

# **The *Marina* Holding: Responsibility and Funding for Offsite Mitigation**

## **C.A.S.H. Workshop**

May 14, 2007

Janet L. Mueller, Esq.  
Miller Brown & Dannis  
750 B Street, #2310  
San Diego, California 92101  
(619) 595-0202

Jeremy K. Brust, Esq.  
Atkinson, Andelson, Loya, Ruud & Romo  
17871 Park Plaza Drive  
Cerritos, California 90703  
(562) 653-3200

## **Presentation Overview**

- **The *Marina* case**
  - Facts
  - Legal and Procedural Background/Court of Appeal
  - Supreme Court Holding
- **Legal Framework/Analysis**
  - The role of CEQA in school site development
  - The relationship between school districts and other public agencies for payment of exactions, fees
- **Coping Tactics**

## **The *Marina* Case**

- Facts of the Case
- Legal Context -- DETOUR
  - CEQA Requirements
  - Government Code 54999 et seq. and the *San Marcos* Case

## **CEQA Requirements and Standard of Review**

- CEQA's mandate:  
Lead agencies must refrain from approving projects with significant environmental effects if there are feasible alternatives or mitigation measures that can substantially lessen or avoid those effects.

## **CEQA Requirements and Standard of Review**

- Prior to certifying an EIR, lead agency must make findings for each significant effect of the project. The lead agency must find:
  - The project has been changed to avoid or substantially reduce the impact;
  - The changes are within the responsibility or jurisdiction of another public agency; or
  - Mitigation or alternatives are infeasible.

## **CEQA Requirements and Standard of Review**

- The findings of the lead agency must document the substantial evidence supporting the action or decision.

## **The *Marina* Case**

- Under CEQA, CSU concluded:
  - The Project would have significant impacts in many areas;
  - EIR identified mitigation for many impacts;
  - BUT: offsite traffic, water supply, wastewater, drainage, and fire safety protection impacts were problematic and full mitigation infeasible.
  - Only FORA had the authority to construct the necessary offsite improvements to mitigate those particular impacts

## **The *Marina* Case**

- CSU concluded:
  - Per Government Code § 54999, CSU had legislative authority to fund partial offsite water, drainage, and sewer improvements, but not offsite traffic or fire safety improvements;
    - What is the relevance of §54999 et seq.?

## **Public Utility/Capital Facilities Fees**

- *San Marcos Water District v. San Marcos USD (1986) 42 Cal.3d 154*
  - Special assessments may not be assessed against public entities without specific statutory authority;
  - A special assessment is “a compulsory charge placed by the state upon real property within a pre-determined district, made under express legislative authority for defraying in whole or in part the expense of a permanent public improvement therein.

## **Public Utility/Capital Facilities Fees**

- *Government Code §§ 54999-54999.5*
  - Legislation enacted as a direct response to the *San Marcos* decision;
  - Public utility may impose a capital facilities fee on education entity “after agreement has been reached between the two agencies through negotiations entered into by both parties.”
  - Rationale: Capital facilities fees are necessary to equitably apportion the cost of capital facilities construction or expansion relied upon by all users, public and private.

## **Public Utility / Capital Facilities Fees**

- AB 2951 – San Marcos legislation **expanded** in 2006
  - Government Code section 54999.7 added to allow direct imposition of a “reasonable” fee for any service or product—no negotiation required;
  - “Capacity facilities fee” now includes connection fee and capacity charge;
  - Short statute of limitations for a challenge

## **Back to the *Marina* Case**

- Based on the foregoing, CSU adopted Statement of Overriding Considerations (SOC), and approved EIR;
- FORA and City challenge, alleging:
  - Failure to adopt feasible mitigation measures;
  - Improper disclaiming of responsibility for mitigation;
  - Improper certification of EIR
  - Improper reliance on SOC to justify EIR

## **The *Marina* Case**

- Court of Appeal finds for CSU:
  - CEQA requires identification, analysis, and disclosure of potential impacts, but does not require full mitigation if a finding of infeasibility is made;
  - The purpose of CSU's funding is to provide educational facilities, not offsite improvements.

## **The *Marina* Case**

- Court of Appeal decision:
  - CSU's funding of offsite improvements could be construed as an illegal gift of public funds.
  - CSU's finding of infeasibility based on the limitations of Government Code § 54999 et seq. was supported by substantial evidence.

## ***BUT!***

- California Supreme Court REVERSES
  - Mitigation of five impacts will require action by FORA, not CSU – water supply, traffic, drainage, wastewater management, and fire protection;
  - FORA’s “provisional effort to estimate” CSU’s fair share of the cost of infrastructure improvements did not represent a compulsory charge, and thus was not a prohibited assessment

## **The *Marina* Case**

- California Supreme Court held:
  - Because the payment was not an assessment, no special legislative authority was required. Payment was therefore feasible;
  - Lead agencies have an independent obligation under CEQA to mitigate the impacts of their projects;
  - No violation of gift of public funds;

## ***The Marina Case***

- California Supreme Court held:
  - The lead agency is responsible for mitigating impacts “within the area” affected by the project, including offsite impacts;
  - CSU failed to demonstrate that it sought funds to pay for mitigation costs;
  - EIR that disclaims the power and duty to mitigate impacts based on an erroneous legal assumption is legally insufficient

## ***Now What: Tactics for Coping with Marina***

- Is the case holding distinguishable for K-12 districts?
  - Are some payments barred by Ed Code 17569?
  - SFP program constraints
- The key to Marina holding is the *voluntary* nature of the financial mitigation. The lead agency must take the initiative to determine the appropriate amount of any financial contribution made as a mitigation measure.

### ***Now What: Tactics for Coping with Marina***

- District's decision re: how much to pay must be supported by substantial evidence in the record;
- Document the calculation of financial contributions, include that documentation in the administrative record, and document attempts to find funding for improvements.

### ***Now What: Tactics for Coping with Marina***

- District must be prepared to rebut evidence of offsite impacts and "fair share" contributions submitted by local agencies;
- The lead agency may avoid disputes by discussing and negotiating contributions with local entities during the planning process.