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S279242

IN THE SUPREME COURT OF CALIFORNIA

MAKE UC A GOOD NEIGHBOR et al.,
Petitioners and Appellants,

v.

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA et al.,
Defendants and Respondents,

RESOURCES FOR COMMUNITY DEVELOPMENT
Real Party in Interest.

AFTER A PUBLISHED OPINION OF THE COURT OF APPEAL
FIRST APPELLATE DISTRICT, DIVISION FIVE,
CASE NO. A165451

APPEAL FROM JULY 29, 2022, ORDER AND AUGUST 2, 2022 ORDER AND JUDGMENT OF THE ALAMEDA SUPERIOR COURT; HON. FRANK ROESCH, DEPT. 17, CASE NO. RG21110142 (CONSOLIDATED FOR PURPOSES OF TRIAL ONLY WITH CASE NOS. RG21109910, RG21110157, 21CV000995 AND 21CV001919)

OPENING SUPPLEMENTAL BRIEF REGARDING NEW AUTHORITY

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OPENING SUPPLEMENTAL BRIEF

INTRODUCTION

On September 7, 2023, Governor Newsom signed urgency legislation, Assembly Bill No. 1307 (2023–2024 Reg. Sess.) (AB 1307), which responds to the Court of Appeal's opinion in this case. AB 1307 passed with no negative votes and validates the Regents' arguments for reversal of the Court of Appeal's judgment.

First, AB 1307 confirms that CEQA does not require an EIR to analyze the noisiness of future project occupants. Second, AB 1307 confirms that CEQA does not require an agency to consider alternatives at a project level that it considered at a programmatic level.

AB 1307 is an urgency statute because "[c]urrently in California there is a substantial housing crisis. To ensure housing projects are not subject to further uncertainty, delay, or risk of lawsuit, it is necessary for this act to take effect immediately." (Respondent's Second Motion for Judicial Notice (MJN) 13 [AB 1307, § 3].) When he signed the bill, Governor Newsom stated, " 'California will not allow NIMBYism to take hold, blocking critically needed housing for years and even decades. I thank Assemblymember Wicks and all the legislative leaders for taking on the status quo and clearing the way for our state to build more affordable housing.' " (California Tackles Roadblocks to Housing Construction (Sept. 7, 2023) Office of Governor Gavin Newsom <https://tinyurl.com/cagov0923> [as of Sept. 18, 2023].)

As the Senate Committee on Housing explained, the bill "will enable UC Berkeley to move forward expeditiously with its People's Park project." (MJN 45 [Sen. Com. on Housing, Analysis of AB 1307 as amended June 26, 2023].) In light of AB 1307, the Court of Appeal's judgment cannot stand. It should be reversed, and work on the People's Park project should be permitted to resume immediately.

I. The Legislature intended Assembly Bill No. 1307 to apply here.

AB 1307 responds directly to the Court of Appeal's opinion in this case. (MJN 44 [Sen. Com. on Housing, Analysis of AB 1307 as amended June 26, 2023].) The Senate Committee on Housing noted that the Court of Appeal's opinion "establishe[d] a new precedent that noise from residents in projects should be an environmental factor considered under CEQA." (*Ibid.*) The committee also noted the extraordinary burden created by this newly established and incorrect rule: "Since all residences have residents and all residents make some amount of noise in their day-to-day lives, the result may be that all residential housing projects would need to conduct an EIR and specifically examine the impacts of the voices and living noises of residents in the project and surrounding areas. This could significantly slow down the CEQA process for residential buildings." (*Ibid.*)

AB 1307 is intended to " 'remove the potential for litigants to challenge residential development based on the speculation that the new residents will create unwanted noises. It would also reestablish existing precedent that minor and intermittent noise

nuisances, such as from unamplified human voices, be addressed through local nuisance ordinances and not via CEQA. As such, no longer could CEQA consider "people as pollution." ' " (MJN 42 [Sen. Com. on Housing, Analysis AB 1307 as amended June 26, 2023]; see MJN 16, 20, 23, 32, 37, 45.)

II. AB 1307 rejects the Court of Appeal's analysis of social noise.

AB 1307 amended CEQA by adding section 21085 to the Public Resources Code, confirming that "for residential projects, the effects of noise generated by project occupants and their guests on human beings is not a significant effect on the environment." (MJN 12 [AB 1307, § 1, emphasis omitted].) Thus, the Legislature clarified that, contrary to the Court of Appeal's conclusion, CEQA does not require agencies to analyze the noisy behavior of future project occupants. Such noise issues are best left to local enforcement.

The People's Park Project will house about 1,113 students and provide about 125 supportive housing beds. (AR 1207–1208.) Under Public Resources Code section 21085, the effect of noise generated by the Project's occupants cannot constitute a significant environmental impact under CEQA. Project opponents argue UC Berkeley is required to analyze "social noise caused by student population increases" in general. (ABOM 49.) But AB 1307 leaves no doubt the Legislature meant to stop CEQA from considering the noise generated by students. (MJN 42 [Sen. Com. on Housing, Analysis of AB 1307 as amended June 26, 2023]; *ante*, pp. 6-7.) Requiring UC Berkeley to consider the behavior of

its past undergraduate students as substantial evidence that its future students may engage in noisy behavior—as the Court of Appeal did—conflicts with this legislative intent.

The Legislature specifically criticized the Court of Appeal's decision: "potentially more alarming, the ruling specifically notes that noise impacts should be considered because *students* are noisy and more likely to party than other people. Assuming the behavior of residents, and the resultant impact of their behaviors on the environment, based on their identity sets a precedent to introduce identity-based discrimination into CEQA review." (MJN 32; see MJN 56.) The Legislature also noted that "CEQA does not need to be expanded to include noises from residents" because the appropriate mechanisms to address noisy neighbors is through local noise ordinances. (MJN 32–33; see MJN 56.)

In sum, the new law confirms UC Berkeley's position on the merits of this case: CEQA's definition of "environment" does not extend to noisiness and other anti-social behavior. (OBOM 28–34; RBOM 12–21.) CEQA does not require UC Berkeley to consider whether the noisiness of its future students constitutes a significant effect on the environment. Accordingly, the Court of Appeal's ruling that CEQA required the Regents to analyze potential noise impacts resulting from the People's Park Project relating to loud student parties is error and must be reversed.[1]

---

[1] "In mandamus proceedings like this one, 'the law to be applied is that which is current at the time of judgment in the appellate court.' " (*Citizens for Positive Growth & Preservation v. City of Sacramento* (2019) 43 Cal.App.5th 609, 626; see *Save Berkeley's*

III. AB 1307 rejects the Court of Appeal's analysis of alternatives to the People's Park project.

AB 1307 also amended CEQA by adding section 21085.2 to the Public Resources Code. Under section 21085.2, subdivision (b), universities such as UC Berkeley do not need to "consider alternatives to the location of the residential or mixed-use housing project" when two conditions are met:

> (1) The residential or mixed-use housing project is located on a site that is no more than five acres and is substantially surrounded by qualified urban uses.
>
> (2) The residential or mixed-use housing project has already been evaluated in the environmental impact report for the most recent long-range development plan for the applicable campus.

(Pub. Resources Code, § 21085.2, subd. (b).)

The Senate Committee on Housing described this new code provision as a "narrow exemption from CEQA's required alternative sites analysis for university-built residential projects that were already evaluated in the university's long-range development plan" that "will enable UC Berkeley to move forward expeditiously with its People's Park project." (MJN 45 [Sen. Com. on Housing, Analysis of AB 1307 as amended June 26, 2023].)

Indeed, the record here demonstrates the People's Park Project meets the statutory criteria: First, the People's Park site

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Neighborhoods v. Regents of the University of California (2023) 91 Cal.App.5th 872, 889–892 [validating a CEQA amendment intended to apply to pending litigation].)

is less than five acres. (AR 11656 ["The Housing Project #2 site is the 2.80-acre site currently known as People's Park bounded by Haste Street to the north, Bowditch Street to the east, Dwight Way to the south, and retail commercial buildings that front Telegraph Avenue to the west in the City of Berkeley, Alameda County, California"].)

Second, the People's Park site is substantially surrounded by qualified urban uses.[2] (AR 9599 [aerial view of site]; 9600 ["Surrounding uses are made up of mixed-use, commercial, residential, and institutional land uses"].) Third, the People's Park Project was evaluated in the EIR for UC Berkeley's long-range development plan. (AR 9597–9612 [EIR Project Description].)

Therefore, UC Berkeley "shall not be required" to consider alternatives to the location of the People's Park Project. (Pub. Resources Code, § 21085.2, subd. (b).) For this reason, as well as those argued in the Opening and Reply briefs, the Court of Appeal erred in concluding the EIR did not adequately consider alternatives to the People's Park Project.

---

[2] " 'Substantially surrounded' means at least 75 percent of the perimeter of the project site adjoins, or is separated only by an improved public right-of-way from, parcels that are developed with qualified urban uses." (Pub. Resources Code, § 21085.2, subd. (a)(4).) " 'Qualified urban use' means any residential, commercial, public institutional, transit or transportation passenger facility, or retail use, or any combination of those uses." (*Id.*, § 21072.)

CONCLUSION

AB 1307 resolves the questions before this Court in favor of the Regents. If it does not, the text and legislative history confirm the correctness of the arguments raised in the opening and reply briefs on the merits including that CEQA should be given a practical construction and not expanded beyond its text. (See OBOM 33–34, RBOM 12–13.)

Consistent with the Court's July 6, 2023, order noting this case has a right to calendar preference, and the Legislature's urgency finding in AB 1307, the Regents request the Court promptly schedule the case for oral argument, then reverse the Court of Appeal's judgment and permit work on the People's Park Project to resume.

September 20, 2023

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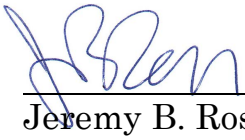

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Case No. S279242

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