SUPREME COURT 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.,
Defendants and Respondents.

REPLY TO ANSWER TO PETITION FOR REVIEW

After an Opinion by the Court of Appeal, First Appellate District
Case No. A144815

On Appeal from the Superior Court of Alameda County,
Case No. RG 13699215, Honorable Evelio Grillo, Judge

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases — Page

California Statutes

California Rules of Court

INTRODUCTION

Respondents contend in the opening paragraph of their Answer to Petition for Review (Answer) that this action does not involve an "unsettled principle of law." (Answer at 6.) This contention mischaracterizes one of the factors warranting Supreme Court review in California Rules of Court, Rule 8.500, subdivision (b): "The Supreme Court may order review of the Court of Appeal decision…[w]hen necessary to settle an *important* question of law…." (Emphasis added.)

Yet the Court of Appeal's decision to moot the challenge to Plan Bay Area (four years after the filing of the notice of appeal and three years after completion of briefing) is not only errant as a matter of law, it effectively precludes judicial review of the central "feasibility" component of S.B. 375. The question at the heart of this case is whether the "sustainable communities strategy" required of every Metropolitan Planning Organization in California mandates adoption of a plan that *will* be accomplished in a reasonable time. (See Government Code sections 65080(b)(2)(B) and 65080.10(c).) This question is not limited to this case, and is certain to reoccur. It is undisputed that this question raises important issues of law for millions of Bay Area residents and over 100 cities and counties. But beyond this, the legislative mandate that regional plans ***shall*** be adopted that ***will*** meet CARB's targets if there is a ***feasible*** way to do so applies to all 18 Metropolitan Planning Organizations across the state, covering 98% of California's population.

If the answer to this question is not an unequivocal "yes," then the radical economic transformation proposed by Respondents will continue unabated with no assurance that the mandated reduction of greenhouse gas emissions will ever occur. Plan Bay Area acknowledges that "[a]mong the new challenges are the requirements of California's landmark 2008 climate law (SB 375, Steinberg): to decrease greenhouse gas emissions from cars and light trucks, and to accommodate *all* needed housing growth within our nine counties." (AR 55630) (emphasis added). Yet as argued in the Court of Appeal, an independent study commissioned by Respondents acknowledged that Plan Bay Area is infeasible as it relies on redevelopment laws that no longer exist, the extinguishment of Proposition 13 as codified in the State Constitution, and the creation of new bond measures to finance its policies. It also seeks to limit development on a massive scale while magically accommodating all needed housing growth.

Not only that, the "sustainable development" outline in Plan Bay Area can only be accomplished through the coercion of local land use autonomy in violation of the State Constitution's home rule guaranty, the infeasible rezoning of land by every city and county into either "priority development areas" or "priority conservation areas," and the escalation of already high housing costs to the detriment of low and middle income families. As non-priority development areas comprise 95% of the land in the nine-county and 101-city "region" encompassing Plan Bay Area, the economic effects will be draconian.

Our State Constitution is premised upon a form of government which preserves the autonomy of local city and county control, with authority granted by voters. Plan Bay Area, on the contrary, creates a government of unelected bureaucratic officials with oversight of "regions" of California (a form of government called "regionalism," not a republic).

This Court should grant review, as the issues raised in this case are of importance, are certain to reoccur and are not mooted by the adoption of the replacement Plan Bay Area 2040.

ARGUMENT

I. RESPONDENTS' ARGUMENT THAT PETITIONERS SHOULD BEAR THE BURDEN OF PROOF CONFLICTS WITH THE PUBLISHED OPINION OF THE COURT OF APPEAL IN *SANDAG III*

The ruling of the court below in this case stems directly from its erroneous assignment of the burden of proof. Specifically, the appellate panel required Petitioners to prove that Respondents' limited and focused updates to Plan Bay Area would *not* render the issues in this case unlikely to recur, and ruled that Appellants had supposedly failed to meet that burden. (Opinion at 7.) As was fully set forth in the Petition for Review, there are strong policy reasons for placing the burden on Respondents to prove that their routine updates *do* resolve the legal and constitutional shortcomings of the original Plan – something Respondents were (and are) unable to do. (Petition at 22-26.)

In their Answer, Respondents cite to four cases in which California courts supposedly did not "place a burden of proof to show that an exception to the mootness

doctrine applies on the party asserting mootness." (Answer at 16.) But that misstates the issue. Respondents contend that their required routine quadrennial updates have mooted this case, *and* that those updates render the important public issues unlikely to recur. (Motion to Dismiss Appeal at 9-11.) Standard jurisprudential principles require Respondents to support these claims with some sort of evidence that the updates in fact address and resolve the important public issues raised by this litigation, yet they have not even attempted to do so.

It is noteworthy that Respondents fail to discuss the most recent and on-point California appellate decision dealing with this issue. In *Cleveland National Forest Foundation v. San Diego Assn. of Governments* (2017) 17 Cal.App.5th 413 (*SANDAG III*), on remand from this Court, the San Diego Association of Governments argued that a challenge to its Regional Transportation Plan and the supporting Environmental Impact Report was moot because the Plan had been updated, "and will be superseded once more by another EIR and transportation plan currently being prepared." (Id. at 423.) The court held that the adoption of an updated plan and EIR did not render the case moot, since *SANDAG had offered no evidence* that the current or future versions of the transportation plan would not rely on the same faulty analysis as the original plan. (Id.) Moreover, the court reasoned that addressing the shortcomings of the original version of those documents "may result in modifications to the current or future versions of the transportation plan, or to projects encompassed within the transportation plan." (Id. at

424.) Finally, because SANDAG had not met its burden of proving that the defects in the original plan had been addressed and remedied by the updates, the court found that:

> "Even if this case were moot, its falls within the exception for cases 'present[ing] important questions of continuing public interest that may evade review' because of the frequency with which SANDAG must update the transportation plan...."

(Id.)

For the same reasons, this Court should grant the Petition for Review to clarify that, in a case such as this, it is the responsibility of the planning agency to prove that required routine updates to a plan have addressed and remedied the defects of the original document. The burden should not rest on members of the public to prove that the updates have *not* done so.

II. THIS CASE SHOULD BE RESOLVED ON THE MERITS BECAUSE IT RAISES ISSUES OF GREAT PUBLIC IMPORTANCE THAT ARE CERTAIN TO RECUR YET EVADE REVIEW

Even if this litigation can be considered moot, it certainly falls within the mootness exception applicable to cases that raise issues of public importance which are likely to recur, yet evade judicial review. (*Cleveland National Forest Foundation v. San Diego Association of Governments* (2017) 3 Cal.5th 497, 511; *Morehart v. County of Santa Barbara* (1994) 7 Cal. 4th 725, 746-47.) Respondents do not dispute that the proper interpretation of SB 375 is a matter of great and continuing statewide concern. (See Petition at 17-18.) Nevertheless, Respondents dispute that these issues are likely to recur with each new round of required updates to the Plan, and that the issues will perpetually evade review. (See Answer at 12-16.)

Following the reasoning of the court below, Respondents argue that the crucial questions of statutory interpretation involved in this case will not be raised in future litigation because (they allege) they were not raised during public hearings on the 2017 Plan updates. (Answer at 13, 15.) Even disregarding the fact that this evidentiary claim was disputed and not resolved below (see Opinion at 6, n. 4), Respondents' argument misses the point. The correct interpretation of SB 375 is of far broader significance than its impact on Plan Bay Area and its regularly scheduled updates. The legislative mandate that regional plans ***shall*** be adopted that ***will*** meet CARB's targets if there is a ***feasible*** way to do so applies to all 18 Metropolitan Planning Organizations across the state, covering 98% of California's population. (Pursuant to Government Code § 65588(e)(5), the status of the 18 regional plans and their required respective updates is maintained by the Department of Transportation at http://www.dot.ca.gov/hq/tpp/offices/orip/rtp/docs/MPORTPStatusChart_Oct2017.docx.)

Determining the meaning of the disputed language in SB 375 will *ipso facto* determine the legality of every regional plan adopted throughout the state pursuant to this legislation, and of every four-year update to each of those plans. This case presents the Court with a clean opportunity to forestall, once and for all, every future dispute from any source regarding the Legislature's meaning in the use of the terms "shall" and "feasible" in S.B. 375.

This Court has already spoken to the need to resolve such issues promptly, instead of dismissing them as moot with every statutorily mandated update to the plan. In

Cleveland National Forest Foundation v. San Diego Association of Governments (2017) 3 Cal.5th 497, 511 (*SANDAG*), this Court noted that a routine, five-year update to a regional transportation plan should not prevent consideration of the merits of a challenge to the previous version of the plan:

> "The issue before us presents an important question of law that is likely to recur yet evade review because of the relatively short period between adoption of a RTP and adoption of a successor plan. Accordingly, we proceed to decide the issue even though SANDAG's 2010 regional transportation plan has now been superseded."

This conclusion is fully applicable to the case at bar.

Respondents contend that the present case is not comparable to *SANDAG* because all parties in *SANDAG* agreed that the Court should reach the merits to resolve an important legal issue that was likely to recur yet evade review. (Answer at 13,16.) All this proves, however, is that the San Diego Association of Governments was concerned with promptly resolving an important question of law to avoid future uncertainty, whereas Respondents in the present case hope to indefinitely evade judicial review of their counterintuitive interpretation of SB 375. This Court had the authority, on its own motion, to dismiss the *SANDAG* litigation as moot but chose not to do so in order to settle the important questions involved. For the same reason, the Court should grant the present petition for review despite the fact that Respondents would prefer to avoid judicial scrutiny.

Respondents also attempt to distinguish *SANDAG* on the basis that that case involved determining the appropriate threshold for analyzing greenhouse gas emissions

under CEQA. (Answer at 14.) Since some form of that issue had been litigated in several other cases, Respondents conclude that this was the reason this Court waived mootness to reach the merits of the litigation. (Id. at 14-15.) But of course, during the relatively short existence of SB 375, the proper interpretation of that law has already come before this Court twice, including the *SANDAG* case itself. (See *Center for Biological Diversity v. Department of Fish & Wildlife* (2015) 62 Cal.4th 204, 230.) And an additional number of cases – including some cited by Respondents – have sought judicial interpretations of SB 375's precedent legislation, the California Global Warming Solutions Act of 2006 (AB 32). (See, e.g., *California Chamber of Commerce v. State Air Resources Bd.* (2017) 10 Cal.App.5th 604; *Association of Irritated Residents v. State Air Resources Bd.* (2012) 206 Cal.App.4th 1487; *Citizens for Responsible Equitable Environmental Development v. City of Chula Vista* (2011) 197 Cal.App.4th 327.) This is not an inconsequential topic that is unlikely to come before the courts again, as Respondents imply.

Finally, Respondents rely on the Opinion below for the proposition that resolving the present case on the merits, despite the adoption of the 2017 updates, would result in "just the kind of advisory opinion on an abstract proposition that the law abhors." (Answer at 11, quoting Opinion at 5, n. 3.) But the same logic would apply to this Court's ruling in *SANDAG*. Public issues of continuing importance transcend, virtually by definition, the specific facts from which they arise. Resolving the crucial issues of statutory interpretation raised by this case would no more constitute a sterile "advisory opinion" than did this Court's resolution of the issues implicated in *SANDAG*.

CONCLUSION

For the foregoing reasons, Petitioners request that this Court grant this petition for review to resolve the important questions of law presented by this case. A sweeping plan that changes the lives of millions of Bay Area residents should not evade judicial review.

Dated: March 28, 2019

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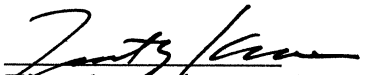
By: 
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CERTIFICATE OF WORD COUNT

I certify that the foregoing Reply to Answer to Petition for Review contains 1,488 words based upon the electronic word count of my computer word processing program.

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PROOF OF SERVICE

I am employed in the County of Sacramento, State of California. I am over the age of 18 years and not a party to the within action. My business address is 621 Capitol Mall, Suite 2025, Sacramento, CA 95814. On March 28, 2019, a true copy of

REPLY TO ANSWER TO PETITION FOR REVIEW

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

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