Blowing Smoke About Impacts? Fourth District Rejects Speculative CEQA Challenge to San Diego's Medical Marijuana Consumer Cooperative Ordinance, Holds Zoning Ordinances Are Not Necessarily CEQA "Projects"

By Arthur F. Coon on October 17, 2016

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In a 29-page published opinion filed October 14, 2016, the Fourth District Court of Appeal dispensed some good news to municipalities desiring to reasonably regulate retail medical marijuana facilities within their jurisdictional boundaries. In *Union of Medical Marijuana Patients, Inc. v. City of San Diego* (4th Dist., Div. 1, 2016) ___ Cal.App.5th ___, Case No. D068185, the Court affirmed the trial court's judgment denying a writ petition on the basis that the City of San Diego's ordinance regulating the establishment and location of medical marijuana consumer cooperatives was not a "project" subject to CEQA.

California Marijuana Law And The City's Ordinance

As background legal context, California's Compassionate Use Act of 1996 and 2003 Medical Marijuana Program (MMP) have removed certain obstacles to qualified patients' access to and medical use of marijuana, including exempting qualified patients and their caregivers from numerous state criminal sanctions for cooperative cultivation activities. The MMP expressly authorizes a city or other local governing body to adopt ordinances regulating the "location, operation, or establishment of a medical marijuana cooperative or collective" within its jurisdiction. (Health & Saf. Code, § 11362.83(a).)

The City of San Diego adopted such an ordinance (Ordinance No. 0-20356; the "Ordinance") in March 2014, defining "medical marijuana consumer cooperative" to mean "a facility where marijuana is transferred to qualified patients or primary caregivers in accordance with the Compassionate Use Act of 1996 and the [MMP]" and specifically stating its regulations "apply to commercial retail facilities." The Ordinance permitted medical marijuana consumer cooperatives (cooperatives) in certain zones, including commercial and industrial zones, with a conditional use permit (CUP), provided that no more than four cooperatives could locate in each of the City's nine (9) City Council districts, and that they are located

1,000 feet from public parks, churches, childcare centers, playgrounds, minor-oriented facilities, residential care facilities, schools and other cooperatives, and 100 feet from residential zones. Additionally, the Ordinance contains requirements for cooperatives' lighting, security, signage and operating hours, inter alia.

A City-commissioned SANDAG analysis of the Ordinance's restrictions showed it could actually allow up to 30 cooperatives spread across many geographic areas in the City.

Plaintiff UMMP's CEQA Arguments And Litigation

Plaintiff Union of Medical Marijuana Patients, Inc. (UMMP) argued to the City prior to the Ordinance's enactment that it was a "project" requiring CEQA analysis; that an estimated 26,451 medical marijuana users resided in the City (based on a 2011 Cal. NORML Internet page printout estimating 2 to 3% of Californians are medical marijuana patients); that at least 30 *illegal* cooperatives were already operating in the City; and that the Ordinance's enactment would have numerous adverse environmental impacts, including traffic and air pollution (from making patients drive farther to get their medicine), adverse impacts from increased home cultivation, and negative impacts from "shifted" development.

The City, contending that adoption of the Ordinance did not have the potential to result in a direct or reasonably foreseeably indirect physical change in the environment and was therefore not a "project" as defined by CEQA Guidelines § 15378, adopted it without CEQA review. UMMP then sued, unsuccessfully repeating its arguments to the trial court, which entered judgment for the City holding adoption of the Ordinance was not a "project" subject to CEQA review.

The Court Of Appeal's Opinion And Analysis Of The CEQA "Project" Definition Issues

In affirming the trial court's judgment denying UMMP's requested writ of mandate, the Court of Appeal characterized the "sole issue on appeal [a]s [being] whether the City improperly determined that adoption of the Ordinance did not constitute a project within the meaning of CEQA." This issue was dispositive under CEQA's jurisdictional "first tier" preliminary review because an activity that is not a "project" as defined by Public Resources Code § 21065 and Guidelines § 15378 "is not subject to CEQA." (Citing *Muzzy Ranch Co. v. Solano County Airport Land Use Com.* (2007) 41 Cal.4th 370, 379-380.)

The essence of the inquiry whether an activity constitutes a CEQA "project" is whether it is the "sort of activity" that may cause a direct or reasonably foreseeable indirect physical change in the environment (*id*., at 382), and the definitional sections of CEQA and the Guidelines are central to the issue. While ordinances are clearly discretionary activities undertaken by public agencies, and thus *potential* "projects" under CEQA (citing *Union of Medical Marijuana Patients, Inc. v. City of Upland* (2016) 245 Cal.App.4th 1265, 1272; Pub. Resources Code, § 21065), this case addressed the further issue whether municipal zoning ordinances are *necessarily* projects – as UMMP contended — or whether they may not qualify as projects in a particular case where there is no basis to conclude the ordinance in question may have a direct or reasonably foreseeable indirect physical environmental impact, as the City contended.

Noting there was no claim the Ordinance would case a *direct* physical change in the environment, and that the issue whether an activity is a project poses "an issue of law that can be decided on undisputed data in the record or appeal" without deference to the agency (citing *Muzzy Ranch*, *supra*, 41 Cal.4th at 381; *Fullerton Joint Union High School Dist. v. State Bd. of Education* (1982) 32 Cal.3d 779, 795), the Court of Appeal proceeded to hold as a matter of law that the Ordinance did not *necessarily* constitute a project by virtue of its status as a "zoning ordinance." It rejected UMMP's argument to that effect under Public Resources Code § 21080(a), which states that "[e]xcept as otherwise provided in [CEQA], [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*, the issuance of zoning variances, the issuance of conditional use permits, and the approval of tentative subdivision maps unless the project is exempt from [CEQA]." (*Id*., emph. added.) UMMP's argument for a "bright-line" CEQA rule that *all* enactments of zoning ordinances are discretionary "projects," based on the above-quoted ambiguous statutory language, failed because § 21080(a) does not stand alone and must be harmonized with the more specific statutory language of § 21065. The latter statute defines a project as having *two* essential components: it must be (1) "an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment"; and (2) "[a]n activity directly undertaken by any public agency" or another enumerated type of activity involving a public agency. Accordingly, the Court held the most reasonable interpretation of § 21080(a) is that its reference to adoption of zoning ordinances is merely *illustrative* of an activity *directly undertaken* by a public agency, but that it does not abnegate § 21065's first component requiring the activity in question to potentially cause either a direct or reasonably foreseeable indirect physical change in the environment.

The Court found its interpretation was confirmed by Guidelines § 15378, which defines "project" as 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[,]" etc. (Emph. added.) Observing that the Guidelines are entitled to great weight unless clearly unauthorized or erroneous, the Court held enactment and amendment of a zoning ordinance is only a project if it *also* creates potential for a direct or indirect physical change in the environment. (Also citing *Wal-Mart Stores, Inc. v. City of Turlock* (2006) 138 Cal.App.4th 273, 286, fn. 7 [concurring that CEQA Guidelines have adopted this construction of statutes defining "project"].)

The Court Of Appeal's Rejection Of Other Case Law Relied On By UMMP

The Court of Appeal also rejected UMMP's reliance on *Rominger v. County of Colusa* (2014) 229 Cal.App.4th 690, which held that in enacting § 21080(a) the Legislature had determined certain activities – including the tentative subdivision map approval at issue in that case – "*always* have at least the *potential* to cause a direct physical change or a reasonably foreseeable indirect physical change in the environment." Noting that the Third District's *Rominger* opinion was not binding on it, the Court found *Rominger's* analysis unpersuasive "to the extent" it was interpreted "to mean that *each* activity listed in [§ 21080(a)] necessarily constitutes a CEQA project" and, in a footnote, also indicated that *tentative subdivision map* approvals – the type of lead agency activity at issue in *Rominger* – are different in nature than zoning ordinance enactments or amendments. In another footnote, after rejecting UMMP's attempted reliance on *Muzzy Ranch*, the Court expressed its view that "not all laws that a party may choose to label as a "zoning ordinance" because they touch upon the use of land will necessarily present the kind of potential impacts to the environment that will qualify them as projects under CEQA."

The Court Of Appeal's Rejection Of UMMP's Arguments That The Ordinance May Cause Reasonably Foreseeable Indirect Physical Impacts

Having rejected UMMP's *categorical* argument that enactment of the Ordinance was a CEQA project as a matter of law, the Court turned next to examining whether it may cause *reasonably foreseeable* indirect physical changes in the environment or, conversely, whether any potential changes were so "speculative or unlikely" as to render environmental review "premature." Per the Court: "[T]o the extent possible, we examine generally whether 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." The Court considered, and in turn rejected, each of UMMP's three above-stated environmental impact arguments.

First, UMMP's "fundamental assumption" that the Ordinance would render it more burdensome for patients to travel to cooperatives was factually and logically unsupported and unduly speculative. While the record was not well developed as to how many cooperatives actually existed in the City prior to the Ordinance's adoption or where they were located, it was clear that no *legal* cooperatives existed, that City authorities already treated any cooperatives as public nuisances, and that City had been successful in abating a great many – over 100 between 2011 and 2012. Since the Ordinance did nothing to increase City's abatement proceedings against illegal cooperatives, or its abatement powers, "UMMP's assumption that the Ordinance will significantly reduce the number of illegal cooperatives [as compared to the existing condition] is speculative and unfounded." To the contrary, the Court held the Ordinance would increase access to *legal* cooperatives by creating the ability to establish 30 such cooperatives across numerous geographic districts and locations, thus providing opportunities for access without necessitating that patients travel over long distances.

The Court likewise held UMMP's argument that the Ordinance may induce indoor cultivation and associated impacts (including increased electricity use) because patients "will decide to undertake their own indoor cultivation … rather than travel to inconveniently located cooperatives" failed because it was "based on the same unwarranted assumption," as well as other "pure speculation." Further, UMMP's arguments in this regard were undermined by the Ordinance's limitation to "commercial retail operations," which ensured it would "not require small groups of individual patients who informally grow and share marijuana to obtain a [CUP] if they are not engaging in [such] operations."

Finally, UMMP's argument that the Ordinance would cause "displaced development" resulting in "new construction" and associated impacts was also "purely speculative" – there was no basis "to assume that the establishment of the cooperatives permitted under the Ordinance will require any new buildings to be constructed, as cooperatives could simply choose to locate in available commercial space in an existing building." Also, if a CUP application would entail new construction, appropriate CEQA review would be required at that time. Per the Court: "As it is impossible to know whether the enactment of the Ordinance will result in any new construction, it is premature to require that the City perform a CEQA analysis at this point based on the mere possibility of new construction." (Citing *Friends of the Sierra Railroad v. Tuolumne Park & Recreation Dist.* (2007) 147 Cal.App.4th 643, 657.)

Conclusion And Implications

In concluding its opinion, the Court summarized as follows: "Having considered and rejected each of the three categories of possible environmental impact from the enactment of the Ordinance identified by UMMP, we conclude that the enactment of the Ordinance does not constitute a project as defined in CEQA because it does not have a potential for resulting in a reasonably foreseeable indirect physical change in the environment."

The Court's opinion is a useful contribution to CEQA jurisprudence addressing the fundamental definition of a "project." Its thoughtful interpretation of CEQA's jurisdictional "project" prerequisite, and its thorough analysis of the required component of potentially causing *reasonably foreseeable* indirect physical environmental impacts, quite helpfully "drill down" on the essential nature of a CEQA "project." The Court makes clear that, despite the illustrative examples of projects provided in Public Resources Code § 21080(a), and overbroad statements in *Rominger*, adoption or amendments of zoning or land use ordinances are not invariably "projects" subject to CEQA review; rather, the nature and reasonably foreseeable effects of the particular ordinance at issue must be examined to answer the threshold legal question whether its adoption qualifies as a "project." The Court also interestingly noted that: "When the potential physical changes that may be caused by a public agency's activity are unduly speculative, the issue of whether that activity constitutes a project for purposes of CEQA, may "merge for all practical

purposes" with the issue of whether it is premature to conduct an environmental review." (Citing *Friends of the Sierra Railroad, supra,* 147 Cal.App.4th at 657, fn. 2.) Thus, the fact that the City's "zoning ordinance" required a CUP to be applied for and obtained in the future before any cooperative could actually be established under it clearly buttressed the Court's conclusions that CEQA review of the Ordinance's approval would be premature and that it was not a "project."

This case is good news for local agencies that want to reasonably regulate land uses – including marijuana dispensaries – without having to conduct unnecessary, unduly speculative and premature CEQA review of the future projects that may emerge under these ordinances and which are capable of being reviewed in a more concrete form under CEQA further "down the road."

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