NO. S254271

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE POST SUSTAINABILITY INSTITUTE, et al.
Plaintiffs and Appellants,

v.

ASSOCIATION OF BAY AREA GOVERNMENTS, et al.
Defendant and Respondent,

After an Unpublished Decision by the Court of Appeal, First Appellate District, Division Two, Civil Case No. A144815

On Appeal from the Superior Court of Alameda County
Case No. RG13699215, Honorable Evelio Grillo, Presiding

ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

California Rules of Court, rule 8.500(b), sets forth the narrow criteria the Supreme Court considers in deciding whether to accept a case for review.[1] Petitioners the Post Sustainability Institute, et al. (collectively, Petitioners) contend the unpublished decision of the California Court of Appeal, First Appellate District, in *Post Sustainability Institute, et al., v. Association of Bay Area Governments,* Case No. A144815 (Opinion), a copy of which is attached hereto, warrants review. But Petitioners fail to demonstrate that the case involves an unsettled principle of law or an existing conflict with case law.

Division Two of the First Appellate District wrote a thoughtful opinion based on sound legal principles that properly interpreted and applied case law particular to issues of mootness. Petitioners' dissatisfaction with the result is not a reason for this Court to grant review. (*People v. Davis* (1905) 147 Cal. 346, 348-350.) The Association of Bay Area Governments (ABAG) and Metropolitan Transportation Commission (MTC) (collectively, the Agencies)[2] respectfully request the Court deny the Petition for Review.

II. FACTUAL AND PROCEDURAL BACKGROUND

The Petition for Review asks this Court to review the First Appellate District's decision, which upheld the Alameda County Superior Court's judgement denying Petitioners' request for a writ of mandate and dismissing Petitioners' complaint for declaratory and injunctive relief. (Opinion, pp. 2, 9.) Petitioners challenged the Agencies' 2013 adoption of

[1] All rules references are to the California Rules of Court.

[2] On July 1, 2017, the staff for ABAG were merged with the staff of MTC to be under the direction of the Executive Director of MTC.

Plan Bay Area, the combined regional transportation plan (RTP) and sustainable communities strategy (SCS) for the nine-county San Francisco Bay Area (2013 Plan), pursuant to federal and State laws requiring each metropolitan planning organization to prepare a combined RTP/SCS. (23 U.S.C. § 134; Cal. Gov. Code, § 65080, et seq.) (AA 123-129.) The 2013 Plan sets forth a forecasted development pattern for the region, which, when integrated with the transportation network and transportation measures and policies, will reduce greenhouse gas emissions by reducing vehicle miles travelled. (AR 55629-55637.) The 2013 Plan relies on a strategy of concentrated growth around the region's existing and planned public transit system, primarily through a Priority Development Area (PDA) framework, to house the growing population and to achieve the regional greenhouse gas emissions targets set by the California Air Resources Board. (AR 457, 1690.)

On October 15, 2013, Petitioners filed a lawsuit challenging the Agencies' adoption of the 2013 Plan and alleging violations of Senate Bill (SB) 375, the State Constitution, State and federal equal protection guarantees, and other federal laws. Petitioners sought a writ directing the Agencies to set aside approval of the 2013 Plan, an injunction or stay enjoining the Agencies from enforcing the 2013 Plan, and a declaration that the 2013 Plan was in violation of the aforementioned laws. (AA024.) A hearing on the merits was held on November 10, 2014. (AA208.) On February 11, 2015, the trial court entered its judgment denying the petition for writ of mandate and requests for injunctive and declaratory relief. (AA206.)

Petitioners filed an appeal in April 2015 requesting that the judgment be reversed and "the trial court [be] directed to provide for issuance of a peremptory writ of mandate directing Respondents to rescind their approval of [the 2013 Plan]." (Petitioners' Opening Appellate Brief, p.

45.) Following the trial court's judgment, the Agencies began preparation of the 2017 Plan pursuant to federal and State laws requiring that the RTP be updated every four years. (23 U.S.C. 134 (c); 49 U.S.C. § 5303(i)(1)(B)(i); Cal. Gov. Code, § 65080, subd. (d).) On April 14, 2017, the Agencies released a Draft EIR and Draft 2017 Plan for public review. During the extensive public outreach and amidst the over 700 public comment letters, Petitioners did not submit any written comments, and none of the comments submitted by others raised the concerns Petitioners raised against the 2013 Plan. On July 26, 2017, the Agencies certified the Final EIR for the 2017 Plan and adopted the 2017 Plan.

On August 14, 2017, the Agencies filed a motion to dismiss the appeal on the grounds that the claims and remedies sought were moot; the relief that Petitioners sought – a court order directing the Agencies to rescind their approval of the now obsolete 2013 Plan – would have no practical impact. On January 16, 2019, the Court of Appeal granted the Agencies' motion, concluding that adoption of the 2017 Plan rendered the appeal moot, and declining to exercise its discretion to consider the appeal. (Opinion, pp. 2, 4.) In response, on February 25, 2019, Petitioners filed their Petition for Review.

III. THIS COURT SHOULD DENY THE PETITION FOR REVIEW BECAUSE PETITIONERS HAVE FAILED TO SHOW REVIEW IS NECESSARY TO SETTLE AN IMPORTANT QUESTION OF LAW OR SECURE UNIFORMITY OF DECISION.

Petitioners fail to identify grounds to support a grant of review. They have not identified an "important question of law" related to mootness, or a need for review to "secure uniformity of decision." As such, Petitioners have failed to show any of the requisite grounds for review pursuant to rule 8.500 (b)(1).

Petitioners argue that review should be granted to determine whether the adoption of an update to Plan Bay Area can moot statutory and constitutional challenges to the prior Plan. (Petition for Review (PFR), pp. 15-17.) Petitioners further argue that review should be granted because the case raises issues of public importance that are certain to recur or that would leave material issues unresolved, and thus should be considered even if their challenges have been rendered moot by adoption of an updated Plan. (PFR, pp. 17-21.) However, neither of these claims raise "an important question of law" as required to support a grant of review under rule 8.500(b)(1). Rather, they are aimed at factual determinations made by the Court of Appeal that are consistent with well-settled legal principles. Petitioners further argue that review should be granted to clarify that the Agencies had the burden of proof in determining whether an exception to the mootness doctrine applied. (PFR, pp. 22-26.) But Petitioners' argument is based on an incorrect statement of the applicable law. The Petition for Review should therefore be denied.

A. *The Court of Appeal's determination that Petitioners' challenges to the 2013 Plan were rendered moot by adoption of the 2017 Plan is supported by the facts in this case and does not raise a question of law for this Court to decide.*

Petitioners argued before the Court of Appeal that the Agencies erred in adopting the 2013 Plan because it could not "feasibly" meet the Air Resources Board's greenhouse gas emissions reduction targets as required by SB 375; it violated State and federal equal protection law by allowing certain housing developers who included low-income housing in their projects to "streamline" environmental review required under the California Environmental Quality Act (CEQA); and included "coercive mandates" that impermissibly usurped local land use authority in violation of State statutory and constitutional law. (Opinion, p. 3.)

The Court of Appeal concluded that, because the 2013 Plan was no longer in effect following adoption of the 2017 Plan, Petitioners could not obtain any effective relief on their claims that related specifically to the 2013 Plan, and the appeal was therefore moot. (Opinion, p. 4.) As stated by the Court of Appeal, the 2013 Plan was replaced by another that contains "***meaningful changes***;" however "limited and focused" the changes to the 2017 Plan might be, "it contains significantly higher regional housing and job growth projections" than the 2013 Plan. (Opinion, p. 6.)

In reaching its conclusion that Petitioners' challenges were moot, the Court of Appeal applied well-settled legal principles that "an appellate court will decide only actual controversies and that a live appeal may be rendered moot by events occurring after the notice of appeal was filed." (Opinion, p. 4, citing *Building a Better Redondo, Inc. v. City of Redondo Beach* (2012) 203 Cal.App.4th 852, 866; see also *Sierra Club v. Board of Supervisors* (1981) 126 Cal.App.3d 701, 704-705.) Here, the Court of Appeal properly found that no actual controversy exists because the challenged 2013 Plan is no longer in effect. The review sought by Petitioners would be "an exercise in futility because the [action sought by Petitioners] has already taken place. . . " (*Building a Better Redondo, Inc.*, *supra*, 203 Cal.App.4th at p. 867 [finding appeal of trial court order directing city to place plan amendments and proposed ordinances on the ballot moot because city had already placed the matters on the ballot].)

The Court of Appeal considered the specific arguments raised by Petitioners and determined that each was aimed at Plan Bay Area 2013, which was no longer in effect. Specifically, the Court of Appeal addresses Petitioners' first claim that the Agencies erred in concluding the 2013 Plan's specified strategies could not have feasibly met the Air Resource Board's greenhouse gas emissions targets, finding that resolution of the claim "depends on [the 2013 Plan's] specific assumptions and strategies."

(Opinion, p. 5.) As stated in the Opinion, courts are "disinclined to consider questions [in cases where the issues are moot] that are dependent on the specific facts of a given situation [citation], and resolution of the petitioners' infeasibility claim depends on [the 2013 Plan's] specific assumptions and strategies." (Opinion, p. 5.) The Court of Appeal further states that it "could consider the meaning of 'feasible' without consideration of the specific strategies and goals of [the 2013 Plan]. However, this would be just the kind of advisory opinion on an abstract proposition that the law abhors." (Opinion, p. 5, fn. 3.) As to Petitioners' second claim that the 2013 Plan violates equal protection guarantees by providing CEQA streamlining to certain developers and third claim that the 2013 Plan is "replete" with coercive mandates that usurped local land use authority, the Court of Appeal again concluded that the claims were "specific to [the 2013 Plan's] goals and strategies." (Opinion, p. 8.) The Court of Appeal therefore applied the established legal doctrine that a court will only hear live controversies to the facts of this case – which showed Petitioners' claims were all aimed at specific assumptions in a planning document no longer in effect – to determine the case was moot. No question of law exists to support the Petition for Review.

Petitioners attempt to create a question of law by asserting that the Court of Appeal's Opinion would allow "any government agency…[to] moot a legal challenge to any statute, ordinance, or plan by the simple expedient of adopting an "'updated' version of the same enactment… ." (PFR, p. 17.) Contrary to Petitioners' alarmist conclusion, the Opinion does not set such a legal precedent in all cases. Instead, the Opinion merely applies the law to the facts of this case to determine that the challenges raised by Petitioners all relate to a Plan that is no longer in effect, and no showing had been made that the same challenges could be made to the updated Plan. (See Opinion, pp. 5-6, 8 [noting that none of the challenges

raised by Petitioners to the 2013 Plan had been raised – by Petitioners or anyone else – during the administrative process for approval of the 2017 Plan].) As specified above, the Court of Appeal considered each of Petitioners' arguments and determined that they were aimed at specific growth projections and assumptions that were no longer in effect with adoption of the 2017 Plan. Thus, no question of law has been raised to support a grant of review by this Court.

B. *The Court of Appeal's decision not to exercise its discretion to apply an exception to the mootness doctrine is supported by facts and does not raise a question of law or show a need for review to secure uniformity of decision.*

Even if a case is moot, if it "falls within the exception for cases 'present[ing] important questions of continuing public interest that may evade review,'" then a court may choose to exercise its discretion to render a decision notwithstanding mootness of the challenges. (*Cleveland National Forest Foundation, et al. v. San Diego Association of Governments, et al.* (2017) 17 Cal.App.5th 413, 424; see also C*leveland National Forest Foundation, et al. v. San Diego Association of Governments, et al.* (2017) 3 Cal.5th 497, 511; *Californians for Alternatives to Toxics v. Department of Pesticide Regulation* (2006) 136 Cal.App.4th 1049, 1069; *California Charter School Assn. v. Los Angeles Unified School District* (2015) 60 Cal.4th 1221, 1233-1234.)

Here, the Court of Appeal considered whether an exception to the mootness doctrine applied, either because the cases presented issues that were likely to recur but evade review, or would leave material issues unresolved, and concluded that no facts had been raised to justify an exercise of its discretion to hear the matter. Specifically, the Court of Appeal found that Petitioners had failed to establish that their claims were likely to recur or raise ongoing and material questions of declaratory relief that require a decision from the court. (Opinion, pp. 5-6.) Because there

was no evidence that Petitioners' claims applied equally to the 2017 Plan or that any of the contentions were raised – by Petitioners or anyone else – during the public review period for preparation of the 2017 Plan, the Court of Appeal concluded it was "disinclined" to analyze the claims. (Opinion, p. 6.) The question whether to decide a case that is moot is within the discretion of the reviewing court. Here, the Court of Appeal considered the facts before it and determined that those facts did not warrant an exercise of its discretion. There is no outstanding question of law based on the Court of Appeal's decision that would warrant this Court's review.

Petitioners point to this Court's decision in *Cleveland National Forest Foundation*, *supra*, 3 Cal.5th at pp. 510-511 to suggest that a challenge to an RTP/SCS "did not become moot simply because, in compliance with statutory requirements, the agency had adopted a 5-year update to the Plan." (PFR, p. 21.) Petitioners misrepresent the holding in that case, which did not consider whether the legal challenge should be dismissed as moot because none of the parties contended they should have been. All of the parties in that case recognized that the legal question at issue was one that was likely to recur yet evade review. (*Ibid*.) Accordingly, the Court proceeded to decide the issue raised in that case, even though the challenged RTP had been superseded. (*Ibid*.) The Court, therefore, did not conclude that adoption of a new RTP can never render challenges to the prior plan moot based on the relatively short period between adoption of an RTP and adoption of a successor plan. Instead, where a plan has been superseded and arguments against the prior plan have otherwise been mooted, the court must determine whether to exercise its discretion to decide a challenge that is likely to recur but would otherwise evade review.

Here, the Agencies argue the issue should be dismissed as moot based on adoption of the 2017 Plan. The Court of Appeal agreed, and

therefore the relevant question was whether an exception applied to justify consideration of Petitioner's claims. (Opinion, p. 4.) As the Court of Appeal concluded, Petitioners raised no allegations that the 2017 Plan suffered from the same alleged deficiencies as the 2013 RTP, either in its briefing before the Court of Appeal or during the administrative process leading up to approval of the 2017 Plan. (Opinion, pp. 5-6, 8.) The Court of Appeal therefore properly declined to exercise its discretion to consider Petitioners' claims because there was no showing that the 2017 Plan is infeasible for the reasons Petitioners argued the 2013 Plan was infeasible, or that there are important declaratory relief issues that should be resolved even though the 2013 plan had been replaced. (Opinion, pp. 5-6, 8.)

This Court's decision in *Cleveland National Forest Foundation* can be further distinguished based on the fact that the challenge raised in that case relates to the proper thresholds to analyze greenhouse gas emissions under CEQA. Specifically, the Court considered whether the EIR prepared for San Diego's RTP should have evaluated the plan's impact against an executive order signed by Governor Schwarzenegger in 2005 declaring a goal of reducing greenhouse gas emissions in California to 80 percent below 1990 levels by year 2050. (*Cleveland National Forest Foundation, supra*, 3 Cal. 5th at pp. 503-504.) This issue is one of continuing importance, as the law on climate change is constantly evolving with the supporting science, and planning agencies "must ensure that [their] CEQA analyses stay in step with evolving scientific knowledge and state regulatory schemes." (*Ibid*. at p. 519.) Use of the 2050 threshold has been discussed in cases issued prior to and following the *Cleveland National Forest Foundation* decision. (See e.g., *Golden Door Properties, LLC v. County of San Diego* (2018) 27 Cal.App.5th 892, 897-898, 904-905; *Spring Valley Lake Assn. v. City of Victorville* (2016) 248 Cal.App.4th 91, 101; *Rialto Citizens for Responsible Growth v. City of Rialto* (2012) 208

Cal.App.4th 899, 938-940;.) And a multitude of cases have addressed the appropriate threshold for use in analyzing greenhouse gas emissions under CEQA. (See e.g., *Center for Biological Diversity v. Department of Fish & Wildlife* (2015) 62 Cal.4th 204, 217; *City of Long Beach v. City of Los Angeles* (2018) 19 Cal.App.5th 465, 491-494; *John R. Lawson Rock & Oil, Inc. v. State Air Resources Bd.* (2018) 20 Cal.App.5th 77, 107-108; *Rodeo Citizens Assn. v. County of Contra Costa* (2018) 22 Cal.App.5th 214, 226; *Association of Irritated Residents v. Kern County Bd. of Supervisors* (2017) 17 Cal.App.5th 708, 743-744; *Bay Area Citizens v. Association of Bay Area Governments* (2016) 248 Cal.App.4th 966, 1012; *Mission Bay Alliance v. Office of Community Investment & Infrastructure* (2016) 6 Cal.App.5th 160, 199; *Sierra Club v. County of San Diego* (2014) 231 Cal.App.4th 1152, 1174-1175; *Rominger v. County of Colusa* (2014) 229 Cal.App.4th 690, 727-728; *Friends of Oroville v. City of Oroville* (2013) 219 Cal.App.4th 832, 842; *North Coast Rivers Alliance v. Marin Municipal Water Dist. Bd. of Directors* (2013) 216 Cal.App.4th 614, 650-653; *POET, LLC v. State Air Resources Bd.* (2013) 218 Cal.App.4th 681, 765; *Rialto Citizens for Responsible Growth*, *supra*, 208 Cal.App.4th at pp. 939-940; *Id*. at fn. 18; *Citizens for Responsible Equitable Environmental Development v. City of Chula Vista* (2011) 197 Cal.App.4th 327, 336.)

Here, the Agencies are aware of no other case brought to challenge adoption of an RTP/SCS raising the same or similar claims that Petitioners raise here. Nor did Petitioners raise these claims again in the administrative process leading up to approval of the 2017 Plan. The Court of Appeal properly determined that there was no showing of continuing controversy with respect to Petitioners' claims. And the fact that the Court in *Cleveland National Forest Foundation* considered the challenges raised in that case despite adoption of a superseding plan does not reflect a need for uniformity of decision, but rather, reflects the very different challenges

raised in the *Cleveland National Forest Foundation* case, which all parties agreed required judicial resolution.

C. *The Court of Appeal properly allocated the burden of proof on the question of whether an exception to the mootness doctrine applied in this case.*

As discussed above, under California law, courts may exercise their inherent discretion to resolve an issue that, although moot, "poses an issue of broad public interest that is likely to recur." (*Edelstein v. City and County of San Francisco* (2002) 29 Cal.4th 164, 172; *Liberty Mut. Ins. Co. v. Fales* (1973) 8 Cal.3d 712, 715-716; *People v. Navarro* (2016) 244 Cal.App.4th 1294, 1298; *Building a Better Redondo, Inc.*, *supra*, 203 Cal.App.4th at p. 867.) None of these cases place a burden of proof to show that an exception to the mootness doctrine applies on the party asserting mootness. Nonetheless, Petitioners attempt to argue that the Agencies had the burden to prove that the 2017 Plan resolved any and all claims that Petitioners alleged with respect to the 2013 Plan, despite the fact that Petitioners never challenged the 2017 Plan. (PFR, pp. 22-24.)

To advance its claim that the Agencies bear the burden of proof, Petitioners first argue that the burden of proof is normally assigned to the party advancing a claim. (PFR, p. 23.) While true, Petitioners' argument ignores the fact that they are the party advancing the argument that the court should exercise its discretion to hear its legal challenges to the 2013 Plan, despite their claims being rendered moot by adoption of the 2017 Plan. Therefore, following Petitioners' reasoning would lead to the conclusion that Petitioners, and not the Agencies, bear the burden of proof, as concluded by the Court of Appeal. (Opinion, p. 7; see also Evidence Code, § 500 ["Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting]; *Conservatorship of*

Hume (2006) 140 Cal.App.4th 1385, 1388 ["if you want the court to do something, you have to present evidence sufficient to overcome the state of affairs that would exist if the court did nothing"])

Petitioners also argue that "when the true facts relating to [a] disputed issue lie peculiarly within the knowledge of one party, the burden of proof may properly be assigned to that party in the interest of fairness." (PFR, p. 23.) As support, Petitioners cite to *ITSI T.V. Productions, Inc. v. Agricultural Association*s (9th Cir. 1993) 3 F.3d 1289, 1292 and *United States v. New York, New Haven & Hartford Railroad Co.* (1957) 355 U.S. 253, 256 n.5. (PFR, pp. 23-24.) These cases are inapplicable as neither pertains to mootness. Moreover, Petitioners cannot allege that any facts were "peculiarly within" the Agencies' knowledge alone. The 2017 Plan was subject to public disclosure throughout the planning process. Any interested member of the public could access a draft of the 2017 Plan and its supporting analyses, including the Performance Assessment Report and provide comments during the public review period. (Gov. Code §§ 65080, subd. (b)(2) & 65584.04, subd. (d).) Thus, none of the relevant information was concealed from Petitioners or "peculiarly within" the Agencies' knowledge alone.

In sum, Petitioners have raised no important question of law and have not shown a need for review to secure uniformity of decision with respect to the appropriate burden of proof where a party is asking the court to exercise its discretion to decide a case despite finding that the claims have been rendered moot. The Petition for Review should be denied.

IV. CONCLUSION

For the reasons stated above, Respondents request this Court deny the Petition for Review. Petitioners have failed to show that review is necessary to secure uniformity of decision or to settle an important question of law. (Rule 8.500 (b)(1).) The Opinion merely applies well-settled

principles of law to determine that adoption of the 2017 Plan rendered the challenges raised by Petitioners moot, and that the facts in this case did not require an exercise of the Court of Appeal's discretion to hear the challenges despite their mootness. The Petition for Review, therefore, should be denied.

Respectfully submitted,

Dated: March 18, 2019

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CERTIFICATE OF WORD COUNT

The undersigned counsel certifies that, pursuant to rule 8.504(d)(1), of the California Rules of Court, the text of this brief contains 3,863 words. Counsel relies on the word count of the computer program used to prepare this brief.

Dated: March 18, 2019

By: _____

Tina A. Thomas

The Post Sustainability Institute v. ABAG
State of California Supreme Court Case No. S254271
State of California First Appellate Dist., Division Two, Case No. A144815
Alameda County Superior Court, Case No. RG13699215

PROOF OF SERVICE

I am a resident of the United States, employed in the City and County of Sacramento. My business address is 455 Capitol Mall, Suite 801, Sacramento, California 95814. I am over the age of 18 years and not a party to the above-entitled action.

On March 18, 2019, a true copy of ANSWER TO PETITION FOR REVIEW was electronically filed with the California Supreme Court through truefiling.com. Notice of this filing will be sent to those below who are registered with the Court's efiling system. Those who are not registered will receive a hard copy via first-class U.S. Mail, postage thereon fully prepaid and deposited in a mailbox maintained by the United States Postal Service in Sacramento, California.

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I declare under penalty of perjury that the foregoing is true and correct and that this Proof of Service was executed this 18th day of March 2019, at Sacramento, California.

Stephanie Richburg