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S279242

Supreme Court Case No. S_____

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

MAKE UC A GOOD NEIGHBOR ET AL.

Petitioners and Appellants,

v.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA ET AL.

Respondents.

RESOURCES FOR COMMUNITY DEVELOPMENT

Real Party in Interest.

PETITION FOR REVIEW

After a published opinion of the Court of Appeal
First Appellate District, Division Five,
Case No. A165451

Appeal from July 29, 2022, Order and August 2, 2022 Order and Judgment of the Alameda Superior Court; Hon. Frank Roesch, Dept. 17, Case No. RG21110142 (Consolidated for Purposes of Trial Only with Case Nos. RG21109910, RG21110157, 21CV000995 and 21CV001919)

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TABLE OF CONTENTS

PAGE

PETITION FOR REVIEW 8

ISSUES PRESENTED 8

INTRODUCTION 9

WHY REVIEW SHOULD BE GRANTED 12

FACTUAL AND PROCEDURAL STATEMENT 16

A. The Regents certify the EIR and approve the LRDP to guide campus development and increase student housing. 16

B. The Superior Court upholds the EIR and the Regents' approvals. 19

C. The Court of Appeal reverses the Judgment, holding the EIR inadequately analyzed impacts from noise from off-campus student parties, and inadequately analyzed potential alternative locations for the People's Park Project. 19

LEGAL DISCUSSION 22

I. REVIEW IS NECESSARY TO CLARIFY THAT SOCIAL ISSUES, LIKE STUDENT PARTY NOISE, ARE NOT ENVIRONMENTAL ISSUES UNDER CEQA 22

A. The law provides that "social changes resulting from a project shall not be treated as significant effects on the environment," but the Opinion paves the way for treating changes to the social status quo as environmental impacts. 22

B. The Opinion creates new law by requiring agencies to first discern, and then analyze, how a specific type of project users will behave when they leave the project site, reinforcing stereotypes and strengthening CEQA as a tool of delay and oppression. 26

C. The Opinion creates a conflict with both CEQA's stated intent of "providing a decent home for every Californian" and the Housing Accountability Act. 30

II. REVIEW IS NECESSARY TO AVOID A CONFLICT WITH *GOLETA I* AND TO AVOID JUDICIAL INTERFERENCE WITH A LEAD AGENCY'S FACTUAL FINDING THAT ALTERNATIVE SITES ARE INFEASIBLE 33

A. The LRDP programmatically identified and analyzed suitable alternative sites for development of student housing. 33

B. The University's decision not to analyze alternatives to the People's Park site in detail is entitled to deference. 35

CONCLUSION 38

CERTIFICATE OF COMPLIANCE 40

TABLE OF AUTHORITIES

Page

Cases

Arcadians for Environmental Preservation v. City of Arcadia (Feb. 16, 2023, No. B320586) ___Cal.App.5th___ [2023 Cal.App. LEXIS 103] 30

Baird v. County of Contra Costa (1995) 32 Cal.App.4th 1464 24

California Native Plant Society v. City of Santa Cruz (2009) 177 Cal.App.4th 957 36

California Renters Legal Advocacy v. City of San Mateo (2021) 68 Cal.App.5th 820 ..... 15, 31

Center for Biological Diversity v. Dept. of Fish & Wildlife (2015) 62 Cal.4th 204 ..... 14, 28, 29, 38

Goleta Valley v. Board of Supervisors (1990) 52 Cal.3d 553 ..... passim

Jenkins v. Brandt-Hawley (2022) 86 Cal.App.5th 1357 29

Laurel Heights Improvement Association v. Regents of the University of California (1988) 47 Cal.3d 376 38

McAllister v. California Coastal Com. (2008) 169 Cal.App.4th 912 36

Mira Mar Mobile Community v. City of Oceanside (2004) 119 Cal.App.4th 477 36

Pacific Palisades Residents Assn., Inc. v. City of Los Angeles (March 8, 2023, No. B306658) __ Cal.App.5th __ [2023 Cal.App. LEXIS 170] 30

Preserve Poway v. City of Poway (2016) 245 Cal.App.4th 560 23

Ruegg & Ellsworth v. City of Berkeley (2021) 63 Cal.App.5th 277 ..... 15, 31

Saltonstall v. City of Sacramento
(2015) 234 Cal.App.4th 549 ..... 23, 24, 36

Save Livermore Downtown v. City of Livermore
(2022) 87 Cal.App.5th 1116 ..... 15, 29

Save Our Residential Environment v. City of West Hollywood
(1992) 9 Cal.App.4th 1745 36

Tiburon Open Space Committee v. County of Marin
(2022) 78 Cal.App.5th 700 29

Federal Cases

Seacoast Anti-Pollution v. Nuclear Regulatory Com'n
(1st Cir. 1979) 598 F.2d 1221 24

Statutes

Education Code, § 66202.5 26

Government Code, § 65589.5 31

Government Code, § 65589.5, subd. (a)(1)(A) 15, 32

Government Code, § 65589.5, subd. (a)(2)(A) 15, 32

Government Code, § 65589.5, subd. I 32

Public Resources Code, § 21000, subd. (g) 31

Public Resources Code, § 21001, subd. (d) 31

Public Resources Code, § 21001, subd. (f) 31

Public Resources Code, § 21001, subd. (g) 31

Public Resources Code, § 21002 26

Public Resources Code, § 21060.5 22

Public Resources Code, § 21068 22

Public Resources Code, § 21080, subd. (e) 23

Public Resources Code, § 21100 22

Public Resources Code, § 21151 22

Rules

California Rules of Court, rule 8.500, subd. (b)(1)..... 12

Regulations

CEQA Guidelines, § 15002, subd. (a) 31
CEQA Guidelines, § 15064 22
CEQA Guidelines, § 15064, subd. (f)(6) 23
CEQA Guidelines, § 15131 10
CEQA Guidelines, § 15382 22
CEQA Guidelines, Appx. G, XIII (a) 28

PETITION FOR REVIEW

TO THE HONORABLE CHIEF JUSTICE OF THE CALIFORNIA SUPREME COURT, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA:

Defendants and Respondents The Regents of the University of California et al. ("Regents"), respectfully petition for review of the published opinion of the Court of Appeal, First District, Division Five, in *Make UC A Good Neighbor et al. v. Regents of University of California et al.* (February 24, 2023, A165451, as modified March 16, 2023 with no change in judgment) (hereafter "Opinion" or "Slip Op."), a copy of which is attached as **Exhibit A**, with modifications attached as **Exhibit B**. The Regents present the following issues for consideration by this Court.

ISSUES PRESENTED

(1) Does the California Environmental Quality Act ("CEQA") require public agencies to treat the general behavioral noise generated by people of a specific social identity that a project will bring to a community as an environmental impact, or is such human behavioral noise a "social effect" that shall not be treated as a significant effect on the environment?

(2) Under CEQA, when a lead agency has identified potential sites for future development and redevelopment in a programmatic planning document, is the agency required to revisit alternative locations for a proposed site-specific project within the program, or would such a requirement infringe upon the lead agency's discretion to prioritize and propose sites in the manner that best serves the agency's goals?

INTRODUCTION

This case arises from (i) the Regents of the University of California's adoption of a Long Range Development Plan ("LRDP") to guide physical development and land use plans at the University of California, Berkeley (the "University"), including its student housing program, through the 2036/37 academic year, and (ii) the Regents' approval of the "People's Park Project." The People's Park Project is a project to redevelop People's Park, a University-owned property in the City of Berkeley, and to provide student and supportive housing, as well as new public open space, at the site.[1]

The University analyzed the LRDP and the People's Park Project together in a single EIR. Following certification of the EIR and approval of the LRDP and the People's Park Project, Appellants Make UC A Good Neighbor and The People's Park Historic District Advocacy Group ("Appellants") and others challenged the Regents' approvals on numerous CEQA grounds, all of which the trial court rejected. (Joint Appendix ["JA"] 313-329.) On appeal, however, the First District Court of Appeal took the unprecedented step of finding that the University abused its discretion by failing to treat "loud student parties" as a significant *environmental* effect of the LRDP and the People's Park Project. (Slip Op., at p. 31.) The Court of Appeal reasoned that CEQA considers "noise" as part of the "environment" and that the record includes evidence of loud noise

[1] Due to its association with protests and community action in the late 1960s and early 1970s, People's Park is designated as an historic resource. Currently, it is an unfenced inactive construction site, formally closed to the public, upon which a homeless encampment has been established.

associated with undergraduate student parties. (*Id.*, pp. 30-36.) The Court of Appeal also faulted the University for not adequately considering alternative locations, other than People's Park, for the People's Park Project. (*Id.*, at pp. 17-27.)

Both the Regents and Real Party in Interest Resources for Community Development ("RCD")[2] raised serious concerns that the Opinion's ruling finding noisy undergraduate parties to be an environmental impact would make new law under CEQA and strengthen the ability of NIMBY (Not-In-My-Backyard) neighbors to wield prejudice and stereotypes as a means to fend off essential housing. (Slip Op., at pp. 34-35.) The Opinion brushes these concerns off as a "straw man argument." (*Id.*, at p. 35.) The Opinion purports to agree that "stereotypes, prejudice, and biased assumptions about people served by a CEQA project——such as a church, school, gym, or housing project—are not substantial evidence that can support a CEQA claim under the fair argument standard." (*Id.*, at p. 34.) It also notes in passing that "CEQA applies to environmental, not social impacts." (*Id.*, at p. 34, citing Guidelines, § 15131.) But in the same breath, the Opinion finds evidence that loud student parties are a "problem" is "proper evidence" to support a finding that the EIR should have analyzed what opponents called "social noise" from "increasing student housing and population in affected neighborhoods" and "increased attendance at off-campus parties by increasing numbers of students housed on- and off-

[2] RCD is a community-based nonprofit corporation that will develop and operate the supportive housing element of the People's Park Project. (Administrative Record ["AR"] 1208.)

campus" as an *environmental* impact. (*Id*., p. 35, emphasis added; see Appellants' Opening Brief ["AOB"], p. 45.)

Thus, despite the Opinion's lip service to a limit on the role "stereotypes, prejudice, and bias" can play in the CEQA process, the Opinion expressly allows, as "proper evidence" of environmental impact, evidence that undergraduate university students are known, as a class of people, to make "loud and unruly" noise. (Slip Op., at p. 35.) Under the Opinion, such evidence may now support a fair argument that any increase in the undergraduate student population could result in an *environmental* impact, requiring analysis in an EIR and consideration of mitigation and alternatives to reduce such impacts. The ramifications of this Opinion extend far beyond students and student housing; the Opinion creates an entirely new weapon for project opponents to thwart desperately needed housing throughout the State by requiring agencies to identify significant environmental impacts based on stereotypes and prejudicial assumptions.

The Opinion also improperly substitutes the Court of Appeal's judgment for that of the lead agency, faulting the Regents for not considering potentially feasible alternative sites for the People's Park Project. In reaching this conclusion, the Opinion also creates a conflict with this Court's holding in *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 576 ("*Goleta I*") by ignoring the context of the People's Park Project within the LRDP planning process. From its inception, this project was intended and designed to remake People's Park, specifically, to memorialize its history, maintain a majority of the site as community open space, and strategically integrate student housing with housing for the formerly homeless.

WHY REVIEW SHOULD BE GRANTED

Supreme Court review of the Opinion is necessary both to secure uniformity of decision and to settle an important question of law. (California Rules of Court, rule 8.500, subd. (b)(1).)

Over the last 50 years of CEQA jurisprudence, one of the few questions this Court has yet to address is how to properly draw the line between "environmental" issues, which appropriately fall within CEQA's purview, and "social" issues, which do not. Though the Courts of Appeal have tried to draw this line, project opponents continue to find ways, as they have in this case, to convince courts that quality of life issues implicate CEQA. This is contrary to law and has the effect of both degrading CEQA's integrity and giving project opponents a formidable tool to attack projects merely because they disrupt the social status quo.

This issue is now ripe for the Court to address, and this case is the appropriate vehicle. This Court is already familiar with the criticism the University has faced from some residents in the local community that increasing student enrollment will result in "environmental and quality of life impacts" including "housing displacement, homelessness, and excessive noise."[3] Those same claims were levelled against the University

[3] Last year, this Court denied the Regents' petition for review and request for a stay of a trial court judgment in a separate case that ordered the University to cap student enrollment at 2020/21 levels until resolution of the Regents' appeal from that judgment. (*Save Berkeley's Neighborhoods v. The Regents of the University of California et al.* (S273160), March 3, 2022 Order Denying Petition for Writ of Supersedeas.) Justices Liu and Groban were of the opinion that the petition should have been granted, noting that these alleged impacts "should be put in perspective." (*Id.*, at p. 7 (dis opn.

in this case, despite the fact that the LRDP does not establish or approve future enrollment, it only plans for the possibility of it.[4] These claims, and others, ultimately became the grounds upon which Appellants based their underlying challenge to the LRDP and subsequent appeal. (Slip Op., at p. 1-2.)

Since the Opinion was filed, the notion that "loud student parties" are an environmental impact within the purview of CEQA has struck many commentators, within and outside of the CEQA bar, as outrageous, absurd, and simply wrong. As one reporter observed, many believe it is a classic example of the "metastasizing regulation" that is CEQA.[5] This reaction is not surprising as the Opinion effectively allows CEQA to be used to try and deprive qualified students of the opportunity to attend one of the State's premier public universities simply because neighbors believe more students means more noisy parties. If this is the law, the outlook for student housing projects, and other housing projects statewide, is bleak. It is unfortunately easy to imagine this same tactic being applied to perpetuate prejudices

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of Liu, J.).) Subsequently, the Legislature amended Section 21080.09 of the Public Resources Code to address the enrollment issue and to clarify that "[e]nrollment or changes in enrollment, by themselves, do not constitute a project as defined in [CEQA]." (Sen. Bill No. 118 (2021-2022 Reg. Sess.) § 1.) On March 1, 2023, the underlying appeal was argued and submitted in Division 1 of the First Appellate District, Case No. A163810.

[4] The number of students admitted by each UC campus is determined by the number of applications received, their overall capacity, and other factors. (AR57; AR10098.)

[5] Wilson, History and housing clash in Berkeley in a fight of People's Park, Washington Post (Mar. 12, 2023) para. 44, https://www.washingtonpost.com/nation/2023/03/12/peoples-park-protests-berkeley/.

against not just student housing, but also multi-family housing, affordable housing, supportive housing, and any other project designed for persons of a specific social identity, whether undergraduate students, families with children, multi-generational families, low income people, and the formerly homeless.

Though the Opinion attempts to limit its holding by stating that bias and prejudice cannot be *expressly* considered to be evidence of a fair argument, legitimizing the consideration of the social identity of the intended users of a project will undoubtedly result in unintended socially and racially discriminatory outcomes. CEQA analysis should be focused on the proposed project, not on the behavioral characteristics and social identity of *the people* a project is designed to serve. Under the Opinion, all a project opponent has to do to trigger a costly, time-consuming EIR is submit evidence that other people with the social identity of the people a project is designed to house, or otherwise accommodate, are known to be noisy or unruly.[6] Once such evidence is submitted, agencies will be forced to treat it as "proper evidence" and to attempt to make predictions about whether those people may engage in behavior that could result in excessive noise and, if the answer is yes, treat increasing the population of those people as an environmental impact. This Court has already recognized that "CEQA is not intended as a population control measure." (*Center for Biological Diversity v. Dept. of Fish & Wildlife* (2015) 62 Cal.4th 204, 220

[6] Already, the Regents are aware of opponents of multi-family housing projects submitting evidence that "families are noisier" than other kinds of residents, requiring analysis of the demographic and behavioral attributes of future housing occupants under the Opinion's rationale.

("*Newhall I*").) This Court should now take the opportunity to ensure that CEQA not be abused as a tool to deprive undergraduate students and underrepresented, vulnerable communities statewide of opportunities for education and housing. This Court should also correct the Opinion's inconsistency with a growing body of appellate case law that heeds the Legislature's findings that the current lack of housing is a critical problem that threatens the economic, environmental, and social quality of life in California and undermines the State's environmental and climate objectives. (See Gov. Code, § 65589.5, subds. (a)(1)(A), (a)(2)(A); *Save Livermore Downtown v. City of Livermore* (2022) 87 Cal.App.5th 1116, 1125-1130 ("*Save Livermore Downtown*"); *California Renters Legal Advocacy v. City of San Mateo* (2021) 68 Cal.App.5th 820, 835 ("*California Renters*"); *Ruegg & Ellsworth v. City of Berkeley* (2021) 63 Cal.App.5th 277, 295-97 ("*Ruegg & Ellsworth*").)

This Court's review is necessary to ensure CEQA's noble purpose is not defiled by allowing social biases and fears to masquerade as legitimate environmental concerns. As this Court cautioned over 30 years ago, "rules regulating the protection of the environment must not be subverted into an instrument for the oppression and delay of social, economic, or recreational development and advancement." (*Goleta I*, *supra*, 52 Cal.3d at p. 576.)

This Court's review is also necessary to clarify that CEQA does not compel agencies to revisit alternative locations for site-specific projects when the agency's overarching planning document has identified and evaluated a group of potential locations and the agency has made a policy decision to prioritize one of those locations over the others.

FACTUAL AND PROCEDURAL STATEMENT

A. The Regents certify the EIR and approve the LRDP to guide campus development and increase student housing.

Each campus in the UC system periodically prepares an LRDP, which provides a high-level planning framework to guide land use and capital investment in line with its mission, priorities, strategic goals, and population projections. (AR9548-49.) Commencing in 2019, the University engaged in a robust campuswide and community planning process that culminated with the Regents' approval of the LRDP in July 2021, superseding the prior LRDP adopted in 2005. (AR9549-50; AR4-25; AR26-123.) The purpose of the LRDP is to provide adequate planning capacity for potential population growth and physical infrastructure that may be needed to support future population levels on a particular UC campus and provide a strategic framework for decisions on development projects, including housing. (AR9548-49; AR9571.)

The University is a 150-year-old urban campus with the lowest percentage of student beds in the UC system, while the high cost of housing in the San Francisco Bay area limits the availability of non-UC housing options near campus. (AR9549; AR38-52.) This lack of campus housing adversely affects the overall student experience, challenges the University's ability to recruit faculty, graduate students, and postdoctoral scholars, and impacts the local residential housing market. (AR1206.) The LRDP strives to "[i]mprove the existing housing stock and construct new student beds and faculty housing units in support of the Chancellor's Housing Initiative"

to provide as many as 11,731 beds to students, faculty and staff, more than doubling existing housing capacity. (AR9558; AR9580; AR58; AR7.)

Recognizing the urgent need to address the shortage of available student housing, the LRDP development program also includes two site-specific student housing projects, one of which is the People's Park Project.[7] (AR9549.) Following a comprehensive evaluation of potential development sites, the University's Chancellor announced that the University would begin its efforts to address its student housing needs at the People's Park site "because it is the only university-owned property that allows the campus to simultaneously address student housing needs; relieve demand-side price pressure on the city's housing market; address crime and safety concerns for the benefit of city and campus communities; revitalize a neighborhood and offer improved safety and services for members of Berkeley's homeless population."[8] The University is currently poised to immediately construct housing for more than 1,100 undergraduate students at People's Park, as well as permanent supportive housing for approximately 125 extremely low-income persons, while preserving two-thirds of the site as open green space for the community, including commemoration of the park's history. (AR1206-08.)

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[7] The other project, known as Anchor House, is not at issue here.

[8] https://news.berkeley.edu/2018/05/03/new-uc-berkeley-plans-for-peoples-park-call-for-student-homeless-housing/, available through https://chancellor.berkeley.edu/housing-initiative, cited at AR9550.

The LRDP does not determine future enrollment or population, or set a future population limit.[9] (AR9494-95; AR57-94.) However, under Section 21080.09, subdivision (d) of the Public Resources Code, the environmental effects relating to changes in campus population at each campus of public higher education are to be considered in the EIR prepared for that campus' LRDP. Therefore, the EIR analyzed, at a programmatic level, the physical environmental effects of projected increases in campus population through 2036/37. This included analysis of potential areas of new development and redevelopment that could accommodate additional housing, "focused on intensive and strategic use of existing UC Berkeley–owned land through determinations of where UC Berkeley can remodel, relocate, densify, or expand current facilities." (AR9573.) The EIR analyzed the People's Park project at a more detailed project-level (i.e., construction and operation).

The University's proposal to redevelop People's Park was contentious given the site's history. Appellants and others objected to the University's plan. Many other community members, including the City of Berkeley's elected leaders, recognized and supported the University's decision to revitalize and redevelop People's Park. The City's Mayor attested, "[T]he vision for the park over 50 years is no longer reflected in its current condition. But this proposal is an opportunity to make things right. Through years of discussion and outreach, this proposal has been meticulously crafted into a win-win-win situation." (AR1293; AR1281-82.)

[9] The University's campus population increase is primarily the result of statewide population growth, and the corresponding increase in high school graduate rates and college-aged Californians. (AR57.)

And the campus Chancellor explained, "this unique project is not without its challenges .... however, ... the value that the project brings to the campus and our civic neighbors outweigh costs and will ultimately strengthen the Berkeley campus's academic and civic stature by clearly demonstrating our values and advancing this transformative design. ... This site has been a challenge to maintain and program effectively for over 50 years. This project is the first proposal since the 1960s that rises to meet the challenges that face our community today: Lack of housing, homelessness, and commemoration of our shared history." (AR24602, 24605.)

On July 22, 2021, the Regents certified the EIR and approved the LRDP. (AR4-155.) Two months later, on September 29, 2021, the Regents approved the People's Park Project in reliance on the certified EIR. (AR1204-1239.)

B. The Superior Court upholds the EIR and the Regents' approvals.

On October 28, 2021, Appellants filed their First Amended and Supplemental Petition for Writ of Mandate in the Superior Court challenging the LRDP and the People's Park Project. (JA7-25.) Two other organizations also filed petitions, which were consolidated with Appellants' case for purposes of trial only.

On August 2, 2022, the trial court entered its order and judgment rejecting all of the petitioners' challenges and denying their petitions for writ of mandate ("Judgment"). (JA313-329.) Appellants' filed their notice of appeal of the Judgment the same day. (JA331.)

C. The Court of Appeal reverses the Judgment, holding the EIR inadequately analyzed impacts from noise from off-

campus student parties, and inadequately analyzed potential alternative locations for the People's Park Project.

In its February 24, 2023 Opinion, the Court of Appeal was unpersuaded by Appellants' contention that the EIR failed to analyze an alternative to the LRDP that would limit student enrollment, recognizing that the LRDP does not set enrollment levels and an agency "is generally not required to consider alternatives that would change the nature of the project." (Slip Op., at pp. 6-16.) It also rejected Appellants' view that the EIR improperly "piecemealed" the LRDP by limiting the geographic scope of the plan to the campus and nearby properties. (*Id*., at p. 28-30.) Departing from its earlier tentative opinion,[10] the Court of Appeal also rejected Appellants' argument that the EIR failed to properly address the impacts of population growth and the potential "indirect" displacement of existing residents by new residents competing for housing. (*Id*., at pp. 38-44.)

The Court of Appeal agreed with Appellants, however, that the EIR did not analyze a reasonable range of alternative locations to the People's Park Project. (Slip Op., at pp. 17-27.) Acknowledging that "an analysis of alternative sites is not required in all cases," the Court of Appeal nevertheless faulted the Regents because they "declined to analyze any alternative locations" to the People's Park site and "failed to provide a valid

[10] On December 22, 2022, the Court of Appeal distributed a draft 48-page tentative opinion, which would have agreed that the EIR failed to properly assess the impacts of the LRDP on unplanned growth and consequent "indirect displacement" of existing residents.

reason for that decision." (*Id*., at p. 18.) The Court of Appeal rejected the Regents' explanation that the EIR and the record as a whole demonstrate that People's Park is the only location that can achieve the University's goals of immediately alleviating the student housing crisis and redeveloping and revitalizing this particular site. (*Id*., at p. 25.)

Finally, the Court of Appeal agreed with Appellants that—as to both the LRDP and the People's Park Project—the EIR "failed to analyze potential noise impacts from loud student parties in residential areas near the campus, where student parties have been a problem for years." (Slip Op., at pp. 30-38.) "Given the long track record of loud student parties that violate the city's noise ordinances (the threshold for significance), there is a reasonable possibility that adding thousands more students to these same residential neighborhoods would make the problem worse." (*Id*., at p. 36.) The Court of Appeal thus concluded that the Regents "must determine whether the potential noise impacts are in fact significant, and, if so, whether mitigation is appropriate." (*Id*., at p. 38.)

Having so concluded, the Court of Appeal reversed the judgment and remanded the matter to the Superior Court to vacate its order and judgment denying Appellants' petition for writ of mandate and enter a modified judgment consistent with the Court of Appeal's conclusions.[11] (Slip Op., at pp. 44-45.)

[11] Upon the finality of the Opinion on March 26, 2023, an earlier Court of Appeal order staying construction activities at People's Park dissolved by its own terms.

LEGAL DISCUSSION

I. REVIEW IS NECESSARY TO CLARIFY THAT SOCIAL ISSUES, LIKE STUDENT PARTY NOISE, ARE NOT ENVIRONMENTAL ISSUES UNDER CEQA

A. The law provides that "social changes resulting from a project shall not be treated as significant effects on the environment," but the Opinion paves the way for treating changes to the social status quo as environmental impacts.

EIRs are required for projects that "may have a significant effect on the environment." (Pub. Resources Code, §§ 21100, 21151.) Pursuant to Public Resources Code section 21068, "'[s]ignificant effect on the environment' means a substantial, or potentially substantial, adverse change in the environment." "'Environment' means the physical conditions that exist within the area which will be affected by a proposed project, including land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance." (Pub. Resources Code, § 21060.5.) Thus, to be subject to review under CEQA, a project's impacts must be related to a change in the physical environment.

As this case demonstrates, however, there is a tension between treating "noise" as a physical environmental condition, and CEQA's prohibition on treating a *social change* as a significant effect on the environment. Specifically, CEQA Guidelines section 15064, subdivision (e) provides that "[e]conomic and social changes resulting from a project shall not be treated as significant effects on the environment," and section 15382 similarly stresses that "[a]n economic or social change by itself shall not be

considered a significant effect on the environment." Further, "evidence of social or economic impacts that do not contribute to, or are not caused by, physical impacts on the environment" is not substantial evidence of a significant effect on the environment. (Pub. Resources Code, § 21080, subd. (e); Guidelines, § 15064, subd. (f)(6).)

The Courts of Appeal, faced with arguments that a proposed project's changes to the social status quo are significant effects on the environment, have enforced this limiting principle. For example, in *Preserve Poway v. City of Poway* (2016) 245 Cal.App.4th 560, 577, the court rejected an argument that CEQA requires analysis of a project's impacts on "community character," finding these issues "go well beyond" the aesthetic impacts that are within CEQA's scope. The court noted, "community character is not merely aesthetics, but also includes psychological and social factors giving residents a sense of place and identity, what makes them feel good and at home in Poway." (*Ibid*.) The impacts described by the citizens in that case, upset over the loss of a horse farm in favor of a housing project, "are not aesthetic impacts; rather, they are impacts to the collective psyche of Poway's residents ... and social impacts caused by the loss of the Stock Farm." (*Id*., at p. 578.) Real as these impacts may be, "CEQA does not require an analysis of subjective psychological feelings or social impacts." (*Id.*, at p. 579.)

Concerns about safety and crime are also not environmental impacts. In *Saltonstall v. City of Sacramento* (2015) 234 Cal.App.4th 549, 558, 584-587, the court declined to find that fears about impacts to public safety caused by crowds congregating around a proposed downtown sports arena and potential for violence due to inebriated fans implicate CEQA. "[T]he

safety of persons at the site of the downtown arena" is not appropriately "considered in an EIR studying *environmental* effects of the project." (*Id.*, at p. 584, emphasis in original.) Similarly, in *Baird v. County of Contra Costa* (1995) 32 Cal.App.4th 1464, 1469, fn.2, the court found a claim that increased crime problems resulting from expansion of an addiction treatment facility for male adolescent drug and alcohol users "is not a proper subject of CEQA inquiry."

The problem, which the Opinion cements and which this Court should correct, is that with the right words, a sophisticated project opponent can easily transform a purely social or psychological impact into an "environmental" impact, condemned to CEQA review in an expensive, time-consuming EIR and subject to mitigation. Unfortunately, the "limits" on social and economic impacts the courts have sought to establish provide a veritable playbook for project opponents to stretch the concept of "environment" to include any potential change to quality of life. As this Court long ago observed, environmental analysis "'may not be turned into a game to be played by persons who -- for whatever reasons and with whatever depth of conviction -- are chiefly interested in scuttling a particular project.'" (*Goleta I*, *supra*, 52 Cal.3d at p. 568, quoting *Seacoast Anti-Pollution v. Nuclear Regulatory Com'n* (1st Cir. 1979) 598 F.2d 1221, 1230-1231.) Without this Court's review, this game-playing will escalate, transforming social, quality of life issues into "environmental impacts" requiring expensive analysis, mitigation, and examination of alternatives under CEQA.

Here, a consortium of neighborhood associations whose members live in the areas south and southeast of the University submitted comments

on the Draft EIR accusing the University of failing to study "noise impacts on surrounding residential neighborhoods" resulting from increased numbers of students in light of existing "late-night noise impacts generated by the present undergraduates." (AR14545.) As the Opinion notes, the University responded to these concerns by identifying the numerous efforts it makes to address concerns about the behavior of some individual students, including noisy behavior. (Slip Op., at pp. 35-36.) The University explained, "it is speculative to assume that an addition of students would generate substantial late night noise impacts simply because they are students. Individuals are subject to the provisions of the Municipal Code and intermittent community complaints are handled on a case by case basis by enforcement officers." (AR14545-46.)

The Opinion rejects the idea that the University's existing process for handling complaints about off-campus parties is the appropriate way to address these social impacts, i.e., facilitating meetings between student and community stakeholders, establishing noise reduction initiatives, and relying on enforcement officers to address intermittent community noise complaints. (See AR10067; AR14545-46.) Instead, the Opinion finds the University must study *off-site* student party noise in an EIR for a student *housing* project that is *not itself increasing the student population*, due to the existence of what the Opinion calls "proper evidence" of a potential environmental impact. (Slip Op., at p. 35.) According to the Opinion, this "proper evidence" includes the Regents' acknowledgment that loud student parties in the City's neighborhoods are a "problem." (*Ibid.*)

This Court's review is necessary to clarify that not all "problems" are "environmental" problems. The need for review is particularly acute

where the only possible means of mitigating the "problem" is reducing the population of the people that may cause the "problem." Appellants concede "there is no effective physical or regulatory mitigation to avoid these increased incidences of significant impacts from late night drunken pedestrians or unruly student parties." (AOB, p. 46.) As such, the only viable solution would presumably be to reduce the amount of students themselves or determine such reductions are infeasible. (See Pub. Resources Code, § 21002 ["[P]ublic agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects."].)

The interests of the State are best served by resolving this issue not as the Court of Appeal did, but in a manner that ensures public universities can fulfill their mandate to "plan that adequate spaces are available to accommodate all California resident students who are eligible and likely to apply to attend an appropriate place within the system" (Ed. Code, § 66202.5), without treating student behavior as an "environmental" impact.

B. The Opinion creates new law by requiring agencies to first discern, and then analyze, how a specific type of project users will behave when they leave the project site, reinforcing stereotypes and strengthening CEQA as a tool of delay and oppression.

The Opinion faults the EIR for not analyzing the noise effects of "increasing the student population" in Berkeley's neighborhoods or "whether adding thousands more students to the area would cause a significant noise increase." (Slip Op., at p. 33.) To be clear, Appellants in

this case did not challenge the EIR's approach to noise emanating from the People's Park Project itself or any other discrete, stationary facility the University controls. The challenge was to noise from undergraduate pedestrians wandering *away from campus*, beyond the University's jurisdiction, and into Berkeley's neighborhoods. (AOB, p. 48 [alleging EIR "lacks any assessment of the impacts of increased sources of social noise and the potential for increased noise disturbances from student parties and late-night pedestrian excursions."].) Thus, the Opinion requires the University to determine whether, and where, incoming undergraduate students may create "party noise" away from University housing.

Currently no methodology exists to address this type of impact, and the problems with requiring such analysis becomes clear when one imagines putting it into practice. If the University, and colleges and universities in general, are required, as the Opinion holds, to "consider and resolve whether noisy parties are a significant effect" of accommodating more students, the analysis would presumably require first assessing what percentage of future students are the kind that are likely to attend noisy parties. It would then require monitoring existing students most likely to resemble these future noisy students to see where they go when they leave campus. This would be a challenge for many reasons, including potential violations of student privacy. Assuming those data points could be established with any accuracy, the analysis would presumably then measure the baseline noise conditions in those areas at times when parties are likely to occur compared to the noise in those areas during student parties to

determine whether they exceed applicable local noise standards.[12] If the analysis shows a violation could occur, then the college or university would have to treat any increase in students of the type that attend noisy parties to be a significant environmental impact, requiring analysis in an EIR. In other words, noisy students themselves are the environmental impact that must be mitigated.

If the Opinion stands, it will undoubtedly result in socially and racially discriminatory outcomes and bolster the use of CEQA as weapon to try and control the population growth of people of specific social identities, contrary to this Court's holdings. (*Goleta I*, *supra*, 52 Cal.3d at p. 576 [The "rules regulating the protection of the environment must not be subverted into an instrument for the oppression and delay of social, economic, or recreational development and advancement."]; *Newhall I*, *supra*, 62 Cal.4th at p. 220 ["CEQA is not intended as a population control measure."].) As Justice Chin noted in dissent to *Newhall I*, joined by Justice Corrigan in part (*id*. at p. 244, conc. & dis. opn. Of Corrigan, J.), the people who would occupy the housing project in that case "will not just go away. They will be living and working somewhere. And that somewhere will undoubtedly be far less green than this project promises to be." (*Id*., at p. 254 (dis. opn. of Chin, J.).) "All this is a recipe for paralysis. But CEQA is not meant to cause paralysis. Carefully planned green communities are needed to

[12] To determine whether a project may have a significant impact on noise, the CEQA Guidelines prompt agencies to ask whether a project would result in "[g]eneration of a substantial temporary or permanent increase in ambient noise levels in the vicinity of the project in excess of standards established in the local general plan or noise ordinance, or applicable standards of other agencies." (CEQA Guidelines, Appx. G, XIII (a).)

accommodate California's growing population. CEQA ensures the informed planning, but it does not prohibit the planned communities." (*Ibid.*)

Just last year, Division Two of the First Appellate District went out of its way in *Tiburon Open Space Committee v. County of Marin* (2022) 78 Cal.App.5th 700, 780-783 to conclude that the worst of Justice Chin's fears had been vindicated when private opposition to a project had made CEQA a "fearsome weapon" of delay. The court observed that "CEQA was meant to serve noble purposes, but it can be manipulated to be a formidable tool of obstruction, particularly against proposed projects that will increase housing density." (*Id.*, at p. 782.)

Unfortunately, project opponents often bring CEQA actions to challenge affordable housing projects on dubious grounds for purposes of delay. (See, e.g., *Save Livermore Downtown*, *supra*, 87 Cal.App.5th at pp. 1136-39 [upholding trial court's ruling that action was brought for purposes of delaying affordable housing project].) There are also plenty of examples of lawsuits that "have nothing to do" with the "environmental impacts" they purport to value and are purely designed to stop a project. (*Jenkins v. Brandt-Hawley* (2022) 86 Cal.App.5th 1357, 1388, the Court of Appeal observed, "[T]he petition 'here involved a group of well-off, "NIMBY" neighbors living in one of the most expensive zip codes in the country trying to prevent their fellow neighbor from rebuilding a decrepit and dangerous residence on their property because the neighbors were concerned about privacy and the design aesthetics of the new build. [Citation.] It had nothing to do with significant or negative environmental effects under CEQA . . .."']; see, e.g., *Pacific Palisades Residents Assn.,*

Inc. v. City of Los Angeles (March 8, 2023, No. B306658) __ Cal.App.5th __ [2023 Cal.App. LEXIS 170, 44-45] ["Without saying so explicitly," opponents of an eldercare facility in Los Angeles' Pacific Palisades neighborhood "implicitly argue for mandatory architectural uniformity" suggesting that "views of *this* building are uniquely odious" despite substantial evidence that "this typical urban building was compatible with existing views in this urban neighborhood."]; *Arcadians for Environmental Preservation v. City of Arcadia* (Feb. 16, 2023, No. B320586) ___Cal.App.5th___ [2023 Cal.App. LEXIS 103].)

Now, with the Opinion, opponents of projects designed to house or otherwise accommodate persons of a particular social identity (e.g., undergraduate students, the homeless, low-income residents, multiple-generation families) can simply submit generalized evidence into the record that people with this social identity are known to create noise problems or, for that matter, any other kind of problem that could arguably be defined as an "environmental" issue. Once submitted, the agency evaluating the project would be compelled under CEQA to consider whether the noise – or other "environmental" change – these people would create is a significant impact requiring mitigation. There is little doubt this would further strengthen CEQA as a tool of obstruction that would disproportionately affect those most in need of education, housing, and other services.

C. The Opinion creates a conflict with both CEQA's stated intent of "providing a decent home for every Californian" and the Housing Accountability Act.

When exercising discretion to approve or carry out activities that affect the quality of the environment, CEQA requires public agencies to

give "major consideration ... to preventing environmental damage" when feasible, "while providing a decent home and satisfying living environment for all California residents." (Pub. Resources Code, §§ 21000, subd. (g), 21001, subds. (d), (f), (g); Guidelines, § 15002, subd. (a).) Law that discourages the provision of housing runs counter to this Legislative intent.

The Housing Accountability Act ("HAA"), Government Code section 65589.5, also establishes limitations to a local government's ability to deny, reduce the density of, or make infeasible housing development projects, emergency shelters, or farmworker housing that are consistent with objective local development standards and contribute to meeting housing need. "[T]he Legislature enacted in 1982 the HAA, colloquially known as the 'Anti-NIMBY' (Not-In-My-Back-Yard) law, and it has amended the statute repeatedly in an increasing effort to compel local governments to approve more housing." (*California Renters, supra,* 68 Cal.App.5th at p. 835, citing Gov. Code, § 65589.5 and *Ruegg & Ellsworth, supra,* 63 Cal.App.5th at pp. 295-97.) The Legislature recently amended the HAA to expand and strengthen its provisions as part of the overall recognition of the critically low volumes of housing stock in California. In amending the HAA, the Legislature made repeated findings that the "lack of housing, including emergency shelters, is a critical problem that threatens the economic, environmental, and social quality of life in California," and "California has a housing supply and affordability crisis of historic proportions. The consequences of failing to effectively and aggressively confront this crisis are hurting millions of Californians, robbing future generations of the chance to call California home, stifling economic opportunities for workers and businesses, worsening poverty and

homelessness, and undermining the State's environmental and climate objectives." (Gov. Code, § 65589.5, subds. (a)(1)(A), (a)(2)(A).)

Despite many HAA protections, jurisdictions are still required to comply with CEQA as applicable to housing projects. (Gov. Code, § 65589.5, subd. (e).) If the Opinion is correct that agencies must treat random unplanned loud noise from residents of urban housing developments as an adverse *environmental* impact, housing project opponents will have yet another tool to slow down, and in many cases stop, exactly the kind of dense, affordable housing projects the Legislature is trying to encourage.

Discouraging residential growth in urban environments is also counterproductive to the Legislative goals of reducing impacts to the legitimate environmental resources CEQA is designed to protect, particularly with respect to vehicle miles travelled ("VMT") and greenhouse gas ("GHG"). The population will grow regardless of any CEQA analysis, and concentrating that growth in urban areas reduces VMT and GHG emissions.[13] As the *Scoping Plan for Achieving Carbon Neutrality* adopted late last year by the California Air Resources Board recognizes, "land use strategies that support more compact development in infill areas, particularly those already displaying efficient resident travel patterns, have the greatest potential to reduce emissions while reducing

[13] Currently, the University provides housing in the vicinity of the campus for about 23 percent of students and less than 1 percent of faculty. The LRDP housing program would increase the proportion of the population housed on University properties to about 42 percent of the students and 12 percent of faculty, which would reduce the number of students and faculty driving to campus. (AR10220.)

combined housing and transportation costs for Californians, and infrastructure costs for local governments due to avoided new roads, public schools, and other sprawl supporting infrastructure."[14] Further, "[a]ccelerating housing production to meet the extraordinary need for more homes can help reduce vehicle miles traveled (VMT) and GHG emissions and advance health and equity objectives when new housing is developed in types and locations that align with these goals." (*Ibid.*)

The Opinion runs contrary to the State's housing goals and subverts these environmentally protective principles.

II. REVIEW IS NECESSARY TO AVOID A CONFLICT WITH *GOLETA I* AND TO AVOID JUDICIAL INTERFERENCE WITH A LEAD AGENCY'S FACTUAL FINDING THAT ALTERNATIVE SITES ARE INFEASIBLE

A. The LRDP programmatically identified and analyzed suitable alternative sites for development of student housing.

In *Goleta I*, *supra*, 52 Cal.3d at pp. 570-573, this Court found a county did not err in rejecting alternative locations for a proposed major new resort hotel as feasible project alternatives where the county's general plan and local coastal program ("LCP") already addressed the very issues the project opponents claimed should have been addressed in the EIR for the hotel. There, "[i]dentification and analysis of suitable alternative sites for the development of new hotels and resorts in the County's coastal zone was precisely the task of the LCP." (*Id.*, at p. 572.) Thus, the county was

[14] Cal. Air Resources Board, 2022 Scoping Plan for Achieving Carbon Neutrality (Nov. 2022), Appx. D, p. 5.

justified in relying on the conclusions and findings of the LCP in assessing the feasibility of alternative sites and determining that none of the sites in question was appropriate for a major resort/visitor-serving commercial development. (*Ibid.*) Nothing required the county to explore optimal alternative sites in a project-level EIR for the resort without regard to feasibility. (*Ibid.*) Indeed, this Court found that "[c]ase-by-case reconsideration of regional land-use policies, in the context of a project-specific EIR, is the very antithesis" of "informed and enlightened regional planning." (*Id.*, at pp. 572-573.)

Just like the county in *Goleta I*, prior to identifying People's Park as one of the initial sites to propose in the EIR, the University undertook a detailed, months-long housing study to determine the best way to effectively implement the LRDP's ambitious housing goals. (AR28137-185; AR28294-304; AR28306-336.) The University asked strategic questions such as: "How can flexibility be incorporated into the housing strategy to accommodate unknown future conditions? What are the anticipated project delivery methods, and how will funding constraints impact implementation of housing over the next ten years? What is the vision for the residential experience, beyond the provision of more beds? How can it be linked to other proposed building, landscape, and mobility projects?" (AR28305.) Ultimately, the study recommended implementing the People's Park Project in the initial phase because, unlike other sites, the University could build at People's Park without relocating other uses. (AR28325-29.) Moreover, the People's Park Project is directly responsive to the LRDP Land Use Element objective to "[m]ake the highest and best use of each site to employ limited land resources most efficiently" and

"prioritize utilization of infill or undeveloped sites for facility development to accommodate program needs." (AR63.)

In spite of this analysis, the Opinion finds it "puzzling" that the University did not analyze project-level alternative locations for the People's Park "given that the university owns several other nearby properties that it has designated, in its development plan, as sites for student housing." (Slip Op., at p. 22.) This misses the point entirely and directly contradicts *Goleta I*. It ignores the fact that the University's LRDP planning process already identified and analyzed potential alternative sites for housing development on and near campus, just as the LCP in *Goleta I* analyzed suitable alternative locations for hotels and resorts. Correctly analyzed, the University was justified in relying on the conclusions and findings of its LRDP planning process in assessing the feasibility of alternative sites and determining that, while those other sites may be appropriate for future development, only the People's Park site could deliver critically-needed student housing in the immediate-term.

This Court's review is necessary to correct this deviation from *Goleta I* and confirm that agencies are not required to reconsider program-level land use policies and priorities on a case-by-case in the context of a project-specific EIR.

B. The University's decision not to analyze alternatives to the People's Park site in detail is entitled to deference.

Because the People's Park Project would result in significant and unavoidable impacts to cultural resources at its proposed location, the EIR conservatively explored the possibility of alternate locations for the project's program but found that idea infeasible and unnecessary to study in

detail in the EIR.[15] (AR10356-57.) The Opinion holds that the Regents failed to present a "viable explanation for declining to consider alternative locations" based on the court's opinion that that the University "hid the ball" by not specifically stating in the EIR that only the People's Park site is suitable for the People's Park Project. (Slip Op., at pp. 20-27.)

In so holding, the Opinion inappropriately disregards the evidence in the record and substitutes the Court's judgment for that of the Regents. (See *McAllister v. California Coastal Com.* (2008) 169 Cal.App.4th 912, 921 [court may not substitute its own findings for that of the agency].) Specifically, it ignores the ample evidence that, in addition to its ability to immediately address the urgent need for student housing, the University selected the People's Park site because it provides an opportunity to simultaneously address crime and safety concerns *at the site* for the benefit of City and campus communities, revitalize a neighborhood, and offer improved supportive housing for the homeless population currently living *at the site*. (AR24605.) The EIR's Project Description chapter, therefore, explains that the University "proposes to redevelop properties it now owns at the site[] of ... proposed Housing Project #2 (People's Park)." (AR9550.)

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[15] CEQA does not require evaluation of alternative locations in every situation. (See, e.g., *California Native Plant Society v. City of Santa Cruz* (2009) 177 Cal.App.4th 957, 993, citing *Mira Mar Mobile Community v. City of Oceanside* (2004) 119 Cal.App.4th 477, 491 ["[T]here is no rule requiring an EIR to explore offsite project alternatives in every case."]; *Saltonstall*, *supra*, 234 Cal.App.4th at p. 576 [agency need not study fruit stand as an alternative to a shopping center]; *Save Our Residential Environment v. City of West Hollywood* (1992) 9 Cal.App.4th 1745, 1751-54 [upholding determination that no feasible alternative sites were available in light of project objective to provide senior housing within specific, urbanized area].)

Moreover, the project, as described and analyzed in the EIR, includes (1) a large public open space that includes commemoration of the history of People's Park (AR9608) and (2) permanent supportive housing for members of the park's homeless population (AR9608), in addition to over 1,100 units of student housing. The record leaves no doubt that the proposed project is not merely a student housing project; it is a project designed to address People's Park and People's Park alone, of which student housing is not the only component.

The Opinion also faults the Regents for not exploring alternative sites "given that the university owns several other nearby properties that it has designated, in its development plan, as sites for student housing." (Slip Op., at p. 22.) This refers, specifically, to the EIR's identification of potential areas of new development and redevelopment, including sixteen properties that could be utilized to increase on-campus housing. (AR9573-75.) But as explained above, nothing required the University to revisit its decision to propose the People's Park Project and explore alternatives to the People's Park site when it is clear from the LRDP and the facts in the record that no other potential sites were appropriate for a project specifically designed to address the issues facing People's Park. (*Goleta I*, *supra*, 52 Cal.3d at p. 573.) In this circumstances, the Regents had discretion to select, as a matter of policy, the People's Park site for redevelopment before any of the other specific student housing sites identified in the EIR.[16]

[16] The Opinion is also internally inconsistent, finding that the University did not have look at an alternative that would cap future enrollment because that "would change the nature and scope of the [LRDP] project" (Slip Op.,

"[T]he duty of identifying and evaluating potentially feasible project alternatives lies with the proponent and the lead agency, not the public." (*Goleta I*, *supra*, 52 Cal.3d at p. 568; see *Laurel Heights Improvement Association v. Regents of the University of California* (1988) 47 Cal.3d 376, 406-07.) Here, the Opinion inappropriately attempts to engineer which site, among the many the University analyzed programmatically, should be prioritized for redevelopment. And while the Opinion professes that it "does not require the Regents to abandon the People's Park Project" but only "return to the trial court and fix the errors in the EIR" (Slip Op., at p. 2), its effect is undeniable. "The harm is in delay ... Delay can become its own reward for project opponents." (*Newhall I*, *supra*, 62 Cal.4th at p. 254 (dis. opn. of Chin, J.).) Courts should not minimize the real-world impact of requiring a "do-over" or feign ignorance of the true stakes when it is transparent that petitioners "are chiefly interested in scuttling a particular project" by causing years of delay. (*Goleta I*, *supra*, 52 Cal.3d at p. 568.) This Court should reverse the Opinion's holding and clarify that under CEQA, courts should not second-guess a lead agency's policy decisions.

CONCLUSION

The published Opinion creates new radical law requiring agencies to treat evidence of the social, behavioral characteristics of the specific type of people a project will serve as proper evidence of a fair argument that an increase in the number of such people would result in significant impacts on the environment, including, but not limited to, an increase in ambient

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at p. 16) while failing to acknowledge that an alternate site would fundamentally change the nature and scope of the People's Park Project.

noise levels. This Court should grant review to clarify that changes to the social status quo are not environmental impacts, and evidence related to the social identity of populations associated with proposed projects cannot be considered as evidence of a fair argument that the project may result in a significant environmental impact. The Court should also grant review to ensure courts do not require analysis of alternative project locations that would infringe on a lead agency's policy and planning prerogative.

DATED: March 27, 2023

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.504(d)(1), I certify that the total word count of this PETITION FOR REVIEW, excluding covers, table of contents, table of authorities, and certificate of compliance, is 8,334.

DATED: March 27, 2023

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EXHIBIT A

Filed 2/24/23

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

MAKE UC A GOOD NEIGHBOR et al., Plaintiffs and Appellants, v. REGENTS OF UNIVERSITY OF CALIFORNIA et al., Defendants and Respondents; RESOURCES FOR COMMUNITY DEVELOPMENT et al., Real Parties in Interest.	A165451 (Alameda County Super. Ct. No. RG21110142)

This case concerns the adequacy of an environmental impact report, or EIR, for (1) the long range development plan for the University of California, Berkeley through the 2036-2037 academic year; and (2) the university's immediate plan to build student housing on the current site of People's Park, a historic landmark and the well-known locus of political activity and protest. Appellants Make UC a Good Neighbor and The People's Park Historic District Advocacy Group (collectively, Good Neighbor) challenge the EIR's sufficiency as to both.

As we will explain, we are unpersuaded by Good Neighbor's contention that the EIR was required to analyze an alternative to the long range development plan that would limit student enrollment. We also reject Good Neighbor's view that the EIR

EXHIBIT A

improperly restricted the geographic scope of the plan to the campus and nearby properties, excluding several more distant properties. Nor did the EIR fail to adequately assess and mitigate environmental impacts related to population growth and displacement of existing residents.

Two of Good Neighbor's arguments, however, find more traction. The EIR failed to justify the decision not to consider alternative locations to the People's Park project. In addition, it failed to assess potential noise impacts from loud student parties in residential neighborhoods near the campus, a longstanding problem that the EIR improperly dismissed as speculative.

We are, of course, aware of the public interest in this case—the controversy around developing People's Park, the university's urgent need for student housing, the town-versus-gown conflicts in Berkeley on noise, displacement, and other issues, and the broader public debate about legal obstacles to housing construction. We do not take sides on policy issues. Our task is limited. We must apply the laws that the Legislature has written to the facts in the record. In each area where the EIR is deficient, the EIR skipped a legal requirement, or the record did not support the EIR's conclusions, or both.

Finally, our decision does not require the Regents to abandon the People's Park project. However, they must return to the trial court and fix the errors in the EIR. As explained more below, whether CEQA will require further changes to the project depends on how the Regents choose to proceed and the results of the analyses they conduct. Ultimately, CEQA allows an agency to approve a project, even if the project will cause significant environmental harm, if the agency discloses the harm and makes required findings. The point of an EIR is to inform decisionmakers and the public about the environmental consequences of a project before approving it.

EXHIBIT A

BACKGROUND

A.

Each UC campus is required periodically to adopt a long range development plan, a high-level planning document that helps guide the university's decisions on land and infrastructure development. (See Ed. Code, § 67504, subd. (a)(1).) The plan at issue here, adopted in 2021, estimates future enrollment for planning purposes but does not determine future enrollment levels or set a limit on the campus's future population. It does, however, establish a maximum amount of new growth that the university may not substantially exceed without amending the plan and conducting additional environmental review.

UC Berkeley provides housing for only 23 percent of its students, by far the lowest percentage in the UC system. For years, enrollment increases have outpaced new student housing (or "beds"). The prior long range development plan, adopted in 2005, called for construction of just 2,600 beds through 2021. This was 10,000 beds short of the projected enrollment increases over the same period. The university only constructed 1,119 of those planned beds. Making matters worse, within two years of adopting the 2005 plan, the university increased enrollment beyond the plan's 2021 projection. By the 2018-2019 academic year, student enrollment exceeded the 2005 projections by more than 6,000 students. With a population of 39,708 students, the university provides housing for fewer than 9,000.

This has transpired in the midst of a decades-long regional housing crisis. A report by a UC Berkeley task force convened to address this "matter of urgent concern" identified a menu of options that could significantly expand student and faculty housing, including numerous potential housing development sites. Informed by the report, the UC Berkeley chancellor's office launched a housing initiative to improve existing housing and construct new housing for students, faculty, and staff.

EXHIBIT A

The 2021 plan encompasses a general strategy for meeting the housing goals identified in the chancellor's initiative. The university anticipates (but is not committed to) constructing up to 11,731 net new beds to accommodate a projected increase in the campus population (students, faculty, and staff) of up to 13,902 new residents. In addition, the plan projects that another 8,173 students, faculty and staff will be added to the population by the 2036-2037 academic year who will not be provided with university housing.

B.

Good Neighbor's lawsuit is based on the California Environmental Quality Act (CEQA).[1] The "foremost principle" under CEQA is that the Legislature intended that it " 'be interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.' " (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 390 *(Laurel Heights*).)

An EIR, the "heart of CEQA," (Guidelines, § 15003, subd. (a)), is, with narrow exceptions, required whenever a public agency proposes to undertake or approve a project that may have a significant effect on the environment. (*Laurel Heights, supra,* 47 Cal.3d at p. 390.) Its purpose is to provide public agencies and the general public with detailed information about the proposed project's likely environmental impacts; to list ways those effects might be minimized; and to identify alternatives to the project as proposed. (CEQA, § 21061; *Save Berkeley's Neighborhoods v. Regents of University of California* (2020) 51 Cal.App.5th 226,

[1] All references to "CEQA" are to the California Environmental Quality Act. (Pub. Resources Code, § 21000 et seq.) All references to "Guidelines" are to the state CEQA Guidelines, which implement the provisions of CEQA. (Cal. Code Regs., tit. 14, § 15000 et seq.)

EXHIBIT A

235 (*Save Berkeley's Neighborhoods*).) The EIR protects the environment and helps ensure enlightened public debate by " ' "inform[ing] the public and its responsible officials of the environmental consequences of their decisions *before* they are made." ' " (*Save Berkeley's Neighborhoods,* at pp. 235-236; *Friends of College of San Mateo Gardens v. San Mateo County Community College Dist.* (2016) 1 Cal.5th 937, 944.)

The most common type of EIR, a project EIR, examines the environmental impacts of all phases of a specific development project, including planning, construction, and operation. (Guidelines, § 15161; *In re Bay-Delta etc.* (2008) 43 Cal.4th 1143, 1169 (*Bay-Delta*).) A program EIR, in contrast, is often used at a relatively early stage of the planning process, before specific components of the program are ready for approval. (See Guidelines, § 15168, subds. (a)-(c).) "An advantage of using a program EIR is that it can '[a]llow the lead agency to consider broad policy alternatives and program wide mitigation measures at an early time when the agency has greater flexibility to deal with basic problems or cumulative impacts.' " (*Bay-Delta,* at p. 1169; Guidelines, § 15168, subds. (a), (b)(4).) Program EIRs are commonly employed in conjunction with "tiering," the use of project EIRs to analyze the environmental impacts of detailed proposals that were not addressed by the program-level planning document. (*Bay-Delta,* at p. 1170.)

C.

The EIR at issue here is a hybrid: it encompasses both a program EIR intended to identify and assess potential environmental impacts from the approval and implementation of the long range development plan and a more detailed, project-level environmental review to analyze the potential impacts of two specific developments proposed for People's Park (Housing Project No. 2) and a site not at issue in this appeal, the Helen Diller Anchor House (Housing Project No. 1). While these

EXHIBIT A

housing projects are conceptually part of the university's long range development plan, they are also separate projects for purposes of CEQA (see CEQA, § 21065) and are analyzed separately in the EIR when required.

Respondents Regents of the University of California certified the EIR and approved the housing projects in July and September 2021. In October 2021, Good Neighbor filed a (first amended) petition for writ of mandate naming the Regents, University of California President Michael Drake, and UC Berkeley Chancellor Carol Christ (collectively, Regents). The writ petition alleges multiple CEQA violations and asks the court to void the approvals of the development plan and housing projects, void the certification of the EIR, and suspend all related activities pending compliance with CEQA.

Following various procedural skirmishes, in August 2022 the trial court denied the writ petition and entered judgment in favor of the Regents. Good Neighbor appealed and filed a petition for writ of supersedeas and request for immediate stay in this court, seeking to preserve People's Park from demolition pending resolution of its appeal. We granted the stay and subsequently issued a writ of supersedeas ordering that all construction and further demolition, tree-cutting, and landscape alteration activities at People's Park be stayed pending resolution of the appeal. We now turn to Good Neighbor's appellate challenges to the adequacy of the EIR.

DISCUSSION

A.

Alternatives to the development plan

Good Neighbor argues the Regents violated CEQA by failing to analyze an alternative to the development plan that would limit student enrollment. We disagree.

EXHIBIT A

1.

As noted, the purpose of an EIR is to provide the government and the public with enough information to make informed decisions about the environmental consequences of a project and ways to avoid or reduce its environmental damage. (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564-565 (*Goleta*).)

To that end, an EIR must consider potentially feasible alternatives to a project. (*Goleta, supra,* 52 Cal.3d at p. 565; see Guidelines, §§ 15126.6, subd. (a), 15364.) The lead agency—not the public—is responsible for proposing the alternatives. (*Goleta,* at p. 568.) The lead agency need not consider every conceivable alternative but instead a reasonable range of alternatives to the project, or to the project's location, that could reduce a project's significant environmental impacts, meet most of the project's basic objectives, and are at least potentially feasible. (Guidelines, § 15126.6, subds. (a)-(c), (f); see generally, 1 Kostka & Zischke, Practice Under the Cal. Environmental Quality Act (Cont.Ed.Bar 2022) §§ 15.7-15.9 (Kostka & Zischke).)

When reviewing a challenge to the alternatives, courts apply the rule of reason: " 'the EIR [must] set forth only those alternatives necessary to permit a reasoned choice' and . . . 'examine in detail only the ones that the lead agency determines could feasibly attain most of the basic objectives of the project.' " (*Bay-Delta*, *supra*, 43 Cal.4th at p. 1163, quoting Guidelines, § 15126.6, subd. (f).) Courts presume an EIR complies with this rule; it is a petitioner's burden to demonstrate it does not. (*California Native Plant Society v. City of Santa Cruz* (2009) 177 Cal.App.4th 957, 987 (*California Native Plant Society*).) We must defer to the Regents' selection of alternatives unless Good Neighbor (1) demonstrates the alternatives selected by the Regents are " ' " ' manifestly unreasonable and . . . do not contribute to a reasonable range of alternatives' " ' " and (2)

EXHIBIT A

identifies evidence of a potentially feasible alternative that meets most of the basic project objectives. (*South of Market Community Action Network v. City and County of San Francisco* (2019) 33 Cal.App.5th 321, 345 (*South of Market*).) The inquiry concerns predominantly factual issues, to which we apply the substantial evidence standard. (*Cleveland National Forest Foundation v. San Diego Assn. of Governments* (2017) 17 Cal.App.5th 413, 435 (*Cleveland National Forest*).)

2.

Below, we provide further background on the alternatives evaluated in the EIR as well as information on the university's enrollment process.

The development plan will provide general guidance for the campus's land development and physical infrastructure. (See Ed. Code, § 67504, subd. (a)(1) [Legislature intends long range development plans to "guid[e] . . . physical development, including land use designations, the location of buildings, and infrastructure systems, for an established time horizon"].) The plan includes an estimate of future enrollment but does not set enrollment levels, require enrollment increases, or commit to any amount of enrollment or development. The EIR lists 14 objectives, mostly comprising broad goals for land use, landscapes, open space, mobility, and infrastructure.

Based on the purpose and objectives, the EIR identifies eight alternatives for the plan. It excluded four alternatives from full consideration for various reasons, and it fully analyzed the remaining four.

In the fully analyzed group, alternative A (the no project alternative) would entail continuing to implement the old (2005) development plan. That plan includes constructing up to 1,530 additional beds as well as 2,476,929 square feet of academic and other space—far less than the proposed development plan (11,731

EXHIBIT A

beds and over three million square feet of other space). The old plan omits Housing Project Nos. 1 and 2 as well as features in the proposed plan to reduce vehicle miles traveled, upgrade utilities, increase energy efficiency, and add renewable energy systems.

Alternative B is described as a reduced development plan. It envisions a 25 percent reduction in new undergraduate beds and academic square footage (9,479 total new beds and 1,713,441 square feet of academic space) compared with the proposed plan. The two housing projects would be included but would be reconfigured and smaller, with a commensurate reduction in beds.

Alternative C focuses on features that would reduce vehicle miles traveled and greenhouse gas emissions through numerous projects to increase remote learning and working, limit parking, and build 500 more faculty and staff beds to reduce commuting.

Alternative D prioritizes more housing for faculty and staff compared to the proposed development plan—an additional 1,000 beds in two campus locations.

The EIR analyzes each alternative's environmental impacts topic-by-topic, compares them to the proposed plan, measures them against the objectives, and determines which alternative is environmentally superior. The EIR concludes that alternative A (no project) would be the environmentally superior alternative, followed by alternative C (reduced vehicle miles). Except for alternative A, which would conflict with many of the plan's objectives, the remaining alternatives would meet most of the objectives.

Among the four alternatives that were eliminated from consideration without a detailed analysis in the EIR, the Regents considered an alternative that focused on reducing the number of future graduate students. This alternative was rejected because, according to the EIR, it would undercut a "core" project

EXHIBIT A

objective—to support and enhance UC Berkeley's status as a leading public research institution.

In comments on the draft EIR, members of the public urged the Regents to consider an alternative that reduced, capped, or otherwise limited undergraduate enrollment. The Regents responded, in the final EIR, that the plan does not set undergraduate enrollment, increase enrollment, or commit the campus to any particular enrollment level; enrollment is determined annually in a separate process.

As the EIR explains, the process for setting enrollment levels in the UC system is complicated, with multiple players, interests, and trade-offs. By statute, the UC system (as a whole) must plan for adequate space to accept all eligible California resident students who apply as well as eligible transfer students. (See Ed. Code, §§ 66011, subd. (a), 66202.5, 66741.) The California Master Plan for Higher Education requires the system to accept the top 12.5 percent of the state's public high school graduates and eligible transfer students from community colleges. The Legislature sometimes uses the budget process to inject itself into the enrollment debate, as it did in 2016, prompting the largest annual enrollment increase in resident students since World War II, and in 2017, when the university agreed to cap enrollment of nonresident students.

To find places for these students, the university's Office of the President coordinates enrollment annually in an iterative process with 10 UC campuses, each of which has different enrollment goals and different demands for its academic programs. UC Berkeley is the second-largest campus in the system. The physical capacity of a campus is just one factor in setting enrollment levels; in recent years, four UC campuses, including UC Berkeley, together exceeded their planned capacity by 12,000 students. The Office of the President tracks existing and projected enrollment data, as well as annual and long-term

EXHIBIT A

plans for the numbers and types of students that can be accommodated at each campus. The university prepared its last long-term enrollment plan in 2008 for a 13-year period; it is currently developing a new long-term plan.

3.

The main issue is whether Good Neighbor has demonstrated that the range of alternatives in the EIR is manifestly unreasonable. (*South of Market*, *supra*, 33 Cal.App.5th at p. 345.) Good Neighbor does not really quarrel with the EIR's alternatives as far as they go. Rather, it argues that the EIR's range is too narrow without at least one alternative that would limit student enrollment. It observes that the number of students is a major driver of environmental impacts. Fewer students would mean, for example, fewer cars and new buildings, which, in turn, would mean fewer impacts to resources protected by CEQA such as air, water, and cultural resources. Good Neighbor also points to other UC campuses that have settled disputes with neighboring communities by agreeing to link enrollment increases to housing—for example, UC Davis's agreement to provide on-campus housing for new students over a baseline figure.

The problem with Good Neighbor's argument is that it ignores the plan's limited purpose and scope. The plan deliberately keeps separate the complex annual process for setting student enrollment levels.

An agency is generally not required to consider alternatives that would change the nature of the project. (*Marin Mun. Water Dist. v. KG Land California Corp*. (1991) 235 Cal.App.3d 1652 (*Marin Municipal*); see Kostka & Zischke, *supra,* § 15.8.) In *Marin Municipal*, a water agency adopted a moratorium on new water connections in response to a drought that caused an acute water shortage. In its EIR, aside from the no-project alternative, the agency considered just one alternative to address the crisis—

EXHIBIT A

mandatory water conservation. (*Id*. at pp. 1657, 1665.) The petitioners argued the agency should have considered more comprehensive alternatives such as adopting a tiered rate system, developing reclaimed water, or securing other new supplies. The court rejected the argument, emphasizing that the agency's objective was "not to solve the [agency's] long-term water supply problems; rather, its more modest goal was to prevent an immediate over-commitment of the [agency's] water supply." (*Id*. at p. 1666.) It held that the range of alternatives was reasonable. (*Ibid*.; compare *Cleveland National Forest, supra,* 17 Cal.App.5th at pp. 435-437 [concluding range of alternatives was unreasonable when the purpose of a plan was to reduce greenhouse gas emissions, but the EIR included no alternative designed to reduce driving, the primary source of emissions].)

Rio Vista Farm Bureau Center v. County of Solano (1992) 5 Cal.App.4th 351 (*Rio Vista*) is also helpful. A county adopted a program EIR for a hazardous waste management plan. The county limited the scope of the plan to a high-level assessment of its need for new facilities and siting criteria for potential facilities. It deliberately stopped short of proposing specific sites or development of actual facilities. (*Id*. at pp. 370-372.) The EIR analyzed three similarly high-level alternatives. (*Id*. at p. 378.) The court rejected the petitioner's argument that the county must consider more detailed alternative plans relating to site-specific issues, such as locating facilities outside the county or limiting the size of facilities. (*Ibid*.) The court observed that the alternatives in the EIR were "tailored to the nature of the Plan, in which site selection criteria, not specific sites, were proposed." (*Id*. at pp. 378-379.) It held that the high-level alternatives in the EIR offered decisionmakers sufficient information to make a reasoned choice. (*Id*. at p. 379.)

EXHIBIT A

The holdings in *Marin Municipal* and *Rio Vista* are reinforced by the process that agencies use to develop the alternatives. A lead agency begins by determining the project's purpose and objectives. (Guidelines, § 15124, subd. (b).) It then uses the purpose and objectives to develop a reasonable range of alternatives to analyze in the EIR. (*Ibid.*; *Bay-Delta*, *supra*, 43 Cal.4th at p. 1163.) This exercise would be meaningless if, long after the EIR is certified, a court tells the agency that it was also required to consider alternatives that serve *different* purposes and objectives. Generally, when an agency has deliberately limited the scope and nature of the problem that it wants to solve, the agency should not be required to consider alternatives that address a much bigger problem (*Marin Municipal*) or that add difficult issues the agency has chosen not to tackle (*Rio Vista*). The EIR's purpose and objectives will often reflect these kinds of limits.

Here, like in *Rio Vista*, the Regents adopted a program EIR for a limited, high-level land use plan and made a reasoned decision to exclude the enrollment process from the scope of the project. The EIR is quite clear that setting enrollment levels is *not* the plan's purpose. The purpose is to guide future development regardless of the actual amount of future enrollment. The plan leaves enrollment decisions to the existing long range and annual planning processes. It estimates future enrollment only for purposes of developing a land use and infrastructure plan that could meet its future needs, consistent with the Legislature's instruction to develop long range plans based on the campus's "academic goals and projected enrollment levels." (Ed. Code, § 67504, subd. (a)(1).)

Likewise, nearly all of the 14 project objectives in the EIR relate to land use and development goals, not enrollment policy

EXHIBIT A

for a public university.[2] None of the objectives would have helped the Regents craft alternatives that address the public policy considerations, institutional values, and tradeoffs involved in limiting enrollment at its premier campus. (See Guidelines, § 15124, subd. (b).) Given the complexity of, and the competing interests in, setting annual enrollment levels, the Regents would presumably need to *add* objectives to the EIR to develop workable alternatives for limiting enrollment—which only emphasizes that Good Neighbor's favored alternative is a horse of a different color.

Notably, Good Neighbor does not argue that the objectives themselves are too narrowly drawn, which could certainly expand the nature and scope of the alternatives. (See, e.g., *We Advocate Through Environmental Review v. County of Siskiyou* (2022) 78 Cal.App.5th 683, 691-693; *North Coast Rivers Alliance v. Kawamura* (2015) 243 Cal.App.4th 647, 669.) Nor does it argue that CEQA requires the Regents to combine the two processes (development and enrollment planning) into a single project. In any case, we would reject that argument. (See *Aptos Council v. County of Santa Cruz* (2017) 10 Cal.App.5th 266, 279-282 [agencies may separate related projects when they serve different

[2] A typical objective is: "Maintain natural areas as well as generous natural and built open spaces on the Campus Park and the Clark Kerr Campus." Other objectives concern bicycle and pedestrian networks and mobility; car access and parking; designing facilities for sustainability, efficiency, and seismic safety; efficient use of resources; open space; improving the housing portfolio; infrastructure; and historic landscapes and architecture. The only objective arguably relevant to enrollment—at least for graduate students—calls for supporting UC Berkeley's status as an internationally renowned public research university by expanding its graduate schools and research programs.

EXHIBIT A

purposes or can be implemented independently]; *Rio Vista*, *supra*, 5 Cal.App.4th at pp. 371-373.)

As in *Rio Vista* and *Marin Municipal*, the alternatives in the EIR are tailored to the plan's limited purpose. The alternatives presented the Regents with a variety of ways to meet the plan's objectives while reducing the plan's significant impacts. The range of alternatives include less development (Alternative B); strategies to reduce carbon emissions by building more housing near the campus, reducing parking, and increasing remote instruction and working (Alternative C); and more housing for faculty and staff located on the campus itself (Alternative D). Importantly, although the alternatives do not include *reducing* the total campus population, they do include *managing* the campus population in ways that could lessen or avoid its impacts by, for example, reducing car travel to the campus; providing more housing for people on campus rather than the surrounding community; and reducing the daily campus population through remote working and instruction. In text, tables, and charts, the EIR explains how, to varying degrees, the alternatives would meet or conflict with different objectives, analyzes the impacts, and proposes mitigation measures. Other than making the general point that some impacts could also be mitigated or avoided by an alternative that reduces the future campus population, Good Neighbor does not explain what is wrong with the alternatives in the EIR.

We do not find Good Neighbor's remaining arguments persuasive.

First, Good Neighbor attacks the Regents' contention that the Regents were excused from evaluating enrollment alternatives because either the alternatives would conflict with the objectives or they are infeasible. We need not reach those issues. Even assuming that an enrollment alternative poses no such conflict and is potentially feasible, we still must determine

EXHIBIT A

whether the range of alternatives that the EIR *did* analyze meets the rule of reason. (See *South of Market*, *supra*, 33 Cal.App.5th at p. 345; *City of Maywood v. Los Angeles Unified School Dist.* (2012) 208 Cal.App.4th 362, 420-421; Guidelines, § 15126.6, subd. (f).) Put another way, if the range of alternatives is reasonable, it does not become unreasonable simply because another potential alternative exists.

Second, Good Neighbor argues that the EIR must consider reducing enrollment as a means of reducing development and the impacts associated with development. It cites *Watsonville Pilots Assn. v. City of Watsonville* (2010) 183 Cal.App.4th 1059, 1087-1090 (*Watsonville Pilots*), in which a city rejected, without analysis, a reduced development alternative in its EIR for a general plan update. The court held that a reduced development alternative should have been included because it would meet most of the project objectives, reduce many of the project's environmental impacts (largely caused by growth), and address a gap in the range of alternatives. (*Ibid.*)

Unlike *Watsonville Pilots*, however, this EIR *did* include a reduced development alternative—alternative B, which would reduce housing and academic space development by 25 percent. Moreover, Good Neighborhood's argument ignores the problem that capping future enrollment levels would change the nature and scope of the project. That was not an issue in *Watsonville Pilots*. (See *Watsonville Pilots*, *supra*, 183 Cal.App.4th at pp. 1087-1088.)

Third, and finally, Good Neighbor notes that CEQA requires the Regents to consider future campus population estimates when they prepare an EIR for a long range development plan and to mitigate significant impacts. (See CEQA, § 21080.09, subds. (b), (d); Ed. Code, § 67504, subds. (a)(1), (b)(1).) Good Neighbor then suggests that, because the Legislature requires the Regents to mitigate impacts from

EXHIBIT A

campus population increases, it must also consider alternative ways to avoid or reduce impacts when setting enrollment levels.

We do not see it that way. We agree that the Regents must consider, and mitigate, projected campus population increases when the Regents prepare an EIR for a long range development plan, as we held in *Save Berkeley's Neighborhoods*, *supra,* 51 Cal.App.5th at pp. 237-241. The EIR does so. But nothing in CEQA section 21080.09 indicates that the Legislature intended to force the Regents to consider alternatives to its process for setting enrollment levels whenever they adopt a new development plan. Indeed, in a recent amendment to the statute, the Legislature exempted enrollment and enrollment increases from the definition of a project under CEQA.[3] (Sen. Bill No. 118 (2021-2022 Reg. Sess.), Stats. 2022, ch. 10, § 1, eff. March 14, 2022; CEQA, § 21080.09, subd. (d).)

Good Neighbor has not met its burden of demonstrating that the range of alternatives for the long range development plan is manifestly unreasonable.

B.

Alternatives to Housing Project No. 2 (People's Park)

We now turn to Good Neighbor's challenge to the alternatives analysis for Housing Project No. 2, which would be built on the present site of People's Park. As noted, although this

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[3] For clarity, we note that the Legislature also recently exempted from CEQA student and faculty housing projects that meet certain criteria. (CEQA, § 21080.58.) The legislation (which became effective January 1, 2023) applies to site-specific housing projects that are consistent with a long range development plan. (CEQA, § 21080.58, subd. (b)(1)(A)(i).) It does not exempt long range development plans, which remain subject to CEQA. (CEQA, § 21080.09, subd. (b).)

EXHIBIT A

site-specific project is related to the long range development plan, and part of the same EIR, it is a separate project (for CEQA purposes) from the plan, and the EIR separately discusses alternatives to the plan and the housing project.

As explained in the previous section, CEQA requires that an EIR consider and analyze a reasonable range of potentially feasible alternatives to the project, or its location, that would attain most of its basic objectives but reduce its environmental impacts. (Guidelines, § 15126.6, subd. (a); *Bay-Delta, supra*, 43 Cal.4th at p. 1163.) Good Neighbor contends the EIR violated this mandate by failing to analyze any alternative locations for Housing Project No. 2 that would spare People's Park from demolition.

We agree, to a point. We do not hold the Regents must necessarily study an alternative site or sites for the People's Park project. We are mindful that an analysis of alternative sites is not required in all cases. (*California Native Plant Society*, *supra*, 177 Cal.App.4th at p. 993.) Here, however, the Regents not only declined to analyze any alternative locations; they failed to provide a valid reason for that decision. (Guidelines, § 15126.6, subd. (f)(2)(B).) There is plenty of evidence that alternative sites exist—the development plan identifies several other university-owned properties as potential student housing sites. (See *Goleta*, *supra*, 52 Cal.3d at p. 574 [public agency's access to alternative sites may expand the range of feasible alternative locations].) Under these circumstances, we are constrained to find the EIR failed to consider and analyze a reasonable range of alternatives.

1.

In the 1960's, the university acquired and cleared the parcel that eventually became People's Park, intending to develop it for parking, student housing, and office space. Funding for the project ran short, and the site remained undeveloped. Over the following year, residents, students, and community organizers

EXHIBIT A

transformed it into an unofficial community gathering space—People's Park.

The park's historic significance stems from its association with social and political activism in Berkeley. A hub of protest against the Vietnam War, in 1969 the park was the site of both violent confrontations between protesters and law enforcement and peaceful demonstrations. Through the early 1970's, People's Park grew to symbolize anti-war activism and suppression of the counterculture movement. Since those times, various proposals by the Regents to develop the site have been met with protest and/or community opposition.

The park is currently used as a venue for occasional special events, including concerts, fairs, basketball tournaments, and theatrical performances. Its predominant use, however, is by transient and unhoused people in multiple encampments. The park is also afflicted with crime, ranging from disturbing the peace and drug and alcohol violations to much more serious offenses including sexual assault, arson, and attempted murder.

The City of Berkeley designated the park as a landmark in 1984. There are 10 historic structures in its immediate vicinity, buildings of two to four stories dating from the 19th- and early 20th-century. These include two National Register-listed resources: the First Church of Christ, Scientist, and Anna Head School for Girls.

To build the housing project, the Regents propose demolishing the park and its amenities and constructing two new buildings. The new buildings would provide approximately 1,113 student beds, eight staff and faculty beds, and 125 beds for lower-income and formerly homeless persons. The project would include a public market, a clinic, and some 1.7 acres of publicly accessible, landscaped green space that would commemorate the history and legacy of People's Park.

EXHIBIT A

The EIR determined the project would result in a substantial adverse change to a historic resource: "Housing Project [No.] 2 would require demolition of existing structures, which currently include a public restroom, basketball courts, and stage, and would reconfigure the existing open space. . . . These proposed changes would leave the park without integrity of design, materials, workmanship, feeling, or association, that is, it would remove its ability to convey its historic significance. Therefore, demolition of the site would result in a *significant* impact." Nobody disputes that, under CEQA, the Regents properly identified this as a significant impact on the environment. (Guidelines, § 15064.5, subds. (a)(2), (b)(2)(A)-(b)(2)(B).)

In addition, Housing Project No. 2 could have significant and unavoidable impacts on the 10 historic resources in the vicinity because its proposed scale and proportion, with a larger footprint and height of up to 17 stories, would likely be incompatible with the smaller structures.

The EIR does not analyze in detail any alternatives to Housing Project No. 2. In the EIR scoping process, the staff identified two alternatives before rejecting them. The first was intended to preserve the park by designing buildings that would maintain the park's key features. The EIR explains that staff concluded this was not possible and rejected the idea. The parties focus on the second rejected alternative, which suggested locating the housing project on one of the many other university-owned properties in the area.

The EIR gives three reasons for rejecting the alternative location proposal. First, "[l]ocating [the project] on other UC Berkeley properties in the City Environs Properties or the Clark Kerr Campus that are designated for future student housing could reduce the total projected number of beds within the proposed LRDP Update development program . . . , or could

EXHIBIT A

require UC Berkeley to identify additional housing sites that are not currently UC Berkeley properties for housing."

Second, development of the project at a different location "would be constrained by site access and parcel size, as many of the eligible sites are smaller than the proposed development sites. Therefore, the development programs would need to either be reduced, or the housing projects would require multiple sites, further diminishing the total number of beds described in the proposed [long range] development program."

Third, relocating the project would not avoid adverse historical impacts: "While a potential alternate site alternative would reduce the significant historic resource impacts at both [Anchor House and People's Park] sites, they would also have the potential to introduce new historic resource impacts at many of the sites in the City Environs Properties and the Clark Kerr Campus, as both contain historic resources or are adjacent to such resources."

In comments on the draft EIR, members of the public asked what specific sites were considered as potential alternatives for Housing Project No. 2. The final EIR responded by identifying numerous potential housing sites that the plan also proposes for new development, redevelopment, and renovation. Like the draft EIR, the final EIR stated that developing Housing Project No. 2 on one or more of those sites would result in fewer beds and potentially introduce new historic resource impacts. In addition, the final EIR stated that "accommodating the same number of beds on multiple sites would cause greater potential for ground disturbance and thus consequently, greater construction impacts." The Regents adopted the conclusions stated in the draft EIR.

EXHIBIT A

2.

The Regents' strategy is puzzling. It can be risky to adopt an EIR that analyzes *no* potentially feasible alternatives. It is especially risky here given that the university owns several other nearby properties that it has designated, in its development plan, as sites for student housing. So if the Regents wanted to consider potentially feasible sites for student housing that would avoid impacts to the park, there are some obvious candidates. Moreover, the Regents concede that, if there are no feasible alternative locations for the project, the EIR should state the reasons for that conclusion. (Guidelines, § 15126.6, subds. (c), (f)(2)(B); *Laurel Heights*, *supra*, 47 Cal.3d at p. 404 [agency cannot expect the public to accept its determination on blind trust].) But the record does not support the reasons stated in the EIR, and the Regents do not try to defend them. Instead, in their brief, they offer new reasons that contradict their earlier reasons and that are nowhere found in the EIR.

The EIR's first reason, again, is that developing an alternative site instead of People's Park "*could*" either reduce the total number of beds that would be built under the long range development plan or require the university to acquire additional properties. This vague, equivocal statement—maybe an alternative site would reduce the total beds, maybe not—falls short of a conclusion, based on facts and analysis, that no potentially feasible sites exist. (See Guidelines, §§ 15126.6, subds. (c), (f)(2)(B) ["If the Lead Agency concludes that no feasible alternative locations exist, it must disclose the reasons for this conclusion"], 15364 [defining feasibility as "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social, and technological factors"], 15126.6, subd. (f)(1) [feasibility includes assessing whether the developer "can reasonably acquire, control or otherwise have access to [an] alternative site"

EXHIBIT A

or already owns one].) Nor do the Regents point to evidence in the record that would shore up this assertion.

Moreover, the rationale is based on a nonexistent conflict with the long range plan. The plan sets no minimum number of beds to be built. Its objective for housing is to "[i]mprove the existing housing portfolio" and "support" the Chancellor's housing initiative by providing "additional" beds. The total number of beds discussed in the plan—11,731—is not a hard number but, instead, merely "the estimated potential envelope of net new development that may occur over time," depending on actual enrollment growth, available financing, and other factors. The EIR acknowledges as much in considering a reduced development alternative—alternative B—that proposed 2,500 fewer beds. The Regents are careful to say, repeatedly, that the plan is not a commitment to build anything, much less 11,731 beds. Similarly, the Regents cite no evidence that acquiring new properties conflicts with the plan or is infeasible. (See *Goleta*, *supra*, 52 Cal.3d at p. 574; Guidelines, § 15126.6, subd. (f)(1).) The plan expressly contemplates acquiring additional properties in the future; it even sets guidelines for doing so. In short, the alleged conflict with the plan does not support an infeasibility finding.

The second reason also is a non-starter. The EIR explained that relocating the project to an alternate site or sites would result in fewer new beds, or require multiple sites, because "*many*" of the eligible sites are smaller than People's Park. (Italics added.) Again, this is not a finding that there are *no* alternative sites that could support an equivalent project. Nor does the EIR or administrative record supply evidence to support such an assertion. (*See Goleta, supra,* 52 Cal.3d at p. 569; Guidelines, § 15126.6, subd. (c).) In fact, the EIR indicates that at least three of the nearby sites identified for student housing could provide more beds than the 1,113 beds at the People's Park

EXHIBIT A

site: Clark Kerr – Central (1,439 net new beds); Channing Ellsworth (2,980 beds); and Fulton-Bancroft (1,200 beds).

The third reason is similarly flawed. The EIR ruled out consideration of alternate locations in part because re-siting the project from People's Park would "have the *potential*" to adversely affect other historic resources at "*many* of the sites in the City Environs Properties and the Clark Kerr Campus," as both areas "contain . . . or are adjacent to [historic] resources." (Italics added.) In other words, relocating Housing Project No. 2 from People's Park, where it will definitely destroy a significant historic resource, to many (but not all) of the sites in those areas might (but might not) affect some different historical resource because such a resource might (or might not) be on or near the site. This artfully drafted language, yet again, cannot substitute for a conclusion based on facts in the record that there are no potentially feasible alternative sites where the project would cause less damage to historic resources.

The EIR's rationale here is questionable for another reason as well: it treats potential adverse environmental impacts on People's Park and various other, unnamed historical resources as if they were interchangeable. Historical places and structures are rarely, if ever, fungible items of equivalent historical significance and value. Even were we to assume re-siting the project would cause adverse impacts to some other historic resource, those impacts would almost necessarily differ in quality and degree from Housing Project No. 2's impacts on People's Park.

The Regents cite no evidence to support the final EIR's additional reason that alternative sites would have a "greater potential for ground disturbance." We deem this point abandoned. (See *State Water Resources Control Bd. Cases* (2006) 136 Cal.App.4th 674, 836.)

EXHIBIT A

While an EIR need not exhaustively explain its reasons for excluding an alternative from analysis (Guidelines, § 15126.6, subds. (c), (f)(2)(B)), unsupported conclusory statements do not suffice. (*Laurel Heights, supra,* 47 Cal.3d at p. 404.) The Regents' explanation, premised as it is on ambiguous generalizations rather than analysis and evidence, failed to serve the purpose of enabling informed decision-making and public discussion. (See *San Bernardino Valley Audubon Society, Inc. v. County of San Bernardino* (1984) 155 Cal.App.3d 738, 750-751 [EIR's statement that development at another site "*may*" result in similar adverse impacts without discussing whether there actually were other potentially suitable sites held insufficient]; *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 735-736 (*San Joaquin Raptor*).)

3.

In their briefs, the Regents spend most of their time developing new reasons for declining to analyze any alternative sites for Housing Project No. 2.

First, they argue that a "primary objective" of the project is to revitalize the People's Park site, and therefore developing any other site would conflict with that objective. (See Guidelines, § 15152, subd. (a); *Jones v. Regents of University of California* (2010) 183 Cal.App.4th 818, 827-828 (*Jones*) [upholding rejection of alternative site because it would conflict with most project objectives].) The Regents point to one of the EIR's seven objectives for Housing Project No. 2: "[r]edevelop and revitalize a UC Berkeley property to provide safe, secure, high quality, and high density student housing to help meet the student housing needs of UC Berkeley." While they acknowledge the reference to "a" UC Berkeley property does not convey a site-specific objective of addressing problems unique to People's Park, they maintain the record "clearly" demonstrates that this is what it meant.

EXHIBIT A

We disagree. The objective applies equally to many of the potential sites that the university has identified for redevelopment in its long range development plan. This is unsurprising. One of the plan's objectives is to provide "renovated safe, secure, accessible, and high-quality housing." The plan therefore identifies a host of underutilized, university-owned properties as potential sites to redevelop as student housing, including the three alternative properties mentioned above (Clark Kerr – Central, Channing Ellsworth and Fulton-Bancroft) and Housing Projects Nos. 1 and 2, all of which the EIR categorizes as redevelopment housing projects. The record simply does not support the Regents' position that its objective to redevelop "a" UC Berkeley property fatally conflicts with redeveloping all other UC Berkeley properties.

The Regents summarily assert it is infeasible to construct Housing Project No. 2 on a different site because the university must utilize *all* of the proposed housing sites near Campus Park to achieve its objective of maintaining that area as the central location for academic, research and student life uses. The Regents identify nothing in the EIR or the record supporting their claim that the objective cannot be achieved without developing every potential site in the area. As noted, the Regents disclaimed any commitment to build anything other than the two housing projects; the other proposed sites, according to the EIR, are simply a "menu of possible options" for future development. In any event, the Regents may not exclude a potentially feasible alternative from analysis simply because it does not fully meet all project objectives. (*Habitat & Watershed Caretakers v. City of Santa Cruz* (2013) 213 Cal.App.4th 1277, 1304; *Watsonville Pilots*, *supra*, 183 Cal.App.4th at p. 1087.)

Finally, we would find the EIR flawed even if we accepted the Regents' argument. The primary explanation they offer now but omitted from the EIR (i.e., they did not consider other sites

EXHIBIT A

because they want to fix the problems at this particular site) contradicts the explanation they gave to the public in the EIR (they considered other sites but found them infeasible because they were too small, etc.). In the chapter on alternatives, where the Regents stated their reasons for rejecting alternative sites, the Regents gave the latter explanation, not the former. When squarely asked by public commentors why they rejected other sites, they did so again. And again in the findings. Hiding the ball is unacceptable. In the seminal *Laurel Heights* case, in which the Regents failed to explain why they rejected alternative sites for a development project, our Supreme Court observed: "The Regents miss the critical point that the public must be equally informed" of the reasons. (*Laurel Heights, supra*, 47 Cal.3d at p. 404, italics omitted.) They missed that point here, too.

In sum, we conclude that, absent a viable explanation for declining to consider alternative locations, the range of alternatives in the EIR was unreasonable. (See *Watsonville Pilots, supra,* 183 Cal.App.4th at pp. 1087-1090.) Because the Regent's explanation was incomplete and inaccurate, it precluded informed public participation and decision-making, so it is prejudicial regardless of whether a different outcome would otherwise have resulted.[4] (CEQA, § 21005, subd. (a).)

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[4] We note, again, that recent legislation exempts certain student and faculty housing projects from CEQA. (CEQA, § 21080.58, added by Sen. Bill No. 886 (2021-2022 Reg. Sess.), Stats. 2022, ch. 663, § 1, eff. Jan. 1, 2023.) Among other limitations, the legislation does not apply to student housing projects that would require the demolition of a structure listed on a local historic register. (CEQA, § 21080.58, subd. (d)(1)(D).) People's Park is a local historic landmark.

EXHIBIT A

C.

Piecemealing

We reject Good Neighbor's argument that the Regents improperly "piecemealed" the long range development plan by limiting its scope geographically to the campus and neighboring properties, thereby excluding several properties further away. We review piecemealing claims de novo. (*Banning Ranch Conservancy v. City of Newport Beach* (2012) 211 Cal.App.4th 1209, 1224 (*Banning Ranch*).)

Piecemealing concerns the scope of the project analyzed in the EIR. CEQA requires that a lead agency describe and analyze the entire project rather than split one large project into smaller ones, resulting in piecemeal environmental review that obscures the project's full environmental consequences. (Guidelines, § 15378; *Banning Ranch*, *supra*, 211 Cal.App.4th at p. 1222.) It is not simply a matter of whether two projects are related. The projects must be linked in a way that logically makes them one project, not two. A classic example is *Laurel Heights*, where a university described the project only as its initial plan to occupy part of a building, omitting its future plan to occupy the entire building. (*Laurel Heights*, *supra*, 47 Cal.3d at p. 396.) Another example is a county's truncated description of a housing development that neglected to include the sewer lines and related facilities designed to serve the project. (*San Joaquin Raptor, supra,* 27 Cal.App.4th at pp. 729-731.)

But two projects may be kept separate when, although the projects are related in some ways, they serve different purposes or can be implemented independently. (See *Banning Ranch*, *supra*, 211 Cal.App.4th at pp. 1223-1224 [summarizing the case law]. An example is *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 99, where the court concluded that a proposed hydrogen production facility at an oil refinery served a different purpose than a pipeline to transport

EXHIBIT A

excess hydrogen from same facility, and thus could be evaluated in a separate EIR.

Here, Good Neighbor argues that the geographic distinction is "arbitrary" and that there is no "independent utility" to adopting separate plans for the remote properties because ultimately they are all part of the UC Berkeley campus and serve its educational mission.

In our view, however, it is perfectly rational for the university to develop a coherent vision for the campus and its adjacent properties while developing separate plans for more remote properties. When a group of projects are related geographically, the Guidelines encourage agencies to analyze them together as one large project in a program EIR, which is precisely what the Regents have done. (See Guidelines, § 15168, subd. (a)(1) [agency may prepare program EIR for a series of actions that can be characterized as one large project and are related geographically].) While the Regents could have chosen to include all its properties in a single plan, that is far different from saying that separate plans serve no logical purpose or could not be implemented independently.

As the EIR explains, the properties in the plan comprise all of UC Berkeley's major instructional facilities and are the primary locations used by nearly all the members of the campus population for instruction, research, and extracurricular activities. The plan itself sets goals and principles that focus on how the campus and adjacent properties function together (e.g., accessibility, connectivity), contribute to the university's institutional objectives (e.g., fostering collaboration), and will be used by the university community. We won't second guess the Regents' decision to group the campus-area properties together for planning purposes. (Cf. *Jones*, *supra*, 183 Cal.App.4th at p. 829 [rejecting argument that university was required to consider off-site alternative locations for campus laboratory, given

EXHIBIT A

university's goals to foster collaboration and a culture of interdisciplinary problem-solving].)

Good Neighbor suggests that, because the Legislature requires each UC "campus" to have a long range development plan (Ed. Code, § 67504, subd. (a)(1)), all of UC Berkeley's properties must be included in a single plan, regardless of their proximity to the actual campus. The statute does not say so. (See Ed. Code, § 67504, subd. (a)(1).) We think it allows the Regents a measure of discretion on this point.

D.

Noise

We agree with Good Neighbor that—as to both the development plan and Housing Project No. 2—the EIR failed to analyze potential noise impacts from loud student parties in residential areas near the campus, where student parties have been a problem for years.

1.

CEQA includes "noise" as part of the " '[e]nvironment.' " (CEQA, §§ 21060.5, 21068.) The Legislature has declared that it is the state's policy to "[t]ake all action necessary to provide the people of this state with . . . freedom from excessive noise." (CEQA, § 21001, subd. (b).) As a general matter, the Regents concede that CEQA applies to the type of noise at issue here—crowds of people talking, laughing, shouting, and playing music that disturbs neighboring residents. (See, e.g., *Keep Our Mountains Quiet v. County of Santa Clara* (2015) 236 Cal.App.4th 714, 732-734 [EIR required for crowd noise and music at wedding venue].)

In preparing an EIR, the lead agency must "consider and resolve every fair argument that can be made about the possible significant environmental effects of a project." (*Protect the*

EXHIBIT A

Historic Amador Waterways v. Amador Water Agency (2004) 116 Cal.App.4th 1099, 1109 (*Amador*).) The agency must make findings in the EIR that such an effect either is, or is not, significant. (*Ibid.*; CEQA¸ § 21100, subds. (b)(1), (c).) A finding of insignificance requires only a brief statement of reasons, but a finding of significance triggers the requirement to consider mitigation measures. (CEQA, §§ 21002.1, subds. (a), (b), 21100, subds. (b)(3), (c).) Because the Regents did not consider and resolve whether noisy parties are a significant effect of the projects, the initial question for us is whether there is a fair argument, based on substantial evidence in the record as a whole, that they *may* be significant effects. (See *Visalia Retail, LP v. City of Visalia* (2018) 20 Cal.App.5th 1, 13, 17 (*Visalia*).) If so, the Regent's failure to make findings one way or the other may have violated CEQA's procedural requirements. (See *Amador*, *supra*, 116 Cal.App.4th at pp. 1111-1112.)

The fair argument standard is a low threshold, which reflects CEQA's preference for resolving doubts in favor of environmental review. (*Taxpayers for Accountable School Bond Spending v. San Diego Unified School Dist*. (2013) 215 Cal.App.4th 1013, 1035 (*Taxpayers*).) The lead agency cannot weigh conflicting evidence: if any substantial evidence exists of a potential significant effect, the agency must analyze the issue even if other evidence indicates that that the project will not have a significant effect. (Guidelines, § 15384, subd. (a).) Substantial evidence may include personal observations of residents, expert opinions, and reasonable inferences based on facts, but not argument, speculation, or unsubstantiated opinions. (Guidelines, § 15384, subds. (a)-(b); *Taxpayers*, *supra*, at pp. 1035-1036.) We owe no deference to the lead agency on its decision to forgo an analysis although we will give them some deference on disputed issues of credibility. (*Taxpayers*, at p. 1035.) Our standard of review is de novo. (*Ibid*.)

EXHIBIT A

2.

At oral argument, the Regents conceded that noise from student parties is a problem in Berkeley's residential neighborhoods near the campus. The record indicates it is a longstanding problem.

In 2007, the City of Berkeley found that parties in residential areas "frequently become loud and unruly," cause "excessive noise," and constitute a public nuisance, and it added a set of warnings and fines to its municipal code. (Berkeley Mun. Code, §§ 13.48.010–13.48.070). The city and university police implemented a joint public safety patrol and weekly reporting process to discourage such parties. Neighborhood groups submitted data of hundreds of citations under the ordinance but stated that enforcement efforts have flagged in recent years and that the parties and noise have increased.

In 2016, the City of Berkeley took further steps to mitigate noisy parties in these neighborhoods when it adopted an ordinance restricting so-called mini-dorms—private homes converted to high-density student housing (e.g., four-bedroom homes housing 12 to 14 students). The city found that these mini-dorms were disrupting the neighborhoods near the campus in numerous ways, including "loud and unruly parties" that "frequently" require police officers to respond. The city found the disturbances had "become much more severe and intolerable because they are no longer occasional, but have become chronic."

For several years, the university has engaged with neighbors and the city on the noise issue through an advisory body that, according to the EIR, "is dedicated to improving the quality of life in the neighborhoods adjacent to UC Berkeley properties." It has "launched and supported good-neighbor initiatives, campaigns, and programs" aimed at reducing noise from parties, as well as other conflicts. The advisory body "meets regularly" with the city and community stakeholders to hear

EXHIBIT A

updates on the work they have done together and to plan new initiatives. Other materials in the record explain that neighbor groups have been meeting with the university since 2008 specifically to address noisy parties, and the university has provided funding for their efforts, beginning in 2011.

The EIR defines a significant noise impact as an increase in ambient noise that would exceed local standards, including Berkeley's noise ordinances. But the EIR does not analyze the issue: it does not address the relevant baseline noise conditions in the neighborhoods afflicted with loud parties, the effect of increasing the student population in those neighborhoods, or the efficacy of the noise reduction efforts it identified, and it makes no findings on whether adding thousands more students to the area would cause a significant noise increase.

Multiple individuals and organizations objected to the EIR's failure to address impacts from loud parties. The commentors include neighborhood groups that, in partnership with the university, have been trying to mitigate student noise for more than a decade. They submitted surveys, reports, and data indicating that the effort had been largely unsuccessful and that the number of such incidents had stayed the same or increased in all but one member neighborhood since 2011. They complained that the development plan proposes to triple the number of undergraduates living at the Clark Kerr campus without studying the potential noise impacts on the surrounding neighborhoods.

The Regents refused to analyze the issue because, according to the final EIR, it is "speculative to assume that an addition of students would generate substantial late night noise impacts simply because they are students."

EXHIBIT A

3.

Although the Regents concede that loud student parties are a real problem in the residential neighborhoods, they insist there is no substantial evidence in the record that adding thousands more students will cause a potential noise increase. Instead, the record contains only opinions and speculation that reflect an anti-student bias. They say that "[n]ewer students could just as well spend more time studying or socializing quietly on the internet compared to prior students."

Similarly, their partner in the People's Park project, Resources for Community Development (RCD), says that Good Neighbor's argument is based on prejudice, stereotypes, and "tales from NIMBY neighbors" rather than evidence. RCD warns that a ruling for Good Neighborhood will allow "NIMBY project opponents" to force affordable housing proponents to conduct noise studies based solely on biased opinions that poor and formerly homeless people are noisier than other neighbors.

As a general matter, we agree with the Regents and RCD that stereotypes, prejudice, and biased assumptions about people served by a CEQA project—such as a church, school, gym, or housing project—are not substantial evidence that can support a CEQA claim under the fair argument standard. (See Guidelines, § 15384, subd. (a) [substantial evidence does not include argument, speculation, and unsubstantiated opinion].) And we agree that the Legislature did not intend CEQA to be used as a redlining weapon by neighbors who oppose projects based on prejudice rather than environmental concerns. (See Guidelines, §§ 15002, subd. (a) [purpose of CEQA is to prevent environmental damage], 15131 [CEQA applies to environmental, not social, impacts]; cf., *Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155, 169-170 & fn. 5 (*Save the Plastic Bag*) [CEQA petitioner with "no demonstrable concern for protecting the environment" may lack standing].)

EXHIBIT A

But here, this is a straw man argument. The Regents and RCD focus on isolated statements from a noise expert who referred to the movie "Animal House," offered colorful opinions about student attitudes toward drinking, and suggested the vast majority of loud and unruly drunk college students are male, not female. We will set those statements aside.

As the lead agency, the Regents are required to consider the *entire* record. (Guidelines, § 15384, subd. (a).) Quite a bit of proper evidence remains. We have no reason to assume, for example, that the City of Berkeley's noise ordinances are based on anti-student bias. The city found that "loud and unruly" student parties have gone from an "occasional" problem to one that is "chronic" and "intolerable." It has declared noise from parties to be a public nuisance. Data from enforcement efforts indicates that student parties consistently violate these ordinances. Neighborhood groups have worked for years to mitigate loud student parties. Based on their experience, observations, and neighborhood surveys, they say the mitigation efforts have been largely unsuccessful and that the noise problem has increased. The record also includes public comments based on personal observations that loud parties are an increasing problem. (See *Taxpayers*, *supra*, 215 Cal.App.4th at pp. 1035-1036 [substantial evidence includes " '[r]elevant personal observations of area residents on nontechnical subjects' "], 1054-1055 [neighbors' observations of traffic problems established fair argument of potential impact].)

Indeed, the Regents' argument is hard to square with their concession that loud student parties in these neighborhoods *are* a problem. For more than a decade, the university has partnered with the city and with neighborhood groups to discourage loud parties. It provided funding to neighborhood groups for this purpose. It collects data on the issue and meets regularly with the city and neighborhood groups to discuss progress and

EXHIBIT A

potential new initiatives. Presumably the university said and did these things because the university agrees that student noise is a genuine problem and not because the university is prejudiced against its students. None of this can be waived away as speculation, unsubstantiated opinion, or bias.

The evidence meets the fair argument standard. Given the long track record of loud student parties that violate the city's noise ordinances (the threshold for significance), there is a reasonable possibility that adding thousands more students to these same residential neighborhoods would make the problem worse. (See Guidelines, Appendix G, XIII, subd. (a), § 15384, subd. (b) [substantial evidence includes reasonable assumptions predicated on facts].) The Regents' suggestion that new students might instead "socializ[e] quietly on the internet" is conjecture, unsupported by the record. (See *City of Hayward v. Trustees of California State University* (2015) 242 Cal.App.4th 833, 858-859 [no substantial evidence supported university's assumption that 5,500 new students would not use regional parks].) New students arrive every year, yet the noise problem has persisted since at least 2007.

The Regents' additional arguments have no merit.

First, in a supplemental brief, the Regents assert that CEQA only applies to crowd noise generated at a "discrete facility" that is designed to host noisy crowds. (See, e.g., *Keep Our Mountains Quiet v. County of Santa Clara*, *supra*, 236 Cal.App.4th at pp. 732-734 [crowd noise at wedding venue].) They cite no authority for this sweeping rule. CEQA applies when it is reasonably foreseeable that a project may cause an impact, directly or indirectly. (CEQA, § 21065; *Union of Medical Marijuana Patients, Inc. v. City of San Diego* (2019) 7 Cal.5th 1171, 1198-1199; Guidelines, §§ 15064, subd. (d)(2), 15358, subd. (a)(2).) The geographic area of a potential impact is not limited to discrete facilities but includes any area where direct or indirect

EXHIBIT A

impacts may occur. (Guidelines, § 15360; *Save the Plastic Bag*, *supra*, 52 Cal.4th at pp. 173-174; e.g., *Mission Bay Alliance v. Office of Community Investment & Infrastructure* (2016) 6 Cal.App.5th 160, 210 [EIR for sports arena considered indirect impacts on nearby neighborhoods of noise from crowds after they leave the arena].) These are settled principles of law, grounded in statutes, the CEQA Guidelines, and Supreme Court cases. The Regents make no attempt to explain why they do not apply here.

Second, the Regents assert Good Neighbor waived any challenge to the EIR's noise analysis because it presented some of its materials after the Regents approved the plan (but before they approved Housing Project No. 2). That is incorrect. Petitioners raised the noise issue in timely comments on the draft EIR and thus preserved the issue. (CEQA, § 21177, subds. (a), (b).)

Third, and finally, the Regents warn that this case will encourage existing homeowners to oppose "development of a single family home on the empty lot next door" unless the lead agency studies and mitigates "typical household noise" like "children playing or dogs barking." We are not sure what they mean. The scenario they posit is a frivolous CEQA claim under existing case law: the alleged impact is obviously insignificant (see Guidelines, Appendix G, XIII, subd. (a)), and it affects only isolated individuals rather than the environment of people generally. (*Clews Land & Livestock, LLC v. City of San Diego* (2017) 19 Cal.App.5th 161, 196 [dismissing as insignificant CEQA claim by neighboring horse ranch that school project must address noise from "children laughing and playing"]; *Dunning v. Clews* (2021) 64 Cal.App.5th 156, 173-175 [malicious prosecution action for frivolous CEQA noise claim].) Nothing in this case suggests otherwise.

The Regents must analyze the potential noise impacts relating to loud student parties. Their decision to skip the issue,

EXHIBIT A

based on the unfounded notion that the impacts are speculative, was a prejudicial abuse of discretion and requires them now to do the analysis that they should have done at the outset. (See *Amador*, *supra*, 116 Cal.App.4th at pp. 1111-1112; CEQA, § 21100, subds. (b)(1), (c).) We express no opinion on the outcome of a noise analysis. The Regents must determine whether the potential noise impacts are in fact significant, and, if so, whether mitigation is appropriate; ultimately, CEQA provides discretion to proceed with a project even if some impacts cannot be mitigated. (CEQA, §§ 21002, 21002.1, subds. (a)-(c), 21100, subds. (b), (c); see also, § 21168.9.)

E.

Population Growth

Good Neighbor contends the EIR violates CEQA because it failed to address properly the impacts of population growth and the consequent displacement of existing residents. We disagree.

1.

The EIR estimates that the long range development plan will add up to 13,902 residents to Berkeley for whom the university plans to provide housing. This population is comprised primarily of undergraduate and graduate students, graduate student family members, faculty, and staff. In addition to this "[d]irect" population growth, the EIR anticipated "[i]ndirect" population growth of another 8,173 residents in Berkeley and surrounding cities—students, faculty, staff and family members for whom the university would not provide housing.

The EIR's Population and Housing analysis concluded this influx of residents would result in two significant impacts if

EXHIBIT A

unmitigated.[5] First, the plan would induce substantial unplanned population growth "either directly (for example, by proposing new homes and businesses) or indirectly (for example, through extension of roads or other infrastructure)." ("Impact POP-1.") As mitigation, the university would provide Berkeley and the Association of Bay Area Governments (ABAG) with annual summaries of enrollment projections and housing production data to "ensur[e] that local and regional planning projections account for UC Berkeley-related population changes." As so mitigated, the impacts of unplanned population growth would be less than significant.

Second, the EIR found the development projects anticipated by the plan could result in displacing substantial numbers of existing residents, houses or businesses. ("Impact POP-2.") This impact was also found to be significant, but less than significant if mitigated by implementing the UC Relocation Assistance Act Policy to help displaced residents find replacement housing. Pursuant to that policy, the university would survey and analyze relocation needs, employ minimum notice requirements, pay moving expenses and relocation payments, and provide "other aspects of relocation assistance" including, in some cases, "last-resort housing."

2.

Good Neighbor asserts the mitigation measure for POP-1 impacts (substantial unplanned population growth) is unenforceable. "Mitigation measures must be fully enforceable through permit conditions, agreements, or other legally-binding instruments." (Guidelines, § 15126.4, subd. (a)(2); CEQA, §

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[5] The EIR noted that other consequences of project-driven growth such as impacts on transportation infrastructure, utilities, public services, recreational facilities, noise levels, air and water pollution, and greenhouse gas emissions were evaluated elsewhere in the document.

EXHIBIT A

21081.6, subd. (b); *Federation of Hillside & Canyon Associations v. City of Los Angeles* (2000) 83 Cal.App.4th 1252, 1261.) While the Regents can ensure the university provides the City of Berkeley and ABAG with summaries of annual enrollment and construction information, they have no authority to compel either entity to undertake planning for university-driven population growth. (*See Sierra Club v. California Coastal Com.* (2005) 35 Cal.4th 839, 859 [CEQA does not expand the authority of public agencies; agencies must rely on their existing powers to mitigate environmental impacts].) Good Neighbor argues such planning is unlikely to occur because "Berkeley's General Plan is twenty years old" and the university's population is " 'not formally coordinated' " with ABAG.

The argument misses its mark. ABAG is required by statute to allocate responsibility for the Bay Area's regional housing needs among its constituent cities and counties, including Berkeley. (Gov. Code, § 65584.04.) In devising its methodology for that allocation, it must consider multiple factors based on data from its constituent local governments. Those factors specifically include "[t]he housing needs generated by the presence of . . a campus of . . the University of California within any member jurisdiction." (Gov. Code, § 65584.04, subd. (e)(9).) Berkeley, in turn, is required to include its allocated share of regional housing in its general plan's housing element, which it must review and revise every eight years. (Gov. Code, §§ 65583, subd. (a)(1), 65588, subd. (e)(3)(A). In view of these statutory obligations, there is no reason to believe either entity will fail in the future to plan for the population growth projected in the long range development plan. (See CEQA, § 21081, subd. (a)(2); *City of Marina v. Board of Trustees of California State University* (2006) 39 Cal.4th 341, 365 [payment of share of improvement costs was valid mitigation measure where statutory directives indicated recipient agency would construct the needed infrastructure].)

EXHIBIT A

We reject Good Neighbor's argument that the city will not actually do the planning. Good Neighbor cites a single sentence in the EIR stating that the population projections in the city's general plan EIR do not go beyond 2020, which in turn cites a "Draft General Plan EIR" dated 2001 that is not in our record. This is thin stuff. It does not tell us when the next housing element update is due or the status of any update in progress. We will not infer from it that the city will violate its statutory planning deadlines.

3.

We now turn to displacement. Impact POP-2, as noted above, concerned the "direct" displacement of existing tenants when university-owned buildings were demolished to make way for new development. "Though the proposed LRDP Update, at full development, would result in a substantial net increase in housing at UC Berkeley (11,731 beds), it is possible that housing development will be less than the total projected, or that individual future housing projects may involve the displacement of existing people or housing." Therefore, "this impact is considered *significant*." However, the impact would be reduced to less than significant when mitigated by adherence to the Relocation Assistance Policy's procedures for helping displaced residents obtain new housing.

Good Neighbor contends this analysis is legally inadequate for two related reasons. First, it fails to address potential environmental impacts caused by "indirect" displacement, i.e., displacement of existing residents caused by adding 8,173 people for whom the university will *not* provide housing. Second, it fails to assess the environmental impacts of direct and indirect displacement, including health and safety effects of crowding and homelessness and the need for construction of replacement housing.

EXHIBIT A

Good Neighbor's first theory illustrates CEQA's long reach. CEQA does not treat a project's social and economic effects (such as displacement) as significant environmental impacts. (Guidelines, §§ 15064, subd. (e), 15131, subd. (a).) However, if a project may cause social or economic impacts that, in turn, cause physical effects on the environment, the EIR may be required to trace this chain of causation and analyze the resulting indirect environmental impacts. (Guidelines, §§ 15064, subd. (e), 15131, subd. (a).) The issue has arisen, for example, in cases where a proposed regional shopping center threatens to put downtown stores out of business and leave them vacant (economic effects), eventually leading to boarded up stores and urban blight (environmental effects). (See *Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo* (1985) 172 Cal.App.3d 151, 169-170.)

More recent cases have emphasized how difficult it can be to establish a factual foundation for this sort of theory, even under the fair argument standard. In *Joshua Tree Downtown Business Alliance v. County of San Bernardino* (2016) 1 Cal.App.5th 677 (*Joshua Tree*), the petitioner cited testimony of a prominent local business owner that a proposed Dollar General store would take business away from existing local businesses, leading to urban blight. (*Id.* at pp. 686-688, 690-692.)

The court of appeal concluded the evidence failed to show a potential environmental effect. While members of the public may provide opinion evidence where the issue does not require special expertise, it explained, the same is not true for technical or scientific information. (*Joshua Tree, supra,* 1 Cal.App.5th at pp. 690-691.) " '[I]n the absence of a specific factual foundation in the record, dire predictions by nonexperts regarding the consequences of a project do not constitute substantial evidence.' " (*Id.* at p. 691.) The business owner was not an economist or otherwise qualified to opine on whether the new store would

EXHIBIT A

cause urban decay; moreover, she offered no particular factual basis for her conclusion that it would. (*Ibid.*) Her conclusion was thus speculative and, although it made a certain amount of sense, did not constitute substantial evidence of an environmental impact. (See *Joshua Tree,* at p. 690; see also, *Visalia*, *supra*, 20 Cal.App.5th at pp. 9-17, 14-15.)

Good Neighbor relies principally on comments by Berkeley's planning director that, in the context of a housing shortage, displacement of residents resulting from unplanned and unmitigated population growth would exacerbate the city's existing homeless crisis. Homelessness, in turn, whether resulting from students unable to afford housing[6] or residents displaced by students, "leads to physical impacts on parks, streets and other public spaces, public safety issues related to homeless encampments locating in unsafe locations, and an increase in public health problems." In addition, the record includes a San Francisco Department of Public Health report on impacts of inadequate housing, which observes generally that a lack of affordable housing and displacement may result in homelessness. Comments on the draft EIR from members of the public summarily asserted the university's growth contributed to homelessness in Berkeley.

In view of *Joshua Tree* and *Visalia*, this evidence is insufficient. The displacement theory is more complicated than the blight scenario: new residents compete for housing, which drives up prices to a point that existing residents cannot afford, which causes them to become homeless, which leads to environmental impacts relating to homelessness (e.g., impacts to parks). Each of those steps requires expertise, a factual

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[6] According to the university's housing survey, approximately 10 percent of undergraduates and approximately 20 percent of doctoral students had experienced homelessness while attending the university.

EXHIBIT A

foundation, and analysis that does not exist in our record. There is no evidence whatever on the *magnitude* of any potential environmental impacts. The theory may appeal to common sense, and it may ring true in a region with crazy housing costs and rampant homelessness. But as *Joshua Tree* and *Visalia* explain, when a theory requires expert opinion, courts cannot substitute common sense, lay opinion, fears, or suspicions. (*Joshua Tree*, *supra,* 1 Cal.App.5th at pp. 690-691; *Visalia*, *supra*, 20 Cal.App.5th at pp. 15-17; CEQA, § 21080, subd. (e); see also, *Jensen v. City of Santa Rosa* (2018) 23 Cal.App.5th 877, 894.)

Finally, Good Neighbor asserts the EIR failed to assess whether indirect displacement will necessitate the construction of replacement housing elsewhere, which the EIR identified as a standard of significance for housing and population impacts. Not so. The "replacement housing" standard of significance refers to new housing constructed for tenants whose university-owned housing will be demolished to make way for new development, not to indirect displacement. It is within the lead agency's discretion to formulate standards of significance. (*King & Gardiner Farms, LLC v. County of Kern* (2020) 45 Cal.App.5th 814, 884; Kostka & Zischke, *supra*, § 13.8.)

To the extent Good Neighbor is suggesting the EIR failed to adequately address the growth-inducing impacts of indirect displacement (see Guidelines § 15126.2, subd. (e)), we also disagree. The EIR analyzes the growth-inducing impacts at a general level of detail, as CEQA requires. (*Napa Citizens for Honest Government v. Napa County Bd. of Supervisors* (2001) 91 Cal.App.4th 342, 369; *Clover Valley Foundation v. City of Rocklin* (2011) 197 Cal.App.4th 200, 227-228.)

DISPOSITION

The judgment is reversed. The matter is remanded to the superior court with directions to vacate its order and judgment denying Good Neighbor's petition for writ of mandate and enter a

EXHIBIT A

modified judgment consistent with our conclusions that the EIR inadequately analyzed potential alternatives to Housing Project No. 2 and impacts from noise and displacement. (CEQA, § 21168.9, subd. (a).)

Good Neighbor is entitled to costs on appeal. (Cal. Rules of Court, rule 8.278.)

EXHIBIT A

_____
BURNS, J.

We concur:

_____
JACKSON, P.J.

_____
SIMONS, J.

A165451

EXHIBIT A

Alameda County Superior Court, No. RG21110142, Hon. Frank Roesch.

Law Offices of Thomas N. Lippe, APC, Thomas N. Lippe; Soluri Meserve, A Law Corporation, Patrick M. Soluri, Osha R. Meserve, and James C. Crowder, for Plaintiffs and Appellants.

The Sohagi Law Group, PLC, Nicole H. Gordon, Margaret M. Sohagi, Mark J.G. Desrosiers; Lubin Olson & Niewiadomski LLP, Charles R. Olson, Philip J. Sciranka; Office of The General Counsel – University of California, Charles F. Robinson, Alison L. Krumbein; UC Berkeley, Office of Legal Affairs, David M. Robinson, for Defendants and Respondents.

Buchalter, A Professional Corporation, Douglas C. Straus, Alicia Cristina Guerra, for Real Party in Interest Resources for Community Development.

EXHIBIT A

EXHIBIT B

Court of Appeal, First Appellate District
Charles D. Johnson, Clerk/Executive Officer
Electronically FILED on 3/16/2023 by V. Pons, Deputy Clerk

Filed 3/16/2023

CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

MAKE UC A GOOD NEIGHBOR et al., Plaintiffs and Appellants, v. REGENTS OF UNIVERSITY OF CALIFORNIA et al., Defendants and Respondents, RESOURCES FOR COMMUNITY DEVELOPMENT et al., Real Parties in Interest.	A165451 (Alameda County Super. Ct. No. RG21110142) **ORDER GRANTING PETITION FOR MODIFICATION AND MODIFYING OPINION [NO CHANGE IN JUDGMENT]**

THE COURT:

Respondents' petition for modification is GRANTED. The opinion filed on February 24, 2023, shall be MODIFIED as follows:

1. On page 3, the first sentence in Background A. is replaced in its entirety as follows: "Each UC campus periodically adopts a long range development plan, a high-level planning document that helps guide the university's decisions on land and infrastructure development. (See Ed. Code, § 67504, subd. (a)(1).)"

EXHIBIT B

2. On page 16, in the second full paragraph, the second sentence is replaced in its entirety as follows: "Moreover, Good Neighbor's argument ignores the problem that the rejected alternative in this case (capping future enrollment) would change the nature and scope of the project."
3. On page 29, in the last sentence of the second full paragraph, the word "their" is substituted for the word "its," so that the sentence reads: "While the Regents could have chosen to include all their properties in a single plan, that is far different from saying that separate plans serve no logical purpose or could not be implemented independently."
4. On page 34, in the first sentence of the first full paragraph of subsection 3, the phrase "will cause a potential noise increase" is deleted and replaced with "may potentially cause a noise increase."
5. On page 36, in the final sentence of the first partial paragraph, the word "waved" is substituted for the word "waived," so that the sentence reads as follows: "None of this can be waved away as speculation, unsubstantiated opinion, or bias."
6. On pages 44-45, in the second sentence of the Disposition, the words "and displacement" are deleted, so that the sentence reads as follows: "The matter is remanded to the superior court with directions to vacate its order and judgment denying Good Neighbor's petition for writ of mandate and enter a modified judgment consistent with our conclusions that the EIR inadequately analyzed potential alternatives to Housing

EXHIBIT B

Project No. 2 and impacts from noise. (CEQA, § 21168.9, subd. (a).)"

The modifications make no change to the judgment.

Dated: 03/16/2023 Jackson, P.J., P.J.

EXHIBIT B

Alameda County Superior Court, No. RG21110142, Hon. Frank Roesch.

Law Offices of Thomas N. Lippe, APC, Thomas N. Lippe; Soluri Meserve, A Law Corporation, Patrick M. Soluri, Osha R. Meserve, and James C. Crowder, for Plaintiffs and Appellants.

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Buchalter, A Professional Corporation, Douglas C. Straus, Alicia Cristina Guerra, for Real Party in Interest Resources for Community Development.

EXHIBIT B

PROOF OF SERVICE

Make UC a Good Neighbor, et al. v. The Regents of the University of California
Court of Appeal, First District, Division 5, Case No. A165451
Alameda County Superior Court, Case No. RG21110142 (Consolidated for Purposes of Trial Only with Case Nos. RG21109910, RG21110157 and 21CV000995

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 11999 San Vicente Boulevard, Suite 150, Los Angeles, CA 90049-5136.

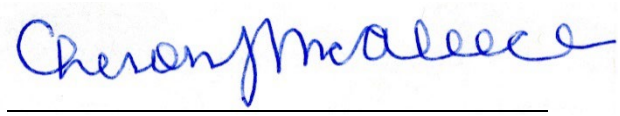
On March 27, 2023, I served true copies of the following document(s) described as **PETITION FOR REVIEW** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY ELECTRONIC SERVICE: I electronically filed the document(s) with the Clerk of the Court by using the TrueFiling system. Participants in the case who are registered users will be served by the TrueFiling system. Participants in the case who are not registered users will be served by mail or by other means permitted by the court rules.

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

Executed on March 27, 2023, at Los Angeles, California.



Cheron J. McAleece

SERVICE LIST

Make UC a Good Neighbor, et al. v. The Regents of the University of California
Court of Appeal, First District, Division 5, Case No. A165451
Alameda County Superior Court, Case No. RG21110142 (Consolidated for Purposes of Trial Only with Case Nos. RG21109910, RG21110157 and 21CV000995)

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Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically FILED on 3/28/2023 by Florentino Jimenez, Deputy

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **Make UC a Good Neighbor et al. v. The Regents for the University of California et al.**
Case Number: **TEMP-11BV1BOJ**
Lower Court Case Number:

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **ngordon@sohagi.com**

3. I served by email a copy of the following document(s) indicated below:

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Filing Type	Document Title
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PETITION FOR REVIEW	230327 Petition for Review.PDF

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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.

3/27/2023

Date

/s/Cheron McAleece

Signature

Gordon, Nicole (240056)

Last Name, First Name (PNum)

The Sohagi Law Group, PLC

Law Firm