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 IMPACT OF NEW STATUTE ON APPEAL

HORVITZ & LEVY LLP
BRADLEY S. PAULEY (BAR NO. 187298)
JEREMY B. ROSEN (BAR NO. 192473)
*MARK A. KRESSEL (BAR NO. 254933)
15760 VENTURA BOULEVARD, 18TH FLOOR
ENCINO, CALIFORNIA 91436-3000
(818) 995-0800 • FAX: (818) 995-3157
bpauley@horvitzlevy.com
jrosen@horvitzlevy.com
mkressel@horvitzlevy.com

GATZKE DILLON & BALLANCE LLP
MARK J. DILLON (BAR NO. 108329)
MICHAEL S. HABERKORN (BAR NO. 159266)
DANIELLE K. MORONE (BAR NO. 246831)
2762 GATEWAY ROAD
CARLSBAD, CALIFORNIA 92009
(760) 431-9501 • FAX: (760) 431-9512
mdillon@gdandb.com
mhaberkorn@gdandb.com
dmorone@gdandb.com

ATTORNEYS FOR DEFENDANT AND RESPONDENT
BOARD OF TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY

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INTRODUCTION

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 to address the impact of Senate Bill 860 (SB 860), a newly enacted statute by which the Legislature has altered CSU's funding system. This appeal raises two questions: (1) Did CSU satisfy its CEQA obligation to mitigate a project's off-site environmental impacts when feasible by requesting mitigation funds from the Legislature? (2) Did the Court of Appeal improperly reject CSU's factual findings regarding the feasibility of mitigation and the significance

of off-site impacts (the Transportation Demand Management (TDM) and transit issues)?

As discussed in greater detail below, the new statute's enactment has altered the first issue raised by this appeal by changing the system under which CSU obtains and allocates its annual funding. In light of this development, this Court should reverse or vacate as moot the judgment of the Court of Appeal as it relates to state funding and remand the case to the trial court, which is the appropriate forum to determine whatever further development of the record may be necessary to resolve this issue. Independent of the Court's determination on the first issue, the Court must first rule on the second issue on appeal.

DISCUSSION

I. PROCEDURAL CONTEXT

In 2007, CSU certified the final Environmental Impact Report (EIR) and approved its San Diego campus (SDSU) master plan to accommodate what it anticipated at the time to be a projected increase in student enrollment demand over a period of 20 years. (See AR-5:04401, 04403-04405; 15:14149, 14156, 14225-14228; 19:18612-18620.) The City of San Diego, the San Diego Metropolitan Transit System (MTS), and the San Diego Association of Governments (SANDAG) challenged the validity of the EIR.

As part of its EIR, CSU identified certain adverse impacts on local traffic that would result from the project, and identified

various mitigation measures to address those impacts. (AR-15:14863-14875; 18:17593-17604; see also AR-17:16753-16754; 18:17169-17172.) CSU also determined in its EIR that if the Legislature denied CSU's appropriation request to pay its share of funding for the off-site mitigation of those significant traffic impacts (i.e., local roadway improvements), such mitigation would be economically infeasible. (AR-19:18473-18474; accord, AR-19:18466-18467, 18617-18618.) CSU also found that the campus plan's many benefits outweigh the adverse impacts on traffic and, therefore, the project should proceed even if mitigation were rendered infeasible by the Legislature's decision not to appropriate the requested funds for off-site mitigation. (AR-19:18474, 18523-18525.)

Following the statutory procedure then in place, CSU submitted a request to the Governor and Legislature for CSU's fair-share contribution of funds for off-site mitigation measures—including those identified in SDSU's EIR—as part of CSU's five-year capital improvement program. (AR-20:20051-20057, 20059-20070, 20074, 20079, 20241-20247.) In each of the next two years, CSU again made a request for legislative appropriations to fund off-site traffic mitigation improvements. (CT-4:895-905.)

The trial court ruled that CSU's economic infeasibility finding regarding such mitigation efforts complied with CEQA. (CT-7:1622-1653, 1662-1664) In so ruling, the trial court relied on this Court's statement in *City of Marina v. Board of Trustees of California State University* (2006) 39 Cal.4th 341, 367 (*Marina*) that "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 Court of Appeal, however, reversed the trial court and held in a published opinion that the quoted portion of the *Marina* opinion is "not supported by any statute, regulation, case, or other authority," and "did not involve extensive analysis." (Typed opn. 29-32.) This Court granted review.

In its merits briefing in this Court, CSU has argued CEQA does not require a state university to subject its budgetary decisions to the approval of local agencies who seek CSU's funds to further their own parochial, non-educational interests whenever the Legislature refuses to fund off-site mitigation measures. (OBOM 29-33, 40-51; RBOM 4-15.) CSU also argued (under the pre-SB 860 funding structure) that the Legislature had expressly provided it would appropriate funds for enrollment growth in the annual support budget, and that if CSU requested funds for off-site mitigation measures and the Legislature denied that request, CSU was prohibited by statute from reallocating toward the rejected off-site mitigation measures any state operating funds appropriated for other purposes. (OBOM 21-29, 34-41.) Finally, CSU explained it was prohibited by statute from re-allocating revenues from non-state sources (e.g., parking and dorm fees, tuition, donations) to pay for off-site traffic mitigations. (OBOM 42-46.)

On January 30, 2013, CSU notified this Court, as required by Public Resources Code section 21167.6, subdivision (i), that briefing was completed. That section provides that upon receipt of such a notification, "the clerk of the reviewing court shall set the appeal for

hearing on the first available calendar date." (*Ibid.*) As of December 4, 2014, this appeal has not been set for oral argument.

On June 20, 2014, Governor Brown signed into law SB 860, an omnibus trailer bill that, among other things, altered the system by which CSU may fund capital improvements. (SB 860, chaptered in relevant part at Ed. Code, §§ 89770-89774, 90083.)

II. SB 860 HAS CHANGED THE FUNDING SCHEME UNDERPINNING CSU'S INFEASIBILITY DETERMINATION.

A. SB 860 largely eliminates the process by which CSU was required to request separate funds for capital projects, providing for CSU to make one funding request from the state for both operating and capital needs, and providing CSU limited new discretion to reallocate annual appropriated support funds for capital projects.

SB 860 gives CSU greater flexibility to reallocate a portion of its annual General Fund support appropriation (operating funds) for capital expenditures. (Ed. Code, §§ 89770, 89771.) CSU now has discretion whether to use this portion of its state funds to service debt (*id.* § 89770, subd. (a)(3)), secure new or existing bonds (*id.* § 90083), or fund "pay-as-you-go capital outlay projects" for academic facilities (*id.* § 89771). It also provides CSU with new

discretion to pledge some of its non-state revenues for capital expenditures. (*Id.* § 89770, subd. (a).)

CSU's new funding authority is not without its limits. First, CSU can only use up to "12 percent of its General Fund support appropriation, less the amount of that appropriation that is required to fund general obligation bond payments and State Public Works Board rental payments" to fund capital expenditures and pay-as-you-go capital outlay projects. (Ed. Code, § 89773.) Second, CSU may not cite the need to fund capital improvements "as a justification for future increases in student tuition, additional employee layoffs, or reductions in employee compensation." (*Id.* § 89770, subd. (d).)

Third, CSU must submit its project proposals to the Joint Legislative Budget Committee and the Department of Finance for approval. (Ed. Code, § 89772, subd. (c); *id.* § 89772, subd. (d)(4).) SB 860 creates a new process, which went into effect at the beginning of the 2014-2015 fiscal year (July 1, 2014), whereby CSU must submit "a report to the committees in each house of the Legislature that consider the State Budget, the budget subcommittees in each house of the Legislature that consider appropriations for the California State University, and the Department of Finance." (*Id.* § 89772, subd. (a)(1).) The Department of Finance as staff to the Governor's administration must then consult with those legislative committees and notify CSU of its approved capital expenditures. (*Id.* § 89772, subds. (a)(2)-(4), (b).) Accordingly, CSU's capital expenditures and capital projects

no longer would be reviewed as part of the regular legislative budget process.

Notably, while SB 860 confers on CSU more discretion concerning how to use the funds the Legislature appropriates, it also preserves the Governor's and the Legislature's supremacy and prerogative to decide how much of the state's funds to appropriate to CSU. (See Ed. Code, § 89770, subds. (a)(2) ["To the extent the university pledges any part of its support appropriation as a source of revenue securing any obligation, it shall provide that this commitment of revenue is subject to annual appropriation by the Legislature"], (c) ["Nothing in this section shall require the Legislature to make an appropriation from the General Fund in any specific amount to support the California State University"], § 89772, subd. (a).)

B. The EIR's economic infeasibility determination no longer reflects the state budgeting process through which funds will be allocated for SDSU's capital expenditures, making it difficult to assess whether that portion of the EIR complies with CEQA.

As CSU explained in its merits briefing, the EIR's economic infeasibility finding at issue in this appeal was premised on the requirement (in place at the time) that CSU had to request funds for capital expenditures—as distinct from annual support funds—from the Legislature. (OBOM 40-41.) The Legislature's denial of CSU's request for a specific capital expenditure to pay for off-site

mitigation necessarily precluded CSU from reallocating other state capital funds for that purpose. (*Ibid.*) Nor could CSU reallocate funds from its annual support budget for capital projects that the Legislature had already refused to fund, because other statutes limited the use of the support budget to purposes such as educating students. (*Ibid.*)

Going forward, it appears the Governor and the Legislature will make one General Fund support appropriation to CSU, and then CSU will have discretion, within the limits discussed above, to allocate some modest percentage of those funds toward capital expenditures for academic and academic support facilities. The new statute thus erodes the previous distinction between appropriations for capital funds and support funds that existed when the EIR was certified, while it also creates new rules concerning allocations for capital projects. (See *ante*, Part II.A.)

CSU's economic infeasibility finding was also premised on the understanding that the use of non-state funding sources, such as tuition, is heavily restricted. (OBOM 42-46.) The new statute now provides CSU with some discretion to employ non-state funds for capital projects. (Ed. Code, § 89770, subd. (a)(1).) However, the ability to re-allocate non-state funds remains limited by other statutes (e.g., *id.* § 66028 et seq.), and restrictions inherent in some of those sources (see, e.g., OBOM 45-46 [donations' uses limited by donor preferences]). Indeed, Governor Brown has stated that he will not go forward with his previously announced plan to increase

state funding for CSU over the next four years if CSU increases its tuition during that time.[1]

The primary issue presented by this appeal is whether CSU's EIR complies with CEQA in light of *Marina*'s holding that "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." (*Marina*, *supra*, 39 Cal.4th at p. 367.) Although this statement is true as a general proposition under both the old and new funding statutes (see Ed. Code, § 89770, subds. (a)(2) & (c)), the fact that CSU's EIR determined economic infeasibility under a legislative appropriation scheme that has been changed makes it difficult to determine how *Marina*'s holding now applies to the EIR and any projects analyzed under it.

That said, under the new statutory scheme, CSU still will be required to allocate scarce state funds and/or operating revenues among numerous projects across its 23 campuses. Thus, the Governor's and Legislature's total funding appropriation, viewed in light of the many competing statewide demands on those funds, will continue to inform CSU's determination whether any particular mitigation measure is economically feasible. Moreover, as set forth in CSU's briefing on the merits, CEQA does not confer on local governments the authority to second-guess CSU's decision to

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[1] (See Gordon, *As UC Regents debate tuition hike, Brown may hold sway*, L.A. Times (Nov. 12, 2014) http://www.latimes.com/local/education/la-me-uc-tuition-column-20141112-story.html [as of Nov. 26, 2014].)

allocate those funds in a way CSU has determined will best effectuate the university's statewide mission. (OBOM 46-51; RBOM 4-15.)

III. AFTER DECIDING THE TDM AND TRANSIT ISSUES, THIS CASE SHOULD BE REMANDED TO THE TRIAL COURT.

In a CEQA appeal, the question whether the lead agency complied with CEQA is determined by applying the law in effect at the time of the appellate determination, not the law that was in effect when the trial court ruled. (*Citizens for Non-Toxic Pest Control v. Department of Food & Agriculture* (1987) 187 Cal.App.3d 1575, 1584.) This is because requests for injunctions and writs of mandate aim to influence the defendant's future conduct. (See *Bruce v. Gregory* (1967) 65 Cal.2d 666, 671; *Cal-Dak Co. v. Sav-On Drugs, Inc.* (1953) 40 Cal.2d 492, 496.)

Similarly, in litigation over ongoing and future compliance with state funding schemes, a post-judgment change in the statutory funding system renders that part of the case moot. (*County of San Diego v. Brown* (1993) 19 Cal.App.4th 1054, 1090; *City of Los Angeles v. County of Los Angeles* (1983) 147 Cal.App.3d 952, 959.) " 'Where an appeal is disposed of upon the ground of mootness and without reaching the merits, in order to avoid ambiguity, the preferable procedure is to reverse the judgment with directions to the trial court to dismiss the action for having become

moot prior to its final determination on appeal.' " (*County of San Diego*, at p. 1090.)

This appeal is a hybrid: a CEQA appeal that turns, in part, on the interpretation of a recently altered statutory funding scheme. The new statute should be applied in this and future proceedings. It therefore renders moot the *specific issue on appeal* of whether the EIR's current infeasibility determination, which relied on the prior funding scheme, complied with CEQA. This is because, going forward, CSU will be obligated to follow the new statute in obtaining funding for SDSU's capital expenditures. The new statute does not, however, moot the *general issue in the litigation* of how CSU can properly determine economic infeasibility under CEQA in light of the new funding system.

A further consideration is the status of the Court of Appeal's decision, currently depublished and superseded by this Court's grant of review. (Cal. Rules of Court, rule 8.1105(e)(1); Eisenberg, Horvitz & Wiener, Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2014) ¶ 13:119, p. 13-28.) That opinion held CEQA requires CSU to demonstrate "as a matter of law" that none of its funding sources could be used to pay for off-site mitigation. (Typed opn. 33.) The opinion thus imposed extremely burdensome future obligations on CSU, not required by CEQA, under a funding system that no longer exists. The Court of Appeal also held that this Court's analysis of the funding relationship between the Legislature and state agencies in *Marina* was "not supported by any statute, regulation, case, or other authority," and that "had the California Supreme Court extensively addressed or analyzed the

issue, *Marina* would have modified or qualified its dictum." (Typed opn. 32.)

In light of these considerations, after resolving the TDM and transit issues, this Court should reverse or vacate as moot that part of the Court of Appeal's judgment related to the economic infeasibility determination, leave the entire Court of Appeal opinion depublished (Cal. Rules of Court, rule 8.1105(e)(1)-(2)), and remand for the trial court to consider anew the appropriateness of CSU's economic infeasibility determination. The trial court is the appropriate forum to oversee any further development of the factual record that may be necessary to resolve these issues in light of CSU's new statutory funding scheme.

If, however, this Court disagrees and feels it is appropriate to decide the appeal on the current record, CSU respectfully requests that this Court order further briefing so that the parties can fully and fairly address the effect of the new statute on this appeal. Given the complexity and breadth of the questions created by the new statute, any such order should provide CSU the opportunity to file both a supplemental opening brief and a supplemental reply brief to respond to arguments raised in the local agencies' supplemental answering briefs.

CONCLUSION

After this Court resolves the TDM and transit issues on their merits, it should reverse or vacate as moot that part of the Court of Appeal's judgment related to the economic infeasibility issue,

leaving the entire Court of Appeal opinion depublished. The Court should then remand to the trial court with instructions to permit such further development of the record as is necessary to determine the propriety of CSU's economic infeasibility determination under the new funding scheme.

December 5, 2014

HORVITZ & LEVY LLP
BRADLEY S. PAULEY
JEREMY B. ROSEN
MARK A. KRESSEL
GATZKE DILLON & BALLANCE LLP
MARK J. DILLON
MICHAEL S. HABERKORN
DANIELLE K. MORONE

By: _____
Mark A. Kressel

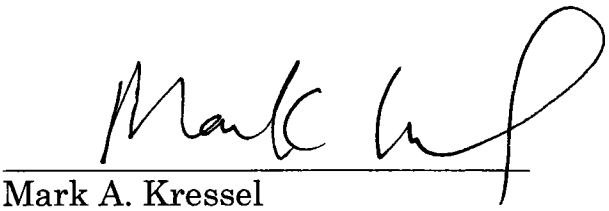
Attorneys for Defendant and Respondent
BOARD OF TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY

CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 8.520(d)(2).)

The text of this brief consists of 2,723 words as counted by the Microsoft Word version 2007 word processing program used to generate the brief.

Dated: December 5, 2013



Mark A. Kressel

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 December 5, 2014, I served true copies of the following document(s) described as **SUPPLEMENTAL BRIEF REGARDING IMPACT OF NEW STATUTE ON APPEAL** on the interested parties in this action as follows:

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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.

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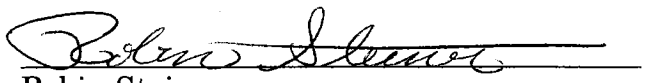

Robin Steiner

SERVICE LIST
San Diego v. CSU
S199557

Christine Marie Leone (SBN 208803)
Office of the City Attorney
1200 3rd Avenue, Suite 1100
San Diego, CA 92101
Phone: (619) 533-6392
Fax: (619) 533-5856
Email: leonec@sandiego.gov

(Counsel for Plaintiffs and Appellants City of San Diego and Redevelopment Agency of the City of San Diego)

Margaret M. Sohagi (SBN 126336)
Philip A. Seymour (SBN 116606)
Nicole H. Gordon (SBN 240056)
The Sohagi Law Group, LLP
11999 San Vicente Blvd., Suite 150
Los Angeles, CA 90049
Phone: (310) 475-5700
Fax: (310) 475-5707
Email: msohagi@sohagi.com
pseymour@silcom.com
ngordon@sohagi.com

(Counsel for Plaintiffs and Appellants San Diego Association of Governments and San Diego Metropolitan Transit System)

John F. Kirk (SBN 149667)
Deputy General Counsel
San Diego Association of Governments
401 "B" Street, Suite 800
San Diego, CA 92101
Phone: (619) 699-1997
Fax: (619) 699-1995
Email: jki@sandag.org

(Counsel for Plaintiffs and Appellants San Diego Association of Governments and San Diego Metropolitan Transit System)

Mark J. Dillon (SBN 108329)
Michael S. Haberkorn (SBN 159266)
Danielle K. Morone (SBN 246831)
Gatzke Dillon & Balance LLP
2762 Gateway Road
Carlsbad, California 92009
Phone: (760) 431-9501
Fax: (760) 431-9512
Email: mdillon@gdandb.com
mhaberkorn@gdandb.com
dmorone@gdandb.com

(Counsel for Defendant and Respondent Board of Trustees of the California State University)

Beth Collins-Burgard (SBN 222108) Dylan K. Johnson (SBN 280858) Brownstein Hyatt Farber Schreck, LLP 21 East Carrillo Street Santa Barbara, California 93101-2706	(Counsel for Amici Curiae League of California Cities and California State Association of Counties)
Heather Wallace (SBN 205201) Erika Frank (SBN 221218) 1215 K Street, Suite 1400 Sacramento, California 95814 Phone: (916) 444-6670 Fax: (916) 325-1272	(Counsel for Amici Curiae California Chamber of Commerce and California Business Roundtable
Stuart M. Flashman (SBN 148396) Law Offices of Stuart M. Flahman 5626 Ocean View Drive Oakland, California 94618-1533 Phone & Fax: (510) 652-5373	(Counsel for Amicus Curiae Hayward Area Planning Association)
Harriet A. Steiner (SBN 109436) Kara K. Ueda, (SBN 210044) Best Best & Krieger LLP 500 Capitol Mall, Suite 1700 Sacramento, California 95814 Phone: (916) 325-4000	(Counsel for Amicus Curiae City of Hayward)
Michael S. Lawson (SBN 48172) 777 B Street, 4th Floor Hayward, California 94541 Phone: (510) 583-4450	(Counsel for Amicus Curiae City of Hayward)
Clerk Court of Appeal Fourth Appellate District Division One 750 "B" Street, Suite 300 San Diego, CA 92101	D057446
Hon. Thomas P. Nugent San Diego Superior Court North County Division Vista Regional Center 325 S. Melrose Dr., Dept. 30 Vista, CA 92081	GIC855643 (Lead Case)