Case No. A154867

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT

COMMUNITY VENTURE PARTNERS,
Plaintiff and Respondent,

v.

MARIN COUNTY OPEN SPACE DISTRICT,
Defendant and Appellant.

[PROPOSED] AMICUS CURIAE BRIEF OF THE CALIFORNIA STATE ASSOCIATION OF COUNTIES AND LEAGUE OF CALIFORNIA CITIES IN SUPPORT OF DEFENDANT AND RESPONDENT MARIN COUNTY OPEN SPACE DISTRICT

On Appeal from the Marin County Superior Court
Case No. CIV 1701913
The Honorable Paul Haakenson

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I. INTRODUCTION

The California Environmental Quality Act (CEQA) is a planning tool. The Legislature has declared that the main purposes of CEQA are to inform government and the public about environmental impacts of proposed activities, and identify ways to reduce and avoid environmental impacts. (Pub. Resources Code, §§ 21000, 21001.) CEQA includes tools for better long-range planning that provide government, developers and the public finality and flexibility while still meeting the fundamental goal of informed decision making. A Program Environmental Impact Report (Program EIR) is one of those tools, providing a streamlined device for related actions that can be characterized as one large project. (Cal. Code Regs., tit. 14, § 15168.)[1]

CEQA, however, is not intended to address every policy question raised by a proposed project. Issues that are outside of CEQA's purview – i.e., those not related to environmental consequences of an action – are not unimportant or intended to be left unaddressed. Rather, such issues are properly resolved through the political process, policy development, and the exercise of a local agency's police power. "Consider the alternative: stretching the definition [of environment] so it encompasses the analysis of how environmental conditions could affect a project's future residents —

[1] As this title of the California Code of Regulations contains the CEQA Guidelines, further citations to this title will be to "Guidelines."

the kind of analysis that the Guidelines purport to require — would require us to define 'environmental effects of a project' in a manner that all but elides the word 'environmental.' That approach, in turn, would allow the phrase to encompass nearly any effect a project has on a resident or user. Given the sometimes costly nature of the analysis required under CEQA when an EIR is required, such an expansion would tend to complicate a variety of residential, commercial, and other projects beyond what a fair reading of the statute would support." (*Calif. Bldg Industry Assn. v. Bay Area Air Quality Management Dist.* (2015) 62 Cal.4th 369, 387-388.)

Against such backdrop, this case raises two questions of particular statewide importance:

(1) Whether subsequent environmental review is required when an agency has found a project to be consistent with a Program EIR based on a thorough examination by the agency through use of a consistency checklist; and

(2) Whether the non-environmental effects that humans experience as a result of different uses on a trail among are the impacts that an agency must assess under CEQA.

Consistent with the plain language, legislative purpose, and judicial interpretation of CEQA, the answer to both questions must be no. When a local agency conducts a valid consistency review, supported by substantial evidence, concluding that a project is consistent with the applicable

Program EIR, no further environmental review is required, and that review need not consider the social impacts on humans that might result from different users of a project.

II. LEGAL ARGUMENT

A. Program EIRs are intended to provide long range planning, avoid duplication, and provide a certain degree of flexibility to the CEQA process.

It is well understood and stated directly in the Guidelines that Program EIRs provide substantial benefits for large projects that may consist of many smaller individual activities. (Guidelines, § 15168, subd. (b).) Preparing a comprehensive Program EIR allows an agency to avoid the burden of multiple EIRs for the individual projects that follow, address impacts and mitigation measures that apply to the project as a whole, and simplify subsequent environmental review for program activities. (*Center for Biological Diversity v. Dept of Fish & Wildlife* (2015) 234 Cal.App.4th 214, 233-234, citing 1 Kostka & Zischke, Practice Under the Cal. Environmental Quality Act (Cont.Ed.Bar 2d ed 2014) § 10.14, p.10-20.) Program EIRs also permit a lead agency "to consider broad programmatic issues for related actions at an early planning stage when the agency has greater flexibility to deal with basic problems or cumulative impacts." (*Ibid.*) A Program EIR, therefore, has advantages "in that it is possible to conduct subsequent activities without preparing a new EIR if the agency

finds that no new effect could occur or no new mitigation measures would be required." (*N. Coast Rivers Alliance v. Kawamura* (2015) 243 Cal.App.4th 647, 664.)

When an EIR has been approved for a project, no subsequent environmental review can be required unless one of three narrow circumstances is present: (1) substantial changes are proposed in the project which will require major revisions of the EIR, (2) substantial changes occur with respect to the circumstances under which that project is being undertaken that will require major revisions in the EIR, or (3) new information, which was not known and could not have been known at the time of the EIR was certified as complete, becomes available. (Pub. Resources Code, § 21166; *Friends of College of San Mateo Gardens v. San Mateo County Community College Dist.* (2016) 1 Cal.5th 937, 945-946.) If an agency determines that these elements are not met, the agency may forgo any further documentation. (Guidelines, § 15162, subd. (b).)

With respect to possible changes to a project, an agency complies with CEQA by considering the changes and their potential environmental effects in light of the existing CEQA document, and then determining whether it is necessary to conduct additional CEQA review to address the changes. The proposed project should not be considered in isolation. Instead, the agency considers the effects of the proposed project in relation to the effects originally considered in the existing environmental document.

(*River Valley Preservation Project v. Metropolitan Transit Development Bd* (1995) 37 Cal.App.4th 154, 176-177.)

As outlined above, the Program EIR process fulfills CEQA's objectives. It provides a mechanism for early, detailed review of large programs that takes into consideration potential environmental impacts of the subsequent projects to follow. This allows both the policy makers and the public to see the totality of the project's impact, and to make decisions on mitigation as part of the framework for the entire program. At the same time, it streamlines subsequent environmental review, providing local agencies with finality in their earlier environmental review work, and with the flexibility to address changes that might emerge as the projects move forward. Questions of an agency's obligations under a Program EIR must be considered with this legislative framework in mind.

1. Subsequent projects that are found to be consistent with a Program EIR do not require an initial study or any other further environmental review, and the trial court ruling to the contrary undermines the express purpose of a Program EIR.

The trial court below concluded that the District violated CEQA by not conducting an initial study before approving the Middagh Trail project. This is clear error for several reasons. First, the applicable Guidelines directly state that if "the agency finds that pursuant to Section 15162, no subsequent EIR would be required, the agency can approve the activity as being within the scope of the project covered by the program EIR, and no

new environmental document would be required." (Guidelines, § 15168, subd. (c)(2).) The trial court opinion that purports to require an initial study before determining whether a project is covered by the Program EIR flatly conflicts with this dictate. An initial study is an environmental document. (Guidelines, § 15063; *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1372.) The District, therefore, could not be required to prepare an initial study *prior* to determining whether the project is consistent with the existing Program EIR. That environmental document would only come after a District finding that the project had environmental effects that were not previously considered in the Program EIR. (Guidelines, § 15168, subd. (c)(1).)

This interpretation is bolstered by guidance documents provided to lead agencies by the State on CEQA implementation. For example, the California Natural Resources Agency advises that the agency first evaluates the project to see whether any additional environmental documentation is required. An initial study is conducted if "a later activity would have effects that were not examined in the program EIR," but if there are no new effects "no new environmental document would be required." (California Natural Resources Agency, CEQA Process Flow Chart (2003).)[2]

The Governor's Office of Planning and Research similarly advises

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[2] Available online at: http://resources.ca.gov/ceqa/flowchart/

the following sequential approach when evaluating whether a later activity is eligible for consideration under a Program EIR: (1) Determine its consistency with the Program EIR and whether it incorporates the feasible mitigation measures and alternatives considered in the Program EIR; (2) Determine whether there are any environmental effects not previously considered in the EIR. "If there are any new effects from the later activity, the lead agency must prepare an initial study to determine the significance of those effects. No subsequent EIR is necessary for a project that is essentially part of the 'project' described by the general plan's program EIR," with some exceptions. (Gov. Office of Planning and Research, General Plan Guidelines (2017) p. 274.)[3]

Notwithstanding this clear direction, the trial court found that: "An initial study must be prepared even in circumstances where, as here, the lead agency may be able to rely on a prior program EIR to analyze the specific project's environmental effect." (Trial Ct Ruling, p. 11.)[4] Such an

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[3] Available online at: http://www.opr.ca.gov/docs/OPR_COMPLETE_7.31.17.pdf

[4] To the extent that the trial court's CEQA ruling is actually based on a lack of consideration of the "social" impacts of the project in its consistency review, that argument is addressed in the District's briefing and below. Further, even if it is true that the social impacts should have been considered here because they were not included in the Program EIR, this would still be a misstatement of the law. Under that scenario, the agency would still conduct the consistency review first, and would then conduct an initial study or complete another applicable environmental document to address impacts not previously considered in the Program EIR.

interpretation of the law eviscerates the intended purpose of a Program EIR, which expressly allows for subsequent projects to proceed without further environmental review if the projects are consistent and raise no new environmental impacts that were not previously considered. The trial court's ruling must therefore be reversed.

2. The checklist process used by the District is precisely as intended by CEQA.

Respondent argues that in failing to conduct an initial study and to proceed instead with a consistency review by completing a "checklist" that ensures the project falls within the Program EIR, the District acted without transparency or accountability. (Respondent Br., pp. 44-45.) To the contrary, however, the District proceeded in precisely the manner contemplated by CEQA and its implementing Guidelines. To the extent that process is not as transparent as Respondent would like, that is an issue for the Legislature to resolve, not the courts.

In determining whether a Program EIR can be used for a later activity, "a written checklist should be used to document the evaluation of any site specific operations." (Barclay, Curtin's California Land Use and Planning Law (2010) p. 163.) That this occurs at the staff level and without a formal CEQA public process is not a violation of law or a reason to find an agency's actions suspect. "In effect, after a sufficiently comprehensive and specific program EIR has been certified, CEQA allows much of the

initial site-specific review to occur outside a formal CEQA process and beyond public view." (*Center for Biological Diversity v. Dept. of Fish & Wildlife, supra,* 234 Cal.App.4th at p. 239.) CEQA does not require the agency to engage in a public process when it determines whether the impacts were addressed and adequately mitigated in the Program EIR. (*Ibid.*)

A consistency checklist process along the lines used by the District here has been approved by the court. In *North Coast Rivers Alliance*, the court reviewed an "evaluation protocol," which the court described as a "checklist to document site-specific impacts and determine whether they were sufficiently analyzed in the program EIR…." (*N. Coast Rivers Alliance, supra,* 243 Cal.App.4th at p. 681.) Quoting *Center for Biological Diversity*, the court upheld the consistency review checklist process: "This is exactly the type of process CEQA requires an agency to utilize outside of public review when it intends to approve a site-specific project that is part of a program previously reviewed in a program EIR." (*Ibid.*)

Thus, while a petitioner could challenge a consistency finding for lack of substantial evidence, an agency's use of a checklist process to review a project's consistency with a Program EIR is not subject to challenge. Rather, that process is precisely what is anticipated by CEQA and the Guidelines, and has been affirmed by the courts even though it does not include the same type of public review protocols required for other

types of environmental review. Since the Program EIR already addresses the project's impact, and itself was subject to a full public review process, CEQA's objective of informing the public of the potential environmental impacts has been fulfilled.

B. CEQA is not intended to address every project impact, and should not be used as a litigation tool to advance every policy issue.

It is evident upon reading Respondent's briefing that the fundamental objection to the project is the potential for conflict between hikers and mountain bikers on the subject trail. The brief contains lengthy quotes about such disputes that have occurred in other locations, and then attempts to frame those disputes as subject to CEQA due to environmental impacts. The specific details on how the actual environmental impacts of the project are addressed are detailed in Appellant's brief, and will not be repeated here. From the statewide perspective of Amici CSAC and the League, however, it is critical to view CEQA as a valuable tool for evaluating and mitigating environmental harm, but not as a tool for addressing all manner of policy impacts. Though the concerns that Respondent raises are perfectly legitimate, not every concern must be analyzed through CEQA review.

Indeed, "CEQA is simply not the right tool to mitigate the health impacts of the environment on a project." (Gualco-Nelson, *Reversing Course in California: Moving CEQA Forward* (2017) 44 Ecology L.Q.

155, 159.) CEQA is a particularly inept tool for addressing some types of human safety concerns because of its case-by-case approach to mitigation, which can result in uncertain and inconsistent safety protections. (*Ibid.*) Local agencies possess many other tools to address concerns like the ones raised by Respondent here, including police powers. (*Id.* at p. 172; *See Village of Belle Terre v. Boraas* (1974) 416 U.S. 1, 9 ["The police power is not confined to elimination of filth, stench and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion and clean air make the area a sanctuary for people."].)

Our courts have also recognized CEQA's limitations on addressing the impacts that projects have on the users, as opposed to on the environment. For example, in *Preserve Poway v. City of Poway* (2016) 245 Cal.App.4th 560, the Court of Appeal reversed a trial court judgment requiring an EIR for a rural subdivision based on the "psychological and social" impacts of a related horse boarding facility closure, concluding that such social, psychological and economic impacts are not cognizable under CEQA. The court had little trouble finding that the project may impact the residents negatively, but did not see how the project would negatively impact the environment. (*Id.* at p. 566.) The court concluded that the social and psychological concern raised by plaintiffs is a "political and policy decision entrusted" to the agency's elected officials, and not a basis for a CEQA claim. (*Ibid.*)

The decision in *Preserve Poway* is, of course, guided by the Supreme Court's conclusion in *California Building Industry Association v. Bay Area Air Quality Management District* (2015) 62 Cal.4th 369, that CEQA does not require a review of how the environment would impact users, but rather only how the project would impact the environment. That opinion is premised on CEQA's basic logic, which requires analysis of a proposed project's potential impacts on the existing physical environment. (*Id.* at p. 388.) A proposed project's hypothetical or predicted users, by themselves, are not part of the existing physical environment as CEQA defines it. Therefore, CEQA does not require analysis of any potential impacts on hypothetical or predicated future users unless those impacts directly cause, or are caused by, physical environmental changes. And even then, such impacts may only be considered in evaluating whether the physical changes are significant. This logical syllogism flows directly and necessarily from CEQA's key statutory definitions and operative provisions, and is reinforced by numerous of its corollary rules, as well as by common sense. (See Pub. Resources Code, § 21060.5 [defining "environment"]; § 21065 [defining "project"]; § 21068 [defining "significant effect on the environment"]; and § 21083.1 [proscription against imposing substantive or procedural requirements not explicitly stated in the statute].)

The trial court ruling undermines these principles by turning what is

essentially a policy dispute between recreational trail users into an environmental litigation matter, at substantial cost to the public and the limited resources of the court. Substantial evidence supports the District's conclusion that the environmental impact of human use of the trail as contemplated by the project has already been considered and mitigated in the Program EIR. The psychological or social impacts raised by Respondent stemming solely from the prospect of sharing the trail with other users are not environmental impacts, and therefore need not have been evaluated by the Program EIR and do not trigger a need for any further environmental review.

III. CONCLUSION

CEQA is a powerful tool for informing decision makers and the public about environmental impacts of a project, and helping to avoid or mitigate such impacts. But it does not require repetitive environmental review, and it is not intended to serve as a mechanism for evaluating every potential policy impact of a project. Because the trial court's ruling errs on these points and is inconsistent with both the language and intent of the statute, Amici CSAC and the League join with the District in asking that this Court reverse and vacate the trial court ruling and enter judgment in favor of the District.

Dated: March 27, 2019

Respectfully submitted,

/s/
By _____
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CERTIFICATION OF COMPLIANCE WITH CALIFORNIA RULES OF COURT, RULE 8.204(c)(1)

I hereby certify that this brief has been prepared using proportionately double-spaced 13 point Times New Roman typeface. According to the word count feature in my Microsoft Word software, this brief contains 3,625 words.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 27th day of March, 2019 in Sacramento, California.

Respectfully submitted,

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