

Michael W. Graf
Law Offices

227 Behrens St.,
El Cerrito CA 94530

Tel: 510-525-1208
email: mwgraf@aol.com

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Via TrueFiling

Presiding Justice Stuart R. Pollak
Justice Jon B. Streeter
Justice Tracie L. Brown
1st District Court of Appeal
Fourth Division
350 McAllister Street
San Francisco, CA 94102

RE: Opposition to Request for Publication; *Community Venture Partners v. Marin County Open Space District*, Appellate Case No. A154867

Honorable Justices:

Respondent *Community Venture Partners* hereby submits this letter in opposition to the request of the California Business Properties Association (“CBPA”) for publication of the Court’s opinion in this matter filed on January 24, 2020.

In this case publication is unwarranted.

First, the Court’s discussion of *Save Tara v. City of West Hollywood* (“*Save Tara*”) (2008) 45 Cal. 4th 116, does not provide any new discussion of CEQA law but instead merely applies existing law to a set of facts, which the Court determines does not meet the ‘*Save Tara*’ standard that the agency, as a practical matter, “committed itself to the project as a whole or to any particular features.” 45 Cal. 4th at 139. Rather than establish any new law or mode of legal reasoning, the Court’s opinion merely refers to selected statements in the record that suggest that District officials were merely ‘recommending’ the proposed project as a candidate for approval. At the same time, the opinion appears to disregard the practical circumstances surrounding the District’s November 29, 2017 ‘approval’ of the project, in which the District had concluded that, based on its non-CEQA “change in use evaluation process,” the addition of bicycle use on the Bob Middagh Trail could be accommodated in a safe and sustainable manner and would not have significant effects.” See AR 93 3369. In short, nothing in the Court’s discussion on this issue contributes to a greater understanding of how *Save Tara* should be interpreted.

Second, the Court’s discussion of CEQA tiering under Public Resources Code § 21094 vis a vis utilization of Public Resources Code § 21166 also does not add any new law on this topic. CBPA claims that the Court’s opinion clarifies confusing language in *Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307, 1319, but in fact the Court simply distinguished that case based on the different land use - mining - proposed in the new project that was never considered or

envisioned by the prior program EIR. *See* Slip. Op., p. 19 (“By contrast, in *Sierra Club*, section 21166 did not control, because a proposed mining project was unquestionably inconsistent with the broader program where the applicant sought to change the permissible uses for a parcel of land that had been designated for agricultural and groundwater recharge uses only.”)

To the extent the Court’s opinion makes new law in this area, a substantial concern is raised whether such law, were it to be published, would be consistent with CEQA.

Here, the Court identifies the test for whether a subsequent site specific project should be considered ‘within the scope’ of a prior program EIR prepared for a larger overall ‘plan’ as “typically involv[ing] two subsidiary issues: whether the proposed project is consistent with the approved program; and whether the program EIR fully discussed the site-specific impacts of the later project. (*See* Remy, et al., *Guide to CEQA* 11th Ed., pp. 650–651.)” *See* Slip Op. p. 19.¹ The opinion then concludes that the project was ‘consistent’ with the RTMP, in that the RTMP envisioned that future trail projects would need to be approved. However, the Court’s opinion never returns to the second prong of the Remy et al. test, *i.e.*, whether the program EIR fully discussed the site-specific impacts of the later project. Instead, the opinion provides a general discussion supporting the Court’s view that the “RTMP EIR adequately assesses the Project’s potential environmental impacts.” *See* Slip. Op. pp. 22-25. Problematically, this discussion does not address the actual ‘within the scope’ test posited, *i.e.*, whether the program EIR fully discussed the *site-specific impacts of the later project*, which, in this instance, it surely did not. *See* AR 59 2734 (“As proposed and assessed in the RD TPEIR, the RTMP is *even less specific than a local general plan or a comprehensive zoning ordinance.....No individual road or trail actions are identified or programmed in the RTMP.*”) (emphases added). *See also* AR 62 3012 (RTMP “does not prescribe lists of road and trail modification projects in specific locations.”)

The Court’s relatively superficial analysis here of whether a subsequent site specific project falls ‘within the scope’ of a prior program EIR has the potential to undermine the tiering principles enshrined in CEQA, which identifies ‘tiering’ as the preferred method for tailoring the scope of the relevant environmental review to the level appropriate for the project at issue. *See* Pub. Res. Code §§ 21093-21094. *Friends of Mammoth v. Town of Mammoth Lakes Redevelopment Agency* (2000) 82 Cal.App 4th 511, 527-528. *See also* *Koster v. County of San Joaquin* (1996) 47 Cal. App. 4th 29, 38 (tiering allows an agency to “focus upon the issues ripe for decision at each level of environmental review and in order to exclude duplicative analysis of environmental effects examined in previous environmental impact reports.”)

Here, the RTMP was never intended to address all the subsequent issues that might arise from future District trail projects based on the site specific environmental settings for each trail location. Such issues might range from locating trails near sensitive wildlife, allowing for trail development along streams or in the vicinity of residential areas, development through rare or listed plant populations *etc.* In contrast, the general policies and analysis contained in the RTMP EIR cannot substitute for a full analysis of the site-specific impacts of later projects. For example, the opinion at one point states that “one study referenced in the Draft EIR [for the RTMP] determined that ‘mountain biking did not appear to have significantly different impacts on vegetation or soils

^{1/} This citation was provided in Respondent’s Opposition Brief at p. 25, n. 3.

than other forms of use.” Slip. Op., p. 22. In this manner the Court’s opinion suggests that the site specific soil or vegetative conditions need not be analyzed for any trail for which mountain biking is proposed, even if such conditions vary considerably from those on which the general statements in the program EIR are based. Such an approach is directly contrary to CEQA’s emphasis on a full and accurate description of the environmental setting relevant to the site-specific project. *See* 14 Cal. Code Regs. § 15125; *Friends of the Eel v. Sonoma County Water Agency* (2003) 108 Cal. App. 4th 859, 874.

In sum, the Court’s opinion opens the door for agencies to adopt a broad and untethered interpretation of what it means for a subsequent, more specific project to fall within the scope of a program EIR, thereby precluding CEQA review for impacts that were not addressed at any level of specificity in the prior planning documents. For that reason, publication should not be granted.

Finally, and of most concern, the Court’s opinion appears to establish new and *incorrect* CEQA law that an agency need not consider the social effects of a project that are caused by physical changes to the environment. Here, the Court’s opinion provides only a cursory reference to the operative CEQA Guideline § 15131(b), *see* Slip. Op., p. 21, but then never returns to that Guideline section in its subsequent discussion of how social effects should have been considered in this case. *See* Slip. Op., pp. 24-26. Indeed, the Court’s conclusion that social effects need not to have been considered erroneously relies on CEQA Guideline § 15131(a), which applies to a different scenario in which social effects *cause* subsequent physical impacts to the environment, as opposed to the other way around. *See* Slip. Op., p. 25 (“CEQA does not require analysis of “the psychological or social impacts stemming solely from the prospect of sharing the trail with other users.” (Guidelines, § 15131, subd. (a).)”).

In this case, there is no question that the restructuring of the Middagh trail into a multi-use trail allowing for mountain biking will have impacts to the *physical environment* in terms of aesthetics, noise, erosion, trail condition and safety. *See e.g.*, ROB, pp. 26-39. Indeed, the addition of bikes themselves constitutes ‘traffic’ that must be considered as part of the changed physical environment. *See e.g.*, 14 Cal Code Regs. § 15360 (CEQA ‘environment,’ includes “both natural and *man-made* conditions,”) (emphasis added); CEQA Guidelines § 15064(d)(1) (examples of “direct physical changes in the environment are the dust, noise, and *traffic of heavy equipment* that would result from construction of a sewage treatment plant.”) (emphasis added.); *Taxpayers for Accountable School Bond Spending v. San Diego Unified School Dist.* (2013) 215 Cal.App.4th 1013, 1053 (“The Guidelines define the ‘environment’ as ‘the physical conditions which exist within the area which will be affected by a proposed project ... [and] includes both natural and man-made conditions.’ Vehicles, whether driven or parked, in effect constitute manmade conditions and therefore may constitute physical conditions in an area that may be affected by a proposed project.”)

Despite the clear physical changes to the environment that will be caused by adding mountain biking, the opinion appears to hold that the significant social effects of this change need not be analyzed. *See* Slip. Op., pp. 24-26. In doing so, the opinion relies on a federal court decision, which was cited by Respondent as *evidence in the record - not controlling case law* – showing the potential for impacts to the physical environment and to existing non-bike users caused by the addition of bikes on National Park Service trails in Marin County. *See* ROB, p. 32 (“[T]he court denied these groups’ challenge based on the ‘[a]mple evidence...that bicycle access to all trails increases incidents

of user conflict and compromises visitor safety.’ AR 547 5886.”) Rather than consider this case as additional record evidence for the potential for bikes to cause significant impacts to the physical environment and other users, the Court’s opinion instead relies on the decision as a *legal basis* for claiming that social ‘user conflict’ issues need not be addressed. *See* Slip Op. p. 24 (“CVP ignores the aspect of Babbitt that has persuasive value—its analysis of the National Environmental Policy Act (NEPA).”) The problem with this holding is that NEPA cannot have ‘persuasive’ value in this instance as NEPA differs on precisely this issue of whether social effects should be considered where based on physical changes to the environment. Here, NEPA has no provisions or CEQA regulations that in any way correspond to the CEQA and CEQA guideline provisions at issue in this case. *See* Pub. Res. Code § 21080(e)(3); § 21082.2(c) CEQA Guideline § 15131(b); §§ 15384 (a)-(b). Thus, it cannot have any ‘persuasive’ value with respect to the issue of social effects caused by physical changes to the environment.

The Court’s opinion on this issue effectively eliminates CEQA Guideline § 15131(b) as an active provision under CEQA law, as well as CEQA’s direction that ‘substantial evidence’ must include evidence of social or economic impacts *caused by physical impacts on the environment*. *See* Pub. Res. Code § 21080(e)(3); § 21082.2(c); CEQA Guidelines §§ 15384 (a)-(b). As such, publication of the opinion is inappropriate as it would create conflicts with CEQA law as well as other published decisions. *See e.g., National Parks & Conservation Assn. v. County of Riverside* (1999) 71 Cal.App.4th 1341, 1361-1362 (loss of aesthetic recreational experience is CEQA impact); *Baldwin v. City of Los Angeles* (1999) 70 Cal. App. 4th 819, 842 (project has significant effect on the environment if it conflicts “with established recreational... uses of the area.” (citing CEQA Guidelines, App. G (w)); *Christward Ministry v. Superior Court* (1986) 184 Cal. App. 3d 180, 197 (“[E]ffects of a project caused by increased noise and traffic on petitioner’s religious retreat activities had to be reviewed under CEQA.)

For all these reasons, Respondent requests that the Court deny CBPA’s request for publication of this decision.

Very truly yours,

By: /s/ Michael W. Graf
Michael W. Graf