[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.

SAN DIEGO ASSOCIATION OF GOVERNMENTS AND SAN DIEGO METROPOLITAN TRANSIT SYSTEM'S ANSWER BRIEF ON THE MERITS TO BOARD OF TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY'S OPENING BRIEF ON THE MERITS

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]

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I. INTRODUCTION AND STATEMENT OF ISSUES

This case arises from approval of a revised Campus Master Plan for the California State University ("CSU") campus at San Diego (aka San Diego State University or "SDSU"). Appellants San Diego Association of Governments ("SANDAG") and San Diego Metropolitan Transit System ("MTS") filed a petition for writ of mandate challenging the adequacy of the Environmental Impact Report ("EIR") certified by CSU in purported compliance with the California Environmental Quality Act ("CEQA," Public Resources Code § 21000 et seq.)[1] The City of San Diego and Redevelopment Agency of the City of San Diego (collectively, "City") also filed a separate CEQA challenge. All claims have since been consolidated in this action.

After being denied relief by the trial court, SANDAG/MTS and the City filed appeals which have also been consolidated. On December 13, 2011 the Court of Appeal issued a published decision ("Slip Opn.") reversing the trial court and finding in favor of the City and SANDAG/MTS on the following issues:

1. Mitigation of Traffic Impacts

   A. CSU failed to proceed in the manner required by law by relying on an erroneous legal interpretation of 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*") to limit its consideration of mitigation measures for off-site traffic impacts of the project. (Slip Opn., pp. 14-40.)

[1] Unless otherwise noted, all code citations herein are to the Public Resources Code.

B. The EIR was inadequate as an informational document due to its failure to consider additional or alternate mitigation measures for off-site traffic impacts. (Slip Opn., pp. 38-40.)

2. Impacts to Public Transit Systems

A. CSU failed to proceed in the manner required by law by failing to undertake any actual investigation or evaluation of potential adverse environmental impacts on public transit systems. (Slip Opn., pp. 71-77.)

B. CSU failed to adequately respond to SANDAG's comments on the Draft EIR requesting an evaluation of transit impacts. (Slip Opn., p. 77, fn. 24; Cal. Code Regs., tit. 14, § 15088.)[2]

C. The EIR failed to contain a statement briefly indicating the basis for CSU's purported conclusion that the project would have no significant impacts on public transit. (Slip Opn., pp. 78-79; § 21100(c); Guidelines § 15128.)

D. The CSU Board of Trustees' conclusory finding that the project would have no significant impacts on transit was not supported by substantial evidence. (Slip Opn., pp. 78-82.)

3. Deferred Mitigation.

CSU unlawfully deferred mitigation for traffic impacts by relying on a mitigation measure (TCP-27) which listed no specific future actions to be taken to mitigate traffic impacts and contained no performance standards or other criteria to measure success of the alleged mitigation. (Slip Opn., pp. 58-62.)

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

The Court of Appeal also denied SANDAG/MTS relief on several other issues, none of which are now before this Court. (Slip Opn., pp. 50-57.)

This Court granted CSU's petition for review on April 18, 2012 without specifying or otherwise limiting the issues to be addressed. In its Opening Brief on the Merits ("CSU OB"), CSU appears to address only three of the foregoing seven issues, specifically, issues 1.A, 2.D and 3, although some of CSU's argument could be construed as addressing issue 1.B. (See CSU OB, pp. 1-2.) Although SANDAG/MTS believe that CSU has waived review on issues 2.A, 2.B and 2.C, they are nevertheless addressed in this brief for the Court.

II. STATEMENT OF FACTS

The facts necessary to decision of the issues presented to the Court are discussed where appropriate in this brief, with citation to relevant portions of the administrative record. A fair statement of relevant background facts appears in the Court of Appeal's opinion (Slip Opn., pp. 4-8), and in the brief concurrently being filed by the City of San Diego and Redevelopment Agency of the City of San Diego.

III. STANDARD OF REVIEW

The decision of CSU to approve the Master Plan is a quasi-legislative decision subject to review under the abuse of discretion standard established in § 21168.5. (*Laurel Heights Improvement Assn. v. Regents of the University of California* (1988) 47 Cal.3d 376, 392.) An 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." (*Id.*)

Under the foregoing standard, the Court reviews questions of primarily a factual nature under the substantial evidence test. (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435; *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1198.) The Court does not determine the ultimate correctness of the respondent agency's findings or conclusions, but only whether they are supported by substantial evidence in light of the whole record. (*Laurel Heights*, 47 Cal.3d 376, 392-393.) This standard is discussed in greater detail in Section V.C of this brief.

Procedural errors under CEQA are reviewed under an independent judgment standard, without deference to the legal opinions or conclusions of the respondent or trial court. (*Vineyard*, 40 Cal.4th 412, 435.) The reviewing Court must "scrupulously enforc[e] all legislatively mandated CEQA requirements." (*Id.*, citing *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564.) To this end, the Court does not review the ultimate correctness of an EIR's conclusions (provided they are supported by substantial evidence), but does independently determine the legal sufficiency of the EIR as an informational document. (*San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 653; *Bakersfield Citizens*, 124 Cal.App.4th 1184, 1197 and 1208.) Several basic principles govern this review. "When assessing the legal sufficiency of an EIR, the reviewing court focuses on adequacy, completeness and good faith effort at full disclosure." (*San Joaquin Raptor*, 149 Cal.App.4th 645, 653, citation omitted.) "An EIR must include detail sufficient to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project." (*Laurel Heights*, 47 Cal.3d 376, 405.) The EIR thus "must contain facts and

analysis, not just the agency's bare conclusions or opinions." (*Id.* at 404; *Bakersfield Citizens*, 124 Cal.App.4th 1184, 1197.) Further, "[W]hatever is required to be considered in an EIR must be in that formal report; what any official might have known from other writings or oral presentations cannot supply what is lacking in the report." (*Laurel Heights*, 47 Cal.3d 376, 405.) Failure to comply with these informational requirements is a "failure to proceed in a manner required by law" and therefore an abuse of discretion. (*Vineyard*, 40 Cal.4th 412, 435; *Save Our Peninsula Committee v. Monterey County Board of Supervisors* (2001) 87 Cal.App.4th 99, 118.)

Although an omission of information does not automatically constitute a prejudicial abuse of discretion, the error is deemed prejudicial "when the omission of relevant information has precluded informed decision making and informed public participation, regardless of whether a different outcome would have resulted if the public agency had complied with the disclosure requirements." (*Bakersfield Citizens*, 124 Cal.App.4th 1184, 1198; § 21005.)

IV. THE COURT OF APPEAL CORRECTLY DETERMINED THAT CSU ABUSED ITS DISCRETION BY RELYING ON A LEGALLY ERRONEOUS INTERPRETATION OF *CITY OF MARINA* AND BY FAILING TO CONSIDER ADDITIONAL MITIGATION MEASURES FOR OFF-SITE TRAFFIC IMPACTS

A. CEQA Imposes an Affirmative Duty on All Public Agencies to Fully Mitigate or Avoid Significant Environmental Effects Whenever it is Feasible to Do So

At its core, this case is about CEQA's duty to mitigate environmental impacts. Ironically, some of the clearest statements of this

duty and its implications are found in *City of Marina*, 39 Cal.4th 341, the same case that CSU relies on as authority for avoiding responsibility for mitigation of impacts. As this Court noted in *City of Marina*, CEQA's affirmative mandate for minimizing or avoiding significant environmental impacts altogether flows from §§ 21002 and 21002.1. (39 Cal.4th 341, 350 and 369.)

Public Resources Code § 21002 establishes the policy that "public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available that would substantially lessen the significant environmental effects of such projects."

Public Resources Code § 21002.1(b) provides 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."

These policies are also reflected in the CEQA Guidelines. Guidelines § 15021(a) provides: "CEQA establishes a duty for public agencies to avoid or minimize environmental damage where feasible." Guidelines § 15002(a)(3) provides that the basic purposes of CEQA are to: "Prevent significant, avoidable damage to the environment by requiring changes in projects through the use of alternatives or mitigation measures when the governmental agency finds the changes are feasible."

Numerous courts, including this one, have commented on the duty to mitigate and its implications. (See, e.g., *Laurel Heights*, 47 Cal.3d 376, 403 ["The chief goal of CEQA is mitigation or avoidance of environmental harm."]; *Sierra Club v. Contra Costa County* (1992) 10 Cal.App.4th 1212, 1217; *Laurel Hills Homeowners Assn. v. City Council* (1978) 83 Cal.App.3d 515, 521 ["As we see it, the fundamental purpose of CEQA is to prevent avoidable damage to the environment from projects."].)

In *Environmental Council of Sacramento v. City of Sacramento* (2006) 142 Cal.App.4th 1018, 1039, the court likened CEQA's mitigation requirements to the "teeth" of CEQA, noting that a report on environmental impacts would be "of little or no value without pragmatic, concrete means to minimize the impacts and restore ecological equilibrium." Consequently, "CEQA *requires* project proponents to mitigate all significant environmental impacts of their projects." (*Id.*, emphasis in original.)

In *County of San Diego v. Grossmont-Cuyamaca Community College Dist.* (2006) 141 Cal.App.4th 86, 98-99, the court described the duties created by §§ 21002 and 21002.1(b) as a "substantive mandate." The court also rejected claims strikingly similar to many advanced by CSU in this case and (unsuccessfully) in *City of Marina* to the effect that the respondent college district was prohibited by statute from mitigating off-site traffic improvements. (*Id.* at 101-107.) After finding that the district had improperly determined that mitigation was infeasible, the court remanded with directions to prepare a new EIR properly addressing mitigation for traffic impacts. (*Id.* at 108-109.)

This Court's most extensive discussion of the duty to mitigate is found in *City of Marina*, 39 Cal.4th 341. In *City of Marina*, CSU contended that it was not required to mitigate certain off-site impacts expected to result from its construction and operation of a new campus because it was legally barred from paying for the necessary off-site improvements. After noting the duty to mitigate created by § 21002.1(b), this Court concluded that CSU was relying on an illegally erroneous premise, and could in fact lawfully pay for the necessary off-site mitigation. (*Id.* at 349-350, 356-363.) This Court further noted that "CEQA does not,

however, as we have explained, limit a public agency's obligation to mitigate or avoid significant environmental effects to effects on the agency's own property." (*Id.* at 367.) Finally, this Court found that CSU could not escape its duty to mitigate environmental effects by relying on a statement of overriding considerations that declared that the project's overall benefits outweighed the detriment of its partially mitigated, but still significant, environmental effects. (*Id.* at 368-369.) This Court held:

> 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 these effects have properly been found infeasible. ... 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 (id., § 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.' (*Id.* at 368-369, emphasis added.)

This discussion is notable not merely because it confirms that feasible mitigation may not be bypassed by a mere finding of overriding considerations, but also because it establishes that *partial* mitigation is not enough. Only when significant environmental effects are *fully* mitigated, i.e., mitigated to a less-than-significant level, does the duty to consider further feasible mitigation end.

B. An EIR Must Consider Alternative Mitigation Measures or Alternative Funding Mechanisms Where an Agency's Preferred Mitigation Is Uncertain and Potentially Infeasible

The EIR has often been called the "heart" of CEQA, but, to borrow a metaphor from the Third Appellate District, it also provides CEQA's

"teeth," by identifying and evaluating mitigation measures available to reduce significant impacts. (*Environmental Council of Sacramento,* 142 Cal.App.4th 1018, 1039; §§ 21002.1(a), 21100(b)(3); Guidelines § 15126.4.)

This case poses the question of whether an EIR may, in some circumstances, be required to identify and evaluate more than one proposed mitigation measure – or more than one means of funding mitigation – for a particular impact. In SANDAG/MTS' view, the question answers itself. If more than one form of mitigation, or source of funding, may be necessary to mitigate impacts to less than significant levels, the EIR must necessarily consider multiple measures, or alternative measures, that will *reliably* permit a lead agency or responsible agencies to meet their obligation to fully mitigate or avoid significant environmental effects if it is feasible to do so. Identification and evaluation of more than one measure becomes imperative where, as in this case, a lead agency's preferred method of funding mitigation is admittedly uncertain and contingent, and the proposed mitigation may therefore prove *infeasible* in practice, i.e., incapable of being carried out for economic reasons. (§ 21061.1.)

Neither existing case law nor the CEQA Guidelines suggest that a lead agency, such as CSU in this case, may simply place its bet on only one mitigation measure, or source of mitigation funding, when there is known and serious uncertainty that the chosen mitigation can be successfully implemented.

Guidelines § 15126.4(a)(1)(A) provides that the EIR should separately identify and discuss mitigation measures proposed by a project applicant, the lead agency, and outside agencies or other persons.

Guidelines § 15126.4(a)(1)(B) further provides (emphasis added): "Where several measures are available to mitigate an impact, *each should be discussed* and the basis for selecting a particular measure should be identified." (See *Woodward Park Homeowners Ass'n, Inc. v. City of Fresno* (2007) 150 Cal.App.4th 683, 724.)

Guidelines § 15126.4(a)(5) also provides that "If the lead agency determines that a mitigation measure cannot be legally imposed, the measure need not be proposed or analyzed. Instead, the EIR may simply reference the fact and briefly explain the reasons underlying the lead agency's determination."

The foregoing Guidelines clearly indicate that consideration of mitigation measures may not necessarily, or even normally, be limited to discussion of a single measure for any given environmental impact. Courts have accordingly observed that an EIR must include a *reasonable range* of mitigation measures as well as project alternatives. (*Cherry Valley Pass Acres and Neighbors v. City of Beaumont* (2010) 190 Cal.App.4th 316, 348; *Rio Vista Farm Bureau Center v. County of Solano* (1992) 5 Cal.App.4th 351, 379.) This range is not necessarily limited to measures conceived by the project applicant or lead agency in the first instance. Where additional feasible mitigation measures are suggested in comments on a draft EIR received from members of the public or other public agencies, the lead agency must respond to the suggestions in writing in the final EIR, and presumably should include the suggested measure in the final EIR's listing of recommended mitigation measures unless there are good reasons not to do so, e.g., they are infeasible, duplicative, or potentially less effective when compared to other available measures. (*Los Angeles Unified School District v. City of Los Angeles* (1997) 58

Cal.App.4th 1019, 1029-1030; see also *Gilroy Citizens for Responsible Planning v. City of Gilroy* (2006) 140 Cal.App.4th 911, 935 [EIR need not include suggested "nickel and dime" mitigation measures, but only measures that would "substantially lessen" impacts]; *Cherry Valley*, 190 Cal.App.4th 316, 348 [EIR is not required to include in-depth discussion of mitigation measures that are clearly infeasible].)

What constitutes a "reasonable range" of feasible mitigation measures will, obviously, vary with the circumstances, and must be judged against the "rule of reason" that governs other aspects of CEQA review. (*Cherry Valley*, 190 Cal.App.4th 316, 348.) What is "reasonable," however, must be viewed in light of the overriding statutory mandate to mitigate or avoid significant impacts "whenever it is feasible to do so," as well as the well-established rule that "[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*, 47 Cal.3d 376, 390; § 21002.1(b).)

In some cases, discussion of only a single mitigation measure may be justified because only one possible feasible mitigation measure or type of mitigation measure exists. In other cases, an EIR might justifiably rely on a single commonly accepted mitigation measure or mitigation strategy whose reliability is known and which has become standard practice.[3] Where such proven mitigation measures can provide complete mitigation

[3] For example, traffic impacts are typically mitigated, as in this case, by using standard engineering methods to identify physical improvements to the existing traffic system (e.g., addition of stop lights, turning lanes or the like) that will improve capacity and alleviate the burden created by new project-generated vehicle trips sufficiently to offset adverse effects.)

by themselves (i.e., reduce impacts to less than significant levels), discussion of more esoteric mitigation measures that are unlikely to be adopted in practice might reasonably be considered unnecessary. However, where no single measure can fully mitigate project impacts, an EIR cannot reasonably restrict consideration to only one measure. This would effectively defeat the EIR's informational purpose of "identify[ing] the significant effects on the environment of a project ... and to indicate the manner in which these significant effects can be mitigated or avoided." (§ 21002.1(a).)

The same considerations require evaluation of multiple or alternate mitigation measures when those first identified by a lead agency are of uncertain feasibility or uncertain efficacy in fully mitigating impacts. As noted previously, an EIR must focus on *feasible* mitigation measures, and therefore need not give detailed consideration to measures that are *infeasible*. (Guidelines § 15126.4(a)(1); *Cherry Valley* 190 Cal.App.4th 316, 348.) This principle cuts both ways. A lead agency cannot reasonably limit its consideration to mitigation measures that are clearly, or at least potentially, infeasible when other more viable mitigation measures are available. "Feasible" means "*capable of being accomplished* in a successful manner within a reasonable period of time, taking into account economic, environmental, social and technological factors." (§ 21061.1, emphasis added; *Los Angeles Unified School Dist.*, 58 Cal.App.4th 1019, 1029.) Thus, if the lead agency has reason to believe that implementation of a proposed mitigation measure may be precluded in practice by funding shortages or uncertainties, technical complexities, or other factors, it cannot reasonably stop its evaluation of potential mitigation measures there and simply hope for the best. As the court noted in *Woodward Park*

Homeowners, 150 Cal.App.4th 683, 724 (emphasis added): "There are two things an agency cannot do: It cannot acknowledge a significant impact, refuse to do or find anything else about it, and approve the project anyway. *And it cannot acknowledge a significant impact and approve the project after imposing a mitigation measures not shown to be adequate by substantial evidence.*"

To allow this kind of truncated consideration of mitigation measures would, at best, authorize lead agencies to gamble with environmental effects rather than affirmatively mitigate them. At worst, it would allow an EIR's discussion of mitigation measures to degenerate into a listing of token measures selected precisely because they may fail and thereby let the project applicant or approving agency off the hook for mitigation costs.

The same principles must apply where there is more than one available method of *funding* mitigation measures. No mitigation measure is feasible, i.e., capable of being successfully implemented, if the financial means do not exist to ensure its implementation. Consequently, if there is more than one possible way of funding an otherwise appropriate mitigation measure, an EIR cannot reasonably ignore a potentially viable source or method of funding, and instead make implementation of the mitigation measure entirely dependent upon another funding source that is actually unavailable, highly contingent upon factors beyond the lead agency's own control, or otherwise of uncertain reliability.

That brings us to the present case.

C. CSU Abused Its Discretion by Relying on an Uncertain Future Appropriation of Funds by the Legislature to the Exclusion of All Other Sources of Funding for Traffic Mitigation

CSU started well enough in this case. It commissioned traffic studies to forecast the increases in vehicle traffic that would result from implementation of the Campus Expansion Plan. CSU then used the data to determine what road and intersection improvements or other measures would be necessary to reduce traffic impacts to acceptable levels, i.e., to maintain acceptable levels of service. In the Draft EIR and Final EIR, CSU identified the appropriate physical improvements and CSU's fair-share contribution to fund the necessary measures. (AR 15{238}14863-14881; 18{275}17593-17611.)[4] The fly in the ointment, and the crux of this case, is that the EIR also purported to condition CSU's actual payment of its fair share upon granting of a request for funds by the Legislature. (AR 15{238}14881; 18{275}17594-17597, 17611.)[5] The Final EIR offered no claim that other funding sources had been considered and found infeasible. CSU's contention, in the EIR and elsewhere in the record, was that CSU was required by the *City of Marina* decision *only* to request funds from the legislature, and was not responsible for mitigating impacts if this request was denied. (AR 18{264}17149-17160; 19{297}18465-18466, 18473-18474.) If CSU considered other options for funding off-site traffic mitigation measures, the EIR does not disclose them.

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[4] There are substantial disputes about the accuracy of CSU's fair-share calculations, but these are not before the Court.

[5] With respect to mitigation for freeway impacts, CSU stated that it would "support CalTrans in its efforts to obtain funding from the state Legislature." (AR 18{275}17600.)

Based on the foregoing, the Court of Appeal found that CSU's reliance on its fanciful interpretation of *City of Marina* was, in and of itself, a prejudicial abuse of discretion. (Slip Opn., pp. 35-37.) 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." (39 Cal.4th 341, 356; see also pp. 365-366; *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 88 [agency's use of an erroneous legal standard constitutes a failure to proceed in a manner required by law].)

This, however, was not the only abuse of discretion by CSU concerning traffic mitigation. The Court of Appeal *also* held that CSU abused its discretion by failing to consider alternate on-site mitigation measures that might mitigate traffic impacts, and relying instead exclusively on the admittedly uncertain strategy of requesting funds for off-site mitigation from the state Legislature. (Slip Opn., pp. 38-40.) The EIR was thus inadequate as an informational document for failure to adequately consider mitigation measures for traffic impacts. (Id.) To this, SANDAG/MTS would add that CSU abused its discretion by failing to investigate and discuss alternative *funding mechanisms* for off-site mitigation measures, as these are the only measures likely to achieve anything approaching full mitigation. At a minimum, CSU was required to disclose in the EIR the reasons for finding that alternative funding sources were legally unavailable, if that is CSU's contention. (Guidelines § 15126.4(a)(5).) In reality, however, CSU undertook no such evaluation and chose to bank on a legal rationale that was both legally incorrect and, in any event, insufficient to excuse its duty to consider additional or alternate

mitigation measures in light of the admitted uncertainty of its chosen mitigation strategy.

D. *City of Marina* Does Not Authorize CSU or Other Public Agencies to Rely Exclusively On Requests for Appropriations by the Legislature As a Means of Funding Mitigation of Environmental Impacts

CSU's answer to the above is apparently that CSU is either allowed, or perhaps even actually required, by *City of Marina* to rely on an appropriation from the Legislature as the sole potential source of funding of mitigation for off-site impacts. This theory has no merit.

1. Implications of CSU's Legal Theory

Before addressing this issue on the merits, it is worth considering the full implications of CSU's legal theory. If misinterpreted as CSU would like, *City of Marina* is not, as most people thought, a mandate for mitigation of environmental impacts by public agencies, but a recipe for abdication and avoidance of responsibility for environmental mitigation.

It is clear from CSU's opening brief that CSU regards itself as a special case. However, if CSU's interpretation of *City of Marina* were correct, there is no reason that any other state agency could not claim a similar right to pass the buck on mitigation measures directly to the state Legislature. The specific language CSU relies on states 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." (*City of Marina,* 39 Cal.4th 341, 367.) This language, by its terms, would apply equally as well to the State Parks Department mitigating impacts from a new campground, the Department of Water Resources mitigating

impacts of a water project, or the State Board of Equalization mitigating impacts of construction of a new office complex. There is also no logical reason that this principle should be limited to "voluntary" payments for off-site traffic mitigation. Most payments a public agency might make for mitigation are "voluntary" in the sense that they are not compelled by any law other than CEQA and its mandate to mitigate. Even these costs can be avoided by disapproving or adequately modifying the proposed project. Even were a state agency to encounter some sort of "involuntary" mitigation requirement, the Legislature also ultimately has authority to exempt the state agency, or simply withhold funds, making compliance infeasible. In sum, although CSU may intend only to open a loophole for itself, its legal reasoning would open a tunnel for avoidance of mitigation by all state agencies for virtually all types of environmental impacts.

In this case, under CSU's own logic, CSU could just as easily have punted every other decision concerning mitigation of the Campus Expansion's environmental impacts to the Legislature, whether it be the decision to fund landscaping to mitigate aesthetic impacts, or to pay for archaeological studies to mitigate cultural impacts, noise walls to mitigate noise impacts, or habitat replacement for biological impacts. (See AR 15{227}14489-14495; 15{228}14516-14517; 15{234}14680-14682.) Indeed, if the theory stated in CSU's opening brief is correct, CSU would be *obligated* to submit all these decisions to the Legislature, so as not to interfere with the Legislature's prerogatives. (CSU OB, pp. 28-29.) Similarly, no other state agency would be required to utilize any existing resources or other source of funds to mitigate any environmental impact, but would have to seek an appropriation directly from the Legislature.

The implications of CSU's theory do not necessarily stop with state agencies. As discussed above, the duty to mitigate, if it has any teeth at all, imposes an obligation to seek out and consider more than one potential source of funding if the initial sources identified are uncertain or contingent. But if CSU is required to simply request funds from a single uncertain source and let it go at that, there is no good reason that any other public agency of any type should be held to a different standard. Should, for example, a city or county government approving a major planned development project in a sensitive environmental area be able to request funds from the Legislature to acquire replacement wetlands and support restoration programs, since these are certainly matters of statewide interest, and let the Legislature decide if the mitigation should actually be funded?

Of course, the buck might not necessarily have to be passed to the state Legislature. If unlikely-to-be-granted requests for special appropriations by the Legislature become too obvious a ploy for ducking mitigation responsibilities, perhaps other arrangements could be considered. The city or county approving a major development project might propose to establish an assessment district or a special tax to pay for it, and let the voters decide if funding will be provided for appropriate mitigation measures. After all, tax and assessment measures are always popular. Or perhaps the local government could pin its hopes on a grant of state or federal park funds, and wash its hands of mitigation responsibilities if the granting agency refuses the grant.

The point of the foregoing hypotheticals is to illustrate the very disturbing but absolutely logical implications of a rule that allows CEQA's duty to mitigate to be avoided by artifices such as that attempted by CSU in this case. If the duty to mitigate does not extend beyond identifying a

single uncertain option, whether it be requesting funds directly from the Legislature or something else, the duty to mitigate will often become no duty at all.

2. *The Court of Appeal Correctly Decided that* City of Marina *Does Not Decree that Appropriations from the Legislature Are the Exclusive Means By Which State Agencies May Fund Mitigation Efforts*

Ironically, CSU spends little time in its current brief on the issue that was the core of its defense at the appellate level. CSU apparently now recognizes that the brief passage it relies on in *City of Marina* is a thin reed for the bold theory it advances. CSU also does not appear to contest the Court of Appeal's conclusion that the passages it relies on are non-binding dictum. (Slip Opn., pp. 28-33.) SANDAG/MTS would actually go a bit further than the Court of Appeal in assessing the weight to be assigned the relevant passage. An intentional statement of law in one of this Court's decisions is generally entitled to substantial deference even if mere dictum, although the degree of deference may vary with the level of analysis supporting the dictum. (*People v. Mendoza* (2000) 23 Cal.4th 896, 915-917; *County of San Bernardino v. Superior Court* (1994) 30 Cal.App.4th 378, 388.) However, not every meaning that can arguably be read into an isolated passage was necessarily *intended* by the Court. A court's choice of words may often be responsive to particular arguments or contentions advanced by the parties in the particular context of the litigation, rather than chosen to announce a new and far-reaching proposition of law. Thus, it has long been settled that decisions – even those with seemingly broad language – "[must] be understood in the light of the facts and the issues before the court, and an opinion is not authority for a proposition not

considered." (*People v. Banks* (1993) 6 Cal.4th 926, 945.) "[E]xpressions used in judicial opinions are always to be construed and limited by reference to the matters under consideration, and that they cannot be safely applied in their largest and most universal sense to dissimilar cases." (*City of Pasadena v. Stimson* (1891) 91 Cal. 238, 250.)

In this case, it is impossible to attach the broad meaning advocated by CSU to the bare-bones statement CSU relies on. Of course, as a general proposition, no-one would disagree that a state agency's power to mitigate its project's effects is "ultimately" subject to legislative control. (*City of Marina,* 39 Cal.4th 341, 367.) This acknowledgement of the ultimate supremacy of the legislative authority, however, does not suggest that reviewing case-by-case requests for appropriations of mitigation funds is the means by which the Legislature wishes to exercise its ultimate power. Given the Legislature's strong statements concerning the duty to mitigate in §§ 21001 and 21002.1, the far more logical interpretation of this phrase is that if state agencies such as CSU desire to limit their obligations to identify and adopt otherwise feasible mitigation measures, they must obtain a special legislative exemption to do so. Such exemptions, of course, have been granted on occasion. (See §§ 21080.9, 21080.29, 21080.42.)

The remaining language relied on by CSU states: "if the Legislature does not appropriate the money, the power [to mitigate] does not exist." (*City of Marina,* 39 Cal.4th 341, 367.) While this might have been true on the facts presented in *City of Marina*, it is obviously not true as a categorical statement about possible sources of mitigation funding for state agencies, and could not have been intended as such by this Court. Certainly not even CSU would contend, for example, that this passage was meant to suggest that the Legislature could not authorize CSU or other state

agencies to impose user fees or accept federal grants to fund mitigation measures, although such funds would not be appropriated by the Legislature. Such a ridiculously overbroad reading of this passage also cannot be reconciled with this Court's repeated statements in *City of Marina* concerning the broad duty to mitigate, nor with the overall language and intent of CEQA itself. Shortly after the foregoing statement, this Court concluded that "for the Trustees 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." (*Id.*, emphasis added.) This language does not suggest that this Court actually intended to foreclose consideration of other potential sources of funds on remand, if such sources were identified by CSU or others. Certainly this language does not suggest that seeking funds from the Legislature is necessarily and in every case *all* that CSU would have to do to satisfy its obligations under CEQA.

If one were to play the game of selecting isolated passages out of *City of Marina* to ascertain the law, the passages that would seem most compelling are those that affirm that public agencies, including CSU, have an affirmative duty "to mitigate or avoid the significant environmental effects on the environment of projects [they] carr[y] out or approve *whenever it is feasible to do so*." (*City of Marina,* 39 Cal.4th 341, 363, emphasis added; see also p. 368 [same] and 368-369 [agency may not approve project on basis of overriding considerations "unless the measures necessary to mitigate those effects are truly infeasible."].) None of these passages, nor the *City of Marina* decision as a whole, suggest that CSU's duty to mitigate onsite or off-site environmental impacts is conditioned

entirely upon the making a successful request for a legislative appropriation earmarked for that purpose, as opposed to using other resources.

Elsewhere in *City of Marina*, this Court also noted that "Of course, a commitment to pay [mitigation] fees without any evidence that mitigation will actually occur is inadequate.'" (*Id.* at 365, quoting *Save Our Peninsula Committee,* 87 Cal.App.4th 99, 140.) This passage would seem far more relevant to the current case than the language relied on by CSU. Applying the principle here, a mere request to the Legislature for mitigation funds, without any assurance that the funds will be granted, is also inadequate mitigation.

SANDAG/MTS has no desire to play the game of interpreting CEQA based on selected phrases or passages excerpted from *City of Marina* or other case law. As this Court long ago cautioned in *Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 268, fn. 9, "We cannot, as respondents would have us do, indulge in an inert exercise, leaning heavily on isolated words and phrases and remaining oblivious to the express legislative intent to protect society against environmental blight." The duty to mitigate is primary. *City of Marina* does not create a semantic way out for CSU.

E. CSU Cannot Avoid Responsibility for Mitigating Impacts By Hiding Under the Mantle of Legislative Prerogative.

Although CSU spends a scant three pages defending its fanciful interpretation of *City of Marina*, it spends a great deal of time suggesting that any questioning of its theory is actually an assault on the "separation of powers doctrine" and the prerogatives of the state Legislature. This line of argument is, to be trite, a red herring, and not a well preserved one.

The real issue of this case is not the Legislature's prerogatives, but whether CSU may simply pass the buck for mitigation funding to the Legislature, without first considering and exhausting other potentially available sources of funding or alternative types of mitigation measures. Neither SANDAG/MTS, the City, nor the Court of Appeal are usurping the Legislature's prerogatives by asking that CSU perform its own legally mandated duty of considering a reasonable range of feasible, reliable mitigation measures in the first instance.

The Legislature, for its part, has already spoken loudly and clearly on this subject in § 21002.1(b). CSU, like all other public agencies, is required to "mitigate or avoid the significant effects on the environment of projects so that it carries out or approves *whenever it is feasible to do so*." (*Id.*, emphasis added.) The Legislature did not say that public agencies shall mitigate significant effects only when a specially earmarked appropriation is approved by the Legislature for that purpose.

It may be added that CSU's approach to obtaining mitigation funds in this case – submitting a request for mitigation funding as a new and separate budget category – is not only novel but seemingly contrary to the Legislature's own intentions. While § 21106 authorizes state agencies to request funds for environmental protection in their budget requests, the notion that mitigation funds can be requested as a separate, and apparently expendable, budget item, separate from the capital projects or operating expenses with which they are associated, is novel at best. It is impossible to believe that the Legislature ever intended to establish itself as the case-by-case arbiter of which environmental effects of which state agency projects would be mitigated, and which impacts would be allowed to go unmitigated for lack of funds. Given the multiple directives in §§ 21000,

21001 and 21002.1 that all state and other public agencies assume direct responsibility for considering environmental effects and minimizing environmental harm, it can only be concluded that the Legislature intended public agencies at all levels to include mitigation as an integral part of their project planning and implementation, not as a separate activity requiring separately earmarked appropriations from the Legislature.

Tellingly, CSU does not contend that it (or any other state agency) has historically presented requests for mitigation funds as a separate appropriations request, severed from the regular budgets for capital, planning, construction and operating costs for projects included in the budget. Indeed, CSU has not found it necessary or desirable to seek separate legislative approval for mitigation costs of the Campus Expansion project other than traffic mitigation costs. Quite clearly CSU has no problem with bypassing Legislative prerogative when it comes to mitigation expenses that CSU finds to its own liking.

As a final matter, and contrary to CSU's contentions, this case not about statewide interests versus parochial local interests. CSU has the same obligation to mitigate environmental effects whether its project is located in San Diego, the San Francisco Bay Area, Crescent City or Sacramento itself. San Diego, moreover, is one of the more populated areas of the State, and provides a very significant share of the state tax base that CSU depends upon. The traffic mitigation funds at issue will also be expended to benefit CSU's own students, faculty and staff, who will themselves be the sufferers of declining traffic conditions if traffic impacts of the project go unmitigated. On these facts, there is no conflict in legitimate state and local interests. There is only CSU's desire to avoid paying its fair share of the costs of mitigating impacts from its own activities.

To make it clear, SANDAG/MTS does not condemn CSU merely for requesting mitigation funds from the Legislature. But this is not the only option that CSU could or should have considered for meeting its fair-share obligations or otherwise mitigating traffic impacts. CSU's error here was to short-circuit the CEQA process and avoid its duty to mitigate by intentionally limiting consideration to a single admittedly contingent and highly uncertain option.

F. Consideration Of Alternate Mitigation Measures Or Alternate Funding Sources Was Not Precluded By Law Or By Alleged Policy Considerations

CSU's remaining arguments center on the themes that CSU is either barred from using funds other than those specially appropriated by the Legislature for mitigation by various statutes, or should not be required to consider other funds for policy reasons. These arguments all fail for a number of reasons.

1. CSU Does Not Claim That It Cannot Consider Alternate On-Site Mitigation Measures to Reduce Traffic Impacts on Remand

Although CSU protests (unsuccessfully, as will be seen) that it cannot use any possible alternate source of funds for off-site traffic mitigation, it does not explain why it could not consider additional on-site mitigation measures to reduce traffic impacts as suggested by the Court of Appeal. (Slip Opn., pp. 38-40.) To be clear, SANDAG/MTS does not believe that such measures could fully mitigate traffic impacts to less than significant levels and absolve CSU from considering alternate funding for off-site mitigation. However, at an absolute minimum, remand is required to address on-site mitigation options. (Id.)

2. *CSU Cannot Avoid Remand by Offering Post-Hoc Rationalizations for its Failure to Consider Alternative Funding Sources*

With respect to alternate sources of mitigation funding, CSU's arguments are simply premature. As the Court of Appeal found, CSU's errors with respect to traffic mitigation consisted of reliance on an erroneous legal standard, and a resulting failure to produce adequate information in the EIR. (Slip Opn., pp. 37-40.) These errors cannot be cured by post-hoc rationalizations offered by CSU's attorneys in this court; they must be addressed in the public context of an EIR and further administrative proceedings. (See, e.g., *Laurel Heights*, 47 Cal.3d 376, 405 [respondent required to explain purported reasons for selecting or rejecting alternatives in EIR].) Even if CSU contends that it has purely legal reasons for rejecting alternate mitigation measures or funding sources, these reasons must be explained in the EIR. (Guidelines § 15126.4(a)(5).)

3. *The Duty to Consider Alternate Funding Sources Comes from CEQA; No Additional Statutory Authorization is Required*

CSU appears to contend, in part, that it is not required to consider alternate funding sources because there is no express legislative authorization or directive to do so. This argument is effectively answered in previous sections of the brief. The obligation is imposed by CEQA. The fact that the Legislature did not spell things out for CSU more explicitly in the Education Code or some other statute does not alleviate CSU from satisfying its duty to mitigate under CEQA.

It is true that CSU is not required to undertake mitigation measures that are beyond its statutory powers or are otherwise precluded by law. (§

21004.) Given this Court's clear holding in *City of Marina* that CSU may be held accountable for off-site mitigation, however, the burden is on CSU to show that it is somehow *legally barred* from pursuing other specific funding alternatives, further discussed below, that are apparently available. CSU cannot do so.

4. There Is No Basis for Finding That Alternative Funding Sources Are Facially Infeasible

Given that CSU intentionally excluded consideration of alternative funding sources from its analysis below, it is not surprising that the record is thin as to what alternate sources of funds may reasonably be targeted for funding of mitigation measures. What evidence there is in the record, however, actually tends to strongly refute CSU's claims that all such sources are somehow untouchable in law or in fact.

a. The Fact that CSU Must Comply with a Budget Does Not Excuse It From Planning Ahead, or From Reallocating Available Funds for Mitigation

CSU's first argument is that the Court of Appeal ignored the complexity of CSU's budgetary process and restrictions imposed on expenditures of both state-appropriated funds and funds from other sources, once an annual budget has been approved. (CSU OB, pp. 40-41.) As an initial matter, CSU grossly overstates the restrictions that even an approved budget imposes on CSU's allocations of funds. Education Code § 89753, on which CSU chiefly relies, actually affords the CSU Board of Trustees broad discretion to reallocate all funds appropriated by the Legislature except those specifically restricted by the Budget Act. This code section is expressly intended to "give the trustees maximum responsibility within

available funds" and allow the trustees greater flexibility in their financial affairs. (Education Code § 89754.)

More fundamentally, CSU's argument here fails because it does not excuse CSU from exercising reasonable foresight in its budgetary planning. CSU cannot use its own self-imposed budget decisions and constraints to justify its failure to timely consider alternate methods of funding mitigation measures. Indeed, the entire EIR process is intended, in part, to ensure that public agencies do *look ahead* and make all plans with environmental consequences and mitigation responsibilities in mind.

b. The Record Does Not Indicate that CSU Is Financially Unable to Allocate Either Appropriated Funds or Funds from Other Sources for Mitigation

The budgetary materials that CSU cites in the record also do not indicate that CSU is either legally or fiscally constrained from utilizing funds other than a direct legislative appropriation for mitigation. What the documents actually indicate is that CSU has both vast resources and numerous options for funding campus projects and necessary mitigation measures. CSU's 2008/2013 Five Year Capital Improvement plan budgets $5.9 *billion* in state-appropriated funds for systemwide improvements, $452.6 million of which were requested for the 2008/2009 fiscal year. (AR 20{322}20052-20053.) The amount of funding requested for off-site mitigation for the entire CSU system for the 2008/2009 budget year was, in contrast, $15 million, of which $5 million to $10.5 million is assigned to mitigation of impacts for the San Diego campus. (AR 20{322}20053, 20081, 20310, 20320, 20325.)

Even more significantly, CSU's budget for the 2008/2013 Five Year Capital Improvement program includes expenditures of an *additional* $4 *billion* in "non-state" funds, i.e., funds derived from non-appropriated sources, $66.5 million of which were planned for the 2008/2009 budget year. (AR 20{322}20052-20054.) These are hardly negligible resources when it is recognized that the traffic mitigation costs for the Campus Expansion project may actually be spread over many years. These budgeted non-state funds include funds from, among other things, auxiliary organizations, donations, grants and user fees from parking programs. (AR 20{322}20053.) The budget documents also disclose that these are precisely the types of funds that CSU is counting on to fund many of the major capital improvements included in the Campus Expansion plan, i.e., the Student Union and renovated Aztec Center, Alvarado Suites Hotel, and Adobe Halls faculty and staff housing project. (AR 20{322}20244-20245; AR 15{222}14243-14267.)

c. CSU Has Not Shown that Its Alternate Sources of Funds are Legally Unavailable

CSU next offers a short list of potentially available non-state appropriated funds and purports to explain why these funds could not be made available for mitigation of off-site traffic impacts. (CSU OB., pp. 42-45.) CSU's arguments here are reminiscent of similar arguments advanced by another public educational entity and rejected in *County of San Diego,* 141 Cal.App.4th 86, 101-105. While CSU here relies on different statutes, its attempts to read prohibitions into the statutes where none exist are of the same ilk. In each case, CSU fails to show that there is any actual direct legal prohibition on expending funds from the various sources for traffic mitigation or other off-site mitigation. The statutes cited generally provide

that funds should be utilized to further CSU's educational purposes but recognize that pursuing these purposes requires, among other things, construction and operation of necessary support and service facilities, including many that do not directly involve educational activity, e.g., parking lots, student and faculty housing, and support facilities. CSU's own long-term plans for the SDSU campus include a hotel, a $14,781,000 alumni center, and a mixed-use commercial and student housing project, indicating how far the permissible scope of expenditures goes. (AR 20{322}20244-20245.)

CSU's argument in reality boils down to a claim that, while it can expend funds on a broad range of facilities and activities only indirectly related to its core educational function, it cannot spend money to mitigate the impacts of these activities. This argument fails on two grounds.

First, CSU does not cite any authority suggesting that its educational mission somehow excludes protection of the environment, whether urban or rural. CSU also does not cite any authority suggesting that mitigation costs can and must be treated differently than other incidental costs generally involved in a modern development project, e.g., landscaping design and installation, insurance, building inspection fees, costs of water and sewer connections, planning, consulting and architectural fees, or the costs of preparing an EIR and supporting documentation. CSU also offers no principled basis for distinguishing expenditures for on-site and off-site mitigation measures, although it clearly believes it has full discretion to expend funds without requiring special Legislative appropriations for the former. Indeed, even with respect to off-site mitigation, CSU's own conduct is inconsistent with the notion that expenditures of funds are outside its spending authority as an educational institution. In *City of*

Marina, CSU actually agreed to pay substantial amounts for off-site improvements to mitigate water supply, drainage and wastewater system impacts (although not sufficient amounts to fully mitigate impacts), and refused to pay for road and fire improvements only in faulty reliance on the *San Marcos* legislation. (*City of Marina*, 39 Cal.4th 341, 352.) In this case, in both the administrative proceedings preceding approval of the project and in the act of specifically requesting $15,000,000 for off-site mitigation from the Legislature, CSU implicitly acknowledged that it was not constrained from spending funds on off-site mitigation by existing statutes. The position taken by CSU in its current brief is thus clearly not one based on past understandings of legislative intent or past administrative interpretation of the statutes.

As a second problem, CSU's argument also fails to acknowledge that CEQA itself is a statutory scheme *in pari materia* with the same statutes that CSU relies on. As such, the statutes must be harmonized and read together. (*County of San Diego*, 141 Cal.App.4th 86, 105.) CEQA commands that *all* public agencies shall "take all action necessary" to protect the environment, and to mitigate significant environmental effects whenever it is feasible to do so. (§§ 21000(g); 21001(a), (b), (d), (f), (g); 21002; 21002.1(b).) The clear intent of the Legislature is that all public agencies in California make environmental protection and mitigation of impacts an integral part of the manner in which they carry out their other statutory functions. Whether preparing an EIR and funding appropriate mitigation measures are themselves deemed to directly further CSU's educational mission, they are as much an integral part of developing and operating university facilities as compliance with building codes, seismic safety requirements or habitat protection policies, although these all might

require expenditures of funds that would otherwise be available for other educational purposes. Absent some very specific statute barring expenditures for particular types of mitigation, the statutes governing CSU's operations must be construed to allow expenditures for environmental impact mitigation as an integral part of carrying out CSU's institutional mission. (*County of San Diego*, 141 Cal.App.4th 86, 105.)

G. The Court is Not Required to Defer to Alleged "Factual" Determinations That CSU Never Made

CSU's final set of arguments are to the effect that the Court and local government agencies should not be able to second-guess CSU's "factual" determinations as to what mitigation measures are legally available and appropriate. The arguments are meshed with what can only be deemed an editorial opinion about the evils of allowing CSU's educational mission to be hampered by local governments preoccupied with the less lofty goals of protecting public health, safety and welfare, including that of CSU's own faculty, staff and students. The short answer to these arguments is that CSU has yet to make any "factual" determinations to defer to. As noted previously, CSU's error in this case was to rely on a faulty legal premise as a rationale for refusing to consider alternate traffic mitigation measures. (Slip Opn., pp. 37-38.) The EIR makes no representation that other alternative measures or funding sources were actually considered and rejected for specific factual or other reasons. When CSU actually considers additional mitigation measures and funding sources on remand and formally adopts or rejects such measures, the time will come to determine what level of deference is owed CSU's factual or legal conclusions.

V. CSU FAILED TO ADEQUATELY ADDRESS IMPACTS ON PUBLIC TRANSIT IN THE EIR

CSU's next major contention is that the Court of Appeal erred by "improperly" second guessing CSU's purported factual finding that the Campus Expansion will not have significant adverse effects on public transit systems. (CSU OB, pp. 54-58). This contention, however, completely ignores most of the Court of Appeal's actual decision concerning CSU's treatment of transit impacts. The Court of Appeal actually found that CSU committed *procedural* error by (1) failing to investigate potential transit impacts (Slip Opn., pp. 71-77, 63-65 [background law]); (2) failing to adequately respond to SANDAG's comments on the Draft EIR concerning transit impacts (Slip Opn., p. 77, fn 24); and (3) failing to provide any statement of reasons in the EIR supporting CSU's contention that transit impacts were not significant (Slip Opn., pp. 64, 78-79; § 21100(c); Guidelines § 15128.) CSU does not address these holdings at all in its brief.

Although unnecessary to support the foregoing holdings, the Court of Appeal also found that a last-minute finding adopted by the CSU Board of Trustees that the project would not have any significant effects on transit systems was not supported by substantial evidence. (Slip Opn., pp. 78-82.) As discussed below, the Court of Appeal was correct on this point as well. Contrary to what CSU appears to believe, the substantial evidence test is not completely toothless. It does not require courts to rubber-stamp agency rationalizations that are based on strained and illogical inferences from isolated, unsupported, and irrelevant conclusory statements or assertions of opinion gleaned from the record.

A. The Applicable Standard of Review

CSU's discussion of the transit impact issue assumes that judicial review is governed by the substantial evidence test. Given that CSU completely ignores the Court of Appeal's findings of procedural error, this is not surprising. But the substantial evidence test is irrelevant where the alleged error is procedural in nature. (*Bakersfield Citizens,* 124 Cal.App.4th 1184, 1208.) Where the question is "predominately one of improper procedure," the Court independently reviews the record to determine whether the respondent has committed legal error, i.e., failed to proceed in the manner required by law. (*Vineyard*, 40 Cal.4th 412, 435.) A failure to obtain information necessary for CEQA review and to include this information in the EIR is a paradigmatic "fail[ure] to proceed in the manner required by CEQA." (*Id.*, citing *Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, 1236; see also, *Save Our Peninsula Committee,* 87 Cal.App.4th 99, 118.)

Issues that turn "predominately" on disputed questions of fact are reviewed under the more deferential substantial evidence test. (*Vineyard,* 40 Cal.4th 412, 435; *Bakersfield Citizens,* 124 Cal.App.4th 1184, 1198.) This standard applies only to the final issue addressed in this section, and is discussed in more detail there.

B. CSU Has Shown No Basis for Reversing the Court of Appeal's Determination that CSU Failed to Proceed in the Manner Required by Law with Respect to Transit Impacts

1. The Preceding Litigation and Court of Appeal Decision

Both in the trial court and on appeal, SANDAG/MTS argued that CSU had committed prejudicial error by failing to undertake any analysis in the EIR of the Campus Expansion's impacts on public transit systems, particularly the "Green Line" trolley whose daily student ridership is forecast to increase to 2½ times its current ridership by 2025 as a result of the expansion. (3 CT 585-589; Opening Brief of Appellants (SANDAG and MTS), pp. 14-28.) SANDAG/MTS also contended that CSU had failed to adequately respond to SANDAG's comments on this subject during the EIR process (Guidelines § 15088), and that a last minute boilerplate finding by CSU that transit impacts would be insignificant was not supported by substantial evidence. (7 CT 593-594; Opening Brief of Appellants, pp. 28-32.)

The Court of Appeal agreed with SANDAG/MTS on all three issues. With respect to SANDAG/MTS' procedural claims, the Court of Appeal concluded, "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." (Slip Opn., pp. 77:1-4; see discussion at pp. 63-65, 71-77.) The error was prejudicial. (Id. at 77.) The Court of Appeal also noted that the CSU had failed to adequately respond to SANDAG's comments on the Draft EIR

requesting an evaluation of transit impacts, contrary to the requirements of Guidelines § 15088. (Slip Opn., p. 77, fn. 24; *Berkeley Keep Jets Over the Bay v. Board of Port Com'rs* (2001) 91 Cal.App.4th 1344, 1367.) In the preface to its analysis of the substantial evidence issue, the court also noted that even if CSU had an adequate basis for contending that transit impacts were less than significant (it did not), the EIR failed to contain a statement briefly indicating the basis for this conclusion in the EIR, as required by § 21100(c). (Slip Opn., pp. 78-79; Guidelines § 15128; *Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1111.)

In the final portion of its discussion, the Court of Appeal found that CSU's purported conclusion that the project would have no significant impacts was not supported by substantial evidence. (Slip Opn., pp. 78-82.) The discussion reviews the "evidence," such as it was, purportedly relied on by CSU and concluded that CSU's finding was "based on speculation, unsubstantiated opinion and narrative or evidence that is clearly inaccurate or erroneous, which does not provide substantial evidence." (Id., p. 82.)

2. CSU Has Waived the Issue of Procedural Error by Failing to Address the Issue at All in Its Opening Brief

Having failed to address the foregoing issues in its opening brief, CSU has effectively waived review. (*Dieckmeyer v. Redevelopment Agency of City of Huntington Beach* (2005) 127 Cal.App.4th 248, 260; *Shaw v. Hughes Aircraft Co.* (2000) 83 Cal.App.4th 1336, 1345, fn. 6.) These issues are nevertheless briefed below in the event that the Court wishes to independently consider them. The relevant facts discussed below

also bear on CSU's claim that its ultimate finding of no significant impacts on transit was supported by substantial evidence.

3. *The Court of Appeal Correctly Determined that CSU Committed Prejudicial Error by Failing to Address and Analyze Potential Transit Impacts in the EIR*

a. Facts

The EIR predicts that a tremendous number of new students, faculty and employees accommodated by the Campus Expansion plan would utilize public transit, and particularly MTS' "Green Line" trolley system, to travel to and from campus. On the surface, this is good news because increased use of public transit will greatly reduce the number of daily vehicle trips to and from campus, along with related traffic and air pollution impacts, and, not coincidentally, CSU's "fair share" obligations for mitigation of traffic impacts. (AR 15{238}14799-14802.) On the other hand, there will be a tremendous increase in the daily burden on public transit systems. The Draft EIR estimated that overall, daily "boardings" by CSU students, faculty and staff at the SDSU "Green Line" trolley station would increase from an average of 4,726 per day in 2006/2007 to 11,624 per day in 2025, an increase of 6,898 daily boardings, or almost 150 percent. (AR 15{238}14797.) Since a "boarding" represents only a one-way trip, i.e., a departure from the station, the total number of to-and-from transit trips would actually be in the neighborhood of 23,248 per day in 2025. These numbers are for CSU faculty, staff and student transit riders only. When additional, non-CSU boardings (21% of the total) are taken into account, actual boardings at the SDSU trolley station averaged 5,982 per day in 2006/2007, and are expected to increase to 14,714 per day in 2025, or over 29,000 actual passenger trips per day. (AR 15{238}14797-

14798; 17{257}16343.) None of these figures include pass-through transit riders, i.e., commuters and others who will occupy the trolleys passing through the SDSU station, but neither embark or disembark at that location.

Presented with this information, SANDAG requested in its written comments on the Draft EIR that the EIR include an analysis of the impacts of this vastly increased ridership on the transit system itself. (AR 17{263}16951-16952.) SANDAG's concern was that these large increases in ridership, coupled with other cumulative increases from regional population growth and development, would overburden the transit system, impairing service levels and requiring substantial investment in physical improvements to offset the increased load. In a separate comment letter, Caltrans also requested that CSU "incorporate a means to identify and disclose its transportation impacts and mitigation to regional facilities, including ... regional transit lines." (AR 17{263}16923.)

CSU's responses to SANDAG's comments were presented in the Final EIR, and are quoted at some length in the Court of Appeal's opinion. (AR 18{264}17229-17232; Slip Opn., pp. 67-69.) In short, CSU refused to undertake any analysis of transit impacts. In its responses, CSU first contended that it was not required by CEQA to consider impacts on transit systems at all, "as they are not environmental impacts recognized under CEQA." (AR 18{264}17229.) [CSU abandoned this position in the subsequent litigation. See Slip Opn., pp. 72-73 and fn. 21.][6] CSU also argued that there were no existing standard criteria for measuring impacts

[6] Notably, while this litigation was pending, Appendix G of the state CEQA Guidelines was amended to specifically include impacts on public transit systems as potentially significant environmental effects which must be addressed under CEQA. (See Guidelines, Appendix G, XVI.a and XVI.f.)

on transit systems, and that SANDAG had failed to provide any information showing that the SDSU trolley station was operating near or at capacity. (AR 18{264}17230-17232.) Elsewhere in the Final EIR, CSU added a paragraph asserting that there were not "criteria" that could be used "to assess the project's impact on transit service." (AR 18{285}17816.) Technical Appendix N-1 (Traffic Technical Report) was similarly amended to complain that neither SANDAG nor the City of San Diego have adopted specific criteria for measuring impacts on transit, and noting that the trolley line extension completed to SDSU in 2005 "was constructed to accommodate large ridership amounts." (AR 18{285}17797, 17816.)

Outside the formal EIR process itself, SANDAG continued to press CSU to undertake mitigation for the project's expected effects on transit systems, using a traditional fair-share, cumulative impact analysis. (AR 18{264}17191-17192; 21{326}20540-20541; 21{327}20670-20671.)

As the final hearing on the Campus Expansion Plan approached, SANDAG, the City of San Diego and Caltrans prepared a joint letter to the CSU Board of Trustees again requesting, among other things, that CSU needed to undertake some meaningful evaluation of transit impacts. (AR 19{310}18630-18635.) MTS also sent a written letter advising the CSU Board, clearly and unambiguously, "Unfortunately, the existing trolley and bus services cannot possibly meet this demand." (SAR 27{592}S22577.) The letter also advised that an estimated $27,000,000 in capital improvements and $1,000,000 per year in operating revenue would be required to serve the increased ridership.

These requests and warnings had no visible effect. However, at its final hearing on the Campus Expansion project on November 14, 2007, the CSU Board of Trustees adopted a pro forma finding, with no supporting

evidence, that the project would have "no significant impacts on transit systems," apparently in a final effort to buttress its position. (AR 19{297}18517.)

b. The Court of Appeal Correctly Determined that CSU Committed Prejudicial Procedural Error by Failing to Investigate Potential Transit Impacts

As the Court of Appeal held, CEQA requires a lead agency charged with preparation of an EIR to do more than report facts already known to the lead agency. Instead, CEQA establishes an affirmative duty to investigate and evaluate potential impacts. (*San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 726; *County Sanitation Dist. No. 2 of Los Angeles County v. County of Kern* (2005) 127 Cal.App.4th 1544, 1597; *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 311 ["CEQA places the burden of environmental investigation on government rather than the public."].) This duty is reflected in Guidelines § 15144, which provides that "While foreseeing the unforeseeable is not possible, an agency must use its best efforts to find out and disclose all that it reasonably can." (Guidelines § 15144; see *Berkeley Keep Jets*, 91 Cal.App.4th 1344, 1370-1371.) Failure to undertake reasonable investigation and resulting analysis in the EIR is a failure to proceed in the manner required by law. (*Bakersfield Citizens*, 124 Cal.App.4th 1184, 1208 and 1213.)

CSU was not being asked to "foresee the unforeseeable" in this case, but rather investigate the rather obvious possibility that swelling of CSU-related transit ridership to 2½ times its present level might have effects on the capacities, service levels, operating requirements (such as number or

frequency of bus or trolley trips), or on the physical equipment and facilities required for operation of the transit system. As the Court of Appeal put it, "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." (Slip Opn., p. 75.)

Notwithstanding this duty to investigate, the record is devoid of evidence that CSU actually did undertake any identifiable effort to evaluate transit impacts. Instead, the record simply discloses CSU's faulty rationalizations for its refusal to do so. CSU's principal argument in the proceedings below was that SANDAG and MTS had failed to provide relevant information on the transit system capacities or other data which sufficient to allow CSU to perform an analysis. (Slip Opn., p. 73.) The Court of Appeal correctly concluded that this not a defense. Under the lead agency concept that is fundamental to CEQA, it is the agency preparing the EIR that bears the burden of investigating and evaluating all the potential environmental impacts of a project, not merely those it finds of interest or concern from its own institutional viewpoint. (Guidelines § 15050.) A lead agency cannot avoid its duties to identify impacts and feasible mitigation measures simply because another public agency has allegedly failed to provide relevant data. (*Woodward Park Homeowners,* 150 Cal.App.4th 683, 728-729.) As the Court of Appeal also noted, the record in this case contains no evidence that CSU ever actually *asked* SANDAG or MTS (or anyone else, for that matter) for information concerning existing transit system service capacities, improvement plans or other

relevant data. (Slip Opn., p. 74.) But even if CSU had requested this information and been dissatisfied with the results, it was not at liberty to simply ignore the subject in the EIR.

c. The Court of Appeal Also Correctly Determined that CSU Failed to Adequately Respond to SANDAG's Comments on the Draft EIR

The Court of Appeal also found, albeit in a footnote, that CSU's responses to SANDAG's comments on the Draft EIR concerning transit impacts were legally inadequate. (Slip Opn., p. 76, fn. 24.) While the Court of Appeal clearly regarded this as a lesser offense in light of CSU's overall failure to investigate and evaluate transit impacts, this holding also constitutes an independent basis for overturning certification of the EIR.

Under CEQA, a lead agency must provide formal written responses to comments received on the Draft EIR. (Guidelines § 15088; *City of Long Beach v. Los Angeles Unified School Dist.* (2009) 176 Cal.App.4th 889, 904.) Thus, "[W]here comments from responsible experts or sister agencies disclose new or conflicting data or opinions that cause concern that the agency may not have fully evaluated the project ..., these comments may not simply be ignored. *There must be good faith, reasoned analysis in response.*" (*Berkeley Keep Jets,* 91 Cal.App.4th 1344, 1367, quoting *Cleary v. County of Stanislaus* (1981) 118 Cal.App.3d 348, 357, emphasis in original; Guidelines § 15088(c).)

CSU's responses to SANDAG's comments on the Draft EIR did not demonstrate good faith or offer reasoned analysis of the legitimate environmental questions raised. CSU's responses offered only

rationalization and legally invalid excuses for failure to analyze transit impacts. This is not the "reasoned analysis" required by CEQA.

d. CSU Also Failed to Disclose Any Basis for Deeming Transit Impacts Insignificant in the EIR

The Court of Appeal also identified a third procedural failure by CSU. (Slip Opn., pp. 64, 78-79.) If, after a reasonable investigation, a lead agency determines that a potential environmental impact will not be significant, it is not required to include a full-blown analysis of the impact in the EIR. It *is* required, however, to include a brief statement of the reasons the impact was deemed insignificant in the EIR. (*Protect the Historic Amador Waterways,* 116 Cal.App.4th 1099, 1111; § 21100(c); Guidelines § 15128.) This requirement reflects the long-standing requirement that an EIR must contain "facts and analysis, not just the agency's bare conclusions or opinions." (*Laurel Heights*, 47 Cal.3d 376, 404-405.) In this case, the EIR does offer legally indefensible rationalizations for CSU's complete failure to evaluate transit impacts, but it certainly does not offer any reasoned factual basis for a conclusion that all possible transit impacts are less than significant. (AR 18{264}17229-17232.) Thus even were CSU correct in claiming that the Project will have no significant adverse effects on transit, the EIR fails as an informational document. (*Protect the Historic Amador Waterways*, 116 Cal.App.4th 1099, 1111-1112.)

C. The Court of Appeal Correctly Determined that CSU's Last Minute Exculpatory Finding That Transit Impacts Would Be Insignificant is Not Supported by Substantial Evidence

Although not contesting the Court of Appeal's decision regarding the foregoing procedural errors, CSU does for some reason seek review of the Court of Appeal's determination that CSU's purported finding that the project would not have any significant impacts on transit is not supported by substantial evidence. This conclusory boilerplate finding was included in the Board of Trustee's CEQA findings and Statement of Overriding Considerations. (AR 19{297}18516-18517.)[7] It is impossible to conclude that it is anything other than a last minute attempt to provide cover for the EIR's failure to actually consider or analyze potential transit impacts. As the Court of Appeal found, there is in fact no substantial evidence in the record to support this finding – hardly a surprising result given CSU's completely failure to actually investigate and evaluate potential impacts.

1. The Substantial Evidence Question is Essentially Moot in Light of the Court of Appeal's Findings of Procedural Error

It may be questioned whether the interests of judicial economy are served by addressing this issue at all. In view of the Court of Appeal's

[7] The "finding" is included in a laundry list of impacts deemed by CSU to be less than significant. (AR 19{297}18516-18517.) It states:

> "The Board of Trustees finds that, based upon substantial evidence in the record, the following impacts associated with the project also are less than Significant and no mitigation is required:
>
> *
>
> • No significant impacts on transit systems
>
> *"

uncontested determination that CSU violated CEQA by failing to adequately investigate potential transit impacts, the question of whether CSU's finding is supported by substantial evidence in the current record would appear to be largely academic. On remand, CSU "must begin anew the analytical process required by CEQA," and cannot rely on past rationales. (*Laurel Heights*, 47 Cal.3d 376, 425.) The record, which will appear after CSU has conducted a reasonable investigation of the facts on remand, will be vastly different, and will presumably provide a far more adequate basis for CSU's ultimate decision. The Court would certainly be justified in declining review of an issue that is essentially moot at this point.

2. CSU Badly Misconstrues the Substantial Evidence Test

If the Court does undertake review of this issue, it will quickly become obvious that the real problem is that CSU does not actually understand the substantial evidence test. While substantial evidence review is deferential, it is not a mere rubber stamp for agency decisions based on blind assumptions, strained inferences unsupported by relevant facts and analysis, or just plain bluff. This is particularly so in the context of CEQA, under which reviewing courts must "carefully scrutiniz[e]" the record to determine whether agency's determinations are actually supported by substantial evidence. (*Laurel Heights*, 47 Cal.3d 376, 408.)

"Substantial evidence" is defined in CEQA 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." (*Bakersfield Citizens*, 124 Cal.App.4th 1184, 1198; Guidelines § 15384(a).) Substantial evidence may consist of "facts, reasonable assumptions predicated upon facts, and expert opinion

supported by facts." (Guidelines § 15384(b), emphasis added.) Substantial evidence, however, does not include mere "[a]rgument, speculation, *unsubstantiated* opinion or narrative," nor purported evidence "which is clearly inaccurate or erroneous." (§ 21082.2(c), emphasis added; *Bakersfield Citizens*, 124 Cal.App.4th 1184, 1198.) Further, the Court must consider the evidence in the record "*as a whole*." (*Laurel Heights*, 47 Cal.3d 376, 408, emphasis in original.) The Court thus may conduct a limited weighing of the evidence to determine whether, viewed in context of the entire record, it is indeed "substantial." (*Bolsa Chica Land Trust v. Superior Court* (1999) 71 Cal.App.4th 493, 503.) An agency may not rely on strained inferences or conjectures that become completely untenable when viewed in light of other facts in the record.

3. CSU's Finding Was Not Supported by Substantial Evidence

The Court of Appeal plainly conducted a conscientious evaluation of the purported "evidence" cited by CSU in the proceedings below. (Slip Opn., pp. 79-82.) In the end, this Court will also have to conduct its own independent review. SANDAG/MTS believe the result will be the same.

The chief piece of actual "evidence" relied on by CSU below was a statement in an economic report attached to the EIR to the effect that "The trolley can accommodate 12,000 students, faculty and staff." (AR 18{286}18215, 18267.) Utterly no supporting information is cited in the report, other than a reference to a website address purportedly containing the information. As the Court of Appeal noted, however, the website page is not only equally conclusory and devoid of actual data or analysis, but does not even directly support the first report. (AR 24{413}S21665; Slip Opn., p. 81, fn. 25.) Qualitatively, it is obvious that all these statements

were originally intended as public relations puffery, not authoritative factual statements or expert opinions base on any actual investigation or analysis. This "evidence" is thus classically the type of bare, unsupported assertion or opinion that does not constitute substantial evidence under CEQA. (§ 21082.2; Guidelines § 15384.) Beyond this, CSU appears to ignore the fact that impacts to the transit system as a whole may not all occur at the SDSU station. CSU's "evidence" does not even begin to address potential impacts on actual service levels or total system capacity, the number and frequency of trolleys required to serve the increased load, need for other system improvements or upgrades, or potential secondary effects at other locations. SANDAG and MTS made it clear, for their part, that the increased demands generated by the project *cannot* be accommodated without considerable investment and improvements to the existing system to maintain service. (AR 18{264}17191-17192; 19{299}18585-18586; 27{592}S22577-22578.) CSU's only answer to these problems has been to ignore them.

CSU now attempts to augment the arguments it submitted below with further inferences it contends can be drawn from facts in the record. These arguments, however, simply confirm that CSU's interpretation of the substantial evidence test turns logic and reason on their heads. For example, CSU contends that the increase in transit ridership will be "a mere 6.4%" per year. (CSU OB, p. 55.) It is unclear how even one year's increase at this rate could be presumed insignificant. One suspects that CSU would not find a 6.4% increase per year in its student enrollment an insignificant impact, nor a 6.4% per year reduction in its operating budget. The proposition becomes absurd when the same increase occurs year after year until ridership has increased to 2½ times existing levels.

CSU's other arguments focus mostly on the capacity of the SDSU transit station, which CSU somehow presumes will be sufficient to handle the tremendous future increases in both SDSU and non-SDSU riders that will occur in coming years, based on a bald assumption that the station must have been planned and built to handle that capacity. This assumption is something akin to assuming that because a road intersection was built or upgraded in the last five years, it must necessarily be able to accommodate traffic from all future development in the area, whether that development was already planned at the time the intersection was completed or not. This bald assumption is even more obviously untenable in light of other evidence in the record indicating that the transit system *cannot* handle this ridership without substantial improvements. (See V.B.3, supra.) In the face of evidence presented by SANDAG and MTS, CSU could not just close its eyes, seize on strained or even absurd inferences from scattered facts in the record and call this substantial evidence to support the improbable conclusion that the massive student increases involved in the Campus Expansion will have no significant effects on the public transit systems that CSU expects to serve them.

VI. THE COURT OF APPEAL CORRECTLY FOUND THAT CSU ILLEGALLY DEFERRED FORMULATION OF THE TRANSPORTATION DEMAND MANAGEMENT ("TDM") PROGRAM THAT IT RELIED ON FOR MITIGATION OF TRAFFIC IMPACTS

CSU frames the last issue presented in its brief as whether "[s]ubstantial evidence supports the propriety of the TDM program as a mitigation measure." (CSU OB, p. 58.) The argument refers to Mitigation Measure TCP-27, which was included at the last minute in the Final EIR.

(AR 18{264}17238.) Mitigation Measure TCP-27, in its entirety, consists of the following:

> TCP-27: 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 the San Diego Association of Governments ("SANDAG") and the 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 18{275}17602.)

Neither the EIR nor anything else in the record further describes just precisely what types of measures the TDM program might include to "reduc[e] vehicle trips to campus." The Court of Appeal concluded that, as argued by SANDAG/MTS, "CSU's adoption of TCP-27 constitutes improper deferral of mitigation of the Project's significant traffic effects." (Slip Opn., p. 61.) The court went on to note that "there are no specific mitigation measures to be considered or any specific criteria or performance standards set forth in the TDM." (Id.) "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." (Id.) TCP-27 thus constitutes a classic example of the type of vague, deferred mitigation measure that has routinely been found inadequate in case law. (See, e.g., *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 92-94; *San Joaquin Raptor*, 149 Cal.App.4th 645, 669-671; *Gentry v. City of Murietta* (1995) 36 Cal.App.4th 1359, 1394-1395; Guidelines § 15126.4(a)(1)(B).)

In attacking the Court of Appeal's conclusion, CSU appears to tacitly admit that the issue is not actually one of substantial evidence. CSU concedes that "The Court of Appeal determined that TCP-27 was an improper deferral of mitigation," and nowhere actually cites any evidence in the record suggesting that TCP-27 will successfully mitigate traffic impacts. (CSU OB, p. 59.) CSU nevertheless contends that the decision "fails to afford CSU the appropriate deference." (Id.) The error here, however, was fundamentally a failure to proceed in the manner required by law. TCP-27 was not found defective by the Court of Appeal because there is a lack of evidence to show that it will be effective (although that is also true), but because the measure is inadequate on its face for failure to comply with the legal standards of certainty and specificity that govern mitigation measures. Reviewing courts evaluate such issues under an independent judgment standard. (*Vineyard*, 40 Cal.4th 412, 435.)

CSU makes some weak attempts to defend TCP-27, but these arguments are clearly fatuous. Indeed, TCP-27 is, by several lengths, the most extreme example of unlawfully deferred mitigation yet to be addressed in published case law. Formulation of the specific details of a mitigation measure or mitigation plan may be deferred *only* where the lead agency has (1) identified concrete measures or types of measures that will be included in the mitigation plan; (2) formally committed itself to implementation of the measures ultimately selected; and (3) included specific *performance standards* or criteria that the mitigation program must satisfy. (See *Communities for a Better Environment,* 184 Cal.App.4th 70, 94; *San Joaquin Raptor*, 149 Cal.App.4th 645, 670.)

TCP-27 satisfies none of these criteria. No specific future mitigation actions whatsoever are identified as potential elements of the plan. No

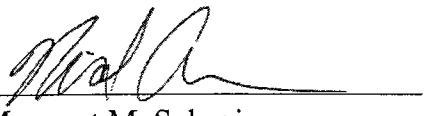
specific performance standards or criteria are specified. The mere statement of a "generalized goal" is not a performance standard. (*Communities for a Better Environment,* 184 Cal.App.4th 70, 93; *San Joaquin Raptor*, 149 Cal.App.4th 645, 670.) Although CSU may be "committed" to actually creating a TDM, the contents of the TDM are so open-ended and undefined that this commitment is essentially meaningless.

Ironically, CSU planners, at least at other CSU campuses, know how to create a detailed TDM program with performance standards when they choose to do so. (See *City of Hayward v. Board of Trustees of the California State University* (2012) 207 Cal.App.4th 446, 466-469.) Here, however, TCP-27 falls short of the standard by several orders of magnitude.

CSU argues that adoption of TCM-27 was not prejudicial because CSU did not rely on it to find that traffic impacts would be mitigated to less than significant levels. It is true that the CSU did not find that traffic impacts would be mitigated to less than significant levels; it concluded that even with implementation of all of the mitigation measures listed in the EIR, traffic impacts would remain significant. (AR 19{297}18473-18474, 18522-18525.) This, however, makes the error all the *more* prejudicial. Faced with significant, unmitigated impacts, CSU was under a duty to consider and adopt any additional feasible mitigation measures available. (See *Woodward Park Homeowners*, 150 Cal.App.4th 683, 724 and Section IV.A, supra.) Reliance on a vague, maybe-we'll-do-something mitigation measure which provides neither the public, interested public agencies or even CSU's own decisionmakers with any idea exactly what was to be done or what mitigating effects might be expected was clearly prejudicial to informed decisionmaking.

VII. CONCLUSION

CSU has failed to show any grounds for reversal of any portion of the Court of Appeal's decision. The decision should be affirmed and the case remanded so that CSU may be afforded another opportunity to actually comply with CEQA while carrying forward its educational mission.

DATE: September 17, 2012 By: 

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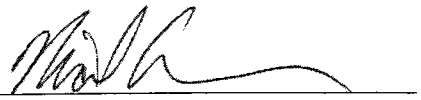
CERTIFICATION OF WORD COUNT

The text of the SAN DIEGO ASSOCIATION OF GOVERNMENTS and SAN DIEGO METROPOLITAN TRANSIT SYSTEM'S ANSWER BRIEF ON THE MERITS TO BOARD OF TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY BRIEF ON THE MERITS consists of 13,996 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: September 17, 2012 By: 

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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.

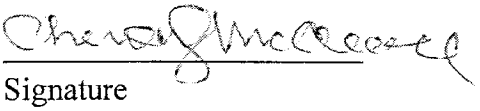
On September 17, 2012, I served true copies of the following document(s) described as **SAN DIEGO ASSOCIATION OF GOVERNMENTS AND SAN DIEGO METROPOLITAN TRANSIT SYSTEM'S ANSWER BRIEF ON THE MERITS TO BOARD OF TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY OPENING BRIEF ON THE MERITS** on the interested parties 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 September 17, 2012, at Los Angeles, California.

Cheron J. McAleece
Printed Name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