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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APPELLANT'S OPENING BRIEF

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

the burden of factually demonstrating that the common-sense exemption applies by demonstrating that "it can be seen with certainty that there is no possibility that the activity may have a significant effect on the environment," the City simply claimed that the "[a]doption of the [O]rdinance does not have the potential for resulting in either direct physical change in the environment or reasonably forseeable [*sic*] indirect physical change in the environment," explaining that "[f]uture projects subject to the ordinance will require discretionary permit [*sic*] and CEQA review and will be analyzed at the appropriate time in accordance with CEQA[.]" AR 439. Rather than admit that the Ordinance was a project under CEQA and have to argue that the common-sense exemption applies, the City postponed all environmental analysis until such later point in time when it is eventually called on to consider individual Conditional Use Permits ("CUPs") for dispensaries. However, at such time it will be too late to consider alternatives that might allow greater mitigation of impacts than the review of a single proposal will afford. To use the instant Ordinance as an example, once it has passed, it becomes too late for the City to decide that it should change the maximum allowed number of dispensaries, the permitted zones in which such uses should be allowed or the required setbacks from sensitive uses. Those mandatory features of the Ordinance have a practical effect on where, how and how much future development under the Ordinance will take place, and cannot be changed when environmental review occurs during review of future CUP applications.

These types of questions present themselves whenever a municipality passes an ordinance regulating land use in a

municipality, which is why the Supreme Court in *Muzzy Ranch* held that the land use plan at issue was categorically a project subject to CEQA. The TALUP "contained binding regulatory consequences for local government . . ." and "'. . . embod[ied] fundamental land use decisions that guide the future growth and development of cities and counties,' and amendment of these plans 'have a potential for resulting in ultimate physical changes to the environment.'" (*Muzzy Ranch Co., v. Solano Cnty. Airport Land Use Comm'n, supra,* 41 Cal.4th at pp. 385–385 (citing *DeVita v. Cnty. of Napa* (1995) 9 Cal.4th 763, 793–794).) At the time these plans are written, the agency has enough information that it can proceed with CEQA review. A Notice of Exemption need only consist of a few paragraphs of analysis. A Negative Declaration can be prepared if there is not substantial evidence in the record that significant environmental impacts will occur. But by claiming that the Ordinance is not a project, the City is avoiding all analysis under CEQA.

Structurally, CEQA's three tiers of analysis narrow down a wide field of activities to those few activities for which an EIR is required. The first tier of CEQA takes the field of all agency actions to determine which ones are, potentially, in the broadest sense, subject to CEQA, namely those that *may* have *some* impact on the environment. Out of that field of actions, the second tier exempts activities from further analysis if an enumerated exemption applies, or if "it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment" (Guidelines § 15061.) If the activity is not exempt and it cannot be shown that it has no potential to cause a *significant* effect on the environment, it

reaches the third tier and must undergo an initial study. After the initial study, the agency may avoid preparation of a full environmental impact report if the initial study finds there is "no substantial evidence that the project or any of its aspects may cause a significant effect on the environment." (Guidelines § 15063.) In that case, the agency is required to prepare a "negative declaration" documenting such determination. (*See* Guidelines § 15070 et seq.)

The City has essentially argued that, when analyzing zoning ordinances, the first tier question of whether the enactment of an ordinance is a project should be judged by the evidence in the record demonstrating whether that ordinance *actually will have* environmental impacts. This is completely inappropriate at the first level of CEQA analysis. Each successive tier of CEQA represents a more intensive, more fact-based inquiry, culminating in a full EIR. Simultaneously, each successive tier of CEQA further narrows a broad field of potentially regulated activity. It does not make sense to ask, as the very first question in analyzing whether or not an activity is subject to environmental review, whether the evidence in the record establishes that the activity will result in environmental impacts.

The City, upon examination of the record, concluded that the adoption of the Ordinance did not "have the potential for resulting in either direct physical change in the environment or reasonably [foreseeable] indirect physical change in the environment." AR 439. This was improper. The City should have concluded that the adoption of the Ordinance was a project as a

matter of law because it was an activity "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.)

Additionally, environmental analysis of higher level planning actions, such as the adoption of general plan amendments and zoning ordinances, is necessary in order to serve one of the fundamental purposes of the statue itself – informed decisionmaking. Compliance with CEQA's procedural requirements is essential to insure informed decisionmaking and accountability.

C. CEQA review is not premature.

1. Meaningful environmental review is possible before the enactment of zoning ordinances, even when the zoning ordinance requires potential users obtain a CUP before operation.

The City sought to justify its choice to forgo all CEQA review in passing the Ordinance by pointing to the fact that the Ordinance requires that users receive a CUP before beginning operation. However, "[t]hat further governmental decisions need to be made before a land use measure's actual environmental impacts can be determined with precision does not necessarily prevent the measure from qualifying as a project." (*Muzzy Ranch Co., v. Solano Cnty. Airport Land Use Comm'n, supra*, 41 Cal.4th at p. 383 (". . . we expressly rejected the board's argument that its approval was not a CEQA project 'merely because further decisions must be made before schools are actually constructed,

bus routes changed, and pupils reassigned.' [Citation]. That the board's approval of the plan was an essential step leading to potential environmental impacts, including construction of a new high school, was sufficient. [Citation]. Nor was the board's approval exempt from CEQA merely because it had to be ratified by the voters. [Citation].") (citing *Fullerton Joint Union High Sch. Dist. v. State Bd. of Educ.* (1982) 32 Cal.3d 779, 794–798).

2. Broader Planning Documents such as Zoning Ordinances That Regulate the Use and Development of Land are "Projects" under CEQA Even when No Physical Development is Proposed

A proposed physical development is not a prerequisite to an activity constituting a project. If this were the case, several activities considered by the courts to be "projects" would actually not be projects at all, such as the enactment of a general plan (*City of Santa Ana v. City of Garden Grove* (1979) 100 Cal.App.3d 521, 532), enactment of regulations (*Plastic Pipe & Fittings Assn. v. California Bldg. Standards Comm'n* (2004) 124 Cal.App.4th 1390, 1413; *Apartment Assn. of Greater Los Angeles v. City of Los Angeles* (2001) 90 Cal.App.4th 1162, 1169), approval of a regional transportation plan (*Edna Valley Assn. v. San Luis Obispo Cnty. etc. Coordinating Council* (1977) 67 Cal.App.3d 444, 447–449), and approval of an airport land use plan (*Muzzy Ranch Co., v. Solano Cnty. Airport Land Use Comm'n, supra*, 41 Cal.4th at pp. 382–385).

The reason why environmental review is conducted for these types of higher level plans and regulatory schemes (even when no

physical development is necessarily proposed) is clear – they embody fundamental land use decisions that guide the future growth and development of cities and counties and therefore have the potential for ultimate physical changes in the environment. (*Muzzy Ranch Co., v. Solano Cnty. Airport Land Use Comm'n*, *supra*, 41 Cal.4th at p. 385.)

With this fact in mind, the Legislature has deemed certain activities categorically "projects" pursuant to Section 20180(a). Included in the list of activities deemed to be projects are "the enactment and amendment of zoning ordinances." (Pub. Resources Code, § 21080, subd. (a), emphasis added.) The court of appeal in *Rominger* explained why subdivisions, one of the items on the list, was a "project," stating:

> In essence, by enacting subdivision (a) of section 21080 the Legislature has determined that certain activities, including the approval of tentative subdivision maps, always have at least the potential to cause a direct physical change or a reasonably foreseeable indirect physical change in the environment. *This makes sense.* It virtually goes without saying that the purpose of subdividing property is to facilitate its use and development. (See Gov.Code, § 66424 [defining "subdivision" for purposes of the Subdivision Map Act "the division, by any subdivider, of any unit or units of improved or unimproved land, or any portion thereof, shown on the latest equalized county assessment roll as a unit or as contiguous units, *for the purpose of sale, lease, or financing,* whether immediate or future," italics added].) Presumably no one goes to the trouble of subdividing property just for the sake of the process; the goal of subdividing property is to make that property more useable. And with the potential for greater or different use comes the potential for

> environmental impacts from that use. Thus, the Romingers are correct that under subdivision (a) of section 21080, the approval of a tentative subdivision map is categorically a CEQA project.

(*Rominger v. Cnty. of Colusa* (2014) 229 Cal.App.4th 690, 702, emphasis added.)

It also makes sense that zoning ordinances are the types of activities that have at least the potential to cause a direct physical change or a reasonably foreseeable indirect physical change in the environment. This is because zoning ordinances, by their very nature, regulate the use of land.

> The purpose of a zoning law is to regulate the use of land. (See 1 Longtin's Cal. Land Use (2d ed. 1987) §§ 3.02–3.03, pp. 234–236.) The procedures by which counties or cities enact and administer zoning ordinances are regulated exclusively by sections 65800 through 65912. . . . Section 65850 states permissible purposes of local zoning laws; all those purposes pertain to land use.

(*Morehart v. Cnty. of Santa Barbara* (1994) 7 Cal.4th 725, 750.)

Muzzy Ranch, even went so far as to apply the same force to one of the CEQA Guidelines that extended the list of activities that were categorically made subject to CEQA by Public Resources Code section 21080.

That the enactment or amendment of a general plan is subject to environmental review under CEQA is well established. (*DeVita v. Cnty. of Napa, supra*, 9 Cal.4th at pp. 793–795, 38 Cal.Rptr.2d 699, 889 P.2d 1019; [*Black Prop. Owners Assn. v. City of Berkeley* (1994) 22 Cal.App.4th 974, 985], 28 Cal.Rptr.2d 305; [*City of*

Santa Ana v. City of Garden Grove, supra, 100 Cal.App.3d at p. 532], 160 Cal.Rptr. 907.) "Although [they are] not explicitly mentioned in the CEQA statutes, general plans 'embody fundamental land use decisions that guide the future growth and development of cities and counties,' and amendments of these plans 'have a potential for resulting in ultimate physical changes in the environment.' [Citation.] General plan adoption and amendment are therefore properly defined in the CEQA guidelines [citation] as projects subject to environmental review." (*DeVita v. Cnty. of Napa, supra,* at pp. 793–794 [enactment or amendment of general plan]; see also *Id.* at p. 538 [revision of sphere of influence guidelines]; *City of Santa Ana v. City of Garden Grove, supra,* at pp. 532–533 [enactment of general plan]; *Edna Valley Assn. v. San Luis Obispo Cnty. etc. Coordinating Council, supra,* 67 Cal.App.3d at p. 449 [adoption of regional transportation plan]; see generally CEQA Guidelines, § 15378, subd. (a)(1).) *Muzzy Ranch Co., v. Solano Cnty. Airport Land Use Comm'n, supra,* 41 Cal.4th at p. 385.) In a footnote to the citation to CEQA Guidelines, § 15378, subd. (a)(1), this Court quoted the regulation in a manner that emphasizes it viewed such a categorical interpretation of Public Resources Code section 21080, subdivision (a) as consistent with the remainder of CEQA: "Section 15378, subdivision (a)(1) of the CEQA Guidelines explains in pertinent part that "project" includes "any activity undertaken by a public agency that reasonably might affect the environment, including but not limited to ... enactment and amendment of zoning ordinances, and the adoption and

amendment of local General Plans or elements thereof." (*Muzzy Ranch Co., v. Solano Cnty. Airport Land Use Comm'n*, *supra*, at fn. 4.)

3. Mitigation opportunities would be foreclosed by delay.

The City's reliance on *Friends of Sierra R.R. v. Tuolumne Park & Recreation Dist.*, *supra*, 147 Cal.App.4th 643 in the lower courts ignores the significant differences between the facts of that case and those presented here. In that case, there were no development plans and no concrete development proposals. The court ruled that

> CEQA review would have been premature because no particular development plans had been announced. Therefore, we hold that the transfer was not a project within the meaning of CEQA. As we will explain, *some* plan with an identifiable impact on the right-of-way would have to be on the table before the CEQA review process could be meaningfully carried out.

(Friends of Sierra R.R. v. Tuolumne Park & Recreation Dist., *supra*, 147 Cal.App.4th at p. 651.)

However, the court noted that

> Environmental documents (environmental impact reports or negative declarations) "should be prepared as early as feasible in the planning process to enable environmental considerations to influence project program and design." (Cal.Code Regs., tit. 14, § 15004, subd. (b).) Without first carrying out CEQA review, agencies must not "take any action which gives impetus to a planned or foreseeable project in a

> manner that forecloses alternatives or mitigation measures that would ordinarily be part of CEQA review." (Cal.Code Regs., tit. 14, § 15004, subd. (b)(2)(B).)

(Friends of Sierra R.R. v. Tuolumne Park & Recreation Dist., supra, 147 Cal.App.4th at p. 654.) It is the current ability of the Respondent to approve meaningful alternatives and mitigation measures that distinguishes the current case from *Friends of Sierra R.R.* Because the impacts of the ultimate development of the parcel at issue in that case were so uncertain as to render the formulation of alternatives or mitigation measures impossible, the court was correct in finding that CEQA review was premature. In the current case, however, the specific consequences of the City's actions are sufficiently predictable to make the formulation of alternatives that will have less impact on the environment not only possible, but required under the law.

In contrasting *Kaufman & Broad-South Bay, Inc. v. Morgan Hill Unified Sch. Dist., supra,* 9 Cal.App.4th 464, with *Fullerton Joint Union High Sch. Dist. v. State Bd. of Educ., supra,* 32 Cal.3d 779, the court observed that

> CEQA review is premature if the agency action in question occurs too early in the planning process to allow meaningful analysis of potential impacts. Although environmental review must take place as early as is feasible, it also must be "late enough to provide meaningful information for environmental assessment."

(Friends of Sierra R.R. v. Tuolumne Park & Recreation Dist., *supra*, 147 Cal.App.4th at pp. 654–55.) The key distinction in *Kaufman & Broad* was that the action at issue in *Kaufman & Broad*

> did not "commit the [school district] to any definite course of action" or "in any way narrow the field of options and alternatives available" to the school district. More importantly, environmental review at that stage would be "meaningless" because "[t]here is simply not enough specific information about the various courses of action available to the [school district] to warrant [environmental] review at this time." For those reasons, the court held that there was no project.

(Friends of Sierra R.R. v. Tuolumne Park & Recreation Dist., *supra*, 147 Cal.App.4th at p. 655 (citations omitted).) The case acknowledges what the key issue really was:

> The reasonably foreseeable likelihood of *some* development on the West Side Lumber Company property, combined with the possibility that the development could impact the historical resource included within the larger property, does not trigger CEQA review. CEQA review has to happen far enough down the road toward an environmental impact to allow meaningful consideration in the review process of alternatives that could mitigate the impact.

(Friends of Sierra R.R. v. Tuolumne Park & Recreation Dist., *supra*, 147 Cal.App.4th at p. 657.)

Pala Band of Mission Indians v. Cnty. of San Diego (1998) 68 Cal.App.4th 556 is similarly inapposite because, once again, no definite plans were on the table.

> [B]ecause all 10 of the proposed landfill sites identified in the siting element are only "tentatively reserved," preparation of an EIR (including a program EIR) would be premature and is not yet required under CEQA.

(Pala Band of Mission Indians v. Cnty. of San Diego, supra, 68 Cal.App.4th at p. 560.) In explaining why the CEQA review was premature, the decision noted the difference between the tentative reservation which had occurred and the ultimate reservation contemplated by the statutory scheme involved and quoted the observation by the lower court that "[i]f this site is ultimately *reserved* for development as a landfill then CEQA protects [Pala] because it will require an EIR which will study environmental impacts, including alternative sites." (*Pala Band of Mission Indians v. Cnty. of San Diego, supra.*)

In the present case, it is clear that there is an available mitigation measure, namely distributing the permissible locations in a manner that would provide easier access to patients throughout the City, thereby reducing the environmental impacts associated with the formulation of the ordinance that was adopted by the City. Unlike the situation in *Friends of Sierra R.R.,* there were specific plans on the table when the Ordinance was adopted. The terms of the ordinance were specific, and those specifics could have been modified to provide a less impactful alternative. Such mitigation measures

available prior to the adoption of the Ordinance will have been foreclosed when future site-specific reviews occur. Opening Brief at 11:14–20. Thus, to avoid running counter to Cal.Code Regs., tit. 14, § 15004, subd. (b)(2)(B), quoted above, such mitigation measures were required to be evaluated before the Ordinance was adopted.

4. The Ordinance has the potential to cause reasonably foreseeable environmental impacts that are not speculative.

The enactment of the Ordinance was an essential step to causing the eventual operation of legally operating medical marijuana dispensaries in San Diego. The potential for this to result in development and redevelopment of real estate to accommodate the use, and the displacement of existing users which do not conform to the new ordinance due to the market forces of competition is reasonably foreseeable. It is not speculative to conclude that the adoption of the Ordinance *may* cause patients to have to drive farther to obtain medicine or force patients to cultivate their own medicine indoors.

There are two countervailing effects at issue regarding whether the Ordinance is likely to increase patient travel and increase local cultivation. On the one hand allowing legal operators might increase the overall supply of dispensaries, increasing accessibility for patients. On the other hand, new operators in compliance with the Ordinance will have a large competitive advantage compared to non-compliant operators who may be forced out of business as a result. Since the Ordinance

only allows a few dispensaries to compliantly operate to serve a very large population and area and places stringent regulations on where they may be located, the Ordinance may have the effect of *concentrating the provision of medical marijuana at the locations where the new dispensaries are allowed.* Rather than increasing access to dispensaries by allowing them wherever they currently operate, the Ordinance allows a small number of dispensaries to operate under strict locational requirements, which will likely force many of the City's more conveniently located dispensaries to shut down. Compliant dispensaries will outcompete non-compliant dispensaries, and the land use will, overall, shift to comply with the Ordinance. Indeed, this is the very point of zoning regulations – to encourage people to operate under its conditions rather than however they used to operate. It is the City's burden to prove that "it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment," and that the reasonably foreseeable relocation of services will not cause increased traffic and air pollution, not the public's burden to prove that such environmental impacts will occur. Furthermore, it is extremely difficult to see how, as a matter of categorical analysis and a question of law, the City and lower courts concluded that an ordinance allowing and regulating a new type of land use cannot possibly cause any environmental impacts. It should be an uncontroversial proposition that when a previously unpermitted land use becomes explicitly permitted, *people will make physical changes to the environment to take advantage of the newly*

allowed land use.[6] Operators under the new ordinance will have to physically convert spaces previously built for other uses—the new use previously was not allowed. New businesses will open, many of them will remodel the spaces they lease, and some of them may even build new structures to take advantage of the Ordinance. These are reasonably foreseeable environmental impacts.

No one would argue that a zoning ordinance which relegated heavy industry to densely populated areas would not be subject to CEQA because the individual factories built under the ordinance would be required to obtain CUPs. Zoning ordinances set out the general rules for what types of land uses are allowed, in what areas, and under what conditions, while CUPs analyze individual applications to operate specific enterprises under the appropriate zoning ordinance. When an agency enacts a zoning ordinance allowing a particular land use in particular areas, subject to particular requirements, the consequences of that activity are sufficiently definite that the agency can investigate whether it might actually have any environmental impacts.

The Ordinance in question has the potential to cause intensified and displaced development, increased vehicle miles travelled, and increased medical marijuana cultivation. Indeed, similar concerns attend any ordinance allowing a previously unpermitted land use. Any development to take advantage of the newly allowed use would impact the physical environment. When

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[6] These changes are even more reasonably foreseeable considering the fact that so many individuals opted to establish dispensaries in the City of San Diego even when such activity was unpermitted.

a previously not unpermitted use becomes permitted, people will reasonably foreseeably develop properties to take advantage of the newly allowed land use. They will reasonably foreseeably develop those properties in the areas where they are allowed under the relevant ordinance, rather than in other areas, and the likely environmental impacts intensity attendant to the chosen intensity and distribution of the land use can be analyzed.

The Court of Appeal committed a critical error of law in analyzing whether the Ordinance was a project. The Court of Appeal relied on section 15064 of the Guidelines, which provides, "A change which is speculative or unlikely to occur is not reasonably foreseeable." (Cal. Code Regs., tit. 14, § 15064(d)(3)) However, while it might be speculative to conclude that a change which was unlikely to occur would, in fact occur, and thus one could properly argue that it would not be reasonably foreseeable that such a change *would* occur, but it is reasonably foreseeable that such a change *might* occur. Whenever one is attempting to predict what might occur, there is always a certain level of speculation involved. To argue that the mere fact that a change is unlikely renders it ineligible for consideration as a reasonably foreseeable potential indirect physical change in the environment would turn decades of CEQA precedent on its head (see, e.g., those cases cited at *Muzzy Ranch Co., v. Solano Cnty. Airport Land Use Comm'n, supra,* 41 Cal.4th at p. 385). It would also be wholly inconsistent with the approach implicit in the common sense exemption contained in Guidelines section 15061, subdivision (b)(3), which requires more than merely that a

change be unlikely, it requires that the agency be able to see "with certainty that there is no possibility that the activity in question may have a significant effect on the environment."

Furthermore, in the instant case, the Court of Appeal failed to analyze the potential impacts of the adoption of the ordinance. Instead, it demanded that the Appellant establish that the foreseeable indirect environment impacts of the adoption of the Ordinance *would* occur. For example, the Court of Appeal held that "UMMP's assumption that the Ordinance *will* significantly reduce the number of illegal cooperatives is speculative and unfounded." (*Union of Med. Marijuana Patients, Inc. v. City of San Diego* (2016) 4 Cal.App.5th 103, 121.) (emphasis added. Similarly, with respect to the negative impacts of indoor cultivation, the Court of Appeal held:

> This argument fails because it is based on the same unwarranted assumption that we discussed above, namely that the enactment of the Ordinance *will* make it more difficult for patients to access medical marijuana in the City because it *will* cause current illegal cooperatives to close and *will* locate legal cooperatives in inconvenient locations. As we have explained above, there is no basis for UMMP's assumption that the enactment of the Ordinance *will* make it more difficult to access medical marijuana in the City than prior to the enactment of the Ordinance.

(Union of Med. Marijuana Patients, Inc. v. City of San Diego, supra, 4 Cal.App.5th at p. 122 (emphasis added).)

The Court of Appeal added, "Moreover, in the context of their cultivation argument, UMMP asks us to make a further

unwarranted and speculative assumption. UMMP assumes that when faced with inconveniently located cooperatives, a significant number of patients *will* decide to set up their own cultivation operation." (*Union of Med. Marijuana Patients, Inc. v. City of San Diego, supra*, 4 Cal.App.5th at p. 122 (emphasis added).)

Finally, the Court of Appeal committed the same error with respect to an activity that undeniably would constitute the required physical change to the environment if it were to occur, namely construction activity:

> UMMP's final argument is that the cooperatives established under the Ordinance will have to be located somewhere, and "this may result in new construction activity." According to UMMP, the possible construction activity will have an impact on the environment.
>
> We reject the argument because it is purely speculative to assume that the establishment of the cooperatives permitted under the Ordinance *will* require any new buildings to be constructed, as cooperatives *could* simply chose to locate in available commercial space in an existing building.

(Union of Med. Marijuana Patients, Inc. v. City of San Diego, supra, 4 Cal.App.5th at p. 123 (footnote omitted; emphasis added).) Obviously, even the Court of Appeal was able to foresee that there were at least two possible consequences with regard to how the establishment of Coops under the ordinance might occur, either new construction of locating in an available building. Even under the latter scenario, however, there would be physical

changes to the environment, at the very least, new signage. The question in the current analysis is *not* whether such physical change is significant. That is part of the analysis to be undertaken after the activity has been recognized as a project, something the City never got to.

The Court of Appeals' conclusion in footnote 13 (omitted in the above quote) that the concept of displaced development is not applicable is also incorrect. The court held,

> Displaced development as discussed in *Muzzy Ranch* occurs when the enactment or amendment of a land use plan restricting residential development in one area will have the reasonably foreseeable effect of causing residential development to shift to a different area where it previously was not anticipated at that level. (*Id.* at pp. 382–383, 60 Cal.Rptr.3d247, 160 P.3d 116.) Here, the Ordinance is not the type of general land use restriction that will shift necessary development to a different area than previously expected. Thus, displaced development is not at issue.

(Ibid.) The only explanation for such a conclusion is that the court viewed displaced development as something that could only occur when residential development was involved, a wholly unwarranted conclusion. Just as in *Muzzy Ranch*, it is reasonable to anticipate the City's actions here in "placing a ban on development in one area of a jurisdiction may have the consequence . . . of displacing development to other areas of the jurisdiction." (*Muzzy Ranch Co., v. Solano Cnty. Airport Land Use Comm'n*, *supra*, 41 Cal.4th at p. 383.)

It is not the public's burden to demonstrate, at the first tier of CEQA analysis, that environmental impacts will occur. The Court of Appeal erred in dismissing potential environmental impacts during the first tier of CEQA analysis on the basis that those potential environmental impacts *might not* occur. The use of the word "*potential*" in the CEQA guidelines, and the use of the word "*may*" in the statute indicate that activities which *might not* cause environmental impacts are nonetheless projects if they also *might* cause environmental impacts. (Guidelines § 15387; CEQA § 21065.) Furthermore, claiming that zoning ordinances are not projects because there is a chance that residents will only use existing structures to operate under them is nonsense.

The potential environmental impacts of zoning ordinances are myriad and obvious –people will alter physical space to comply with zoning ordinances. The magnitude and likelihood of the environmental impacts of individual zoning ordinances differ, but whether a single property is being re-zoned to allow a single additional low-impact use, or an entire downtown corridor will allow buildings to be twice as high, zoning ordinances have the potential to impact the environment. If the particular zoning ordinance at issue *will not* affect the environment, the agency can claim the common-sense exemption. But if the agency is unable to even meet the burden to prove "with certainty that there is no possibility that the activity in question may have a significant effect on the environment," and the common-sense exemption applies, it should not be allowed to sidestep CEQA at the first stage simply because reasonably foreseeable environmental

impacts have not been proven to exist. (Guidelines § 15061 (b)(3); *see Muzzy Ranch Co., v. Solano Cnty. Airport Land Use Comm'n, supra*, 41 Cal.4th at p. 383.*)*

5. *Muzzy Ranch* looks to the type of claimed environmental impacts to determine whether the impact is unduly speculative.

In *Muzzy Ranch*, the Court considered two arguments raised by the agency before determining that the adoption of the land use plan by the agency constituted a project subject to CEQA. The agency had argued that any displaced "development was inherently too speculative to be considered a reasonably foreseeable effect of an airport land use compatibility plan" and that "because the TALUP merely advises the jurisdictions it affects, it cannot be the legal cause of environmental changes that result if the jurisdictions follow its advice." (*Muzzy Ranch Co., v. Solano Cnty. Airport Land Use Comm'n, supra*, 41 Cal.4th at p. 382.) The Court's analysis regarding the displaced development argument is instructive. (*Id.* at p. 348.) In determining whether "displaced development was inherently too speculative," the Court never analyzed the specifics of the land use plan at issue. (*Id.* at p. 382.) Indeed, if it had, it would have concluded that there was no possibility of displaced development, since any such displaced development had already been caused by existing regulations, as it concluded after turning to analyze the applicability of the common-sense exemption. (*Id.* at p. 389.) Instead, the court only analyzed whether displaced development is a theoretically possible environmental impact. (*Id.* at pp.

381–385.) The Court noted that "[t]he population of California is ever increasing[,]" that providing more housing is a "legal and practical necessity," and that "[d]epending on the circumstances, a government agency may reasonably anticipate that its placing a ban on development in one area of a jurisdiction *may* have the consequence, notwithstanding existing zoning or land use planning, of displacing development to other areas of the jurisdiction." (*Id.* at pp. 382–383 (emphasis added).) However, when determining whether or not enacting the TALUP constituted a Project under CEQA the Court did not analyze whether the particular restrictions contained in the TALUP would, in the context of the existing environment and regulatory scheme, actually cause any displaced development (such analysis occurs under the second tier of CEQA), rather the Court analyzed whether or not the *alleged environmental impact*, displaced development, was "categorically outside the concern of CEQA." (*Id.* at p. 383.) There is no reason for this Court to rule that environmental impacts due to displaced development, increased traffic, and increased indoor marijuana cultivation are "categorically outside the concern of CEQA" now. *(Ibid.)*

III. It is illogical to deem an activity not a project based on a lesser showing than would be required to claim a common-sense exemption or support a Negative Declaration.

CEQA Guidelines section 15061, subdivision(b)(3) describes the "common-sense" exemption. ("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.") The court in *Davidon Homes v. City of San Jose*, read this strongly worded exemption as placing the burden of proof on the agency to demonstrate that the common-sense exemption applied. (*Davidon Homes v. City of San Jose* (1997) 54 Cal.App.4th 106, 116 ("[T]he agency must itself provide the support for its decision before the burden shifts to the challenger. Imposing the burden on the members of the public in the first instance to prove a possibility or substantial adverse environmental impact would frustrate CEQA's fundamental purpose of ensuring that governmental officials 'make decisions with environmental consequences in mind.'").)

It is important to note that in *Muzzy Ranch* the Court held that the CEQA common sense exemption applied. That is, "it [could] be seen with certainty that there [was] no possibility that the [adoption of the air field land use plan at issue (the "TALUP")] may have a significant effect on the environment," because "any potential displacement the TALUP might otherwise have effected *already has been caused by the existing land use policies"* which the TALUP had incorporated. (*Muzzy Ranch Co., v. Solano Cnty. Airport Land Use Comm'n, supra*, 41 Cal.4th at p. 389 (emphasis added).)

By reaching the conclusion that the TALUP *was simultaneously a "project" under CEQA and exempt from CEQA* under the common-sense exemption because it had no possibility of causing any significant impacts demonstrates that agencies cannot sidestep the first tier of CEQA by claiming that the specific action in question will not cause environmental impacts, even if the agency can demonstrate that "it can be seen with certainty that there is no possibility that the activity may have a

significant effect on the environment." (Guidelines § 15061(b)(3).) As explained in *Davidon Homes v. City of San Jose,* to claim the common-sense exemption,

> . . . the agency must itself provide the support for its decision before the burden shifts to the challenger. Imposing the burden on the members of the public in the first instance to prove a *possibility* of substantial adverse environmental impact would frustrate CEQA's fundamental purpose of ensuring that governmental officials make decisions with environmental consequences in mind.

(Davidon Homes v. City of San Jose (1997) 54 Cal.App.4th 106, 116 (emphasis added).) When an agency determines the common-sense exemption applies, the agency is encouraged to publish a notice of exemption so that the public is aware of the activity which may potentially cause environmental impacts, even though the agency has already determined that it actually will not. Then, if judicially reviewed, the agency's determination would be subject to an abuse of discretion standard, since the question of the application of a particular exemption is a mixed question of law and fact. In contrast, the first tier of CEQA is a categorical question which can be decided by a court as a matter of law without deference to the agency, and when an agency determines that an activity is not subject to CEQA, it faces no publication requirements.

The City never even attempted to argue that it would meet the burden of proof required by the common-sense exemption, even though the common-sense exemption only requires the agency show that no *significant* impacts will result. This standard

should be an easier standard to meet than a standard showing that there is no *potential* for *any* environmental impacts to result, and yet the City has not attempted to and does not meet the standard here. The City claimed that the Ordinance was not a project based on the bald assertion that "[a]doption 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." AR 28. Its provided explanation was "[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. As noted in *Davidon*, "[a] determination which has the effect of dispensing with further environmental review at the earliest possible stage requires something more." (*Davidon Homes v. City of San Jose*, *supra*, 54 Cal.App.4th at p. 117.) Even if substantial evidence in the record existed that the Ordinance would *not* result in *any* significant environmental impacts, the City still would not be able to establish that the Ordinance qualifies for the common-sense exemption. If the City could make that showing, it could support a determination that the Ordinance qualifies for a negative declaration, but the City never adopted a negative declaration, nor did it even conduct an initial study as required by CEQA prior to adoption of a negative declaration.

The City attempts to forgo CEQA analysis entirely on the basis that there are no *potential* environmental impacts when the City cannot even meet the burdens imposed by the more restrictive tiers of CEQA to prove that there will not be

significant impacts under the common-sense exemption or that there is no evidence that there will be significant impacts pursuant to the third tier of CEQA.

If an activity truly has no *potential* for causing environmental impacts, the City should logically be able to show that it will not cause significant environmental impacts under the common-sense exemption and that there is no evidence that there will be significant impacts under the third tier of CEQA. If the agency cannot show that an activity will not cause significant environmental impacts, how can it show that the activity has no potential to cause any environmental impacts?

It should be noted that the "showing required of a party challenging an exemption under [the commonsense exemption] is slight, since that exemption requires the agency to be certain that there is no possibility the project may cause significant environmental impacts. If legitimate questions can be raised about whether the project might have a significant impact and there is any dispute about the possibility of such an impact, the agency cannot find with certainty that a project is exempt." Id.

IV. Zoning Ordinances are *per se* projects under *Rosenthal* and *Rominger*.

Before CEQA § 21065 was amended to include the "*may cause*" language, *Rosenthal v. Board of Supervisors* held that zoning ordinances are projects under CEQA after a thorough review of California Supreme Court precedent, and no analysis of the specific potential environmental impacts of the ordinance in question. (*Rosenthal, v. Bd. of Supervisors, supra*, 44 Cal.App.3d

at pp. 822–823 (analyzing *No Oil, Inc. v. City of Los Angeles, supra*, 13 Cal.3d 68 and *Bozung v. Local Agency Formation, Comm'n* (1975) 13 Cal.3d 263). Likewise, *Concerned Citizens of Palm Desert v. Board of Supervisors* held that CEQA "makes it clear that it applies to 'the enactment and amendment of zoning ordinances.'" (*Citizens of Palm Desert v. Bd. of Supervisors* (1974) 38 Cal.App.3d 272, 283 (quoting Pub. Res. Code § 21080).) The office of the Attorney General also opined that "Ordinances and resolutions adopted by a local agency are 'projects' within the meaning of CEQA." (60 Ops. Cal. Atty. Gen. 335 (1977).) The 1994 amendment did not change this analysis however since, as argued throughout this brief, the enactment of a zoning ordinance always "may cause" environmental impacts as that term is used in CEQA § 21065.

Since § 21065 was amended, the *Rominger v. County of Colusa* court has read the statutory list of "discretionary projects" including "the enactment and amendment of zoning ordinances" contained in CEQA § 21080 as setting out a non-exhaustive list of *categorical* projects under CEQA. (*Rominger v. Cnty. of Colusa, supra*, 229 Cal.App.4th at p. 702.) This is the plainest reading of the statutory language which says "[CEQA] shall apply to discretionary projects proposed to be carried out or approved by public agencies, *including*, but not limited to, the enactment and amendment of zoning ordinances..." (CEQA § 21080.) The statute says it applies to discretionary projects, and gives a non-exhaustive list of what it means by "discretionary projects." Each of the projects listed is an activity "of a general kind with which CEQA is concerned"—that's why they were chosen as the examples. (*Muzzy Ranch Co., v. Solano Cnty. Airport Land Use*

Comm'n, supra, 41 Cal.4th at p. 381; *see* CEQA Pub. Resources Code, § 21080. *Muzzy Ranch* says that whether something is a project under CEQA is a "categorical" question. CEQA Guidelines § 20180 gives us a statutory set of categories of projects.

However, the appellate court below disagreed with *Rominger*'s analysis and has now created a split among the California appellate courts as to whether projects are to be determined on a categorical basis, or whether activities that would constitute "projects" under the statute are no longer considered "projects" if they do not cause a "direct physical change in the environment or a reasonably foreseeable indirect physical change in the environment." (Pub. Res. Code § 21065.) While that is part of the statutory definition of "project," the statute also sets out *activities which categorically constitute projects*, as *Muzzy* explains. Simply put, the statute sets out a broad definition, and later sets out some specific examples of projects, *all* of which meet the first definition because they *usually* cause direct or "reasonably foreseeably indirect physical change in the environment." (*See* CEQA §§ 21065 and 21080.) The statute sets out a non-exhaustive list of the types of activities that are subject to CEQA review. (Guidelines § 21080.) Agencies and courts must follow its guidance.

V. The enactment of the Ordinance was a project.

Whether or not this Court decides that the enumerated categories listed in § 20180 are all categorically projects, and whether or not this Court decides that all zoning ordinances are

categorically processes, the adoption of this Ordinance, which allows a definite number of medical marijuana dispensaries to operate under certain conditions, in certain areas, was an activity "of a general kind with which CEQA is concerned," "which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment." (*Muzzy Ranch Co., v. Solano Cnty. Airport Land Use Comm'n, supra*, 41 Cal.4th at p. 381; CEQA § 21065.)

CONCLUSION

What constitutes a project is a question at the very heart of CEQA. The primary purpose of CEQA is to force governmental entities to *transparently* analyze the environmental consequences of their actions—if they do not analyze their actions the statute serves no purpose at all. If the Court of Appeal's decision is upheld, cities and counties will be emboldened to ignore *Muzzy* and argue that each particular zoning ordinance and land use plan they pass has no reasonably foreseeable environmental impacts because it only regulates a certain industry, a certain type of land use, or certain areas of the locality. Indeed, under the Court of Appeals' logic, you could take an entire municipal zoning scheme and enact it industry-by-industry, land use-by-land use, and neighborhood by neighborhood and never analyze it under CEQA.

Channel Law Group, LLP

Respectfully submitted,

Dated: May 19, 2017

By: _____

Jamie T. Hall

Attorney for Plaintiff and Appellant

CERTIFICATE OF COMPLIANCE

This brief is set using **13-pt Century Schoolbook**. According to TypeLaw.com, the computer program used to prepare this brief, this brief contains **11,635** words, excluding the cover, tables, signature block, and this certificate.

The undersigned certifies that this brief complies with the form requirements set by California Rules of Court, rule 8.204(b) and contains fewer words than permitted by rule 8.630(b) or by Order of this Court.

Dated: May 19, 2017

By: _____
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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. S238563

PROOF OF SERVICE

I declare:

At the time of service I was at least 18 years of age and not a party to this legal action. My business address is 8200 Wilshire Blvd., Suite 300, Beverly Hills, CA 90211. I served document(s) described as Appellant's Opening Brief as follows:

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On May 19, 2017, I served by email (from jamie.hall@channellawgroup.com), and no error was reported, a copy of the document(s) identified above as follows:

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

Dated: May 19, 2017

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Jamie T. Hall