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IN THE SUPREME COURT OF CALIFORNIA

CITY OF SAN DIEGO, et al.,
Plaintiffs and Appellants,

v.

BOARD OF TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY,
Defendant and Respondent.

AFTER A DECISION BY THE COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE
CASE NO. D057446

PETITION FOR REVIEW

HORVITZ & LEVY LLP
JEREMY B. ROSEN (BAR NO. 192473)
BRADLEY S. PAULEY (BAR NO. 187298)
15760 VENTURA BOULEVARD, 18TH FLOOR
ENCINO, CALIFORNIA 91436-3000
(818) 995-0800 • FAX: (818) 995-3157
bpauley@horvitzlevy.com
jrosen@horvitzlevy.com

GATZKE DILLON & BALLANCE LLP
MARK J. DILLON (BAR NO. 108329)
MICHAEL S. HABERKORN (BAR NO. 159266)
DANIELLE K. MORONE (BAR NO. 246831)
1525 FARADAY AVENUE, SUITE 150
CARLSBAD, CALIFORNIA 92008
(760) 431-9501 • FAX: (760) 431-9512
mdillon@gdandb.com
mhaberkorn@gdandb.com
dmorone@gdandb.com

ATTORNEYS FOR DEFENDANT AND RESPONDENT
BOARD OF TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY

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PETITION FOR REVIEW

ISSUES PRESENTED

1. In *City of Marina v. Board of Trustees of California State University* (2006) 39 Cal.4th 341, 367 (*Marina*), a decision involving whether the Board of Trustees of the California State University (CSU) was obligated by the California Environmental Quality Act, Public Resources Code section 21000 et seq. (CEQA) to mitigate a project's significant off-site environmental impacts, a six-member majority of this Court stated that "a state agency's power to mitigate its project's effects through voluntary mitigation payments is ultimately subject to legislative control; if the Legislature does not appropriate the money, the power does not exist." In a

concurring opinion, Justice Chin disagreed, calling the majority's analysis on this point "dictum," and rejecting it on its merits, noting: "[W]ere the Legislature to reject such a request, arguably, the Trustees would still have responsibility and jurisdiction to contribute [to the project] from the CSU's general operating fund." (*Id.* at p. 372 (conc. opn. of Chin, J.).)

In its published opinion here, the Court of Appeal rejected the majority opinion in *Marina* and instead agreed with Justice Chin, holding this Court's statement regarding mitigation in *Marina* is "dictum," is "not supported by any statute, regulation, case, or other authority," and "did not involve extensive analysis." (Typed opn., 29-32.) The Court of Appeal further observed, "had the California Supreme Court extensively addressed or analyzed the issue, *Marina* would have modified or qualified its dictum." (Typed opn., 32.)

In light of the above, does a state agency satisfy its obligation under CEQA to mitigate the off-site environmental impacts of a project by requesting funds for such mitigation from the Legislature, consistent with this Court's views as stated in *Marina*? Or, as the Court of Appeal held here in rejecting this Court's analysis in *Marina*, and, as Justice Chin suggested in his separate opinion in *Marina*, must the agency also address in its Environmental Impact Report (EIR) "[t]he availability of potential sources of funding other than the Legislature" and demonstrate "compelling reasons" showing those sources cannot, as a matter of law, be used to pay for mitigation?

2. Does an appellate court review an agency's decision to certify an EIR for abuse of discretion, upholding the agency's factual determinations where they are supported by substantial evidence, as long-established law requires? Or, are reviewing courts free to engage in de novo review of agencies' factual determinations, scrutinizing the supporting evidence anew and reversing an agency's EIR certification based on speculative matters outside the appellate record as the Court of Appeal did here?

INTRODUCTION: WHY REVIEW SHOULD BE GRANTED

This case arises from the plan of CSU's Board of Trustees to expand educational opportunities at San Diego State University (SDSU) by adding an array of new academic, academic support and other educational and multi-purpose buildings, and significantly increasing student enrollment. As required by CEQA, in its EIR, CSU determined the project would result in significant traffic-related impacts in the vicinity of the SDSU campus. It therefore sought funds from the Legislature to pay to mitigate those impacts. However, because CSU could not guarantee that the Legislature would appropriate the requested funds, it further determined that the impacts were "unavoidable" and adopted a statement of overriding considerations determining that, given its substantial benefits to the state and local community, the project should nonetheless proceed.

The City of San Diego (the City) and other local government entities sued, challenging CSU's approval of the project and certification of the EIR. The trial court determined that CSU had complied with CEQA when it approved the project. The Court of Appeal reversed in an 83-page published opinion that rejected this Court's majority opinion in *Marina* regarding an agency's inability to mitigate off-site impacts if the Legislature refuses to appropriate the necessary money, and instead adopted the contrary reasoning of Justice Chin's separate concurring opinion. (Typed opn., 33.) Based on its apparent de novo review of the record, the Court of Appeal also set aside factual findings CSU made during the administrative process regarding the project's potential effect on trolley service, and the propriety of a program to reduce and manage vehicle traffic near the campus. As we explain, this Court should grant review to secure uniformity of decision on these important issues.

First, this Court should grant review to clarify that it meant what it said in *Marina*: a state agency fulfills its obligations with respect to funding mitigation of off-site impacts under CEQA by requesting the necessary funds from the Legislature and, absent such an appropriation, the power to mitigate does not exist. (*Marina*, *supra*, 39 Cal.4th at p. 367.) Echoing Justice Chin's separate opinion in *Marina*, however, the Court of Appeal held the majority's statements are dicta that need not be followed, and further speculated that if this Court had analyzed the issue more carefully it would have reached a different conclusion. (Typed opn., 29-32.) On that basis, the Court of Appeal proceeded to invalidate CSU's approval of the project and certification of the EIR, holding

CSU must first address "[t]he availability of potential sources of funding other than the Legislature" and demonstrate "compelling reasons showing those sources cannot, as a matter of law, be used to pay for mitigation . . . ." (Typed opn., 33.)

Contrary to the Court of Appeal's holding, state agencies should not be required to identify every other conceivable source of funding and demonstrate why each possible source is unavailable as a matter of law before an EIR may be certified and a project may proceed. But in any event, this Court should grant review regardless of whether its views as stated in *Marina* are correct given the confusion and lack of uniformity engendered by the Court of Appeal's decision, which now makes it impossible for state agencies to know what they must do to meet CEQA's mitigation requirements.

Second, this Court should grant review to restore uniformity to the law concerning the standard of review used to evaluate an agency's decision to certify an EIR under CEQA. Until now, the case law has been clear that an agency's decision to approve an EIR is reviewed for abuse of discretion. (*Marina, supra,* 39 Cal.4th at p. 355.) But here, the Court of Appeal repeatedly went outside the appellate record and took it upon itself to second-guess CSU's factual findings, effectively employing de novo review. (Typed opn., 33, 58-62, 79-81, fn. 25.) Review is needed to avoid confusion and to underscore the need for judicial deference to agencies' factual findings.

STATEMENT OF THE CASE

A. CSU approves an important planned expansion of SDSU and certifies the project's EIR. The City and others sue, challenging the EIR.

CSU is a 23-campus public university system, with approximately 450,000 students and 23,000 faculty members. (AR 20:20069, 20075, 20077.) CSU's mission is to provide quality higher education so that graduating students can contribute to California's economy, culture, and future. (AR-20:20070.) Specific to SDSU, the campus is a critical component of the San Diego region's higher education system, serving approximately 34,000 students during the 2006/2007 academic year. (AR-18:18206.) SDSU contributes a total of $2.4 billion annually in direct, indirect, and induced output into the San Diego regional economy from university and student spending, which equates to approximately $308 million in tax revenue. (AR-18:18207.) By 2025, SDSU will contribute approximately $4.5 billion in spending annually, and about $587 million to the regional tax base. (AR-18:18208-9.)

In furtherance of its mission, in 2005, CSU approved a significant planned expansion of SDSU (the project) and certified an EIR for the project. (AR-5:4401, 4403-5; 15:14156.) The project's Master Plan is designed to accommodate 20 years of campus development, and identifies buildings and facilities needed to facilitate that growth. (AR-15:14157-14160, 14240-14243; 19:18446, 18571-18572, 18644.) The project is intended to allow SDSU to

meet projected increases in demand for higher education by increasing student enrollment and enhancing SDSU's role as an outstanding undergraduate, graduate and research university in the San Diego area. (AR-15:14157.)

As approved, the project entailed the construction of new academic, academic support and other buildings, and an expansion of student enrollment from 25,000 to 35,000 full-time equivalent students by the 2024/2025 academic year. (AR-1:89-109.) The City and others filed a petition in the Superior Court challenging the project's EIR as inadequate under CEQA. (AR-15:14156.)

B. CSU sets aside its original EIR in response to this Court's decision in *Marina*, revises the project's master plan and issues a new draft EIR.

In 2006, while litigation challenging the project's EIR was pending, this Court issued its decision in *Marina*, which concerned CSU's plans to expand another one of its campuses. (*Marina*, *supra*, 39 Cal.4th at pp. 341, 345.) In light of *Marina*'s holding that CSU was obligated to attempt to mitigate off-site impacts, CSU set aside its earlier decision to certify its EIR and approve the SDSU project. (AR-15:14156.) The trial court entered judgment consistent with CSU's action and issued a writ of mandate setting aside the 2005 EIR. (CT-3:753-756.) The court retained jurisdiction pending CSU's revision of the SDSU project and preparation of a new EIR in compliance with CEQA. (*Ibid.*)

In 2007, CSU substantially revised its master plan for the project and prepared a new EIR. It released the draft EIR for public comment (AR-15:14163) and held numerous meetings to solicit comments about the project and the EIR from government agencies and the local community. (AR-19:18295-18358, 18359-18383, 18572-185733, 18667-18672, 18677-18680.)

The draft EIR determined the project would result in significant impacts to certain roadways and intersections in the vicinity of the SDSU campus. (AR-15:14807, 14816-14847.) Roadway improvements were identified as the best way to mitigate the off-campus traffic impacts. (AR-15:14863-14872; 18:17593-17602.) The draft EIR calculated CSU's fair-share contribution percentages for each of the roadway improvement mitigation measures according to a formula used by the City. (AR-18:17593-17602, 17603-17604.)

C. The City and other government entities comment on the draft EIR. CSU's efforts to negotiate its mitigation obligations fail.

In its comments on the draft EIR, the City stated that CSU's calculated fair-share contribution percentages were "unacceptable," and that CSU should be responsible for 100 percent of certain roadway improvement costs. (AR-18:17152-17153, 17262.) CSU attempted to negotiate with the City and other government entities regarding the amount of CSU's fair-share contribution for off-site mitigation. (AR-18:17151.)

Though no agreement was reached, CSU acknowledged it was obligated to request funds from the Legislature to pay for traffic impact mitigation (AR-18:17151, 17162-17163, 17693-17705; 21:20339, 20349-20350) and ultimately requested $6,437,860 to fund off-campus roadway improvements. (AR-18:17153-4; 20:20052, 20064-20065.) This was not simply a one-time request. In recognition of its ongoing obligation under *Marina* to mitigate off-site impacts, in CSU's five-year capital improvement program for 2008-09 through 2012-13, it placed particular emphasis on funding for off-site environmental mitigation efforts, including at SDSU. (AR-20:20053, 20055.) Since then, CSU has adopted additional capital improvement programs that likewise recognize the ongoing need for legislative appropriations to fund mitigation of off-site environmental impacts. (CT-4:895-905.) And with regard to the SDSU project, CSU will seek off-site mitigation funding as necessary in connection with future EIRs prepared for specific projects under the Master Plan.

The San Diego Association of Governments (SANDAG) asserted that, as a result of the project, CSU was responsible for approximately $193 million in regional transportation improvements, including improvements to transit (buses and trolleys). (AR-18:17158-17159; 17191-17192.) A trolley line operated by the San Diego Metropolitan Transit System (MTS) serves SDSU.[1] (AR-18:17231.) However, SANDAG offered no

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[1] SANDAG suggested the EIR consider trolley use to help meet the travel demands associated with the project, reduce air quality impacts, and reduce parking demand. (AR-16:15271.)

evidence the project would have significant transit impacts. (AR-18:17159.) In response to SANDAG's request that the EIR address the MTS trolley system's "capacity limitations," CSU considered the available information, which was based on SANDAG's own published data, and concluded the project would result in no significant impacts on transit.[2] (AR-18:17229-17232; 19:18517.)

MTS was largely silent regarding transit impacts until the day before CSU's hearing to consider final approval of the project, when it submitted written comments. In those comments, MTS opined, without citation to evidence, that it was "unlikely" MTS could expand service to support the draft EIR's transit assumptions, and that an additional $27 million would be needed to serve future campus ridership. (AR-27:22577-22578.)

In response to SANDAG's comments on the draft EIR, CSU added a mitigation measure, TCP-27, providing for the preparation of a Transportation Demand Management program (including such measures as the promotion of rideshare programs, transit use, vanpools and bicycles) in consultation with SANDAG and MTS. (AR-18:17237-17238; see also AR-17:17237-17239.) Because trolley ridership had not yet achieved its full potential, the EIR noted a comprehensive program was unnecessary in the near term. The EIR required that the program be implemented by the 2012/2013 academic year, "with the ultimate goal of reducing vehicle trips to

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[2] With regard to the project's likely impact on transit use, the SDSU traffic engineer calculated that, over an 18 year period, the project would add a total of 6,898 trolley riders using the SDSU station by 2024/2025. (AR-15:14797.)

campus in favor of alternate modes of travel." (AR-18:17514, 17602; 19:18563.)

D. CSU certifies the final EIR and approves the revised project.

CSU completed the final EIR in November 2007. (AR-17:16908-16914.) After a hearing and public testimony, it certified the final EIR as adequate under CEQA, approved the project and the corresponding increase in student enrollment, and approved $6,484,000 in off-campus fair-share mitigation funding for roadway improvements. (AR-19:18612-18615, 18617-18619, 18620.)

CSU's Trustees made findings under CEQA regarding the unavoidability of significant off-site impacts that stated, in relevant part:

> [B]ecause CSU cannot guarantee that its request . . . for the necessary mitigation funding will be approved, . . . , or that the funding will be granted in the amount requested, or that the public agencies will fund the mitigation improvements that are within their responsibility and jurisdiction, *the identified significant impacts are determined to be significant and unavoidable.*

(AR-19:18466, 18617, emphasis added.)

CSU's Board of Trustees also adopted a statement of overriding considerations in which it concluded the project's overriding and substantial benefits outweighed its unavoidable environmental effects and, accordingly, the project should proceed. (AR-19:18522, 18618.) In addition to the expansion of educational

opportunities, by 2025, the project is expected to result in $4.5 billion in annual spending by SDSU, a contribution of $588 million to the regional tax base, and the addition of 22,800 jobs to the regional economy. (AR-18:17174-17175.)

E. The City, SANDAG and MTS sue, challenging CSU's certification of the final EIR and approval of the revised project. The Superior Court upholds the final EIR.

In December 2007, the City and its Redevelopment Agency (collectively, the City), along with SANDAG and MTS, filed petitions for writs of mandate in the trial court challenging CSU's certification of the final EIR and approval of the revised project. (CT-1:1-50.) The trial court upheld the final EIR, finding CSU had complied with its CEQA obligations as clarified in *Marina*. (CT-7:1622-1653, 1662-1664.) The City, SANDAG and MTS appealed.

F. The Court of Appeal reverses, holding CSU did not comply with its CEQA mitigation obligations and that CSU's factual findings in the final EIR were not supported by substantial evidence.

On appeal, the City, SANDAG and MTS argued the trial court erred when it concluded CSU had complied with CEQA by finding off-site impacts would be unavoidable if the Legislature failed to approve CSU's request for funding, and by concluding the final EIR

was not required to address potential alternative sources of funds to pay for off-site mitigation costs. (Typed opn., 14.) They also challenged CSU's factual findings, including the finding that the project would have no significant impact on transit, and the finding that the Transportation Demand Management program was an appropriate way to achieve mitigation of increased traffic around the campus under CEQA. (Typed opn., 58, 62-63.)

In an 83-page published opinion, the Court of Appeal reversed and directed the trial court to issue a writ of mandate "ordering CSU to void its certification of the [final EIR] and adoption of [CSU's factual findings] and to void its approval of the Project based on noncompliance with CEQA. . . ." (Typed opn., 83.) The Court of Appeal rejected CSU's reliance on this Court's opinion in *Marina* that "a state agency's power to mitigate its project's effects through voluntary mitigation payments is ultimately subject to legislative control; if the Legislature does not appropriate the money, the power does not exist." (*Marina*, *supra*, 39 Cal.4th at p. 367.) It concluded the statement is "dictum because it was not necessary for the holding or disposition" and need not be followed. (Typed opn., 29.) The Court of Appeal also observed that this Court's statement "is not supported by any statute, regulation, case, or other authority." (Typed opn., 32.) It then surmised that "had the California Supreme Court extensively addressed or analyzed the issue, *Marina* would have modified or qualified its dictum." (*Ibid.*)

The Court of Appeal then held CSU erred by assuming its mitigation obligations were contingent on receiving funding from the Legislature, and likewise erred by concluding that, absent such

funding, off-site traffic impacts would be unavoidable. (Typed opn., 33, 35.) Instead, according to the Court of Appeal, CSU was required to address "[t]he availability of potential sources of funding other than the Legislature" in its draft and final EIR's. (Typed opn., 33.) Moreover, "all of those potential sources should not be deemed 'infeasible' sources for CSU's 'fair-share' funding . . . without a comprehensive discussion of those sources and compelling reasons showing those sources cannot, as a matter of law, be used to pay for mitigation of the significant off-site environmental effects of the Project." (*Ibid.*) On this basis, the Court of Appeal invalidated both CSU's finding that off-site traffic impacts would be unavoidable in the event the Legislature failed to appropriate funds, and the related statement of overriding considerations. (Typed opn., 35-36.)

The Court of Appeal also rejected CSU's factual findings that the project would have no significant impact on transit, explaining "there is insufficient evidence in the administrative record to support CSU's finding" and that those findings were based on "evidence that is clearly inaccurate or erroneous." (Typed opn., 79, 82.)

Finally, the Court of Appeal rejected CSU's factual finding that the EIR's mitigation measure TCP-27, providing for the implementation of a Transportation Demand Management program by 2012/2013, was a proper mitigation measure that would be effective to achieve its goal of reducing vehicle trips to the SDSU campus. (Typed opn., 61; see also AR-18:17514, 17602; 19:18563.)

LEGAL ARGUMENT

I. REVIEW IS NECESSARY TO CLARIFY WHETHER A STATE AGENCY SATISFIES ITS CEQA OBLIGATIONS TO MITIGATE OFF-SITE ENVIRONMENTAL IMPACTS BY REQUESTING FUNDS FOR SUCH MITIGATION FROM THE LEGISLATURE.

A. In *Marina*, this Court held a state agency's power to mitigate off-site impacts is subject to the Legislature's control and, if the Legislature fails to appropriate funds for off-site mitigation, the power to mitigate does not exist.

In *Marina*, this Court, in an opinion signed by six justices, decided whether CSU was obligated to fund the mitigation of off-site environmental impacts of a campus development project. There, CSU had certified the project's EIR, asserting that the off-site improvements were the exclusive responsibility of a local government agency, that such mitigation was infeasible because CSU could not legally contribute to such improvements, and the planned campus expansion offered overriding benefits that outweighed any unmitigated effects on the environment. (*Marina*, *supra*, 39 Cal.4th at p. 351.) This Court held CSU was obligated to mitigate off-site impacts, and that if CSU could not do so directly,

paying another government entity "to perform the necessary acts off campus may well represent a feasible alternative." (*Id.* at p. 367.)

Critically, for purposes of this petition, this Court also explained: *"[A] state agency's power to mitigate its project's effects through voluntary mitigation payments is ultimately subject to legislative control; if the Legislature does not appropriate the money, the power does not exist."* (*Marina, supra,* 39 Cal.4th at p. 367, emphasis added.) This Court's explanation was based on two CEQA provisions. First, Public Resources Code section 21002.1, subdivision (b), requires all public agencies to mitigate significant effects when feasible to do so.[3] (*Ibid.*; see also *id.* at pp. 349, 359, 360-361, 363 [noting CEQA provisions requiring mitigation only when feasible].) Second, section 21106 requires all state agencies to request from the Legislature the funds necessary to protect the environment relative to their projects' significant effects. (*Marina,* at p. 367.)

Justice Chin wrote a separate concurring opinion in which he explained he did not join the majority's opinion partly because "it appears to suggest that a public agency lacks jurisdiction and responsibility within the meaning of [Public Resources Code] section 21081, subdivision (a)(2), when 'the Legislature does not appropriate' money requested to pay for mitigation measures."[4]

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[3] All further statutory references are to the Public Resources Code.

[4] Section 21081 requires that a public agency prepare written findings for a project's identified significant environmental impacts, accompanied by a brief explanation of the rationale for the finding. Subdivision (a)(2) allows an agency to proceed with a project if it

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(*Marina, supra*, 39 Cal.4th at p. 372 (conc. opn. of Chin, J.).) Justice Chin opined that the majority's discussion of that issue was "dictum," observing that CSU had not requested funds for such off-site mitigation from the Legislature and it was therefore "unnecessary and premature to express an opinion" on the issue. (*Ibid.*) Justice Chin also questioned the soundness of the majority's statement, suggesting that, regardless of whether the Legislature rejected CSU's request for funds to pay for mitigation, CSU "arguably" still would have "responsibility and jurisdiction" under CEQA to contribute to off-site mitigation "with money from the CSU's general operating fund" or from other sources. (*Ibid.*)

B. The Court of Appeal here created a conflict in the law by holding, contrary to this Court's statements in *Marina*, that a state agency owes a duty to mitigate off-site impacts regardless of whether the Legislature appropriates funds for that purpose.

Consistent with the Court's holding in *Marina*, CSU here recognized its obligation under CEQA to mitigate the significant off-site environmental impacts of the SDSU project and requested funds for such mitigation from the Legislature.[5] (AR-18:17151,

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(...continued)
finds that mitigation of a significant effect is "within the responsibility and jurisdiction" of another public agency.

[5] As previously noted, CSU also has recognized its ongoing obligation to fund such mitigation efforts and has incorporated
(continued...)

17153-17154, 17162-17163, 17693-17705; 20:20052, 20064-20065; 21:20339, 20349-20350.) Further, based on the Court's statements that CSU's "power to mitigate its project's effects through voluntary mitigation payments is ultimately subject to legislative control," and "if the Legislature does not appropriate the money, the power does not exist" (*Marina, supra*, 39 Cal.4th at p. 367), CSU determined off-site traffic impacts to be unavoidable in the event the Legislature were to fail to appropriate those funds. (AR-19:18466, 18617.) CSU further determined that, given the overriding considerations that outweigh the project's significant and unavoidable environmental impacts, it should proceed. (AR-19:18522, 18618.) On that basis, CSU certified the EIR and approved the revised project. (*Ibid.*)

In reversing the trial court's judgment and invalidating CSU's findings, however, the Court of Appeal rejected this Court's views as stated in *Marina*, and instead applied the divergent reasoning of Justice Chin's separate opinion. (See typed opn., 29-33.) Specifically, the Court of Appeal concluded this Court's statement regarding the limits of a state agency's power to mitigate off-site impacts through voluntary mitigation payments was "dictum," and, in any event, unconsidered and erroneous. (Typed opn., 29, 32.)

According to the Court of Appeal's opinion, before finding mitigation infeasible CSU must first address "[t]he availability of potential sources of funding other than the Legislature" and

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proposed appropriations for such programs into its five-year capital improvement programs. (AR-20:20053, 20055; CT-4:895-905.)

demonstrate "compelling reasons showing those sources cannot, as a matter of law, be used to pay for mitigation of the significant off-site environmental effects of the Project." (Typed opn., 33.) On this point too, the opinion tracks Justice Chin's stated views. (See *Marina, supra*, 39 Cal.4th at p. 372 (conc. opn. of Chin, J.) [CSU is required to contribute to off-site mitigation "with money from the CSU's general operating fund" or from other sources].)

C. The Court of Appeal's decision is erroneous and improperly ignores this Court's prior directive.

In ruling that CSU has mitigation obligations beyond seeking appropriations from the Legislature, the Court of Appeal failed to appreciate the interplay between sections 21002.1, subdivision (b), and 21106 that this court recognized in *Marina*. If the Legislature does not appropriate funds requested by a state agency pursuant to section 21106, mitigation is economically infeasible and, under section 21002.1, subdivision (b), the agency has no obligation to mitigate. "'An appropriation is a legislative act setting aside "a certain sum of money for a specified object in such manner that the executive officers are authorized to use that money and no more for such specified purpose."'" (*Quantification Settlement Agreement Cases* (2011) 201 Cal.App.4th 758, 799.) "'[W]hen the Legislature fails to make an appropriation [the courts] cannot remedy that evil.'" (*Id.* at p. 800, quoting *Myers v. English* (1858) 9 Cal. 341, 349, disapproved on another ground in *Mandel v. Myers* (1981) 29 Cal.3d 531; see also Cal. Const., art. XVI, § 7.) The Court of

Appeal's assertion that CEQA does not "preclude[ ] CSU . . . from using nonlegislatively appropriated funding" to pay for off-site mitigation (typed opn., 32-33) is therefore inconsistent with CEQA's statutory scheme.

Moreover, contrary to the Court of Appeal's view, this Court's statement in *Marina* is not "dictum" but binding authority. This Court held the power to mitigate is subject to the Legislature's control in the course of evaluating CSU's off-site mitigation obligations. (*Marina*, *supra*, 39 Cal.4th at p. 367.) Accordingly, the observation was an intrinsic part of this Court's analysis and was necessary to its decision. (*Hubbard v. Superior Court* (1997) 66 Cal.App.4th 1163, 1168.) By refusing to follow *Marina*, the Court of Appeal's opinion undermines this Court's role as the final arbiter of California law. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 ["The decisions of [the Supreme Court] are binding upon and must be followed by all the state courts of California"].) But even if the statement were dictum, as dictum of this Court it commands "serious respect." (*Sheeler v. Greystone Homes, Inc.* (2003) 113 Cal.App.4th 908, 919, fn. 6 ["Our Supreme Court's decisions bind us, and its dicta command our serious respect"]; *Hubbard*, at p. 1169 ["Generally speaking, follow dicta from the California Supreme Court"].)

Indeed, by applying, sub silentio, the rationale of Justice Chin's concurring opinion in *Marina*, rather than the six-justice majority's opinion, the Court of Appeal here has abrogated the well-settled rule that "[a] concurring opinion does not constitute authority under the doctrine of stare decisis. The majority opinion,

not the minority, states the law and constitutes the decision of the court which binds lower courts." (*People v. Superior Court (Persons)* (1976) 56 Cal.App.3d 191, 194; accord, *People v. Byrd* (2001) 89 Cal.App.4th 1373, 1383.)

Finally, regardless of whether this Court's statements in *Marina* are correct, lower courts and state agencies now have no way of knowing what California law might require with respect to mitigation of a project's significant off-site environmental impacts. Review is therefore necessary to clarify state agencies' obligations when the Legislature fails to appropriate funds for that purpose. Given the importance of the issue and the frequency with which it arises, this Court should not wait.[6] It should take this opportunity to clarify California law. (Cal. Rules of Court, rule 8.500(b)(1) [review may be granted "[w]hen necessary to secure uniformity of decision or to settle an important question of law"].)

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[6] Indeed, CSU has another fully briefed appeal in the First District Court of Appeal raising precisely this issue. (See *City of Hayward v. Board of Trustees of the California State University*, Case No. A131412; *Hayward Area Planning Association, et al. v. Board of Trustees of the California State University*, Case No. A131413.)

II. REVIEW IS NECESSARY TO CLARIFY THE STANDARD OF REVIEW FOR AGENCIES' FACTUAL FINDINGS IN CEQA CASES BECAUSE THE COURT OF APPEAL'S PUBLISHED DECISION CONFLICTS WITH OTHERWISE SETTLED LAW.

As required by CEQA, appellate courts have traditionally reviewed an agency's decision to certify an EIR, like CSU's decision here, under the abuse of discretion standard. (See Pub. Resources Code, § 21168.5; *Marina, supra*, 39 Cal.4th at p. 355.) "Abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence." (Pub. Resources Code, § 21168.5.) The CEQA Guidelines define substantial evidence as "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached." (Cal. Code Regs., tit. 14, § 15384, subd. (a); see *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 393 (*Laurel Heights*).)

This standard commands that courts afford "much deference" to the factual and environmental conclusions made by the lead agency in its EIR. (*Marina, supra*, 39 Cal.4th at p. 355.) "In reviewing for substantial evidence, the reviewing court 'may not set aside an agency's approval of an EIR on the ground that an opposite conclusion would have been equally or more reasonable,' for, on factual questions, our task 'is not to weigh conflicting evidence and

determine who has the better argument.'" (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435; *Citizens for East Shore Parks v. California State Lands Com.* (2011) __ Cal.App.4th __ [2011 WL 6848346, at pp. *7-*8] [upholding agency findings in EIR as supported by substantial evidence].)

"'[T]he reviewing court must resolve reasonable doubts in favor of the administrative finding and decision.'" (*Laurel Heights, supra*, 47 Cal.3d at p. 393.) A reviewing court "must uphold an EIR if there is any substantial evidence in the record to support the agency's decision that the EIR is adequate and complies with CEQA." (*Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1265; *Sacramento Old City Assn. v. City Council* (1991) 229 Cal.App.3d 1011, 1027 ["[W]here substantial evidence supports the approving agency's conclusion that mitigation measures will be effective, courts will uphold such measures against attacks based on their alleged inadequacy"].)

As we explain, the published decision of the Court of Appeal turns decades of seemingly settled law on its head. While paying lip service to the correct standard of review, the court repeatedly rejected the factual determinations CSU made in its EIR in a manner best described as second guessing a lead agency's factual findings, in favor of a de novo review. This Court should therefore grant review to re-establish the uniform rule of deferential review of agencies' factual determinations in CEQA cases.

The factual finding regarding whether other funds are available for off-site mitigation if the Legislature fails to

appropriate funds. In its EIR, CSU found that "because CSU cannot guarantee that its request . . . for the necessary mitigation funding will be approved, [by the Legislature]. . . the identified significant impacts are determined to be significant and unavoidable." (See AR-19:18466, 18617.) The Court of Appeal, however, went outside the record to speculate that SDSU might "receive revenues or other funds from a myriad of sources," including "tuition, student fees, revenue bonds, parking fees, and private donations," and on that basis rejected CSU's factual findings.[7] (Typed opn., 33.)

The factual finding regarding whether the project will have significant impacts on transit use. CSU made factual findings that the project would have no significant impact on transit based on the following from the administrative record: (1) there is no evidence that the trolley line serving SDSU is presently operating at or near capacity (AR-18:17231; 24:S21662); (2) an

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[7] Below, CSU was not afforded the opportunity to address potential alternative sources of funding because neither the City nor any other entity specifically raised the issue during the EIR certification process, and thus failed to exhaust its administrative remedies. (Pub. Resources Code, § 21177, subd. (a); *Tracy First v. City of Tracy* (2009) 177 Cal.App.4th 912, 926.) The trial court so found. (CT-7:1633-1634.) The Court of Appeal disagreed, improperly scouring the administrative record for an isolated place in which other sources of mitigation funding was briefly mentioned in internal staff meeting agenda notes. On that basis alone, the Court of Appeal concluded that the "City, SANDAG and MTS may rely on the above agenda of CSU's staff to show they exhausted their administrative remedies and CSU had an opportunity to consider and address the issue whether there were alternative sources for funding its obligations under CEQA . . . " (Typed opn., 42-45.)

economic report prepared by SDSU found the existing trolley station would have sufficient capacity to handle the projected increase in ridership (AR-18:18267); (3) CSU's traffic engineer worked with SANDAG to assess trolley passenger volumes, but at no time did SANDAG express concern that the trolley line would be unable to cope with projected volumes (AR 15:14797; 17:16343, 16556-16557; 18:17231); (4) based on SANDAG's estimates, the project would add only 383 trolley riders per year, an annual ridership increase of just six percent (see AR-15:14797; 17:16343; 18:17257-17258); and (5) the absence of specific documentation supporting SANDAG and MTS's transit impact claims; documentation *required* to be provided under CEQA (see section 21104, subd. (c), and the Court of Appeal's contrary finding, typed opn., 75, fn 22.). The Court of Appeal rejected this evidence based on its own independent evaluation, even going outside the record to review the contents of a website cited in the economic report relied on by CSU and finding it wanting. (See typed opn., 79-81 & fn. 25.)

The factual finding that TCP-27 (the Transportation Demand Management program) would effectively mitigate traffic impacts. The following substantial evidence supported CSU's factual finding that TCP-27 would be effective to mitigate the project's traffic impacts: (1) preparation of the Transportation Demand Management program is mandatory; (2) the EIR includes a date certain—the 2012/2013 academic year—for the program's implementation; (3) in formulating the program, the EIR requires CSU to consult with local and regional agencies responsible for transportation planning; (4) TCP-27 provides a framework for

implementing the program; and (5) TCP-27 sets an appropriate performance standard of "reducing vehicle trips to campus in favor of alternate modes of travel." (See AR-18:17514, 17602; 19:18563.) In addition, TCP-27 is enforceable through the project's Mitigation Monitoring and Reporting Plan. (See Pub. Resources Code, § 21081.6.)

The Court of Appeal, however, ruled TCP-27 is an improper deferral of mitigation in violation of CEQA Guidelines section 15126.4(a)(1)(B). (Typed opn., 58-62.) In so ruling, the court necessarily second-guessed CSU's factual findings regarding the lack of a present need for such a program, and the suitability of TCP-27 to meet its mitigation objectives.

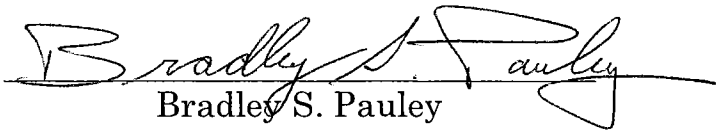
In short, this Court of Appeal opinion deviates from long-settled precedent regarding the appropriate application of the deferential standard of review for agency findings. Absent review by this Court, lower courts and public agencies will be forced to grapple with unsettled law on this important point.

CONCLUSION

The Court of Appeal's published opinion is in outright conflict with this Court's majority opinion in *Marina*. As a result, California law is in turmoil and state agencies have no clear guidance regarding the nature and extent of their off-site mitigation obligations under CEQA. This Court should grant review to provide uniformity of law on that important issue. The Court also should grant review to reconfirm the need for deferential review of agencies' factual findings.

January 20, 2012

HORVITZ & LEVY LLP
JEREMY B. ROSEN
BRADLEY S. PAULEY
GATZKE DILLON & BALLANCE LLP
MARK J. DILLON
MICHAEL S. HABERKORN
DANIELLE K. MORONE

By: 
Bradley S. Pauley

Attorneys for Defendant and Respondent
Board of Trustees of the California State University

CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 8.504(d)(1).)

The text of this petition consists of 5,944 words as counted by the Microsoft Word version 2007 word processing program used to generate the petition.

Dated: January 20, 2012

Bradley S. Pauley

Filed 12/13/11

CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

CITY OF SAN DIEGO et al., Plaintiffs and Appellants, v. BOARD OF TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY, Defendant and Respondent.	D057446 (Super. Ct. Nos. GIC855643, GIC855701, 37-2007-00083692-CU-WM-CTL, 37-2007-00083773-CU-MC-CTL, 37-2007-00083768-CU-TT-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Thomas P. Nugent, Judge. Affirmed in part, reversed in part and remanded with directions.

Jan I. Goldsmith, City Attorney, Donald R. Worley, Assistant City Attorney, and Christine M. Leone, Chief Deputy City Attorney, for Plaintiffs and Appellants the City of San Diego and Redevelopment Agency of the City of San Diego.

John F. Kirk; the Sohagi Law Group, Margaret M. Sohagi, Philip A. Seymour, and Nicole H. Gordon for Plaintiffs and Appellants San Diego Association of Governments and San Diego Metropolitan Transit System.

Ronald W. Beals, Thomas C. Fellenz, David H. McCray, Brandon S. Walker and Elizabeth R. Strayer for State of California, Department of Transportation as Amicus Curiae on behalf of Plaintiffs and Appellants.

Remy, Thomas, Moose & Manley, Sabrina V. Teller and Laura M. Harris for League of California Cities and California State Association of Counties as Amicus Curiae on behalf of Plaintiffs and Appellants.

Gatzke, Dillon & Ballance, Mark J. Dillon, Michael S. Haberkorn and Danielle K. Morone for Defendant and Respondent.

In 2005, the Board of Trustees of the California State University (CSU) certified an environmental impact report (EIR) and approved a project for the expansion of San Diego State University (SDSU). The project included the construction of new buildings and an increase in SDSU's student enrollment from 25,000 full-time equivalent students (FTES) to 35,000 FTES by the 2024/2025 academic year. During the pendency of litigation challenging the 2005 EIR certification and project approval, the California Supreme Court issued its opinion in *City of Marina v. Board of Trustees of California State University* (2006) 39 Cal.4th 341 (*Marina*), which addressed certain issues involved in the 2005 SDSU EIR litigation. In response to *Marina*, the trial court in 2006 entered judgment against CSU and issued a writ of mandate directing it to set aside its certification of the 2005 EIR and approval of the SDSU expansion project. The court retained jurisdiction of the matter until it determined CSU had complied with the

California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.)[1] (CEQA) and the views expressed in *Marina*.

In 2007, CSU revised its master plan for expansion of SDSU (the Project) and released a draft EIR (DEIR) for the Project. After receiving comments from the general public and governmental agencies, CSU prepared a final EIR (FEIR), responding to those comments and revising the DEIR. In November 2007, CSU certified the FEIR and approved the Project, finding that because it might not obtain "fair-share" off-site mitigation funding from the Legislature and Governor, there are no feasible mitigation measures to reduce the Project's significant off-site traffic impacts to a less than significant level. Based in part on its finding that those significant off-site traffic impacts were unavoidable, CSU adopted a statement of overriding considerations, concluding the Project's benefits outweighed its unavoidable significant environmental effects, and then approved the Project.

The City of San Diego and the Redevelopment Agency of the City of San Diego (together City), San Diego Association of Governments (SANDAG), and San Diego Metropolitan Transit System (MTS) filed petitions for writs of mandate challenging CSU's certification of the FEIR and approval of the Project. After consolidating the cases and hearing arguments of counsel, the trial court denied the petitions and discharged the 2006 writ, finding CSU had complied with *Marina*. It then entered judgment for CSU.

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1 All statutory references are to the Public Resources Code unless otherwise specified.

On appeal, City, SANDAG, and MTS contend the trial court erred by: (1) concluding CSU complied with CEQA and *Marina* by finding "fair-share" payments for mitigation of significant off-site environmental impacts were infeasible because it could not guarantee the Legislature and Governor would approve the funding, and that the FEIR was not required to address potential alternative means of paying CSU's "fair-share" of those off-site mitigation costs; (2) concluding they could not raise those issues in the trial court because they did not raise them during the administrative proceedings (i.e., they failed to exhaust their administrative remedies); (3) denying their request for judicial notice of certain documents pertaining to the issue of whether CSU complied with CEQA and *Marina*; (4) concluding the FEIR did not err in calculating the increased vehicle traffic caused by the Project's increased student enrollment; (5) concluding CSU did not improperly defer adoption of mitigation measures to reduce vehicle traffic; and (6) concluding the FEIR adequately addressed the Project's potential impacts on transit and that there is substantial evidence to support CSU's finding the Project will not cause any significant effect on public transit (e.g., trolley and bus facilities and service). For the reasons discussed below, we conclude the trial court erred in denying the petitions and the request for judicial notice and in discharging the 2006 writ.

FACTUAL AND PROCEDURAL BACKGROUND

The SDSU campus is located in The City of San Diego along the southern rim of Mission Valley. The campus consists of about 280 acres with the following general boundaries: Montezuma Road on the south, East Campus Drive on the east, 55th Street and Remington Road on the west, and Adobe Falls Road (north of Interstate 8) on the

north. In 2005, CSU certified an EIR and approved a project for the expansion of SDSU. During the pendency of litigation challenging that 2005 EIR certification and project approval, the California Supreme Court issued its opinion in *Marina*. In response to *Marina*, in 2006 the trial court entered judgment against CSU, issued a writ of mandate directing it to set aside its certification of the 2005 EIR and approval of the project, and retained jurisdiction of the matter until it determined CSU had complied with CEQA and *Marina*.

In February 2007, toward its continuing goal of expanding SDSU's enrollment, CSU prepared a new notice of preparation and initial study (NOP) and circulated it for public comment. In June, after receiving public comments on the NOP, CSU prepared the DEIR. As described in the DEIR, the Project is CSU's master plan for expansion of SDSU through the 2024/2025 academic year by increasing student enrollment from 25,000 FTES to 35,000 FTES (equal to an actual increase of 11,385 students) and developing six components: (1) additional on-campus student housing (i.e., an additional 2,976 beds); (2) between 172 and 348 condominium and/or townhouse units on the 33-acre Adobe Falls site for SDSU faculty and staff housing; (3) a 120-room hotel on its Alvarado Road site; (4) 612,000 square feet of new building space on its Alvarado Road site for academic, research, and/or medical use and a 552,000 square foot parking structure; (5) renovation and expansion of the student union building; and (6) a 70,000 square foot campus conference center for meetings, conferences, office space, and food and retail services. The DEIR states the proposed increase in student enrollment will require the hiring of 691 additional faculty members and 591 additional staff members.

The Project will result in a total of 12,667 additional students, faculty, and staff on the SDSU campus by the 2024/2025 academic year.[2] The DEIR discussed the Project's potential significant environmental impacts and mitigation measures and alternatives that would reduce or avoid those impacts.

CSU circulated the DEIR for public comment from June 12, 2007, through July 27, 2007. CSU held multiple community meetings to present the DEIR and the Project, and receive comments. CSU received about 87 comment letters on the DEIR from residents who live in neighborhoods that would be affected by the Project; other members of the public; and federal, state, and local governmental agencies, including City and SANDAG. CSU then prepared the FEIR, which attached the comment letters, responded to them, and revised the DEIR.

On November 13 and 14, 2007, CSU held a public meeting on the FEIR. Representatives of City, SANDAG, MTS, and the State of California Department of Transportation (Caltrans) and members of the public expressed concerns regarding the FEIR and the Project. CSU then adopted findings of fact (Findings) and the mitigation measures set forth in the mitigation monitoring and reporting program (MMRP). In the Findings, CSU found the FEIR identified potentially significant effects that could result from implementation of the Project, and inclusion of mitigation measures as part of approval of the Project would reduce most, but not all, of those effects to less than

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2 This total is the sum of 11,385 additional students, 691 additional faculty, and 591 additional staff.

significant levels. However, as to those significant impacts that are unavoidable even after incorporating all feasible mitigation measures, CSU found the benefits of the Project outweighed those unavoidable significant impacts. CSU expressly found the Project would have "[n]o significant impacts on transit systems." CSU approved resolutions stating:

> "7. A portion of the mitigation measures necessary to reduce traffic impacts to less than significant are the responsibility of and under the authority of the City . . . . The City and [CSU] have not come to agreement. [CSU] therefore cannot guarantee that certain mitigation measures that are the sole responsibility of the City will be timely implemented. [CSU] therefore finds that certain impacts upon traffic may remain significant and unavoidable if mitigation measures are not implemented, and adopts Findings of Fact that include specific Overriding Considerations that outweigh the remaining potential unavoidable significant impacts with respect to traffic and transit that are not under the authority and responsibility of [CSU].
>
> "8. . . . [CSU] hereby certifies the FEIR for the [Project] as complete and adequate in that the FEIR addresses all significant environmental impacts of the [Project] and fully complies with the requirements of CEQA and the CEQA Guidelines. . . .
>
> "9. It is necessary, consistent with [*Marina*], for CSU to pursue mitigation funding from the [L]egislature to meet its CEQA fair-share mitigation obligations. The chancellor is therefore directed to request from the [G]overnor and the [L]egislature, through the annual state budget process, the future funds ($6,484,000) necessary to support costs as determined by [CSU] necessary to fulfill the mitigation requirements of CEQA.
>
> "10. In the event the request for mitigation funds is approved in full, the chancellor is directed to proceed with implementation of the [master plan for the Project]. Should the request for funds only be partially approved, the chancellor is directed to proceed with implementation of the [P]roject, funding identified mitigation measures to the extent of the available funds. In the event the request for funds is not approved, the chancellor is directed to

proceed with implementation of the [P]roject consistent with resolution number 11 below.

"11. Because [CSU] cannot guarantee that the request to the [L]egislature for the necessary mitigation funding will be approved, or that the local agencies will fund the measures that are their responsibility, [CSU] finds that the impacts whose [sic] funding is uncertain remain significant and unavoidable, and that they are necessarily outweighed by the Statement of Overriding Considerations adopted by [CSU]."

CSU certified the FEIR and approved the Project. It then issued a notice of determination regarding its findings and actions.

In December 2007, City, SANDAG and MTS filed separate petitions for writs of mandate challenging CSU's certification of the FEIR and approval of the Project. The trial court subsequently consolidated the cases. CSU filed a motion to discharge the 2006 writ. In February 2010, the trial court issued a statement of decision rejecting all of the claims asserted by City, SANDAG and MTS. In March 2010, the court entered judgment for CSU, denying the petitions for writs of mandate filed against it and discharging the 2006 writ. The court found CSU had met the requirements of CEQA and *Marina*. City, SANDAG and MTS timely filed notices of appeal challenging the judgment.[3]

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3 We granted the requests to file, and have considered, amicus curiae briefs filed by Caltrans and by the League of California Cities and California State Association of Counties. We also have considered CSU's responses to those amicus briefs. In support of CSU's response to Caltrans's amicus brief, CSU filed a motion requesting that we take judicial notice of certain documents pertaining to Caltrans and its capital improvement program for transportation projects. Because Caltrans is not a party to this appeal and those documents are irrelevant and unnecessary to our disposition of this case, we exercise our discretion and deny CSU's request for judicial notice.

DISCUSSION

I

Standard of Review

The abuse of discretion standard of review applies to our review of CSU's compliance with CEQA in the circumstances of this case. Section 21168.5 provides:

> "In any action or proceeding, other than an action or proceeding under Section 21168, to attack, review, set aside, void or annul a determination, finding, or decision of a public agency on the grounds of noncompliance with this division, the inquiry shall extend only to whether there was a prejudicial abuse of discretion. Abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence."

"An appellate court's review of the administrative record for legal error and substantial evidence in a CEQA case, as in other mandamus cases, is the same as the trial court's: The appellate court reviews the agency's action, not the trial court's decision; in that sense appellate judicial review under CEQA is de novo. [Citations.] We therefore resolve the substantive CEQA issues on which we granted review by independently determining whether the administrative record demonstrates any legal error by the [public agency] and whether it contains substantial evidence to support the [public agency's] factual determinations." (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 427 (*Vineyard*).) We review de novo, or independently, the question whether CSU committed any legal error under CEQA (i.e., did not "proceed[] in a manner required by law") in preparing and certifying the FEIR and approving the Project. (§ 21168.5.) When a public agency does not comply with

procedures required by law, its decision must be set aside as presumptively prejudicial. (*Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, 1236 (*Sierra Club*).) Noncompliance by a public agency with CEQA's substantive requirements or noncompliance with its information disclosure provisions that preclude relevant information from being presented to the public agency "constitute[s] a prejudicial abuse of discretion within the meaning of Sections 21168 and 21168.5, regardless of whether a different outcome would have resulted if the public agency had complied with those provisions." (§ 21005, subd. (a); *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 946.) "In other words, when an agency fails to proceed as required by CEQA, harmless error analysis is inapplicable. The failure to comply with the law subverts the purposes of CEQA if it omits material necessary to informed decisionmaking and informed public participation." (*County of Amador*, at p. 946.)

We apply the substantial evidence standard of review to a public agency's "conclusions, findings, and determinations, and to challenges to the scope of an EIR's analysis of a topic, the methodology used for studying an impact, and the reliability or accuracy of the data upon which the EIR relied because these types of challenges involve factual questions." (*City of Long Beach v. Los Angeles Unified School Dist.* (2009) 176 Cal.App.4th 889, 898.) "Substantial evidence" is defined in the CEQA guidelines as "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also

be reached." (Cal. Code Regs., tit. 14, § 15384, subd. (a).)[4] "The agency is the finder of fact and we must indulge all reasonable inferences from the evidence that would support the agency's determinations and resolve all conflicts in the evidence in favor of the agency's decision." (*Save Our Peninsula Committee v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 117.) However, "[a]rgument, speculation, unsubstantiated opinion or narrative, evidence which is clearly inaccurate or erroneous . . . is not substantial evidence. Substantial evidence shall include facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts." (§ 21082.2, subd. (c); Guidelines, § 15384.)

II

CEQA Generally

CEQA generally requires preparation and certification of an EIR by a lead public agency on any proposed project that may have a significant effect on the environment. (§§ 21080, subd. (d), 21082.2, subd. (d), 21100, subd. (a), 21151.) The EIR must describe, in detail, all the significant effects on the environment of the project. (*Sunnyvale West Neighborhood Assn. v. City of Sunnyvale City Council* (2010) 190 Cal.App.4th 1351, 1372 (*Sunnyvale*).) "In evaluating the significance of the environmental effect of a project, the lead agency shall consider direct physical changes in the environment which may be caused by the project and reasonably foreseeable

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4 All regulatory citations are to title 14 of the California Code of Regulations (Guidelines).

indirect physical changes in the environment which may be caused by the project." (Guidelines, § 15064, subd. (d).) "CEQA compels government first to identify the environmental effects of projects, and then to mitigate those adverse effects through the imposition of feasible mitigation measures or through the selection of feasible alternatives. It permits government agencies to approve projects that have an environmentally deleterious effect, but also requires them to justify those choices in light of specific social or economic conditions. (§ 21002.)" (*Sierra Club, supra,* 7 Cal.4th at p. 1233.)

"With narrow exceptions, CEQA requires an EIR whenever a public agency proposes to approve or to carry out a project that may have a significant effect on the environment. [Citations.] 'Project' means, among other things, '[a]ctivities directly undertaken by any public [agency]' [or an activity undertaken by a person that is supported, in whole or in part, through contracts or other forms of assistance from one or more public agencies]. [Citation.] . . . The Legislature has made clear that an EIR is 'an informational document' and that '[t]he purpose of an environmental impact report is to provide public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment; to list ways in which the significant effects of such a project might be minimized; and to indicate alternatives to such a project." (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 390-391, fn. omitted (*Laurel Heights*).)

"Under CEQA, the public is notified that a draft EIR is being prepared [citations], and the draft EIR is evaluated in light of comments received. [Citations.] The lead

agency then prepares a final EIR incorporating comments on the EIR and the agency's responses to significant environmental points raised in the review process. [Citations.] The lead agency must certify that the final EIR has been completed in compliance with CEQA and that the information in the final EIR was considered by the agency before approving the project. [Citation.] Before approving the project, the agency must also find either that the project's significant environmental effects identified in the EIR have been avoided or mitigated, or that unmitigated effects are outweighed by the project's benefits." (*Laurel Heights*, *supra*, 47 Cal.3d at p. 391, fn. omitted.) "If CEQA is scrupulously followed, the public will know the basis on which its responsible officials either approve or reject environmentally significant action, and the public, being duly informed, can respond accordingly to action with which it disagrees. [Citations.] The EIR process protects not only the environment but also informed self-government." (*Id.* at p. 392.)

"[T]he ultimate decision of whether to approve a project, be that decision right or wrong, is a nullity if based upon an EIR that does not provide the decision-makers, and the public, with the information about the project that is required by CEQA." (*Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818, 829.) In *City of Santee v. County of San Diego* (1989) 214 Cal.App.3d 1438, we stated that "only through an accurate view of the project may the public and interested parties and public agencies balance the proposed project's benefits against its environmental cost, consider appropriate mitigation measures, assess the advantages of terminating the proposal and properly weigh other alternatives . . . ." (*Id.* at p. 1454.) If a final EIR does not

"adequately apprise all interested parties of the true scope of the project for intelligent weighing of the environmental consequences of the project," informed decisionmaking cannot occur under CEQA and the final EIR is inadequate as a matter of law. (*Id.* at pp. 1454-1455.)

Under CEQA, a public agency is required to mitigate or avoid the significant environmental effects of a project that it carries out or approves if it is feasible to do so. (§ 21002.1, subd. (b); *Marina*, *supra*, 39 Cal.4th at p. 359.) Measures to mitigate significant environmental effects adopted by the agency must be fully enforceable. (§ 21081.6, subd. (b).) "A public agency shall provide that measures to mitigate or avoid significant effects on the environment are fully enforceable through permit conditions, agreements, or other measures. . . ." (*Ibid.*)

III

Marina and Mitigation of Significant Off-site Environmental Impacts

City, SANDAG and MTS contend the trial court erred by concluding CSU complied with CEQA and *Marina* by finding "fair-share" payments by CSU for mitigation of the Project's significant off-site environmental impacts were infeasible because CSU could not guarantee the Legislature and Governor would approve mitigation funding and by concluding the FEIR was not required to address potential alternative means of paying CSU's "fair-share" of off-site mitigation costs.

A

The DEIR identified and discussed the Project's potentially significant off-site traffic impacts to certain street intersections, street segments, freeway ramps, and freeway

mainline segments. For each of those potentially significant traffic impacts, the DEIR recommended specific mitigation measures, which primarily consisted of contributions to City of CSU's fair share of costs of implementing those mitigation measures (e.g., improvements to City street intersections and segments). As to each of the 34 traffic mitigation measures, the DEIR calculated CSU's respective "fair-share" percentage (ranging from 1 percent to 39 percent) of the total cost of that mitigation measure. With implementation of the proposed mitigation measures, the DEIR concluded all of the specific traffic impacts would be reduced to a level below significant, except for four specific impacts that would remain significant and unavoidable. Regarding CSU's mitigation measures, the DEIR stated: "Fair-share mitigation is recommended that would reduce the identified impacts to a level below significant. However, [CSU's] fair-share funding commitment is necessarily conditioned [on] requesting and obtaining funds from the California Legislature. If the Legislature does not provide funding, or if funding is significantly delayed, all identified significant impacts would remain significant and unavoidable."

In a letter dated July 27, 2007, City commented on the DEIR, restating many of the concerns it raised in its prior letter commenting on the NOP. City stated the DEIR's traffic impact analysis was "fatally flawed because it does not guarantee the implementation of the traffic mitigation measures it proposes." City disagreed with CSU's interpretation of *Marina* reflected in a quoted statement from the DEIR that CSU's "fair-share funding commitment is necessarily conditioned up[on] requesting and obtaining funds from the California Legislature. If the Legislature does not provide

funding, or if funding is significantly delayed, all identified significant impacts would remain significant and unavoidable." (Underscoring added by City.) City quoted language from *Marina* on which CSU apparently relied and argued that language was "pure dictum."[5] City asserted the DEIR "fails because [CSU] disingenuously attempt[s] to dodge true responsibility [for mitigation of the Project's significant impacts] by relying on dicta in [*Marina*]."

In the FEIR, CSU responded to comments by City and others criticizing CSU's interpretation of *Marina* and its interpretation of its obligation under CEQA to discuss and propose measures to mitigate the Project's significant off-site traffic environmental impacts. The FEIR stated:

> "The following are the requisite principles established by [*Marina*], relative to the [Project] and [FEIR]: [¶] . . . [¶]
>
> "[CSU] is obligated to request funding from the Legislature for mitigation, including funds for its local agency fair-share mitigation costs. [Citation.]
>
> "However, the power of [CSU] to mitigate the [P]roject's effects through voluntary mitigation payments is ultimately subject to legislative control; if the Legislature does not appropriate the money, the power does not exist. [Citation.]
>
> "Thus, if the Legislature does not fund [CSU's] fair share, [CSU] has the authority to adopt a statement of overriding considerations and proceed with the [P]roject. [Citation.]"

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5 As we discuss in more detail below, that language states: "[A] state agency's power to mitigate its project's effects through voluntary mitigation payments is ultimately subject to legislative control; if the Legislature does not appropriate the money, the power does not exist." (*Marina*, *supra*, 39 Cal.4th at p. 367.)

Citing *Marina*, CSU's response further stated: "[T]he [FEIR] proposes a series of mitigation measures that requires [CSU], subject to funding by the state Legislature, to contribute its 'fair share' of the costs required to improve existing infrastructure, as needed. [Citation.] . . . Further, the [FEIR] determined that impacts related to traffic and circulation would be significant and unavoidable in light of the potential for the Legislature to deny CSU's or Caltrans'[s] funding requests, or to grant less funding than requested, or to delay receipt of the funds." CSU further stated:

> "Consistent with [*Marina*], upon project approval by [CSU], the CSU Chancellor will request from the Governor and the state Legislature, through the annual State Budget process, the funds necessary to fulfill the mitigation requirements of CEQA, as determined by [CSU]. [¶] . . . [¶]
>
> "If the Legislature approves the CSU funding request, or a portion of that request, it is anticipated the appropriated funds will be provided to [City] and the City of La Mesa in annual amounts corresponding to actual annual enrollment growth, provided that each entity identifies a fund or traffic impact fee program assuring that the funds will be expended solely in furtherance of the subject roadway improvements.
>
> "Because CSU cannot guarantee that its request to the Governor and the Legislature for the necessary mitigation funding will be approved, or that Caltrans'[s] request for funding will be approved, or that funding will be granted in the amount requested, or that the public agencies will fund the mitigation improvements that are within their responsibility and jurisdiction, if the [P]roject is approved, CSU will find that the impacts whose [sic] funding is uncertain remain significant and unavoidable, and CSU will adopt a statement of overriding considerations pursuant to CEQA."

The FEIR made certain revisions to the DEIR, including a statement that its proposed traffic mitigation measures are consistent with *Marina*. As to many, if not most, of the specific traffic mitigation measures, the FEIR qualified CSU's obligation to

contribute to City its fair share of mitigation costs by including the prefatory language "[s]ubject to funding by the state Legislature." The FEIR also listed its proposed fair-share percentage contribution, ranging from ` percent to 39 percent, toward the cost of each of the 34 specific off-site traffic mitigation measures. Although the FEIR concluded the Project "would result in significant impacts at various intersections, freeway interchanges and mainline segments" and recommended CSU pay "fair-share" mitigation to reduce those impacts below a level of significance, it concluded CSU's "fair-share funding commitment is necessarily conditioned upon requesting and obtaining funds from the California Legislature for those impacts within the jurisdiction of local agencies, and Caltrans obtaining funds from the Legislature for those impacts within its jurisdiction. If the Legislature does not provide funding, or if funding is significantly delayed, all identified significant impacts would remain significant and unavoidable." The FEIR then cited its response to comments on its interpretation of *Marina*.

CSU adopted the Findings and the mitigation measures set forth in the MMRP. In the Findings, CSU found the FEIR identified potentially significant effects that could result from implementation of the Project, but inclusion of mitigation measures as part of approval of the Project would reduce most, but not all, of those effects to less than significant levels. However, the Findings stated:

> "*Because CSU's request to the Governor and the Legislature*, made pursuant to [*Marina*], *for the necessary mitigation funding may not be approved* in whole or in part, or because any funding request submitted by Caltrans may not be approved, and, because the local public agencies may not fund the mitigation improvements that are within their responsibility and jurisdiction, even if state funding is obtained, [CSU] finds *there are no feasible mitigation measures* that

> would reduce the identified significant impacts to a level below significant. Therefore, these impacts must be considered unavoidably significant even after implementation of all feasible transportation/circulation and parking mitigation measures." (Italics added.)

Furthermore, as to those significant impacts that are unavoidable even after incorporating all feasible mitigation measures, CSU found the benefits of the Project outweighed those unavoidable impacts. CSU approved resolutions stating that:

> "7. A portion of the mitigation measures necessary to reduce traffic impacts to less than significant are the responsibility of and under the authority of the City . . . . The City and [CSU] have not come to agreement. [CSU] therefore cannot guarantee that certain mitigation measures that are the sole responsibility of the City will be timely implemented. [CSU] therefore finds that certain impacts upon traffic may remain significant and unavoidable if mitigation measures are not implemented, and adopts Findings of Fact that include specific Overriding Considerations that outweigh the remaining, potential, unavoidable significant impacts with respect to traffic and transit that are not under the authority and responsibility of [CSU].
>
> "8. . . . [CSU] hereby certifies the FEIR for the [Project] as complete and adequate in that the FEIR addresses all significant environmental impacts of the [Project] and fully complies with the requirements of CEQA and the CEQA Guidelines. . . .
>
> "9. It is necessary, consistent with [*Marina*], for CSU to pursue mitigation funding from the [L]egislature to meet its CEQA fair-share mitigation obligations. The chancellor is therefore directed to request from the [G]overnor and the [L]egislature, through the annual state budget process, the future funds ($6,484,000) necessary to support costs as determined by [CSU] necessary to fulfill the mitigation requirements of CEQA.
>
> "10. In the event the request for mitigation funds is approved in full, the chancellor is directed to proceed with implementation of the [master plan for the Project]. Should the request for funds only be partially approved, the chancellor is directed to proceed with implementation of the [P]roject, funding identified mitigation

> measures to the extent of the available funds. In the event the request for funds is not approved, the chancellor is directed to proceed with implementation of the [P]roject consistent with resolution number 11 below.
>
> "11. Because [CSU] cannot guarantee that the request to the [L]egislature for the necessary mitigation funding will be approved, or that the local agencies will fund the measures that are their responsibility, [CSU] finds that the impacts whose [sic] funding is uncertain remain significant and unavoidable, and that they are necessarily outweighed by the Statement of Overriding Considerations adopted by [CSU]."

CSU certified the FEIR and approved the Project.

In denying City's subsequent petition for writ of mandate and discharging the 2006 writ, the trial court issued a statement of decision, stating in part:

> "[*Marina*] did not rule out the possibility that a voluntary payment negotiated . . . for the purpose of mitigating specified environmental effects would not satisfy [CSU's] CEQA obligations as to such effects. In reliance on this opinion, CSU negotiated with the City and Caltrans to determine its fair share of the offsite improvements. CSU then requested the necessary funds from the Legislature and[,] in doing so, complied with the mandate of [*Marina*]. [¶] . . . [¶]
>
> "Petitioners suggest that CSU must discuss other methods to fund mitigation measures, such as non-state funded revenue bonds or reducing the scope of the [P]roject. [*Marina*] does not so hold. Further, such arguments were not raised in the underlying proceedings and cannot be raised now. . . . Here, Petitioners cited to several comment letters . . . . [H]owever, the alternative funding claims were not raised in these comment letters. [¶] . . . [¶]
>
> "The Court finds that CSU has met the requirements of [*Marina*] and CEQA. The 2006 writ is discharged."

B

In *Marina*, the California Supreme Court addressed CSU's obligations under CEQA to discuss in an EIR measures to mitigate the significant off-site environmental

impacts of a project involving the expansion of its Monterey Bay campus (CSUMB) on Fort Ord, a former United States Army base, to accommodate an increase in enrollment from 3,800 students to 25,000 students by 2030. (*Marina*, *supra*, 39 Cal.4th at pp. 345-346, 348.) The Fort Ord Reuse Authority (FORA) was created by the Legislature to manage the transition of the former Fort Ord base to civilian uses, including residential housing, business, light industry, research and development, recreation, and education. (*Id.* at p. 346.) The Legislature gave FORA the power and duty to prepare the base's infrastructure for development for those civilian uses. (*Id.* at p. 347.) FORA's capital improvement plans included construction of infrastructure for transportation (e.g., roadways), water supply, and wastewater management. (*Ibid.*) The Legislature directed FORA to arrange its own financing for those infrastructure improvements, rather than through legislative appropriations. (*Ibid.*)

In its EIR for the expansion of CSUMB, CSU identified many significant environmental effects of the project and adopted specific mitigation measures that would mitigate most of those effects to a level of less than significant. (*Marina*, *supra*, 39 Cal.4th at p. 349.) However, because full mitigation of certain significant effects, including off-site traffic impacts, would require action by both CSU and FORA, the EIR did not provide for mitigation of those effects. (*Id.* at pp. 349-351.) Nevertheless, FORA's own planning documents included plans for infrastructure improvements that would fully mitigate the remaining effects of CSU's expansion of CSUMB. (*Id.* at p. 351.) In so doing, FORA assumed CSUMB would pay its share of the cost of the infrastructure improvements. (*Ibid.*) However, CSU refused to contribute any funds to

FORA for road and fire protection improvements. (*Ibid.*) CSU certified the EIR and approved the project despite the remaining unmitigated effects, finding (as *Marina* paraphrases) that "(1) improvements to roads and fire protection are the responsibility of FORA rather than of [CSU]; (2) mitigation is infeasible because [CSU] may not legally contribute funds toward these improvements; and (3) the planned expansion of CSUMB offers overriding benefits that outweigh any remaining unmitigated effects on the environment." (*Ibid.*, fn. omitted.)

FORA and the City of Marina filed separate petitions for writs of mandate challenging CSU's certification of the EIR, alleging that CSU "had (1) failed to identify and adopt existing, feasible measures to mitigate significant effects on the environment described in the EIR, (2) improperly certified the EIR and approved the [project] despite the availability of feasible mitigation measures, (3) improperly disclaimed responsibility for mitigating CSUMB's environmental effects, and (4) improperly relied on a statement of overriding considerations to justify certifying the EIR and approving the [project]." (*Marina*, *supra*, 39 Cal.4th at p. 354.) The trial court granted the petitions and issued a writ of mandate directing CSU to vacate its actions and set aside the EIR's statement of overriding considerations. (*Id.* at pp. 354-355.) On appeal, the court of appeal reversed the judgment. (*Id.* at p. 355.) The California Supreme Court granted FORA's petition for review. (*Ibid.*)

In *Marina*, the court defined the question before it as "whether [CSU] ha[s] properly certified the EIR for CSUMB and, on that basis, approved the [project]." (*Marina*, *supra*, 39 Cal.4th at p. 355.) FORA contended CSU's certification of the EIR

must be vacated because three of its underlying findings were based on the erroneous legal assumption that the California Constitution precluded it from contributing funds to FORA for mitigation of the project's environmental effects. (*Ibid.*) The first two of CSU's findings were that (1) CSU cannot feasibly mitigate those significant effects, and (2) mitigation of those effects was not CSU's responsibility. (*Ibid.*) Those two findings required the third finding that overriding considerations outweighed the remaining unmitigated effects and justified certification of the EIR and approval of the project. (*Ibid.*) The Supreme Court in *Marina* agreed with FORA. (*Ibid.*) The court stated: "[A]n EIR that incorrectly disclaims the power and duty to mitigate identified environmental effects based on erroneous legal assumptions is not sufficient as an informative document." (*Id.* at p. 356.)

Regarding the first issue, *Marina* rejected CSU's claim that mitigation of significant off-site effects was infeasible. (*Marina, supra,* 39 Cal.4th at pp. 356-366.) The court held the California Constitution did *not* preclude *voluntary* mitigation payments by CSU because they do not constitute compulsory charges or assessments without legislative authority. (*Id.* at pp. 356-359.) *Marina* stated:

> "CEQA requires [CSU] to avoid or mitigate, if feasible, the significant environmental effects of their project (. . . § 21002.1, subd. (b)) and . . . payments to FORA may represent a feasible form of mitigation. To illustrate the point, if campus expansion requires that roads or sewers be improved, [CSU] may do the work [itself] on campus, but [it has] no authority to build roads or sewers off campus on land that belongs to others. Yet [CSU is] not thereby excused from the duty to mitigate or avoid CSUMB's off-campus effects on traffic or wastewater management, because CEQA requires a public agency to mitigate or avoid its projects' significant effects not just on the agency's own property, but '*on the environment*' (. . . § 21012.1,

> subd. (b), italics added), with 'environment' defined for these purposes as 'the physical conditions which exist *within the area which will be affected by a proposed project*' (*id.*, § 21060.5, italics added). Thus, if [CSU] cannot adequately mitigate or avoid CSUMB's off-campus environmental effects by performing acts on campus (as by reducing sufficiently the use of automobiles or the volume of sewage), then to pay a third party such as FORA to perform the necessary acts off campus may well represent a feasible alternative. A payment made under these circumstances can properly be described neither as compulsory nor, for that reason, as an assessment." (*Marina, supra,* 39 Cal.4th at pp. 359-360.)

Marina held: "[N]o rule precludes a public entity from sharing with another the cost of improvements benefiting both. Furthermore, while education may be CSU's core function, to avoid or mitigate the environmental effects of its projects is also one of CSU's functions. This is the plain import of CEQA, in which the Legislature has commanded that '[*e*]*ach public agency* shall mitigate or avoid the significant effects on the environment of projects that it carries out or approves whenever it is feasible to do so." (*Marina, supra,* 39 Cal.4th at pp. 360-361.)

Marina also held that a payment by CSU for mitigation of its project's environmental effects "would *not* constitute an unlawful gift of public funds" (*Marina, supra*, 39 Cal.4th at p. 363, italics added) because those payments would be used for "the public purpose of discharging [its] duty as a public agency, under the express terms of CEQA, to 'mitigate or avoid the significant effects on the environment . . . whenever it is feasible to do so.' " (*Id.* at p. 372.)

Marina also rejected CSU's assertion that mitigation of its expansion of CSUMB was infeasible because it could not guarantee that FORA would actually implement the proposed infrastructure improvements. (*Marina, supra*, 39 Cal.4th at p. 363.) CSU

found in its EIR that the off-site mitigation measures were not feasible because implementation of those measures was disputed and therefore mitigation of the effects to less than significant levels could not be assured. (*Ibid.*) *Marina* concluded: "The presently identified, unavoidable uncertainties affecting the funding and implementation of the infrastructure improvements FORA has proposed in its Reuse Plan do not render voluntary contributions to FORA by [CSU] infeasible as a method of mitigating CSUMB's effects. Both the CEQA Guidelines and judicial decisions recognize that a project proponent may satisfy its duty to mitigate its own portion of a cumulative environmental impact by contributing to a regional mitigation fund. . . . [*C*]*ourts have found fee-based mitigation programs for cumulative impacts, based on fair-share infrastructure contributions by individual projects, to constitute adequate mitigation measures under CEQA*." (*Id.* at p. 364, italics added.) Although the court cautioned that a commitment to pay fair-share fees without any evidence the mitigation would actually occur would be inadequate, it concluded "[t]here is . . . no reason to doubt that FORA will meet its statutory obligation" to construct the public capital facilities necessary for civilian development. (*Id.* at p. 365.) CEQA requires only a reasonable plan for mitigation and not a time-specific schedule for specific mitigation measures (e.g., specific road improvements). (*Ibid.*)

Regarding the second issue, *Marina* rejected CSU's claim that mitigation was exclusively the responsibility of FORA. (*Marina*, *supra*, 39 Cal.4th at pp. 366-367.) Under section 21081, subdivision (a)(2), a public agency does not have to undertake identified mitigation measures if it finds those measures "are within the responsibility and

jurisdiction of another public agency and have been, or can and should be, adopted by that other agency." In the circumstances of *Marina*, although FORA has responsibility to implement its proposed infrastructure improvements, "the FORA Act contemplates that the costs of those improvements will be borne by those who benefit from them." (*Marina,* at p. 366.) However, *Marina* held the section 21081, subdivision (a)(2), finding may be made by a lead agency "only when the other agency said to have responsibility has *exclusive* responsibility." (*Marina,* at pp. 366-367.) *Marina* stated:

> "As the CEQA Guidelines explain, '[t]he finding in subsection (a)(2) shall not be made if the agency making the finding has concurrent jurisdiction with another agency to deal with identified feasible mitigation measures or alternatives.' (CEQA Guidelines, § 15091, subd. (c).) The Guidelines' logical interpretation of CEQA on this point 'avoids the problem of agencies deferring to each other, with the result that no agency deals with the problem. . . .' " (*Marina, supra,* 39 Cal.4th at p. 366.)

Marina rejected CSU's argument that it had no responsibility to mitigate off-site environmental effects of its project because it lacked the power to construct off-site infrastructure improvements. (*Id.* at pp. 366-367.) *Marina* held:

> "CEQA does not . . . limit a public agency's obligation to mitigate or avoid significant environmental effects to effects occurring on the agency's own property. (See . . . §§ 21002.1, subd. (b), 21060.5.) CEQA also provides that '[a]ll state agencies . . . shall request in their budgets the funds necessary to protect the environment in relation to problems caused by their activities.' (*Id.*, § 21106.) Thus, as we have also explained, if [CSU] cannot adequately mitigate or avoid CSUMB's off-campus environmental effects by performing acts on the campus, then *to pay a third party* such as FORA *to perform the necessary acts off campus may well represent a feasible alternative.*" (39 Cal.4th at p. 367, italics added.)

Marina then stated:

> "To be clear, we do not hold that the duty of a public agency to mitigate or avoid significant environmental effects (. . . § 21002.1, subd. (b)), combined with the duty to ask the Legislature for money to do so (*id.*, § 21106), will always give a public agency that is undertaking a project with environmental effects shared responsibility for mitigation measures another agency must implement. Some mitigation measures cannot be purchased, such as permits that another agency has the sole discretion to grant or refuse. *Moreover, a state agency's power to mitigate its project's effects through voluntary mitigation payments is ultimately subject to legislative control; if the Legislature does not appropriate the money, the power does not exist. For the same reason, however, for* [*CSU*] *to disclaim responsibility for making such payments before they have complied with their statutory obligation to ask the Legislature for the necessary funds is premature, at the very least. The superior court found no evidence* [*CSU*] *had asked the Legislature for the funds.* In [its] brief to this court, [CSU] acknowledge[s] [it] did not budget for payments [it] assumed would constitute invalid assessments . . . . That assumption, as we have explained, is invalid." (*Marina, supra,* 39 Cal.4th at p. 367, italics added, fn. omitted.)

Regarding the third issue (i.e., statement of overriding considerations), *Marina* stated: "A statement of overriding considerations is required, and offers a proper basis for approving a project despite the existence of unmitigated environmental effects, only when the measures necessary to mitigate or avoid those effects have *properly* been found to be *infeasible*. (. . . § 21081, subd. (b).) Given our conclusion [CSU] [has] abused [its] discretion in determining that CSUMB's remaining effects cannot feasibly be mitigated, that [CSU's] statement of overriding circumstances [sic] is invalid necessarily follows. *CEQA does not authorize an agency to proceed with a project that will have significant, unmitigated effects on the environment, based simply on a weighing of those effects against the project's benefits, unless the measures necessary to mitigate those effects are truly infeasible*. Such a rule, even were it not wholly inconsistent with the relevant

statute (. . . § 21081, subd. (b)), would tend to displace the fundamental obligation of '[e]ach public agency [to] mitigate or avoid the significant effects on the environment of projects that it carries out or approves whenever it is feasible to do so' (. . . § 21002.1, subd. (b))." (*Marina, supra,* 39 Cal.4th at pp. 368-369, italics added.)

Marina concluded CSU must be directed to vacate its certification of the EIR and approval of the project and set aside its statement of overriding considerations. (*Marina, supra*, 39 Cal.4th at p. 369.)

C

City, joined by SANDAG and MTS, contends the trial court erred in interpreting *Marina* to hold that CSU does not have to make "fair-share" payments for mitigation of the Project's significant off-site environmental impacts because CSU cannot guarantee the Legislature and Governor will approve the funding and therefore those mitigation measures are "infeasible" under CEQA.[6] City asserts CSU and the trial court wrongly relied on dictum in *Marina* that would allow CSU to avoid its duty to mitigate under CEQA. City further argues the FEIR fails as an informational document because it did not discuss potential alternative means of paying CSU's "fair-share" of off-site mitigation costs.

The language in *Marina* on which CSU and the trial court relied is contained in a paragraph *after* the court held mitigation was not the exclusive responsibility of FORA

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6 CSU argued below that off-site mitigation was 'infeasible" because it could not guarantee funding from the Legislature.

and CSU had an obligation under CEQA to mitigate or avoid the project's off-site environmental effects by paying a third party (e.g., FORA) to perform those acts if payments were feasible and on-campus actions could not adequately mitigate those effects. (*Marina*, *supra*, 39 Cal.4th at pp. 366-367.) *Marina* then noted CSU had not made any request of the Legislature for off-site mitigation funding because CSU (erroneously) concluded it did not have any responsibility under CEQA to mitigate the off-site environmental effects of its project. (*Id.* at p. 367.) The court stated: "[F]or [CSU] to disclaim responsibility for making such payments before [it has] complied with [its] statutory obligation to ask the Legislature for the necessary funds is premature, at the very least." (*Ibid.*) The court also stated: "[A] state agency's power to mitigate its project's effects through voluntary mitigation payments is ultimately subject to legislative control; if the Legislature does not appropriate the money, the power does not exist." (*Ibid.*, italics added.) It is that latter language (on which CSU and the trial court relied) that City asserts is dictum and does not provide persuasive reasoning to limit CSU's duty under CEQA to make "fair-share" mitigation payments for the Project's significant off-site effects to merely making a request for such funding from the Governor and the Legislature.

The language in *Marina* at issue is dictum because it was not necessary for the holding or disposition. "Only statements necessary to the decision are binding precedents . . . ." (*Western Landscape Construction v. Bank of America* (1997) 58 Cal.App.4th 57, 61.) "The doctrine of precedent, or stare decisis, extends only to the ratio decidendi of a decision, not to supplementary or explanatory comments which might

be included in an opinion. To determine the precedential value of a statement in an opinion, the language of that statement must be compared with the facts of the case and the issues raised." (*Ibid.*)[7] "A decision is authority only for the point actually passed on by the court and directly involved in the case." (*Gomes v. County of Mendocino* (1995) 37 Cal.App.4th 977, 985.)

The ratio decidendi of *Marina* is defined by those issues directly raised by the parties and addressed by the California Supreme Court that were necessary to its decision. In *Marina*, the court defined the question before it as "whether [CSU] ha[s] properly certified the EIR for CSUMB and, on that basis, approved the [project]." (*Marina*, *supra*, 39 Cal.4th at p. 355.) FORA contended CSU's EIR certification must be vacated because three of CSU's underlying findings were based on the erroneous legal assumption that the California Constitution precluded it from contributing funds to FORA for mitigation of the project's environmental effects. (*Ibid.*) The California Supreme Court agreed with FORA that CSU erred in making the first two findings, i.e., that (1) CSU cannot feasibly mitigate those significant effects, and (2) mitigation of those effects was not CSU's responsibility. (*Ibid.*) The court then agreed CSU erred in making its third finding (i.e., its statement of overriding considerations) because it was based on

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7 "The *ratio decidendi* is the principle or rule that constitutes the ground of the decision, and it is this principle or rule that has the effect of a precedent. It is therefore necessary to read the language of an opinion in the light of its facts and the issues raised, to determine (a) which statements of law were necessary to the decision, and therefore binding precedents, and (b) which were arguments and general observations, unnecessary to the decision, i.e., dicta, with no force as precedents." (9 Witkin, Cal. Procedure (5th ed. 2008) Appeal, § 509, pp. 572-573.)

erroneous assumptions that it could not feasibly mitigate the significant off-site effects of its project and mitigation was not its responsibility. (*Ibid.*) *Marina* concluded: "An EIR that incorrectly disclaims the power and duty to mitigate identified environmental effects based on erroneous legal assumptions is not sufficient as an informative document." (*Id.* at p. 356.)

The language in *Marina* on which CSU relies in the instant appeal was set forth in *Marina*'s discussion of whether mitigation of off-site effects was exclusively the responsibility of FORA. (*Marina, supra*, 39 Cal.4th at pp. 366-367.) The court concluded CSU had a responsibility under CEQA to mitigate the significant off-site effects of its project even though it had no legal power to actually construct the off-site improvements. (*Ibid.*) *Marina* suggested that if CSU could not adequately mitigate significant off-site effects by performing on-campus acts, it could feasibly mitigate those off-site effects by paying a third party (e.g., FORA) to perform off-site mitigation (e.g., construct infrastructure improvements). (*Id.* at p. 367.) For purposes of stare decisis, that discussion constituted the court's reasoning necessary to its decision. Contrary to CSU's assertion, *Marina*'s additional statements—that CSU had not requested funding from the Legislature for that off-site mitigation and that if the Legislature did not provide such funding, had it been requested, CSU would not have the power to mitigate those off-site effects—were supplementary or explanatory comments to its ratio decidendi and were dicta. (*Western Landscape Construction v. Bank of America, supra*, 58 Cal.App.4th at p. 61; *Gogri v. Jack in the Box Inc.* (2008) 166 Cal.App.4th 255, 272.) We conclude *Marina*'s statement that "if the Legislature does not appropriate the money [for voluntary

payments for off-site mitigation], the power does not exist," (*Marina,* at p. 367) was unnecessary to its disposition of the appeal and is dictum we are not required to follow. (*Western Landscape*, at p. 61; *Gogri*, at p. 272.)

CSU argues that, even though that statement in *Marina* may be dictum, we nevertheless should follow it. However, although we generally consider California Supreme Court dicta to be persuasive (*Hubbard v. Superior Court* (1997) 66 Cal.App.4th 1163, 1169), the court's statement in question did not involve extensive analysis. We agree with the reasoning of *Marina*'s preliminary statements that CSU has an obligation under CEQA to mitigate or avoid the significant environmental effects of its projects (whether those effects are on-campus or off-site) and, toward fulfilling that obligation, it has a duty to ask the Legislature for funding to do so. (*Marina*, *supra*, 39 Cal.4th at p. 367.) However, the statement in *Marina* that: "[A] state agency's power to mitigate its project's effects through voluntary mitigation payments is ultimately subject to legislative control; if the Legislature does not appropriate the money, the power does not exist" (*ibid.*) is not supported by any statute, regulation, case, or other authority. Rather, *Marina* merely proceeds from its conclusory statement to note that because CSU had not even requested such appropriation from the Legislature, CSU could not argue it had no obligation under CEQA to make voluntary mitigation payments to a third party for off-site mitigation. (*Ibid.*)

We believe that had the parties in *Marina* specifically addressed the issue and had the California Supreme Court extensively addressed or analyzed the issue, *Marina* would have modified or qualified its dictum. As City asserts, neither CEQA nor any provision

of the Education Code or other statute precludes CSU (or any other state agency) from using nonlegislatively appropriated funding for making voluntary payments to third parties for mitigation of the off-site significant environmental effects of its projects. For example, we presume a campus of CSU (e.g., SDSU) may receive revenues or other funds from a myriad of sources (e.g., tuition, student fees, revenue bonds, parking fees, and private donations). Furthermore, in the context of the instant case, SDSU presumably will receive additional revenues from Project-related sources (e.g., rent from Adobe Falls faculty and student housing, revenue from guests of the Alvarado hotel, fees charged to residents of the Project's new dormitories and/or other student housing, revenue from the new campus conference center, and revenue from the expanded and renovated student union). The availability of potential sources of funding other than the Legislature for off-site mitigation measures should have been addressed in the DEIR and FEIR and all of those potential sources should not be deemed "infeasible" sources for CSU's "fair-share" funding of off-site mitigation measures without a comprehensive discussion of those sources and compelling reasons showing those sources cannot, as a matter of law, be used to pay for mitigation of the significant off-site environmental effects of the Project.

CSU did not cite in the DEIR or FEIR, or in its trial or appellate briefs, any statute, regulation, or other provision that bars it from using some or all of those revenue or other funding sources to help pay its "fair-share" of the costs to mitigate the significant off-site environmental effects of the Project. CEQA expressly provides that a public agency may use its discretionary powers for the purpose of mitigating or avoiding a significant

environmental effect of a project (except as otherwise provided by law). (§ 21004; Guidelines, § 15040(c); see also *County of San Diego v. Grossmont-Cuyamaca Community College Dist.* (2006) 141 Cal.App.4th 86, 103-104.) Under CEQA, a public agency (e.g., CSU) is required to mitigate or avoid the significant environmental effects of a project that it carries out or approves if it is feasible to do so. (§ 21022.1, subd. (b); *Marina*, *supra*, 39 Cal.4th at p. 359.) *Marina* stated: "CEQA requires [CSU] to avoid or mitigate, if feasible, the significant environmental effects of their project (. . . § 21002.1, subd. (b)) and . . . payments to FORA may represent a feasible form of mitigation." (*Marina*, at p. 359.) The court stated: "*CEQA does not authorize an agency to proceed with a project that will have significant, unmitigated effects on the environment, based simply on a weighing of those effects against the project's benefits, unless the measures necessary to mitigate those effects are truly infeasible.* Such a rule, even were it not wholly inconsistent with the relevant statute (. . . § 21081, subd. (b)), would tend to displace the fundamental obligation of '[e]ach public agency [to] mitigate or avoid the significant effects on the environment of projects that it carries out or approves whenever it is feasible to do so' (. . . § 21002.1, subd. (b))." (*Id.* at pp. 368-369, italics added.) Because of CSU's duty under CEQA to adopt *feasible* measures to mitigate or avoid the significant environmental effects of the Project (whether those effects occur on-campus or off-site), it would be *illogical* to interpret that duty to mitigate as requiring payment for off-site mitigation measures only if, and only to the extent, CSU obtains funding for that mitigation from one particular source of its myriad of revenue or other funding sources (i.e., a specific appropriation by the Legislature for that mitigation) to the exclusion of the

many other funding sources CSU could use to help pay its "fair-share" of the costs to mitigate the off-site effects of the Project. Were we to accept CSU's interpretation of *Marina*, it would, in effect, allow CSU to avoid its obligation under CEQA to take feasible measures to mitigate or avoid the significant off-site environmental effects of the Project and thereby obtain the benefits of the Project while leaving City and other public agencies with the entire burden of paying for mitigation of the off-site environmental effects of the Project (or causing neighboring residents and commuters to suffer the unmitigated adverse impacts of the Project). Also, to so limit CSU's duty to mitigate under CEQA would not further the Legislature's intent that CEQA "be interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language." (*Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 259, disapproved on another ground in *Kowis v. Howard* (1992) 3 Cal.4th 888, 896-897.)

D

Because CSU erred in relying on the above dictum from *Marina* in preparing the DEIR, responses to comments, the FEIR, and the Findings, and concluding its payment to City and other public agencies of its "fair-share" of the costs of off-site mitigation measures was "not feasible" (i.e., infeasible), we, like the court in *Marina*, conclude CSU's *erroneous legal assumption* invalidates both its finding that measures to mitigate the off-site effects of the Project were infeasible and its statement of overriding considerations that can only be adopted when "*the measures necessary to mitigate those*

effects are truly infeasible."[8] (*Marina*, *supra*, 39 Cal.4th at pp. 368-369, italics added.) "[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 . . . ." (§ 21002.) Furthermore, an agency can adopt a statement of overriding considerations only after it has first properly found that mitigation measures are truly infeasible. (*Marina*, at pp. 368-369.) *Marina* stated: "A statement of overriding considerations is required, and offers a proper basis for approving a project despite the existence of unmitigated environmental effects, only when the measures necessary to mitigate or avoid those effects have *properly* been found to be *infeasible.* (. . . § 21081, subd. (b).) Given our conclusion [CSU] [has] abused [its] discretion in determining that CSUMB's remaining effects cannot feasibly be mitigated, that [CSU's] statement of overriding circumstances [sic] is invalid necessarily follows." (*Marina*, at p. 368, italics added.) The court explained: "*CEQA does not authorize an*

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8 The Findings stated that: "*Because CSU's request to the Governor and the Legislature*, made pursuant to [*Marina*], *for the necessary mitigation funding may not be approved* in whole or in part, or because any funding request submitted by Caltrans may not be approved, and, because the local public agencies may not fund the mitigation improvements that are within their responsibility and jurisdiction, even if state funding is obtained, [CSU] finds *there are no feasible mitigation measures* that would reduce the identified significant impacts to a level below significant. Therefore, these impacts must be considered unavoidably significant even after implementation of all feasible transportation/circulation and parking mitigation measures." (Italics added.) CSU represents on appeal that the Legislature has not granted its request for such funding. Given the difficult choices the Legislature and Governor faced in making widespread funding cuts in California's most recent budget, a pragmatist could reasonably predict that it is unlikely the Legislature will provide funding for off-site mitigation of the Project in the foreseeable future.

agency to proceed with a project that will have significant, unmitigated effects on the environment, based simply on a weighing of those effects against the project's benefits, unless the measures necessary to mitigate those effects are truly infeasible. Such a rule, even were it not wholly inconsistent with the relevant statute (. . . § 21081, subd. (b)), would tend to displace the fundamental obligation of '[e]ach public agency [to] mitigate or avoid the significant effects on the environment of projects that it carries out or approves whenever it is feasible to do so' (. . . § 21002.1, subd. (b))." (*Id.* at pp. 368-369, italics added.)

Because the DEIR, the FEIR, and the Findings were based on the erroneous legal assumption that CSU could pay its "fair-share" of off-site mitigation costs *only if* the Legislature specifically appropriated such funding, CSU improperly found those mitigation measures were infeasible and improperly adopted a statement of overriding considerations for those "unavoidable" effects of the Project (i.e., effects for which mitigation was wrongly deemed infeasible). Alternatively stated, CSU did not proceed in a manner required by law and thereby abused its discretion by certifying the FEIR and approving the Project. (§ 21168.5; *Vineyard*, *supra*, 40 Cal.4th at p. 427.) When a public agency does not comply with procedures required by law, its decision must be set aside as presumptively prejudicial. (*Sierra Club*, *supra*, 7 Cal.4th at p. 1236.)

To the extent CSU continues to assert, as it did in its Findings and resolutions, that mitigation of the significant off-site effects of the Project is infeasible because CSU cannot guarantee City or other public agencies (e.g., Caltrans) will fund and implement measures to mitigate those significant effects, *Marina* noted "unavoidable uncertainties

affecting the funding and implementation of" off-site mitigation measures do *not* make CSU's voluntary "fair-share" contributions toward mitigation of those off-site effects "infeasible." (*Marina*, *supra*, 39 Cal.4th at p. 364.) Furthermore, the DEIR, the FEIR, and the Findings do not contain any detailed discussion showing City or other public agencies will not take measures to fund and implement mitigation measures within their respective jurisdictions and control. Our review of the record shows CSU has identified specific mitigation measures for each significant off-site environmental effect of the Project (e.g., street intersections and segments and freeway onramps and segments) and CSU has not shown the public agencies with jurisdiction over those mitigation measures had rejected those mitigation measures assuming CSU pays its "fair-share" of those mitigation costs.[9]

City also asserts the DEIR and FEIR did not discuss alternatives to the Project's on-campus components or other on-campus acts that could mitigate the significant off-site environmental effects of the Project and thereby reduce or eliminate CSU's obligation to pay its "fair-share" for off-site mitigation. *Marina* implicitly recognized that CEQA requires CSU to consider on-campus acts that can mitigate off-site effects, stating: "[I]f

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9 Although Caltrans is not a direct party to this appeal, it has filed an amicus brief in which it argues that CSU wrongly interprets *Marina* as holding CSU need not make "fair-share" payments to another state agency (e.g., Caltrans) for off-site mitigation of the Project's environmental effects (e.g., freeway onramps and segments) because they both depend on the Legislature for their funding. We do not decide this issue because it is not directly before us in this appeal. Nevertheless, we express our doubt that CSU's apparent strained interpretation of *Marina* (as reflected in the DEIR and FEIR) is consistent with either *Marina* or CEQA.

[CSU] cannot adequately mitigate or avoid [a project's] off-campus environmental effects by performing acts on the campus [e.g., by sufficiently reducing the use of vehicles], then to pay a third-party [e.g., City or Caltrans] to perform the necessary acts off campus may well represent a feasible alternative." (*Marina*, *supra*, 39 Cal.4th at p. 367; see also Guidelines, § 15126.4; *Federation of Hillside & Canyon Associations v. City of Los Angeles* (2000) 83 Cal.App.4th 1252, 1261, fn. 4.) Based on our review of the DEIR and FEIR, we do not believe those documents adequately addressed the possibility of reducing or avoiding the need for certain off-site mitigation measures (and CSU's "fair-share" funding thereof) by taking feasible measures to alter certain on-campus components of the Project or taking other acts on SDSU's campus. Although the DEIR and FEIR extensively discussed specific alternatives to the Project, they did not expressly discuss possible *feasible* modifications to the Project or other *on-campus acts* that could reduce or eliminate the need for CSU's "fair-share" funding of off-site mitigation costs. (Cf. *Center for Biological Diversity v. County of San Bernardino* (2010) 185 Cal.App.4th 866, 882-883; *Save Round Valley Alliance v. County of Inyo* (2007) 157 Cal.App.4th 1437, 1457 ["If an alternative is identified as at least potentially feasible, an in-depth discussion is required."]; *Association of Irritated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, 1400 ["An EIR must 'describe a range of reasonable alternatives to the project, or to the location of the project, which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project, and evaluate the comparative merits of the alternatives.' "].) Because the DEIR and FEIR did not contain an adequate discussion of

the possible feasible *on-campus* measures that could reduce or avoid the need for *off-site* mitigation, they were inadequate informational documents under CEQA. Accordingly, CSU did not proceed in a manner required by law and thereby abused its discretion by certifying the FEIR and approving the Project. (§ 21168.5; *Vineyard, supra*, 40 Cal.4th at p. 427; *Sierra Club, supra*, 7 Cal.4th at p. 1236.)

Because of the above deficiencies, the DEIR and FEIR are inadequate informational documents under CEQA. (*Laurel Heights, supra*, 47 Cal.3d at p. 392; *City of Santee v. County of San Diego, supra*, 214 Cal.App.3d at pp. 1454-1455.) CSU's decision makers and the public did not have proper and adequate information regarding the Project and feasible sources for "fair-share" funding of significant off-site mitigation measures and feasible on-campus acts that could reduce or eliminate the need for off-site mitigation and funding. CSU abused its discretion by certifying the FEIR and approving the Project.[10] The trial court erred in concluding otherwise.

IV

Exhaustion of Administrative Remedies

CSU asserts, as it did in the trial court, that City, SANDAG, and MTS are barred by the doctrine of exhaustion of administrative remedies from raising the contentions that CSU erred in interpreting *Marina* and improperly found off-site mitigation was infeasible

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10 In so holding, we do not address City's additional assertion that CSU's position constitutes improper deferral of mitigation by, in effect, shifting responsibility for mitigation from CSU to the Governor and the Legislature.

because CSU could not guarantee the Legislature would appropriate funding for mitigation of the Project's significant off-site effects.

A

"Exhaustion of administrative remedies is a jurisdictional prerequisite to maintenance of a CEQA action. Only a proper party may petition for a writ of mandate to challenge the sufficiency of an EIR or the validity of an act or omission under CEQA. The petitioner is required to have 'objected to the approval of the project orally or in writing during the public comment period provided by this division or prior to the close of the public hearing on the project before the issuance of the notice of determination.' ([Former] § 21177, subd. (b).) The petitioner may allege as a ground of noncompliance any objection that was presented by any person or entity during the administrative proceedings. [Citation.] Failure to participate in the public comment period for a draft EIR does not cause the petitioner to waive any claims relating to the sufficiency of the environmental documentation." (*Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1199 (*Bakersfield*).) Furthermore, "a party can litigate issues that were timely raised by others, but only if that party objected to the project approval on any ground during the public comment period or prior to the close of the public hearing on the project." (*Federation of Hillside & Canyon Associations v. City of Los Angeles, supra,* 83 Cal.App.4th at p. 1263.)

"The purpose of the rule of exhaustion of administrative remedies is to provide an administrative agency with the opportunity to decide matters in its area of expertise prior to judicial review. [Citation.] The decisionmaking body ' "is entitled to learn the

contentions of interested parties before litigation is instituted." ' " (*Napa Citizens for Honest Government v. Napa County Bd. of Supervisors* (2001) 91 Cal.App.4th 342, 384.) To exhaust administrative remedies, "[m]ore is obviously required" than "generalized environmental comments at public hearings." (*Coalition for Student Action v. City of Fullerton* (1984) 153 Cal.App.3d 1194, 1197.) The objection must be sufficiently specific to give the agency an opportunity to evaluate and respond to it. (*Porterville Citizens for Responsible Hillside Development v. City of Porterville* (2007) 157 Cal.App.4th 885, 909; cf. *Resource Defense Fund v. Local Agency Formation Com.* (1987) 191 Cal.App.3d 886, 894 [requiring the exact issue to have been raised], disapproved on another ground in *Voices of Wetlands v. State Water Resources Control Bd.* (2011) 52 Cal.4th 499, 529.) "On the other hand, less specificity is required to preserve an issue for appeal in an administrative proceeding than in a judicial proceeding." (*Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo* (1985) 172 Cal.App.3d 151, 163.) Application of the exhaustion doctrine is a question of law we determine de novo. (*Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 536; *Planning & Conservation League v. Castaic Lake Water Agency* (2009) 180 Cal.App.4th 210, 251.)

B

We conclude the doctrine of exhaustion of administrative remedies does not bar City, SANDAG, and MTS from raising the contentions that CSU wrongly interpreted *Marina* and improperly found "fair-share" payments for off-site mitigation of significant effects were infeasible because CSU could not guarantee the Legislature would

appropriate funding for that off-site mitigation. Based on our independent review of the administrative record, there are at least three documents or comments that show those issues were raised in a sufficiently specific manner to allow CSU an opportunity to evaluate and address them. First, in a letter to CSU from City's attorney dated July 27, 2007, City restated its concerns that it raised in its February 21 letter responding to the NOP. Furthermore, City asserted the DEIR was "fatally flawed because it does not guarantee the implementation of the traffic mitigation measures it proposes." Quoting language from the DEIR stating that CSU's "fair-share" funding commitment is necessarily conditioned on requesting and obtaining funds from the Legislature, City asserted: "This approach relies on a faulty interpretation of [*Marina*]." City extensively discussed *Marina* and asserted that it included "pure dictum" in stating CSU did not have the power to mitigate if the Legislature does not appropriate funding for mitigation. City argued: "The [DEIR] improperly relies on this dictum to build towards an untenable either-or-finding, that either they will—or they will not—mitigate significant traffic impacts." City concluded: "The [DEIR] fails because [CSU] disingenuously attempt[s] to dodge true responsibility by relying on dicta in the same California Supreme Court case [i.e., *Marina*] that caused the collapse of the first [DEIR] on the [Project]." We conclude City's letter was sufficiently specific to apprise CSU of the contentions that City asserted in objecting to the DEIR (i.e., that CSU wrongly interpreted *Marina* and improperly relied on *Marina*'s dictum to conclude that "fair-share" payments for off-site mitigation of the Project's significant effects were infeasible because CSU could not guarantee the Legislature would appropriate funding for that off-site mitigation).

Second, on February 21, 2007 (after the NOP was issued), CSU held a scoping meeting at which it heard comments from the public. At that meeting, Anne Brunkow, president of the Del Cerro Action Council, made the following oral comments (transcribed by a reporter and included in the administrative record):

> "I want to remind [CSU] that [*Marina*] indicated that public agencies have a requirement to either avoid or mitigate the significant impacts of their projects. So while it is comforting to know that [CSU] is going to request funding for the mitigation requirement, I want to remind [CSU] that *not only do you need to request that funding from the [L]egislature, but you simply need to mitigate. So assuming that the [L]egislature denies your request for funding, that does not eliminate your responsibility to mitigate* the [P]roject['s] [significant environmental effects]." (Italics added.)

Brunkow's comment clearly presented her position that under CEQA and *Marina* CSU had a duty to mitigate the significant environmental effects of the Project *even if* the Legislature denied CSU's request for mitigation funding. City, SANDAG and MTS can rely on Brunkow's comment to refute CSU's claim that they did not exhaust their administrative remedies. As plaintiffs challenging CSU's certification of the FEIR and approval of the Project, they may raise in court "as a ground of noncompliance any objection that was presented by any person or entity during the administrative proceedings." (*Bakersfield, supra*, 124 Cal.App.4th at p. 1199.)

Third, the administrative record shows that even *CSU's own staff* was aware of and considered *Marina* and other options for funding mitigation of the Project's effects. The written agenda for a January 16, 2007, meeting of CSU's campus planning staff and its CEQA traffic consultants included a section describing the topics of prior discussion, including: "**2. Other less technical issues of mitigation concern**[:] [¶] a. *Sources of*

funding (lack thereof); *Legislature, local agencies, CSU capital funds (G.O.* [general obligation] *bonds)* . . . ." (Italics added.) The agenda then listed topics for discussion at that meeting, including: "**8**. Are there *other avenues*, particularly with the state Legislature[,] that should be explored as a way of addressing [*Marina*] implementation?" (Italics added.) Based on that agenda, it is clear CSU staff had discussed at a past meeting *alternative sources of funding* CSU's mitigation obligation, including CSU's capital funds or general obligation bonds. It can also be reasonably inferred from the agenda that CSU staff discussed "other avenues" (i.e., alternative sources) for funding the implementation of its mitigation obligation under *Marina* and CEQA. Because CSU is charged with the actions and knowledge of its staff in preparing the DEIR, particularly when that information is contained in the administrative record it is considering, we conclude City, SANDAG and MTS may rely on the above agenda of CSU's staff to show they exhausted their administrative remedies and CSU had an opportunity to consider and address the issue whether there were alternative sources for funding its obligation under CEQA to pay its "fair-share" of off-site mitigation measures. (*Bakersfield*, *supra*, 124 Cal.App.4th at p. 1199 [petitioner may raise "any objection that was presented by any person or entity during the administrative proceedings"].)

We conclude City, SANDAG and MTS are not barred by the doctrine of exhaustion of administrative remedies from raising the issues that CSU wrongly interpreted *Marina* and improperly found "fair-share" payments for off-site mitigation of significant effects were infeasible because CSU could not guarantee the Legislature would appropriate funding for that off-site mitigation. Those issues were adequately

raised during the administrative proceedings by sufficiently specific comments to give CSU an opportunity to evaluate and respond to them. (*Porterville Citizens for Responsible Hillside Development v. City of Porterville*, *supra*, 157 Cal.App.4th at p. 909.) Furthermore, the specific issue of alternative (i.e., nonlegislative) sources of funding for off-site mitigation was raised at least implicitly, if not expressly, in the portions of the administrative record discussed above. *City of Walnut Creek v. County of Contra Costa* (1980) 101 Cal.App.3d 1012, cited by CSU and relied on by the trial court, is inapposite and does not persuade us to reach a contrary conclusion. Therefore, the trial court erred by concluding City, SANDAG and MTS were barred by the doctrine of exhaustion of administrative remedies from raising the contentions regarding funding for off-site mitigation measures.[11]

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11 In its statement of decision, the trial court stated: "Petitioners suggest that CSU must discuss other methods to fund mitigation measures, such as non-state funded revenue bonds or reducing the scope of the [P]roject. . . . [S]uch arguments were not raised in the underlying [administrative] proceedings and cannot be raised now. A project opponent cannot make a skeletal showing during the administrative process and then obtain a hearing on expanded issues in the reviewing court. [Citation.] Here, Petitioners cited to several comment letters . . . . [H]owever, the alternative funding claims were not raised in these comment letters." Based on our reasoning above, we conclude the trial court erred in concluding City, SANDAG and MTS were barred from raising the contention that CSU was required to consider other, nonlegislative sources for payment of its "fair-share" of off-site mitigation measures.

V

Request for Judicial Notice

City contends the trial court erred by denying its request for judicial notice of certain documents pertaining to the issue of whether CSU complied with CEQA and *Marina.*

A

CSU moved to discharge the 2006 writ, arguing it had complied with *Marina.* In opposition to CSU's motion to discharge, City filed a request for judicial notice (RJN) of 22 exhibits (Exhs. A through W), consisting of about 1,418 pages. City argued the trial court should take judicial notice of: (1) documents contained in certain exhibits (Exhs. A through L) pursuant to Evidence Code section 452, subdivision (c), because they represented official acts of the executive and legislative offices of the State of California and were not reasonably subject to dispute; and (2) documents contained in certain exhibits (Exhs. M through W) pursuant to Evidence Code section 452, subdivision (h), because they are writings of CSU's executive offices, evidence of official acts taken by CSU, and not reasonably subject to dispute. CSU then filed a motion to strike the documents for which City's RJN sought judicial notice. CSU argued those documents were irrelevant to the issue of whether it had complied with CEQA and had not been considered by CSU when it certified the FEIR and approved the Project. City argued the RJN documents should be judicially noticed to show CSU had not complied with *Marina* (and CEQA) by simply requesting mitigation funding from the Governor and the Legislature. The trial court granted CSU's motion to strike the RJN documents, stating:

"The court does not concur with . . . City's interpretation of [*Marina*] . . . . These documents were not part of the administrative record and were never considered by CSU when certifying the [FEIR] and approving the 2007 Project."

On October 7, 2010, City filed a motion to augment the record on appeal with the documents lodged with its RJN (i.e., Exhs. A through W). On October 27, we issued an order granting City's motion to augment the record on appeal.

B

Evidence Code section 452 provides:

> "Judicial notice may be taken of the following matters to the extent that they are not embraced within [Evidence Code] Section 451: [¶] . . . [¶]
>
> "(c) Official acts of the legislative, executive, and judicial departments of the United States and of any state of the United States. [¶] . . . [¶]
>
> "(h) Facts and propositions that are not reasonably subject to dispute and are capable of immediate and accurate determination by resort to sources of reasonably indisputable accuracy."

"Although a court may judicially notice a variety of matters [citation], only *relevant* material may be noticed. 'But judicial notice, since it is a substitute for proof [citation], is always confined to those matters which are relevant to the issue at hand.' " (*Mangini v. R. J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1063, overruled on another ground in *In re Tobacco Cases II* (2007) 41 Cal.4th 1257, 1276.) A trial court's decision whether to take judicial notice of documents is subject to review for abuse of discretion. (*In re Social Services Payment Cases* (2008) 166 Cal.App.4th 1249, 1271; *Salazar v. Upland Police Dept.* (2004) 116 Cal.App.4th 934, 946.)

C

Because we reverse the judgment on other grounds, we do not address the merits of City's contention that the trial court erred by granting CSU's motion to strike City's RJN documents and thereby implicitly denying the RJN. Nevertheless, to provide the parties and the trial court with guidance in future proceedings in this matter, we briefly comment on the trial court's rationale for not taking judicial notice of, and striking, the RJN documents. The court's primary reason for striking the RJN documents was that, given its rejection of City's interpretation of *Marina*, those documents were irrelevant to its determination that CSU had complied with *Marina* by requesting off-site mitigation funding from the Legislature. However, as we concluded above, a mere request by CSU that the Legislature appropriate funding for off-site mitigation of the Project's significant effects does not comply with CEQA (and, at a minimum, an extensive discussion considering other possible feasible sources for funding off-site mitigation is required). CEQA and *Marina* require that CSU adopt feasible measures to mitigate the significant off-site environmental effects of the Project. CSU must consider and adopt feasible sources of off-site mitigation funding in addition to requesting funding from the Governor and the Legislature. Therefore, to the extent the RJN documents are relevant to CSU's obligation to take feasible measures to mitigate the significant effects of the Project, including considering possible feasible sources for off-site mitigation funding, CSU should consider those documents and the trial court in any future proceeding may, in the reasonable exercise of its discretion, grant any future request to take judicial notice

of documents relevant to the question of whether CSU has proceeded in a manner required by law.[12]

VI

Increased Vehicle Traffic Calculations

SANDAG and MTS contend the trial court erred by concluding CSU did not improperly calculate the increased vehicle traffic that will be caused by the Project's increased student enrollment. They assert CSU erred in calculating the average daily vehicle trip (ADT) rates for both the Project's anticipated new resident students and new nonresident (or commuter) students.[13]

A

Resident Student ADT Rate. For purposes of analyzing the impact of the Project on traffic, the DEIR considered a new student to be a "resident" if that student either lived on the SDSU campus or within one-half mile of the campus. The DEIR assumed the Project would result in enrollment of an additional 11,385 students by the 2024/2025 academic year and that 35 percent of those new students (3,984) would be resident

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12 Although we have not reviewed the RJN documents in question, City represents that those documents are CSU and state budget and finance documents appropriate for judicial notice because they relate to the question of whether CSU properly interpreted *Marina* and complied with its CEQA obligation to adopt and implement feasible measures to mitigate the significant off-site environmental effects of the Project.

13 For purposes of linguistic convenience, we generally will refer to nonresident students as "commuter" students.

students and the remaining 65 percent of new students (7,401) would be commuter students.

In estimating the ADT rate for the 3,984 new resident students, the DEIR relied on prior ADT rate calculations for resident students made by City and the University of California San Diego (UCSD). In a College Community Redevelopment Project EIR drafted by City in 1993 (Redevelopment EIR), City calculated the ADT rate for a resident SDSU student would range from 0.12 to 0.64. In a separate EIR, UCSD calculated the ADT rate for a resident UCSD student to be 0.41. For purposes of analyzing the impact of the Project on traffic, the DEIR assumed the higher 0.64 ADT rate from the Redevelopment EIR would apply to the Project's new resident students.

SANDAG and MTS argue the DEIR erred by using the Redevelopment EIR's ADT rate for resident SDSU students because, in so doing, it treated the Project's new resident students as existing commuter students who relocated to campus housing. They argue the analysis used in the Redevelopment EIR is inapposite because that EIR considered the effect of constructing new student housing near the SDSU campus and the reduction in traffic as the result of the relocation of existing commuter students to housing near the campus and did not consider any increase in SDSU enrollment. However, we are not persuaded by that argument because the relevant issue is whether SANDAG and MTS have shown the Redevelopment EIR's penultimate ADT calculation for resident students is not supported by substantial evidence and cannot reasonably be relied on by CSU in calculating the ADT rate for the Project's new resident students. We conclude they have not carried their burden on appeal to make that showing.

SANDAG and MTS extensively discuss the Redevelopment EIR's methodology in calculating the ADT rate for existing commuter students who relocate to housing near the SDSU campus. However, we need only briefly set forth that methodology and its calculations. Table 5-14 of the Redevelopment EIR (specifically cited in the DEIR) began with a vehicle ADT rate for commuters of between 3.1 and 4.4 per dwelling unit, depending on the type of housing.[14] The 4.4 ADT rate was then reduced by 2.8 ADT's per dwelling unit to reflect the fact that SDSU commuter students who relocated to the new redevelopment housing near SDSU would no longer need to commute to SDSU by vehicle. The Redevelopment EIR concluded the relocated, and then resident, SDSU students (and faculty and staff) would have an ADT rate of 1.6 per dwelling unit. Dividing the Redevelopment EIR's 1.6 ADT resident rate by the number of students (2.5) per dwelling unit, the DEIR calculated an ADT rate of 0.64 per new resident student should apply in analyzing the traffic impacts of the Project. That 0.64 ADT rate per student was then multiplied by the number of the Project's new resident students (3,984), for a total increase of 2,550 ADT's, or daily vehicle trips, by the new resident students.

We conclude CSU's methodology in relying on the Redevelopment EIR's ADT calculations for resident students was reasonable. Furthermore, the Redevelopment EIR provided substantial evidence to support the DEIR's 0.64 ADT rate for new resident

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14 City's engineer for the Redevelopment EIR assumed that for medium density housing there were 6.0 daily trips per dwelling, of which about 4.4 trips were by vehicle and the remaining 1.6 daily trips were by walking or bicycle (1.24 trips) or by carpool, vanpool, or transit (bus or trolley) (0.37 trips).

students. SANDAG and MTS do not carry their burden on appeal to show otherwise. We are not persuaded by their assertion that CSU improperly considered the Project's new resident students to be relocated commuter students by taking a "relocation deduction." CSU did *not* consider the Project's new resident students to be relocated commuter students, but rather relied on, and adopted, the Redevelopment EIR's ADT calculation for relocated, and then resident, students. It was the end result of the ADT rate calculated for a resident student that the DEIR adopted from the Redevelopment EIR and *not* the Redevelopment EIR's assumption that existing commuters would relocate to housing on or near SDSU's campus.[15] Finally, because the DEIR assumed the higher 0.64 ADT rate for new resident students applied to the Project (based on the Redevelopment EIR's calculations), we need not address SANDAG and MTS's additional assertion that there was no substantial evidence to support CSU's reliance on UCSD's

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15 We likewise are not persuaded by SANDAG and MTS's argument that CSU improperly took a "double" deduction for transit use by new resident students. As noted above, in relying on the Redevelopment EIR's end result for the ADT rate for resident students, CSU did *not* include in that ADT rate a 0.37 ADT deduction for transit use. Rather, that deduction was part of the Redevelopment EIR's methodology of beginning with a 6.0 total trip rate per dwelling unit for medium density housing and then deducting 0.37 trips for transit use and 1.24 trips for walking and bicycling. It was the penultimate 0.64 ADT rate for resident students that was adopted in the DEIR and relevant in analyzing the Project's traffic impacts. The Redevelopment EIR's transit deduction of 0.37 trips for commuting students who relocate to housing on or near SDSU's campus was irrelevant to *transit use by resident students*, which was not involved in the Redevelopment EIR's ADT calculation for resident students. Therefore, there was no double deduction when, as discussed below, the DEIR reduced the ADT's for both resident and commuter students based on projections that students would increasingly use transit in the future.

0.41 ADT rate for its resident students. CSU did not rely on that lower ADT rate in analyzing the traffic impacts of the Project.

B

Commuter Student ADT Rate. SANDAG and MTS assert CSU improperly calculated the increase in ADT's caused by the Project's new commuter students because it assumed new (and existing) commuter students would increasingly use transit (i.e., trolley and buses) rather than individual vehicles for their trips. They argue CSU wrongly assumed that increased transit use would result in a 47 percent "shift-to-trolley" reduction in vehicle trips by the 2024/2025 academic year.

Based on an actual vehicle count conducted during a five-day period in November 2006 at SDSU's parking lots, CSU determined SDSU's total ADT's were 66,807 and, when divided by the then-current number of commuter students (27,047), obtained an ADT rate of 2.47 per commuter student. Multiplying that 2.47 ADT rate by the number of *new commuter* students (7,401) to be added by the Project, a total of 18,280 new vehicle trips per day would be expected for new commuter students. When that total of 18,280 ADT's for new commuter students was added to the 2,550 ADT's for new resident students (as discussed above), the 1,376 ADT's for Adobe Falls housing residents, and the 1,200 ADT's for Alvarado hotel guests, a total of 23,406 ADT's would be added by the Project by 2024/2025 based on 2006 figures. However, because the 2.47 ADT rate for commuter students was based on 2006 vehicle and trolley usage, it did not reflect any anticipated future increase in the rate of trolley usage and resultant decrease in the rate of

vehicle usage.[16] Based on SANDAG and MTS's projections that daily boardings at the SDSU trolley station would increase from 5,982 to 14,714 by 2024/2025, CSU calculated there would be an increase of 8,732 passengers boarding at the SDSU station over the current number of boardings. After adjusting for non-SDSU-related boardings (e.g., transfers), carpools, and use of other forms of transit (e.g., bus), CSU determined 5,460 of the 8,732 increase in daily boardings at the SDSU station would be SDSU-related trolley boardings. Because daily boardings represent only outbound trips, CSU multiplied 5,460 by 2 to obtain the increased number (10,920) of SDSU-related trolley trips (both inbound and outbound) by 2024/2025 based on SANDAG and MTS's projections. Because CSU assumed that projected increased trolley usage reflected a shift from vehicle usage to trolley usage, CSU subtracted that increased trolley usage (10,920) from the gross total increased number of ADT's resulting from the Project based on 2006/2007 figures (23,406) and obtained a net increase of 12,486 ADT's resulting from the Project. Therefore, CSU reduced the initial calculation for the gross increase (23,406) in the Project's ADT's, or average daily vehicle trips, based on its assumption that SDSU students, faculty and staff would increasingly use the trolley by 2024/2025 instead of vehicles, resulting in a net increase in ADT's caused by the Project of only 12,486 by 2024/2025.[17]

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16 Likewise, the 0.64 ADT rate for new resident students also did not reflect any anticipated future increase in trolley usage.

17 The DEIR incorrectly stated the net increase in ADT's was 12,484, rather than the correct figure of 12,486. For purposes of this opinion, we will use the correct number.

SANDAG and MTS argue CSU improperly reduced the gross increase in ADT's by 47 percent to reflect the projected increased usage of the trolley by 2024/2025.[18] They argue that 47 percent "shift-to-trolley" reduction was improper because it reduced an already reduced ADT rate based on trolley use. However, as CSU notes, its gross 2.47 ADT commuter rate was based on the then-existing rate of trolley usage and did not account for future increases in the rate of trolley usage. Accordingly, CSU reduced the Project's total increase in ADT's caused by new commuter students, new resident students, Adobe Falls housing residents, and Alvarado hotel guests, by 47 percent to reflect the projected increase in the rate of trolley usage and resultant decrease in the rate of vehicle usage. In so doing, we cannot conclude that CSU acted unreasonably or without substantial evidence for using that methodology. (*City of Long Beach v. Los Angeles Unified School Dist.*, *supra*, 176 Cal.App.4th at p. 898 [substantial evidence standard of review applies to agency's methodology used for studying an impact and the reliability or accuracy of data on which agency relied].)

Furthermore, we reject SANDAG and MTS's assertion that CSU "essentially [assumed] all new non-residents, faculty, staff and visitors would be vehicle drivers who were somehow magically persuaded to switch to trolley transportation." Rather, CSU initially calculated the gross increase in ADT's resulting from the Project's new students

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18 Based on our calculations, the actual "shift-to-trolley" percentage reduction (10,920 trolley trips divided by 23,406 ADT's) is approximately 46.65 percent, which is rounded up to 47 percent.

(commuters and residents), faculty, staff, and guests, based on 2006/2007 rates of trolley usage and then reduced that number to reflect a 47 percent "shift-to-trolley" use by 2024/2025. We conclude there is substantial evidence to support CSU's methodology and calculations in finding the Project's net increase in ADT's will be 12,486. To the extent SANDAG and MTS argue CSU should have used a different methodology, they do not show there is insufficient evidence to support the methodology CSU used in calculating the Project's traffic impact in increasing ADT's. Accordingly, SANDAG and MTS have not carried their burden on appeal to show CSU improperly calculated the increase in ADT's by the Project's new commuter students based on CSU's assumption that new (and existing) commuter students (as well as resident students, Adobe Falls housing residents, and Alvarado hotel guests) would increasingly use the trolley rather than vehicles.

C

Based on the above arguments challenging CSU's methodology and calculations regarding the increased number of ADT's caused by the Project, SANDAG and MTS assert CSU's calculation of its "fair share" of costs to mitigate the Project's traffic impacts (i.e., $6,484,000) is not supported by substantial evidence. However, because we rejected those methodology and calculation arguments above, we conclude SANDAG and MTS have not carried their burden on appeal to show there is insufficient evidence to support CSU's calculation of its "fair share" of traffic mitigation costs.

VII

Deferral of Mitigation of Traffic Impacts

SANDAG and MTS contend the trial court erred by concluding CSU properly deferred adoption of mitigation measures to reduce vehicle traffic. They assert CSU's adoption of mitigation measure "TCP-27," requiring CSU to consult with them in developing a transportation demand management (TDM) program with the goal of reducing vehicle trips to SDSU's campus in favor of alternate modes of travel, constitutes improper deferral of measures to mitigate the Project's traffic impacts.

A

Feasible mitigation measures for significant environmental effects must be set forth in an EIR for consideration by the lead agency's decision makers and the public before certification of the EIR and approval of a project. The formulation of mitigation measures generally cannot be deferred until after certification of the EIR and approval of a project. Guidelines, section 15126.4(a)(1)(B) states: "Formulation of mitigation measures should not be deferred until some future time. However, measures may specify performance standards which would mitigate the significant effect of the project and which may be accomplished in more than one specified way."

"A study conducted after approval of a project will inevitably have a diminished influence on decisionmaking. Even if the study is subject to administrative approval, it is analogous to the sort of post hoc rationalization of agency actions that has been repeatedly condemned in decisions construing CEQA." (*Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 307.) "[R]eliance on tentative plans for future

mitigation after completion of the CEQA process significantly undermines CEQA's goals of full disclosure and informed decisionmaking; and[,] consequently, these mitigation plans have been overturned on judicial review as constituting improper deferral of environmental assessment." (*Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 92 (*Communities*).)

"Deferral of the specifics of mitigation is permissible where the local entity commits itself to mitigation and lists the alternatives to be considered, analyzed and possibly incorporated in the mitigation plan. [Citation.] On the other hand, an agency goes too far when it simply requires a project applicant to obtain a biological [or other] report and then comply with any recommendations that may be made in the report." (*Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1275.) "If mitigation is feasible but impractical at the time of a general plan or zoning amendment, it is sufficient to articulate specific performance criteria and make further approvals contingent on finding a way to meet them." (*Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 793.)

However, a lead agency's adoption of an EIR's proposed mitigation measure for a significant environmental effect that merely states a "generalized goal" to mitigate a significant effect without committing to any specific criteria or standard of performance violates CEQA by improperly deferring the formulation and adoption of enforceable mitigation measures. (*San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 670; *Communities*, *supra*, 184 Cal.App.4th at p. 93 ["EIR merely proposes a generalized goal of no net increase in greenhouse gas emissions and then sets

out a handful of cursorily described mitigation measures for future consideration that might serve to mitigate the [project's significant environmental effects.]"]; cf. *Sacramento Old City Assn. v. City Council* (1991) 229 Cal.App.3d 1011, 1028-1029 [upheld EIR that set forth a range of mitigation measures to offset significant traffic impacts where performance criteria would have to be met, even though further study was needed and EIR did not specify which measures had to be adopted by city].)

B

The DEIR concluded the Project would cause significant traffic impacts. In response to comments from SANDAG and others that CSU should take a more balanced approach to mobility and provide mitigation measures supporting alternative modes of travel, CSU revised the DEIR to include mitigation measure TCP-27 in the FEIR. TCP-27 stated:

> "SDSU shall develop a campus Transportation Demand Management ('TDM') program to be implemented not later than the commencement of the 2012/2013 academic year. *The TDM program shall be developed* in consultation with [SANDAG] and [MTS] and shall facilitate a balanced approach to mobility, *with the ultimate goal of reducing vehicle trips* to campus in favor of alternate modes of travel." (Italics added.)

In the Findings, CSU adopted TCP-27, along with other traffic mitigation measures. CSU also adopted the mitigation measures set forth in the MMRP, which included TCP-27. CSU then certified the FEIR and approved the Project.

C

SANDAG and MTS assert the traffic mitigation measure set forth in TCP-27 constitutes improper deferral of mitigation by CSU in violation of CEQA. They argue

TCP-27 did not identify any specific future mitigation actions or set any specific goals or performance standards. They argue TCP-27 merely stated a generalized goal and did not commit CSU to take any actual or specific mitigation actions, thereby constituting improper deferral of mitigation of the Project's significant traffic effects.

We agree with SANDAG and MTS's assertion that CSU's adoption of TCP-27 constitutes improper deferral of mitigation of the Project's significant traffic effects. TCP-27 commits CSU only to consult with SANDAG and MTS and then develop a TDM to be implemented by 2012/2013. The TDM "shall facilitate a balanced approach to mobility, with the ultimate goal of reducing vehicle trips to campus in favor of alternate modes of travel," but there are no specific mitigation measures to be considered or any specific criteria or performance standards set forth in the TDM. TCP-27 sets only a "generalized goal" of reducing vehicle trips by, presumably, encouraging alternate modes of travel. "This is inadequate. No criteria or alternatives to be considered are set out. Rather, the mitigation measure does no more than require a report be prepared and followed, or allow approval by [CSU] without setting any standards." (*Endangered Habitats League, Inc. v. County of Orange*, *supra*, 131 Cal.App.4th at p. 794.) Therefore, the TDM required to be developed by TCP-27 appears to be, at best, an amorphous measure that does not commit CSU to take any specific mitigation measures to reduce vehicle trips and does not provide for any objective performance standards by which the success of CSU's mitigation actions can be measured. Accordingly, as in another case, "[t]he only criteria for 'success' of the ultimate mitigation plan adopted is the subjective judgment of [CSU], which presumably will make its decision outside of any public

process . . . after the Project has been approved." (*Communities*, *supra*, 184 Cal.App.4th at p. 93.) Furthermore, because TCP-27 and the TDM are lacking in specifics, neither CSU's decision makers nor the public had an opportunity to consider possible specific, concrete mitigation measures to reduce vehicle trips to SDSU. Because CSU only adopted TCP-27 in response to comments to the DEIR and thereby apparently deferred studying actual measures that could be taken to reduce vehicle trips, "[t]he solution was not to defer the specification and adoption of mitigation measures until . . . after Project approval, but, rather, to defer approval of the Project until proposed mitigation measures were fully developed, clearly defined, and made available to the public and interested agencies for review and comment." (*Id.* at p. 95.) *Sacramento Old City Assn. v. City Council*, *supra*, 229 Cal.App.3d 1011, cited by CSU, is inapposite and does not persuade us to reach a contrary conclusion.[19] The trial court erred by concluding CSU did not improperly defer adoption of mitigation measures to reduce vehicle traffic by adopting TCP-27.

VIII

The Project's Effect on Transit

SANDAG and MTS contend the trial court erred by concluding the FEIR adequately addressed the Project's potential impacts on transit and there is substantial

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19 Furthermore, to the extent CSU argues SANDAG and MTS failed to exhaust their administrative remedies on this issue, CSU does not make any substantive argument on the facts or law showing they are barred from raising this issue on appeal. We conclude CSU has waived that conclusory argument.

evidence to support CSU's finding that the Project will not cause any significant effect on public transit (e.g., trolley and bus facilities and service).

A

An EIR must describe, in detail, all the significant effects on the environment of the project. (*Sunnyvale, supra*, 190 Cal.App.4th at p. 1372.) An EIR must include a detailed discussion of "[a]ll significant effects on the environment of the proposed project." (§ 21100, subd. (b)(1).) Section 21068 states: " 'Significant effect on the environment' means a *substantial, or potentially substantial, adverse change* in the environment." (Italics added.) Section 21060.5 states: " 'Environment' means the *physical conditions* which 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." (Italics added.) "In evaluating the significance of the environmental effect of a project, the lead agency shall consider direct physical changes in the environment which may be caused by the project and reasonably foreseeable indirect physical changes in the environment which may be caused by the project." (Guidelines, § 15064, subd. (d).)

"[U]nder CEQA, the lead agency bears a burden to investigate potential environmental impacts." (*County Sanitation Dist. No. 2 v. County of Kern* (2005) 127 Cal.App.4th 1544, 1597.) In so doing, the lead agency must consult with any public agency that has jurisdiction over natural resources or other potential environmental impacts of a project. (*Berkeley Keep Jets Over the Bay Com. v. Board of Port Cmrs.* (2001) 91 Cal.App.4th 1344, 1370 (*Berkeley*).) If an agency's investigation shows

particular environmental effects of the project will not be potentially substantial, the EIR must "contain a statement briefly indicating the reasons for determining that various effects on the environment of a project are not significant and consequently have not been discussed in detail in the [EIR]." (§ 21100, subd. (c); see also Guidelines, § 15064(b).) Alternatively stated, the EIR must include a statement of the agency's reasons, albeit brief, for its conclusion that a particular environmental impact is not potentially substantial (i.e., significant). (*Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1111 (*Amador*).) A mere conclusion of insignificance is not adequate to allow meaningful judicial review and constitutes a failure to proceed in the manner required by law. (*Id.* at pp. 1111-1112.)

Even if an agency provides an adequate statement of reasons regarding its conclusion that a particular effect of a project will not be significant, that conclusion can be challenged as an abuse of discretion if not supported by substantial evidence in the administrative record. (*Amador, supra,* 116 Cal.App.4th at p. 1113.) If a lead agency does not conduct an adequate initial study regarding a particular environmental effect of a project, it cannot rely on an absence of evidence resulting from that inadequate study as proof there is substantial evidence showing that particular effect is not significant under CEQA. (*Sundstrom v. County of Mendocino, supra,* 202 Cal.App.3d at p. 311.) Likewise, an agency cannot conclude a particular environmental effect is not significant based on a purported absence of precise methodology or quantification for determining the level of significance for that effect. (*Berkeley, supra*, 91 Cal.App.4th at p. 1370.) An

agency must use its best efforts to evaluate whether a particular impact is significant. (*Id.* at pp. 1370-1371.)

"The Legislature has made clear that an EIR is 'an informational document' and that '[t]he purpose of an environmental impact report is to provide public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment; to list ways in which the significant effects of such a project might be minimized; and to indicate alternatives to such a project." (*Laurel Heights, supra,* 47 Cal.3d at pp. 390-391.) "Before approving the project, the agency must also find either that the project's significant environmental effects identified in the EIR have been avoided or mitigated, or that unmitigated effects are outweighed by the project's benefits." (*Id.* at p. 391.) Under CEQA, a public agency is required to mitigate or avoid the significant environmental effects of a project that it carries out or approves if it is feasible to do so. (§ 21022.1, subd. (b); *Marina, supra,* 39 Cal.4th at p. 359.)

B

The DEIR circulated by CSU discussed the potentially significant impacts of the Project on the environment. Although the DEIR's traffic analysis included a substantial reduction of the Project's impact on traffic as a result of the projected "shift-to-trolley" use as discussed above, the DEIR did *not* substantively address whether that increased rate of trolley use, together with the additional trolley trips taken by the new 11,385 students to be added by the Project, would cause a significant effect, whether direct or indirect, on the environment. Appendix N (Traffic Technical Report) to the DEIR relied on SANDAG's forecast that boardings at the SDSU trolley station would increase from

5,982 daily boardings in 2007 to 17,450 daily boardings in 2030 to conclude, through interpolation, that there would be 14,714 daily boardings in the 2024/2025 academic year. Appendix H1 reflected that interpolation of SANDAG's forecasted increase in boardings at the SDSU station.

In response to the DEIR, SANDAG sent a letter, dated August 8, 2007, to SDSU stating that "the traffic study assumes a high level of transit mode share while failing to address capacity limitations of the [transit] system to absorb the projected transit trips. Consequently, the traffic study understates traffic impacts and does not adequately mitigate for those impacts in the short or long term." It further stated: "Project-specific impacts should be mitigated with specific transit, highway, and roadway improvements that are implemented by [CSU]. Long-term impacts should be mitigated through a combination of project-specific improvements and by participating in the construction and/or funding of regional transportation facilities and services at a fair-share level." SANDAG expressed the specific concern that the DEIR's traffic analysis "assume[d] a high proportion of trips accommodated by transit without addressing the needed capital and operating support necessary to attain that mode split." SANDAG stated:

> "The analysis includes an unsupported assumption that one-half of the growth in vehicular trips generated by the campus growth will be handled by transit. This assumption is based on the SANDAG model's estimate of future boarding growth at the SDSU trolley station. The SANDAG model projects demand for transit travel unconstrained by the limitations of the system's capacity. *We are skeptical that the projected 10,000 additional transit trips can be absorbed by the system without infrastructure and operational improvements to the trolley and bus system.* While we support any effort to meet [SDSU's] future travel needs with transit, *the DEIR must address the impacts of the demand growth on transit and*

assess SDSU's responsibility to provide improvements to mitigate those impacts.

" . . . The Master Plan and EIR should identify mode split targets for 2030 and intermediate years, and include specific measures geared toward achieving those targets. *The DEIR should include a plan for capital and operating improvements that mitigate for additional demand and any negative impacts to current transit operations as a result of SDSU's plans.* For example, *the capacity of the trolley infrastructure and services should be evaluated, and mitigation measures should be proposed, such as improvements to track, rolling stock, and station infrastructure, or additional service to address capacity issues.* These measures should be identified in consultation with [MTS]. (Italics added.)

The FEIR included CSU's responses to various comments by other agencies and the public to the DEIR, including a specific response to SANDAG's comments. The FEIR stated:

"Between March 2007 and August 2007, representatives of SDSU and SANDAG met on numerous occasions to discuss the [Project]. *Because the [DEIR] did not find that the [Project] would result in significant impacts to transit (i.e., trolley or bus systems), it is SDSU/CSU's position that no mitigation is required.*

"*SANDAG, however, contends that SDSU is responsible for transportation improvements, including primarily improvements to transit* . . . . According to SANDAG, this per capita cost figure [$19,300] could be used as an initial basis for determining SDSU's fair share contribution toward the regional impacts resulting from the [P]roject. [Citation.]

"*SANDAG has provided no evidence that the [Project] would result in significant impacts to transit within the meaning of CEQA*, nor has it provided SDSU with a sufficient nexus study relative to the [Project's] impacts and the $19,000/student mitigation payment it proposes. . . ." (Italics added.)

In regard to SANDAG's specific concern that the DEIR assumed a high level of transit use but did not address the capacity limitations of the transit system to absorb those increased transit trips, CSU responded:

> "*The premise of the comment is incorrect. CEQA does not require that the traffic impacts analysis address whether the transit system has capacity limitations or is able to absorb the projected transit trips.* (See, e.g., CEQA Guidelines Appendix G, Subparagraph XV, Transportation/Traffic . . . .) . . .
>
> "Additionally, *CEQA does not define increased transit ridership as an 'impact,' nor does it provide applicable thresholds of significance to determine when such increased ridership would be 'significant' within the meaning of CEQA*, thereby requiring mitigation. Absent identification of a significant impact within the meaning of CEQA, no mitigation is required.
>
> "*In addition to the absence of significance criteria in Appendix G of the CEQA Guidelines, neither SANDAG nor the City of San Diego has developed criteria that may be utilized to assess whether the* [*Project*] *would significantly impact transit services.* . . .
>
> "Moreover, *to require a project proponent to 'mitigate' increased transit ridership by paying for capital improvements to the transit system, as the comment letter requests, would be directly contrary to statewide land use and planning principles, which uniformly encourage the increased use of transit to reduce traffic impacts and related air quality impacts.* . . . [T]he comments ask SDSU to take steps to further increase transit ridership, while at the same time contending that such increased ridership is an 'impact' requiring mitigation. The inherent disincentive in this approach is counter to the fundamental principles of CEQA to reduce, not increase, environmental impacts.
>
> "*In sum, any transit 'impacts' that may result from the* [*Project*] *relating to increased transit ridership are not subject to CEQA analysis as they are not environmental impacts recognized under CEQA.* Accordingly, if a transit impact analysis were to be undertaken, as the comment letter suggests, it would necessarily be conducted under a non-CEQA regime.

> "The comment implies that the focus of any such analysis would be on whether the [Project] contributes to transit ridership rates in such a manner that implementation of the [Project] would result in over-capacity. Accordingly, any analysis to be undertaken would entail assessing the transit service's ability to accommodate the additional riders. [¶] . . . [¶]
>
> "Notably, at no time during the traffic consultant's discussions with SANDAG was any concern expressed regarding future capacity associated with the Green Line. Furthermore, *at present time, there is no evidence that the Green Line is operating at or near capacity due to SDSU ridership*. SANDAG's comment letter provided no data or other documentation that the Green Line is operating over capacity, thereby resulting in physical deficiencies in the system. . . .
>
> " . . . [T]he projections of future ridership utilized in the EIR are based on SANDAG's own generated estimates. Therefore, *it is reasonable to expect that* because the source of the numbers is SANDAG, *SANDAG is planning for the increased ridership* [and] this increased ridership has already been factored [into] SANDAG's long-range plans for the system. Finally, *there is no evidence that SANDAG will not be able to secure funding for any necessary transportation infrastructure programs through traditional funding sources* at the local, state, and federal levels . . . ." (Italics added.)

Based on CSU's responses to SANDAG's comments, the FEIR revised the DEIR's transportation analysis section to include the following statement:

> **"With respect to transit, neither SANDAG nor the City of San Diego has established criteria that could be utilized to assess the project's impact on transit service. Additionally, the Congestion Management Program ('CMP') provides no methodology to analyze potential impacts to transit and there is no criteria to determine whether an increase in transit ridership would be a significant impact within the meaning of CEQA."**

The FEIR also included revisions to its Appendix N-1 (Traffic Technical Report), adding the following statements: "The [P]roject will result in an increase in ridership on both local bus service and the San Diego Trolley. The SANDAG forecasted increase in trolley

ridership is discussed in Section 8.1.4 of this report. Neither SANDAG nor the City of San Diego has criteria that could be utilized to assess the [P]roject's impact on transit service. In addition, the Congestion Management Program (CMP) provides no methodology to analyze potential impacts to transit and there is no criteria to determine whether the increase in ridership would be significant. [¶] The San Diego Trolley line was recently extended to [SDSU] in 2005 and was constructed to accommodate large ridership amounts."

On November 13, 2007 (after the period for public comment on the DEIR had ended), MTS sent a letter to CSU, expressing some of the same concerns SANDAG had expressed. MTS stated:

> "The [DEIR] for the [Project] recognizes the importance of transit and indicates that a large part of the anticipated growth in the campus population will rely on transit to gain access to campus facilities. Unfortunately, *the existing trolley and bus services cannot possibly meet this demand.* Based on preliminary review, *transit would need to provide an additional $27 million investment in capital and an additional $1 million per year to operate the service.* The current state of funding for transit makes this investment impossible. Among other factors contributing to this lack of funding is the State of California's diversion of $17 million from MTS in this fiscal year and the promise to continue this diversion next year.
>
> "Currently, MTS's trolley and buses make over 10,000 trips per day to and from SDSU, which represents over 20 percent of the student population. Based on the EIR, the number of transit trips serving SDSU is expected to increase by 64 percent. Not only is this substantial increase a reflection of the growth in student population, it also assumes an increase in transit's share of trips to the university. *To achieve this increase and adequately serve the demand, transit operations need to be expanded. . . .*" (Italics added.)

On November 13 and 14, 2007, CSU held a public meeting on the FEIR. Representatives of SANDAG and MTS, among others, expressed their concerns regarding the FEIR and the Project. CSU then adopted the Findings and the MMRP. In the Findings, CSU generally found the FEIR identified potentially significant effects that could result from implementation of the Project, but inclusion of mitigation measures as part of approval of the Project would reduce most, but not all, of those effects to less than significant levels. CSU expressly found the Project would have "[*n*]*o significant impacts on transit systems*." (Italics added.) CSU then certified the FEIR and approved the Project.

C

We first address SANDAG and MTS's assertion that CSU did not adequately investigate or address the Project's potential impacts on transit. Based on our independent review of the administrative record, we conclude CSU did not adequately investigate and address the Project's significant (i.e., substantial or potentially substantial) adverse impacts on the San Diego public transit system (i.e., trolley and bus systems).[20] Although CSU calculated (per SANDAG projections) that the number of daily boardings at the SDSU trolley station would increase from 5,982 boardings in 2006/2007 to 14,714 boardings in the 2024/2025 academic year (apparently due primarily to the Project's additional 11,385 students and shift from vehicle to trolley usage as discussed above),

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20 Section 21068 defines a " '[s]ignificant effect on the environment' " as "a substantial, or potentially substantial, adverse change in the environment."

CSU did *not* conduct any *substantive* investigation or other study of the potential environmental impacts of that increased trolley usage and whether those impacts were significant environmental effects under CEQA. SANDAG and MTS's comments expressed their concerns that the increased trolley trips resulting from the Project could not be absorbed by the trolley system without infrastructure and operational improvements. They expressed their belief that CSU should study the capacity limitations of the trolley system and propose mitigation measures to reduce the Project's significant effects on the trolley system. However, rather than accepting their suggestions, CSU rejected them. In its responses to SANDAG's comments and in the FEIR, CSU took the position that it had no duty under CEQA to investigate the potential effects of the Project on the transit system because: (1) any impact of the Project on the transit system is not an "environmental" effect under CEQA; (2) SANDAG and other agencies did not, and the Guidelines do not, provide CSU with any criteria for determining the capacity of the SDSU trolley station or whether the increased trolley usage is a "significant" environmental effect under CEQA; and (3) public policy favors increased transit use so impacts on the trolley system should not be considered significant environmental impacts subject to mitigation obligations under CEQA.

On appeal, CSU appears to rely only on the second ground to justify its failure to investigate and address the potential significant effects of the Project on the trolley

system.[21] CSU argues, in conclusory fashion, that because SANDAG and other agencies (e.g., City and MTS) did not provide it with either the exact capacity limitations of the SDSU trolley station or specific criteria for determining whether the Project's effects on the trolley system would be "significant" effects, there was no evidence in the administrative record that would allow it to investigate and determine whether the Project's increased trolley usage would exceed the SDSU trolley station's capacity. CSU further argues that absent specific criteria for determining whether the Project's effects on the trolley system would be "significant," it had no duty to investigate those effects and determine, on its own, whether those effects would be "significant" under CEQA.

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21 Although CSU does not substantively address or rely on the other two grounds on appeal, we believe CSU wisely chose to abandon them. We are unaware of any statute, regulation, or case that provides or holds a project's effects on a transit system cannot be considered to be "environmental" effects under CEQA. On the contrary, section 21060.5 defines "environment" under CEQA to be the "physical conditions which exist within the area which will be affected by a proposed project." Like a project's effects on streets and highways, a project's effects on a transit system logically should be considered "environmental" effects under CEQA because those effects ordinarily will impact, both directly and indirectly, the physical conditions in the area of a project. Likewise, although we presume there is a public policy generally favoring increased use of public transit, that policy does not necessarily preclude, much less outweigh, the public policy underlying CEQA regarding the consideration of, and elimination or reduction of, a project's potentially significant environmental effects before that project is approved. Because the latter public policy expressed in CEQA is the more specific one, we believe the public policy favoring public transit usage should not exempt a lead agency (e.g., CSU) from CEQA's requirements that it investigate a project's potentially significant environmental impacts on a public transit system and adopt feasible mitigation measures to avoid or reduce those effects. As the California Supreme Court has stated, "[t]he foremost principle under CEQA is that the Legislature intended the act 'to 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*, *supra*, 47 Cal.3d at p. 390.)

However, in so arguing, CSU improperly attempts to avoid, or at least unduly minimize, its duties as a lead agency under CEQA to investigate and address a project's potentially significant environmental effects in an EIR and to discuss and adopt feasible mitigation measures to avoid or reduce those effects. (See generally §§ 21002, 21080, subd. (d), 21082.2, subd. (d), 21100, subd. (a), 21151; *Sunnyvale*, *supra*, 190 Cal.App.4th at p. 1372; *Sierra Club*, *supra*, 7 Cal.4th at p. 1233; *Laurel Heights*, *supra*, 47 Cal.3d at p. 391 [lead agency must prepare an EIR which "is 'an informational document' and . . . '[t]he purpose of an [EIR] is to provide public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment; to list ways in which the significant effects of such a project might be minimized; and to indicate alternatives to such a project.' "].) "[U]nder CEQA, the lead agency bears a burden to investigate potential environmental impacts." (*County Sanitation Dist. No. 2 v. County of Kern*, *supra*, 127 Cal.App.4th at p. 1597.) In so doing, the lead agency must consult with any public agency that has jurisdiction over natural resources or other potential environmental impacts of a project. (*Berkeley*, *supra*, 91 Cal.App.4th at p. 1370.)

CSU has a duty to investigate potential environmental impacts of the Project, including whether the Project's impacts on the transit system may be significant environmental effects. Although the record supports a finding that CSU consulted with SANDAG and other public agencies on certain matters, CSU does not cite, and we are not aware of, any document in the administrative record showing CSU expressly requested data or other specific information regarding the capacity limitations of the

SDSU trolley station or trolley line or system generally. CSU cannot fulfill its duties as a lead agency under CEQA by acknowledging the Project will cause a substantial increase in trolley ridership and then not proactively investigate whether that increase will exceed the trolley system's capacity or otherwise cause potentially substantial adverse changes to the trolley system's infrastructure and operations. (Guidelines, § 151445 ["[A]n agency must use its best efforts to find out and disclose all that it reasonably can."]; *Berkeley*, *supra*, 91 Cal.App.4th at p. 1370 [no evidence lead agency made "reasonably conscientious effort" to collect data or make further inquiries of other agencies].) Alternatively stated, CSU cannot both conclude the Project will cause substantially increased trolley ridership (i.e., an additional 6,898 SDSU-related riders) and then passively wait for other agencies to provide it with data or other information that would allow it to determine whether that effect is a significant environmental effect under CEQA.[22] Therefore, although we presume SANDAG and MTS did not provide CSU with specific data regarding the capacity limitations of the SDSU trolley station or the trolley line or system generally, their failure to provide CSU with that data or information did not excuse CSU from carrying out its duty, on its own, to investigate and discuss in the DEIR and FEIR the Project's potentially substantial adverse effects on the transit

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22 CSU implicitly concedes that SANDAG and MTS are *not* "responsible agencies" under CEQA required to provide CSU "with specific detail about the scope and content of the environmental information related to [that] agency's area of statutory responsibility that must be included in the Draft EIR." (Guidelines, § 15082(b).) Accordingly, neither SANDAG nor MTS had an affirmative duty under CEQA to provide CSU with specific data regarding the trolley station's capacity or specific criteria for determining whether the Project would have a significant effect on the transit system.

system, including whether the capacity of the trolley station and system may be exceeded and thereby cause rider congestion at the station, denigration of trolley service, infrastructure, and rolling stock, and additional infrastructure and operating costs.[23] (Cf. *Woodward Park Homeowners Assn., Inc. v. City of Fresno* (2007) 150 Cal.App.4th 683, 728-729 ["There is no foundation for the idea that [a lead agency] can refuse to require mitigation of an impact solely because another agency did not provide information."].)

Furthermore, although Appendix G of the Guidelines does not specifically list transit as an environmental factor under CEQA or set forth criteria for determining when transit impacts are significant, those omissions do not support CSU's assertion that it need not address the Project's effects on the trolley system. That appendix is only an illustrative checklist and does not set forth an exhaustive list of potentially significant environmental impacts under CEQA or standards of significance for those impacts. (See, e.g., *Amador, supra,* 116 Cal.App.4th at pp. 1108-1111.) Also, the lack of precise quantification or criteria for determining whether an environmental effect is "significant" under CEQA does not excuse a lead agency from using its best efforts to evaluate whether an effect is significant. (*Berkeley, supra*, 91 Cal.App.4th at p. 1370.)

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23 Likewise, CSU did not investigate and discuss in the DEIR and FEIR the other potentially substantial adverse effects of the Project on the transit system, such as high usage at *peak* times that exceeds the capacity or causes congestion of the trolley system or SDSU trolley station (rather than simply considering *average daily* capacity limitations), and whether the Project's effects, when considered cumulatively with other planned developments or other factors affecting the transit system, will have a significant effect on the transit system.

By not substantively investigating and addressing the Project's impacts on the transit system and whether those impacts may be significant environmental impacts under CEQA, CSU did not proceed in a manner required by law and therefore abused its discretion under CEQA. (§ 21168.5.) Because CSU did not comply with procedures required by law, its decision must be set aside as presumptively prejudicial. (*Sierra Club*, *supra*, 7 Cal.4th at p. 1236.) CSU's noncompliance with CEQA's substantive requirements and its information disclosure provisions precluded relevant information from being presented to CSU and the general public and "constitute[d] a prejudicial abuse of discretion within the meaning of Sections 21168 and 21168.5, regardless of whether a different outcome would have resulted if [CSU] had complied with those provisions." (§ 21005, subd. (a); *County of Amador v. El Dorado County Water Agency*, *supra*, 76 Cal.App.4th at p. 946.) "In other words, when [CSU] fail[ed] to proceed as required by CEQA, harmless error analysis is inapplicable. The failure to comply with the law subverts the purposes of CEQA if it omits material necessary to informed decisionmaking and informed public participation." (*County of Amador*, at p. 946.) The trial court erred by concluding CSU adequately investigated and addressed the Project's potential impacts on public transit.[24]

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24 For the same reasons discussed above, CSU, as SANDAG and MTS assert, also failed to adequately respond to SANDAG's comments to the DEIR as CEQA requires. (§ 15088.) CSU was required to make a good faith, reasoned analysis in response to SANDAG's comments. (*Berkeley*, *supra*, 91 Cal.App.4th at p. 1367.) As in *Berkeley*, CSU's responses to SANDAG's comments were conclusory and evasive and did not reflect a meaningful attempt to determine whether the Project's effects on the transit system would be significant. (*Id.* at p. 1371.)

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SANDAG and MTS also assert there is insufficient evidence to support CSU's finding that the Project will not cause any significant effect on public transit (e.g., trolley facilities and service). SANDAG and MTS also argue CSU's finding that the Project will have no significant effect on the transit system is legally deficient. After CSU did not substantively address in the DEIR whether the Project's increased trolley use would cause a significant effect, whether direct or indirect, on the trolley system or other physical conditions within the area (§§ 21060.5, 2100, subd. (b)(1)), SANDAG commented on the DEIR and raised that issue. In response, CSU made a conclusory, and unsupported, statement in the FEIR that "any transit 'impacts' that may result from the [Project] relating to increased transit ridership are not subject to CEQA analysis as they are not environmental impacts recognized under CEQA." In the Findings, CSU then made the conclusory finding that the Project would have "[*n*]*o significant impacts on transit systems*." (Italics added.) In so finding, CSU did not support its finding of no significant effect on the transit system with a brief statement of its reasons for that finding. If an agency's investigation shows particular environmental effects of the project will not be potentially significant, the EIR must "contain a statement briefly indicating the reasons for determining that various effects on the environment of a project are not significant and consequently have not been discussed in detail in the [EIR]." (§ 21100, subd. (c); see also Guidelines, § 15064(b).) Furthermore, the EIR must include a statement of the agency's reasons, albeit brief, for its conclusion that a particular environmental impact is not potentially significant. (*Amador, supra*, 116 Cal.App.4th at p. 1111.) A mere

conclusion of insignificance is not adequate to allow meaningful judicial review and constitutes a failure to proceed in the manner required by law. (*Id.* at pp. 1111-1112.) Accordingly, CSU's conclusory finding that the Project will not have a significant effect on the transit system is legally deficient under CEQA.

More importantly, there is insufficient evidence in the administrative record to support CSU's finding the Project will not have a significant effect on the transit system. On appeal, CSU does not cite or rely on any substantial evidence showing the projected increase in trolley usage resulting from the Project's additional enrollment will not cause a "potentially substantial, adverse change" in or to the transit system. (§ 21068 [" 'Significant effect on the environment' means a substantial, or potentially substantial, adverse change in the environment."].) CSU calculated, based on SANDAG's projections, that there will be an increase from 5,982 daily boardings to 14,714 daily boardings at the SDSU station by the 2024/2025 academic year. Of those 14,714 daily boardings, CSU calculated that 11,624 will be SDSU-related boardings, an increase of 6,898 boardings over the 4,726 SDSU-related boardings in 2006/2007. Therefore, there will be an increase of almost 150 percent in the number of SDSU-related riders from 2006/2007 to 2024/2025. However, CSU did not conduct any substantive investigation or analysis regarding whether that substantial increase in SDSU-related trolley usage may affect the trolley system. Furthermore, CSU does not cite, and we are not aware of, any evidence in the administrative record showing the Project's increased trolley usage will not have a significant effect on the transit system.

Although CSU argues an SDSU economic benefit analysis contained in the administrative record provides support for its finding that the Project will not have a significant effect on the transit system, we conclude that analysis does not constitute substantial evidence in support of CSU's finding. CSU cites Appendix Q to the FEIR, titled "SDSU Economic Impact Report." That report, dated July 19, 2007, was prepared by ICF International for SDSU and describes the report as "Measuring the Economic Impact on the Region." By the nature of the issues it addresses, the economic benefit report does not directly investigate or address whether the Project's increased trolley usage will have a significant environmental effect on the transit system. Nevertheless, in summarizing the Project's impacts on transportation, the report stated: "An estimated 12,000 students, faculty and staff can be accommodated by the SDSU trolley station." The report stated: "The trolley can accommodate 12,000 students, faculty and staff." That statement is supported by a citation to footnote 21, which is a reference to the website "http://www.scup.org/about/Awards/2006/San_Diego_State.html." None of the parties discuss, much less provide us with information regarding, that supporting website. Furthermore, the website's information is not contained in the administrative record. Without further information regarding the supporting citation, we conclude the evidence is insufficient to support the economic benefit report's statement that the SDSU trolley station can accommodate 12,000 students, faculty and staff. Accordingly, that unsubstantiated conclusory statement in the economic benefit report cannot provide substantial evidence for a finding that SDSU's trolley station capacity is 12,000 or that

the Project will not have a significant effect on the transit system.[25] "[U]nsubstantiated opinion or narrative, evidence which is clearly inaccurate or erroneous . . . is not substantial evidence. Substantial evidence shall include facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts." (§ 21082.2, subd. (c); Guidelines, § 15384.)

In arguing there is substantial evidence to support its finding, CSU primarily argues SANDAG and MTS failed to provide it with data or other information that would allow it to determine whether the Project would have a significant effect on the transit system. CSU apparently argues that because those agencies did not provide it with evidence of the capacity limitations of the SDSU station or otherwise show the Project would have a significant effect on the transit system, there is substantial evidence to support its finding that the Project will not have a significant effect on the transit system. In so arguing, CSU either misconstrues and/or misapplies the substantial evidence

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25 Even had the administrative record included the information set forth on that website, we would nevertheless reach the same conclusion. That website reflects a 2006 architectural award or citation given to SDSU by the Society for College and University Planning. In describing the award for the SDSU transit station, the website states: "The trolley has allowed the University to expand without adding parking for the next 20-25 years. They plan to add 12,000 students without new parking and now have surplus parking." (See <http://www.scup.org/about/Awards/2006/San_Diego_State.html>.) Contrary to the economic benefit report's statement, the website does *not* state that the SDSU trolley station can accommodate 12,000 students, faculty and staff. Because the report's citation to the website provides *no support* for its statement, the report's unsupported statement that the SDSU trolley station can accommodate 12,000 students, faculty and staff, in turn, provides no support for CSU's assertion that the SDSU trolley station can accommodate 12,000 SDSU-related users and therefore the Project's additional trolley users will not exceed the SDSU station's capacity or otherwise cause a significant effect on the transit system.

standard of review under CEQA. "Substantial evidence" under CEQA is defined as "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached." (Guidelines, § 15384, subd. (a).) Although we make all reasonable inferences from the evidence that would support the agency's determinations and resolve all conflicts in the evidence in favor of the agency's decision (*Save Our Peninsula Committee v. Monterey County Bd. of Supervisors*, *supra*, 87 Cal.App.4th at p. 117), "[a]rgument, speculation, unsubstantiated opinion or narrative, evidence which is clearly inaccurate or erroneous . . . is not substantial evidence. Substantial evidence shall include facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts." (§ 21082.2, subd. (c); Guidelines, § 15384.) SANDAG and MTS correctly assert there is *no* evidence in the administrative record to support CSU's finding that the Project's increased trolley usage will not cause a potentially substantial adverse change to the transit system. (§ 21068.) CSU's finding that the Project will have no significant effect on the transit system is based on speculation, unsubstantiated opinion and narrative or evidence that is clearly inaccurate or erroneous, which does not provide substantial evidence. (§ 21082.2, subd. (c); Guidelines, § 15384.) Accordingly, the trial court erred by concluding there is substantial evidence to support CSU's finding that the Project will not have a significant effect on the transit system.

DISPOSITION

The judgment is reversed in part and affirmed in part, and the matter is remanded to the trial court with directions to enter a new judgment granting in part and denying in

part the petitions for writs of mandate consistent with this opinion. The court shall issue a writ of mandate ordering CSU to void its certification of the FEIR and adoption of the Findings and to void its approval of the Project based on noncompliance with CEQA as set forth in this opinion. The trial court shall also issue an order that the Project may be considered for re-approval by CSU if a new, legally adequate EIR is prepared, circulated for public comment, and certified in compliance with CEQA consistent with the views expressed in this opinion. Appellants are awarded costs on appeal.

McDONALD, J.

WE CONCUR:

McCONNELL, P. J.

O'ROURKE, J.

PROOF OF SERVICE

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 15760 Ventura Boulevard, 18th Floor, Encino, California 91436-3000.

On January 20, 2012, 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 MAIL: I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

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

Executed on January 20, 2012, at Encino, California.

Inez Martinez

SERVICE LIST

Christine Marie Leone (SBN 208803)
Office of the City Attorney
1200 3rd Avenue, Suite 1100
San Diego, CA 92101
Phone: (619) 533-6392
Fax: (619) 533-5856
Email: leonec@sandiego.gov

(Counsel for Plaintiffs and Appellants City of San Diego and Redevelopment Agency of the City of San Diego)

Margaret M. Sohagi (SBN 126336)
Philip A. Seymour (SBN 116606)
Nicole H. Gordon (SBN 240056)
The Sohagi Law Group, LLP
11999 San Vicente Blvd., Suite 150
Los Angeles, CA 90049
Phone: (310) 475-5700
Fax: (310) 475-5707
Email: msohagi@sohagi.com
pseymour@silcom.com
ngordon@sohagi.com

(Counsel for Plaintiffs and Appellants San Diego Association of Governments and San Diego Metropolitan Transit System)

John F. Kirk (SBN 149667)
Deputy General Counsel
San Diego Association of Governments
401 "B" Street, Suite 800
San Diego, CA 92101
Phone: (619) 699-1997
Fax: (619) 699-1995
Email: jki@sandag.org

(Counsel for Plaintiffs and Appellants San Diego Association of Governments and San Diego Metropolitan Transit System)

Mark J. Dillon (SBN 108329)
Michael S. Haberkorn (SBN 159266)
Danielle K. Morone (SBN 246831)
Gatzke Dillon & Balance LLP
1525 Faraday Ave., Suite 150
Carlsbad, CA 92008
Phone: (760) 431-9501
Fax: (760) 431-9512
Email: mdillon@gdandb.com
mhaberkorn@gdandb.com
dmorone@gdandb.com

(Counsel for Defendant and Respondent Board of Trustees of the California State University)

Brandon S. Walker (SBN 254581)
State of California
Department of Transportation
1120 N Street (MS 57)
Sacramento, CA 95812
Phone: (916) 654-2630
Fax: n/a
Email: brandon.walker@dot.ca.gov

(Counsel for Amicus Curiae Department of Transportation)

Sabrina V. Teller (SBN 215759)
Remy, Thomas Moose and Manley
455 Capitol Mall, Suite 210
Sacramento, CA 95814
Phone: (916) 443-2745
Fax: (916) 443-9017
Email: steller@rmmenvirolaw.com

(Counsel for Amicus Curiae League of California Cities and California State Association)

Clerk
Court of Appeal
Fourth Appellate District
Division One
750 "B" Street, Suite 300
San Diego, CA 92101

Hon. Thomas P. Nugent
San Diego Superior Court
North County Division
Vista Regional Center
325 S. Melrose Dr., Dept. 30
Vista, CA 92081