S117816

IN THE SUPREME COURT OF CALIFORNIA

CITY OF MARINA and FORT ORD REUSE AUTHORITY,

Plaintiffs and Respondents,

vs.

BOARD OF TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY,

Defendant and Appellant.

AFTER A DECISION BY THE COURT OF APPEAL
SIXTH APPELLATE DISTRICT
CASE NO. H023158

ANSWER TO AMICUS CURIAE BRIEFS

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INTRODUCTION

The creation of the University was sought and welcomed by the surrounding municipalities as needed economic and civic rejuvenation to a depressed region following the closure of Fort Ord. Now, Amici Curiae in support of FORA argue this court should step in and require the University to

assume a significant portion of the expenses the surrounding municipalities may incur to mitigate the University's impact. Amici argue it is "unfair" for a state entity to be immune from assessment by local government. But the California Constitution and Legislature disagree.

Whether it would be unfair for the University to refuse to pay FORA's unauthorized special assessment fees was settled by the drafters of the California Constitution, who undoubtedly recognized the many benefits a college brings to the local community. As this court has explained, absent express authorization from the Legislature, the Constitution precludes state-owned property devoted to public use (such as a state university) from being specially assessed to pay for local infrastructure improvements – and payment of such unauthorized fees is constitutionally prohibited as an unlawful gift of public funds. (*San Marcos Water Dist. v. San Marcos Unified School Dist.* (1986) 42 Cal.3d 154, 161 (*San Marcos*); *Inglewood v. County of Los Angeles* (1929) 207 Cal. 697, 703-704 (*Inglewood*); Cal. Const., art. XIII, § 3, subd. (b), art. XVI, § 6.) Such constitutional immunity from special assessments is fair because it:

- "[P]revent[s] one tax-supported entity from siphoning tax money from another such entity" with a possible end result of "unnecessary administrative costs and no actual gain in tax revenues." (*San Marcos, supra,* 42 Cal.3d at p. 161.)
- Avoids "'taking money out of one pocket and putting it into another.'" (*Eisley v. Mohan* (1948) 31 Cal.2d 637, 642.)
- "[P]reserve[s] the balance in funding established by the Legislature and . . . avoid[s] unnecessary administrative costs." (*San Marcos, supra,* 42 Cal.3d at p. 167.)
- Prevents the inevitable loss of funds available to state institutions which would result in a "diminution of . . . services, or also an

increased tax burden on the citizens." (*County of Santa Barbara v. City of Santa Barbara* (1976) 59 Cal.App.3d 364, 369.)

All these justifications are applicable here. If funds earmarked for education were siphoned for strictly local uses, the educational services the University could provide would diminish correspondingly. Funding allocated by the Legislature for *education* and educational facilities would be diverted to pay for local infrastructure improvements. The tax burden on all citizens of the state would be unfairly increased to pay for strictly local benefits. The fairness of the state's constitutional immunity from local assessments must be viewed from a statewide perspective, not just from a narrow local and regional viewpoint.

These justifications also reflect a broader underlying fairness principle surely contemplated by the drafters of the constitution: that a local community receives enormous benefits from the establishment of a major university that counterbalances any economic effect from the university's sovereign immunity from assessment. Here, the surrounding communities will enjoy new employment opportunities; economic revitalization resulting from consumer spending by student body and faculty members; new cultural and entertainment events, such as plays, sporting events, lectures, and night classes; and parks, open spaces and green belts maintained by the university for public use. The presence of a major university will bring a vibrancy of life to the local community that is immeasurable, including a world-class library and an influx of quality neighbors associated with an institution of higher learning. Thus, it is fair that the community provide infrastructure improvements in exchange for the enormous benefits it receives.

And there are other aspects of fairness to be considered. It remains undisputed that: (i) FORA's Base Reuse Plan charges the University for mitigation measures unrelated and disproportionate to the impacts caused by

the University; (ii) FORA has taken no steps to design or build the improvements; and, (iii) FORA has taken no steps to fund the improvements. Instead, FORA has utilized CEQA's mitigation requirements as a pretext to obtain a $20 million up-front payment from the University into FORA's general fund, purportedly to pay for infrastructure projects that do not have even so much as an engineer's design and which may never be built. CEQA and the EIR process were not meant to be used as end-runs around important procedural safeguards protecting the University from the type of unilateral assessments at issue here.

Moreover, to proceed as advocated by the Amici would not be fair to the public; it would require the Trustees of the University to certify a misleading if not fraudulent EIR. An EIR is an informative document meant to "'provide the decision-makers, and the public, with the information about the project that is required by CEQA.'" (*San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 721-722.) The trial court had effectively required the Trustees to commit funds to FORA, and then approve a revised EIR which concludes that the substantial negative impacts caused by the Master Plan will be mitigated to levels of insignificance by virtue of this payment. But even if the Trustees were to commit funds to FORA, it would remain uncertain whether the infrastructure improvements needed to offset the University's specific impacts would ever actually be implemented since FORA has never taken any concrete steps to design, fund or build them. The Trustees should not be required to conclude that mitigation is feasible when mitigation remains uncertain. But more importantly, it is contrary to precepts of CEQA to demand that the Trustees present untrue feasibility findings to the public.

Finally, not only were the Trustees' findings *fair*, they were also in full compliance with CEQA's *legal* requirements. Under CEQA, even if an

agency determines that mitigation of certain environmental impacts is infeasible, it may approve a project if the project's benefits outweigh its impacts. Substantial evidence supports the Trustees' findings that: (i) the University could not ensure that off-campus impacts would be mitigated because implementation of off-campus infrastructure improvements was within the exclusive control of another agency; and (ii) the project's "economic, educational, social and other considerations . . . outweigh the unavoidable environmental impacts."

The Trustees' findings do not necessarily mean that the impacts will never be mitigated – only that the Trustees cannot guarantee that they will, and must so inform the public. The findings are honest and accurate, as required by CEQA.

In the discussion that follows, we will address the arguments of the four Amici Curiae in support of FORA.

LEGAL ARGUMENT

I.

THE COURT OF APPEAL'S OPINION COMPLIES WITH SETTLED LAW REGARDING THE STATE'S SOVEREIGN IMMUNITY FROM SPECIAL ASSESSMENTS

A. The trial court's writ of mandate effectively ordered the University to pay unconstitutional special assessments.

It is long-settled that property owned by the state and devoted to public use is exempt from special assessments unless the assessment is expressly authorized by the Legislature. (*Inglewood*, *supra*, 207 Cal. at p. 703; *San*

Marcos, supra, 42 Cal.3d at p. 161; see also *City Street Imp. Co. v. Regents etc.* (1908) 153 Cal. 776, 781.) The payment by a public entity of a special assessment fee would be an unconstitutional "'gift of public funds.'" (*San Marcos*, at p. 167; *County of Riverside v. Idyllwild County Water Dist.* (1978) 84 Cal.App.3d 655, 660.)

In *San Marcos, supra*, 42 Cal.3d at page 162, this Court defined a "special assessment" as "a charge imposed on particular real property for a local public improvement of direct benefit to that property, as for example a street improvement, lighting improvement, irrigation improvement, sewer connection, drainage improvement, or flood control improvement."

Any fee FORA may assess against the University in the Base Reuse Plan is a special assessment under *San Marcos* because it is a charge for off-campus infrastructure improvements for traffic, fire protection, water and sewage.

Amici Curiae the League of California Cities and California State Association of Counties (collectively, the League) argue FORA's Base Reuse Plan fee is not a special assessment because it was imposed as a result of the University's voluntary "business decision" to develop its property. (League 15-17.) This contention is factually and legally incorrect.

First, the University is a *state entity* whose stated purpose for expanding the campus is to meet the educational needs of 25,000 underrepresented students. (AR 1466.) Thus, the University's decision flows from its educational mission, not from a "business decision." Moreover, the decision was made in concert with all the local communities who welcomed the presence of a major university, not only because it would provide educational opportunities to its citizens, but also because of the economic revitalization that would result from the influx of new employment opportunities and the

increase in student/faculty population. (AR 271, 980; ABOM 6-7.)

Second, the League's argument is legally flawed because it uses the wrong criteria for determining whether a fee is a special assessment. The *San Marcos* court endorsed a pragmatic test developed in the Courts of Appeal that places the emphasis on the *purpose* of the charge:

> By placing the emphasis on the *purpose* of the charge, the courts in those cases created a rule which both conforms to the policy behind the implied exemption for public entities, and avoids easy manipulation. A contrary ruling would, in effect, abrogate the public entities' implied exemption from assessments by sewer districts. Under the rule we adopt, no matter how the *form* of the fee is varied . . . , the *purpose* of the fee will determine whether or not pubic entities are exempt from paying the fee.

(*San Marcos, supra,* 42 Cal.3d at p. 164, original emphasis; see *Sacramento Mun. Utility Dist. v. County of Sonoma* (1991) 235 Cal.App.3d 726, 735.) This court concluded that "a fee aimed at assisting a utility district to defray costs of capital improvements will be deemed a special assessment from which other public entities are exempt." (*San Marcos*, at pp. 164-165.) Under the *San Marcos* rule, a fee is a special assessment if the utility provider's *purpose* for the fee is to build infrastructure improvements. (*Ibid.*) *San Marcos* expressly rejected the lower court's holding (which paralleled the League's argument) that the fees imposed on the school district were not special assessments because the school district created the need for the infrastructure improvements. (*Id.* at p. 160.) Here, FORA's Base Reuse Plan fee is a special assessment because its purpose is to fund infrastructure improvements.[1/]

The two cases upon which the League relies are inapposite because they

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1/ On this basis, the Court of Appeal in *Loyola Marymount University v. Los Angeles Unified School District* noted that a development fee (i.e., a fee imposed only if a property owner elects to develop) is a special assessment under the *San Marcos* definition, from which *public entity* developers are constitutionally immune. (*Loyola Marymount University v. Los Angeles Unified School Dist.* (1996) 45 Cal.App.4th 1256, 1268-1269.)

pertain to fees imposed on private, not public entities, and their holdings turn on the meaning of specific language in Article XIIID of the California Constitution (Proposition 218), which is not at issue in this case.

In *Richmond v. Shasta Community Services Dist.* (2004) 32 Cal.4th 409, this court considered whether a capacity charge imposed by a water district on private applicants for new service connections was an assessment on real property within the meaning of Proposition 218 (Cal.Const., art. XIIID, § 2, subd. (b).) (*Richmond v. Shasta Community Services Dist.*, *supra*, 32 Cal.4th at p. 418.) *Richmond* noted that there was a fundamental difference between the definition of "special assessment" under Article XIIID, section 2, subdivision (b), and the definition of "special assessment" in the *San Marcos* case:

> In deciding what constituted an assessment in *San Marcos*, we sought to determine and effectuate the constitutional purpose for exempting public entities from property taxes, a purpose that plays no role in interpreting the provisions of article XIII D that are at issue here. The characteristic that we found determinative for identifying assessments in *San Marcos* – that the proceeds of the fee were used for capital improvements – forms no part of article XIII D's definition of assessments. For each of these reasons, we agree with the Court of Appeal that *San Marcos* is not helpful, much less controlling, in this strikingly different context.

(*Id.* at p. 422.) Thus, *Richmond's* definition of special assessment is not implicated in this case.

Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles (2001) 24 Cal.4th 830 is even more attenuated because it did not involve a special assessment. This court considered whether a rental inspection fee on private landlords is subject to Proposition 218's requirement that all fees imposed "'"upon a parcel or upon a person as an incident of property ownership"'" be approved by two-thirds vote of the electorate. (*Id.* at p. 834.) The analysis turned on the meaning of specific language in Proposition 218 as

applied to a specific business fee, neither of which is at issue in this case.

The League next argues that FORA's Base Reuse Plan fee is distinguishable from the special assessment in *San Marcos* because it will be used to fund new infrastructure, rather than to fund "existing public services." (League 18.) *San Marcos* did not base its reasoning on this distinction. The fee in that case was deemed a special assessment because its purpose, as here, was "to defray costs of capital improvements." (*San Marcos*, *supra*, 42 Cal.3d at pp. 164-165.)

The League also contends the Base Reuse Plan fee was merely a "mitigation proposal," not a special assessment, because FORA did not attempt to "impose" it on the University by compulsion. (League 17-20; see also City of Davis 5.) But were the Base Reuse Plan fee a mere "proposal" without a component of compulsion, FORA would have accepted the University's decision to reject it. Instead, FORA has caused the development of the University campus to come to a halt since 1998, and has attempted to use the courts to force the University to accept its "proposal." Under these circumstances, FORA's mitigation proposal "'*is little more than a disguised special assessment.*'" (*San Marcos, supra,* 42 Cal.3d at p. 164.)

Amicus Curiae The City of Davis argues that the Court of Appeal's decision would unfairly grant universities the freedom to develop private projects unrelated to their educational purpose (such as hotels, retail shopping, housing, cultural centers, etc.) without mitigating the impacts caused by those projects, thereby effectively granting universities subsidies that other private developers do not receive. (City of Davis 8-9, 12-16, 21; see also West Davis Neighbors 7.)

This contention is incorrect. It is long established that land owned by a public entity that is "not directly and necessarily used for a public purpose . . . may be subjected to the payment of special assessments for benefits."

(*City Street Imp. Co. v. Regents etc.*, *supra*, 153 Cal. at p. 779.) "The rule in this state is, as above indicated, that such property when actually devoted to the public use is exempt; otherwise not." (*Id.* at p. 781; see also *Raisch v. Regent of U. C.* (1918) 37 Cal.App. 697, 699.) Thus, any "private projects" developed by the University would be subject to special assessment. (See, e.g., *Connolly v. County of Orange* (1992) 1 Cal.4th 1105, 1130 [state university's sovereign immunity from property taxation did not extend to campus housing subleased on a long-term basis to faculty because leasehold interest was private].) In other words, if a university becomes entrepreneurial, the exemption disappears, and the university is treated like any other private developer.[2/] In this case, the University intends to use the land solely for a public purpose. (See Appellant's Opening Brief to the Court of Appeal 16, fn. 4.)

B. FORA has not invoked any statutory mechanism authorizing special assessments on state owned property. CEQA does not authorize special assessments against a state university.

"A special assessment may not be imposed on property belonging to a public agency absent *express* legislative authorization." (*San Marcos, supra,* 42 Cal.3d at p. 166, original emphasis; *County of Riverside v. Idyllwild County Water Dist.*, *supra*, 84 Cal.App.3d at pp. 659-660 ["unless the Legislature *expressly* so authorizes, property publicly owned and used is exempt from special assessments" (emphasis added)].)

2/ For this reason, West Davis Neighbors' equal protection concern that state universities and private developers are receiving disparate treatment is meritless. (West Davis Neighbors 4.)

We explained in the Answer Brief on the Merits that while the FORA Act authorizes special assessments on state-owned property in limited circumstances, FORA has not invoked any of these statutory mechanisms for imposing assessments. (ABOM 27-31.) None of the Amici Curiae contest this point.

Instead, they turn to another provision that authorizes assessment of state owned property. The League argues that "Proposition 218 gives local agencies positive authority to impose 'assessments' on public property." (League 23; see also City of Davis 13-14.) However, Proposition 218 also requires that any special assessment be imposed in accordance with numerous procedural safeguards.[3/] (Cal. Const., art. XIIID, § 1.) FORA has complied

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3/ Specifically, Proposition 218 requires a local government to (among other things):

- identify all parcels upon which an assessment will be imposed and identify which parcel will receive a "special benefit" (i.e., "a particular and distinct benefit over and above general benefits conferred on real property located in the district or to the public at large" (Cal.Const., art. XIIID, § 2(i));
- determine the proportionate special benefit derived by each identified parcel in relationship to the entire capital cost of a public improvement;
- not impose an assessment on any parcel which exceeds the reasonable cost of the proportional special benefit conferred on that parcel;
- separate the general benefits conferred upon a parcel from the special benefits and only assess the parcel for special benefits;
- support all assessments and proportionate allocations with a detailed report prepared by a registered professional engineer certified by the state;
- give the property owner written notice by mail of the proposed assessment, including the total amount chargeable to the entire district, the proportionate amount chargeable to the owner's parcel, the duration of payments, the reason for the assessment and the basis upon which the amount of the proposed assessment was calculated, the date, time and location of a public hearing to be held on the proposed assessment, and a notation that a weighted average voting requirement applies and that a majority protest will result in the assessment not being imposed;

(continued...)

with none of these procedures and, thus, has not invoked the authority of Proposition 218.

Rather, FORA has attempted to impose a special assessment by invoking CEQA, which has no comparable procedural requirements. However, there is no provision in CEQA that expressly authorizes the special assessment of state-owned property. (ABOM 31-36; UC Regents 10-15.) None of the other Amici Curiae point to any CEQA provision that does.

Amicus Curiae West Davis Neighbors argues that CEQA has been "historically . . . construed" to provide cities with "an avenue to achieve actual mitigation of significant impacts." (West Davis Neighbors 6.) However, the need to "construe" CEQA just goes to prove that it lacks an express provision. Under *San Marcos,* implied authority is insufficient to abrogate a state entity's sovereign immunity from assessment. (*San Marcos, supra,* 42 Cal.3d at p. 166.)

Finally, the League argues that FORA should be able to "propose" that the University contribute to FORA's infrastructure program "without going through all of the procedures to impose an assessment [which] put[s] a prohibitive price on one agency talking to another." (League 24.) This argument proves our point: simply by calling a special assessment by another name (i.e., a "mitigation proposal"), localities have attempted to circumvent the mandatory procedural safeguards designed by the Legislature to ensure that the assessment fees are fair and that the improvement project for which assessment is charged will actually be built. It is precisely such manipulation

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3/ (...continued)

- enclose a ballot upon which the owner may indicate his or her support or opposition to the assessment;
- hold a public hearing within 45 days of the mailing of the notice and tabulate the ballots, which are to be weighted according to the proportional financial obligations affecting the property.

(Cal. Const., art. XIIID, § 4.)

that the *San Marcos* "purpose of the fee" rule was designed to circumvent. (*San Marcos*, *supra*, 42 Cal.3d at p. 163 [the "form of the fee [is] a matter which can be easily manipulated"].)

C. The University is constitutionally prohibited from "voluntarily" paying the special assessment fees imposed in FORA's Base Reuse Plan because to do so would be a gift of public funds.

By ordering the University to pay FORA's unauthorized special assessment fees, the trial court effectively required the University to make a "'gift of public funds in contravention of article XVI, section 6 of the California Constitution.'" (*San Marcos, supra*, 42 Cal.3d at p. 167; see also *County of Riverside v. Idyllwild County Water Dist., supra*, 84 Cal.App.3d at p. 660 ["For the county to agree to pay an invalid charge would amount to an [unconstitutional] gift of public funds"].)

The League adopts FORA's argument that a state entity's expenditure of public funds is permissible (and not an unconstitutional "gift") where the expenditure is for a "public purpose." The League concludes that because the infrastructure improvements proposed in the Base Reuse Plan are for a public purpose, the University's contribution to FORA's Base Reuse Plan fund would not constitute an unlawful "gift of public funds." (League 24-25; see also City of Davis 16-17, fn. 5.)

In the Answer Brief on the Merits we explained that the "public purpose doctrine" pertains only to an analysis of the constitutionality of *legislative appropriation* of public funds. (See ABOM 38-39.) As demonstrated by all of the cases cited by the League and FORA, courts applying that doctrine consider only whether a *statute* is constitutional, not whether a payment *not authorized* by statute is constitutional – the issue here.[4/]

4/ The cases cited by the League and FORA include: *County of Alameda v. Janssen* (1940) 16 Cal.2d 276, 278 [challenging constitutionality of appropriation under the Old Age Security Act]; *County of Alameda v.* (continued...)

The League claims that "[t]his is a distinction without a difference" because "[w]hether an expenditure is a gift of public funds does not depend on who is spending it but on what it is being spent on." (League 25.) The League cites no case to support this contention, and we know of none. There is good reason. The League's (and FORA's) interpretation of the "public purpose doctrine" would directly contradict the sovereign immunity rule at issue in this case, i.e., that state property *used for a public purpose* is immune from special assessment absent express authority by the Legislature, while state property that is *used for private purpose* is subject to special assessment. (*Inglewood*, *supra*, 207 Cal. at pp. 703-704; *San Marcos*, *supra*, 42 Cal.3d at p. 161; *City Street Imp. Co. v. Regents etc.*, *supra*, 153 Cal. at p. 779.) Under the League's (and FORA's) interpretation of the "public purpose doctrine," *all* state property could be assessed – whether it is used for public or private purpose – and *San Marcos* would be written out of the law. The "public purpose doctrine" can only be harmonized with the *San Marcos* sovereign immunity rule if it pertains to a spending decision of the *Legislature* – which has authority to exempt sovereign immunity.

4/ (...continued)
Carleson (1971) 5 Cal.3d 730, 740, 744-747 [challenging Welfare and Institution Code's AFDC program]; *Schettler v. County of Santa Clara* (1977) 74 Cal.App.3d 990, 1002-1004 [challenging appropriation under section 226 of the Revenue and Tax Code]; *Redevelopment Agency v. Shepard* (1977) 75 Cal.App.3d 453, 457 [challenging appropriation under Health and Safety Code's housing program]; *California Teachers Assn. v. Board of Trustees* (1978) 82 Cal.App.3d 249, 252 [challenging Education Code statutes authorizing school districts to enter into contracts with private driver training schools]; *City of Oakland v. Garrison* (1924) 194 Cal. 298, 300 [challenging appropriation in Street and Highway Code for paving public street].

D. The Amici Curiae's public policy arguments have no merit.

The Amici Curiae writing in support of FORA assert a variety of policy arguments as a basis for this court to reverse the Court of Appeal's decision. None has merit.

First, the Amici Curiae believe it is inherently unfair to shift the burden of mitigating the University's impacts onto the local governments and taxpayers. (San Joaquin Raptor Rescue Center, Protect Our Water, and Central Valley Safe Environmental Network (collectively, Raptor Rescue) 2-5, 7-9 ["local residents . . . will now be unfairly required to fund the costs arising from governmental landowners' use of their lands"]; City of Davis 9-12, 21 ["the cost of mitigation would fall on the City and its taxpayers"]; West Davis Neighbors 1, 2, 5, 7; League 26.)

However, as we have shown, this question was settled long ago by this court, and can only be changed by the Legislature. (See *Regents of University of California v. City of Los Angeles* (1979) 100 Cal.App.3d 547, 550 (*Regents I*) ["This argument, perhaps a good one, is directed in the wrong quarter, for this court has no authority to modify the tax-exempt status of publicly owned property"]; *Regents of University of California v. City of Los Angeles* (1983) 148 Cal.App.3d 451, 454 (*Regents II*).)

Moreover, the real unfairness arises when a locality attempts to shift the burden of paying for strictly local benefits to statewide taxpayers. Only the Legislature is authorized to sanction such a shift. (Cal. Const., art. XIII, § 24; *San Marcos*, *supra*, 42 Cal.3d at p. 165 ["Rather than allowing these essentially local special districts to determine that public entities should contribute to their capital improvements, however, we believe that the Legislature should evaluate statewide needs and allocate funds accordingly"].)

But, in any event, *both* the University and the localities are funded by taxes. Thus, the local taxpayers will pay for the cost of mitigation regardless through which entity's budget the money flows. This case is really about the competition for public funds between tax-supported entities. "'The municipal government is but an agent of the state, not an independent body.'" (*In re Means* (1939) 14 Cal.2d 254, 259.) The localities' demand that state universities pay for infrastructure improvements "'would be merely taking money out of one pocket and putting it into another'" – a result that sovereign immunity was meant to prevent. (*Eisley v. Mohan, supra*, 31 Cal.2d at p. 642.)

It would also be unfair to local citizens if money allocated by the Legislature to pay for *education* and educational facilities in their communities is siphoned (without legislative authorization) to pay for infrastructure improvements, as pointed out so well by Amicus Curiae Coalition for Adequate School Housing. (CASH 9-14.) In exempting school property from taxation "'the framers of the Constitution . . . had in mind the great benefits derived from our educational institutions and desired to relieve them from the burden of taxation. The history of this state shows that it has been the steadfast policy of the people of the state to encourage in every possible way the cause of education.'" (*Connolly v. County of Orange*, *supra*, 1 Cal.4th at pp. 1123-1124.) If a state university were assessed without legislative authorization, there would "inevitably be a loss of funds available" for its educational mission and "a resulting diminution of . . . services." (*County of Santa Barbara v. City of Santa Barbara, supra,* 59 Cal.App.3d at p. 369.) As the Court of Appeal stated below:

> FORA and the City of Marina, in bringing this writ action, attempt to have the court reorder the budgetary authority that the Legislature has enacted. They seek to have the appropriations to the University devoted to building off-campus roads and fire stations rather than to the purposes for which the Legislature

> understood the money was to go under established precedent that such money was not subject to assessments for off-campus capital improvements.

(Typed opn., 21.)

Second, the City of Davis argues that local governments cannot raise sufficient funds to build infrastructure improvements because they are statutorily prohibited from passing mitigation costs on to private developers. (City of Davis 11.) However, local governments have a variety of means by which they can raise revenue, including (among other things) the numerous mechanisms for imposing special assessments on state property provided by the Legislature and Proposition 218. (ABOM 27-29, 40.) The League complains that the price for a locality to comply with "all of the procedures to impose an assessment" is "prohibitive." (League 24.) But the cost associated with complying with the procedural requirements are part of the Legislature's plan for accountability. FORA's and Amici's effort to exact funds under threat of CEQA circumvents any accountability, a result the Legislature never intended.

Third, the City of Davis also argues that the Court of Appeal's opinion would have the effect of undermining the City's previous mitigation agreement with the University of California at Davis (UCD). (City of Davis 8-9.) However, existing sovereign immunity law has not been changed by this opinion – all public entities have been immune from special assessment for over 100 years. (Typed opn., 20 ["The decision of the Supreme Court in *San Marcos* . . . did not create but merely upheld a long history under which it has been held that fee assessment for off-site capital improvements against a public school violates the Constitution"].) Under established law, UCD's funds can only be used in a manner expressly authorized by the Legislature. This case merely confirms the fact CEQA does not provide such authorization.

Fourth, Amici Curiae argue the Court of Appeal's opinion "has the effect of mandating that local governments and their taxpayers subsidize *all* public projects." (Raptor Rescue 3, emphasis added; see also City of Davis 20 [opinion would "affect any project that would have environmental impacts on territory outside of the constructing agency's immediate jurisdiction"]; League 6 [CSU's argument would apply "to all projects approved by all public agencies"].) This projection is too grand. The scope of the Court of Appeal's holding is limited: it applies only where a locality, acting without legislative authority, seeks to assess a public entity that is constitutionally exempt from paying special assessments. Whether this holding would apply to a particular public entity or project would, of course, depend on the unique facts and sovereign immunity law applicable to that public entity.

Fifth, the City of Davis argues that the Court of Appeal opinion would adversely affect the relationship between cites and universities, and would lead to less cooperation and more litigation. (City of Davis 17, 19-20 ["the City will have little incentive to continue its efforts to be a good neighbor to the campus"]; see also League 11, 13 ["relations of public agencies will take on the Hobbesian 'condition of war of everyone against everyone'"].) The universities in the California State University system have always maintained cooperative relationships with local governments. The Court of Appeal's opinion will facilitate their cooperative efforts by clarifying the constitutional parameters under which the universities must operate. Such clarification would lead to less litigation, not more.

Sixth, the Amici Curiae argue that the Court of Appeal's opinion may encourage poor regional planning because it gives universities incentive to place new projects in locations that would shift environmental impacts offsite. (Raptor Rescue 11; West Davis Neighbors 5; City of Davis 12.) However, CEQA provides procedural mechanisms for localities to oppose such projects,

or to propose alternatives to them. If a project *could* be re-designed to keep all environmental impacts on-campus and under the university's control, an infeasibility finding would be improper and the project could be successfully challenged under CEQA.[5/] (Pub. Resources Code, § 21002.)

Seventh, the League contends the University should be required to mitigate its impacts since private developers are routinely required to mitigate theirs. (League 4, 7-8.) However, there is a fundamental difference between a private developer and a state entity constitutionally prohibited from making gifts of public funds. This distinction was noted by the court in *Loyola Marymount University v. Los Angeles Unified School Dist.*, *supra*, 45 Cal.App.4th at pp. 1268-1269, which observed that a development fee imposed on a private property owner who elects to develop does *not* apply to public entity developers who are constitutionally immune from paying special assessments.

Eighth, the League states the Trustees are not "elected and accountable" and do not "ha[ve] to live with the local effects of [their] decisions." (League 6, fn. 5.) Although the League's legal argument is unclear, we point out that the selection of Trustees is in the hands of two elected bodies: the Governor (by whom the Trustees are appointed), and the Senate (by whom the Trustees must be confirmed by a two-thirds majority). (Ed. Code, § 66602, subd. (a).) The public policy reason the Trustees are not subject to direct election is to ensure that they are "entirely independent of all political and sectarian

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5/ West Davis Neighbors' concern that public entities might use the mitigation money they save to design bigger projects with greater environmental impacts can also be resolved through CEQA's review mechanisms. (West Davis Neighbors 5-6.) Of course, it is just as likely that the public entity will use the funds allotted to further its public purpose. There is little likelihood these days that a public entity will have disposable cash to overbuild.

influence." (Ed. Code, § 66607.) No doubt this is the reason CEQA does not require a certifying agency to be directly elected.

Finally, Raptor Rescue argues that under the Court of Appeal's opinion, off-site impacts to endangered species might remain unmitigated because universities could not make payments into existing habitat conservation programs. (Raptor Rescue 9.) However, habitat conservation programs would not be affected by this opinion since they have nothing to do with special assessments by local governments to pay for infrastructure improvements.

E. The Trustees' infeasibility findings complied with CEQA's "mitigation" requirements.

1. An agency may approve a project where it determines mitigation of environmental impacts is infeasible and the project is justified by overriding considerations.

We explained in the Answer Brief on the Merits that CEQA permits the Trustees to approve the Master Plan even though it was infeasible to mitigate certain environmental impacts caused by the project.[6/] (ABOM 44-45.)

Courts have held that although "CEQA imposes a duty on public agencies to avoid or mitigate the significant environmental impacts caused by

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6/ "Under CEQA, an EIR is presumed adequate . . . and the plaintiff in a CEQA action has the burden of proving otherwise." (*Barthelemy v. Chino Basin Mun. Water Dist.* (1995) 38 Cal.App.4th 1609, 1617, internal quotation marks omitted.) Thus, a trial court's inquiry in an action to set aside an agency's decision under CEQA "shall extend only to whether there was a prejudicial abuse of discretion. Abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence." (Pub. Resources Code, § 21168.5.)

projects *when feasible to do so* . . . CEQA also gives public agencies the authority to approve a project notwithstanding its environmental impacts, if the agency determines it is not feasible to lessen or avoid the significant effects." (*Kenneth Mebane Ranches v. Superior Court* (1992) 10 Cal.App.4th 276, 291, original emphasis.) The agency must simply "explain, in written findings, that mitigation measures or environmentally sounder alternatives were not feasible, and that overriding considerations justify the project's approval." (*Towards Responsibility in Planning v. City Council* (1988) 200 Cal.App.3d 671, 683, citing Pub. Resources Code, § 21081; Cal. Code Regs., tit. 14, §§ 15091, 15093.)

In these written findings, an agency may conclude, based on substantial evidence, "[i] that the mitigation measures are 'required in, or incorporated into, the project'; or [ii] that the measures are the responsibility of another agency and have been, or can and should be, adopted by the other agency; or [iii] that mitigation is infeasible and overriding considerations outweigh the significant environmental effects." (*Federation of Hillside & Canyon Associations v. City of Los Angeles* (2000) 83 Cal.App.4th 1252, 1260, citing Pub. Resources Code, § 21081 and Cal. Code Regs., tit. 14, § 15091, subd. (b); AOB 33.)

The Trustees' written findings with respect to the project's impacts on traffic, fire protection, water, and sewage meet these requirements, as we next discuss.

2. The Trustees' first finding – that impacts on traffic, fire protection, water, and sewage could be mitigated *only* if FORA implemented the off-campus improvements identified in the Base Reuse Plan – is supported by substantial evidence.

The Trustees identified significant impacts affecting off-campus traffic, fire protection, water, and sewage that they found could be mitigated *only* if FORA implemented the off-campus improvements identified in the Base Reuse Plan. (See AR 1001, 1005, 1010-1011.) This finding is evidenced by the absence in the record of any other possible mitigation measures with respect to these impacts.

The Amici Curiae do not contest this point.

3. The Trustees' second finding – that off-campus infrastructure improvements are FORA's exclusive responsibility and could and should be adopted by FORA – is supported by both substantial evidence and the law.

Findings are adequate under CEQA if the agency concludes, based on substantial evidence, that the mitigation measures "are *within the responsibility and jurisdiction of another public agency* and have been, or *can and should be, adopted by that other agency*." (Pub. Resources Code, § 21081, subd. (a)(2), emphasis added; see also Cal. Code Regs., tit. 14 § 15091, subd. (a)(2); *Federation of Hillside & Canyon Associations v. City of Los Angeles, supra,* 83 Cal.App.4th at p. 1260.) The purpose of a "can and should" finding is to ensure that the appropriate agency implements the identified mitigation.

The Trustees' finding that off-campus infrastructure improvements "are within FORA's exclusive responsibility" is supported by provisions in the FORA Act which give FORA *exclusive* authority to plan and construct off-campus local infrastructure improvements. (Gov. Code, §§ 67655, subd. (i), 67679, subd. (a)(1) & (3); see also AR 3221-3223, 3301.) And the Trustees' finding that FORA "could and should" implement these improvements is supported by provisions in the FORA Act which give FORA authority to seek funding for the improvements from sources such as special taxes, bonds, federal funding, and assessments. (Gov. Code, §§ 67655, subd. (i), 67679, subds. (a)(1) &(3), (d), 67683; see also AR 3221-3223, 3301; AOB 34.)

The Amici Curiae do not contest these points.

4. The Trustees' third finding – that CSU could not assure that the off-campus infrastructure improvements would actually be implemented – is supported by both substantial evidence and the law.

Findings are also adequate under CEQA if the agency concludes, based on substantial evidence, "that mitigation is *infeasible* and overriding considerations outweigh the significant environmental effects." (*Federation of Hillside & Canyon Associations v. City of Los Angeles*, *supra*, 83 Cal.App.4th at p. 1260, emphasis added, citing Pub. Resources Code, § 21081.) An "infeasibility" finding must be based on "[s]pecific *economic*, *legal*, social, technological, or other considerations." (Pub. Resources Code, § 21081, subd. (a)(3), emphasis added; see also OBOM 47 [conceding "feasible" includes "legal" factors].)

The Trustees' infeasibility findings took into account both economic and legal uncertainty about whether funding – and therefore eventual

construction – of the off-campus improvements would ever be achieved. The Trustees noted in their findings that FORA was "capable" of implementing infrastructure improvements because it has "regular access to tax revenues and appropriations" from sources identified in the FORA Act. (AR 1013-1014.) Nevertheless, the Trustees concluded they could not assure that implementation would ever be accomplished because of the "current [legal] dispute" over whether the University could financially contribute to the cost of the improvements and whether FORA would follow through with construction. (AR 1010-1011; see also AR 1001, 1005, 1013-1014; 2170-2171, 2429-2462.)

The League argues that the University could assure implementation of the infrastructure improvements by contributing to FORA's infrastructure improvement plan. (League 7-9 ["all an agency needs for mitigation of extraterritorial impacts to be feasible is a willing partner"].)

However, the University is *constitutionally prohibited* from voluntarily paying FORA's $20 million fee because (i) it is an unauthorized special assessment; (ii) it is unrelated and disproportionate to impacts caused by the University; and (iii) payment would be a gift of public funds.

The League argues, without citation to authority, that it was the Trustees' obligation as the lead agency to determine the appropriate proportional amount of its contribution to the FORA infrastructure program, not FORA. (League 10, 19.) CEQA only requires that the Trustees determine whether mitigation is feasible, and the Trustees did so. It would be impossible for the University to determine its proportionate share since such a determination is dependant on FORA's plans. But, in any event, under *San Marcos,* the University is constitutionally prohibited from paying even a proportionate share.

The League also argues that the University could have adopted other mitigation agreements being used by other agencies in the state. (League 11-12.) However, each of the agreements identified by the League involves financial contributions for local infrastructure improvements which, as discussed, the University would be constitutionally prohibited from paying.

Moreover, the League's solutions fail to take into account that merely throwing money at a significant impact is infeasible mitigation where there is uncertainty that the funds demanded will ultimately be used for actual implementation of mitigation measures. (See, e.g., *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 727-728; *San Franciscans for Reasonable Growth v. City and County of San Francisco* (1984) 151 Cal.App.3d 61, 79.) Here, it is undisputed that FORA has taken no concrete steps to ensure the infrastructure improvements will ever be designed, funded, or built. (AOB 41-42.) Thus, even if the University *could* voluntarily pay the full assessment fees, the Trustees would be required under CEQA to make the same "infeasibility" findings because they could not identify how "feasible mitigation measures will *actually be implemented . . .* " (*Federation of Hillside & Canyon Associations v. City of Los Angeles, supra,* 83 Cal.App.4th at p. 1261, partial original emphasis, citing Pub. Resources Code, § 21002.1, subd. (b)); and because they could not explain how payment of the special assessment fees would translate into mitigation "capable of being accomplished . . . within a reasonable period of time" (Cal. Code Regs., tit. 14, § 15364).

F. The Trustees' statement of overriding considerations meets the requirements of CEQA.

Where a project's benefits outweigh its impacts, a certifying agency can

approve the EIR, despite the inability to fully mitigate those impacts, by adopting a statement of overriding considerations. (*Concerned Citizens of South Central L.A. v. Los Angeles Unified School Dist.* (1994) 24 Cal.App.4th 826, 846.) A statement of overriding considerations may be based "on the larger, more general reasons for approving the project, such as the need to create new jobs, provide housing, generate taxes, and the like" (*id*. at p. 847) and "is intended to demonstrate the balance struck by the body in weighing the 'benefits of the proposed project against its unavoidable environmental risks'" (*Sierra Club v. Contra Costa County* (1992) 10 Cal.App.4th 1212, 1222, quoting Cal. Code Regs., tit. 14, § 15093, subds. (a) & (c)). "Thus, so long as it has made an informed decision in adopting a statement of overriding considerations, an agency need not require mitigation." (*Concerned Citizens of South Central*, at p. 846.)

Here the Trustees identified and balanced the unavoidable adverse impacts and the numerous benefits of the proposed project, and concluded "that the economic, educational, social, and other considerations of the CSUMB Physical Master Plan outweigh the unavoidable environmental impacts . . . ." (AR 1015.)

The benefits the surrounding communities will receive from the presence of a major university are multifold: localities will enjoy new employment opportunities; economic revitalization resulting from consumer spending by student body and faculty members; new cultural and entertainment events, such as plays, sporting events, lectures, and night classes; and parks, open spaces and green belts maintained by the university for public use. These benefits are amply supported by the record. (AR 9800, 982, 1016, 1459, 1473, 1483, 1521-1522, 1723, 1728, 1747, 2149, 2484, 2817, 2734, 2817.)

The City of Davis argues that the benefits are not one-sided; the localities provide benefits to the students and faculty of the University,

including a "safe and stable community with a plethora of public amenities and services." (City of Davis 18-19.) The City of Davis believes contributing funds to mitigate off-campus impacts would be but a small trade-off for these benefits. (*Ibid.*) The University does receive benefits from the localities. However, CEQA's cost/benefits analysis only requires the certifying agency to weigh a project's unavoidable impacts against the benefits the project *provides*, not against the benefits a project proponent *receives*. (*Sierra Club v. Contra Costa County*, *supra*, 10 Cal.App.4th at p. 1222; Cal. Code Regs., tit. 14, § 15093, subds. (a) & (c).) Neither the City of Davis nor the other Amici contest that the Trustees' statement of overriding considerations complied with CEQA's requirements and were supported by substantial evidence.

And finally, Raptor Rescue argues that the rule enunciated by the Court of Appeal exempting a state entity from paying special assessment fees would "apply to a project constructed by any public agency, whether or not that project provided prestige, cultural or other benefits to the local community." (Raptor Rescue 8.) However, under CEQA, if the project's benefits did not outweigh the unavoidable negative impacts (like Raptor Rescue's hypothetical project), then a statement of override would be inappropriate and the project could not be approved. Thus, there is already law in place responsive to Raptor Rescue's concerns.

CONCLUSION

The Trustees proceeded in a manner required by law by providing sufficient information (supported by substantial evidence) with which the public may evaluate their ultimate decision to certify the EIR and approve the Master Plan despite unavoidable environmental impacts. Accordingly, this

court – reviewing the administrative record de novo – should affirm the Trustees' certification of the EIR and approval of the Master Plan.