Case No. S213478

IN THE SUPREME COURT OF CALIFORNIA

CALIFORNIA BUILDING INDUSTRY ASSOCIATION, *et al.*
Plaintiff and Respondent

vs.

BAY AREA AIR QUALITY MANAGEMENT DISTRICT
Defendant and Appellant

CALIFORNIA BUILDING INDUSTRY ASSOCIATION'S REPLY TO ANSWER TO PETITION FOR REVIEW

After a Decision by the Court of Appeal in a Published Opinion
First Appellate District, No. A135335 & A136212

On Appeal from a Judgment
Alameda County Superior Court, No. RG10548693
Honorable Frank Roesch, Judge of the Superior Court

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

State Cases

State Statutes

Rules and Regulations

Other Authorities

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I. INTRODUCTION

The Bay Area Air Quality Management District ("BAAQMD" or the "District") argues that resolving the fundamental question of whether CEQA is properly concerned with the effect of the existing environment on the project should wait for another day. The District, however, has no response to the fact that resolving this question now will prevent continued confusion and wasted resources, including resources related to the District's own TAC receptor Thresholds, which are causing substantial uncertainty in the nine-county Bay Area. The Opinion at issue has already been cited as contradicting what had been a growing body of case law clearly confining CEQA to its rightful purpose of testing a project's impact on the environment—not the existing environment's impact on the project. The uncertainty and confusion in this arena, exacerbated by the Opinion, will continue unless this Court grants review. This issue is of inarguable statewide importance and is ripe for this Court to address.

On the question of implied exemption, the District acknowledges that the Opinion creates a bright line rule that formal adoption of land use policies, regardless of the potential impacts of those policies, are never subject to the CEQA if adopted as thresholds of significance pursuant CEQA Guideline 15064.7. The District denies that the Opinion creates an implied exemption in direct conflict with this Court's holding in *Mountain Lion*, but the District's attempt to distinguish *Mountain Lion* does not pass

the straight face test. The CEQA statute does not exempt thresholds of significance. The CEQA Guidelines create no categorical exemption for thresholds of significance. Yet the Opinion finds an absolute exemption for thresholds of significance through the silence of the Guidelines. That is an implied exemption.

A government agency should not be permitted to ignore potential adverse environmental impacts of its action when adopting land use policies that would result in reasonably foreseeable changes in the environment simply because the agency provided an undefined "public review process"—a process that in this case admittedly included no environmental impact analysis at all. The District attempts to excuse the court of appeal's flouting of this Court's holding in *Mountain Lion* by contending that CEQA itself exempts the adoption of generally applicable thresholds of significance from any CEQA review. Not so. CEQA Guideline 15064.7 is not in the CEQA statute. Nothing in the CEQA statute exempts an agency action like what the District undertook.

Thus, the District is left trying to defend the implied exemption by pretending it is not an implied exemption. If left to stand, the Opinion's new class of implied exemption opens the door to local agencies seeking to adopt controversial land use policies without studying or disclosing the impacts of those policies, all under the guise that they are adopted as generally applicable thresholds of significance pursuant to Guideline

15064.7. The Opinion creates an implied exemption in direct contravention of *Mountain Lion* that this Court should not allow.

II. ARGUMENT

A. THE OPINION DOES NOT IDENTIFY A VALID USE OF THE TAC THRESHOLDS

The TAC receptor Thresholds demand a CEQA analysis of the impact of the existing environment on a proposed project. Four published cases have held that CEQA does not require analysis of the impact of the environment on the project. The Opinion disagrees, and then to sidestep the issue, the Opinion offers the hypothesis that the Thresholds can have some valid applications irrespective of their non-compliance with CEQA. None of the hypotheticals works.

CBIA explained in its petition for review why the Opinion's examples of purported valid uses of the TAC Thresholds were straw men. (CBIA's Petition for Review at 23-26.) For example, the use of the TAC receptor Thresholds for school siting under Public Resources Code section 21151.8 would be improper because that law requires a broader geographic analysis of potential sources of emissions than the District's Thresholds. (*Id.* at 25.) Thus, even if the Opinion properly applies the case law related to constitutional facial attacks (which it does not), the TAC receptor Thresholds are invalid. (*Id.* at 25-26.)

The District's answer to the petition does not even attempt to rehabilitate the Opinion's flawed examples, but instead attempts to sidestep CBIA's arguments by characterizing them as "quibbles." (District's Answer at 6.) Instead, the District quickly attempts to divert this Court's attention by arguing whether or not there is a proper use of the TAC receptor Thresholds is irrelevant because that issue may be deferred until some later lawsuit. The District embraces the idea that the robust litigation caused by the controversy surrounding the TAC receptor Thresholds will eventually yield a case that that this Court can review. Condemning the Bay Area to unnecessary CEQA analyses and voluminous litigation is the District's answer. (District's Answer at 6-7.)

The District is clear in its intent that the Thresholds are to be applied to new development projects throughout the Bay Area. (Appellants' Opening Brief at 12 [TAC Thresholds intended to address concern "that projects developed in areas near existing TAC sources will expose new residents and employees to unhealthy air pollution"] AR 9:2104, 2112-2113.) Whether CEQA is concerned with the impact of existing environment on a project is an issue that should be determined now, rather than inviting a future multitude of lawsuits throughout the Bay Area and awaiting a some later court of appeal decision for this Court to review.

Both the District and the Opinion ignore the holding of *County Sanitation District v. County of Kern* (2005) 127 Cal.App.4th 1544.

CBIA's briefing in the court of appeal explained that *Kern County* had made the same argument as the District does here, that an ordinance it approved would be implemented by other local agencies so it should be excused from analyzing the impacts of its action. (*See* CBIA's Respondent's Brief at 53-54.) *Kern County* argued that preparing an EIR would be meaningless "because the uncertainty over how the sanitation districts would react to [the ordinance] rendered environmental analysis of those reactions premature." (*County Sanitation District v. County of Kern* (2005) 127 Cal.App.4th 1544, 1599.) The court of appeal held such an argument confused "deferring" environmental review with "avoiding" it. (*Id.* at 1601.) "Because the adoption of [the ordinance] was a definitive action by County that completed its project . . . County had no opportunity to assess the indirect physical impacts of [the ordinance] before those impacts occurred." (*Id.* at 1602.) "By avoiding preparation of an EIR, County committed to a particular approach and completed its project without the benefit of the environmental analysis and information an EIR would have contained." (*Id.*)

The court of appeal explained that the county's attempt to pass off the responsibility to analyze the impacts of the ordinance to other agencies would create a "gap" in CEQA and deprive the public of the benefits that could result from consideration of alternatives to the proposed ordinance. *Id.* at 1603. The same is true for the District. The Thresholds project is

complete and the District has failed to consider any alternatives under CEQA to that project before its environmental impacts occur. No local agency can later conduct the required environmental review for the District or is in a better position to analyze the cumulative impacts of the Thresholds. If this Court declines review, the Bay Area is at risk of piecemeal litigation and tremendous uncertainty related to whether the TAC receptor Thresholds may properly be applied to new development projects.

B. THE OPINION CREATES UNCERTAINTY REGARDING THE SCOPE OF CEQA

Next, the District argues that the Opinion does not create any uncertainty in the law related to the holdings of *Baird* to *Ballona*. The District ignores the immediate fallout of Opinion.

The Opinion is considered the first negative citing reference for *Baird, Long Beach, SOCWA,* and *Ballona* according to Westlaw's KeyCite reports for those cases. Petitioners' counsel have grabbed on to the apparent questioning of these cases in at least one pending case in the Courts of Appeal. (*Notice of New Authority, California Rules of Court, Rule 8.254 Parker Shattuck Neighbors, et al. v. Berkeley City Council, et al., First District Court of Appeal Case No. A136873* [filed September 30, 2013] [the Opinion "held that the significant [*sic.*] thresholds, referred to as 'receptor thresholds,' were established to analyze human health impacts at and near a project area, in compliance with CEQA, and noted that a new project

located in an area that will expose its occupants to preexisting dangerous pollutants can be said to have substantial adverse effects on human beings"].) Further, environmental consultants are relying on the Opinion to justify analysis of the impacts of the preexisting environment on a project. (*See CBIA v. BAAQMD: Setting Significance Thresholds – Not a CEQA "Project;" Effects of Environment on a Project – Not Disallowed* (Ascent Environmental, Inc.) [*available at* http://eepurl.com/D8y3T].) The District's response to the Opinion's weakening of the holdings of *Baird, et al.* is essentially to pretend nothing is happening.

This Court should provide clarity to project applicants, lead agencies and project opponents as to whether the "purpose of CEQA is to protect the environment from proposed projects, not to protect proposed projects from the existing environment." (*Baird v. County of Contra Costa* (1995) 32 Cal.App.4th 1464, 1468).

If this Court does not grant review, local agencies will continue to defer the BAAQMD expertise in air quality, and apply the Thresholds in circumstances that violate the holdings of *Baird, et al.* Inviting inefficient repetitive litigation and risking inconsistent results is not the solution.

C. THE OPINION DEVIATES FROM SUPREME COURT PRECEDENT BY EXEMPTING GOVERNMENT ACTION FROM CEQA THAT IS NEITHER STATUTORILY NOR CATEGORICALLY EXEMPT

The Opinion concedes that the adoption of the Thresholds is an activity directly undertaken by a public agency that could potentially be a CEQA project if it could cause direct or reasonably foreseeable indirect physical changes to the environment. (Slip Op. at 14-15.) However, the Opinion also concludes that, by silence, CEQA Guideline 15064.7 exempts the adoption of thresholds of significance from environmental review. (Slip Op. at 12.) This exemption is even broader than the categorical exemptions promulgated by the Resources Agency because the Opinion would not even require CEQA review of an action taken under CEQA Guideline 15064.7 if the action would have a reasonable possibility of a significant effect on the environment due to unusual circumstances. (*Compare with* CEQA Guidelines § 15300.2(b) [unusual circumstances exception to categorical exemptions]; Kostka & Zischke, *Practice Under CEQA* (CEB 2013) § 5.72 (explaining the unusual circumstances exemption codified *Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190, 204, which noted that because the Secretary of Natural Resources Agency may exempt only activities that do not have a significant effect on the environment, a reasonable possibility

that an activity will have a significant effect of the environment precludes a categorical exemption].)

The Opinion takes the position that the severity of impact does not matter; *any* action taken in compliance of CEQA Guideline 15064.7 does not need to undergo environmental review because "the preparation of an EIR or other CEQA document would largely duplicate the public review process and substantial evidence standard set forth in section 15064.7." (Slip Op. 12.)

The District embraces this bright line rule, stating: "[b]ecause the Guidelines do not require environmental review prior to the adoption of thresholds, the Court would not interpret them to impose such an additional requirement." (District's Answer at 8.) The District states that exempting such actions from the definition of a "project" found in Public Resources Code section 21065 is not an implied exemption but instead "avoid[s] creating an additional implied requirement for the adoption of thresholds of significance that does not appear in the Guidelines themselves." (*Id.*)

Following the Opinion's logic, endorsed by the District's answer, even if there were absolute certainty that thresholds adopted in compliance CEQA Guideline 15064.7[1] would have significant adverse environmental impacts, there is no need to consider those impacts or to attempt to avoid or

[1] That is, a threshold of significance adopted in a public process with the thresholds themselves based on substantial evidence.

mitigate them, because doing so would "impose[] procedural or substantive requirements beyond those explicitly stated in [CEQA] or the [CEQA] guidelines." (District's Answer at 8 [quoting Pub Res. Code § 20183.1].)

The proper course would be to interpret CEQA "in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language." (*Mountain Lion Foundation v. Fish & Game Comm'n* (1997) 16 Cal.4th 105, 112.) Interpreting the CEQA Guidelines to trump the statute and provide immunity from having to consider the environmental repercussions of taking an action under CEQA Guideline 15064.7 does not comport with this guidance. The adoption of generally applicable thresholds of significance is not exempt from CEQA. (*See* CEQA Guidelines § 15061(b).)

The Opinion's conclusion that there is no requirement to conduct an environmental review of an action authorized by CEQA if the CEQA Guidelines are silent regarding the need to conduct such environmental review is contradicted by the administrative history of the CEQA Guidelines themselves.

In 1998, the Resources Agency promulgated CEQA Guideline 15126.4, which requires analysis of the environmental effects of proposed mitigation measures. (CEQA Guidelines § 15126.4(a)(1)(D).) If the Opinion were correct that the CEQA Guidelines' *silence* on the need for environmental review equals an exemption, then before 1998 there would

have been no duty to analyze the environmental effects caused by mitigation measures.[2] That is not the case.

The authority the Resources Agency relied upon for the 1998 requirement to analyze the environmental effects of a mitigation measure is a 1981 CEQA case. (CEQA Guidelines § 15126.4(a)(1)(D) [*citing Stevens v. Glendale* (1981) 125 Cal.App.3d 986].) The 1981 CEQA case did not rely on silence in the Guidelines to imply an exemption.

The CEQA statute does not exempt thresholds of significance from the definition of a project or environmental review. The Opinion erred by creating an implied exemption, one that is all the more egregious because it is an absolute exemption. This Court should grant review to reaffirm that there are no implied exemptions from CEQA.

D. THE OPINION IMPOSES A HEIGHTENED BURDEN OF PROOF TO DEMONSTRATE AN ACTIVITY IS A CEQA PROJECT

The District dismisses CBIA's argument that the Opinion broke with precedent by demanding a higher level of certainty to demonstrate that environmental changes related to displaced development are reasonably foreseeable. The District argues that the Opinion applies prior precedent and that Thresholds are not a project because (1) the Thresholds are not

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[2] Public Resources Code section 21002 has required mitigation measures to be imposed for significant environmental effects since at least 1980.

binding and (2) "the connection between adoption of the Thresholds and the ultimate environmental impact posited by BIA would take at least ten steps requiring multiple assumptions at each step of the way." (District's Answer at 11-12.) These arguments fail.

The District attempts to construe *Muzzy Ranch Co. v. Solano County Airport Land Use Comm'n* (2007) 41 Cal.4th 372, as relying on the binding nature of the airport land use plan in question as critical to the determination of whether that plan met the definition of a project. (District's Answer at 11.) A review of this Court's opinion shows that is not the case. The respondent in *Muzzy Ranch* made two separate arguments for why its action was not a project under CEQA: (1) that displaced development was too speculative; and (2) that because the plan was non-binding, it could not be the legal cause of environmental changes. (*Muzzy Ranch Co. v. Solano County Airport Land Use Comm'n* (2007) 41 Cal.4th 372, 382.) This Court dealt with each argument separately. (*Id.* 382-384.) In its analysis of displaced development impacts, this Court found "no California locality is immune from the legal and practical necessity to expand housing due to increasing population pressures" and "[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." (*Id.* at 382-383.) The Court, in a separate section, rejected the respondent's second

argument that its action was non-binding. (*Id.* at 383-384.) Development pressure is unyielding in the Bay Area. *Muzzy Ranch* supports the conclusion that it is reasonably foreseeable that increasing infill development's regulatory burden *may* result in a change in land use patterns.

The District also relies on the Opinion's analysis that any indirect physical change to the environment is at least 10 steps removed from the Thresholds. (District's Answer at 11-12; Slip Op. at 16.) This facile argument could be developed for almost any CEQA case that found an activity to be a project. For example, in *Muzzy Ranch*, the approval of the plan in question could arguably take 14 steps before it resulted in displaced development: (1) the Airport Land Use Commission (ALUC) would have to propose or receive an application to amend the Airport Land Use Compatibility Plan so that it was no longer consistent with existing general plans; (2) the ALUC would need to undertake CEQA review of that proposed amendment; (3) the ALUC would need to approve the amendment (including approving a potential statement of overriding considerations); (4) a local agency would need to incorporate the plan's changes into its general plan rather than override the commission's recommendation after conducting its own CEQA review; (5) a developer would have to propose a project that was consistent with the Airport Land Use Compatibility Plan prior to its amendment but inconsistent with the

plan as amended; (6) a lead agency would need to conduct a CEQA review on that project; (7) the lead agency would have approved the project but for its inconsistency with the amended plan; (8) the developer would need to not revise its project, such as reducing its height or floor area ratio, to be consistent with the plan's new requirements; (9) the developer would need to abandon its project or the lead agency would need to deny its application; (10) the developer would have to move its project elsewhere; (11) the "elsewhere" would have to be in a location sufficiently distant from the prior location to be considered "displaced;" (12) the newly sited project would have to be approved following CEQA review by the lead agency in the new jurisdiction; (13) people who would have otherwise lived in the prior abandoned project would have to move to the newly sited project but continue to commute to the prior location; and (14) this sequence of events would have to repeated with sufficient frequency for the increase in traffic or other effects attributable to the displaced development to change the physical environment.

Parsing reasonable foreseeability into this level of multi-step analysis is a facile way to pretend the obvious causal relationship between increased burden and reduced development does not exist. However, it parallels the analysis found in the Opinion on page 16.

The analysis is actually far more simple and direct: (1) a developer determines not to submit an application due to the regulatory burden

represented by the Thresholds and development is located elsewhere to meet the Bay Area's overwhelming housing demand; or (2) a lead agency implements the Thresholds and adopts a buffer zone into its planning documents which inhibits residential development within 500 feet of a major roadway and overwhelming housing demand results in development farther away from roadways, for example, on undeveloped or agricultural land in the outer Bay Area.

Even the District recognizes the power of increased CEQA burdens to shape development patterns. It did not require a multi-step analysis to conclude that increasing the burden on greenfield development by ratcheting up the greenhouse gas emissions burdens under CEQA would discourage greenfield development and avoid the generation of a significant volume of greenhouse gasses. For the District to deny the same relationship between increasing the burdens on infill development and discouraging infill development strains credulity.

This Court should grant review to affirm that the evidentiary burden met in *Muzzy Ranch* controls for CEQA claims related to displaced development and that expert planners' opinion regarding the impacts of adopting a planning policy is sufficient to demonstrate that an activity is a project. Here, it is not a question *if* the Thresholds will have an impact on infill development (they did [see District's survey at CT 8:2138-2209]) it is only a question of how much. (*See California Unions for Reliable Energy*

v. Mojave Desert Air Quality Management Dist. (2009) 178 Cal.App.4th 1225, 1237, 1245 [court rejects an air district's argument that an offset policy was not subject to CEQA because "'the [offset] rule does not permit the paving of any road or the using of any offset: . . . the rule simply sets forth a protocol for calculating such an offset if one is sought;" The court noted the "only thing that was even arguably speculative about these effects was their quantity. Plaintiffs' evidence did not necessarily require a finding that these adverse environmental effects would be significant."].)

III. CONCLUSION

For the foregoing reasons, CBIA asks that this Court grant review on each of the three important issues presented.

Dated: October 15, 2013

Respectfully submitted,
Cox, Castle & Nicholson LLP

By: _____
Andrew B. Sabey
Attorneys for Plaintiff and Respondent California Building Industry Association

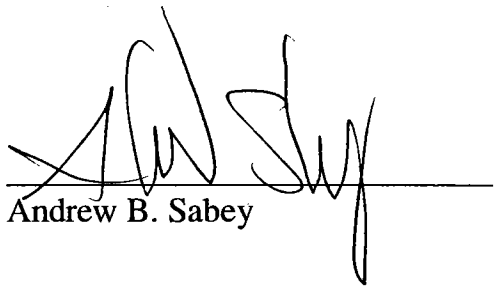
CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, Rule 8.504(d)(1))

I, Andrew B. Sabey, hereby certify that the word count in REPLY TO ANSWER TO PETITION FOR REVIEW is 3,646 words.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed this 15th day of October 2013 in San Francisco, California.



Andrew B. Sabey

PROOF OF SERVICE

I am employed in the County of San Francisco, State of California. I am over the age of 18 and not a party to the within action; my business address is 555 California Street, 10th Floor, San Francisco, California 94104-1513.

On October 15, 2013, I served the foregoing document(s) described as **CALIFORNIA BUILDING INDUSTRY ASSOCIATION'S REPLY TO ANSWER TO PETITION FOR REVIEW** on ALL INTERESTED PARTIES in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

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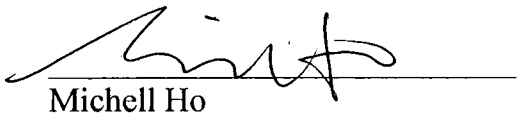

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APPELLATE CASE NOS. A135335 & A136212

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