Case No. S213478

IN THE SUPREME COURT OF CALIFORNIA

CALIFORNIA BUILDING INDUSTRY ASSOCIATION
Plaintiff and Respondent

vs.

BAY AREA AIR QUALITY MANAGEMENT DISTRICT
Defendant and Appellant

CALIFORNIA BUILDING INDUSTRY ASSOCIATION'S REPLY BRIEF

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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INTRODUCTION

The District contends there is no such thing as reverse CEQA analysis. The District contends that CEQA properly applies to any project that may expose human beings to "disagreeable conditions," regardless of whether the project contributes to those conditions. Attracting people to areas where they may be exposed to such conditions is enough. (Answering Brief ("Ans.Br.") at 22). The District's version of CEQA is untethered by the fundamental requirement that a project must have a potentially significant impact on the environment, and instead, threatens to convert CEQA to an all-encompassing human wellness law that seeks to remedy existing environmental conditions.

While the District primarily is concerned with health impacts from degraded air quality—and no one disagrees that air quality is an important governmental policy concern—the District fails to acknowledge that its reading of CEQA is not confined to air quality. It applies to any potentially substantial direct or indirect "adverse effect" on human beings that can be associated with attracting people to a given location.

The breadth of this reading can be seen in the reverse application of core CEQA concerns often associated with development projects. The District contends that siting a development in an area with existing odor requires the lead agency to analyze the issue and impose

mitigation measures on the developer even if the new development makes no contribution to the existing odors. Urban decay is a recognized impact that must be studied when a new project threatens to cause physical blight. The District's interpretation means that siting a new development in an area suffering from existing physical blight, regardless of whether the new project would contribute to it, will require environmental review for the impact of the blight conditions on the new inhabitants. A proposed project that would cast substantial shadows on neighboring development can be found to have a significant environmental impact. Is building within the shadow of existing buildings now a CEQA impact?

Interpreting CEQA in this fashion not only perverts traditional CEQA analysis, it opens the floodgates of new potentially significant adverse effects for projects that may not otherwise trigger CEQA review. The adverse effect of urban living is an area of great scientific interest. Evidence regarding stress, exposure to communicable diseases, crime, physical injury in city crosswalks, are all viable topics for a fair argument of a potentially significant impact of attracting people to inhabit urban areas. This science is as credible as the 70-year exposure model that the District relies on for its TAC Receptor Thresholds. (*See* Opinion below at 27-28). Under the District's proffered interpretation, these are areas of inquiry that lead agencies must study, not as a matter of

planning or zoning policy, but on a case-by-case basis under CEQA. If the "impacts" could not be mitigated to less than significance, the lead agency would be unable to approve the project without preparing an EIR and adopting a statement of overriding considerations.

Further, if CEQA is triggered by merely attracting new people to locations with risk, its newfound reach would not be confined to urban areas. It would apply equally to a new park in mountain lion country; or an area known to have ticks with Lyme Disease; or an area with poison oak. Does CEQA require the lead agencies considering trail improvements (that are designed to attract more people) in these areas to analyze and mitigate for increased human exposure to these potentially significant adverse effects?

The District bases its proposal for dramatic expansion of CEQA on a reading of the statute that ignores both the plain meaning of the words, the context, and the overall purpose of the law. It pits the Resources Agency's contention, as expressed in the administrative history of Guidelines section 15126.2, against a plain reading of *the statute*, as interpreted in an unbroken line of Courts of Appeal cases decided between 1995 and 2011.[1] The more recent case law, in particular *SOCWA*, includes

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1 These cases, which are referenced throughout this Reply Brief, are: *Baird v. Cnty. of Contra Costa* (1995) 32 Cal.App.4th 1464 ["*Baird*"]; *City of Long Beach v. L.A. Unified Sch. Dist.* (2009) 176 Cal.App.4th

a thoughtful analysis of Legislative intent to support the conclusion that reverse CEQA is not authorized by statute. The District is disdainful of the Courts of Appeal's longstanding analysis, but its proffer of various expressions of disagreement by the Resources Agency is not a persuasive rebuttal. This Court should preserve the proper reading of CEQA by affirming *Baird*, *Long Beach*, *SOCWA*, and *Ballona*. In so doing, this Court should remand the matter to the trial court to issue a writ commanding that the District's Receptor Thresholds be set aside.

ARGUMENT

I. CEQA DOES NOT REQUIRE AN ANALYSIS OF THE EXISTING ENVIRONMENT'S IMPACT ON A PROJECT'S USERS

The parties agree that the plain language of CEQA controls. However, the District's theory regarding the "clear" intent of the Legislature requires this Court to read words out of context and then give great deference to the contentions of a regulatory agency while dismissing the Court of Appeal's decisions interpreting the plain meaning of the statute. Statutory interpretation is a judicial function and this Court owes no deference to an agency's disagreement with the Court of Appeal.

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889 ["*Long Beach*"]; *S. Orange Cnty. Wastewater Auth. v. City of Dana Point* (2011) 196 Cal.App.4th 1604 ["*SOCWA*"]; *Ballona Wetlands Land Trust v. City of L.A.* (2011) 201 Cal.App.4th 455 ["*Ballona*"].

A. CEQA's Plain Language Indicates That CEQA Is Intended To Reduce Or Avoid A Project's Physical Impacts On The Environment

CEQA defines the "environment" as the "physical conditions which exist within the area which will be affected by a proposed project." (Pub. Resources Code, § 21060.5.)[2] The District agrees that "'[a] significant effect on the environment' is 'a substantial, or potentially substantial, adverse change' in those *physical* conditions." (Ans.Br. at 15-16 [emphasis added], *quoting* § 21068.) Read together, a "significant effect on the environment" is "a substantial, or potentially substantial, adverse change" in the "physical conditions which exist within the area which will be affected by a proposed project." (§§ 21060.5, 21068.) This plain reading is consistent with the entire thrust of the statute. (*See* Op.Br. at 18.)

The District attempts to avoid the common sense and ordinary meaning of the above words by relying on section 21083(b), which states that a public agency shall find that a project may have a significant effect on the environment if any of three conditions exist: (1) "[a] proposed project has the potential to degrade the quality of the environment, curtail the range of the environment, or to achieve short-term, to the disadvantage

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2 All subsequent references are to the Public Resources Code, unless noted otherwise.

of long-term, environmental goals"; (2) "[t]he possible effects of a project are . . . cumulatively considerable"; or (3) "[t]he *environmental effects of a project* will cause substantial adverse effects on human beings, either directly or indirectly." (§ 21083(b) [emphasis added].) The District argues that "the environmental effects of a project" include bringing people to the existing environment. The District is wrong.

The proper approach to statutory construction is to harmonize section 21083(b)(3) with sections 21060.5 and 21068. (*Select Base Materials v. Bd. of Equalization* (1959) 51 Cal.2d 640, 645.) CEQA requires that a public agency conclude that an impact is significant when a substantial, or potentially substantial, adverse change in the physical conditions that exist within the area affected by a proposed project will cause "substantial adverse effects on human beings." (*See* §§ 21060.5, 21068, 21083(b)(3) .) By contrast, the District's approach reads words and phrases in isolation and without context.

CEQA case law is replete with examples of analyses of a project being a *source* of direct or indirect substantial adverse impacts on human beings. (*See*, e.g., *Ocean View Estates Homeowners Ass'n, Inc. v. Montecito Water Dist.* (2004) 116 Cal.App.4th 396, 401-03 [visual impacts)]; *Newberry Springs Water Ass'n v. Cnty. of San Bernardino* (1984) 150 Cal.App.3d 740, 749 [causing odors and attracting flies];

Citizens for Responsible & Open Government v. City of Grand Terrace (2008) 160 Cal.App.4th 1323, 1340-41 [causing noise disturbing neighbors]; *Berkeley Keep Jets Over the Bay Comm. v. Bd. of Port Commissioners* (2001) 91 Cal.App.4th 1344, 1372 -83 [causing noise and being a source of TAC]; *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1219-1220 [causing air quality impacts].) Each of these examples is consistent with CEQA's statutory text that public agencies should consider a *project's* adverse changes to the physical environment that may adversely affect human beings.

The District instead asserts that a project does not need to result in an adverse change in the environment in order to have a significant effect on the environment. Rather, the District contends that a project need only result in a change in the environment that results in attracting people to an area. (Ans.Br. at 16.) Once that minimum threshold is passed, the District argues, a public agency must consider adverse effects that the existing environment may have on the future occupants or users of a project. (*Id.*)

The District's proposed interpretation would require a public agency to analyze, at least during the initial study phase, whether a project that involves human users that creates no odors nonetheless has a significant odor impact, or that creates no noise has a significant noise

impact, or that has no nighttime lighting or reflective surfaces has a significant nighttime light or glare impact. If this were the meaning of CEQA's statutory text, the fair argument standard of review would require an EIR for almost any project used or occupied by human beings in an urban environment. (*Cnty. Sanitation Dist. v. Cnty. of Kern* (2005) 127 Cal.App.4th 1544, 1588-89 [exceeding air district threshold requires preparation of EIR]; Op.Br. at 9 n. 3.)

The District misplaces reliance on *San Lorenzo Valley Community Advocates v. San Lorenzo Valley Unified School District* for the proposition that reverse CEQA is required because CEQA protects human health. (Ans.Br. at 17-18.) The *San Lorenzo* opinion correctly concludes that "the overriding purpose of CEQA is to ensure that agencies regulating *activities that may affect the quality of the environment* give primary consideration to *preventing environmental damage*." (*San Lorenzo Valley Cmty. Advocates v. San Lorenzo Valley Unified Sch. Dist.* (2006) 139 Cal.App.4th 1356, 1372 [emphasis added].)

To determine if a project would have a significant effect on the environment, the *San Lorenzo* court explained: "First, the impact must constitute a *change* in environmental conditions." (*Id.* at 1390 [original emphasis].) "[W]e will not consider evidence or arguments about the impact from the *existent* [ ] plant." "Second, the impact must affect the

environment. . . . Third, the impact must constitute a *physical* environmental change, as opposed to a social or economic one.

(*Id.* at 1390 [original emphasis, citations omitted].)

The court then rejected claims about risks to students from preexisting mold because "there is no indication that the presence of mold is a *change* in environmental conditions. The mold was a preexisting condition at [the school], and there is no evidence it would be exacerbated by the presence of additional pupils." (*Id.* at 1392.) The court also rejected claims regarding geologic hazards because there was no evidence that "any geologic hazard is new, so as to constitute a change in environmental conditions." (*Id.*)

The *San Lorenzo* court therefore applied the same principles found in the *Baird* line of cases and rejected claims related to impacts from the existing environment, even where the project involved bringing students to those existing impacts. Having cited the case with approval, the District then seems to suggest *San Lorenzo* is among the cases reaching an "irrational" result because if causing an air quality problem such as mold is a cognizable impact, the District would argue that exposing humans to that same impact should also be CEQA impact. (Ans.Br. at 18.)

B. The Resources Agency's Misinterpretation Of Statutory Law Is Not Entitled To Deference

CBIA informed the Court in its Opening Brief that Guidelines section 15126.2 has been inconsistent with CEQA since its adoption. (Op.Br. at 28.) The District points out that the Resources Agency's attempt to expand the scope of CEQA goes back to 1982. (Ans.Br. at 21.) But whether Guidelines section 15126.2(a) is valid does not turn on the date its language was adopted. "The question is whether the regulation alters or amends the governing statute or case law, or enlarges or impairs its scope. In short, the question is whether the regulation is within the scope of the authority conferred; if it is not, it is void." (*Cmtys. for a Better Envt. v. Cal. Res. Agency* (2002) 103 Cal.App.4th 98, 108 ["*CBE*"].)

The District admits that no legislative history supports its position. (Ans.Br. at 19.) Instead, the District relies almost exclusively on the Resources Agency's administrative history of Guidelines section 15126.2, the very Guideline *SOCWA* and *Ballona* found unlawful to the extent it requires reverse CEQA analysis. [3] (*SOCWA*, 196 Cal.App.4th at 1616; *Ballona*, 201 Cal.App.4th at 474.) The Resources Agency's proffered

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3 This Court has not determined whether the CEQA Guidelines are regulatory mandates or only aids to interpreting CEQA. (*Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal.* (1988) 47 Cal.3d 376, 391, fn. 2.)

interpretation of the statute, after the statute is adopted, "is only as persuasive as its reasoning." (*Grupe Development Co. v. Superior Court* (1993) 4 Cal.4th 911, 922 ["*Grupe*"].)

1. The 1979 Version of the Guidelines Does Not Support Reverse CEQA

The District points to a 1979 version of the Guidelines to argue reverse CEQA is required. But the 1979 Guidelines offer no such support. Rather, the 1979 Guidelines stated that "[a] *project* will normally have a significant effect *on the environment* if it will . . . [e]xpose people or structures to major geologic hazards." This language would not require reverse CEQA. For example, in *El Dorado County Taxpayers for Quality Growth v. County of El Dorado* (2004) 122 Cal.App.4th 1591, 1601-02, a county analyzed the potential for a mining reclamation project to cause landslides that would impact Highway 49. (*See also No Oil, Inc. v. Occidental Petroleum Corp.* (1975) 50 Cal.App.3d 8, 12-13 [oil well project studied to understand if a well blowout could "trigger a disastrous landslide," with "severe environmental consequences"].)

Next, in a sleight of hand, the District argues that the 1979 CEQA Guidelines stated a project may have a significant effect on the environment if it exposes people to "existing" high levels of air pollution. (Ans.Br. at 20.) This is false. The document the District relies on states that

such an impact could occur if a project would "[v]iolate any ambient air quality standard, contribute substantially to an existing or projected air quality violation, or expose sensitive receptors to substantial pollutant concentrations." (District Motion for Judicial Notice ["MJN"], Exhibit B, p. 1.) This threshold is ubiquitously applied to *sources* of air pollution in environmental documents. It does not create an inference that reverse CEQA is lawful. Building a power-plant or other industrial facility next to an apartment building likely would "expose sensitive receptors to substantial pollutant concentrations." None of the other examples the District points to in the 1979 Guidelines supports a different conclusion. (*SOCWA*, 196 Cal.App.4th at 1616; *Ballona*, 201 Cal.App.4th at 474.)

2. The Legislature's Failure to Amend CEQA in Response to the *Baird* line of Cases is More Persuasive Than the Resources Agency's and Members of the State Bar's Interpretation of CEQA

The District asks this Court to defer to the Resources Agency's interpretation of CEQA rather than the consistent interpretation of the Court of Appeal in *Baird, et al.* No such deference is due. (*CBE*, 103 Cal.App.4th at 108-10.) In matters of statutory interpretation, the Resources Agency has no "comparative interpretive advantage over the courts." (*Bonnell v. Med. Bd. of Cal.* (2003) 31 Cal.4th 1255, 1265 ["Board's

interpretation is incorrect in light of the unambiguous language of the statute. We do not accord deference to an interpretation that is 'clearly erroneous.'"].)

This Court has held that "[b]ecause an interpretation is an agency's *legal opinion*, however 'expert,' rather than the exercise of a delegated legislative power to make law, it commands a commensurably lesser degree of judicial deference." (*Yamaha Corp. of Am. v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 11 [emphasis in original].) And "[d]epending on the context, [an interpretation] may be helpful, enlightening, even convincing. It may sometimes be of little worth." (*Id.* at 7-8.) The Resources Agency's interpretation is of little worth in this case.

The Resources Agency's argument that harmonizing CEQA section 21060.5's definition of the environment and CEQA section 21083(b)(3)'s concern regarding adverse effects on humans requires reverse CEQA analyses is unpersuasive.[4] (Ans.Br. at 22.) As explained in Part I.A, above, there is no need to expand the scope of CEQA through interpretive gymnastics to harmonize those sections. CEQA requires an analysis of a *project's* direct and indirect adverse effects on humans, such

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4 The Resources Agency's post-*Baird* explanation of why it considers CEQA Guidelines section 15126.2 lawful – that is, that there must be at least some similarity in impact between that of the project and the existing environment, is inconsistent with this unconstrained interpretation from 1982. (*See* Op.Br. at 30.) Vacillating interpretations are not entitled to deference.

as a project's air emissions, and not the existing environment's effects on a project or its users.

The District next contends that the Legislature was well aware of the Resources Agency's interpretation of CEQA and implies that the Legislature's failure to amend the statute on such grounds somehow should affect this Court's analysis of the question presented. (Ans.Br. at 23-24.) The District bases this argument on a State Bar committee report ("State Bar Report") that offers no statutory analysis. (Ans.Br. at 23-24; District MJN Exhibit H.) Instead, the State Bar Report only cites the CEQA Guidelines as a basis to require an analysis of the impacts of the environment on a project. (District MJN Exhibit H, p. 45; *c.f. Grupe*, 4 Cal.4th at 922 [interpretation only as good as it reasoning]; *see also* CBIA's Opposition to District's MJN at pp. 4-5.)

Also, even assuming that the Legislature had knowledge of the Resources Agency's interpretation, its failure to act directly in response to such knowledge is not indicative of the Legislature's implicit adoption of or acquiescence to the Resources Agency's interpretation. Rather, where an agency's interpretation alters or enlarges the terms of a statute, the interpretation does not govern the interpretation of the statute, "even though the statute is subsequently reenacted without change." (*Traverso v. People ex. rel. Dep't of Transp.* (1996) 46 Cal.App.4th 1197, 1206-07; *see also*

Whitcomb Hotel, Inc. v. Cal. Emp't Comm'n (1944) 24 Cal.2d 753, 757-58 [same].)

On the other hand, when the Legislature amends a statute without altering portions of the provision that have previously been judicially construed, "the Legislature is presumed to have been aware of and to have acquiesced in the previous judicial construction." (*Marina Point, Ltd. v. Wolfson* (1982) 30 Cal.3d 721, 734-35.) Thus, the Legislature's inaction in light of the *Baird* line of cases is more probative of Legislative intent than the the Resources Agency's overreaching regulations.

C. The District's Reliance On Cases That Do Not Analyze The Issue Presented Is Unavailing

On pages 33 and 34 of its Opening Brief, CBIA notes that a number of CEQA cases discuss reverse CEQA impacts. But CBIA also explains that none of these cases discuss whether such impacts are properly within the scope of CEQA. (Op.Br. at 33.) These cases have no bearing on whether CEQA requires an analysis of the existing environment's impact on a project or its users.

Nonetheless, the District provides several examples of such cases and proffers the facile conclusion that "[t]hese cases would not have

been decided as they were if CEQA did not require an analysis of these [reverse CEQA] impacts." (Ans.Br. at 27.) The District provides no basis to reject a long standing theory of jurisprudence that it is improper to infer a holding that does not exist. (*Santa Clara Cnty. Transp. Auth. v. Guardino* (1995) 11 Cal.4th 220, 243.)

D. CEQA Identifies The Specific Circumstances In Which The Existing Environment Should Be Considered

The plain reading of CEQA's definition of the "environment" and a "significant effect on the environment" demonstrates that the impact of the existing environment on a project ordinarily is not required when preparing an environmental document. (*See* §§ 21060.6, 21068; *SOCWA*, 196 Cal.App.4th at 1615.) As explained in CBIA's Opening Brief, CEQA does contain certain exceptions to this rule. (Op.Br. at 34-39.)

The District argues that this Court ignore CEQA's definitions and conclude that CEQA's exceptions are in fact evidence of a general rule. The District is wrong. (*Witt Home Ranch, Inc. v. Cnty. of Sonoma* (2008) 165 Cal.App.4th 543, 558-59 ["Internal definitions are controlling."].)

1. CEQA Section 21096

The District first argues that CEQA section 21096 is evidence of a general reverse CEQA requirement. The District relies on enrolled bill reports prepared by the Office of Planning and Research ("OPR") and the

Resources Agency related to section 21096. (Ans.Br. at 29.) But enrolled bill reports are of limited persuasive value. (*See Kaufman & Broad Cmtys., Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26, 40-42.)

Indeed, one of the cited enrolled bills states that "the *sponsor recognizes* that . . . agencies should already consider the effect of airports on a proposed project." (District MJN Exhibit J.) The view of an individual legislator is irrelevant to legislative history. (*Quintano v. Mercury Casualty Co.* (1997) 11 Cal.4th 1049, 1062.) These reports do not demonstrate a general rule for reverse analyses. (*Grupe*, 4 Cal.4th at 922.).

The District also relies on an enrolled bill report by the Department of Finance, which states that "the Department of Finance defers to the Resources Agency regarding the policies and merits of the proposed changes." (District MJN Ex. L at 1.) This echo chamber created by OPR and the Resources Agency does not establish a general statutory requirement for reverse CEQA.

Finally, the District relies on a document actually presented to the Legislature related to CEQA section 21096 – the Legislative Counsel's Digest for the bill creating that section. (District MJN, Ex. M.) The digest states that CEQA requires an EIR when a project "may have a significant effect on the environment." No party disputes that contention. It also states that SB 1453 would "impose a state-mandated local program by imposing

new duties on local lead agencies." That is accurate. The digest provides no support for a general requirement to conduct reverse CEQA analyses.

2. CEQA Section 21151.8

The District next attempts to persuade the Court that CEQA's *special* provisions specific to schools are evidence of a *general* rule that reverse CEQA analyses are required. But the need for specific rules unique to schools suggests that these special rules do not apply generally. The District further admits that the "[l]egislative history for this provision does not explicitly address whether the Legislature believed it created an exception to CEQA's general requirements or merely specified how agencies must undertake their preexisting duties." (Ans.Br. at 31.) That should have been the end of the District's discussion, but it is not.

The District goes on to rely on a document of unknown origin that is entitled an "Enrolled Bill Report." (*Cf. Kaufman*, 133 Cal.App.4th at 37[noting that document of unknown authorship or with an unknown purpose is not legislative history].) The District quotes the portion entitled "Argument: Pro." (District MJN Ex N.) There is no evidence whether this is the author's view or that of a third party stakeholder. Exhibit N does not show that the Legislature focused on whether CEQA generally requires an analysis of the existing environment's impact on a project when adopting CEQA section 21151.8.

3. CEQA's Exemptions for Housing Development

Continuing to conjure a phantom legislative intent for reverse CEQA where none exists, the District points to several CEQA statutory exemptions for certain housing projects. (Ans.Br. at 32-33.)

The District argues that, because a project must meet certain requirements to qualify for several housing statutory exemptions, this Court should infer that those requirements demonstrate that the Legislature considered those prerequisites significant effects *on the environment.* (Ans.Br. at 32-33.) This is incorrect. The requirements that must be met reflect *policy decisions* by the Legislature for when a project should benefit from statutory CEQA streamlining. CEQA is full of such policy decisions unrelated to whether a project would have a significant environmental impact. For example, to qualify for a "transit project" exemption, the project must include specific ratios of affordable housing. (§ 21155.1(c)(1).) To qualify for a "qualified housing project," a project must include public assistance and affordability guarantees. (§ 21159.22(a)(2)(B)-(C); *see also* §§ 21159.23(a)(1), 21159.24(a)(7).) Legislative considerations divorced from any environmental consideration can yield CEQA exemptions. Section 21168.6.6 provides CEQA streamlining for "an arena facility that will become the new home to the City of Sacramento's National Basketball Association (NBA) team." (*See*

also § 21183(a)-(b) [investment and job creation requirements for streamlining].) The siting requirements found in the housing exemptions appear to reflect policy decisions unrelated to any purported general requirement for reverse CEQA. (*See also*, Cal. Code Regs., tit. 5, § 14010; Education Code, § 17212 [similar siting requirements for schools.][5].)

E. Legislative Committee Reports And Legislative Counsel's Digests Are Persuasive

In its Opening Brief, CBIA stated that "[i]f the Legislature determines that the analyses advocated by the District should be included within CEQA's mandate, the Legislature may amend CEQA to abrogate the holdings of [the *Baird* line of cases]." CBIA then summarized the analyses by the Legislative Counsel, the Senate Committee on Environmental Quality, the Assembly Committee of Natural Resources, and the Senate

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5 Exhibit O to the District's MJN is *not* SB 375 itself as the District claims, but a Senate transportation committee report analyzing that bill. The analysis does not identify which provisions it states are "intended to ensure the project has no significant impacts." SB 375 added, for example, section 21155.1, which has several provisions that could be the intended reference. (§ 21151.1(a)(2), (5).) One sentence in a 10 page analysis focused on transportation issues has limited persuasive value. Similarly, the District relies on an Assembly Committee on Agriculture Report, which points to the size of a project and its distance to transit when referring to "criteria established to ensure a project does not have a significant effect on the environment." Again, a sentence in an analysis from a committee without CEQA expertise is of limited value. (*Grupe*, 4 Cal.4th at 922.)

Appropriations Committee that all concluded a general reverse CEQA mandate does not currently exist. (Op.Br. at 37-39.)

The District minimizes this issue by noting that unenacted bills' histories can be the subject of conflicting inferences. (Ans.Br. at 33.) The District is correct that "[l]egislative history is only relevant to the extent a court can ascertain the intent of the Legislature as a whole." (Ans.Br. at 35.) The Legislative Counsel analyses and legislative committee reports, focused on the issue presented to this Court, meet this standard much better than random sentences the District pulled from enrolled bill reports and a report by a committee of the State Bar.[6] (*cf. Peltier v. McCloud River R.R. Co.* (1995) 34 Cal.App.4th 1809, 1820 ["State Bar's view of the meaning of proposed legislation, even if it authored that legislation, is not an index of legislative intent."].)

This Court will decide what weight to give to the fact that the Legislature did not adopt either of the two bills that would have abrogated the *Baird* line of cases.[7] (Op.Br. at 37, fn.8). But the structure of those bills

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6 The District claims CBIA's analyses support the District's position. (Ans.Br. at 35.) Emblematic of the District's position, it relies on quotes to the CEQA Guidelines *not* the CEQA statute.

7 The District argues that California courts have refused to notice "unenacted bills' histories." (Ans.Br. at 36.) The cases cited, however, only speak to what inference should be given to the Legislature's decision to not adopt a bill. (*Marina Point, Ltd. v. Wolfson* (1982) 30 Cal.3d 721, 735, fn. 7; *Grupe*, 4 Cal.4th at 923.)

demonstrates that there is no need for this Court to make the policy decision of when reverse CEQA analyses should be required. The Legislature has the tools to address that issue, and in choosing to do so will be presumed to have knowledge of *Baird*, *Long Beach*, *SOCWA*, and *Ballona*.

II. THE *BAIRD* LINE OF CASES CORRECTLY SETS FORTH THE REQUIREMENTS OF CEQA

The District asks this Court to overrule an unbroken line of cases based solely on the District's and the Resources Agency's interpretation of CEQA sections 21060.5, 21068, and 21083. The District suggests such extraordinary action is required because the *Baird, Long Beach*, *SOCWA*, and *Ballona* opinions "are notably lacking in any meaningful attempt to ascertain the Legislature's intent and to interpret the statute consistent with its purposes." The District is wrong. (*See* Op.Br. at 20-27.)

A. The District Offers No Basis To Overrule The *Baird* Line of Cases

All four cases begin with the language of the statute itself. As explained in Part I.A above, CEQA's definition of the "environment" and "significant effect on the environment" demonstrate the Legislature's intent

that public agencies consider the adverse impacts a project may have on the environment, not the existing environment's impact on a project. And the District's attempt to read the language from CEQA section 21083(b)(3) regarding "adverse effects on human beings" without the limitations imposed on it by CEQA's definition of the "environment" or "significant effect on the environment" fails.

1. *Baird*

The District argues *Baird* should be overruled because it does not cite Guidelines section 15126.2 or CEQA section 20183(b)(3). (Ans.Br. at 38.) As to the first, the Guidelines cannot alter or expand the scope of CEQA, so the *Baird* opinion does not overlook any relevant legislative intent. As to the second, CBIA has already explained in Part I.A above how section 21083(b)(3) does not support the conclusion that reverse analyses are required by CEQA.

The District's reliance on secondary sources is unavailing. The District ignores that the analysis of *Baird* found in the 2007 version of *Guide to CEQA* contains the following caveat: "absent further judicial decisions confirming and expanding upon the reasoning of *Baird*, EIRs and negative declarations should continue to include analyses of impacts that might occur due to existing environmental . . . conditions." (Remy et al.,

Guide to CEQA (11th ed. 2007) at 441.) The publication of *Long Beach, SOCWA*, and *Ballona* make the 2007 commentary outdated.

Likewise, the District quotes 2007 language from the Miller & Star California Real Estate treatise. This language also is outdated, as the authors of that treatise recognized. The 2013 supplement to that treatise states "CEQA is concerned with analyzing the impacts of the proposed project on the existing environment and *not* the impacts of the existing environment on the proposed project." (Miller & Star, Cal. Real Estate (3d ed. 2013) 2013-1014 Supplement, p. 111 § 25A:7; *see also id.* [*SOCWA* "based its holding on both the legislative intent and unambiguous statutory language"].) The treatise also includes a new section entitled "Effect of the environment on the project beyond the scope of the EIR." (*Id.* at 139 § 114.) This new section explains in detail the holdings of *Ballona* without finding fault in that opinion's analysis.

Also, despite citing with favor CEB's *Practice Under the CEQA* elsewhere in its Answering Brief, the District fails to address that treatise's section entitled "Impacts of the Environment on the Project," which states "CEQA does not extend to situations in which the project, not the environment, is at risk" (Kostka & Zischke, *Practice Under the CEQA* (2nd ed. 2013) § 6.35.)

Unable to distinguish *Baird*, the District endorses an untenable theory of jurisprudence – courts that do not agree with the motives of a party will misstate or misapply the law. (Ans.Br. at 39 [*Baird* "merely reflect[s] 'judicial impatience with a lawsuit filed for social, rather than environmental purposes'"].) The District has not identified any valid reason *Baird* should be overturned.

2. *Long Beach*

The District's attack on *Long Beach* follows its attack on *Baird*: the opinion does not have the citations the District would like it to have. (Ans.Br. at 40.) Also, there should be no surprise that the EIR in Long Beach addressed student pedestrian safety issues. (Ans.Br. at 40.) School projects are required to address a host of student pedestrian safety requirements. (Cal. Code Regs., tit. 5, § 14010(d) [safety analyses required related to railroad tracks]; *id.* § 14010(e) [prohibition of siting school near road or freeway where study shows would have safety problems]; *id.* § 14010(l) [all traffic hazards must be mitigated]; *id.* § 14010(m) [existing and proposed zoning must not pose safety risk to students and staff based on traffic studies].) School siting is heavily regulated and subject to unique rules. It does not provide a general template. The *Long Beach* decision is particularly compelling because it clearly distinguishes between the specific

school siting rules that permit limited reverse analysis and the general CEQA rule that does not. (*See* Op.Br. at 22.)

3. *SOCWA* and *Ballona*

The District argues that the pages of statutory interpretation found in *SOCWA* and *Ballona* analyzing the intent of CEQA is too cursory to be upheld.[8] (Ans.Br. at 41-42.) The District argues that despite citing the legislative intent sections of CEQA twice, the *SOCWA* opinion ignores those sections. (*Id.*) A reading of the *SOCWA* opinion shows the opposite. (*SOCWA*, 196 Cal.App.4th at 1613-17 [basing its holding on §§ 21000, 21001, 21060.5, 21100, 21201, 21151, CEQA Guidelines § 15126.2, Appendix G]; Op.Br. at 23-25 [summarizing *SOCWA's* analysis.].) *SOCWA* relied on the text of CEQA, the touchstone of legislative intent, and concluded that the "statutory definition of 'environment' – 'the physical conditions . . . which will be affected by a proposed project' (§ 21060.5) – precludes" an analysis of the impacts of existing odors on a project. (*See SOCWA*, 196 Cal.App.4th at 1614-15.) The District's disdain for the court's conclusion is not evidence of a poorly reasoned analysis. The District's

8 The District posits that the *Baird* line of cases could have been decided by rejecting the claims on substantial evidence grounds. (Ans.Br. at 47.) They were not. The District's preferred approach to the analyses of the claims in *Baird*, *Long Beach*, *SOCWA*, and *Ballona* is not a basis to overturn those opinions' holdings.

criticism of *Ballona* mirrors its criticism of *SOCWA* and fails for the same reasons.

Nor can the District argue that this plain reading of the statute runs contrary to this Court's directive to interpret CEQA "in such a manner as to afford the fullest possible protection to *the environment* within the reasonable scope of the statutory language." (*See Laurel Heights*, 47 Cal.3d at 390 [emphasis added].) The "environment" is the "physical conditions . . . which will be affected by a proposed project." (§ 21060.5.) An interpretation that requires an analysis of the *environment's* impact on a *project* is not within the reasonable scope of the statutory language, nor would it act to protect the *environment*. This Court should decline the District's request to uphold Guidelines section 15126.2 and overrule *Baird*, *Long Beach*, *SOCWA*, and *Ballona*.

B. The District's Interpretation Of CEQA Would Lead To Uncertainty In The Law And Absurd Results

1. Reverse CEQA Would Represent a Paradigm Shift

The District argues that overturning the *Baird* line of cases would not expand the reach of CEQA. (Ans.Br. at 43-46.) That is incorrect. If CEQA requires an analysis of the "adverse effects" on human beings resulting from attracting or bringing people to an existing environmental

condition, the reach of CEQA would extend situations that there is no evidence the Legislature intended.

The District argues that the cause of an adverse environmental condition is irrelevant, and the only meaningful consideration is whether an action by a public agency results is additional people experiencing that condition. (Ans.Br. at 18 [if a source impact must be analyzed and mitigated under CEQA, it is "irrational" not to also require a receptor analysis of the same type of impact]; 45-46 [impacts caused by a project are subject to CEQA; "Accordingly, agencies should also analyze whether these types of impacts will have a substantial, adverse impact on future project residents."].) Though the District is concerned with the public health impacts associated with air pollution, CEQA is not limited to health issues alone. The documents provided by the district show that the Resources Agency itself believes that, under CEQA, "disagreeable conditions . . . must be seen as a significant effect of the project." (Ans.Br. at 22.)

Thus, the District embraces the concept that bringing additional people to a smelly environment would be a significant impact under CEQA. (Ans.Br. at 52.) And there is no language in the statute that would prevent CEQA from applying to all aspects of siting decisions. For example, under existing law a project that increases the number of vectors,

such as mosquitoes, may have a significant impact on the environment. (*See Cal. Farm Bureau Fed'n v. Cal. Wildlife Conservation Bd.* (2006) 143 Cal.App.4th 173, 185-87 [causing potential standing water would create mosquito breeding habitat, therefore CEQA common sense exception did not apply].) The District's proposed construction would then lead to a significant impact if a building, amphitheater, park, or public facility, was proposed for an area with high numbers of mosquitoes to which new users would be exposed. The risk of communicable disease from mosquitoes is on par with the increased cancer risk in the Receptor Thresholds. (*See* Opinion at 27-28 [ten in a million risk of cancer based on 70 years of assumed exposure].) Blight is a CEQA impact, so under the District's reasoning, *attracting* people to a blighted area through construction of new housing in a troubled neighborhood could be a significant effect on the environment. Again, there is nothing in the text of CEQA that would preclude experiencing blight being an "adverse effect" on human beings. The potentially substantial adverse effects associated with the urban environment is a growing area of study, and if CEQA is concerned with attracting people to disagreeable conditions, it will know no bounds.[9]

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9 Indeed, a quick review of the growing body of scientific inquiry into how the built environment may adversely impacts human beings underscores how dramatically the District's untethered interpretation could alter CEQA's application to virtually every infill project. Handy, *How the Built Environment Affects Physical Activity* (August 2002)

2. The District Fails to Identify any Limits on CEQA's Reach

The District's non-sequitur—that impact significance conclusions must be based on substantial evidence and not speculation—seems to ignore the issue presented to this Court. (*See* Ans.Br. at 43-45.) This Court asked when does CEQA "require an analysis of how existing environmental conditions will impact future residents or users (receptors) of a proposed project." The existing environment is not speculative. If the existing environment is degraded related to noise, odors, vibration, aesthetics, air quality, traffic, hazards, urban decay, or myriad other substantial risks, the future users of a project *will be* exposed to that degraded environment. And the fair argument standard of review would likely require an EIR be prepared for such impacts resulting from such exposure if *any* substantial evidence exists, such as a scientific journal article, that those impacts could be significant. Indeed, the Opinion finds that studies related to the impacts of stationary sources over a presumed 70

American Journal of Preventive Medicine; Ewing, *Relationship Between Urban Sprawl and Weight of United States Youth* (December 2006) American Journal; Lee, *Relationship Between the Built Environment and Physical Activity Levels: The Harvard Alumni Health Study* (October 1, 2010) American Journal of Preventive Medicine; Lucy, *Mortality Risk Associated with Leaving Home: Recognizing the Relevance of the Built Environment* (May 10, 2003); Economic Research Service, *Access to Affordable and Nutritious Food: Measuring and Understanding Food Deserts and Their Consequences* (June 2009) United States Department of Agriculture).

years of exposure was substantial evidence supporting the identical threshold being applied to both sources and receptors. (Opinion at 27-28.)

Further, the District attempts to provide comfort that a public agency "will not need to discuss every possible way in which environmental conditions may harm people." (Ans.Br. at 44.) But if this Court were to adopt the District's construction, the limits of the reverse CEQA line will only be determined on a case-by-case basis through successive lawsuits. There is no principle the District can point to that would limit reverse analyses only to air impacts or serious physiological health impacts. (*See* § 21083(b)(3) [referring to "adverse effects on human beings" not adverse human health impacts].) Though the District is willing to concede that reverse CEQA would only apply to "environmental" impacts (Ans.Br. at 45), it is unclear what this supposed limitation would exclude other than social or economic impacts that are unrelated to environmental conditions. (*Anderson First Coalition v. City of Anderson* (2005) 130 Cal.App.4th 1173, 1182 [discussing why causing blight is germane to CEQA].) This supposed limitation would do nothing to foreclose the claims described above.[10]

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10 The District's suggested requirement for CEQA analysis and mitigation of existing conditions invites this Court to open a veritable Pandora's Box regarding the varying sensitivities of different populations and sub-populations to particular ambient environmental stressors. The District's TAC Thresholds implicate the category of age (youth and elderly

C. The District's Argument That Other Laws Do Not Supplant CEQA Is A Red Herring

CBIA does not argue that other laws supplant CEQA. (*Contra* Ans.Br. at 48.) CBIA agrees with the *Baird* lines of cases and the plain reading of the statute that CEQA does not require an analysis of the existing environment's impact on a proposed project. CBIA informed the Court that, as acknowledged by *Baird* and *SOCWA*, laws other than CEQA address the environment's impact on projects and their users, and CBIA provided numerous examples of such laws. (Op.Br. at 49.) In light of the Legislature's prerogative to determine how to address valid policy concerns regarding the impact of the existing environment on humans, CBIA asked this Court to abide by the mandate found in CEQA section 21083.1, and not expand CEQA's procedural or substantive requirements as requested by the District.

The District's reliance on cases regarding a *project's* impacts on the environment is misplaced. CBIA does not argue that if a law other than CEQA already addresses a project's physical impact on the environment that CEQA should not apply. (*See Wildlife Alive v. Chickering*

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populations), but if the legal trigger is any substantial adverse effect on human beings, there would be no principled basis to avoid EIRs to investigate the differing medical and neurological sensitivities of other discrete human populations when they would be the users (receptors) of a project.

(1976) 18 Cal.3d 190 [impacts of hunting season and permits on bears]; *Neighbors for Smart Rail v. Exposition Metro Line Constr. Auth.* (2013) 57 Cal.4th 439 (impacts of transportation project); *CBE*, 103 Cal.App.4th at 112 (concerned with restricting fair argument standard application to "a proposed project [that] has an environmental effect that complies with a . . . regulatory standard"]; *Ebbetts Pass Watch v. Cal. Dep't of Forestry and Fire Prot.* (2008) 43 Cal.4th 936 [impacts of timber harvest plans on the environment].) Instead, CBIA and the District fundamentally disagree on the scope of CEQA.

III. THE DISTRICT'S THRESHOLDS SHOULD BE OVERTURNED

The Thresholds should be overturned "if clearly unauthorized or erroneous under CEQA." (*See* Op.Br. at 41.) They are. Unlike the laws and regulations in the cases the District cited, the Thresholds include specific guidance on how they should be applied. For example, the Thresholds state that a significant impact exists where existing sources within 1,000 feet of a receptor's property cause increases in health risks. (AR 9:2063.) This statement cannot be squared with the *Baird* line of cases. Likewise, the Thresholds require reverse CEQA analyses when they require an analysis of whether a project includes exposing a new receptor "to existing or planned odor sources." (AR 9:02066, 2121; *see also* Op.Br. 7-

11.) The Thresholds are inconsistent with the CEQA statute. Attempting to save the Thresholds by devising hypothetical *new* uses for the Thresholds – as opposed to the District's expressly intended uses – is unavailing.

The resolution adopting the Thresholds states that the Thresholds are intended to determine whether a project would have a "significant effect on the environment" under CEQA. (AR 1:00003.) Whether the science behind the Thresholds may be used for a purpose other than determining if a project has a "significant effect on the environment" is irrelevant. CBIA does not argue that the scientific concerns underpinning the Thresholds are unlawful, but instead argues that it would be improper to use the Thresholds in the manner intended by the District (and expressed in the Thresholds themselves) to determine whether a project has a significant effect on the environment.

The District continues to argue that if the analysis proposed in the Thresholds can be used for any legal purpose, regardless of whether that purpose is inconsistent with the District's intent as stated in its Resolution 2010-06, that should somehow save the Thresholds themselves.[11] This is

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11 The District also continues to argue that because the Thresholds are not "mandatory," they are immune from legal challenge. (Ans.Br. at 61.) But the courts have overturned CEQA Guidelines over the years without deciding whether they are mandatory or advisory. If the District's Receptor Thresholds violate CEQA, they must be set aside. (*C.f. Cnty Sanitation District*, 127 Cal.App.4th at 1601-1603; *Friends of Sierra*

absurd. (*cf. San Remo Hotel v. City & Cnty. of S.F.* (2002) 27 Cal.4th 643, 673 [must only show action is inconsistent with governing principle in "the *generality* or *great majority* of cases"].)

First, the District argues that if the Thresholds are *altered* by a lead agency, they could properly be used in a school endangerment assessment. (Ans.Br. at 56 [citing AR4:882 ("It is up to the lead agency to determine if the 1,000 foot radius line should be expanded to consider risks from stationary source for siting a new receptor or source.")].) Rewriting the Thresholds is not a *use* of the Thresholds.

Further, this is not an example of the Thresholds being used to determine a significant effect *on the environment*, the stated purpose of the Thresholds adopted by resolution under authority of CEQA Guidelines section 15064.7, but to analyze the impacts of the environment on the school project as specifically required in the Education Code and CEQA section 21151.8.

The District argues that the Thresholds could properly be used to determine whether certain exemptions apply. (Ans.Br. at 56.) Again, this is not using the Thresholds to determine if a project has a significant effect on the environment. Using the Thresholds for purposes not found in Resolution 2010-06, or the Thresholds themselves, does not

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Madre v. City of Sierra Madre (2001) 25 Cal.4th 161, 196, [appropriate relief for noncompliance with CEQA was invalidation of ordinance].)

speak to the legality of the Threshold's expressly intended purpose. If the District wishes to rescind Resolution 2010-06 and issue new general guidance on how to conduct a student hazard assessment or determine whether certain exemptions apply, it is free to do so. Through Resolution 2010-06, it adopted generally applicable thresholds of significance intended to be used to determine whether a project has a significant impact on the environment. The Receptor Thresholds must be set aside.

The District argues that its *Receptor* Thresholds could be used to analyze "whether a new project's TAC emissions" will have a cumulative impact. (Ans.Br. at 57.) As explained in CBIA's Opening Brief, a project's own emissions should be analyzed under a *source* threshold, which the District has already adopted. The District cannot fairly argue that its needs receptor thresholds to analyze the impacts of a new source. That is the province of source thresholds.

Next, the District reads CEQA section 21083(b)(3) in isolation, ignoring CEQA's definition of the "environment" and "significant effect on the environment," to argue that the Thresholds could be used to determine if a project is consistent with local planning and zoning laws. Again, that is not a use of the Thresholds to determine whether the project has a significant effect *on the environment.* Indeed, OPR has recently issued draft guidance on planning and siting issues as

required by the Planning and Zoning Law.[12] (Gov. Code, § 65040.12.) The draft guidance does not rely on reverse CEQA.

Finally, the District argues that the Thresholds could be used in analyses beyond those required by CEQA if a public agency elects to include reverse analyses in its environmental documents. (Ans.Br. at 58-61.) Though it may be true that disclosures that are not required by CEQA may be included in an EIR, a lead agency would be foreclosed from determining that a reverse CEQA impact is a significant impact on the environment and impose mitigation for such reverse impacts. (§§ 21002.1(a)-(b), 21003.) Thus, Resolution 2010-06, which adopted generally applicable thresholds of significance to determine if a project would have a significant effect on the environment, is void.[13]

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12 This statutory language shows the Legislature knows how to require analysis of the effects of siting new residences in potentially problematic existing environments. It is telling that the CEQA statute contains no such similar general directive.

13 The District contends that CBIA waived any challenge to the District's odor thresholds. (Op.Br. at 9, fn. 3.) But CBIA put the District on notice that the Receptor Thresholds (requiring reverse CEQA) were invalid. The claim was not waived. (*See Save Our Residential Env't v. City of W. Hollywood* (1992) Cal.App.4th 1745, 1749-50 [apprising city on substance of the issue satisfied CEQA requirements].) Moreover, the District's odor threshold is just another example of reverse CEQA—requiring a finding of significance by attracting new people to existing conditions.

IV. CONCLUSION

CBIA respectfully requests that this Court adopt the plain reading of CEQA and conclude that it does not generally require analysis of how the existing environment will impact future users or residents (receptors) of a proposed project. Accordingly, the District's Receptor Thresholds relying on reverse CEQA should be set aside.

Dated: March 17, 2014

Respectfully submitted,
Cox, Castle & Nicholson LLP

By: _____
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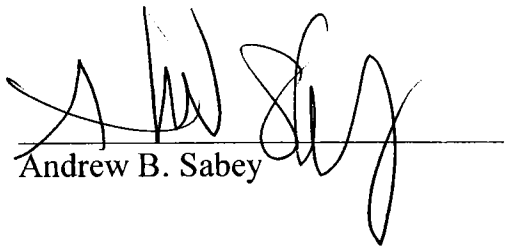
California Building Industry Association

CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, Rule 8.504(d)(1))

I, Andrew B. Sabey, hereby certify that the word count in **CALIFORNIA BUILDING INDUSTRY ASSOCIATION'S REPLY BRIEF** is 8,345 words.

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

Executed this 17th day of March, 2014 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 **March 17, 2014**, I served the foregoing document(s) described as **CALIFORNIA BUILDING INDUSTRY ASSOCIATION'S REPLY BRIEF** 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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CALIFORNIA BUILDING INDUSTRY ASSOCIATION, et al. v. BAY AREA QUALITY MANAGEMENT DISTRICT
APPELLATE CASE NOS. A135335 & A136212

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