[See fee exemption, Gov. Code § 6103]

Supreme Court Case No. S199557

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

SAN DIEGO ASSOCIATION OF GOVERNMENTS and SAN DIEGO METROPOLITAN TRANSIT SYSTEM,

Petitioners and Appellants,

v.

BOARD OF TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY,

Defendant and Respondent.

SUPPLEMENTAL BRIEF ON ISSUE OF PARTIAL MOOTNESS OF SAN DIEGO ASSOCATION OF GOVERNMENTS AND SAN DIEGO METROPOLITAN TRANSIT SYSTEM

After a Decision by the Court of Appeal
Fourth Appellate District Division One
Case No. D057446
From the Judgment of the Superior Court of the State of California,
County of San Diego, Honorable Thomas Nugent
San Diego Superior Court,

Superior Court Case No. GIC 855643 (Lead Case)
[Consolidated with Case Nos. GIC 855701; 37-207-00083692-CU-WM-CTL; 37-2007-00083768-CU-TT-CTL; 37-2007-00083773-CU-MC-CTL]

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I. INTRODUCTION

One major issue in this case – but hardly the only issue – is whether respondent California State University ("CSU") could satisfy its obligations under the California Environmental Quality Act ("CEQA") to mitigate offsite environmental impacts merely by requesting mitigation funds from a single source – a special appropriation by the state Legislature – with the full knowledge that the funding request might be denied, and despite the fact that other potential sources of mitigation funds were available. CSU contends in its Supplemental Brief Regarding Impact of New Statute on Appeal ("CSU Supplemental Brief") that this issue has been rendered at least partially moot by recent amendments to the Education Code affecting CSU's budget process and spending authority. CSU requests that after two other issues in the case are resolved by this Court, the case be remanded to the trial court for further proceedings concerning CSU's obligation to mitigate off-site environmental impacts.

Appellants San Diego Association of Governments ("SANDAG") and San Diego Metropolitan Transit Systems ("MTS") do not agree that the issue of CSU's mitigation obligations has been rendered moot. Neither do SANDAG/MTS agree that a remand to the trial court for further proceedings on this issue would be appropriate even if the issue were deemed partially moot. Lastly, SANDAG/MTS do not agree with CSU's characterization of the issues remaining to be decided in the case or, for that matter, with CSU's characterization of the issues claimed to be moot.

II. THE EDUCATION CODE AMENDMENTS CITED BY CSU DO NOT RENDER THE ISSUES CONCERNING CSU'S OBLIGATIONS TO MITIGATE OFF-SITE ENVIRONMENTAL IMPACTS MOOT

A. CSU Cannot Avoid Issuance of a Writ of Mandate and Remand for Further Administrative Proceedings By Conceding that the Legal Basis for One of its Arguments No Longer Exists

CSU's requests disclose considerable confusion about the doctrine of mootness. In the CEQA context, as in other contexts, "A case becomes moot when a court ruling can have no practical effect or cannot provide the parties with effective relief." (*Californians for Alternatives to Toxics v. California Dept. of Pesticide Regulation* (2006) 136 Cal.App.4th 1049, 1069; *Golden Gate Holdings LLC v. East Bay Regional Park District* (2013) 215 Cal.App.4th 353, 366.) A CEQA case is not moot if a court ruling could lead to revision of an environmental impact report or reconsideration and possible adoption of additional mitigation measures or other additional relief. (*Citizens for Restoration of L Street v. City of Fresno* (2014) 229 Cal.App.4th 340, 362-363; *Golden Gate Holdings*, 215 Cal.App.4th 353, 366-367 [compliance with writ issued by trial court did not render case moot where petitioner requested expanded relief on appeal]; *Woodward Park Homeowners Ass'n v. Garreks, Inc.* (2000) 77 Cal.App.4th 880, 888 [completion of challenged project did not render case moot where additional mitigation measures could be imposed on remand].) That is precisely the situation here.

The changes in the Education Code relied on by CSU do not cure CSU's prior failures to comply with CEQA. CSU is apparently conceding that it can no longer rely on one of its chief rationales for failing to fund off-

site environmental mitigation measures, i.e., its assertion that dictum in *City of Marina v. Board of Trustees of the California State University* (2006) 39 Cal.4th 341, 367 limited its obligations to mitigate off-site impacts to requesting an appropriation of mitigation funds by the Legislature. (See CSU Opening Brief, pp. 28-29.) However, this concession simply *increases,* not eliminates, the likelihood that CSU will be required to reopen and revise its environmental impact report and reconsider offsite traffic mitigation measures on remand. Far from eliminating this Court's ability to grant practical, effective relief, the changes in CSU's budgetary options simply eliminate one excuse for failing to mitigate off-site impacts when the case is remanded for further administrative proceedings.

B. A Change in the Law Favoring SANDAG/MTS and the City of San Diego Does Not Make the Case Moot

Although CSU cites a number of cases in support of its position, none are actually helpful to CSU. All are either easily distinguishable or actually undermine CSU's own arguments.

CSU cites *Citizens for Non-Toxic Pest Control v. Department of Food & Agriculture* (1986) 187 Cal.App.3d 1575, 1584 for the proposition that the court in a mandamus action should apply the law in effect at the time of its decision rather than the law in effect at the time of the challenged administrative actions. How this helps CSU is a complete mystery. In *Citizens for Non-Toxic Pest Control*, the court did not find the case moot. It simply determined that the respondent's actions in that case were inconsistent with the new law, and that the lower court's determination that the respondent had violated CEQA remained correct, if for slightly different reasons. The court thus affirmed the trial court judgment ordering issuance of a peremptory writ. (*Id.* at 1586-1589.) In this case, CSU now essentially

concedes that it can no longer rely on one of its previous rationales for refusing to fund off-site environmental mitigation measures. The appropriate remedy is, as in *Non-Toxic Pest Control*, to affirm the judgment of the court of appeal and remand the case to CSU for corrective action, not remand the case to the trial court for a dismissal.

SANDAG/MTS recognize that, in some cases, a change in the law may render a case moot because the legal duty the respondent is accused of violating no longer exists, and a writ of mandate will not issue to compel performance of a duty that no longer exists. (See, e.g., *County of San Diego v. Brown* (1993) 19 Cal.App.4th 1054, 1090.) That is simply the opposite of the situation here. The change in the law relied on by CSU has made its legal position even less defensible, not absolved it of any previously existing legal duty.

This is also not a case in which a challenge to a statute, tax measure or funding scheme has been rendered moot by repeal or supersession of the challenged measures. (See, e.g., *City of Los Angeles v. County of Los Angeles* (1983) 147 Cal.App.3d 952, 958.) As discussed further below, the subject matter of this case has always been CSU's refusal to fund or otherwise provide for mitigation of offsite environmental impacts, not the constitutionality of the budget appropriation process that CSU previously claimed as an excuse for failing to reliably fund off-site mitigation.

Lastly, this is not a case where voluntary compliance with a lower court judgment has rendered the case moot. (*Bruce v. Gregory* (1967) 65 Cal.2d 666, 671.) CSU is not conceding it will revise its EIR or affirmatively commit to funding the mitigation measures at issue. It is instead requesting a remand to the trial court so it can simply re-litigate the relevant issues from a slightly different perspective. In CSU's words, a remand is requested "for

the trial court to consider anew the appropriateness of CSU's economic infeasibility determination" and to allow the trial court to "oversee any further development of the factual record that may be necessary to resolve these issues in light of CSU's new statutory funding scheme." (CSU Supplemental Brief, p. 12.) This hardly suggests that the central issue of CSU's responsibility to mitigate off-site environmental impacts has become moot.

C. The Changes to the Education Code Do Not Moot All or Even Most Issues Relating to CSU's Obligations to Mitigate Traffic or Other Impacts

CSU's mootness argument also badly misperceives the scope of the issues in question. Indeed, CSU arguments are internally contradictory on this point, as well as inconsistent with how the issues have previously been defined by the Court of Appeal, by appellants SANDAG/MTS and the City of San Diego, and by CSU itself.

The Court of Appeal addressed CSU's *City of Marina* argument in great detail in its published opinion (Slip Opn., pp. 14-38), but did so as part of a larger issue as to whether CSU made an adequate effort to mitigate off-site traffic impacts. The opinion also found that CSU failed its duty to mitigate by failing to consider alternative sources of funding for off-site mitigation and alternative programmatic traffic reduction measures. (Slip. Opn., pp. 33-40.)

In its Petition for Review, CSU correspondingly framed the issues presented as follows:

> [D]oes a state agency satisfy its obligation under CEQA to mitigate the off-site environmental impacts of a project by requesting funds for such mitigation from the Legislature, consistent with this Court's views as stated in *Marina*? Or, as the

> Court of Appeal held here ... must the agency also address in its Environmental Impact Report (EIR) '[t]he availability of potential sources of funding other than the Legislature' and demonstrate 'compelling reasons' showing these sources cannot, as a matter of law, be used to pay for mitigation.'

(Petition for Review, p. 2.)

In briefing on the merits, all parties have extensively addressed the larger scope of CSU's duty to mitigate, including the availability of alternate non-legislative funding sources and CSU's claim that any attempt to require consideration of non-state funds violates separation of powers principles. (See CSU Opening Brief, pp. 29-37, 40-50; SANDAG Answer Brief, pp. 5-13, 16-18, 25-32; City of San Diego Answer Brief, pp. 25-33, 37-40.) Even in its current Supplemental Brief asserting mootness, CSU acknowledges arguing that "it was prohibited by statute from re-allocating revenues from non-state sources (e.g., parking and dorm fees, tuition, donations) to pay for off-site traffic mitigations." (CSU Supp. Brief, p. 4.)

The changes in the Education Code cited by CSU do not moot any of these broader issues. Education Code § 89770 merely authorizes CSU to pledge (subject to various limitations) portions of its annual legislative General Fund support appropriation to secure and repay bonds issued under the authority of the State University Revenue Bond Act. Education Code § 89771 authorizes CSU to utilize funds from its annual General Fund support appropriation to fund "pay-as-you-go" capital outlay projects. Education Code § 89772 requires CSU to submit detailed annual reports of expenditures of funds under these two statutes to the Legislature and Department of Finance, presumably so these expenditures can be monitored and future appropriations adjusted as deemed necessary by the Legislature.

Nothing in these statutes directly addresses funding for CEQA

mitigation measures. Indeed, it is not entirely clear that CSU could not reassert some variation on its past legislative prerogative or separation of powers arguments even in the wake of these statutes. CSU appears to contend these amendments are significant because they break down an allegedly rigid previous distinction between appropriations for operating expenses and appropriations for capital projects, and consequently give CSU greater flexibility in allocating appropriated funds. However, CSU does not concede that these statutes affirmatively require it to fund off-site mitigation measures of the type at issue in this case. Neither is it evident that these new statutes, standing by themselves, dramatically change existing law. SANDAG/MTS and the City appellants have always contended that CSU had sufficient budget flexibility under previous law to fund offsite mitigation measures without special legislative authorization. (SANDAG/MTS Answer Brief, pp. 27-29; City of San Diego Answer Brief, pp. 25-29.) This litigation arose only when CSU, seeking to capitalize on its strained interpretation of *City of Marina*, chose to carve out funding for off-site mitigation measures as a separate budget line-item in the proposed capital budget submitted to the Legislature. CSU seems to be admitting that with the advent of Education Code §§ 89770-89772, it can no longer rely on this tactic. However, nothing on the face of these statutes would inherently preclude CSU from engaging in some revised form of manipulation of the budget process in the future, nor inherently preclude CSU from resurrecting some of the arguments advanced in this case if it did so.

CSU also is clearly not abandoning its position on the unavailability of alternate sources of funding for off-site mitigation, i.e., funds from sources other than a direct legislative appropriation, such as endowments, grants, or user fees. (CSU Opening Brief, pp. 40-50; SANDAG Answer Brief, pp. 25-

32; City of San Diego Answer Brief, pp. 25-33.) While CSU contends that Education Code § 89770(a)(1) "now provides CSU with some discretion to employ non-state funds for capital projects," it concurrently maintains that its ability to do so "remains limited by other statutes ... and restrictions inherent in some of those sources." (CSU Supp. Brief, p. 8.) As CSU itself ultimately concedes, "The [new] statute does not, however, moot *the general issue in the litigation* of how CSU can properly determine economic infeasibility under CEQA in light of the new funding system." (Supp. Brief, p. 11.)

D. <u>There is No Basis for Remanding the Traffic Mitigation Issue to the Trial Court for Further Proceedings, as Opposed to Issuing a Writ of Mandate Requiring CSU to Reconsider its Prior Decision and Findings at the Administrative Level.</u>

While CSU's arguments about mootness are merely without merit, its request that the case be remanded to the trial court (and not to the Court of Appeal) for further proceedings on these issues is frivolous. If the issues are truly moot, there is, by definition, nothing left to decide. A remand to the trial court for purposes of entering a dismissal may be appropriate where a case has truly become moot. (*County of San Diego*, 19 Cal.App.4th 1054, 1090.) But as even CSU concedes, many issues remain to be resolved. CSU cites no authority suggesting that a case may be remanded to the trial court simply to commence a new round of litigation involving most of the same basic issues, with the possibility of yet another appeal and even another petition to this Court, due merely to an intervening non-dispositive change in existing law. If CSU is conceding that its legal position on a controlling issue is no longer defensible in light of changes in the law, the correct procedure would be to issue a writ of mandate directing CSU to vacate its prior certification of the EIR and approval of the campus master plan and

reconsider in light of the changed law (and the Court's ruling on other issues). (Cf. *Citizens for Non-Toxic Pest Control,* 187 Cal.App.3d 1575, 1588-1589.) The fact that the law is now even *less* favorable to CSU than before is hardly a justification remand to the trial court.

E. CSU Mischaracterizes the Additional Issues to Be Decided by this Court

CSU concedes that at least two issues in this case must still be decided by this Court: issues relating to CSU's Transportation Demand Management ("TDM") mitigation measure and CSU's analysis of transit impacts. (CSU Supp. Brief, pp. 1-2.) In doing so, however, CSU grossly mischaracterizes these issues.

The validity of CSU's TDM mitigation measure is not a question of "factual findings" as CSU suggests, but concerns the procedural legality of deferring actual formulation of this mitigation measure. (Slip Opn., pp. 58-62; *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 92.)

The subject of transit impacts, as addressed by the Court of Appeal and in SANDAG/MTS' briefs, in fact includes four distinct issues, only one of which concerns CSU's last-minute purported "finding" on transit impacts. These issues consist of the following: (1) whether CSU erred procedurally by failing to actually investigate potential transit impacts; (2) whether CSU failed to adequately respond to comments concerning transit impacts (CEQA Guidelines § 15088); (3) whether, if transit impacts were deemed insignificant, CSU erred procedurally by failing to state the reasons for this conclusion in the EIR (Guidelines § 15128); and (4) whether CSU's last minute exculpatory "finding" that transit impacts were insignificant was legally sufficient and supported by substantial evidence. (Slip Opn., pp. 62-

82; SANDAG/MTS Answer Brief, pp. 33-48.) Ironically, the only one of these issues that is arguably moot is the last issue, i.e., the substantial evidence question that CSU contends the Court should still decide. This issue is arguably moot because CSU failed to address the first three issues in its Opening Brief and, thus, effectively waived any claim of error in the Court of Appeal's ruling on these issues. (Slip Opn., pp. 71-79 and fn. 24; *Tisher v. California Horse Racing Bd.* (1991) 231 Cal.App.3d 349, 361.) Since the case must be remanded for full reevaluation and reconsideration of the issue of transit impacts in any event, there would be little point in this Court addressing the sufficiency of the evidence in the current administrative record concerning CSU's previous "finding" on the issue.

III. CONCLUSION

For the reasons stated in this brief, CSU has failed to establish that any dispositive issue in this case had been rendered moot, or that there is any basis for a remand to the trial court. This Court should proceed directly to a hearing and decision on the merits of all issues, save those which CSU concedes are no longer in dispute.

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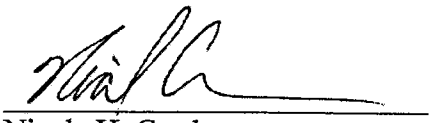
CERTIFICATION OF WORD COUNT

The text of the SUPPLEMENTAL BRIEF ON ISSUE OF PARTIAL MOOTNESS OF SAN DIEGO ASSOCIATION OF GOVERNMENTS (SANDAG) AND SAN DIEGO METROPOLITAN TRANSIT SYSTEM consists of 2,793 words, including footnotes. The undersigned legal counsel has relied on the word count of the Microsoft Word 2013 Word processing program to generate this brief. (Cal. Rules of Court, Rule 8.204(c)(1).)

DATE: January 14, 2015 By: 

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PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
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 11999 San Vicente Boulevard, Suite 150, Los Angeles, California 90049.

On January 14, 2015, I served true copies of the following document(s) described as **SUPPLEMENTAL BRIEF ON ISSUE OF PARTIAL MOOTNESS OF SAN DIEGO ASSOCIATION OF GOVERNMENTS (SANDAG) AND SAN DIEGO METROPOLITAN TRANSIT SYSTEM** on the interested parties in this action as follows:

☒ BY OVERNIGHT DELIVERY: I enclosed said document(s) in an envelope or package provided by the overnight service carrier and addressed to the persons at the addresses listed in the Service List. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight service carrier or delivered such document(s) to a courier or driver authorized by the overnight service carrier to receive documents.

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

Executed on January 14, 2015, at Los Angeles, California.

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