Case No. S251709

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

PROTECTING OUR WATER & ENVIRONMENTAL RESOURCES et al.,
Plaintiffs and Appellants,

v.

STANISLAUS COUNTY et al.,
Defendants and Respondents.

After a Decision by the Court of Appeal Fifth Appellate District
Case No. F073634

Appeal from the Stanislaus County Superior Court
Case No. 2006153
The Honorable Roger M. Beauchesne, Judge, Presiding

APPELLANTS' SUPPLEMENTAL BRIEF REGARDING NEW AUTHORITIES [CRC 8.520(d)]

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I. INTRODUCTION

Plaintiffs and Appellants, Protecting Our Water & Environmental Resources and California Sportfishing Protection Alliance (Appellants), submit this supplemental brief to discuss two opinions issued since the completion of briefing: *Union of Medical Marijuana Patients, Inc. v. City of San Diego* (2019) 7 Cal.5th 1171 (*Medical Marijuana*); and *Willow Glen Trestle Conservancy v. City of San Jose* (May 18, 2020) H047068, __Cal.App.5th__ [2020 WL 2521232] (*Willow Glen Trestle*).

II. ARGUMENT

A. This Court's opinion in *Medical Marijuana* strongly supports Appellants' arguments at pages 43-48 of their Answer Brief on the Merits.

This Court's decision in *Medical Marijuana* concerns one of the two criteria an "activity" must meet to be considered a "CEQA project" subject to environmental review pursuant to CEQA.[1] One criterion is that the public agency must have discretionary authority to approve, carry out, or modify the activity. (*Medical Marijuana, supra*, 7 Cal.5th at 1183, 1188; 1191; CEQA § 21080(a) [CEQA "shall apply to discretionary projects proposed to be carried out or approved by public agencies"].) The other criterion is that the public agency must approve or carry out an activity that may change or lead to changes in the physical

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[1]The California Environmental Quality Act is codified at Public Resources Code § 21000 et seq. and is referred to herein as CEQA. Portions of the Public Resources Code comprising CEQA are cited as "CEQA section #."

environment, as provided in CEQA's definition of the term "project." (*Id*. 7 Cal.5th at 1182, 1191; CEQA § 21065.)

The instant case involves the "discretionary authority" criterion, while the Court's decision in *Medical Marijuana* focuses on the criterion relating to changes in the physical environment. The Court's discussion of this criterion, nevertheless, sheds considerable light on the "discretionary authority" criterion.

Medical Marijuana concerned an amendment to a zoning ordinance allowing medical marijuana dispensaries in the city of San Diego. The City argued that its adoption of the ordinance was not a CEQA project because it would not change or lead to changes in the environment. The CEQA plaintiff argued to the contrary that adoption of the ordinance was a CEQA project because subdivision (a) of CEQA section 21080 refers to "the enactment and amendment of zoning ordinances" as a "discretionary project."

The Court agreed with the CEQA plaintiff that the zoning ordinance was a CEQA project, but for a different reason, holding that, as a matter of statutory construction, a zoning ordinance is not a "CEQA project" unless it "may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment" as provided in CEQA section 21065. (*Medical Marijuana*, supra, 7 Cal.5th at 1191.)

The Court then turned to whether the zoning ordinance at issue meets the definition of "project" because it "may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the

environment." The Court's analysis was heavily grounded in the legal and statutory policy considerations engaged at this most preliminary stage of review for CEQA's applicability. Thus, the Court observed that:

> "a proposed activity is a CEQA project if, by its general nature, the activity is capable of causing a direct or reasonably foreseeable indirect physical change in the environment. This determination is made without considering whether, under the specific circumstances in which the proposed activity will be carried out, these potential effects will actually occur."

(*Id*. at 1197, citing *Muzzy Ranch Co. v. Solano County Airport Land Use Com*. (2007) 41 Cal.4th 372, 383 (*Muzzy Ranch*).)

The Court reiterated this point several times. (*Medical Marijuana*, *supra*, 7 Cal.5th at 1198-1200.) For example, the Court noted that:

> *Muzzy Ranch* clearly requires a public agency to consider the substance of a proposed activity in determining its status as a project. *What need not be considered is the activity's actual impact in the specific circumstances presented.*

(*Id*. at 1198 (italics added).)

The Court then explained why the inquiry regarding the possibility that an activity may lead to environmental impacts is very different at this preliminary, first stage of the CEQA process, where the purpose is to determine whether CEQA applies. The Court explained that "The somewhat abstract nature of the project decision is appropriate to its preliminary

role in CEQA's three-tiered decision tree" because this determination "occurs at the inception of agency action, presumably before any formal inquiry has been made into the actual environmental impact of the activity." (*Id.* at 1197–1198.)

The Court explained that the question posed at that point in the CEQA analysis:

> is not whether the activity *will* affect the environment, or *what those effects might be*, but whether the activity's potential for causing environmental change is sufficient to justify the further inquiry into its actual effects that will follow from the application of CEQA.

(*Id.* at 1197–1198 (italics added).)

Applying this rule of decision to the facts, the Court held that the CEQA plaintiffs had argued, and the Court of Appeal had analyzed, incorrectly, whether the zoning ordinance may have environmental impacts "in the context of the specific circumstances it claimed to prevail in the City, hypothesizing various City-specific reasons why the Ordinance might indirectly produce physical changes." (*Id.* at 1199.) The Court explained that the plaintiff's "framing of the arguments in this manner and the court's rejection of them put the cart before the horse" because:

> *The likely actual impact of an activity is not at issue in determining its status as a project.* Further, at this stage of the CEQA process virtually any postulated indirect environmental effect will be "speculative" in a legal sense — that is, unsupported by evidence in the record (citation) — *because little or no factual*

record will have been developed.

(*Id*. at 1199–1200 (italics added).)

These same considerations apply with equal force to Respondent County's argument that "to invalidate the County's policy of issuing permits without complying with CEQA ... Plaintiffs must show that the [separation] standard applies to all or the 'great majority' of the County's well construction permit approvals," (Defendants' Opening Brief (DOB) 59-62, citing *Sierra Club v. County of Sonoma* (2017) 11 Cal.App.5th 11, 15 (*County of Sonoma*). As this Court explained in *Medical Marijuana*, the purpose of the preliminary, first stage of the CEQA process is to determine whether CEQA applies. With respect to the criterion relating to the possibility of environmental impact, the Court recognized that the "somewhat abstract nature of the project decision is appropriate to its preliminary role in CEQA's three-tiered decision tree" because "[d]etermination of an activity's status as a project occurs at the inception of agency action, presumably before any formal inquiry has been made into the actual environmental impact of the activity." (*Id*. at 1197–1198.)

The same is true for the criterion relating to the agency's discretionary authority. This inquiry occurs "before any formal inquiry has been made into the actual environmental impact of the activity." (*Id*. at 1198.) The County, relying on *County of Sonoma*, argues that the discretionary-ministerial inquiry must await development of the factual record showing that specific facts trigger the need for the County to actually use its

discretionary power in some fashion. But the only facts that could trigger such action would be facts about the environmental impacts of the project, which as this Court observed in *Medical Marijuana* are simply not developed at this stage of the process. For agencies or the courts to determine if CEQA applies based on whether an agency *will* exercise its discretionary powers as compared to whether it *could* exercise its discretionary powers, "puts the cart before the horse." (*Id*. at 1199.)

Therefore, it is well-settled that whether a statute confers discretionary authority on an agency that requires it to comply with the mandates of CEQA is a question of law determined by the terms of the statute giving rise to a permit requirement. (See Answer Brief on the Merits, 22-23; 33-37.)

Moreover, as Appellants argue elsewhere, if the agency has discretion to vary objective standards, then even a decision not to vary objective standards represents an exercise of that discretion. (Answer Brief on the Merits, 11-12 ["the discretion conferred by the separation standard 'applies' to all well permits applications because the County must decide whether the separation standard's "objective guideposts" are "adequate" to protect water quality or require modification for each permit," (citing *Bank of Italy v. Johnson* (1926) 200 Cal. 1, 15 and *Valley Advocates v. City of Fresno* (2008) 160 Cal.App.4th 1039, 1063.)

In sum, *Medical Marijuana* strongly supports Appellants' arguments at pages 43-48 of its Answer Brief on the Merits, including Appellants' arguments that the *County of Sonoma* decision is incorrect and should be disapproved.

B. The Sixth District Court of Appeal's opinion in *Willow Glen Trestle* contains non-precedential dicta on one issue presented in this case.

In *Willow Glen Trestle*, the City of San Jose decided to demolish a 1921 railroad trestle and replace it with a metal bridge to serve as part of a pedestrian trail. In 2014, the City prepared a negative declaration under CEQA, approved the demolition, and entered into a Streambed Alteration Agreement (SAA) with the California Department of Fish and Wildlife (CDFW) under Fish & Game Code section 1600 et seq. While the negative declaration was challenged, unsuccessfully, in a CEQA lawsuit, the SAA expired. (*Willow Glen Trestle, supra*, __Cal.App.5th __ at 1-2.)

The City applied for a new SAA, which was then challenged in a second CEQA lawsuit. The CEQA plaintiff contended the City's decision to apply for a new SAA was a discretionary CEQA project approval which, in light of changed circumstances as to the Trestle's historic status, triggered subsequent environmental review under CEQA section 21166. (Id. at 1-2; see generally, *Friends of College of San Mateo Gardens v. San Mateo County Community College Dist.* (2016) 1 Cal.5th 937, 945 (*San Mateo Gardens*).)

The Court of Appeal ruled that the City's actions to secure a new SAA were not "approvals" because the City was "simply implementing the project that it had already approved in 2014." (Id. at 4.)

Since the Court of Appeal did not decide whether the City

had "discretionary authority" to pursue the new SAA, the case holding is not relevant here. However, the decision states, in dicta, that: "[w]hile it is true that CDFW's issuance of the final SAA was an 'approval,' that action was not an approval by the City. And …CDFW could not consider whether the Trestle was an historical resource because CDFW's environmental review was limited to fish and wildlife resources. (Fish & G. Code, §§ 1602, 1603)." (Id. at 3.)

This statement that "CDFW's environmental review was limited to fish and wildlife resources" is dicta because CDFW was not a party to the appeal and the legality of its action in approving the SAA was not adjudicated. The Court of Appeal did not address the nature and extent of CDFW's authority under CEQA when it approves an SAA, because it was unnecessary for the Court to do so to decide the case. As the Court said in the next sentence following this quote: "The Conservancy's argument depends on its characterization of the City's actions in seeking and obtaining the SAA as an 'approval.'" (Ibid.)

Moreover, the Willow Glen Trestle opinion does not address the arguments that Appellants made at pages 54-56 of their Answer Brief on the Merits. "[C]ases are not authority for propositions not considered." (*People v. Ault* (2004) 33 Cal.4th 1250, 1268, fn. 10.)

III. CONCLUSION

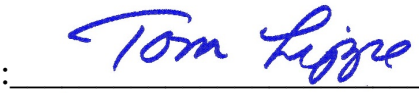
Adding a fact-specific inquiry during the preliminary, first stage of the CEQA process to determine whether an agency has discretionary authority to approve, carry out, or modify an

activity is inconsistent with the purpose of preliminary review, which is to determine if a fact-specific inquiry is required. The decision in *County of Sonoma, supra*, should be disapproved to the extent it is inconsistent with this rule.

Also, the Second District Court of Appeal decision in *California Water Impact Network v. County of San Luis Obispo*, Supreme Court Case No. S251056, as to which this Court granted "review and hold," relies on *County of Sonoma* to erroneously add a fact-specific inquiry during the preliminary stage of the CEQA process to determine whether the agency has discretionary authority.

The Court should affirm the Court of Appeal's disposition on the additional grounds discussed in this brief.

Dated: May 22, 2020 LAW OFFICES OF THOMAS N. LIPPE

By: 

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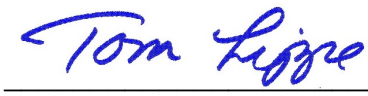

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