S279242

Supreme Court Case No. S279242

IN THE SUPREME COURT
OF THE
STATE OF CALIFORNIA

MAKE UC A GOOD NEIGHBORHOOD, et al.,
Petitioners and Appellants
v.
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al.,
Respondents,

RESOURCES FOR COMMUNITY DEVELOPMENT,
Real Party in Interest.

ANSWER BRIEF

After a published opinion of the Court of Appeal,
First Appellate District, Division 5, Case No. A165451

Appeal from July 29, 2022, Order and August 2, 2022, Order and Judgment of the Alameda Superior Court; Hon. Frank Roesch, Dept. 17, tel: 510-267-6933, Case No. RG21110142 (Consolidated for Purposes of Trial Only with Case Nos. RG21109910, RG21110157 and 21CV000995)

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I. INTRODUCTION

In their Opening Brief ("OB"), the Regents of the University of California ("UC") make a number of arguments that violate well-established principles that govern both CEQA and mandamus actions.[1]

Regarding student generated noise, much of UC's argument is based on an unfounded fear that CEQA will be abused to discriminate against people based on social classifications. (Opening Brief ("OB"), 12-13, 33-35.) This argument could be made about any law that gives people the right to file a lawsuit. The remedy for any such abuse is not to eviscerate the law; the remedy is careful judicial oversight applying well-developed legal principles. In this case, the governing legal principle is "substantial evidence supporting a fair argument of significant impacts." Careful judicial oversight is exactly what the Court of Appeal provided.

UC borrows the concept of a "protected class" from equal protection law and implies that students are a "protected class." But UC fails to cite a single statute or judicial decision addressing discrimination against "protected classes" and fails to cite any legal authority that students are a "protected class."[2] As a result,

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[1]CEQA is codified at Public Resources Code sections 21000 et seq. In this brief CEQA is cited as "CEQA section #."

[2]UC implies that "undergraduate students" have something in common with "families with children, multi-generational families, low-income people, the formerly unhoused, the formerly incarcerated" (OB, 13, n. 2) but never explains what they have in

UC's discrimination argument is forfeit.

Also, to the extent there are statutory or constitutional protections for various "protected classes," requiring that an agency evaluate the environmental consequences of a proposed project would not interfere with such legal protections. Indeed, if an EIR were to find that a project associated with a protected class would have a significant impact, the agency could decline to mitigate the impact based on legal infeasibility if mitigation would interfere with a pre-existing legal protection for the class. (See e.g., *Kenneth Mebane Ranches v Superior Court* (1992) 10 CA4th 276, 291 (*Kenneth Mebane Ranches*); CEQA, §§ 21004, 21081(a)(3); Guidelines, §§ 15091-15093; 15364.)[3] At that point, the agency could approve the project based on overriding public benefits. (*Kenneth Mebane Ranches*, *supra*; CEQA, §§ 21002.1, 21081(b); Guidelines, §§ 15091-15093.)

Ultimately, UC's discrimination argument is a series of sound bites supporting a thinly disguised request for an exemption from CEQA for "social noise." UC's request for a new exemption is directed to the wrong branch of government.

Regarding Housing Project #2, UC argues that it is a "good" project, suggesting that its compliance with CEQA is unimportant. (E.g., OB, 11-2, 51-52.) This argument is irrelevant

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common that might be relevant to this case.

[3]The CEQA Guidelines are codified at Title 14, California Code of Regulations, sections 15000, et. seq. And are cited herein as "Guidelines."

because judicial review of an EIR does not turn on the courts' assessment of the project's environmental merits. (*Center for Biological Diversity v. California Dept. of Fish and Wildlife* (2015) 62 Cal.4th 204, 240 (*Newhall Ranch I*).)

UC also attempts to use its staff's administrative commitment to build housing in People's Park as a basis for certifying an EIR that fails to analyze *any* alternative sites for that housing. This directly contravenes multiple decisions by this Court. CEQA's purpose is to require environmental review *before* the "bureaucratic and financial momentum ... behind a proposed project ... provid[es] a strong incentive to ignore environmental concerns." (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 395; see also, *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 132.)

UC also violates the rule that it cannot conduct its required CEQA analysis or make its required CEQA findings in its litigation briefs in the first instance. (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 443 (*Vineyard*) ["[t]hat a party's briefs to the court may explain or supplement matters that are obscure or incomplete in the EIR, for example, is irrelevant"].)

For example, UC implies there is something "unique" about People's Park that makes it particularly suited to supportive housing. (OB, 19, citing AR1206-08; OB, 51.)[4] But UC never

[4]"AR" refers to the certified Administrative Record lodged with the trial court and this Court.

explains, in the EIR or its brief what it is about People's Park that makes it particularly suited to supportive housing. Moreover, as discussed below, UC's only support for this "uniqueness" is a document quoting UC Berkeley's Chancellor that is not in evidence because it is not in the administrative record.

UC's brief uses subtle semantic shifts to recast the discussion. A prominent example is UC's nomenclature for the analysis of alternative sites that it failed to include in the project EIR. UC argues that because its staff already analyzed alternative locations in their private deliberations, including any such analysis in the project EIR would be "*pro forma*." It is difficult to imagine a more fundamental misunderstanding of CEQA than UC's obliviousness to the critical role that public participation plays in CEQA procedure. UC's view is that involving the public is *pro forma*! (See *Union of Medical Marijuana Patients, Inc. v. City of San Diego* (2019) 7 Cal.5th 1171, 1184–1185 (*Medical Marijuana*); *Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 516 (*County of Fresno*).)

To suggest that Housing Project #2 is inextricably linked to People's Park, UC renames Housing Project #2 as the "People's Park Project," despite the fact that "People's Park Project" is not used in the project EIR or UC's CEQA findings.

UC created its current predicament by its own decades-long mismanagement of the gross imbalance between student enrollment and student housing at UC Berkeley. The Opinion describes this imbalance as follows:

> UC Berkeley provides housing for only 23 percent of its students, by far the lowest percentage in the UC system. For years, enrollment increases have outpaced new student housing (or "beds"). The prior long range development plan, adopted in 2005, called for construction of just 2,600 beds through 2021. This was 10,000 beds short of the projected enrollment increases over the same period. The university only constructed 1,119 of those planned beds. Making matters worse, within two years of adopting the 2005 plan, the university increased enrollment beyond the plan's 2021 projection. By the 2018-2019 academic year, student enrollment exceeded the 2005 projections by more than 6,000 students. With a population of 39,708 students, the university provides housing for fewer than 9,000. [¶]This has transpired in the midst of a decades-long regional housing crisis.

(Court of Appeal Slip Opinion ("Op."), 3.) The Opinion also notes that UC Berkeley's own survey demonstrates that "approximately 10 percent of undergraduates and approximately 20 percent of doctoral students had experienced homelessness while attending the university." (Op., 43.)

While UC's readiness to build more student housing is long overdue, its history of failing its students in this way cannot be used as an excuse to violate CEQA and run roughshod over all other environmental values in the community, including the value of preserving a local, state, and national historic resource such as People's Park.

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II. FACTUAL BACKGROUND

A. The Project.

UC is required to periodically adopt a LRDP, following certification of an EIR, to guide new construction on each campus. (CEQA §§ 21100(a); 21080.09; Ed. Code § 67504; *Save Berkeley's Neighborhoods v. Regents of University of California* (2020) 51 Cal.App.5th 226, 239-240.)

The LRDP Update proposes a massive building program to accommodate UC Berkeley's large projected increase in population through 2037 and to demolish or renovate an astonishing number and array of buildings and other properties that the EIR and UC's Findings concede are historically and culturally significant, eligible for listing on the California Register of Historic Resources or already listed, for which the demolition or renovation is a significant environmental impact. (AR9803-04 [46 listed, eligible, and potentially eligible resources identified as redevelopment or renovation sites]; 9796; 9808; 9810-11; 185-88; 1258-62.)

Housing Project #2 proposes to demolish People's Park, a City of Berkeley historical landmark. (AR9800-01.) Housing Project #2 would construct two new mixed-use buildings. (AR9697.) The "student housing" building includes two wings, one with 12 stories (at 133 feet) and the other with six stories (at 55 feet); the "supportive housing" building is six stories (at 55 feet). (AR9697, 1210-11.)

Between 2005 and 2037, UC has added and plans to add almost 16,000 students, for a total population increase of about

20,000. Housing this steadily increasing population is a primary driver of the LRDP Update's construction program, including Housing Project #2. (AR9551-53; 10353-54; 14194-95].) The EIR identifies substantial past and proposed increases in campus population:

Enrollment Population	Under-graduate	Graduate	Total Student	Faculty Staff	Totals
2005-06	32,886		32,886	14,818	47,704
2018-19	29,932	9,776	39,708	15,421	55,129
2036-37	35,000	13,200	48,200	19,000	67,200

(AR9572 [Table 3-1]; 14193 [Table 5-3].)

The EIR projects that UC Berkeley will substantially increase population through 2037 by 12,071, or 21.9%, from 55,129 to 67,200, and that 71% of all students and 29% of all faculty will live in Berkeley. (AR10104-05.) The LRDP Update will add at least 13,902 residents to Berkeley for whom it plans to provide housing (AR10112) and another 8,173 residents to Berkeley and nearby jurisdictions for whom UC will not provide housing, including 2,291 new unhoused Berkeley residents. (AR10116.)

In discussing impacts of UC Berkeley's 2007-2019 population growth, which was not evaluated in the 2005 LRDP EIR, the EIR acknowledges that certain impacts are caused by physical development, while others are caused directly by population increases, i.e., "population is a metric of analysis." (AR14194-95.) The EIR concludes that impacts related to air

quality, greenhouse gas ("GHG"), noise, population and housing, public services, and parks and recreation are population-driven. (AR 14195, 14787.)

In its Opening Brief, UC implies that UC Berkeley's population growth is "required" by the State of California. (OB, 15-16.) This is both irrelevant and incorrect. Because it is incorrect, Make UC A Good Neighbor and The People's Park Historic District Advocacy Group ("Good Neighbors") provides the correct facts here.[5]

UC's admissions obligation to California resident undergraduates is system-wide, not specific to an individual campus, and UC has repeatedly agreed to cap or phase undergraduate enrollment at particular campuses in connection with LRDP adoptions. (AR14559, 14509, 14535, 14502, 15204-05, 1306-09, 1348-49.) Neither the EIR nor UC's brief identifies any legally binding requirement governing UC Berkeley's share of statewide enrollment targets.[6] The EIR admits UC has discretion to limit enrollment to match housing capacity, explaining UC

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[5]UC also contradicts this representation, stating that: "The LRDP does not determine, mandate, or commit the campus to any specific level of growth, future enrollment, or population, nor does it set a future population limit." (OB, 15; see also, OB, 34, n. 12; AR14176.)

[6]Further, the state projects that the number of California public high school graduates and K-12 students will decrease during the 15-year LRDP planning horizon, reducing the number of UC admissions needed to satisfy this obligation. (AR1136-37, 1561-68].)

"develops annual enrollment targets for each university" based upon the "capacity of each campus." (AR10098.) The EIR also does not dispute that UC has authority to control and maintain fixed enrollment at any given UC campus while meeting its system-wide obligations for admission of resident undergraduates, e.g., by assigning students to the UC campuses not suffering critical housing shortages. (AR14773-76, 14789-90, 14174-78.)

B. Facts Regarding the EIR's Treatment of "Social Noise Impacts."

Comments and expert opinion discussed below presented substantial evidence supporting a fair argument that student-generated noise may cause significant noise impacts because it will result in repeated, increased numbers of exceedances of noise standards adopted by the EIR as thresholds of significance. But the EIR failed to conduct a qualitative or quantitative assessment of "possible party and noise-related violations" caused by student population increases projected in the LRDP Update (AR10067, 1598-99) and the EIR discussions of noise related to Housing Project #1 and Housing Project #2 do not consider student generated social noise in off-campus private housing (AR10074-75, 10080-81).

The EIR's five sentence treatment of potential social noise impacts related to the LRDP Update consists of the statement in the stationary noise section that "noise generated by residential ... users" is "generally short and intermittent" and the identification of various "noise reduction initiatives" for student

parties, including the Happy Neighbors program, the CalGreeks Alcohol Taskforce, and the City's Exterior Noise Standards. (AR10067.) The EIR provides no discussion of baseline social noise conditions, the effects of increasing student housing and population in affected neighborhoods, increased attendance at off-campus parties by increasing numbers of students housed on- and off-campus, or the efficacy of noise abatement efforts. The EIR's stationary noise significance conclusion is based on mitigation for mechanical equipment noise sources and simply does not address social noise. (AR10067.)

Comments submitted in 2019 regarding UC Berkeley's Draft Supplemental EIR for the Goldman School previously informed UC Berkeley about adverse effects of late-night party and pedestrian noise. (AR1607-14.) Comments on this EIR objected that its assessment is similar to the EIR Judge Seligman rejected in 2019 for its failure to assess baseline and increased community noise and cumulative impacts from enrollment increases or to provide evidence that noise reduction programs are effective. (AR1127, citing 1168-70.) Comments also requested analysis and mitigation of this type of noise, but the FEIR refused, dismissing these comments as "not germane to the environmental evaluation" and "speculative."(AR14540, 14545-56; 14553, 14545-46, 14566, 15060.)

Accordingly, Good Neighbors asked noise consultant Derek Watry to comment on this issue. (AR1587-1743 [Lippe, Watry, Bokovoy, Exhibits].) In Watry's professional opinion, vocal noise from house parties and from late-night pedestrians will exceed

the residential Exterior Noise Limits adopted by the EIR as a threshold of significance. (AR1600-03.) Watry notes the growth in off-campus mini-dorms for students that UC does not house and points out that students in UC housing, with its strict alcohol and party policies, will attend off-campus parties at unregulated locations. (AR1599-600.) Watry projects that the increase in student beds in the EIR study area "portends a 103% increase in unruly parties." (AR1602, citing AR9580, 10114 [DEIR population projections].) Watry concludes that there is no effective physical or regulatory mitigation to avoid these increased incidences of significant impacts from late night drunken pedestrians or unruly student parties. (AR1602-03.)

Watry's expert opinion was based on the projected growth in campus population and on a documented history of growing noise complaints and ineffective abatement efforts prepared by Phillip Bokovoy, who was a leader in UC's "Happy Neighbors" noise abatement program cited by the DEIR. (AR1599-600, citing AR1615-743.) Bokovoy explains that not all noise abatement program recommendations were implemented, that violations continue without real consequence, and that interventions have declined since 2017. (AR1616-18, citing AR1620-97.)

Bokovoy documents his history. He provides City Council findings for its "Second Response Ordinance" that inadequately supervised parties "frequently become loud and unruly to the point that they constitute a threat to the peace, health, safety and general welfare." (AR1666.) Despite this ordinance, the Council later found for that noise disturbances "have become chronic" due

to the "heavy demand for student housing" in off-campus mini-dorms where there are "numerous loud and unruly parties" that "involve the consumption of large amounts of alcoholic beverages," which "contributes to the nuisance conditions affecting the surrounding neighborhood," "frequently" requiring police officers to respond "to disperse uncooperative participants." (AR1715-16.)

Council staff reported 120 noise warning letters and 14 citations in 9 months. (AR1674.) Despite the City's Second Response and mini-dorm ordinances, police reports and neighbor noise complaints have continued. (AR1678-1684 [compilation of Southside Safety Patrol police reports including noise responses]; 1687-97, 1733-1743 [representative 2020-2021 noise complaints].) Bokovoy explains that noise enforcement waned and party noise increased after 2017 due to staffing cutbacks and leadership changes. (AR1618.)

In sum, Bokovoy testifies as a direct participant in UC's noise abatement program and provides extensive documentation of significant social noise impacts due to the proliferation of private "mini-dorm" housing for the student population not housed by UC Berkeley and the inability of the City's ordinances and the UC noise programs to control this source of party noise. (AR1618-19, citing AR1698-1743.)

Watry explains that the LRDP will increase the UC Berkeley population by 22%, i.e., 12,071 persons, including 5,068 undergraduates. (AR1596, citing AR10114 [DEIR].) Watry explains that, contrary to the FEIR, it is not "speculative" to

conclude on the basis of documented past experience that some in this large new student population will "get drunk and make a lot of noise." (AR1596.) Furthermore, "[i]f the population gets bigger, the propensity for noise gets bigger." (AR1598.) This finding is consistent with the City Council's findings. (AR1715-16, 1666.)

C. The Project's Significant Adverse Effect on the Historical Significance of People's Park.

The EIR finds that People's Park is a CEQA historic resource and satisfies Criterion A of the National Register of Historic Places and Criterion 1 of the California Register of Historical Resources at the local level of significance for its association with social and political activism in Berkeley during the late 1960s and 1970s, particularly with regard to UC Berkeley's land use decisions as well as the antiwar movement. (AR9800-01; 11994-12049; 12036-38.)

The EIR found that People's Park "maintains a strong connection to its history of social and political activism, as it has repeatedly been the site of protests in opposition to proposed University of California development and demonstrations to raise awareness of social and political issues including the antiwar movement, protection of free speech, and homelessness." (AR12036-38; see also, AR9800-01; 11994-12049.)

The EIR finds that demolition "would remove [People's Park's] ability to convey its historic significance" and "result in a significant impact [and] substantial adverse change to a historic resource." (AR9810.)

In addition to its direct impacts on People's Park, the EIR

and UC found that Housing Project #2 would have significant and unavoidable adverse effects on up to ten (10) historically significant buildings in the surrounding area. (AR9810-12; 1258-60; 37636-39.) One of these ten buildings, the First Church of Christ Scientist, is a Berkeley Landmark and a National Historic Landmark. (AR37636-37.)

D. Facts Regarding the EIR's Treatment of Alternative Locations For Housing Project #2.

UC's consultants — in the privacy of UC's administrative process — identified at least fifteen other properties in the immediate vicinity of the UC Berkeley campus and People's Park where it could build new student housing. (AR28187-292). Sites near the Campus Park include the Anna Head school site (AR28195-99); 2000 Carleton (AR28214-17); Oxford Tract (AR28226-28); Channing Ellsworth (AR28249-51); Unit 3 (AR28260-62); Foothill North (AR28271-74); and Clark Kerr (AR28286-90). Sites within the Campus Park include Alumni House, Bancroft Parking Structure, and North Field (AR25540); Dwinelle Parking Lot (AR25558); Cesar Chavez Student Center (AR25576-78); Tolman Hall (AR25557); Evans Hall (AR25569); and Edwards Field (AR25581).

Comments objected to the EIR's failure to analyze nearby alternative locations to develop housing (AR14360, 14578-79, 14788-89, 15074, 15117, 15146, 15177) and identified three of the 15 sites that could accommodate more beds than are proposed for Housing Project's #2. These are (1) Channing Ellsworth, bordered by Channing Way, Haste Street and Ellsworth Street, covering

most of the city block (AR24149; see also, AR9575-76); (2) the Golden Bear Center parking lot at 1995 University Avenue, between University Avenue, Berkeley Way, Milvia Street and Bonita Avenue (AR 24148 ["The Center's parking lot covers half of the block" and "was originally approved with the intention of building over the lot, and the parking structure is therefore designed to support construction above"], see also, AR9575-76); and (3) the Lower Hearst parking garage (AR24150). Comments noted that these sites "deserve consideration as alternatives to the Project 1 and Project 2 sites," and that they are "grossly underutilized, and would require no destruction of historic resources." (AR24147-51.)

Yet in preparing its EIR, UC omitted analysis of any alternative site for the housing proposed in People's Park. The Draft EIR briefly mentions, but excludes from its analysis, two alternatives to the LRDP Update that could avoid building in People's Park, including the Historic Resources Avoidance alternative and the Housing Projects #1 and #2 Alternate Locations alternative. (AR10356.) These alternatives are discussed in section IV.B.3, below.

III. STANDARD OF REVIEW

"The 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.'" (*County of Fresno*, *supra*, 6 Cal.5th at 511 (citations omitted).) An EIR must reflect a good faith effort at full disclosure, including "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 I, supra,* 47 Cal.3d at 405; Guidelines, § 15151.)

In reviewing an EIR, courts determine whether the agency prejudicially abused its discretion by: (1) failing to proceed in the manner required by law, or (2) reaching a decision or determination that is not supported by substantial evidence. (*Laurel Heights I*, *supra*, 47 Cal.3d at 392.) "A reviewing court must adjust its scrutiny to the nature of the alleged defect, depending on whether the claim is predominantly one of improper procedure or a dispute over the facts." (*Vineyard, supra,* 40 Cal.4th at 435.)

"Whether an EIR has omitted essential information is a procedural question subject to de novo review." (*County of Fresno*, *supra*, 6 Cal.5th at 515-516; *Banning Ranch Conservancy v. City of Newport Beach* (2017) 2 Cal.5th 918, 935 *(Banning Ranch*). The "ultimate inquiry ... is whether the document includes enough detail 'to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project ... . The inquiry ... is generally subject to independent review." (*County of Fresno*, *supra*, 6 Cal.5th at 516.)

By contrast, courts use the "substantial evidence" test to review an agency's "substantive factual conclusions." (*Vineyard*, *supra*, 40 Cal.4th at 435.) But "the existence of substantial evidence supporting the agency's ultimate decision ... *is not*

relevant when one is assessing a violation of [CEQA's] information disclosure provisions." (*Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 82 (*CBE v. Richmond*) (italics added).) While substantial evidence review involves deference to the agency's role as fact-finder, such deference does not mean abdication of vigorous judicial review. (*Laurel Heights I, supra,* 47 Cal.3d at 409 ["We do not suggest that a court must uncritically rely on every study or analysis presented by a project proponent in support of its position..."].)

IV. ARGUMENT

A. The EIR's Analysis of Social Noise Impacts is Legally Inadequate.

UC failed to assess the significance of noise to be generated by the addition of thousands of students to Berkeley's neighborhoods. The Opinion held that the record provides substantial evidence that social noise impacts would be significant (Op., 30-36) and that UC's "decision to skip the issue, based on the unfounded notion that the impacts are speculative, was a prejudicial abuse of discretion and requires them now to do the analysis that they should have done at the outset." (Op., 37-38, citing *Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1111-12 (*Amador Waterways*); CEQA, § 21100, subds. (b)(1), (c).)

UC's arguments to the contrary amount to a thinly disguised request for an exemption from CEQA and, as such, are directed to the wrong branch of government.

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1. Standard of Review.

The standard of review for Good Neighbors' noise related claim is the "fair argument" standard. An EIR must analyze every issue for which the record contains substantial evidence supporting a "fair argument" of significant impact. (*Visalia Retail, LP v. City of Visalia* (2018) 20 Cal.App.5th 1, 13; *Amador Waterways, supra,* 116 Cal.App.4th at 1109.)

The fair argument standard is met when a "lead agency is presented with a fair argument that a project may have a significant effect on the environment, ... even though it may also be presented with other substantial evidence that the project will not have a significant effect." (*Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1111 (*Berkeley Hillside*); Guidelines, § 15064(f)(1).)

This presents a question of law reviewed de novo. (*Berkeley Hillside*, *supra*, 60 Cal.4th at 1112.)

2. The Court of Appeal's Ruling is Not Based on Prejudice or Bias; it is Based on Evidence.

UC mischaracterizes Good Neighbors' noise claim as based on "prejudice and bias" (OB, 34, 37), as an objection to the "characteristics" of students (OB, 31), as based on a presumption that students have an "anti-social predilection" (OB, 33) or "anti-social tendencies." (OB, 35.) UC also argues that accepting the inference that students will generate noise in excess of City standards will validate future arguments about environmental impacts based on bias and prejudice about families, low-income people, formerly homeless people, formerly incarcerated people,

(OB, 31, 33), public housing tenants including "female-headed multi-problem families" (OB, 32), and "particular social groups" (OB, 31). Similarly, UC argues that the Opinion "not only endorses, but would affirmatively require, elevation of speculation and unsubstantiated opinion to the level of substantial evidence." (OB, 36.)

UC's hyperventilated fear that the Opinion may give the public a legal club with which to discriminate against social groups based on stereotyping is entirely unfounded. CEQA is elegantly constructed to eliminate such concerns.

Under CEQA, the potential significance of noise impacts generated by any group of people, however identified, must meet the "fair argument" standard to trigger any obligation to study the issue in an environmental impact report ("EIR"). (*Visalia Retail, supra,* 20 Cal.App.5th at 13; *Amador Waterways, supra,* 116 Cal.App.4th at 1109.) The fair argument standard is met when "it can be fairly argued on the basis of substantial evidence that the project may have a significant environmental impact." (*Berkeley Hillside, supra,* 60 Cal.4th at 1111, quoting *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 75 (*No Oil*).) "Substantial evidence" means facts or reasonable assumptions predicated on facts. (Guidelines, § 15384, subd. (b).) It does not include predictions based on stereotypes. (See Op., 34-35.) "Complaints, fears, and suspicions about a project's potential environmental impact likewise do not constitute substantial evidence. [Citations.]" (*Joshua Tree Downtown Business Alliance v. County of San Bernardino* (2016) 1 Cal.App.5th 677, 690.)

As the Opinion notes, the record in this case easily meets the fair argument standard. (Op., 36.)

Second, even if an EIR, after studying noise generated by an identifiable social group based on facts and evidence-based inference, finds that a project will cause significant noise impacts, this does not prevent the lead agency from approving the project. To do so, the lead agency is required to mitigate the impact to the extent feasible (*City of Marina v. Board of Trustees of California State University* (2006) 39 Cal.4th 341, 350, 368 (*City of Marina*); CEQA § 21081(a)(1); Guidelines § 15091(a)(1), 15092(b)(2)(A)); and for unavoidably significant impacts (meaning impacts that cannot be mitigated to a less-than-significant level), the agency must find that the social or economic benefit of the project outweighs the environmental harm before approval (*City of Marina, supra,* 39 Cal.4th at 350, 368; CEQA § 21081(a)(1); Guidelines § 15092(b)(2)(B), 15093(a), (b)). Thus, UC's speculation that applying CEQA to "social noise" will necessarily preclude approval of housing and education projects is wrong.

UC's position would eliminate any and all fact gathering or analysis regarding noise generated by an identifiable social group based solely on fear that someone might "abuse" CEQA and file administrative comments or a lawsuit based on stereotyping. But refusing to investigate or analyze an issue is antithetical to CEQA and is exactly the problem that CEQA is intended to combat. (*Medical Marijuana, supra,* 7 Cal.5th at 1184-1185.)

As noted above, UC's argument based on fear of abuse can be made about any law that gives people legal rights to protect

their interests. The remedy is not to weaken the law; the remedy is careful judicial oversight, applying well-developed principles of "substantial evidence," as the Court of Appeal provided here. The Opinion observes:

> we agree with the Regents and RCD that stereotypes, prejudice, and biased assumptions about people served by a CEQA project ... *are not substantial evidence that can support a CEQA claim under the fair argument standard*.

(Op., 34-35 (italics added).) Indeed, the Opinion describes multiple established legal protections in place to guard against meritless claims or claims based on stereotyping. (Op., 27.) This is careful judicial oversight.

The "fair argument" standard has been in place for almost 50 years since this Court's seminal opinion in *No Oil, supra*. It has stood the test of time. (See *Berkeley Hillside, supra*.) UC makes no argument that judicial application of the "fair argument" standard cannot distinguish legitimate CEQA causes of action from those that fail.

In short, the Opinion's holding regarding noise impacts is not about stereotypes, it is about evidence. The reason that increasing student population at UC Berkeley may cause significant noise impacts, and thus require study and possible mitigation, is not because people are "college students" per se, it is because entirely undisputed evidence in the record shows that UC Berkeley students have created a lot of noise in the past and it is reasonable to expect they will do so in the future.

As noted above, UC's argument related to discrimination against a protected class is unsupported by citation to legal authority that students are a protected class and is forfeit.

The argument also fails on its merits. UC does not demonstrate that students or persons who predicably create noise disturbances fall into a protected class with regard to accommodations. For example, the California Fair Employment and Housing Act (FEHA) bars discrimination on the basis of "race, color, religion, sex, gender, gender identity, gender expression, sexual orientation, marital status, national origin, ancestry, familial status, source of income, disability, veteran or military status, or genetic information of that person." (Gov. Code section 12955(a).) California law barring discrimination in the provision of state funded services bars discrimination on the basis of "sex, race, color, religion, ancestry, national origin, ethnic group identification, age, mental disability, physical disability, medical condition, genetic information, marital status, or sexual orientation." (Gov. Code section 11135(a).) Neither of these laws identify students or persons who predicably create noise disturbances as a protected class.

UC's argument apparently depends on the additional assumption that agencies will unfairly discriminate against protected classes on the basis of an unfounded determination that this protected class is predictably likely to create noise disturbances. It is UC, not Good Neighbors, that has advanced this assumption, and UC has simultaneously advanced and recoiled from this stereotyping to make what the Court of Appeal

correctly characterizes as a "straw man argument." (Op., at 35.) There is nothing in the record to support a claim that analysis of predicable noise disturbances associated with the LRDP and its implementing projects is based on stereotyping a protected class as noisy.

Regardless, even if students or noisy persons were a protected class, or if an agency or person discriminated against a member of a protected class unfairly on the basis that they were predictably likely to create noise disturbances, UC has not shown that the analysis of noise disturbances under CEQA would preclude remedies for any such discriminatory treatment. For example, nothing in FEHA's remedies for housing discrimination precludes relief based on unfair stereotyping of a protected class as noisy. (Gov. Code §§ 12980-12989.3.) In short, if there is a remedy for discrimination on the basis of an unfounded determination that a person or persons is likely to create a noise disturbance, an agency's analysis of noise impacts under CEQA does not preclude that remedy.

Indeed, if a person or class demonstrated that mitigation or alternatives could not legally be imposed on the basis of antidiscrimination laws, then CEQA would bar such legally infeasible mitigation or alternatives. (Guidelines §§ 15126.4(a)(5), 15126.6(c), (f)(1).) However, this does not obviate an agency's duty to assess the noise impact in the first instance and to consider feasible mitigation or alternatives, if any, or failing that, consider making a finding of overriding considerations.

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3. UC's Argument That Noise Created by an Identifiable Social Group Is a "Social" Effect, Not a Change in the Physical Environment, Is Incorrect.

UC's argument that noise created by an identifiable social group is a "social" effect, not a change in the physical environment, borders on frivolous. (OB, 28-30.) In none of the cases that UC string cites (at OB, 29-30) did a court find that noise impacts are not cognizable under CEQA.

The EIR defines "sound" as "a disturbance created by a vibrating object, which when transmitted by pressure waves through a medium such as air, is capable of being detected by the human ear or a microphone" and "noise" as "sound that is loud, unpleasant, unexpected, or otherwise undesirable." (AR 10040.) Thus, noise is a "physical change in the environment."(CEQA, § 21065; see also Guidelines, Appendix G, § XII, subds. (a), (d) [noise impacts cognizable]; *Mission Bay Alliance v. Office of Community Inv. & Infrastructure* (2016) 6 Cal.App.5th 160, 192-193 [upholding Appendix G noise thresholds].)

Even characterizing the increase in enrollment as causing this effect "indirectly" does not help UC because CEQA recognizes a "significant effect on the environment" where "effects of a project will cause substantial adverse effects on human beings, either directly or *indirectly*." (CEQA,§ 21083(b)(3) (italics added); see also, CEQA § 21065 ["an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable *indirect* physical change in the environment"] (italics added); *Medical Marijuana, supra*, 7 Cal.5th at 1197 ["a

'reasonably foreseeable' *indirect* physical change is one that the activity is capable, at least in theory, of causing"] (italics added); citing Guidelines, § 15064(d)(3).)

Guidelines section 15131(a) explains the relationship between a project's social or economic effects and physical effects:

> An EIR may trace a chain of cause and effect from a proposed decision on a project through anticipated economic or social changes resulting from the project to physical changes caused in turn by the economic or social changes.

(See also, Guidelines § 15064(e); *Citizen's Assn. for Sensible Development v. County of Inyo* (1985) 172 Cal.App.3d 151, 170-71 ["the lead agency shall consider the secondary or indirect environmental consequences of economic and social changes"]; *County of Fresno, supra*, 6 Cal.5th at 521 [EIR must discuss human health impacts associated with project's environmental impacts]; *California Building Industry Assn. v. Bay Area Air Quality Management District* (2015) 62 Cal.4th 369, 386 ["Section 21083(b)(3) ... requires a finding of a 'significant effect on the environment' [citation] whenever the 'environmental effects of a project will cause substantial adverse effects on human beings, either directly or indirectly'"]; *California Building Industry Assn. v. Bay Area Air Quality Management District* (2016) 2 Cal.App.5th 1067, 1077-78.)

Here, both the DEIR and expert comments provided substantial evidence of the adverse effects on people and their health from excessive noise. (See AR10042-43 [DEIR discusses

psychological and physiological effects of noise, including body tensions affecting blood pressure, heart function, and the nervous system and potential hearing damage]; AR1594-1595 [noise expert Watry discusses adverse effects of noise, including induced hearing loss, speech interference, sleep disturbance, cardiovascular and physiological effects, and impaired cognitive performance].)

In the face of this legal authority and these facts, UC's position that noise generated by an identifiable social group such as college students is not subject to CEQA's requirements for investigating facts and providing analysis is, at its core, a request for an exemption from CEQA. "Projects and activities can be made wholly or partially exempt, as the Legislature chooses, regardless of their potential for adverse [environmental] consequences." (*North Coast Rivers Alliance v. Westlands Water Dist.* (2014) 227 Cal.App.4th 832, 850.) CEQA contains many "statutory exemptions." (See, e.g., CEQA, §§ 21080(b); 21080.01; 21080.02; 21080.03; 21080.05.) UC is free to request an exemption from the Legislature, but not from this Court.

Indeed, UC repeatedly invokes policy arguments to support its contention that student generated noise should not be a cognizable impact under CEQA. For example, UC argues that requiring analysis of noise where the facts support a fair argument of significant impacts "would push student housing projects to locations far from campus, thus increasing driving, pollution, and similar factors detrimental to the physical environment." (OB, 45.) Once again, UC gets ahead of itself in the

CEQA process. Simply identifying impacts does not require any particular outcome on the ground. It merely starts the analysis of mitigation, and where mitigation is infeasible, balancing public benefits against environmental harm.

Contrary to UC, the Opinion's holding that CEQA applies to noise generated by a particular group of people is not unprecedented. For example, in *Keep Our Mountains Quiet v. County of Santa Clara* (2015) 236 Cal.App.4th 714, a case involving CEQA analysis of noise caused by social events, the Court of Appeal held that "There is substantial evidence in the record supporting a fair argument that music played by a DJ during events on the Property may have significant noise impacts on surrounding residents" (*Id.* at 733) and "substantial evidence in the record supports a fair argument that Project-related crowd noise may have significant noise impacts on surrounding residents." (*Id.* at 734.)

Similarly, in *Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929, this Court found that noise impacts stemming from an increase in the size of a concert venue and its seating capacity and "the acoustic effects of moving the stage to face the single-family dwellings north of the fairgrounds" required consideration in an EIR. (*Id.*, at 937.)

Would UC argue that "crowd noise" is not cognizable under CEQA because the only people who make crowd noise are the "type of people" who attend musical concerts? These examples illustrate the vacuity of UC's "type of people" trope and that the Opinion's holding that the record contains substantial evidence

that adding more college students to Berkeley neighborhoods may cause significant noise impacts is not unprecedented.

UC's citation to *Maryland-National Capital Park and Planning Commission v. U.S. Postal Service* (D.C. Cir. 1973) 487 F.2d 1029, regarding its "people as pollution" concern is unavailing. (OB, 31.) Apparently, someone in that case suggested that the mere "influx of low-income workers into the County" could cause environmental effects but without any evidence regarding the type or degree of such speculated effects. (*Id*. at 1037.) The case is inapposite because here there is substantial evidence of the type and degree of environmental impact.

UC's citation to *Olmsted Citizens for a Better Community v. U.S.* (8th Cir. 1986) 793 F.2d 201 fares no better. In that case, converting part of a mental hospital to a federal prison would not effect any change in the physical environment; any changes would be social and economic. (*Id*. at 205.) Here the change is environmental.

The same is true of *Nucleus of Chicago Homeowners Ass'n v. Lynn* (7th Cir. 1975) 524 F.2d 225. In that case, '[t]he gravamen of plaintiffs' complaint is that low-income public housing tenants as a group statistically exhibit a high incidence of violence, law violation, and destruction of property." (*Id*. at 231.) Again, these are social impacts, not changes to the physical environment. In any case, the Court did not decide whether these impacts were cognizable under NEPA, because the agency assessed them in its environmental analysis. (*Id*. at 231.)

4. UC's New Arguments Regarding Social Noise are Irrelevant and Without Merit.

UC makes several new arguments as to why the EIR did not need to assess noise caused by students. These arguments are immaterial because the EIR did not include them as findings or rationales. (*Vineyard, supra*, 40 Cal.4th at 443.)

a. UC's new argument that environmental impacts that violate other regulatory laws are not cognizable under CEQA is wrong.

UC makes a new argument that an environmental impact such as noise that may also be a violation of the law (i.e., Berkeley's noise ordinance) should not be cognizable as an environmental impact under CEQA. (OB, 38-41.) In a similar vein, UC argues that the existence of its own "social interventions" such as its noise complaint process renders CEQA analysis of social noise "improper." (OB, 40.)

In addition to being too late because it was not included in the EIR, case law rejects UC's argument. In CEQA, the Legislature mandated that public agencies evaluate the environmental impacts of all proposed changes to the physical environment caused by their discretionary activities. There is no exception for activities that are subject to other regulatory laws. Case law holds that an EIR cannot rely on the fact that such regulatory controls exist to avoid evaluating the significance of an environmental impact. (*Ebbetts Pass Forest Watch v. California Dept. of Forestry and Fire Protection* (2008) 43 Cal.4th 936, 957 (*Ebbetts Pass*) [error to conclude that compliance with pesticide restrictions precludes significant impact]; *Californians for*

Alternatives to Toxics v. Department of Food & Agriculture (2005) 136 Cal.App.4th 1, 16.)

UC also argues that "crime and public safety concerns" are not environmental impacts. (OB, 29; 38-39.) Regardless of the merits of this proposition in the abstract, it is inapposite to the noise issue presented here because, as discussed in section IV.A.3, above, noise is a recognized environmental impact.

UC's argument also ignores intrinsic differences between CEQA and other regulatory laws. Regulatory laws such as Berkeley's noise ordinance become enforceable only when violated; as a result, such laws primarily look back in time to punish past violations. CEQA, in contrast, looks forward in time and is predictive in operation, to avoid or mitigate impacts before they occur. (*Medical Marijuana, supra*.)

UC's reliance on the presumption in Evidence Code section 664 that Berkeley "will carry out its responsibility under that Code" (OB, 41) is misplaced. The case law allows EIRs to rely on regulatory controls to mitigate significant impacts where such controls are effective. (*Citizens for a Sustainable Treasure Island v. City and County of San Francisco* (2014) 227 Cal.App.4th 1036, 1060 ["CSTI has failed to identify any evidence in the record suggesting that requiring regulatory compliance as mitigation would be infeasible or ineffective"].) Here, however, the evidence shows that Berkeley's enforcement of its noise ordinance is ineffective, as student generated noise impacts remain significant. (Op., 32-36; AR1594-1743 [Watry], 1616-1743 [Bokovoy].)

Instead of making a valid legal argument, UC resorts to a bumper sticker, arguing that the Opinion treats "people as pollution." (OB, 41.) UC's use of "people as pollution" as a meme is ludicrous. People cause all of the pollution regulated by all environmental statutes, including air and water pollution, loss of wildlife habitat, and noise pollution. No one argues that people are pollution and no one can argue that people, including students, do not cause pollution. Imagine trying to apply UC's "people as pollution" meme to a new student housing project's wastewater impact on nearby water quality where a fair argument is made that the impact will be significant. Not even UC would argue that the EIR could forgo analyzing this impact because doing so assumes students are "pollution." UC, not Good Neighbors, conflates people with the pollution they cause, and does so solely for rhetorical purposes.

In a similar rhetorical vein, UC mounts an *ad hominem* attack on Good Neighbors by attempting to analogize this case to NEPA and CEQA cases in which the courts have disapproved of plaintiffs using these statutes to stymie a project for non-environmental reasons. (OB, 29-32.) Such cases exist, but the important point is that in all of these cases the plaintiffs failed to raise a valid NEPA or CEQA claim. Judicial criticism of plaintiffs' motives does not and cannot occur in cases — such as this one — where the plaintiff prevails. UC cannot fairly paint Good Neighbors with a broad brush derived from the cases cited on pages 29-32 of its Opening Brief.

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b. UC's new argument that it lacks a methodology to study student generated noise is without merit.

UC argues that the Court of Appeal ruling would require agencies to find a methodology to assess the off-site effects of "people like them" and that "no methodology exists for analyzing alleged anti-social behavior in CEQA." (OB, 31, 37.) In addition to being too late because it was not included in the EIR, UC's argument ignores the methodology that Good Neighbors and their consultant (Derek Watry) used, the results of which the Court of Appeal found constituted substantial evidence supporting a fair argument that the impact is significant. (Op., 30-38.)

Watry's opinion was based on the projected growth in campus population and on a documented history of growing noise complaints and ineffective abatement efforts prepared by Phillip Bokovoy, who was a leader in UC's "Happy Neighbors" noise abatement program cited by the DEIR. (AR1599-600, citing AR1615-743.) These facts are set forth in section II.B, above.

As the Court in *Berkeley Keep Jets Over the Bay Committee vs. Board of Port Commissioners* (2001) 91 Cal.App.4th 1344 held, an agency's failure to use its best efforts to assess an impact identified by commenters is not excused by the lack of a single universal methodology for that impact assessment.

> The fact that a single methodology does not currently exist that would provide the Port with a precise, or "universally accepted," quantification of the human health risk from TAC exposure does not excuse the preparation of any health risk assessment-it requires

> the Port to do the necessary work to educate itself about the different methodologies that are available ... .

(*Id*. at 1370-1371.) UC erred by dismissing social noise impacts as "not germane" and "speculative" without any effort at analysis or substantive engagement with the public's comments and concerns. (*Id*. at 1368; AR14540, 14545-56; 14553, 14545-46, 14566.)[7]

UC also argues that because there is no effective mitigation for noise, its analysis is a "meaningless, and perilous, exercise." (OB, 13-14.) This argument puts the cart before the horse. The analysis of impacts must occur first. The analysis of the effectiveness and feasibility of mitigation measures follows the impacts analysis. (*Lotus v. Department of Transportation* (2014) 223 Cal.App.4th 645, 653-658 [EIR must specify whether impacts are significant without mitigation so its impacts are adequately described and so that the need for and the sufficiency of mitigation are separately evaluated].)

UC's related argument that the "Court of Appeal erred by allowing calls to reduce student noise to serve as a proxy for the reduction of students themselves" (OB, 42) is misplaced. Requiring that the EIR analyze the impacts does not, *ipso facto,*

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[7]UC also argues that the significance of an impact may vary in an urban vs. rural area, citing Guidelines section 15064, sub. (b)(1), implying that social noise that exceeds the City's regulatory standards might not be a significant impact. (OB, 44.) Since UC elected not to assess this impact at all, UC's argument is pure speculation.

require reducing the number of students. Indeed, UC admits that CEQA permits unmitigated impacts if there are overriding considerations. (OB, 38-39.)

5. UC's Argument That the EIR Need Not Analyze Noise Impacts Because the LRDP Does Not Determine Enrollment Is Incorrect.

UC argues that a noise analysis is not required because the LRDP does not "increase the population of UC Berkeley students." (OB, 34, fn 12; see also 39-40 [LRDP does "not cause or drive campus growth]."") Then, seeking to disavow its own responsibility for the environmental impacts of projected growth, UC also inconsistently argues that "growth will occur with or without" the LRDP and Housing Project #2. (OB, 40; see also 34 ["people in question will exist in the urban setting regardless of the proposed project," original emphasis]; 43 ["populations grow regardless of any CEQA analysis"].)

These claims are not supported by the record or common sense. As noted, the EIR projects that the LRDP will *add* thousands of housed and unhoused students to Berkeley. (AR10112, 10116.) UC admits that the "LRDP is UC Berkeley's long-term plan to accommodate reasonably foreseeable population growth at UC Berkeley through 2036-37." (OB, 55.) The LRDP expressly adopts a population plan in the form of "population projections ... developed in consultation with UC Berkeley leadership and enrollment planners." (AR57.) The LRDP's population plan is described in the EIR as the "horizon-year population estimates for undergraduate students, graduate

students, and faculty and staff" (AR9571), consistent with the Legislature's mandate that the LRDP be "based on academic goals and projected student enrollment levels, for an established time horizon." (Ed. Code, § 67504(c)(1).)

Indeed, despite its claim that UC has no commitment to increasing the UC Berkeley population, UC argues that UC Berkeley is required to accommodate population growth by the State of California. (OB, 16, 40.) Regardless of whether this growth is required or enabled by the LRDP, this is the growth that CEQA requires UC to evaluate and that the EIR itself purports to assess for many types of impacts.

Thus, contrary to UC, Senate Bill 118 (effective March 14, 2022) amending CEQA section 21080.09 does not repeal UC's obligation to determine whether there is substantial evidence that "more students means more noise." (OB, 41, see Op., at 35-36 [finding substantial evidence that "adding thousands more students to these same residential neighborhoods would make the problem worse"].)

In 1989, the Legislature provided that "academic and enrollment plans" associated with an LRDP "shall become effective for a campus ... only after the environmental effects of those plans have been analyzed as required [by CEQA] in a long range development plan environmental impact report." (CEQA, § 21080.09(d), Stats. 1989, ch. 659.) The principal change to section 21080.09 in SB 118 was to refer to "population plans" instead of "academic and enrollment plans" and to provide that CEQA review is not required of enrollment changes "by themselves,"

e.g., enrollment changes made at the time of annual enrollment decisions. (SB 118, CEQA, § 21080.09(d).)

SB 118's deletion of the mandate to assess effects of enrollment changes "by themselves" does not repeal UC's obligations, as stated in section 21080.09 and the Education Code, to evaluate and avoid or reduce the negative effects of "the expansion of campus enrollment and facilities" *when adopting an LRDP*. (Ed. Code, § 67504(b)(1).) Section 21080.09 subdivision (d), as amended by SB 118, references "the obligations of public higher education pursuant to this division to consider the environmental impact of academic and campus population plans" and provides that the campus population plans become "effective" only after analysis of impacts in the LRDP EIR is complete. Subdivision (e)(1) refers to "campus population ... projections adopted in the most-recent long-range development plan and analyzed in the supporting environmental impact report," and it sets out a timeline and criteria for courts to enjoin increases in campus population that exceed the population plan adopted in the LRDP.

By requiring that an LRDP include long-term population plans, that the LRDP EIR assess the effects of long-term changes in population, that campuses mitigate the negative effects of population increases, and that a campus population plan is effective only after certifying an LRDP EIR, the Legislature has tightly integrated a campus' population plan into the LRDP and the LRDP's CEQA review. By providing in SB 118 that changes in enrollment by themselves are not a CEQA project, the Legislature

did not abandon its existing CEQA and Education Code requirement to assess the environmental effects of enrollment changes in the context of an LRDP's campus population plan.

And in fact, the EIR does evaluate the effect of a number of impacts that it acknowledges are caused directly by population increases, not just by physical development projects, i.e., impacts for which "population is a metric of analysis." (AR14194-95.) For example, the EIR concludes that impacts related to air quality, greenhouse gas ("GHG"), noise, population and housing, public services, and parks and recreation are population-driven. (AR14195, 14787.) There is no justification for excluding social noise caused by student population increases from this list.

6. The Error is Prejudicial.

The issue of prejudice from UC's legal error in failing to analyze student-generated noise impact is straightforward. While prejudice is not presumed, the complete absence of information gathering and analysis on this issue satisfies this Court's test for prejudicial error: "an omission in an EIR's significant impacts analysis is deemed prejudicial if it deprived the public and decision makers of substantial relevant information about the project's likely adverse impacts." (*Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439, 463; see also Op., 37-38 [UC's decision to "skip the issue... was a prejudicial abuse of discretion"].)

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B. The EIR Fails to Analyze Alternative Sites for Housing Project #2.

1. Standard of Review.

"One of [an EIR's] major functions ... is to ensure that all reasonable alternatives to proposed projects are thoroughly assessed by the responsible official." (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 565 (*Goleta II*.) "The EIR is the heart of CEQA, and the mitigation and alternatives discussion

forms the core of the EIR." (*In re Bay-Delta* (2008) 43 Cal.4th 1143, 1162 (*Bay-Delta*).) Therefore, CEQA requires that an EIR analyze a range of reasonable alternatives to the proposed project. (Guidelines, § 15126.6.)

For these claims, "[t]he statutory requirements for consideration of alternatives must be judged against a rule of reason." (*Goleta II, supra,* 52 Cal.3d at 565.) This standard includes de novo review of legal errors (*City of Marina, supra,* 39 Cal.4th at 355-356) and substantial evidence review of the agency's factual determinations for excluding an alternative from analysis (*Bay-Delta, supra,* 43 Cal.4th at 1165.)

Thus, review of an EIR's selection of alternatives to analyze is similar to other informational sufficiency claims under CEQA, where, the "[a] reviewing court must adjust its scrutiny to the nature of the alleged defect, depending on whether the claim is predominantly one of improper procedure or a dispute over the facts." (*Vineyard*, *supra*, 40 Cal.4th at 435.)

"In determining whether the agency complied with the

required procedures and whether the agency's findings are supported by substantial evidence, the trial court and the appellate courts essentially perform identical roles." (*Environmental Protection Information Center v. Cal. Dept. of Forestry & Fire Protection* (2008) 44 Cal.4th 459, 479 ["We review the record de novo and are not bound by the trial court's conclusions."]

2. At Issue Is Whether an Alternative Location Is "Potentially Feasible," and to Be Potentially Feasible, an Alternative Need Not Meet All Project Objectives.

UC argues that it was entitled to reject an alternative site for analysis in the EIR if it is "infeasible." (OB, 50.) The relevant question, however, is whether the alternative site is "potentially feasible." If it is potentially feasible and would substantially reduce significant impacts, it was legal error to omit analysis of it.

The feasibility of alternatives arises at two junctures in the EIR process: "(1) in the assessment of alternatives in the EIR; and (2) during the agency's later consideration of whether to approve the project;" and "different factors come into play at each stage." (*California Native Plant Society v. City of Santa Cruz* (2009) 177 Cal.App.4th 957, 981 (*CNPS*), citing *Mira Mar Mobile Community v. City of Oceanside* (2004) 119 Cal.App.4th 477, 489 (*Mira Mar*).) When selecting alternatives to analyze in an EIR, the standard is whether the alternative is "potentially feasible." (*Mira Mar*, *supra*, 119 Cal.App.4th at 489; Guidelines, § 15126.6(a).) In the second project approval phase, the

decision-maker evaluates whether alternatives are actually feasible, and may reject alternatives on grounds of actual infeasibility even though the EIR found them potentially feasible and analyzed them. (*Watsonville Pilots Assn. v. City of Watsonville* (2010) 183 Cal.App.4th 1059, 1087 *(Watsonville*) [citing *CNPS*, *supra*, at 981, 999-1000 and *Mira Mar*, *supra*, at 489]; Guidelines, § 15091(a)(3).)

It is an abuse of discretion for an agency to exclude a potentially feasible alternative that would substantially reduce significant impacts from analysis in the EIR simply because it does not meet all project objectives. (*Habitat & Watershed Caretakers v. City of Santa Cruz* (2013) 213 Cal.App.4th 1277, 1304 (*Caretakers*) ["limited-water alternative could not be eliminated from consideration solely because it would impede to some extent the attainment of the project's objectives"]; *Watsonville, supra,* 183 Cal.App.4th at 1087 [agency's refusal to analyze a reduced development alternative because it failed to meet two of 12 project objectives was legal error].) As argued below, UC prejudicially abused its discretion because there is no substantial evidence that any and all alternative sites are not potentially feasible or would not meet most project objectives. (*Watsonville, supra*, 183 Cal.App.4th at 1089.)

3. The EIR's Stated Reasons for Refusing to Analyze Alternative Sites Are Conclusory and Unsupported.

When rejecting an alternative location from analysis in a Draft EIR, the EIR must explain its reasons (Guidelines, §

15126.6, subds. (c), (f)(2)(B)), and unsupported, conclusory statements do not suffice. (*Laurel Heights, supra*, 47 Cal.3d at 404.)[8]

The Draft EIR identified the Housing Projects #1 and #2 Alternate Locations alternative as an alternative that was not analyzed (i.e., it was "considered and rejected.") (AR10356.) The EIR's reasons for omitting analysis of this alternative are:

> Development of Housing Projects #1 and #2 at one or more alternative sites would be constrained by site access and parcel size, as many of the eligible sites are smaller than the proposed development sites. Therefore, the development programs would need to either be reduced, or the housing projects would require multiple sites, further diminishing the total number of beds described in the proposed LRDP development program. ¶ While a potential alternate site alternative would reduce the significant historic resource impacts at both sites, they would also have the potential to introduce new historic resource impacts at many of the sites in the City Environs Properties and the Clark Kerr Campus, as both

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[8]The Draft EIR briefly mentions, but excludes from its analysis, an alternative version of the LRDP Update that could avoid building in People's Park, namely, the Historic Resources Avoidance alternative. (AR10356.) This was an alternative to the LRDP program, not to the HP #2 project. Further, UC's brief does not mention this alternative (OB, 48) or contend that the EIR's stated reasons for excluding analysis of this LRDP Update alternative supports the EIR's omission of analysis of alternative sites for Housing Projects #2. Therefore, Good Neighbors does not further discuss the EIR's reasons for not analyzing this alterative.

> contain historic resources or are adjacent to such resources.

(AR10357; see Op., 20-21.) In addition, the final EIR states that "accommodating the same number of beds on multiple sites would cause greater potential for ground disturbance and thus consequently, greater construction impacts." (AR14215.) In effect, the EIR finds that any and all alternative sites for HP #2 are not potentially feasible.

The Opinion explains why these equivocal reasons are legally inadequate, noting that the EIR expressly disavows any commitment to a total number of beds, that several available sites are bigger than People's Park, that there is no evidence that UC cannot acquire additional sites, and that there is no evidence that historic resource impacts would be as severe at other sites. (Op., 20-24.) Good Neighbors adopts the Court of Appeal's analysis of the inadequacy of the EIR's stated reasons as set forth on pages 22 through 24 of the Opinion.

Except for the EIR's contention that any and all alternative sites would "diminish the total number of beds described in the proposed LRDP development program," — an argument properly rejected by the Court of Appeal — UC's opening brief mostly ignores the EIR's stated reasons for omitting analysis of the Housing Projects #1 and #2 Alternate Locations alternative. Instead, UC's opening brief makes a number of different factual and legal arguments — mostly untethered to the EIR's stated reasons — to justify omitting the analysis. Good Neighbors addresses these arguments in sections IV.B.2 through IV.B.8,

below.

Regarding the EIR's contention that any alternative sites would "diminish the total number of beds described in the proposed LRDP development program," UC embellishes the contention by misrepresenting the record. UC argues that building Housing Project #2 is not potentially feasible because it intends to build housing on all 16 sites that it identified in the LRDP Update. (OB, 14, 49 ["not developing housing at People's Park would result in an unacceptable cumulative reduction of the LRDP's Housing Program"]; 56 ["UC Berkeley determined in the EIR that it must optimize all sites at its disposal ..."].)

UC's argument is specious because, as the Court of Appeal noted, UC's approval of the LRDP Update does not commit it to building any housing beyond Housing Projects #1 and #2. (Op., 23.) The Final EIR states:

> The LRDP Update is a high-level framework document, intended to guide future growth and development. It is not a detailed implementation plan for development and does not commit UC Berkeley to carrying out specific development projects or to any given timeline.

(AR14170, see Op., 23.)

Further, the EIR's objectives do not establish a target number of residential beds for the LRDP as a whole or for Housing Project #2 by itself (AR9551-9553), so UC cannot argue that an alternative site would be inconsistent with even one objective, much less the majority of the objectives. Put simply, UC never decided to build at all 16 sites. It merely identified 16

potentially feasible sites on which it could build housing.

Moreover, even if the EIR's objectives included a target number of beds, that target could have been at most the 11,731 beds identified in the "proposed housing program." (AR9580.) But the EIR identifies UC-owned potential residential sites for 13,862 beds, which is 2,131 beds more than the proposed housing program. (See AR9575 [difference between the sums of the existing and proposed beds in Table 3-2].) Since Housing Project #2 would supply only 1,312 of the housing program beds (AR9598), any cumulative "target" for the housing program could have been met using other UC-owned sites.[9]

UC also argues "It was entirely reasonable, and certainly not an abuse of discretion, for UC Berkeley to decline in the EIR to *proceed with* these alternatives, given its clear Housing Program targets." (OB, 49 (italics added).) Again, UC misconceives the issue presented. It is not whether the UC must "*proceed* with these alternatives." It is whether the EIR is required to analyze any alternative sites to building Housing Project #2 in People's Park.

UC's cites *Jones v. Regents of University of California* (2010) 183 Cal.App.4th 818 (*Jones*) for the proposition that an alternative that would "change the underlying nature of the project" is not potentially feasible. (OB, 5143.) *Jones*, however,

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[9]In addition, the EIR acknowledges that "UC may acquire ... additional properties" to meet its needs. (AR9573; see also Guidelines, § 15126.6(f)(1) [feasibility includes assessing whether developer can acquire alternative site].)

involved an EIR rejecting an off-site alternative for analysis because it would "prevent the realization of the project's primary objective of creating a more campus-like setting at the hill site, and would nullify most, if not all, of the other project objectives as well." (*Id*. at 827-28.) Here, in contrast, the EIR's description of Housing Project #2's objectives does not include building in People's Park and building on a different site would not "nullify most, if not all, of the other project objectives." (AR9552-53.)

4. UC's New Arguments Based on "Project Objectives" Are Without Merit.

UC argues that Housing Project #2's objectives include building in People's Park because one objective is to revitalize People's Park. (OB, 51.) UC elides the inconvenient fact that the project's objectives do not mention People's Park. (AR9552-53.) UC relies on the fact that the EIR's description of Housing Project #2 site is at People's Park. (OB, 51, citing AR9608-09.) But this is irrelevant because Good Neighbors does not dispute UC's authority to identify People's Park as the project's preferred location as part of the EIR's project description. This is expected. (*Washoe Meadows Community v. Department of Parks & Recreation* (2017) 17 Cal.App.5th 277, 288-289.)

Further, this project description does not support a conclusion that building the project in People's Park is a "fundamental project objective" as this phrase is used in *Bay-Delta*, *supra*, 43 Cal.4th at 1167. Unlike here, in *Bay-Delta* the agency had developed substantial evidence through a series of public workshops, scoping meetings, and agency consultations

that there was one underlying goal of the project. (*Id*. at 1165-1167.) Here, the Regents made no comparable public determination regarding the necessity of the People's Park location. Unlike *Bay-Delta*, here the EIR identifies 14 distinct LRDP project objectives and 7 Housing Project #2 objectives and none of those objectives mention a People's Park location, much less prioritize it as a fundamental objective. (AR9552-53.)

Bay-Delta upholds CALFED's choice of alternatives precisely because the agency had developed substantial evidence in a public process that there was one underlying fundamental goal that required each of the four primary objectives to be met to make an alternative even potentially feasible. (*Id*. at 1167.) *Bay-Delta* is not relevant because here UC made no comparable determination that the feasibility of Housing Project #2 depended on the People's Park location or that using that particular site was the "the underlying fundamental purpose" of Housing Project #2. Indeed, the "underlying fundamental purpose" of Housing Project #2 is student housing. In sum, UC cannot defend the EIR's failure to analyze alternative locations on grounds it would not achieve the project's objectives.

UC argues that the EIR's project objective of "revitalizing" a UC property includes immediately alleviating the student housing crisis, address homelessness and "specifically address crime and safety at People's Park" and therefore, People's Park is the only feasible location for the project. (OB, 14, see also, OB, 19, 25, 51, 54.) UC also incorrectly suggests the supportive housing component of Housing Project #2 renders all sites other than

People's Park infeasible. (OB, 19, 54.)

Further, even if an alternative that reduces significant impacts might not accomplish all project objectives, that is not a legally sufficient reason to exclude the alternative from analysis in the Draft EIR. (*Watsonville*, *supra*, 183 Cal.App.4th at 1087.)

UC implies that there is something "unique" about People's Park that makes it particularly suited to supportive housing, stating:

> In recognition of the site's unique attributes, the proposal includes permanent supportive housing and commemorative community open space, in addition to the student housing component. (AR1206-08.)

(OB, 19, see also, 14.) In a similar vein, UC argues that supportive housing is one of "the integrated elements of the People's Park Project" and "these elements cannot be transplanted to any alternative location without fundamentally changing the nature and scope of the Project." (OB, 51.) This text assumes that UC has proven its implication that People's Park is uniquely suited to supportive housing. But UC never explains, in the EIR, or in its brief, what it is about People's Park that makes it particularly suited to supportive housing.

Instead, UC cites a document in which the Chancellor asserts that People's Park is "the only university-owned property that allows the campus to simultaneously address" student housing as well as crime and safety concerns for unhoused people. UC cannot cite to or rely on this document because Chancellors' assertion is unsupported by evidence and the document is not

admissible evidence.

The document is not contained in the administrative record; therefore, it is not admissible. (*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 573; 576.) A party may move to augment the administrative record with a document referenced in the record by a URL that leads directly to the referenced document. (*Consolidated Irrigation Dist. v. Superior Court* (2012) 205 Cal.App.4th 697, 724; *Madera Oversight Coalition, Inc. v. County of Madera* (2011) 199 Cal.App.4th 48, 62-65.) Here, UC did not move to augment the record with this document and the document is not even eligible to be included in the administrative record.

If it had, the motion would have been denied. UC cites to a URL at AR 9550. (OB, 19.) But AR 9550 does not include the Chancellor's assertion and the URL link cited at AR 9550 does not lead directly to the document where the Chancellor makes the assertion. Instead, in footnote 7 on page 19 of its Opening Brief UC provides a new URL to a new document that is not cited in any document in the record or in the EIR. Thus, this new document is not eligible for augmentation to the record had UC made such a motion.

In short, there is no substantial evidence to support a finding that alternative sites were not potentially feasible, because neither the EIR nor UC's CEQA findings support such a conclusion with facts or disclose the analytic route between facts and conclusions. (*Laurel Heights I,* supra, 47 Cal.3d at 404; *Topanga Association for a Scenic Community v. County of Los*

Angeles (1974) 11 Cal.3d 506, 514-515.)

Since the EIR did not present these rationales for not analyzing alternative sites, they are irrelevant. (*Vineyard, supra*, 40 Cal.4th at 443.) The EIR did not explain that it is infeasible to build Housing Project #2 anywhere but People's Park because doing so would not serve the goal of preventing people from camping in the park or of reducing crime. If the EIR had said so, the public could have submitted comments showing that both UC and the City of Berkeley are fully capable of preventing people from camping in their parks and open spaces without building a high-rise apartment building in every park and that crime is no worse in People's Park than surrounding areas of south Berkeley.[10]

UC cannot rewrite the EIR's project objectives to satisfy its litigation objectives. Public comment was submitted on the EIR as written, not on the EIR as UC would now revise it. Allowing UC to create a moving target at this stage would deprive the public of the opportunity to submit comments and evidence related to the revision. (See *Cleveland National Forest Foundation v. San Diego Assn. of Governments* (2017) 3 Cal.5th 497, 516 (*Cleveland National Forest*); *Vineyard, supra*, 40 Cal.4th

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[10]Indeed, the case record includes such evidence. (See e.g., Declaration of Harvey Smith in Opposition to Request to Advance Briefing Schedule on Petition for Writ of Supersedeas and in Support Of Petition for Writ of Supersedeas, filed in the Court of Appeal on July 5, 2022; Supplemental Declaration of Harvey Smith in Support of Petition for Writ of Supersedeas filed in the Court of Appeal on July 7, ¶¶ 3-7.

at 443.)

At bottom, UC tries to create a new CEQA finding as to why there is no feasible alternative site for Housing Project #2 that it did not make in the EIR or administrative process. This violates the core CEQA principle that an agency cannot explain its rationale for its environmental decisions for the first time in its legal briefs to the courts; it must do so in the EIR. (*Vineyard, supra*, 40 Cal.4th at 443.) In language that is directly on point, the decision in *Laurel Heights I* observes:

> ... alternatives and the reasons they were rejected, however, must be discussed in the EIR in sufficient detail to enable meaningful participation and criticism by the public. ... If the Regents previously considered alternatives in their internal processes as carefully as they now claim to have done, it seems the Regents could have included that information in the EIR.

(*Laurel Heights I,* 47 Cal.3d at 405.)[11]

5. UC's Argument That it Can Rely on a Planning Document That the EIR Was Supposed to Analyze for Environmental Impact to Exclude Analysis of Alternative Sites Is Incorrect.

UC incorrectly argues that because the LRDP Update,

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[11]The lead agency's analysis of a range of reasonable alternatives is required to be in the EIR; it cannot be buried in an appendix or elsewhere in the administrative record. (Guidelines, § 15126.6.) "Whatever 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 I,* 47 Cal.3d at 405; accord, *Cleveland National Forest,* 3 Cal.5th at 516.)

which was the subject of the instant *program-level* EIR, sets land use policies for the UC Berkeley campus, this fact excuses the *project-level* EIR for Housing Project #2 from analyzing alternative sites. (OB, 14; 54-57.) UC's reliance on *Goleta II, supra,* 52 Cal.3d at 553 for this argument is misplaced.

UC is correct that CEQA does not necessarily require it to "change" its judgment about where to build Housing Project #2. But it does require, on these facts, that the EIR for the project either analyze alternative sites that would avoid or reduce its significant impacts or provide a valid reason not to do so.

In UC's erroneous view, once it decides where it wants to build a project, there are no circumstances in which CEQA would require that it analyze an alternative location in the project EIR. Contrary to UC, its argument, not the Opinion, is directly at odds with *Goleta II*.

Goleta II holds that in evaluating the reasonableness of a range of alternatives, "[e]ach case must be reviewed on the facts, and the facts must, in turn, be reviewed in light of the purpose of CEQA's alternatives requirement." (*Goleta II*, *supra*, 52 Cal.3d at 566.) *Goleta II* also holds that "[t]he statutory requirements for consideration of alternatives must be judged against a rule of reason." (*Id*. at 565.)

More specifically, in *Goleta II*, this Court emphasized the importance of EIRs analyzing alternative locations for projects, stating:

> we here reaffirm the principle that an EIR for any project subject to CEQA review must consider a

> reasonable range of alternatives to the project, *or to the location of the project*, which: (1) offer substantial environmental advantages over the project proposal (Pub. Resources Code, § 21002); and (2) may be "feasibly accomplished in a successful manner" considering the economic, environmental, social and technological factors involved.

(*Id*., at 566 (italics added).)

UC implies that *Goleta II's* rule of decision is that whenever a lead agency adopts a planning document or program and certifies a "program EIR," then a project-specific EIR is not required to analyze alternative locations for a specific project. This is incorrect because *Goleta II* has no such rule of decision.

Goleta II is also factually inapposite. In *Goleta II*, the Court of Appeal had previously rejected an initial EIR for a coastal hotel project because it failed to analyze any alternative locations. (*Goleta II, supra*, at 560, citing *Citizens of Goleta Valley v. Board of Supervisors* (1988) 197 Cal.App.3d 1167 (*Goleta I*).) Thereafter, the county prepared a supplemental EIR that analyzed an alternative location at Santa Barbara Shores. (*Goleta II, supra*, at 560.) Therefore, unlike the instant EIR, the EIR at issue in *Goleta II* did analyze an alterative location in detail.

The CEQA petitioners in *Goleta II* also claimed that the supplemental EIR failed to analyze several additional alternative sites that the petitioners proposed for analysis very late in the process. This Court rejected the claim, because unlike here, the Local Coastal Plan portion of the respondent county's General Plan contained an extensive analysis of potentially suitable

alternate sites for locating hotels in the coastal zone and the EIR excluded analysis of these alternative sites because the county's LCP findings had already determined alternative sites were infeasible. (*Goleta II, supra*, at 570–573.)

Importantly, the county had adopted the Local Coastal Plan pursuant to and after an extensive "CEQA equivalent" public review process. (*Id.*; Guidelines, §15251(f).) Here, the LRDP EIR, which includes both a program and project-specific EIR, does not analyze any alternative sites; and UC did not engage in any other public CEQA process to assess alternative sites, either in a program or project-specific EIR, before committing to the People's Park site.

Here, the Opinion finds that the EIR "not only declined to analyze any alternative locations; they [the Regents] failed to provide a valid reason for that decision" despite "plenty of evidence that alternative sites exist." (Op., 18.) This holding is consistent with *Goleta II*.

6. Housing Project #2's Public Benefits are Irrelevant to the Issues Accepted for Review.

UC's reliance on its view that Housing Project #2 may have public benefits is irrelevant because it is not the courts' job to evaluate a project's environmental merits. (*Newhall Ranch I*, *supra*, 62 Cal.4th 204, 240 ["Even if Newhall Ranch offered the environmentally best means of housing this part of California's growing population, CEQA's requirements ... would still have to be enforced"]; see also, *Banning Ranch, supra,* 2 Cal.5th at 937 [this Court set aside an EIR because the agency failed to

"meaningfully address feasible alternatives or mitigation measures"].)[12]

This Court long ago explained that where a project's benefits make significant environmental harm acceptable, the agency must still comply with CEQA's procedural and informational requirements, holding that "Before a public agency ... may approve a project for which the EIR has identified significant effects on the environment ... the agency must make one or more of the findings required by section 21081 of the Public Resources Code." (*City of Marina, supra,* 39 Cal.4th at 350.)

> [These]required 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 ... .'

(*Id.,* quoting CEQA §§ 21002; 21002.1, subd. (a).)

Thus, public benefit considerations do not arise until after the agency has analyzed impacts, analyzed potentially feasible mitigation measures and alternatives, and adopted feasible mitigation or alternatives. (CEQA, §21081(b); Guidelines, §§

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[12]UC's suggestion that affirming the Opinion will require it to "abandon" People's Park as a location for student housing is hyperbole. (OB, 14.) The Opinion does not hold that UC cannot build housing in People's Park; it merely requires that UC comply with CEQA before doing so.

15092(b)(2)(B); 15093.)[13]

7. UC's Reliance on its Staff's Years-Long Commitment to Build Housing in People's Park Is Contrary to CEQA.

UC suggests that its staff's years-long commitment to build housing in People's Park supports certifying an EIR that fails to analyze any alternative locations for that housing. (OB, 48-54.) This directly contravenes decades of this Court's decisions. CEQA's purpose is to require environmental review before the "bureaucratic and financial momentum ... behind a proposed project ... provid[es] a strong incentive to ignore environmental concerns." (*Laurel Heights I, supra,* 47 Cal.3d at 395.) In language directly applicable to the instant case, *Laurel Heights I* observes that "This problem may be exacerbated where, as here, the public agency prepares and approves the EIR for its own project." (*Id.*)

Since *Laurel Heights I*, this Court has repeatedly interpreted CEQA as prohibiting agencies from using their own commitment to a project as a reason to limit CEQA review. For example, in *Vineyard, supra*, this Court observed that an EIR must sound its 'environmental alarm bell' before the project has taken on overwhelming "bureaucratic and financial momentum." (40 Cal.4th at 441, quoting *Laurel Heights I*, at 395.) In *Save*

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[13]Accord, *King & Gardiner Farms, LLC v. County of Kern* (2020) 45 Cal.App.5th 814, 866 ["[A]n agency must have adopted all feasible mitigation measures before approving a project with significant environmental effects based on overriding considerations"].)

Tara v. City of West Hollywood (2008) 45 Cal.4th 116, this Court held that an agency cannot lawfully commit to carrying out a project before it completes CEQA review. (*Id*. at 132.)

UC's argument that its legal obligations under CEQA are somehow curtailed by its own pre-commitment to building desired housing in People's Park is directly contrary to these precedents and would turn CEQA on its head.

8. UC's Argument That its Staff *Considered* Alternative Sites in Their *Private* Deliberations Is Immaterial.

UC misdirects the inquiry by its repeated argument that it *considered* alternative locations for student housing. (E.g., OB, 52.) This argument fails to address Good Neighbors' claim, which is not that UC's staff failed to consider alternative sites *in their private deliberations*; but that UC circulated and certified an EIR that failed to analyze any of them, *which precluded the public from commenting on the environmental merits of alternative locations relative to People's Park*.

UC's brief ignores the public participation goals of CEQA and the public participation purposes of an EIR and of an EIR's analysis of alternatives. As such, it flies directly in the face of decades of Supreme Court and appellate case law.

> The purpose of an EIR is to give the public and government agencies the information needed to make informed decisions, thus protecting "'not only the environment but also informed self-government.'" [citation omitted] The EIR is the heart of CEQA, and the mitigation and alternatives discussion forms the

core of the EIR.

(*Bay-Delta*, *supra*, 43 Cal.4th at 1162.)

In *Laurel Heights I, supra*, this Court rejected a UC-certified EIR for failing to analyze alternative locations for a proposed biomedical facility in San Francisco, stating:

> the EIR provides no information to the public to enable it to understand, evaluate, and respond to the bare assertion of nonavailability of alternative space. 'The key issue is whether the selection and discussion of alternatives fosters informed decisionmaking and informed public participation.' (Guidelines, § 15126, subd. (d)(5), italics added.)"

(*Id*., at 404.) The instant EIR is similarly devoid of useful information.

UC ignores this legal authority, arguing instead that because its staff analyzed alternative locations in their private deliberations, it would be "*pro forma*" to include any such analysis in the EIR. UC's obliviousness to the critical role that public participation plays in CEQA procedure betrays its fundamental misunderstanding of, or refusal to accept, CEQA procedures. Two of CEQA's "four related purposes" as described by this Court relate to public participation. (*Medical Marijuana, supra,* 7 Cal.5th at 1184–1185.) As this court stated in *County of Fresno*, *supra*, "The ultimate inquiry ... is whether the EIR includes enough detail 'to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project.'" (6 Cal.5th at 516, quoting *Laurel Heights I, supra*, 47 Cal.3d at p. 405.) In contrast, UC's

view is that involving the public is *pro forma*.

UC argues that after privately considering locations for Housing Project #2, it had the "discretion" to prioritize People's Park as its preferred location. (OB, 52.) This is irrelevant because, as noted above, Good Neighbors does not dispute UC's authority to identify People's Park as the project's preferred location as part of the EIR's project description. (*Washoe Meadows, supra,* 17 Cal.App.5th at 288-289.) Good Neighbors' legal claim is that UC circulated and certified an EIR that failed to analyze any alternative locations, *which precluded the public from commenting on the environmental merits of alternative locations relative to People's Park*.

Good Neighbors also does not dispute that after complying with CEQA's procedural and informational requirements, UC may ultimately decide to adopt its preferred project description and location if there is substantial evidence that there is no feasible alternative site with substantially lessened significant impacts. (*San Diego Citizenry, supra*, 219 Cal.App.4th at 18.)

As noted in section II.D, above, UC's consultants — in the privacy of UC's administrative process — identified at least fifteen other properties in the immediate vicinity of the UC Berkeley campus and People's Park where it could build new student housing and comments identified three of these sites that could accommodate more beds than Housing Project #2 as configured in People's Park and that would not require demolishing People's Park.

Given these facts, the Opinion's description of UC's decision

to omit analysis of any alternative site for the housing proposed in People's Park as "puzzling" is more than charitable. (Op., 22.)

9. The Error is Prejudicial.

The Court of Appeal correctly determined that the EIR's legal error regarding alternative sites is prejudicial. (See Op., 27.)

V. CONCLUSION

UC's rhetoric generates much heat and little light. Its arguments regarding social noise are at odds with basic principles of CEQA. And UC is singularly myopic in its mistaken belief that its pre-commitment to People's Park as the site for Housing Project's #2 trumps CEQA's requirements for public participation. The Court should affirm the Opinion.

DATED: August 4, 2023

LAW OFFICES OF THOMAS N. LIPPE, APC

By:_____
Thomas N. Lippe, Attorney for Make UC A Good Neighbor and The People's Park Historic District Advocacy Group

Certificate of Compliance - Word Count

I, Thomas N. Lippe, counsel for Make UC A Good Neighbor and The People's Park Historic District Advocacy Group, hereby certify that the word count of this Answer Brief is 13,980 words according to the word processing program (i.e., Corel Wordperfect) used to prepare it.

Dated: August 4, 2023

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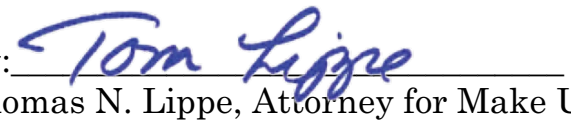
By: 

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Executed on August 4, 2023, in the County of Nevada, California.

Kelly Marie Perry

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Supreme Court of California

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STATE OF CALIFORNIA
Supreme Court of California

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Case Number: **S279242**
Lower Court Case Number: **A165451**

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

8/4/2023

Date

/s/Kelly Perry

Signature

Lippe, Thomas (104640)

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