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 EXCERPTS OF THE ADMINISTRATIVE RECORD CITED IN THE ANSWER BRIEF ON THE MERITS

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INTRODUCTION

The City of San Diego and the Redevelopment Agency of the City of San Diego (the City) seeks judicial notice of the excerpts of the administrative record cited in its Answer Brief on the Merits. This Court should deny the motion. To begin with, the Rules of Court do not authorize the use of a motion for judicial notice as a vehicle to create a courtesy compendium of record citations for a court's convenience. More fundamentally, one of the documents

included in the City's motion was excluded from the administrative record by the trial court, and is therefore not appropriately before this Court in any form.

ARGUMENT

A. A motion for judicial notice is not the appropriate procedure to provide the Court with a courtesy compendium of documents already in the Court's possession.

" 'Judicial notice is the recognition and acceptance by the court . . . of the existence of a matter of law or fact that is relevant to an issue in the action without requiring formal proof of the matter.' " (*Lockley v. Law Office of Cantrell, Green Pekich, Cruz & McCort* (2001) 91 Cal.App.4th 875, 882.) Once a court takes judicial notice, "the 'fact' noticed is, in effect, treated as true," and "[j]udicial notice is thus a substitute for formal proof." (*Sosinsky v. Grant* (1992) 6 Cal.App.4th 1548, 1564 (*Sosinsky*).)

A request for judicial notice cannot "be used to 'circumvent[]' appellate rules and procedures, including the normal briefing process." (*Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1064-1065, overruled in part on another ground in *In re Tobacco Cases II* (2007) 41 Cal.4th 1257, 1276.) Here, no rule

authorizes a party to use a motion for judicial notice to submit a courtesy copy of materials cited in a party's brief.[1]

The City admits that that the purpose of its request for judicial notice is not to establish the existence of a matter of law or fact as indisputably true, but rather to provide the Court with a courtesy copy of citations in the City's answer brief. (RJN 5.)[2] The City's motion is thus an improper use of a motion for judicial notice procedure and should be denied.

The City's reliance on *Silverado Modjeska Recreation and Park Dist. v. County of Orange* (2011) 197 Cal.App.4th 282, 307, fn. 18, and *Katzeff v. Department of Forestry & Fire Protection* (2010) 181 Cal.App.4th 601, 606 fn. 2, is misplaced. (RJN 3-4.) In those cases the court took judicial notice of court records that were relevant to the issues on appeal but not otherwise part of the administrative record. (*Silverado*, at pp. 291-292, 295, 307-308, fn. 18 [granting judicial notice of excerpts from administrative record for a prior EIR that was no longer in litigation but related to EIR under review]; *Katzeff*, at pp. 606-607 & fn. 2 [granting judicial

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[1] California Rules of Court, rule 3.1365(c) does provide that "[a] court may require each party filing a brief to prepare and lodge an appendix of excerpts that contains the documents or pages of the record cited in that party's brief." However, this Court has not issued an order under that rule. And, were this Court to issue such an order, rule 3.1365(c) contemplates only that a party may "lodge" its excerpts with a court, not that a party should seek a ruling that these excerpts are "indisputably true" (*Sosinksy, supra*, 6 Cal.App.4th at p. 1564) through a motion for judicial notice.

[2] This opposition uses the following citation formats: "CT-[volume]:[page]" (Clerk's Transcript), "RJN" (City's request for judicial notice).

notice of administrative record because appeal arose from grant of motion for judgment on the pleadings, where basis for such motion must appear on the face of complaint or in matters subject to judicial notice].) Neither case suggests that it is proper to take judicial notice of documents already in the appellate record for the mere purpose of assembling them in a more convenient format.

B. At minimum, this Court should not take judicial notice of a document the superior court ruled was not part of the administrative record.

"[I]t would never be 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; *RiverWatch v. Olivenhain Municipal Water Dist.* (2009) 170 Cal.App.4th 1186, 1218-1219 [denying request for judicial notice of documents not part of administrative record].)

The City claims all of the documents included in its motion are contained in the administrative record for the Environmental Impact Report (EIR) under review here. (RJN 1-2, 6.) The City is wrong.

The issue of what could be included in the certified administrative record was the subject of extensive motion practice in the trial court. (See CT-1:51, 53, 58, 60, 67, 108, 184; CT-2:317, 321, 328, 338, 393, 427, 437; CT-7:1624-1626 [summarizing history].) The City sought to include many more documents in the

certified administrative record than CSU originally certified. (*Ibid.*) Among the additional documents the City sought to include was one entitled "San Diego State University Financial Statements 2007," marked for inclusion as SAR Vol. 35, pages S25410 to S25453 (the 2007 Financial Statements). (CT-2:334, 347 [lines 10-11], 357-360, 380, 389-390.) The Superior Court ruled that these documents, including the 2007 Financial Statements, should not be included in the administrative record because they were not before CSU, and CSU did not consider them, when it certified the EIR. (CT-2:437-438; CT-7:1625.) The City did not challenge this order on appeal.

The City has now included the same 2007 Financial Statements among the documents of which it seeks to have this Court take judicial notice. (RJN, Index of Excerpts of Administrative Record, p. 3 [tab 38]; Exhs. to RJN, tab 38.) The sole basis for the City's request is that this document was purportedly part of the administrative record. But because this document was in fact *not* part of the administrative record, this Court should deny the request for judicial notice with regard to this document.

C. The lower courts did not take judicial notice of the entire administrative record.

The City claims each court in a CEQA action must consider whether the lead agency's factual conclusions in the EIR are supported by substantial evidence " 'in light of the whole record,' " and, therefore, "the trial court and the Court of Appeal took

informal judicial notice of the Administrative Record." (RJN 3-4.) The City does not explain what it means by "informal judicial notice." In any event, the City misconstrues the meaning of judicial notice. " 'There is a vast difference between judicial notice and judicial knowledge.' " (*Stafford v. Ware* (1960) 187 Cal.App.2d 227, 231-232.) The mere fact that a court has reviewed the entire record in the case before it does not mean that the court has taken judicial notice of the entire record. Such "whole record" review provides no support for granting the City's motion.

CONCLUSION

This Court should deny the City's request for judicial notice.

October 22, 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 October 22, 2012, I served true copies of the following document(s) described as OPPOSITION TO MOTION BY THE CITY OF SAN DIEGO AND REDEVELOPMENT AGENCY OF THE CITY OF SAN DIEGO FOR REQUEST FOR JUDICIAL NOTICE OF EXCERPTS OF THE ADMINISTRATIVE RECORD CITED IN THE ANSWER BRIEF ON THE MERITS 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.

Robin Steiner

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