

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

**RESPONDENT'S ANSWER TO AMICUS BRIEFS FILED BY MARIN COUNTY
BICYCLE COALITION AND CALIFORNIA STATE ASSOCIATION OF
COUNTIES AND LEAGUE OF CALIFORNIA CITIES**

COMMUNITY VENTURE PARTNERS,
Plaintiff and Respondent

vs.

MARIN COUNTY OPEN SPACE DISTRICT,
Defendant and Appellant

APPELLATE CASE NO: A154867
Marin County Superior Court Case No. CIV 1701913
Judge: Honorable Paul M. Haakenson

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I. INTRODUCTION AND SUMMARY

Respondent Community Venture Partners (“Respondent”) submits this Answer to the Amicus Briefs filed by Marin County Bicycle Coalition (“MCBC”) and the California State Association of Counties and League of California Cities (“City”) (and together, “Amici.”)

Amici’s Briefs are in large part reiterations of the briefs filed by Appellant Marin County Open Space District (“District”) in appealing the trial court’s decision that the District did not comply with the California Environmental Quality Act (“CEQA”), or its own Road and Trail Management Plan (“RTMP”), when it approved the Project in this case. As discussed in Respondent’s Opposition Brief, the Project converts the Middagh Trail, a local hiking and equestrian trail in the Alto Bowl Preserve in Marin County into a mountain biking route that can be used as a bike connector between Mill Valley and Corte Madera.

Amici’s Briefs argue that this conversion has no potential for significant impacts that were not already considered in the Environmental Impact Report prepared for the RTMP in 2014 (“RTMP EIR”), an argument inextricably linked to a flawed legal and factual assertion, that the impacts of this trail conversion have, as a *matter of law*, no CEQA-recognized impacts on the existing users who have used the Middagh trail for hiking

and horseriding for decades without bikes being allowed. As discussed in Respondent's Opposition Brief ("ROB"), however, the impacts of this conversion on existing users will be significant due to the changes in aesthetics, noise, recreational quality and safety. Amici dismiss these impacts as somehow outside the purview of CEQA review, based on the theory that the change in trail design and addition of bikes to this historical hiking and equestrian trail will have no impacts to the 'environment' and thus any effects on humans who have recreated in the Project area for decades cannot be recognized under CEQA.

As is true for the District's arguments on appeal, this argument fails.

Here, Amici characterize the CEQA 'environment' as limited to the 'non-human' environment, consisting of air, water, flora and fauna. *See e.g.*, MCBC Brief, p. 26. However, the CEQA 'environment,' includes "both natural and *man-made* conditions," *see* 14 Cal Code Regs. ("CEQA Guidelines") § 15360 (emphasis added), which include non-natural conditions such as 'objects of aesthetic significance,' Pub. Res. Code § 21060.5, as well as 'traffic' and even 'parking' conditions. *See e.g.*, *Taxpayers for Accountable School Bond Spending v. San Diego Unified School Dist.* (2013) 215 Cal.App.4th 1013, 1051-1053. MCBC asserts that it has 2,000 members with interests in riding on the Middagh Trail. *See e.g.*,

MCBC Brief, p. 10. The proposition that the addition of these mountain bikers will have no ‘environmental’ impacts is not supported by CEQA law.

Amici make further arguments that the District properly ‘tiered’ its environmental review to the RTMP EIR, as embodied by the District’s ‘Consistency Assessment.’ However, Amici fail to acknowledge that neither the RTMP EIR or Consistency Assessment ever reviewed the site specific impacts of a project such as in this case, where a long time local hiking and equestrian trail is converted to a mountain biking connector route without additional CEQA analysis. The RTMP EIR acknowledges it was not intended to address site specific project impacts, *see* AR 59 2734, AR 62 3012, while denying that such impacts of trail use conversion are even cognizable under CEQA. *See* AR 59 2241.

Amici repeat many of the District’s arguments on the proper timing and role of an initial study, or how once a program EIR is prepared there is typically no further need for CEQA review. However, as discussed in Respondent’s Opposition Brief and more fully below, these arguments are either red herrings to the central issues on appeal, or contrary to fundamental CEQA policies applicable to tiering.

Amici argue that the trial court’s decision represents a catastrophic expansion of CEQA law that will stymie future decision-makers in

choosing available policy options. Respondent has two responses.

First, the trial court's decision is measured and based on applicable CEQA law. Social effects of CEQA projects *can* be considered when based on changes to the environmental conditions - both natural and man-made- in the project area. The trial court's ruling is *not* an expansion of CEQA.

Second, the application of this long-standing CEQA law to the specific facts of this case - involving a rare combination of sensitive recreational resources with overwhelming documented evidence showing the potential for adverse impacts and user displacement - will not open the door for unwarranted CEQA review where none is called for. Here, the vast majority of District trail projects will not trigger the thresholds crossed by this particular Project. Further, to the extent that CEQA review *is* required, such review can provide District decision-makers with valuable information about significant impacts that may occur and options for alternatives to avoid those impacts where feasible. This is what CEQA requires, to ensure that government decision making on such important land use issues remains accountable and rational to interested citizens. This Court should uphold the trial court's decision, which preserves these CEQA principles. *See e.g.*, Pub. Res. Code § 21000(d) (CEQA assesses "critical thresholds for the *health and safety* of the people of the state.")

II. FACTUAL RESPONSES

A. MCBC'S ASSERTION THAT THERE WAS BROAD PUBLIC SUPPORT TO OPEN UP THE MIDDAGH TRAIL TO MOUNTAIN BIKING IS INCORRECT AND IRRELEVANT.

MCBC identifies itself as an organization” whose “core mission ...focuses on facilitating the increased use of bicycles as a means for transportation and recreation.” MCBC Brief, pp. 8-9. MCBC has a direct interest in this Project as the original proponent of the plan to open the Middagh Trail to bikes, *see* MCBC Brief, pp. 10-11, AR 67 3229-3237, despite the RTMP policies to “apply increased trail use restrictions within certain areas to enhance safety, minimize conflicts between trail users and protect natural resources” including in areas “proximate to stables” and “traditionally heavily traveled by equestrians.” AR 62 3145 (Policy SW 16). *See also* MCBC Brief, p. 11 (“Amicus has a strong interest in the outcome of this case because the Court’s decision could adversely affect the District’s approval of the trail project and the associated benefits of this important trail segment for its members and community as a whole.”)

Given its vested interest in having the Project approved and implemented for its member bikers, it is not surprising that MCBC parrots the District’s assertion made in the administrative proceedings that “82 percent of approximately 400 public commenters were in support of

allowing bicycle access on the Trail.” MCBC Brief, p. 11.

As a factual matter based on the record, this is false. Rather than cite to the comments in the record, MCBC asserts the fact as true, without accounting for the 1,088 local citizens who signed a petition strongly opposed to opening the Preserve to biking, *see* AR 252 4729-4840, submitted to the District prior to the Project approval. *See* AR 281 4929.

Even if one were to ignore the petition signatures opposing the Project, MCBC’s assertion is still inaccurate. Instead, a review of individual comments received display an approximately equal number of comments on both sides of the issue, with the *vast majority of local citizens opposed*, while most of the pro-biking comments coming from email communications from biking advocates responding to MCBC’s internet requests for form letters from its members as well as biking advocate allies throughout the region. *See* AR Rows 273-466.

Finally, the issue of the Project’s relative popularity is irrelevant to the issue on appeal of whether the District proceeded lawfully in changing the use on the Middagh Trail to allow biking without CEQA review. While nothing in CEQA ultimately prevents the District from making the policy decision to allow bikes on a particular trail, the District must do so in accordance with CEQA, including the fundamental requirement that the

District not take any action with significant impacts where there are feasible alternatives or mitigation that would avoid those impacts. *See e.g.*, Pub. Res. Code §§ 21002, 21081.

MCBC is an advocacy group for expanding mountain biking to all trails in Marin County, and thus sees the issue purely through a partisan lens, with success or failure based solely on its ability to sway the local politics. Here, the record shows that there was widespread opposition to the proposal to open the Preserve to mountain biking among those current trail users most likely to be adversely physically affected by the introduction of loud, fast moving vehicles into a hiking and horseback riding area. Thus, MCBC's suggestion that it is merely a small group of 'disgruntled' citizens who oppose the District's determined intent to convert the Preserve and Middagh Trail to a bike connector route is unfounded.

B. THE COUNTY DID NOT CONDUCT A CEQA REVIEW PROCESS IN APPROVING THE PROJECT TO OPEN UP THE MIDDAGH TRAIL TO MOUNTAIN BIKING.

Amici generally portray the District's Project approval as complying with CEQA and the RTMP based on Amici's characterization of the District's process as composed of an initial 'feasibility' analysis, followed later by a 'CEQA' review. *See e.g.*, MCBC Brief, pp. 16-18. This portrayal distorts the procedural history of the District's approval, as outlined in

detail in Respondent's Opposition Brief at pages 19-21 & 44-49.

The factual history here shows that the District had decided from an early point that the Alto Bowl Preserve and Middagh Trail would be opened up to biking, due at least in part to heavy lobbying from advocacy groups such as MCBC. This can be seen by the District's pre-ordained process of only considering the MCBC proposal to add bikes to the Middagh Trail while rejecting all other restoration proposals for the area submitted by local groups that did not include a change to open up the area to mountain biking. *See e.g.*, ROB, pp. 60-67. Thus, by the time the District presented a completed "feasibility analysis" of allowing bikes in the Preserve at a community workshop on August 25, 2016, *see* AR 92 3309-3367, the District was already essentially committed to the Project. *See e.g.*, AR 92 3323 ("Staff recommends *change-in-use*....") (emphasis added.)

Following the workshop, the District did *not* conduct CEQA review but instead an abbreviated process culminating in its November 29, 2016 decision to approve the Project. *See* AR 93 3372 ("[A]ddition of bicycle use on the Bob Middagh Trail ...would not have significant effects to natural or cultural resources.") That the District approved the Project at that time is corroborated by subsequent communications by the District's general manager and staff. *See* AR 581 5981; AR 596 6012; AR 598 6014.

Once this decision was made, the District was committed to approving a change of use to install a recontoured Middagh Trail accessible to mountain biking. Seen in this context, the after-the-fact “Consistency Assessment” was nothing more than a post-hoc process designed to bolster a decision already made by the District, contrary to CEQA. *See e.g., John R. Lawson Rock & Oil, Inc. v. State Air Resources Bd.* (2018) 20 Cal. App. 5th 77, 97 (“If post-approval environmental review were allowed, EIR's would likely become nothing more than post hoc rationalizations to support action already taken.”) (citing *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 394.)

III. ARGUMENT

A. THE PROJECT’S IMPACTS TO THE ENVIRONMENT, INCLUDING INDIRECT PHYSICAL AND SOCIAL IMPACTS TO EXISTING USERS OF THE MIDDAGH TRAIL, MUST BE CONSIDERED AS PART OF CEQA REVIEW.

Respondent’s Brief in support of the trial court’s decision argued that “the Project will alter the physical environment by introducing fast moving bikes that affect the physical terrain, aesthetics, noise level and safety conditions in the Preserve, and that “[t]hrough these physical changes, the Project will cause adverse aesthetic, noise, recreational and safety impacts on current hiker/equestrian users of the trail, measured both in physical *and* social effects.” *See* ROB, p. 26. *See also* ROB, pp. 26-45 (discussing how the District

did not address such impacts in its ‘CEQA’ review of the Project.)

Reviewing the City’s and MCBC’s Amicus Briefs, it would not appear as if these parties considered these arguments in any depth. Instead, both the City and MCBC reiterate the legal position, not on point with the facts of this case, that social effects, *standing alone and not related to a project’s physical impacts* to the environment, need not be analyzed under CEQA. *See e.g.*, MCBC Brief, pp. 27-31. This legal argument ignores the fact that, here, the Project’s social impacts are due to changes to the physical environment of the Alto Bowl Preserve and Middagh Trail caused by the Project’s reconstruction of the Trail and introduction of biking as a new, unprecedented use. *See e.g.*, CEQA Guidelines §§ 15064(e); 15131(b); ROB, pp. 28-29.

Respondent answers Amici’s additional arguments below.

1. The ‘Environment’ in this Case Encompasses the ‘Man-Made’ Environment that Includes Bike Traffic on the Middagh Trail.

MCBC argues that “CEQA Specifically Avoids Consideration of the Human Environment” and thus the addition of bikes added to the Middagh Trail – presumably a component of the ‘human’ environment - is not a change to the ‘environment’ that must be addressed as part of a CEQA review process. *See* MCBC Brief, p. 26. This argument, also made by the District in its appellate briefing, is incorrect.

Under CEQA, the ‘environment’ to be considered in evaluating ‘environmental impacts’ under CEQA is not simply the natural world of water, air, fauna and flora, but also includes “man-made conditions.” CEQA Guidelines § 15360. In *Taxpayers for Accountable School Bond Spending v. San Diego Unified School Dist*, *supra*, 215 Cal.App.4th 1013, the court discussed this issue in the context of parking and traffic:

[C]ars and other vehicles are *physical objects that occupy space* when driven and when parked. Therefore, whenever vehicles are driven or parked, *they naturally must have some impact on the physical environment*. The fact that a vehicle's impact may be only temporary (e.g., only so long as the vehicle remains parked) does not preclude it from having a physical impact on the environment around it. Therefore, as a general rule, we believe CEQA considers a project's impact on parking of vehicles to be a physical impact that could constitute a significant effect on the environment.

Id. at 1051 (emphasis added.) The court thereby concluded that changes in parking constituted changes in the environmental condition of an area that must be assessed under CEQA:

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*.’ (Guidelines, § 15360...*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*, thereby requiring a lead agency to study whether a project's impact on parking may cause a significant effect on parking and thus the environment. Furthermore, to the extent the lack of parking affects humans, that factor may be considered in determining whether the project's effect on parking is significant under CEQA. (Cf. Guidelines, § 15064, subd. (e) [*overcrowding of a public facility that causes an adverse effect on*

people may be regarded as a significant effect].

Id. at 1053 (emphases added.)¹ Here, the introduction of bike traffic onto the Middagh Trail is a major change to the environmental conditions on the Trail in that bikes are “physical objects that occupy space” formerly not occupied by bikes. *Id.* at 1051. This change to the ‘environmental conditions’ has the potential for indirect physical *and* social impacts to humans who have used the Trail for decades without bikes and thus must be considered under CEQA.

2. Environmental Impacts Include Changes to Aesthetics, Noise and Traffic Conditions on the Middagh Trail.

Amici’s briefs discuss the social impacts caused by the District’s change in use to allow bikes as merely “subjective psychological feelings” that have no place in a CEQA review process. *See e.g.*, MCBC Brief, p. 27. However, these ‘social effects’ are caused by changes to the environmental conditions in terms of aesthetics, noise, safety conditions, loss of wildlife, trail rutting and erosion and other physical alterations of the environment as experienced by human users. These effects must be therefore considered as

¹Numerous other cases, as well as the CEQA Guidelines, Appendix G, Section XVI, identify the addition of ‘traffic’ as a change in environmental conditions that must be analyzed under CEQA. *See e.g.*, *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013), 57 Cal. 4th 439, 457-459; *Sunnyvale West Neighborhood Assn. v. City of Sunnyvale City Council* (2010) 190 Cal. App. 4th 1351, 1372, 1377; *Fairview Neighbors v. County of Ventura* (1999) 70 Cal.App.4th 238, 240-241.

part of the CEQA analysis. *See* CEQA Guidelines §§ 15064(e); 15131(b) (social effects are considered when those impacts are themselves caused by changes to the physical environment.) The Amici’s briefs ignore this point.

3. The *City of Poway* Case is both Distinguishable and Supports Respondent’s Argument.

Both the City and MCBC rely on *Preserve Poway v. City of Poway* (2016) 245 Cal.App.4th 560 to support their arguments that the impacts of the Project on existing users of the Middagh Trail need not be considered, as they are simply “social and psychological concerns” that 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.” City Brief, pp. 15, 17. *See also* MCBC Brief, p. 27. However, *Preserve Poway* is distinguishable and in fact supports the point that adding bike traffic is a change to the environmental conditions with reviewable effects on existing Trail users.

In contrast to the facts of this case, *Preserve Poway* did not find that social effects of the project on local residents were at all related to the changes in environmental conditions, but were rather due to the psychological impacts of losing ‘community character’ caused by the replacement of a local horse stable with a new housing development, which the court characterized as an “impact[] to the *collective psyche* of Poway's residents.” 245 Cal. App 4th at 578 (emphasis added.) That ‘social effect’ was not caused by a physical

change to the environment and thus was not eligible for CEQA review. *Id.*

In contrast, the court *did* consider changes in the environmental conditions due to the project relating to ‘traffic’ and ‘aesthetics’ but found that these impacts were insignificant and also unrelated to the psychological impacts experienced by residents due to the loss of the horse stables to another housing development. *See id.* at 578 (“[T]here is no substantial evidence creating a fair argument that the Project is visually out of character with the surrounding community.”); at 583 (no impact from traffic.) Critically, none of the loss of community impacts were related to these physical changes. *Id.*

Preserve Poway falls squarely within the CEQA cases finding that the social effects caused by the mere identity of a new land user are not cognizable under CEQA. *See e.g., Friends of Davis v. City of Davis* (2000) 83 Cal.App.4th 1004, 1019 (change in identity of tenant not a physical impact triggering review of social effects); *City of Pasadena v. State of California* (1993) 14 Cal.App.4th 810, 829 (citizens’ fear caused by conversion of building into a parole office is not due to physical change in the environment.)

Here, in contrast to this line of case law, the CEQA impacts of the Project on local citizens that have used and wish to continue to use the Middagh Trail in the future is not due to some abstract opposition to biking or loss of community, but rather the changes in environmental conditions that

will cause indirect physical and social impacts on existing users.

4. The *Building Industries Association* Case is Limited to Situations Where the Environment Has the Potential for Significant Impacts on the Project and Thus Does Not Apply to the Facts of this Case.

The City’s Brief argues that this case is controlled by the Supreme Court’s decision in *California Building Industry Assn. v. Bay Area Air Quality Management Dist.* (“*Building Industry*”) (2015) 62 Cal.4th 369, 381. *See* City Brief, p. 16. In *Building Industry*, the court found that although “public health and safety are of great importance in the statutory scheme,”² CEQA “does not contain language directing agencies to analyze the *environment’s effects on a project.*” *Id.* at 387. In other words, where a new project attracts persons or development to an area with safety or other ‘risks,’ the potential impacts to those future occupants cannot be considered a CEQA impact. *See id.* at 388 (“[W]e must distinguish between requirements that consider the environment’s effects on a project and those that contemplate the project’s impacts on the existing environment.”)

Notwithstanding the City’s arguments, *Building Industry* is not on point with the facts of this case. Here, the proposed Project will have *impacts to*

² The court cited CEQA’s policy provisions at Public Resources Code §§ 21000, subds. (b), (c), (d), (g) and 21001, subds. (b), (d) as “emphasizing the need to provide for the public’s welfare, health, safety, enjoyment, and living environment.” *Id.* at 386.

existing environmental conditions, indeed it will change those conditions in a way that may adversely affect persons currently occupying the Project area as long time users who predate the District’s Project approval by decades. Here it is not the existing environment that will cause adverse impacts, but rather the *changes caused by the Project* to existing environmental conditions that will cause adverse impacts to existing users. Thus the reasoning behind *Building Industry* simply does not apply.³

5. Social Effects are More than Just a ‘Factor’ that Can be Ignored in an Agency’s Analysis of Whether Project Impacts to the Environment are Significant.

MCBC argues that even if the social effects of a project arising from project related changes to environmental conditions may be considered, such effects are only a ‘factor’ in the District’s determination and thus, in this case, “the District appropriately analyzed the Trail Proposal’s impacts under CEQA without allowing social impacts to undermine the required analysis.” MCBC Brief, p. 30. There are two problems with this argument.

First, here, it is clear the District did not believe itself obligated to even

³ *Building Industry* would, in contrast, be applicable were the District proposing to build a trail and attract new users to an area with existing hazards that could cause harm to those users. In that case, the CEQA issue would be whether the proposed project would change the environmental conditions so as to exacerbate those hazards and increase the threat of harm. *See* 62 Cal.4th at 388 (“[P]roject’s potentially significant *exacerbating effects* on existing environmental hazards” may be considered under CEQA.) (emphasis added.)

consider the social effects arising from these changes to environmental conditions, and thus did not even consider these effects as a ‘factor’ in its impact analysis. *See* AR 59 2241, AR 2734, AR 62 3012.

Second, the CEQA Guidelines do not support the proposition that where the adverse social effects from environmental impacts are significant, an agency may nevertheless discount those effects so as not to ‘undermine’ the impact analysis as claimed by MCBC. *See e.g.*, CEQA Guidelines § 15064(e) (“For example, if a project would cause overcrowding of a public facility and the overcrowding causes an adverse effect on people, the overcrowding *would be regarded as a significant effect.*”) (emphasis added.); *id.* § 15131(b) (“[I]f the construction of a road and the resulting increase in noise in an area disturbed existing religious practices in the area...[t]he religious practices would need to be analyzed *only to the extent to show that the increase in traffic and noise would conflict with the religious practices.*”) (emphasis added.)

Here, the combined indirect physical impacts and social effects of converting the Middagh Trail to a destination for mountain bikers seeking a connecting route will be significant, particularly considering the number of potential riders cited by MCBC, to existing long-time users in the absence of enforceable mitigation adopted through the CEQA process. *See* ROB, pp. 29-37. These impacts were never analyzed by the District, in violation of CEQA.

6. Safety Impacts in this Case are Not Unfounded Concerns Regarding Risk, but Rather Foreseeable Physical Impacts to the Health of Existing Trail Users, Which In Turn Lead to Adverse Social Effects Causing User Displacement.

MCBC makes the additional argument that ‘safety impacts’ are not actually CEQA impacts but instead simply social effects based on the unsubstantiated fears of citizens about the dangers posed by mountain biking in Marin County to hikers and equestrians. *See e.g.*, MCBC Brief, p. 29 “[M]uch of the rhetoric (regarding trail user safety) is derived from a perception of conflict and unsubstantiated stories. Thus, safety is not a physical effect, but rather a psychological effect.”)

As discussed in Respondent’s Opposition Brief, the record evidence is overwhelming that trail safety issues are neither speculative or unsubstantiated, but instead actual and foreseeable and thus no different than potential impacts caused by any other health malady such as air or water pollution, toxic exposure etc. *See* ROB, pp. 30-34. Here, MCBC fails to distinguish between speculative fears versus documented foreseeable hazards created by adding adventure seeking mountain bikers to a trail long used by slow moving hikers and horseback riders, many elderly and/or with children. *See id.* & pp. 39-42.

To the extent that MCBC is arguing that CEQA impacts do not include non-speculative threats to human safety, this claim must be rejected as contrary to a legion of CEQA polices, Guidelines and case law. *See e.g.*, *Building*

Industry, supra, 62 Cal.4th at 381 (“[P]ublic health and safety are of great importance in the statutory scheme...”); Pub. Res. Code § 21000(d) (“[I]t is the intent of the Legislature that the government of the state take immediate steps to identify any critical thresholds for the health and safety of the people of the state.”); *id.* § 21083(b)(3) (impact is significant where project causes “substantial adverse effects on human beings.”); CEQA Guidelines, App. G, Section XVI.f (does the project “[c]onflict with adopted policies, plans, or programs regarding public transit, bicycle, or pedestrian facilities, or otherwise decrease the performance or *safety of such facilities*”?) (emphasis added.)

MCBC’s arguments fail to acknowledge the record in this case, which contains 1) hundreds of ‘incident reports’ showing that accidents involving Marin County mountain bikers and hikers and equestrians are not speculative but rather foreseeable, *see* ROB, pp. 31-32 & n. 5; and 2) considerable testimony from local citizens as to this Project discussing their direct – and not imaginary – experiences involving dangerous interactions between hikers, equestrians and adventure seeking mountain bikers. *Id.*, pp. 30-31.

7. Amici’s Argument that this Case Involves Only Policy Disagreements that are Not Subject to CEQA Review is Contrary to CEQA Law and to the Record in this Case.

Amici make the predictable arguments that the impacts caused by converting the Middagh Trail to a mountain bike destination route are not

CEQA impacts but instead simply ‘policy disagreements’ that must be resolved in the political arena. *See e.g.*, City Brief, pp. 16-17 (“The trial court ruling undermines these principles by turning what is essentially a policy dispute between recreational trail users into an environmental litigation matter.”)

This argument fails because it is not the policy dispute that has turned this matter into a ‘litigation matter’ but instead the District’s failure to comply with CEQA in approving this major use change for the Middagh Trail without any CEQA review. Under CEQA, the District has the authority to adopt mitigation or alternatives to avoid the significant impacts of this change on existing users, or even to adopt the Project despite those impacts based on political balancing through a statement of overriding considerations. *See* Pub. Res. Code §§ 21002, 21081(b). In the absence of CEQA review, however, the District’s actions become unaccountable, leading to public confusion, outrage and loss of faith in government decision-making. *See e.g.*, ROB, pp. 44-45.

B. THE DISTRICT’S TOTAL RELIANCE ON THE RTMP EIR FOR THE CEQA REVIEW OF THIS SITE SPECIFIC PROJECT CONVERTING THE MIDDAGH TRAIL TO A MOUNTAIN BIKING DESTINATION IS CONTRARY TO CEQA.

Amici each argue that the District’s ‘tiering’ procedure followed CEQA by properly relying on the RTMP EIR as a prior programmatic CEQA document that addressed all potential impacts from this site specific Project. These arguments are mostly addressed in Respondent’s Opposition Brief at

pages 50-60. To the extent Amici raise new issues, they are addressed below.

1. The City’s Arguments that Second Tier Projects that are “Consistent” With the Prior Program EIR Require No Further CEQA Review are Contrary to Law.

The City makes the wrongful assertion that if the Project is found to be ‘consistent’ with the RTMP, then no further CEQA review is required. *See e.g.*, City Brief, pp. 6-7 (“When a local agency conducts a valid consistency review...concluding that a project is consistent with the applicable Program EIR, no further environmental review is required.”); *id.* p. 9 (Subsequent projects that are found to be consistent with a Program EIR do not require ...any ...further environmental review.”)

These assertions are legally flawed. Indeed, in a tiering context, an agency *must first determine that a second tier project is consistent* with the programmatic project and EIR *before it can utilize the tiering process at all.* *See* Pub. Res. Code § 21094(b)(1) (tiering “applies only to a later project that the lead agency determines is ...[c]onsistent with the program, plan, policy, or ordinance for which an environmental impact report has been prepared and certified.”) (emphasis added.)

As discussed in Respondent’s Opposition Brief, CEQA tiering is an iterative process, in which an agency may adopt a program EIR for an overarching plan, with the intent to conduct subsequent CEQA review *where*

necessary on subsequent site specific projects. *See e.g.*, Pub. Res. Code §§ 21093, 21094; CEQA Guidelines § 15152. *See also* ROB, pp. 49-54. Here the problem with the City’s argument in the tiering context is that it conflates ‘consistency’ between a ‘program’ and a subsequent ‘project’ with the separate and more relevant inquiry of whether the issues raised by the subsequent project were ‘adequately discussed’ at a “sufficient level of detail” in the prior program EIR. *See* Pub. Res. Code § 21094; CEQA Guidelines § 15152(f).

Amici also mischaracterize Respondent’s Opposition Brief as arguing that a second tier CEQA document is required for *all* subsequent projects following an EIR, *see e.g.*, MCBC Brief, p. 19, but this is not Respondent’s position. Instead, the need for subsequent CEQA review should be based on the criteria set forth under Pub. Res. Code §§ 21093, 21094 and CEQA Guidelines § 15152. *See* ROB, pp. 49-54.

2. The RTMP EIR Never Addressed the Potentially Significant Physical and Social Impacts to Existing Users That Might Occur due to Major Changes in Trail Design and Use Such as Those Proposed for the Middagh Trail.

In considering Amici’s arguments on tiering, including whether the issues raised by this site specific second-tier trail Project were ‘adequately discussed’ at a “sufficient level of detail” in the prior program EIR, two important points are clear from the record.

First, the RTMP itself did not contemplate, nor did the RTMP EIR

analyze, any specific trail plan projects in a manner which would suggest that full reliance on the RTMP EIR for *this* Project's CEQA review was appropriate. *See e.g.*, AR 59 2734 ("No individual road or trail actions are identified or programmed in the RTMP"); AR 62 3012 (RTMP "does not prescribe lists of road and trail modification projects in specific locations.")

Second, and even more critical in this instance to the tiering analysis, the RTMP EIR *never considered* the impacts of changes in trail use on existing users as a CEQA impact, and thus, under any evaluative method, cannot substitute for the required site specific CEQA review necessary to evaluate the impacts of trail conversion on the existing users of the Alto Bowl Preserve and Middagh Trail. *See e.g.*, AR 59 2241 ("Because the safety of users of the road and trail system is a social effect within the meaning of Section 15131(a), it is not within the purview of CEQA.")

Given this, Amici's arguments fail. For example, MCBC asserts that "the RTMP EIR specifically identified the addition of bicycles access to the RMTP's covered trail network and analyzed the potential environmental impacts of providing such access on the environment." MCBC Brief, p. 23. But this argument ignores the facts that 1) the RTMP never considered the introduction of mountain bikes onto any trail not already allowing such biking; and 2) never considered, either specifically or generically, the environmental

and social impacts of adding bikes to a non-biking trail on the existing users, which, as discussed, the RTMP considered all to be ‘social effects’ not worthy of CEQA consideration.⁴ It was this fact, that the District never acknowledged the need for such an analysis under CEQA, either at the programmatic stage *or* the trail project stage, that led the trial court to decline to address the tiering issue at all in its ruling. *See* 4 CTA 735 (“In light of the above findings, it is not necessary or appropriate for the court to rule on Petitioner's claim that Respondent improperly 'tiered' the Middagh Trail project to the TPEIR.”)

3. Amici’s Arguments Challenging Whether an “Initial Study” is Required Do Not Change the Conclusion that the District Erred in Tiering the Project Completely to the RTMP EIR.

Amici follow the District’s lead in attempting to have the merits of this case turn on a side procedural issue, whether or not the trial court erred in finding that an initial study was required. *See e.g.*, MCBC Brief, pp. 18-19 (“Petitioner managed to convolute the issues such that the Trial Court’s ruling creates *new CEQA precedent mandating an initial study* and either a new EIR

⁴MCBC argues further (p. 23) that it is too late now for Respondent to challenge the RTMP EIR, without acknowledging there would have been no need to do so at the time the RTMP EIR was adopted given that the RTMP did not purport to analyze site specific trail project impacts or provide a regulatory framework that would make future CEQA review unnecessary. *See e.g.*, AR 61 2995 (review of future site specific trail projects “*will require an initial study for all projects not exempt from CEQA*. The MCOSD will not rely on the evaluation tool as a substitute for CEQA review.”) (emphasis added.)

or negative declaration for any action following preparation of a program EIR.”) (emphasis added.); City Brief, pp. 11-12 (“Such an interpretation of the law eviscerates the intended purpose of a Program EIR...”)

As discussed in Respondent’s Opposition Brief (p. 55), this issue is a red herring given that the trial court ultimately *did consider the Consistency Assessment as a substitute initial study* and found it made no difference to its ruling. *See* 4 CTA 730. In Respondent’s view, the trial court's ruling is best interpreted as an implicit holding that CEQA's tiering provisions requiring the initial study, Public Resources Code § 21094(c), applied in this case given that the issue of the Project’s impacts on existing users in the Alto Bowl Preserve was not ‘adequately addressed’ in the RTMP EIR.⁵

At any rate, the issue of whether an initial study is required in *every* program EIR tiering situation is not dispositive as to the merits of this case.

C. AMICI’S DOOMSDAY PREDICTIONS FOR THE CONSEQUENCES OF PROPER CEQA REVIEW IN THIS CASE ARE VASTLY OVERSTATED.

Predictably Amici both raise doomsday arguments that requiring CEQA review to the ‘user’ conflict issue in this case will be disastrous to the District’s ability to implement trail projects in the future. *See e.g.*, MCBC

⁵ *See* Remy, Thomas, Moose and Manley, Guide to the California Environmental Quality Act (CEQA) (2007) 11th Ed., pages 650-651 (whether second tier project is ‘within the scope’ of a program EIR must inquire “whether the program EIR fully discussed the site specific impacts of the later project.”)

Brief, p. 8 (“Allowing the Trial Court’s order to stand would vastly complicate state and local government trail management planning processes and create an entirely new category of CEQA impacts involving bicycles based on perceived “user conflict” which, according to Petitioner’s approach, must always be deemed significant...”); *id.*, p. 9 (trial court’s ruling “would result in an unprecedented expansion” of CEQA and would “require an evaluation of social concerns associated with any new trail or trail use whether it be to provide access for the disabled, horses or hikers.”)

The concerns for an unwarranted expansion of CEQA may be valid in the abstract, but do not apply in this case upon closer inspection.

First, the facts of this case are relatively extreme when considered from the point of view of existing non-mountain biking trail users. Here, a trail used for decades – indeed restored and created in order to allow for hiking and equestrian use adjacent to one of the few existing horse stables left in Marin County – is simply converted by the District to mountain biking without any CEQA review, based on the facile assurances that any impacts to existing users will be avoided through clearly ineffective mitigation policies such as the edict “that all users will conduct themselves in a safe manner, to protect their own safety and the safety of other users.” 58 AR 1637 (Policy T.3.) The RTMP indeed contains policies that address this precise situation, in which trails

traditionally catering to hiker and equestrian uses are to be preserved, *see* AR 62 3145 (Policies SW.16 & 17) yet these policies were never considered in the face of the pressure from mountain biking advocacy groups such as MCBC to open more trails to bikes. Here, it is not clear there are any other preserves or trails in the District's system that would be so egregiously and adversely affected by a change in use to create a biking connector route. In sum, this case is likely an outlier in the District's vast trail system in the County.

Second, requiring the District to consider the effects of trail use changes on existing users, where appropriate, is far from a death knell to implementing new trail projects. Here, under CEQA, the District would have the opportunity to streamline the approval of projects that did not create significant user conflict issues, or for whose impacts a programmatic EIR had already envisioned and evaluated. In the alternative, the District retains the authority to adopt enforceable mitigation to ensure that new trail projects would not have significant impacts through the adoption of negative declarations, a routine CEQA process in the rest of the world of agency decision-making.

IV. CONCLUSION

For the reasons stated above, Respondent requests the Court to affirm the trial court's ruling setting aside the District's approval of the Project until it has complied with the RTMP and CEQA.

DATED: May 1, 2019

By: /s/ Michael W. Graf
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CERTIFICATION OF WORD COUNT
(Cal Rules of Court, Rule 14(c)(1))

The text of Respondent's Answer to Amicus Briefs consists of 6,473 words, as counted by the Corel Word Perfect word processing program used to generate this brief.

DATED: May 1, 2019

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