Civil Case 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; SAN MATEO COUNTY COMMUNITY COLLEGE DISTRICT BOARD OF TRUSTEES; and DOES 1 through 5,

Defendants and Appellants.

After an Unpublished Decision by the Court of Appeal
First Appellate District, Division One, Case No.: A135892

Appeal from the Superior Court of the State of California
for the County of San Mateo, the Honorable Clifford Cretan
San Mateo County Superior Court Case No.: CIV 508656

SAN MATEO COUNTY COMMUNITY COLLEGE DISTRICT'S SUPPLEMENTAL REPLY BRIEF

James G. Moose, SBN 119374
*Sabrina V. Teller, SBN 215759
REMY MOOSE MANLEY, LLP
555 Capitol Mall, Ste. 800
Sacramento, CA 95814
Telephone: 916-443-2745
Facsimile: 916-443-9017
Email: jmoose@rmmenvirolaw.com
steller@rmmenvirolaw.com

Attorneys for Defendants and Appellants
SAN MATEO COUNTY COMMUNITY COLLEGE DISTRICT and
SAN MATEO COUNTY COMMUNITY COLLEGE DISTRICT
BOARD OF TRUSTEES

Civil Case 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; SAN MATEO COUNTY COMMUNITY COLLEGE DISTRICT BOARD OF TRUSTEES; and DOES 1 through 5,

Defendants and Appellants.

After an Unpublished Decision by the Court of Appeal
First Appellate District, Division One, Case No.: A135892

Appeal from the Superior Court of the State of California
for the County of San Mateo, the Honorable Clifford Cretan
San Mateo County Superior Court Case No.: CIV 508656

SAN MATEO COUNTY COMMUNITY COLLEGE DISTRICT'S SUPPLEMENTAL REPLY BRIEF

James G. Moose, SBN 119374
*Sabrina V. Teller, SBN 215759
REMY MOOSE MANLEY, LLP
555 Capitol Mall, Ste. 800
Sacramento, CA 95814
Telephone: 916-443-2745
Facsimile: 916-443-9017
Email: jmoose@rmmenvirolaw.com
steller@rmmenvirolaw.com

Attorneys for Defendants and Appellants
SAN MATEO COUNTY COMMUNITY COLLEGE DISTRICT and
SAN MATEO COUNTY COMMUNITY COLLEGE DISTRICT
BOARD OF TRUSTEES

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

[Cal. Code Regs., tit. 14, § 15000 et seq. ("CEQA Guidelines")]

I. INTRODUCTION

Despite the facts that negative declarations are required in certain circumstances, and that all potentially significant impacts of a proposed project must be clearly reduced to a less than significant level through mitigation measures in order for a lead agency to adopt a mitigated negative declaration instead of an EIR, Plaintiff/Respondent Friends of the College of San Mateo Gardens espouses the view that negative declarations provide little to no environmental protection and therefore must be subject forever to the heightened scrutiny and skepticism of the "fair argument" standard. But this cynical view of the wisdom and judgment both of the Legislature, in creating negative declarations as a valid CEQA tool, and of lead agencies, in using them, finds no support in the statute, CEQA Guidelines, or case law. The court should decline Friends' invitations to consign negative declarations to second-class status under the law and to rewrite a 38-year-old CEQA Guideline regarding subsequent review of projects initially approved with negative declarations that has never been invalidated by any lower court.

The language of Public Resources Code section 21166 and CEQA Guidelines section 15162 regarding the proper standard of review for agency decisions not to prepare supplemental or subsequent EIRs following the original adoptions of negative declarations is plain and clear. It is the substantial evidence standard. While this standard requires judicial deference to an agency and its administrative record on factual issues, the standard still creates a significant hurdle for agencies that often requires them to generate extensive technical analysis and to spend considerable time to develop in order to adequately document their decisions not to require subsequent or supplemental EIRs. And such decisions are, of course, themselves subject to legal challenge. Application of the substantial

evidence standard in *all* subsequent review situations provides adequate protection of both CEQA's environmental protection purposes and its co-equal policies of certainty and finality once the initial review process has been completed.

The San Mateo County Community College District (District) agrees with the analysis and positions set forth by the California Attorney General in its Supplemental Brief on behalf of the California Natural Resources Agency and the Governor's Office of Planning and Research. The perspective of the Resources Agency and OPR regarding the meaning and intent of Public Resources Code section 21166 and CEQA Guidelines section 15162 should be given great weight because those agencies are statutorily charged with interpreting and implementing CEQA.

II. ARGUMENT

A. The legislative history of Public Resources Code section 21166 does not support Friends' assertion that the Legislature's omission of negative declarations was purposeful or that such omission renders CEQA Guidelines section 15162 invalid.

Friends argues that the court should impute important legislative intent to a lack of action on Public Resources Code section 21166. (Friends' Supp. Brief, pp. 6-7.) It is true that the Legislature has not added negative declarations to section 21166 while it added negative declarations to other sections of CEQA. But there is no basis for the court to assume that the Legislature intentionally excluded negative declarations in section 21166 because the Legislature has a long standing intent for section 21166 not to apply to negative declarations.

In the view of the District and the California Attorney General, however, the Legislature's lack of action has a different, more compelling explanation: agreement with the CEQA Guidelines and case law, and the resulting absence of any desire or need to amend the statute. As the District

explained in its Supplemental Brief, the legislative history is devoid of any explanation for why the Legislature did not include negative declarations in section 21166 in 1973 or 1977 or why the Legislature has never since amended the statute to add them in the several decades since Guidelines section 15162 has included negative declarations. But, as the Attorney General noted in its supplemental brief, it is telling that, despite amending other provisions of the statute numerous times over the years, the Legislature has never enacted any changes either to reject the Resources Agency's inclusion of negative declarations in Guidelines section 15162 (added in 1978), or to refute the courts' holdings in *Bowman v. City of Petaluma* (1986) 185 Cal.App.3d 1065 (*Bowman*) and *Benton v. Board of Supervisors* (1991) 226 Cal.App.3d 1467 (*Benton*) applying the substantial evidence standard to subsequent reviews following the certification of an EIR and following the adoption of a negative declaration, respectively. (AG's Supp. Brief, pp. 13-14, citing *People v. Overstreet* (1986) 42 Cal.3d 891, 897 [Legislature is deemed to be aware of existing laws and judicial decisions at the time legislation is enacted].)

Evidence in the *regulatory* history includes the lengthy discussion by the Resources Agency in support of its 1994 amendments to Guidelines section 15162, in which the Agency explained its understanding of why negative declarations were not included in section 21166 and why the Agency believed it was appropriate to include them in Guidelines section 15162:

> The terms "negative declaration" and "EIR" are appropriately used in tandem in sections (a) (1), (2) and (3). P.R.C. section 21166 which sets the rules for subsequent EIRs *is an old section dating from before the statute referred to negative declarations*. At that time the Guidelines provided for negative declarations as the document to use when the agency determined that an EIR would not be required because the project would not have a significant effect on the

> environment. The courts recognized the validity of the negative declaration document, and later the statute added references to negative declarations. In the meantime the courts interpreted references in the statute to an EIR as meaning an EIR or a negative declaration depending on whether the agency found that there would or would not be a significant effect on the environment.
>
> *Accordingly, we have interpreted the references in Section 21166 as including either an EIR or a negative declaration and applying where a public agency had previously prepared a CEQA environmental document for the project at hand. If the agency prepared a negative declaration previously, and any of the circumstances described in Section 21166 occur, we believe that the standards in the section control.* The agency's decision as to whether to prepare a subsequent EIR would be subject to the substantial evidence standard of review rather than the more stringent "fair argument" standard that applies to a decision to prepare a first EIR or negative declaration for a project. We believe the language in the section is appropriate.

(Joint Request for Judicial Notice [JRJN], Vol. II, p. 613, italics added.)

In the absence of any evidence in the legislative history indicating that the Legislature intended to exclude negative declarations from the subsequent review scheme, and given the Legislature's presumed knowledge of the evolution of the Guidelines and case law, there is no basis for assuming that the Legislature intended that, where the prior review for a project was based on a negative declaration, the standard of review for all future agency actions reauthorizing or modifying such a project would be the fair argument standard.

/ / /

/ / /

B. The regulatory history of CEQA Guidelines section 15162 contradicts Friends' claim that negative declarations were added to section 15162 following *Benton v. Board of Supervisors*; they were actually added in 1978, long before *Benton*.

Friends falsely claims that the expansion of Guidelines section 15162 to include negative declarations occurred solely in response to the ruling in *Benton*, which it argues was erroneously decided. (Friends Supp. Brief, pp. 1, 3, 9.) In fact, section 15162's predecessor, section 15067, was amended to include negative declarations in 1978, 13 years before *Benton* was decided. (JRJN, Vol. II, pp. 331-332.) Thus, long before the *Benton* decision, the presumption against further environmental review embodied in Public Resources Code section 21166 and implemented in Guidelines section 15162 applied equally to negative declarations and EIRs.

In response to *Benton*, section 15162 was amended to add reference to the substantial evidence standard, in large part because the claim made in that case by the plaintiffs and rejected by that court was the same that Friends makes now: namely, that the fair argument standard, not the substantial evidence standard, should apply to an agency's determination not to prepare an EIR following project approval based on a negative declaration. (*Benton*, *supra*, 226 Cal.App.3d at pp. 1477-1478; JRJN, Vol. II, pp. 561-563.) But the reasoning of the court in *Benton* (and more recently, the court in *Abatti v. Imperial Irrigation District* (2012) 205 Cal.App.4th 650) was sound then and still is sound today. As those courts held, section 15162, as applied to negative declarations, is a valid regulation by which the Office of Planning and Research (OPR) and the Resources Agency, using their broad rulemaking powers under Public Resources Code section 21083, permissibly filled a gap in Public Resources Code section 21166 in order to give effect to the Legislature's policies of promoting certainty and finality after the completion of the

initial review process for a project, as further discussed in the District's opening supplemental brief. This court should uphold section 15162[1] in its entirety.

C. The only interpretation of Sections 21166 and 15162 that can be harmonized with the statute on the whole are the positions argued by the Attorney General and the District – that the substantial evidence standard applies in all subsequent review situations, and section 15162 is a valid regulation.

Friends concedes the logic of the *Bowman* decision as applied to EIRs and claims not to dispute its reasoning (Friends Supp. Brief, pp. 8-9), yet Friends fails to coherently explain why the important principles of finality and certainty cited by the *Bowman* court in differentiating the standards found in Public Resources Code section 21151 and 21166 are not equally valid as applied to negative declarations:

> [Sections 21151 and 21166] serve quite different purposes and have correspondingly different effects. The question addressed by section 21151 is whether *any* environmental review is warranted. CEQA procedures reflect a preference for resolving doubts in favor of such review. [Citations.] In the present case, however, section 21166 comes into play precisely because in-depth review has already occurred, the time for challenging the sufficiency of the original EIR has already expired [citation], and the question is whether circumstances have *changed* enough to justify *repeating* substantial portion of the process. Thus, while section 21151 is intended to create a "low threshold requirement for preparation of an EIR" [citation], section 21161 [sic] indicates a quite different intent, namely, to restrict the powers of agencies "by prohibiting [them] from requiring a

---

[1] / Friends takes advantage of the opportunity of supplemental briefing to argue that Guidelines section 15164 as applied to environmental review following negative declarations is also invalid. The court did not invite briefing on the scope and validity of section 15164, but to the extent that it considers Friends' additional attacks on section 15164 anyway, the District believes that section 15164 is valid for the same reasons that section 15162 is valid.

> subsequent or supplemental environmental impact report" unless the stated conditions are met.

(*Bowman*, *supra*, 185 Cal.App.3d at pp. 1073-1074, original italics.) The *Bowman* court considered the legislative history of section 21166 and determined that the reason for the Legislature's decision to create a presumption against further review was to "provide a balance against the burdens created by the environmental review process and to accord a reasonable measure of finality and certainty to the results achieved." (*Id.* at p. 1074.)

As the District and the Attorney General explained in their supplemental briefs, the only interpretation that harmonizes all of the important policies and provisions of CEQA and the CEQA Guidelines, including the desired "balance" of burdens that the *Bowman* court acknowledged, is that the substantial evidence standard applies in *all* subsequent review situations. This court has also previously recognized this inherent need for balance in CEQA's competing policies. (*Laurel Heights Improvement Assn. v. Regents of the University of California* (1993) 6 Cal.4th 1112, 1130 ("*Laurel Heights II*") ["[a]fter certification, the interests of finality are favored over the policy of encouraging public comment"].)

To decide otherwise would render other portions of the statute and Guidelines meaningless or confusing. (See Pub. Resources Code, §§ 21080.1 [establishing a presumption of compliance and finality for EIRs *and* negative declarations once the limitations period described in section 21167 has run]; 21167.3 [extending similar presumption of compliance and finality for projects subject to litigation until final judicial determination]; CEQA Guidelines, § 15064, subd. (f)(7) ["the fair argument standard does not apply to determinations of significance pursuant to sections 15162, 15163, and 15164"].)

III. CONCLUSION

Friends' position that the fair argument standard must apply in perpetuity to projects initially reviewed with a negative declaration is rooted in their fundamental belief that negative declarations are an illegitimate form of "environmental review," inadequate to the task of analyzing, disclosing, and mitigating environmental impacts. Such a dim view of an entire class of CEQA documents is not supported by the statutory mandates directing agencies to prepare negative declarations and mitigated negative declarations where appropriate, and instructing courts, the public, and other agencies to afford negative declarations the presumption of compliance, finality, and certainty once the initial review process has run. Those directives cannot be given their full effect or meaning if the court both adopts Friends' arguments to subject projects originally analyzed in negative declarations to the fair argument standard in perpetuity and, in doing so, invalidates Guidelines section 15162. If adopted by the court, Friends' approach would throw the long-accepted subsequent review process into turmoil and would cause significant delays, substantial additional costs, duplicative and excessive documentation, and considerable uncertainty for public agencies and project proponents.

///

///

The District respectfully urges the court to apply the plain language of section 15162 regarding the applicable standard of review, and to consider and respect the balance of competing goals that OPR and the Resources Agency have effectuated in exercising their broad rule-making authority under CEQA.

Respectfully submitted,

Date: June 22, 2016

REMY MOOSE MANLEY, LLP

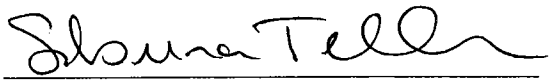
By: Sabrina V. Teller

SABRINA V. TELLER
Attorneys for Defendants/Appellants
San Mateo County Community
College District, et al.

CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.520(c) of the California Rules of Court, I hereby certify that this **SUPPLEMENTAL REPLY BRIEF** contains 2,315 words, according to the word counting function of the word processing program used to prepare this petition.

Executed on this 22nd day of June 2016, at Sacramento, California.



SABRINA V. TELLER

Friends of the College of San Mateo Gardens v.
San Mateo County Community College District, et al.
Supreme Court of California Case No.: S214061
(First Appellate District, Div. 1, Case No.: A135892;
San Mateo County Superior Court Case No.: CIV508656)

PROOF OF SERVICE

I, Bonnie Thorne, am a citizen of the United States, employed in the City and County of Sacramento. My business address is 555 Capitol Mall, Suite 800, Sacramento, California 95814 and email address is bthorne@rmmenvirolaw.com. I am over the age of 18 years and not a party to the above-entitled action.

I am familiar with Remy Moose Manley, LLP's practice whereby the mail is sealed, given the appropriate postage and placed in a designated mail collection area. Each day's mail is collected and deposited in a U.S. mailbox after the close of each day's business.

On June 22, 2016, I served the following:

SAN MATEO COUNTY COMMUNITY COLLEGE DISTRICT'S SUPPLEMENTAL REPLY BRIEF

☑ On the parties in this action by causing a true copy thereof to be placed in a sealed envelope with postage thereon fully prepaid in the designated area for outgoing mail addressed as follows; or

☑ On the parties in this action by causing a true copy thereof to be delivered via Federal Express to the following person(s) or their representative at the address(es) listed below; or

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury that the foregoing is true and correct and that this Proof of Service was executed this 22nd day of June, 2016, at Sacramento, California.

_____
Bonnie Thorne

Friends of the College of San Mateo Gardens v.
San Mateo County Community College District, et al.
Supreme Court of California Case No.: S214061
(First Appellate District, Div. 1, Case No.: A135892;
San Mateo County Superior Court Case No.: CIV508656)

SERVICE LIST

Susan L. Brandt-Hawley BRANDT-HAWLEY LAW GROUP 13760 Arnold Drive/ P.O. Box 1659 Glen Ellen, CA 95442 Tel.: (707) 938-3900 Fax: (707) 938-3200 Email: susanbh@preservationlawyers.com	Attorney for Plaintiff and Respondent *Friends of the College of San Mateo Gardens* **VIA FEDERAL EXPRESS** (courtesy copy via email)
Jeffrey Reusch OFFICE OF THE ATTORNEY GENERAL, DEPARTMENT OF JUSTICE 1300 I Street Sacramento, CA 95814 Tel: (916) 327-7851 Fax: (916) 327-2319 Email: Jeffrey.reusch@doj.ca.gov	Attorney for *California Natural Resources Agency and Governor's Office of Planning and Research* **VIA FEDERAL EXPRESS**
Sara Hedgpeth-Harris LAW OFFICES 2125 Kern Street, Suite 301 Fresno, CA 93721 Tel.: (559) 233-0907 Fax: (310) 798-2402 Email: sara.hedgpethharris@shh-law.com	Attorney for Amici Curiae *Association of Irritated Residents, Madera Oversight Coalition, Revive the San Joaquin, and Sierra Club* **VIA U.S. MAIL**
Michael W. Graf LAW OFFICES 227 Behrens Street El Cerrito, CA 94530 Tel.: (510) 525-1208 Fax: (510) 525-1208 Email: mwgraf@aol.com	Attorney for Amicus Curiae *High Sierra Rural Alliance* **VIA U.S. MAIL**

Jan Chatten-Brown
Amy Minteer
CHATTEN-BROWN & CARSTENS
2200 Pacific Coast Highway, Suite 318
Hermosa Beach, CA 90254
Tel.: (310) 798-2400
Fax: (310) 798-2402
Email: jcb@cbcearthlaw.com

Attorneys for Amicus Curiae *California Preservation Foundation*

VIA U.S. MAIL

Andrew B. Sabey
Linda C. Klein
COX, CASTLE & NICHOLSON LLP
555 California Street, 10th Floor
San Francisco, CA 94104
Tel.: (415) 262-5100
Fax: (415) 262-5199
Email: asabey@coxcastle.com

Attorneys for Amici Curiae *California Building Industry Association, Building Industry Association of the Bay Area, and California Business Properties Association*

VIA U.S. MAIL

Amanda Monchamp
HOLLAND & KNIGHT LLP
50 California Street, 28th Floor
San Francisco, CA 94111
Tel.: (415) 743-6900
Fax: (415) 743-6910
Email:amanda.monchamp@hklaw.com

Attorney for Amicus Curiae *The Regents of the University of California*

VIA U.S. MAIL

Christian L. Marsh
Amanda M. Pearson
DOWNEY BRAND LLP
333 Bush Street, Suite 1400
San Francisco, CA 94104
Tel.: (415) 848-4800
Fax: (415) 848-4831
Email: apearson@downeybrand.com

Attorneys for Amici Curiae *League of California Cities, California State Association of Counties, and Association of California Waste Water Agencies*

VIA U.S. MAIL

Richard T. Drury
Lozeau Drury LLP
410 12th Street, Suite 250
Oakland, CA 94607
Tel: (510) 836-4200
Fax: (510) 836-4205
Email: richard@lozeadrury.com

Attorneys for Amici Curiae *Communities for a Better Environment, Environmental Defense Center, and Southern California District Council of Laborers*

VIA U.S. MAIL

Clerk of the Court
First District Court of Appeal
Division One
350 McAllister Street
San Francisco, CA 94102
Tel. (415) 865-7300

VIA U.S. MAIL

Clerk of the Court
San Mateo County Superior Court
400 County Center
Redwood City, CA 94063
Tel.: (650) 261-5201

VIA U.S. MAIL