S199557

Court of Appeal, Fourth Appellate District, Division One – No. D057446

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

CITY OF SAN DIEGO AND REDEVELOPMENT AGENCY OF THE CITY OF SAN DIEGO.

Plaintiffs and Appellants,

v.

BOARD OF TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY

Defendant and Respondent.

THE CITY OF SAN DIEGO AND REDEVELOPMENT AGENCY OF THE CITY OF SAN DIEGO'S ANSWER BRIEF ON THE MERITS

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STATEMENT OF THE CASE

The City of San Diego and the City of San Diego Redevelopment Agency (collectively referred to herein as "City") challenge an environmental impact report ("EIR") prepared by the Board of Trustees of the California State University ("CSU") for the San Diego State University (SDSU) campus. The EIR concerns CSU's plan to expand the campus at six new or expanded building sites, including a large hotel and business center, and to increase enrollment to 35,000 students (Campus Expansion Project). The planned expansion will have significant effects on the physical environment in San Diego where SDSU is located. City challenges CSU's decision to certify the EIR despite the remaining unmitigated environmental impacts, as an abuse of discretion under the California Environmental Quality Act (Pub. Resources Code § 21000 *et seq.*) (CEQA).

The Campus Expansion Project is a twenty-year development plan of unprecedented, controversial, and dramatic proportion that will extend the SDSU campus facilities north across Interstate 8 for the first time in history. The EIR created to address the effects of the Campus Expansion Project on the surrounding community establishes numerous significant and unmitigated traffic impacts; yet the EIR failed to disclose, discuss and implement feasible mitigation for these impacts.

This deficiency is primarily due to CSU's narrow reading and mistaken interpretation of *City of Marina v. Board of Trustees of the California State University* (2006) 39 Cal.4th 341 (*City of Marina*). Based upon *City of Marina*, CSU contends it has satisfied its CEQA obligation to pay for off-site mitigation simply by requesting funds from the Legislature. CSU considers its obligations satisfied even if the Legislature denies the

appropriation request. Thereby, even before receiving a response from the Legislature regarding appropriation of funds, CSU approved the Campus Expansion Project without any further plan to implement feasible mitigation. CSU took this action despite the fact that three of the six project components are privately financed and are not subject to legislative funding.

CSU has been here before. In *City of Marina*, CSU claimed it was "legally constrained" from complying with CEQA because state law prohibited it from expending school funds to mitigate off-campus adverse environmental effects resulting from their campus expansion project. The Court's rejection of this argument was clear: CSU must comply with CEQA even if the impacts result off-site.

CSU now uses the same decision, which was intended to confirm CSU's obligations to mitigate pursuant CEQA, to once again relieve it of its obligations for the environmental impacts its campus expansion plans create. While CSU now agrees that it has an obligation to mitigate outside campus boundaries, its new "legal constraint" is the Legislature. CSU argues that because it cannot "guarantee" funding from the Legislature (while ignoring all other potential sources of funding), the mitigation to address the identified traffic impacts is infeasible.

This limitation is self-created, unjustified and unfair. While CSU can find money to fund campus expansion, it consistently claims no money is available to mitigate adverse effects on the communities and the surrounding environment. In fact, CSU even budgets off-campus impacts separate from the construction project which gives rise to the necessary mitigation. Local entities are therefore once again required to ask the Court to direct CSU to meet its obligations under CEQA.

The question before the Court is whether CSU has properly certified the EIR and, on that basis, approved the Campus Expansion Project. City contends CSU's decision must be vacated because the approval depends on an erroneous legal assumption that *City of Marina* limited its obligations under CEQA. City challenges CSU's finding that mitigation measures are "infeasible" because CSU cannot guarantee it will receive funding from the Legislature. The Appellate Court agreed with City's position, stating "[B]ecause the DEIR, the FEIR, and the Findings were based on the erroneous legal assumption that CSU could pay its 'fair share' mitigation costs only if the Legislature specifically appropriated such funding, CSU improperly found those mitigation measures were infeasible and improperly adopted a statement of overriding considerations." (Typed Opn., p. 37.) Based on this reasoning, the Appellate Court held "CSU did not proceed in a manner required by law and thereby abused its discretion" requiring that the project approval be set aside and the EIR be decertified. (Typed Opn., p. 37.)

The legal insufficiency of the EIR, coupled with CSU's refusal to accept its duty to mitigate significant off-site impacts, causes the City and the surrounding community to either incur excessive financial expense or accept extensive deterioration of the environment. CSU's actions in approving the Campus Expansion Project and certifying the EIR without complying with CEQA is a prejudicial abuse of discretion, which warrants the setting aside of the decision to certify the EIR as the Court of Appeal held.

STATEMENT OF FACTS

A. The Parties

Appellant, City of San Diego, is a charter city, organized under the laws of California. The areas of proposed development to San Diego State University lie within the geographic limits of the City of San Diego. Appellant City of San Diego Redevelopment Agency, is the implementing agency for the Campus Expansion Project. On February 1, 2012, the Redevelopment Agency of the City of San Diego (Agency) was dissolved by operation of law. (*California Redevelopment Assn. v. Matosantos* (2001) 53 Cal.4th 231.) By Resolution of the San Diego City Council No. R-307238, the City became the successor agency to the Agency, and that entity is now known as "City of San Diego, solely in its capacity as the designated successor agency to the Redevelopment Agency of the City of San Diego, a former public body, corporate and politic." The successor agency is designated to "serve as the successor agency to the Redevelopment Agency pursuant to sections 34171(j) and 34173(d)(1) of AB 26 . . ." and will stand in the Agency's place for the remainder of these proceedings. Prior to its dissolution, the Agency oversaw the regional plan for the College Area in which San Diego State University is proposing development, and was a responsible agency for purposes of CEQA.

Appellant, SANDAG, is a consolidated, regional agency with numerous statutory responsibilities, many of them related to transportation and transit. Appellant, Metropolitan Transit System (MTS), is a public agency responsible for operation of the public transit system serving SDSU including light rail transit (trolley) and buses.[1]

[1] Pursuant to Cal Rules of Court 8.200(a)(5), City joins and incorporates the briefs and arguments of Appellants SANDAG and MTS.

Respondent, the Board of Trustees of the California State University, is responsible for the administration, management and control of the California State University system, including the San Diego State University campus. CSU, as lead agency, took the action of certifying and approving the final Environmental Impact Report for the Campus Expansion Project. Real Party in Interest, San Diego State University, an undergraduate and graduate university in San Diego County, is the project's developer and sponsor.

B. San Diego State University 2007 Campus Master Plan Revision

The Project is located in and around the San Diego State University campus, in the City of San Diego, approximately ten miles east of downtown San Diego, within the College Area and Navajo Community Planning Area of the City of San Diego. (AR 15:232:14608.)

The proposed Campus Expansion Project is the adoption and subsequent implementation of the SDSU 2007 Campus Master Plan Revision. (AR 15:222:14209.) The EIR states that the Master Plan Revision will enable SDSU to meet projected increases in student demand for higher education, as well as further enhance SDSU's status as a premier undergraduate, graduate and research university. (*Id.*) The stated objective of the proposed project will be to provide a framework for implementing SDSU's goals and programs for the campus by identifying needed buildings, facilities, improvements and services to support campus growth and development from the current SDSU enrollment of 25,000 full-time equivalent students (FTES) to new Campus Master Plan enrollment of 35,000 FTES by the 2024/25 academic year. (*Id.*)

The Campus Expansion Project has multiple development components, to be constructed in phases, which will result in significant traffic impacts to the streets and freeways in the area.[2]

C. The 2005 Campus Expansion Was Also Challenged

From January 18, 2005 to March 18, 2005, CSU circulated a Draft Environmental Impact Report for the 2005 Campus Master Plan (2005 DEIR). (AR 1:1:00024, 4:22:03809, 5:29:04142.) The City and Agency, by and through their agents, together with numerous other concerned parties, provided oral and written comments to CSU outlining the deficiencies in the 2005 DEIR. (AR 3:17:02088-02095, 5:29:04133-04134.) From March 2005 through September 2005, the City and Agency provided oral and written comments explaining the failures of both the 2005 DEIR and the subsequent Final Environmental Impact Report (2005 EIR). (AR 3:17:02131, 3:17:02106-02110, 3:17:03142-04154, 5:34:04202-04206, 5:38:04273-04274, 5:43:04334, 5:43:04350-04359.) These comments repeatedly raised issues related to failures in the traffic reports, analysis of alternatives and refusal to pay for off-site mitigation. (*Id.*)

On July 20, 2005, the Board of Trustees held a public hearing at which concerned community members aired their misgivings regarding the 2005 DEIR. (AR 5:36:04234 and AR 5:34:04181, 5:34:04201.) In light of the large volume of opposition generated at the hearing, CSU voted to hold off on project approval for an additional two months, during which the Board claimed it would consider project alternatives. (AR 5:43:04350.) In an effort to mediate and possibly settle the disputes, the Board agreed to form two ad-hoc committees consisting of representatives from all affected parties. (*Id.*) In spite of CSU's promise to delay certification of the 2005

[2] The Answering briefs filed by MTS and SANDAG set forth the unmitigated traffic impacts.

EIR to pursue additional investigation, CSU paid no heed to its promises to discuss alternatives with area residents, businesses, or City and Agency officials. (See generally, AR Tabs 36 through 39. [No additional meetings, analysis or investigation performed prior to final approval of the 2005 EIR].) Instead, CSU docketed the issue for approval and certification of the 2005 EIR at the September 20, 2005, meeting of the Commission on Campus Planning, Building and Grounds in Long Beach, California, a full two weeks before the first meeting of the ad-hoc committees. (AR 5:43:04387.)

Despite the overwhelming, significant and impassioned public testimony regarding its inherent legal and social defects, as well as repeated requests from community members to allow the ad-hoc committees to meet before taking final action, CSU certified and approved the SDSU Campus Master Plan Revision on September 21, 2005. (AR 5:43:04349-04350, 5:43:04359.)

D. Several Parties Challenge the Adequacy of the 2005 Campus Master Plan EIR

On October 20, 2005, the City and Agency filed a petition under CEQA challenging the decision of CSU to approve the 2005 Campus Master Plan Revision and certify the corresponding EIR. (3 CT 636-651.) After the City and Agency filed their opening briefs, CSU voluntarily agreed to set aside its prior certification of the EIR and approval of the Project through a peremptory writ of mandate. (3 CT 630-633.) According to CSU, the California Supreme Court's decision in *City of Marina v. Board of Trustees of the California State University* was the primary reason the writ was necessary to set aside its prior certification of the EIR and approval of the Project. (*Id.*) The court granted judgment on September 1, 2006, issuing a peremptory writ of mandate to directing the CSU to set aside the certification of the EIR and approval of the Project. (*Id.*) The

preemptory writ required CSU to withdraw the project approval and decertify the 2005 EIR. The trial court entered a peremptory writ of mandate and final judgment setting aside CSU's certification of the EIR and its approval of the 2005 Master Plan. The trial court also retained jurisdiction to entertain a subsequent writ to determine CSU's eventual compliance with CEQA and the requirements set forth in *City of Marina*.

E. The EIR Certified for the 2007 Campus Master Plan Revision Shares Many of the Same Defects as the EIR for the 2005 Campus Master Plan

The Draft Environmental Impact Report (DEIR) for the SDSU 2007 Campus Master Plan Revision was circulated for review from June 12, 2007, through July 27, 2007. (AR 27:261:16913.) Again, the City and Agency together with numerous other concerned parties, provided oral and written comments to CSU outlining the deficiencies in the DEIR. (See generally AR 17:Tab 263; AR 17:263:16955-16960, 17:263:16961-16964, 17:263:16965-16967, 17:263:16968-16973, 17:263:16974-16976, and 19:310:18630-18635.) These comments repeatedly raised issues related to failures in the traffic reports, failure to identify appropriate mitigation measures and the impropriety of CSU's claim that it had complied with the *City of Marina* case requiring CSU to pay for identified mitigation measures. (*Id.*) Despite numerous letters from residents and government officials, including Senator Christine Kehoe, Mayor Jerry Sanders, and then candidate (now sitting Councilmember) Marti Emerald requesting a postponement of the certification (AR 19:309:18628-18629, 19:307:18626, 19:310:18630-18635), CSU approved the 2007 Campus Master Plan Revision and certified the final Environmental Impact Report (EIR) on November 14, 2007. (AR 19:303:18616-18619.)

F. Challenges to the 2007 Campus Master Plan Revision EIR

On December 14, 2007, the City and Agency filed a Petition challenging the Campus Expansion Project EIR certification and related approvals. Separate petitions challenging the Campus Expansion Project were filed by SANDAG and MTS on December 14, 2007. On June 10, 2009, CSU filed a Motion to Discharge the Preemptory Writ of Mandate entered in 2006. (2 CT 475-476.) All cases were consolidated into one action.

After a one day bench trial on the matter, the court denied the Petitions and granted the Motion to Discharge. (6 CT 1553-1585.) City filed objections to the Proposed Statement of Decision (PSOD) on January 27, 2010. (7 CT 1586-1596.) Other petitioners also filed objections to the PSOD. (7 CT 1597-1603.) On February 10, 2010, CSU filed a response to City's objections. (7 CT 1612-1621.) On February 11, 2010, the trial court entered the final Statement of Decision (SOD) without change from the PSOD. (7 CT 1622-1654.) The trial court entered final judgment on March 26, 2010. (7 CT 1655-1659.) Judgment was entered on April 23, 2010. (7 CT 1660-1668.) The City, MTS and SANDAG appealed. The Court of Appeal, Fourth Appellate District issued its ruling on December 13, 2011.[3]

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[3] CSU does not challenge the Court of Appeal ruling that City exhausted its administrative remedies prior to filing this CEQA action. (Typed Opn., p. 42.) When a brief fails to contain a legal argument with citation of authorities, a reviewing court may treat the arguments as waived or abandoned. (*Ellenberger v. Espinosa* (1994) 30 Cal.App.4th 943, 948.) Generally, asserted grounds for appeal that are unsupported by any citation to authority and that merely complain of error without presenting a coherent legal argument are deemed abandoned and unworthy of discussion. (*Wright v. City of Los Angeles* (2001) 93 Cal.App.4th 683, 689. See *Rossiter v. Benoit* (1979) 88 Cal.App.3d 706, 710-711[issue treated as abandoned where no argument or citation to authority in opening brief supported the issue].) CSU did not argue, much less cite to any authority, that City failed to exhaust its administrative remedies. (Opening Brief, p. 42, fn. 9) Thus, the argument is waived.

ARGUMENT

I. THE *CITY OF MARINA* CASE CONFIRMED CSU'S CEQA OBLIGATIONS AND DID NOT CREATE ANY RESTRICTIONS OR LIMITATIONS TO THOSE OBLIGATIONS

A. Standard of Review

As CEQA directs, this matter is reviewed under the abuse of discretion standard. (Pub. Resources Code § 21168.5.) 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. (*Ibid.*) Although this standard would command much deference to factual and environmental conclusions in the EIR based on conflicting evidence (e.g., *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 393, 409), no such conclusions are at issue. The question at issue is whether CSU made the proper legal interpretation of *City of Marina* to limit its mitigation obligations. (Pub. Resources Code § 21168.5). These findings depend on a disputed question of law; a question reviewed de novo. (*City of Marina*, 39 Cal.4th 355-356; *20th Century Ins. Co. v. Garamendi* (1994) 8 Cal.4th 216, 271; *Connerly v. State Personnel Bd.* (2006) 37 Cal.4th 1169, 1175.) In the context of review for abuse of discretion, an agency's "use of an erroneous legal standard constitutes a failure to proceed in a manner required by law." (*No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 88; see *also Save Our Peninsula Committee v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 118.)

De novo review of legal questions is consistent with the principle that, in CEQA cases, "'[t]he court does not pass upon the correctness of the EIR's environmental conclusions, but only upon its sufficiency as an 'informative document.'" (*Laurel Heights Improvement Assn. v. Regents of*

University of California, 47 Cal.3d at 392, quoting *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 189.)

B. CEQA Prohibits Project Approval Before a Reasonable Plan to Implement Feasible Mitigation is Established by CSU

CEQA generally requires preparation and certification of an EIR by a lead public agency on any proposed project that may have a significant effect on the environment. (Pub. Resources Code §§ 21080(d), 21082.2(d), 21100(a), 21151.) The EIR must describe, in detail, all the project's significant effects on the environment. (*Sunnyvale West Neighborhood Assn. v. City of Sunnyvale City Council* (2010) 190 Cal.App.4th 1351, 1372.) "In evaluating the significance of the environmental effect of a project, the lead agency shall consider direct physical changes in the environment which may be caused by the project and reasonably foreseeable indirect physical changes in the environment which may be caused by the project." (Cal. Code Regs., tit. 14, § 15064(d).)[4]

Before a public agency may approve a project for which the EIR has identified significant effects on the environment, CEQA requires the public agency to mitigate or avoid the identified impacts and to discuss feasible methods of mitigation. (*City of Marina*, 39 Cal.4th at 350; Pub. Resources Code §§ 21002, 21002.1, 21081, 21100(b)(3), 21151; CEQA Guidelines § 15126.4.) "A public agency shall provide that measures to mitigate or avoid significant effects on the environment are fully enforceable through permit conditions, agreements, or other measures. . . ." (Pub. Resources Code § 21081.6(b); CEQA Guidelines § 15126.4(a)(2); *Rio Vista Farm Bureau*

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

Center v. County of Solano (1992) 5 Cal.App.4th 351, 376-377; *Save Round Alliance v. County of Inyo* (2007) 157 Cal.App.4th 1437.)

When an agency finds that mitigation is infeasible, it must adopt a statement of overriding considerations. (Pub. Resources Code § 21081(b); CEQA Guidelines §15093; *Woodward Park Homeowners Assn., Inc. v. City of Fresno* (2007) 150 Cal.App.4th 683, 717.) The agency must make findings that the specific overriding economic, legal or social, technological or other benefits of the project outweigh the significant effects on the environment. (CEQA Guidelines § 15093.) These findings constitute the principal means chosen by the Legislature to enforce the state's declared policy "that public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects." (Pub. Resources Code § 21002.)

Under the proposed Campus Expansion Project, there will be significant impacts to fifteen off-site intersections, eight street segments, one freeway ramp meter, and four freeway mainline segments. (AR 18:265:17501;19:297:18465.) Cit has estimated that the mitigation necessary would cost approximately $20 million dollars. (AR 18:264:17153.) The EIR identifies specific mitigation measures for each of the impacts (AR 19:297:18466-18473) and states that, in compliance with *City of Marina*, CSU has requested "funding from the state Legislature to pay its fair-share of the mitigation costs associated with the identified significant impacts." (AR 19:297:18465, 18:264:17159-17160.) CSU asserts, however, that "because CSU cannot guarantee that its request to the Governor and the Legislature for the necessary mitigation funding will be approved,... or that the funding will be granted in the amount

requested,...the identified significant impacts are determined to be significant and unavoidable." (AR 19:297:18466, 19:297:18473-18474.)[5] Based thereon, CSU made a finding that "specific economic, legal, social, technological, or other considerations make infeasible the alternatives identified in the EIR and the identified transportation/circulation and parking impacts are thereby acceptable because of specific overriding considerations." (AR 19:297:18474.)

CSU's findings do not render the mitigation infeasible because *City of Marina* did not foreclose CSU from meeting its CEQA obligations by funding the mitigation from sources other than the Legislature. CSU's position that it need only pay for mitigation if it gets money makes the mitigation illusory preventing CSU from approving the project. (*Save Our Peninsula Committee*, 87 Cal.App.4th at 141.)

Mitigating conditions are not mere expressions of hope. (*Lincoln Place Tenants Assn. v. City of Los Angeles* (2005) 130 Cal.App.4th 1491, 1508.) A commitment to pay fees without any evidence that mitigation will actually occur is inadequate. (*City of Marina*, 39 Cal. 4th at 365.) "[R]eliance on tentative plans for future mitigation after completion of the CEQA process significantly undermines CEQA's goals of full disclosure and informed decision making; and consequently, these mitigation plans have been overturned on judicial review as constituting improper deferral

[5] The EIR also included a finding that the mitigation was infeasible because Appellate could not guarantee any monies it did provide would actually fund mitigation because "the mitigation improvements are within the responsibility and jurisdiction" of other public entities. The Court of Appeal held "[T]he DEIR, the FEIR, and the Findings do not contain any detailed discussion showing City or other public agencies will not take measures to fund and implement mitigation measures within their respective jurisdictions and control." (Typed Opn., p. 38.) CSU does not challenge this ruling, thus, the argument is waived. (*Ellenberger v. Espinosa* (1994) 30 Cal.App.4th 943, 948.)

of environmental assessment." (*Communities for a Better Env't v. City of Richmond* (2010) 184 Cal.App.4th 70, 92, reh'g denied (May 13, 2010).) Here, CSU deferred the most significant aspect of its fair-share mitigation measures—the actual payment thereof—until (and if) the Legislature appropriated the funds, which would or would not happen until after the approval of the EIR. This is not only an improper deferral of mitigation under CEQA, but also a failure of full disclosure and informed decision making. The proper solution was not to defer the adoption of mitigation measures until after the project's approval; but, rather, to defer approval of the project until proposed mitigation measures were fully developed. (*Id.* at 95.)

Moreover, if CSU is able to avoid funding feasible mitigation based upon a finding that mitigation would be implemented when, and if, a separate funding mechanism was funded by a third-party source, any agency would have the right to comply with CEQA in this manner. Public agencies could create special assessment districts or other funding mechanism which would depend on third party funding to pay for feasible mitigation. This would defeat the primary purpose of CEQA and lead to more projects being approved without certainty of ensuring mitigation is implemented.

Therefore, certification of the EIR and approval of the Mitigation, Monitoring and Responsibility Plan (MMRP) for the Campus Expansion Project identifying 29 traffic mitigation measures, without a plan to fund or implement these measures, was an abuse of discretion.

C. CSU's Interpretation That *City Of Marina* Created A Limitation On Its Mitigation Obligations Under CEQA Was Wrong

The *City of Marina* ruling confirmed CSU's duty to pay for feasible mitigation, and did not create any constraints on or exemptions to fulfilling those obligations as argued by CSU.

CSU relies on the following dictum from *City of Marina* to support its claim that it was not required to disclose or consider any other funding sources to pay for feasible mitigation prior to approval of the Campus Expansion Project:

> "[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."

The issue presented in *City of Marina* was on the legality of disclaiming the responsibility to mitigate off-campus environmental effects; the source and scope of mitigation funding was not at issue. As the Appellate Court properly stated "[T]he language in *Marina* at issue is dictum because it was not necessary for the holding or disposition." (Typed Opn., p. 29.)

As stated by the Court of Appeal, "The language in *City of Marina* on which CSU relied is contained in a paragraph *after* the court held that mitigation was not the exclusive responsibility of FORA and CSU had an obligation under CEQA to mitigation or avoid the project's off-site environmental effects by paying a third party to perform those acts if payments were feasible and on-campus actions could not adequately mitigate those effects." (Typed Opn. pp. 28-29, emphasis original.) The

Court of Appeal further noted that "*Marina* then noted CSU had not made any request of the Legislature for off-site mitigation funding because CSU (erroneously) concluded it did not have any responsibility under CEQA to mitigate the off-site environmental effects of its project (Typed Opn., pp. 28-29) and "[F]or [CSU] to disclaim responsibility for making such payments before [it has] complied with [its] statutory obligation to ask the Legislature for the necessary funds is premature, at the very least." (Typed Opn., p. 29) *City of Marina* suggested that if CSU could not adequately mitigate significant off-site effects by performing on-campus acts, it could feasibly mitigate those off-site effects by paying a third party to perform off-site mitigation. (*Id.* at 367.) For purposes of *stare decisis*, it was the above discussion that constituted the court's reasoning necessary to its decision. Contrary to CSU's theory, the additional statements on which it relies were supplementary or explanatory comments to its *ratio decidendi* and were dicta. (*Western Landscape Construction v. Bank of America* (1997) 58 Cal.App.4th 57, 61; *Gogri v. Jack in the Box Inc.* (2008) 166 Cal.App.4th 255, 272.)

Contrary to CSU's position, nothing in *City of Marina* constrained CSU from using all available funding sources to ensure implementation of feasible mitigation. Failure to disclose and consider other sources, based upon its misinterpretation of *City of Marina*, rendered the EIR defective. An EIR that erroneously disclaims the power and duty to mitigate identified environmental effects based on erroneous legal assumptions is not sufficient as an informative document, and the decision to approve the project must be set aside. (*City of Marina*, 39 Cal.4th at 356.)

D. CSU Cannot Rely On *City of Marina* to Limit Its CEQA Obligations Because the Issues In This Case Were Not Before The Court In *City Of Marina*

This case takes *City of Marina* one step further. As set forth above, CSU's obligation to pay for or contribute to payment of mitigation measures for off-site impacts was confirmed in the *City of Marina*; now the Court must decide the scope of that requirement under CEQA.

Several components of the Campus Expansion Project includes commercial projects not funded by the Legislature, including development of off-campus faculty housing (AR 20:322:20245-20246), a hotel (AR 20:322:20245) and a conference center (AR 20:322:20244.) *City of Marina* did not address the circumstances presented here in which portions of the project are not subject to legislative funding. Thus, the language CSU relies on regarding Legislative appropriation could not have addressed the issues presented in this case. During the Administrative Process, CSU did not distinguish those portions of the project or calculate a "fair share" payment for the portions that were not designed or constructed using legislative funds. Thus, even if CSU were correct that *City of Marina* limited its off-campus mitigation funding obligations to only those funds requested and received by the Legislature, at the very least, CSU should have funded the mitigation made necessary by the commercial, non-legislative funded portions of the Campus Expansion Project.

Moreover, CSU's claim that it is constrained from using any funds other than those specifically allocated for environmental mitigation is strained by the fact that CSU has made payments for off-campus mitigation to other cities even though the Legislature has never funded CSU's off-site mitigation budget item. (see www.calstate.edu.budget/reports, Report on

Proposed Campus Physical Master Plan Revisions and Mitigation Agreements for Off-Campus Impacts (April 12, 2011, May 2, 2012).)

Because *City of Marina* did not decide the issues now before this Court, CSU cannot legitimately rely on the language from *City of Marina* cited above for its claim that its mitigation obligations under CEQA were fulfilled. (*People v. Jennings* (2010) 50 Cal.4th 616, 684; *Dey v. Continental Cent. Credit* (2008) 170 Cal.App.4th 721, 728 ["A decision is authority only for the point actually passed on by the court and directly involved in the case."]; *Rosen v. State Farm General Ins. Co.* (2003) 30 Cal.4th 1070, 1076 ["An opinion is only authority for those issues actually considered or decided."]

E. *City Of Marina* Could Not Create CSU's Hypothesized Legal Restriction Because Only The Legislature Can Create CEQA Exemptions

CSU's claim that it can proceed with projects with unfunded mitigation hypothesizes a new, judicially-created exemption for state agencies. There is no such CEQA exemption, and only the Legislature can excuse a project or category of projects from compliance with CEQA. (Pub. Resources Code §§ 21080-21084; CEQA Guidelines §§15260-15300.)

CEQA is a comprehensive legislative scheme designed to provide long term protection to the environment. (Pub. Resources Code § 21001.) The fundamental purpose of CEQA is to promote "[t]he maintenance of a quality environment for the people of this state now and in the future ...." (Pub. Resources Code § 21000(a).) When construing CEQA for the first time, the Court "conclude[d] that the Legislature intended [it] to be interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language." (*Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 259.)

Since its the enactment in 1970, the Legislature has made careful and measured choices about projects and categories of projects that are exempt from CEQA review. (Pub. Resources Code § 21080 *et seq.*) Courts, however, do not sit in review of the Legislature's wisdom in balancing these policies against the goal of environmental protection because, no matter how important its original purpose, CEQA is a legislative act, and the Legislature both had and retains the authority to limit the projects to which CEQA applies. (*Napa Valley Wine Train, Inc. v. Public Utilities Com.* (1990) 50 Cal.3d 370, 376-377; *Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, 1230.)

Absent an express statutory or categorical exemption from the requirements of CEQA, courts cannot infer an exemption unless they discern a clear legislative intent to exempt the activity. (*Plastic Pipe & Fittings Assn. v. California Bldg. Standards Comm.* (2004) 124 Cal.App.4th 1390, 1413.) Statutory exemptions are those granted by the Legislature. (CEQA Guidelines, Article 18.) A statutory exemption only applies if a project falls under its definition, regardless of the project's potential impacts to the environment. (*Western Municipal Water District of Riverside County v. Superior Court of San Bernardino County* (1986) 187 Cal.App.3d 1104.) A categorical exemption must be based on a finding by the Secretary for Resources that the class of projects does not have a significant effect on the environment, and thus, is exempt from CEQA. (CEQA Guidelines, Article 19.)

In addition to the exemptions which have been a part of the CEQA statutory scheme since its passage, the Legislature does create new exemptions when it deems it important and necessary for the state. For example, during the 2011 legislative session, the California legislature

added sections 21080.35 and 21094.5 to the Public Resources Code, which create new CEQA statutory exemptions for solar energy systems installed on the roof of an existing building or at an existing parking lot and reduces the CEQA requirements for in-fill projects, respectively. Since *City of Marina*, the Legislature has not created a CEQA exemption for CSU's Campus Expansion Project.

Instead of relying on a non-existent legislative exemption, CSU tries to create the "what-we-do-is-more-important" exemption. Throughout the Opening Brief, CSU's position is that its school mission is simply more important than the environmental impacts associated with the traffic impacts on the community and citizens of San Diego. CSU does not explain how its argument might supersede this Court's determination that "while education may be [CSU's] core function, to avoid or mitigate the environmental effects of its projects is also one of [CSU's] functions." (*City of Marina*, 39 Cal.4th at 360.) Thus, CSU cannot prioritize its educational mission over its CEQA obligations.

Moreover, a project proponent cannot decide which environmental impacts it deems worthy to mitigate. By implying that City's traffic impacts are less important than CSU's project, CSU is claiming that it can simply ignore the Legislature's mandate and decide some environmental impacts are necessary to mitigate while others are not. 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. (*Santa Clarita Organization for Planning the Environment v. City of Santa Clarita* (2011) 197 Cal.App.4th 1042.)

Compliance with CEQA and mitigating environmental impacts is necessary to give effect to the Legislature's intent of CEQA to "create and maintain conditions under which man and nature can exist in productive harmony to fulfill the social and economic requirements of present and future generations preservation of the environment for generations to come." (Pub. Resources Code § 21001(e.)). CSU may not ignore this legislatively declared policy or the business concerns of the Chamber of Commerce (AR 19:290:18380), life-safety concerns regarding emergency vehicles and access to Alvarado Hospital (AR 17:263:16957, 17:263:16986, 17:263:16997-98, 17:263:17052, 17:263:17062, 17:263:17095) and safety concerns raised by the Highway Patrol which result from CSU's Campus Expansion Project. (AR 3:17:20100.)

The Legislature has not exempted CSU's Campus Expansion Project, thus, CSU must comply with all CEQA requirements.

F. The Legislature Did Not Limit CSU's Mitigation Funding Obligations Under CEQA Following *City of Marina*

CSU contends that the Legislature responded to *City of Marina*, and, by omission, limited CSU's mitigation obligations as CSU interprets them under *City of Marina*. (Opening Brief, p. 23.) The Public Resources Code and the CEQA Guidelines provide clear legislative requirements regarding mitigation obligations. (Pub. Resources Code § 21002.1(b); *City of Marina*, 39 Cal.4th at 368- 369.) Absent an express Legislative exemption, the requirements must be met.

In 2009, the Legislature addressed *City of Marina* by revising sections of the Education Code relating to public postsecondary reporting requirements. The Legislature did not create any new or different limitation

on CSU's obligations under CEQA. The 2009 legislation was passed to ensure that schools addressed the effect of negative impact campus expansion plans have on the environment. The legislation did not limit, and instead highlighted, the responsibilities of the educational system to the environment. The Legislature stated:

> (d) (1) The Legislature further finds and declares that the expansion of campus enrollment and facilities may negatively affect the surrounding environment. In view of the case *City of Marina v. the Board of Trustees of the California State University* (2006) 639 Cal.4th 341, it is the intent of the Legislature that the California State University take steps to reach agreements with local public agencies regarding the mitigation of off-campus impacts related to campus growth and development. (Ed. Code § 67504(d)(1).)

The legislation did not create the express restriction claimed by CSU. In construing a statute, courts presume that the Legislature, when enacting a statute, was aware of existing related laws and intended to maintain a consistent body of rules. (*Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2009) 173 Cal.App.4th 13, 21, review denied.) "The Legislature's failure to include an express . . . exception within the statutory scheme is significant, because the Legislature knows how to craft such an exception when it wishes to do so." (*Bernard v. Foley* (2006) 39 Cal.4th 794, 811.) Courts do not construe statutes in isolation, but rather read every statute with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness. (*Horwich v. Superior Court* (1999) 21 Cal.4th 272, 276.) Here, the Legislature was aware of *City of Marina* and did not create an express directive limiting CSU's CEQA obligations. Without an express

exemption, CSU must meet its mitigation obligations set forth in the Public Resources Code and CEQA Guidelines.

II. AS A RESULT OF CSU'S ERRONEOUS INTERPRETATION OF *CITY OF MARINA*, THE EIR FAILED TO IDENTIFY AND IMPLEMENT FEASIBLE MITIGATION AS REQUIRED UNDER CEQA

CSU's misinterpretation of *City of Marina* resulted in a number of defects to the EIR. Specifically, CSU 1) failed to look at alternate funding sources to mitigate feasible mitigation before project approval, 2) ignored its discretion to budget for mitigation as part of the project components of the Campus Expansion Project, and 3) failed to adequately discuss possible feasible on-campus measures to reduce or avoid off-site mitigation. These failures are an abuse of a discretion requiring revocation of the project approval.

A. Standard of Review

Under CEQA, the court must determine whether the agency has committed a prejudicial abuse of discretion. (Pub. Resources Code § 21168.5.) The certification of a legally inadequate EIR is a prejudicial abuse of discretion. (Pub. Resources Code § 21005(a); *Citizens to Preserve the Ojai v. County of Ventura* (1985) 176 Cal.App.3d 421, 428.) An abuse of discretion is established if: 1) The agency's determination or decision is not supported by substantial evidence; or 2) The agency has failed to proceed in a manner required by law. (*Id.*)

Under the substantial evidence standard, the court must determine, as a legal matter, "whether the EIR is sufficient as an informational document." (*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 711.) "Substantial evidence" means "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." (CEQA Guidelines § 15384(a).) While a court "may not substitute our judgment for that of the decision makers, it must ensure strict compliance with the procedures and mandates of the statute." (*Laurel Heights Improvement Assn.*, 47 Cal.3d 376, at 408, 409, fn. 12; *Topanga Assn. For A Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 514; *Save Our Peninsula Committee v. Monterey County Board of Supervisors*, 87 Cal.App.4th at 118.)

B. The EIR Is Deficient Because It Failed To Identify and Discuss Feasible Options To Mitigate Identified Adverse Environmental Effects Caused by the Campus Expansion Project

City of Marina did not absolve CSU of its CEQA obligations by the act of merely requesting funds from the Legislature. Instead, *City of Marina* provided two methods for CSU to meet its off-campus mitigation obligations. First, *City of Marina* confirms that a public agency can make a voluntary and discretionary payment to discharge its duty under CEQA to mitigate environmental effects of its project. (*City of Marina* at 357, 358.) Second, the Court stated CSU could alter the project on-campus to reduce effects off-campus and, thus, reduce the mitigation required. (*City of Marina* at 360, 367.)

If CSU had not erroneously limited its obligations based upon its interpretation of *City of Marina*, it should have considered both these options prior to approving the Campus Expansion Project.

III. CSU CAN USE FUNDS APPROPRIATED THROUGH THE LEGISLATURE TO PAY FOR OFF-CAMPUS MITIGATION TO ENSURE IMPLEMENTATION OF MITIGATION MEASURES

CSU has the authority to fund off-campus mitigation as part of the power and responsibility conferred on CSU for construction and development of state university campuses. Public agencies may use their discretionary powers granted by laws other than CEQA to mitigate environmental impacts. (Pub. Resources Code § 21004.) While CEQA does not expand the powers granted by other laws; when a public agency adopts measures to mitigate an environmental impact, it may exercise those express or implied powers provided by law other than CEQA. (Pub. Resources Code § 21004; CEQA Guidelines § 15040(d).) The declaration of legislative intent accompanying Public Resource Code section 21004 states that the statute is intended to confirm an agency's broad authority to mitigate. (Stats 1982 ch 1438, § 4.) Additionally, the CEQA Guidelines provide that where another law grants an agency discretionary powers, CEQA supplements those discretionary powers by authorizing the agency to use the discretionary powers to mitigate or avoid significant effects on the environment when it is feasible to do so with respect to projects subject to the powers of the agency. (CEQA Guidelines § 15040(c).)

CSU is expressly authorized to fund campus construction and related expenses required to carry out construction of a project: Trustees of the State of California State University shall have full power and responsibility in the construction and development of any state university campus, and any buildings or other facilities or improvements connected with the California State University. (Ed. Code § 66606.) Further, CSU may expend all money appropriated for the support and maintenance of the [CSU] (*id.*, §

89750), and provides broad authorization to accomplish this development. (Ed. Code § 89036(a).) Based thereon, CSU has both the responsibility and jurisdiction within the meaning of Public Resources Code section 21081, subdivision (a)(2), to contribute to the cost of off-site infrastructure improvements needed to mitigate significant environmental impacts of an expansion project. The authority provided under the Education Code read in conjunction with CEQA, provides CSU broad authority to mitigate off-site environmental impacts. (*San Franciscans for Reasonable Growth v. City and County of San Francisco* (1989) 209 Cal.App.3d 1502, 1525.)

The EIR for the Campus Expansion Project must address this and other non-legislative sources (ie, private gifts, fundraising, sale of property, subsequent requests to the Legislature) for mitigation funding before it concludes that identified mitigation is infeasible.

A. CSU Received Money for Campus Construction and Has Discretion and Authority to Use Those Funds to Pay for Off-Campus Mitigation

As part of university operations, CSU prepares a Capital Improvement Program Budget and Capital Improvement Plan which sets forth the needs for state university campus construction and funding requests to accomplish those goals. (AR 20:322:20052, 20:322:20052, 20:322:20067-20332, 20:322:20235-20247, 20:322:20069, 20:322:20235-20247.) The Improvement Program sets forth the total budget request and priority of funding. (AR 20:322:20051-20333.) The budget documents acknowledge the *City of Marina* case and CSU's requirement to pay for off-campus mitigation resulting from the campus expansion construction projects. (AR 20:322:20053.) However, instead of including the costs of off-campus mitigation as part of the general cost of construction in the Capital Outlay Program, CSU separates out the "mitigation costs" from the cost of construction and creates a separate, distinct budget line item request.

(AR 20:322:20052-20053, 20:322:20059.) CSU does not separate out on-campus mitigation from the construction fund.

Despite CSU's claim that it made the mitigation line item a "priority" budget item, CSU specifically advised the State that when considering the budget request, the State monies appropriated to CSU for off-campus mitigation should not come from the monies allocated through the Governor's Compact; rather CSU's request to the Legislature for the mitigation funds was "separate" from all construction projects and intended to be "above and beyond" CSU's normal request. (AR:20:322:20319-20322, 20053,20332-20333; Supp. CT, Exhibit E, 0902; Exhibit F 0903-1038; Supp. CT, Exhibit C, 0595-0608 and Supp. CT, Exhibit W, 1416-1418.)[6] CSU's decision to separate construction funding from mitigation funding leads to the untenable result of major projects with significant environmental impacts being constructed without the corresponding mitigation.

The state budget process did, however, result in an allocation to CSU of over $2.9 billion. (Supp. AR 35:693:S25410-S25453; Supp. CT, Exhibit C, 0704.) After the State appropriates funds to CSU, the appropriations are allocated among the campuses by the Office of the Chancellor. (Supp. AR 35:693:S25410-S25453.) The CSU's Chancellor is given complete discretion to make adjustments to the priority, scope, and ultimate use of the funds provided by the State in connection with the 2008-2009 State Funded Capital Outlay Program. (AR 20:322:20054, 20059-20061; Supp. CT, Exhibits O (1340-1353) and P (1354-1362).)

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[6] CSU has not challenged the Court of Appeal's ruling granting City's Request for Judicial Notice, thus, the issue is waived. (Typed Opn., 49-50.) (*Wright v. City of Los Angeles* (2001) 93 Cal.App.4th 683, 689; See *Rossiter v. Benoit* (1979) 88 Cal.App.3d 706, 710-711.)

Even though CSU had complete discretion to allocate funds to pay for the mitigations measures, it choose not to. To date, no funds have been allocated to pay for mitigation measures identified as necessary by the Campus Expansion Project.

B. Cost of Off-Campus Mitigation Could Be Calculated as Part of Project Expenses Identified in the Capital Outlay Program

CSU received millions of dollars from the State as part of the 2008-2008 Capital Outlay Program budget request. These funds could have been used as part of a reasonable mitigation plan to perform off-campus mitigation. CSU's decision to make "off-campus mitigation" a separate budget line item is not supported by any authority and conflicts with its duties under the Education Code, CEQA and *City of Marina*.

CEQA is designed to ensure that agencies consider and avoid the environmental effects of its development decisions. To meet this obligation, CSU can treat mitigation costs for off-campus impacts as part of the total project cost. Instead, CSU created an artificial, unsupported distinction between the cost of the construction and the cost of off-campus mitigation (significantly, CSU designated on-campus mitigation as a part of the total construction budget). There should be no separation because the requirement to mitigate under CEQA is an inherent part of the project itself.

The interpretation that construction funds and mitigation funds are inseparable was set forth in *County of San Diego v. Grossmont-Cuyamaca Community College District* (2006) 141 Cal.App.4th 86, 103-104. The Appellate Court concluded that the District was authorized under the provisions of the Community College Construction Act of 1980 (Ed. Code, § 81800 et seq.), Education Code section 81949 and CEQA Guidelines 57100 & 57121(f) to spend funds on project related off-campus road and intersection improvements as mitigation measures under CEQA. (*Id.* at

106.) Here, CSU is governed by parallel legislative provisions for state universities authorizing use of construction related funds to pay for off-campus mitigation. This does not, as CSU claims, involve a prohibited review of CSU's budget process or constitute a violation of the separation of powers doctrine. This is simply an available option for CSU to meet its CEQA obligations.

C. CSU Can Fund Feasible Mitigation by Using the Funding Sources Used to Design and Construct Each Particular Component of the Campus Expansion Project

CSU knew of, and should have disclosed, the option of paying for feasible mitigation measures by and through the funding sources proposed for each project component. Each individual project has its own funding source used to design and construct that portion of the Campus Expansion Project.[7] If these sources are available to build the projects, the money

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[7] (1) Adobe Falls Faculty/Staff Housing. The Adobe Falls development is a two phased development of faculty and staff housing units on a site approximately 33 acres in size located north of Interstate 8 (I-8). The Adobe Falls projects are non-state funded Capital Outlay projects and will be built and funded by "outside development interests." (AR 20:322:20245-20246.)

(2) Student Housing. The student housing projects include demolition of two existing student housing structures and the construction of five new housing structures. (AR 15:222:14210-14211.) The student housing projects are non-state funded Capital Outlay projects which will proceed based on a "viable financial plan and qualification for the Systemwide Revenue Bond Program." (AR 20:322:20245-20246.)

(3) Alvarado Park – Land Acquisition. The Alvarado Park is an expansion of the northeastern campus boundary, consisting of multi-phase development (near-term and long-term) of approximately 612,000 GSF of academic/research/medical space, and a 552,000 GSF vehicle parking structure. (AR 15:222:14210.) Project funding for this project component will be provided by campus parking reserves and a future bond sale supported by campus parking fees. (AR 20:322:20246.)

(4) Alvarado Hotel. The Alvarado Hotel project will consist of an approximately 60,000 GSF six-story building with approximately 120 hotel rooms and studio suites. (AR 15:222:14210.) The Alvarado Hotel is a non-state funded Capital Outlay project and will be built and funded by "a viable financial plan and partnership arrangements." (AR 20:322:20245)

sources should also be available to mitigate. The funding sources for each of the individual projects with the Campus Expansion Project are used to plan, construct and operate the facilities. (AR 20:322:20074, 20:322:20053.) There is nothing in the EIR to suggest that CSU considered these funding sources (i.e., bonds , private donations, developer funds, student fees) to fund the mitigation. During the trial court proceedings many of the projects identified above were still in the preliminary planning stage which would have allowed CSU to calculate and incorporate mitigation costs as part of the planning process. (AR 20:322:20242.)

D. Implementing Mitigation Measures with Bonds is Feasible

CSU is capable of using non-state funds for off-site mitigation costs without prior approval from the Legislature. For example, the State University Revenue Bond Act of 1947 (Act) provides CSU with the ability to issue non-state funded revenue bonds. (Ed. Code §§ 90010-90081.) CSU can also use any source of funding available to it, including revenue bonds and revenue bond anticipation notes to construct any project and acquire all property necessary therefore on such terms and conditions as it may deem advisable. (Ed. Code §§ 90061, 90064.) Here, the EIR concludes there are several area roadway improvements required to bring the Campus

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(5) Campus/Alumni Conference Center. A new 70,000 GSF 3-story building to be used for meeting/conference space, office space, food services, and retail services, on approximately one-half acre located east of Cox Arena. (AR 15:222:14211.) The project will be funded with donor funds. (AR 20:322:20244.)

(6) Student Union. This project will include a 70,000 GSF expansion and renovation of the existing Aztec Center to include social space, recreation facilities, student organization offices, food services, and retail services and will be built and funded by "student fees." (AR 15:222:1421, 20:322:20245, Supp. AR 22:343:S21122.) An increase of 10.0% in the State University Fee was approved for fiscal year 2008, which would generate $8.9 million in additional tuition and fees revenue for the University in fiscal year 2008. (Supp. AR 35:693:S25410-S25453.)

Expansion Project's traffic impacts to below a level of significance. This off-site mitigation represents a condition of approval to the Campus Expansion Project; therefore CSU may fund using any mechanism available to it under the Act, including revenue bonds.

In 2003, pursuant to the Act, CSU approved policies and procedures for funding capital improvements with non-state funding through the adoption of Systemwide Revenue Bonds. (3 CT 614-627.) Systemwide Revenue Bonds provide funding for various construction projects, including student residence and dining halls facilities, continuing education buildings, student unions, parking facilities, health facilities, and auxiliary organization facilities at designated campuses within the System as specified by the individual bond documents. (*Id.*) This program has provided CSU with unilateral authority to approve funding for capital projects that otherwise would require legislature approval. To date, CSU has used non-state funded Revenue Bonds to finance student housing, student unions, parking facilities, health facilities, continuing education facilities, and auxiliary organization facilities throughout the CSU system. Since CSU unilaterally manages and disburses funds held within the Systemwide Revenue Bond program, no interaction with or approval by the Legislature is required, and therefore no permission or request for off-site mitigation funding is required.

E. Implementing Mitigation Measures by Altering the Scope of the Project is Feasible

Section 15126.4 of the CEQA Guidelines provides that to ensure mitigation measures are implemented, the mitigation measures can be incorporated into the project design. To incorporate mitigation measures into a project means to amend the project so that the mitigation measures will be implemented, such as reducing the scope of the project requiring

that mitigation measures are implemented as a condition of the project. (*Federation of Hillside and Canyon Assns. v. City of Los Angeles* (2000) 83 Cal.App.4th 1252, 1261, fn. 4.)

The Court of Appeal held that *City of Marina* implicitly recognized that CEQA requires CSU to consider on-campus acts that can mitigate off-site effects. (Typed Opn., pp. 38-39.) While the Court of Appeal acknowledged that the EIR discussed specific project alternatives, the Court held "[CSU] did not expressly discuss possible *feasible* modifications to the Project or other *on-campus acts* that could reduce or eliminate the need for CSU's 'fair-share' funding of off-site mitigation costs. (Typed Opn., p. 39, (emphasis original)(internal citations omitted).) The Court of Appeal held, "[B]ased on our review of the DEIR and FEIR, we do not believe those documents adequately addressed the possibility of reducing or avoiding the need for certain off-site mitigation measures (and CSU's 'fair-share' funding thereof) by taking feasible measures to alter certain on-campus components of the Project or taking other acts on SDSU's campus." (Typed Opn., p. 39.)

Based thereon, the Court held CSU did not proceed in a manner required by law and abused its discretion by certifying the FEIR and approving the Campus Expansion Project. (Typed Opn., p. 40.)

IV. COMPLYING WITH CEQA MITIGATION OBLIGATIONS DOES NOT USURP CSU OF ITS BUDGET DISCRETION

For the first time in any of these judicial proceedings, CSU now claims that there are other funding sources to pay for CEQA mitigation; however, CSU does not need to identify those sources prior to project approval because no one can tell them how to use those funds. CSU claims that requiring it to comply with its mitigation obligations is an improper intervention by the Court because it would tell CSU how to spend its money.

The intention of raising various methods to fund the off-campus mitigation is not an effort to take over or micro-manage CSU's budget process. The City does not dispute CSU's right to manage its own budget, but does dispute that it is not required to use that discretion to comply with CEQA. As a result of CSU's complete failure to provide any information in the EIR or during the Administrative Process about its ability to fund feasible mitigation, City was required to provide this information to the Court to show that the "infeasibility" finding was improper.

Additionally, meeting this requirement will not burden or prejudice CSU. First, based upon the Opening Brief, it does not appear too particularly onerous to set forth CSU's position regarding funding sources. (Opening Brief, pp. 40-46.) This could and should have been done prior to approval of the EIR. Moreover, every campus expansion project may not require extensive discussion regarding funding mitigation measures. But for this project (that included six distinct component parts and unique funding sources for each), it was necessary to identify and discuss all available options before determining the mitigation is infeasible. Had CSU made any effort to disclose information in furtherance of its mitigation obligations, judicial review of its EIR, if necessary, may have led to a different result. However, that is not the posture of this case, and is a decision for a different day.

V. CSU DID NOT MAKE ECONOMIC INFEASIBLITY FINDINGS WHICH SHOULD BE REVIEWED UNDER THE DEFERENTIAL STANDARD OF REVIEW

CSU argues for the first time that it made "economic infeasibility" findings which require review under the deferential standard of review.[8] CSU claims that it had sole discretion to determine that the mitigation was

[8] This legal argument has never previously been raised and should not be considered.

economically infeasible and that decision should be given deference. (Opening Brief, pp. 26-28.) CSU's argument fails because the EIR made no factually findings regarding economic infeasibility of the identified mitigation. The sole basis asserted by CSU for failing to fund feasible mitigation was its interpretation of *City of Marina.*

A finding of economic infeasibility is a high standard requiring specific factual findings supported by substantial evidence in the record. CSU made no such findings and cites to no facts in the record to support this claim. CEQA requires that an EIR, in addition to analyzing the environmental effects of a proposed project, also consider and analyze project alternatives that would reduce adverse environmental impacts. (*In re Bay–Delta etc.* (2008) 43 Cal.4th 1143, 1163.) "The range of potential alternatives ... shall include those that could feasibly accomplish most of the basic objectives of the project and could avoid or substantially lessen one or more of the significant effects." (CEQA Guidelines § 15126.6(c); *Preservation Action Council v. City of San Jose* (2006) 141 Cal.App.4th 1336, 1354.) The EIR shall include sufficient information about each alternative to allow meaningful evaluation, analysis, and comparison with the proposed project...." (CEQA Guidelines § 15126.6(d).)

In *Uphold Our Heritage v. Town of Woodside* (2007) 147 Cal.App.4th 587, Steve Jobs proposed demolition of an historic mansion. The Court determined that the economic infeasibility findings were not supported because there were no estimates or other evidence indicating the likely cost of the replacement home as it compared to the cost of the mitigation required. The Court does not take into account the wealth of the particular project proponent but whether or not the project will be economically successful. In *Uphold Our Heritage*, Jobs provided some information about the economic infeasibility but the Court found it

insufficient. Here, CSU provides no facts or evidence, thus, they cannot met this standard.

In *Association of Irritated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, the Court determined that the economic infeasibility findings were supported because the project proponent was able to show with substantial evidence that the mitigation would eliminate all profit and loss of construction financing. CSU does not come close to meeting this evidentiary burden.

In *Preservation Action Council v. City of San Jose* (2006) 141 Cal.App.4th 1336, the EIR considered a project to build a 162,000–square–foot hardware store, which would have required demolishing a historic building built during the 1950's. A reduced-size alternative, namely, a smaller-scale hardware store, would have allowed the historic building to remain. (*Id.* at 1341-1342.) In *Preservation Action Council*, the City failed to make *any* finding that the reduced-size alternative was infeasible, and there was no substantial evidence in the record to support such a finding. (*Id.* at 1355-1356, emphasis original.) Similarly, CSU made no findings of economically infeasible, thus, their claim should not be upheld.

The cases cited by CSU do not support its position.

In *Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, the Fourth District Court of Appeal upheld the city's determination that on-site or off-site development of 3,100 acres of agricultural land (out of the 7,743 acre project) was considered infeasible mitigation measures in the long term. The court agreed with the city that large scale agriculture would not be economically viable in the long run in Orange County, because of increasing land prices and environmental regulation, higher water and labor costs, higher property taxes, competition from other parts of the state and foreign countries, and growing urbanization. (*Id.* at 1269-1270.) This case had nothing to do with whether the proposed mitigation measures could be

funded in the first place. Thus, *Defend the Bay* does nothing to support CSU's argument that "[e]vidence supporting a determination of infeasibility includes lack of funding" for a mitigation measure.

In *Concerned Citizens of South Central L.A. v. Los Angeles United School District* (1994) 24 Cal.App.4th 826, plaintiffs claimed that the District was obligated to consider, as mitigation measures, the funding of replacement housing or building replacement housing for citizens displaced as a result of the project. (*Id.* at 842.) The Second District Court of Appeal stated, "[w]e are aware of no authority which would require District . . . to consider a mitigation measure which itself may constitute a project at least as complex, ambitious, and costly as the . . . project itself." (*Id.*) The court held that "*[u]nder the circumstances in this case*, the District's failure to discuss infeasible mitigation measures does not constitute a prejudicial abuse of discretion . . ." (*Id.* at 843) (emphasis added). In the present case, the mitigation measure itself is not infeasible, because "[f]ee-based mitigation programs for cumulative traffic impacts—based on fair share-infrastructure contributions by individual projects—have been found to be adequate mitigation measures under CEQA." (*Anderson First Coalition v. City of Anderson* (2005) 130 Cal.App.4th 1173, 1188.) CSU claims that this form of mitigation is made infeasible only because, it argues, it cannot guarantee funding. Further, CSU is required to mitigate its off-campus environmental traffic impacts. (*City of Marina*, 39 Cal.4th at 366-367.) Thus, *Concerned Citizens* does not stand for CSU's position that lack of funding can justify a determination of infeasibility.

CSU also cites *Laurel Heights Improvement Assn. v. Regents of University of California* (1997) 6 Cal.4th 1112, 1141-1142 (*Laurel Heights II*) for its argument that evidence supporting a determination of infeasibility includes the fact that the Legislature has previously rejected the proposed measure, summarizing it as "[agency properly found alternative location for

proposed university expansion infeasible because Legislature urged against further expansion in that location])." (Opening Brief, pp. 26-27.) To analogize *Laurel Heights II* to support CSU's argument in the present case, the Legislature would have had to have denied CSU's request for mitigation funding before CSU made the determination that the fair-share mitigation measures were infeasible. That is not the case here, where CSU states that it had requested the funds but it was uncertain whether the funds would be appropriated. Thus, there was no evidence supporting a determination of infeasibility before that determination was made.

Moreover, where funding for identified mitigation measure is uncertain, and there is no mandate that the measure will actually be implemented as a condition to the development, the lead agency lacks substantial evidence to conclude mitigation measure was incorporated into project, as required by CEQA. (*Federation of Hillside & Canyon Assns. v. City of Los Angeles*, 83 Cal.App.4th at 1260-1262.) This rule of law contravenes CSU's argument that its determination of infeasibility was properly based on lack of funding, because the mitigation measure was not supported by substantial evidence under CEQA in the first place. "[A] commitment to pay fees without any evidence that mitigation will actually occur is inadequate." (*City of Marina*, 39 Cal. 4th at 365.)

VI. THE EDUCATION CODE DOES NOT RESTRICT CSU'S COMPLIANCE WITH CEQA MITIGATION

Neither the Budget Act nor any other section of the Education Code restricts CSU's mitigation funding obligations. (Opening Brief, pp. 21-24.) The Legislature presents broad policy goals, similar to CEQA, but expressly describes the discretion CSU has to manage the policies and programs set forth in the Education Code:

> 66003. It is the intent of the Legislature to outline in statute the broad policy and programmatic goals of the master plan and clear,

concise statewide goals and outcomes for effective implementation of the master plan, attuned to the public interest of the people and State of California, and to expect the system as a whole and the higher education segments to be accountable for attaining those goals. **However, consistent with the spirit of the original master plan and the subsequent updates, it is the intent of the Legislature that the governing boards be given ample discretion in implementing policies and programs necessary to attain those goals.** (Ed. Code § 66003, emphasis added.)

CSU cites to random Education Code funding requirements and then draws the conclusion that the Education Code prohibits funding CEQA mitigation because there is no express section of the Education Code calling for this type of payment. By way of this argument, CSU is arguing for the repeal of the mitigation requirements under CEQA.

Where one or more statutes appear to be in conflict, courts must seek to avoid repeal of any statute by implication. (*San Mateo City School Dist. v. Public Employment Relations Bd.* (1983) 33 Cal.3d 850, 865.) The presumption against implied repeal is so strong that, "[T]o overcome the presumption the two acts must be irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation." (*Western Oil & Gas Assn. v. Monterey Bay Unified Air Pollution Control Dist.* (1989) 49 Cal.3d 408, 419-420.) The courts are bound, if possible, to maintain the integrity of both statutes if the two may stand together. (*Id.*, citations omitted.) Courts have also noted that implied repeal should not be found unless there is undebatable evidence of an intent to supersede the earlier. (*Id.*, citations omitted.)

The clear intent of CEQA requires CSU to identify and fund feasible mitigation prior to approval of the Campus Expansion Project. There is no evidence of any intent that the Education Code intended to repeal or

preempt the requirements under CEQA. Thus, CSU's interpretation of the Education Code should be disregarded because it would lead to the implied repeal of this statutory body of law.

VII. THERE IS NO LEGISLATIVE MANDATE PROHIBITING CSU FROM FUNDING FEASIBLE MITIGATION

CSU claims it cannot spend money on off-site mitigation because the Legislature denied money for that budget item thus, prohibiting CSU from funding the off-site mitigation program/project. (Opening Brief, p. 34.) CSU claims that the "agency's capacity for action is dependent on the Legislature's appropriation." (Opening Brief, p. 34.) As set forth throughout, there is no legal or factual support for CSU's claim that it is restricted by *City of Marina* or the Legislature from meeting its obligations to fund feasible mitigation.

VIII. REQUIRING CSU TO COMPLY WITH CEQA WILL NOT VIOLATE THE SEPARATION OF POWERS DOCTRINE

CSU argues that the Court cannot direct CSU to provide funding for off-site mitigation because it violates the separation of powers doctrine. (Opening Brief, pp. 30-33.) A violation of this doctrine requires the Court to tell the Legislature how to allocate state funds. The City is not requesting the Court to require the Legislature to fund off-site mitigation for CSU's Campus Expansion Project. City is seeking an order requiring CSU to comply with CEQA.

CSU argues that a ruling against CSU is essentially a funding directive to the Legislature. The entirety of this argument relies upon the unsupported legal assertion that CSU is legally constrained from using any money other than that appropriated from the Legislature earmarked for "environmental mitigation." As there is no restriction on CSU to meet its

CEQA obligations separate and apart from Legislative funding, CSU's argument fails.

The separation of powers doctrine limits the authority of one of the three branches of government to take onto itself the core functions of another branch. (*In re Attorney Discipline System* (1998) 19 Cal. 4th 582, 596; *Superior Court v. County of Mendocino* (1996) 13 Cal. 4th 45, 53.) The courts have long recognized that the primary purpose of the separation-of-powers doctrine is to prevent the combination in the hands of a single person or group of the basic or fundamental powers of government. (*Davis v. Municipal Court* (1988) 46 Cal. 3d 64, 76.) Here, an order by the Court requiring CSU to comply with its requirements under CEQA would not result in an intrusion into the functions of the Legislature.

The cases cited by CSU are inapposite because they all address disputes between agencies and the State regarding rights and obligations under state mandates. All the cases cited address Article XIII B, section 6 of the California Constitution which provides "[w]henever the Legislature or any state agency mandates a new program or higher level of service on any local government, the State shall provide a subvention of funds to reimburse such local government for the costs of such program or increased level of service ...." These cases are not relevant to the instant issues.

IX. THE EIR FAILS AS AN INFORMATIONAL DOCUMENT

The purpose of an EIR is to provide state and local agencies and the general public with detailed information on the potentially significant environmental effects that a proposed project is likely to have and to list ways in which the significant environmental effects may be minimized as well as indicate alternatives to the project. (Pub. Resources Code §§ 21002 and 21003.) A local agency must make an initial determination as to which

alternatives are feasible and which are not. (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 569.) If an alternative is identified as at least potentially feasible, an in-depth discussion is required. (*Sierra Club v. County of Napa* (2004) 121 Cal.App.4th 1490, 1504-1505.)

"The failure to provide enough information to permit informed decision-making is fatal." (*Napa Citizens for Honest Gov't v. County of Napa* (2001) 91 Cal.App.4th 342, 361.) "When the informational requirements of CEQA are not complied with, an agency has failed to proceed in a manner required by law and has therefore abused its discretion." (*Id.*, quoting *Save Our Peninsula Committee v. Monterey County Board of Supervisors,* 87 Cal.App.4th at 118.) Failure to comply with procedures that result in the omission of relevant information from the environmental review constitutes a prejudicial abuse of discretion "regardless of whether a different outcome would have resulted" had the agency complied with CEQA's requirements. (*Neighbors of Cavitt Ranch v. County of Placer* (2003) 106 Cal.App.4th 1092, 1100; *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1198, 1208; *Rural Landowners Assn. v. City Council* (1983) 143 Cal.App.3d 1013, 1023 [where "failure to comply with the law results in a subversion of the purposes of CEQA by omitting information from the environmental review process, the error is prejudicial."].) The critical question is whether an alleged procedural violation "deprived the public or local agencies of information relevant to" the project. (*Neighbors of Cavitt Ranch*, 106 Cal.App.4th at 1102; *Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, 1236-1237 [prejudice is presumed where the absence of information "frustrated the purpose of the public comment

provisions of the Forest Practice Act" and made "meaningful assessment of potentially significant environmental impacts" impossible.].)

The public was never provided with all information relevant to this project. Failure to adequately address the alternate mitigation options left the public without the ability to comment and participate in the process. CSU concedes it failed to meet the disclosure requirements of CEQA by setting forth all the funding information in its Opening Brief, none of which was disclosed in the EIR. (Opening Brief, pp. 40-47.) This is information that should have been part of the public process prior to approval. CSU's position that disclosure of funding information would be overly complex and difficult is undermined by its ability to set forth its position regarding the funding methods relevant to the component parts of the Campus Expansion Project in seven pages.

An EIR that incorrectly disclaims the power and duty to mitigate identified environmental effects based on erroneous legal assumptions is not sufficient as an informative document. (*City of Marina*, at 356.) Refusal and failure to discuss the potentially feasible methods of mitigating the indentified traffic impacts was an abuse of discretion.

CSU abused its discretion by certifying the Campus Expansion Project and EIR without relevant and material information regarding funding options for feasible mitigation. As set forth above, it is clear this information was available to CSU at the time of the project was approved and the EIR was certified. Because of CSU's position regarding *City of Marina*, CSU simply choose not to disclose and discuss the various options to pay for the mitigation. This failure is an abuse of discretion and warrants decertification of the EIR.

CONCLUSION

For the reasons set forth herein, CSU failed to proceed in a manner required by law in certifying and approving the 2007 Campus Master Plan Revision EIR in compliance with CEQA and the Public Resources Code. Moreover, this decision, and the statement of overriding considerations justifying the decision, was unsupported by substantial evidence. Accordingly, the decision to certify and adopt the EIR should be set aside, and CSU ordered to prepare and certify a new Environmental Impact Report which meets the standards set forth under CEQA.

Dated: September 17, 2012

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CERTIFICATE OF COMPLIANCE
[CRC 14(c)(1)]

Pursuant to California Rules of Court, rule 8.520(c)(1), I certify that this Answer Brief on the Merits, contains 11,987 words and is printed in a 13-point typeface.

Dated: September 17, 2012

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Court of Appeal, Fourth Appellate District, Division One – No. D057446

PROOF OF SERVICE

S199557

IN THE SUPREME COURT OF CALIFORNIA

City of San Diego, et al., Plaintiffs and Appellants,

v.

Board of Trustees of the California State University, Defendant and Respondent

I, the undersigned, declare that:

I was at least 18 years of age and not a party to the case; I am employed in the County of San Diego, California, where the mailing occurs; and, my business address is 1200 Third Avenue, Suite 1100, San Diego, California, 92101.

I further declare that on September 17, 2012, I served the foregoing **THE CITY OF SAN DIEGO AND REDEVELOPMENT AGENCY OF THE CITY OF SAN DIEGO'S ANSWER BRIEF ON THE MERITS**

I caused the document(s) to be delivered overnight via an overnight delivery service (Golden State Overnight) in lieu of delivery by mail to the addressee(s) on this same day, at my business address shown above, following ordinary business practices, addressed to:

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I declare under penalty of perjury and the laws of the State of California that the foregoing is true and correct. Executed on September 17, 2012, in San Diego, California.

Merlita C. Sarmiento

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