No statute (in CEQA or elsewhere) imposes any per se geographical limit on otherwise appropriate CEQA evaluation of a project's environmental impacts. To the contrary, CEQA broadly defines the relevant geographical environment as “the area which will be affected by a proposed project.” (Pub. Resources Code, § 21060.5.)6 Consequently, “the project area does not define the relevant environment for purposes of CEQA when a project's environmental effects will be felt outside the project area.” (County Sanitation Dist. No. 2 of Los Angeles County v. County of Kern (2005) 127 Cal.App.4th 1544, 1582–1583, 27 Cal.Rptr.3d 28.) Indeed, “the purpose of CEQA would be undermined if the appropriate governmental agencies went forward without an awareness of the effects a project will have on areas outside of the boundaries of the project area.” *388 (Napa Citizens for Honest Government v. Napa County Bd. of Supervisors (2001) 91 Cal.App.4th 342, 369, 110 Cal.Rptr.2d 579 (Napa Citizens).) Thus, the Commission is mistaken in its suggestion that agencies have no obligation under CEQA to consider geographically distant environmental impacts of their activities.

Muzzy Ranch Co. v. Solano County Airport Land Use Com. (2007) 41 Cal.4th 372, 387–388 [60 Cal.Rptr.3d 247, 258, 160 P.3d 116], as modified (Sept. 12, 2007)

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CEQA Developments

Not A CEQA "Project"? Not So Fast, Lead Agency! Supreme Court Reverses Fourth District's Decision That San Diego's Adoption of Medical Marijuana Dispensary Ordinance Was Not A Project Requiring CEQA Review

By Arthur F. Coon on August 21, 2019

Introduction And Overview

On August 19, 2019, the California Supreme Court issued its unanimous 38-page opinion, authored by Chief Justice Cantil-Sakauye, in the CEQA "project definition" case we've been tracking with interest. *Union of Medical Marijuana Patients, Inc. v. City of San Diego (California Coastal Commission, Real Party in Interest)* (2019) ____ Cal.5th ____, Case No. S238563. As anticipated based on the high court's questioning and remarks at oral argument (*see* "***Supreme Court Hears Oral Argument in CEQA Project Definition Case***," posted June 6, 2019), it reversed the Fourth District Court of Appeal's decision that the City's approval of the medical marijuana dispensary ordinance at issue was not a CEQA "project"; accordingly, it held that the City was required to treat it as such and "proceed to the next steps of the CEQA analysis."

The Court rejected plaintiff's UMMP's argument that *all* enactments labelled "zoning ordinances" are *automatically* CEQA projects as a matter of law, based on the statutory list of specific discretionary public agency actions contained in Public Resources Code § 21080. But it still held as a matter of law that the City's action adopting the dispensary ordinance was, indeed, a "project" under the test announced in its 2007 decision in *Muzzy Ranch* – "a proposed activity is a CEQA project if, by its general nature, the activity is capable of causing a direct or reasonably foreseeable indirect physical change in the environment." Setting aside the Court's rather tortuous reasoning

on the first issue (perhaps the price of a unanimous opinion with no concurrence?), the legal test for determining whether an action is a CEQA project that the Court ultimately reaffirms and follows is a simple and easily satisfied one.

While significant because it deals with a fundamental threshold issue governing CEQA's applicability, the Supreme Court's decision really breaks no new legal ground, but instead follows existing law as laid out in its prior precedent. While it resolves what was a somewhat esoteric disagreement between the courts of appeal over proper interpretation and reconciliation of Public Resources Code § 21065 (defining "project") and § 21080 (listing discretionary projects subject to CEQA), the Court's holding ultimately rests on case law established over a decade ago in former Justice Werdegar's unanimous opinion in *Muzzy Ranch Co. v. Solano County Airport Land Use Commission* (2007) 41 Cal.4th 372. The Court's opinion here reaffirms and clarifies that the *"Muzzy Ranch* test" for whether a public agency action is a "project" requiring CEQA review is an *abstract, theoretical inquiry* – properly resolved as a *question of law*, *apart from the factual record*, and based on the "general nature" of the proposed activity – as to whether the activity "is capable of causing a direct or reasonably foreseeable indirect change in the environment." Such a test would appear to be easily satisfied in the case of most zoning and land use ordinances, with the only readily apparent exceptions being those merely restating existing law without change, or those mislabeled as "zoning" restrictions when they are actually something else. Accordingly, the biggest *practical* "takeaway" from this decision, in my view, seems to be its message to public agencies that they cannot "short cut" the CEQA process and evade their CEQA review responsibilities by the simple expedient of labelling local land use or zoning ordinances "not a project."

Case Background And The Parties' Arguments

As brief background, the case involved a City of San Diego ordinance authorizing (as a new use in industrial/commercial zones) and restricting the location and manner of operation of medical marijuana dispensaries within the City. The ordinance's central provisions amended various City zoning regulations to specify allowed locations for new dispensaries. The City found the ordinance's adoption was not a project for CEQA purposes and thus conducted no environmental review. Plaintiff UMMP challenged the City's failure to conduct CEQA review, arguing that (1) zoning ordinances and amendments were conclusively declared projects by Public Resources Code § 21080, and that (2) in any event, the ordinance at issue met the definition of a project under § 21065 because dispensary siting restrictions could potentially cause physical environmental changes, including increased cross-City travel by patients, additional user cultivation, and other urban development impacts associated with new dispensaries.

Plaintiff's first argument relied in part on *Rominger v. County of Colusa* (2014) 229 Cal.App.4th 690, which held under § 21080 that a county's approval of a *tentative subdivision map* was a project as a matter of law. The Fourth District Court of Appeal in this case disagreed with *Rominger's* reasoning, however, and concluded that the amendment of a zoning ordinance – a discretionary agency activity also listed in § 21080 – was nonetheless subject to the same statutory "project" test under § 21065 as other public agency actions, whether or not listed in § 21080. It also found no error in the City's conclusion that the ordinance was not a project because it lacked the potential to cause a physical change in the environment; the Court of Appeal rejected plaintiff's contrary arguments as too speculative and unsupported by record evidence to establish that the ordinance foreseeably had the potential to physically change the environment, even indirectly, so as to render it a "project" necessitating CEQA review. As discussed further below, however, the Fourth District erred in conflating "potential" with "actual" causation in this first tier project inquiry.

The Supreme Court's Decision And CEQA's Three-Tier Process

The Supreme Court agreed that § 21080 does not "override" § 21065's definition of "project" for CEQA purposes, thus resolving the conflict between the Fourth District's *UMMP* decision and *Rominger* on that point. But that particular issue was not dispositive; despite prevailing on it, the City still lost the case. The Supreme Court went on to hold that "the Court of Appeal misapplied the test for determining whether a proposed activity has the potential to cause environmental change under section 21065, which was established in *Muzzy Ranch* [], and erred in affirming the City's finding that adoption of the ordinance did not constitute a project."

Key to understanding the Supreme Court's decision is placing it in the proper context of CEQA's "three-tier process," which the high court's opinion describes as follows:

> A putative lead agency's implementation of CEQA proceeds by way of a multistep decision tree, which has been characterized as having three tiers. (*Muzzy Ranch, supra,* 41 Cal.4th at p. 380.) First, the agency must determine whether the proposed activity is subject to CEQA at all. Second, assuming CEQA is found to apply, the agency must decide whether the activity qualifies for one of the many exemptions that excuse otherwise covered activities from CEQA's environmental review. Finally, assuming no applicable exemption, the agency must undertake environmental review of the activity, the third tier.

(Citing *Muzzy Ranch,* at 380-381, fn. omitted.)

The Court noted that the first tier of the "decision tree", concerning CEQA's applicability, "requires the agency to conduct a preliminary review to determine whether the proposed activity constitutes a "project" for purposes of CEQA." (Citing *Tuolumne Jobs & Small Business Alliance v. Superior Court* (2014) 59 Cal.4th 1029, 1037; and Pub. Resources Code, § 21065; CEQA Guidelines § 15378(a) [both defining "project"].) If, upon this preliminary project determination, "the proposed activity is found not to be a project, the agency may proceed without further regard to CEQA." (Citing *Muzzy Ranch,* at 380; CEQA Guidelines, § 15060(c)(3).) If the lead agency determines it is faced with a project, it then considers – at the "second tier" of the process – whether the project is exempt from CEQA review by any statutory or categorical exemption. Finally, if no exemption applies, the agency proceeds to the "third tier" of the process by undertaking an initial study to determine whether the project *may* have a *significant effect* on the environment, which will determine whether the lead agency prepares a negative declaration or mitigated negative declaration (appropriate where there is no substantial evidence that the project as proposed or mitigated may have any significant effect), or an EIR (where the initial study finds substantial evidence the project may have a significant effect). Obviously, there are several points along the lead agency's "three-tier" decision tree at which the CEQA analysis, or environmental review under CEQA, could either continue or end, and the issue in this case was whether the process was properly terminated at the *first-tier, preliminary review stage* on the basis that the dispensary ordinance was not even a "project."

The Supreme Court's Interpretation And Harmonization Of Public Resources Code §§ 21065 And 21080

Against the foregoing general background, Public Resources Code § 21065 defines project "as an activity (1) undertaken or funded by or requiring the approval of a public agency that (2) "may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment."" (Quoting statute, citing *Sunset Sky Ranch Pilots Assn. v. County of Sacramento* (2009) 47 Cal.4th 902, 907.) The reader should here take note that only the *potential* for *some* "physical change" is required, and there is no requirement that the possible physical change be substantial, extensive or adverse – or of any particular extent or nature – for the action to qualify as a "project" at CEQA's first tier. Investigation and analysis of the magnitude, nature, extent and significance of a project's potential *adverse environmental impacts* is undertaken later by the lead agency, typically at the third tier of CEQA process when it conducts an initial study leading either to an EIR or some type of negative declaration.

Public Resources Code § 21080, based on which plaintiff UMMP argued zoning ordinances (and other agency activities listed therein) were legislatively determined to be CEQA projects *per se* (per

Rominger) without regard to § 21065, provides: "Except as otherwise provided in this division, this division 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,* the issuance of zoning variances, the issuance of conditional use permits, and the approval of tentative subdivision maps unless the project is exempt from this division." (Citing § 21080(a), emph. Court's.) The statutory interpretation issue before the Court essentially boiled down to whether the specific agency actions listed in § 21080(a) were *ipso facto* CEQA "projects" – thus obviating consideration of § 21065 to subject them to CEQA – or whether those activities were still required to satisfy the definitional requirement of § 21065, just like all other discretionary lead agency activities. The Court of Appeal had correctly held that satisfaction of § 21065's definition requires that the particular activity have "a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment," but further reasoned that the various indirect impacts posited by plaintiff – i.e., increased traffic from patients driving to new dispensaries, increased self-cultivation, and changed urban development patterns – were simply too speculative and lacking in record support to be reasonably foreseeable. It was the Court of Appeal's incorrect further reasoning that led to the reversal of its decision.

The Supreme Court engaged in extensive analysis of statutory interpretation and legislative history, observing that "project" is a defined term in § 21065 and concluding that § 21080 does not currently declare the listed activities – including zoning ordinances and amendments – to be CEQA projects as a matter of law. While the Court's analysis in this regard seems more scholastic than common sense and practical, perhaps most persuasive were its observations, based on those of amici curiae League of California Cities and California State Association of Counties, that many types of local government regulations covering a wide range of subjects are labeled "zoning ordinances," and that whether such regulations carry the potential for environmental change should depend on their particular substance and should not be presumed solely from their label. That point is well taken, and despite the fact that it is difficult to imagine a true zoning ordinance – i.e., one actually regulating the permissible physical uses of land – *not* having at least the *potential* to indirectly cause *some* physical change in the environment, the Court's reasoning here makes some sense. After all, what's in a name (especially one that CEQA does not define)? A "zoning" ordinance could well be mislabeled as such, or could (as in the case of reenactments and recodifications) be an amendment merely restating (rather than changing) existing law, and thus carry no potential for resulting in a physical change.

But the Court's discussion in this regard still seems far more esoteric and academic than practical, especially given the nature of its subsequent analysis reaffirming and following *Muzzy Ranch's*

"project" determination test under § 21065. And despite the Court's analysis and interpretation of § 21080 in a manner contrary to *Rominger*, lead agencies should not be misled. The bottom line (as discussed further below) is that, as both a legal and very practical matter, zoning and land use ordinances that change existing law will *almost always* be treated as projects subject to CEQA by local agencies conscientiously following the *Muzzy Ranch* test.

The Supreme Court's Application Of The *Muzzy Ranch* CEQA Project Test

The concluding part – and meat – of the Supreme Court's *UMMP* opinion analyzed the dispositive issue, i.e., whether San Diego's medical marijuana dispensary ordinance was, under the *Muzzy Ranch* test, the "sort of activity that may cause a direct or indirect physical change in the environment" so as to qualify as a "project" at the first tier of the CEQA decision tree and thus require CEQA review. The Court answered this question in the affirmative, disagreeing with the City's and Court of Appeal's contrary conclusion.

In 2007, *Muzzy Ranch* held the Travis Air Force Base land use compatibility plan (TALUP) – which restricted residential development in certain low-overflight areas surrounding the military base to existing general plan and zoning densities – was a CEQA project at the *first tier* as a matter of *law* because, given population pressures and possible "displaced development" effects, it "might cause a reasonably foreseeable indirect physical change in the environment." At the same time, *Muzzy Ranch* held the TALUP project was exempt from CEQA under the "common sense" exemption at the *second tier* as a matter of *fact* because upon examination of the factual record it could be seen with certainty that there was no possibility it would *actually* have any *significant* effect on the environment.

Contrasting these two distinct inquires – first tier "project" determination and second tier common sense *exemption* finding – the Supreme Court in its *UMMP* opinion makes a number of points that usefully state and clarify the nature and operation of the *Muzzy Ranch* project test:

- "Under *Muzzy Ranch,* a local agency's task in determining whether a proposed activity is a project is to consider the potential environmental effects of undertaking the type of activity proposed, "without regard to whether the activity will actually have environmental impact."" (Quoting *Muzzy Ranch,* at 381.) The Court observed that in *Muzzy Ranch*'s discussion of the first-tier "project" issue, it "made no reference to any evidence in the record bearing on the *actual* impact of the TALUP on development in Solano County" and instead "restricted itself to an examination of the potential effects that could reasonably be anticipated from adopting a land use policy of the type contained in the TALUP."

- "To encapsulate the *Muzzy Ranch* test, a proposed activity is a project if, by its general nature, the activity is capable of causing a direct or reasonably foreseeable indirect physical change in the environment. This determination is made without considering whether, under the specific circumstances in which the proposed activity will be carried out, these potential effects will actually occur."
- "Consistent with this standard, a "reasonably foreseeable indirect physical change is one that the activity is capable, at least in theory, of causing. [citation] Conversely, an indirect effect is not reasonably foreseeable if there is no causal connection between the proposed activity and the suggested environmental change or if the postulated causal mechanism connecting the activity and the effect is so attenuated as to be "speculative." [citations]"
- "The somewhat abstract nature of the project decision is appropriate to its preliminary role in CEQA's three-tiered decision tree . . . . The question posed at that point in the CEQA analysis is not whether the activity will affect the environment, or what those effects might be, but whether the activity's potential for causing environmental change is sufficient to justify the further inquiry into its actual effects that will follow from the application of CEQA."
- "Only as so [properly] understood is the nature of the project decision consistent with the scope of appellate review[,]" which treats the decision as a question of law, rather than fact. (Were it actually a question of fact, the Court noted, the lead agency's evidence-supported conclusions would receive judicial deference, which is not the case with the *Muzzy Ranch* project test.)
- "*Muzzy Ranch* clearly requires a public agency to consider the substance of a proposed activity in determining its status as a project. What need not be considered is the activity's actual impact in the specific circumstances presented."
- The Court of Appeal erred in determining the City's adoption of the dispensary ordinance was not a project because "establishment of the[] new businesses [authorized by the ordinance] is capable of causing indirect physical changes in the environment," including through new retail construction, and citywide changes in "traffic [patterns] from the businesses' customers, employees, and suppliers." Per the Court: "The[se] theoretical effects . . . are sufficiently plausible to raise the possibility that the Ordinance "may cause . . . a reasonably foreseeable indirect physical change in the environment" (§ 21065), warranting its consideration as a project."
- To summarize, where an activity has the "potential" for such "plausible" effects, at least "in theory," they meet the "reasonably foreseeable" standard and require that the activity be determined to be a CEQA "project." This conclusion cannot be rejected because the potential

effects are "speculative" in the sense that they are unsupported (or not yet supported) by "evidence in the record" because at this point in the CEQA process – prior to any initial study or even review for exemptions – there is no "record." As explained by the Court: "[A]t this stage of the CEQA process virtually any postulated indirect environmental effect will be "speculative" in a legal sense – that is, unsupported by evidence in the record [citation] – because little or no factual record will have been developed. A lack of support in the record, however, does not prevent an agency from considering a possible environmental effect at this initial stage of CEQA analysis. Instead, such an effect may be rejected as speculative only if, as noted above, the postulated causal mechanism underlying its occurrence is tenuous."

- Hence, the Court held with respect to San Diego's medical marijuana dispensary ordinance: "At this initial tier in the CEQA process, the potential of the Ordinance to cause an environmental change requires the City to treat it as a project and proceed to the next steps of the CEQA analysis."

Conclusion And Implications

The Supreme Court's holding in this case is not unexpected or surprising. The *Muzzy Ranch* project test has been settled law for over a decade, and CEQA's definition of "projects" within its scope at the "first tier" is – also unsurprisingly – intentionally broad and encompassing. Practitioners and lead agencies dealing with "zoning" ordinances (including, but not limited to, those regulating the location and operation of marijuana cultivation, manufacturing and distribution uses) will virtually always be required to treat them as CEQA projects so long as there is a plausible argument in theory that they may indirectly cause some physical change in the environment; arguing over facts on an undeveloped record will not be relevant to the abstract inquiry required because the issue at the "first tier" is *potential* and *theoretical*, not *actual*, physical change. As noted above, the latter will be the subject of subsequent environmental review, likely at CEQA's third tier, if the project is not found exempt at the second tier. All in all, the Supreme Court's *UMMP* decision reaffirms and follows existing law under which the first tier project test sets a very low threshold for qualification as a CEQA "project" that is usually easily satisfied, as it was by San Diego's ordinance here.

*Questions? Please contact **Arthur F. Coon** of Miller Starr Regalia. Miller Starr Regalia has had a well-established reputation as a leading real estate law firm for more than fifty years. For nearly all that time, the firm also has written Miller & Starr, California Real Estate 4th, a 12-volume treatise on California real estate law. "The Book" is the most widely used and judicially recognized real estate*

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