

1 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

2 IN AND FOR THE COUNTY OF SAN DIEGO

3 DEPARTMENT 72

BEFORE HON. TIMOTHY TAYLOR

4
5 TAXPAYERS FOR ACCOUNTABLE)

6 SCHOOL BOND SPENDING,)

7 Plaintiff,) No. 37-2007-00076126-CU-BT-CTL

8 vs.)

9 SAN DIEGO UNIFIED SCHOOL)

10 DISTRICT,)

11 Defendants.) MOTION HEARING

12
13 REPORTER'S TRANSCRIPT

14 September 20, 2013

15
16 APPEARANCES:

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Official Reporter Pro Tempore

28 San Diego, California

COPY

SAN DIEGO, CALIFORNIA, SEPTEMBER 20, 2013; 1:38 PM.

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2
3 THE COURT: Let's take up the Taxpayers for
4 Accountable School Bond spending, et cetera.

5 MR. WARD: Good afternoon, your Honor. Cameron
6 Ward appearing for the San Diego Unified School District.
7 I have with me in the courtroom today Dr. Chuck Podhorsky,
8 who is the principal of Hoover High School.

9 MR. SHERMAN: Good morning, your Honor. Craig
10 Sherman on behalf of Taxpayers.

11 MR. CARDIFF: Good morning, your Honor. Todd
12 Cardiff on behalf of Taxpayers.

13 THE COURT: Okay. We have a continued hearing on
14 what started out as a TRO request, and we also have an ex
15 parte application that was scheduled by plaintiff's
16 counsel. I have the reply brief filed by plaintiff's
17 counsel pursuant to the briefing schedule that I gave you
18 the last time you were here. I read it. I have -- I also
19 have the ex parte application and I have the district's
20 response to the ex parte application, which is really a
21 response to the tentative ruling that I issued earlier
22 this week.

23 MR. WARD: That's correct, your Honor.

24 THE COURT: So I've read all of that, as well.
25 That latter document came to me this morning, but I've
26 looked at it.

27 MR. WARD: Thank you, your Honor.

28 THE COURT: So as far as the ex parte application

1 is concerned, the defendant got it right. The word "pay"
2 was a typo. I've reprinted the peremptory writ of
3 mandamus deleting that word and intended to sign that and
4 have that be your amended writ. It will be now word for
5 word with the judgment. It was never my intention to
6 require anybody to pay anything in connection with the
7 writ of mandate. It was a typographical error.

8 So now that you know what my thinking is in that
9 regard, do you want to address it?

10 MR. SHERMAN: Yes, your Honor. In light of the
11 Court's tentative ruling, which does change the nature of
12 the restitution, paying-back issue, if you will, with the
13 current ruling, I believe it would be appropriate to amend
14 both the judgment and the writ to be consistent with your
15 Honor's order in the tentative ruling. The point being,
16 the required accounting would be necessarily made part of
17 the writ of mandamus. And under endangered habitat --

18 THE COURT: I take -- I don't agree with you. I
19 think that's a part of the retained jurisdiction. While
20 the case is still pending here, while the EIR is being
21 prepared, while I still have jurisdiction to make sure
22 that the EIR is done correctly and am awaiting the return
23 on the writ, I have jurisdiction to make orders like that,
24 I believe, within the case law, the case that I cited.

25 And I'm going to have them make an accounting so
26 that we know -- I mean, you're guessing now what was spent
27 for what. I think we should all know. I think everybody
28 should be on the same level playing field and know what

1 was paid for what at Hoover and the other places that are
2 the subject of the petition. And then we can
3 intelligently address whether restitution -- if that's
4 really what it is because I don't think it's actually
5 restitution -- but some sort of transfer of funds between
6 one account and another needs to happen and, if so, how
7 much. As of right now, you don't know. You haven't seen
8 the books and records, I take it, have you?

9 MR. SHERMAN: We haven't seen the physical books
10 and records. We do have an idea -- I've had discussions
11 with counsel of what those amounts are, but we do need to
12 go through the process and we'll respect --

13 THE COURT: That's what I contemplated is let's
14 all know rather than have a general idea about how much
15 was spent and then proceed from there. Then if there's
16 further appellate review, you'll know dollars and cents.

17 MR. SHERMAN: That makes sense.

18 THE COURT: That's the reason that I decided to
19 go that way. I don't think that has to be a part of a
20 judgment though. I think it's part of my retained
21 jurisdiction.

22 MR. SHERMAN: And we --

23 THE COURT: To craft a remedy that, you know,
24 makes sense under the circumstances. I don't even know
25 what the circumstances are until I get the accounting.
26 But I don't agree with you that it has to be part of the
27 judgment.

28 MR. SHERMAN: We have no problem in putting that

1 off in the sense that, you know, the Court's order with
2 regards to the accounting certainly is effectual and
3 noncompliance of it has its own course and consequences.

4 I guess with that said, in light of the Court's
5 ruling on that expenditure issue, I'd just ask that if
6 that could be put on calendar to be heard.

7 THE COURT: Well, I'm disinclined to put it on
8 calendar until I have the accounting. And once you have
9 the accounting and I have it, then if you think a further
10 order of the Court is necessary, you can schedule it. And
11 by then there will have been a hearing on the attorney's
12 fees motion, I presume; right?

13 MR. SHERMAN: Based upon the Court's currently
14 available dates, that would be the case.

15 THE COURT: And -- look, if I could snap my
16 fingers and make the backlog go away, I would do it.
17 Okay? But I can't. So I have to schedule it when I can
18 schedule it. And, you know, I'm sorry that's true, but
19 that's just the facts of life.

20 So do you want to address any other part of the
21 tentative ruling on your request for further injunctive
22 relief, separate and apart from the ex parte application,
23 which I think we've addressed?

24 MR. SHERMAN: We'll submit on the tentative in
25 that regard and any remarks or responses I'll reserve.

26 THE COURT: All right. Let's hear from your
27 adversary.

28 MR. WARD: Thank you, your Honor. With respect

1 to the accounting, as we laid out in our paper, we're put
2 in a difficult situation where you're requiring us to do
3 something further to a mandate that hasn't yet been given.
4 So the Court of Appeal hasn't mandated restitution. I
5 understand your Honor to say that your judgment also won't
6 include that. So we're left --

7 THE COURT: Not today.

8 MR. WARD: We're in a position now where we
9 couldn't take an appeal on that until after we've already
10 complied with an order which -- which we obviously have
11 argued this Court ought not to make.

12 THE COURT: File a writ.

13 MR. WARD: But --

14 THE COURT: If you don't agree that your -- that
15 I have the authority to order you to make an accounting,
16 take a writ.

17 MR. WARD: What I'm --

18 THE COURT: And the Court of Appeal will read all
19 of this stuff and then we'll all know whether the Court of
20 Appeal thinks I'm carrying out the mandate correctly. I
21 think I am. I really do. I mean, look --

22 MR. WARD: But --

23 THE COURT: -- here's the problem. You lost.
24 You did your best. You -- you lost. Okay? They
25 changed -- the Fourth DCA changed the law. You know that.
26 You took it up to the Court of Appeal. You asked them to
27 decide whether parking is or isn't and, you know, they
28 decided not to decide. So now we have a split among the

1 appellate districts. And I know which case I'm going to
2 be following in the future on parking issues. And as for
3 the other courts in the state, they're going to have to
4 pick between the Fourth DCA and, what was it,
5 San Francisco?

6 MR. WARD: Yes.

7 THE COURT: Yeah. I don't know how that's going
8 to shake out. But since the one that's creating my papers
9 is right up the street, I know which court I'm going to be
10 following from now on.

11 MR. WARD: And obviously the San Diego Unified
12 School District in the Fourth District will have to be
13 following that, as well.

14 THE COURT: Right.

15 MR. WARD: And -- but that is -- just having lost
16 on those issues doesn't resolve this issue of what did the
17 Court of Appeal direct this Court to do. And what your
18 Honor has described is a situation where we don't have a
19 Court of Appeal saying restitution. We don't have the
20 judgment of this court saying restitution.

21 THE COURT: Yet.

22 MR. WARD: You have it saying do something that
23 won't be -- that won't be as part of the judgment, and I
24 don't see how we can take that --

25 THE COURT: It's not a judgment --

26 MR. WARD: -- up on appeal.

27 THE COURT: -- but it's still a court order. So
28 you have a choice. You can writ it, if you think that I'm

1 going beyond my authority, and then we'll all know. Or
2 you can refuse to comply with it, and then there's a 100
3 percent chance that Mr. Sherman will have you down here on
4 a contempt. You know, if you want to roll the dice and
5 get it teed up for appeal that way, that will be okay with
6 me too.

7 MR. WARD: Well, certainly that would not be our
8 preferred option.

9 THE COURT: I mean, I have a strong feeling --
10 maybe I'm wrong -- strong feeling that the district could,
11 with punching a few key strokes, print out a line-by-line
12 expenditure summary for everything. And then you can
13 redact it and have it apply just to field lighting and you
14 can give me the accounting and give it to Mr. Sherman and
15 that will be that. And then we'll know what was spent and
16 he can then take the ball there.

17 And then, informed by that, he can file papers
18 saying you should order restitution. And you can then
19 file papers saying there's no basis for such an order.
20 And I'll have to decide it then. But I don't want to
21 decided it until I know what we're talking about. What
22 are the actual dollars and cents? What accounts did they
23 come from? How were they spent, et cetera, for what
24 schools? I need to know that before I send it on its way
25 back to the Court of Appeal

26 MR. WARD: Well, I think that the point we tried
27 to make in the papers is whether it's \$10, \$100,000, or
28 \$1,000,000, shouldn't make a difference as to whether or

1 not they're entitled to that relief. The district either
2 has an obligation for restitution, or is it does not,
3 whatever the amount would happen to be.

4 THE COURT: I bet if it was \$10, you wouldn't be
5 facing a motion from them.

6 MR. WARD: Well, I'll bet it's not \$10, too.
7 It's more likely to be hundreds of thousands of dollars.
8 What we said in our papers, hundreds of thousands of
9 dollars. And the implication of could the District come
10 up with the numbers? Quite possibly, although it's hard
11 to break out what's been spent on planning when you're
12 planning an entire facility. But certainly a good faith
13 effort could be made to do that. To do that in advance,
14 an obligation to make restitution, seems to be putting the
15 cart before the horse. But we've addressed the point and
16 we understand your Honor's position.

17 THE COURT: Well, I don't take positions, I
18 just -- I am trying my best to understand what the Court
19 of Appeal wants us to -- wants me to do here -- not wants,
20 has ordered me to do. And as of today, I think I've fully
21 carried out the mandate. But it says "including but not
22 limited to." That bespeaks that there's something more
23 that they anticipate me doing. Otherwise they wouldn't
24 have said that. They would have said, "Enter the
25 following orders," and that would have been it. It says,
26 "Including but not limited to."

27 Now the fight that you and Mr. Sherman are going
28 to be having is what does that mean. And I'm going to

1 have to decide whether what he's now asking for is
2 consistent with the decision the Court of Appeal made or
3 not. And I'd like to go at that with the most input that
4 I can, including how much is at stake. I'd like to know
5 that. I think that's an important input for me and that's
6 why I'm ordering you to give me the accounting.

7 MR. WARD: I respect that as the order of the
8 Court. Should we address the CEQA issues?

9 THE COURT: If you'd like to, sure.

10 MR. WARD: As we --

11 THE COURT: All of these folks are saying, "Boy,
12 I'm glad I don't do CEQA work."

13 MR. WARD: It's fun, your Honor.

14 THE COURT: I agree. It's challenging,
15 especially when you don't know from day to day what the
16 law is, even though you read the right case and the Court
17 of Appeal decides to change it on you.

18 MR. WARD: So with respect to the CEQA issues,
19 there were two points in the tentative ruling that -- that
20 were brought to your attention in the matter that we
21 didn't ask for the judgment to be postponed, only that the
22 mandate requiring the vacation of the approval be done at
23 the same time on the -- on the return. And that's part
24 of -- part of what -- when the Court of Appeal says,
25 "including things," that's one of the things that you can
26 do to ensure compliance, you will have compliance as of
27 the -- as of the return date, same with the EIR.

28 THE COURT: I understand. I do. But I just

1 didn't find any support for that in the very lengthy, very
2 learned opinion of the Court of Appeal. I read it loud
3 and clear, this was an illegally approved project and you
4 can't do it any more. You can't have field -- you can't
5 have the field lit until it's properly approved. And, you
6 know, I understand that you would like to keep going for
7 the kids. So would I. But I just didn't find any support
8 for that in the opinion of Justice McDonald.

9 MR. WARD: Well, I would suggest that the support
10 for that is turning back to this Court the discretion to
11 form the remedy to bring the District into compliance.
12 Which, as we said in briefing, includes what the public
13 resources code 21168.9 says when you're forming that
14 mandate, is that you do address the points that need to be
15 addressed and do the least amount of harm that can be
16 done. And in this case, because the only issue that the
17 Court of Appeal disagreed with on the CEQA issue was
18 parking and traffic -- and basically the evidence to
19 support it, the calculations that were done -- we now have
20 the evidence that shows there won't be those impacts
21 certainly for these games.

22 THE COURT: But you're going to be facing a
23 dispute in -- and as sure as I'm sitting here, you're
24 going to get comments on the EIR if your baseline is after
25 the field lights were lit.

26 MR. WARD: We're not talking about the baseline.
27 What we're talking about is at the time that the MMD was
28 done, we were using estimates of figures of what would the

1 attendance be. Those were projections. That's what the
2 Court of Appeal found was inadequately supported. We now
3 have those estimates and we have actual data from the
4 operation of it. So that's not a new baseline. That's
5 just more accurate information, which is exactly what the
6 Court of Appeal asked us to provide. And what that shows
7 and what has already worked --

8 THE COURT: I'm seeing the cloud of further
9 litigation on the horizon on that.

10 MR. WARD: I understand.

11 THE COURT: Believe me, the last thing I want to
12 do is foul up the football season and, therefore, the
13 soccer season and all the other teams that play on that
14 field.

15 MR. WARD: And we also address, though, the --
16 take out the football games, all of the activities that
17 don't draw crowds that can impact the parking and traffic.

18 THE COURT: But you have to look at it from the
19 perspective of the plaintiffs in the group that -- that
20 represents the people that care about this. They don't
21 want stadium lights at all. They wanted me to order them
22 taken down in the middle of the school year. I'm not
23 going to do that. But I just don't think it's appropriate
24 to use the lights while there's no valid approval for the
25 building of the lights.

26 I understand you're suggesting that it's just a
27 parking issue. But as I told you the last time you were
28 here, you have to do a fully, legally compliant EIR.

1 That's how I read the opinion.

2 MR. WARD: Correct.

3 THE COURT: Okay. And that hasn't been done yet.
4 And until it's done and approved and the project
5 re-approved properly with, I assume, a statement of
6 overriding considerations? Is that how it's going to
7 probably go?

8 MR. WARD: There's a likelihood of that, but I
9 don't want to prejudge what the EIR will say.

10 THE COURT: Well, okay. That's fair. I just
11 don't see how we can leave the lights on, particularly
12 given that the status quo ante was no lights for how many
13 years? When did the prior lights come down? In the '70s?

14 MR. WARD: I think so, although I have -- I have
15 heard that the --

16 THE COURT: That's my memory.

17 MR. WARD: -- that the portable lights were used
18 from time to time in between.

19 THE COURT: Yeah.

20 MR. WARD: Be that as it may.

21 THE COURT: Well, I feel badly about this for the
22 kids. I do. Particularly the seniors, as I said in my
23 tentative ruling. Because they probably had the
24 expectation for homecoming and senior night and so forth
25 that it was going to be Friday Night Lights. It's not
26 going to be that way. But, you know, I also respect our
27 system. And when a three-judge panel of the Court of
28 Appeal says, "You got it wrong. We're changing the law,"

1 and the Supreme Court says, "We're not going to disturb
2 that," that's loud and clear to me.

3 MR. WARD: Very well, your Honor.

4 THE COURT: Anything further?

5 MR. SHERMAN: Nothing further, your Honor.

6 THE COURT: I'm signing the amended peremptory
7 writ, dropping the word "pay," which is improvidently
8 included as a vestige of an earlier draft of this order.
9 The existing judgment remains. Madam clerk, here is the
10 amended peremptory writ of mandamus. Must be filed. And
11 with that, the tentative ruling that was published earlier
12 this week is adopted as the order of the court, is ordered
13 set forth in the minutes in full and the accounting
14 ordered therein is ordered and is due 30 days hence.

15 MR. WARD: How would you like that submitted,
16 your Honor?

17 THE COURT: I presume that it would be attached
18 to a declaration from either you and/or the person
19 preparing it. Doesn't matter to me which.

20 MR. WARD: Okay.

21 THE COURT: Okay.

22 MR. WARD: Very well.

23 MR. SHERMAN: Your Honor --

24 THE COURT: And you obviously have to serve it on
25 Mr. Sherman and his colleague.

26 MR. SHERMAN: An inquiry as to your Honor's
27 preliminary injunctive -- or further injunctive relief.
28 I'd be happy to prepare an order for that, submit it to

1 the Court.

2 THE COURT: From my perspective, the minutes are
3 satisfactory because the tentative is now the order of the
4 court. If you want something beyond that, give notice of
5 the ruling. It doesn't matter to me, but I think that it
6 is now the order of the court. Until moments ago, the
7 tentative ruling is quite explicit and clear as to what I
8 did and did not order. Okay?

9 MR. SHERMAN: Fair enough.

10 MR. WARD: Thank you, your Honor.

11 MR. SHERMAN: Thank you, your Honor.

12 THE COURT: Okay.

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14 (The proceedings were adjourned at 1:58 p.m.)

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