IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. S238563

UNION OF MEDICAL MARIJUANA PATIENTS, INC.,
Plaintiff and Appellant,

v.

CITY OF SAN DIEGO,
Defendant and Respondent,

CALIFORNIA COASTAL COMMISSION,
Real Party in Interest.

Court of Appeal of California
Fourth District, Division One
D068185

Superior Court of California
San Diego County
37-2014-00013481-CU-TT-CTL
Hon. Joel Wohlfeil

Reply to Answer to Petition for Review

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INTRODUCTION

"Throughout, we must bear in mind that "[t]he foremost principle under CEQA is that the Legislature intended the act 'to be interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.'" *Muzzy Ranch Co. v. Solano Cnty. Airport Land Use Com'n* (2007) 41 Cal.4th 372, 381 (citing (*Laurel Heights Improvement Assn. v. Regents of Univ. of California* (1988) 47 Cal.3d 376, 390). To implement CEQA in accordance with this principle, the statute's language, and this Court's decision in *Muzzy Ranch*, agencies must do initial CEQA review whenever they pass ordinances which regulate land use on a large-scale basis in certain areas of a locality ("zoning ordinances"), and certainly whenever they pass zoning ordinances which regulate medical marijuana dispensaries throughout large metropolitan areas.

LEGAL DISCUSSION

I. *Muzzy Ranch* mandates a categorical analysis, which dictates CEQA review of all ordinances which regulate land use, on a large-scale basis in certain areas of a locality (i.e. 'zoning ordinances'), or, in the alternative, all zoning ordinances regulating medical marijuana dispensaries.

It is important to note that the protested action by the City of San Diego was not a Notice of Exemption or other initial agency determination that the project would actually not have significant environmental impacts. Such analysis occurs only after an agency action has been determined to be a "project." CEQA, the CEQA Guidelines, and existing California Supreme Court precedent provide a speedy, low-cost means to comply with CEQA for individual projects which, after initial analysis, do not have any reasonably foreseeable indirect impacts to the environment. Indeed, in *Muzzy Ranch* itself, the court ruled that the agency improperly determined that the land use measure at issue in that case was incorrectly determined not to be a project, but ultimately upheld the agency action based on a later completed Notice of Exemption claiming a common-sense exemption because "it [could] be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment." (*Muzzy Ranch Co. v. Solano Cnty. Airport Land Use Com'n, supra*, 41 Cal.4th at p. 252 (citing CEQA Guidelines § 15061(b)(3)).) After the agency completes initial review and determines that the common-sense exemption applies, they may properly file a Notice of Exemption. (*Muzzy*

Ranch Co. v. Solano Cnty. Airport Land Use Com'n, supra, at p. 252.*)* If they do so, "no further environmental review is necessary." (*Id.* at pp. 252–253 (citing *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 74).)

Here, rather than analyze the potential impacts of the action, the City determined the Ordinance "was not a project, i.e., was a *type* of governmental activity not subject to CEQA." (*No Oil, Inc. v. City of Los Angeles, supra,* 13 Cal.3d at p. 257 (emphasis added).) The City purposefully misconstrues *Muzzy Ranch* in their answer, claiming that the Court in *Muzzy Ranch* "analyzed the causation element of section 21065 at length before finding that the adoption of the planning document at issue qualified as a 'project,'" and so implying that the causation element analyzed in *Muzzy Ranch* was the specific environmental impacts of the adopted land use plan. Answer to Petition for Review, 10–11.

However, the Court in *Muzzy Ranch* analyzed the general implications of adopting land use regulations of the *type* at issue, not arguments that the specific regulation in that case did not have any reasonably foreseeable indirect environmental impacts. In its analysis of whether the land use plan at issue was to be considered a "project," the Court in *Muzzy Ranch,* stated "*Depending on the circumstances,* a government agency *may* reasonably anticipate that its placing a ban on development in one area of a jurisdiction may have the consequence, notwithstanding existing zoning or land use planning, of displacing development to other areas of the jurisdiction." (*Muzzy Ranch Co. v. Solano Cnty. Airport Land Use Com'n, supra,* 41 Cal.4th at p. 254.) The Court did not then go on to analyze whether the specific ban on development in the land use plan at

issue would have these impacts. (*Ibid.*) The court merely made an illustrative comment on an aspect of the land use plan that may have impacts. (*Ibid.*) Indeed, zoning ordinances nearly universally "plac[e] a ban on development in one area of a jurisdiction" and may have the consequence of "displacing development." (*Ibid.*)

Similarly, the Court in *Muzzy Ranch* stated "[t]hat further governmental decisions need to be made before a land use measure's actual environmental impacts can be determined with precision does not necessarily prevent the measure from qualifying as a project." (*Muzzy Ranch Co. v. Solano Cnty. Airport Land Use Com'n*, *supra*, 41 Cal.4th at pp. 254–255.) It should be noted the Court, again, did not connect this piece of analysis—which applies to nearly all land use and zoning ordinances which invariably require additional approvals for most activities which effect the environment (*e.g.* building permits and conditional use permits)—to any of the specific future decisions that would occur in the implementation of the land use measure, or to any of the specific features (such as the development ban) of the land use measure at all. (*Ibid.*)

The Court in *Muzzy Ranch* even stated, before a series of string-citations, that "[a]lthough [they are] not explicitly mentioned in the CEQA statutes,"—note that zoning ordinances *are* explicitly mentioned—

> "general plans 'embody fundamental land use decisions that guide the future growth and development of cities and counties,' and amendments of these plans 'have a potential for resulting in ultimate physical changes in the environment.'

> General plan adoption and amendment are therefore properly defined in the CEQA guidelines as projects subject to environmental review."

(Muzzy Ranch Co. v. Solano Cnty. Airport Land Use Com'n, supra, 41 Cal.4th at pp. 256–257. (Citations omitted); CEQA Guidelines, § 21080.)

Additionally, the land use measure at issue in *Muzzy Ranch* only imposed *pre-existing* development restrictions in the area immediately surrounding an Air Force base rather than regulating a large and growing industry throughout an entire metropolitan city. (*Muzzy Ranch Co. v. Solano Cnty. Airport Land Use Com'n, supra,* 41 Cal.4th at p. 250.) The entire County of Solano, the agency whose action was reviewed in *Muzzy Ranch,* as of the 2010 census, had a population of 413,344. (U.S. Census Bureau QuickFacts, Solano County, California, available at http://www.census.gov/quickfacts/table/PST045215/06095.) In contrast, the City of San Diego had a population of 1,307,402 and the County of San Diego had a population of 3,095,313 as of the 2010 census. (U.S. Census Bureau QuickFacts, San Diego City, California, available at http://www.census.gov/quickfacts/table/PST045215/0666000; U.S. Census Bureau, QuickFacts, San Diego County, California, available at https://www.census.gov/quickfacts/table/PST045215/06073.)

The City cites to *Wal-Mart Stores, Inc. v. City of Turlock* for that case's analysis of whether a zoning ordinance is *per se* a project under CEQA. Answer to Petition for Review, 12 (citing *Wal-Mart Stores, Inc. v. City of Turlock* (2006) 138 Cal.App.4th 273). The court in that case noted that an argument similar to

the City's argument here is tenable under CEQA section 21065 and 21080, and that the CEQA guidelines conflate the requirements of the two statutory sections, but ultimately did not actually endorse such view, and, in any case, was decided before *Muzzy Ranch* which mandates a categorical analysis. (*Wal-Mart Stores, Inc. v. City of Turlock, supra,* at p. 286, fn. 7.)

The City refers to *Rominger v. County of Colusa*—which Appellant cited in the Petition for Review—to point out that such case dealt with a subdivision map, not a zoning ordinance. Answer to Petition for Review, 11. (citing *Rominger v. Cnty. of Colusa* (2014) 229 Cal.App.4th 690). That is correct. Appellant had earlier cited to the court in *Rominger* because the court of appeal applied *Muzzy Ranch*'s analysis to CEQA section 21080(a) and concluded that a subdivision was a project *categorically* under that case and statutory section.

> The Romingers contend the Adams subdivision qualifies as a CEQA project because section 21080 specifically provides that CEQA applies to "the approval of tentative subdivision maps." We agree.
>
> Subdivision (a) of section 21080 provides that "[e]xcept as otherwise provided in [CEQA], [CEQA] shall apply to discretionary projects proposed to be carried out or approved by public agencies, including, but not limited to, the enactment and amendment of zoning ordinances, the issuance of zoning variances, the issuance of conditional use permits, and *the approval of tentative subdivision maps* unless the project is exempt from this division." (Italics added.) According to the Romingers, this statute makes the approval of a tentative subdivision map a CEQA project *categorically*. The county responds that "[t]his ignores the facts and elevates form over substance"

> because "[a]ll subdivisions are not born alike," and "[t]he fact remains that the [Adams] Subdivision ... will not directly or indirectly result in significant impacts to the environment."
>
> The answer to the county's response largely lies in the Supreme Court's recognition in *Muzzy Ranch* that "[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, supra,* 41 Cal.4th at p. 381, 60 Cal.Rptr.3d 247, 160 P.3d 116, italics added.) In essence, by enacting subdivision (a) of section 21080 the Legislature has determined that certain activities, including the approval of tentative subdivision maps, *always* have at least the *potential* to cause a direct physical change or a reasonably foreseeable indirect physical change in the environment. This makes sense. It virtually goes without saying that the purpose of subdividing property is to facilitate its use and development.

(Rominger v. Cnty. of Colusa, supra, 229 Cal.App.4th at pp. 690–691 (underlining added).) Likewise, "[i]t virtually goes without saying that the purpose of [amending a zoning ordinance] is to facilitate [land] use and development." (*Ibid.)*

Rominger held that a subdivision map, because it was statutorily enumerated by CEQA section 21080(a), is categorically a project under CEQA. *(Ibid.)* Zoning ordinances are also a statutorily enumerated category under section 21080(a) and are also categorically projects under CEQA. If one applies the law of *Rominger* rather than the law of the Court of Appeals

below, such result is clearly dictated. The two decisions apply contradictory rules, and must be reconciled for the law on this issue to be settled in California.

Throughout its entire analysis of whether the land use measure was a project under CEQA, the Court in *Muzzy Ranch* never looked to the measure's specific reasonably foreseeable indirect environmental impacts. As per the dictates of CEQA, the Court in *Muzzy Ranch* only addressed whether the action in question was the *type* of measure which *may* cause reasonably foreseeable indirect environmental impacts. The analysis of the Court in *Muzzy Ranch* applies equally here, where the land use measure is a zoning ordinance which—because of its nature as a zoning ordinance, because of the specific activities regulated, and because of the size of the jurisdiction adopting the ordinance—has the potential to cause far greater environmental impacts. These potential impacts must be analyzed according to CEQA. They must be analyzed simply because the ordinance passed was a zoning ordinance and zoning ordinances categorically may cause reasonably foreseeable environmental impacts—but even more urgently must be analyzed because passing a zoning ordinance regulating medical marijuana in a major municipality is clearly a type of land use measures which may cause reasonably foreseeable environmental impacts. If, but not until, the City determines that no environmental impacts will reasonably foreseeably occur, the City may issue a Notice of Exemption.

II. Meaningful review is possible when a zoning ordinance is being drafted, but mitigation measures will be foreclosed if review is not conducted until a later time.

The City argues that meaningful review of the Ordinance was not possible, and that such CEQA review must needs be postponed until applications for permits under the Ordinance are received. This logic is flawed. While environmental review of specific permits is often mandated by CEQA, environmental review of the agency action which creates the overall regulatory scheme is also mandated. The reasons for this should be obvious. If a zoning ordinance relegates all industrial uses to wetlands, there will be reasonably foreseeable environmental impacts even before individual developments or businesses are proposed. Likewise, when a zoning ordinance limits the total number of medical marijuana collective storefronts in a city, and relegates them to certain areas, the total number of allowed collectives, there areas to which they are regulated, and the conditions under which they can operate must be considered. Allowing thirty collectives will have different environmental impacts than allowing two hundred or two collectives. Zoning them to industrial zones instead of commercial zones may change traffic patterns and result in more development since industrial spaces are not likely to be built out to accommodate storefront dispensaries. Considering the amount of set-back and similar restrictions placed on dispensaries in the Ordinance, the specific locations where storefronts may be opened are few enough that the environmental impacts in those neighborhoods may be analyzed. Indeed, the Ordinance is so restrictive that we already

know that the setback requirements are so restrictive that only 30 dispensaries can physically operate under the terms of the Ordinance even though it purportedly allows a maximum of 36, suggesting that the possible specific locations within industrial zones where storefronts may operate under the ordinance are already somewhat known. AR 1904. These must be analyzed now, or else the number and locations of storefronts will already be fixed—without any environmental analysis—even if the specific operating conditions of individual storefronts may be analyzed later.

According to the case cited by the City to support their argument that review would be premature,

> "Environmental documents (environmental impact reports or negative declarations) 'should be prepared as early as feasible in the planning process to enable environmental considerations to influence project program and design.' Without first carrying out CEQA review, agencies must not 'take any action which gives impetus to a planned or foreseeable project in a manner that forecloses alternatives or mitigation measures that would ordinarily be part of CEQA review.'

(Friends of the Sierra R.R. (2007) 147 Cal.App.4th 643, 654 (citing Cal. Code Regs., tit. 14, § 15004(b)). As is true with ordinances which regulate land use in certain areas of a locality on a large-scale basis (*i.e.*, zoning ordinances), mitigation measures were possible to implement when the Ordinance was planned. Changing the conditions, restrictions, allowed areas, and allowed number of medical marijuana dispensaries (to use the instant Ordinance as an example) could all have been

considered as part of any mitigation measures if CEQA review had been undertaken. Since the Ordinance was passed, these options are foreclosed as ways to mitigate its environmental impacts unless a replacement ordinance is passed.

The case analyzed by the City to claim that CEQA review in the instant case would have been premature is *Friends of the Sierra Railroad*. Answer to Petition for Review, 8–9. In that case, the agency sold a single six-tenths (.6)) of a mile by 100 foot (approximately 7.27 acre) right of way, and use of such right of way was already limited to "a trail dedicated for public use by pedestrians, equestrians, and non-motorized vehicles and/or for a railroad" by the County's General Use Plan, as referenced in the agency's determination approving the sale. (*Friends of the Sierra R.R., supra*, 147 Cal.App.4th at p. 649.) The court concluded that CEQA review would be premature and the action was not a "project" under CEQA. (*Id.* at p. 664.) That case dealt with a specific, small piece of property with a single overriding environmental concern, which was already protected by the land use plan and which could be easily addressed later. It is completely inapplicable to zoning ordinances, which fix the locations and conditions of development throughout a broad area. Not only do zoning ordinances affect much more land and the general composition of a locality, but they also impose the sorts of conditions that the court in *Friends of Sierra* noticed had already been put into place by a previous land use measure.

CEQA review should be conducted as soon as meaningful environmental review can occur, and early enough in the course

of an agency action that environmental considerations can affect the eventual action taken. Here, such review should have been conducted before the City passed the Ordinance.

CONCLUSION

Zoning ordinances are the very heart of local land use regulation. They decide—in broad terms, on a municipality-wide basis—which land uses occur, where they occur, and the conditions under which they occur. They always implicate concerns about potential developments, changes in traffic patterns, and the environmental effects of the specific land use regulated. The primary purpose of CEQA is to force governmental entities to analyze the environmental consequences of their actions. If municipalities are not required analyze their proposed zoning ordinances—even just to determine whether the common-sense exemption applies—the statute will not be applied to perhaps the most important determinations that local municipalities make. Under CEQA, the CEQA Guidelines, and California Supreme Court law, the City was required to conduct initial environmental review before passing the Ordinance. Should the Court of Appeal decision stand, municipalities will have precedent which says that they need not do any CEQA review of zoning ordinances, contrary to established law.

Channel Law Group, LLP

Respectfully submitted,

Dated: December 22, 2016 By: _____

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CERTIFICATE OF COMPLIANCE

This brief is set using **13-pt Century Schoolbook**. According to TypeLaw.com, the computer program used to prepare this brief, this brief contains **2,863** words, excluding the cover, tables, signature block, and this certificate.

The undersigned certifies that this brief complies with the form requirements set by California Rules of Court, rule 8.204(b) and contains fewer words than permitted by rule 8.504(d) or by Order of this Court.

Channel Law Group, LLP

Dated: December 22, 2016 By: _____

Jamie T. Hall

Attorney for Plaintiff and Appellant

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. S238563

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I declare:

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