project proponent, a proposed finding that the project will not have a significant effect on the environment, a copy of an initial study that may be in the checklist format provided in CEQA's Appendix G to summarize environmental impacts, and a description of mitigation measures. (CEQA Guidelines, §§ 15063, 15071, Appendix G.) Public review must occur for 20 to 30 days depending on whether the negative declaration is submitted to the State Clearinghouse for review by state agencies. (*Id.*, §§ 15073. 15105.)

An EIR, on the other hand, has exponentially more detailed requirements to consider all phases of a project in detail, including its environmental setting and consideration and discussion of site-specific and cumulative environmental impacts and mitigation measures. Because EIRs address projects with potentially significant

environmental impacts, project alternatives must be considered and discussed. This is a critical distinction; no alternatives need be considered in a negative declaration process because to qualify for a negative declaration the project must have no potentially significant impacts — and without significant impacts there is no need to consider alternatives. An EIR is published and made available to the public and concerned agencies for comment for no less than 30 days. The lead agency must substantively respond to written comments and publish the responses in a Final EIR. (Guidelines, §§ 15082-15090, 15105, 15121-15132.) While small-scale projects may complete an EIR process in a few months, complex projects take longer to achieve environmental protection and public disclosure.

As discussed in the supplemental brief, the impetus for section 21166 was to avoid delay in the EIR process. When there has already been in-depth review, the Legislature has determined that finality in the CEQA process outweighs decreased environmental protection. That goal does not apply to already-streamlined negative declarations; they are not at all on "equal footing with EIRs after they are adopted." (Appellants' Supplemental Brief, p. 3; Friends' Supplemental Brief, p. 7, RJN, 2:300.)

### C. Application of Section 21166 Consistent with its Plain Language and Legislative History Will Enforce CEQA

Appellants claim that application of the fair argument standard to proposed supplemental negative declarations would somehow "create havoc across the state," but provide no basis for such a prediction. (Appellants' Supplemental Brief, p. 4.) When a project may have a significant environmental impact, CEQA requires that an EIR be prepared; the fact that a related prior project may have been approved with a negative declaration is largely irrelevant. The approval was final for the original project. When there is evidence supporting a fair argument that a current project needing a new discretionary approval may have significant impacts, an EIR is triggered to assess impacts and feasible mitigations and alternatives.

This case does not provide the best example of supplemental review, because the proposed demolition of the 60-year old campus gardens is a new project. Supplemental review standards cannot apply, even had there been a prior EIR. As the Court knows, because the gardens and horticulture complex were proposed to be retained in full in a campus plan approved with a negative declaration, environmental impacts of demolition were not considered. As in

*Sierra Club v. County of Sonoma* (1992) 6 Cal.App. 4th 1307, a demolition project that follows a preservation project is a new project under CEQA, and the fair argument standard applies.[2]

The very real danger would be if the Court held that the fair argument standard does not apply to all negative declarations; that indeed would create uncertainty and environmental harm.

## Conclusion

Appellants, the Resources Agency, and OPR repeatedly pronounce that the substantial evidence standard applies to supplemental negative declarations, claiming authorization by CEQA section 21166, and repeatedly rely on quotes addressing EIRs as if the same quotes must apply to negative declarations. Yet there is no

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[2] The state agencies are incorrect in arguing that the substantial evidence standard was applied in *Sierra Club*, and, beyond the scope of the supplemental briefing, that a decision as to whether a project is new or supplemental is a factual determination. (Resources Agency/OPR Brief, p. 5, n.4.) Further, *Laurel Heights Improvement Association v. Regents of the University of California* (1993) 6 Cal.4th 1112, relied upon by opposing parties, addressed recirculation of EIRs. The Court cited *Benton* in dicta, stating that the fair argument test has been applied "*only* to the decision whether to prepare an original EIR or negative declaration." (*Id.*, p. 1135.) At that time, the statement was true; but the merits of *Benton* were not discussed and the legislative history of CEQA section 21166 was not before the Court.

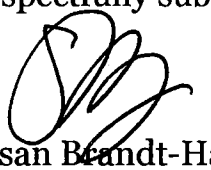
support in the record for their position that reasonably complies with the framework, mandates, and goals of CEQA.

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 to the extent that they apply section 21166 and the substantial evidence standard to supplemental negative declarations. The Resources Agency and OPR can then amend the guidelines through their established administrative procedures, separate from this concluded case.

Counsel's Certificate of Word Count per Word:mac2011: 1934

June 22, 2016

Respectfully submitted,



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*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 22, 2016, I served one true copy of,

## SUPPLEMENTAL REPLY BRIEF

✓ By emailing a copy to counsel as noted below:

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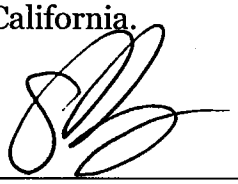
✓ By placing a true copy enclosed in a sealed envelope with prepaid postage, in the United States mail in San Francisco, California, to addresses listed below.

**See attached Service List**

I declare under penalty of perjury that the foregoing is true and correct and is executed on June 22, 2016, at San Francisco, California.



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