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SUPREME COURT
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MAR 12 2014

Case No. S213478

IN THE SUPREME COURT OF CALIFORNIA

Frank A. McGuire Clerk

Deputy

CALIFORNIA BUILDING INDUSTRY ASSOCIATION
Plaintiff and Respondent

vs.

BAY AREA AIR QUALITY MANAGEMENT DISTRICT
Defendant and Appellant

**CALIFORNIA BUILDING INDUSTRY ASSOCIATION'S
PARTIAL OPPOSITION TO BAY AREA AIR QUALITY
MANAGEMENT DISTRICT'S MOTION FOR JUDICIAL NOTICE**

After a Decision by the Court of Appeal in a Published Opinion
First Appellate District, No. A135335 & A136212

On Appeal from a Judgment
Alameda County Superior Court, No. RG10548693
Honorable Frank Roesch, Judge of the Superior Court

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**MEMORANDUM OF POINTS AND AUTHORITIES IN PARTIAL
OPPOSITION TO BAY AREA AIR QUALITY MANAGEMENT
DISTRICT'S MOTION FOR JUDICIAL NOTICE**

Plaintiff and Respondent California Building Industry Association (“CBIA”) partially opposes the Motion for Judicial Notice filed by Defendant and Appellant Bay Area Air Quality Management District (“District”). In its Motion, the District seeks judicial notice of three broad categories of documents: (1) prior versions of particular sections of Title 14 of the California Code of Regulations (“CEQA Guidelines”); (2) enrolled bill reports and other documents related to various bills that amended or sought to amend the California Environmental Quality Act (“CEQA”); and (3) files from state regulatory agencies pertaining to those agencies’ modification of the CEQA Guidelines.

While none of the documents the Districts seeks notice of is particularly helpful to the Court’s task of construing the Public Resources Code, the majority of the documents have sufficient indicia of authenticity and otherwise appear to be noticeable, if relevant. CBIA only opposes judicial notice, for any purpose, of three documents: (1) “[a] document from the California Natural Resources Agency’s rulemaking file containing the Agency’s response to a comment related to its 1982 revisions to the CEQA guidelines” (District’s Motion for Judicial Notice (“MJN”), Ex. F); (2) “excerpts from A Report to the Assembly Committee on Natural Resources by the Committee on the Environment of the State Bar of

California entitled ‘The California Environmental Quality Act: Recommendations for Legislative and Administrative Change’ ” (MJN, Ex. H); and (3) “Enrolled Bill Report, Senate Bill No. 2262, Stats. 1990 (Reg. Sess.)” (MJN, Ex. N). The District asserts that judicial notice of each of these three documents is appropriate under Evidence Code section 452, subsections (c)¹ and (h)². (MJN, at 4-5, 7.) As explained below, CBIA opposes the judicial notice of each of these documents.³

Exhibit F: CBIA objects to the Court’s judicial notice of Exhibit F on the ground that it has not properly been authenticated pursuant to Evidence Code § 1401 and otherwise lacks foundation. (*See* Evid. Code, § 1401 [requiring authentication of a writing before either “it may be received in evidence” or “secondary evidence of its content may be received in evidence”].) According to the District’s Motion, Exhibit F was obtained “from the California Natural Resources Agency’s rulemaking file” and purportedly represents “the Agency’s response to a comment related to its 1982 revisions to the CEQA Guidelines.” (MJN, at 4, Ex. T.)

¹ Subsection (c) allows for judicial notice to be taken of “[o]fficial acts of the legislature, executive, and judicial departments of the United States and of any state of the United States.”

² Subsection (h) provides for judicial notice of “[f]acts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy.”

³ Although CBIA’s opposition is limited to Exhibits F, H, and N, CBIA’s Reply Brief further will explain why all of the exhibits attached to the District’s Motion, even if technically noticeable, are not noticeable for the reasons offered and otherwise lack persuasive value.

Exhibit F, however, neither identifies the document's author nor reflects the purpose for which the document was created – in short, it is impossible to tell whether this document is what the District asserts it to be. (*See* Evid. Code, § 1400 [“Authentication of a writing means (a) the introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is or (b) the establishment of such facts by any other means provided by law.”].) The document's header, for example, merely states that it is a summary of and response to comments submitted by Allen Jones – there is no indication of who created the document. Even assuming that Exhibit F was authored by someone within the Resources Agency, the mere fact that it was obtained from the Agency's “rulemaking file” does not establish its authenticity. The document, for example, may have been an internal draft response to the comment, or may represent the opinion of a single Agency employee. Neither the document nor the District's proffer demonstrates that this document is actually a formal response to comment and therefore represents the Resources Agency's opinion on the question presented.

On this basis, CBIA requests that this Court deny the District's Motion for Judicial Notice with respect to Exhibit F.

Exhibit H: CBIA objects to the Court's judicial notice of Exhibit H on the grounds that it is neither an official act of a state judicial agency nor a statement of fact or proposition not reasonably subject to dispute. By its

own language, for example, Exhibit H was “not . . . acted on by the Board of Governors of the State Bar and does not necessarily reflect the views of the Board or of the State Bar.” (MJN Ex. H at p. 4.) Rather, the report notes that it reflects merely the opinion of “attorneys representing development, conservation, public agency, and academic perspectives.” (*Ibid.*) Thus, the report does not reflect the opinion of the State Bar of California and therefore would not amount to a judicially noticeable “official act[.]” Nor is Exhibit H a fact or proposition not reasonably subject to dispute.

CBIA further objects to this Court’s judicial notice of Exhibit H to the extent that it is used as legislative history on the grounds of irrelevancy. Citing *Kaufman & Broad* (2005) 133 Cal.App.4th 26, 36, the District contends that Exhibit H is tantamount to an “official Commission report[.]” (MJN, at 5.) Notwithstanding the fact that the State Bar of California is not a “commission” as referenced in the case law (*See, e.g., Katzber v. Regents of Univ. of Cal.* (2002) 29 Cal.4th 300, 319, fn. 18 [California Constitution Revision Commission]; *Estate of Dye* (2001) 92 Cal.App.4th 966, 985 [California Law Revision Commission]; *Dep’t of Personnel Admin. v. Superior Court* (1992) 5 Cal.App.4th 155, 183 [California State Government Organization and Economy Commission]), there is no evidence that this report “shed[s] light on the collegial view of the Legislature as a whole.” (*See Kaufman & Broad, supra*, at p. 30.)

Neither the report itself nor the District, for instance, provides any indication that Exhibit H ever was shared with the Assembly Committee on Natural Resources, much less the Legislature *as a whole*. (*Ibid.*; *cf. People v. Patterson* (1999) 72 Cal.App.4th 438, 443 [statements by bill’s author about bill’s intended purpose not proper legislative history]; *Quintano v. Mercury Cas. Co.* (1995) 11 Cal.4th 1049, 1062, fn. 5 [letters to particular legislators, including bill’s author, not proper legislative history]; *id.* at 1062 [subjective intent reflected by statements of interested parties and individual legislators, including bill’s author, not communicated to legislature as a whole nor proper legislative history]; *State Comp. Ins. Fund v. Workers’ Comp. Appeals Bd.* (1985) 40 Cal.3d 5, 10, fn. 3 [documents with unknown author and purpose not proper legislative history]) As such, it does not constitute cognizable legislative history, and CBIA therefore requests that this Court deny the District’s Motion for Judicial Notice with respect to Exhibit H. (*See also Peltier v. McCloud River R.R. Co.* (1995) 34 Cal.App.4th 1809, 1820 [noting that “the State Bar’s view of the meaning of proposed legislation, even if it authored that legislation, is not an index of legislative intent”]; *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 742 [rejecting staff report as proper legislative history where report represented neither the intent of the Legislature that drafted the section nor that of the electorate in adopting it].)

Exhibit N: Finally, CBIA objects to Exhibit N on the grounds that it has not properly been authenticated pursuant to Evidence Code section 1401 and otherwise lacks foundation. Although Exhibit N is titled as an “Enrolled Bill Report,” the document does not identify which agency authored the document – and the District’s Motion and accompanying declaration in support thereof provide no such additional details. (MJN, at 7, Ex. T.) Accordingly, CBIA requests that this Court deny the District’s Motion for Judicial Notice with respect to Exhibit N.⁴ (*Cf. State Comp. Fund v. Workers’ Comp. Appeals Bd.* (1985) 40 Cal.3d 5, 10, fn. 3 [documents with unknown purpose and author are not proper legislative history].)

In sum, neither Exhibit F, H, nor N should be judicially noticed because the District has failed to provide sufficient indicia of authenticity, because they do not fall within Evidence Code section 452, subsections (c) or (h), or because they otherwise are irrelevant to the question presented in this matter. Accordingly, CBIA respectfully requests that this Court deny

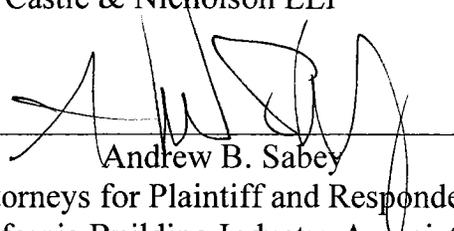
⁴ While CBIA otherwise acknowledges that enrolled bill reports generally represent cognizable legislative history in California (*See Committee for Green Foothills v. Santa Clara County Board of Supervisors* (2010) 48 Cal.4th 32, 49, fn. 15), it notes that such reports provide little probative value on matters of legislative intent. (*See Kaufman & Broad Cmty., Inc. v. Performance Plastering, Inc.* (2005) 133 Cal.App.4th 26, 40-42 [critiquing value of enrolled bill reports on grounds that such reports are prepared by the executive branch, rather than the legislative branch, and are prepared only after the bill has passed the Legislature and has become “enrolled.”].)

the District's motion for judicial notice as it concerns these three documents.

Dated: March 12, 2014

Respectfully submitted,
Cox, Castle & Nicholson LLP

By: _____


Andrew B. Sabey

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California Building Industry Association

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PROOF OF SERVICE

I am employed in the County of San Francisco, State of California. I am over the age of 18 and not a party to the within action; my business address is 555 California Street, 10th Floor, San Francisco, California 94104-1513.

On **March 12, 2014**, I served the foregoing document(s) described as **CALIFORNIA BUILDING INDUSTRY ASSOCIATION'S PARTIAL OPPOSITION TO BAY AREA AIR QUALITY MANAGEMENT DISTRICT'S MOTION FOR JUDICIAL NOTICE** on ALL INTERESTED PARTIES in this action by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

Please see attached Service List

On the above date:

 x BY U.S. MAIL The sealed envelope with postage thereon fully prepaid was placed for collection and mailing following ordinary business practices. I am aware that on motion of the party served, service is presumed invalid if the postage cancellation date or postage meter date on the envelope is more than one day after the date of deposit for mailing set forth in this declaration. I am readily familiar with Cox, Castle & Nicholson LLP's practice for collection and processing of documents for mailing with the United States Postal Service and that the documents are deposited with the United States Postal Service the same day as the day of collection in the ordinary course of business.

I hereby certify that the above document was printed on recycled paper.

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

Executed on **March 12, 2014**, at San Francisco, California.



Michell Ho

SERVICE LIST

Supreme Court of California Case No. S213478

*CALIFORNIA BUILDING INDUSTRY ASSOCIATION, et al. v.
BAY AREA QUALITY MANAGEMENT DISTRICT
APPELLATE CASE NOS. A135335 & A136212*

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