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.

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

Appellant's Opening Brief

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ISSUES PRESENTED

1. Is amendment of a zoning ordinance an activity directly undertaken by a public agency that categorically constitutes a "project" under CEQA?

2. Is a "the enactment of a law allowing the operation of medical marijuana cooperatives in certain areas of a municipality under certain conditions is the type of activity that may cause a reasonably foreseeable change to the environment," categorically?

INTRODUCTION

In *Muzzy Ranch Co. v. Solano Cnty. Airport Land Use Comm'n* (2007) 41 Cal.4th 372, the California Supreme Court held, "That the enactment or amendment of a general plan is subject to environmental review under CEQA is well established." 41 Cal.4th at p. 385. This case presents a preliminary dispositive question for a wide swath of litigation under CEQA, the answer to which would seem to be implicit in that ruling: is passing a zoning ordinance a "project" under CEQA? To answer this question in the affirmative would provide clarity to governments across California as to when they must perform CEQA analysis, prevent countless suits, demurrers and appeals from reaching the courts, and ensure the public is informed whenever an agency passes a zoning ordinance. *Muzzy Ranch, supra*; *Rominger v. Cnty. of Colusa* (2014) 229 Cal.App.4th 690; and *Rosenthal, v. Bd. of Supervisors* (1975) 44 Cal.App.3d 815 all support the

proposition that CEQA review is required each time a zoning ordinance or amendment is enacted. If the Court of Appeal's decision became the law of the land, agencies would be allowed to forgo analyzing zoning ordinances by claiming that impacts were too speculative, without being forced to meet the heightened burden of proof required to claim the common-sense exemption, undergo the increased public scrutiny that attends the preparation of a Negative Declaration, or undergo any CEQA compliance whatsoever. (*Union of Med. Marijuana Patients, Inc. v. City of San Diego* (2016) 4 Cal. App. 5th 103, 110.)

Muzzy Ranch dictates preliminary CEQA review on a categorical basis whenever local governments undertake activities of the general type to which CEQA applies. (*Muzzy Ranch, supra*, 41 Cal.4th at p. 381.) CEQA and its implementing guidelines[1], as read by *Muzzy Ranch* and the sources cited below, stated simply, say that CEQA requires at least a minimal analysis under CEQA of any activities "of a general kind with which CEQA is concerned, without regard to whether the activity will actually have environmental impact." (*Ibid.*)

STATEMENT OF THE CASE

The City of San Diego (the "City") has a complicated history regarding the regulation of medical marijuana. On October 6, 2009 the San Diego City Council voted to initiate a process that culminated in the adoption on March 28, 2011, of an ordinance setting forth a process to permit marijuana facilities.

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[1] Located at 14 California Code of Regulations § 15000 *et. seq.* (the "Guidelines")

Administrative Record[2] 16. However, a petition was circulated to amend the ordinance AR 32. In response, the City Council repealed the ordinance in September, 2011. AR 32. In a widely-attended, noticed public hearing on April 22, 2013, the City Council directed the Mayor and City Attorney to develop a new ordinance, City of San Diego Ordinance No. O-20356 (the "Ordinance" or "Project"), to allow medical marijuana facilities. AR 16, 231. Thereafter, on December 5, 2013, the Planning Commission held a noticed public hearing to discuss the proposed Ordinance. AR 27. Discussion of the Ordinance lasted two and a half hours, and numerous members of the public attended and spoke. AR 27.

The Ordinance came before the City Council in a noticed public hearing on February 25, 2014. AR 32. After nearly three hours of discussion, with numerous members of the public providing comments, the City Council voted 8–1 to amend and approve. AR 31, 32. Final adoption of an ordinance requires a second, noticed public hearing, with public comments, which occurred on March 11, 2014. AR 43.

The Ordinance made amendments to the City's Land Development Code that allows medical marijuana facilities to operate in specific commercial and industrial zones. AR 42. The Ordinance authorizes the establishment of up to four "Medical Marijuana Consumer Cooperatives" ("dispensaries") per City

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[2] Citations to the Administrative Record will follow the format of "AR [Page Number]". Thus, citation to page 16 will be AR 16. Further, the Administrative Record will be abbreviated as either "AR" or "Record."

Council District.[3] AR 33. In other words, the City authorized up to 36 dispensaries in the City. AR 1904. At the time the Ordinance was adopted, there was evidence that there were approximately 26,451 patients in the City of San Diego. AR 1661. Numerous dispensaries existed in the City at the time the Ordinance was adopted, but the City did not view these dispensaries as legally established uses. AR 1660.

Because the Ordinance limited the location of Coops to certain zoning districts and mandated buffer zones separating dispensaries from residential zones, certain sensitive uses, or other dispensaries, only 30 dispensaries could actually be established in the City. AR 1904. Further due to the Ordinance's restrictions, in some City Council Districts it was not possible to site up to four dispensaries, and in at least one City Council District, no dispensaries could be established. AR 255. The City of San Diego is vast, but due to the Ordinance's buffer zones and other locational requirements, Coops will be concentrated in certain parts of the City. AR 1660, 254, 257.

The City did not conduct an initial study under CEQA. Rather, the City concluded that the Ordinance was not a project under CEQA, stating:

> 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

[3] The Ordinance defined a "Medical Marijuana Consumer Cooperative" 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 sections 11362.5 through 11362.83." AR 26.

> 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. The City did not analyze any of the environmental effects the ordinance might as the result of the development allowed by the ordinance, traffic the ordinance may generate, or indoor cultivation by current patients that may be induced if dispensaries are systematically relocated. Id. Its only justification for asserting that adopting the Ordinance had no potential for environmental impacts was that "[f]uture 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." Id. But future review of permits issued under an ordinance cannot result in any changes to the ordinance. Ordinances must be subject to environmental review when they are enacted, even if they require individual users to obtain permits before operation. The enactment of the ordinance fixes higher level land use policies which cannot be changed upon further review. These policies enacted by zoning ordinances always have the potential to effect the environment, and their effects must be analyzed under CEQA.

Appellant is a California corporation whose members consist of medical cannabis patient associations, medical cannabis patients, and ordinary citizens that would be affected by the

Project's environmental impacts. Appellant's members reside in cities and counties throughout California, including the City of San Diego. Clerk's Transcript ("CT") pp. 81–84; CT pp. 85–97.

To alert the City of potential resulting environmental impacts of which the City was likely unaware, Appellant commented on the Ordinance by submitting two lengthy letters to the City and raised the legal deficiencies asserted by this suit. AR 1658–1733, 1902–1923. Among other things, Petitioner alerted the City to the fact that the Ordinance would cause: (1) the operation of dispensaries to be systematically relocated to locations which are compliant with the Ordinance, (2) the development of dispensaries in such areas, and (3) potential increased travel and personal cultivation by patients due to the Ordinance's undue restrictions on where dispensaries may operate.[4] Petitioner highlighted that each of these activities have the potential to create at least *some* changes to the physical environment including environmental impacts such as traffic and air pollution, both within and outside the City. Id.

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[4] Before the Ordinance, all dispensaries across San Diego were non-conforming. After the Ordinance, dispensaries will be incentivized to relocate to the few areas where they can conform to the Ordinance. Before the Ordinance convenience for patients would be one of the most important considerations in determining where to locate a dispensary. After the Ordinance, compliance takes precedence. It is foreseeable that this may result in physical changes to the environment, as it is hardly an unthinkable notion that, all other things being equal, people have a tendency to behave in accordance with the law and so as to avoid its penalties.

Appellant filed its Petition for Writ of Mandate on April 29, 2014 naming the City of San Diego as the Respondent and the California Coastal Commission as a Real Party in Interest. CT pp. 1–11.

The trial court conducted a hearing on the Petition for Writ of Mandate, denied the Petition for Writ of Mandate, and entered judgment on April 22, 2015. CT pp. 135–144. Judge Wohlfeil held that Petitioner had standing to prosecute the appeal, but sustained the City's argument that the Ordinance was not a project under CEQA. CT pp. 107–111.

On May 18, 2015, Petitioner filed its notice of appeal regarding the denial of the Petition for Writ of Mandate, and on October 14, 2016 the Fourth Appellate District Court of Appeal affirmed the trial court's judgment. CT pp. 156–159 [Notice of Appeal]; Court of Appeal, Fourth Appellate District Judgment.

Petitioner filed a Petition for Review on the issues of whether zoning ordinances are categorically projects and whether zoning ordinances regulating medical marijuana are categorically projects, and the Supreme Court granted review on January 11, 2017.

LEGAL DISCUSSION

I. The California Environmental Quality Act Provides the Relevant Legal Framework.

A. The purpose of CEQA is to protect the environment to the fullest extent possible, including by fostering informed agency decision-making and increased public participation.

The California Environmental Quality Act ("CEQA") is a "comprehensive scheme designed to provide long-term protection to the environment." (*Mountain Lion Found. v. Fish & Game Comm'n* (1997) 16 Cal.4th 105, 112.) The Legislature enacted CEQA to require public agencies to "give prime consideration to preventing environmental damage when carrying out their duties." (*Ibid.*) For this reason, courts must interpret CEQA "to afford the fullest possible protection to the environment within the reasonable scope of the statutory language." (*Ibid.* (quoting *Friends of Mammoth v. Bd. of Supervisors* (1972) 8 Cal.3d 247, 259.)

Allowing the public to oversee the government's environmental review is a fundamental objective of CEQA and its implementing regulations, contained in 14 CCR § 15000 et. seq. ("Guidelines"). *San Joaquin Raptor/Wildlife Rescue Ctr. v. Cnty. of Stanislaus* (1996) 42 Cal.App.4th 608, 614 (citing Guidelines § 15002); *see also* CEQA §§ 21000(g). The Guidelines state that one of the four basic purposes of CEQA is to "[d]isclose to the public the reasons why a governmental agency approved the project in the manner the agency chose if significant environmental effects

are involved." (§ 15002.) To ensure that CEQA adequately protects the environment as intended Guidelines explicitly enshrine public oversight in its definition of the purposes of CEQA.

"CEQA is primarily a procedural statute . . . ." 1 Kostka & Zischke, Practice Under the California Environmental Quality Act 17 (January 2011). Although CEQA is intended both to avoid, reduce or prevent environmental damage when possible by requiring alternatives or mitigation measures and to provide information to decisionmakers and the public concerning the environmental effects of proposed activities, it is this second goal to which CEQA makes no exception. Guidelines § 15002. As the supreme court stated in *Citizens of Goleta Valley v. Bd. of Supervisors* (1990) 52 Cal.3d 553, 576:

> The wisdom of approving this or any other development project, a delicate task which requires a balancing of interests, is necessarily left to the sound discretion of the local officials and their constituents who are responsible for such decisions. The law as we interpret and apply it simply requires that those decisions be informed, and therefore balanced.

It is therefore critical that CEQA's procedural rules be "scrupulously followed" (*Laurel Heights Improvement Assn. v. Regents of Univ. of California* (1988) 47 Cal.3d 376, 392) so that "the public will know the basis on which its responsible officials either approve or reject environmentally significant action, and the public, being duly informed, can respond accordingly to action with which it disagrees." (*Ibid.)*

As noted in *Burbank-Glendale-Pasadena Airport Auth. v. Hensler* (1991) 233 Cal.App.3d 577, 596:

> One of the basic purposes of CEQA is to inform governmental decision makers and the public about the potential, significant environmental effects of proposed activities. (Guidelines, § 15002, subd. (a)(1).) " 'The EIR process protects not only the environment but also informed self-government.' " ([Citation].) As stated in Guidelines section 15200, "The purposes of review of EIR's and negative declarations include: [¶] (a) Sharing expertise, [¶] (b) Disclosing agency analyses, [¶] (c) Checking for accuracy, [¶] (d) Detecting omissions, [¶] (e) Discovering public concerns, and [¶] (f) Soliciting counter proposals." Guidelines section 15201 provides that "Public participation is an essential part of the CEQA process.

This court has also indicated, referring to the EIR, "Its purpose is to inform the public and its responsible officials of the environmental consequences of their decisions *before* they are made." (*Citizens of Goleta Valley v. Bd. of Supervisors*, *supra*, 52 Cal.3d at p. 564, emphasis in original.) This is equally true of the entire statutory scheme. Post hoc rationalizations or claims (even if they are correct) made by attorneys for an agency after it has already made its decision (and been sued) come too late to serve the purposes of the statute.

B. CEQA analysis consists of a three-tiered process.

CEQA and its implementing regulations contained in 14 California Code of Regulations § 15000 *et. seq.* (the "Guidelines")

set out a three-tier process of CEQA review. In the first tier, the agency conducts preliminary review to determine whether or not an activity is covered by CEQA at all—*i.e.*, whether the activity constitutes a "project" under CEQA. *Muzzy Ranch, supra*, 41 Cal.4th at p. 380 (citing Guidelines § 15060 and CEQA § 21065.)). If the activity is a project under CEQA, the agency must then proceed to the second tier and ask whether an exemption applies. Id. (citing CEQA § 21080(b)(1), (2) and CEQA Guidelines §§ 25061(b)(1) and 15260). If a public agency properly finds that a project is exempt from CEQA, no further environmental review is necessary. *(Muzzy Ranch, supra*, 41 Cal.4th at p. 380.*)* If the activity is a project under the first tier, and is not exempt under tier two, then the agency must continue to the third tier of CEQA analysis, conducting an initial study to determine if the project may have a significant effect on the environment ([Guidelines] § 15063, subd. (a)) and preparing either a negative declaration, a mitigated negative declaration or an EIR. *Muzzy Ranch, supra,* 41 Cal.4th at pp. 380–81.

C. The Court should review the agency action for abuse of discretion, but recognize that the question of whether an activity constitutes a project under CEQA is a matter of law to be decided without deference to the agency's decision.

In CEQA appeals, the appellate court reviews the agency action independently of and under the same standards as the

trial court. (*See Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 426.) Those standards are the typical ones applied in appellate review.

"In any action or proceeding ... to attack. review, set aside, void or annul a determination, finding, or decision of a public agency on the grounds of noncompliance with this division, the inquiry shall extend only to whether there was a prejudicial abuse of discretion. Abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence." (Pub. Resources Code, § 21168.5.)Whether an act constitutes a "project" within the purview of CEQA is an issue of law which can be decided on undisputed data in the record on appeal, and thus presents no question of deference to agency discretion or review of substantiality of evidence. (*Kaufman & Broad-South Bay, Inc. v. Morgan Hill Unified Sch. Dist.* (1992) 9 Cal.App.4th 464, 470.) In dealing with an agency's conclusion that the action in question was not a project within the meaning of CEQA, a trial court employs its own analysis of undisputed facts in the record and decides the question as a matter of law without deference to the agency's decision. (*Friends of Sierra R.R. v. Tuolumne Park & Recreation Dist.* (2007) 147 Cal.App.4th 643, 652.)

II. Under Supreme Court Precedent, the Ordinance is a Project.

A. *Muzzy Ranch*, interpreting CEQA and its implementing regulations, defines a project as an "activity . . . of a general kind with which CEQA is concerned, without regard to whether the activity will actually have environmental impact."

This case presents a question of the meaning of the term "project" as used in CEQA. CEQA § 21065 and CEQA Guidelines § 15061 and § 15378 provide relevant statutory and regulatory authority.

CEQA § 21065 is contained in CEQA's "Definitions" chapter and defines a "project" as:

> an activity which *may cause* either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and which is any of the following: [¶] (a) An activity directly undertaken by any public agency. . . .

(emphasis added). This section establishes a multipart test, the first part of which requires that the activity "may cause" either a direct or indirect environmental impact.[5] Whether an activity should be determined to meet this "may cause" test by looking at the *general type of activity* or by looking at the activity's *actual anticipated environmental effects* is a primary subject of this

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[5] That the City's enactment of the Ordinance constitutes an "activity directly undertaken by any public agency" is not in dispute.

dispute. The Court in *Muzzy Ranch v. Solano County Airport Land Use Com'n* provides the answer, as is discussed below. (*Muzzy Ranch Co., supra,* 41 Cal.4th 372.)

Guidelines § 15378 offers guidance on how to interpret CEQA §§ 21065. It states:

> (a) 'Project' means the whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and that is any of the following: [¶] (1) An activity directly undertaken by any public agency including but not limited to . . . enactment and amendment of zoning ordinances. . . .

Guidelines § 15378 rewords the statutory language "an activity which may cause" from CEQA § 21065 to "the whole of an action, which has a potential for resulting." This change specifies that an entire activity must be considered, but otherwise is essentially synonymous with the language in the statute. It is important to note that neither the Guidelines nor CEQA itself define a project as something that will *in fact* have an impact on the environment. "[T]he definition of project for CEQA purposes is not limited to agency activities that demonstrably *will* impact the environment. '. . . CEQA does not speak of projects which *will* have a significant effect, but those which *may* have such effect.'" (*Muzzy Ranch Co., v. Solano Cnty. Airport Land Use Comm'n, supra,* 41 Cal.4th at p. 383. (quoting *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 83, fn 16.) And in the defining of project, CEQA does not even speak of *significant* effects, but simply of effects on the environment. *See* Guidelines § 15387 (". . .

potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment . . .")

In the context of determining whether an activity is a project under CEQA, the test covers an even broader range of activities, because a "project" includes not only activities which have merely the potential to have a *significant* effect on the environment, the concept encompasses activities that have merely the potential to have *any* effect on the environment. The Court of Appeal erred in dismissing Appellant's arguments on the grounds that the impacts cited were "speculative" and might not happen. But that is not the question that should have been analyzed. If the *possibility* of effects on the physical environment is reasonably foreseeable, regardless of whether those impacts are insignificant and regardless of whether they are likely, the activity is a project and must be analyzed to see if it is, for example, exempt under the common-sense exemption. It is certainly not appropriate to hide that analysis behind a determination that the activity is not a project, and transfer the agency's obligation to first articulate its rationales from the contemplated process involving the local public to a hearing before a court. Allowing an agency to wait until it is before the court to first articulate its analysis of the potential for impacts to the environment undermines one of the primary functions of CEQA, fostering informed public decision-making and accountability.

The Guidelines contain a specific section to deal with agency activities which actually will not harm the environment in any major way, which applies during the second tier of CEQA analysis, the common-sense exemption. This section applies even

if a project has some environmental impacts and allows agencies to forgo full CEQA review of projects which actually will not cause *significant* environmental impacts. This section, Guidelines § 15061, titled "Review for Exemption." reads:

> (a) Once a lead agency has determined that an activity is a project subject to CEQA [i.e., a "project"], a lead agency shall determine whether the project is exempt from CEQA.
>
> . . .
>
> Where it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment, the activity is not subject to CEQA.

This second tier of CEQA applies as soon as an agency merely has determined whether an activity has the "*potential* for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment," *i.e.*, (that the activity is a project). Guidelines § 15378 (emphasis added).

The Court in *Muzzy Ranch* provides a way to interpret the statutory sections and the guidelines harmoniously, which takes into account the guiding purpose of CEQA, the practical considerations of the relative burdens of preparing a notice of exemption compared to the difficulty of citizen oversight over activities for which absolutely no environmental review is conducted by the agency, and CEQA's overall scheme of successively narrowing down which activities must undergo full

EIR preparation by setting out a series of increasingly restrictive tests. *Muzzy Ranch* says that ". . .whether 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 Co., v. Solano Cnty. Airport Land Use Comm'n, supra*, 41 Cal.4th at p. 381.) "The question," as framed by the Court in *Muzzy Ranch* is "whether the [agency]'s [action] is the *sort of activity* that may cause a direct physical change or a reasonably foreseeable indirect physical change in the environment so as to constitute a project." (*Id.* at p. 382 (citing Guidelines § 21065) (emphasis added). This is a very broad test which merely determines whether or not an activity is subject to CEQA at all. Id.

This Court of Appeal failed to recognize that a municipality's adoption of an ordinance regulating certain land uses in certain areas of a municipality under certain conditions (a "zoning ordinance") is "[an activity] of a general kind with which CEQA is concerned" (actual environmental impacts of the project notwithstanding), that is, *categorically* a "project" under CEQA. (*Muzzy Ranch, supra*, 41 Cal.4th at p. 381.)

The enactment of the Ordinance in this case, which allows the previously disallowed land use of operating medical marijuana cooperatives, in certain areas of a municipality, and under certain conditions certainly constitutes "[an activity] of a general kind with which CEQA is concerned." *Ibid.*

The statutory and regulatory structure of CEQA support the Court's decision in *Muzzy Ranch* and its application to the Ordinance. CEQA, as implemented by the regulations and

interpreted by the Court in *Muzzy Ranch* defines "project" extremely broadly. This is by statutory design. Tier 1 of CEQA analysis applies to many agency activities so that no activity that might cause environmental impacts goes undetected. CEQA and its implementing regulations contain myriad exemptions, including the common-sense exemption, so that projects that are very unlikely to cause significant environmental impacts need not be over-analyzed. Considering this structure, and 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,'" the Court in *Muzzy Ranch* adopted a categorical approach to the first tier of CEQA based solely on the type of activity in question "without regard to whether the activity will actually have environmental impact." (*Laurel Heights Improvement Assn. v. Regents of Univ. of California, supra,* 47 Cal.3d at p. 390; *Muzzy Ranch Co., v. Solano Cnty. Airport Land Use Comm'n, supra,* 41 Cal.4th at p. 381. Zoning ordinances, and certainly zoning ordinances such as the instant Ordinance, categorically constitute activities "of a general kind with which CEQA is concerned." (*Muzzy Ranch Co., v. Solano Cnty. Airport Land Use Comm'n, supra,* 41 Cal.4th at p. 381.)

B. The City erred in its determination that the enactment of the Ordinance did not constitute a project under CEQA.

Here, the City decided the Ordinance was not a project. Rather than undergo the second step of CEQA analysis and bear