

A State Agency's Duty To Mitigate Significant Environmental Impacts Does Not Depend On A Legislative Appropriation Of Funds For Mitigation

The California State University system may not condition its funding of mitigation for off-site impacts of a campus expansion project on receipt of a legislative appropriation earmarked for that purpose, according to a decision issued yesterday by the California Supreme Court. [City of San Diego v Board of Trustees of the California State University](#), No. S199557 (Cal. Supr. Ct. Aug. 3, 2015). The effect of the decision is that state agencies will have to look to existing appropriations and other available sources to fund off-site mitigation for projects they undertake, and will be precluded from shifting the cost of mitigation to regional and local agencies simply because the Legislature has not appropriated specific funds for mitigation. The court's opinion does, however, leave a key question unanswered: When can a public agency considering one of its own projects decide that a measure designed to mitigate one of its significant environmental impacts is economically infeasible?

Background.

The case involved a challenge to the environmental impact report for a plan to expand the San Diego State University campus. The plan calls for housing for faculty and staff; a hotel and campus conference center; new student housing; expansion and renovation of the student union; and new buildings for academic, research and medical use, along with a supporting parking structure.

The EIR found that the expansion project would worsen congestion on city streets and a nearby freeway. The CSU Board agreed with the city and CalTrans on the University's fair share of the cost of mitigation – about \$15 million -- but declined to commit the funding, taking the position that the University is required to pay for off-campus mitigation only if the Legislature appropriates funds specifically for that purpose.

Reasoning that the Legislature might not appropriate funds for mitigation, the Board determined that off-campus traffic mitigation was infeasible and adopted a statement of overriding considerations.

No legal support for University's determination off-site mitigation is infeasible.

The California Supreme Court unanimously rejected the University's legal arguments, concluding that:

- The court's 2006 decision discussing the University's duties under CEQA to mitigate environmental impacts through fair-share payments (*City of Marina v Board of Trustees*) did not support the Board's claim that the University may lawfully contribute funds for off-campus mitigation only through a legislative appropriation earmarked for that purpose.
- Most of the proposed new campus facilities will be financed with non-appropriated funds through revenue bonds, student fees, donations, and joint ventures with private interests. The University's authority to undertake such projects necessarily includes the authority to budget for mitigation costs.
- The expansion plan EIR calls for a variety of on-site mitigation measures that will be funded through project budgets. There is no reason to conclude that off-site mitigation measures cannot be funded the same way. CEQA does not draw a distinction between on-site impacts and off-site impacts, and instead

refers to the environment as the entire area that "will be affected by a proposed project."

- CEQA expressly subjects the Board's decisions concerning campus master plans to its requirements and does not exempt those plans from the duty CEQA imposes to mitigate significant environmental impacts when it is feasible to do so.

A rule allowing state agencies to avoid off-site mitigation would have significant negative consequences.

The court also identified what it viewed as the broader consequences of a rule allowing state agencies to condition off-site mitigation on the availability of a specific legislative appropriation. Such an appropriation condition, the court concluded, would necessarily apply to all state agencies, forcing the Legislature to decide, on a case-by-case basis, whether off-site impacts of state agency projects should be mitigated. Any time the Legislature failed to make a requested appropriation for a state agency project, local and regional agencies would be saddled with the state agency's share of the cost of addressing the project's impacts on local infrastructure.

The court also pointed out that the Board's proposed exception would result in off-site mitigation being found infeasible for many state projects that receive funding from sources other than the Legislature. A state agency's authority to participate in such projects necessarily includes the authority to ensure that mitigation costs are included in the project budget, and an earmarked legislative appropriation for mitigation cannot necessarily be expected for such projects.

An unanswered question: When can a public agency find a mitigation measure economically infeasible?

Turning to the University's more general arguments, the court rejected the contention that the University should not be required to demonstrate, in the EIR process, "that its budget has adequately balanced competing educational and environmental demands" such as whether its funds "would be better spent on more classrooms or more traffic lights."

These arguments, according to the court, missed a fundamental point: that an agency cannot leave a project's significant environmental impacts unmitigated "based simply on a weighing of those effects against the project's benefits, unless the measures necessary to mitigate those effects are truly infeasible."

CEQA specifies that a public agency may find mitigation measures infeasible for a variety of reasons, including economic infeasibility. The opinion, however, does not address how public agencies should gauge the economic feasibility of mitigation measures for the projects they undertake.

The budgeting process for public agencies necessarily entails a balancing of competing agency goals and interests. Although the mitigation of environmental impacts is an important objective for all public agencies, by providing that only mitigation measures that agencies determine are feasible need be adopted, CEQA reserves their discretion to decide whether the cost of particular mitigation measures is practicable in light of the other demands on the limited financial resources available to them – to decide, perhaps, that it would be unreasonable to expend funds on more traffic lights, rather than more classrooms.

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