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## LAW ALERT

# FAIR IS FAIR: STATE AGENCIES MUST CONSIDER FAIR SHARE MITIGATION PAYMENTS APART FROM LEGISLATIVE EARMARKS

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In *City of San Diego v. Board of Trustees of the California State University (San Diego v. CSU)*, the California Supreme Court rejected CSU's contention that the University could not pay off-site environmental mitigation costs unless the Legislature specifically earmarked funds for that purpose. The August 3, 2015 decision affirms that all public agencies are required to avoid the harmful environmental effects of their projects whenever feasible and requires state agencies to comply with the California Environmental Quality Act (CEQA) by considering the feasibility of fair-share mitigation payments independently from the Legislature's funding appropriations.

### **I. Background.**

In 2007, CSU released a draft environmental impact report (EIR) for a proposed expansion of CSU's San Diego campus. According to the EIR, the proposed project would have significant traffic impacts at multiple intersections. The EIR identified specific improvements to mitigate the impacts and analyzed CSU's "fair share contribution" to the improvements. However, the EIR concluded that the impacts would remain significant and unavoidable if the Legislature declined to earmark funding for the off-site mitigation.

Assuming that the Legislature would not specifically fund CSU's fair share contribution, CSU concluded that mitigation was infeasible. It approved the project with a statement of overriding considerations, alleging that under the Supreme Court's 2006 decision in *City of Marina v. Board of Trustees of the California*

*State University (Marina v. CSU)*, state agencies may contribute funds for off-site mitigation only through appropriations specifically earmarked by the Legislature.

The City of San Diego, along with the San Diego Association of Governments and the San Diego Metropolitan Transit System, sued to challenge CSU's decision to certify its EIR, asserting that CSU misapplied *Marina v. CSU* and abused its discretion by concluding that mitigation was infeasible.

### **II. Ruling.**

The Supreme Court unanimously concluded that *Marina v. CSU* did not support CSU's conclusion that state agencies may not contribute their fair share of off-site mitigation measures without a specific appropriation from the Legislature, nor could CSU justify its conclusion that mitigation was infeasible under other rationale.

The Supreme Court explained that CSU, along with all public agencies, must comply with CEQA by mitigating its projects' significant effects on the environment. Under CEQA, the payment of fees to a third party to mitigate off-site environmental impacts can be a "feasible alternative" to reduce a project's significant impact.

The assertion that mitigation can only be paid for by a specific appropriation conflicts with CSU's power to develop projects using non-appropriated funds. CSU's proposed project involved the construction of multiple buildings

using non-appropriated funds. The power to engage in such projects comes with the responsibility under CEQA to ensure that CSU's share of mitigation costs are included in such projects' budgets.

In addition, the Supreme Court emphasized that there is "no distinction for purposes of mitigation" between impacts on the project site and off-site impacts. Because CSU conceded that it had the power to use non-earmarked funds for on-site mitigation, the Supreme Court concluded that CSU also had the same power to fund off-site mitigation.

Finally, CSU's interpretation of *Marina v. CSU* would shift the cost of addressing impacts from state projects to local and regional governments in conflict with CEQA's plain text, which the Supreme Court called an "unreasonable consequence[]." CEQA expressly subjects CSU and other state agencies to its requirements, and neither CEQA nor any other state law identified by CSU exempts CSU from

its duty to mitigate the significant environmental impacts of its projects when such mitigation is feasible. CSU has campuses throughout California, and it had relied on its interpretation of *Marina v. CSU* to avoid making fair-share contribution payments for off-site mitigation in multiple instances, including another case (*City of Hayward v. Trustees of California State University*) pending before the Supreme Court. Under *San Diego v. CSU*, all state agencies, including CSU, must examine all available funding sources to contribute to their fair-share of mitigation for their projects. The Supreme Court's decision thereby prevents state agencies from shifting the cost of mitigating their projects' impacts to local governments who are responsible for providing the supporting infrastructure without a comprehensive analysis of why such mitigation is truly infeasible.

If you have any questions, please contact Barbara Kautz, Eric Phillips, or any other attorney at Goldfarb & Lipman.

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