First District Holds Increased Enrollment-Related CEQA Challenges To UC Regents' 2018 SEIR For Berkeley Campus Development And Minor LRDP Amendment Are Mooted By Superseding 2021 LRDP Update EIR And Passage Of SB 118

By Arthur F. Coon on May 30, 2023

In an opinion filed April 27, and certified for partial publication on May 19, 2023, the First District Court of Appeal (Div. 1) vacated the trial court's order granting a writ directing the University of California's Regents (Regents) to decertify a 2018 Supplemental EIR (2018 SEIR) for a campus development project and to suspend increases in student enrollment pending CEQA compliance; it further directed the trial court to dismiss the petition, which it held was largely mooted by the Regents' certification of a 2021 EIR and the passage of CEQA amendments via SB 118, events that combined to preclude the Court's ability to grant effective relief. *Save Berkeley's Neighborhoods v. The Regents of the University of California, et al.* (2023) ___ Cal.App.5th ___.

The belatedly published portions of the opinion include: (1) a brief introductory part; (2) the case's extensive factual and legal background (which includes a prior 2020 appellate decision – *Save Berkeley I* – that reversed the trial court's grant of a demurrer and was analyzed in my 7/2/20 post ***here***, and another 2021 appellate decision that affirmed an order dismissing necessary – but not indispensable – parties, and was analyzed in my 10/26/21 post ***here***); and (3) the mootness analysis leading to the Court's holding that petitioner Save Berkeley's Neighborhood's (SBN) challenge to the 2018 SEIR's analysis of student enrollment increases is moot. (The opinion's unpublished portions dealt with the standard of review, the trial court's ability to review the Regents' CEQA analysis of enrollment increases under the facts of this case, and SBN's remaining non-mooted challenges to the SEIR, which were all rejected; those unpublished parts are nonprecedential and will not be further discussed here.)

Whether SBN's appeal was moot turned on the application of settled mootness principles, which the Court observed apply to CEQA cases. (Citing *Santa Monica Baykeeper v. City of Malibu* (2011) 193 Cal.App.4th 1538, 1547-1548.) Under these principles, a court's duty is to decide actual controversies by a judgment that can be carried into effect, not to give opinions on moot questions that can't affect the

matter in issue, and therefore when some event renders it impossible to grant the plaintiff any effectual relief a court will generally dismiss a case as moot. (Citing *Parkford Owners for a Better Community v. County of Placer* (2020) 54 Cal.App.5th 714, 722; *Golden Gate Land Holdings LLC v. East Bay Regional Park Dist.* (2013) 215 Cal.App.4th 353, 366.)

Here, two events collectively rendered SBN's challenges to the 2018 SEIR's analysis of impacts from student enrollment increases moot. First, that EIR was superseded and replaced by the Regents' subsequently certified 2021 EIR. The 2021 EIR analyzed an LRDP Update that covered a "buildout horizon" period through the 2036-2037 academic year and expressly analyzed and mitigated for – per its Master Response 17, inter alia, and per the requests of the City of Berkeley and others – environmental impacts of unanticipated enrollment growth that had already occurred between 2007 and 2018. (Whether or not it was actually required by CEQA to analyze and mitigate for such past impacts as part of the current "project" is doubtful, but presented an issue the Court didn't need to reach in light of the Regents' independent commitments to conduct the analysis, and the Court's mootness conclusions.) The 2021 EIR thus analyzed the same impacts that SBN claimed the 2018 SEIR had failed to analyze, and the 2021 EIR specifically "replaced" the analysis in both the 2018 SEIR and the prior 2005 LRDP EIR that it supplemented, such that SBN's challenges were directed to an EIR that was no longer in effect.

Second, the passage of Senate Bill No. 118 (Reg. Sess. 2021-2022) (SB 118) rendered the relief granted by the trial court unenforceable. The trial court's judgment purported to (1) void any decision the Regents may have made in academic year 2022-2023 or later to increase Berkeley student enrollment above 2020-2021 levels, and (2) order the Regents to suspend any future increases above 2020-2021 levels pending CEQA compliance. But SB 118 amended Public Resources Code section 21080.09 to alter its focus to "campus population" and clarify that: "Enrollment or changes in enrollment, by themselves, do not constitute a project" for CEQA purposes. (§ 21080.09(d).) It also limited available judicial remedies if a court finds enrollment-based CEQA review deficiencies, as follows:

> "If a court determines that increases in campus population exceed the projections adopted in the most recent [LRDP] and analyzed in the supporting [EIR], and those increases result in significant environmental impacts, the court may order the campus or medical center to prepare a new, supplemental, or subsequent environmental impact report. Only if a new, supplemental, or subsequent [EIR] has not been certified within 18 months of that order, the court may … enjoin increases in campus population that exceed the projections adopted in the most recent [LRDP] and analyzed in the supporting [EIR]."

(Pub. Resources Code, § 21080.09(e)(1).)

Further, to cover all bases, SB 118 voids any preexisting injunctions or judgments affecting enrollment. (See, § 21080.09(e)(2) ["Notwithstanding any other provision of this division [i.e., CEQA], any injunction or judgment in effect as of the effective date of this subdivision suspending or otherwise affecting enrollment shall be unenforceable."].)

The Court rejected SBN's argument that SB 118 was an unconstitutional violation of the separation of powers doctrine. Specifically, while that doctrine bars the Legislature from reversing a judicial determination in a finally-adjudicated case (*Smart Corner Owners Assn. v. CJUF Smart Corner LLC* (2021) 64 Cal.App.5th 439, 465-466), it does not preclude the Legislature from amending a statute and applying the amended statute to both pending and future cases, including applying it to cases still pending on appeal. (*Ibid.*) Per the Court: "Here, the judgment and writ issued by the trial court was not "final" for separation of powers purposes. Rather, the Regents were entitled to, and did, appeal to this

court. During that time, the Legislature passed Senate Bill 118. Accordingly, its application to this mater does not run afoul of the separation of powers doctrine." (Fn. omitted.)

The Court further noted that "courts have rejected separation of powers challenges to legislation that alters the prospective effect of an injunction" (citing *Mendly v. County of Los Angeles* (1994) 23 Cal.App.4th 1193, 1200-1203, 1211-1212) and have also rejected such challenges to legislation exempting from CEQA a project being challenged in still-pending CEQA litigation. (Citing *Sagaser v. McCarthy* (1986) 176 Cal.App.3d 288, 298, 311-312.) It observed that "SBN does not dispute the Legislature is entitled to amend CEQA to meet changing policy goals" (citing *Saltonstall v. City of Sacramento* (2014) 231 Cal.App.4th 837, 854), and "has not cited any authority suggesting the Legislature cannot prioritize access to education via enrollment levels over certain environmental concerns."

The Court thus found SB 118 constitutional and applicable, and that its plain language rendered void and unenforceable the trial court's orders voiding and suspending the Regents' decisions to increase student enrollment. Further, SB 118's above-referenced limitation on remedies "precludes any further injunction as to enrollment or campus population at this time."

In sum, the Court held that the "unique set of circumstances" presented by the Regents' "certification of the 2021 EIR and [the Legislature's] passage of [SB] 118" prevented it from providing the parties with effective relief and mooted the case's issues with respect to "increased enrollment" CEQA analysis. Combined with its rejection of SBN's remaining arguments in the unpublished portion of its opinion, this holding led the Court to vacate the trial court's judgment and remand the matter with directions to dismiss SBN's writ petition.

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