

1 allowed, subject to a conditional use permit and solid waste
2 facilities permit.

3 On August 2, 2017, the Fresno Planning Commission considered
4 and approved a revised proposed zoning amendment that would have
5 permitted CRV recycling facilities in light and heavy industrial
6 districts and within the permitted footprint of a business. The
7 staff report for the proposed zoning amendment stated that the City
8 had determined that the project would have no environmental impacts
9 under section 15061(b) of the CEQA Guidelines, the so-called "common
10 sense" exemption to CEQA. The report stated that, "[g]iven that
11 the proposed text amendment will only modify application processing,
12 locational restrictions and operational requirements of existing
13 establishments, and further refine the already limited locations
14 where new CRV Recycling Centers may locate, the revisions will not
15 result in a significant change to the physical environment.
16 Individual establishments that require a new Conditional Use Permit
17 are subject to CEQA review at the time of application submittal."

18 On September 21, 2017, the Fresno City Council considered the
19 proposed amendments, but with a major revision. The new version of
20 the ordinance only permitted CRV recycling facilities within the
21 permitted interior footprint of a business. Again, the staff report
22 stated that there would be no environmental impact from the new
23 ordinance, as "[t]he proposed text amendment will only modify
24 application processing, locational restrictions and operational
25 requirements of existing establishments, and further refine the
26 already limited locations where new CRV Recycling Centers may
27 locate. The text amendment will not result in a direct change to
28 the physical environment." However, Councilman Paul Caprioglio

1 acknowledged that the ordinance would result in the closure of 16
2 of the 22 recycling centers in Fresno.

3 After conducting an open hearing and listening to comments
4 from the public and interested parties, the City Council approved
5 the amendments unanimously on September 21, 2017, despite the
6 written and oral objections of petitioner California Grocers
7 Association and other interested parties.

8 On October 4, 2017, the City issued a notice of exemption under
9 section 15061(b)(3) of the CEQA Guidelines. Once again, the City
10 found that there would be no significant environmental impact from
11 the amendment to the ordinance. "In addition to this, enforcing
12 these code regulations on existing facilities will only result in
13 fewer impacts to the physical environment, not more. It will reduce
14 noise and aesthetic concerns within existing neighborhoods, thus it
15 is clear that there is no possibility that the activity in question
16 may have a significant effect on the environment. Individual
17 establishments that require a new Conditional Use Permit are subject
18 to CEQA review at the time of application submittal."

19 The ordinance was confirmed at a second vote by the City
20 Council on October 12, 2017. The Mayor signed the ordinance into
21 law on October 18, 2017. The effective date of the amended ordinance
22 is May 18, 2018.

23 Petitioner filed the present writ of mandate petition on
24 November 7, 2017, as well as a motion for preliminary injunction to
25 prevent the City from implementing the new ordinance before the
26 matter can be heard and decided on the merits. Respondent has filed
27 opposition briefs to the writ petition and the motion for
28 preliminary injunction.

1 III.

2 DISCUSSION

3 **A. Petitioner's Opening Brief**

4 Petitioner contends that the City violated CEQA by enacting
5 the ordinance even though it will admittedly reduce the number of
6 CRV recycling centers in the City by 70%. California law
7 specifically requires state-certified recycling centers near
8 grocery stores and other beverage container dealers. Nevertheless,
9 the City has taken the position that its ordinance will have no
10 significant environmental impacts. The City conducted no
11 environmental review before approving the amended ordinance, and
12 thus it prejudicially abused its discretion.

13 Also, petitioner contends that the City's finding that there
14 would be no significant environmental impacts from the ordinance is
15 not supported by substantial evidence. The City admits that the
16 ordinance will result in the elimination of 16 of the 22 state-
17 certified recycling facilities, yet it claims that there is no
18 possibility that the ordinance could result in any significant
19 environmental impact. If an agency makes a determination that the
20 project is exempt from CEQA due to absence of any environmental
21 impact, it bears the burden of producing substantial evidence to
22 support this conclusion.

23 Here, petitioner argues that the City cannot meet its burden,
24 as there is no evidence in the record to support the conclusion
25 that the ordinance is exempt from CEQA. The City's environmental
26 assessment consists of four conclusory sentences on the first draft
27 of the ordinance that were never changed despite major revisions to
28 the ordinance since the first assessment was made. Simply making

1 a "conclusory recital" that the project is exempt from CEQA under
2 section 15061 is not enough to show substantial evidence to
3 demonstrate that the project is actually exempt where there is no
4 indication that any preliminary environmental review was conducted
5 before the exemption decision was made.

6 Also, petitioner argues that the ordinance is preempted by
7 state law, as it directly conflicts with the State Recycling Act by
8 prohibiting recycling centers that are authorized by the Act in an
9 area fully occupied by the state. Therefore, petitioner concludes
10 that the court should issue the writ of mandate and direct the City
11 to rescind the ordinance.

12 **B. Respondent's Opposition Brief**

13 Respondent contends that petitioner is using CEQA for their
14 own personal financial benefit to attempt to defeat an ordinance
15 that was enacted by the Fresno City Council to protect the health,
16 safety and welfare of the public. The ordinance made amendments to
17 the City's Municipal Code related to zoning and use regulations for
18 California Redemption Value (CRV) recycling centers within the City.
19 Petitioner claims that the amendments will cause some of the CRV
20 centers to close. However, petitioner identifies only speculative
21 environmental impacts that might result from the ordinance, and
22 points to no evidence in the record that would support its claim
23 that the ordinance will result in environmental harm.

24 While petitioner claims that closing the CRV centers will
25 result in increased litter and reduced recycling, there is ample
26 evidence in the record that there are other means for people to
27 recycle in the City, including curbside recycling bins and recycling
28 centers in grocery stores, as well as recycling centers in

1 industrial areas. In fact, the evidence indicates that the
2 ordinance will reduce blight and litter, not contribute to it.

3 Also, to the extent that petitioner claims that closing the
4 CRV centers will result in economic harm to it and others, the
5 Courts of Appeal have recently rejected this argument, finding that
6 CEQA is concerned with environmental impacts, not economic impacts.

7 (*Joshua Tree Downtown Business Alliance v. County of San Bernardino*
8 (2016) 1 Cal.App.5th 677, 691; *Visalia Retail, L.P. v. City of*
9 *Visalia* (2018) 228 Cal.Rptr.3d 351.) Here, petitioner has failed
10 to show that the ordinance will cause a significant effect on the
11 environment, rather than purely economic effects. Petitioner's
12 claim is also supported by mere conjecture rather than evidence,
13 and there is no showing that the economic effects of the ordinance
14 will be so severe as to cause a substantial effect on the
15 environment. Even "if a handful of properties were to remain
16 permanently vacant, the result would not necessarily be the kind of
17 change to the physical environment that implicates CEQA." (*Visalia*
18 *Retail, supra*, at p. 354.)

19 Finally, the City argues that the ordinance is not preempted
20 by the State Recycling Act ("The SRA"). The SRA expressly
21 acknowledges that the cities have the power to regulate the location
22 of recycling centers. (Public Resources Code § 14501(e).) The SRA
23 does state that it solely occupies the field of redemption values,
24 deposit values, and refund or fee values. (Public Resources Code
25 § 14529.) However, the City has not attempted to regulate any of
26 these values. Moreover, California case law holds that the SRA
27 imposes no mandatory duty on a public entity on which a plaintiff
28 can base a private claim or action for declaratory relief.

1 (*Shamsian v. Department of Conservation* (2006) 136 Cal.App.4th 621,
2 641-642.) In addition, the State's comment letter in the record
3 raises no claim of preemption. If there were such a valid claim to
4 be raised, surely it would have been raised by the State in its
5 comments on the proposed ordinance, yet the State raised no such
6 claim. Therefore, the City concludes that the petition for a writ
7 of mandate should be denied.

8 **C. Standard of Review**

9 "In any action or proceeding, other than an action or
10 proceeding under Section 21168, to attack, review, set aside, void
11 or annul a determination, finding, or decision of a public agency
12 on the grounds of noncompliance with this division, the inquiry
13 shall extend only to whether there was a prejudicial abuse of
14 discretion. Abuse of discretion is established if the agency has
15 not proceeded in a manner required by law or if the determination
16 or decision is not supported by substantial evidence." (Pub.
17 Resources Code, § 21168.5.)

18 "Our inquiry into whether the Commission has complied with
19 CEQA extends only to 'whether there was a prejudicial abuse of
20 discretion.' In a CEQA case, as in other mandamus cases, our review
21 of the administrative record for error is the same as the trial
22 court's; we review the agency's action, not the trial court's
23 decision. Throughout, we must bear in mind that '[t]he foremost
24 principle under CEQA is that the Legislature intended the act "to
25 be interpreted in such manner as to afford the fullest possible
26 protection to the environment within the reasonable scope of the
27 statutory language.'" (Muzzy Ranch Co. v. Solano County Airport

28

1 *Land Use Com'n* (2007) 41 Cal.4th 372, 381, internal citations
2 omitted.)

3 "An agency abuses its discretion if there is no basis in the
4 record for its determination that the project was exempt from CEQA."
5 (*Davidon Homes v. City of San Jose* (1997) 54 Cal.App.4th 106, 114,
6 internal citations omitted.)

7 "[A]n agency may abuse its discretion under CEQA either by
8 failing to proceed in the manner CEQA provides or by reaching
9 factual conclusions unsupported by substantial evidence. (§
10 21168.5.) Judicial review of these two types of error differs
11 significantly: while we determine de novo whether the agency has
12 employed the correct procedures, 'scrupulously enforc[ing] all
13 legislatively mandated CEQA requirements', we accord greater
14 deference to the agency's substantive factual conclusions. In
15 reviewing for substantial evidence, the reviewing court 'may not
16 set aside an agency's approval of an EIR on the ground that an
17 opposite conclusion would have been equally or more reasonable,'
18 for, on factual questions, our task 'is not to weigh conflicting
19 evidence and determine who has the better argument.'" (*Vineyard*
20 *Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova*
21 (2007) 40 Cal.4th 412, 435, internal citations omitted.)

22 "In evaluating an EIR for CEQA compliance, then, a reviewing
23 court must adjust its scrutiny to the nature of the alleged defect,
24 depending on whether the claim is predominantly one of improper
25 procedure or a dispute over the facts. For example, where an agency
26 failed to require an applicant to provide certain information
27 mandated by CEQA and to include that information in its
28 environmental analysis, we held the agency 'failed to proceed in

1 the manner prescribed by CEQA.' In contrast, in a factual dispute
2 over 'whether adverse effects have been mitigated or could be better
3 mitigated', the agency's conclusion would be reviewed only for
4 substantial evidence." (*Ibid*, internal citations omitted.)

5 "When faced with a challenge to an agency's exemption
6 determination, the court considers whether the agency proceeded in
7 the manner required by law and whether its determination is
8 supported by substantial evidence. The scope of an exemption may
9 be analyzed as a question of statutory interpretation and thus
10 subject to independent review. But 'the substantial evidence test
11 governs our review of the [agency's] factual determination that a
12 project falls within a categorical exemption.'" (*San Lorenzo Valley
13 Community Advocates for Responsible Educ. v. San Lorenzo Valley
14 Unified School Dist.* (2006) 139 Cal.App.4th 1356, 1381-1382,
15 internal citations omitted.)

16 "In applying the substantial evidence standard, 'the reviewing
17 court must resolve reasonable doubts in favor of the administrative
18 finding and decision.' The Guidelines define 'substantial evidence'
19 as 'enough relevant information and reasonable inferences from this
20 information that a fair argument can be made to support a
21 conclusion, even though other conclusions might also be reached.'" (*Laurel Heights Improvement Assn. v. Regents of University of
22 California* (1988) 47 Cal.3d 376, 393, internal citations omitted.)

23 "Substantial evidence includes facts, reasonable assumptions
24 predicated upon facts, and expert opinion supported by facts.
25 [Citations.] It does not include "[a]rgument, speculation,
26 unsubstantiated opinion or narrative, [or] evidence which is clearly
27 inaccurate or erroneous..." [Citations.]" 'Complaints, fears, and
28

1 suspicions about a project's potential environmental impact
2 likewise do not constitute substantial evidence. [Citations.]’”
3 (*Joshua Tree Downtown Business Alliance v. County of San Bernardino*
4 (2016) 1 Cal.App.5th 677, 690-691, internal citations omitted.)

5 Also, “Members of the public may ... provide opinion evidence
6 where special expertise is not required. [Citations.]’ However,
7 ‘[i]nterpretation of technical or scientific information requires
8 an expert evaluation. Testimony by members of the public on such
9 issues does not qualify as substantial evidence. [Citations.]’
10 ‘[I]n the absence of a specific factual foundation in the record,
11 dire predictions by nonexperts regarding the consequences of a
12 project do not constitute substantial evidence. [Citations.]’”
13 (*Ibid*, internal citations omitted.)

14 **D. The “Common Sense” Exemption**

15 In the present case, the City determined that the amended
16 ordinance was exempt from CEQA because it had no potential for
17 causing a significant effect on the environment, and thus there was
18 no need to conduct any further study of any environmental effects.

19 Under California Code of Regulations, Title 14, section 15061,
20 subdivision (b)(3), “A project is exempt from CEQA if: .. (3) The
21 activity is covered by the general rule that CEQA applies only to
22 projects which have the potential for causing a significant effect
23 on the environment. Where it can be seen with certainty that there
24 is no possibility that the activity in question may have a
25 significant effect on the environment, the activity is not subject
26 to CEQA.” (Cal. Code Regs., tit. 14, § 15061, subd. (b)(3).)

27 “In order to ‘[e]nsure that the long-term protection of the
28 environment, consistent with the provision of a decent home and

1 suitable living environment for every Californian, shall be the
2 guiding criterion in public decisions', CEQA and its implementing
3 administrative regulations (CEQA Guidelines) establish a three-tier
4 process to ensure that public agencies inform their decisions with
5 environmental considerations. The first tier is jurisdictional,
6 requiring that an agency conduct a preliminary review to determine
7 whether an activity is subject to CEQA. An activity that is not a
8 'project' as defined in the Public Resources Code and the CEQA
9 Guidelines is not subject to CEQA." (*Muzzy Ranch Co. v. Solano*
10 *County Airport Land Use Com'n* (2007) 41 Cal.4th 372, 379-380,
11 internal citations omitted; see also *Union of Medical Marijuana*
12 *Patients, Inc. v. City of Upland* (2016) 245 Cal.App.4th 1265, 1271.)

13 "CEQA defines a project (in part) as '[a]n activity directly
14 undertaken by any public agency' that 'may cause either a direct
15 physical change in the environment, or a reasonably foreseeable
16 indirect physical change in the environment.' (§ 21065; Guidelines,
17 § 15378.) 'Ordinances passed by cities are clearly activities
18 undertaken by a public agency and thus *potential* 'projects' under
19 CEQA.'" (*Union of Medical Marijuana Patients, Inc. v. City of*
20 *Upland, supra*, 245 Cal.App.4th at p. 1272, internal citations
21 omitted, italics in original.)

22 However, "[a] municipal ordinance that merely restates or
23 ratifies existing law does not constitute a project and is therefore
24 not subject to environmental review under CEQA." (*Id.* at p. 1273,
25 internal citations omitted.)

26 "The second tier concerns exemptions from CEQA review. The
27 Legislature has provided that certain projects, such as ministerial
28 projects and repairs to public service facilities of an emergency

1 nature, are exempt. In addition, pursuant to the Legislature's
2 command, the CEQA Guidelines list categorical exemptions or 'classes
3 of projects' that the Resources Agency has determined to be exempt
4 per se because they do not have a significant effect on the
5 environment." (*Muzzy Ranch, supra*, at p. 380, internal citations
6 omitted.)

7 "A project that qualifies for neither a statutory nor a
8 categorical exemption may nonetheless be found exempt under what is
9 sometimes called the 'common sense' exemption, which applies
10 '[w]here it can be seen with certainty that there is no possibility
11 that the activity in question may have a significant effect on the
12 environment'." (*Ibid*, internal citations omitted.)

13 "If a public agency properly finds that a project is exempt
14 from CEQA, no further environmental review is necessary. The agency
15 need only prepare and file a notice of exemption, citing the
16 relevant statute or section of the CEQA Guidelines and including a
17 brief statement of reasons to support the finding of exemption."
18 (*Ibid*, internal citations omitted.)

19 "[W]hether a particular activity qualifies for the common sense
20 exemption presents an issue of fact, [and] that the agency invoking
21 the exemption has the burden of demonstrating it applies. An
22 agency's duty to provide such factual support 'is all the more
23 important where the record shows, as it does here, that opponents
24 of the project have raised arguments regarding possible significant
25 environmental impacts.'" (*Id.* at p. 386, citing *Davidon Homes v.*
26 *City of San Jose* (1997) 54 Cal.App.4th 106, 114.)

1 "An agency abuses its discretion if there is no basis in the
2 record for its determination that the project was exempt from CEQA."
3 (*Davidon Homes, supra*, at p. 114, internal citations omitted.)

4 "[T]he agency must itself provide the support for its decision
5 before the burden shifts to the challenger. Imposing the burden on
6 members of the public in the first instance to prove a possibility
7 for substantial adverse environmental impact would frustrate CEQA's
8 fundamental purpose of ensuring that government officials 'make
9 decisions with environmental consequences in mind.'" (*Id.* at p.
10 116, internal citation omitted.)

11 In *Davidon Homes*, the court held that the agency's finding
12 that the project would have no significant environmental impacts
13 and thus fell under the common sense exemption was not supported by
14 any evidence in the record, and thus was an abuse of discretion.
15 "In this case the City's action was supported only by a conclusory
16 recital in the preamble of the Ordinance that the project was exempt
17 under section 15061, subdivision (b)(3). There is no indication
18 that any preliminary environmental review was conducted before the
19 exemption decision was made. The agency produced no evidence to
20 support its decision and we find no mention of CEQA in the various
21 staff reports. A determination which has the effect of dispensing
22 with further environmental review at the earliest possible stage
23 requires something more. We conclude the agency's exemption
24 determination must be supported by evidence in the record
25 demonstrating that the agency considered possible environmental
26 impacts in reaching its decision." (*Id.* at pp.116-117.)

27 "An agency's obligation to produce substantial evidence
28 supporting its exemption decision is all the more important where

1 the record shows, as it does here, that opponents of the project
2 have raised arguments regarding possible significant environmental
3 impacts." (*Id.* at p. 117.)

4 "Moreover, the showing required of a party challenging an
5 exemption under subdivision (b)(3) is slight, since that exemption
6 requires the agency to be certain that there is *no possibility* the
7 project may cause significant environmental impacts. If legitimate
8 questions can be raised about whether the project might have a
9 significant impact and there is any dispute about the possibility
10 of such an impact, the agency cannot find with certainty that a
11 project is exempt. As the court in *Myers v. Board of Supervisors*
12 observed, the exemption under subdivision (b)(3) should be reserved
13 for those 'obviously exempt' projects, 'where its absolute and
14 precise language clearly applies.'" (*Ibid*, internal citations
15 omitted, italics in original.)

16 On the other hand, "We do not agree with appellant that any
17 possibility of an environmental impact, however remote or
18 outlandish, will be sufficient in every case to remove a project
19 from exempt status under section 15061, subdivision (b)(3). That
20 would render the common sense exemption meaningless. We believe,
21 however, that if a reasonable argument is made to suggest a
22 possibility that a project will cause a significant environmental
23 impact, the agency must refute that claim *to a certainty* before
24 finding that the exemption applies." (*Id.* at p. 118, italics in
25 original.)

26 "Finally, it cannot be assumed that activities intended to
27 protect or preserve the environment are immune from environmental
28 review." (*Id.* at p. 119, internal citations omitted.)

1 However, "Determining whether a project qualifies for the
2 common sense exemption need not necessarily be preceded by detailed
3 or extensive factfinding. Evidence appropriate to the CEQA stage
4 in issue is all that is required. Under CEQA, a public agency is
5 not always 'required to make a *detailed* analysis of the impacts of
6 a project on [future] housing and growth.' ... The detail required
7 in any particular case necessarily depends on a multitude of
8 factors, including, but not limited to, the nature of the project,
9 the directness or indirectness of the contemplated impact and the
10 ability to forecast the actual effects the project will have on the
11 physical environment.'" (*Muzzy Ranch Co. v. Solano County Airport*
12 *Land Use Com'n, supra*, 41 Cal.4th at p. 388, internal citations
13 omitted, italics in original.)

14 **E. The City Has Failed to Show that the Common Sense**
15 **Exemption Applied to the Amended Ordinance**

16 Here, the City relied on the common sense exemption to find
17 that the project did not require further study as it would not cause
18 any significant environmental impacts under CEQA. "Given that the
19 proposed text amendment will only modify locational restrictions
20 and operational requirements of new and existing establishments,
21 and further refine the already limited locations where new CRV
22 Recycling Centers may locate, the revisions will not result in a
23 significant change to the physical environment. In addition to this,
24 enforcing these code regulations on existing facilities will only
25 result in fewer impacts to the physical environment, not more. It
26 will reduce noise and aesthetic concerns within existing
27 neighborhoods, thus it is clear that there is no possibility that
28 the activity in question may have a significant effect on the

1 environment. Individual establishments that require a new
2 Conditional Use Permit are subject to CEQA review at the time of
3 application submittal."

4 However, the City's cited reasons for finding that the common
5 sense exemption applies rely on speculation, conclusions and
6 generalities rather than any substantial evidence or analysis. The
7 City simply states that the proposed amended ordinance "will only
8 modify locational restrictions and operational requirements of new
9 and existing establishments, and further refine the already limited
10 locations where new CRV Recycling Centers may locate, the revisions
11 will not result in a significant change to the physical
12 environment." Yet, Councilman Paul Caprioglio acknowledged in his
13 presentation to the Council that the amended ordinance would
14 "affect" and result in the closure of 16 of the 22 CRV recycling
15 facilities in the City.

16 On its face, this admission alone suggests that the amended
17 ordinance might have a significant impact on the environment, since
18 the elimination of a large number of recycling centers could
19 foreseeably affect the ability of City residents to recycle items
20 that might otherwise go into landfills or become litter. Indeed,
21 the State agency in charge of recycling, CalRecycle, submitted a
22 letter to the City during the consideration of the proposed
23 amendment, expressing concern that the amended ordinance would
24 reduce opportunities for Fresno residents to recycle. "[I]f
25 recycling centers close in Fresno, for some residents the nearest
26 center will be located in the City of Clovis. Therefore, the
27 amendment could reduce opportunities to redeem for residents in
28 your city." (*Ibid.*) Thus, there was substantial evidence in the

1 record to suggest that there might be at least a possibility of
2 significant environmental impact from the proposed amended
3 ordinance.

4 The City contends that the closure of 16 out of 22 recycling
5 centers in the City would not create any significant impact on the
6 environment because residents can still use the blue curbside
7 recycling bins provided by the City, go to grocery stores to redeem
8 their recyclable items, or go to one of the recycling centers in
9 industrial or light industrial areas. However, as CalRecycle noted
10 in its letter, the remaining six recycling centers are located in
11 widespread sections of the City that are not easily accessible to
12 many residents. Thus, it is foreseeable that residents might not
13 use the recycling centers, as they are not conveniently located and
14 may not be accessible at all to residents without access to
15 transportation.

16 In addition, to the extent that the City relies on the fact
17 that grocery stores can still take in recycling and thus fill the
18 void left by the closure of the CRV centers, there is evidence in
19 the record that many grocery stores are not interested in taking in
20 recycling for redemption, and that they would refuse to do so
21 because of the health and safety issues involved, as well as the
22 additional time burden and inconvenience that accepting recycling
23 would cause. The Senior Director of Save Mart testified that his
24 stores simply opt to pay the \$100 per day fine to the State rather
25 than accept recycling because they do not want to have dirty cans
26 and bottles in their stores near the fresh food, and they do not
27 have any storage for recyclables. The owners of two Grocery Outlet
28 stores testified that closing the CRV recycling centers would be

1 "devastating" to their businesses and would force them to close,
2 because it would force them to either accept recycling, which
3 creates a health and safety concern as well as a security threat,
4 or pay a \$100 per day fine, which they cannot afford. Thus, there
5 was substantial evidence in the record that grocery stores would
6 not be willing or able to accept recyclables, and consequently the
7 City's claim that grocery stores would fill the void left by the
8 closed CRV centers is not supported by any evidence in the record.

9 Also, the owners of the Grocery Outlet stores testified that
10 the ordinance would force them out of business by requiring them to
11 either pay the \$100 per day fine to the State or accept recyclables
12 in their stores, which they are not able to do. Thus, there was
13 substantial evidence that the amended ordinance could cause urban
14 decay. Urban blight has been recognized as an environmental impact
15 that should be considered under CEQA. (*Cal. Clean Energy Committee*
16 *v. City of Woodland* (2014) 225 Cal.App.4th 173, 188-89.)

17 The City argues in opposition that several courts, including
18 the Fifth District Court of Appeal, have found that economic impacts
19 such as the closure of some stores are not the type of environmental
20 effects that must be considered under CEQA. "CEQA is concerned
21 with significant effects on the environment (§ 21100, subd. (b)),
22 not with purely economic impacts. The fact that a policy may hurt
23 certain businesses is not an effect covered by CEQA, unless that
24 impact on business causes a significant effect on the environment."
25 (*Visalia Retail, LP v. City of Visalia* (2018) 20 Cal.App.5th 1, 5,
26 internal citations omitted.)

27 Thus, "even if the land use policy would undoubtedly cause
28 some adverse economic consequences, appellant's expert offered

1 little to show that 'the magnitude of this effect' may lead to a
2 substantial impact on the environment. That is, 'even if a handful
3 of properties were to remain permanently vacant, the result would
4 not necessarily be the kind of change the physical environment that
5 implicates CEQA.'" (Id. at p. 6, internal citations omitted.)

6 "[C]ourts have recognized that CEQA is not a weapon to be
7 deployed against all possible development ills. For example,
8 although CEQA requires public agencies to evaluate the possible
9 negative environmental effects of constructing big-box retail
10 stores (e.g., air pollution from traffic, noise and light pollution,
11 destruction of open space), the fact that they may drive smaller
12 retailers out of business is not an effect covered by CEQA.
13 [Citation.] Only if the loss of businesses affects the physical
14 environment - for example, by causing or increasing urban decay -
15 will CEQA be engaged. [Citations.]" (*South Orange County Wastewater
16 Authority v. City of Dana Point* (2011) 196 Cal.App.4th 1604, 1614.)

17 In the cases cited by respondent, however, there had at least
18 been some studies performed regarding the environmental impacts from
19 the closure of the stores. Here, on the other hand, there has been
20 no study of the magnitude of the economic effects that might result
21 from the ordinance. It is impossible to say from the present record
22 whether the ordinance will result in the closure of a few stores,
23 many stores, or none at all. This is because the City found that
24 the common sense exemption applied, and thus it did not need to
25 conduct an initial study or complete an EIR. There was at least
26 some evidence in the record, however, that the ordinance might cause
27 the closure of some Grocery Outlet stores, which is enough to
28 suggest at least the possibility of the type of environmental impact

1 from urban blight that would require an EIR. The City offered no
2 substantial evidence to rebut the store owners' testimony that they
3 would be forced to close. At most, Mr. Capriogolio offered his
4 unsupported opinion that taking recyclables inside the stores was
5 not likely to be a problem for stores.

6 The City has also concluded that the project would have no
7 impact based on the occurrence of a speculative future event, namely
8 that grocery stores would begin accepting recyclables in-store.
9 However, the agency is required to consider the environment as it
10 exists at the time of the proposed project, not another set of
11 circumstances that might exist at some future time. (Public
12 Resources Code § 21060.5; CEQA Guidelines § 15125, subd. (a).)

13 "A long line of Court of Appeal decisions holds, in similar
14 terms, that the impacts of a proposed project are ordinarily to be
15 compared to the actual environmental conditions existing at the
16 time of CEQA analysis, rather than to allowable conditions defined
17 by a plan or regulatory framework... In each of these decisions,
18 the appellate court concluded the baseline for CEQA analysis must
19 be the 'existing physical conditions in the affected area', that
20 is, the "'real conditions on the ground'", rather than the level of
21 development or activity that could or should have been present
22 according to a plan or regulation." (*Communities For A Better*
23 *Environment v. South Coast Air Quality Management Dist.* (2010) 48
24 Cal.4th 310, 320-321, internal citations omitted.)

25 Here, there was substantial evidence on the record that the
26 environmental baseline was that stores do not accept recyclables
27 in-store, so the City should not have used the occurrence of some
28 possible future event to find that the ordinance would have no

1 impact on the environment. This is particularly true here, where
2 the store owners had testified that they were not willing or able
3 to accept recyclables in-store, so the future event was unlikely to
4 occur.

5 Also, while the City suggested that residents can simply use
6 the blue curbside recycling bins to recycle their items, this
7 contention assumes that most residents who had previously used the
8 CRV centers would choose to use the blue bins for recycling even
9 though they would receive no money for their items. However, it
10 seems equally likely that many people will simply stop recycling
11 altogether if they cannot make any money from it. In any event,
12 whether or not people might use blue recycling bins to deposit their
13 items after the CRV centers close, there was no evidence presented
14 as to how many people might use this option or whether use of the
15 blue bins would adequately mitigate the loss of the CRV recycling
16 centers to the point where closure of the centers would not result
17 in any significant environmental impact. Again, the City appears
18 to be merely speculating that use of the blue bins would make up
19 for the loss of the CRV recycling centers.

20 The City also claimed in its notice of exemption that the only
21 effect on the environment from the proposed amendment would be
22 positive rather than negative, and thus there was no need to do any
23 further study under CEQA. "In addition to this, enforcing these
24 code regulations on existing facilities will only result in fewer
25 impacts to the physical environment, not more. It will reduce noise
26 and aesthetic concerns within existing neighborhoods, thus it is
27 clear that there is no possibility that the activity in question
28 may have a significant effect on the environment."

1 However, while there is some evidence in the record that the
2 ordinance would have a beneficial effect on the environment, there
3 was also other evidence that it would negatively affect the
4 environment by closing recycling facilities and potentially causing
5 urban blight due to grocery store closures. "[W]here there is a
6 reasonable possibility that a project or activity may have a
7 significant effect on the environment, an exemption is improper."
8 (*Dunn-Edwards Corp. v. Bay Area Air Quality Management Dist.* (1992)
9 9 Cal.App.4th 644, 657, disapproved on other grounds in *Western*
10 *States Petroleum Assn v. Superior Court* (1995) 9 Cal.4th 559.)

11 "When the impact may be either adverse or beneficial, it is
12 particularly appropriate to apply CEQA which is carefully conceived
13 for the purpose of increasing the likelihood that the environmental
14 effects will be beneficial rather than adverse." (*Wildlife Alive*
15 *v. Chickering* (1976) 17 Cal.3d 190, 206, internal citations omitted,
16 superseded by statute on other grounds, as stated in *Berkeley Hills*
17 *Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1107-1108.)

18 Here, there was evidence of both positive and adverse
19 environmental consequences from the amended ordinance. The City
20 presented evidence that the amendment would have positive effects
21 because it would reduce crime, noise and aesthetic concerns,
22 primarily because the CRV recycling centers have become hubs for
23 homeless activity, crime, vandalism, loitering, etc. On the other
24 hand, there was also evidence that the ordinance would cause the
25 City to lose many of its recycling facilities, which could result
26 in the closure of businesses and the potential for urban blight and
27 other environmental impacts. Therefore, the City abused its
28 discretion in determining without further study that the amended

1 ordinance would not result in any significant effect on the
2 environment.

3 Because there was no substantial evidence in the record to
4 support the City's finding that the amended ordinance would not
5 have any significant effect on the environment, the City abused its
6 discretion in determining that the common sense exemption applied
7 to the ordinance. As a result, the court hereby grants the petition
8 for writ of mandate and orders the City to rescind its amended
9 ordinance and conduct further proceedings in compliance with CEQA.¹

10 **F. Motion for Preliminary Injunction**

11 Petitioner has also moved for a preliminary injunction to
12 prevent implementation of the amended ordinance, contending that
13 its members will suffer irreparable harm if the ordinance is allowed
14 to go into effect because they will be forced to either accept
15 recyclables in-store, which poses health and safety risks, or go
16 out of business if they have to pay fines to the State. However,
17 in light of the court's ruling on the merits of the petition for
18 writ of mandate, the motion for a preliminary injunction is moot.
19 Therefore, the court denies the motion for preliminary injunction.²

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22 ¹ Because the court will grant the writ based on the lack of evidence of no
23 significant environmental impact, there is no need for the court to reach the
petitioner's alternative argument regarding statutory preemption.

24 ² The City objects to petitioner's evidence in support of the injunction, which
25 consists of declarations from several owner/operators of CRV centers who state
26 that the ordinance will drive them out of business, and that they have been
27 unable to find any stores willing to allow them to operate inside their
28 facilities. The City claims that these declarations are improper extra-record
evidence, and that they are irrelevant to the issues raised by petitioner because
they are not statements from the petitioner's members. However, the court
overrules the objections, since the evidence may be considered in support of the
preliminary injunction application, if not the writ petition. Also, the evidence
is relevant to the issue of whether there are any stores that will accept CRV
recycling, as well as whether the ordinance will force CRV centers out of the
area.

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IV.

CONCLUSION

The petition for writ of mandate is granted. The City is ordered to rescind its amended ordinance and conduct further proceedings regarding the environmental effects of the ordinance in accordance with CEQA. The motion for preliminary injunction is denied, as it is moot in light of the court's ruling on the writ petition.

It is so ordered.

DATED this 30th day of April, 2018.



Hon. Jane Cardoza
Judge of the Superior Court