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FILED
ALAMEDA COUNTY

MAR 05 2012

CLERK OF THE SUPERIOR COURT

By *Pam Williams*
Deputy

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA**

California Building Industry Association,
Petitioner and Plaintiff

vs.

Bay Area Air Quality Management District,
Respondent and Defendant.

Case No. RG10-548693

Statement of Decision

Petitioner and Plaintiff, California Building Industry Association (CBIA),
challenged the June 2, 2010 decision of the Bay Area Air Quality Management District
(BAAQMD) to adopt its Resolution No. 2010-06 (1 AR 01-4)¹. By its resolution, it
adopted its new California Environmental Quality Act (“CEQA”) air quality thresholds of
significance (the Thresholds). After this court’s orders on demurrer, only CBIA’s Second

¹ Citations to the Administrative Record take the Format of “[Volume] AR [Page Number]”.

Claim for Relief (Violation of CEQA) and Third Claim for Relief (“Arbitrary & Capricious Rulemaking Without Rational Basis”) remained in controversy. This matter came on regularly for hearing on the Petition for Writ of Mandate on January 9, 2012 in Department 24. Appearing for CBIA was Andrew B. Sabey, Esq. and Christian H. Cebrian, Esq. of Cox, Castle and Nicholson LLP. Appearing for BAAQMD was Ellison Folk, Esq. and Erin Chalmers, Esq. of Shute, Mihaly & Weinberger LLP.

After hearing the arguments and considering all papers filed with the court, including the certified administrative record, the court issued an oral tentative decision granting the Petition for the Writ of Mandate and directed CBIA to prepare a Proposed Statement of Decision for the court’s review and consideration. Having considered CBIA’s Proposed Statement of Decision, the Court issued a Proposed Statement of Decision, and has, since, considered the Objections filed by BAAQMD on February 29, 2012. Good cause appearing therefore, the Petition is GRANTED.

BACKGROUND

BAAQMD is a public agency; a regional air pollution control district as described in Health & Safety Code § 40000, *et seq.* It is charged with the primary responsibility for control of air pollution from all sources other than motor vehicle emissions in its region. (Health & Safety Code § 40000).

In furtherance of its important charge, BAAQMD created and adopted a set of Air

Quality CEQA Thresholds of Significance. The adoption of the thresholds included the thresholds themselves, and the Resolution that BAAQMD and all other lead agencies in the district apply BAAQMD's Air Quality Thresholds of Significance on all CEQA projects, (1 AR03-4) and, further, that projects failing to meet the Thresholds "will normally be determined to have a significant effect on the environment for purposes of CEQA."(IAR 03.)

Prior to its adoption of Resolution 2010-06, BAAQMD did not engage in any CEQA analysis. BAAQMD maintains the position that CEQA does not apply to its discretionary act of the promulgation of the Thresholds on the theory that its Resolution is not a CEQA "project."

CBIA asserts four arguments in support of its Petition:

First, CBIA argues that the promulgation of the Thresholds is a CEQA "Project" and, as such, must be evaluated in the manner required by CEQA.

Second, CBIA argues that BAAQMD's Thresholds are arbitrary and capricious because they mandate a finding of "significant environmental effect" that is contrary to CEQA. The argument is that the Thresholds require an impermissible evaluation "of the environment on the project" and that such analysis imposes an improper requirement on the proponent of any project which has the effect of requiring a higher level of CEQA review solely because of the improper requirement.

Third, CBIA argues that the Thresholds include thresholds, for which no substantial

evidentiary support can be found in the administrative record, thus violating CEQA's requirement that thresholds of significance be supported by substantial evidence.

Fourth, CBIA argues that BAAQMD's promulgation of the Thresholds fails the "rational basis test" because substantial evidence does not exist for agency approval.

BAAQMD responds that the adoption of the Thresholds is not a "project" under CEQA. This argument has three parts: first, that it is not a "project" and thus the matter of its CEQA compliance is not ripe for adjudication; second, it is not a "project" and thus no environmental review is required; and third, even if the promulgation of the Thresholds were a project it would be exempt from CEQA review under the "common sense exemption" found in CEQA Guidelines § 15061(b)(3)².

BAAQMD also argues that while its Thresholds do require an analysis of the impact of the baseline air quality on a CEQA construction project, such an analysis is required by CEQA to evaluate air quality impacts to the health of people who may later reside in or visit a proposed construction project.

Finally, BAAQMD argues that the Thresholds are supported by substantial evidence and that the Thresholds are not arbitrary or capricious.

DISCUSSION

A CEQA analysis must be performed at some level for any "project". The

² CEQA Guidelines are found at California's Code of Regulations title 14, chapter 3. §15000-15387 ("Guidelines".)

legislature in 1994, defined “project” in Public Resource Code § 21065, to include any activity directly undertaken by any public agency which may cause either a direct physical change in the environment or a reasonably foreseeable indirect physical change in the environment. This definition has been the subject of multiple appellate determinations which have made clear that the definition of “project” calls for a broad reading. See *e.g.* *Muzzy Ranch Co. v. Solano County Airport Land Commission*, (2007) 41 Cal 4th 372, (“Muzzy Ranch”); *Plastic Pipe and Fittings Association v. California Building Standards Commission*, (2004) 124 Cal App 4th 1390; *Azuza Land Reclamation Co. v. Main San Gabriel Watermaster*, (1997) 52 Cal App 4th 1165 and *City of Livermore v. Local Agency Formation Commission*, (1986) 184 Cal App 3rd 531.

The court finds that BAAQMD’s promulgation of the Thresholds is a “project” under CEQA and, as such, BAAQMD is obligated by CEQA to evaluate the potential impact on the environment consequent to the project. The promulgation of the Thresholds fits the Public Resources Code § 21065 definition; it is a discretionary activity directly undertaken by a public agency which may cause a reasonably foreseeable indirect physical change in the environment. (Public Resources Code § 21065.)

The evidence in the administrative record supports the position that the promulgation of the Thresholds is intended to cause a change in the environment. See *e.g.* 1 AR 24, 1 AR 68, 29 AR 6584, 29 AR 6590, 29 AR 6643, 29 AR 6702.

While the evidence is not overwhelming, it does raise a fair argument that the implementation of the Thresholds may cause a reasonably foreseeable indirect change in

the environment.

BAAQMD is incorrect that the challenge to the Thresholds is not ripe. The Thresholds here are much more like the “guidelines” in *Communities for a Better Environment v. California Resources Agency*, (2002)103 Cal App 4th 98 than they are like the “guidelines” in *Pacific Legal Foundation v. California Coastal Commission*, (1982) 33 Cal 3rd 158. The action in *Pacific Legal Foundation v. California Coastal Commission* was a challenge to the policy underlying a set of guidelines relating to public access. The court determined that the challenge was not ripe as “the guidelines are not mandatory...but rather adopt a flexible approach: the Commission is to determine the appropriateness of access exactions on a case-by-case basis.” (*Pacific Legal Foundation v. California Coastal Commission*, (1982) 33 Cal 3rd 158, 174.) In contrast, *Communities for a Better Environment v. California Resources Agency* was a challenge to the CEQA guidelines promulgated by the California Resources Agency applicable in every relevant case and not subject to any case-by-case appropriateness determination. While the Thresholds are mandatory only on BAAQMD itself, they are not mandatory on other agencies. The Thresholds are not flexible and, moreover, the Thresholds do not provide for a further determination by BAAQMD of the appropriateness of their application in any particular proposed project. The matter before the court presents a concrete legal dispute ripe for judicial evaluation.

BAAQMD is also incorrect in its contention that the evidence in the administrative record cannot support a fair argument that the Thresholds might discourage urban infill

development, encourage suburban development or change land use patterns, and/or is too speculative to support a fair argument that such an environmental impact could occur. The controlling case for this view is *California Unions for Reliable Energy v. Mojave Desert Air Quality Management District*, (2009), 178 Cal App 4th 1225, see also, *Plastic Pipe Fittings Association v. Californian Building Standards Commission*, (2004) 124 Cal App 4th 1390.

BAAQMD is also incorrect in its assertion that even if the promulgation of the Thresholds is a project, the common sense exemption found in Guidelines § 15061(b)(3) applies to the Thresholds á la *Muzzy Ranch* (*Muzzy Ranch Co. v. Solano County Airport Land Use Commission*, (2007) 41Cal 4th 372). The drawbacks with that assertion are clear. While in *Muzzy Ranch*, the agency made a finding in its resolution that the land use plan was not a CEQA project, which is not dissimilar to the instant case, the agency also filed a “Notice of Exemption” with the County Clerk, a pivotal point which is absent here. The Administrative Record here is devoid of any Notice of Exemption from the requirements of CEQA or any determination that the project is exempt from CEQA (other than that the contention that it is not a “project”) or any other assertion that the exemption might be applicable. In contrast, the filing of the Notice with the County Clerk in *Muzzy Ranch* was the assertion that the agency had made its determination that it could be seen with certainty that there is no possibility that its activity in question, the TALUS, may have a significant effect on the environment, thereby qualifying for the common sense exemption.

The absence here of that required (see *Muzzy Ranch* 41 Cal 4th 372,391) Notice

leads the court to conclude that the common sense exemption argument is now raised as a post-hoc justification for the purpose of this litigation. As such it must be rejected even if the record could have supported a common sense exemption.

Independent of the court's determination that the lack of the required Notice is a fatal defect to the assertion of the common sense exemption, the court also finds that the record does not support the exemption because a fair argument was raised before the agency that the Thresholds might result in displaced development or be a barrier to urban infill development.

It directly follows from the above that the promulgation of the Thresholds is a CEQA "project", that it is not exempt from CEQA review, and that the approval of the project without any CEQA environmental evaluation was an abuse of discretion by BAAQMD. For that reason the Thresholds must be invalidated by the court.

THE THIRD CAUSE OF ACTION

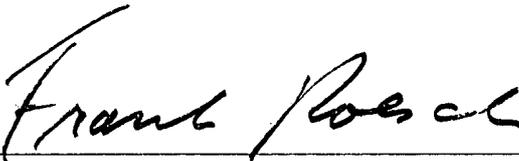
CBIA Also attacks the substance of the Thresholds as illegally requiring an analysis of the air quality effect of the existing baseline environment on a proposed project in addition to the effect on the air quality baseline as a consequence of a proposed project.

The Court, however, does not reach this issue as the court has determined that BAAQMD's promulgation of the Thresholds must be set aside for its failure to perform any CEQA analysis on such a project.

CONCLUSION

For the reasons stated above, the Petition for Writ of mandate is GRANTED. The Court's Writ will issue requiring Respondent to set aside its Resolution No. 2010-06 and to take no further action to disseminate the Thresholds as a BAAQMD approved set of air quality thresholds until and unless BAAQMD fully complies with its obligations under CEQA.

Date: March 5, 2012



Frank Roesch
Judge of the Superior Court

CLERK'S CERTIFICATE OF SERVICE BY MAIL
CCP 1013a(3)

CASE NAME: California Building Industry Association
Vs
Bay Area Quality Management District

ACTION NO.: RG10-548693

I certify that the following is true and correct: I am the clerk in Dept. 24 of the Superior Court of California, County of Alameda and not a party to this cause. I served the **STATEMENT OF DECISION** by placing copies in envelopes addressed as shown below and then by sealing and placing them for collection, stamping or metering with prepaid postage, and mailing on the date stated below, in the United States mail at Alameda County, California, following standard court practices.

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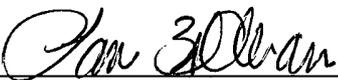
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I declare under penalty of perjury that the following is true and correct

Executed on March 6, 2012 at Oakland, California.

Pat Sweeten
Executive Officer/Clerk

by 
Deputy