S199557

Court of Appeal, Fourth Appellate District, Division One – No. D057446

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

CITY OF SAN DIEGO AND REDEVELOPMENT AGENCY OF THE CITY OF SAN DIEGO.

Plaintiffs and Appellants,

v.

BOARD OF TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY

Defendant and Respondent.

THE CITY OF SAN DIEGO'S AND REDEVELOPMENT AGENCY OF THE CITY OF SAN DIEGO'S SUPPLEMENTAL BRIEF REGARDING IMPACT OF SENATE BILL 860 ON APPEAL

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I. STATEMENT OF THE CASE

On December 5, 2014, the Board of Trustees of the California State University ("CSU") filed with the Court a Supplemental Brief Regarding Impact of New Statute on Appeal arguing that Senate Bill 860 ("SB860") moots the issues on appeal and requesting that the Court vacate the ruling of the Court of Appeal. The City of San Diego and the City of San Diego Redevelopment Agency (collectively referred to herein as "City") contend CSU's position regarding SB860 is incorrect and that the request for relief be denied.

The question pending before this Court is whether the environmental impact report ("EIR") certified by CSU in connection with the San Diego State University Campus Expansion Plan ("Campus Expansion Plan") complies with the California Environmental Quality Act (Pub. Resources Code § 21000 *et seq.* (CEQA)). The Fourth Appellate District, Division One, determined the EIR failed as an informational document and, thus, CSU abused its discretion by certifying the EIR and approving the Campus Expansion Plan. The Appellate Court ordered a writ of mandate issue directing CSU to decertify the EIR and void the approval of the Campus Expansion Plan because "the availability of potential sources of funding other than the Legislature for off-site mitigation measures should have been addressed in the DEIR and FEIR" and "CSU did not cite in the DEIR or FEIR, or in its trial or appellate briefs, any statute, regulations, or other provision that bars it from using...other funding sources..." (Typed Opn., p. 33.)

Passage of SB860 does not affect the deficiencies of the EIR or the questions on appeal. SB860 implements technical changes to CSU's budget process but does not eliminate or change the funding options that were

available to CSU at the time the EIR was certified. SB860, at most, provides additional potential funding sources for off-campus environmental mitigation. Despite the availability of the various funding options (City's Answer Brief on the Merits (ABOM) 25-31), CSU decided the totality of its disclosure obligations began and ended with a request to the Legislature as it believes was directed by *City of Marina.*[1] If CSU was required to re-do the SDSU EIR today, CSU would have the same information regarding funding options available now as it did when the EIR was certified. Thus, the passage of SB860 does not moot the issues on appeal.

Additionally, SB860 does not address whether commerical construction activities would be subject to the purported, restrictive language in *City of Marina.* CSU claims that *City of Marina* constrained it from using any funds for off-campus mitigation when money was not appropriated through the Legislature for environmental mitigation. This argument presumed the construction activities were educational in nature and originally funded through State Legislative appropriations. In this case, over half of the Campus Expansion Plan consisted of commercial construction activities, which were not funded through the Legislature. Whether CSU reasonably relied on the *City of Marina* language to meet its mitigation and disclosure requirements in this context is not affected by SB860.

Finally, SB860 does not affect whether CSU was required to reduce the project to make mitigation economically feasible as expressly required

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[1] CSU relied on the following language: "A state agency's power to mitigate its project's effects through voluntary mitigation payments is ultimately subject to legislative control; if the Legislature does not appropriate the money, the power does not exist." *City of Marina v. Board of Trustees of the California State University* (2006) 39 Cal. 4th 341, 367.

by *City of Marina*. Compliance with CEQA required the EIR to discuss adjusting the scope of a project, if necessary, to ensure that appropriate environmental mitigation was implemented. (Typed Opn., 38-40.) In this case, CSU did not determine if reducing the scope of the project would reduce or remove the need for such extensive environmental mitigation or if additional funds would have been available to pay for the mitigation with a reduced project scope. Thus, SB860 does not affect this question on appeal.

For the reasons stated herein, Senate Bill 860 does not moot or change the issues presented to this Court and the matter should proceed accordingly.

II. ARGUMENT

A. SB860 DOES NOT CURE CSU'S FAILURE TO DISCLOSE AND DISCUSS FUNDING OPTIONS FOR ENVIRONMENTAL MITIGATION UNDER THE BUDGET PROCESS IN PLACE AT THE TIME THE SDSU EIR WAS CERTIFIED.

The purpose of an EIR is to provide state and local agencies and the general public with detailed information on the potentially significant environmental effects, which a proposed project is likely to have and to list ways in which the significant environmental effects may be minimized as well as indicate alternatives to the project. Pub. Resources Code §§ 21002 and 21003. A local agency must make an initial determination as to which alternatives are feasible and which are not. *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal. 3d 553, 569. If an alternative is identified as at least potentially feasible, an in-depth discussion is required. *Sierra Club v. County of Napa* (2004) 121 Cal. App. 4th 1490, 1504 n.5.

"The failure to provide enough information to permit informed decision-making is fatal." *Napa Citizens for Honest Gov't v. County of*

Napa (2001) 91 Cal. App. 4th 342, 361. "When the informational requirements of CEQA are not complied with, an agency has failed to proceed in a manner required by law and has therefore abused its discretion." *Ibid.*, quoting *Save Our Peninsula Committee v. Monterey County Board of Supervisors* (2001) 87 Cal. App. 4th 99, 118. Failure to comply with procedures that result in the omission of relevant information from the environmental review may constitute a prejudicial abuse of discretion "regardless of whether a different outcome would have resulted" had the agency complied with CEQA's requirements. *Neighbors of Cavitt Ranch v. County of Placer* (2003) 106 Cal. App. 4th 1092, 1100.

The SDSU EIR identified specific mitigation measures for each of the impacts (AR 19:297:18466-18473) and stated that, in compliance with *City of Marina*, CSU requested "funding from the state Legislature to pay its fair-share of the mitigation costs associated with the identified significant impacts." (AR 19:297:18465, AR 18:264:17159-17160.) CSU asserted, however, that "because CSU cannot guarantee that its request to the Governor and the Legislature for the necessary mitigation funding will be approved,... or that the funding will be granted in the amount requested,...or the identified significant impacts are determined to be significant and unavoidable." (AR 19:297:18466, AR 19:297:18473-18474.) Based thereon, CSU made a finding that "specific economic, legal, social, technological, or other considerations make infeasible the alternatives identified in the EIR and the identified transportation/circulation and parking impacts are thereby acceptable because of specific overriding considerations." (AR 19:297:18474.) This is the totality of CSU's discussion regarding the feasibility of funding off-campus environmental mitigation.

CSU argues that changes in the budget process as a result of SB860 provide new options to pay for environmental mitigation made necessary

by the Campus Expansion Plan and, that these new funding options warrant the vacation of the Appellate Court judgment. While SB860 may offer additional funding options, it does not eliminate the funding options that were available at the time CSU certified the EIR and approved the Campus Expansion Plan. The City identified the funding options which could and should have been disclosed in the SDSU EIR (City's ABOM, 25-31) and the Court of Appeal agreed that CSU provided no basis for failing to disclose and discuss those options prior to determining the mitigation was economically infeasible. (Typed Opn., p. 33.) SB860 does not change this result. CSU provides no evidence that SB860 intended to override or eliminate the funding sources and processes available prior to SB860. If CSU were required to re-do the EIR, as ordered by the Appellate Court, the EIR could and should discuss the various funding options identified by the City. The only difference is that CSU may have additional disclosures regarding funding now available through SB860.

The budget process, pre-SB860, did not constrain CSU from making fair-share contributions for mitigation without a budget allocation from the Legislature. In 2009, in response to *City of Marina*, the California State Legislature directed CSU to mitigate off-campus environmental impacts. The Legislature addressed *City of Marina* by revising sections of the Education Code relating to public postsecondary reporting requirements. The 2009 legislation was passed to ensure that schools addressed the effect of negative impact campus expansion plans have on the environment. The legislation did not limit, and instead highlighted, the responsibilities of the educational system to the environment. The Legislature stated:

> (d) (1) The Legislature further finds and declares that the expansion of campus enrollment and facilities may negatively affect the surrounding environment. In view of the case *City of Marina v. the Board of Trustees of the California State University* (2006) 639

> [sic] Cal. 4th 341, it is the intent of the Legislature that the California State University take steps to reach agreements with local Public agencies regarding the mitigation of off-campus impacts related to campus growth and development.

Ed. Code § 67504(d)(1).

The 2009 legislation was a broad mandate to CSU that it must pay its fair-share to ensure mitigation was implemented. There is nothing in the language of this legislation which limited the source or method of funding. Notably, SB860 also does not mention any limitations on this legislative mandate. Further, CSU's claim that it was constrained from using any funds other than those specifically allocated for environmental mitigation is strained by the fact that CSU made payments for off-campus mitigation to other cities even though the Legislature has never funded CSU's off-site mitigation budget item. (see www.calstate.edu.budget/reports, Report on Proposed Campus Physical Master Plan Revisions and Mitigation Agreements for Off-Campus Impacts (April 12, 2011, May 2, 2012).)

Because CSU was not constrained from disclosing and discussing funding sources for environmental mitigation prior to SB860 and SB860 did not change or eliminate those funding sources, the current question on appeal is not moot.

B. SB860 DOES NOT AFFECT CSU'S FAILURE TO DISCLOSE AND DISCUSS FUNDING FOR ENVIRONMENTAL MITIGATION MADE NECESSARY BY THE COMMERCIAL CONSTRUCTION ACTIVTIES OF THE CAMPUS EXPANSION PLAN.

Over half of the Campus Expansion Plan includes commercial projects not funded by the Legislature, including development of off-campus faculty housing (non-state funded Capital Outlay project built by

outside development interests), a hotel (non-state funded Capital Outlay project built by financial plan and partnership arrangements) and a conference center (alumni funds)(ABOM 29-30.) *City of Marina* did not address the circumstances presented here in which portions of the project are not subject to Legislative funding. During the administrative process, CSU did not distinguish these portions of the project or calculate a "fair share" payment for the portions that were not designed or constructed using legislative funds.

Thus, even if CSU were correct that *City of Marina* limited its off-campus mitigation funding obligations to only those funds requested and received by the Legislature, at the very least, CSU should have disclosed and discussed funding options for the mitigation made necessary by the commercial, non-legislative funded portions of the Campus Expansion Plan. This remains an open issue to be determined and it is not affected by SB860.

C. ANY CHANGE IN THE BUDGET PROCESS THROUGH SB860 DID NOT ALTER CSU'S REQUIREMENT UNDER CEQA TO DISCUSS ADJUSTMENT TO THE SCOPE OF THE PROJECT TO ALLOW IMPLEMENTATION OF FEASIBLE MITIGATION

Section 15126.4(a)(2) of the CEQA Guidelines provides that to ensure mitigation measures are implemented, the mitigation measures can be incorporated into the project design. To incorporate mitigation measures into a project means to amend the project so that the mitigation measures will be implemented, such as reducing the scope of the project or requiring that mitigation measures are implemented as a condition of the project. *Federation of Hillside and Canyon Assns. v. City of Los Angeles* (2000) 83 Cal. App. 4th 1252, 1261 n.4.

The Court of Appeal held that *City of Marina* implicitly recognized that CEQA requires CSU to consider on-campus acts that can mitigate off-site effects. (Typed Opn., pp. 38-39.) While the Court of Appeal acknowledged that the EIR discussed specific project alternatives, the Court held "[CSU] did not expressly discuss possible feasible modifications to the Project or other on-campus acts that could reduce or eliminate the need for CSU's 'fair-share' funding of off-site mitigation costs. (Typed Opn., p. 39, (emphasis original)(internal citations omitted).) The Court of Appeal held, "[B]ased on our review of the DEIR and FEIR, we do not believe those documents adequately addressed the possibility of reducing or avoiding the need for certain off-site mitigation measures (and CSU's 'fair-share' funding thereof) by taking feasible measures to alter certain on-campus components of the Project or taking other acts on SDSU's campus." (Typed Opn., p. 39.) Based thereon, the Court held CSU did not proceed in a manner required by law and abused its discretion by certifying the FEIR and approving the Campus Expansion Project. (Typed Opn., p. 40.)

This remains an open issue to be determined and it is not affected by SB860.

III. CONCLUSION

The foundational purpose of CEQA is to require a developer to prepare a document that provides information to allow the government and the public to be informed and confident that the developer has done everything necessary to avoid or limit environmental damage caused by the project. The EIR prepared for the SDSU expansion failed this fundamental principal by failing to disclose and discuss potential funding methods to mitigate the environmental damage CSU agreed would be caused by the expansion. SB860 does nothing to cure or moot these deficiencies. The

only way to cure the defects is for the EIR to be presented to the public for re-certification with full and complete disclosure and discussion of funding options and sources to address the significant, environmental impacts created in the San Diego community as a result of the Campus Expansion Plan.

Dated: January 28, 2015

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CERTIFICATE OF COMPLIANCE

[CRC 14(c)(1)]

Pursuant to California Rules of Court, rule 8.520(c)(1), I certify that The City of San Diego's and Redevelopment Agency of the City of San Diego's Supplemental Brief Regarding Impact of Senate Bill 860 on Appeal contains 2,301 words and is printed in a 13-point typeface.

Dated: January 28, 2015

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PROOF OF SERVICE

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

I, the undersigned, declare that:

I was at least 18 years of age and not a party to the case; I am employed in the County of San Diego, California, where the mailing occurs; and, my business address is 1200 Third Avenue, Suite 1100, San Diego, California, 92101. I further declare that on January 28, 2015, I served the foregoing **THE CITY OF SAN DIEGO'S AND REDEVELOPMENT AGENCY OF THE CITY OF SAN DIEGO'S SUPPLEMENTAL BRIEF REGARDING IMPACT OF SENATE BILL 860 ON APPEAL**

I caused the document(s) to be delivered overnight via an overnight delivery service (Golden State Overnight) in lieu of delivery by mail to the addressee(s) on this same day, at my business address shown above, following ordinary business practices, addressed to:

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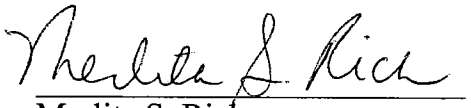
I declare under penalty of perjury and the laws of the State of California that the foregoing is true and correct. Executed on January 28, 2015, in San Diego, California.



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