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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 TO PETITION FOR REVIEW

Jan I. Goldsmith, City Attorney
Glenn T. Spitzer, Deputy City Attorney
California State Bar No. 218664

Office of the City Attorney
1200 Third Avenue, Suite 1620
San Diego, California 92101-4178
Telephone: (619) 236-6220
Facsimile: (619) 236-7215
email: gspitzer@sandiego.gov

Attorneys for Respondent City of San Diego

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Office of the City Attorney
1200 Third Avenue, Suite 1620
San Diego, California 92101-4178
Telephone: (619) 236-6220
Facsimile: (619) 236-7215
email: gspitzer@sandiego.gov

Attorneys for Respondent City of San Diego

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I.

INTRODUCTION

At issue in this case is whether the City of San Diego's (City) enactment of ordinance O-20356 (Ordinance), which establishes a permitting process for medical marijuana facilities, constitutes a "project" as that term is defined in the California Environmental Quality Act (CEQA). The Court of Appeal affirmed the judgment in favor of the City after determining that the Ordinance is not a project because the activity did not "cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment[.]" Public Resources Code section 21065.

Petitioner argues that the Court of Appeal decision creates a conflict in the law because other authority holds an enactment of a zoning ordinance is a "project" regardless of whether the activity meets the definition of "project" in Public Resources Code section 21065. Petitioner is incorrect; there is no legal authority for the proposition that the enactment of a zoning ordinance is *per se* a "project." Accordingly, the Supreme Court should deny the petition.

II.

STATEMENT OF THE CASE

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

The Ordinance came before City Council for a first reading on February 25, 2014, and a second reading on March 11, 2014. (AR 32:472; AR 36.) Prior to the adoption of the Ordinance, medical marijuana facilities were not allowed in the City.

The Ordinance makes amendments to the City's Land Development Code that will 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 4:44-45.)

"The 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 adoption, 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 Lower Court Rulings

On March 9, 2015, Judge Joel R. Wohlfeil issued a ruling 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 its notice of appeal. (CT 158-159.)

In an opinion filed October 14, 2016, the Fourth District Court of Appeal, Division One, affirmed the judgment in favor of the City. The Court of Appeal analyzed the "project" issue under Public Resources Code section 21065 and CEQA Guidelines, section 15378, and found the enactment of the Ordinance did not constitute a "project" because there was no evidence in the administrative record to support a finding that the activity may cause a direct physical change in the environment or a reasonably foreseeable indirect physical change in the environment. The Court of Appeal found that all the changes alleged and argued by Petitioner were speculative. The Court of Appeal also analyzed and rejected Petitioner's argument that Public Resources Code section 21080(a) makes the enactment of a zoning ordinance subject to CEQA regardless of whether the activity meets the definition of "project" under section 21065.

III.

STANDARD OF REVIEW

Supreme Court review of a court of appeal decision is appropriate "[w]hen necessary to secure uniformity of decision or to settle an important question of law." Cal. Rules of Court 8.500(b)(1).

IV.

LEGAL ARGUMENT: SUPREME COURT REVIEW IS NOT WARRANTED BECAUSE THERE IS NO CONFLICTING AUTHORITY HOLDING THE ENACTMENT OF A ZONING ORDINANCE IS *PER SE* A "PROJECT" UNDER CEQA.

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).[1] "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 Co. v. Solano County Airport Land Use Com.* (2007) 41 Cal. 4th 372, 380).

Petitioner argues only the existence of indirect physical changes. "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).) "The question whether alleged physical changes are reasonably foreseeable requires an examination of the evidence presented in the administrative record." *Wal-Mart Stores, Inc.,* 138 Cal. App. 4th at 291.

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*

[1] 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.

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, 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 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 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 added).

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 within 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. There Is No Case Holding the Enactment of a Zoning Ordinance is *Per Se* a "Project" under CEQA.

Petitioner argues that the Court of Appeal decision is inconsistent with this Court's decision in *Muzzy Ranch Co. v. Solano County Airport Land Use Commission,* (2007) 41 Cal. 4th 372 (*"Muzzy Ranch"*) and Public Resources Code section 21080(a). Petitioner relies heavily on the language in *Muzzy Ranch*: "[w]hether an activity constitutes a project subject to CEQA is a *categorical question* respecting whether the activity is of a general kind with which CEQA is concerned, without regard to whether the activity will actually have environmental impact." *Muzzy Ranch,* 41 Cal. 4th at p. 381 (emphasis added). Petitioner argues that this language supports its argument that certain categories of activities are *per se* subject to CEQA regardless of whether they will cause actual foreseeable changes to the environment. Petitioner relies on this language in conjunction with Public Resources Code section 21080 to argue that the activities referenced in section 21080 are *per se* subject to CEQA.

This is an incorrect reading of *Muzzy Ranch.* In *Muzzy Ranch,* the Supreme Court did not hold that certain activities are subject to CEQA regardless of whether the activities meet the causation element of section 21065. In fact, the Court analyzed the causation element of section 21065 at length before finding that the adoption of the planning document at issue qualified as a "project." Moreover, the Court did not address—or even reference—section 21080.

Under section 21065, an activity must meet both the categorical element and the causation element. Namely, it must be the *type* of activity

that is subject to CEQA, and it must be an activity that may cause a direct or reasonably foreseeable indirect change on the environment. This is consistent with *Muzzy Ranch.* It is incorrect to read *Muzzy Ranch* as eliminating the causation element for certain activities.

The causation element goes to the very purpose of CEQA. The primary goals of CEQA are to identify an activity's environmental impacts, and to lessen those impacts with the adoption of feasible mitigation measures and project alternatives. Pub. Res. Code § 21002. These are the very issues addressed in an environmental impact report. However, if an agency is unable to identify a direct or reasonably foreseeable indirect environmental change, then it cannot possibly assess or mitigate an impact through the CEQA process.

There is no question that the enactment of a zoning ordinance is the type of activity that CEQA regulates. CEQA Guidelines, § 15378(a)(1). However, the activity at issue in this case was not subject to CEQA because it was not an activity that may result in a direct or reasonably foreseeable indirect change to the environment. CEQA Guidelines, § 15378(a).

There are no cases that hold the enactment of a zoning ordinance is *per se* a "project" under CEQA. *Muzzy Ranch* did not address zoning ordinances. Petitioner also cites to *Rosenthal v. Board of Supervisors* (1975) 44 Cal. App. 3d 815, but that case does not stand for the proposition that the enactment of a zoning ordinance is *per se* a "project." Moreover, that case was decided prior to the 1994 amendment of section 21065 to include the causation element.

Petitioner also cites to *Rominger v. County of Colusa,* (2014) 229 Cal. App. 4th 690. However, that case does not address the enactment of a zoning ordinance. Instead, the case addresses the approval of a subdivision map.

The only case that addresses the issue of whether the enactment of a zoning ordinance is *per se* subject to CEQA under section 21080 is *Wal-Mart Stores, Inc. v. City of Turlock* (2006) 138 Cal. App. 4th 273 (disapproved on other grounds in *Hernandez v. City of Hanford* (2007) 41 Cal. 4th 279). That court analyzed the statutory construction issue as follows:

> Sections 21065 and 21080 could be construed to mean that the enactment of a zoning ordinance is not automatically a project and will not be a project unless all of the essential elements for a project contained in section 21065 are met. Under this view, the qualifying language at the beginning of subdivision (a) of section 21080, which states that "[e]xcept as otherwise provided in [CEQA]," would be construed to mean that all of the essential elements for a project contained in section 21065 are "otherwise provided in [CEQA]" and are not eliminated by the language in section 21080 that states discretionary projects include the enactment of zoning ordinances. If such a construction were adopted, courts could not presume that the enactment of a zoning ordinance "may cause ... a ... physical change in the environment" (§ 21065), but would have to review the administrative record for evidence establishing both the requisite causal link as well as the requisite physical change in the environment. Under this construction, the main significance of subdivision (a) of section 21080 would be limiting the applicability of CEQA to *discretionary* projects.
>
> This issue of statutory construction has not been raised in a published appellate opinion or in two widely used CEQA treatises. (See 1 Kostka & Zischke, Practice Under the Cal. Environmental Quality Act (Cont.Ed.Bar 2005) § 4.21, pp. 172–173; see Remy, *supra,* at p. 78 ["The following are all 'projects' subject to CEQA: [¶] ... [¶] (3) the enactment and amendment of zoning ordinances"].) The Guidelines, however, have melded the provisions of subdivision (a) of section 21080 into the definition of "project" (see Guidelines, § 15378, subd. (a)(1)) and, thus, appear to have rejected by implication a bright-line rule that all zoning amendments are projects.

Id. at 286, fn. 7. Thus, the *Walmart* case analyzed the issue consistent with the Fourth District's decision here.

V.

CONCLUSION

Based on the foregoing, review is not appropriate under California Rules of Court, Rule 8.500(b)(1). Accordingly, the City respectfully requests that the Supreme Court deny the Petition.

Dated: December 12, 2016

Jan I. Goldsmith, City Attorney

By _____
Glenn T. Spitzer
Deputy City Attorney

Attorneys for Respondent,
City of San Diego

CERTIFICATE OF COMPLIANCE

[CRC 14(c)(1)]

Pursuant to California Rule of Court, Rule 14(c)(1), I certify that this **ANSWER FOR PETITION FOR REVIEW**, contains 2,386 words and is printed in a 13-point typeface.

Dated: December 12, 2016

Jan I. Goldsmith, City Attorney

By _____
Glenn T. Spitzer
Deputy City Attorney

Attorneys for Respondent,
City of San Diego

IN THE

SUPREME COURT OF CALIFORNIA

PROOF OF SERVICE

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Union of Medical Marijuana Patients, Inc.. v. City of San Diego, et al.

S _____

4th Civil No. D068185
San Diego County Superior Court
Case No. 37-2014-00012481-CU-TT-CTL

I, the undersigned, declare that:

I was at least 18 years of age and not a party to the case; I am employed in the County of San Diego, California, where the mailing occurs; and, my business address is 1200 Third Avenue, Suite 1100, San Diego, California, 92101.

I served the foregoing **ANSWER TO PETITION FOR REVIEW on December 12, 2016,** by overnight mail via Golden State Overnight (GSO) to the following:

Jamie T. Hall
Julian K. Quattlebaum
CHANNEL LAW GROUP, LLP
8200 Wilshire Blvd., Suite 300
Beverly Hills, CA 90211
Tel: (310) 982-1760
Fax: (323) 723-3960
email: Jamie.hall@channellawgroup.com

Mitchell E. Rishe Deputy Attorney General
Public Rights Division, Land law Section
California Department of Justice
300 South Spring Street, Suite 1702
Los Angeles, CA 90013
Attorney for Real Party in Interest,
California Coastal Commission
Tel: (213) 897-6224
Fax: (213) 897-2801
Email: mitchellrishe@doj.ca.gov

The Honorable Joel Wohlfeil
San Diego Superior Court
Department C-73
330 West Broadway
San Diego, CA 92101

Court of Appeal
4th District Div 1
750 B Street, Suite 300
San Diego, CA 92101

The Supreme Court of California
http://courts.ca.gov/9408.htm
Via E-Submission
350 McAllister Street
Room 1295
San Francisco, CA 94102
(original plus 8 copies)

I declare under penalty of perjury and the laws of the State of California that the foregoing is true and correct. Executed on December 12, 2016, in San Diego, California.

Merlita S. Rich
Legal Secretary