S199557

IN THE SUPREME COURT OF CALIFORNIA

CITY OF SAN DIEGO et al.,
Plaintiffs and Appellants,

v.

BOARD OF TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY,
Defendant and Respondent.

AFTER A DECISION BY THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE
CASE NO. D057446

SUPPLEMENTAL BRIEF REGARDING NEW AUTHORITY

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Pursuant to California Rules of Court, rule 8.520(d), defendant and respondent the Board of Trustees of the California State University (CSU) submits this supplemental brief regarding new authorities that were not available at the time CSU filed its briefs on the merits. As discussed below, two recent Court of Appeal opinions support CSU's argument that mitigation measure TCP-27, which requires implementation of a Transportation Demand Management (TDM) program, was not an improper deferral of mitigation under CEQA[1] as the Court of Appeal incorrectly held.

[1] (California Environmental Quality Act, Pub. Resources Code, § 21000 et seq.)

(See CEQA Guidelines, Cal. Code Regs., tit. 14, § 15126.4(a)(1)(B); OBOM 58-60; RBOM 48-53.)

North Coast Rivers Alliance v. Marin Municipal Water Dist. Bd. of Directors (2013) 216 Cal.App.4th 614, 628-630, 648 (*North Coast Rivers Alliance*), upheld the lead agency's determination that two mitigation measures were satisfactory under CEQA and did not improperly defer mitigation. The first mitigation measure was a response to the lead agency's finding that the project at issue would cause a significant visual impact to the surrounding area. The lead agency proposed to mitigate this impact by hiring a landscaper to design and implement a landscaping plan that would " 'identify the location and types of planting (i.e., trees and shrubs) that will soften the visual intrusion of the [project] and identify success metrics such as survival and growth rates for the plantings.' " (*Id.* at p. 628.) Reversing the trial court, the Court of Appeal held this measure was not an improper deferral of mitigation: it was sufficient that the lead agency committed to mitigation in the form of developing and implementing a landscaping plan, and the performance criteria of "soften[ing] the visual intrusion" was sufficiently concrete. (*Id.* at p. 630.)

The second mitigation measure addressed the lead agency's finding that the project's construction activity, which required driving concrete piles into San Rafael Bay, would harm local fish. (*North Coast Rivers Alliance, supra*, 216 Cal.App.4th at p. 645-646.) To mitigate this potentially significant impact, the lead agency adopted a measure requiring it to consult with the relevant fishery agency regarding appropriate measures to reduce the construction's

impacts, and to monitor during construction for signs fish were being injured. (*Ibid.*) The mitigation measure also listed two measures typically adopted to protect fish. (*Ibid.*) The Court of Appeal reversed the trial court on this point as well, holding the mitigation measure was not an improper deferral of mitigation, relying in part on information contained not in the mitigation measure but elsewhere in the Environmental Impact Report (EIR). (*Id.* at p. 648.)

In another recent case, *Friends of Oroville v. City of Oroville* (Sept. 18, 2013, C070448) __ Cal.App.4th __ [2013 WL 5273738, at pp. *7-*9] (*Friends of Oroville*), the Court of Appeal upheld the lead agency's determination that two mitigation measures were not improper deferrals of mitigation. The first mitigation measure concerned drainage and required that the project developer retain an engineer to prepare a drainage plan that ensured project-related runoff would be released a rate no greater than that of the pre-development condition. (*Id.* at p. *7.) The second measure concerned stormwater management and required that the developer submit a plan identifying measures to prevent polluted stormwater runoff from leaving the project site and to ensure that "water quality in downstream water bodies is not degraded." (*Ibid.*) The measure further required that the plan include eleven listed pollution prevention measures demonstrated to be effective at preventing polluted runoff. (*Ibid.*) The Court of Appeal upheld both measures as adequate under CEQA. (*Id.* at p. *8.)

Here, as CSU's merits briefing discussed, in addition to other measures adopted to mitigate traffic impacts, CSU adopted

mitigation measure TCP-27, in which the university committed to prepare a TDM program to "facilitate a balanced approach to mobility" (including promoting rideshare programs, transit use, vanpools, and bicycle use) "with the ultimate goal of reducing vehicle trips to campus in favor of alternate modes of travel." (AR-18:17159, 17237-17239, 17514, 17602; 19:18466-18473; see OBOM 58-60; RBOM 48-53.) CSU committed to prepare the TDM program in consultation with the San Diego Association of Governments (SANDAG) and the San Diego Metropolitan Transportation System (MTS), two local agencies with expertise in transportation matters that take an active role in managing the region's transportation systems. (AR-18:17159, 17237-17239, 17514, 17602; 19:18466-18473; AR-20:19759, 19879, 19882, 19898, 19901, 19905, 19912.)

The Court of Appeal held that mitigation measure TCP-27 was an improper deferral of mitigation because it listed "no specific mitigation measures to be considered or any specific criteria or performance standards." (Typed opn. 61.) Both *North Coast Rivers Alliance* and *Friends of Oroville* provide support for the conclusion that, in so ruling, the Court of Appeal (1) failed to appropriately defer to CSU's finding on the efficacy of the TDM program and (2) erred by concluding CSU's adoption of the TDM program violated CEQA. (See OBOM 58-60; RBOM 48-53.)

CSU's mitigation measure commits the university to "the ultimate goal of reducing vehicle trips to campus" (AR-18:17159, 17514), which is more specific than the criteria of "soften[ing] the visual intrusion," upheld in *North Coast Rivers Alliance, supra,* 216 Cal.App.4th at page 630. CSU's measure can also be said to

incorporate a nonexclusive list of eleven traffic reduction measures from the EIR that the TDM program will consider and potentially employ (AR 18:17237-17238), a list at least as expansive as the lists of measures upheld in *North Coast Rivers Alliance, supra*, 216 Cal.App.4th at pages 645-646 and *Friends of Oroville, supra*, 2013 WL 5273738, at page *7. Finally, CSU's measure commits the university to developing the TDM program in consultation with relevant government agencies, similar to the approach upheld in *North Coast Rivers Alliance.* (216 Cal.App.4th at p. 646-647 [holding consultation with fishery agencies was not impermissible deferral because the consultation was required "under the express terms of the mitigation measure"].)

In conclusion, these two new authorities provide the Court with additional support for the determination that mitigation measure TCP-27 constitutes adequate mitigation under CEQA.

October 4, 2013

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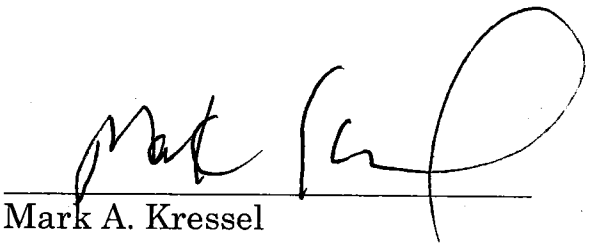
CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 8.204(c)(1).)

The text of this brief consists of 998 words as counted by the Microsoft Word version 2007 word processing program used to generate the brief.

Dated: October 4, 2013



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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 15760 Ventura Boulevard, 18th Floor, Encino, California 91436-3000.

On October 4, 2013, I served true copies of the following document(s) described as **SUPPLEMENTAL BRIEF REGARDING NEW AUTHORITY** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on October 4, 2013, at Encino, California.

Robin Steiner

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