

# California: State Agencies Cannot Declare Mitigation of Project Impacts Infeasible Based Solely on the Lack of Legislative Appropriations

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A public agency may not rely solely on a request to the Legislature to appropriate funding to mitigate a project's adverse environmental impacts and conclude that mitigation is infeasible because the funding cannot be guaranteed, according to the California Supreme Court's August 3, 2015, opinion in [City of San Diego v. Board of Trustees of the California State University](#). The Court reexamined an important question left open by its 2006 decision in *City of Marina v. Board of Trustees of California State University* concerning the measures an agency must consider to mitigate environmental impacts when the lead agency lacks both the authority to implement mitigation measures, and the authority to force an appropriation of funds by the Legislature to pay for mitigation. The *City of San Diego* opinion makes clear that a state agency cannot condition its duty to mitigate a project's environmental impacts on the Legislature's grant of an earmarked appropriation, and instead must consider other means of mitigation, including other sources of funding, adopting changes to the proposed project, adopting alternative projects, and ensuring that mitigation costs attributable to the project are included in the project's budget.

## Mitigation of Adverse Impacts Under CEQA

The California Environmental Quality Act ("CEQA") mandates that, before approving a project, a public agency must first identify the project's significant adverse environmental impacts, and then mitigate those impacts by adopting feasible, enforceable mitigation measures or selecting feasible alternatives that avoid the impacts. If mitigation is infeasible, the agency may approve the project despite adverse impacts only by finding that unmitigated effects are outweighed by the project's benefits.

Oftentimes, especially for large developments and civic projects, the project may have adverse impacts outside the project's footprint and beyond the agency's control, such as when increased traffic congestion will result from the project. The state agency could offer to pay for its fair share of the cost of improvements to offset the increased traffic, but if the agency must seek an appropriation from the Legislature, it may not be able to guarantee that the proposed mitigation will be funded, as the power to appropriate funds belongs solely to the Legislature. In such a case, may the agency declare mitigation to be infeasible and proceed with the project?

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In *City of San Diego*, the California Supreme Court answered this important question with a resounding "No."

### ***City of San Diego v. Board of Trustees of the California State University***

In the *City of San Diego* case, the Board of Trustees of the California State University proposed an expansion to San Diego State University to provide for an increase in student enrollment from 25,000 to 35,000 by the 2024/2025 academic year. The project involved the construction of new student housing and the renovation and expansion of on-campus facilities, and was expected to adversely impact off-campus traffic within the region. Mitigation measures, such as improving city street intersections and segments, could reduce the increased traffic congestion to less than significant, but implementation of those measures was within the City of San Diego's jurisdiction and authority. The university proposed offsetting the project's increased traffic by providing to the City a "fair share" of funds for traffic improvements, but offered no assurance that it would pay its share of mitigation costs, and instead directed the university chancellor to request funds from the Governor and the Legislature through the annual state budget process. Because the Legislature could refuse to appropriate the funds, the university found that there were no feasible mitigation measures that would reduce traffic congestion from the project to less than significant levels, and concluded that impacts were unavoidable but outweighed by the project's benefits. The university thus certified the environmental impact report and approved the project.

In finding that funding offsite mitigation was infeasible, the university relied on dictum in *City of Marina*, which stated that "a state agency's power to mitigate its project's effect through voluntary mitigation payments is ultimately subject to legislative control; if the Legislature does not appropriate the money, the power does not exist." But after carefully analyzing the *City of Marina* opinion, the Court concluded that the above-quoted statement was overbroad and did not justify the university's position. Public agencies have other discretionary powers, including adopting changes to the project and imposing conditions on approval, and are not limited to simply spending appropriations; thus, appropriations earmarked for the mitigation are not the only means to pay mitigation costs. Moreover, no provision of CEQA conditions the duty of a state agency to mitigate its project's environmental impacts on the Legislature's grant of an earmarked appropriation. Upholding the university's findings would result in findings of infeasibility for offsite mitigation in many state projects, ultimately shifting the financial burden of alleviating infrastructure impacts to local governments.

### **Implications of *City of San Diego***

The university must now return to the drawing board, and in any new EIR it must consider the availability of potential sources of funding for offsite mitigation measures other than the Legislature, or it may have to redesign the project to incorporate funding for offsite mitigation within the project's budget. Even though sources of funding available to a public agency are subject to strict controls, public agencies in the future may be unable to deem such sources infeasible without a comprehensive discussion showing that such sources cannot be used to pay for mitigation of the significant offsite environmental impacts of the project.

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