[See fee exemption, Gov. Code § 6103]

Supreme Court Case No. S199557

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

SAN DIEGO ASSOCIATION OF GOVERNMENTS and SAN DIEGO METROPOLITAN TRANSIT SYSTEM,

Petitioners and Appellants,

v.

BOARD OF TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY,

Defendant and Respondent.

ANSWER TO PETITION FOR REVIEW

After a Decision by the Court of Appeal, Fourth Appellate District Division One
Case No. D057446
From the Judgment of the Superior Court of the State of California,
County of San Diego, Honorable Thomas Nugent
San Diego Superior Court,

Superior Court Case No. GIC 855643 (Lead Case)
[Consolidated with Case Nos. GIC 855701; 37-207-00083692-CU-WM-CTL; 37-2007-00083768-CU-TT-CTL; 37-2007-00083773-CU-MC-CTL]

THE SOHAGI LAW GROUP, PLC
Margaret M. Sohagi, State Bar No. 126336
Philip A. Seymour, State Bar No. 116606
Nicole H. Gordon, State Bar No. 240056
11999 San Vicente Boulevard, Suite 150
Los Angeles, California 90049-5136
Telephone: (310) 475-5700
Facsimile: (310) 475-5707

SAN DIEGO ASSOCIATION OF GOVERNMENTS
John F. Kirk, General Counsel,
State Bar No. 149667
401 B Street, Suite 800
San Diego, California 92101
Telephone: (619) 699-1997
Facsimile: (619) 699-1995

Attorneys for Petitioners and Appellants
SAN DIEGO ASSOCIATION OF GOVERNMENTS and
SAN DIEGO METROPOLITAN TRANSIT SYSTEM.

[See fee exemption, Gov. Code § 6103]

Supreme Court Case No. S199557

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

SAN DIEGO ASSOCIATION OF GOVERNMENTS and SAN DIEGO METROPOLITAN TRANSIT SYSTEM,

Petitioners and Appellants,

v.

BOARD OF TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY,

Defendant and Respondent.

ANSWER TO PETITION FOR REVIEW

After a Decision by the Court of Appeal, Fourth Appellate District Division One
Case No. D057446
From the Judgment of the Superior Court of the State of California,
County of San Diego, Honorable Thomas Nugent
San Diego Superior Court,

Superior Court Case No. GIC 855643 (Lead Case)
[Consolidated with Case Nos. GIC 855701; 37-207-00083692-CU-WM-CTL; 37-2007-00083768-CU-TT-CTL; 37-2007-00083773-CU-MC-CTL]

THE SOHAGI LAW GROUP, PLC
Margaret M. Sohagi, State Bar No. 126336
Philip A. Seymour, State Bar No. 116606
Nicole H. Gordon, State Bar No. 240056
11999 San Vicente Boulevard, Suite 150
Los Angeles, California 90049-5136
Telephone: (310) 475-5700
Facsimile: (310) 475-5707

SAN DIEGO ASSOCIATION OF GOVERNMENTS
John F. Kirk, General Counsel,
State Bar No. 149667
401 B Street, Suite 800
San Diego, California 92101
Telephone: (619) 699-1997
Facsimile: (619) 699-1995

Attorneys for Petitioners and Appellants
SAN DIEGO ASSOCIATION OF GOVERNMENTS and
SAN DIEGO METROPOLITAN TRANSIT SYSTEM.

Table of Contents

Table of Contents
(continued)

Table of Authorities

Page

Cases

Table of Authorities
(continued) **Page**

Statutes

Regulations

Table of Authorities
(continued)

Page

Rules

The San Diego Association of Governments ("SANDAG") and San Diego Metropolitan Transit Service (MTS"), prevailing appellants below, submit this Answer to the Petition for Review filed by petitioner (respondent below) Board of Trustees of the California State University ("CSU").

I. ISSUES PRESENTED

A. Issues Presented by Petitioner

Petitioner CSU presents the issues proposed for review in this case in rambling narrative form. They boil down to the following two questions:

1. Under the California Environmental Quality Act ("CEQA," Pub. Resources Code § 21000 et seq.), may a state university or other state agency satisfy its obligation to discuss feasible mitigation measures for off-site traffic impacts in an Environmental Impact Report solely by proposing to request funds for mitigation from the State Legislature?

2. Did the Court of Appeal apply the correct standard of review to certain factual and legal issues presented in the appeal?

CSU suggests that the first question must be answered in the affirmative, based on language found in this Court's decision in *City of Marina v. Board of Trustees of the California State University* (2006) 39 Cal.4th 341 ("*City of Marina*"). The Court of Appeal, however, correctly found that the dictum relied on by CSU does not establish the rule proposed by CSU, nor trump the general rule articulated in *City of Marina* and numerous other cases that public agencies – including state universities – are required to identify, discuss and adopt meaningful mitigation measures to avoid or reduce the significant environmental effects of projects they approve whenever it is feasible to do so, and that this obligation may not be artificially restricted by ignoring legally available alternative funding

mechanisms where more than one option for funding mitigation is available. (*City of Marina*, 39 Cal.4th 341, 359-360, 368-369; Pub. Resources Code §§ 21002, 21002.1, 21081, 21100.)

The second purported issue (actually, set of issues) proposed for review by CSU is filler. The Court of Appeal did not purport to adopt or apply any new standard of review in CEQA cases. CSU's claims that the Court of Appeal somehow misapplied the existing, well-settled standards of review do not present any issue meriting Supreme Court review, nor are they correct on the merits. Instead, CSU misunderstands the applicable standards and badly misrepresents the actual nature of the issues decided by the Court of Appeal.

B. Additional Issues Proposed for Review

Respondents SANDAG and MTS do not propose any additional issues for review by this Court.

II. FACTUAL BACKGROUND

This case arises from the approval of a large-scale campus expansion program for the California State University campus in San Diego, California. The relevant factual background of the case is adequately summarized in the decision of the Court of Appeal. (Slip Opn. at pp. 2-8.) Further specifics germane to the issues raised in the petition for review are discussed where relevant in the following text.

III. REVIEW SHOULD NOT BE GRANTED ON THE QUESTION OF WHETHER THE COURT OF APPEAL CORRECTLY APPLIED PRINCIPLES STATED IN THE *CITY OF MARINA* CASE AND IN OTHER CEQA CASE LAW GOVERNING MITIGATION OF TRAFFIC IMPACTS AND OTHER ENVIRONMENTAL IMPACTS

The primary issue posed in the petition for review is whether the Court of Appeal decision conflicts with this Court's decision in *City of Marina*, 39 Cal.4th 341. CSU relies on the following brief passage from the *City of Marina* decision:

"Moreover, a state agency's power to mitigate a 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." (*City of Marina*, 39 Cal.4th 341, 367.)

Based on this brief passage, CSU contends that *City of Marina* establishes a rule that state agencies are never required to consider sources of funding for environmental impacts other than appropriations by the State Legislature, and a corollary rule that state agencies (or at least state universities) are absolved from any obligation to mitigate environmental impacts occurring beyond their own property boundaries if the Legislature fails to make a special appropriation for this purpose.

The Court of Appeal fully considered the language relied on by CSU, and reached a different conclusion. This is because, unlike CSU, the Court of Appeal also considered the language and conclusions of the *City of Marina* decision *as a whole*, along with the relevant statutory language and other case law construing the CEQA statutory scheme. (Slip Opn. at pp. 20-35.) The court concluded that the language relied on by CSU was dictum. (Slip Opn. at pp. 29-33.) More important, given the complete absence of any

further discussion or analysis of the relevant issue in *City of Marina*, this dictum could not be considered persuasive authority for the proposition advanced by CSU. (Slip Opn. at pp. 32-33.) Indeed, given the conclusions and tenor of *City of Marina* as a whole, the conclusion is almost inescapable that this Court in no way intended to establish or endorse the type of far-reaching rule that CSU would like to distill from the single sentence at issue. (Slip. Opn. at pp. 32-35.) As *City of Marina* decisively affirms, the general rule established by CEQA is that public agencies at all levels must mitigate the significant environmental effects of projects they undertake *whenever it is feasible to do so*. (*City of Marina*, 39 Cal.4th 341, 360; Pub. Resources Code §§ 21002, 21002.1(b), 21081; see *California Native Plant Soc. v. City of Santa Cruz* (2009) 177 Cal.App.4th 957, ("C.N.P.S.")982; *County of San Diego v. Grossmont-Cuyamaca Community College Dist.* (2006) 141 Cal.App.4th 86, 98-99.) The corollary, of course, is that a public agency is not required to give in-depth consideration or to adopt mitigation measures that are validly determined to be *infeasible* for legitimate reasons, including legal reasons. (*City of Marina*, 39 Cal.4th 341, 356; Pub. Resources Code §§ 21002.1(c), 21081(a)(3).) But before concluding that mitigation is infeasible, a public agency must first *actually consider* a reasonable range of potentially available mitigation measures during the EIR process, and may reject potentially available mitigation measures only if they have in fact been shown to be infeasible. That is the reasoning – and indisputably the correct reasoning – of the Court of Appeal in this case. This, of course, did not mean CSU was precluded from requesting funds directly from the Legislature as *one possible* source of mitigation funds. CSU erred, however, by restricting its consideration to only this single, admittedly uncertain mitigation option when other means for funding the offsite traffic mitigation

measures prescribed in the EIR were potentially available, based on the legally erroneous premise that CSU's obligation to consider and adopt feasible mitigation measures was exhausted solely by requesting an appropriation from the Legislature. (Slip Opn. at 14-19, 35-37.)

A. The Court of Appeal Correctly Determined that the Language from *City of Marina* Relied on by CSU Was Dictum

CSU's attempts to inflate the issue presented for review by first mistakenly urging that the language it relies on in *City of Marina* is legally binding authority rather than mere dictum. The Court of Appeal was clearly correct in rejecting this contention. Little can be added to the thorough discussion of this point in the Court of Appeal's opinion. The principal issue presented in *City of Marina* was whether mitigation of certain offsite impacts was legally infeasible under the terms of the "San Marcos legislation," Government Code section 54999 et seq. (*City of Marina*, 39 Cal.4th 341, 356-363.) The Court had no occasion in *City of Marina* to explore, nor did it actually explore, what sources of funds might or might not be legally available to CSU to fulfill its mitigation obligations once this excuse was eliminated. The Court simply did not consider whether CSU's obligations to mitigate could have been satisfied from non-appropriated sources of revenue that CSU has been authorized to collect and spend by other legislation or accepted practice, e.g., tuition, student fees, revenue bonds, parking fees, private donations, and partnerships with private developers.

As discussed below, SANDAG and MTS do not believe the dictum relied on by CSU actually supports the drastic interpretation espoused by CSU, particularly when read together with other language in the *City of*

Marina decision. But even if construed to support CSU's theory, the Court of Appeal was also fully correct in treating this dictum as unpersuasive.

The Court of Appeal recognized that even dicta in this Court's opinions may be entitled to considerable persuasive value. How *much* persuasive value, however, depends upon additional factors, particularly whether the dicta is the product of actual discussion and thoughtful analysis in the opinion, or whether it appears to be a more casual statement, made without full regard for its precedential value or the ramifications of possible future interpretations (or misinterpretations) of that language. Dictum from this Court should thus generally be followed where it "demonstrates a thorough analysis of the issue or reflects compelling logic." (*County of San Bernardino v. Superior Court* (1994) 30 Cal.App.4th 378, 388, quoting *Smith v. County of Los Angeles* (1989) 214 Cal.App.3d 266, 297; *Rodrigo v. Koryo Martial Arts* (2002) 100 Cal.App.4th 946, 956, fn 3.)

Conversely, unsupported statements that reflect no deliberation or apparent contemplation of consequences beyond the facts of a particular case carry little weight, and should not be followed if they appear inconsistent with governing statutes or principles of law. (See, e.g., *People v. Mendoza* (2000) 23 Cal.4th 896, 915-917; *Gogri v. Jack in the Box Inc.* (2008) 166 Cal.App.4th 255, 272-273; *County of San Bernardino*, 30 Cal.App.4th 378, 388.) As this Court has said, "we must view with caution seemingly categorical directives not essential to earlier decisions and be guided by this dictum only to the extent it remains analytically persuasive." (*People v. Mendoza*, 23 Cal.4th 896, 915, quoting *People v. Superior Court (Marks)* (1991) 1 Cal.4th 56, 66.)

B. More Fundamentally, the Language Relied on by CSU Clearly was Not Intended to Establish the Type of Broad Rule Claimed by CSU

CSU's arguments concerning the effect to be given this Court's dictum in *City of Marina* also ask the Court to construe the relevant language far more broadly than is justified. Given the overall tenor and many specific statements in *City of Marina* decision concerning public agencies' obligation to mitigate environmental impacts, it is inconceivable that this Court ever intended the passage relied on by CSU to have the drastic meaning or consequences urged by CSU.

This Court and other courts have long warned against overly ambitious reading of casual statements made in prior judicial opinions, and the unintended consequences that may derive from such. "It is axiomatic that language in a judicial opinion is to be understood in accordance with the facts and issues before the Court. An opinion is not authority for propositions not considered." (*Chevron U.S.A., Inc. v. Workers Comp. Appeals Bd.*(1999) 19 Cal.4th 1182, 1195; *Estate of Haffner* (1986) 184 Cal.App.3d 1371, 1385.) Thus, "[A] decision is authority only for the point actually passed on by the court and directly involved in the case. General expressions in opinions that go beyond the facts of the case will not necessarily control the outcome in a subsequent suit involving different facts." (*Redevelopment Agency of City of San Diego v. Attisha* (2005) 128 Cal.App.4th 357, 372, quoting *Gomes v. County of Mendocino* (1995) 37 Cal.App.4th 977, 985.) "Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not considered as having been decided as to constitute precedents." (*Ferguson v. Workers'*

Comp. Appeals Bd. (1995) 33 Cal.App.4th 1613, 1624, quoting *Webster v. Fall* (1925) 266 U.S. 507, 511.)

Here, no-one would quarrel with the proposition advanced in the first half of the language relied on by CSU. A state agency's ability to mitigate impacts through voluntary mitigation payments – or, indeed, to pay for any type of mitigation – is without doubt "ultimately subject to legislative control." (*City of Marina*, 39 Cal.4th 341, 367.) CSU, however, reads far more into the following language than is justified. It is no doubt true, in an ultimate sense, that a state agency may lack the power to mitigate if the Legislature fails to provide the means to do so. But the language relied on by CSU is not intended to imply that only funds specially appropriated by the Legislature for the specific purpose of mitigating project impacts may be used to fund CEQA mitigation. Clearly there is no basis for such a proposition in existing law. As the Court of Appeal noted, CSU has at no time in the litigation cited law or evidence suggesting that it may not employ discretionary funds appropriated by the Legislature or other sources of revenue for mitigating environmental impacts. (Slip. Opn. at p. 33.) CSU continues to offer no such authority or evidence in its petition for review. The Court of Appeal can hardly be faulted for declining to attribute a meaning to the language cited by CSU which has no apparent supporting basis in law.

It is also clear that this Court did *not* expressly endorse the proposition advanced by CSU, that CSU would necessarily satisfy its CEQA obligations merely by applying to the Legislature for funds specifically allocated to mitigation measures. As the Court said instead, any attempt to disclaim responsibility for mitigation before pursuing this alternative would be "*premature*, at the very least." (*City of Marina,* 39 Cal.4th 341, 367,

emphasis added.) The Court did not say a request to the Legislature would automatically and in every case exhaust CSU's entire obligation under CEQA.

CSU's reading of its chosen excerpt becomes even less plausible when it is read in light of other specific statements in *City of Marina*, and in light of the opinion as a whole. The overall message of *City of Marina* is clearly that state agencies (like all other public agencies in California) must use all avenues legally and practically available to them to mitigate environmental effects. (*City of Marina,* 39 Cal.4th 341, 359-361, 368-369.) The decision makes a number of categorical statements to this effect, e.g., "the Trustees are 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.'*" (*Id.* at 359-360, emphasis added.) On its face, this seemingly categorical language, which clearly is not mere dictum, would appear to controvert (and trump) the subsequent dictum relied on by CSU. But unlike CSU, SANDAG and MTS (and the Court of Appeal) do not believe that far-reaching rules of law can or should be distilled from individual passages in a decision. We know that the seemingly unconditional language quoted above is modified by language elsewhere in *City of Marina* that recognizes the duty to mitigate is subject to additional principles, principally the requirement that mitigation be *feasible*. As the Court states, "This is the plain import of CEQA, in which the Legislature has commanded that '[e]ach public agency shall mitigate or avoid significant effects on the environment of projects that it carries out or approves *whenever it is feasible to do so.*'" (*Id.* at 360, emphasis altered.) Thus, "CEQA does not authorize an agency to proceed with a project that

will have significant, unmitigated effects on the environment,... *unless the measures necessary to mitigate those effects are truly infeasible.*" (*Id.* at 368-369, emphasis added.)

Given the foregoing specific statements of law and the overall thrust of the *City of Marina* decision, it would clearly be the tail wagging the dog to suggest that the single sentence relied on by CSU establishes that the state agencies have no obligation for funding mitigation measures for their projects beyond a polite request for funds from the Legislature, regardless of what other resources or other funding options may be available to them. It simply cannot be believed that the Court attempted, in the short sentence relied on by CSU, to establish a limitation on the general rule requiring mitigation of environmental impacts that would largely swallow the rule.

C. CSU's Purported Interpretation of *City of Marina* is Clearly Incompatible with the Express Provisions and Underlying Legislative Policies of CEQA

CSU's arguments also suffer from complete myopia concerning the larger body of statutory and decisional law that bear on its exculpation theory. *City of Marina* is an important decision which, as has just been discussed, actually undercuts CSU's arguments. But *City of Marina* is not the only word on the subject. CSU, however, makes no effort to reconcile its strained interpretation of *City of Marina* with the broader principles that govern implementation of CEQA generally. The Court of Appeal decision, in contrast, is fully consistent with these principles. (Slip Opn. at pp. 33-35.)

It has long been recognized that CEQA imposes an affirmative, substantive duty on public agencies, codified in the statute itself, to avoid or mitigate the significant environmental effects of projects they undertake whenever it is feasible to do so. (Pub. Resources Code §§ 21002,

21002.1(b), 21081; 14 CAL. CODE REGS. §§ 15021(a), 15091; *County of San Diego*, 141 Cal.App.4th 86, 98-99; *C.N.P.S. v. City of Santa Cruz*, 177 Cal.App.4th 957, 982; *Federation of Hillside and Canyon Associations v. City of Los Angeles* (2005) 126 Cal.App.4th 1180, 1198; *Sierra Club v. Gilroy City Council* (1990) 222 Cal.App.3d 30, 41.) Nothing in the statutes or case law suggests this duty may be satisfied merely by finding that one particular form of mitigation, or source of funds for mitigation, is infeasible, or, as in this case, by placing sole reliance on one particular form of mitigation whose feasibility is admittedly uncertain, and where other forms of mitigation or sources mitigation funds may be available. The CEQA Guidelines specifically provide, for example, that where more than one mitigation measure is potentially available, "each should be discussed and the basis for selecting a particular measure should be identified." (14 Cal. Code Regs. § 15126.4(a)(1)(B); see also *Los Angeles Unified School Dist. v. City of Los Angeles* (1997) 58 Cal.App.4th 1019, 1029 [EIR must consider and respond to suggestions for significant additional feasible mitigation measures].) The substantive duty to mitigate cannot be satisfied by adopting mitigation measures of uncertain feasibility where other more viable measures exist. Instead, the approving agency must normally strive to develop and adopt mitigation measures that are "fully enforceable," and that, therefore, do not depend upon uncertain future contingencies, to the extent possible. (Pub. Resources Code § 21081.6(b), 14 Cal. Code Regs. § 15126.4(a)(2); see *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 444.)

No-one can fault CSU for considering a future appropriation from the Legislature as *one* potential source of funding for off-site mitigation, but given the uncertain nature of this approach, CSU could not simply stop there

and shrug off other possible sources at its disposal. While, as this Court observed in *City of Marina*, CSU's spending for off-site mitigation may ultimately be subject to legislative control, there is no indication anywhere in existing law that the Legislature intended to bar CSU from expending money from its general funds or other sources of revenue for mitigating such impacts. Certainly, as the Court of Appeal pointed out, CSU to date has identified no statute, legislative enactment or other legal constraint barring it from doing so. What the Legislature *has* made clear is that it expects *all* public agencies to mitigate all significant environmental effects of their projects *to the full extent feasible*. (Pub. Resources Code §§ 21002, 21002.1(b).) The Court, in turn, has made it clear that CSU may not rely on untenable legal rationalizations for its failure to consider, adopt and implement otherwise available traffic and other mitigation measures. The Court of Appeal decision in this case merely affirms that rule.

D. CSU has not Shown that Review of the Decision is Necessary to Clarify the Law

Aside from failing to show any legal merit to its contentions, CSU has also failed to show there is any need to review the Court of Appeal decision to ensure uniformity in application of the law. CSU does not contend the Court of Appeal decision conflicts with any other decision of the courts of appeal. CSU has not even identified any significant body of informed legal opinion that conflicts with the Court of Appeal decision. Indeed, in the over five years since *City of Marina* was published, there does not appear to be any other case in which the interpretation urged by CSU has been seriously argued by any party other than CSU itself. If the limitation on state agencies' obligation to mitigate posited by CSU was in fact the law, one would think that more than one cash-strapped state agency would have

sought to avail itself of this loophole by now. Instead, the paramount importance of the duty to mitigate environmental impacts remains essentially unquestioned by anyone but CSU. The fact that CSU raised the question provided reasonable justification for the Court of Appeal's decision to certify its decision for publication. Further review of the issue, however, simply is not required to clarify or amplify the law.

IV. REVIEW IS NOT WARRANTED ON THE QUESTION OF WHETHER THE COURT OF APPEAL CORRECTLY APPLIED THE APPLICABLE STANDARD OF REVIEW

Petitioner frames the second "issue" presented for review in purely rhetorical terms:

> 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? (Petition, p. 3.)

In practice, there is no dispute about the general principles that govern CEQA review. The issues actually posed by CSU under this heading simply boil down to complaints that the Court of Appeal *misapplied* the "long established law" governing the standard of review in CEQA cases to specific issues in this case. On the face of it, CSU is thus merely seeking review of garden-variety legal errors, not presenting issues requiring clarification by this Court. If the Court cares to examine the specific alleged errors asserted by CSU in its petition, it will quickly discover there were no errors. Instead,

in each instance it is CSU that either fails to comprehend the standard of review, or badly misrepresents the nature of the issues decided and the actual rulings of the Court of Appeal.

A. The Court of Appeal Did Not Purport to State any New Rules or Question Existing Rules Governing the Standard of Review in CEQA Cases

Although CSU apparently contends the Court of Appeal broke new ground in applying the applicable standards of review, the decision itself indicates no intent to do so. The Court of Appeal neither purported to state any new or different rules, nor questioned any existing case law applying the foregoing standards. Instead, the opinion faithfully tracks existing jurisprudence both in its general discussion of the standard of review, and throughout the opinion. (Slip Opn. at pp. 9-11.) It is CSU, and not the Court of Appeal, that consistently wishes to depart from the governing standards. Even were there some arguable error in the Court of Appeal's application of the standards – and there is none – the error would be nothing more than a run-of-the-mill misapplication of law, not a departure requiring Supreme Court review to maintain uniformity in the decisional law as a whole.

B. CSU Confuses the Question of Legal Adequacy of the EIR with the Question of Whether Specific Fact-Based Findings or Determinations are Supported by Substantial Evidence

The basic fallacy underlying all of CSU's arguments governing application of the standard of review is a failure to distinguish issues that are fundamentally legal in nature, and those that are fundamentally factual in nature. In *Vineyard Area Citizen*, 40 Cal.4th 412, 435, this court recognized that the abuse of discretion standard established for review of CEQA claims in Public Resources Code § 21168 and 21168.5 embraces two distinct legal

standards governing these two types of issues. Questions of whether a public agency has complied with CEQA's procedural mandates are fundamentally *questions of law* which the court reviews de novo, and without any deference to the respondent agency's own opinions or conclusions. (*Id.*; see, e.g., *Clover Valley Foundation v. City of Rocklin* (2011) 197 Cal.App.4th 200, 211; *County of San Diego*, 141 Cal.App.4th 86, 96; *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1208.)

A failure to include information that is legally required by CEQA, or to perform some investigation or analysis where investigation or analysis is required by CEQA, is fundamentally a failure to proceed in the manner required by law, and thus subject to review under the independent judgment standard. (*Vineyard*, 40 Cal.4th 412, 435; *C.N.P.S. v. City of Santa Cruz*, 177 Cal.App.4th 957, 986; *Bakersfield Citizens*, 124 Cal.App.4th 1184, 1208; *Save Our Peninsula Committee v. Monterey County Board of Supervisors* (2001) 87 Cal.App.4th 99, 118.) Reliance on an incorrect legal standard, erroneous legal conclusions or misinterpretation of CEQA's legal requirements also constitutes a failure to proceed in the manner required by law which is reviewed using an independent judgment standard. (See, e.g., *City of Marina*, 39 Cal.4th 341, 355-356; *Sunnyvale West Neighborhood Assn. v. City of Sunnyvale City Council* (2010) 190 Cal.App.4th 1351, 1371.) The purported existence of substantial evidence to support the lead agency's ultimate conclusions is irrelevant to the question of whether the agency has committed procedural error by failing to comply with CEQA's procedural requirements, including particularly, CEQA's information disclosure requirements. (*Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 82-83; *Association of Irritated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, 1392.)

In contrast, questions which turn "predominately" upon the validity of a lead agency's factual judgments and conclusions governs the substantial evidence test. (*Vineyard Area Citizens*, 40 Cal.4th 412, 435; *Ebbetts Pass Forest Watch v. California Dept. of Forestry & Fire Protection* (2008) 43 Cal.4th 936, 944 and 954.) Under the substantial evidence test, the Court must generally defer to a lead agency's factually based findings and conclusions. (*Id.*; see, generally, Laurel Heights Improvement Assn. v. Regents of University of California (1988) 47 Cal.3d 376, 392-393 and 407-408.) But even the substantial evidence test does not command *blind* deference to agency decisions. Instead, the reviewing court "must scrutinize the record" to determine if the agency's determinations are actually supported by substantial evidence. (*Laurel Heights*, 47 Cal.3d 376, 408.) Courts do not defer to findings or conclusions that are simply baseless or rest on wholly illogical assumptions or hopelessly strained inferences. (See, e.g., *Gray v. County of Madera* (2008) 167 Cal.App.4th 1099, 1116-1117 ["Law is not required to abandon common sense."].)

As discussed below, all of CSU's claims of error applying the standard of review depend at least in part upon arguing, incorrectly, that the Court of Appeal should have applied the substantial evidence standard to issues that are fundamentally procedural in nature, and thus subject to an entirely different standard.

C. The Court of Appeal Did Not Misapply the Applicable Standards of Review

CSU cites three specific instances in which it believes the Court of Appeal misapplied the standard of review. In each case, CSU contends that the Court of Appeal improperly ignored factual findings or determinations made by CSU during the administrative process despite the fact they were

supported by "substantial evidence." In each instance, however, CSU simply confuses the applicable standard of review and ignores or misrepresents the actual decision of the Court of Appeal.

As this Court has previously observed, the substantial evidence test does not govern judicial review for errors that are fundamentally procedural in nature, including failures to provide basic, legally required information in an EIR, or reliance on erroneous legal conclusions or standards. (*Vineyard Area Citizens*, 40 Cal.4th 412, 435; *City of Marina*, 39 Cal.4th 341, 366, 355.) Thus, in arguing that the Court of Appeal failed to give proper heed to CSU's factual findings on specified issues, CSU is essentially attacking a straw man. Moreover, as noted where appropriate, CSU also often ignores the fact it never actually made the findings or reached the purported conclusions it would like the Court to defer to, or that the Court of Appeal actually did review evidence cited by CSU, and determined it simply did not amount to substantial evidence.

1. Availability of Alternate Mitigation Funds

CSU contends the Court of Appeal ignored its factual finding that traffic impacts of the project were "significant and unavoidable" because CSU could not guarantee that mitigation funds would be appropriated by the Legislature. CSU also accuses the Court of Appeal from going "outside the record" to conclude that other sources of funding might be available. (Petition at pp. 23-24.)

The argument misrepresents the issue actually decided by the Court. The fundamental error found by the Court of Appeal with respect to CSU's mitigation of off-site traffic impacts is that CSU relied on the legally incorrect premise that CSU was not required to consider any source of funding for a traffic mitigation program other than a request to an

appropriation of funds to the Legislature. (AR 19{297}18465; Slip Opn. at pp. 35-37.) This type of error is also fundamentally *legal* in nature, meaning that a reviewing court exercises its independent judgment as to whether the respondent proceeded in the manner required by law. (*City of Marina*, 39 Cal.4th 341, 355-356; *Vineyard Area Citizens*, 40 Cal.4th 412, 435.) As this Court held in *City of Marina*, "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." (*City of Marina,* 39 Cal.4th 341, 356.) CSU cannot overcome this error by contending there was substantial evidence to support the conclusions it reached based on legally impermissible assumptions.

CSU's claim that the Court of Appeal relied on impermissible speculation are also without merit. As appellant City of San Diego demonstrated in its briefs, the record is replete with references to other sources of funds that CSU might utilize for mitigation purposes. For example, literally none of the major new building facilities CSU will add as part of the Campus Expansion project will be funded by the Legislature. All will be financed with other sources of revenue such as bond revenues, parking fees, donor funds or partnerships with private developers. (See Appellants' The City of San Diego and Redevelopment Agency of the City of San Diego's Opening Brief, pp. 29-30; AR 20{322}20244-20246.) There is no reason CSU could not have considered using the same sources of funds for mitigation of impacts directly related to the campus expansion. In making this observation, the Court of Appeal was doing no more than applying common sense to the facts presented in the record.

2. Significant Effects on Transit Facilities and Use

CSU next complains the Court of Appeal failed to defer to CSU's findings, such as they were, that the Campus Expansion Project would not have any significant adverse impacts on transit use or facilities. (Petition at pp. 24-25.) This argument again ignores the actual nature of the legal error found by the Court of Appeal. (Slip Opn. at pp. 71-77.) Moreover, the Court of Appeal *did* fully consider the so-called evidence in the record supporting CSU's exculpatory boiler-plate finding concerning transit impacts, and found there was no substantial evidence to support this finding. (Slip Opn. at pp. 78-82; see "finding" re transit impacts at AR 19{297}18516-18517.)

The fundamental error found by the Court of Appeal with respect to transit-related impacts was CSU's complete failure to undertake any actual investigation or evaluation of those impacts. (Slip Opn. at pp. 71-77.) Instead, and despite the fact that CSU predicted massive increases of public transit use caused by the Project, the Draft EIR contained no discussion whatsoever concerning the potential impacts of this increased ridership on existing transit facilities, service levels or system capacity. When this defect was pointed out by SANDAG in comments on the draft EIR, CSU responded with a series of essentially legal rationalizations, which are set forth in the Court of Appeal opinion. (AR 18{264}17229-17231; Slip Opn. at pp. 66-70.) CSU, however, did not undertake any actual substantive investigation or evaluation of transit-related impacts. CSU's basic argument on appeal is that the Final EIR's failure to further analyze transit-related impacts, and its cursory findings that there would be no such impacts, were justified by SANDAG's and MTS' failure to provide information demonstrating such impacts. The Court of Appeal correctly found that CSU, as a lead agency

under CEQA, could not blame its failure to obtain and discuss relevant information on other public agencies. (Slip Opn. at pp. 71-77.)

This error was fundamentally procedural in nature, and not subject to review under the substantial evidence test. (See *Bakersfield Citizens*, 124 Cal.App.4th 1184, 1208.) First, CEQA imposes an affirmative duty on lead agencies to investigate and evaluate potentially significant environmental effects. (Slip Opn. at pp. 74-76.) Second, even if a lead agency concludes that a potential environmental effect will not actually be significant, it must set forth a brief statement of reasons supporting this conclusion in the EIR. (Slip Opn. at pp. 78-79; 14 Cal. Code Regs. § 15128; *Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1110-1111.) CSU could not rationalize away these duties by claiming that other parties failed to provide the relevant information in the first instance. As this Court noted in *City of Marina*, reliance on an erroneous legal position or premise is itself legal error which the Court reviews under an independent judgment standard, without deference to the lead agency. (*City of Marina*, 39 Cal.4th 341, 355-356 and 365-366.)

Although the Court of Appeal could have stopped its analysis there, it fully reviewed the evidence in the record to determine whether there was any factual support for CSU's purported ultimate finding that there would be no significant transit-related impacts. The court concluded there was none. (Slip Opn. at pp. 78-82.) Even if one were to disagree with the Court of Appeal on this point, the issue is hardly one warranting Supreme Court review. There is, however, also no reason to doubt the Court of Appeal's conclusions on this point. What CSU is really attempting to do is fault the Court of Appeal for adhering to this Court's mandate that reviewing courts carefully "scrutinize the record" to determine whether a decision is actually

supported by substantial evidence, rather than blindly defer to agency rationalizations. (*Laurel Heights*, 47 Cal.3d 376, 408.)

3. The Purported "Finding" Regarding the Effectiveness of Mitigation Measure TCP-27

CSU's final claim is that the Court of Appeal failed to defer to CSU's "factual finding that [mitigation measure] TCP-27 would be effective to mitigate the project's traffic impacts." (Petition at p. 25; see Slip Opn. at pp. 58-62.) CSU again misstates the actual issued decided by the Court of Appeal and the governing standard of review. It also ignores the fact that there was no actual finding or determination – or even any discussion – concerning the effectiveness of mitigation measure TCP-27 anywhere in the record.

Mitigation Measure TCP-27 was added to the Final EIR in response to comments from SANDAG. (AR 18{264}17238.) It calls for preparation of a Transportation Demand Management ("TDM") program of unspecified contents which will have the goal "of reducing vehicle trips to campus in favor of alternate modes of travel." (AR 18{275}17602, full text in margin; Slip Opn. at p. 60.) [1]

[1] The full test of Mitigation Measure TCP-27 is as follows:

> SDSU shall develop a campus Transportation Demand Management ("TDM") program to be implemented no later than the commencement of the 2012/2013 academic year. The TDM program shall be developed in consultation with the San Diego Association of Governments ("SANDAG") and Metropolitan Transit System ("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. (AR {275}17602, Slip Opn. at p. 60.)

Had CSU indeed found that mitigation measure TCP-27 would be "effective" in significantly reducing actual traffic impacts, the Court of Appeal would, as discussed below, have been well justified in holding that this finding was not supported by substantial evidence. The actual error found by the Court of Appeal, however, was procedural in nature. Mitigation Measure TCP-27 on its face is inadequate to constitute a valid mitigation measure under CEQA. (Slip Opn. pp. 58-62.) The Court of Appeal relied on a long line of cases that have held that a lead agency may not defer formulation of the core provisions of mitigation measures to be implemented in the future until some time after the close of public review of the EIR and initial approval of the project. (See, e.g., *Communities for a Better Environment,* 184 Cal.App.4th 70, 92-94; *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 669-671; 14 Cal. Code Regs. § 15126.4(a)(1)(B).) As these cases have explained, formulation of the full details of mitigation measures may sometimes be deferred until more complete information is available, but such a deferral is permissible *only* where the lead agency has identified the concrete measures or types of measures that will be considered, formally committed itself to implementation of the measures ultimately selected, and adopted a specific performance criteria or standards that the mitigation program must satisfy. (See *Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 794; *Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1275-1277; *Gentry v. City of Murietta* (1995) 36 Cal.App.4th 1359, 1394-1395.)

Mitigation Measure TCP-27 obviously fails the test. The EIR fails to identify any specific concrete measures *whatsoever* that might actually be included in the TDM plan. Further, while Mitigation Measure TCP-27 states

a *goal* "of reducing vehicle trips to campus in favor of alternate modes of travel," this is not an objective performance standard against which the effectiveness of the future TDM can be judged. It is simply a vague and unenforceable statement of good intentions. (See *San Joaquin Raptor Rescue*, 149 Cal.App.4th 645, 670 [identification of stated goal not substitute for specific performance standard]; *Gray v. County of Madera*, 167 Cal.App.4th 1099, 1119 [same].) Mitigation Measure TCP-27 is thus legally deficient on its face, even were there some evidence in the record that it would be "effective" in accomplishing some measurable level of traffic mitigation.

CSU's claim of error here fails on additional grounds. There is no identifiable finding or conclusion in the record that Mitigation Measure TCP-27 would be "effective" in reducing traffic impacts in any amount. There is also no identifiable *evidence* that TCP-27 would be effective, which should come as no surprise since the EIR does not even explain precisely what sorts of concrete mitigation measures might be included in the future TDM program. As noted above, Mitigation Measure TCP-27 was added to the Final EIR in response to comments from SANDAG regarding the Draft EIR's inadequate traffic mitigation program. (AR 18{264}17238.) The Final EIR, however, contains no actual substantive discussion of this mitigation measure or how "effective" it would be, or even precisely what types of measures might be included in the TDM program. CSU's ultimate findings for the project also contain no substantive discussion of Mitigation Measure TCP-27 by itself. (AR 19{297}18465-18474.) Instead, the findings conclude that all of the traffic mitigation measures proposed by CSU put together would not fully mitigate traffic impacts, even if funding for CSU's "fair-share" monetary contributions were approved by the

Legislature. (AR 19{297}18466.) There was thus no administrative finding or determination concerning the effectiveness of Mitigation Measure TCP-27 to defer to, let alone any identifiable evidence that the measure would be "effective" in accomplishing any significant level of mitigation in practice.

V. CONCLUSION

Petitioner CSU has not shown that the Court of Appeal committed any legal error, much less that the decision of the Court of Appeal conflicts with decisions of this Court or other courts of appeal, or otherwise raises any questions requiring review by this Court. The petition for review should be denied and the case remanded so that CSU may finally comply with its legal obligations under CEQA.

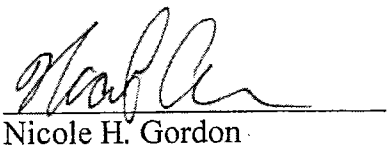
DATE: February 14, 2012 By: 

Margaret M. Sohagi
Philip A. Seymour
Nicole H. Gordon
THE SOHAGI LAW GROUP, PLC
Attorneys for Petitioners/Appellants
SAN DIEGO ASSOCIATION OF GOVERNMENTS and
SAN DIEGO METROPOLITAN TRANSIT SYSTEM

W:\C\192\012\00192319.DOC

CERTIFICATION OF WORD COUNT

The text of the Answer to Petition for review consists of 6,725 words, including footnotes. The undersigned legal counsel has relied on the word count of the Microsoft Word 2007 Word processing program to generate this brief. (Cal. Rules of Court, rule 8.204(c)(1).)

DATE: February 14, 2012 By: 

Nicole H. Gordon
THE SOHAGI LAW GROUP, PLC
Attorneys for Petitioners/Appellants
SAN DIEGO ASSOCIATION OF GOVERNMENTS and
SAN DIEGO METROPOLITAN TRANSIT SYSTEM

W:\C\192\012\00192734.DOC

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 11999 San Vicente Boulevard, Suite 150, Los Angeles, California 90049.

On February 14, 2012, I served true copies of the following document(s) described as **ANSWER TO PETITION FOR REVIEW** on the interested parties in this action as follows:

☒ BY OVERNIGHT DELIVERY: I enclosed said document(s) in an envelope or package provided by the overnight service carrier and addressed to the persons at the addresses listed in the Service List. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight service carrier or delivered such document(s) to a courier or driver authorized by the overnight service carrier to receive documents.

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

Executed on February 14, 2012, at Los Angeles, California.

Cheron J. McAleece
Printed Name

Signature

SERVICE LIST

John F. Kirk, General Counsel
San Diego Association Of Governments
401 B Street, Suite 800
San Diego, California 92101
Telephone: (619) 699-1997
Facsimile: (619) 699-1995
Email: jki@sandag.org

ATTORNEYS FOR PETITIONERS AND APPELLANTS SAN DIEGO ASSOCIATION OF GOVERNMENTS

Karen Landers, General Counsel
San Diego Metropolitan Transit System
1255 Imperial Avenue, Suite 1000
San Diego, California 92101-7490
Telephone: (619) 231-1466
Facsimile: (619) 234-3407
Email: karen.landers@sdmts.com

ATTORNEYS FOR PETITIONERS AND APPELLANTS SAN DIEGO METROPOLITAN TRANSIT SYSTEM

Jeremy B. Rosen
Bradley S. Pauley
Horvitz & Levy LLP
15760 Ventura Boulevard, 18th Floor
Encino, CA 91436-3000
Telephone: (818) 995-0800
Facsimile: (818) 995-3157
Email: BPauley@horvitzlevy.com
Email: JRosen@horvitzlevy.com

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

Michael S. Haberkorn
Mark J. Dillion
Danielle K. Morone
Gatzke, Dillon & Balance LLP
1525 Faraday Avenue, Suite 150
Carlsbad, California 92008
Telephone: (760) 431-9501
Facsimile: (760) 431-9512
Email: mhaberkorn@gdandb.com
Email: mdillion@gdandb.com
Email: dmorone@gdandb.com

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

SERVICE LIST

Christine Leone, Chief Deputy City Attorney Jan I. Goldsmith, City Attorney Office of the San Diego City Attorney 1200 Third Avenue, Suite 1100 San Diego, California 92101 Telephone: (619) 533-5800 Facsimile: (619) 533-5856 Email: Leonec@sandiego.gov Email: GoldsmithJ@sandiego.gov	**ATTORNEYS FOR PETITIONERS AND APPELLANTS CITY OF SAN DIEGO AND REDEVELOPMENT AGENCY OF THE CITY OF SAN DIEGO**
Carey L. Cooper Klinedinst PC 501 West Broadway, Suite 600 San Diego, California 92101 Telephone: (619) 239-8131 Facsimile: (619) 238-8707 Email: ccooper@klinedinstlaw.com	**ATTORNEY FOR DEL CERRO ACTION COUNCIL**
Hon. Thomas P. Nugent San Diego Superior Court, Dept. 30 325 South Melrose Drive Vista, California 92081 Telephone: (760) 201-8030	**TRIAL COURT JUDGE** **(1 Copy of Proof of Service Only)**
Clerk of the Court California Court of Appeal Fourth District, Division 1 750 B Street, #300 San Diego, CA 92101-8189 Telephone: (619) 744-0760	**APPELLATE COURT** **(1 Copy of Proof of Service Only)**

W:\C\192\012\00192734.DOC