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

REPLY TO ANSWER TO PETITION FOR REVIEW

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INTRODUCTION

The Answer Brief urges this court to deny review based on their view that the Court of Appeal purportedly was correct to ignore this Court's statement in *City of Marina v. Board of Trustees of California State University* (2006) 39 Cal.4th 341, 367 (*City of Marina*), that "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."

Regardless of whether the Court of Appeal was correct (it was not), review is necessary to address the conflict between this court's opinion in *City of Marina* and the Court of Appeal's

published opinion here and to provide uniformity in the law. Is the law as set forth in this Court's majority opinion, which provides that a state agency satisfies its off-site mitigation obligations by asking for a legislative appropriation to fund such efforts? Or, is the law as set forth in the Court of Appeal's opinion here, which is based, without attribution, on Justice Chin's concurring opinion in *City of Marina*, where he openly disagreed with the majority's analysis on this precise issue? By ignoring the majority opinion in *City of Marina*, the Court of Appeal has created confusion such that state agencies and lower courts cannot know what the law requires as it pertains to off-site mitigation obligations under CEQA. This Court should grant review to provide needed uniformity and clarity on this important question.

Review is also necessary to re-confirm the established rule that reviewing courts must defer to agencies' factual findings. Here, the Court of Appeal improperly circumvented that rule when it re-characterized CSU's factual findings as legal or procedural questions.

LEGAL ARGUMENT

THIS COURT SHOULD GRANT REVIEW TO RESOLVE THE CONFLICT BETWEEN THE COURT OF APPEAL'S OPINION AND THIS COURT'S OPINION IN *CITY OF MARINA.*

A. The Answer Brief only underscores the confusion engendered by the Court of Appeal's opinion.

The Answer Brief does not dispute that the Court of Appeal opinion here rejects the majority's opinion in *City of Marina* and adopts the contrary reasoning of Justice Chin's concurrence. Instead, the Answer contends this conflict does not warrant review because (a) there is no conflict between the opinions of intermediate appellate courts; and (b) the Court of Appeal was somehow correct to dismiss this Court's majority opinion as unconsidered and incorrect dictum. (See Ans. Br. 3-13.) The fact that the Answer Brief advances these arguments only underscores that review is needed to provide clarity to the bench and bar in this important area of law.

Review is warranted "[w]hen necessary to secure uniformity of decision or to settle an important question of law." (Cal. Rules Court, rule 8.500(b)(1).) The Court of Appeal's rejection of the majority opinion in *City of Marina* creates precisely the circumstances under which review is warranted under this rule. This Court previously held that "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, supra,* 39 Cal.4th at p. 367.) In a concurring opinion, Justice Chin disagreed, calling the majority's analysis on this point "dictum," and rejecting it on its merits. (*Id.* at p. 372 (conc. opn. of Chin, J.).) In its published opinion here, the Court of Appeal rejected the majority opinion in *City of Marina* and instead agreed with Justice Chin, holding this court's statement regarding mitigation in *City of Marina* is "dictum," is "not supported by any statute, regulation, case, or other authority," and "did not involve extensive analysis." (Typed opn., 29-32.) The Court of Appeal further observed, "had the California Supreme Court extensively addressed or analyzed the issue, *City of Marina* would have modified or qualified its dictum." (Typed opn., 32.)

In light of the Court of Appeal's open disapproval of this Court's opinion in *City of Marina,* lower courts and litigants are forced to choose between following the majority opinion in *City of Marina* or the Court of Appeal's opinion in this case, thereby running the risk of litigation based on whichever decision they elect not to follow. Contrary to the argument advanced in the Answer Brief, it is irrelevant that there is no other conflicting intermediate appellate opinion. (See Ans. Br. 12-13.) An undeniable conflict exists between an opinion of this Court and a published opinion of an intermediate court. Thus, this Court should step in to secure uniformity of decision.

The Answer Brief's disregard for this Court's opinion in *City of Marina* only highlights why state agencies, lawyers and lower courts need guidance from this Court. Much like the Court of Appeal, the Answer Brief surmises that, in *City of Marina*, this "Court simply did not consider whether CSU's obligations to mitigate could have been satisfied from non-appropriated sources of revenue" and that in any event, "the Court of Appeal was also fully correct in treating this dictum as unpersuasive." (Ans. Br. 5-6; see also Ans. Br. 6 ["unsupported statements that reflect no deliberation or apparent contemplation of consequences beyond the facts of a particular case carry little weight, and should not be followed if they appear inconsistent with governing statutes or principles of law"].) That the Court of Appeal's rationale of repudiating a decision of this Court could be so quickly seized upon by litigants and parroted back to this Court only underscores the fact that a serious conflict now exists in California law.

In short, the Answer Brief wholly fails to demonstrate the absence of a conflict concerning this important question of law. Only this Court can say whether it meant what it said in *City of Marina*. At this point, whether this Court was right or wrong is irrelevant. Where a concurring opinion openly takes issue with a specific portion of the majority's opinion and, in the face of that challenge, the majority stands by its language, the only reasonable interpretation for litigants and lower courts is that this Court meant what it said, and that even if dicta, it is the category of dicta that should be followed. (See, e.g., *People v.*

Superior Court (Persons) (1976) 56 Cal.App.3d 191, 194 ["A concurring opinion does not constitute authority under the doctrine of stare decisis. The majority opinion, not the minority, states the law and constitutes the decision of the court which binds lower courts"]; *Sheeler v. Greystone Homes, Inc.* (2003) 113 Cal.App.4th 908, 919, fn. 6 ["Our Supreme Court's decisions bind us, and its dicta command our serious respect"].) The fact that a Court of Appeal decided it could, in a published opinion, ignore this Court's articulation of the law necessarily creates a conflict in the law that must be resolved.

Although unnecessary for purposes of review, we next explain that this Court was correct to say that CSU's mitigation obligation is satisfied by asking the Legislature for an appropriation, as CSU has done in this case (see PFR 17-18, fn. 5).

B. Although irrelevant to whether review is needed, the Court of Appeal was wrong to conclude that CSU should be required to look beyond the Legislature when seeking funds for off-site mitigation.

The Court of Appeal reversed the trial court's decision affirming the project by hypothesizing that other sources of funding aside from legislative appropriations "presumably" exist in the form of "additional revenues from Project-related sources (e.g., rent from Adobe Falls faculty and student housing, revenue from guests of the Alvarado hotel, fees charged to residents of the

Project's new dormitories and/or other student housing, revenue from the new campus conference center, and revenue from the expanded and renovated student union)." (Typed opn. 33.) The Answer Brief adopts the same approach, arguing "[n]o-one can fault CSU for considering a future appropriation from the Legislature as *one* potential source of funding for off-site mitigation, but given the uncertain nature of this approach, CSU could not simply stop there and shrug off other possible sources at its disposal." (Ans. Br. 11-12.)

The Court of Appeal should not have adopted this speculative approach to funding off-site mitigation obligations for a number of reasons. To begin with, as the trial court correctly found, CSU was afforded no opportunity below to address any theoretical alternative sources of funding because this issue was not raised during the EIR process, and thus, the City, SANDAG, and MTS failed to exhaust their administrative remedies. (See PFR 24, fn. 7.)

Moreover, the Court of Appeal's approach of compelling CSU and any other state agency confronted with off-site mitigation obligations to establish that it has no other available sources of funding as a matter of law is wrong and unworkable. As a public agency, CSU must "mitigate or avoid the significant effects on the environment of projects that it carries out or approves whenever it is *feasible* to do so." (Pub. Resources Code, § 21002.1, subd. (b), emphasis added.) Under Public Resources Code section 21106, "[a]ll state agencies . . . shall request in their budgets the funds necessary to protect the environment in

relation to problems caused by their activities." (*Id.* § 21106.) This Court properly recognized that the interplay between sections 21002.1 and 21106 means that "if the Legislature does not appropriate the money, the power [to mitigate] does not exist." (*City of Marina, supra*, 39 Cal.4th at p. 367.)

In any event, the other theoretical sources of funding mentioned by the Court of Appeal do not represent funds that can be used for any purpose. (See, e.g., Ed. Code, §§ 90020 [revenues earned from State University project can be required to be security for repayment of bonds used to finance the project]; 89304 [revenue from new university student center may be required to go to repayment of bonds used to construct center]; 89703 [revenue from housing rental fees must go to either debt service or other housing projects].) Accordingly, the Court of Appeal erred by speculating that there are other monies separate from legislative appropriations that CSU could employ to fund off-site mitigation here.

C. Review is needed to reconfirm previously well-established rules requiring judicial deference to an agency's factual findings.

In the Petition for Review, we explained that review should be granted to address a second issue: the Court of Appeal repeatedly failed to afford the appropriate level of deference to CSU's factual findings in approving the project, in violation of long-standing authority. (See PFR 22-26.) The Answer Brief

contends this issue is not review-worthy because there is no dispute about the governing standards of review and because the Court of Appeal supposedly adhered to those standards. (Ans. Br. 13-24.) In attempting to justify the Court of Appeal's failure to afford deference to CSU's factual findings, the Answer seeks to re-characterize the findings as "fundamentally legal in nature," "fundamentally procedural in nature," or that "there was no actual finding." (Ans. Br. 14, 17, 21.)

The Answer Brief is wrong. CSU made numerous factual findings regarding the impact the project would have on local transit use. (See PFR 24-25.) The Answer contends that the Court of Appeal was justified to second-guess those findings because "CSU . . . did not undertake any actual substantive investigation or evaluation of transit-related impacts." (Ans. Br. 19.) But regardless of the gloss placed upon the Court of Appeal's action, the fact remains that the Court of Appeal openly disagreed with CSU's factual findings on this point. (See PFR 24-25.)

CSU also made a factual finding that TCP-27 (the Transportation Demand Management program) would mitigate traffic impacts and that it was not needed until the 2012/2013 academic year given the actual traffic impacts. (See PFR 25-26.) The Answer asserts that the Court of Appeal correctly rejected this finding because it was a "procedural" error to allow deferral of mitigation. (Ans. Br. 22.) But this is contrary to the actual factual findings made by CSU with respect to when the traffic

situation would require mitigation and what sort of mitigation would best alleviate adverse traffic conditions. (See PFR 25-26.)

In short, by seeking to re-characterize the Court of Appeal's failure to defer to CSU's factual findings as involving questions of law instead of fact, the Answer aptly demonstrates why review is needed here. Absent review, reviewing courts who disagree with an agency's discretionary decisions will now feel emboldened to conduct improper end-runs around the well established principle of deference to agencies' factual findings. And, in the meantime, there is now confusion and uncertainty about how the previously well-established rule of deference is to be applied in practice.

CONCLUSION

The Court of Appeal's opinion implicates an important area of law—the nature and extent of a state agency's off-site mitigation obligations under CEQA—and creates conflicts with existing opinions from this Court and elsewhere. Absent review, this opinion will create unnecessary confusion and uncertainty in the lower courts.

February 24, 2012

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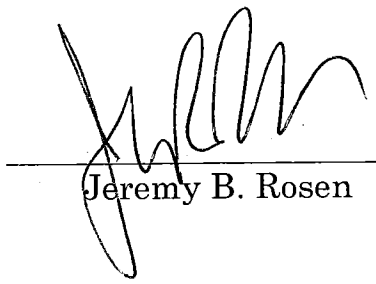
CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 8.504(d)(1).)

The text of this brief consists of 2,140 words as counted by the Microsoft Word version 2007 word processing program used to generate the brief.

Dated: February 24, 2012



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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 February 24, 2012, I served true copies of the following document(s) described as **REPLY TO ANSWER TO PETITION FOR REVIEW** 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 February 24, 2012, at Encino, California.

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