

California Supreme Court: State University Campus Responsible for Mitigating Off-Site Infrastructure Impacts

In 1998, the Fort Ord Reuse Authority (FORA) challenged the Environmental Impact Report (EIR) for the California State University Monterey Bay (CSUMB) master plan.¹ The case went through the Superior and Appeals Courts, and finally to the California Supreme Court. School districts had hoped this case would deflect the demands of cities, counties and other agencies that schools pay for off-site infrastructure improvements. However, the California Supreme Court ruled that CSUMB is responsible for mitigating the impacts of its master plan, even those that are off-site and whose implementation is the responsibility of another agency.

The case has significant ramifications for school districts and similar agencies across California. It is especially critical when viewed within the context of the state School Facilities Program, which provides a share for off-site mitigation only when required by ordinance (CCR 1859.76(b)). The Supreme Court found that payments to mitigate impacts under the obligations of the California Environmental Quality Act (CEQA) are *voluntary* and *discretionary* (not a compulsory charge or a tax on real property). Therefore, while school districts retain their obligation to pay to mitigate off-site impacts under CEQA, these mitigations are not fundable under the State Facilities Program.

BACKGROUND

CSUMB occupies a portion of Fort Ord, a former Army base located five miles north of Monterey. FORA was created to oversee the conversion of the former base to civilian use and, as part of that effort, FORA prepared a Base Reuse Plan that addresses land use, transportation, conservation, recreation and capital improvements. FORA also developed a comprehensive business plan that calculated CSUMB's share of needed infrastructure improvements at 18 annual payments of \$1.14 million each. The Board of Trustees of the California State University system disclaimed responsibility for these off-site infrastructure improvement costs.

DECISION

The court's decision centered on these three questions:

1. Is mitigation in the form of payment for off-site roadway improvements infeasible?
2. May an agency disclaim mitigation responsibility where it finds that such mitigation is the exclusive responsibility of another agency?
3. Do overriding circumstances justify approving a project with unmitigated significant impacts?

¹ City of Marina, et al., v. Board of Trustees of the California State University, 2006 WL 2099943.

QUESTION 1:

Is mitigation in the form of payment for off-site roadway improvements infeasible?

No. The Trustees made three arguments to support their position that mitigation in the form of payments to fund off-site roadway improvements was infeasible under CEQA §21061.1. CEQA defines feasible as “capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors.” Elsewhere in the Statute and CEQA Guidelines, “legal” factors are added to the determination of feasibility (CEQA §21081(a)(3) and Guidelines §15364).

The following sections review the arguments put forth by the Trustees and the court’s response.

a. Is it infeasible because the agency may not lawfully make such a payment?

No. The Trustees unsuccessfully argued that the California Constitution does not allow such payments because “[p]roperty owned by the State” is “exempt from property taxation...” (Gov. Code §67679). The Supreme Court quickly dismissed this argument, explaining that the current case did not involve an *assessment* of public agency property. Also, the court explained that the *San Marcos* case, upon which the Trustees relied, addresses only *compulsory* charges imposed on one public agency by another. According to the court, *San Marcos* is not relevant because CSUMB mitigation involves potential payment on a *voluntary* basis.

b. Does payment for off-site mitigation represent a prohibited gift of public funds?

No. This question hinges on whether the appropriation is for a public or private purpose. If for a public purpose, such an appropriation is not a gift under the Constitution. An agency’s payment would serve the public purpose where the agency is discharging its duty under CEQA, to “mitigate or avoid the significant effects on the environment of projects that it carries out or approves whenever it is feasible to do so” (Pub. Resources Code §21002.1, subd. (b)).

c. Is it infeasible when the agency cannot guarantee that the receiving responsible agency will actually implement the improvements?

No. The uncertainties involved in funding and implementing infrastructure improvements do not relieve the agency from its obligations to contribute toward necessary mitigation.

QUESTION 2:

May an agency disclaim responsibility for mitigation where it finds that such mitigation is the exclusive responsibility of another agency?

No. One of the findings an agency may make is that mitigation is “the responsibility and jurisdiction of another public agency and have been, or can and should be, adopted by that other agency” (Pub. Resources Code, §21081, subd. (a)(2)). With a finding that mitigation is infeasible, the agency may override a significant and unmitigated impact and proceed with the project.

The Trustees argued that they lacked the authority to construct off-site improvements on land they do not own or control. The court countered that CEQA does not limit an agency’s obligations to mitigate its impacts to properties it owns. If improvements to its own property are not sufficient mitigation, the court stated that payments in support of another agency’s mitigation efforts would be appropriate. Further, the court cited CEQA Statute §21106, which provides that “[a]ll state agencies ... shall request in their budgets the funds necessary to protect the environment in relation to problems caused by their activities.”

However, the court’s answer to this question also charts another possible route for agencies to disclaim mitigation responsibility. The court suggests that if the agency asks the legislature for funding and is denied, the agency could then use this finding and deny *all* responsibility. The concurring opinion by Justice Chin raised an obvious concern with this position, that it ignores the use of other available funding sources and strategies an agency may have at its disposal, including use of its general fund monies.

There is another dilemma created by the court’s ruling. How is a district to demonstrate that it has been denied state funding when it can’t apply for such funding until *after* it completes the CEQA process?

QUESTION 3:

Do overriding circumstances justify approving a project with unmitigated significant impacts?

Yes, but not in this case. An agency may override unmitigated significant impacts, but only where it has properly found that mitigation is infeasible. As explained above, the Trustees were wrong, in these circumstances, in finding payment for off-site mitigation infeasible. As a result, they could not override the significant off-site infrastructure impacts.

RECOMMENDATIONS

1. School districts have an obligation under CEQA to identify the impacts of their projects and seek the means to minimize them. If obvious mitigation strategies are impossible, seek more creative solutions. Find alternatives that would accomplish most of your goals, but with less impact to reduce the need for off-site mitigation. Structure property deals to include mitigation credits in the purchase price. If joint-use partners do not have funding limitations, shift off-site mitigation costs to them. Regardless, don't lose sight of the ultimate goal of providing a healthy, safe and environment-friendly school facility.
2. Only after you've done everything possible to provide feasible mitigation, consider a finding that mitigating your project's significant impact is infeasible. If you must take this path, make sure your analysis provides a solid basis for the finding, well supported by facts.
3. Where you have adopted mitigation, make sure you have *some* evidence that the mitigation will actually occur (*Save Our Peninsula Committee v. Monterey County Bd. of Supervisors, supra*, 87 Cal.App.3d 692, 727-728). The court explained that CEQA doesn't require "a time-specific schedule for the County to complete specified road improvements" but only "that there be a reasonable plan for mitigation." Make sure you meet this standard.
4. Understand that you may override significant impacts only when you've prepared an EIR. The option to override a significant, unmitigated impact does not exist where you've prepared a Mitigated Negative Declaration.
5. Where another agency has jurisdiction over a needed mitigation measure and you cannot ensure that it will be completed, make the finding that this mitigation is the responsibility of another agency. This does not eliminate your obligation to mitigate impacts, such as providing a "fair share" of the funding necessary to construct the improvement, but this finding is important to "bulletproof" your CEQA process. Also, recognize that you are protected from providing more than your fair share by two US Supreme Court cases, which provided that there must be a "nexus" between the impact and the mitigation and there must be "rough proportionality" between your impact and the mitigation you provide.
6. The court made clear that it is not the role of the judiciary to provide a formula for determining impacts or the level of mitigation required. This remains the lead agency's responsibility. Recognize this as both an obligation and an opportunity. As lead agency, you maintain control of the process, the analysis, conclusions and, ultimately, the mitigation measures. Don't cede this authority to other agencies.
7. Where you have identified the need for off-site mitigation, make sure you seek possible funding sources and document your search in the record. Where you are unsuccessful in securing the funds, documentation of your efforts will be important in supporting a finding of infeasibility. Strengthen your mitigation for off-site impacts by including a provision that you commit to funding such measures to the extent funded by the state.

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