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“Local Government Fees and Charges--Do You Have to Pay?”

Friday, December 7, 2007

9:00 a.m. to 3:00 p.m.

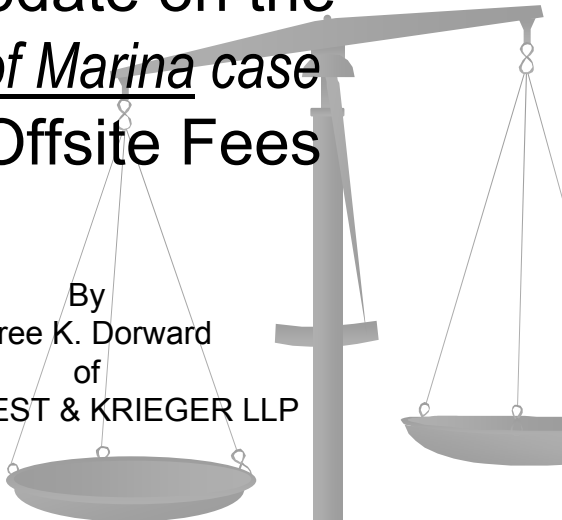
Ontario Airport Marriott
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Ontario, California

AN UPDATE ON THE CITY OF MARINA AND OFFSET FEES

TY DORWARD


Best Best & Krieger LLP

An Update on the City of Marina case and Offsite Fees



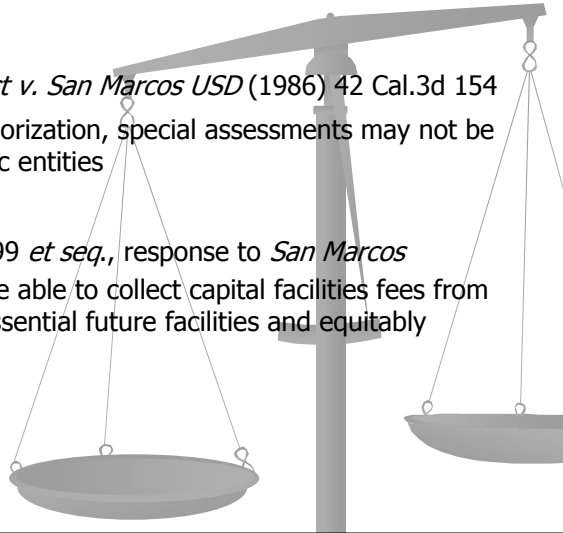
By
Tyree K. Dorward
of
BEST BEST & KRIEGER LLP

Problems Offsite Impact Disputes Create

- No service to project
 - Potential challenge/dispute by local agencies
 - If unplanned for, adds costs and delays to project
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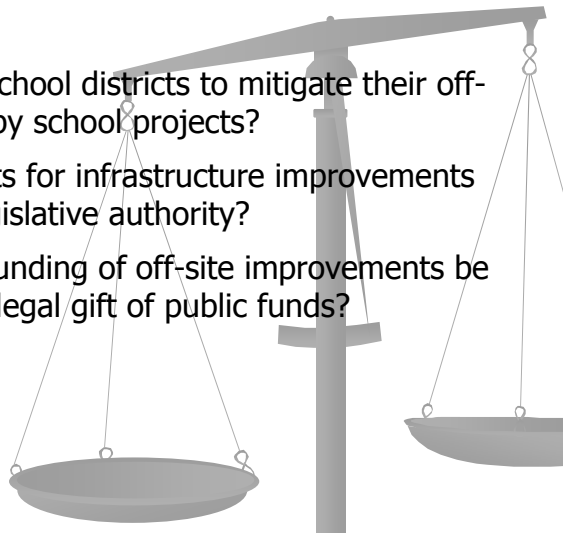
Where we Started Public Utility/Capital Facilities Fees Prior to the City of Marina case

- *San Marcos Water District v. San Marcos USD* (1986) 42 Cal.3d 154
 - Absent statutory authorization, special assessments may not be charged against public entities
- Government Code § 54999 *et seq.*, response to *San Marcos*
 - Public utilities must be able to collect capital facilities fees from all users to finance essential future facilities and equitably apportion costs



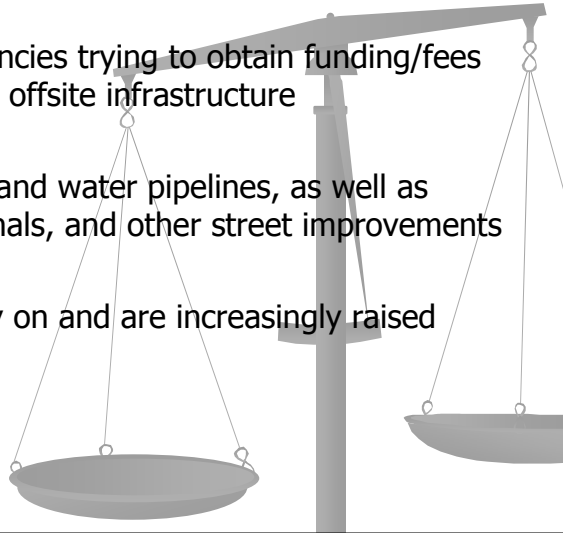
Questions After the *San Marcos* Decision and Legislation

- Does CEQA require school districts to mitigate their off-site impacts caused by school projects?
 - Do mitigation costs for infrastructure improvements require special legislative authority?
 - Could a school's funding of off-site improvements be construed as an illegal gift of public funds?



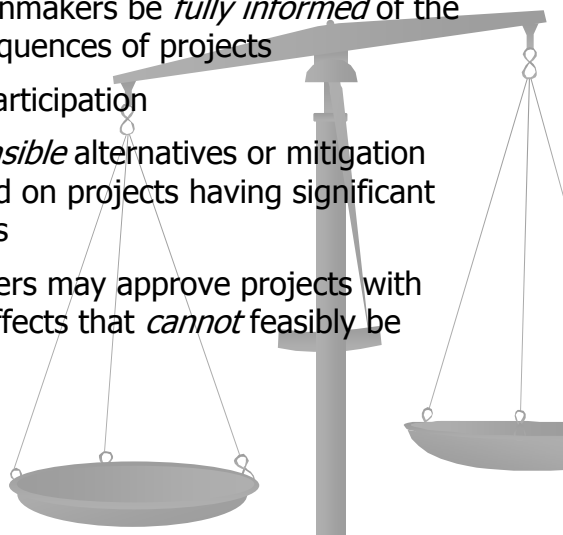
Background on Offsite Impact Fees & *City of Marina* Case

- General purpose agencies trying to obtain funding/fees for more and greater offsite infrastructure
- Common for sewers and water pipelines, as well as sidewalks, traffic signals, and other street improvements
- Issues come up early on and are increasingly raised during CEQA process

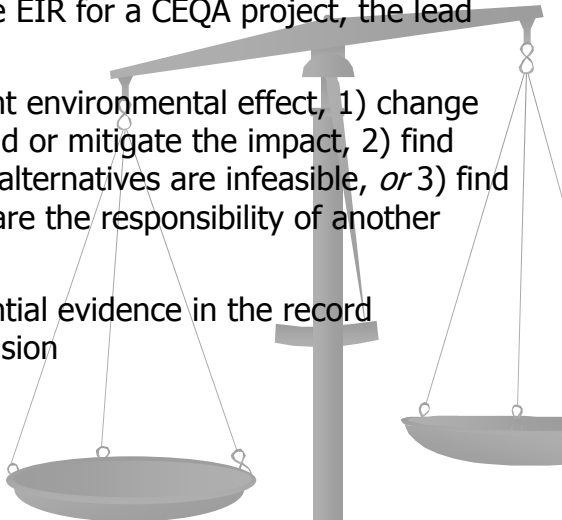


CEQA

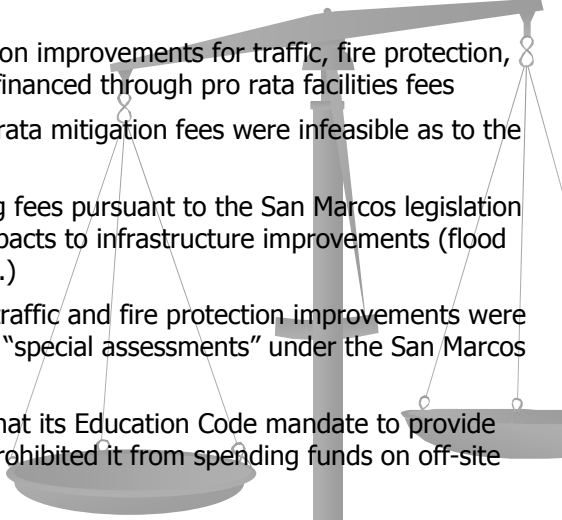
- Requires that decisionmakers be *fully informed* of the environmental consequences of projects
- Provides for public participation
- Mandates that all *feasible* alternatives or mitigation measures be imposed on projects having significant environmental effects
 - But decisionmakers may approve projects with environmental effects that *cannot* feasibly be mitigated



CEQA Record

- In order to certify the EIR for a CEQA project, the lead agency must:
 - For each significant environmental effect, 1) change the project to avoid or mitigate the impact, 2) find that mitigation or alternatives are infeasible, *or* 3) find that the changes are the responsibility of another agency
 - Document substantial evidence in the record supporting its decision
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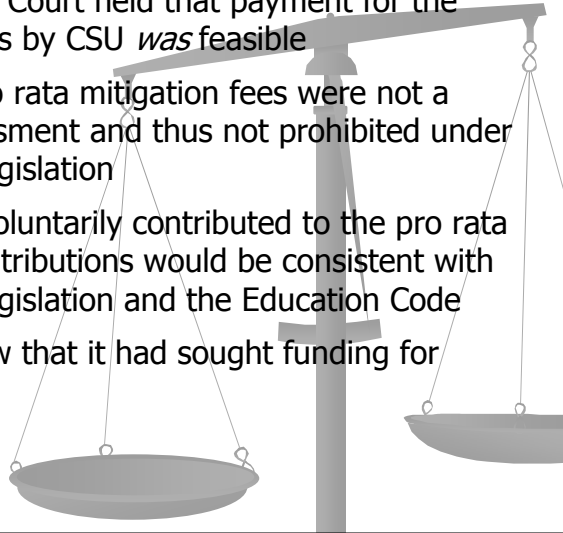
The City of Marina Case: Facts

- California State University certified an EIR for a campus development project
 - The EIR identified mitigation improvements for traffic, fire protection, water and sewage, to be financed through pro rata facilities fees
 - CSU claimed that the pro rata mitigation fees were infeasible as to the traffic and fire protection
 - CSU anticipated paying fees pursuant to the San Marcos legislation for “public utilities” impacts to infrastructure improvements (flood control, sanitation, etc.)
 - *But*, CSU claimed the traffic and fire protection improvements were prohibited compulsory “special assessments” under the San Marcos legislation
 - Further, CSU argued that its Education Code mandate to provide educational facilities prohibited it from spending funds on off-site improvements
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The City of Marina Case: Decision

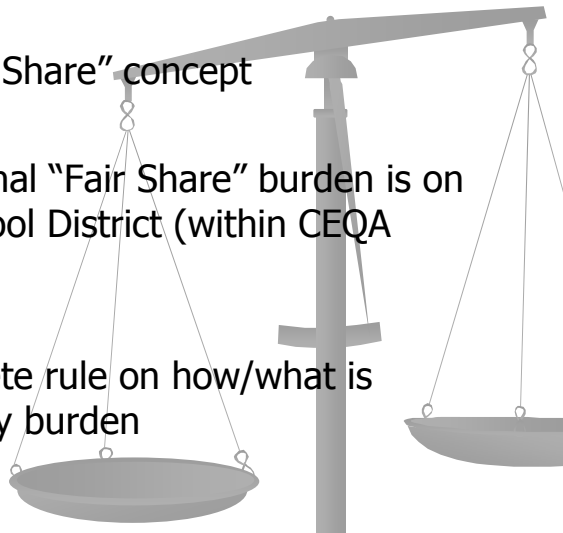
The California Supreme Court held that payment for the off-site improvements by CSU *was* feasible

- The estimated pro rata mitigation fees were not a compulsory assessment and thus not prohibited under the San Marcos legislation
- CSU could have voluntarily contributed to the pro rata fees and such contributions would be consistent with the San Marcos legislation and the Education Code
- CSU failed to show that it had sought funding for mitigation costs



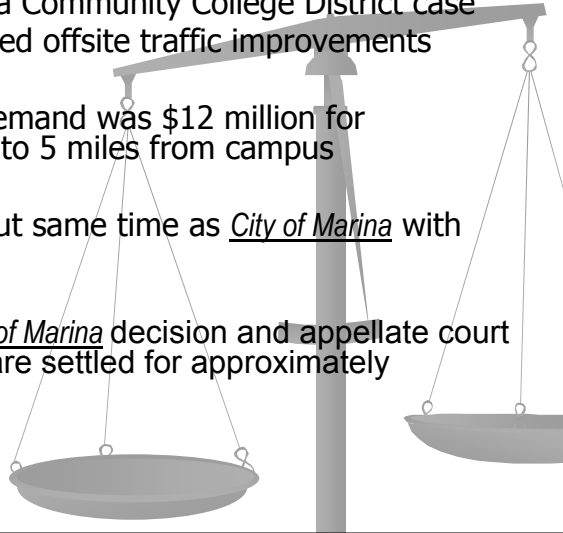
Practical Impact: City of Marina Decision

- “Proportional Fair Share” concept
- Proving proportional “Fair Share” burden is on Lead Agency/School District (within CEQA Document)
- No specific concrete rule on how/what is sufficient to satisfy burden



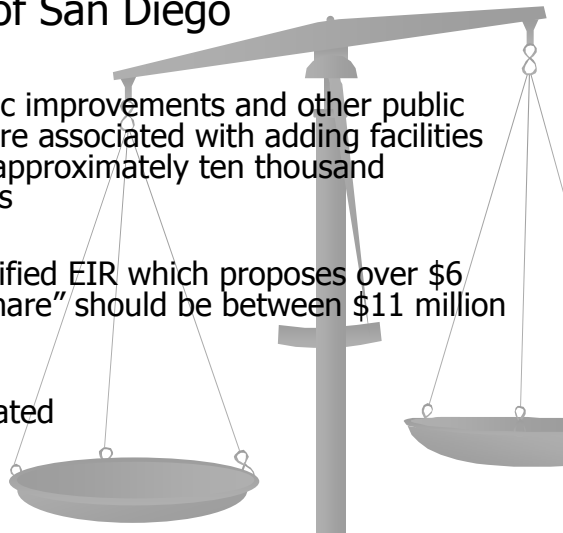
Where We Are Now: Examples

- Grossmont-Cuyamaca Community College District case
 - Like *Marina* involved offsite traffic improvements
 - Original County demand was \$12 million for improvements up to 5 miles from campus
 - Case decided about same time as *City of Marina* with similar result
 - Based on the *City of Marina* decision and appellate court decision, parties are settled for approximately \$850,000

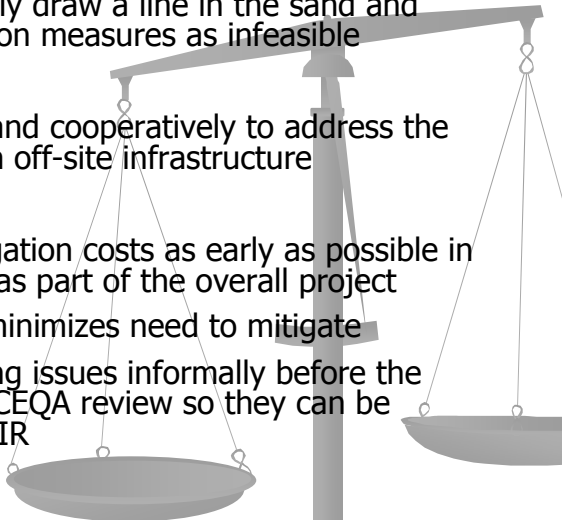


Where We Are Now: Examples (cont'd)

- SDSU and City of San Diego
 - Dispute over traffic improvements and other public works infrastructure associated with adding facilities to accommodate approximately ten thousand additional students
 - CSU Trustees certified EIR which proposes over \$6 million for "Fair Share" should be between \$11 million and \$21 million
 - Case is being litigated



Practice pointers after the City of Marina:

- Agencies cannot simply draw a line in the sand and reject off-site mitigation measures as infeasible
 - Work collaboratively and cooperatively to address the issues associated with off-site infrastructure
 - Consider off-site mitigation costs as early as possible in the planning process as part of the overall project
 - Select a site that minimizes need to mitigate
 - Resolve all financing issues informally before the completion of the CEQA review so they can be addressed in the EIR
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Practice pointers after the City of Marina: (cont. . .)

- Be prepared to rebut evidence of off-site impacts and “fair share” contributions with substantial evidence for the record
 - Document “fair share” funds calculations with appropriate studies, reports, etc.
 - An agency cannot be required to commit to pay fees without any evidence that mitigation will actually occur
 - a reasonable plan for the mitigation is also required to justify fees
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