Appellate Case No. A147499

COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION FOUR

FRIENDS OF OUTLET CREEK, Appellant,

v.

COUNTY OF MENDOCINO and THE BOARD OF SUPERVISORS OF THE COUNTY OF MENDOCINO
Respondents,

GRIST CREEK AGGREGATES, LLC and BRIAN HURT,
Real Parties in Interest.

APPELLANT'S OPENING BRIEF

Appeal from Order Sustaining Respondent's Demurrer to Appellant's First Amended Petition for Writ of Mandate
The Honorable Richard J. Henderson, Judge, Dept. G, (707) 468-2003
Case No. SCUK-CVPT-15-0065618-000

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Cal. Rules of Court, rule 8.208)

Pursuant to California Rule of Court 8.208, Appellant hereby declares that no entity or person has an ownership or other financial interest in Appellant, or in the outcome of this proceeding.

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MEMORANDUM

I. INTRODUCTION

In this action, Friends of Outlet Creek ("Appellant") challenges the County of Mendocino, and Mendocino County Board of Supervisors' ("Respondents") approval of the construction and operation of a new asphalt plant ("Project") by Grist Creek Aggregates, LLC. ("Real Party in Interest").

The issue presented by this appeal is whether Appellant's claims are moot, despite Respondents having twice affirmatively declared that the Project at issue may commence without undertaking environmental review pursuant to the California Environmental Quality Act (Pub. Res. Code §§ 21000 *et seq*.) ("CEQA"), and without undertaking development review pursuant to Mendocino County Code ("M.C.C.") section 20.188.025(C) (Clerk's Transcript on Appeal ("C.T.") at 126), and despite the Project having subsequently been constructed and operational, causing significant and adverse environmental change. The answer is clearly no. Where Respondents have twice approved a project that has since been built and is now operational, the Superior Court erred by dismissing Appellant's case as moot.

II. SUMMARY OF FACTS AND PROCEEDINGS

A. The Property

Real Party in Interest Grist Creek Aggregates, LLC ("GCA"), is the

owner of a newly constructed hot-mix asphalt plant located at 37342 Covelo Road, in Mendocino County, situated between the north side of State Highway 162 and Outlet Creek ("Property"). (C.T. 40.) The adjacent Outlet Creek is home to listed endangered and threatened species, including coho salmon and steelhead trout (C.T. 42), and is impaired by pollution such as sediment and elevated temperatures. (C.T. 42.)

B. Administrative History

On February 24, 2015, Real Party in Interest submitted an "Operational Statement" to the County proposing to construct the asphalt plant at the Property. (C.T. 45.) The Operational Statement sought the County's determination on whether the Project would require development review pursuant to the Mendocino County Code, which provides:

> A new or changed industrial use shall require further review pursuant to this Chapter. The developer, tenant, lessee, or occupant shall report a new or changed industrial use to the Department of Planning and Building Services and shall not commence construction or operation of that use until he or she has received approval from the Department of Planning and Building Services and obtained a business license.

(M.C.C. § 20.188.025(C), C.T. 126.)

Real Party in Interest had proposed a similar project in 2011 at the same Property, for which the County Planning Commission had determined that development review would be required. (C.T. 154.) Then, the Planning Commission actually prepared a Mitigated Negative Declaration pursuant to CEQA, but the project application was withdrawn before the public

review period concluded, and the CEQA document was not certified. (C.T. 44, 183.)

The 2015 Project proposal, however, took a different course. Here, the Board of Supervisors voted to take jurisdiction over the Project away from the Planning Commission that had previously determined new development review and CEQA compliance would be required. (C.T. 45, 143.) The Board of Supervisors took written and oral public comment on the proposed project (C.T. 143), and, on March 17, 2015, adopted Resolution No. 15-054 (the "March Resolution"), determining that no development review or CEQA review would be required for the construction and operation of the asphalt plant. (C.T. 134-135.)

The basis for this determination was clearly flawed. Respondents concluded that the construction and operation of an asphalt plant at the property was simply a resumption of a previously-approved use. (C.T. 134-135.) As such, a review of the Property history is in order.

On June 13, 2002, Respondent County of Mendocino ("County") approved Use Permit Renewal #UR 5-72/2002 ("2002 Use Permit") which involved asphalt production and aggregate processing at the Site. (C.T. 43.) The 2002 Use Permit was issued to Parnum Paving, Inc. and included an expiration date of June 13, 2012. (C.T. 109-110.) The County adopted a Mitigated Negative Declaration ("2002 MND") pursuant to CEQA, as well as twenty-seven conditions of approval which were included in the 2002

Use Permit. (C.T. 43.)

From the period between 2002 until GCA began its operations in early 2015, little or no aggregate processing or asphalt batch plant activity took place. (C.T. 44.) Sometime during, or before, 2007, the previous owner of the Property ceased asphalt processing and dismantled the asphalt production equipment from the Property. (C.T. 44.)

On August 17, 2009, Respondent Board of Supervisors of the County of Mendocino ("the Board") certified an EIR for the County's 2009 General Plan Update. (C.T. 44.) The EIR did not analyze the impacts of aggregate processing and asphalt production at the Property. (C.T. 44.)

On May 11, 2010, the County rezoned the Property from Rangeland to General Industrial. (C.T. 118.) At the time of the rezoning, the County made clear the limited scope of its action:

> Because these rezones are merely map changes for consistency, many site specific issues will ultimately involve an analysis that would be conducted at the time actual development proposals are presented to the County for consideration.

(C.T. 137.) Accordingly, Mendocino County Zoning Ordinance 4239, rezoned the property but made no other changes; it did not incorporate any of the conditions of the 2002 Use Permit. (C.T. 118.)

In 2011, GCA became the owner of the Property. (C.T. 44.) That year, GCA applied to the County for development review of a concrete batch plant and an asphalt batch plant. (C.T. 44.) County Planning Staff

discouraged GCA from including asphalt production in the proposal because of "the additional environmental impacts that could potentially result from the asphalt portion of the proposal." (C.T. 155.) Even without inclusion of the asphalt plant, County Staff required development review in order to assess "potential environmental impacts resulting from the reestablishment of industrial uses at the site [. . .] in order to satisfy [the] requirements of CEQA." (C.T. 44.) The County prepared a Mitigated Negative Declaration with twenty-four proposed conditions of approval to comply with CEQA. (C.T. 44, 152-170.)

At the very latest, on June 13, 2012, long after asphalt production had ceased at the Property, asphalt production equipment had been removed from the Property, the Property transferred to a new owner, and the 2002 Use Permit, along with its conditions of use, expired. (C.T. 44, 146.) As of that date, the 2002 Use Permit, a nontransferable instrument issued to an entity other than Real Party in Interest GCA, became null and void, along with each of its permit conditions. (*See* M.C.C. § 20.196.040) ("[e]ach . . . use permit shall expire and become null and void at the time specified in such use permit.") (C.T. 44, 120.)

Against this backdrop, GCA approached the County seeking to construct a new asphalt plant at the Property.

> [T]he County and GCA agreed that the clearest procedure for any review as to whether the resumption of asphalt production [at the Property] was a new or changed use was

> through a zoning interpretation by the Board of Supervisors, which the Board could hear under its original jurisdiction of land use matters procedures (Mendocino County Code Section 2.54.010).

(C.T. 115.) As a result of this County/GCA agreement, the Board of Supervisors received the February 24, 2015, "Operational Statement" instead of an application for development review. (C.T. 45.) The Board of Supervisors took original jurisdiction of review of the "Operation Statement" and determined in its March Resolution that no development review or CEQA review would be required for Real Party in Interest to construct and operate a new asphalt plant adjacent to Outlet Creek. (C.T. 107-108.) Respondents concluded that the new asphalt plant was not a "substantial change" in use of the Property. (C.T. 45, 108.) The Board furthermore concluded that the Property is somehow "subject to the conditions of approval of the [2002 Use Permit] that remain applicable" to the Property–even though the 2002 Use Permit, nontransferable and issued to a different party for a facility that had been dismantled, had expired over three years prior. (C.T. 46, 107-112.) Attached to the March Resolution is a list of conditions of the 2002 Use Permit with checkmarks next to some of the conditions. (C.T. 109-112.) The County did not explain how, other than potentially by the March Resolution, the conditions of approval of an expired permit attached to a new project and a new owner.

Respondents, without even consulting a CEQA checklist or

performing any initial CEQA review, concluded that the proposed project was exempt from CEQA and issued a Notice of Exemption, reasoning that their obligation to approve GCA's proposal was ministerial, based upon the alleged similarity of the Project to the asphalt plant, now dismantled, previously permitted under the 2002 Use Permit, now expired. (C.T. 46, 107, 133.)

On June 2, 2015, the Mendocino County Air Quality Management District ("County Air District") issued Authority to Construct No. 1416-5-01-15-26 ("2015 Air Permit"), allowing the construction and operation of a new asphalt plant at the Property. (C.T. 150, 199.) Even though the County Air District characterized GCA's asphalt plant as a "project" for purposes of CEQA, and acknowledged that the proposed project was "not categorically exempt from the requirements of [CEQA]," the County Air District declined to perform environmental review pursuant to CEQA, reasoning that "the lead Planning agency" had determined that a "new

[EIR] was not required."[1] (C.T. 177-179, 199.)

After Petitioner initiated this action to challenge Respondents' determinations approving the Project (discussed below), Respondents adopted a second resolution with the stated intent of avoiding this lawsuit. (C.T. 115-116.) On June 16, 2015, the Board issued Resolution No. 15-087 ("June Resolution"), which asserted that it fully rescinded the March Resolution approving the Project, and that the March Resolution "did nothing to affect GCA's land use entitlements for the Site." (C.T. 114-116, 199.) The June resolution recited the exact same site history, above, as did the March Resolution, including restating the Board's reasoning that CEQA and development review do not apply to the Project because the Board had in March made only a ministerial determination that the Project "conforms to the conditions of approval outlined in [the expired 2002 Use Permit] that remain applicable to the Site, which conditions had been found to be the equivalent of a development review process for the rezoning of the Site."

[1] Friends of Outlet Creek has challenged the 2015 Air Permit as well as a related subsequent Authority to Construct issued for the Project by the County Air District, primarily for failure of the County Air District to conduct any CEQA review of the Project in reliance upon alleged CEQA review by another agency, presumably the Board of Supervisors. *See Friends of Outlet Creek v. Mendocino County Air Quality Management District, et al.* (Mendocino County Superior Court Case No. SCUK-CVPT-15-66445, Filed September 30, 2015) ("*MAQMD I*"); *Friends of Outlet Creek v. Mendocino County Air Quality Management District, et al.* (Mendocino County Superior Court Case No. SCUK-CVPT-1667449, Filed May 6, 2016) ("*MAQMD II*.")

(C.T. 115.) The Board then purported to rescind the March Resolution, but stated that "the rescission of [the March Resolution] in no way impairs the land use entitlements of the Site as they existed prior to March 17, 2015." (C.T. 116.) The June Resolution did not assert that the previously-approved project could not go forward as approved, and the Board did not withdraw or rescind the Notice of Exemption from CEQA for the Project. (C.T. 199.)

C. Superior Court Proceedings

Appellant filed its Verified Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief ("Petition") on April 24, 2015, asserting that Respondents' March Resolution approval of the Project violated CEQA, County ordinances, and the County's 2009 General Plan. (C.T. 3.) In response to the June Resolution, and the Project construction commencing sometime in early July 2015 (C.T. 199.), on July 10, 2015, Appellant amended its Petition ("Amended Petition"), asserting that Respondents' June Resolution had again wrongly approved the Project without development or CEQA review. (C.T. 49.)

Respondents demurred to Appellant's Amended Petition on August 17, 2015, arguing that the June Resolution, by fully rescinding the March Resolution, mooted Appellant's case. (C.T. 70.) On October 22, 2015, the Mendocino County Superior Court sustained the demurrer to all causes of action without leave to amend (C.T. 226), and entered an order to that effect on November 16, 2015. (C.T. 224.) Subsequently, on December 9,

2015, it entered dismissal of Appellant's petition, and judgment in favor of Respondents, and served notice of dismissal on Appellant on December 11, 2015. (C.T. 231-233.)

Appellant timely filed its Notice of Appeal with the court below on January 22, 2016. (C.T. 234.)

III. SUMMARY OF LAW

A. Statement of Appealability

Appellant appeals from a final judgment sustaining demurrer without leave to amend that is appealable to this court pursuant to Code of Civil Procedure section 904.1, subd. (a)(1).

B. CEQA

Pursuant to CEQA, prior to approving any discretionary project, an agency must fully disclose and analyze all of the project's potentially significant direct, indirect, and cumulative environmental effects. (Cal. Code of Regs., Tit. 14, Div. 6, Ch. 3, ("CEQA Guidelines") § 15002, subd. (f).) A "project" for CEQA purposes is an activity that may cause either direct physical change in the environment, or reasonably foreseeable indirect physical change in the environment. (Pub. Res. Code § 21065, subd. (a).) A "discretionary" project is one that is subject to the agency's judgmental controls, where the agency can use its judgment to decide whether and how to carry out a project. (CEQA Guidelines § 15002, subd. (i).) In determining whether or not a project requires discretionary approval

triggering CEQA:

> Courts should look not only to the terms of the agreement but to the surrounding circumstances to determine whether, as a practical matter, the agency has committed itself to the project as a whole or to any particular feature, so as to effectively preclude any alternatives or mitigation measures that CEQA would otherwise require to be considered, including the alternative of not going forward with the project.

(*Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 139, citing CEQA Guidelines § 15126.6, subd. (e).)

Public agencies must interpret CEQA in a way that "afford[s] the fullest possible protection to the environment within the reasonable scope of the statutory language." (*Mountain Lion Found. v. Fish & Game Comm'n* (1997) 16 Cal.4th 105, 112; *see also, e.g.*, *Ass'n for a Cleaner Env't. v. Yosemite Cmty. College Dist.* (2004) 116 Cal.App.4th 629, 637.) CEQA mandates that public agencies avoid or minimize such environmental damage where feasible. (CEQA Guidelines § 15021, subd. (a).) To this end, mitigation measures must be enforceable through conditions of approval, contracts, or other legally binding means. (Pub. Res. Code § 21081.6, subd. (b); CEQA Guidelines § 15126.4, subd. (a)(2); *see also Ctr. for Biological Diversity v. Dep't of Fish & Wildlife* (2015) 62 Cal.4th 204, 237 ("[W]e see a significant distinction between discussing in an EIR measures that might be taken [. . .] and specifying those actions as binding mitigation measures upon which project approval is

conditioned.").) Ultimately, no public agency may approve or carry out a project where one or more significant effects on the environment may occur if the project is approved, unless certain narrow findings are made. (CEQA Guidelines §§ 15091, 15093.)

A lead agency may rely on a previously-prepared Program EIR where "[s]ubsequent activities in the program must be examined in the light of the program EIR to determine whether an additional environmental document must be prepared." (CEQA Guidelines § 15168, subd. (c).) The CEQA Guidelines provide specific procedural direction for how subsequent activities are to be treated, including using a "written checklist or similar devise to document the evaluation of the site and the activity to determine whether the environmental effects of the operation were covered in the program EIR." (*Id*. at subd. (c)(4).) The CEQA Guidelines require incorporation of "feasible mitigation measures and alternatives developed in the program EIR into subsequent actions in the program." (*Id*. at subd. (c)(3); Pub. Res. Code, § 21081.6, subd. (b) ("[i]n the case of the adoption of a plan, policy, regulation, or other public project, [enforceability must be assured] by incorporating the mitigation measures into the plan, policy, regulation, or project design.").)

C. Mootness

A question becomes moot when a court's ruling can have no practical effect or cannot provide the parties with effective relief. (*Simi*

Corp. v. Garamendi (2003) 109 Cal.App.4th 1496, 1503.)

A CEQA challenge will not be barred by mootness even if a project has been partially or fully completed, if it is possible for the agency to change or deny approval of the project when reconsidering it after completing additional environmental review. (*See Save Our Schools v. Barstow Unified Sch. Dist. Bd. of Educ.* (2015) 240 Cal.App.4th 128, 144-46; *Cal. Native Plant Soc'y v. County of El Dorado* (2009) 170 Cal.App.4th 1026, 1030-31; *Save Tara*, 45 Cal.4th at 127; *Woodward Park Homeowners Ass'n v. Garreks, Inc.* (2000) 77 Cal.App.4th 880, 888-89.)

Finally, even if all project approvals are set aside following commencement of litigation, Public Resources Code section 21168.9 provides the court with jurisdiction to suspend subsequent ongoing project activities undertaken by the Real Party in Interest.

D. Standard of Review

In a CEQA case, the appellate court "review[s] the agency's action, not the trial court's decision." (*Rominger v. County of Colusa* (2014) 229 Cal.App.4th 690, 713 (citation omitted).) "Whether an act constitutes a project within the purview of CEQA is an issue of law [. . .] and thus presents no question of deference to agency discretion or review of substantiality of evidence." (*Yosemite Cmty. College Dist.*, 116 Cal.App.4th at 637 (internal citations omitted).) Similarly, whether an agency has rendered a "project approval" for purposes of CEQA also "raises

predominantly a legal question, which [the courts] answer independently from the agency whose decision is under review." (*Save Tara*, 45 Cal.4th at 127.) Finally, a court must accept as true a petitioner's allegations of adverse environmental impacts on demurrer unless rebuked by a factual showing by the respondents. (*Evans v. City of Berkeley* (2006) 38 Cal.4th 1, 20.)

IV. ARGUMENT

The trial court erred by dismissing this case as moot for at least two reasons. First, a review of the March and June Resolutions makes clear that Respondents fully intended that the Project be approved, constructed, and operational, without undertaking development review or CEQA review. This is exactly what did, in fact, occur, and Appellant here challenges the determinations made by Respondents leading to that result. This is a live controversy enshrined in, and not mooted by, the June Resolution.

Second, even accepting as true that the June Resolution fully rescinded the March Project approval—which it did not—this case still would not be moot since even after all project approvals are set aside, CEQA provides the courts the further power to "suspend any or all specific project activity or activities." (Pub. Res. Code § 21168.9, subd. (a)(2).) Respondents and Real Party in Interest do not dispute that the Project began construction and operation at a time after the underlying Petition gave the court jurisdiction over the Project.

Accordingly, this court now has before it both procedural and environmental harms that are capable of redress, and are not moot.

A. Both the March and June Resolutions Erroneously Conclude that the Project Could Commence without Development Review or CEQA Review.

The crux of this dispute is whether Respondents erred in determining that the Project asphalt plant could be constructed and operated without undertaking development review pursuant to Mendocino County Code, or environmental review pursuant to CEQA. This question is not moot, or purely academic, but rather, is expressly set forth by both the March and June Resolutions, and has resulted in significant adverse environmental harm. Each of these issues can and should be addressed by the Court.

1. The Case is Not Moot Because Respondents Approved the Project.

Respondents cannot avoid CEQA by simply refusing to call an approval an approval when all circumstances indicate otherwise. In determining whether or not an agency has approved a project for CEQA purposes:

> courts should look not only to the terms of the agreement but to the surrounding circumstances to determine whether, as a practical matter, the agency has committed itself to the project as a whole or to any particular features, so as to effectively preclude any alternatives or mitigation measures that CEQA would otherwise require to be considered, including the alternative of not going forward with the project.

(*Save Tara*, 45 Cal.4th at 139, citing CEQA Guidelines § 15126.6, subd.

(e).) Whether or not an agency has approved a project is a question of law on which the court affords no deference to the action agency. (*Id.*) Here, the clear letter and intent of the County's March Resolution was to approve the Project. (*See* C.T. 107-112.) In turn, the clear letter and intent of the County's June Resolution was to continue to allow the Project to proceed, while attempting to extinguish this lawsuit. (C.T. 114-116.) Finally, the Project was approved because it has commenced operation following the County's decisions. (C.T. 47.)

To begin, the Board took original jurisdiction over the Project and review of the "Operational Statement" pursuant to Mendocino County Code section 2.54.010 (C.T. 122), which allows the Board of Supervisors to bypass the Planning Commission and "reserve to itself the functions of the planning agency when time is of the essence with respect to any permit or approval based on the project's special contribution to the County's general welfare and economic or environmental wellbeing." (C.T. 115.) Upon assumption of this role, "[t]he Board may approve, modify or deny the subject application." (M.C.C. § 2.54.010(B)(5); C.T. 122.) Original jurisdiction thus plainly vests the Board with discretion to consider a project.

On March 2, 2015, the County issued a Notice of Public Hearing ("Notice of Hearing") inviting comments regarding the "project." (C.T. 143).) The Notice of Hearing stated that the Project was a request from

GCA for an "administrative determination that the proposed resumption of the asphalt plant by Grist Creek Aggregates, LLC at its existing Longvale aggregate processing plant . . . is not a new or changed use and may resume operation subject to the conditions of approval [of the 2002 Use Permit]." (C.T. 143.) This question plainly calls upon the Board's discretion. The Notice of Hearing invited public comment "regarding the above project." (C.T. 143.) Public comments can only be meaningful if the ultimate decision-maker has some discretion to consider them. The March Notice of Hearing also provided information for members of the public who might wish to "challenge the project in court." (C.T. 143.) Furthermore, the March Notice of Hearing clearly contemplates the conditioning of any Project approval upon resuscitation and attachment of the conditions of the expired 2002 Use Permit. (C.T. 143.) The County does not and cannot dispute that the Notice of Hearing provided notice of a discretionary act.

After taking public comment on the Project, the County rendered its discretionary determination in the March Resolution that the Project did not constitute a new or changed use that would require new development review and CEQA review:

> The Mendocino County Board of Supervisors hereby determines that the production of asphalt at the Site is a use that has undergone development review by virtue of the Board's previous actions and is a permitted use on the Site subject to the conditions of approval of #UR 5-72/2002 that remain applicable to the Site . . .

> The installation of a new asphalt plant at the Site as proposed by Grist Creek Aggregates, LLC, is not substantially changed from the operation as it previously existed and is not a new or changed use pursuant to Mendocino County Code . . . that requires further development review . . .
>
> [And] that the determination of the Board of Supervisors being made by this resolution is not a project under CEQA . . .

(C.T. 30-31.)

This approval includes Respondents' discretionary decision to subject Project approval to the long-expired 2002 Use Permit conditions of approval of a defunct and dismantled asphalt plant held by (and previously binding only upon) a prior owner of the Property, to attempt to mitigate or avoid the Project's environmental effects.

There is no dispute that Real Parties in Interest could reasonably rely on this approval to commence construction of the Project without undertaking new development or CEQA review. Having thus approved the Project in March, if the County truly wanted the June Resolution to reverse its prior approval, and prohibit the construction and operation of the asphalt plant unless and until further development review and CEQA review were completed, the June Resolution should have afforded Real Parties clear notice of the County's changed determination. As discussed further, below, it did not. Under these circumstances, the only reasonable interpretation of the June Resolution is that Respondents fully intended that the Project proceed without development review or CEQA review.

And proceed, the Project did. Under such circumstances, even where an agency contends no formal CEQA approval of a project is required, the date of project "approval" may be considered to be the date on which the project commences. (CEQA Guidelines § 15112, subd. (c)(5) (stating statute of limitations period is "180 days after . . . Commencement of the project if the project is undertaken without a formal decision by the public agency").) The Amended Petition thus alleges that the Project began operation in early July 2015. (C.T. 47.) GCA clearly did so with the blessing of the County. At the latest, CEQA considers this to be the project approval date. The Project thus commenced and approved is therefore not moot.

2. The Case is Not Moot Because the March and June Resolutions Set Forth the Same Position that Appellant Challenges Here.

Respondents' June Resolution was nothing more than a ruse. Reasoning that, because the March Resolution did not actually *require* Real Party in Interest to undergo any new development review or CEQA review, Respondents wanted to have their cake and eat it too: allow the Project to proceed, while mooting this this case by rescinding the "do-nothing" March

Resolution.[2] However, Respondents' underlying position that no development review or CEQA review would be required for the Project remained unchanged from the March Resolution to the June Resolution. It is precisely that determination that Appellant challenges by and through this action, constituting a live controversy that is not moot.

Instead of merely rescinding the March Resolution, the June Resolution recites the exact same underlying rationale regarding the prior land use and zoning determinations for the Property as the March Resolution recites, including the Board's discretionary conclusion that no development review or CEQA review would be required because the Project would be consistent with the expired and non-binding conditions of the 2002 Use Permit, based on conversations between County Staff and GCA. (C.T. 115.) The June Resolution again recites that the "conditions of approval outlined in the [2002 Use Permit] . . . remain applicable to the Site," even though they were issued to a different party, and had long-expired. (C.T. 38, 114-116.) Respondents furthermore did not rescind or withdraw the Notice of Exemption previously issued for the Project. (C.T. 133.)

[2] The June Resolution reveals its primary purpose was to dispense with this litigation, stating that "litigating CEQA lawsuits requires significant expense and exposes the County to other financial liabilities that the County chooses not to pass on to its citizens at this time." (C.T. 116.)

Resting on these premises, the June Resolution determined that the March Resolution could be rescinded because the March Resolution "was not required." (C.T. 116.) Respondents' obvious intent and position here was that, if the March Resolution "was not required" for the County to approve the Project in the first instance—because approving the Project ultimately required no new CEQA review or development review—then the County could continue to approve the Project without the March Resolution in place. But that underlying determination is what Appellants challenge: whether or not new development review or CEQA review is required. By determining that the March Resolution "was not required," the June Resolution simply advances the same position and discretionary determination that no CEQA or development review would be required by the County to approve the Project. The legal validity of that determination constitutes a live controversy, and is not mooted by the June Resolution.

3. The Project was Illegally Approved without CEQA Review or Development Review.

The County abused its discretion when adopting the March and June Resolutions because the Resolutions violate the County's development review process and subvert CEQA review.

In reviewing whether the Development Review Process applies, the County's own ordinance requires that it "follow the 'State CEQA Guidelines.'" (M.C.C. § 20.188.025(A) (C.T. 124).) The Development

Review Process is triggered by "[a] **new** or changed use." (*Id.*, emphasis added.) A new asphalt plant, operated by a new entity, at a location where one did not presently exist is a **new** use.

The County's own treatment of a nearly identical project in 2011 demonstrates the scope of discretion the County had to address the Project application. In 2011 GCA submitted a Development Review application to the County for an asphalt plant and concrete batch plant. (C.T. 44, 152.) Prior to GCA's withdrawal of its 2011 application, the County treated the proposed concrete batch plant as a project, which is substantially similar to (or less impactful than) the Project, as a project for CEQA purposes. (C.T. 152-175.)

The Operational Statement was simply a resurrection of the 2011 application, but styled with the express intension to bypass development and environmental review by County planning staff. (*See* June Resolution (C.T. 115) ("the County and GCA agreed that the clearest procedure for any review as to whether the resumption of asphalt production was a new or changed use was through a zoning interpretation by the Board of Supervisors, which the Board could hear under its original jurisdiction".) This would be more convenient for GCA certainly, as in 2012, County planning staff stated that "[w]hile the uses themselves are allowed within the I2 District, any potential environmental impacts resulting from the reestablishment of industrial uses at the site will need to be evaluated in

order to satisfy requirements of [CEQA].” (C.T. 153.).)

Respondents’ reliance on expired permit conditions as part and parcel of the Project considered further violated CEQA. First, the County cannot avoid CEQA by preemptively attaching conditions to a project. In *Salmon Protection & Watershed Network v. County of Marin*, the County of Marin sought to avoid CEQA review in the same manner:

> The Board [of Supervisor]'s ultimate conclusion that the project would not result in adverse effects was expressly founded on ‘dozens of conditions that have been applied to enhance mitigations and reduce to a minimum the possibility of any adverse environmental impacts.

((2004) 125 Cal.App.4th 1098 (“*SPAWN*”).) The Court set aside the County’s project approval for its failure to comply with CEQA, reasoning, “if a project may have a significant effect on the environment, CEQA review must occur and only then are mitigation measures relevant.” (*Id.* at 1107.)

CEQA does allow that, if “revisions in the project plans or proposals made by, or agreed to by, the applicant before [being] . . . released for public review would avoid the effects or mitigate the effects to a point where clearly no significant effect on the environment would occur,” a “mitigated negative declaration” may be prepared for a project. (Pub. Res. Code §§ 21064.5; 21080, subd. (c)(2)); CEQA Guidelines §§ 15064, subd. (f)(2); 15070, subd. (b).)

The problem is magnified here because the Respondents did not

actually successfully attach conditions to the Project. They attempt to avoid CEQA review altogether, simply alleging that "GCA met with County staff to *discuss* GCA's plans to resume the production of asphalt at the Site, using a more efficient model plant an [sic] in a manner consistent with the conditions of approval of [the 2002 Use Permit]" to reduce or avoid the Project's environmental effects (or at least stave off environmental review). (C.T. 115.) Mitigation measures adopted in a CEQA document must be *enforceable* through conditions of approval, contracts, or other legally binding means. (Pub. Res. Code, § 21081.6, subd. (b); CEQA Guidelines § 15126.4, subd. (a)(2).) The discussions between GCA and County Staff in December 2014 are insufficient as they are not legally binding on GCA.

If in fact the Respondents did through the Resolutions impose upon the new owner and new Project conditions contained in the expired 2002 Use Permit, then this would constitute discretionary action by the County, triggering CEQA review. In the absence of attachment of the conditions, the County's argument that the Project is identical to or substantially the same as the asphalt production allowed by the 2002 Use Permit falls apart, as that permit was bound by 27 conditions of approval.

Indeed, Respondents have failed to demonstrate precisely where they have completed CEQA environmental review for an asphalt plant at this site. The March and June Resolutions both reference the County's 2009 General Plan EIR, but offer no attempt to comply with the procedures

CEQA would impose for Respondents to tier from the "program" level General Plan EIR for this site-level Project. Reliance on a Program EIR requires that "[s]ubsequent activities in the program must be examined in the light of the program EIR to determine whether an additional environmental document must be prepared." (CEQA Guidelines § 15168, subd. (c).) The CEQA Guidelines provide specific procedural direction for how subsequent activities are to be treated, including using a "written checklist or similar devise to document the evaluation of the site and the activity to determine whether the environmental effects of the operation were covered in the program EIR." (*Id*. at subd. (c)(4).) They require incorporation of "feasible mitigation measures and alternatives developed in the program EIR into subsequent actions in the program." (*Id*. at subd. (c)(3).) The County's 2009 EIR addressed land use classifications. It did not analyze individual land use activities, including any impacts of adding an asphalt plant at the Longvale Site, and, as a result, Respondents have not and cannot meet any of the tiering requirements, above. (C.T. 44.) (C.T. 130 ("Additional environmental review would be required and would be generally based upon the subsequent project's consistency with the General Plan and the analysis in this EIR, as required under CEQA").)

Nor did, nor could, the County properly tier from the 2011 site rezoning, as the sole legal effect of the action by the Board of Supervisors in adopting Mendocino County Zoning Ordinance No. 4239 was to change

the underlying land use classification for the Property to Industrial. (C.T. 118.) At the time of the rezoning, the County made clear the limited scope of its action:

> Because these rezones are merely map changes for consistency, many site specific issues will ultimately involve an analysis that would be conducted at the time actual development proposals are presented to the County for consideration.

(C.T. 138.) Mendocino County Zoning Ordinance No. 4239 does not provide a basis for the County's discretionary choice to avoid environmental review.

In sum, Respondents have not demonstrated that the impacts of the newly-constructed asphalt plan were reviewed in compliance with CEQA's mandatory procedures, and therefore have not rebutted the presumptions asserted in Friends of Outlet Creek's 1st Amended Petition, by way of demurrer.

B. Even if the June Resolution Set Aside the March Approval, the Court has Jurisdiction to Suspend the Project.

Enacting CEQA, the Legislature declared it to be "the policy of the state to: take all action necessary to protect, rehabilitate, and enhance the environmental quality of the state," and "all action necessary to provide the people of this state with clean air and water, enjoyment of aesthetic, natural, scenic, and historic environmental qualities . . ." (Pub. Res. Code § 21001, subds. (a), (b).) This, therefore, must be the principle focus of any remedy

in any CEQA litigation. Accordingly, even where a court or lead agency rescinds a project's approval, including any CEQA determination, complete relief pursuant to CEQA is not afforded unless and until the parties "take all action necessary to protect, rehabilitate, and enhance the environmental quality of the state." (*Id*.) For example, in *Woodward Park Homeowners Association*, the Court of Appeal commented that a project built based on a faulty CEQA approval "can be modified, torn down, or eliminated to restore the property to its original condition." (77 Cal.App.4th at 889.) For this reason, Public Resources Code section 21168.9 provides the court with jurisdiction to suspend subsequent ongoing project activities undertaken by the Real Party in Interest.

Accordingly, the case at hand is not moot. Appellants and the surrounding environment, including the adjacent Outlet Creek, continue to suffer from the environmental impacts of an asphalt plant approved without the safeguards afforded by proper CEQA compliance and Development Review. CEQA and its interpreting case law confirm that this Court has the power to order Project operations suspended, and returned to pre-Project conditions, unless and until brought into compliance with all applicable law.

V. Conclusion

For each of the foregoing reasons, the trial court erred in its ruling that this matter is moot.

DATED: May 25, 2016

Respectfully submitted,

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Friends of Outlet Creek

VI. CERTIFICATION OF WORD COUNT

Pursuant to Rule 8.204(c)(1) of the California Rules of Court, I, Jason R. Flanders, counsel for Petitioner, having relied on the word count tool on Microsoft Word, hereby by certify that the amount of words in this appellate brief is 7,260 words including footnotes but excluding exhibits, which is less than the California Rules of Court, rule 8.204(c)(1) limit of 14,000 words.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: May 25, 2016

Jason R. Flanders
Counsel for Petitioner, Friends of Outlet Creek

PROOF OF SERVICE

I am employed in the County of Alameda. My business address is 409 45th Street, Oakland, CA 94609. I am over the age of 18 years and not a party to the above-entitled action. Document(s) served:

- **APPELLANT'S OPENING BRIEF**

On May 25, 2016, I served the foregoing document(s) by placing a true copy thereof enclosed in a sealed envelope deposited with the United States Postal Service with postage thereon fully prepaid, addressed as follows:

Superior Court of California
County of Mendocino
Court Clerk
100 North State Street
Ukiah, California 95482

In addition, I electronically filed the above document via TrueFiling with the California First District Court of Appeal, whereby TrueFiling provides electronic service as follows:

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I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on May 25, 2016, in San Francisco, California.

Riti Chandiok