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September 6, 2012

The Honorable Tani Gorre Cantil-Sakauye, Chief Justice
and Honorable Associate Justices of the
Supreme Court of California
350 McAllister St.
San Francisco, CA 94102-4797

Re: *City of Hayward v. Board of Trustees of the California State University*; Hayward Planning Association et al., Case No. S203939

The Chief Justice and the Associate Justices:

I am writing on behalf of the League of California Cities (the "League") pursuant to California Rule of Court 8.500(g), to support the City of Hayward's petition for review. The League is an association of 469 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and general welfare of their residents and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys from all regions of the state. The Committee monitors litigation of concern to municipalities and identifies those cases that are of statewide or nationwide significance. The Committee has identified this case as being of such significance.

This case is of significance to California cities since, if not reviewed by this Honorable Court, the Court of Appeal opinion could decimate cities' budgets whenever a state entity or agency proposes a new project or the expansion of an existing state facility without mitigating the adverse impacts on the host city.

The League is also concerned that the Appellate Court decision erodes and confuses the law in this area. The holding of this Appellate Court is contrary to the holding in *City of San Diego v. Board of Trustees* (2011) 201 Cal. App. 4th 1134, review of which has been granted by this Honorable Court on April 18, 2012 (S199557).

Most importantly, the Appellate Court misconstrues the State Constitution as it pertains to local cities' obligations to provide fire and emergency services and places an impossible burden on local governments to mitigate the impacts of state projects. The Appellate Court also discounts or ignores the physical impacts of a foreseeable reduction in service levels of fire and emergency services on both property and people in the City and the cumulative impact on the residents of the City and surrounding cities.

Issues Presented

Is a state agency required under CEQA to mitigate for an adverse impact on a city and its residents caused by its project?

Is a state agency permitted to assume that a city will maintain existing levels of service, using the city's own funds, to mitigate an adverse impact caused by a state agency?

Can a state agency comply with CEQA and *City of Marina v. Board of Trustees of California State University* (2006) 39 Cal.4th 341 by merely requesting funding for a specific mitigation measure from the Legislature and at the same time, and without looking at any alternative mitigation measures, assume that the Legislature will not fund and then override the adverse impact?

Is the impact on people and property from a significant decrease in fire and emergency services and a resultant significant increase in the likelihood of serious bodily harm or damage to property directly caused by a project an impact that requires analysis under CEQA or is it merely an economic impact that can be disregarded?

These issues are of importance to California cities that host state agencies. There are literally hundreds of occasions when such agencies propose projects that will operate in ways that will have a significant impact on cities and their residents. For the most part, cities and local agencies are able to work together to provide funding mechanisms to mitigate these impacts.

However, when a state agency proposes a project over which the city has no legislative, planning, or supervisory control, it must look to CEQA to make sure those adverse impacts are mitigated.

Here, the Court of Appeal's opinion completely misses the mark. In substance, it holds that a state agency is not required to fund or mitigate its impacts on local fire and emergency services. The Court of Appeal cites California Constitution Article XIII, section 35, subdivision (a)(2) as requiring protection of the public safety as the first responsibility of a local government. This provision was added to the Constitution to articulate a reason for the allocation of a portion of the sales taxes and did not create a standard or provide for the ways and means of delivering local fire protection. The League understands and supports cities providing the best level of fire protection within their means, but the provision of fire and emergency services is not without limitation.

In instances where a city provides primary protection of the public safety to its citizens, it has control over the reasonable conditions that must first occur before that service obligation arises. (2010 Edition of the California Fire Code, § 502.2.2) For example, a local fire chief acting under authority granted to him or her by the local legislative body can determine the many conditions that must be implemented by the local project in order to qualify for emergency services.

Fire chiefs daily determine such reasonable conditions to emergency services such as the width of access roads, restrictions on parking, location and length of turnarounds, location of fire houses and other decisions to keep and maintain the level of service the community is accustomed to (2010 Edition of the California Fire Code, section 502.2.2). That is to say, that local government has the power and ability to condition local projects so that they comply with its reasonable requirements and fund those improvements that are necessary for that level of service. The law expressly so provides (Health & Safety Code § 17922). Further, a city may, and typically does, impose mitigation measures so that new development provides the physical requirements for the added fire service needed to maintain levels of service for the new development; and the new development pays through property taxes or additional special taxes the on-going costof providing fire service.

In this case, the Appellate Court concluded that since the Trustees agreed to comply with the Fire Code, the Trustees had no further mitigation obligation. However, this myopic view ignores the stark reality of the fact

that service levels will deteriorate and new facilities and personnel will be required but not funded. The Court of Appeal recognizes but dismisses this and concludes that fire and emergency level of service is not an environmental impact that CEQA requires a project proponent to mitigate (Slip opinion at page 5).

The Court of Appeal reaches this decision by narrowly reading CEQA Guideline 15382, concluding that the provision of fire service is only a social or physical change "by itself," and assuming that the construction of a new fire house in an urban undisclosed location will not have any significant adverse impacts. However, this rather narrow view is neither supported by the record nor in keeping with a court's duty to look at the entire action which will result in a reduction of the level of service to both the university and to the citizens of Hayward. The reduction in that level of service will have a foreseeable adverse physical environmental impact. In this regard, the trial court got it right when quoted by the Appellate Court as follows:

> The project will cause fire protection services, measured from the existing base line, to change from adequate to inadequate. That condition of inadequate fire protection services causes an adverse effect on the property and people, i.e., both people and property will not be safe in the event of a fire. It follows directly that the lack of adequate fire protection must be regarded as a significant effect…such a significant effect must be mitigated, if feasible. (Slip opinion at page 4).

Although it is a painful memory, one only needs to ask the citizens of Oakland, as victims and witnesses to the Oakland hills fire, whether or not a reduction in service levels has impacts.[1]

Next, the Court of Appeal determined that the Trustees were not obligated to pay their fair share for the costs of mitigating the physical impacts that will lead to the reduction in levels of fire and emergency response based on its interpretation of the *Goleta* case (*Goleta School Union District v. Regents of the University of California* (1995) 37 Cal. App. 4th 1025) and the *City of Marina* case (*City of Marina v. Board of Trustees of California State University* (2006) 39 Cal. App. 4th 341). In the *Goleta* case, the UC Regents actually offered to contribute a fair share of its costs of mitigating its impacts on local schools and set forth a number of means to relieve the effect of increased student enrollment and classroom overcrowding. *Goleta School Union District* at 1029. The *Goleta* court concluded that the projected student enrollment increases were not by themselves significant environmental impacts (*Id*. at 1033) but, regardless, the EIR was adequate because it provided a range of possible mitigation measures and committed the UC Regents to provide its fair share cost of mitigation. *Id*. at 1034. While school overcrowding is important, it is not akin to a consequence of reduced fire and emergency services. The Court of Appeal in the instant case further distinguished the *Goleta* case by concluding that a large increase in student population would necessitate the construction of new classrooms; while in this case, the reduction of service levels would not cause an environmental impact, even though the service reduction would necessitate the construction of new facilities.

When is the point reached when a social or economic change leading to a physical change must be mitigated? According to the Appellate Court in this case, that point has not been reached, but the court offers no guidance to cities as to when that will occur. If 11 additional firefighters, a new command unit, a new fire station or expanded fire station and new equipment is not enough to reach that point, what is?

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[1] The CSU Hayward project at issue in this case is immediately adjacent to wildlands that adjoin the Oakland Hills fire areas.

Next, the Court of Appeal concludes that the Trustees' obligation under the *City of Marina* case was simply to ask the Legislature for funding and if, as is likely, no funding is provided then a statement of overriding considerations is appropriate. First, that is an inadequate remedy for cities and ignores the fact that in the *Marina* case, the Trustees had volunteered to pay a fair share but believed they were precluded by law. So the Appellate Court dismisses that case as providing no authority for payment of mitigation. The problem with that approach is that the case is not authority for issues not decided. In this case, had the CSU Trustees offered to voluntarily pay their fair share, this case would be in a very different posture. Instead, we have the opposite situation where the Trustees have not volunteered to make any payments and the court has concluded that there are no adverse environmental impacts from the reduction of service levels. This issue needs to be clarified and will likely be clarified in the *City of San Diego* case now pending before this Court (Case No. S199557) and the City of Carlsbad cases if accepted for review (Case No's S203634 and S204970).

It is also somewhat remarkable to note that the Appellate Court determined CSU's EIR was insufficient when it came to an analysis of neighboring parklands but concluded the EIR was sufficient in the discussion of emergency services. In the parklands discussion, the Appellate Court concludes that the Trustees did not do enough to analyze the potential impacts on park usage resulting from the expansion of its campus while concluding that the Trustees' analysis of acknowledged deterioration in emergency service levels was legally sufficient. It is respectfully submitted that one service is just as much a "financial or economic" impact as the other.

Finally, the Court of Appeal confuses the role of the Trustees and the role of the City as a planning agency. The City determined that it could accommodate growth in the city under its general plan. The Trustees extended that finding by concluding that the expansion of the university would also fall within the City's findings. However, the City possesses the power to require mitigation for local projects within its jurisdiction and can plan for the future in this regard. However, it cannot require compliance with conditions, impose fees, or otherwise require mitigation for the University's proposed expansion since it is a state entity and beyond the City's planning, zoning or building standards and cannot impose conditions or fees to maintain a prudent level of service, unless this Court reviews the Appellate Court's conclusion. Under this decision, cities will be required to reduce levels of service for emergency and fire protection services for both the state agency and its citizens.

It would be substantially unfair and prejudicial to the City of Hayward to allow the Appellate Court decision to become final while at the same time deciding the *City of San Diego* case differently, as it presents substantially similar issues.

For all of the forgoing reasons, the League respectfully requests that this Honorable Court accept the petition by the City of Hayward for review.

Very truly yours,

/s/
RONALD R. BALL
City Attorney, City of Carlsbad

PROOF OF SERVICE

At the time of service I was over 18 years of age and not a party to this action. My business address is City of Carlsbad, 1200 Carlsbad Village Drive, Carlsbad, CA 92008. On September 7, 2012, I served the following document(s):

Amicus Letter Brief

I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses listed below. I placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that 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 am a resident or employed in the county where the mailing occurred. The envelope or package was placed in the mail at Carlsbad, California, addressed as follows:

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

Executed on September 7, 2012, at Carlsbad, California.

/s/

Flora R. Waite