Vichy Springs Resort, Inc. v. City of Ukiah

Court of Appeal of California, First Appellate District, Division Four

March 29, 2024, Opinion Filed

A165345, A167000

Reporter
101 Cal. App. 5th 46 *; 2024 Cal. App. LEXIS 221 **; 319 Cal. Rptr. 3d 865

VICHY SPRINGS RESORT, ***INC***., Plaintiff and Appellant, ***v***. ***CITY*** OF ***UKIAH*** et al., Defendants and Respondents; ***UKIAH*** RIFLE AND PISTOL CLUB, ***INC***., Real Party in Interest.

Notice: CERTIFIED FOR PARTIAL PUBLICATION*

Prior History: [1]** Superior Court of Mendocino County, No. SCUK-CVPT 18-70200, Ann C. Moorman, Judge.

Core Terms

moot, alleges, cause of action, trial court, environmental, building permit, mitigation measures, regulatory authority, Powers, zoning, ordinances, regulation, demurrer, notice, lease, environmental impact, discretionary power, sustain a demurrer, injunctive relief, public agency, completion, inaction, lessee's, argues

Case Summary

Overview

HOLDINGS: [1]-A petition sufficiently pleaded a county violated the California Environmental Quality Act, Pub. Resources Code, § 21000 et seq., abused its discretion, and failed to proceed in the manner required by law under *Pub. Resources Code, § 21168.5*, because it alleged the county closed complaints about a construction project without enforcement after mistakenly determining it had no regulatory authority over the project; [2]-Although the ***city***, not the county, issued the permit, a project was adequately alleged because the definition in *Pub. Resources Code, § 21065*, required an activity involving permit issuance and construction was such an activity; [3]-The project's completion did not render the claim moot because effective relief was still possible, such as the imposition of mitigation measures to reduce or avoid the significant environmental impacts alleged in the petition.

Outcome
Reversed and remanded.

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > Judgments > Pretrial Judgments > Judgment on Pleadings

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Demurrers

Civil Procedure > Appeals > Standards of Review > Questions of Fact & Law

HN1[] **Standards of Review, De Novo Review**

An appellate court reviews de novo a trial court's order sustaining demurrers and exercises its independent judgment as to whether the petition states a cause of action as a matter of law. The appellate court accepts as true all material facts properly pled and matters which may be judicially noticed, but disregards contentions, deductions, or conclusions of fact or law. The appellate court gives the complaint a reasonable interpretation, reading it as a whole and its parts in their context. Because a motion for judgment on the

* Pursuant to *California Rules of Court, rules 8.1105(b)* and *8.1110*, this opinion is certified for publication with the exception of part I.C. and parts II.–***V***.

pleadings is equivalent to a demurrer, it is governed by the same standard of review.

Civil Procedure > Appeals > Standards of Review > Abuse of Discretion

Constitutional Law > ... > Case or Controversy > Mootness > Great Public Concern

Civil Procedure > ... > Justiciability > Mootness > Public Interest Exception

Civil Procedure > Appeals > Standards of Review > De Novo Review

HN2[] Standards of Review, Abuse of Discretion

Issues of justiciability, such as mootness, are generally reviewed de novo. However, insofar as the trial court's rejection of the public interest exception to mootness is an exercise of the court's inherent discretion, this determination is arguably subject to an abuse of discretion standard of review.

Environmental Law > Assessment & Information Access > Environmental Impact Statements
Business & Corporate Compliance > Environmental & Natural Resources > Environmental Impact Statements

Environmental Law > Assessment & Information Access > Environmental Assessments

HN3[] Environmental & Natural Resources, Environmental Impact Statements

The California Environmental Quality Act (CEQA), Pub. Resources Code, § 21000 et seq., establishes a three-tier process to ensure that public agencies inform their decisions with environmental considerations. The first tier requires that an agency conduct a preliminary review to determine whether an activity is subject to CEQA. An activity that is not a project as defined in the Public Resources Code, pursuant to *Pub. Resources Code, § 21065*, and the Guidelines for the Implementation of the California Environmental Quality Act, *Cal. Code Regs., tit. 14, § 15000 et seq.*, as set forth in *Cal. Code Regs., tit. 14, § 15378*, is not subject to CEQA.

Environmental Law > Assessment & Information Access > Environmental Assessments

HN4[] Assessment & Information Access, Environmental Assessments

Because the California Environmental Quality Act, Pub. Resources Code, § 21000 et seq., regulates the use of discretionary powers, it does not apply to a project that requires only ministerial approval. *Pub. Resources Code, § 21080, subd. (b)(1)*. A project is discretionary when an agency is required to exercise judgment or deliberation in deciding whether to approve an activity.

Environmental Law > Assessment & Information Access > Environmental Assessments

Environmental Law > Assessment & Information Access > Public Participation

HN5[] Assessment & Information Access, Environmental Assessments

Under *Pub. Resources Code, § 21065, subd. (a)*, a project includes an activity directly undertaken by any public agency.

Civil Procedure > ... > Writs > Common Law Writs > Mandamus

Environmental Law > Natural Resources & Public Lands > National Environmental Policy Act

HN6[] Common Law Writs, Mandamus

When a governmental agency has violated the California Environmental Quality Act (CEQA), Pub. Resources Code, § 21000 et seq., the mechanism through which the remedy or remedies are implemented to correct the CEQA violation is a peremptory writ of mandate.

Civil Procedure > Appeals > Notice of Appeal

Civil Procedure > ... > Justiciability > Mootness > Real Controversy Requirement

HN7[] **Appeals, Notice of Appeal**

An appellate court will decide only actual controversies, and a live appeal may be rendered moot by events occurring after the notice of appeal was filed. Reviewing courts will not render opinions on moot questions or abstract propositions, or declare principles of law which cannot affect the matter at issue on appeal. A case is moot when the decision of the reviewing court can have no practical impact or provide the parties effectual relief. Stated differently, moot cases are those in which an actual controversy did exist but, by the passage of time or a change in circumstances, ceased to exist. The pivotal question in determining if a case is moot is therefore whether the court can grant the plaintiff any effectual relief.

Environmental Law > Assessment & Information Access > Environmental Assessments

Environmental Law > Administrative Proceedings & Litigation > Judicial Review

HN8[] **Assessment & Information Access, Environmental Assessments**

Pub. Resources Code, § 21168.5, applies to an action to attack, review, set aside, void or annul a determination, finding, or decision of a public agency on the grounds of noncompliance with the California Environmental Quality Act, Pub. Resources Code, § 21000 et seq.

Environmental Law > Assessment & Information Access > Environmental Assessments

Environmental Law > Natural Resources & Public Lands > Coastal Zone Management > Permits

HN9[] **Assessment & Information Access, Environmental Assessments**

The definition of a project under *Pub. Resources Code, § 21065*, does not require that a permit be issued. It requires that the proposed activity involve the issuance to a person of a permit.

Headnotes/Summary

Summary

[*46] CALIFORNIA OFFICIAL REPORTS SUMMARY

The trial court sustained demurrers to causes of action that included violations of the *California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.)*. (Superior Court of Mendocino County, No. SCUK-CVPT 18-70200, Ann C. Moorman, Judge.)

The Court of Appeal reversed and remanded. The court held the petition sufficiently pleaded a county violated CEQA, abused its discretion, and failed to proceed in the manner required by law (*Pub. Resources Code, § 21168.5*) because it alleged the county closed complaints about a construction project without enforcement after mistakenly determining it had no regulatory authority over the project. Although the ***city***, not the county, issued the permit, a project was adequately alleged because the definition (*Pub. Resources Code, § 21065*) requires an activity involving permit issuance, and construction is such an activity. The project's completion did not render the claim moot because effective relief was still possible, such as the imposition of mitigation measures to reduce or avoid the significant environmental impacts alleged in the petition. (Opinion by Goldman, J., with Brown, P. J., and Smiley, J.,† concurring.)

Headnotes

CALIFORNIA OFFICIAL REPORTS HEADNOTES

CA(1)[] **(1)**

Appellate Review § 128—Scope—Function of Appellate Court—Demurrers.

An appellate court reviews de novo a trial court's order sustaining demurrers and exercises its independent judgment as to whether the petition states a cause of action as a matter of law. The appellate court accepts as true all material facts properly pled and matters which may be judicially noticed, but disregards contentions, deductions, or conclusions of fact or law. The appellate court gives the complaint a reasonable interpretation, reading it as a whole and its parts in their context. Because a motion for judgment on the

† Judge of the Alameda Superior Court, assigned by the Chief Justice pursuant to *article VI, section 6 of the California Constitution*.

pleadings is equivalent to a demurrer, it is governed by the same standard of review.

CA(2)[] **(2)**

Appellate Review § 144—Scope—Justiciability—Mootness.

Issues of justiciability, such as mootness, are generally reviewed de novo. However, insofar as the trial court's rejection of the public interest exception to mootness is an exercise of the court's inherent discretion, this determination is arguably subject to an abuse of discretion standard of review.

CA(3)[] **(3)**

Pollution and Conservation Laws § 1.6—California Environmental Quality Act—Projects—Preliminary Review.

The California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.) establishes a three-tier process to ensure that public agencies inform their decisions with environmental considerations. The first tier requires that an agency conduct a preliminary review to determine whether an activity is subject to CEQA. An activity that is not a project as defined in the Public Resources Code (Pub. Resources Code, § 21065) and the Guidelines for the Implementation of the California Environmental Quality Act (*Cal. Code Regs., tit. 14, § 15000 et seq.*) (*Cal. Code Regs., tit. 14, § 15378*) is not subject to CEQA. Under Pub. Resources Code, § 21065, subd. (a), a project includes an activity directly undertaken by any public agency.

CA(4)[] **(4)**

Pollution and Conservation Laws § 1.6—California Environmental Quality Act—Projects—Discretionary.

Because the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.) regulates the use of discretionary powers, it does not apply to a project that requires only ministerial approval (Pub. Resources Code, § 21080, subd. (b)(1)). A project is discretionary when an agency is required to exercise judgment or deliberation in deciding whether to approve an activity.

CA(5)[] **(5)**

Pollution and Conservation Laws § 2.9—California Environmental Quality Act—Proceedings—Judicial Review—Peremptory Writ of Mandate.

When a governmental agency has violated the California ***[*48]*** Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.), the mechanism through which the remedy or remedies are implemented to correct the CEQA violation is a peremptory writ of mandate.

CA(6)[] **(6)**

Appellate Review § 120—Dismissal—Grounds—Mootness.

An appellate court will decide only actual controversies, and a live appeal may be rendered moot by events occurring after the notice of appeal was filed. Reviewing courts will not render opinions on moot questions or abstract propositions, or declare principles of law which cannot affect the matter at issue on appeal. A case is moot when the decision of the reviewing court can have no practical impact or provide the parties effectual relief. Stated differently, moot cases are those in which an actual controversy did exist but, by the passage of time or a change in circumstances, ceased to exist. The pivotal question in determining if a case is moot is therefore whether the court can grant the plaintiff any effectual relief.

CA(7)[] **(7)**

Pollution and Conservation Laws § 2.9—California Environmental Quality Act—Proceedings—Judicial Review—Jurisdiction—*City* and County.

A petition alleged that a county's local ordinances required a club to obtain a discretionary use permit from the county for a construction project; that because the club's project would have reasonably foreseeable significant environmental impacts, the county's discretionary authority over the project required California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.) review; and that the petitioner filed complaints with the county asserting that the club was constructing a new facility without having obtained necessary permits or complied with CEQA, which complaints were closed without enforcement based on the county's mistaken determination that the project was within the sole jurisdiction of the ***city***. Accordingly, the petition alleged that the county failed to

proceed in the manner required by law by maintaining a blanket policy of no CEQA enforcement against the club. These allegations were sufficient to state a cause of action for violation of CEQA.

[*Manaster & Selmi, Cal. Environmental Law & Land Use Practice (2024) ch. 23, § 23.04*; *Cal. Forms of Pleading and Practice (2024) ch. 418, Pollution and Environmental Matters, § 418.37*.]

CA(8)[] **(8)**

Pollution and Conservation Laws § 2.9—California Environmental Quality Act—Judicial Review—Scope.

Pub. Resources Code, § 21168.5, applies to an action to attack, review, set aside, void or annul a determination, finding, or decision of a public agency on the grounds of noncompliance with the *California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.)*.

[*49] ***CA(9)***[] **(9)**

Pollution and Conservation Laws § 1.6—California Environmental Quality Act—Projects—Definition.

The definition of a project under *Pub. Resources Code, § 21065*, does not require that a permit be issued. It requires that the proposed activity involve the issuance to a person of a permit.

Counsel: Bartkiewicz, Kronick & Shanahan, Jennifer T. Buckman and Kristin B. Peer for Plaintiff and Appellant.

David J. Rapport, ***City*** Attorney, for Defendant and Respondent ***City*** of ***Ukiah***.

Christian M. Curtis, County Counsel, and Brina A. Blanton, Deputy County Counsel, for Defendant and Respondent County of Mendocino.

Cannata, O'Toole & Olson, Therese Y. Cannata, Michael Ching, Vincent Lee; Law Office of David M. Kindopp and David M. Kindopp for Real Party in Interest.

Judges: Opinion by Goldman, J., with Brown, P. J., and Smiley, J.*, concurring.

* Judge of the Superior Court of California, Alameda County, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

Opinion by: Goldman, J.

Opinion

GOLDMAN, J.—Real Party in Interest ***Ukiah*** Rifle and Pistol Club, ***Inc***. (Club), operates a shooting range on land it leases from the ***City*** of ***Ukiah*** (***City***). The property, although owned by the ***City***, is located in an unincorporated area of Mendocino County (County). Half a mile from the Club lies ***Vichy Springs Resort***, ***Inc***. (***Vichy***), a mineral ***springs resort*** and spa. Faced with uncertainty about whether or to what extent the ***City*** or the County has regulatory authority over the Club's activities, ***Vichy*** sued both entities regarding the Club's planned demolition of its existing main shooting **[**2]** range and construction of a new range (Project), which ***Vichy*** contended would have significant environmental impacts such as lead contamination and increased noise and traffic. While the case was pending in the trial court, the Club completed the Project—***Vichy*** did not ask the court to enjoin it—and the ***City*** and the County entered into an agreement for shared exercise of land use and California building code authority under the *Joint Exercise of Powers Act, Government Code section 6500 et seq.* (the Joint Powers Agreement or Agreement), with respect to the Club's activities. Ultimately, after several rounds of motions, the trial court entered judgment in favor of the ***City*** and the County on ***Vichy***'s second amended petition for writ of mandate and complaint for declaratory and injunctive relief (Petition). The trial court then denied ***Vichy***'s motion for attorneys' fees under *Code of Civil Procedure [*50] section 1021.5*, rejecting ***Vichy***'s argument that the lawsuit was the "catalyst" for the establishment of the Joint Powers Agreement.

On appeal, ***Vichy*** contends the trial court erred by (1) sustaining without leave to amend demurrers to the causes of action alleging that the ***City*** and the County failed to comply with the *California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.*; future undesignated statutory references are to this code) and their respective **[**3]** general plans (General Plan) and local ordinances; (2) granting the Club's motion to strike allegations related to its lease with the ***City***; and (3) granting the ***City***'s and the County's motion for judgment on the pleadings on ***Vichy***'s claim for declaratory relief on the ground that it was mooted by the Joint Powers Agreement. ***Vichy*** also contends the court erred in denying its motion for attorneys' fees.

We find no error insofar as the trial court sustained the demurrer to the second and third causes of action against the ***City*** (for alleged violations of local law in issuing a building permit), and insofar as it found that the claim for declaratory relief was moot. We conclude, however, that the trial court erred in granting the motion to strike, and that the Petition sufficiently alleges that both the ***City*** and the County violated CEQA and the County abused its discretion in determining it had no regulatory authority over the Club's Project. Accordingly, we reverse the judgment and remand for further proceedings. In light of our reversal of the judgment, we will dismiss ***Vichy***'s appeal of the order denying the motion for attorneys' fees.

BACKGROUND

In January 2018, ***Vichy*** sued to (1) set aside the building **[**4]** permit issued by the ***City*** in December 2017, authorizing the demolition of the Club's existing main shooting range and construction of a new range, and (2) enjoin operation of all unauthorized and improperly authorized activity at the Club until the ***City*** and the County have properly exercised their regulatory authority over the Club's use of the property and issued the necessary permits. The Petition described the Project as follows: "In order to accommodate the increase in use, the Gun Club is undertaking to demolish the main range and rebuild with a different and modern structure." The Petition also detailed an alleged "pattern and practice of failing to regulate" the Club by both the ***City*** and the County and sought a declaration that the property is subject to land use regulation by both entities.

As amended, the Petition alleges that the County erroneously determined that the ***City***'s ownership of the property rendered the Club's activities immune from the County's regulatory authority under *Government Code sections 53090* and *53091*, which (as relevant here) exempt ***cities*** from a **[*51]** county's building and zoning ordinances.[1] According to the Petition, the Club's use of the property is for a private purpose, and the ***City***'s immunity **[**5]** from County regulation does not extend to ***city***-owned property located outside its territorial jurisdiction that is leased to a private entity for a private purpose. With respect to the ***City***, the Petition alleges that it has no *statutory* authority to regulate uses of property outside of its jurisdiction, but that the ***City***'s lease with the Club enables it to condition any improvements the Club wishes to make on compliance with the ***City***'s and the County's local plans and ordinances. It also alleges that the ***City*** accepts the County's position that the County's General Plan and zoning and building codes do not apply to the Club's activities, and that the ***City*** therefore does not require the Club to comply with the County's laws.

The first cause of action alleges CEQA violations by the County and the ***City***. According to the Petition, the County violated CEQA by erroneously determining that it had no regulatory responsibility for the Project and, as a result of that determination, allowing it to proceed without review or interruption. It alleges that the ***City***'s violations consisted in issuing a building permit outside of its jurisdiction, improperly determining that the Project was not subject **[**6]** to CEQA, and failing to require the Club to obtain approvals, including a building permit and use permit, from the County.

The second cause of action alleges that the County violated section 20.204.015(B) of its zoning code, which ***Vichy*** contends prohibited the Club from resuming its nonconforming use after demolishing the main range, by refusing to take any action against the Project, and by improperly allowing the ***City*** to issue a building permit and certificate of occupancy in the County's jurisdiction. It alleges that the ***City*** violated the ***Ukiah City*** Code by issuing a building permit and certificate of occupancy outside of its jurisdiction.

The third cause of action alleges that the ***City*** unlawfully failed to consider the ***City***'s and the County's General Plan policies when it issued a building permit to the Club.

Under the first three causes of action, the Petition seeks a writ of mandate directing the ***City*** to set aside the building permits and both the ***City*** and the County to comply with CEQA and their respective local laws, and an injunction prohibiting the continued use of the Club property until all necessary review has been conducted and required permits have been issued.
[*52]

Finally, the fourth cause of action **[**7]** seeks a declaration that the Club is subject to land use regulation by the County and the ***City***.

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[1] *Government Code section 53091, subdivision (a)*, provides: "Each local agency shall comply with all applicable building ordinances and zoning ordinances of the county or ***city*** in which the territory of the local agency is situated." However, *Government Code section 53090, subdivision (a)*, excludes ***cities***, among other public entities, from the definition of "local agency."

While the action was pending, and in response to a 2014 request by the County, the Attorney General issued Opinion 14-403, clarifying that "a ***city***'s private lessee is exempt under *[Government Code] section 53090*, provided that the lessee's use of the property primarily serves the ***city***'s public purposes, but that it is not exempt where the lessee's use of the property primarily serves the lessee's private interests." (*101 Ops.Cal.Atty.Gen. 88 (2018)*.) The opinion is therefore consistent with the Petition's contention that a private lessee who uses ***city***-owned property for a private purpose does not receive intergovernmental immunity, although it does not decide whether the Club is using the property primarily for a private purpose, as the Petition alleges.

In May 2021, the County demurred to the first and second causes of action. It argued that the first cause of action failed to state a claim against the County for violation of CEQA because there was no "project" subject to CEQA when ***Vichy*** was complaining solely of the County's failure to act. It argued that the second cause of action failed because a writ of mandate does not lie to compel the **[**8]** County to take specific action to enforce its zoning laws. The Club, joined by the ***City***, filed a demurrer to the first, second, and third causes of action, arguing that they were all mooted by the Project's completion. The Club also filed a motion to strike various allegations from the Petition, in which the ***City*** likewise joined. The court sustained the demurrers without leave to amend, and granted the motion to strike.[2]

The ***City*** and the County later entered into the Joint Powers Agreement. They agreed that (1) "the County shall exercise land use jurisdiction over the Gun Club's use of the Gun Club Property in accordance with the County's duly adopted zoning ordinance as it currently reads in Title 20 of the Mendocino County Code or as it may be amended or superseded in the future"; (2) "[t]he ***City*** rather than the County shall continue to assure that any improvements constructed on the Gun Club Property comply with the procedures and substantive requirements of the Model Codes adopted by the ***City*** pursuant to Division 3, Chapter 1 of the ***Ukiah City*** Code ('UCC') as it currently reads or as it may be amended or superseded in the future"; and (3) "[t]he ***City*** and the County shall agree upon a process by which the ***City*** can verify that County **[**9]** has made all necessary zoning review, prior to the ***City*** issuing a permit." The Agreement provides that either party may withdraw from it with specified notice.
[*53]

Thereafter, the ***City*** filed a motion for judgment on the pleadings, which the County joined, seeking dismissal of the fourth cause of action on the ground that it had been rendered moot by the entry of the Agreement between the County and the ***City***. The trial court agreed and entered judgment in favor of the ***City*** and the County. ***Vichy*** timely filed a notice of appeal.

Vichy subsequently filed its motion for attorneys' fees. The trial court denied the motion and ***Vichy*** timely filed a second notice of appeal. At the request of the parties, we ordered the appeals consolidated for all purposes.[3]

DISCUSSION

CA(1)[↑] **(1)** The judgment was entered after the trial court sustained demurrers to the first three causes without leave to amend and then granted a motion for judgment on the pleadings as to the fourth cause of action on the ground that it was moot. *HN1*[↑] We review de novo the trial court's order sustaining the demurrers and exercise our independent judgment as to whether the Petition states a cause of action as a matter of law. (*Moore **v**. Regents of University of California (1990) 51 Cal.3d 120, 125 [271 Cal. Rptr. 146, 793 P.2d 479]*.) We accept as true all **[**10]** material facts properly pled and matters which may be judicially noticed, but disregard contentions, deductions, or conclusions of fact or law. (*Blank **v**. Kirwan (1985) 39 Cal.3d 311, 318 [216 Cal. Rptr. 718, 703 P.2d 58]*.) We "give the complaint a reasonable interpretation, reading it as a whole and its parts in their context." (*Ibid.*) Because a motion for judgment on the pleadings is equivalent to a demurrer, it is governed by the same standard of review. (*People ex rel. Harris **v**. Pac Anchor Transportation, **Inc**. (2014) 59 Cal.4th 772, 777 [174 Cal. Rptr. 3d 626, 329 P.3d 180]*.)

HN2[↑] *CA(2)*[↑] **(2)** "Issues of justiciability, such as mootness, are generally reviewed de novo." (*Robinson **v**. U-Haul Co. of California (2016) 4 Cal.App.5th 304,*

[2] There is no written order sustaining the Club's demurrer. Both ***Vichy*** and the Club rely on the trial court's oral ruling at the hearing, where it stated that it would "grant the demurrer to the second-amended petition filed by the pistol club as to causes of actions 1, 2, and 3."

[3] The County's request for judicial notice is denied. The documents included in the request are all already included in the record on appeal.

319 [209 Cal. Rptr. 3d 81].) However, insofar as the trial court's rejection of the "public interest exception to mootness is an exercise of the court's 'inherent discretion' [citation], [this] determination [is] arguably … subject to an abuse of discretion standard of review." (*Ibid.*)

I. *CEQA Claim*

The purpose of CEQA is to protect and maintain California's environmental quality. (§ 21000.) As explained in the CEQA Guidelines,[4] "CEQA is **[*54]** intended to be used in conjunction with discretionary powers granted to public agencies by other laws. [¶] … CEQA does not grant an agency new powers independent of the powers granted to the agency by other laws. [¶] … Where another law grants an agency discretionary powers, CEQA supplements those discretionary powers **[**11]** by authorizing the agency to use the discretionary powers to mitigate or avoid significant effects on the environment when it is feasible to do so with respect to projects subject to the powers of the agency." (CEQA Guidelines, § 15040.)

HN3[↑] CA(3)[↑] **(3)** CEQA establishes "a three-tier process to ensure that public agencies inform their decisions with environmental considerations." (Muzzy Ranch Co. **v.** Solano County Airport Land Use Com. (2007) 41 Cal.4th 372, 379–380 [60 Cal. Rptr. 3d 247, 160 P.3d 116].) In this case, we are concerned only with the first tier, which requires that "an agency conduct a preliminary review to determine whether an activity is subject to CEQA." (*Id. at p. 380*.) "An activity that is not a 'project' as defined in the Public Resources Code (see § 21065) and the CEQA Guidelines (see § 15378) is not subject to CEQA." (*Ibid.*) As relevant here, section 21065 defines a "Project" as "an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and which is any of the following: [¶] … [¶] (c) An activity that involves the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies."[5] CA(4)[↑] **(4)** However, HN4[↑] because CEQA regulates the use of discretionary powers, it does not apply to a project that requires **[**12]** only "ministerial" approval. (§ 21080, subd. (b)(1); Mission Peak Conservancy **v.** State Water Resources Control Bd. (2021) 72 Cal.App.5th 873, 880 [287 Cal. Rptr. 3d 666].) "A project is discretionary when an agency is required to exercise judgment or deliberation in deciding whether to approve an activity." (Protecting Our Water & Environmental Resources **v.** County of Stanislaus (2020) 10 Cal.5th 479, 489 [268 Cal. Rptr. 3d 148, 472 P.3d 459].)

HN6[↑] CA(5)[↑] **(5)** "When a governmental agency … has violated CEQA, '[t]he mechanism through which the remedy or remedies are implemented [to correct the CEQA violation] is a peremptory writ of mandate.'" (McCann **v.** **City** of San Diego (2023) 94 Cal.App.5th 284, 292 [312 Cal. Rptr. 3d 34].) Under section 21168.5, "In any action or proceeding, other than an action or proceeding under Section 21168, to attack, review, set aside, void or annul a determination, finding, or decision of a public agency on the grounds of noncompliance with this division, the inquiry shall extend only to whether there was a prejudicial abuse of discretion. Abuse of discretion is established **[*55]** if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence."

A. *Mootness*

CA(6)[↑] **(6)** As an initial matter, the Club, joined by the **City**, argues that the CEQA claim is moot because there is no effective relief the court can order now that the Project has been completed. ""It is well settled that HN7[↑] an appellate court will decide only actual controversies and that a live appeal may be rendered moot by events occurring **[**13]** after the notice of appeal was filed. We will not render opinions on moot questions or abstract propositions, or declare principles of law which cannot affect the matter at issue on appeal."' [Citation.] 'A case is moot when the decision of the reviewing court "can have no practical impact or provide the parties effectual relief."' [Citation.] [¶] 'Stated differently, moot cases "are '[t]hose in which an actual controversy did exist but, by the passage of time or a change in circumstances, ceased to exist.'"' [Citation.] 'The pivotal question in determining if a case is moot is therefore whether the court can grant the plaintiff any effectual relief.'" (Committee for Sound Water & Land

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[4] We use the term "CEQA Guidelines" to refer to the regulations for the implementation of CEQA authorized by the Legislature under section 21083 and codified in ***title 14, section 15000 et seq. of the California Code of Regulations.***

[5] HN5[↑] Under section 21065, subdivision (a), a project also includes an activity directly undertaken by any public agency. No party has suggested that the Project meets this definition simply because the **City** owns the land on which construction will occur.

*Development **v**. **City** of Seaside (2022) 79 Cal.App.5th 389, 405 [294 Cal. Rptr. 3d 215]*.)

We disagree that the claim is moot.[6] In *Bakersfield Citizens for Local Control **v**. **City** of Bakersfield (2004) 124 Cal.App.4th 1184, 1203–1204 [22 Cal. Rptr. 3d 203]*, the court rejected Bakersfield's argument that the appeal, which challenged project approvals for two retail shopping centers, was rendered moot by the completion of the project. The court held that while the shopping centers were complete and several businesses were already in operation, the appeal was not moot because, among other reasons, "even at **[*56]** this late juncture full CEQA compliance would not be a meaningless exercise of form over substance." (*Id. at p. 1204*.) The court explained, "The ***City*** possesses **[**14]** discretion to reject either or both of the shopping centers after further environmental study and weighing of the projects' benefits versus their environmental, economic and social costs. As conditions of reapproval, the ***City*** may compel additional mitigation measures or require the projects to be modified, reconfigured or reduced. The ***City*** can require completed portions of the projects to be modified or removed and it can compel restoration of the project sites to their original condition." (*Ibid.*; see also *Woodward Park Homeowners Assn. **v**. Garreks, **Inc**. (2000) 77 Cal.App.4th 880, 888 [92 Cal. Rptr. 2d 268]* [challenge to approval of car wash without preparation of an Environmental Impact Report (EIR) is not moot, despite completion of project, where "decision upholding the court's order directing the preparation of an EIR could result in modification of the project to mitigate adverse impacts or … removal of the project altogether"].)

The same is true here. The Petition alleges that the Project will increase use of the range and that, as a result, the contamination of the water flowing off site, noise, and traffic will all increase. According to the Petition, the County could require the Club to alleviate environmental impacts by engaging in a proactive lead removal program, implementing a pollution **[**15]** prevention plan, using lead-free ammunition at the main range until the Club demonstrates that it is no longer contributing lead to Sulfur Creek and the Russian River, and limiting the hours of use and allowed uses at the main range. Thus, while the Project may be complete, mitigation measures could still be imposed to reduce or avoid the significant environmental impacts alleged in the Petition. The permit and certificate of occupancy issued by the ***City*** could be revoked and held in abeyance while the County completes its review. (See, e.g., *Save Our Skyline **v**. Board of Permit Appeals (1976) 60 Cal.App.3d 512, 514, 522 [131 Cal. Rptr. 570]* [affirming writ of mandate requiring revocation of building permit for failure to comply with CEQA].)

The Club relies on *Parkford Owners for a Better Community **v**. County of Placer (2020) 54 Cal.App.5th 714 [268 Cal. Rptr. 3d 653]* and *Santa Monica Baykeeper **v**. **City** of Malibu (2011) 193 Cal.App.4th 1538 [124 Cal. Rptr. 3d 382] (Baykeeper)*, but they are both distinguishable. In *Parkford*, the court found that the appellant's CEQA claims, which challenged the expansion of self-storage facility without preparation of an EIR, were rendered moot by completion of the expansion project. (*Parkford, at pp. 716–717*.) Unlike in the present case, however, although the appellant argued summarily in the trial court that the County could still "'modify the project or impose mitigation measures, or require that the property be restored,'" it did not elaborate and it did not reassert that argument in its **[**16]** briefing on appeal. (*Id. at p. 725*.) Similarly, in *Baykeeper*, in holding that the completion of a park project rendered appellant's CEQA claim moot, the court noted that although **[*57]** appellant claimed that "'the project can be modified and the construction impacts can be ameliorated,'" it had not suggested how that could be accomplished "now that the project is finished

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[6] We observe, however, that despite scattered uses of the word "justiciable," ***Vichy***'s opening brief did not clearly address whether the first three causes of action were mooted by the Project's completion. Moreover, in its reply brief, it wrote, "Notably, the superior court's Orders did not find the first three causes of action were moot," pointing to the court's order sustaining the *County*'s demurrer, which did not raise a mootness argument. We find this statement disingenuous. As noted earlier, there was no written order sustaining the Club's demurrer, which challenged the first three causes of action based on mootness; the parties rely instead on the court's oral ruling. In that ruling, the court expressly found that there is "no longer a justiciable issue" because "the event around which this lawsuit is constructed" has been "over for approximately three years." Because ***Vichy*** is required to overcome all grounds for the trial court's decision, its failure to address mootness in a substantive way in the opening brief arguably forfeits the claim of error. (See, e.g., *Sonoma Luxury **Resort** LLC **v**. California Regional Water Quality Control Bd. (2023) 96 Cal.App.5th 935, 941 [314 Cal. Rptr. 3d 848]*; *LNSU #1, LLC **v**. Alta Del Mar Coastal Collection Community Assn. (2023) 94 Cal.App.5th 1050, 1070–1071 [312 Cal. Rptr. 3d 707]*; *Ivanoff **v**. Bank of America, N.A. (2017) 9 Cal.App.5th 719, 729, fn. 1 [215 Cal. Rptr. 3d 442]*.) Given the fragmented state of the record and the Club's and the ***City***'s failure to argue forfeiture, however, we exercise our discretion to consider the issue.

and operating." (*Baykeeper, at p. 1549*.) Here, ***Vichy*** has included allegations about post-completion mitigation measures in its Petition.

We are also not persuaded by the Club's argument that we should find the claims moot because ***Vichy*** did not seek a preliminary injunction staying construction during the pendency of the litigation. Doubtless it would have been preferable for ***Vichy*** to ask for temporary injunctive relief; the progress of a project can impact the feasibility of mitigation measures and in some cases can indeed mean there is no longer anything the court could reasonably order as a remedy. Although the Club knew ***Vichy*** was challenging the ***City***'s determination that the Project was not subject to CEQA or qualified for an exemption, we cannot fault it for proceeding with construction given ***Vichy***'s inaction. But we see no legal basis for concluding **[**17]** that a petitioner's earlier failure to seek injunctive relief requires a court to find a CEQA claim moot in a situation in which effective relief remains available.

The cases the Club cites on this subject, *Baykeeper, supra, 193 Cal.App.4th 1538* and *Wilson & Wilson **v.** **City** Council of Redwood **City** (2011) 191 Cal.App.4th 1559 [120 Cal. Rptr. 3d 665]*, do not support such a broad proposition. In *Baykeeper*, the court noted that the appellant had failed to take steps to maintain the status quo pending resolution of its claims by seeking injunctive relief or a stay, doing so only once the case reached the court of appeal and construction was nearly complete. (*Baykeeper, at pp. 1547–1548*.) But as discussed above, appellants in that case offered only conclusory arguments regarding what relief might be available. In *Wilson & Wilson **v.** **City** Council of Redwood **City**, supra, 191 Cal.App.4th 1559*, the court held that appellant's action was moot because construction had been completed prior to entry of judgment in the trial court and no injunctive relief was sought. That case, however, was a reverse validation action under *Code of Civil Procedure section 863*, not a petition for writ of mandate challenging the approval of a project in violation of CEQA. (*Wilson & Wilson **v.** **City** Council of Redwood **City**, at p. 1567*.) The trial court's judgment invalidated resolutions and development agreements, but "did not order the ***City*** to take any corrective action." (*Id. at p. 1571*.) Although the court rejected the appellant's argument that the developer **[**18]** had proceeded with construction at its own risk, it did not consider any argument that the trial court could or should have ordered mitigation measures notwithstanding the completion of construction. (*Id. at pp. 1579–1580*.)

Finally, the Club argues that the possible mitigation measures alleged in the Petition do not relate to the harms caused by the Project, and that ***Vichy*** is **[*58]** improperly attempting to obtain environmental review of the Club's use of the *entire* facility through its claims regarding the Project. The Club suggests, for example, that the Petition is "silent on how lead-free bullets or annual reclamation efforts would mitigate the discrete construction project at issue." This argument, however, ignores the allegation in the Petition that the Project will increase use of the facility, which would in turn result in increased bullets. (Cf. *Berkeley Keep Jets Over the Bay Com. **v.** Board of Port Cmrs. (2001) 91 Cal.App.4th 1344, 1382 [111 Cal. Rptr. 2d 598]* [EIR for airport expansion project did not adequately consider potential noise impact of increased nighttime flights].) Because this appeal follows the trial court's decision sustaining demurrers, we cannot find the claim moot based on factual challenges to the mitigation measures alleged in the Petition, although the Club remains free to raise those issues **[**19]** later on.

B. *The County*

CA(7)[↑] **(7)** The Petition alleges that (1) the County's local ordinances required the Club to obtain a discretionary use permit from the County, and that because the Club's Project would have reasonably foreseeable significant environmental impacts, the County's discretionary authority over the Project required CEQA review; (2) ***Vichy*** filed complaints with the County in January 2017 and November 2017 asserting that the Club was constructing a new facility without having obtained necessary permits or complied with CEQA, and both complaints were closed without enforcement based on the County's determination that the Project is within the sole jurisdiction of the ***City***; and (3) the County's failure to exercise its regulatory authority was based on its mistaken belief that the Club was immune from regulation under *Government Code sections 53090* and *53091*. Accordingly, the Petition alleges that the County failed to proceed in the manner required by law by maintaining a "blanket policy of no CEQA enforcement against the Gun Club." We agree with ***Vichy*** that these allegations are sufficient to state a cause of action for violation of CEQA.

CA(8)[↑] **(8)** Again, ***HN8***[↑] *section 21168.5* applies to an action "to attack, review, set aside, void or annul a determination, **[**20]** finding, or decision of a public agency on the grounds of noncompliance with" CEQA. ***Vichy*** is attacking the County's determination that it did not have regulatory responsibility for the Club's Project,

in the absence of which the County cannot have any CEQA obligations. Because the County's alleged decision did not rest on any provision of CEQA, and instead allegedly misapplied intergovernmental immunity statutes, arguably ***Vichy***'s challenge to it is not "on the grounds of noncompliance with" CEQA. But we think that narrow reading of *section 21168.5* would be overly formalistic when ***Vichy*** is complaining of the County's resulting failure to follow any of CEQA's requirements. (Cf. *Central **[*59]** Delta Water Agency **v.** Department of Water Resources (2021) 69 Cal.App.5th 170, 207 [284 Cal. Rptr. 3d 212]* [ensuring agency's compliance with CEQA's substantive and procedural requirements with respect to a particular environmental impact is the "primary right" of a CEQA cause of action].)

CA(9)[] **(9)** The County argues that the trial court correctly concluded that the Petition does not describe a "project" for purposes of CEQA because the County did not issue a permit. But ***HN9***[] the definition of a "project" under *section 21065* does not require that a permit be issued. It requires that the proposed activity "involve[] the issuance to a person of a … permit." **[**21]** The Petition alleges, and the County does not dispute, that if the activity was subject to the County's authority, a permit would be required. Thus, the Petition sufficiently alleges that the Club purported to carry out a project within the meaning of CEQA.

The County also argues that CEQA applies only to project approvals, not to governmental inaction, and that the County did not approve the Project. The County explains: "At the time that work on the main range commenced, the County's request for an opinion had been submitted to the Attorney General's Office and the Gun Club was on notice that the County was seeking a formal Attorney General opinion on whether County zoning ordinances applied to Gun Club activities on ***City*** property. The Gun Club, however, appears to have decided to commence work without waiting for that opinion and without obtaining or seeking a use permit from the County. This unusually bold choice exposed the Gun Club to potential enforcement action, penalties, and other adverse consequences if its conduct was ultimately determined to be illegal. The County, however, was neither required to nor capable of conducting environmental analysis of a third party's decision **[**22]** to start work without County approval." The County argues that, because it has not approved the Club's Project, any claimed violation of CEQA is not ripe.

The County's explanation, however, conflicts with the Petition's allegations. The Petition alleges that the County declined to regulate the Club's activities based on its incorrect conclusion that it had no authority to do so. Consistent with this allegation are documents attached to the Petition showing that the County closed two complaints ***Vichy*** submitted about the Project. The first document, from April 2017, stated that ***Vichy***'s complaint was closed pending advice from County counsel about which entity was responsible for issuing permits. The second, from December 2017, stated that the complaint was being closed because "[t]his is the jurisdiction of ***City*** of ***Ukiah*** per lease **[*60]** agreement." For purposes of a demurrer, we must take as true the allegation that the County determined that the Project was not subject to CEQA review.[7]

The County's reliance on *Center for Biological Diversity **v.** Department of Conservation, etc. (2019) 36 Cal.App.5th 210, 226–227 [248 Cal. Rptr. 3d 449]*, for the proposition that a CEQA challenge is not ripe before approval of the project is misplaced. In that case, the CEQA challenge was not ripe because there was no project for the **[**23]** local agency's consideration. Here, however, the Petition alleges the existence of a project that the County determined was not subject to regulation. Whether that determination was correct is a question ripe for review. While the Club did not apply for a permit, doing so would have been an idle act so long as the County maintained it had no regulatory authority. In this unusual circumstance, the County's determination meant that the Project was allowed to proceed without environmental review, which directly conflicts with the stated purpose of CEQA.

For this reason, we likewise find unavailing the County's reliance on *Lake Norconian Club Foundation **v.** Department of Corrections & Rehabilitation (2019) 39 Cal.App.5th 1044 [252 Cal. Rptr. 3d 394]*, which it cites when arguing that it cannot violate CEQA through inaction. In that case, the court held that the public agency's failure to repair a historic building was not a

[7] Because the County contends that it was waiting for the Attorney General's opinion before formulating a position, it does not offer any argument about whether in fact it possessed regulatory authority over the Project before entering into the Joint Powers Agreement. We assume for the purposes of our analysis that it did, but only because that is what the Petition alleges and no one has argued otherwise. Nothing in this opinion should be construed as adjudicating that question—or whether, as alleged in the Petition, the Club's use of the property was primarily for a private purpose.

project subject to CEQA because "the failure to act is not itself an activity, even if, as may commonly be true, there are consequences, possibly including environmental consequences, resulting from the inactivity." (*Lake Norconian, at p. 1051*.) The project at issue here, however, is not the County's inaction; it is the Club's demolition and construction of the main range. Because the County does not dispute that the Project **[**24]** would have been subject to its environmental review if the County had regulatory authority, the Petition properly alleges a violation of CEQA with its allegations that the County erroneously concluded it had no responsibility for issuing a discretionary permit that would have triggered its review obligations.

C. *The **City*** **[*61]** * [NOT CERTIFIED FOR PUBLICATION]

II.–***V***.* [NOT CERTIFIED FOR PUBLICATION]

DISPOSITION

The judgment is reversed and the matter remanded with directions to the trial court to deny the Club's motion to strike, and to overrule the demurrers to the first cause of action and the County's demurrer to the second cause of action. Appeal No. A167000 is dismissed. ***Vichy*** shall recover its costs on appeal.

Brown, P. J., and Smiley, J.,† concurred.

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* See footnote, *ante*, page 46.

* See footnote, *ante*, page 46.

† Judge of the Alameda Superior Court, assigned by the Chief Justice pursuant to *article VI, section 6 of the California Constitution*.