California Supreme Court Holds that State Agencies May Not Escape CEQA Mitigation Requirements Based on Failure of the Legislature to Appropriate Mitigation Funds

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In a decision that enhances the ability of local interests to obtain mitigation funds from state agencies, the California Supreme Court held that the California Environmental Quality Act ("CEQA") requires the Board of Trustees ("Board") of the California State University ("CSU") to mitigate the cumulative traffic impacts of a campus expansion project where the Legislature had not appropriated funds to pay for the traffic mitigation. (*City of San Diego v. Board of Trustees of the California State University* (August 3, 2015, S199557) ___ Cal.4th ___.) The decision makes it difficult for state agencies to refuse to contribute to regional fair-share mitigation programs on the grounds that the Legislature failed to appropriate funds for the mitigation. The decision may also make it more difficult for all public agencies to determine that a mitigation measure is infeasible and to adopt overriding considerations. The Court invalidated the Board's statement of overriding considerations stating "CEQA does not authorize an agency to proceed with a project that will have significant unmitigated effects on the environment, based simply on a weighing of those effects against the project's benefits, unless the measures to mitigate those effects are truly infeasible." This aspect of the decision will likely trigger CEQA litigation challenging agency statements of overriding considerations based on a weighing of costs and benefits.

In 2007, the Board certified an environmental impact report ("EIR") for the proposed expansion of the San Diego State University ("SDSU") campus. The proposed project included, among other things, housing for faculty, staff, and students, research and academic facilities, the renovation and expansion of the student union, and a hotel. The EIR acknowledged that the proposed project would contribute significantly to cumulative traffic congestion off campus in San Diego. The Board estimated that its "fair-share" contribution of the congestion would be roughly 12 percent. The Board conditioned its fair-share funding commitments on the appropriation of funds by the Legislature. The Board adopted a Statement of Overriding Considerations, stating that "[i]f the Legislature does not provide funding, or if funding is significantly delayed, all identified significant impacts would remain significant and unavoidable."

The Board based its position on language in *City of Marina v. Board of Trustees* (2009) 39 Cal.4th 341 ("*Marina*"), which involved an expansion of the CSU Monterey Bay campus. In that case, the Board had taken the position that it was not responsible for any off-site mitigation. The Court rejected this assertion, holding the Board was responsible for its fair-share of mitigation for off-site environmental impacts. In explaining the potential limits of the Court's decision, the Court stated: "[A] state agency's power to mitigate its project's effects through voluntary mitigation payments is ultimately subject to legislative control; if the Legislature does not appropriate the money, the power does not exist." The Board interpreted this language as prohibiting it from funding off-site mitigation, absent an express appropriation by the Legislature.

The Board submitted multiple requests to the Department of Finance to include funds in the budget to pay for the costs of the traffic mitigation. Neither the budget proposed by the Governor or approved by the Legislature included funds for this purpose. Thus, the Board concluded that the project would have significant impacts on traffic, that the impacts could not feasibly be mitigated, and that overriding considerations justified proceeding with the project despite the unmitigated effects.

The City of San Diego, the San Diego Association of Governments, and the Metropolitan Transit System challenged the Board's certification of the EIR, arguing the Board's interpretation of Marina was improper as a matter of law. The Supreme Court agreed, rejecting the Board's interpretation of *Marina*.

The Court provided several reasons as to why the *Marina* dictum did not justify the Board's position. Among other things, the Court reasoned that "to read the *Marina* dictum as saying anything about earmarked appropriations is strained." Calling the *Marina* language "an overstatement," the Court clarified that "[i]n mitigating the effects of its projects, a public agency has access to all of its discretionary powers and not just the power to spend appropriations." The Court explained that "[n]either CEQA itself, *Marina* [ ], nor any other decision suggests that mitigation costs for a project funded by the Legislature cannot appropriately be included in the project's budget and paid with the funds appropriated for the project." The Court also found it compelling that nothing in CEQA conditions a state agency's duty to mitigate project impacts on the grant of an earmarked appropriation.

The Court invalidated both the Board's finding that mitigation was infeasible and its statement of overriding considerations, and affirmed the Court of Appeal's decision directing the Board to vacate its certification of the EIR.