S199557

IN THE SUPREME COURT OF CALIFORNIA

CITY OF SAN DIEGO et al.,
Plaintiffs and Appellants,

v.

BOARD OF TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY,
Defendant and Respondent.

AFTER A DECISION BY THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE
CASE NO. D057446

OPPOSITION TO REQUEST FOR JUDICIAL NOTICE OF THE MOTION TO AUGMENT THE RECORD ON APPEAL FILED IN THE FOURTH DISTRICT COURT OF APPEAL; DECLARATION OF MARK A. KRESSEL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules of Court

Cal. Rules of Court

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INTRODUCTION

The City of San Diego and Redevelopment Agency of the City of San Diego (the City) seeks judicial notice of documents it filed concurrently with its motion to augment the record in the Court of Appeal. These documents include various state budget and finance documents. Both the trial court and the Court of Appeal declined to take judicial notice of the documents because they were not part of the administrative record and were not considered by the Board of Trustees of the California State University (CSU) when preparing

its Environmental Impact Report (EIR). The Court of Appeal granted the City's motion to augment the appellate record to include these documents as part of the record. However, permitting the documents to be included in the appellate record (as attachments to the City's denied request for judicial notice in the superior court) is in no way the same as this Court taking judicial notice of these same documents and thus giving them weight to which they are not entitled. This Court should deny the City's request for judicial notice for the same reasons the trial court and Court of Appeal did.

ARGUMENT

THIS COURT SHOULD NOT TAKE JUDICIAL NOTICE OR AUGMENT THE RECORD WITH DOCUMENTS THAT WERE NOT PART OF THE ADMINISTRATIVE RECORD BELOW.

A. The documents are part of the record on appeal, but the Court of Appeal properly declined to take judicial notice of them.

The City claims this Court should take judicial notice of the documents in question because the Court of Appeal previously took

judicial notice of them. (RJN 4.)[1] The City's description of the procedural history and current status of the documents is incorrect.

The City first tried to introduce these documents by filing a request for judicial notice in the superior court. (CT-3:823-828; CT-7:1625.) CSU opposed the request for judicial notice and filed a motion to strike the documents on the basis that CSU did not consider the documents as part of the administrative process and they were, therefore, not part of the administrative record. (CT-4:1103; CT-7:1625.) The court denied the City's request and granted CSU's motion to strike, ruling "[t]hese documents were not part of the administrative record and were never considered by CSU when certifying the [FEIR] and approving the 2007 Project."[2] (CT-7:1626; see also typed opn., 47-48.)

On appeal, the City filed a motion to augment the record with these same documents that had been lodged with the City's request for judicial notice filed in the trial court. The Court of Appeal granted the motion, and the trial court motion and attached documents became part of the record on appeal. (Typed opn., 48; Declaration of Mark A. Kressel, exh. A.)

In its merits briefing before the Court of Appeal, the City claimed that the trial court erred by denying the City's request for

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[1] This opposition uses the following citation formats: "CT-[volume]:[page]" (Clerk's Transcript), "RJN" (City's request for judicial notice), "OBOM" (CSU's Opening Brief on the Merits), "City ABOM" (City's Answer Brief on the Merits).

[2] The trial court also observed that it had *previously* ruled that two of the documents (exhibits L and T) were not part of the certified administrative record. (CT-7:1625.)

judicial notice. (Typed opn., 4, 47.) The Court of Appeal declined to rule on the City's claim. (Typed opn., 49 ["we do not address the merits of City's contention that the trial court erred by granting CSU's motion to strike City's RJN documents and thereby implicitly denying the RJN"].) To provide guidance on remand, the court explained that in light of its holding that "an extensive discussion considering other possible feasible sources for funding off-site mitigation is required" under the California Environmental Quality Act (CEQA), documents of the type the City sought to be judicially noticed might be relevant to the administrative proceedings on remand. (*Ibid.*) Accordingly, the court explained, documents of this type might become part of the administrative record for the revised EIR or, if necessary, could be the subject of a future request for judicial notice in a future trial court proceeding. (Typed opn., 49-50.) The Court of Appeal clarified that the court had not even *reviewed* the documents much less judicially noticed them. (Typed opn. 50, fn. 12.)

Therefore, the City is simply wrong when it asserts that while the superior court "denied the RJN, the Court of Appeal reversed that finding and granted City's request."[3] (RJN 6.)

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[3] The Court of Appeal's introductory summary did not state that it took judicial notice of the documents. (Typed opn., 4.) The City may have come to the contrary conclusion by misreading the introduction to the Court of Appeal's opinion, which stated: "we conclude the trial court erred in denying the petitions and the request for judicial notice. . . ." (*Ibid.*) In light of the Court of Appeal's subsequent statement that it "[would] not address the merits" of the request for judicial notice or review the documents at issue (typed opn., 49-50), the introductory statement can only mean (continued...)

B. The City—not CSU—waived its claim regarding judicial notice.

The City also argues in its answer brief that CSU "has not challenged the Court of Appeal's ruling granting City's Request for Judicial Notice, thus, the issue is waived." (City ABOM 27, fn. 6.) However, as explained above, the Court of Appeal did not grant the City's request for judicial notice. (Typed opn., 49-50.) Therefore, there was no ruling for CSU to challenge and, as a result, no waiver by CSU.

On the other hand, because the Court of Appeal declined to *grant* the City's request for judicial notice, the City had to seek review of that ruling from this Court in order to preserve *the City's* right to challenge it. (See *Pearson Dental Supplies, Inc. v. Superior Court* (2010) 48 Cal.4th 665, 682, fn. 5 [this Court generally will not decide issues not raised in the petition for review or answer]; *Title Ins. & Trust Co. v. County of Riverside* (1989) 48 Cal.3d 84, 98-99 [declining to consider issue that party did not raise in its answer to petition for review]; Cal. Rules of Court, rules 8.500(a)(2), 8.500(c)(1), 8.504(b)-(c), 8.516(b)(1).)

(...continued)
that the Court of Appeal determined the trial court's refusal to take judicial notice was premised on an incorrect interpretation of *City of Marina v. Board of Trustees of California State University* (2006) 39 Cal.4th 341, but that its reversal of the decision to approve the EIR and remand for further proceedings rendered the propriety of judicial notice moot.

The City did not seek review of the Court of Appeal's ruling declining to take judicial notice of the documents. (RJN 6.) Therefore, it is the City who has waived its rights with respect to this issue.

C. This Court should not take judicial notice because the documents were not part of the administrative record and are therefore not relevant.

It is not "proper to take judicial notice of evidence that (1) is absent from the administrative record, *and* (2) was not before the agency at the time it made its decision." (*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 573, fn. 4 (*Western States Petroleum*).) This is because a court may only take judicial notice of relevant evidence, and evidence that was not before the agency at the time it made its decision is irrelevant to the determination whether substantial evidence supports a lead agency's factual determinations or whether the agency has proceeded in a manner required by CEQA. (*Id.* at pp. 565, 571-573 & fn. 4; *RiverWatch v. Olivenhain Municipal Water Dist.* (2009) 170 Cal.App.4th 1186, 1218-1219 (*RiverWatch*) [denying request for judicial notice of documents not part of administrative record because irrelevant to CEQA review]; *Health First v. March Joint Powers Authority* (2009) 174 Cal.App.4th 1135, 1137, fn. 1 [same]; *Porterville Citizens for Responsible Hillside Development v. City of Porterville* (2007) 157 Cal.App.4th 885, 890, 894 ["Extrajudicial evidence may not be used to challenge the substantiality of the

evidence supporting the City's adoption of the [CEQA report] or to prove that the City failed to proceed in a manner required by law pursuant to [Pub. Resources Code, section] 21168.6"].) Here, the trial court ruled that the documents "were not part of the administrative record and were never considered by CSU when certifying the EIR." (CT-7:1626.) The City does not contend otherwise.

Because CSU never considered the documents, they are irrelevant to deciding this appeal. (*Western States Petroleum, supra*, 9 Cal.4th at pp. 565, 571-573 & fn. 4; *RiverWatch, supra*, 170 Cal.App.4th at p. 1218-1219.) The purpose of this appeal is to determine whether CSU must submit its budget for an ad hoc public review to determine whether it is "feasible" to reallocate its funds from other uses to pay for off-campus transportation improvements and not to undertake the contemplated budget review at this time. (OBOM 2-5.) The documents are merely evidence of recent state and university budgeting activity that were not part of the administrative record in CSU's EIR review process, and are therefore not relevant to the issues on appeal. Indeed, although the superior court and the Court of Appeal reached opposite holdings on the merits, neither took judicial notice of these documents for the very reason that they were irrelevant to the issues presented. (Typed opn., 49; CT:7-1626.)

The existence of CSU's budgeting process is not disputed. The City seeks judicial notice of the documents at issue solely as a means to establish the truth of their contents. Because that is an improper reason to seek judicial notice, the City's request should be

denied. (*Arce v. Kaiser Foundation Health Plan, Inc.* (2010) 181 Cal.App.4th 471, 482 ["[W]hile [a court] may take judicial notice of court records and official acts of state agencies (Evid. Code, § 452, subds. (c), (d)), the truth of matters asserted in such documents is not subject to judicial notice"].)

D. The documents are already part of the record on appeal.

Finally, this Court should not construe the City's motion for judicial notice in the alternative as a motion to augment the record. The Court of Appeal granted the City's motion to augment the appellate record, and the documents became part of the record at that time. (Typed opn., 48; Kressel Decl., exh. A.) Upon receiving a copy of CSU's petition for review, the Court of Appeal promptly sent the record to the Supreme Court. (Cal. Rules of Court, rule 8.512(a).) There is no need for the City to file a redundant motion to augment the record in this Court with the same documents.

CONCLUSION

For the foregoing reasons, this Court should deny the City's request for judicial notice.

October 22, 2012

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By: _____
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BOARD OF TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY

DECLARATION OF MARK A. KRESSEL

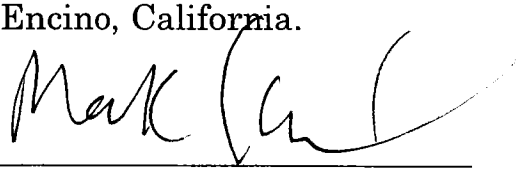
I, Mark A. Kressel, declare as follows:

1. I am an attorney duly admitted to practice before this Court. I am an associate with Horvitz & Levy LLP, attorneys of record for Board of Trustees of the California State University. I have personal knowledge of the facts set forth herein, except as to those stated on information and belief and, as to those, I am informed and believe them to be true. If called as a witness, I could and would competently testify to the matters stated herein.

2. Attached as Exhibit A to this declaration is a true and correct copy of the Court of Appeal's order of October 27, 2010.

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

Executed October 22, 2012, at Encino, California.



Mark A. Kressel

Exhibit A

COURT OF APPEAL - STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION ONE

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D057446
San Diego County No. GIC855643
San Diego County No. 37-2007-00083692-CU-WM-CTL
San Diego County No. 37-2007-00083773-CU-MC-CTL
San Diego County No. GIC855701
San Diego County No. 37-2007-00083768-CU-TT-CTL

THE COURT:

Appellants' unopposed request to augment the record on appeal is GRANTED.

IT IS ORDERED that the documents attached to the motion to augment filed on October 7, 2010, are deemed a part of the record on appeal.

McConnell
Presiding Justice

cc: All Parties

AFFIDAVIT OF TRANSMITTAL

I am a citizen of the United States, over 18 years of age, and not a party to the within action; that my business address is 750 B Street, Suite 300, San Diego, CA 92101; that I served a copy of the attached material in envelopes addressed to those persons noted below.

That said envelopes were sealed and shipping fees fully paid thereon, and thereafter were sent as indicated via the U.S. Postal System from San Diego, CA 92101.

I certify under penalty of perjury that the foregoing is true and correct.

Stephen M. Kelly, Clerk of the Court

Deputy Clerk

10/27/10
Date

CASE NUMBER: D057446

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 15760 Ventura Boulevard, 18th Floor, Encino, California 91436-3000.

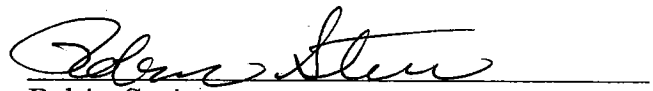
On October 22, 2012, I served true copies of the following document(s) described as OPPOSITION TO MOTION BY APPELLANTS CITY OF SAN DIEGO AND REDEVELOPMENT AGENCY OF THE CITY OF SAN DIEGO FOR REQUEST FOR JUDICIAL NOTICE OF THE MOTION TO AUGMENT THE RECORD ON APPEAL THAT WAS FILED IN THE FOURTH DISTRICT COURT OF APPEAL on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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

Executed on October 22, 2012, at Encino, California.



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