

APPELLATE NO. A157551

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT
DIVISION 5

SAVE BERKELEY'S NEIGHBORHOODS
Petitioner and Appellant,

vs.

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

ALAMEDA COUNTY SUPERIOR COURT • CASE NO. RG18902751
Hon. Frank Roesch, Dept. 17, Telephone: (510) 267-6933 and
Hon. Noel Wise, Dept. 24, Telephone: (510) 267-6940

APPELLANT'S APPENDIX

VOLUME 3 of 3

THOMAS N. LIPPE (Bar No.104640)
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AA00495

APPELLANTS APPENDIX
Chronological Index

| <u>Document</u> | <u>Vol. No.</u> | <u>Date Filed</u> | <u>Tab No.</u> | <u>Page No.</u> |
|--|-----------------|-------------------|----------------|-----------------|
| Petition for Writ of Mandate and Complaint for Declaratory Relief | 1 | 4/27/2018 | 01 | AA00017 |
| Plaintiff's Request and Election to Prepare Record of Proceedings | 1 | 4/27/2018 | 02 | AA00038 |
| First Amended Petition for Writ of Mandate and Complaint for Declaratory Relief | 1 | 6/18/2018 | 03 | AA00040 |
| Notice of Entry of Order; Stipulation and Order to Extend Deadlines to Allow Parties to Engage in Further Settlement Negotiations | 1 | 7/2/2018 | 04 | AA00061 |
| Notice of Request and Request for Hearing | 1 | 7/24/2018 | 05 | AA00067 |
| Notice of Entry of Order; Order following Third Stipulation and [Proposed] Order to Extend Deadlines to Allow Parties to Engage in Further Settlement Negotiations | 1 | 8/17/2018 | 06 | AA00071 |
| Plaintiff's Case Management Statement | 1 | 10/4/2018 | 07 | AA00077 |
| Respondents' Case Management Statement | 1 | 10/4/2018 | 08 | AA00089 |
| Second Amended Petition for Writ of Mandate and Complaint for Declaratory Relief | 1 | 10/16/2018 | 09 | AA00096 |
| Memorandum of Points and Authorities in Support of Demurrer to Petitioner's Second Amended Petition for Writ of Mandate and Complaint for Declaratory Relief | 1 | 10/19/2018 | 10 | AA00115 |
| Notice of Demurrer and Demurrer to the Second Amended Petition for Writ of Mandate and Complaint for Declaratory Relief | 1 | 10/19/2018 | 11 | AA00135 |
| Request for Judicial Notice in Support of Demurrer to Second Amended Petition and Complaint for Declaratory Relief | 1 | 10/19/2018 | 12 | AA00139 |

Document received by the CA 1st District Court of Appeal.

APPELLANTS APPENDIX
Chronological Index

| <u>Document</u> | <u>Vol. No.</u> | <u>Date Filed</u> | <u>Tab No.</u> | <u>Page No.</u> |
|---|-----------------|-------------------|----------------|-----------------|
| Declaration of Russ Acker in Support of Demurrer to Second Amended Petition and Complaint for Declaratory Relief | 1 | 10/19/2018 | 13 | AA00155 |
| Declaration of Timothy D. Cremin in Support of Demurrer to Second Amended Petition and Complaint for Declaratory Relief | 1 | 10/19/2018 | 14 | AA00159 |
| Notice of Entry of Order; Order Following Stipulation Granting Plaintiff Leave to File Second Amended Petition for Writ of Mandate and Complaint for Declaratory Relief | 1 | 10/24/2018 | 15 | AA00163 |
| Memorandum of Points and Authorities in Opposition to Demurrer to Second Amended Petition for Writ of Mandate and Complaint for Declaratory Relief | 1 | 11/1/2018 | 16 | AA00171 |
| Declaration of Phillip Bokovoy in Opposition to Demurrer to Second Amended Petition for Writ of Mandate and Complaint for Declaratory Relief | 1 | 11/1/2018 | 17 | AA00191 |
| Declaration of Thomas N. Lippe in Opposition to Demurrer to Second Amended Petition for Writ of Mandate and Complaint for Declaratory Relief | 1 | 11/1/2018 | 18 | AA00206 |
| Memorandum of Points and Authorities in Support of Motion to Compel Further Responses to Plaintiff's Request for Production of Documents, Set One | 1 | 11/5/2018 | 19 | AA00210 |
| Notice of Motion and Motion to Compel Further Responses to Plaintiff's Request for Production of Documents, Set One | 1 | 11/5/2018 | 20 | AA00218 |

Document received by the CA 1st District Court of Appeal.

APPELLANTS APPENDIX
 Chronological Index

| <u>Document</u> | <u>Vol. No.</u> | <u>Date Filed</u> | <u>Tab No.</u> | <u>Page No.</u> |
|--|-----------------|-------------------|----------------|-----------------|
| Separate Statement in Support of Plaintiff's Motion to Compel Further Responses to Plaintiff's Request for Production of Documents, Set One | 1 | 11/5/2018 | 21 | AA00220 |
| Declaration of Thomas N. Lippe in Support of Motion to Compel Further Responses to Plaintiff's Request for Production of Documents, Set One | 1 | 11/5/2018 | 22 | AA00230 |
| Reply to Opposition to Demurrer | 1 | 11/7/2018 | 23 | AA00269 |
| Objections to and Request to Strike Declaration of Phillip Bokovoy in Support of Opposition to Respondents' Demurrer to Second Amended Petition for Writ of Mandate and Complaint for Declaratory Relief | 1 | 11/7/2018 | 24 | AA00284 |
| Respondents' Case Management Statement | 2 | 11/15/2018 | 25 | AA00305 |
| Plaintiff's Case Management Statement | 2 | 11/16/2018 | 26 | AA00312 |
| Opposition to Petitioner's Motion to Compel Further Responses to Petitioner's Request for Production of Documents, Set One | 2 | 11/21/2018 | 27 | AA00324 |
| Respondents' Separate Statement in Support of Opposition to Petitioner's Motion to Compel Further Responses | 2 | 11/21/2018 | 28 | AA00340 |
| Notice of Entry of Order; Demurrer Sustained | 2 | 11/21/2018 | 29 | AA00346 |
| Third Amended Petition for Writ of Mandate and Complaint for Declaratory Relief | 2 | 11/21/2018 | 30 | AA00350 |
| Reply Memorandum of Points and Authorities in Support of Motion to Compel Further Responses to Plaintiff's Responses for Production of Documents, Set One | 2 | 11/29/2018 | 31 | AA00386 |

Document received by the CA 1st District Court of Appeal.

APPELLANTS APPENDIX
Chronological Index

| <u>Document</u> | <u>Vol. No.</u> | <u>Date Filed</u> | <u>Tab No.</u> | <u>Page No.</u> |
|--|-----------------|-------------------|----------------|-----------------|
| Reply Declaration of Thomas N. Lippe in Support of Motion to Compel Further Responses to Plaintiff's Responses for Production of Documents, Set One | 2 | 11/29/2018 | 32 | AA00392 |
| Notice of Entry of Order; Motion to Compel - Denied | 2 | 12/10/2018 | 33 | AA00395 |
| Memorandum of Points and Authorities in Support of Demurrer to Petitioner's Third Amended Petition for Writ of Mandate and Complaint for Declaratory Relief | 2 | 12/10/2018 | 34 | AA00400 |
| Notice of Demurrer and Demurrer to the Third Amended Verified Petition for Writ of Mandate and Complaint for Declaratory Relief | 2 | 12/10/2018 | 35 | AA00420 |
| Declaration of Timothy D. Cremin in Support of Demurrer to Third Amended Petition and Complaint for Declaratory Relief | 2 | 12/10/2018 | 36 | AA00425 |
| Memorandum of Points and Authorities In Opposition to Demurrer to Third Amended Petition for Writ of Mandate and Complaint for Declaratory Relief | 2 | 1/2/2019 | 37 | AA00429 |
| Declaration of Phillip Bokovoy In Opposition to Demurrer to Third Amended Petition for Writ of Mandate and Complaint for Declaratory Relief | 2 | 1/2/2019 | 38 | AA00450 |
| Reply to Opposition to Demurrer to Third Amended Petition for Writ of Mandate and Complaint for Declaratory Relief | 2 | 1/8/2019 | 39 | AA00450 |
| Objections to and Request to Strike Declaration of Phillip Bokovoy in Support of Opposition to Respondents' Demurrer to Third Amended Petition for Writ of Mandate and Complaint for | 2 | 1/8/2019 | 40 | AA00470 |
| Respondents' Case Management Statement | 2 | 1/24/2019 | 41 | AA00475 |

Document received by the CA 1st District Court of Appeal.

APPELLANTS APPENDIX
Chronological Index

| <u>Document</u> | <u>Vol. No.</u> | <u>Date Filed</u> | <u>Tab No.</u> | <u>Page No.</u> |
|--|-----------------|-------------------|----------------|-----------------|
| Plaintiff's Case Management Statement | 2 | 1/25/2019 | 42 | AA00482 |
| Supplemental Reply Memorandum of Points and Authorities in Opposition to Demurrer to Third Amended Petition for Writ of Mandate and Complaint for Declaratory Relief | 3 | 2/4/2019 | 43 | AA00511 |
| Supplemental Brief in Support of Respondents' Demurrer to Third Amended Petition for Writ of Mandate and Complaint for Declaratory Relief | 3 | 2/4/2019 | 44 | AA00518 |
| Order Setting Further Hearing on Defendants' Demurrer to Third Amended Petition for Writ of Mandate and Complaint for Declaratory Relief | 3 | 4/2/2019 | 45 | AA00524 |
| Ex Parte Application for Leave to File Plaintiff's Request for Judicial Notice in Opposition to Demurrer to Third Amended Petition for Writ of Mandate and Complaint for Declaratory Relief | 3 | 4/5/2019 | 46 | AA00528 |
| Memorandum of Points and Authorities in Support of Ex Parte Application for Leave to File Plaintiff's Request for Judicial Notice in Opposition to Demurrer to Third Amended Petition for Writ of Mandate and Complaint for Declaratory Relief | 3 | 4/5/2019 | 47 | AA00541 |
| Declaration of Thomas N. Lipee in Support of Ex Parte Application for Leave to File Plaintiff's Request for Judicial Notice in Opposition to Demurrer to Third Amended Petition for Writ of Mandate and Complaint for Declaratory Relief | 3 | 4/5/2019 | 48 | AA00545 |
| Declaration of Phillip Bokovy in Support of Ex Parte Application for Leave to File Plaintiff's Request for Judicial Notice in Opposition to Demurrer to Third Amended Petition for Writ of Mandate and Complaint for Declaratory Relief | 3 | 4/5/2019 | 49 | AA00548 |

Document received by the CA 1st District Court of Appeal.

APPELLANTS APPENDIX
Chronological Index

| <u>Document</u> | <u>Vol. No.</u> | <u>Date Filed</u> | <u>Tab No.</u> | <u>Page No.</u> |
|--|-----------------|-------------------|----------------|-----------------|
| [Proposed] Order Granting Ex Parte Application for Leave to File Plaintiff's Request for Judicial Notice in Opposition to Demurrer to Third Amended Petition for Writ of Mandate and Complaint for Declaratory Relief | 3 | 4/5/2019 | 50 | AA00551 |
| Notice of Hearing, Civil Ex Parte for 04/08/2019, 4:00PM Department 17, Alameda Superior Court, Administration Building, Third Floor 1221 Oak Street, Oakland, CA | 3 | 4/5/2019 | 51 | AA00553 |
| Minutes - re Ex Parte hearing 04/08/2019, matter dropped | 3 | 4/8/2019 | 52 | AA00555 |
| Respondents' Opposition to Petitioner's Ex Parte Application for Leave to File Plaintiff's Request for Judicial Notice and Supporting Pleadings and Declarations | 3 | 4/8/2019 | 53 | AA00557 |
| Ex Parte Application for Leave to File Plaintiff's Request for Judicial Notice in Opposition to Demurrer to Third Amended Petition for Writ of Mandate and Complaint for Declaratory Relief | 3 | 4/17/2019 | 54 | AA00562 |
| Memorandum of Points and Authorities in Support of Ex Parte Application for Leave to File Plaintiff's Request for Judicial Notice in Opposition to Demurrer to Third Amended Petition for Writ of Mandate and Complaint for Declaratory Relief | 3 | 4/17/2019 | 55 | AA00576 |
| Declaration of Thomas N. Lippe in Support of Ex Parte Application for Leave to File Plaintiff's Request for Judicial Notice in Opposition to Demurrer to Third Amended Petition for Writ of Mandate and Complaint for Declaratory Relief | 3 | 4/17/2019 | 56 | AA00580 |

Document received by the CA 1st District Court of Appeal.

APPELLANTS APPENDIX
 Chronological Index

| <u>Document</u> | <u>Vol. No.</u> | <u>Date Filed</u> | <u>Tab No.</u> | <u>Page No.</u> |
|--|-----------------|-------------------|----------------|-----------------|
| Declaration of Phillip Bokovoy in Support of Ex Parte Application for Leave to File Plaintiff's Request for Judicial Notice in Opposition to Demurrer to Third Amended Petition for Writ of Mandate and Complaint for Declaratory Relief | 3 | 4/17/2019 | 57 | AA00583 |
| [Proposed] Order Granting Ex Parte Application for Leave to File Plaintiff's Request for Judicial Notice in Opposition to Demurrer to Third Amended Petition for Writ of Mandate and Complaint for Declaratory Relief | 3 | 4/17/2019 | 58 | AA00586 |
| Respondents' Opposition to Petitioner's Ex Parte Application for Leave to File Plaintiff's Request for Judicial Notice and Supporting Pleadings and Declarations | 3 | 4/17/2019 | 59 | AA00588 |
| Minutes - re Petition for Writ of Mandate, matter taken under submission | 3 | 4/18/2019 | 60 | AA00596 |
| Order Dismissing Petition | 3 | 4/30/2019 | 61 | AA00598 |
| Order Sustaining Defendants' Demurrer to Third Amended Petition for Writ of Mandate and Complaint for Declaratory Relief | 3 | 4/30/2019 | 62 | AA00600 |
| [Proposed] Judgment of Dismissal of Entire Case and All Causes of Action with Prejudice | 3 | 5/9/2019 | 63 | AA00605 |
| Notice of Entry of Order; Order Sustaining Defendants' Demurrer to Third Amended Petition for Writ of Mandate and Complaint for Declaratory Relief | 3 | 5/9/2019 | 64 | AA00617 |
| Judgment of Dismissal of Entire Case and All Causes of Action with Prejudice | 3 | 6/7/2019 | 65 | AA00624 |
| Notice of Appeal | 3 | 6/13/2019 | 66 | AA00635 |

Document received by the CA 1st District Court of Appeal.

APPELLANTS APPENDIX
Chronological Index

| <u>Document</u> | <u>Vol. No.</u> | <u>Date Filed</u> | <u>Tab No.</u> | <u>Page No.</u> |
|---|-----------------|-------------------|----------------|-----------------|
| Appellant's Notice Designating Record on Appeal | 3 | 6/21/2019 | 67 | AA00649 |

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Document received by the CA 1st District Court of Appeal.

APPELLANTS APPENDIX
Alphabetical Index

| <u>Document</u> | <u>Vol. No.</u> | <u>Date Filed</u> | <u>Tab No.</u> | <u>Page No.</u> |
|--|-----------------|-------------------|----------------|-----------------|
| Appellant's Notice Designating Record on | 3 | 6/21/2019 | 67 | AA00649 |
| Declaration of Phillip Bokovoy in Opposition to Demurrer to Second Amended Petition for Writ of Mandate and Complaint for Declaratory Relief | 1 | 11/1/2018 | 17 | AA00191 |
| Declaration of Phillip Bokovoy In Opposition to Demurrer to Third Amended Petition for Writ of Mandate and Complaint for Declaratory Relief | 2 | 1/2/2019 | 38 | AA00450 |
| Declaration of Phillip Bokovoy in Support of Ex Parte Application for Leave to File Plaintiff's Request for Judicial Notice in Opposition to Demurrer to Third Amended Petition for Writ of Mandate and Complaint for Declaratory Relief | 3 | 4/17/2019 | 57 | AA00583 |
| Declaration of Phillip Bokovy in Support of Ex Parte Application for Leave to File Plaintiff's Request for Judicial Notice in Opposition to Demurrer to Third Amended Petition for Writ of Mandate and Complaint for Declaratory Relief | 3 | 4/5/2019 | 49 | AA00548 |
| Declaration of Russ Acker in Support of Demurrer to Second Amended Petition and Complaint for Declaratory Relief | 1 | 10/19/2018 | 13 | AA00155 |
| Declaration of Thomas N. Lippe in Support of Ex Parte Application for Leave to File Plaintiff's Request for Judicial Notice in Opposition to Demurrer to Third Amended Petition for Writ of Mandate and Complaint for Declaratory Relief | 3 | 4/5/2019 | 48 | AA00545 |
| Declaration of Thomas N. Lippe in Opposition to Demurrer to Second Amended Petition for Writ of Mandate and Complaint for Declaratory Relief | 1 | 11/1/2018 | 18 | AA00206 |

Document received by the CA 1st District Court of Appeal.

APPELLANTS APPENDIX
Alphabetical Index

| <u>Document</u> | <u>Vol. No.</u> | <u>Date Filed</u> | <u>Tab No.</u> | <u>Page No.</u> |
|--|-----------------|-------------------|----------------|-----------------|
| Declaration of Thomas N. Lippe in Support of Ex Parte Application for Leave to File Plaintiff's Request for Judicial Notice in Opposition to Demurrer to Third Amended Petition for Writ of Mandate and Complaint for Declaratory Relief | 3 | 4/17/2019 | 56 | AA00580 |
| Declaration of Thomas N. Lippe in Support of Motion to Compel Further Responses to Plaintiff's Request for Production of Documents, Set One | 1 | 11/5/2018 | 22 | AA00230 |
| Declaration of Timothy D. Cremin in Support of Demurrer to Second Amended Petition and Complaint for Declaratory Relief | 1 | 10/19/2018 | 14 | AA00159 |
| Declaration of Timothy D. Cremin in Support of Demurrer to Third Amended Petition and Complaint for Declaratory Relief | 2 | 12/10/2018 | 36 | AA00425 |
| Ex Parte Application for Leave to File Plaintiff's Request for Judicial Notice in Opposition to Demurrer to Third Amended Petition for Writ of Mandate and Complaint for Declaratory Relief | 3 | 4/5/2019 | 46 | AA00528 |
| Ex Parte Application for Leave to File Plaintiff's Request for Judicial Notice in Opposition to Demurrer to Third Amended Petition for Writ of Mandate and Complaint for Declaratory Relief | 3 | 4/17/2019 | 54 | AA00562 |
| First Amended Petition for Writ of Mandate and Complaint for Declaratory Relief | 1 | 6/18/2018 | 03 | AA00040 |
| Judgment of Dismissal of Entire Case and All Causes of Action with Prejudice | 3 | 6/7/2019 | 65 | AA00624 |
| Memorandum of Points and Authorities in Opposition to Demurrer to Second Amended Petition for Writ of Mandate and Complaint for Declaratory Relief | 1 | 11/1/2018 | 16 | AA00171 |

Document received by the CA 1st District Court of Appeal.

APPELLANTS APPENDIX
Alphabetical Index

| <u>Document</u> | <u>Vol. No.</u> | <u>Date Filed</u> | <u>Tab No.</u> | <u>Page No.</u> |
|--|-----------------|-------------------|----------------|-----------------|
| Memorandum of Points and Authorities In Opposition to Demurrer to Third Amended Petition for Writ of Mandate and Complaint for Declaratory Relief | 2 | 1/2/2019 | 37 | AA00429 |
| Memorandum of Points and Authorities in Support of Demurrer to Petitioner's Second Amended Petition for Writ of Mandate and Complaint for Declaratory Relief | 1 | 10/19/2018 | 10 | AA00115 |
| Memorandum of Points and Authorities in Support of Demurrer to Petitioner's Third Amended Petition for Writ of Mandate and Complaint for Declaratory Relief | 2 | 12/10/2018 | 34 | AA00400 |
| Memorandum of Points and Authorities in Support of Ex Parte Application for Leave to File Plaintiff's Request for Judicial Notice in Opposition to Demurrer to Third Amended Petition for Writ of Mandate and Complaint for Declaratory Relief | 3 | 4/5/2019 | 47 | AA00541 |
| Memorandum of Points and Authorities in Support of Ex Parte Application for Leave to File Plaintiff's Request for Judicial Notice in Opposition to Demurrer to Third Amended Petition for Writ of Mandate and Complaint for Declaratory Relief | 3 | 4/17/2019 | 55 | AA00576 |
| Memorandum of Points and Authorities in Support of Motion to Compel Further Responses to Plaintiff's Request for Production of Documents, Set One | 1 | 11/5/2018 | 19 | AA00210 |
| Minutes - re Ex Parte hearing 04/08/2019, matter dropped | 3 | 4/8/2019 | 52 | AA00555 |
| Minutes - re Petition for Writ of Mandate, matter taken under submission | 3 | 4/18/2019 | 60 | AA00596 |

Document received by the CA 1st District Court of Appeal.

APPELLANTS APPENDIX
 Alphabetical Index

| <u>Document</u> | <u>Vol. No.</u> | <u>Date Filed</u> | <u>Tab No.</u> | <u>Page No.</u> |
|---|-----------------|-------------------|----------------|-----------------|
| Notice of Appeal | 3 | 6/13/2019 | 66 | AA00635 |
| Notice of Demurrer and Demurrer to the Second Amended Petition for Writ of Mandate and Complaint for Declaratory Relief | 1 | 10/19/2018 | 11 | AA00135 |
| Notice of Demurrer and Demurrer to the Third Amended Verified Petition for Writ of Mandate and Complaint for Declaratory Relief | 2 | 12/10/2018 | 35 | AA00420 |
| Notice of Entry of Order; Demurrer Sustained | 2 | 11/21/2018 | 29 | AA00346 |
| Notice of Entry of Order; Motion to Compel - Denied | 2 | 12/10/2018 | 33 | AA00395 |
| Notice of Entry of Order; Order Following Stipulation Granting Plaintiff Leave to File Second Amended Petition for Writ of Mandate and Complaint for Declaratory Relief | 1 | 10/24/2018 | 15 | AA00163 |
| Notice of Entry of Order; Order following Third Stipulation and [Proposed] Order to Extend Deadlines to Allow Parties to Engage in Further Settlement Negotiations | 1 | 8/17/2018 | 06 | AA00071 |
| Notice of Entry of Order; Order Sustaining Defendants' Demurrer to Third Amended Petition for Writ of Mandate and Complaint for Declaratory Relief | 3 | 5/9/2019 | 64 | AA00617 |
| Notice of Entry of Order; Stipulation and Order to Extend Deadlines to Allow Parties to Engage in Further Settlement Negotiations | 1 | 7/2/2018 | 04 | AA00061 |
| Notice of Hearing, Civil Ex Parte for 04/08/2019, 4:00PM Department 17, Alameda Superior Court, Administration Building, Third Floor 1221 Oak Street, Oakland, CA | 3 | 4/5/2019 | 51 | AA00553 |

Document received by the CA 1st District Court of Appeal.

APPELLANTS APPENDIX
Alphabetical Index

| <u>Document</u> | <u>Vol. No.</u> | <u>Date Filed</u> | <u>Tab No.</u> | <u>Page No.</u> |
|--|-----------------|-------------------|----------------|-----------------|
| Notice of Motion and Motion to Compel Further Responses to Plaintiff's Request for Production of Documents, Set One | 1 | 11/5/2018 | 20 | AA00218 |
| Notice of Request and Request for Hearing | 1 | 7/24/2018 | 05 | AA00067 |
| Objections to and Request to Strike Declaration of Phillip Bokovoy in Support of Opposition to Respondents' Demurrer to Third Amended Petition for Writ of Mandate and Complaint for Declaratory Relief | 2 | 1/8/2019 | 40 | AA00470 |
| Objections to and Request to Strike Declaration of Phillip Bokovoy in Support of Opposition to Respondents' Demurrer to Second Amended Petition for Writ of Mandate and Complaint for Declaratory Relief | 1 | 11/7/2018 | 24 | AA00284 |
| Opposition to Petitioner's Motion to Compel Further Responses to Petitioner's Request for Production of Documents, Set One | 2 | 11/21/2018 | 27 | AA00324 |
| Order Dismissing Petition | 3 | 4/30/2019 | 61 | AA00598 |
| Order Setting Further Hearing on Defendants' Demurrer to Third Amended Petition for Writ of Mandate and Complaint for Declaratory Relief | 3 | 4/2/2019 | 45 | AA00524 |
| Order Sustaining Defendants' Demurrer to Third Amended Petition for Writ of Mandate and Complaint for Declaratory Relief | 3 | 4/30/2019 | 62 | AA00600 |
| Petition for Writ of Mandate and Complaint for Declaratory Relief | 1 | 4/27/2018 | 01 | AA00017 |
| Plaintiff's Request and Election to Prepare Record of Proceedings | 1 | 4/27/2018 | 02 | AA00038 |
| Plaintiff's Case Management Statement | 1 | 10/4/2018 | 07 | AA00077 |

Document received by the CA 1st District Court of Appeal.

APPELLANTS APPENDIX
Alphabetical Index

| <u>Document</u> | <u>Vol. No.</u> | <u>Date Filed</u> | <u>Tab No.</u> | <u>Page No.</u> |
|---|-----------------|-------------------|----------------|-----------------|
| Plaintiff's Case Management Statement | 2 | 11/16/2018 | 26 | AA00312 |
| Plaintiff's Case Management Statement | 2 | 1/25/2019 | 42 | AA00482 |
| [Proposed] Judgment of Dismissal of Entire Case and All Causes of Action with Prejudice | 3 | 5/9/2019 | 63 | AA00605 |
| [Proposed] Order Granting Ex Parte Application for Leave to File Plaintiff's Request for Judicial Notice in Opposition to Demurrer to Third Amended Petition for Writ of Mandate and Complaint for Declaratory Relief | 3 | 4/5/2019 | 50 | AA00551 |
| [Proposed] Order Granting Ex Parte Application for Leave to File Plaintiff's Request for Judicial Notice in Opposition to Demurrer to Third Amended Petition for Writ of Mandate and Complaint for Declaratory Relief | 3 | 4/17/2019 | 58 | AA00586 |
| Reply Declaration of Thomas N. Lippe in Support of Motion to Compel Further Responses to Plaintiff's Responses for Production of Documents, Set One | 2 | 11/29/2018 | 32 | AA00392 |
| Reply Memorandum of Points and Authorities in Support of Motion to Compel Further Responses to Plaintiff's Responses for Production of Documents, Set One | 2 | 11/29/2018 | 31 | AA00386 |
| Reply to Opposition to Demurrer | 1 | 11/7/2018 | 23 | AA00269 |
| Reply to Opposition to Demurrer to Third Amended Petition for Writ of Mandate and Complaint for Declaratory Relief | 2 | 1/8/2019 | 39 | AA00455 |
| Request for Judicial Notice in Support of Demurrer to Second Amended Petition and Complaint for Declaratory Relief | 1 | 10/19/2018 | 12 | AA00139 |
| Respondents' Case Management Statement | 1 | 10/4/2018 | 08 | AA00089 |

Document received by the CA 1st District Court of Appeal.

APPELLANTS APPENDIX
 Alphabetical Index

| <u>Document</u> | <u>Vol. No.</u> | <u>Date Filed</u> | <u>Tab No.</u> | <u>Page No.</u> |
|--|-----------------|-------------------|----------------|-----------------|
| Respondents' Case Management Statement | 2 | 11/15/2018 | 25 | AA00305 |
| Respondents' Case Management Statement | 2 | 1/24/2019 | 41 | AA00475 |
| Respondents' Opposition to Petitioner's Ex Parte Application for Leave to File Plaintiff's Request for Judicial Notice and Supporting Pleadings and Declarations | 3 | 4/8/2019 | 53 | AA00557 |
| Respondents' Opposition to Petitioner's Ex Parte Application for Leave to File Plaintiff's Request for Judicial Notice and Supporting Pleadings and Declarations | 3 | 4/17/2019 | 59 | AA00588 |
| Respondents' Separate Statement in Support of Opposition to Petitioner's Motion to Compel Further Responses | 2 | 11/21/2018 | 28 | AA00340 |
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| Separate Statement in Support of Plaintiff's Motion to Compel Further Responses to Plaintiff's Request for Production of Documents, Set One | 1 | 11/5/2018 | 21 | AA00220 |
| Supplemental Brief in Support of Respondents' Demurrer to Third Amended Petition for Writ of Mandate and Complaint for Declaratory Relief | 3 | 2/4/2019 | 44 | AA00518 |
| Supplemental Reply Memorandum of Points and Authorities in Opposition to Demurrer to Third Amended Petition for Writ of Mandate and Complaint for Declaratory Relief | 3 | 2/4/2019 | 43 | AA00511 |
| Third Amended Petition for Writ of Mandate and Complaint for Declaratory Relief | 2 | 11/21/2018 | 30 | AA00350 |

Tab 043

FEB/04/2019/MON 03:34 PM Law O. Thomas Lippe

FAX No. 1-415-777-5603

F. 032

FILED BY FAX
ALAMEDA COUNTY
 February 04, 2019
 CLERK OF
 THE SUPERIOR COURT
 By Burt Moskaira, Deputy
 CASE NUMBER:
RG18902751

1 Thomas N. Lippe, SBN 104640
 2 LAW OFFICES OF THOMAS N. LIPPE, APC
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8 Attorney for Plaintiff: Save Berkeley's Neighborhoods

9
 10 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**
 11 **IN AND FOR THE COUNTY OF ALAMEDA**

12 **SAVE BERKELEY'S NEIGHBORHOODS, a**
 13 **California nonprofit public benefit corporation;**

14 Plaintiff,
 15 vs.

16 **THE REGENTS OF THE UNIVERSITY OF**
 17 **CALIFORNIA; JANET NAPOLITANO, in her**
 18 **capacity as President of the University of**
 19 **California; CAROL T. CHRIST, in her capacity as**
 20 **Chancellor of the University of California,**
 21 **Berkeley; and DOES 1 through 20,**

22 Respondents and Defendants.
 23
 24
 25
 26
 27
 28

Case No. RG18902751

**SUPPLEMENTAL REPLY MEMORANDUM
 OF POINTS AND AUTHORITIES IN
 OPPOSITION TO DEMURRER TO THIRD
 AMENDED PETITION FOR WRIT OF
 MANDATE AND COMPLAINT FOR
 DECLARATORY RELIEF**

**[CALIFORNIA ENVIRONMENTAL
 QUALITY ACT]**

Reservation No.: R-2022686

Date: January 15, 2019

Time: 3:45 P.M.

Dept.: 24

Judge: Hon. Noel Wise

Action Filed: April 27, 2018

Trial Date: Not Set

Assigned for All Purposes to:

Hon. Noel Wise, Dept. 24

Document received by the CA 1st District Court of Appeal.

1 **1. The difference between enrollment plans and physical development. (RT 1/24/19 21:7.)**

2 A “program” may be a “CEQA project.” (*Stanislaus Natural Heritage Project v. County of*
3 *Stanislaus* (1996) 48 Cal.App.4th 182, 195; see CEQA § 21065; CEQA Guidelines §§ 15168, 15378.) Here,
4 the Regents are carrying out a program of increasing student enrollment, and they changed the program to
5 substantially exceed the increase disclosed in the 2005 EIR. CEQA section 21080.09 requires that the
6 Regents make long-term programmatic decisions regarding enrollment and analyze these decisions using
7 programmatic EIRs, and that the Regents update these CEQA analyses to evaluate subsequent changes in
8 programmatic enrollment plans using CEQA documents that “tier” to the original programmatic EIR for the
9 LRDP. (CEQA § 21080.09, subds. (b), (d); *Vineyard Area Citizens for Responsible Growth, Inc. v. City of*
10 *Rancho Cordova* (2007) 40 Cal.4th 412, 429-30, 440 (*Vineyard*) [discussion of “tiering”].)¹

11 The Regents argue that LRDPs, as defined in CEQA section 21080.09(a)(2), do not include
12 enrollment; and, therefore, there is no valid CEQA claim for the Regents’ failure to conduct subsequent
13 CEQA review based on enrollment increases above the 2020 LRDP’s projected increase. But subdivision
14 (b) of section 21080.09 provides that “long range development plans are subject to this division and require
15 the preparation of an environmental impact report” and “*Environmental effects relating to changes in*
16 *enrollment levels shall be considered for each campus ... in the environmental impact report prepared for*
17 *the long range development plan*” (italics added). The Regents’ construction of this statute is incorrect
18 because it is inconsistent with long-standing CEQA legal principles, it would violate cardinal rules
19 governing the interpretation of statutes and of CEQA, and it would lead to absurd results.²

20 “An accurate, stable and finite project description is the Sine qua non of an informative and legally
21 sufficient EIR.” (*County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 192–193.) The Courts
22 have construed the term “project” broadly to ensure that environmental review under CEQA includes a

23 ¹CEQA applies to “discretionary,” not “ministerial” projects. (Guidelines § 15357.) The Regents’ decision
24 to increase enrollment at UCB is “discretionary” because the Regents had to “use its judgment in deciding
25 whether and how to carry out or approve” its 2020 LRDP project. (Guidelines, §§ 15002(i); 15357; *Friends*
of Westwood, Inc. v. City of Los Angeles (1987) 191 Cal.App.3d 259, 269, 273.)

26 ²The court’s “primary task in interpreting a statute is to determine the Legislature’s intent, giving effect to
27 the law’s purpose. [citation] We begin with the language of the statutes as the most reliable indicator of
28 intent. We construe terms in context, harmonizing the statutes both internally and with each other to the
extent possible.” (*Leider v. Lewis* (2017) 2 Cal.5th 1121, 1135.)

1 components of the activity that may harm the environment, in order to prevent “the fallacy of division,”
2 which is the “overlooking [of a project’s] cumulative impact by separately focusing on isolated parts of the
3 whole.” (*McQueen v. Board of Directors* (1988) 202 Cal.App.3d 1136, 1144.) Environmental
4 considerations may not be submerged by chopping a single CEQA project into smaller parts for piecemeal
5 assessment. (*Bozung v. Local Agency Formation Com.* (1975) 13 Cal.3d 263, 283–284.) Rather, “the whole
6 of an action ” or the entire activity for which the approvals are being sought must be considered by the
7 agency. (Guidelines § 15378(a), (c).) Also, EIRs must evaluate the environmental impacts of reasonably
8 foreseeable future activities associated with the project where these activities may contribute to significant
9 environmental effects. (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47
10 Cal.3d 376, 395-396 (*Laurel Heights I*).)

11 The Regents’ objective is to avoid subsequent CEQA review for its post-LRDP enrollment increases
12 that exceed the 2020 LRDP’s projected increases. The Regents’ construction of section 21080.09 imputed
13 to the Legislature an intent to require that an LRDP EIR evaluate the significance of impacts caused by its
14 projected enrollment increases, but not consider such projected enrollment increases to be “part” of the
15 LRDP “project” or a reasonably foreseeable future activity, and to exempt subsequent additional enrollment
16 increases from subsequent CEQA review! This is inconsistent with the case law cited above, which was
17 well-established before the Legislature adopted section 21080.09 in 1989. Thus, the Regents’ construction
18 violates the principle that courts “presume the Legislature was aware of existing judicial decisions directly
19 bearing on the legislation it enacted” and “do not presume it meant to overthrow long-established principles
20 of law, unless such an intention is clearly expressed or necessarily implied.” (*Leider v. Lewis* (2017) 2
21 Cal.5th 1121, 1135; *Big Creek Lumber v. County of Santa Cruz* (2006) 38 Cal.4th 1139.) The Regents’
22 construction of section 21080.09 is also inconsistent with decades of CEQA case law that post-dates 1989
23 (see e.g., *Nelson v. County of Kern* (2010) 190 Cal.App.4th 252, 270–271; Education Code section 67504.5
24 and the rule that CEQA is “to be interpreted to afford the fullest possible protection to the environment
25 within the reasonable scope of the statutory language.” (*Laurel Heights I, supra*, at 390.)

26 The Regents’ construction is foreclosed by section 21080.09, subd. (d), which requires subsequent
27 environmental review of post-LRDP enrollment increases by preparing a new CEQA document “tiered” to
28 the LRDP EIR. “Tiering” refers to subsequent CEQA review documents that an agency may use to assess
the impacts of changes to a project occurring after initial or previous CEQA review and that rely on and
incorporate by reference a previous CEQA document. (See, *Vineyard, supra*; *Friends of College of San*

1 *Mateo Gardens v. San Mateo County Community College District* (2016) 1 Cal.5th 937.) After including
2 enrollment increases in the 2020 LRDP/2005 EIR, section 21080.09 allows subsequent CEQA review of
3 further increases to “tier” to the 2005 EIR; it does not authorize dispensing with subsequent CEQA review.

4 **2. The Court asked “I’m still not clear how far back you think it’s not moot.” (RT 1/24/19:21.)**


5 Plaintiff’s CEQA claim is that the Regents changed the 2020 LRDP program by substantially
6 increasing enrollment such that the Regents must conduct subsequent CEQA review of the program. A
7 claim is not moot if the Court can grant effective relief. (*Woodward Park Homeowners Assn. v. Garreks,*
8 *Inc.* (2000) 77 Cal.App.4th 880, 888.) Here, a court order requiring the Regents to conduct CEQA review
9 of the subsequent enrollment increases to identify and mitigate their adverse effects would be effective relief.

10 *Californians for Alternatives to Toxics v. California Department of Pesticide Regulation* (2006) 136
11 Cal.App.4th 1049, 1069-1070 requires rejecting the Regents’ attempt to frame Plaintiff’s CEQA claim as
12 individual challenges to a series of annual enrollment increases where the harm caused by each annual
13 enrollment ends when the academic year ends. This view is not realistic, because UC Berkeley is
14 permanent resident of the City of Berkeley and its students have permanent impacts on the City’s quality
15 of life and environment. Chopping UC Berkeley’s long-term program of enrolling students into a number
16 of separate individual years commits the “fallacy of division” that California courts have consistently
17 rejected.

18 **3. The Court asked when enrollment increases became “substantial.” (RT 1/24/8:7.)** Plaintiff must
19 prove that enrollment increases were “substantial” by the time it filed its mandamus claim (*Concerned*
20 *Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929, 932-34, 936-937, 939
21 (*Concerned Citizens*), or will be “substantial” for its declaratory relief claim (*Kirkwood v. California State*
22 *Automobile Assn. Inter-Ins. Bureau* (2011) 193 Cal.App.4th 49, 59 [“Declaratory relief operates
23 prospectively....”]). The TAP alleges Plaintiff discovered, on October 31, 2017, that “substantial”
24 enrollment increases had occurred (“substantial” meaning the excess enrollment may or will cause
25 significant environmental effects). Plaintiff must also demonstrate that it exercised reasonable diligence
26 leading up to October 31, 2017, in discovering that “substantial” enrollment increases occurred. (*Concerned*
27 *Citizens, supra.*). Plaintiff is not aware of any authority that it must allege or prove, or that the Court must
28 determine, exactly when enrollment increases became “substantial.” If Plaintiff is incorrect on this point,
Plaintiff requests leave to amend to allege when enrollment increases became “substantial.”

1 DATED: February 4, 2019

LAW OFFICES OF THOMAS N. LIPPE, APC

2
3 By: 
4 Thomas N. Lippe
5 Attorney for Plaintiff

6 T:\TL\UC Enroll\Trial\Motions\M040c Supp Demurrer Opp TAP.wpd
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PROOF OF SERVICE


I am a citizen of the United States, employed in the City and County of San Francisco, California. My business address is 201 Mission Street, 12th Floor, San Francisco, CA 94105. I am over the age of 18 years and not a party to the above entitled action. On February 4, 2019, I served the following document(s) on the parties below, as designated:

- Supplemental Reply Memorandum of Points and Authorities in Opposition to Demurrer to Third Amended Petition for Writ of Mandate and Complaint for Declaratory Relief

MANNER OF SERVICE
(check all that apply)

- [B] By E-mail: I caused such document to be served via electronic mail equipment transmission (E-mail) on the parties as designated on the attached service list by transmitting a true copy to the following E-mail addresses listed under each addressee below. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.
- [A] By Personal Delivery by Courier: I caused each such envelope to be delivered to an authorized courier or driver, in an envelope or package addressed to the addressee below.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on February 4, 2019, in the City and County of San Francisco, California.



Kelly Marie Perry

SERVICE LIST

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Honorable Noel Wise, Dept. 24
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EXEMPT FROM FILING FEES
 GOV'T CODE § 6103

12 Attorneys for The Regents of the University of
 13 California; Janet Napolitano, in her capacity as
 14 President of the University of California; Carol T.
 15 Christ, in her capacity as Chancellor of the
 16 University of California, Berkeley

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

17 SAVE BERKELEY'S NEIGHBORHOODS, a
 18 California nonprofit public benefit
 19 corporation,

Petitioner and Plaintiff,

v.

21 THE REGENTS OF THE UNIVERSITY OF
 22 CALIFORNIA; JANET NAPOLITANO, in
 23 her capacity as President of the University of
 24 California; CAROL T. CHRIST, in her
 25 capacity as Chancellor of the University of
 26 California, Berkeley; and DOES 1 through 20,

Respondents and Defendants.

Case No. RG18902751

ASSIGNED FOR ALL PRE-TRIAL
 PURPOSES TO JUDGE NOEL WISE
 DEPARTMENT 24

**SUPPLEMENTAL BRIEF IN SUPPORT
 OF RESPONDENTS' DEMURRER TO
 PETITIONER'S THIRD AMENDED
 PETITION FOR WRIT OF MANDATE
 AND COMPLAINT FOR
 DECLARATORY RELIEF**

Action Filed: April 27, 2018
 Trial Date: None Set

1 The Court requested supplemental briefing on three questions. The answers to these
2 questions highlight the fundamental deficiencies with the Third Amended Petition (“TAP”) and
3 demonstrate why Respondents The Regents of the University of California, Janet Napolitano, and
4 Carol T Christ’s (collectively “UC’s”) demurrer should be sustained without leave to amend.

5 **I. ARGUMENT**

6 **A. LRDP is Not an Enrollment Plan**

7 The Court asked whether there is a difference between the impacts of enrollment and the
8 impacts of physical changes to the Long Range Development Plan (“LRDP”). This question
9 highlights the primary flaw in Petitioner’s case. Because the LRDP is not an enrollment plan,
10 changes in enrollment do not trigger subsequent CEQA review of the LRDP.

11 The CEQA provision governing higher education projects defines the LRDP as “a *physical*
12 *development and land use plan* to meet the institutional and academic objectives for a particular
13 campus...” (Pub. Res. Code (“PRC”), § 21080.09, subd. (a)(2) [emphasis added].) LRDP
14 approval is subject to CEQA, and requires the preparation of an Environmental Impact Report
15 (“EIR”). (PRC § 21080.09, subd. (b).) CEQA also requires the LRDP EIR to *consider*
16 “[e]nvironmental effects relating to changes in enrollment levels ...” (*Id.*) Consistent with this
17 requirement, when preparing LRDPs, campuses utilize enrollment projections to assist in
18 determining the amount of physical development required to accommodate the projected student
19 population, as well as the faculty and staff required to support that population. The impacts of this
20 physical development are then, as required by CEQA, evaluated in the LRDP EIR.

21 Contrary to Petitioner’s assertions, the LRDP is not an enrollment plan, nor does it approve
22 a level of enrollment. The LRDP is a comprehensive plan for the development of physical
23 facilities on a campus. The analysis of the environmental effects of projected enrollment in the
24 LRDP EIR “satisfies the obligations” of CEQA with respect to enrollment. (PRC § 21080.09,
25 subd. (c).) As a matter of law, therefore, CEQA does not require further review of the
26 environmental impacts of enrollment levels once UC certifies the LRDP EIR. As such, Petitioner
27 cannot state a claim alleging that a change in enrollment levels is a change to the LRDP which
28 requires subsequent or supplemental environmental review of the LRDP EIR. (See Opening Brief

1 ISO Demurrer to the TAP (“OB”) pp. 13, 15-16; Reply Brief ISO Demurrer (“RB”), pp. 6-10.)

2 It is important to note, however, that the potential impacts of increased campus enrollment
3 will not remain unexamined under CEQA, as Petitioner has alleged. To the contrary, these
4 impacts will be addressed during subsequent review of the future *physical development* projects
5 contemplated in the LRDP. (PRC, §§ 21094, 21166; CEQA Guidelines §§ 15152, 15162.) When
6 UC considers subsequent development projects, it may “tier” the environmental analysis of that
7 project from the LRDP EIR, thereby streamlining the later analysis and avoiding repetitive
8 discussions of the same issues. (PRC § 21093.) As part of this tiered analysis, UC determines
9 whether current enrollment levels (that may have exceeded the projections in the LRDP) may have
10 caused any significant impacts not considered in the LRDP EIR. UC is currently using this
11 approach for the Goldman School of Public Policy’s Upper Hearst Project (“GSPP”). (Request
12 Judicial Notice filed ISO UC’s Demurrer to the SAP, Ex. 1, on file herein.) It is through the
13 CEQA process for the GSPP that Petitioner should raise its concerns over environmental impacts
14 of enrollment levels, not through this lawsuit.

15 Allowing this lawsuit to proceed also would be contrary to the Legislature’s determination
16 that annual CEQA review of enrollment levels is not required under PRC section 21080.09.
17 Indeed, such annual CEQA review and the inevitable subsequent legal challenges to UC’s
18 enrollment would place an impossible burden on UC to complete this review before allowing
19 students to enroll at its campuses. It would also contravene UC’s control over public higher
20 education under the State Constitution. (See RB, p. 10.) Fortunately, the statutory scheme the
21 Legislature enacted under PRC section 21080.09 avoids these annual review issues.

22 **B. Cyclical Mootness Is Not an Issue Because Enrollment Increases Are**
23 **Addressed Through Subsequent Projects**

24 The Court also asked whether Petitioner’s challenge to annual enrollment under CEQA
25 falls into the trap of cyclical mootness. When enrollment is viewed in its proper context, however,
26 cyclical mootness is not an issue.

27 As UC has argued extensively, changes in enrollment levels are not changes to the LRDP
28 and, therefore, do not require annual CEQA review to determine whether enrollment is in line with

1 levels predicted in the LRDP. Rather, enrollment changes must be considered in the CEQA
2 review for the next discretionary action by UC for a development project that relies on the LRDP
3 EIR's analysis. (PRC, §§ 21080.09, 21094, 21166; CEQA Guidelines §§ 15152, 15162.) Thus,
4 CEQA avoids the issue of cyclical mootness on challenges to enrollment levels by providing UC
5 with the opportunity to analyze the potential impacts of increased enrollment in the CEQA process
6 for subsequent discretionary decisions for physical projects, and by providing Petitioner and the
7 public the opportunity to comment on that analysis and, if desired, to seek judicial review.

8 **C. Petitioner Must Allege When Any Change Is "Substantial"**


9 The Court's final inquiry—when does Petitioner allege that any change to the LRDP
10 became "substantial"—is directed at Petitioner, and with good reason. Petitioner refuses to allege
11 this essential element of its claim in defiance of both the rules for pleadings and this Court's Order
12 sustaining UC's demurrer to the Second Amended Petition. ("Order," on file herein.) UC cannot
13 answer this question for Petitioner. Moreover, because Petitioner's only allegations regarding
14 changes to the LRDP concern changes to enrollment, Petitioner's answer is irrelevant. Enrollment
15 changes cannot constitute a change to an LRDP because an LRDP is a plan for the development of
16 facilities, not an enrollment plan. (OB, pp. 13, 15-16; RB, pp. 6-10.) Therefore, whenever
17 Petitioner alleges enrollment changes became "substantial," those changes cannot support a claim
18 for subsequent CEQA review of the LRDP.

19 However, assuming *arguendo* that enrollment changes could constitute a change to the
20 LRDP, Petitioner must allege such facts because: pleading requirements mandate that Petitioner
21 allege essential facts; the Court's Order mandated that Petitioner allege this fact; and Petitioner's
22 answer is critical to the determination of whether Petitioner's claims are barred by the statute of
23 limitations. (OB, pp. 10-13; RB, pp. 10-12; Order.). While it is a question of fact when any
24 alleged change *actually* became substantial, Petitioner must first allege when Petitioner *claims*
25 such an alleged change became substantial in order for the Court and UC to test the veracity of
26 that allegation. The obvious intent of Petitioner's prevarication is to prevent the application of the
27 statute of limitations to its claims. Petitioner cannot avoid the question of whether its claims are
28 time barred by simply refusing to allege an essential element of its claim.

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DATED: February 4, 2019

MEYERS, NAVE, RIBACK, SILVER & WILSON

By: 
Timothy D. Cremin
Attorneys for The Regents of the University of
California; Janet Napolitano, in her capacity as
President of the University of California; Carol T.
Christ, in her capacity as Chancellor of the
University of California, Berkeley

3166016.6

Document received by the CA 1st District Court of Appeal.

1 PROOF OF SERVICE

2 **STATE OF CALIFORNIA, COUNTY OF ALAMEDA**

3 At the time of service, I was over 18 years of age and **not a party to this action**. I am
4 employed in the County of Alameda, State of California. My business address is 555 12th Street,
Suite 1500, Oakland, CA 94607.

5 On February 4, 2019, I served true copies of the following document(s) described as
6 **SUPPLEMENTAL BRIEF IN SUPPORT OF RESPONDENTS' DEMURRER TO**
7 **PETITIONER'S THIRD AMENDED PETITION FOR WRIT OF MANDATE AND**
8 **COMPLAINT FOR DECLARATORY RELIEF** on the interested parties in this action as
follows:

8 Thomas N. Lippe, Esq.
9 Kelly Marie Perry, Esq.
10 Law Offices of Thomas N. Lippe, APC
201 Mission Street, 12th Fl.
11 San Francisco, CA 94105

Attorneys for Plaintiff SAVE
BERKELEY'S NEIGHBORHOODS

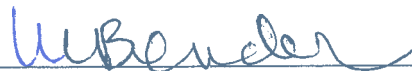
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12 **BY MAIL:** I enclosed the document(s) in a sealed envelope or package addressed to the
13 persons at the addresses listed in the Service List and placed the envelope for collection and
14 mailing, following our ordinary business practices. I am readily familiar with Meyers, Nave,
15 Riback, Silver & Wilson's practice for collecting and processing correspondence for mailing. On
the same day that the correspondence is placed for collection and mailing, it is deposited in the
ordinary course of business with the United States Postal Service, in a sealed envelope with
postage fully prepaid.

16 **BY E-MAIL OR ELECTRONIC TRANSMISSION:** I caused the document(s) to be
17 sent from e-mail address mbender@meyersnave.com to the persons at the e-mail addresses listed
18 in the Service List. I did not receive, within a reasonable time after the transmission, any
electronic message or other indication that the transmission was unsuccessful.

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

20 Executed on February 4, 2019, at Oakland, California.

21
22 
23 Melissa Bender

Document received by the CA 1st District Court of Appeal.



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FILED
ALAMEDA COUNTY

APR 2 - 2019

CLERK OF THE SUPERIOR COURT
By Vandy Wright Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

SAVE BERKELEY'S
NEIGHBORHOODS,

Plaintiff,

vs.

THE REGENTS OF THE UNIVERSITY
OF CALIFORNIA, et al.,

Defendants.

No. RG18-902751

ORDER SETTING FURTHER
HEARING ON DEFENDANTS'
DEMURRER TO THIRD
AMENDED PETITION FOR WRIT
OF MANDATE AND COMPLAINT
FOR DECLARATORY RELIEF

The Demurrer by Defendants and Respondents The Regents of the University of California, et al. ("the Regents") to the Third Amended Petition for Writ of Mandate and Complaint for Declaratory Relief came on regularly for hearing on January 24, 2019 in Department 24 of the above-entitled court, the Honorable Noel Wise presiding. After oral argument, the Court directed the parties to file supplemental briefs by February 4, 2019, which the parties subsequently did.

The Court has considered all of the papers filed in connection with the Demurrer and the arguments of counsel, and, good cause appearing, hereby

schedules a further hearing on this Demurrer for April 18, 2019 at 9:00 a.m. in Department 24.

The Court is currently inclined to sustain the Regents' Demurrer, without leave to amend, for the following reasons.

In this action, Plaintiff challenges a Final Environmental Impact Report prepared in 2005 ("the 2005 EIR") for the Regents' Long Range Development Plan for the University of California at Berkeley ("the LDRP"), also adopted in 2005. The LDRP and 2005 EIR, *inter alia*, projected an increase of 1,650 in student enrollment by 2020. (See Third Amended Petition, paragraphs 3-5; see also Plaintiff's opposition brief at page 1.) Plaintiff alleges that beginning in about 2007, the Regents made "informal, discretionary decisions" to increase enrollment at UC Berkeley beyond the projected 1,650 additional students. (See Third Amended Petition, paragraphs 6-7.) Plaintiff contends that it only learned about these "informal, discretionary decisions" on October 30, 2017, when the Regents responded to a request on enrollment information from the City of Berkeley. (See Third Amended Petition, paragraphs 9-11.) This action was filed on April 27, 2018.

To the extent that the Third Amended Petition challenges the adequacy of the 2005 EIR or the LDRP adopted also in 2005, it is barred by the 180 day statute of limitations of Public Resources Code § 21167(a). Plaintiff, however, contends that the Regents' "informal, discretionary decisions" to increase student

enrollment beyond that anticipated in the LDRP constituted “project changes” that required CEQA review. (See Plaintiff’s opposition brief at pages 3-4.)

The Court rejects this argument. The LDRP, as statutorily defined, is not a student enrollment plan. Rather, it is “a physical development and land use plan” for a campus of public higher education. (See Public Resources Code § 21080.09(a)(2).) Environmental effects relating to projected changes in enrollment levels are to be considered in the environmental impact report prepared for the long range development plan (see § 21080.09(b)), but any discrepancies between the estimated changes in enrollment levels and the actual enrollment levels in subsequent years are not themselves project or program changes that require subsequent CEQ review. The Regents’ 2005 analysis of the estimated projections of enrollment changes by 2020, as set forth in the 2005 EIR and the LDRP, satisfied the Regents’ obligations to consider the environmental impact of those enrollment plans. (See § 21080.09(d).) The time for Plaintiff to challenge the adequacy of the 2005 EIR and LDRP expired 180 days after their approval. (See § 21167(a).)


In addition to the First Cause of Action for Violation of CEQA, Plaintiff alleges a Second Cause of Action for Declaratory Relief, seeking a declaration that the Regents’ actions violate CEQA. The Second Cause of Action is therefore entirely duplicative of the First Cause of Action and fails for the same reason. Plaintiff contends that its declaratory relief claim is not duplicative of its

mandamus claim because it challenges a policy rather than a specific administrative decision, and because it is prospective in effect. However, in light of the Court's determination that the increased enrollment at UC Berkeley is neither a project nor a project change that required CEQA review, Plaintiff's challenge to the Regent's alleged policy of prospectively increasing admissions beyond the estimated projections in the LDRP as a violation of CEQA fails.

The Court did not consider the declaration of Phillip Bokovoy submitted with Plaintiff's opposition papers. As the Court already advised counsel in its November 15, 2018 order on the Regents' prior demurrer, in ruling on a demurrer, the Court considers only the allegations in the challenged pleading and facts of which the Court can take judicial notice, not extrinsic evidence.

The parties are directed to address the above-referenced issues at the continued hearing on April 18, 2019.

4/2/19
Date



Noel Wise
Judge of the Superior Court

Document received by the CA 1st District Court of Appeal.

FILED
ALAMEDA COUNTY
APR 05 2019
CLERK OF THE SUPERIOR COURT
By Sue Roesch Deputy

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8 Attorney for Plaintiff: Save Berkeley's Neighborhoods

9
10 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **IN AND FOR THE COUNTY OF ALAMEDA**
12

13 SAVE BERKELEY'S NEIGHBORHOODS, a
14 California nonprofit public benefit corporation;

15 Plaintiff,
16 vs.

17 THE REGENTS OF THE UNIVERSITY OF
18 CALIFORNIA; JANET NAPOLITANO, in her
19 capacity as President of the University of
20 California; CAROL T. CHRIST, in her capacity as
21 Chancellor of the University of California,
22 Berkeley; and DOES 1 through 20,

23 Respondents and Defendants.
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Case No. RG18902751

**EX PARTE APPLICATION FOR LEAVE TO
FILE PLAINTIFF'S REQUEST FOR
JUDICIAL NOTICE IN OPPOSITION TO
DEMURRER TO THIRD AMENDED
PETITION FOR WRIT OF MANDATE AND
COMPLAINT FOR DECLARATORY
RELIEF**

[CEQA]

Assigned for All Purposes to:
Hon. Frank Roesch, Dept. 17

Reservation No.: R-2064996

Date: April 8, 2019

Time: 4:00 P.M.

Dept.: 17

Judge: Hon. Frank Roesch

Action Filed: April 27, 2018

Trial Date: Not Set

1 TO: ALL PARTIES AND THEIR COUNSEL OF RECORD:

2 PLEASE TAKE NOTICE THAT on April 8, 2019, at 4:00 p.m. in Department 17 of the
3 above-entitled court located at the Alameda County Administration Building, 1221 Oak Street, 3rd
4 Floor, Oakland, California 94612. This application seeks an order granting leave to file Plaintiff's
5 Request for Judicial Notice in Opposition to Demurrer to Third Amended Petition for Writ of Mandate
6 and Complaint for Declaratory Relief, attached hereto as Attachment 1.

7 The grounds for this application are that in their demurrer to Plaintiff's Third Amended
8 Complaint, which is currently submitted for decision, Respondent Regents argue they have no obligation
9 under the California Environmental Quality Act (CEQA) to conduct subsequent environmental review of
10 the increase in student enrollment over and above the increase in student enrollment projected in the
11 2020 Long Range Development Plan (2020 LRDP) adopted in 2005. (See Memorandum of Points and
12 Authorities in Support of Demurrer to Petitioner's Third Amended Petition for Writ of Mandate and
13 Complaint for Declaratory Relief, pp. 13-16.) However, in their Final Environmental Impact Report for
14 the 2020 LRDP that the Regents certified in 2005 (2005 Final EIR), the Regents asserted the opposite,
15 stating: "However, if the 2020 LRDP is adopted by the Regents, any further increase beyond the
16 maximum stated in the plan would require an amendment of the plan, including CEQA review." (See
17 Attachment 1, Exhibit 2 [2020 LRDP FEIR], p. 11.2-115.)

18 The Court recently issued a tentative ruling on the Regents' pending demurrer, which reflects the
19 Court's construction of CEQA section 21080.09. (See discussion in the Memorandum of Points and
20 Authorities submitted in support of this application and in Attachment 1.) The Regents' statement in the
21 2020 LRDP FEIR quoted above is directly relevant to this construction because the Regents are tasked,
22 in the first instance, with interpreting and complying with their legal obligations under CEQA section
23 21080.09. (*City of Marina v. Board of Trustees of California State University* (2006) 39 Cal.4th 341,
24 360 ["while education may be CSU's [California State University] core function, to avoid or mitigate the
25 environmental effects of its projects is also one of CSU's functions. This is the plain import of CEQA, in
26 which the Legislature has commanded that '[e]ach public agency shall mitigate or avoid the significant
27 effects on the environment of projects that it carries out or approves whenever it is feasible to do so'];
28 accord *City of San Diego v. Board of Trustees of California State University* (2015) 61 Cal.4th 945,
966.) Moreover, while courts determine the meaning of statutes using their independent judgment, the

1 Regents interpretation of a statute it is charged with enforcing is one of “several interpretive tools” that
2 may help a court independently judge the meaning of a statute. (*City of Long Beach v. Department of*
3 *Industrial Relations* (2004) 34 Cal.4th 942, 951; *Agnew v. State Bd. of Equalization* (1999) 21 Cal.4th
4 310, 322; *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7 (*Yamaha*).)

5 Thus, the Regents interpretation of their legal obligations under CEQA in 2005 is directly
6 relevant to the Court’s ruling on their pending demurrer.


7 Plaintiff brings this application an ex parte basis because Plaintiff will suffer irreparable injury
8 (as provided in CRC 3.1202(c)) unless the relief requested here is granted. Absent this relief, the Court
9 would rule on the demurrer without this information, which would represent a miscarriage of justice.
10 Also, Plaintiff did not learn the Regents had admitted their obligation under CEQA to conduct
11 subsequent environmental review of the increase in student enrollment over and above the increase in
12 student enrollment projected in the 2020 LRDP until March 25, 2019. (Declaration of Thomas N. Lippe
13 in Support of Ex Parte Application for Leave to File Plaintiff’s Request for Judicial Notice in Opposition
14 to Demurrer to Third Amended Petition for Writ of Mandate and Complaint for Declaratory Relief
15 (Lippe Decl.) , ¶¶ 2-4; Declaration of Phillip Bokovoy in Support of Ex Parte Application for Leave to
16 File Plaintiff’s Request for Judicial Notice in Opposition to Demurrer to Third Amended Petition for
17 Writ of Mandate and Complaint for Declaratory Relief, ¶¶ 2-5.)

18 Plaintiff’s counsel notified opposing counsel of this application prior to 10 a.m. on Friday, April
19 5, 2019. (Lippe Decl. ¶ 5.)

20 This Motion is based on the Verified Third Amended Petition for Writ of Mandate and
21 Complaint for Declaratory Relief filed in this action; this Application, the supporting Memorandum of
22 Points and Authorities, the supporting declarations of Thomas N. Lippe and Philip Bokovoy, on all other
23 papers on file in this matter, and upon such other oral and/or documentary evidence as may be presented
24 at the hearing on this application.

25 DATED: April 5, 2019

LAW OFFICES OF THOMAS N. LIPPE, APC

26 By: 
27 Thomas N. Lippe
28 Attorney for Plaintiff

T:\TL\UC Enroll\Trial\Ex Parte\EXP001a Signed Ex Parte re RJN TAP Demurrer.wpd

ATTACHMENT 1

Document received by the CA 1st District Court of Appeal.

AA00531

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2 LAW OFFICES OF THOMAS N. LIPPE, APC
3 201 Mission Street, 12th Floor
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5 Tel: (415) 777-5604
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7 E-mail: Lippelaw@sonic.net

8 Attorney for Plaintiff: Save Berkeley's Neighborhoods

9
10 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **IN AND FOR THE COUNTY OF ALAMEDA**
12

13 SAVE BERKELEY'S NEIGHBORHOODS, a
14 California nonprofit public benefit corporation;

15 Plaintiff,
16 vs.

17 THE REGENTS OF THE UNIVERSITY OF
18 CALIFORNIA; JANET NAPOLITANO, in her
19 capacity as President of the University of
20 California; CAROL T. CHRIST, in her capacity as
21 Chancellor of the University of California,
22 Berkeley; and DOES 1 through 20,

23 Respondents and Defendants.
24
25
26
27
28

Case No. RG18902751

**PLAINTIFF'S REQUEST FOR JUDICIAL
NOTICE IN OPPOSITION TO DEMURRER
TO THIRD AMENDED PETITION FOR
WRIT OF MANDATE AND COMPLAINT
FOR DECLARATORY RELIEF**

[CEQA]

Assigned for All Purposes to:
Hon. Frank Roesch, Dept. 17

Reservation No.: R-2022686

Date: January 15, 2019

Time: 3:45 P.M.

Dept.: 24

Judge: Hon. Noel Wise

Action Filed: April 27, 2018

Trial Date: Not Set

1 Pursuant to Evidence Code sections 452, subdivision (c) and 453, Plaintiff Save Berkeley's
2 Neighborhoods requests that the Court take judicial notice of the following two documents:

3 **Exhibit 1:** Page 3 of the February 20, 2019, Draft Supplemental EIR to the 2020 Long Range
4 Development Plan Environmental Impact Report for the Upper Hearst Development for the Goldman School
5 of Public Policy and Minor Amendment to UC Berkeley's 2020 Long Range Development Plan. (Draft
6 SEIR).

7 **Exhibit 2:** Page 11.2-115 of the Responses to Comments portion of the Final Environmental Impact
8 Report for UC Berkeley's 2020 Long Range Development Plan 2020 LRDP that the Regents certified in
9 2005 (2005 Final EIR).

10 **Memorandum of Points and Authorities**

11 Exhibits 1 and 2 are subject to judicial notice because they are official acts of the executive
12 department of the state of California as described in evidence Code section 452, subd. (c).

13 These documents are relevant to Respondent Regents' pending demurrer to Plaintiff's Third
14 Amended Complaint, because they show that the Regents' admitted—before this litigation—that they have
15 an obligation under the California Environmental Quality Act (CEQA) to conduct subsequent environmental
16 review of the increase in student enrollment over and above the increase in student enrollment projected in
17 the 2020 LRDP adopted in 2005, yet they deny this obligation in their demurrer.

18 In their demurrer to Plaintiff's Third Amended Complaint, the Regents argue they have no obligation
19 under CEQA to conduct subsequent environmental review of the increase in student enrollment over and
20 above the increase in student enrollment projected in the 2020 LRDP adopted in 2005. (See Memorandum
21 of Points and Authorities in Support of Demurrer to Petitioner's Third Amended Petition for Writ of
22 Mandate and Complaint for Declaratory Relief, pp. 13-16.)

23 In its April 2, 2019, Order Setting Further Hearing on Defendants' Demurrer to Third Amended
24 Petition for Writ of Mandate and Complaint for Declaratory Relief (Order Setting Further Hearing), the
25 Court accepts this position, stating:

26 Plaintiff, however, contends that the Regents' "informal, discretionary decisions" to increase
27 student enrollment beyond that anticipated in the LDRP constituted "project changes" that
28 required CEQA review. (See Plaintiffs opposition brief at pages 3-4.) ¶ The Court rejects
this argument. The LDRP, as statutorily defined, is not a student enrollment plan. Rather, it
is "a physical development and land use plan" for a campus of public higher education. (See

Public Resources Code § 21080.09(a)(2).) Environmental effects relating to projected changes in enrollment levels are to be considered in the environmental impact report prepared for the long range development plan (see § 21080.09(b)), *but any discrepancies between the estimated changes in enrollment levels and the actual enrollment levels in subsequent years are not themselves project or program changes that require subsequent CEQA review.* The Regents' 2005 analysis of the estimated projections of enrollment changes by 2020, as set forth in the 2005 EIR and the LRDP, satisfied the Regents' obligations to consider the environmental impact of those enrollment plans. (See § 21080.09(d).)

(Order Setting Further Hearing, pp. 2-3 (italics added).

It turns out, however, that in the Final Environmental Impact Report for the 2020 LRDP that the Regents certified in 2005 (2005 Final EIR), the Regents asserted the opposite of the italicized language in the Order Setting Further Hearing quoted above, stating: "However, if the 2020 LRDP is adopted by the Regents, any further increase beyond the maximum stated in the plan would require an amendment of the plan, including CEQA review." (Exhibit 2 [2020 LRDP FEIR], p. 11.2-115.)

On February 20, 2019, the Regents published their Draft Supplemental EIR to the 2020 Long Range Development Plan Environmental Impact Report for the Upper Hearst Development for the Goldman School of Public Policy and Minor Amendment to the 2020 Long Range Development Plan (Draft SEIR) for public comment. This document states:

... in its response to comments to the 2020 LRDP EIR, UC Berkeley made a commitment to the City of Berkeley that, if enrollment increased beyond the projections set forth in the 2020 LRDP, it would undertake additional review under CEQA.

(Exhibit 1 [Draft SEIR p. 3].)

In the Responses to Comments portion of the 2005 Final EIR, the Regents responded to a City of Berkeley comment by stating:

The growth in the number of college-age Californians is projected to level off around 2010, and the 2020 LRDP recommends UC Berkeley enrollment stabilize at this point. The writer correctly notes the Regents can direct any campus to absorb more growth if conditions make it necessary to do so. However, if the 2020 LRDP is adopted by the Regents, any further increase beyond the maximum stated in the plan would require an amendment of the plan, including CEQA review.

CEQA expressly provides that the environmental impacts of changes in enrollment levels are to be assessed at the campus level as part of the LRDP process for each campus. See Public

Resources Code Section 21080.09(b). The Enrolled Bill Report for the legislation enacting Public Resources Code Section 21080.09 (Senate Bill 896, Mello) clarifies that the intent of the bill was to ensure that CEQA evaluation of student enrollment changes should be addressed at each campus individually as part of the LRDP process, and not on a statewide or systemwide basis. The bill's author stated that the bill "clarifies the intent of existing law that the appropriate place for environmental review of the impact of academic and enrollment plans under CEQA is in a Long Range Development Plan EIR...for the particular campus or medical center where the environmental impact actually takes place" and not on a "statewide, systemwide basis." See letter dated September 12, 1989, from State Senator Henry J. Mello to Governor George Deukmejian.

(Exhibit 2 [2020 LRDP FEIR p. 11.2-115].)

The portion of the Court's tentative ruling quoted above reflects the Court's construction of CEQA section 21080.09. The Regents' statement in the 2020 LRDP FEIR quoted above is directly relevant to this construction because the Regents are tasked, in the first instance, with interpreting and complying with their legal obligations under CEQA section 21080.09. (*City of Marina v. Board of Trustees of California State University* (2006) 39 Cal.4th 341, 360 ["while education may be CSU's [California State University] core function, to avoid or mitigate the environmental effects of its projects is also one of CSU's functions. This is the plain import of CEQA, in which the Legislature has commanded that '[e]ach public agency shall mitigate or avoid the significant effects on the environment of projects that it carries out or approve whenever it is feasible to do so'"]; accord *City of San Diego v. Board of Trustees of California State University* (2015) 61 Cal.4th 945, 966.) Moreover, while courts determine the meaning of statutes using their independent judgment, the Regents interpretation of a statute it is charged with enforcing is one of "several interpretive tools" that may help a court independently judge the meaning of a statute. (*City of Long Beach v. Department of Industrial Relations* (2004) 34 Cal.4th 942, 951; *Agnew v. State Bd. of Equalization* (1999) 21 Cal.4th 310, 322; *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 11 (Yamaha).)

Thus, the Regents interpretation of their legal obligations under CEQA in 2005 is directly relevant to the Court's ruling on their pending demurrer. Plaintiff, obviously, believes the Regents were correct on this point in 2005 and that their pending demurrer is incorrect on this point.

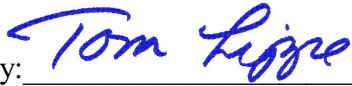
Plaintiffs did not learn of the Regents' statement in the 2020 LRDP FEIR quoted above until after they read the Draft SEIR published on February 20, 2019, which first alerted them to the existence of this

1 statement in the 2020 LRDP FEIR. (Declaration of Thomas N. Lippe in Support of Ex Parte Application for
2 Leave to File Plaintiff's Request for Judicial Notice in Opposition to Demurrer to Third Amended Petition
3 for Writ of Mandate and Complaint for Declaratory Relief, ¶¶ 2-4; Declaration of Phillip Bokovoy in
4 Support of Ex Parte Application for Leave to File Plaintiff's Request for Judicial Notice in Opposition to
5 Demurrer to Third Amended Petition for Writ of Mandate and Complaint for Declaratory Relief, ¶¶ 2-5.)

6 Therefore, Plaintiff requests that the Court take judicial notice of Exhibits 1 and 2 attached hereto.

7 DATED: April 5, 2019

LAW OFFICES OF THOMAS N. LIPPE, APC

8 By: 

9 Thomas N. Lippe

10 Attorney for Plaintiff

11 T:\TL\UC Enroll\Trial\Ex Parte\M045c Signed RJN Demurrer Opp TAP.wpd
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Document received by the CA 1st District Court of Appeal.

EXHIBIT 1

Document received by the CA 1st District Court of Appeal.

AA00537

one subterranean level. The fourth level would provide access to a rooftop terrace. The centerpiece of the design would be a two-story atrium bordered on the exterior by a glass façade. This atrium would face west toward the existing GSPP building located at 2607 Hearst Avenue and would have public space and interaction areas. By the end of the 2022-23 academic year, the academic building would house five permanent staff members and 30 students on an average, year-round basis. The academic building's event space would have a seating capacity of 300 and would accommodate up to 450 visitors at maximum capacity; public and private events would occur periodically during both daytime and evening hours.

The Minor LRDP Amendment would accommodate the proposed housing land use on the Project site. Specifically, the Minor LRDP Amendment would expand the Housing Zone to accommodate residential development on the Project site (see Appendix B).

Please see Section 3, *Project Description*, for additional Project information and plans.

Environmental Analysis

This Draft SEIR has been prepared pursuant to CEQA and the CEQA Guidelines to evaluate the environmental effects of the proposed Project, and to identify feasible mitigation measures and alternatives to reduce or avoid the Project's significant impacts.

The Draft SEIR also establishes an updated population baseline to reflect the existing campus headcount (which is greater than the projections in the 2020 LRDP) and new campus headcount projections through the 2022-23 school year, when increased enrollment at GSPP as a result of the Project would plateau. Despite the growth in campus headcount over 2020 LRDP projections, which led to the new baseline, the analysis in this SEIR demonstrates that the UC Berkeley campus is still operating within the capacity and demand identified and analyzed in the 2020 LRDP EIR for resources such as housing, water, electricity and public services, among others. Moreover, to date, UC Berkeley has accommodated the increased campus headcount completely within the physical development identified in the 2020 LRDP and, in fact, has developed fewer square feet of academic and support space and fewer housing units than what was identified in the 2020 LRDP and analyzed in the 2020 LRDP EIR. Nonetheless, in its response to comments to the 2020 LRDP EIR, UC Berkeley made a commitment to the City of Berkeley that, if enrollment increased beyond the projections set forth in the 2020 LRDP, it would undertake additional review under CEQA.

Consistent with this commitment, the SEIR uses an updated population baseline and, in its environmental analysis of each impact category, takes this updated baseline into account and explains how it factors into and/or affects the environmental analysis and significance conclusions reached in the 2020 LRDP EIR and this SEIR. For some impact categories, such as Aesthetics, Cultural Resources, Land Use, and Tribal Cultural Resources, the analysis of whether the increased headcount would cause environmental impacts hinges on physical development to accommodate an increased headcount. For other impact categories, such as Air Quality, Greenhouse Gas Emissions, Noise, Population, Public Services, and Transportation and Traffic, the analysis of whether the increased headcount would cause environmental impacts hinges on population numbers on the campus. The introductory section of each impact category in Section 6, *Environmental Evaluation*, explains the approach taken to account for the increased campus headcount in that section, and how the increase in campus headcount factors into the impact analysis.

EXHIBIT 2

Document received by the CA 1st District Court of Appeal.

RESPONSE TO COMMENT B7-7

See Response B7-1. The University believes that the 74-page LRDP serves as an adequate project description. The writer also seems to object to the fact the 2020 LRDP was not prepared and presented to the community in advance of the environmental analysis. However, preparing the LRDP and EIR simultaneously enabled the University to respond to the results of the environmental analysis in the plan itself, and also enabled the public to use those results in the review and critique of the plan.

RESPONSE TO COMMENTS B7-8 AND B7-9

A Long Range Development Plan does not need to set forth significance thresholds for environmental impacts. To the extent this comment really applies to the Draft EIR, each impact analyzed provides significance thresholds that are used in evaluation of the 2020 LRDP, and which can be applied to future projects as they undergo individual CEQA review. Those impacts found to be significant within the 2020 LRDP EIR have corresponding mitigation measures, many of which have impact thresholds that trigger their implementation in future projects. General Plan and state zoning law requirements do not apply to the University of California. Please see Thematic Response 1 regarding future project review, and Thematic Response 5 regarding the use of qualifiers.

RESPONSE TO COMMENT B7-10

See Thematic Response 5 regarding the use of qualifiers.

RESPONSE TO COMMENTS B7-11 THRU B7-14

See Thematic Response 6 regarding the relationship to LBNL.

RESPONSE TO COMMENTS B7-15 AND B7-16

The growth in the number of college-age Californians is projected to level off around 2010, and the 2020 LRDP recommends UC Berkeley enrollment stabilize at this point. The writer correctly notes the Regents can direct any campus to absorb more growth if conditions make it necessary to do so. However, if the 2020 LRDP is adopted by the Regents, any further increase beyond the maximum stated in the plan would require an amendment of the plan, including CEQA review.

CEQA expressly provides that the environmental impacts of changes in enrollment levels are to be assessed at the campus level as part of the LRDP process for each campus. See Public Resources Code Section 21080.09(b). The Enrolled Bill Report for the legislation enacting Public Resources Code Section 21080.09 (Senate Bill 896, Mello) clarifies that the intent of the bill was to ensure that CEQA evaluation of student enrollment changes should be addressed at each campus individually as part of the LRDP process, and not on a statewide or systemwide basis. The bill's author stated that the bill "clarifies the intent of existing law that the appropriate place for environmental review of the impact of academic and enrollment plans under CEQA is in a Long Range Development Plan EIR...for the particular campus or medical center where the environmental impact actually takes place" and not on a "statewide, systemwide basis." See letter dated September 12, 1989, from State Senator Henry J. Mello to Governor George Deukmejian.

RESPONSE TO COMMENT B7-17

The figures in table 3.1-1 reflect our best estimates of how the 4000 FTE increase would translate into regular term and summer headcount at UC Berkeley.

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Attorney for Plaintiff: Save Berkeley's Neighborhoods

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA

SAVE BERKELEY'S NEIGHBORHOODS, a
California nonprofit public benefit corporation;

Plaintiff,
vs.

THE REGENTS OF THE UNIVERSITY OF
CALIFORNIA; JANET NAPOLITANO, in her
capacity as President of the University of
California; CAROL T. CHRIST, in her capacity as
Chancellor of the University of California,
Berkeley; and DOES 1 through 20,

Respondents and Defendants.

Case No. RG18902751

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF EX
PARTE APPLICATION FOR LEAVE TO
FILE PLAINTIFF'S REQUEST FOR
JUDICIAL NOTICE IN OPPOSITION TO
DEMURRER TO THIRD AMENDED
PETITION FOR WRIT OF MANDATE AND
COMPLAINT FOR DECLARATORY
RELIEF

[CEQA]

Assigned for All Purposes to:
Hon. Frank Roesch, Dept. 17

Reservation No.: R-2064996

Date: April 8, 2019

Time: 4:00 P.M.

Dept.: 17

Judge: Hon. Frank Roesch

Action Filed: April 27, 2018

Trial Date: Not Set

FILED
ALAMEDA COUNTY
APR 05 2019
CLERK OF THE SUPERIOR COURT
By *Sue Panko*
Deputy

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I. INTRODUCTION

Plaintiff Save Berkeley's Neighborhoods applies for leave to file Plaintiff's Request for Judicial Notice in Opposition to Demurrer to Third Amended Petition for Writ of Mandate and Complaint for Declaratory Relief. These documents that Plaintiff asks the Court to judicially notice are relevant to Respondent Regents' pending demurrer to Plaintiff's Third Amended Complaint, because they show that the Regents' admitted—before this litigation—that they have an obligation under the California Environmental Quality Act (CEQA) to conduct subsequent environmental review of the increase in student enrollment over and above the increase in student enrollment projected in the 2020 LRDP adopted in 2005, yet they deny this obligation in their demurrer.

The Regents failed to notify the Court that they previously shared Plaintiff's view of their legal obligations in this regard, and Plaintiff did not learn of the Regents' previous admission on this point until the Regents disclosed its existence in a new Draft Supplemental Environmental Impact Report published on February 20, 2019, well after the Court took the demurrer under submission on February 4, 2019.

II. STATEMENT OF FACTS

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In their demurrer to Plaintiff's Third Amended Complaint, the Regents argue they have no obligation under CEQA to conduct subsequent environmental review of the increase in student enrollment over and above the increase in student enrollment projected in the 2020 LRDP adopted in 2005. (See Memorandum of Points and Authorities in Support of Demurrer to Petitioner's Third Amended Petition for Writ of Mandate and Complaint for Declaratory Relief, pp. 13-16.)

In its April 2, 2019, Order Setting Further Hearing on Defendants' Demurrer to Third Amended Petition for Writ of Mandate and Complaint for Declaratory Relief (Order Setting Further Hearing), the Court accepts this position, stating:

Plaintiff, however, contends that the Regents' "informal, discretionary decisions" to increase student enrollment beyond that anticipated in the LDRP constituted "project changes" that required CEQA review. (See Plaintiffs opposition brief at pages 3-4.) ¶
The Court rejects this argument. The LDRP, as statutorily defined, is not a student enrollment plan. Rather, it is "a physical development and land use plan" for a campus of public higher education. (See Public Resources Code § 21080.09(a)(2).) Environmental effects relating to projected changes in enrollment levels are to be considered in the environmental impact report prepared for the long range development plan (see § 21080.09(b)), *but any discrepancies between the estimated changes in enrollment levels*

1 *and the actual enrollment levels in subsequent years are not themselves project or*
2 *program changes that require subsequent CEQA review.* The Regents' 2005 analysis of
3 the estimated projections of enrollment changes by 2020, as set forth in the 2005 EIR and
4 the LRDP, satisfied the Regents' obligations to consider the environmental impact of
those enrollment plans. (See § 21080.09(d).)

5 (Order Setting Further Hearing, pp. 2-3 (italics added)).

6 It turns out, however, that in the Final Environmental Impact Report for the 2020 LRDP that the
7 Regents certified in 2005 (2005 Final EIR), the Regents asserted the opposite of the italicized language
8 in the Order Setting Further Hearing quoted above, stating: "However, if the 2020 LRDP is adopted by
9 the Regents, any further increase beyond the maximum stated in the plan would require an amendment
10 of the plan, including CEQA review." (Exhibit 2 [2020 LRDP FEIR], p. 11.2-115.)

11 The Court has set a new hearing on the demurrer for April 18, 2019.

12 III. ARGUMENT

13 A. The Regents interpretation of their legal obligations under CEQA in 2005 is directly 14 relevant to the Court's ruling on their pending demurrer.

15 The portion of the Court's tentative ruling quoted above reflects the Court's construction of
16 CEQA section 21080.09. The Regents' statement in the 2020 LRDP FEIR quoted above is directly
17 relevant to this construction because the Regents are tasked, in the first instance, with interpreting and
18 complying with their legal obligations under CEQA section 21080.09. (*City of Marina v. Board of*
19 *Trustees of California State University* (2006) 39 Cal.4th 341, 360 ["while education may be CSU's
20 [California State University] core function, to avoid or mitigate the environmental effects of its projects
21 is also one of CSU's functions. This is the plain import of CEQA, in which the Legislature has
22 commanded that '[e]ach public agency shall mitigate or avoid the significant effects on the environment
23 of projects that it carries out or approves whenever it is feasible to do so'"]; accord *City of San Diego v.*
Board of Trustees of California State University (2015) 61 Cal.4th 945, 966.)

24 Moreover, while courts determine the meaning of statutes using their independent judgment, the
25 Regents interpretation of a statute it is charged with enforcing is one of "several interpretive tools" that
26 may help a court independently judge the meaning of a statute. (*City of Long Beach v. Department of*
27 *Industrial Relations* (2004) 34 Cal.4th 942, 951; *Agnew v. State Bd. of Equalization* (1999) 21 Cal.4th
28 310, 322; *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7 (*Yamaha*).)

Thus, the Regents interpretation of their legal obligations under CEQA in 2005 is directly

1 relevant to the Court's ruling on their pending demurrer. Plaintiff, obviously, believes the Regents were
2 correct on this point in 2005 and that their pending demurrer is incorrect on this point.

3 **B. Plaintiffs did not learn of the Regents' statement in the 2020 LRDP FEIR quoted above**
4 **until after they read the Draft SEIR published on February 20, 2019.**


5 The Regents failed to notify the Court that they previously shared Plaintiff's view of their legal
6 obligations in this regard, and Plaintiff did not learn of the Regents' previous admission on this point
7 until the Regents disclosed its existence in a new Draft Supplemental Environmental Impact Report
8 published on February 20, 2019, well after the Court took the demurrer under submission on February 4,
9 2019. (Declaration of Thomas N. Lippe in Support of Ex Parte Application for Leave to File Plaintiff's
10 Request for Judicial Notice in Opposition to Demurrer to Third Amended Petition for Writ of Mandate
11 and Complaint for Declaratory Relief, ¶¶ 2-4; Declaration of Phillip Bokovoy in Support of Ex Parte
12 Application for Leave to File Plaintiff's Request for Judicial Notice in Opposition to Demurrer to Third
13 Amended Petition for Writ of Mandate and Complaint for Declaratory Relief, ¶¶ 2-5.)

14 **IV. CONCLUSION**

15 Therefore, the Court should grant Plaintiff leave to file their Request for Judicial Notice in
16 Opposition to Demurrer to Third Amended Petition for Writ of Mandate and Complaint for Declaratory
17 Relief.

18 DATED: April 5, 2019

LAW OFFICES OF THOMAS N. LIPPE, APC

19 By: 
20 Thomas N. Lippe
21 Attorney for Plaintiff

22 T:\TL\UC Enroll\Trial\Ex Parte\EXP003a MPA Ex Parte re RJN TAP Demurrer.wpd

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8 Attorney for Plaintiff: Save Berkeley's Neighborhoods

9
10 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **IN AND FOR THE COUNTY OF ALAMEDA**
12

13 SAVE BERKELEY'S NEIGHBORHOODS, a
14 California nonprofit public benefit corporation;

15 Plaintiff,
16 vs.

17 THE REGENTS OF THE UNIVERSITY OF
18 CALIFORNIA; JANET NAPOLITANO, in her
19 capacity as President of the University of
20 California; CAROL T. CHRIST, in her capacity as
21 Chancellor of the University of California,
22 Berkeley; and DOES 1 through 20,

23 Respondents and Defendants.
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Case No. RG18902751

**DECLARATION OF THOMAS N. LIPPE IN
SUPPORT OF EX PARTE APPLICATION
FOR LEAVE TO FILE PLAINTIFF'S
REQUEST FOR JUDICIAL NOTICE IN
OPPOSITION TO DEMURRER TO THIRD
AMENDED PETITION FOR WRIT OF
MANDATE AND COMPLAINT FOR
DECLARATORY RELIEF**

[CEQA]

Assigned for All Purposes to:
Hon. Frank Roesch, Dept. 17

Reservation No.: R-2064996

Date: April 8, 2019

Time: 4:00 P.M.

Dept.: 17

Judge: Hon. Frank Roesch

FILED
ALAMEDA COUNTY
APR 05 2019
CLERK OF THE SUPERIOR COURT
By *Sue P. [Signature]* Deputy

Document received by the CA 1st District Court of Appeal.

1 I, Thomas N. Lippe, declare:

2 1. I am an attorney at law duly admitted and licensed to practice before all courts of this State. I am
3 attorney of record for the Plaintiff in this case.

4 2. On February 20, 2019, the Regents published their Draft Supplemental EIR to the 2020 Long
5 Range Development Plan Environmental Impact Report for the Upper Hearst Development for the
6 Goldman School of Public Policy and Minor Amendment to the 2020 Long Range Development Plan
7 (Draft SEIR) for public comment.

8 3. On March 25, 2019, Plaintiff asked me to review portions of this Draft SEIR to understand how
9 it might affect this litigation. At that time I read the text in the Draft SEIR stating: “in its response to
10 comments to the 2020 LRDP EIR, UC Berkeley made a commitment to the City of Berkeley that, if
11 enrollment increased beyond the projections set forth in the 2020 LRDP, it would undertake additional
12 review under CEQA.” I then reviewed the Responses to Comments portion of the 2005 Final EIR for
13 the 2020 Long Range Development Plan, and discovered there the following response by the Regents to
14 a comment submitted by the City of Berkeley:

15 The growth in the number of college-age Californians is projected to level off around
16 2010, and the 2020 LRDP recommends UC Berkeley enrollment stabilize at this point.

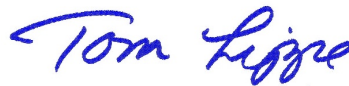
17 The writer correctly notes the Regents can direct any campus to absorb more growth if
18 conditions make it necessary to do so. However, if the 2020 LRDP is adopted by the
19 Regents, any further increase beyond the maximum stated in the plan would require an
20 amendment of the plan, including CEQA review.

21 CEQA expressly provides that the environmental impacts of changes in enrollment levels
22 are to be assessed at the campus level as part of the LRDP process for each campus. See
23 Public Resources Code Section 21080.09(b). The Enrolled Bill Report for the legislation
24 enacting Public Resources Code Section 21080.09 (Senate Bill 896, Mello) clarifies that
25 the intent of the bill was to ensure that CEQA evaluation of student enrollment changes
26 should be addressed at each campus individually as part of the LRDP process, and not on
27 a statewide or systemwide basis. The bill’s author stated that the bill “clarifies the intent
28 of existing law that the appropriate place for environmental review of the impact of
academic and enrollment plans under CEQA is in a Long Range Development Plan
EIR...for the particular campus or medical center where the environmental impact
actually takes place” and not on a “statewide, systemwide basis.” See letter dated
September 12, 1989, from State Senator Henry J. Mello to Governor George Deukmejian.

1 4. Prior to Plaintiff asking me to review the February 2019 Draft SEIR, I had not previously
2 reviewed the thousand-plus page Responses to Comments portion of the the 2005 Final EIR, as I did not
3 view this as a necessary or cost-effective use of my client's limited resources for purposes of prosecuting
4 this litigation, and I was not aware that the 2005 Final EIR included an acknowledgment by the Regents
5 that they would be legally obligated under CEQA to conduct subsequent environmental review of the
6 increase in student enrollment over and above the increase in student enrollment projected in the 2020
7 LRDP.

8 5. I notified the Regents' counsel, Tim Cremin, of this application before 10 a.m. on April 5, 2019,
9 by sending him an email on April 4, 2019, to which he confirmed receipt on April 5, 2019 by email at
10 9:43 a.m.

11 I declare under penalty of perjury under the laws of the State of California that the foregoing is
12 true and correct of my personal knowledge. Executed on April 5, 2019, at San Francisco, California.

13 

14 Thomas N. Lippe

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1 Thomas N. Lippe, SBN 104640
2 LAW OFFICES OF THOMAS N. LIPPE, APC
3 201 Mission Street, 12th Floor
4 San Francisco, California 94105
5 Tel: (415) 777-5604
6 Fax: (415) 777-5606
7 E-mail: Lippelaw@sonic.net

FILED
ALAMEDA COUNTY
APR 05 2019
CLERK OF THE SUPERIOR COURT
BY *[Signature]* Deputy

8 Attorney for Plaintiff: Save Berkeley's Neighborhoods

9
10 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **IN AND FOR THE COUNTY OF ALAMEDA**

12 SAVE BERKELEY'S NEIGHBORHOODS, a
13 California nonprofit public benefit corporation;

14 Plaintiff,
15 vs.

16 THE REGENTS OF THE UNIVERSITY OF
17 CALIFORNIA; JANET NAPOLITANO, in her
18 capacity as President of the University of
19 California; CAROL T. CHRIST, in her capacity as
20 Chancellor of the University of California,
21 Berkeley; and DOES 1 through 20,

22 Respondents and Defendants.
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Case No. RG18902751

**DECLARATION OF PHILLIP BOKOVOY
IN SUPPORT OF EX PARTE
APPLICATION FOR LEAVE TO FILE
PLAINTIFF'S REQUEST FOR JUDICIAL
NOTICE IN OPPOSITION TO DEMURRER
TO THIRD AMENDED PETITION FOR
WRIT OF MANDATE AND COMPLAINT
FOR DECLARATORY RELIEF**

[CEQA]

Assigned for All Purposes to:
Hon. Frank Roesch, Dept. 17

Reservation No.: R-2064996

Date: April 8, 2019

Time: 4:00 P.M.

Dept.: 17

Judge: Hon. Frank Roesch

1 I, Phillip Bokovoy, declare:

2 1. I am the founder and President of Save Berkeley's Neighborhoods, the plaintiff in this case.

3 2. After the Regents published, on February 20, 2019, their Draft Supplemental EIR to the 2020
4 Long Range Development Plan Environmental Impact Report for the Upper Hearst Development for the
5 Goldman School of Public Policy and Minor Amendment to the 2020 Long Range Development Plan
6 (Draft SEIR) for public comment, I began to review it for purposes of submitting comments on it.

7 3. On March 25, 2019, I asked Thomas Lippe, counsel for Save Berkeley's Neighborhoods, to
8 review portions of this Draft SEIR to help me understand how it might affect this litigation.

9 4. On March 26, 2019, Mr. Lippe reported to me that this Draft SEIR states: "in its response to
10 comments to the 2020 LRDP EIR, UC Berkeley made a commitment to the City of Berkeley that, if
11 enrollment increased beyond the projections set forth in the 2020 LRDP, it would undertake additional
12 review under CEQA."

13 5. On March 26, 2019, Mr. Lippe also reported to me that upon reading the Draft SEIR text quoted
14 in paragraph 4, he also reviewed the Responses to Comments portion of the 2005 Final EIR for the 2020
15 Long Range Development Plan, and discovered there the following response by the Regents to a
16 comment submitted by the City of Berkeley:

17 The growth in the number of college-age Californians is projected to level off around
18 2010, and the 2020 LRDP recommends UC Berkeley enrollment stabilize at this point.
19 The writer correctly notes the Regents can direct any campus to absorb more growth if
20 conditions make it necessary to do so. However, if the 2020 LRDP is adopted by the
21 Regents, any further increase beyond the maximum stated in the plan would require an
22 amendment of the plan, including CEQA review.

23 CEQA expressly provides that the environmental impacts of changes in enrollment levels
24 are to be assessed at the campus level as part of the LRDP process for each campus. See
25 Public Resources Code Section 21080.09(b). The Enrolled Bill Report for the legislation
26 enacting Public Resources Code Section 21080.09 (Senate Bill 896, Mello) clarifies that
27 the intent of the bill was to ensure that CEQA evaluation of student enrollment changes
28 should be addressed at each campus individually as part of the LRDP process, and not on
a statewide or systemwide basis. The bill's author stated that the bill "clarifies the intent
of existing law that the appropriate place for environmental review of the impact of
academic and enrollment plans under CEQA is in a Long Range Development Plan
EIR...for the particular campus or medical center where the environmental impact

1 actually takes place” and not on a “statewide, systemwide basis.” See letter dated
2 September 12, 1989, from State Senator Henry J. Mello to Governor George Deukmejian.

3 6. Prior to Mr. Lippe’s report to me on these matters, I had not read the thousand-plus page
4 Responses to Comments portion of the 2005 Final EIR and I was not aware that the 2005 Final EIR
5 included an acknowledgment by the Regents that they would be legally obligated under CEQA to
6 conduct subsequent environmental review of the increase in student enrollment over and above the
7 increase in student enrollment projected in the 2020 LRDP.

8 I declare under penalty of perjury under the laws of the State of California that the foregoing is
9 true and correct of my personal knowledge. Executed on April 5, 2019, at HALEAKA, MAUI
10 Island

11 
12 Phillip Bokovoy

13
14 T:\TLAUC Enroll\trial\Ex Parte\EXP002d Ex Parte Decl PB.wpd

1 Thomas N. Lippe, SBN 104640
2 LAW OFFICES OF THOMAS N. LIPPE, APC
3 201 Mission Street, 12th Floor
4 San Francisco, California 94105
5 Tel: (415) 777-5604
6 Fax: (415) 777-5606
7 E-mail: Lippelaw@sonic.net

8 Attorney for Plaintiff: Save Berkeley's Neighborhoods

9
10 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **IN AND FOR THE COUNTY OF ALAMEDA**
12

13 SAVE BERKELEY'S NEIGHBORHOODS, a
14 California nonprofit public benefit corporation;
15 Plaintiff,
16 vs.

17 THE REGENTS OF THE UNIVERSITY OF
18 CALIFORNIA; JANET NAPOLITANO, in her
19 capacity as President of the University of
20 California; CAROL T. CHRIST, in her capacity as
21 Chancellor of the University of California,
22 Berkeley; and DOES 1 through 20,
23

24 Respondents and Defendants.
25
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Case No. RG18902751

**[Proposed] ORDER GRANTING EX PARTE
APPLICATION FOR LEAVE TO FILE
PLAINTIFF'S REQUEST FOR JUDICIAL
NOTICE IN OPPOSITION TO DEMURRER
TO THIRD AMENDED PETITION FOR
WRIT OF MANDATE AND COMPLAINT
FOR DECLARATORY RELIEF**

[CEQA]

Assigned for All Purposes to:
Hon. Frank Roesch, Dept. 17

Reservation No.: R-2064996

Date: April 8, 2019

Time: 4:00 P.M.

Dept.: 17

Judge: Hon. Frank Roesch

Action Filed: April 27, 2018

Trial Date: Not Set

1 Good cause appearing, Plaintiff Save Berkeley's Neighborhoods Ex Parte Application for Leave to
2 File Plaintiff's Request for Judicial Notice in Opposition to Demurrer to Third Amended Petition for Writ
3 of Mandate and Complaint for Declaratory Relief is granted. Plaintiff may file said document, in the form
4 attached to the application as Attachment 1, within three (3) court days of entry of this order.

5 So Ordered.

6 April ____, 2019

7 Judge of the Superior Court

8 T:\TL\UC Enroll\Trial\Ex Parte\EXP005 Prop Order Ex Parte re RJN.wpd
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Document received by the CA 1st District Court of Appeal.

Law Offices of Thomas N. Lippe, APC
Attn: Lippe, Thomas N.
201 Mission Street, 12th Floor
San Francisco, CA 94105

Meyers, Nave, Riback, Silver &
Wilson
Attn: Cremin, Timothy D.
555 12th Street
Suite 1500
Oakland, CA 94607

**Superior Court of California, County of Alameda
Rene C. Davidson Alameda County Courthouse**

Save Berkeley's Neighborhoods

Plaintiff/Petitioner(s)

VS.

The Regents of the Universi

Defendant/Respondent(s)

(Abbreviated Title)

No. RG18902751

NOTICE OF HEARING

To each party or to the attorney(s) of record for each party herein:

Notice is hereby given that the above entitled action has been set for:

Civil Ex-Parte

You are hereby notified to appear at the following Court location on the date and time noted below:

Civil Ex-Parte:

DATE: 04/08/2019 TIME: 04:00 PM DEPARTMENT: 17

LOCATION: Administration Building, Third Floor
1221 Oak Street, Oakland

Dated: 04/05/2019

Chad Finke Executive Officer / Clerk of the Superior Court

By



Deputy Clerk

CLERK'S CERTIFICATE OF MAILING

I certify that the following is true and correct: I am the clerk of the above-named court and not a party to this cause. I served this Notice by placing copies in envelopes addressed as shown hereon and then by sealing and placing them for collection, stamping or metering with prepaid postage, and mailing on the date stated below, in the United States mail at Alameda County, California, following standard court practices.

Executed on 04/05/2019.

By



Deputy Clerk

Document received by the CA 1st District Court of Appeal.

| | |
|--|----------------------------|
| SHORT TITLE: Save Berkeley's Neighborhoods VS The Regents of the Universi | CASE NUMBER: RG18902751 |
|--|----------------------------|

ADDITIONAL ADDRESSEES

Robinson, Charles F.
University of California
1111 Franklin Street, 8th Floor
Oakland, CA 94607-5200

Document received by the CA 1st District Court of Appeal.

Superior Court of California, County of Alameda
Rene C. Davidson Alameda County Courthouse

| | |
|--------------------------------------|-------------------------|
| Save Berkeley's Neighborhoods | Plaintiff/Petitioner(s) |
| VS. | |
| The Regents of the Universi | Defendant/Respondent(s) |
| (Abbreviated Title) | |

No. RG18902751

Minutes

Department 17

Honorable Frank Roesch , Judge

Cause called for Hearing Re: Application Re: Other Ex Parte: 04/08/2019

Petitioner Save Berkeley's Neighborhoods represented by Lippe, Thomas N..

Respondent Carol T. Christ not appearing.

Respondent Janet Napolitano not appearing.


Respondent The Regents of the University of California not appearing.

Matter Dropped

Minutes of 04/08/2019

Entered on 04/08/2019

Chad Finke Executive Officer / Clerk of the Superior Court

By 
 Deputy Clerk

Minutes

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Document received by the CA 1st District Court of Appeal.

| | |
|--|----------------------------|
| SHORT TITLE: Save Berkeley's Neighborhoods VS The Regents of the Universi | CASE NUMBER: RG18902751 |
|--|----------------------------|

ADDITIONAL ADDRESSEES

Robinson, Charles F.
University of California
1111 Franklin Street, 8th Floor
Oakland, CA 94607-5200

Document received by the CA 1st District Court of Appeal.

Charles F. Robinson (SBN 113197)
 Alison Krumbein (SBN 229728)
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 Facsimile: (510) 444-1108

EXEMPT FROM FILING FEES
 GOV'T CODE § 6103

Attorneys for The Regents of the University of
 California; Janet Napolitano, in her capacity as
 President of the University of California; Carol T.
 Christ, in her capacity as Chancellor of the
 University of California, Berkeley

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

SAVE BERKELEY'S NEIGHBORHOODS, a
 California nonprofit public benefit
 corporation,

Petitioner and Plaintiff,

v.

THE REGENTS OF THE UNIVERSITY OF
 CALIFORNIA; JANET NAPOLITANO, in
 her capacity as President of the University of
 California; CAROL T. CHRIST, in her
 capacity as Chancellor of the University of
 California, Berkeley; and DOES 1 through 20,

Respondents and Defendants.

Case No. RG18902751

ASSIGNED FOR ALL PURPOSES TO
 Judge Frank Roesch

**RESPONDENTS' OPPOSITION TO
 PETITIONER'S EX PARTE
 APPLICATION FOR LEAVE TO FILE
 REQUEST FOR JUDICIAL NOTICE AND
 SUPPORTING PLEADINGS AND
 DECLARATIONS**

Reservation No.: R-2064996
 Date: April 8, 2019
 Time: 4:00 PM
 Dept: 17

Action Filed: April 27, 2018
 Trial Date: None Set

1 This Court should summarily deny Petitioner Save Berkeley Neighborhood's ("Petitioner")
2 wholly improper and frivolous Ex Parte Application For Leave to File a Request for Judicial
3 Notice ("Application"). The Application is nothing more than Petitioner's attempt to file
4 supplemental briefing on the order issued by Judge Wise on April 2, 2109 ("Order") sustaining the
5 Demurrer to the Third Amended Complaint ("Demurrer") in this matter which is scheduled for
6 further hearing on April 18, 2019 before Judge Wise. This Court, in its March 28, 2019 Case
7 Management Conference Order, stated that Judge Wise was ruling on the Demurrer. The
8 Application is simply an attempt to undercut Judge Wise's Order and her authority over the
9 Demurrer which she heard and took under submission. This gamesmanship should not be
10 allowed.

11 **I. APPLICATION DOES NOT MEET STANDARDS FOR EXTRAORDINARY**
12 **RELIEF**

13 The Application does not meet the basic standards for extraordinary relief. There is no
14 imminent harm and Petitioner has no excuse for failing to bring a Request for Judicial Notice
15 much earlier in the proceeding – at least six months or more ago. The present filing is a last-ditch
16 attempt to improperly contest the adverse Order issued by Judge Wise. This matter was filed one
17 year ago. Petitioner has amended its Petition three times to attempt to state a claim under the
18 California Environmental Quality Act ("CEQA"). An order sustaining the Demurrer to the
19 Second Amended Complaint with Leave To Amend was issued on November 15, 2018. The
20 pending Demurrer has been fully briefed, including supplemental briefing ordered by Judge Wise
21 filed on February 4, 2019. Now, over two months after the matter has been fully briefed,
22 Petitioner requests judicial notice of one page from a document over 15 years old (the Final Long
23 Range Development Plan Environmental Impact Report ("LRDP EIR")) and one page from a draft
24 supplement to the LRDP EIR that has been available since February 20, 2019 (Draft Supplement
25 to LRDP EIR for Upper Hearst Development for the Goldman School of Public Policy and Mining
26 Amendment to the 2020 Long Range Development Plan ("GSPP Draft SEIR"). This court took
27 Judicial Notice of the Notice of Preparation ("NOP") for the GSPP SEIR in its Order dated
28 November 15, 2018. The NOP clearly stated that the GSPP SEIR would analyze the increase in

1 campus population beyond the projections in the LRDP. The single page cited in the GSPP Draft
2 SEIR contains no new information that was not disclosed in the NOP. Therefore, without
3 question, Petitioner could have raised the information in the documents attached to its RJN in its
4 opposition to the previous two demurrers filed in this case.

5 The allegations in the Declarations of Thomas N. Lippe and Philip Bokovoy
6 (“Declarations”) submitted to support the “emergency” necessitating the Application can be easily
7 dismissed. The Declarations claim they were not aware of the language in the LRDP EIR even
8 though the analysis in that EIR are the key basis for allegations in the Petition and have been
9 subject to multiple briefings on two demurrers. That the Declarations claim certain language was
10 “missed” is incredulous. Similarly, Respondents have repeatedly referenced the GSPP SEIR
11 process in its briefing on two demurrers. Petitioner cannot be excused for failing to immediately
12 and thoroughly review the analysis of campus population growth in GSPP Draft SEIR when it was
13 released six weeks ago. The original comment period on the GSPP Draft SEIR ended April 8,
14 2019 (although it has been extended). The claims in the Declarations for why this was not done
15 cannot be believed.

16 **II. GSPP DRAFT SEIR IS NOT PROPER SUBJECT OF JUDICIAL REVIEW**

17 The GSPP Draft SEIR is a draft document released for public review. It has not been
18 certified or approved by the Respondents. In fact, the whole purpose under CEQA for submitting
19 draft EIRs for public review and comment is so the lead agency can consider public comments and
20 revise the document before considering certification. Draft records are not subject to judicial
21 notice. (Evidence Code sec. 452(c) (only documents of “official acts” of agency subject to
22 judicial notice; *People v. Webster* (1991) 54 Cal.3d 411, 428, fn. 4 [Requests for judicial notice
23 should not be used to “circumvent []” court rules and procedures, including the normal briefing
24 process].). If the Court decides to take judicial notice of both or either of the documents attached
25 to the RJN, the Respondents request that the Court take notice of the entire document so the single
26 pages attached to the RJN can be put in context and other pages addressing the relevant issue can
27 be reviewed by the Court.

1 **III. ALL FACTUAL ALLEGATION AND ATTORNEY ARGUMENT ON ORDER**
2 **SHOULD BE STRIKEN**

3 As stated above, the Application is nothing more than an attempt by Petitioner to file
4 supplemental briefing on Judge Wise's Order. The arguments and factual allegations relating to
5 the Order should be stricken. The only information properly before the Court under the
6 Application are (1) the single page documents attached as Exhibits 1 and 2 to the RJN and (2) the
7 legal explanation of why those documents are the proper subject of judicial notice. Respondents
8 request that all other attorney argument and factual allegations in the pleading submitted in
9 conjunction with the Application, in particular, those contesting Judge Wise's Order, be stricken.


10 **IV. REQUEST FOR SANCTIONS**

11 Respondents request sanctions in the amount of \$3000 to cover its attorney time and costs
12 in responding to this frivolous Application. As described above, the Application has no merit. It
13 is solely an attempt to undermine an Order issued by another judge on a matter under submission.
14 It is really a form of judge-shopping which is clearly not allowed under Court Rules. Petitioner
15 should have to pay for its waste of judicial and Respondents' resources on this Application.

16
17 DATED: April 8, 2019

MEYERS, NAVE, RIBACK, SILVER & WILSON

18
19 By:


Timothy D. Cremin
Attorneys for The Regents of the University of
California; Janet Napolitano, in her capacity as
President of the University of California; Carol
Christ, in her capacity as Chancellor of the
University of California, Berkeley

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1 **PROOF OF SERVICE**

2 **STATE OF CALIFORNIA, COUNTY OF ALAMEDA**

3 At the time of service, I was over 18 years of age and **not a party to this action**. I am
4 employed in the County of Alameda, State of California. My business address is 555 12th Street,
Suite 1500, Oakland, CA 94607.

5 On April 8, 2019, I served true copies of the following document(s) described as
6 **OPPOSITION TO PETITIONER'S EX PARTE APPLICATION FOR LEAVE TO FILE**
7 **REQUEST FOR JUDICIAL NOTICE AND SUPPORTING PLEADINGS AND**
8 **DECLARATIONS** on the interested parties in this action as follows:

9 Thomas N. Lippe, Esq.
10 Kelly Marie Perry, Esq.
11 Law Offices of Thomas N. Lippe, APC
201 Mission Street, 12th Fl.
San Francisco, CA 94105

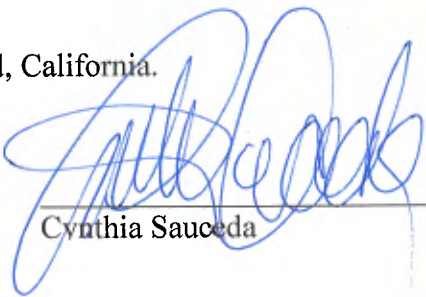
Attorneys for Plaintiff SAVE
BERKELEY'S NEIGHBORHOODS

Tel: (415) 777-5604
Fax: (415) 777-5606
Email: lippelaw@sonic.net
kmhperry@sonic.net

12 **BY E-MAIL OR ELECTRONIC TRANSMISSION:** Based on an agreement of the
13 parties to accept service by e-mail or electronic transmission, I caused the document(s) to be sent
from e-mail address CSauceda@meyersnave.com to the persons at the e-mail addresses listed in
14 the Service List. I did not receive, within a reasonable time after the transmission, any electronic
message or other indication that the transmission was unsuccessful.

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

17 Executed on April 8, 2019, at Oakland, California.

18 
19 Cynthia Saucedo
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Document received by the CA 1st District Court of Appeal.

Tab 054

APR/17/2019/WED 08:16 AM Law O. Thomas Lippe

FAX No. 1-415-777-5606

F. 032

FILED BY FAX
ALAMEDA COUNTY

April 17, 2019

**CLERK OF
THE SUPERIOR COURT**
By Shabra Iyamu, Deputy**CASE NUMBER:
RG18902751**

1 Thomas N. Lippe, SBN 104640
 2 LAW OFFICES OF THOMAS N. LIPPE, APC
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 4 San Francisco, California 94105
 5 Tel: (415) 777-5604
 6 Fax: (415) 777-5606
 7 E-mail: Lippelaw@sonic.net
 8
 9 Attorney for Plaintiff: Save Berkeley's Neighborhoods

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**IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
 IN AND FOR THE COUNTY OF ALAMEDA**

10 SAVE BERKELEY'S NEIGHBORHOODS, a
 11 California nonprofit public benefit corporation;

12 Plaintiff,
 13 vs.

14 THE REGENTS OF THE UNIVERSITY OF
 15 CALIFORNIA; JANET NAPOLITANO, in her
 16 capacity as President of the University of
 17 California; CAROL T. CHRIST, in her capacity as
 18 Chancellor of the University of California,
 19 Berkeley; and DOES 1 through 20,

20 Respondents and Defendants.

Case No. RG18902751

**EX PARTE APPLICATION FOR LEAVE TO
 FILE PLAINTIFF'S REQUEST FOR
 JUDICIAL NOTICE IN OPPOSITION TO
 DEMURRER TO THIRD AMENDED
 PETITION FOR WRIT OF MANDATE AND
 COMPLAINT FOR DECLARATORY
 RELIEF**

[CEQA]

Assigned for All Purposes to:
 Hon. Frank Roesch, Dept. 17

Assigned for Purposes of Demurrer to Third
 Amended Petition for Writ of Mandate and
 Complaint for Declaratory Relief:
 Hon. Nicole Wise, Dept. 24

Reservation No.: R-2067573

Date: April 18, 2019

Time: 9:30 A.M.

Dept.: 24

Judge: Hon. Nicole Wise

Action Filed: April 27, 2018

Trial Date: Not Set

1 TO: ALL PARTIES AND THEIR COUNSEL OF RECORD:

2 PLEASE TAKE NOTICE THAT on April 18, 2019, at 9:30 a.m. in Department 24 of the
3 above-entitled court located at the Alameda County Administration Building, 1221 Oak Street, 3rd
4 Floor, Oakland, California 94612. This application seeks an order granting leave to file Plaintiff's
5 Request for Judicial Notice in Opposition to Demurrer to Third Amended Petition for Writ of Mandate
6 and Complaint for Declaratory Relief, attached hereto as Attachment 1.

7 The grounds for this application are that in their demurrer to Plaintiff's Third Amended
8 Complaint, which is currently submitted for decision, Respondent Regents argue they have no obligation
9 under the California Environmental Quality Act (CEQA) to conduct subsequent environmental review of
10 the increase in student enrollment over and above the increase in student enrollment projected in the
11 2020 Long Range Development Plan (2020 LRDP) adopted in 2005. (See Memorandum of Points and
12 Authorities in Support of Demurrer to Petitioner's Third Amended Petition for Writ of Mandate and
13 Complaint for Declaratory Relief, pp. 13-16.) However, in their Final Environmental Impact Report for
14 the 2020 LRDP that the Regents certified in 2005 (2005 Final EIR), the Regents asserted the opposite,
15 stating: "However, if the 2020 LRDP is adopted by the Regents, any further increase beyond the
16 maximum stated in the plan would require an amendment of the plan, including CEQA review." (See
17 Attachment 1, Exhibit 2 [2020 LRDP FEIR], p. 11.2-115.)

18 The Court recently issued a tentative ruling on the Regents' pending demurrer, which reflects the
19 Court's construction of CEQA section 21080.09. (See discussion in the Memorandum of Points and
20 Authorities submitted in support of this application and in Attachment 1.) The Regents' statement in the
21 2020 LRDP FEIR quoted above is directly relevant to this construction because the Regents are tasked,
22 in the first instance, with interpreting and complying with their legal obligations under CEQA section
23 21080.09. (*City of Marina v. Board of Trustees of California State University* (2006) 39 Cal.4th 341,
24 360 ["while education may be CSU's [California State University] core function, to avoid or mitigate the
25 environmental effects of its projects is also one of CSU's functions. This is the plain import of CEQA, in
26 which the Legislature has commanded that '[e]ach public agency shall mitigate or avoid the significant
27 effects on the environment of projects that it carries out or approves whenever it is feasible to do so'];
28 accord *City of San Diego v. Board of Trustees of California State University* (2015) 61 Cal.4th 945,
966.) Moreover, while courts determine the meaning of statutes using their independent judgment, the

1 Regents interpretation of a statute it is charged with enforcing is one of “several interpretive tools” that
2 may help a court independently judge the meaning of a statute. (*City of Long Beach v. Department of*
3 *Industrial Relations* (2004) 34 Cal.4th 942, 951; *Agnew v. State Bd. of Equalization* (1999) 21 Cal.4th
4 310, 322; *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7 (*Yamaha*).)

5 Thus, the Regents interpretation of their legal obligations under CEQA in 2005 is directly
6 relevant to the Court’s ruling on their pending demurrer.

7 On April 5 (with Reservation No. R- 2064996) Plaintiff previously filed this application for
8 hearing on April 8 in Department 17 before Judge Roesch because the case is single assigned to Judge
9 Roesch. When counsel for Plaintiff appeared to present the application, Judge Roesch said it would
10 have to be presented in Department 24 to Judge Wise because she is deciding the demurrer in this case
11 and the ex parte application relates to the demurrer. Counsel for Plaintiff wrote to Department 24
12 requesting a reservation to hear the ex parte application before Judge Wise to coincide with the hearing
13 on the demurrer currently scheduled for April 18, at 9:00 am. Opposing counsel agreed to this schedule.
14 Department 24 reserved the ex parte application for hearing on April 18, 2019, at 9:30 am stating “please
15 don’t be concerned about the 9:30 time. We are expecting you at 9:00.” (Declaration of Thomas N.
16 Lippe in Support of Ex Parte Application for Leave to File Plaintiff’s Request for Judicial Notice in
17 Opposition to Demurrer to Third Amended Petition for Writ of Mandate and Complaint for Declaratory
18 Relief (Lippe Decl.) ¶ 5.)

19 Plaintiff brings this application an ex parte basis because Plaintiff will suffer irreparable injury
20 (as provided in CRC 3.1202(c)) unless the relief requested here is granted. Absent this relief, the Court
21 would rule on the demurrer without this information, which would represent a miscarriage of justice.
22 Also, Plaintiff did not learn the Regents had admitted their obligation under CEQA to conduct
23 subsequent environmental review of the increase in student enrollment over and above the increase in
24 student enrollment projected in the 2020 LRDP until March 25, 2019. (Lippe Decl. ¶¶ 2-4; Declaration
25 of Phillip Bokovoy in Support of Ex Parte Application for Leave to File Plaintiff’s Request for Judicial
26 Notice in Opposition to Demurrer to Third Amended Petition for Writ of Mandate and Complaint for
27 Declaratory Relief, ¶¶ 2-5.)


28 Plaintiff’s counsel notified opposing counsel (Timothy Cremin, 555 12th Street, Suite 1500,
Oakland, California 94607, Telephone: (510) 808-2000) of this application on April 15, 2019 by email

1 sent at 9:53 a.m, which Mr. Cremin acknowledged by email sent at 12:37 p.m. on the same day.
2 Opposing counsel opposes this application. (Lippe Decl.¶ 6.)

3 This Motion is based on the Verified Third Amended Petition for Writ of Mandate and
4 Complaint for Declaratory Relief filed in this action; this Application, the supporting Memorandum of
5 Points and Authorities, the supporting declarations of Thomas N. Lippe and Philip Bokovoy, on all other
6 papers on file in this matter, and upon such other oral and/or documentary evidence as may be presented
7 at the hearing on this application.

8 DATED: April 15, 2019

LAW OFFICES OF THOMAS N. LIPPE, APC

9
10 By: 
11 Thomas N. Lippe
12 Attorney for Plaintiff

13 T:\TL\UC Enroll\Trial\Ex Parte\EXP010a NEWC Signed Ex Parte re RJN TAP Demurrer.wpd

Document received by the CA 1st District Court of Appeal.

ATTACHMENT 1

Document received by the CA 1st District Court of Appeal.

AA00566

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2 LAW OFFICES OF THOMAS N. LIPPE, APC
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4 San Francisco, California 94105
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7 E-mail: Lippelaw@sonic.net

8 Attorney for Plaintiff: Save Berkeley's Neighborhoods

9
10 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **IN AND FOR THE COUNTY OF ALAMEDA**
12

13 SAVE BERKELEY'S NEIGHBORHOODS, a
14 California nonprofit public benefit corporation;

15 Plaintiff,
16 vs.

17 THE REGENTS OF THE UNIVERSITY OF
18 CALIFORNIA; JANET NAPOLITANO, in her
19 capacity as President of the University of
20 California; CAROL T. CHRIST, in her capacity as
21 Chancellor of the University of California,
22 Berkeley; and DOES 1 through 20,

23 Respondents and Defendants.
24
25
26
27
28

Case No. RG18902751

**PLAINTIFF'S REQUEST FOR JUDICIAL
NOTICE IN OPPOSITION TO DEMURRER
TO THIRD AMENDED PETITION FOR
WRIT OF MANDATE AND COMPLAINT
FOR DECLARATORY RELIEF**

[CEQA]

Assigned for All Purposes to:
Hon. Frank Roesch, Dept. 17

Reservation No.: R-2022686

Date: January 15, 2019

Time: 3:45 P.M.

Dept.: 24

Judge: Hon. Noel Wise

Action Filed: April 27, 2018

Trial Date: Not Set

1 Pursuant to Evidence Code sections 452, subdivision (c) and 453, Plaintiff Save Berkeley's
2 Neighborhoods requests that the Court take judicial notice of the following two documents:

3 **Exhibit 1:** Page 3 of the February 20, 2019, Draft Supplemental EIR to the 2020 Long Range
4 Development Plan Environmental Impact Report for the Upper Hearst Development for the Goldman School
5 of Public Policy and Minor Amendment to UC Berkeley's 2020 Long Range Development Plan. (Draft
6 SEIR).

7 **Exhibit 2:** Page 11.2-115 of the Responses to Comments portion of the Final Environmental Impact
8 Report for UC Berkeley's 2020 Long Range Development Plan 2020 LRDP that the Regents certified in
9 2005 (2005 Final EIR).

10 Memorandum of Points and Authorities

11 Exhibits 1 and 2 are subject to judicial notice because they are official acts of the executive
12 department of the state of California as described in evidence Code section 452, subd. (c).

13 These documents are relevant to Respondent Regents' pending demurrer to Plaintiff's Third
14 Amended Complaint, because they show that the Regents' admitted—before this litigation—that they have
15 an obligation under the California Environmental Quality Act (CEQA) to conduct subsequent environmental
16 review of the increase in student enrollment over and above the increase in student enrollment projected in
17 the 2020 LRDP adopted in 2005, yet they deny this obligation in their demurrer.

18 In their demurrer to Plaintiff's Third Amended Complaint, the Regents argue they have no obligation
19 under CEQA to conduct subsequent environmental review of the increase in student enrollment over and
20 above the increase in student enrollment projected in the 2020 LRDP adopted in 2005. (See Memorandum
21 of Points and Authorities in Support of Demurrer to Petitioner's Third Amended Petition for Writ of
22 Mandate and Complaint for Declaratory Relief, pp. 13-16.)

23 In its April 2, 2019, Order Setting Further Hearing on Defendants' Demurrer to Third Amended
24 Petition for Writ of Mandate and Complaint for Declaratory Relief (Order Setting Further Hearing), the
25 Court accepts this position, stating:

26 Plaintiff, however, contends that the Regents' "informal, discretionary decisions" to increase
27 student enrollment beyond that anticipated in the LDRP constituted "project changes" that
28 required CEQA review. (See Plaintiffs opposition brief at pages 3-4.) ¶ The Court rejects
this argument. The LDRP, as statutorily defined, is not a student enrollment plan. Rather, it
is "a physical development and land use plan" for a campus of public higher education. (See

Public Resources Code § 21080.09(a)(2).) Environmental effects relating to projected changes in enrollment levels are to be considered in the environmental impact report prepared for the long range development plan (see § 21080.09(b)), *but any discrepancies between the estimated changes in enrollment levels and the actual enrollment levels in subsequent years are not themselves project or program changes that require subsequent CEQA review.* The Regents' 2005 analysis of the estimated projections of enrollment changes by 2020, as set forth in the 2005 EIR and the LRDP, satisfied the Regents' obligations to consider the environmental impact of those enrollment plans. (See § 21080.09(d).)

(Order Setting Further Hearing, pp. 2-3 (italics added).

It turns out, however, that in the Final Environmental Impact Report for the 2020 LRDP that the Regents certified in 2005 (2005 Final EIR), the Regents asserted the opposite of the italicized language in the Order Setting Further Hearing quoted above, stating: "However, if the 2020 LRDP is adopted by the Regents, any further increase beyond the maximum stated in the plan would require an amendment of the plan, including CEQA review." (Exhibit 2 [2020 LRDP FEIR], p. 11.2-115.)

On February 20, 2019, the Regents published their Draft Supplemental EIR to the 2020 Long Range Development Plan Environmental Impact Report for the Upper Hearst Development for the Goldman School of Public Policy and Minor Amendment to the 2020 Long Range Development Plan (Draft SEIR) for public comment. This document states:

... in its response to comments to the 2020 LRDP EIR, UC Berkeley made a commitment to the City of Berkeley that, if enrollment increased beyond the projections set forth in the 2020 LRDP, it would undertake additional review under CEQA.

(Exhibit 1 [Draft SEIR p. 3].)

In the Responses to Comments portion of the 2005 Final EIR, the Regents responded to a City of Berkeley comment by stating:

The growth in the number of college-age Californians is projected to level off around 2010, and the 2020 LRDP recommends UC Berkeley enrollment stabilize at this point. The writer correctly notes the Regents can direct any campus to absorb more growth if conditions make it necessary to do so. However, if the 2020 LRDP is adopted by the Regents, any further increase beyond the maximum stated in the plan would require an amendment of the plan, including CEQA review.

CEQA expressly provides that the environmental impacts of changes in enrollment levels are to be assessed at the campus level as part of the LRDP process for each campus. See Public

1 Resources Code Section 21080.09(b). The Enrolled Bill Report for the legislation enacting
2 Public Resources Code Section 21080.09 (Senate Bill 896, Mello) clarifies that the intent of
3 the bill was to ensure that CEQA evaluation of student enrollment changes should be
4 addressed at each campus individually as part of the LRDP process, and not on a statewide
5 or systemwide basis. The bill's author stated that the bill "clarifies the intent of existing law
6 that the appropriate place for environmental review of the impact of academic and enrollment
7 plans under CEQA is in a Long Range Development Plan EIR...for the particular campus or
8 medical center where the environmental impact actually takes place" and not on a "statewide,
9 systemwide basis." See letter dated September 12, 1989, from State Senator Henry J. Mello
10 to Governor George Deukmejian.

11 (Exhibit 2 [2020 LRDP FEIR p. 11.2-115].)

12 The portion of the Court's tentative ruling quoted above reflects the Court's construction of CEQA
13 section 21080.09. The Regents' statement in the 2020 LRDP FEIR quoted above is directly relevant to this
14 construction because the Regents are tasked, in the first instance, with interpreting and complying with their
15 legal obligations under CEQA section 21080.09. (*City of Marina v. Board of Trustees of California State
16 University* (2006) 39 Cal.4th 341, 360 ["while education may be CSU's [California State University] core
17 function, to avoid or mitigate the environmental effects of its projects is also one of CSU's functions. This
18 is the plain import of CEQA, in which the Legislature has commanded that '[e]ach public agency shall
19 mitigate or avoid the significant effects on the environment of projects that it carries out or approve
20 whenever it is feasible to do so"]; accord *City of San Diego v. Board of Trustees of California State
21 University* (2015) 61 Cal.4th 945, 966.) Moreover, while courts determine the meaning of statutes using
22 their independent judgment, the Regents interpretation of a statute it is charged with enforcing is one of
23 "several interpretive tools" that may help a court independently judge the meaning of a statute. (*City of Long
24 Beach v. Department of Industrial Relations* (2004) 34 Cal.4th 942, 951; *Agnew v. State Bd. of Equalization*
25 (1999) 21 Cal.4th 310, 322; *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1,
26 (Yamaha).)

27 Thus, the Regents interpretation of their legal obligations under CEQA in 2005 is directly relevant
28 to the Court's ruling on their pending demurrer. Plaintiff, obviously, believes the Regents were correct on
this point in 2005 and that their pending demurrer is incorrect on this point.

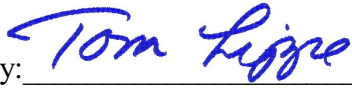
Plaintiffs did not learn of the Regents' statement in the 2020 LRDP FEIR quoted above until after
they read the Draft SEIR published on February 20, 2019, which first alerted them to the existence of this

1 statement in the 2020 LRDP FEIR. (Declaration of Thomas N. Lippe in Support of Ex Parte Application for
2 Leave to File Plaintiff's Request for Judicial Notice in Opposition to Demurrer to Third Amended Petition
3 for Writ of Mandate and Complaint for Declaratory Relief, ¶¶ 2-4; Declaration of Phillip Bokovoy in
4 Support of Ex Parte Application for Leave to File Plaintiff's Request for Judicial Notice in Opposition to
5 Demurrer to Third Amended Petition for Writ of Mandate and Complaint for Declaratory Relief, ¶¶ 2-5.)

6 Therefore, Plaintiff requests that the Court take judicial notice of Exhibits 1 and 2 attached hereto.

7 DATED: April 5, 2019

LAW OFFICES OF THOMAS N. LIPPE, APC

8
9 By: 
10 Thomas N. Lippe
11 Attorney for Plaintiff

12 T:\TL\UC Enroll\Trial\Ex Parte\M045c Signed RJN Demurrer Opp TAP.wpd
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Document received by the CA 1st District Court of Appeal.

EXHIBIT 1

Document received by the CA 1st District Court of Appeal.

AA00572

one subterranean level. The fourth level would provide access to a rooftop terrace. The centerpiece of the design would be a two-story atrium bordered on the exterior by a glass façade. This atrium would face west toward the existing GSPP building located at 2607 Hearst Avenue and would have public space and interaction areas. By the end of the 2022-23 academic year, the academic building would house five permanent staff members and 30 students on an average, year-round basis. The academic building's event space would have a seating capacity of 300 and would accommodate up to 450 visitors at maximum capacity; public and private events would occur periodically during both daytime and evening hours.

The Minor LRDP Amendment would accommodate the proposed housing land use on the Project site. Specifically, the Minor LRDP Amendment would expand the Housing Zone to accommodate residential development on the Project site (see Appendix B).

Please see Section 3, *Project Description*, for additional Project information and plans.

Environmental Analysis

This Draft SEIR has been prepared pursuant to CEQA and the CEQA Guidelines to evaluate the environmental effects of the proposed Project, and to identify feasible mitigation measures and alternatives to reduce or avoid the Project's significant impacts.

The Draft SEIR also establishes an updated population baseline to reflect the existing campus headcount (which is greater than the projections in the 2020 LRDP) and new campus headcount projections through the 2022-23 school year, when increased enrollment at GSPP as a result of the Project would plateau. Despite the growth in campus headcount over 2020 LRDP projections, which led to the new baseline, the analysis in this SEIR demonstrates that the UC Berkeley campus is still operating within the capacity and demand identified and analyzed in the 2020 LRDP EIR for resources such as housing, water, electricity and public services, among others. Moreover, to date, UC Berkeley has accommodated the increased campus headcount completely within the physical development identified in the 2020 LRDP and, in fact, has developed fewer square feet of academic and support space and fewer housing units than what was identified in the 2020 LRDP and analyzed in the 2020 LRDP EIR. Nonetheless, in its response to comments to the 2020 LRDP EIR, UC Berkeley made a commitment to the City of Berkeley that, if enrollment increased beyond the projections set forth in the 2020 LRDP, it would undertake additional review under CEQA.

Consistent with this commitment, the SEIR uses an updated population baseline and, in its environmental analysis of each impact category, takes this updated baseline into account and explains how it factors into and/or affects the environmental analysis and significance conclusions reached in the 2020 LRDP EIR and this SEIR. For some impact categories, such as Aesthetics, Cultural Resources, Land Use, and Tribal Cultural Resources, the analysis of whether the increased headcount would cause environmental impacts hinges on physical development to accommodate an increased headcount. For other impact categories, such as Air Quality, Greenhouse Gas Emissions, Noise, Population, Public Services, and Transportation and Traffic, the analysis of whether the increased headcount would cause environmental impacts hinges on population numbers on the campus. The introductory section of each impact category in Section 6, *Environmental Evaluation*, explains the approach taken to account for the increased campus headcount in that section, and how the increase in campus headcount factors into the impact analysis.

EXHIBIT 2

Document received by the CA 1st District Court of Appeal.

RESPONSE TO COMMENT B7-7

See Response B7-1. The University believes that the 74-page LRDP serves as an adequate project description. The writer also seems to object to the fact the 2020 LRDP was not prepared and presented to the community in advance of the environmental analysis. However, preparing the LRDP and EIR simultaneously enabled the University to respond to the results of the environmental analysis in the plan itself, and also enabled the public to use those results in the review and critique of the plan.

RESPONSE TO COMMENTS B7-8 AND B7-9

A Long Range Development Plan does not need to set forth significance thresholds for environmental impacts. To the extent this comment really applies to the Draft EIR, each impact analyzed provides significance thresholds that are used in evaluation of the 2020 LRDP, and which can be applied to future projects as they undergo individual CEQA review. Those impacts found to be significant within the 2020 LRDP EIR have corresponding mitigation measures, many of which have impact thresholds that trigger their implementation in future projects. General Plan and state zoning law requirements do not apply to the University of California. Please see Thematic Response 1 regarding future project review, and Thematic Response 5 regarding the use of qualifiers.

RESPONSE TO COMMENT B7-10

See Thematic Response 5 regarding the use of qualifiers.

RESPONSE TO COMMENTS B7-11 THRU B7-14

See Thematic Response 6 regarding the relationship to LBNL.

RESPONSE TO COMMENTS B7-15 AND B7-16

The growth in the number of college-age Californians is projected to level off around 2010, and the 2020 LRDP recommends UC Berkeley enrollment stabilize at this point. The writer correctly notes the Regents can direct any campus to absorb more growth if conditions make it necessary to do so. However, if the 2020 LRDP is adopted by the Regents, any further increase beyond the maximum stated in the plan would require an amendment of the plan, including CEQA review.

CEQA expressly provides that the environmental impacts of changes in enrollment levels are to be assessed at the campus level as part of the LRDP process for each campus. See Public Resources Code Section 21080.09(b). The Enrolled Bill Report for the legislation enacting Public Resources Code Section 21080.09 (Senate Bill 896, Mello) clarifies that the intent of the bill was to ensure that CEQA evaluation of student enrollment changes should be addressed at each campus individually as part of the LRDP process, and not on a statewide or systemwide basis. The bill's author stated that the bill "clarifies the intent of existing law that the appropriate place for environmental review of the impact of academic and enrollment plans under CEQA is in a Long Range Development Plan EIR...for the particular campus or medical center where the environmental impact actually takes place" and not on a "statewide, systemwide basis." See letter dated September 12, 1989, from State Senator Henry J. Mello to Governor George Deukmejian.

RESPONSE TO COMMENT B7-17

The figures in table 3.1-1 reflect our best estimates of how the 4000 FTE increase would translate into regular term and summer headcount at UC Berkeley.

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7 E-mail: Lippelaw@sonic.net
8 Attorney for Plaintiff: Save Berkeley's Neighborhoods

FILED BY FAX
ALAMEDA COUNTY

April 17, 2019

CLERK OF
THE SUPERIOR COURT
By Shabra Iyamu, Deputy

CASE NUMBER:
RG18902751

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA

10 SAVE BERKELEY'S NEIGHBORHOODS, a
11 California nonprofit public benefit corporation;

12 Plaintiff,

13 vs.

14 THE REGENTS OF THE UNIVERSITY OF
15 CALIFORNIA; JANET NAPOLITANO, in her
16 capacity as President of the University of
17 California; CAROL T. CHRIST, in her capacity as
18 Chancellor of the University of California,
19 Berkeley; and DOES 1 through 20,

21 Respondents and Defendants.

Case No. RG18902751

MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF EX
PARTE APPLICATION FOR LEAVE TO
FILE PLAINTIFF'S REQUEST FOR
JUDICIAL NOTICE IN OPPOSITION TO
DEMURRER TO THIRD AMENDED
PETITION FOR WRIT OF MANDATE AND
COMPLAINT FOR DECLARATORY
RELIEF

[CEQA]

Assigned for All Purposes to:
Hon. Frank Roesch, Dept. 17

Assigned for Purposes of Demurrer to Third
Amended Petition for Writ of Mandate and
Complaint for Declaratory Relief:
Hon. Nicole Wise, Dept. 24

Reservation No.: R-2067573

Date: April 18, 2019

Time: 9:30 A.M.

Dept.: 24

Judge: Hon. Nicole Wise

Action Filed: April 27, 2018

Trial Date: Not Set

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I. INTRODUCTION

Plaintiff Save Berkeley's Neighborhoods applies for leave to file Plaintiff's Request for Judicial Notice in Opposition to Demurrer to Third Amended Petition for Writ of Mandate and Complaint for Declaratory Relief. These documents that Plaintiff asks the Court to judicially notice are relevant to Respondent Regents' pending demurrer to Plaintiff's Third Amended Complaint, because they show that the Regents' admitted—before this litigation—that they have an obligation under the California Environmental Quality Act (CEQA) to conduct subsequent environmental review of the increase in student enrollment over and above the increase in student enrollment projected in the 2020 LRDP adopted in 2005, yet they deny this obligation in their demurrer.

The Regents failed to notify the Court that they previously shared Plaintiff's view of their legal obligations in this regard, and Plaintiff did not learn of the Regents' previous admission on this point until the Regents disclosed its existence in a new Draft Supplemental Environmental Impact Report published on February 20, 2019, well after the Court took the demurrer under submission on February 4, 2019.

II. STATEMENT OF FACTS

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In their demurrer to Plaintiff's Third Amended Complaint, the Regents argue they have no obligation under CEQA to conduct subsequent environmental review of the increase in student enrollment over and above the increase in student enrollment projected in the 2020 LRDP adopted in 2005. (See Memorandum of Points and Authorities in Support of Demurrer to Petitioner's Third Amended Petition for Writ of Mandate and Complaint for Declaratory Relief, pp. 13-16.)

In its April 2, 2019, Order Setting Further Hearing on Defendants' Demurrer to Third Amended Petition for Writ of Mandate and Complaint for Declaratory Relief (Order Setting Further Hearing), the Court accepts this position, stating:

Plaintiff, however, contends that the Regents' "informal, discretionary decisions" to increase student enrollment beyond that anticipated in the LDRP constituted "project changes" that required CEQA review. (See Plaintiffs opposition brief at pages 3-4.) ¶ The Court rejects this argument. The LDRP, as statutorily defined, is not a student enrollment plan. Rather, it is "a physical development and land use plan" for a campus of public higher education. (See Public Resources Code § 21080.09(a)(2).) Environmental effects relating to projected changes in enrollment levels are to be considered in the environmental impact report prepared for the long range development plan (see § 21080.09(b)), *but any discrepancies between the estimated changes in enrollment levels*

1 *and the actual enrollment levels in subsequent years are not themselves project or*
2 *program changes that require subsequent CEQA review.* The Regents' 2005 analysis of
3 the estimated projections of enrollment changes by 2020, as set forth in the 2005 EIR and
4 the LRDP, satisfied the Regents' obligations to consider the environmental impact of
those enrollment plans. (See § 21080.09(d).)

5 (Order Setting Further Hearing, pp. 2-3 (italics added)).

6 It turns out, however, that in the Final Environmental Impact Report for the 2020 LRDP that the
7 Regents certified in 2005 (2005 Final EIR), the Regents asserted the opposite of the italicized language
8 in the Order Setting Further Hearing quoted above, stating: "However, if the 2020 LRDP is adopted by
9 the Regents, any further increase beyond the maximum stated in the plan would require an amendment
10 of the plan, including CEQA review." (Exhibit 2 [2020 LRDP FEIR], p. 11.2-115.)

11 The Court has set a new hearing on the demurrer for April 18, 2019.

12 III. ARGUMENT

13 A. The Regents interpretation of their legal obligations under CEQA in 2005 is directly 14 relevant to the Court's ruling on their pending demurrer.

15 The portion of the Court's tentative ruling quoted above reflects the Court's construction of
16 CEQA section 21080.09. The Regents' statement in the 2020 LRDP FEIR quoted above is directly
17 relevant to this construction because the Regents are tasked, in the first instance, with interpreting and
18 complying with their legal obligations under CEQA section 21080.09. (*City of Marina v. Board of*
19 *Trustees of California State University* (2006) 39 Cal.4th 341, 360 ["while education may be CSU's
20 [California State University] core function, to avoid or mitigate the environmental effects of its projects
21 is also one of CSU's functions. This is the plain import of CEQA, in which the Legislature has
22 commanded that '[e]ach public agency shall mitigate or avoid the significant effects on the environment
23 of projects that it carries out or approves whenever it is feasible to do so'"]; accord *City of San Diego v.*
Board of Trustees of California State University (2015) 61 Cal.4th 945, 966.)

24 Moreover, while courts determine the meaning of statutes using their independent judgment, the
25 Regents interpretation of a statute it is charged with enforcing is one of "several interpretive tools" that
26 may help a court independently judge the meaning of a statute. (*City of Long Beach v. Department of*
27 *Industrial Relations* (2004) 34 Cal.4th 942, 951; *Agnew v. State Bd. of Equalization* (1999) 21 Cal.4th
28 310, 322; *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7 (*Yamaha*).)

Thus, the Regents interpretation of their legal obligations under CEQA in 2005 is directly

1 relevant to the Court's ruling on their pending demurrer. Plaintiff, obviously, believes the Regents were
2 correct on this point in 2005 and that their pending demurrer is incorrect on this point.

3 **B. Plaintiffs did not learn of the Regents' statement in the 2020 LRDP FEIR quoted above**
4 **until after they read the Draft SEIR published on February 20, 2019.**


5 The Regents failed to notify the Court that they previously shared Plaintiff's view of their legal
6 obligations in this regard, and Plaintiff did not learn of the Regents' previous admission on this point
7 until the Regents disclosed its existence in a new Draft Supplemental Environmental Impact Report
8 published on February 20, 2019, well after the Court took the demurrer under submission on February 4,
9 2019. (Declaration of Thomas N. Lippe in Support of Ex Parte Application for Leave to File Plaintiff's
10 Request for Judicial Notice in Opposition to Demurrer to Third Amended Petition for Writ of Mandate
11 and Complaint for Declaratory Relief, ¶¶ 2-4; Declaration of Phillip Bokovoy in Support of Ex Parte
12 Application for Leave to File Plaintiff's Request for Judicial Notice in Opposition to Demurrer to Third
13 Amended Petition for Writ of Mandate and Complaint for Declaratory Relief, ¶¶ 2-5.)

14 **IV. CONCLUSION**

15 Therefore, the Court should grant Plaintiff leave to file their Request for Judicial Notice in
16 Opposition to Demurrer to Third Amended Petition for Writ of Mandate and Complaint for Declaratory
17 Relief.

18 DATED: April 15, 2019

LAW OFFICES OF THOMAS N. LIPPE, APC

19 By: 
20 Thomas N. Lippe
21 Attorney for Plaintiff

22 T:\TL\UC Enroll\Trial\Ex Parte\EXP003b NEWC MPA Ex Parte re RJN TAP Demurrer.wpd

Tab 056

APR/17/2019/WED 08:23 AM Law O. Thomas Lippe

FAX No. 1-415-777-5606

F. 023

FILED BY FAX
ALAMEDA COUNTY
 April 17, 2019
 CLERK OF
 THE SUPERIOR COURT
 By Shabra Iyamu, Deputy
 CASE NUMBER:
RG18902751

1 Thomas N. Lippe, SBN 104640
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 3 201 Mission Street, 12th Floor
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 5 Tel: (415) 777-5604
 6 Fax: (415) 777-5606
 7 E-mail: Lippelaw@sonic.net
 8 Attorney for Plaintiff Save Berkeley's Neighborhoods

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA

10 SAVE BERKELEY'S NEIGHBORHOODS, a
 11 California nonprofit public benefit corporation;
 12 Plaintiff,
 13 vs.
 14 THE REGENTS OF THE UNIVERSITY OF
 15 CALIFORNIA; JANET NAPOLITANO, in her
 16 capacity as President of the University of
 17 California; CAROL T. CHRIST, in her capacity as
 18 Chancellor of the University of California,
 19 Berkeley; and DOES 1 through 20,
 20 Respondents and Defendants.

Case No. RG18902751

**DECLARATION OF THOMAS N. LIPPE IN
 SUPPORT OF EX PARTE APPLICATION
 FOR LEAVE TO FILE PLAINTIFF'S
 REQUEST FOR JUDICIAL NOTICE IN
 OPPOSITION TO DEMURRER TO THIRD
 AMENDED PETITION FOR WRIT OF
 MANDATE AND COMPLAINT FOR
 DECLARATORY RELIEF**

[CEQA]

Assigned for All Purposes to:
 Hon. Frank Roesch, Dept. 17

Assigned for Purposes of Demurrer to Third
 Amended Petition for Writ of Mandate and
 Complaint for Declaratory Relief:
 Hon. Nicole Wise, Dept. 24

Reservation No.: R-2067573

Date: April 18, 2019

Time: 9:30 A.M.

Dept.: 24

Judge: Hon. Nicole Wise

AA00580

Document received by the CA 1st District Court of Appeal.

1 I, Thomas N. Lippe, declare:

2 1. I am an attorney at law duly admitted and licensed to practice before all courts of this State. I am
3 attorney of record for the Plaintiff in this case.

4 2. On February 20, 2019, the Regents published their Draft Supplemental EIR to the 2020 Long
5 Range Development Plan Environmental Impact Report for the Upper Hearst Development for the
6 Goldman School of Public Policy and Minor Amendment to the 2020 Long Range Development Plan
7 (Draft SEIR) for public comment.

8 3. On March 25, 2019, Plaintiff asked me to review portions of this Draft SEIR to understand how
9 it might affect this litigation. At that time I read the text in the Draft SEIR stating: "in its response to
10 comments to the 2020 LRDP EIR, UC Berkeley made a commitment to the City of Berkeley that, if
11 enrollment increased beyond the projections set forth in the 2020 LRDP, it would undertake additional
12 review under CEQA." I then reviewed the Responses to Comments portion of the 2005 Final EIR for
13 the 2020 Long Range Development Plan, and discovered there the following response by the Regents to
14 a comment submitted by the City of Berkeley:

15 The growth in the number of college-age Californians is projected to level off around
16 2010, and the 2020 LRDP recommends UC Berkeley enrollment stabilize at this point.

17 The writer correctly notes the Regents can direct any campus to absorb more growth if
18 conditions make it necessary to do so. However, if the 2020 LRDP is adopted by the
19 Regents, any further increase beyond the maximum stated in the plan would require an
20 amendment of the plan, including CEQA review.

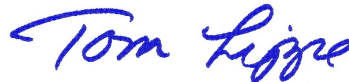
21 CEQA expressly provides that the environmental impacts of changes in enrollment levels
22 are to be assessed at the campus level as part of the LRDP process for each campus. See
23 Public Resources Code Section 21080.09(b). The Enrolled Bill Report for the legislation
24 enacting Public Resources Code Section 21080.09 (Senate Bill 896, Mello) clarifies that
25 the intent of the bill was to ensure that CEQA evaluation of student enrollment changes
26 should be addressed at each campus individually as part of the LRDP process, and not on
27 a statewide or systemwide basis. The bill's author stated that the bill "clarifies the intent
28 of existing law that the appropriate place for environmental review of the impact of
academic and enrollment plans under CEQA is in a Long Range Development Plan
EIR...for the particular campus or medical center where the environmental impact
actually takes place" and not on a "statewide, systemwide basis." See letter dated
September 12, 1989, from State Senator Henry J. Mello to Governor George Deukmejian.

1 4. Prior to Plaintiff asking me to review the February 2019 Draft SEIR, I had not previously
2 reviewed the thousand-plus page Responses to Comments portion of the the 2005 Final EIR, as I did not
3 view this as a necessary or cost-effective use of my client's limited resources for purposes of prosecuting
4 this litigation, and I was not aware that the 2005 Final EIR included an acknowledgment by the Regents
5 that they would be legally obligated under CEQA to conduct subsequent environmental review of the
6 increase in student enrollment over and above the increase in student enrollment projected in the 2020
7 LRDP.

8 5. On April 5 (with Reservation No. R- 2064996) Plaintiff previously filed this application for
9 hearing on April 8 in Department 17 before Judge Roesch because the case is single assigned to Judge
10 Roesch. When I appeared to present the application, Judge Roesch said it would have to be presented in
11 Department 24 to Judge Wise because she is deciding the demurrer in this case and the ex parte
12 application relates to the demurrer. I then wrote to Department 24 requesting a reservation to hear the ex
13 parte application before Judge Wise to coincide with the hearing on the demurrer currently scheduled for
14 April 18, at 9:00 am. Opposing counsel agreed to this schedule. Department 24 reserved the ex parte
15 application for hearing on April 18, 2019, at 9:30 am stating "please don't be concerned about the 9:30
16 time. We are expecting you at 9:00."

17 6. I notified the Regents' counsel (Timothy Cremin, 555 12th Street, Suite 1500, Oakland,
18 California 94607, Telephone: (510) 808-2000) of this application on April 15, 2019 by email sent at 9:53
19 a.m, which Mr. Cremin acknowledged by email sent at 12:37 p.m. on the same day. Opposing counsel
20 opposes this application.

21 I declare under penalty of perjury under the laws of the State of California that the foregoing is
22 true and correct of my personal knowledge. Executed on April 15, 2019, at San Francisco, California.

23 

24 Thomas N. Lippe

25 T:\TL\UC Enroll\Trial\Ex Parte\EXP012a NEWC Signed Ex Parte Decl TNL.wpd
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27
28

1 Thomas N. Lippe, SBN 104640
2 LAW OFFICES OF THOMAS N. LIPPE, APC
3 201 Mission Street, 12th Floor
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8 Attorney for Plaintiff: Save Berkeley's Neighborhoods

FILED BY FAX
ALAMEDA COUNTY
April 17, 2019
CLERK OF
THE SUPERIOR COURT
By Shabra Iyamu, Deputy
CASE NUMBER:
RG18902751

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA

10 SAVE BERKELEY'S NEIGHBORHOODS, a
11 California nonprofit public benefit corporation;

12 Plaintiff,
13 vs.

14 THE REGENTS OF THE UNIVERSITY OF
15 CALIFORNIA; JANET NAPOLITANO, in her
16 capacity as President of the University of
17 California; CAROL T. CHRIST, in her capacity as
18 Chancellor of the University of California,
19 Berkeley; and DOES 1 through 20,

20 Respondents and Defendants.
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Case No. RG18902751

DECLARATION OF PHILLIP BOKOVOY
IN SUPPORT OF EX PARTE
APPLICATION FOR LEAVE TO FILE
PLAINTIFF'S REQUEST FOR JUDICIAL
NOTICE IN OPPOSITION TO DEMURRER
TO THIRD AMENDED PETITION FOR
WRIT OF MANDATE AND COMPLAINT
FOR DECLARATORY RELIEF

[CEQA]

Assigned for All Purposes to:
Hon. Frank Roesch, Dept. 17

Assigned for Purposes of Demurrer to Third
Amended Petition for Writ of Mandate and
Complaint for Declaratory Relief:
Hon. Nicole Wise, Dept. 24

Reservation No.: R-2067573

Date: April 18, 2019

Time: 9:30 A.M.

Dept.: 24

Judge: Hon. Nicole Wise

1 I, Phillip Bokovoy, declare:

2 1. I am the founder and President of Save Berkeley's Neighborhoods, the plaintiff in this case.

3 2. After the Regents published, on February 20, 2019, their Draft Supplemental EIR to the 2020
4 Long Range Development Plan Environmental Impact Report for the Upper Hearst Development for the
5 Goldman School of Public Policy and Minor Amendment to the 2020 Long Range Development Plan
6 (Draft SEIR) for public comment, I began to review it for purposes of submitting comments on it.

7 3. On March 25, 2019, I asked Thomas Lippe, counsel for Save Berkeley's Neighborhoods, to
8 review portions of this Draft SEIR to help me understand how it might affect this litigation.

9 4. On March 26, 2019, Mr. Lippe reported to me that this Draft SEIR states: "in its response to
10 comments to the 2020 LRDP EIR, UC Berkeley made a commitment to the City of Berkeley that, if
11 enrollment increased beyond the projections set forth in the 2020 LRDP, it would undertake additional
12 review under CEQA."

13 5. On March 26, 2019, Mr. Lippe also reported to me that upon reading the Draft SEIR text quoted
14 in paragraph 4, he also reviewed the Responses to Comments portion of the 2005 Final EIR for the 2020
15 Long Range Development Plan, and discovered there the following response by the Regents to a
16 comment submitted by the City of Berkeley:

17 The growth in the number of college-age Californians is projected to level off around
18 2010, and the 2020 LRDP recommends UC Berkeley enrollment stabilize at this point.
19 The writer correctly notes the Regents can direct any campus to absorb more growth if
20 conditions make it necessary to do so. However, if the 2020 LRDP is adopted by the
21 Regents, any further increase beyond the maximum stated in the plan would require an
22 amendment of the plan, including CEQA review.

23 CEQA expressly provides that the environmental impacts of changes in enrollment levels
24 are to be assessed at the campus level as part of the LRDP process for each campus. See
25 Public Resources Code Section 21080.09(b). The Enrolled Bill Report for the legislation
26 enacting Public Resources Code Section 21080.09 (Senate Bill 896, Mello) clarifies that
27 the intent of the bill was to ensure that CEQA evaluation of student enrollment changes
28 should be addressed at each campus individually as part of the LRDP process, and not on
a statewide or systemwide basis. The bill's author stated that the bill "clarifies the intent
of existing law that the appropriate place for environmental review of the impact of
academic and enrollment plans under CEQA is in a Long Range Development Plan
EIR...for the particular campus or medical center where the environmental impact

1 actually takes place” and not on a “statewide, systemwide basis.” See letter dated
2 September 12, 1989, from State Senator Henry J. Mello to Governor George Deukmejian.

3 6. Prior to Mr. Lippe’s report to me on these matters, I had not read the thousand-plus page
4 Responses to Comments portion of the 2005 Final EIR and I was not aware that the 2005 Final EIR
5 included an acknowledgment by the Regents that they would be legally obligated under CEQA to
6 conduct subsequent environmental review of the increase in student enrollment over and above the
7 increase in student enrollment projected in the 2020 LRDP.

8 I declare under penalty of perjury under the laws of the State of California that the foregoing is
9 true and correct of my personal knowledge. Executed on April 5, 2019, at TAKAKA, NEW
Zealand

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11 Phillip Bokovoy
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Tab 058

APR/17/2019/WED 08:24 AM Law O. Thomas Lippe

FAX No. 1-415-777-5606

F. 026

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9 Attorney for Plaintiff: Save Berkeley's Neighborhoods

10 **IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA**
11 **IN AND FOR THE COUNTY OF ALAMEDA**

12 SAVE BERKELEY'S NEIGHBORHOODS, a
13 California nonprofit public benefit corporation;

14 Plaintiff,

15 vs.

16 THE REGENTS OF THE UNIVERSITY OF
17 CALIFORNIA; JANET NAPOLITANO, in her
18 capacity as President of the University of
19 California; CAROL T. CHRIST, in her capacity as
20 Chancellor of the University of California,
21 Berkeley; and DOES 1 through 20,

22 Respondents and Defendants.

Case No. RG18902751

**[Proposed] ORDER GRANTING EX PARTE
APPLICATION FOR LEAVE TO FILE
PLAINTIFF'S REQUEST FOR JUDICIAL
NOTICE IN OPPOSITION TO DEMURRER
TO THIRD AMENDED PETITION FOR
WRIT OF MANDATE AND COMPLAINT
FOR DECLARATORY RELIEF**

[CEQA]

Assigned for All Purposes to:
Hon. Frank Roesch, Dept. 17

Assigned for Purposes of Demurrer to Third
Amended Petition for Writ of Mandate and
Complaint for Declaratory Relief:
Hon. Nicole Wise, Dept. 24

Reservation No.: R-2067573

Date: April 18, 2019

Time: 9:30 A.M.

Dept.: 24

Judge: Hon. Nicole Wise

Action Filed: April 27, 2018

Trial Date: Not Set

1 Good cause appearing, Plaintiff Save Berkeley's Neighborhoods Ex Parte Application for Leave to
2 File Plaintiff's Request for Judicial Notice in Opposition to Demurrer to Third Amended Petition for Writ
3 of Mandate and Complaint for Declaratory Relief is granted. Plaintiff may file said document, in the form
4 attached to the application as Attachment 1.

5 So Ordered.

6 April ____, 2019

Judge of the Superior Court

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9 T:\TL\UC Enroll\Trial\Ex Parte\EXP014 NEWC Prop Order Ex Parte re RJN.wpd
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Document received by the CA 1st District Court of Appeal.

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EXEMPT FROM FILING FEES
GOV'T CODE § 6103

Attorneys for The Regents of the University of
California; Janet Napolitano, in her capacity as
President of the University of California; Carol T.
Christ, in her capacity as Chancellor of the
University of California, Berkeley

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA

SAVE BERKELEY'S NEIGHBORHOODS, a
California nonprofit public benefit
corporation,

Petitioner and Plaintiff,

v.

THE REGENTS OF THE UNIVERSITY OF
CALIFORNIA; JANET NAPOLITANO, in
her capacity as President of the University of
California; CAROL T. CHRIST, in her
capacity as Chancellor of the University of
California, Berkeley; and DOES 1 through 20,

Respondents and Defendants.

Case No. RG18902751

ASSIGNED FOR ALL PURPOSES TO
Judge Frank Roesch

**RESPONDENTS' OPPOSITION TO
PETITIONER'S EX PARTE
APPLICATION FOR LEAVE TO FILE
REQUEST FOR JUDICIAL NOTICE AND
SUPPORTING PLEADINGS AND
DECLARATIONS**

Reservation No.: R-2067573

Date: April 18, 2019

Time: 9:30 AM

Dept: 24

Action Filed: April 27, 2018

Trial Date: None Set

1 Respondents THE REGENTS OF THE UNIVERSITY OF CALIFORNIA; JANET
2 NAPOLITANO, and CAROL T. CHRIST (Collectively, "UC") submit this Opposition to
3 Petitioner Save Berkeley Neighborhood's ("Petitioner") wholly improper and frivolous Ex Parte
4 Application For Leave to File a Request for Judicial Notice and related pleadings and declarations
5 ("Application"). This Court should summarily deny the Application. It is nothing more than
6 Petitioner's attempt to file supplemental briefing on the Order issued by this Court on April 2,
7 2019 ("Order") sustaining the Demurrer to the Third Amended Complaint ("Demurrer") which is
8 scheduled for further hearing on *the same day as this Application*. It is a last-ditch attempt at
9 further briefing, introducing new arguments and delaying this proceeding - tactics Petitioner has
10 employed throughout the case. The Petitioner has already amended the Petition three times and
11 submitted at least three substantive briefs on the Demurrer issues, including supplemental briefing
12 already ordered by this Court. Despite all this, at the eleventh hour, on the day of the hearing on
13 the Order, Petitioner wants this Court to consider allegedly "new" arguments and information that
14 could have been presented to this Court months ago. In addition, this is the second time Petitioner
15 brought this Application. It was previously improperly filed in Judge Roesch's department even
16 though this Court had already issued the Order. Judge Roesch properly refused to hear the
17 Application since he is not the judge hearing the Demurrer. Going to Judge Roesch first was
18 improper, inexcusable and an attempt to undermine this Court's Order and jurisdiction over the
19 Demurrer. This gamesmanship should not be allowed.

20 Moreover, Petitioner's Application does not make the required showing to establish the
21 basis for the Court to grant the relief requested. Petitioner simply does not address the applicable
22 standards. The only claimed grounds for extraordinary relief is a bald assertion that the
23 Application is necessary to prevent a "miscarriage of justice." Such unsupported assertions is not
24 a legal basis for granting Petitioner's ex parte Application. Petitioner cannot be allowed
25 supplemental, day-of-hearing briefing just because it disagrees with the Court's Order. The
26 Request for Judicial Notice ("RJN") also does not meet the legal standards for this Court's
27 consideration of the documents.

28 Even if the Court decides to consider the proffered evidence, it does not provide a basis for

1 changing the Court's Order. The documents are consistent with UC's position from day one of
2 this case and the Order. UC has consistently argued that under Public Resources Code, section
3 21080.09, an enrollment increase, in and of itself, does not constitute a "project" subject to the
4 California Environmental Quality Act ("CEQA"). However, to the extent that enrollment exceeds
5 that anticipated and analyzed in the Long Range Development Plan ("LRDP") Environmental
6 Impact Report ("EIR"), UC would need to examine the impacts of enrollment in its environmental
7 review of a future discretionary development project that relies on the LRDP EIR under applicable
8 standards for supplemental environmental review. The Upper Hearst Development for the
9 Goldman School of Public Policy and Minor Amendment to the 2020 Long Range Development
10 Plan project ("GSPP Project") is a discretionary development project and the Supplemental EIR
11 for the GSPP project ("Draft SEIR") is appropriately examining the impacts of increased
12 enrollment under supplemental environmental review standards. UC has informed this Court of
13 the GSPP project and its Draft SEIR in all of its briefing. The Court has already taken Judicial
14 Notice of the Notice of Preparation ("NOP") for the GSPP Draft SEIR in its Order dated
15 November 15, 2018. So, the record already contains information about the GSPP Draft SEIR
16 which Petitioner could have cited in its numerous briefs.

17 Petitioner's Application to file an RJN should be denied because it is improper, the
18 standards for a RJN have not been met, the RJN is a barely-disguised supplemental briefing on
19 issues that could have been previously raised, and the case is already submitted.

20 **I. APPLICATION IS NOT ALLOWED UNDER ORDER**

21 The Order specifically scheduled and allows only further hearing on the sustaining of the
22 Demurrer without leave to amend. The Court already ordered and allowed supplemental briefing
23 on this matter which was filed on February 4th. The Court confirmed at the February 8th Case
24 Management Conference that the matter was under submission but further hearing may be
25 scheduled at the Court's discretion. Therefore, the RJN is a filing which is not allowed under the
26 Order and given the case status. Attempts to submit further pleadings and supplemental briefing
27 after a court has issued its order is not a permitted procedure.
28

1 **II. APPLICATION DOES NOT MEET STANDARDS FOR EXTRAORDINARY**
2 **RELIEF**

3 The Application does not meet the fundamental standards for extraordinary relief. An ex
4 parte applicant “must make an affirmative factual showing in a declaration containing competent
5 testimony based on personal knowledge of irreparable harm, immediate danger, or any other
6 statutory basis for granting relief ex parte.” (Cal. Rule of Court, Rule 3.1202(c).) An ex parte
7 application that fails to comply with these rules is properly denied. (*Datig v. Dove Books, Inc.*
8 (1999) 73 Cal.App.4th 964, 977.) Petitioner’s Memorandum of Points and Authorities (“MPA”)
9 in support of its Application does not discuss the standards for providing ex parte relief, nor does
10 the MPA provide any legal or factual justification for the Application. The closest Petitioner
11 comes to offering legal support for the Application comes in the Application itself, where
12 Petitioner asserts, without reference to law or fact, that Petitioner “will suffer irreparable injury”
13 because “[a]bsent this relief, the Court would rule on the demurrer without this information, which
14 would represent a miscarriage of justice.” (Application, p. 2.) So, Petitioner is basically arguing
15 that because it disagrees with the Order, ex parte, day-of-hearing briefing on the matter should be
16 allowed.

17 There is no imminent harm and Petitioner has no excuse for failing to bring a Request for
18 Judicial Notice much earlier in the proceeding – at least six months or more ago. The present
19 filing is a last-ditch attempt to improperly contest the adverse Order issued by this Court. This
20 matter was filed one year ago. Petitioner has amended its Petition three times to attempt to state
21 claim under CEQA. An order sustaining the Demurrer to the Second Amended Complaint with
22 Leave To Amend was issued on November 15, 2018. The pending Demurrer has been fully
23 briefed, including supplemental briefing ordered by this Court, and filed on February 4, 2019.
24 Now, over two months after the matter has been fully briefed, Petitioner requests judicial notice of
25 one page from the over 15 years old LRDP EIR and one page from the GSPP Draft SEIR that has
26 been available since February 20, 2019. The Court took Judicial Notice of the NOP for the GSPP
27 Draft SEIR in its Order dated November 15, 2018. The NOP clearly stated that the GSPP Draft
28 SEIR would analyze the increase in campus population beyond the projections in the LRDP EIR.

1 The single page cited in the GSPP Draft SEIR contains no new information that was not disclosed
2 in the NOP. Therefore, without question, Petitioner could have raised the information in the
3 documents attached to its RJN in its opposition to the previous two demurrers filed in this case.

4 The allegations in the Declarations of Thomas N. Lippe and Philip Bokovoy
5 (“Declarations”) submitted to support the “emergency” necessitating the Application can be easily
6 dismissed. The Declarations claim they were not aware of the language in the LRDP EIR even
7 though the analysis in that EIR are the key basis for allegations in the Petition and have been
8 subject to multiple briefings on two demurrers. That the Declarations claim certain language was
9 “missed” is incredulous. Similarly, UC has repeatedly referenced the GSPP Draft SEIR process in
10 its briefing on two demurrers. Petitioner cannot be excused for failing to immediately and
11 thoroughly review the analysis of campus population growth in GSPP Draft SEIR when it was
12 released eight weeks ago. The original comment period on the GSPP Draft SEIR ended April 8,
13 2019 (although it was extended). The claims in the Declarations for why this was not done cannot
14 be believed.

15 **III. GSPP DRAFT SEIR IS NOT PROPER SUBJECT OF JUDICIAL REVIEW**

16 The GSPP Draft SEIR is a draft document released for public review. It has not been
17 certified or approved by UC. In fact, the whole purpose under CEQA for submitting draft EIRs
18 for public review and comment is so the lead agency can consider public comments and revise the
19 document before considering certification. Draft records are not subject to judicial notice.
20 (Evidence Code sec. 452(c) (only documents of “official acts” of agency subject to judicial notice;
21 *People v. Webster* (1991) 54 Cal.3d 411, 428, fn. 4 [Requests for judicial notice should not be
22 used to “circumvent []” court rules and procedures, including the normal briefing process].).

23 **IV. THE RJN DOCUMENTS ARE CONSISTENT WITH ORDER AND UC’S 24 POSITION IN THIS CASE**

25 In addition to the complete lack of legal or factual justification for granting the
26 Application, the Application itself seeks to submit further evidence and argument on the Demurrer
27 that provides no basis for changing the Order. Petitioner asserts that the RJN is relevant because
28 UC’s interpretation of Public Resources Code section 21080.09 (“Section 21080.09”) is relevant

1 to the Court's ruling on the Demurrer and that UC has somehow taken inconsistent positions in
2 this litigation and in UC's CEQA documents. (MPA, pp. 2-3.) Neither assertion is correct.

3 First, Petitioner argues that the Court should now give deference to UC's interpretation of
4 CEQA (despite arguing to the contrary throughout these proceedings). While UC has consistently
5 argued herein that its interpretation of Section 21080.09 is correct, the cases cited by Petitioner
6 concern administrative agencies' interpretation of statutes for which those agencies have been
7 charged with developing regulations, and do not apply to UC in the CEQA context. (See *City of*
8 *Long Beach v. Dep't of Indus. Relations* (2004) 34 Cal.4th 942, 951 [Department of Industrial
9 Relations interpretation of state prevailing wage law]; *Agnew v. State Bd. of Equalization* (1999)
10 21 Cal.4th 310, 322 [Board of Equalization's interpretation of Revenue and Taxation Code];
11 *Yamaha Corp. of Am. v. State Bd. of Equalization* (1998) 19 Cal. 4th 1, 7 [Same].)

12 Second, UC's arguments in this case, which the Order agrees with, are consistent with the
13 language in the LRDP EIR and GSPP Draft SEIR. UC has consistently argued that Section
14 21080.09 does not define enrollment increases alone to be a "project" subject to CEQA.
15 Enrollment increases may need to be studied in the CEQA documents for subsequent discretionary
16 approvals if enrollment exceeds that anticipated in the LRDP EIR and the CEQA standards for
17 supplemental review are triggered. (See MPA in support of Demurrer to Second Amended
18 Petition ("SAP"), p. 10 ["If and when UC considers a subsequent discretionary approval, it may
19 need to account for current student enrollment numbers in any CEQA determination that relies on
20 the LRDP EIR. For instance, UC is in the process of preparing a supplemental EIR to the LRDP
21 EIR for the" GSPP]; Reply Brief in Support of Demurrer to SAP, pp. 9-11 [arguing that
22 enrollment increases are not stand alone projects, but that they may need to be considered as a part
23 of a supplemental CEQA analysis, which UC is currently conducting]; MPA in Support Demurrer
24 to Third Amended Petition ("TAP"), pp. 13-17 [Same]; Reply Brief in Support of Demurrer to
25 TAP, pp. 6-9 [Same and stating ["the NOP [for the GSPP SEIR] is not an admission that
26 enrollment decisions are discretionary projects requiring subsequent CEQA review of the LRDP.
27 Rather, it is an acknowledgment that the enrollment estimates in the LRDP EIR should be updated
28 in order for UC to rely on the EIR for the discretionary approval of the GSPP"].)

1 Therefore, UC is doing exactly what it said it was going to do all along and examine the
2 potential impacts of increased enrollment in the GSPP Draft SEIR. As such, Petitioner's RJN,
3 seeking to add single-page excerpts from the LRDP EIR and the GSPP Draft SEIR are not
4 relevant to the Court's determination of the Demurrer because they provide no new information
5 not already contained in UC's extensive arguments. Petitioner clearly could have raised the issues
6 in the RJN documents in its previous briefing on the Demurrer.

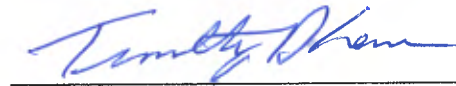
7 **V. ALL FACTUAL ALLEGATIONS AND ATTORNEY ARGUMENT ON ORDER**
8 **SHOULD BE STRIKEN**

9 As stated above, the Application is nothing more than an attempt by Petitioner to file
10 supplemental briefing on the Order. The arguments and factual allegations relating to the Order
11 should be stricken. The only information properly before the Court under the Application are (1
12 the single page documents attached as Exhibits 1 and 2 to the RJN; and (2) the legal explanation
13 of why those documents are the proper subject of judicial notice. UC requests that all other
14 attorney argument and factual allegations in the pleading submitted in conjunction with the
15 Application, in particular, those contesting the Order, be stricken.

16 DATED: April 17, 2019

MEYERS, NAVE, RIBACK, SILVER & WILSON

17
18 By:



Timothy D. Cremin
Attorneys for The Regents of the University of
California; Janet Napolitano, in her capacity as
President of the University of California; Carol
Christ, in her capacity as Chancellor of the
University of California, Berkeley

22 3216362.3

1 **PROOF OF SERVICE**

2 **STATE OF CALIFORNIA, COUNTY OF ALAMEDA**

3 At the time of service, I was over 18 years of age and **not a party to this action**. I am
4 employed in the County of Alameda, State of California. My business address is 555 12th Street,
Suite 1500, Oakland, CA 94607.

5 On April 17, 2019, I served true copies of the following document(s) described as
6 **OPPOSITION TO PETITIONER'S EX PARTE APPLICATION FOR LEAVE TO FILE**
7 **REQUEST FOR JUDICIAL NOTICE AND SUPPORTING PLEADINGS AND**
8 **DECLARATIONS** on the interested parties in this action as follows:

9 Thomas N. Lippe, Esq.
10 Kelly Marie Perry, Esq.
11 Law Offices of Thomas N. Lippe, APC
201 Mission Street, 12th Fl.
San Francisco, CA 94105

Attorneys for Plaintiff SAVE
BERKELEY'S NEIGHBORHOODS

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kmhperry@sonic.net

12 **BY E-MAIL OR ELECTRONIC TRANSMISSION:** Based on an agreement of the
13 parties to accept service by e-mail or electronic transmission, I caused the document(s) to be sent
from e-mail address CSauceda@meyersnave.com to the persons at the e-mail addresses listed in
14 the Service List. I did not receive, within a reasonable time after the transmission, any electronic
message or other indication that the transmission was unsuccessful.

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

17 Executed on April 17, 2019, at Oakland, California.

18 

19 Melissa Bender

Document received by the CA 1st District Court of Appeal.

Superior Court of California, County of Alameda
Rene C. Davidson Alameda County Courthouse

| | |
|--------------------------------------|-------------------------|
| Save Berkeley's Neighborhoods | Plaintiff/Petitioner(s) |
| VS. | |
| The Regents of the Universi | Defendant/Respondent(s) |
| (Abbreviated Title) | |

No. RG18902751

Minutes

Department 24

Honorable Noel Wise , Judge

Cause called for: Petition for Writ of Mandate (CEQA) on April 18, 2019.

Petitioner Save Berkeley's Neighborhoods represented by Lippe, Thomas N..

Respondent Carol T. Christ represented by Cremin, Timothy D..

Respondent Janet Napolitano represented by Cremin, Timothy D..

Respondent The Regents of the University of California represented by Cremin, Timothy D..

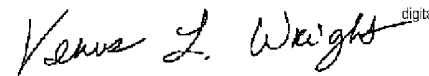
Reporter: Sheila Pham CSR #13293 (415) 517-5439

Ruling on Petition for Writ of Mandate (CEQA) Taken Under Submission

Minutes of 04/18/2019

Entered on 04/18/2019

Chad Finke Executive Officer / Clerk of the Superior Court

By digital
Deputy Clerk

| | |
|--|----------------------------|
| SHORT TITLE: Save Berkeley's Neighborhoods VS The Regents of the Universi | CASE NUMBER: RG18902751 |
|--|----------------------------|

ADDITIONAL ADDRESSEES

Robinson, Charles F.
University of California
1111 Franklin Street, 8th Floor
Oakland, CA 94607-5200

Document received by the CA 1st District Court of Appeal.

Law Offices of Thomas N. Lippe, APC
Attn: Lippe, Thomas N.
201 Mission Street, 12th Floor
San Francisco, CA 94105

Meyers, Nave, Riback, Silver &
Wilson
Attn: Cremin, Timothy D.
555 12th Street
Suite 1500
Oakland, CA 94607

Superior Court of California, County of Alameda
Rene C. Davidson Alameda County Courthouse

Save Berkeley's Neighborhoods

Plaintiff/Petitioner(s)

VS.

The Regents of the Universi

Defendant/Respondent(s)

(Abbreviated Title)

No. RG18902751

Dismissal

Date: 04/18/2019

Time: 09:00 AM

Dept: 24

Judge: Noel Wise

Petition for Writ of Mandate (CEQA) dismissed by Court with Prejudice - Pursuant to Court Order.

Dated: 04/30/2019



facsimile

Judge Noel Wise

Document received by the CA 1st District Court of Appeal.

| | |
|--|----------------------------|
| SHORT TITLE: Save Berkeley's Neighborhoods VS The Regents of the Universi | CASE NUMBER: RG18902751 |
|--|----------------------------|

ADDITIONAL ADDRESSEES

Robinson, Charles F.
University of California
1111 Franklin Street, 8th Floor
Oakland, CA 94607-5200

Document received by the CA 1st District Court of Appeal.

ENDORSED
FILED
ALAMEDA COUNTY

APR 30 2019

CLERK OF THE SUPERIOR COURT

BY: Venus L. Wright Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

SAVE BERKELEY'S
NEIGHBORHOODS,

Plaintiff,

vs.

THE REGENTS OF THE UNIVERSITY
OF CALIFORNIA, et al.,

Defendants.

No. RG18-902751

ORDER SUSTAINING
DEFENDANTS' DEMURRER TO
THIRD AMENDED PETITION
FOR WRIT OF MANDATE AND
COMPLAINT FOR
DECLARATORY RELIEF

The Demurrer by Defendants and Respondents The Regents of the University of California, et al. ("the Regents") to the Third Amended Petition for Writ of Mandate and Complaint for Declaratory Relief came on regularly for hearing on April 18, 2019 in Department 24 of the above-entitled court, the Honorable Noel Wise presiding. The Court has considered all of the papers filed in connection with the Demurrer and the arguments of counsel, and, good cause appearing, hereby ORDERS that the Regents' Demurrer is SUSTAINED, WITHOUT LEAVE TO AMEND.

In this action, Plaintiff challenges a Final Environmental Impact Report prepared in 2005 ("the 2005 EIR") for the Regents' Long Range Development

Document received by the CA 1st District Court of Appeal.

Plan for the University of California at Berkeley (“the LDRP”), also adopted in 2005. The LDRP and 2005 EIR, *inter alia*, projected an increase of 1,650 in student enrollment by 2020. (See Third Amended Petition, paragraphs 3-5; see also Plaintiff’s opposition brief at page 1.) Plaintiff alleges that beginning in about 2007, the Regents made “informal, discretionary decisions” to increase enrollment at UC Berkeley beyond the projected 1,650 additional students. (See Third Amended Petition, paragraphs 6-7.) Plaintiff contends that it only learned about these “informal, discretionary decisions” on October 30, 2017, when the Regents responded to a request regarding enrollment information from the City of Berkeley. (See Third Amended Petition, paragraphs 9-11.) This action was filed on April 27, 2018.

To the extent that the Third Amended Petition challenges the adequacy of the 2005 EIR or the LDRP adopted also in 2005, it is barred by the 180 day statute of limitations of Public Resources Code (PRC) § 21167(a). Plaintiff, however, contends that the Regents’ “informal, discretionary decisions” to increase student enrollment beyond that anticipated in the LDRP constituted “project changes” that required CEQA review. (See Plaintiff’s opposition brief at pages 3-4.)

The Court rejects this argument. The LDRP, as statutorily defined, is not a student enrollment plan. Rather, it is “a physical development and land use plan” for a campus of public higher education. (See PRC § 21080.09(a)(2).) Environmental effects relating to projected changes in enrollment levels are to be

considered in the environmental impact report prepared for the long range development plan (see PRC § 21080.09(b)), but any discrepancies between the estimated changes in enrollment levels and the actual enrollment levels in subsequent years are not themselves project or program changes that require subsequent CEQ review. The Regents' 2005 analysis of the estimated projections of enrollment changes by 2020, as set forth in the 2005 EIR and the LDRP, satisfied the Regents' obligations to consider the environmental impact of those enrollment plans. (See § 21080.09(d).) The time for Plaintiff to challenge the adequacy of the 2005 EIR and LDRP expired 180 days after their approval. (See § 21167(a).)

In addition to the First Cause of Action for Violation of CEQA, Plaintiff alleges a Second Cause of Action for Declaratory Relief, seeking a declaration that the Regents' actions violate CEQA. The Second Cause of Action is therefore entirely duplicative of the First Cause of Action and fails for the same reason. Plaintiff contends that its declaratory relief claim is not duplicative of its mandamus claim because it challenges a policy rather than a specific administrative decision, and because it is prospective in effect. However, in light of the Court's determination that the increased enrollment at UC Berkeley is neither a project nor a project change that required CEQA review, Plaintiff's challenge to the Regent's alleged policy of prospectively increasing admissions beyond the estimated projections in the LDRP as a violation of CEQA fails.

At the hearing on April 18, Plaintiff's counsel indicated that, even if given leave to amend, he would allege essentially the same claims contained in the Third Amended Petition. The Court therefore determines that further leave to amend would be futile.

The Court did not consider the declaration of Phillip Bokovoy submitted with Plaintiff's opposition papers. As the Court already advised counsel in its November 15, 2018 order on the Regents' prior demurrer, in ruling on a demurrer, the Court considers only the allegations in the challenged pleading and facts of which the Court can take judicial notice, not extrinsic evidence.

This entire action is DISMISSED, WITH PREJUDICE.

APR 30 2019
Date

NOËL WISE

Noël Wise
Judge of the Superior Court

Document received by the CA 1st District Court of Appeal.

CLERK'S CERTIFICATE OF SERVICE BY MAIL
CCP 1013a(3)

CASE NAME: Save Berkeley's Neighborhoods vs. The Regents of the UC
ACTION NO.: RG18902751

I certify that, I am not a party to the within action. I served the foregoing ORDER SUSTAINING DEFENDANTS' DEMURRER TO THIRD AMENDED PETITION FOR WRIT OF MANDATE AND COMPLAINT FOR DECLARATORY RELIEF by depositing a true copy thereof in the United States mail in Oakland, California in a sealed envelope with postage fully prepaid thereon addressed to:

Lippe, Thomas N.
Law Offices of Thomas N. Lippe, APC
201 Mission Street, 12th Floor
San Francisco, CA 94105

Cremin, Timothy D.
Meyers, Nave, Riback, Silver & Wilson
555 12th Street
Suite 1500
Oakland, CA 94607

Robinson, Charles F.

University of California
1111 Franklin Street, 8th Floor
Oakland, CA 946075200

ENDORSED
FILED
ALAMEDA COUNTY

APR 30 2019

CLERK OF THE SUPERIOR COURT
BY: Venus L. Wright Deputy

I declare under penalty of perjury that the above is true and correct

Executed on April 30, 2019 at Oakland, California.

Chad Finke
Executive Officer/Clerk

by Venus L. Wright
Deputy Clerk

Document received by the CA 1st District Court of Appeal.

AA00604

MAY 09 2019

Randy

1 Charles F. Robinson (SBN: 113197)
 2 Alison Krumbein (SBN: 229728)
 3 alison.krumbein@ucop.edu
 4 THE UNIVERSITY OF CALIFORNIA
 5 Office of General Counsel
 6 1111 Franklin St 8th Floor
 7 Oakland, CA 94607
 8 Telephone: (510) 987-0851
 9 Facsimile: (510) 987-9757

6 Amrit S. Kulkarni (SBN: 202786)
 7 akulkarni@meyersnave.com
 8 Timothy D. Cremin (SBN: 156725)
 9 tcremin@meyersnave.com
 10 Edward Grutzmacher (SBN: 228649)
 11 egrutzmacher@meyersnave.com
 12 MEYERS, NAVE, RIBACK, SILVER & WILSON
 13 555 12th Street, Suite 1500
 14 Oakland, California 94607
 15 Telephone: (510) 808-2000
 16 Facsimile: (510) 444-1108

EXEMPT FROM FILING FEES
 GOV'T CODE § 6103

12 Attorneys for The Regents of the University of
 13 California; Janet Napolitano, in her capacity as
 14 President of the University of California; Carol T.
 15 Christ, in her capacity as Chancellor of the
 16 University of California, Berkeley

15 SUPERIOR COURT OF THE STATE OF CALIFORNIA
 16 COUNTY OF ALAMEDA

17 SAVE BERKELEY'S NEIGHBORHOODS, a
 18 California nonprofit public benefit
 19 corporation,

20 Petitioner and Plaintiff,

21 v.

22 THE REGENTS OF THE UNIVERSITY OF
 23 CALIFORNIA; JANET NAPOLITANO, in
 24 her capacity as President of the University of
 25 California; CAROL T. CHRIST, in her
 26 capacity as Chancellor of the University of
 27 California, Berkeley; and DOES 1 through 20,

28 Respondents and Defendants.

Case No. RG18902751

ASSIGNED FOR ALL PURPOSES TO THE
 HON. FRANK ROESCH, DEPARTMENT 17

**[PROPOSED] JUDGMENT OF
 DISMISSAL OF ENTIRE CASE AND ALL
 CAUSES OF ACTION WITH PREJUDICE**

Action Filed: April 27, 2018
 Trial Date: None Set



[PROPOSED] JUDGMENT

Respondents The Regents of the University of California, Janet Napolitano, in her capacity as President of the University, and Carol T. Christ, in her capacity as Chancellor of the University's (collectively, "Defendants") Demurrer to the Third Amended Petition for Writ of Mandate ("Demurrer") filed by Petitioner Save Berkeley's Neighborhoods ("Petitioner") came on regularly for further hearing on April 18, 2019 in Department 24 of the above-entitled court, the Honorable Noel Wise presiding. Petitioner was represented by counsel Thomas Lippe, and Defendants were represented by counsel Timothy D. Cremin of Meyers Nave Riback Silver & Wilson.

The Court having read and considered the Demurrer, opposition, reply, supplemental briefs, and having heard argument of counsel, on April 30, 2019, the Court entered an Order Sustaining Defendants' Demurrer To Third Amended Petition For Writ Of Mandate and Complaint For Declaratory Relief Without Leave to Amend ("Court Order").

Pursuant to the Court Order, attached as Exhibit A, the Court entered a Dismissal of the Petition for Writ of Mandate and Complaint for Declaratory Relief with Prejudice dated April 30, 2019 ("Dismissal"), attached as Exhibit B.

THEREFORE, PURSUANT TO THE COURT ORDER AND DISMISSAL, JUDGMENT IS ENTERED DISMISSING THE ENTIRE CASE AND ALL CAUSES OF ACTION WITH PREJUDICE.

IT IS SO ORDERED.

DATED: May __, 2019

HON. NOEL WISE
JUDGE OF THE SUPERIOR COURT

3222711.1

1 PROOF OF SERVICE

2 **STATE OF CALIFORNIA, COUNTY OF ALAMEDA**

3 At the time of service, I was over 18 years of age and **not a party to this action**. I am
4 employed in the County of Alameda, State of California. My business address is 555 12th Street,
Suite 1500, Oakland, CA 94607.

5 On May 9, 2019, I served true copies of the following document(s) described as
6 **[PROPOSED] JUDGMENT OF DISMISSAL OF ENTIRE CASE AND ALL CAUSES OF
ACTION WITH PREJUDICE** on the interested parties in this action as follows:

7 Thomas N. Lippe, Esq.
8 Kelly Marie Perry, Esq.
9 Law Offices of Thomas N. Lippe, APC
201 Mission Street, 12th Fl.
San Francisco, CA 94105

Attorneys for Plaintiff SAVE
BERKELEY'S NEIGHBORHOODS
Tel: (415) 777-5604
Fax: (415) 777-5606
Email: lippelaw@sonic.net
kmhperry@sonic.net

10
11 **BY E-MAIL OR ELECTRONIC TRANSMISSION:** Based on an agreement of the
12 parties to accept service by e-mail or electronic transmission, I caused the document(s) to be sent
13 from e-mail address mbender@meyersnave.com to the persons at the e-mail addresses listed in the
Service List. I did not receive, within a reasonable time after the transmission, any electronic
message or other indication that the transmission was unsuccessful.

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

16 Executed on May 9, 2019, at Oakland, California.

17 
18 _____
Melissa Bender

EXHIBIT A

Document received by the CA 1st District Court of Appeal.

AA00608

ENDORSED
FILED
ALAMEDA COUNTY

APR 30 2019

CLERK OF THE SUPERIOR COURT
BY: Venus C. Bap
Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA

SAVE BERKELEY'S
NEIGHBORHOODS,

Plaintiff,

vs.

THE REGENTS OF THE UNIVERSITY
OF CALIFORNIA, et al.,

Defendants.

No. RG18-902751

ORDER SUSTAINING
DEFENDANTS' DEMURRER TO
THIRD AMENDED PETITION
FOR WRIT OF MANDATE AND
COMPLAINT FOR
DECLARATORY RELIEF

The Demurrer by Defendants and Respondents The Regents of the University of California, et al. ("the Regents") to the Third Amended Petition for Writ of Mandate and Complaint for Declaratory Relief came on regularly for hearing on April 18, 2019 in Department 24 of the above-entitled court, the Honorable Noel Wise presiding. The Court has considered all of the papers filed in connection with the Demurrer and the arguments of counsel, and, good cause appearing, hereby ORDERS that the Regents' Demurrer is SUSTAINED, WITHOUT LEAVE TO AMEND.

In this action, Plaintiff challenges a Final Environmental Impact Report prepared in 2005 ("the 2005 EIR") for the Regents' Long Range Development

Plan for the University of California at Berkeley (“the LDRP”), also adopted in 2005. The LDRP and 2005 EIR, *inter alia*, projected an increase of 1,650 in student enrollment by 2020. (See Third Amended Petition, paragraphs 3-5; see also Plaintiff’s opposition brief at page 1.) Plaintiff alleges that beginning in about 2007, the Regents made “informal, discretionary decisions” to increase enrollment at UC Berkeley beyond the projected 1,650 additional students. (See Third Amended Petition, paragraphs 6-7.) Plaintiff contends that it only learned about these “informal, discretionary decisions” on October 30, 2017, when the Regents responded to a request regarding enrollment information from the City of Berkeley. (See Third Amended Petition, paragraphs 9-11.) This action was filed on April 27, 2018.

To the extent that the Third Amended Petition challenges the adequacy of the 2005 EIR or the LDRP adopted also in 2005, it is barred by the 180 day statute of limitations of Public Resources Code (PRC) § 21167(a). Plaintiff, however, contends that the Regents’ “informal, discretionary decisions” to increase student enrollment beyond that anticipated in the LDRP constituted “project changes” that required CEQA review. (See Plaintiff’s opposition brief at pages 3-4.)

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This entire action is DISMISSED, WITH PREJUDICE.

APR 30 2019

Date

NOËL WISE

Noël Wise
Judge of the Superior Court

Document received by the CA 1st District Court of Appeal.

CLERK'S CERTIFICATE OF SERVICE BY MAIL
CCP 1013a(3)

CASE NAME: Save Berkeley's Neighborhoods vs. The Regents of the UC
ACTION NO.: RG18902751

I certify that, I am not a party to the within action. I served the foregoing ORDER SUSTAINING DEFENDANTS' DEMURRER TO THIRD AMENDED PETITION FOR WRIT OF MANDATE AND COMPLAINT FOR DECLARATORY RELIEF by depositing a true copy thereof in the United States mail in Oakland, California in a sealed envelope with postage fully prepaid thereon addressed to:

Lippe, Thomas N.
Law Offices of Thomas N. Lippe, APC
201 Mission Street, 12th Floor
San Francisco, CA 94105

Cremin, Timothy D.
Meyers, Nave, Riback, Silver & Wilson
555 12th Street
Suite 1500
Oakland, CA 94607

Robinson, Charles F.
University of California
1111 Franklin Street, 8th Floor
Oakland, CA 946075200

ENDORSED
FILED
ALAMEDA COUNTY
APR 30 2019
CLERK OF THE SUPERIOR COURT
BY: *Venus L. Wright* Deputy

I declare under penalty of perjury that the above is true and correct

Executed on April 30, 2019 at Oakland, California.

Chad Finke
Executive Officer/Clerk

by *Venus L. Wright*
Deputy Clerk

Document received by the CA 1st District Court of Appeal.

AA00613

EXHIBIT B

Document received by the CA 1st District Court of Appeal.

Law Offices of Thomas N. Lippe, APC
Attn: Lippe, Thomas N.
201 Mission Street, 12th Floor
San Francisco, CA 94105

Meyers, Nave, Riback, Silver &
Wilson
Attn: Cremin, Timothy D.
555 12th Street
Suite 1500
Oakland, CA 94607

Superior Court of California, County of Alameda
Rene C. Davidson Alameda County Courthouse

Save Berkeley's Neighborhoods

Plaintiff/Petitioner(s)

VS.

The Regents of the Universi

Defendant/Respondent(s)

(Abbreviated Title)

No. RG18902751

Dismissal

Date: 04/18/2019

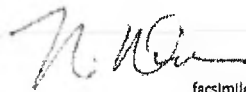
Time: 09:00 AM

Dept: 24

Judge: Noel Wise

Petition for Writ of Mandate (CEQA) dismissed by Court with Prejudice - Pursuant to Court Order.

Dated: 04/30/2019



facsimile

Judge Noel Wise

Document received by the CA 1st District Court of Appeal.

AA00615

| | |
|--|----------------------------|
| SHORT TITLE: Save Berkeley's Neighborhoods VS The Regents of the Universi | CASE NUMBER: RG18902751 |
|--|----------------------------|

ADDITIONAL ADDRESSEES

Robinson, Charles F.
University of California
1111 Franklin Street, 8th Floor
Oakland, CA 94607-5200

Document received by the CA 1st District Court of Appeal.

| | | | |
|---|---|---|------------------------------------|
| <p>ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address): Amrit S. Kulkarni (SBN 202786); Timothy D. Cremin (SBN 156725) Meyers Nave Riback Silver Wilson 555 12th Street, Ste. 1500 Oakland, CA 94607 TELEPHONE NO.: (510) 808-2000 FAX NO. (Optional): (510) 444-1108 E-MAIL ADDRESS (Optional): tcremin@meyersnave.com ATTORNEY FOR (Name): The Regents of the University of California, et al.</p> | <p>FOR COURT USE ONLY</p> <p>ENDORSED FILED ALAMEDA COUNTY</p> <p>MAY 09 2019</p> <p>CLERK OF THE SUPERIOR COURT</p> <p>Anita Dhir</p> | | |
| <p>SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA STREET ADDRESS: 1221 Oak Street MAILING ADDRESS: CITY AND ZIP CODE: Oakland, CA 94612 BRANCH NAME:</p> | | | |
| <p>PLAINTIFF/PETITIONER: Save Berkeley's Neighborhoods DEFENDANT/RESPONDENT: The Regents of the University of California, et al.</p> | | | |
| <table border="1"> <tr> <td data-bbox="115 724 1039 940"> <p align="center">NOTICE OF ENTRY OF JUDGMENT OR ORDER</p> <p>(Check one): <input checked="" type="checkbox"/> UNLIMITED CASE (Amount demanded exceeded \$25,000) <input type="checkbox"/> LIMITED CASE (Amount demanded was \$25,000 or less)</p> </td> <td data-bbox="1039 724 1484 940"> <p>CASE NUMBER: RG18902751</p> </td> </tr> </table> | | <p align="center">NOTICE OF ENTRY OF JUDGMENT OR ORDER</p> <p>(Check one): <input checked="" type="checkbox"/> UNLIMITED CASE (Amount demanded exceeded \$25,000) <input type="checkbox"/> LIMITED CASE (Amount demanded was \$25,000 or less)</p> | <p>CASE NUMBER: RG18902751</p> |
| <p align="center">NOTICE OF ENTRY OF JUDGMENT OR ORDER</p> <p>(Check one): <input checked="" type="checkbox"/> UNLIMITED CASE (Amount demanded exceeded \$25,000) <input type="checkbox"/> LIMITED CASE (Amount demanded was \$25,000 or less)</p> | <p>CASE NUMBER: RG18902751</p> | | |

TO ALL PARTIES :

1. A judgment, decree, or order was entered in this action on (date): April 30, 2019
2. A copy of the judgment, decree, or order is attached to this notice.

Date: May 9, 2019

Timothy D. Cremin

(TYPE OR PRINT NAME OF ☐ ATTORNEY ☐ PARTY WITHOUT ATTORNEY)



(SIGNATURE)

Document received by the CA 1st District Court of Appeal.

1 PROOF OF SERVICE

2 **STATE OF CALIFORNIA, COUNTY OF ALAMEDA**

3 At the time of service, I was over 18 years of age and **not a party to this action**. I am
4 employed in the County of Alameda, State of California. My business address is 555 12th Street,
Suite 1500, Oakland, CA 94607.

5 On May 9, 2019, I served true copies of the following document(s) described as **NOTICE**
6 **OF ENTRY OF ORDER RE ORDER SUSTAINING DEMURRER TO THIRD AMENDED**
7 **PETITION FOR WRIT OF MANDATE AND COMPLAINT FOR DECLARATORY**
8 **RELIEF** on the interested parties in this action as follows:

9 Thomas N. Lippe, Esq.
10 Kelly Marie Perry, Esq.
11 Law Offices of Thomas N. Lippe, APC
201 Mission Street, 12th Fl.
San Francisco, CA 94105


Attorneys for Plaintiff SAVE
BERKELEY'S NEIGHBORHOODS

Tel: (415) 777-5604
Fax: (415) 777-5606
Email: lippelaw@sonic.net
kmhperry@sonic.net

12 **BY E-MAIL OR ELECTRONIC TRANSMISSION:** Based on an agreement of the
13 parties to accept service by e-mail or electronic transmission, I caused the document(s) to be sent
from e-mail address mbender@meyersnave.com to the persons at the e-mail addresses listed in the
14 Service List. I did not receive, within a reasonable time after the transmission, any electronic
message or other indication that the transmission was unsuccessful.

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

16 Executed on May 9, 2019, at Oakland, California.

17 
18 _____
19 Melissa Bender

Document received by the CA 1st District Court of Appeal.

ENDORSED
FILED
ALAMEDA COUNTY

APR 30 2019

CLERK OF THE SUPERIOR COURT
BY: *Venus Liba*
Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA

SAVE BERKELEY'S
NEIGHBORHOODS,

Plaintiff,

vs.

THE REGENTS OF THE UNIVERSITY
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No. RG18-902751

ORDER SUSTAINING
DEFENDANTS' DEMURRER TO
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At the hearing on April 18, Plaintiff's counsel indicated that, even if given leave to amend, he would allege essentially the same claims contained in the Third Amended Petition. The Court therefore determines that further leave to amend would be futile.

The Court did not consider the declaration of Phillip Bokovoy submitted with Plaintiff's opposition papers. As the Court already advised counsel in its November 15, 2018 order on the Regents' prior demurrer, in ruling on a demurrer, the Court considers only the allegations in the challenged pleading and facts of which the Court can take judicial notice, not extrinsic evidence.

This entire action is DISMISSED, WITH PREJUDICE.

APR 30 2019

Date

NOËL WISE

Noël Wise
Judge of the Superior Court

Document received by the CA 1st District Court of Appeal.

CLERK'S CERTIFICATE OF SERVICE BY MAIL
CCP 1013a(3)

CASE NAME: Save Berkeley's Neighborhoods vs. The Regents of the UC
ACTION NO.: RG18902751

I certify that, I am not a party to the within action. I served the foregoing ORDER SUSTAINING DEFENDANTS' DEMURRER TO THIRD AMENDED PETITION FOR WRIT OF MANDATE AND COMPLAINT FOR DECLARATORY RELIEF by depositing a true copy thereof in the United States mail in Oakland, California in a sealed envelope with postage fully prepaid thereon addressed to:

Lippe, Thomas N.
Law Offices of Thomas N. Lippe, APC
201 Mission Street, 12th Floor
San Francisco, CA 94105

Cremin, Timothy D.
Meyers, Nave, Riback, Silver & Wilson
555 12th Street
Suite 1500
Oakland, CA 94607

Robinson, Charles F.

University of California
1111 Franklin Street, 8th Floor
Oakland, CA 946075200

ENDORSED
FILED
ALAMEDA COUNTY
APR 30 2019
CLERK OF THE SUPERIOR COURT
BY: *Venus L. Wright*
Deputy

I declare under penalty of perjury that the above is true and correct

Executed on April 30, 2019 at Oakland, California.

Chad Finke
Executive Officer/Clerk

by *Venus L. Wright*
Deputy Clerk

Document received by the CA 1st District Court of Appeal.

AA00623



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 2 Alison Krumbein (SBN: 229728)
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 4 THE UNIVERSITY OF CALIFORNIA
 5 Office of General Counsel
 6 1111 Franklin St 8th Floor
 7 Oakland, CA 94607
 8 Telephone: (510) 987-0851
 9 Facsimile: (510) 987-9757
 10
 11 Amrit S. Kulkarni (SBN: 202786)
 12 akulkarni@meyersnave.com
 13 Timothy D. Cremin (SBN: 156725)
 14 tcremin@meyersnave.com
 15 Edward Grutzmacher (SBN: 228649)
 16 egrutzmacher@meyersnave.com
 17 MEYERS, NAVE, RIBACK, SILVER & WILSON
 18 555 12th Street, Suite 1500
 19 Oakland, California 94607
 20 Telephone: (510) 808-2000
 21 Facsimile: (510) 444-1108
 22
 23 Attorneys for The Regents of the University of
 24 California; Janet Napolitano, in her capacity as
 25 President of the University of California; Carol T.
 26 Christ, in her capacity as Chancellor of the
 27 University of California, Berkeley
 28

FILED
 ALAMEDA COUNTY

JUN 7 2019

CLERK OF THE SUPERIOR COURT

By *Venus L. Smith* Deputy

EXEMPT FROM FILING FEES
 GOV'T CODE § 6103

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

SAVE BERKELEY'S NEIGHBORHOODS, a
 California nonprofit public benefit
 corporation,

Petitioner and Plaintiff,

v.

THE REGENTS OF THE UNIVERSITY OF
 CALIFORNIA; JANET NAPOLITANO, in
 her capacity as President of the University of
 California; CAROL T. CHRIST, in her
 capacity as Chancellor of the University of
 California, Berkeley; and DOES 1 through 20,

Respondents and Defendants.

Case No. RG18902751

ASSIGNED FOR ALL PURPOSES TO THE
 HON. FRANK ROESCH, DEPARTMENT 17

**[PROPOSED] JUDGMENT OF
 DISMISSAL OF ENTIRE CASE AND ALL
 CAUSES OF ACTION WITH PREJUDICE**

Action Filed: April 27, 2018
 Trial Date: None Set

[PROPOSED] JUDGMENT DISMISSING THE CASE IN ITS ENTIRETY

1 ~~PROPOSED~~ JUDGMENT

2 Respondents The Regents of the University of California, Janet Napolitano, in her capacity
3 as President of the University, and Carol T. Christ, in her capacity as Chancellor of the
4 University's (collectively, "Defendants") Demurrer to the Third Amended Petition for Writ of
5 Mandate ("Demurrer") filed by Petitioner Save Berkeley's Neighborhoods ("Petitioner") came on
6 regularly for further hearing on April 18, 2019 in Department 24 of the above-entitled court, the
7 Honorable Noel Wise presiding. Petitioner was represented by counsel Thomas Lippe, and
8 Defendants were represented by counsel Timothy D. Cremin of Meyers Nave Riback Silver &
9 Wilson.

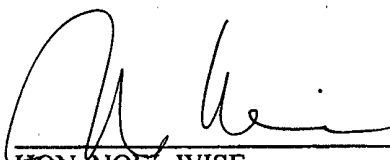
10 The Court having read and considered the Demurrer, opposition, reply, supplemental
11 briefs, and having heard argument of counsel, on April 30, 2019, the Court entered an Order
12 Sustaining Defendants' Demurrer To Third Amended Petition For Writ Of Mandate and
13 Complaint For Declaratory Relief Without Leave to Amend ("Court Order").

14 Pursuant to the Court Order, attached as Exhibit A, the Court entered a Dismissal of the
15 Petition for Writ of Mandate and Complaint for Declaratory Relief with Prejudice dated April 30,
16 2019 ("Dismissal"), attached as Exhibit B.

17
18 THEREFORE, PURSUANT TO THE COURT ORDER AND DISMISSAL,
19 JUDGMENT IS ENTERED DISMISSING THE ENTIRE CASE AND ALL CAUSES OF
20 ACTION WITH PREJUDICE.

21 IT IS SO ORDERED.

22 DATED: May 30, 2019

23
24 

25 HON. NOEL WISE
26 JUDGE OF THE SUPERIOR COURT

27 3222711.1
28

EXHIBIT A

Document received by the CA 1st District Court of Appeal.

AA00626

ENDORSED
FILED
ALAMEDA COUNTY

APR 30 2019

CLERK OF THE SUPERIOR COURT
BY: *Venus [Signature]*
Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

SAVE BERKELEY'S
NEIGHBORHOODS,

Plaintiff,

vs.

THE REGENTS OF THE UNIVERSITY
OF CALIFORNIA, et al.,

Defendants.

No. RG18-902751

ORDER SUSTAINING
DEFENDANTS' DEMURRER TO
THIRD AMENDED PETITION
FOR WRIT OF MANDATE AND
COMPLAINT FOR
DECLARATORY RELIEF

The Demurrer by Defendants and Respondents The Regents of the University of California, et al. ("the Regents") to the Third Amended Petition for Writ of Mandate and Complaint for Declaratory Relief came on regularly for hearing on April 18, 2019 in Department 24 of the above-entitled court, the Honorable Noel Wise presiding. The Court has considered all of the papers filed in connection with the Demurrer and the arguments of counsel, and, good cause appearing, hereby ORDERS that the Regents' Demurrer is SUSTAINED, WITHOUT LEAVE TO AMEND.

In this action, Plaintiff challenges a Final Environmental Impact Report prepared in 2005 ("the 2005 EIR") for the Regents' Long Range Development

Plan for the University of California at Berkeley ("the LDRP"), also adopted in 2005. The LDRP and 2005 EIR, *inter alia*, projected an increase of 1,650 in student enrollment by 2020. (See Third Amended Petition, paragraphs 3-5; see also Plaintiff's opposition brief at page 1.) Plaintiff alleges that beginning in about 2007, the Regents made "informal, discretionary decisions" to increase enrollment at UC Berkeley beyond the projected 1,650 additional students. (See Third Amended Petition, paragraphs 6-7.) Plaintiff contends that it only learned about these "informal, discretionary decisions" on October 30, 2017, when the Regents responded to a request regarding enrollment information from the City of Berkeley. (See Third Amended Petition, paragraphs 9-11.) This action was filed on April 27, 2018.

To the extent that the Third Amended Petition challenges the adequacy of the 2005 EIR or the LDRP adopted also in 2005, it is barred by the 180 day statute of limitations of Public Resources Code (PRC) § 21167(a). Plaintiff, however, contends that the Regents' "informal, discretionary decisions" to increase student enrollment beyond that anticipated in the LDRP constituted "project changes" that required CEQA review. (See Plaintiff's opposition brief at pages 3-4.)

The Court rejects this argument. The LDRP, as statutorily defined, is not a student enrollment plan. Rather, it is "a physical development and land use plan" for a campus of public higher education. (See PRC § 21080.09(a)(2).) Environmental effects relating to projected changes in enrollment levels are to be

considered in the environmental impact report prepared for the long range development plan (see PRC § 21080.09(b)), but any discrepancies between the estimated changes in enrollment levels and the actual enrollment levels in subsequent years are not themselves project or program changes that require subsequent CEQ review. The Regents' 2005 analysis of the estimated projections of enrollment changes by 2020, as set forth in the 2005 EIR and the LDRP, satisfied the Regents' obligations to consider the environmental impact of those enrollment plans. (See § 21080.09(d).) The time for Plaintiff to challenge the adequacy of the 2005 EIR and LDRP expired 180 days after their approval. (See § 21167(a).)

In addition to the First Cause of Action for Violation of CEQA, Plaintiff alleges a Second Cause of Action for Declaratory Relief, seeking a declaration that the Regents' actions violate CEQA. The Second Cause of Action is therefore entirely duplicative of the First Cause of Action and fails for the same reason. Plaintiff contends that its declaratory relief claim is not duplicative of its mandamus claim because it challenges a policy rather than a specific administrative decision, and because it is prospective in effect. However, in light of the Court's determination that the increased enrollment at UC Berkeley is neither a project nor a project change that required CEQA review, Plaintiff's challenge to the Regent's alleged policy of prospectively increasing admissions beyond the estimated projections in the LDRP as a violation of CEQA fails.

At the hearing on April 18, Plaintiff's counsel indicated that, even if given leave to amend, he would allege essentially the same claims contained in the Third Amended Petition. The Court therefore determines that further leave to amend would be futile.

The Court did not consider the declaration of Phillip Bokovoy submitted with Plaintiff's opposition papers. As the Court already advised counsel in its November 15, 2018 order on the Regents' prior demurrer, in ruling on a demurrer, the Court considers only the allegations in the challenged pleading and facts of which the Court can take judicial notice, not extrinsic evidence.

This entire action is DISMISSED, WITH PREJUDICE.

APR 30 2019

Date

NOËL WISF

Noël Wise
Judge of the Superior Court

CLERK'S CERTIFICATE OF SERVICE BY MAIL
CCP 1013a(3)

CASE NAME: Save Berkeley's Neighborhoods vs. The Regents of the UC
ACTION NO.: RG18902751

I certify that, I am not a party to the within action. I served the foregoing ORDER SUSTAINING DEFENDANTS' DEMURRER TO THIRD AMENDED PETITION FOR WRIT OF MANDATE AND COMPLAINT FOR DECLARATORY RELIEF by depositing a true copy thereof in the United States mail in Oakland, California in a sealed envelope with postage fully prepaid thereon addressed to:

Lippe, Thomas N.
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555 12th Street
Suite 1500
Oakland, CA 94607

Robinson, Charles F.

University of California
1111 Franklin Street, 8th Floor
Oakland, CA 946075200

ENDORSED
FILED
ALAMEDA COUNTY
APR 30 2019
CLERK OF THE SUPERIOR COURT
BY: *Venus L. Wright* Deputy

I declare under penalty of perjury that the above is true and correct

Executed on April 30, 2019 at Oakland, California.

Chad Finke
Executive Officer/Clerk

by Venus L. Wright
Deputy Clerk

Document received by the CA 1st District Court of Appeal.

AA00631

| | | |
|---|--|--|
| ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO.: 104640 NAME: Thomas N. Lippe FIRM NAME: Law Offices of Thomas N. Lippe, APC STREET ADDRESS: 201 Mission Street, 12th Floor CITY: San Francisco STATE: CA ZIP CODE: 94105 TELEPHONE NO.: 415-777-5604 FAX NO.: 415-777-5606 E-MAIL ADDRESS: Lippelaw@sonic.net ATTORNEY FOR (name): Plaintiffs; Berkeley Hills Watershed Coalition, et al. | | FOR COURT USE ONLY ENDORSED FILED ALAMEDA COUNTY JUN 13 2019 CLERK OF THE SUPERIOR COURT By <u>SAN SENG</u> Deputy |
| SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA STREET ADDRESS: 1225 Fallon Street MAILING ADDRESS: 1225 Fallon Street CITY AND ZIP CODE: Oakland, California 94612 BRANCH NAME: Rene C. Davidson Courthouse | | |
| PLAINTIFF/PETITIONER: Save Berkeley's Neighborhoods DEFENDANT/RESPONDENT: The Regents of the University of CA, et al. | | |
| <input checked="" type="checkbox"/> NOTICE OF APPEAL <input type="checkbox"/> CROSS-APPEAL (UNLIMITED CIVIL CASE) | | CASE NUMBER: RG18902751 |

Notice: Please read *Information on Appeal Procedures for Unlimited Civil Cases* (Judicial Council form APP-001) before completing this form. This form must be filed in the superior court, not in the Court of Appeal. A copy of this form must also be served on the other party or parties to this appeal. You may use an applicable Judicial Council form (such as APP-009 or APP-009E) for the proof of service. When this document has been completed and a copy served, the original may then be filed with the court with proof of service.

1. NOTICE IS HEREBY GIVEN that (name): Save Berkeley's Neighborhoods
 appeals from the following judgment or order in this case, which was entered on (date): April 30, 2019, and June 7, 2019
- ☐ Judgment after jury trial
☒ Judgment after court trial
☐ Default judgment
☐ Judgment after an order granting a summary judgment motion
☐ Judgment of dismissal under Code of Civil Procedure, §§ 581d, 583.250, 583.360, or 583.430
☐ Judgment of dismissal after an order sustaining a demurrer
☐ An order after judgment under Code of Civil Procedure, § 904.1(a)(2)
☐ An order or judgment under Code of Civil Procedure, § 904.1(a)(3)-(13)
☒ Other (describe and specify code section that authorizes this appeal):
 April 30, 2019, Order dismissing Petition for Writ of Mandate
2. For cross-appeals only:
- a. Date notice of appeal was filed in original appeal:
- b. Date superior court clerk mailed notice of original appeal:
- c. Court of Appeal case number (if known):

Date: June 13, 2019

Thomas N. Lippe

(TYPE OR PRINT NAME)

▶ *Tom Lippe*

(SIGNATURE OF PARTY OR ATTORNEY)

Document received by the CA 1st District Court of Appeal.

Law Offices of Thomas N. Lippe, APC
Attn: Lippe, Thomas N.
201 Mission Street, 12th Floor
San Francisco, CA 94105

Meyers, Nave, Riback, Silver &
Wilson
Attn: Cremin, Timothy D.
555 12th Street
Suite 1500
Oakland, CA 94607

Superior Court of California, County of Alameda
Rene C. Davidson Alameda County Courthouse

Save Berkeley's Neighborhoods

Plaintiff/Petitioner(s)

VS.

The Regents of the Universi

Defendant/Respondent(s)

(Abbreviated Title)

No. RG18902751

Dismissal

Date: 04/18/2019

Time: 09:00 AM

Dept: 24

Judge: Noel Wise

Petition for Writ of Mandate (CEQA) dismissed by Court with Prejudice - Pursuant to Court Order.

Dated: 04/30/2019



facsimile

Judge Noel Wise

Document received by the CA 1st District Court of Appeal.

AA00636

| | |
|--|----------------------------|
| SHORT TITLE: Save Berkeley's Neighborhoods VS The Regents of the Universi | CASE NUMBER: RG18902751 |
|--|----------------------------|

ADDITIONAL ADDRESSEES

Robinson, Charles F.
University of California
1111 Franklin Street, 8th Floor
Oakland, CA 94607-5200

Document received by the CA 1st District Court of Appeal.



20642791

1 Charles F. Robinson (SBN: 113197)
 2 Alison Krumbein (SBN: 229728)
 3 alison.krumbein@ucop.edu
 4 THE UNIVERSITY OF CALIFORNIA
 5 Office of General Counsel
 6 1111 Franklin St 8th Floor
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 8 Telephone: (510) 987-0851
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21 Attorneys for The Regents of the University of
 22 California; Janet Napolitano, in her capacity as
 23 President of the University of California; Carol T.
 24 Christ, in her capacity as Chancellor of the
 25 University of California, Berkeley

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

26 SAVE BERKELEY'S NEIGHBORHOODS, a
 27 California nonprofit public benefit
 28 corporation,

Petitioner and Plaintiff,

v.

THE REGENTS OF THE UNIVERSITY OF
 CALIFORNIA; JANET NAPOLITANO, in
 her capacity as President of the University of
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 capacity as Chancellor of the University of
 California, Berkeley; and DOES 1 through 20,

Respondents and Defendants.

FILED
 ALAMEDA COUNTY

JUN 7 2019

CLERK OF THE SUPERIOR COURT

By

Venus L. Smith
 Deputy

EXEMPT FROM FILING FEES
 GOV'T CODE § 6103

Case No. RG18902751

ASSIGNED FOR ALL PURPOSES TO THE
 HON. FRANK ROESCH, DEPARTMENT 17

**[PROPOSED] JUDGMENT OF
 DISMISSAL OF ENTIRE CASE AND ALL
 CAUSES OF ACTION WITH PREJUDICE**

Action Filed: April 27, 2018
 Trial Date: None Set

[PROPOSED] JUDGMENT DISMISSING THE CASE IN ITS ENTIRETY

AA00638

Document received by the CA 1st District Court of Appeal.

1 ~~PROPOSED~~ JUDGMENT

2 Respondents The Regents of the University of California, Janet Napolitano, in her capacity
3 as President of the University, and Carol T. Christ, in her capacity as Chancellor of the
4 University's (collectively, "Defendants") Demurrer to the Third Amended Petition for Writ of
5 Mandate ("Demurrer") filed by Petitioner Save Berkeley's Neighborhoods ("Petitioner") came on
6 regularly for further hearing on April 18, 2019 in Department 24 of the above-entitled court, the
7 Honorable Noel Wise presiding. Petitioner was represented by counsel Thomas Lippe, and
8 Defendants were represented by counsel Timothy D. Cremin of Meyers Nave Riback Silver &
9 Wilson.

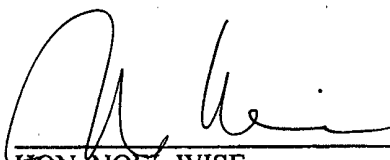
10 The Court having read and considered the Demurrer, opposition, reply, supplemental
11 briefs, and having heard argument of counsel, on April 30, 2019, the Court entered an Order
12 Sustaining Defendants' Demurrer To Third Amended Petition For Writ Of Mandate and
13 Complaint For Declaratory Relief Without Leave to Amend ("Court Order").

14 Pursuant to the Court Order, attached as Exhibit A, the Court entered a Dismissal of the
15 Petition for Writ of Mandate and Complaint for Declaratory Relief with Prejudice dated April 30,
16 2019 ("Dismissal"), attached as Exhibit B.

17
18 THEREFORE, PURSUANT TO THE COURT ORDER AND DISMISSAL,
19 JUDGMENT IS ENTERED DISMISSING THE ENTIRE CASE AND ALL CAUSES OF
20 ACTION WITH PREJUDICE.

21 IT IS SO ORDERED.

22 DATED: May 30, 2019

23
24 

25 HON. NOEL WISE
26 JUDGE OF THE SUPERIOR COURT

27 3222711.1
28

EXHIBIT A

Document received by the CA 1st District Court of Appeal.

ENDORSED
FILED
ALAMEDA COUNTY

APR 30 2019

CLERK OF THE SUPERIOR COURT
BY: *Venus [Signature]*
Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF ALAMEDA

SAVE BERKELEY'S
NEIGHBORHOODS,

Plaintiff,

vs.

THE REGENTS OF THE UNIVERSITY
OF CALIFORNIA, et al.,

Defendants.

No. RG18-902751

ORDER SUSTAINING
DEFENDANTS' DEMURRER TO
THIRD AMENDED PETITION
FOR WRIT OF MANDATE AND
COMPLAINT FOR
DECLARATORY RELIEF

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In this action, Plaintiff challenges a Final Environmental Impact Report prepared in 2005 ("the 2005 EIR") for the Regents' Long Range Development

Plan for the University of California at Berkeley ("the LDRP"), also adopted in 2005. The LDRP and 2005 EIR, *inter alia*, projected an increase of 1,650 in student enrollment by 2020. (See Third Amended Petition, paragraphs 3-5; see also Plaintiff's opposition brief at page 1.) Plaintiff alleges that beginning in about 2007, the Regents made "informal, discretionary decisions" to increase enrollment at UC Berkeley beyond the projected 1,650 additional students. (See Third Amended Petition, paragraphs 6-7.) Plaintiff contends that it only learned about these "informal, discretionary decisions" on October 30, 2017, when the Regents responded to a request regarding enrollment information from the City of Berkeley. (See Third Amended Petition, paragraphs 9-11.) This action was filed on April 27, 2018.

To the extent that the Third Amended Petition challenges the adequacy of the 2005 EIR or the LDRP adopted also in 2005, it is barred by the 180 day statute of limitations of Public Resources Code (PRC) § 21167(a). Plaintiff, however, contends that the Regents' "informal, discretionary decisions" to increase student enrollment beyond that anticipated in the LDRP constituted "project changes" that required CEQA review. (See Plaintiff's opposition brief at pages 3-4.)

The Court rejects this argument. The LDRP, as statutorily defined, is not a student enrollment plan. Rather, it is "a physical development and land use plan" for a campus of public higher education. (See PRC § 21080.09(a)(2).) Environmental effects relating to projected changes in enrollment levels are to be

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In addition to the First Cause of Action for Violation of CEQA, Plaintiff alleges a Second Cause of Action for Declaratory Relief, seeking a declaration that the Regents' actions violate CEQA. The Second Cause of Action is therefore entirely duplicative of the First Cause of Action and fails for the same reason. Plaintiff contends that its declaratory relief claim is not duplicative of its mandamus claim because it challenges a policy rather than a specific administrative decision, and because it is prospective in effect. However, in light of the Court's determination that the increased enrollment at UC Berkeley is neither a project nor a project change that required CEQA review, Plaintiff's challenge to the Regent's alleged policy of prospectively increasing admissions beyond the estimated projections in the LDRP as a violation of CEQA fails.

At the hearing on April 18, Plaintiff's counsel indicated that, even if given leave to amend, he would allege essentially the same claims contained in the Third Amended Petition. The Court therefore determines that further leave to amend would be futile.

The Court did not consider the declaration of Phillip Bokovoy submitted with Plaintiff's opposition papers. As the Court already advised counsel in its November 15, 2018 order on the Regents' prior demurrer, in ruling on a demurrer, the Court considers only the allegations in the challenged pleading and facts of which the Court can take judicial notice, not extrinsic evidence.

This entire action is DISMISSED, WITH PREJUDICE.

APR 30 2019

Date

NOËL WISF

Noël Wise
Judge of the Superior Court

CLERK'S CERTIFICATE OF SERVICE BY MAIL
CCP 1013a(3)

CASE NAME: Save Berkeley's Neighborhoods vs. The Regents of the UC
ACTION NO.: RG18902751

I certify that, I am not a party to the within action. I served the foregoing ORDER SUSTAINING DEFENDANTS' DEMURRER TO THIRD AMENDED PETITION FOR WRIT OF MANDATE AND COMPLAINT FOR DECLARATORY RELIEF by depositing a true copy thereof in the United States mail in Oakland, California in a sealed envelope with postage fully prepaid thereon addressed to:

Lippe, Thomas N.
Law Offices of Thomas N. Lippe, APC
201 Mission Street, 12th Floor
San Francisco, CA 94105

Cremn, Timothy D.
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555 12th Street
Suite 1500
Oakland, CA 94607

Robinson, Charles F.

University of California
1111 Franklin Street, 8th Floor
Oakland, CA 946075200

ENDORSED
FILED
ALAMEDA COUNTY
APR 30 2019
CLERK OF THE SUPERIOR COURT
BY: *Venus L. Wright* Deputy

I declare under penalty of perjury that the above is true and correct

Executed on April 30, 2019 at Oakland, California.

Chad Finke
Executive Officer/Clerk

by Venus L. Wright
Deputy Clerk

Document received by the CA 1st District Court of Appeal.

AA00645



CLERK'S CERTIFICATE OF SERVICE BY MAIL
CCP 1013a(3)

CASE NAME: Save Berkeley's Neighborhoods vs. The Regents of the UC
ACTION NO.: RG18902751

I certify that, I am not a party to the within action. I served the foregoing JUDGMENT OF DISMISSAL OF ENTIRE CASE AND ALL CAUSES OF ACTION WITH PREJUDICE by depositing a true copy thereof in the United States mail in Oakland, California in a sealed envelope with postage fully prepaid thereon addressed to:

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Suite 1500
Oakland, CA 94607

Robinson, Charles F.

University of California
1111 Franklin Street, 8th Floor
Oakland, CA 946075200

FILED
ALAMEDA COUNTY
JUN 7 2019
CLERK OF THE SUPERIOR COURT
By Venus L. Wright
Deputy

I declare under penalty of perjury that the above is true and correct.

Executed on June 7, 2019 at Oakland, California.

Chad Finke
Executive Officer/Clerk

by Venus L. Wright
Deputy Clerk

Document received by the CA 1st District Court of Appeal.

AA00646

1 **PROOF OF SERVICE**

2 I am a citizen of the United States, employed in the City and County of San Francisco, California.
3 My business address is 201 Mission Street, 12th Floor, San Francisco, CA 94105. I am over the age of 18
4 years and not a party to the above entitled action. On June 13, 2019, I served the following document on
5 the parties below, as designated:

6 • **NOTICE OF APPEAL**

7
8 **MANNER OF SERVICE**
9 **(check all that apply)**

10 ☒ By Mail: In the ordinary course of business, I caused each such envelope to be
11 placed in the custody of the United States Postal Service, with
12 postage thereon fully prepaid in a sealed envelope.

13 ☒ By E-mail: I caused such document to be served via electronic mail equipment
14 transmission (E-mail) on the parties as designated on the attached
15 service list by transmitting a true copy to the following E-mail
16 addresses listed under each addressee below. I did not receive, within
17 a reasonable time after the transmission, any electronic message or
18 other indication that the transmission was unsuccessful.

19 I declare under penalty of perjury under the laws of the State of California that the foregoing is true
20 and correct. Executed on June 13, 2019, in the City and County of San Francisco, California

21 
22 _____
23 Kelly Marie Perry

24 //
25 //
26 //
27 //
28 //
29 //
30 //

SERVICE LIST

Office of General Counsel
Anagha Dandekar Clifford, Senior Counsel
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| | | |
|---|--|---|
| ATTORNEY (name, State Bar number, and address): NAME: Thomas N. Lippe FIRM NAME: Law Offices of Thomas N. Lippe, APC STREET ADDRESS: 201 Mission Street, 12th Floor CITY: San Francisco TELEPHONE NO.: 415-777-5604 E-MAIL ADDRESS (if available): Lippelaw@sonic.net ATTORNEY FOR (name): Save Berkeley's Neighborhoods | | STATE BAR NO.: 104,640 ENDORSED FILED ALAMEDA COUNTY JUN 21 2019 CLERK OF THE SUPERIOR COURT By <u>J. Suttice</u> Deputy |
| SUPERIOR COURT OF CALIFORNIA, COUNTY OF Alameda STREET ADDRESS: 1225 Fallon Street MAILING ADDRESS: 1225 Fallon Street CITY AND ZIP CODE: Oakland, CA 94612 BRANCH NAME: Rene C. Davidson Courthouse | | |
| PLAINTIFF/PETITIONER: Save Berkeley's Neighborhoods DEFENDANT/RESPONDENT: The Regents of the University of CA, et al. | | |
| APPELLANT'S NOTICE DESIGNATING RECORD ON APPEAL (UNLIMITED CIVIL CASE) | | SUPERIOR COURT CASE NUMBER: RG18902751 |
| RE: Appeal filed on (date): June 12, 2019 | | COURT OF APPEAL CASE NUMBER (if known): |
| Notice: Please read form APP-001 before completing this form. This form must be filed in the superior court, not in the Court of Appeal. | | |

1. RECORD OF THE DOCUMENTS FILED IN THE SUPERIOR COURT

I elect to use the following method of providing the Court of Appeal with a record of the documents filed in the superior court (check a, b, c, d, or e and fill in any required information):

- a. ☐ A clerk's transcript under rule 8.122. (You must check (1) or (2) and fill out the clerk's transcript section on page 2 of this form.)
- (1) ☐ I will pay the superior court clerk for this transcript myself when I receive the clerk's estimate of the costs of this transcript. I understand that if I do not pay for this transcript, it will not be prepared and provided to the Court of Appeal.
- (2) ☐ I request that the clerk's transcript be provided to me at no cost because I cannot afford to pay this cost. I have submitted the following document with this notice designating the record (check (a) or (b)):
- (a) ☐ An order granting a waiver of court fees and costs under rule 3.50 et seq.; or
- (b) ☐ An application for a waiver of court fees and costs under rule 3.50 et seq. (Use Request to Waive Court Fees (form FW-001) to prepare and file this application.)
- b. ☒ An appendix under rule 8.124.
- c. ☐ The original superior court file under rule 8.128. (NOTE: Local rules in the Court of Appeal, First, Third, Fourth, and Fifth Appellate Districts, permit parties to stipulate to use the original superior court file instead of a clerk's transcript; you may select this option if your appeal is in one of these districts and all the parties have stipulated to use the original superior court file instead of a clerk's transcript in this case. Attach a copy of this stipulation.)
- d. ☐ An agreed statement under rule 8.134. (You must complete item 2b(2) below and attach to your agreed statement copies of all the documents that are required to be included in the clerk's transcript. These documents are listed in rule 8.134(a).)
- e. ☐ A settled statement under rule 8.137. (You must complete item 2b(3) below and attach to your proposed statement on appeal copies of all the documents that are required to be included in the clerk's transcript. These documents are listed in rule 8.137(b)(3).)

2. RECORD OF ORAL PROCEEDINGS IN THE SUPERIOR COURT

I elect to proceed:

- a. ☐ WITHOUT a record of the oral proceedings in the superior court. I understand that without a record of the oral proceedings in the superior court, the Court of Appeal will not be able to consider what was said during those proceedings in determining whether an error was made in the superior court proceedings.

CASE NAME: Save Berkeley's Neighborhoods
v The Regents of the University of CA, et al

SUPERIOR COURT CASE NUMBER:
RG18902751

2. b. ☒ WITH the following record of the oral proceedings in the superior court:
- (1) ☒ A reporter's transcript under rule 8.130. (You must fill out the reporter's transcript section on page 3 of this form.) I have (check all that apply):
- (a) ☒ Deposited the approximate cost of transcribing the designated proceedings with this notice as provided in rule 8.130(b)(1).
- (b) ☐ Attached a copy of a Transcript Reimbursement Fund application filed under rule 8.130(c)(1).
- (c) ☐ Attached the reporter's written waiver of a deposit for (check either (i) or (ii)):
- (i) ☐ all of the designated proceedings.
- (ii) ☐ part of the designated proceedings.
- (d) ☒ Attached a certified transcript under rule 8.130(b)(3)(C).
- (2) ☐ An agreed statement. (Check and complete either (a) or (b) below.)
- (a) ☐ I have attached an agreed statement to this notice.
- (b) ☐ All the parties have agreed in writing (stipulated) to try to agree on a statement. (You must attach a copy of this stipulation to this notice.) I understand that, within 40 days after I file the notice of appeal, I must file either the agreed statement or a notice indicating the parties were unable to agree on a statement and a new notice designating the record on appeal.
- (3) ☐ A settled statement under rule 8.137. (You must attach the motion required under rule 8.137(a) to this form.)

3. RECORD OF AN ADMINISTRATIVE PROCEEDING TO BE TRANSMITTED TO THE REVIEWING COURT

- ☐ I request that the clerk transmit to the reviewing court under rule 8.123 the record of the following administrative proceeding that was admitted into evidence, refused, or lodged in the superior court (give the title and date or dates of the administrative proceeding):

| Title of Administrative Proceeding | Date or Dates |
|------------------------------------|---------------|
|------------------------------------|---------------|

4. NOTICE DESIGNATING CLERK'S TRANSCRIPT

(You must complete this section if you checked item 1a. above indicating that you elect to use a clerk's transcript as the record of the documents filed in the superior court.)

- a. **Required documents.** The clerk will automatically include the following items in the clerk's transcript, but you must provide the date each document was filed or, if that is not available, the date the document was signed.

| Document Title and Description | Date of Filing |
|--|----------------|
| (1) Notice of appeal | |
| (2) Notice designating record on appeal (this document) | |
| (3) Judgment or order appealed from | |
| (4) Notice of entry of judgment (if any) | |
| (5) Notice of intention to move for new trial or motion to vacate the judgment, for judgment notwithstanding the verdict, or for reconsideration of an appealed order (if any) | |
| (6) Ruling on one or more of the items listed in (5) | |
| (7) Register of actions or docket (if any) | |

CASE NAME: Save Berkeley's Neighborhoods
v The Regents of the University of CA, et al

SUPERIOR COURT CASE NUMBER:
RG18902751

4. NOTICE DESIGNATING CLERK'S TRANSCRIPT

- b. **Additional documents.** (If you want any documents from the superior court proceeding in addition to the items listed in 4a. above to be included in the clerk's transcript, you must identify those documents here.)

☐ I request that the clerk include the following documents from the superior court proceeding in the transcript. (You must identify each document you want included by its title and provide the date it was filed or, if that is not available, the date the document was signed.)

| | Document Title and Description | Date of Filing |
|------|--------------------------------|----------------|
| (8) | | |
| (9) | | |
| (10) | | |
| (11) | | |
| (12) | | |

☐ See additional pages.

c. Exhibits to be included in clerk's transcript

☐ I request that the clerk include in the transcript the following exhibits that were admitted in evidence, refused, or lodged in the superior court (for each exhibit, give the exhibit number, such as Plaintiff's #1 or Defendant's A, and a brief description of the exhibit. Indicate whether or not the court admitted the exhibit into evidence):

| | Exhibit Number | Description | Admitted (Yes/No) |
|-----|----------------|-------------|-------------------|
| (1) | | | |
| (2) | | | |
| (3) | | | |
| (4) | | | |
| (5) | | | |

☐ See additional pages.

5. NOTICE DESIGNATING REPORTER'S TRANSCRIPT

(You must complete this section if you checked item 2b(1) above indicating that you elect to use a reporter's transcript as the record of the oral proceedings in the superior court. Please remember that you must pay for the cost of preparing the reporter's transcript.)

- a. I request that the reporters provide (check one):

- (1) ☐ My copy of the reporter's transcript in paper format.
- (2) ☒ My copy of the reporter's transcript in computer-readable format.
- (3) ☐ My copy of the reporter's transcript in paper format and a second copy in computer-readable format.

(Code Civ. Proc., § 271; Cal. Rules of Court, rule 8.130(f)(4).)

Document received by the CA 1st District Court of Appeal.

CASE NAME: Save Berkeley's Neighborhoods
v The Regents of the University of CA, et al

SUPERIOR COURT CASE NUMBER:
RG18902751

5. b. **Proceedings**

I request that the following proceedings in the superior court be included in the reporter's transcript. (You must identify each proceeding you want included by its date, the department in which it took place, a description of the proceedings—for example, the examination of jurors, motions before trial, the taking of testimony, or the giving of jury instructions—the name of the court reporter who recorded the proceedings, and whether a certified transcript of the designated proceeding was previously prepared.)

| Date | Department | Full/Partial Day | Description | Reporter's Name | Prev. prepared? |
|-------------|------------|------------------|-------------|--------------------|---|
| (1)11/15/18 | 24 | Partial | Court Trial | Carol Haraburda | <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No |
| (2)12/06/18 | 24 | Partial | Court Trial | Raquel Giana Sharp | <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No |
| (3)01/24/19 | 24 | Partial | Court Trial | Nancy E. Presant | <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No |
| (4)04/18/19 | 24 | Partial | Court Trial | Sheila Pram | <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No |
| (5) | | | | | <input type="checkbox"/> Yes <input type="checkbox"/> No |
| (6) | | | | | <input type="checkbox"/> Yes <input type="checkbox"/> No |
| (7) | | | | | <input type="checkbox"/> Yes <input type="checkbox"/> No |

c. The proceedings designated in 5b ☒ include ☐ do not include all of the testimony in the superior court.

If the designated proceedings DO NOT include all of the testimony, state the points that you intend to raise on appeal (rule 8.130(a)(2) provides that your appeal will be limited to these points unless, on motion, the reviewing court permits otherwise).

Date: June 18, 2019

Thomas N. Lippe
(TYPE OR PRINT NAME)


(SIGNATURE OF APPELLANT OR ATTORNEY)

Document received by the CA 1st District Court of Appeal.

1 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

2 IN AND FOR THE COUNTY OF ALAMEDA

3 1221 OAK STREET, OAKLAND, CALIFORNIA 94612

4 BEFORE THE HONORABLE FRANK ROESCH, JUDGE

5 DEPARTMENT NO. 24

CERTIFIED
TRANSCRIPT

6 ---oOo---

7 SAVE BERKELEY'S NEIGHBORHOODS, a
8 California nonprofit public benefit
corporation,

9 Petitioner and Plaintiff,

10 vs.

CASE NO. RG18-902751

11 THE REGENTS OF THE UNIVERSITY OF
12 CALIFORNIA; JANET NAPOLITANO, in her
capacity as President of the University
13 of California; CAROL T. CHRIST, in her
capacity as Chancellor of the University
14 of California, Berkeley; and DOES 1
through 20,

15 Respondents and Defendants.
_____ /

17 REPORTER'S TRANSCRIPT OF PROCEEDINGS

18 THURSDAY, NOVEMBER 15, 2018

19 REPORTED BY: CAROL HARABURDA, RPR, CSR NO. 8052
20 Court Certified Realtime Reporter
21 No. 103480

22 ---oOo---

23 AIKEN WELCH COURT REPORTERS
24 One Kaiser Plaza, Suite 250
Oakland, California 94612
510-451-1580/877-451-1580
25 Fax: 510-451-3797
www.aikenwelch.com

Document received by the CA 1st District Court of Appeal.

AA00653

1 APPEARANCES OF COUNSEL:

2 FOR THE PLAINTIFF:

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8 Lippelaw@sonic.net

9 FOR THE DEFENDANTS:

10 MEYERS NAVE RIBACK SILVER & WILSON
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12 555 12th Street, Suite 1500
13 Oakland, California 94607
14 510.808.2000 - 800.464.3559
15 tcremin@meyersnave.com

16 ---oOo---

Document received by the CA 1st District Court of Appeal.

THURSDAY, NOVEMBER 15, 2018 - 3:45 P.M.

---oOo---

P R O C E E D I N G S

(Other court matters heard.)

---oOo---

(Proceedings commenced at approximately 3:50
p.m.)

THE COURT: Good afternoon.

MR. LIPPE: Good afternoon, Your Honor. Tom
Lippe for Save Berkeley's Neighborhoods.

MR. CREMIN: Good afternoon, Your Honor. Tim
Cremin on behalf of all the respondents, the Regents of
the University of California, President Napolitano of the
University of California, and Chancellor Carol Christ of
the University of California, Berkeley.

THE COURT: All right. Please, have a seat.

I issued the tentative ruling, and you asked to
make argument, Mr. Lippe?

MR. LIPPE: Yes, Your Honor. I have a limited
purpose here. I appreciate the amendments that the Court
has granted leave to make, and the plaintiff will make
those amendments in another complaint or petition.

But there was one amendment, in particular, that
I had requested leave to make in the opposition brief that

1 was not addressed in the tentative, and that was that the
2 plaintiff did not know or could not reasonably have known
3 of the changes in the project, meaning the increases in
4 enrollment above the increases that were disclosed in the
5 2005 EIR. I was concerned that --

6 THE COURT: I had not intended in my tentative
7 ruling to limit what you could put into your petition,
8 rather I was trying to provide some guidance about what
9 was missing that can bring you within the CEQA umbrella.

10 MR. LIPPE: I appreciate that clarification, Your
11 Honor. With that said, I have nothing further to add,
12 unless Mr. Cremin has comments that I would respond to.

13 THE COURT: All right. Mr. Cremin, do you have
14 any comments that you'd like to respond to?

15 MR. CREMIN: No, Your Honor. We would just like
16 to point out that we agree with the Court's tentative,
17 and, also, that this will be the fourth time that he has
18 been able to plead -- or try to plead his case, and we
19 think that the fatal flaw really is what the Court's
20 identified as --

21 THE COURT: This was the second amended
22 complaint.

23 MR. CREMIN: Right.

24 THE COURT: But nobody had previously gone
25 through a whole demurrer.

1 MR. CREMIN: Correct.

2 THE COURT: You had meet-and-confer sessions,

3 perhaps.

4 MR. CREMIN: Correct. We just would like to

5 point out that we think that the failure to allege a

6 project under the CEQA definition is the fatal flaw in the

7 complaint, and that there has been -- that the failure to

8 plead facts relating to a CEQA project is the fatal flaw

9 in the complaint.

10 THE COURT: Well, you can't have a CEQA case

11 without a discretionary determination in the project.

12 That's pretty clear. If anybody knows that, Mr. Lippe

13 does. Mr. Lippe, good luck.

14 MR. LIPPE: Thank you, Your Honor.

15 THE COURT: I'll send out the tentative ruling.

16 MR. CREMIN: Thank you, Your Honor.

17 (Proceedings concluded at approximately 3:55

18 p.m.)

19 ---oOo---

20

21

22

23

24

25

REPORTER'S CERTIFICATION

---oOo---

I, CAROL HARABURDA, do hereby certify that I am a
certified shorthand reporter of the State of California
and duly appointed shorthand reporter.

That the foregoing pages are a full, true, and
correct transcript of my shorthand notes taken in the
above-mentioned matter.

IN WITNESS WHEREOF, I have hereunto subscribed my
name this 24th day of NOVEMBER 2018.



CAROL HARABURDA, RPR, CSR NO. 8052
Certified Shorthand Reporter
Court Certified Realtime Reporter
State of California

Document received by the CA 1st District Court of Appeal.

1 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

2 IN AND FOR THE COUNTY OF ALAMEDA

3 THE HONORABLE FRANK ROESCH, JUDGE, PRESIDING

4 DEPARTMENT 24

5 ---o0o---

CERTIFIED COPY

6 SAVE BERKELEY'S NEIGHBORHOODS,

7 a California nonprofit public

8 benefit corporation,

9 Plaintiff,

10 vs.

NO. RG18902751

11 THE REGENTS OF THE UNIVERSITY

12 OF CALIFORNIA; JANET NAPOLITANO,

13 in her capacity as President of

14 the University of California;

15 CAROL T. CHRIST, in her capacity

16 as Chancellor of the University

17 of California, Berkeley;

18 and DOES 1 through 20,

19 Defendants.

20 _____/

21 REPORTER'S TRANSCRIPT OF PROCEEDINGS

22 THURSDAY, DECEMBER 6, 2018

23 Courthouse, Oakland, California

24 (Appearances on the next page.)

25 RAQUEL GIANA SHARP, RPR, CSR #10619

Document received by the CA 1st District Court of Appeal.

A P P E A R A N C E S

FOR THE PLAINTIFF: THOMAS N. LIPPE, ESQ.

Law Offices of Thomas Lippe
201 Mission Street, 12th Flr.
San Francisco, CA 94105

FOR THE DEFENDANT: TIMOTHY CREMIN, ESQ.

Meyers Nave
555 12th Street, Suite 1500
Oakland, CA 94607

--o0o--

Document received by the CA 1st District Court of Appeal.

P R O C E E D I N G S

THURSDAY, DECEMBER 6, 2018

4:00 P.M.

--o0o--

THE COURT: Save Berkeley's Neighborhoods
versus the Regents.

All right. If I could ask counsel to
state their appearances.

MR. LIPPE: Tom Lippe for plaintiffs,
Save Berkeley's Neighborhoods.

Good afternoon.

MR. CREMIN: Good afternoon, your Honor.

Tim Cremin for respondents, the Regents
of the University of California; Janet
Napolitano, president of the University of
California; and Carol Christ, Chancellor of the
University of California, Berkeley.

THE COURT: Okay. I had a great deal of
difficulty trying to figure out what to do with
this motion.

My biggest difficulty was that I am
entirely uncertain as we sit here today what
plaintiffs case is.

The documents that are sought all seem to
be related to the 2005 development plan. The
CEQA case by definition is not a challenge of the
2005 development plan because the time for filing
that is long gone.

Document received by the CA 1st District Court of Appeal.

1 There's a third amended complaint that I
2 read, and I couldn't tell from reading the
3 complaint what exactly the issue that was
4 underpinning the CEQA claim.

5 Let me tell you what I saw as three
6 possible alternatives that could possibly have
7 been intended, even though I'm not sure.

8 The first one was that the 2005 LRDP had
9 a development goal of increasing student
10 enrollment to a certain level, and the University
11 not only achieved that goal but actually
12 increased the enrollment past what had been
13 estimated in the EIR underpinning that.

14 That is, if you will, to draw an analogy,
15 that the long-range development plan said, "We're
16 going to build a building with 10,000 square feet
17 for a library," and then without any further EIR
18 or approval or anything else, built a library
19 that had 50,000 square feet; that is, they
20 exceeded what they intended to do according to
21 what was studied under the EIR.

22 And of course, if that's what it is, then
23 there is some law on how you evaluate a Statute
24 of Limitations and how you determine what you are
25 going to do on it.

26 The second possibility is that the 2005
27 long-range development plan stated a baseline and
28 within that baseline included an anticipated

Document received by the CA 1st District Court of Appeal.

1 enrollment increase to a certain level, and that,
2 as time went on, the University ignored that
3 baseline plus projection and permitted a level of
4 enrollment that exceeded that.

5 And I'm not sure as I sit here today
6 whether that is a violation of CEQA or not. It
7 all would have to do with whether or not it's a
8 baseline or it's a part of the development.

9 And then there's the third option, which
10 is that the 2005 long-range development plan has
11 nothing to do with it, and that what we have is
12 the University making a determination at some
13 point that enrollment is going to go up by X
14 numbers of students.

15 And this lawsuit was filed within 180
16 days of that determination. No specific
17 determination can be found in the third amended
18 complaint that supports that kind of a theory.

19 But if that is what the case is all
20 about, then the request for documents that go
21 back to 2005 are -- the objection that's found on
22 every one of them that it's overbroad and
23 non-related, not related and not likely to lead
24 to the discovery of any kind of evidence that
25 could in the remotest way come in under Western
26 States Petroleum, it is a totally valid
27 objection.

28 Anyway, with that sort of a backdrop, you

Document received by the CA 1st District Court of Appeal.

1 can argue your case, Mr. Lippe.

2 MR. LIPPE: Thank you, your Honor.

3 It's helpful to have the Judge's
4 thoughts, so that I can focus my comments.

5 I think we can set the second one aside,
6 the baseline. Baseline is the environmental
7 setting concept. And in my mind, I think it's
8 clear that the anticipated increase of 1,650
9 students that was disclosed in the 2005 LRDP and
10 the 2005 EIR was part of the project.

11 And it has to be part of the project
12 because Public Resources Code Section 21080.09
13 says that the University of California is
14 required to make its enrollment plans part of its
15 long-range development planning process.

16 So the 2020 LRDP was required to say what
17 the enrollment plans are and it did. And so part
18 of that project, which is a program much larger
19 than one specific building that's going to be
20 built or one specific year of enrollment, it's a
21 20-year program, and that CEQA project did
22 include --

23 THE COURT: I thought it was a 15-year
24 program.

25 MR. LIPPE: 15.

26 Thank you, your Honor. I was confused by
27 the 2020. I was getting my numbers mixed up.

28 But that program, which is a CEQA

Document received by the CA 1st District Court of Appeal.

1 project, included as a component of its project
2 description an increase of 1,650 students.

3 So that's -- I don't think the baseline
4 is part of it. I think we can set number two
5 aside.

6 Going back to number one, I think the
7 third amended complaint clearly states that the
8 2020 LRDP is the CEQA project. That is the
9 linchpin of the case because it has an EIR that
10 did include a disclosure of the increase of 1650
11 students.

12 And then what happened after that was an
13 informal decision or decisions, and we don't know
14 which it is because we don't have the documents
15 laying out the decision making history to exceed
16 the 1650 students. And at this point, that
17 number is up to about 8,000 or more.

18 THE COURT: Well, let me ask you a
19 question.

20 If the case were about building a library
21 that's five times bigger than what was in the --
22 that was evaluated in the EIR and was part of the
23 development plan, what is your remedy?

24 MR. LIPPE: The remedy is a CEQA document
25 that evaluates the environmental impact of the
26 larger building. It's the same remedy.

27 THE COURT: No. We're talking about
28 after the building was built.

Document received by the CA 1st District Court of Appeal.

1 It's sort of like what happened in
2 Emeryville when they said, "We're going to build.
3 We're going to do some fill-out here, and it's
4 going to be three acres." And the city of
5 Emeryville said, "No. It's going to be one
6 acre." Maybe it was one acre or five acres. I
7 don't know the size. And then they said, "Okay.
8 Okay. We'll only do one acre."

9 But then when they actually did it, they
10 went back to the original plan and did the whole
11 thing. It's all still there of course.

12 But that's what we're talking about here.
13 We're talking about a plan that says X, and they
14 didn't do X, they did Y.

15 When you discovered that they did Y which
16 exceeded X, what are your remedies there? Do you
17 ask them to tear it down?

18 MR. LIPPE: Well, I think that the
19 Court's really getting at the question of
20 whether the case is moot. And a CEQA case --

21 THE COURT: Oh, no. I'm not getting at
22 whether it's moot or not.

23 It's more of what sort of discovery could
24 you possibly do to -- that's going to fall within
25 Western States Petroleum.

26 MR. LIPPE: Well, for a CEQA case we've
27 identified the project. We've identified the
28 changes in the project.

Document received by the CA 1st District Court of Appeal.

1 So it's like concerns there of Costa Mesa
2 where the amphitheater was planned and disclosed
3 to be facing in one direction and they actually
4 built it facing a different direction without any
5 public notice or formal decision.

6 And the Supreme Court said on the Statute
7 of Limitations question, you have a time period
8 from when you knew or reasonably should have
9 known about the change in the direction of the --

10 THE COURT: It's a 180-day notice.

11 MR. LIPPE: -- so bring your lawsuit.

12 And so that's on the statute question.

13 But in terms of the remedy, we're kind of
14 at the very A, B, C's of the case where we have
15 to get the record prepared so that we have an
16 evidentiary basis on which to prove that there
17 was a CEQA violation, which is the failure to
18 evaluate the increase of enrollment above the
19 1650.

20 THE COURT: So it's not the fact that
21 they built it. It's the fact that they made a
22 decision to increase the enrollment and didn't
23 put that out for supplemental EIR or whatever
24 the proper venue would be.

25 MR. LIPPE: That's correct.

26 THE COURT: So you have to figure out
27 when did they make that decision and when did
28 you become aware or when was the public

Document received by the CA 1st District Court of Appeal.

1 available to become aware of the increase in
2 enrollment. And then you've got -- from that
3 date forward, you've got 180 days to file the
4 lawsuit.

5 MR. LIPPE: Correct. And my clients know
6 when they found out --

7 THE COURT: All right. But the time --

8 MR. LIPPE: -- but they don't know when
9 the Regents made their decisions because we
10 don't have the documents of that history because
11 they were not formal decisions, there was not
12 public notice.

13 And the discovery is intended to fill in
14 that evidentiary gap so that we can make our case
15 that you made decisions without invoking CEQA,
16 without applying CEQA, which they clearly did.

17 If there were a CEQA document, we would
18 see it, we would have it. We've looked at their
19 web page that has all their CEQA documents since
20 the 2020 LRDP was approved in 2005, and there
21 isn't one for these increases.

22 And those increases continue to have
23 environmental impacts on the community, and the
24 Regents should be held to account by way of at
25 least a lawsuit that is based on their
26 documentary records of their decision making and
27 then applying CEQA to that.

28 Were they required to do a CEQA document?

Document received by the CA 1st District Court of Appeal.

1 We think they were. But we don't think we have
2 much chance of proving all of the components that
3 need to be proved without having their
4 documentary record, which in a CEQA case that's
5 really the first thing you do. After you file
6 your petition, you start preparing the records,
7 somebody does. And my clients elected to prepare
8 that. We asked for the documents to do that.

9 I don't think we're at the point of, do
10 we look for the documents outside a record,
11 because we don't know what the record is.

12 If once we have the record, which is the
13 record of these informal, non-noticed decisions
14 to increase enrollment, then we'll know whether
15 we need to go beyond that. Because the decisions
16 were informal, we might be able to add extra
17 evidence to the evidence before the Court.

18 But we're not there yet. Right now we're
19 at the very first step, which is to get a record
20 together so that we know how to litigate this
21 case.

22 But that was the first of the Court's
23 options that I was talking about, which is the
24 2005 decision is the project. It was changed in
25 a way -- the Court's analogy is a bigger library.
26 The facts here are more students.

27 The third possibility that the Court
28 referenced was the 2005 decision is kind of

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1 obsolete and out of the picture because there was
2 a new decision made.

3 And the reason I don't think that's
4 correct is because when you look at the language
5 in concerned citizens of Costa Mesa, it talks
6 about what the claim is, and the claim is this
7 failure to do CEQA review of the change in the
8 project.

9 And this project is still ongoing. The
10 one that's approved in 2005, the LRDP, is still
11 in play.

12 THE COURT: What do you need in plain
13 language of the LRDP that establishes that
14 they're going to build a 10,000 square foot
15 library? And then the additional evidence that
16 in fact that they've got a 50,000 square foot
17 library instead of the one that is described in
18 the plan. What more do you need?

19 MR. LIPPE: I think that's a fair
20 question, your Honor.

21 I tend to be kind of a methodical and
22 conservative attorney. I only get one shot at
23 it.

24 If I did a motion for summary judgment
25 based on what I already have, I suppose I could
26 get two bites of the apple, do that, and if it
27 doesn't succeed, go to a hearing on the merits.

28 But you don't get a lot of chances to

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1 regroup in a lawsuit. If I go forward without
2 having all the evidence, that's -- to me that's
3 not a prudent way to proceed because I don't know
4 what my opposing counsel is going to bring to
5 bear in their opposition brief.

6 It just seems the way that I learn to
7 practice law, you get to all the evidence before
8 you -- before you try to prove your case so that
9 you know what you are up against.

10 THE COURT: This is a mandate case. It's
11 not a case where you have to bring together
12 evidence and witnesses. It's -- we have a
13 limited field from which we can evaluate the
14 evidence, and that limited field is the
15 administrative record.

16 And additional documents are only if the
17 decision-makers of the discretionary decision
18 either should have known about it or did know
19 about it, even though those records weren't part
20 of the actual administrative record.

21 MR. LIPPE: And this motion is to flush
22 out that field. That limited field of the
23 administrative record is exactly what this
24 motion is intended to provide.

25 Right now we have absolutely not one
26 piece of paper that the Regents have provided,
27 other than a series of specific CEQA documents,
28 for specific buildings that I was able to

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1 download from their website.

2 But in terms of this document that
3 references the decision-making about how many
4 students are going to be admitted, we don't have
5 anything since 2005, and so that would be the
6 record for this case.

7 I mean, this case is not about a building
8 being bigger. It's about more students being
9 enrolled.

10 THE COURT: Well, you filed your case in
11 2018.

12 MR. LIPPE: Correct.

13 THE COURT: If you go back 180 days from
14 that, you have to evaluate what was first
15 disclosed about enrollment at a point after
16 that. Because if it was disclosed about
17 enrollment prior to that 180 days, then your
18 statute has run.

19 I'm just thinking off the top of my head
20 here.

21 And if you -- if you try to figure out
22 what decision or what implementation of a prior
23 decision occurred after that 180-day mark, it
24 seems reasonable to ask about documents that
25 were -- that exist that demonstrate a decision by
26 somebody on the enrollment question.

27 And I'm not sure that you need to do it
28 through discovery. You might just ask. If you

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1 can't get it at all, perhaps discovery is a
2 proper vehicle for it.

3 But I don't see how you could go beyond
4 that all the way back to 2005.

5 MR. LIPPE: Well, the law in the Statute
6 of Limitations is that if there was an informal
7 decision, not a formal decision, in other words
8 no public notice --

9 THE COURT: That's right. When you first
10 became aware or could have become aware.

11 MR. LIPPE: Right. But in that
12 situation --

13 THE COURT: When did they first notice
14 that the stadium was facing east instead of
15 south?

16 MR. LIPPE: Well, the court in that case
17 said it was going to be a factual question. And
18 that case came up on a demurrer as well, and the
19 court said, "We're not going to try to figure
20 that out on a demurrer. We'll let the facts be
21 brought to court on that."

22 But in this case, my clients did their
23 investigation, and this is referenced in the
24 third amended complaint, with the city of
25 Berkeley. And then a request was made to UC to
26 provide information on enrollment.

27 That was provided October 30th of 2017,
28 and my client was apprized of that a day later

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1 from the city of Berkeley. And this is all in
2 the complaint. Within 180 days, they brought
3 this lawsuit.

4 And so it does go back beyond that
5 October of 2017 because there was no formal
6 public disclosure of decision to increase
7 enrollment since 2005.

8 THE COURT: Am I wrong to guess that it's
9 an annual event?

10 MR. LIPPE: Well, certainly enrollment
11 happens every semester. It's more than annual.

12 THE COURT: Well, who decides how much
13 enrollment they're going to permit?

14 Because, you know, you see a big, fancy
15 school, everybody wants to go there, and so they
16 have to turn away a lot of people.

17 Who decides where they draw the line?

18 MR. LIPPE: That's exactly the question
19 we're trying to answer by getting discovery
20 on -- starting with the documents. Show us the
21 documents that record these decisions, and then
22 from there, we can understand who did what and
23 when.

24 It just seems to me that we can't really
25 move forward in the case either for defending the
26 case or for prosecuting the case without having
27 the documentary record, which would be the
28 administrative record for the CEQA claims.

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1 But because the decisions were not
2 noticed, there was no 180-day from the decision
3 of the Statute of Limitations.

4 THE COURT: You can't tell me that
5 something happened in 2006 that had anything at
6 all to do with what you discovered in October of
7 2017.

8 I'm not even sure -- and you discovered
9 it, but perhaps other people should have been
10 able to discover it, which is really what you
11 have to look at. It's not actual discovery but
12 when you reasonably could have discovered it.

13 But putting that question aside, nothing
14 that happened in 2006 is going to be even
15 remotely relevant.

16 MR. LIPPE: I don't see how the Court can
17 say that. I really don't.

18 If a decision was made in 2006 that, you
19 know, we're going to scrap the 1650 number and
20 we're going to go for 8,000 in the next ten
21 years, if somebody made that decision and there's
22 a piece of paper that says that, that's highly
23 relevant to this case.

24 THE COURT: Well, then your statute ran
25 180 days after they exceeded that enrollment
26 level.

27 MR. LIPPE: That is not the case, your
28 Honor.

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1 THE COURT: Sure. Because then you knew
2 that they had broken the rule.

3 MR. LIPPE: We didn't know until we get
4 the document in discovery in this litigation in
5 the scenario we're talking about. In other
6 words, if it was an informal decision that was
7 not noticed --

8 THE COURT: Wasn't it available to
9 anybody what calls enrollment?

10 MR. LIPPE: It's a factual question.

11 I think the Court's trying to flush out
12 the facts based on supposition, and I don't think
13 that's proper.

14 THE COURT: Well, what I'm trying to
15 figure out is what might be proper in a writ of
16 mandate case to seek by way of request for
17 production of documents when I'm not even clear
18 on the cause of action that's being asserted in
19 the third amended complaint.

20 That was what I came into the discussion
21 with, and I'm -- frankly I'm still having
22 difficulty with it.

23 And if it's in fact that they exceeded
24 what they promised that they were going to do, to
25 use my analogy about the library again, they
26 promised a 10,000 square foot library and then
27 they built a 50,000 square foot in 2010, and then
28 in 2015, they wanted to add a couple stories to

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1 it, which is how I'm imagining that the
2 enrollment went up, I don't know the facts to be
3 sure, but the issue of the extra stories starts
4 when they started building the extra stories.

5 The Statute of Limitation with regard to
6 the 50,000 square foot starts when it became
7 apparent then that what they were building
8 exceeded the original -- exceeded the original
9 development plan.

10 And I just -- I'm having a real difficult
11 time figuring out, with the breadth of things
12 that you have asked for in your request for
13 production of documents, it really seems to me
14 like it's so overwhelmingly broad that I couldn't
15 enforce the request.

16 And then I have to get to the question,
17 the next question, which is whether or not there
18 would be documents that actually would be
19 relevant within the Western States Petroleum
20 limitations of documents in a -- in a writ of
21 mandate case.

22 MR. LIPPE: Can I address the Court's
23 comment about when it becomes apparent?

24 And so with the library, it's much bigger
25 and it's apparent when you see it being built,
26 and with an amphitheater and the concerns, it's
27 apparent when you see it when the concert is
28 played and it's facing toward you.

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1 But here it was not apparent that
2 reasonable meant was increasing and by how much.
3 The question is how does the average person
4 understand or --

5 THE COURT: Really? With all these
6 environmental impacts, you didn't notice?

7 MR. LIPPE: People did notice gradually,
8 but it was this kind of creeping incrementalism
9 of changes in the neighborhood with more student
10 housing in the neighborhoods as opposed to on
11 campus, more parties and more trash and more
12 noise, and people started to investigate. But
13 it did creep up on people, and it took time.

14 So there's still the factual question of
15 what information was actually available and when,
16 and when were plaintiffs reasonably on notice so
17 that they -- reasonably they should have been
18 aware of it. And those are factual questions.

19 And you know, admittedly the time period
20 is a long one, but it's also true that these were
21 small increases over time that finally came to a
22 head where people stood up and said, "Okay.
23 Let's figure out what's going on."

24 And they went to the city of Berkeley.
25 They figured out what was going on. And then
26 when they knew what was going on, they brought
27 their lawsuit within 180 days.

28 So from a demurrer standpoint and a

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1 pleading standpoint, it's within the boundaries
2 of what the concerns of the citizens of Costa
3 Mesa decision says.

4 And in terms of the breadth of the
5 request, they're really only about the
6 preparation of the LRDP in 2005 and the EIR for
7 it. They're about any documents relating to this
8 increase in enrollment since then --

9 THE COURT: But the preparation of the
10 EIR in 2005 is utterly irrelevant to anything
11 that you could possibly have filed a lawsuit on
12 in 2018.

13 MR. LIPPE: Okay. I think that's fair,
14 your Honor. And so that one perhaps is going
15 too far back, and we can start with the EIR in
16 2005.

17 But after that, any documents that were
18 prepared that relate to the decisions to increase
19 enrollment and to look at the environmental
20 impacts of those increases in enrollment, those
21 would be directly relevant to and really the only
22 things that are relevant to this lawsuit, which
23 is to say that these changes that were made
24 without a formal decision have environmental
25 impacts and they haven't been subjected to CEQA.

26 And the statute -- the 21080.09 that
27 directly applies to the UC system says you have
28 to subject your enrollment plans to CEQA.

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1 THE COURT: Well, that -- my reading of
2 that statute was that it was enacted in 2007 or
3 2008 or 2009, I don't remember the year, but it
4 was subsequent to the 2005 long-range
5 development plan.

6 And in fact, if you read that statute, it
7 demands, requires the university to provide
8 numbers in 2010, 2011, and 2012. It doesn't say
9 anything about 2013 or thereafter. But clearly
10 it impose a burden on the university to make some
11 kind of reports there and also to compensate the
12 local municipalities for whatever extra costs
13 it's going to cost them to take care of the
14 university's buildings or whatever they're doing.

15 MR. LIPPE: Agreed, your Honor.

16 The -- I don't think that that law's
17 clear statements that UC has to subject its
18 enrollment and increases in enrollment to CEQA
19 changes what existed before that in terms of just
20 standard CEQA law. It's a public agency carrying
21 out a project --

22 THE COURT: I don't disagree with that.

23 MR. LIPPE: -- and so it has to be
24 subjected to CEQA if it might reasonably cause a
25 change in the physical environment, which is
26 alleged here for purposes of the pleading.

27 THE COURT: One of the things that's very
28 fuzzy in this case is trying to figure out

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1 exactly what the discretionary determination was
2 when this occurred and what it amounted to.

3 And I'm not sure that you are going to
4 get a good answer to that question from the --
5 from discovery.

6 MR. LIPPE: Understood.

7 THE COURT: I don't know the answer to
8 that question.

9 MR. LIPPE: For me it's -- the first step
10 is to get the documents and see what we have.
11 We know what happened in the real world, but we
12 don't know why, we don't know when, we don't
13 know who.

14 And it may be that the Court's suggestion
15 of putting on the case without those documents is
16 certainly possible, but to me it seems not
17 prudent in terms of being thorough so that we
18 know what we're dealing with.

19 But in terms of the broadness of the
20 request, I think I addressed that with respect
21 to, you know, the documents preceding the 2005
22 EIR.

23 Perhaps I agree with the Court's those
24 aren't necessary, but in terms of the time
25 periods after that, I don't think they're
26 overbroad. They were very specifically tailored
27 to the increases in enrollment and the
28 environmental impacts of those increases.

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1 THE COURT: Which one are you referring
2 to?

3 I mean, you have one that says all
4 writings after certification of the EIR. You
5 have one, all writings since the adoption of the
6 long-range plan, all writings that were prepared
7 in connection with the adoption of any
8 environmental document, and you have all writings
9 that were prepared in connection with the
10 adoption of the long-range development plan.

11 And you referred to it as the 2020
12 long-range development plan, and I took that to
13 mean the 2005 long-range development plan.

14 MR. LIPPE: That's correct.

15 THE COURT: But every one of them is tied
16 to events that happened in 2005 or immediately
17 thereafter until today.

18 MR. LIPPE: Well, five and six are
19 specific about the time period after the
20 adoption of the 2020 LRDP in 2005 --

21 THE COURT: Yes.

22 MR. LIPPE: -- that relate --

23 THE COURT: But it goes back all the way
24 to there. It can't be read in any other way.

25 MR. LIPPE: Well, that's true because --
26 but I think it has to.

27 And I don't think that's overbroad
28 because we have a very long time where decisions

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1 were made in secret without public notice that we
2 don't have the information on.

3 THE COURT: Okay. Mr. Cremin, can I ask
4 you a question?

5 MR. CREMIN: Sure.

6 THE COURT: Who decides how many students
7 are going to be let into the university in any
8 particular semester or year?

9 MR. CREMIN: Well, I think -- I mean,
10 today's motion I understand --

11 THE COURT: No, no. This is a question
12 of substance.

13 Who is it that makes the decision saying,
14 "Okay. We're going to let so many people into
15 the engineering school and so many people into
16 the liberal arts schools"? Who makes that
17 decision?

18 MR. CREMIN: The decisions are -- is
19 ultimately made by the thousands of students who
20 are offered admission. And it's an offer that
21 has to be accepted, and that's why it attached
22 to the petition.

23 THE COURT: So then who makes the
24 decision how many offers are going to be sent
25 out?

26 MR. CREMIN: It's part of -- part of the
27 UC process, UC Berkeley process.

28 THE COURT: So there's nobody says,

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1 "Okay. We're going to send out 800 offers to
2 people who want to go into engineering"?
3 Somebody must make -- somebody must draw the
4 line some place.

5 MR. CREMIN: I can't sit here and testify
6 to that as to --

7 THE COURT: You're not under oath.
8 You're not testifying.

9 MR. CREMIN: I'm just -- I didn't mean it
10 that formally. I just meant I don't feel
11 comfortable today, you know, providing evidence
12 to the Court of an internal administrative
13 process at UC.

14 But I will say for the purposes of today
15 and the discussion that I have been listening to
16 very carefully, we have a discovery motion before
17 you and, you know, we really do share your
18 concerns --

19 THE COURT: Well, look --

20 MR. CREMIN: -- about where we stand on
21 this and whether we do have a CEQA case that's
22 been properly pled and placed before you.

23 There's a recent demurrer ruling that we
24 agreed with that, I think, with particularity
25 identified the fatal flaws in what was then a
26 second amended petition.

27 THE COURT: Well, there's a third amended
28 petition. If you are going to demur to that,

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1 you're going to have to demur to that.

2 Currently it's what's there.

3 MR. CREMIN: Except that the discovery
4 request -- there's a couple things going on.

5 If I may.

6 The date when we were served discovery,
7 okay, just the one that's at issue before this
8 Court today, we were served discovery on May
9 18th, which was 23 days -- well, my math is
10 wrong. Sorry. 21 days after the filing of the
11 petition.

12 The petition was filed, call it three
13 weeks, three weeks later in a CEQA case, a writ
14 of mandate case in which Western States controls.
15 We get served a request for production of
16 documents that, as you point out correctly, is
17 overbroad.

18 But I agree with you. I mean, there's no
19 other way of reading any of these to say it
20 doesn't go back to 2005.

21 So here we are three weeks into a CEQA
22 case, and we get served discovery.

23 That tells me that it's a fishing
24 expedition; that they don't really know what the
25 theory of their case is, so therefore they're
26 going to launch out discovery. So that's what
27 they do.

28 But this isn't a civil case. This is a

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1 CEQA writ of mandate case. And you can't do
2 that.

3 And the other thing I want to point out
4 is, under the Local Rules that were in effect at
5 that time -- and we appeared in Alameda Court a
6 lot -- they're since repealed (ph), but at that
7 time, you had the Local Rules where the
8 respondent or the plaintiff or petitioner elected
9 to prepare, that we were required to identify
10 documents that related to their petition. We
11 complied with that.

12 You know, so he serves us discovery
13 before even the Local Rules tell him what
14 documents should be in the record.

15 Our response, which sort of echoes what
16 the Court orders, was -- in the demurrer was,
17 "You haven't identified a project that we can
18 figure out here that is subject to CEQA. You
19 haven't identified an approval that is subject to
20 CEQA, so we can't identify documents."

21 And I think that process, your Honor, is
22 important when you look at the request before you
23 today. Because now he's done. We've told him
24 that -- 30 days into the case, we told him, "We
25 don't know what you're pleading. We can't
26 identify the documents."

27 We have a meet and conferred on
28 discovery. We talk about the limits. We have a

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1 meet and confer on the demurrer.

2 We tell him the problems with the
3 petition. He says, "Can I amend our complaint?"
4 We say, "Okay. We'll stipulate to that."
5 Supposed to be a meet and confer works.

6 He files a second amended complaint. We
7 read it carefully. Court reads it carefully. We
8 both come to the same conclusion. What's the
9 CEQA case here? What's the CEQA project you're
10 challenging? When was the decision? When was
11 the project commitment?

12 He files a third. This was a week ago.

13 You know, obviously we have ten days to
14 respond, so we had to carefully read the third
15 one.

16 I met and conferred with Mr. Lippe
17 yesterday because we planned to file another
18 demurrer after careful deliberation because of
19 some of the concerns the Court expressed today.

20 So I sit here a little concerned about a
21 discovery motion in a CEQA case with a pleading
22 that's uncertain that the Judge has already
23 expressed some concern about.

24 And you know, I could go and respond to
25 all --

26 THE COURT: Actually, I think that all
27 three of those theories that I propounded at the
28 beginning were theories that I determined after

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1 reading the pleading. It's just I didn't know
2 which one was the one that Mr. Lippe was running
3 with.

4 MR. CREMIN: Fair.

5 But I don't think we should be put in a
6 position to be guessing what his claim is either.

7 I mean, they're the petitioner. We're on
8 the receiving end. They have the obligation to
9 put before the Court a claim. And at this
10 moment, we don't think there is. As far as their
11 motion to compel today, it's going back to a May
12 production of documents to a complaint that no
13 longer exists.

14 And I did also want to bring to the
15 Court's attention, because this is escalating --

16 THE COURT: I'm not going to make a
17 ruling saying that the underpinning complaint or
18 petition, rather, in this case has changed so
19 therefore the discovery is no longer relevant,
20 that it's moot. I won't make that decision.

21 But it's a matter of the petitioner
22 adequately describing what their cause of action
23 is. I don't believe that it has changed.

24 MR. CREMIN: Okay. And honestly we find
25 it continuing to be unclear.

26 And I would also like to say one thing in
27 response to the question about reasonably could
28 have known or the example, which is I think the

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1 building that was approved for a certain number
2 of feet that was built taller.

3 I mean, this is what the third complaint
4 says, "We reasonably couldn't have known because
5 we asked the city of Berkeley and the city of
6 Berkeley was asking UC. And we're going to wait
7 until the city of Berkeley hears from UC and
8 tells us what UC tells them," when he just sat
9 here and said, like any person would say, they
10 went to the website and looked at all EIR's for
11 the past ten years.

12 Well, you know, it's also on their
13 website, which any person can do, school starts
14 every year. Every year there's a first day of
15 class. Every year there's a number of students.
16 UC puts that out there. Just like they put out
17 all kinds of information.

18 So you know, we're just stuck with a very
19 confusing status of the pleading, and we think
20 that discovery, besides it being improper and not
21 allowed in the Western States and not asking
22 leave of the Court and all the reasons we brought
23 in our papers in opposition that's improper, we
24 don't think that it should be allowed.

25 And we will file a demurrer to the third
26 complaint, and we don't think it complies with
27 the Court order.

28 THE COURT: All right. Mr. Lippe, is

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1 there anything you might want to add?

2 MR. LIPPE: Just to respond to a couple
3 of things Mr. Cremin said.

4 UC doesn't put it out there. That's the
5 problem. It's not --

6 THE COURT: Well, today's ruling is going
7 to have nothing to do with whether or not UC
8 actually announced their decisions on their
9 website and you missed the Statute of
10 Limitations. That may be a factual
11 determination that the Court's going to have to
12 make before the end of the day, but we're not
13 there yet.

14 MR. LIPPE: Okay. The alternative claim
15 in the complaint is a declaratory relief claim
16 based on a pattern and practice.

17 THE COURT: You know, their declaratory
18 relief is absolutely, totally, 100 percent the
19 same as your CEQA claim.

20 I looked at what you wrote in the third
21 amended complaint, and I thought, "Well, it's
22 just totally surplus. It's the same exact
23 claim." It's just you want a declaration that
24 they're violating CEQA.

25 Frankly, I know what it's going to be,
26 belt and suspenders, but I don't think that's
27 anything more than belt and suspenders.

28 MR. LIPPE: I don't think I have any

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1 further comment, your Honor.

2 THE COURT: All right. Well, it's
3 inescapable to me that the discovery sought to
4 be enforced here is way, way overbroad under the
5 facts of the case, and I have to deny the motion
6 to compel.

7 Sorry about that.

8 But it's just in -- there's good news
9 though. The good news is that starting in
10 January you will have a new CEQA, Judge.

11 MR. LIPPE: That's not good news, your
12 Honor. We've been there before in this county,
13 and it's not good news.

14 MR. CREMIN: I would occur with that, if
15 we can agree on one thing.

16 MR. LIPPE: Well, your Honor, this may be
17 a case management note.

18 We filed a CEQA case. We elected to
19 prepare the record. Usually the Local Rules used
20 to have more specific provisions, now they don't,
21 but the agency provides the documents for the
22 record. That is -- that has not been done.

23 THE COURT: But you usually have a
24 discrete decision by the agency, whether it's
25 the University or the city of Berkeley or
26 whomever, and it's easier to figure out what
27 those documents are.

28 If it's an informal determination, then

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1 I'm -- I don't know what you are going to find.
2 And I can see the agency not being clear about
3 what they ought to be producing.

4 MR. LIPPE: Well, with respect to --

5 THE COURT: I might -- I have no secret
6 way of figuring out how you figure out what the
7 administrative record is in an informal decision
8 making discretionary determination.

9 MR. LIPPE: Well, that's the request.
10 Five and six simply asks for those documents
11 that relate to the decision making that was
12 made, informal though it was.

13 THE COURT: Well, maybe you can focus a
14 different question a little bit more narrowly so
15 that you can have it apply to the increase of
16 students that you are talking about.

17 But that's going to be left for another
18 day. Today's ruling is that it's denied.

19 MR. LIPPE: Thank you, your Honor.

20 MR. CREMIN: And, your Honor, just one
21 follow-up question.

22 THE COURT: We'll send out the order.

23 MR. CREMIN: That's what I was going to
24 ask.

25 Thank you.

26
27 (Recess taken at 4:43.)

28 --o0o--

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REPORTER'S CERTIFICATE

I, RAQUEL GIANA SHARP, RPR, CSR #10619, a
Certified Shorthand Reporter in and for the State
of California, do hereby certify:

That the foregoing proceeding was taken
down by me in shorthand at the time and place
named therein and was thereafter reduced to
typewriting under my supervision;

That this transcript is a true record of
the proceedings and contains a full, true and
correct record of the proceedings which took
place at the time and place set forth in the
caption thereto as shown by my original
stenographic notes.

I further certify that I am not a
relative or employee of any attorney of the
parties, nor financially interested in the
action.

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

EXECUTED this 13th day of December, 2018

Raquel Sharp

RAQUEL GIANA SHARP, RPR, CSR #10619

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A

able 11:16 13:28 17:10
absolutely 13:25 32:18
accepted 25:21
account 10:24
achieved 4:11
acre 8:6,6,8
acres 8:4,6
action 18:18 30:22 35:19
actual 13:20 17:11
add 11:16 18:28 32:1
additional 12:15 13:16
address 19:22
addressed 23:20
adequately 30:22
administrative 13:15,20
13:23 16:28 26:12
34:7
admission 25:20
admitted 14:4
admittedly 20:19
adoption 24:5,7,10,20
afternoon 3:11,12
agency 22:20 33:21,24
34:2
ago 29:12
agree 23:23 27:18 33:15
agreed 22:15 26:24
Alameda 1:2 28:5
alleged 22:26
allowed 31:21,24
alternative 32:14
alternatives 4:6
amend 29:3
amended 4:1 5:17 7:7
15:24 18:19 26:26,27
29:6 32:21
amounted 23:2
amphitheater 9:2 19:26
analogy 4:14 11:25
18:25
announced 32:8
annual 16:9,11
answer 16:19 23:4,7
anticipated 4:28 6:8
anybody 18:9
Anyway 5:28
apparent 19:7,23,25,27
20:1
appearances 1:26 3:8
appeared 28:5
apple 12:26
applies 21:27
apply 34:15
applying 10:16,27
apprized 15:28
approval 4:18 28:19
approved 10:20 12:10
31:1
argue 6:1
arts 25:16
aside 6:5 7:5 17:13
asked 11:8 19:12 31:5
asking 31:6,21
asks 34:10
asserted 18:18
attached 25:21
attention 30:15

B

B 9:14
back 5:21 7:6 8:10 14:13
15:4 16:4 21:15 24:23
27:20 30:11
backdrop 5:28
based 10:25 12:25 18:12
32:16
baseline 4:27,28 5:3,8
6:6,6 7:3
basis 9:16
bear 13:5
beginning 29:28
believe 30:23
belt 32:26,27
benefit 1:8
Berkeley 1:18 3:17 15:25
16:1 20:24 25:27 31:5
31:6,7 33:25
Berkeley's 1:6 3:5,10
beyond 11:15 15:3 16:4
big 16:14
bigger 7:21 11:25 14:8
19:24
biggest 3:21
bit 34:14
bites 12:26
boundaries 21:1
breadth 19:11 21:4
brief 13:5
bring 9:11 13:4,11 30:14
broad 19:14
broadness 23:19
broken 18:2
brought 15:21 16:2
20:26 31:22
build 4:16 8:2 12:14
building 4:16 6:19 7:20
7:26,28 14:7 19:4,7
31:1
buildings 13:28 22:14
built 4:18 6:20 7:28 9:4
9:21 18:27 19:25 31:2
burden 22:10

C

C 2:1 3:1
C's 9:14
CA 2:5,10
California 1:1,7,13,15,18
1:24 3:14,16,17 6:13
35:5,21
call 27:12
calls 18:9
campus 20:11
capacity 1:14,16
caption 35:14
care 22:13
careful 29:18
carefully 26:16 29:7,7,14

Carol 1:16 3:16
carrying 22:20
case 3:23,26 5:19 6:1
7:9,20 8:20,20,26 9:14
10:14 11:4,21 13:8,10
13:11 14:6,7,10 15:16
15:18,22 16:25,26,26
17:23,27 18:16 19:21
22:28 23:15 26:21
27:13,14,22,25,28
28:1,24 29:9,21 30:18
33:5,17,18
cause 18:18 22:24 30:22
CEQA 3:26 4:4 5:6 6:21
6:28 7:8,24 8:20,26
9:17 10:15,16,17,19
10:27,28 11:4 12:7
13:27 16:28 21:25,28
22:18,20,24 26:21
27:13,21 28:1,18,20
29:9,9,21 32:19,24
33:10,18
certain 4:10 5:1 31:1
certainly 16:10 23:16
CERTIFICATE 35:1
certification 24:4
Certified 35:4
certify 35:5,16
challenge 3:26
challenging 29:10
chance 11:2
Chancellor 1:17 3:16
chances 12:28
change 9:9 12:7 22:25
changed 11:24 30:18,23
changes 8:28 20:9 21:23
22:19
Christ 1:16 3:16
citizens 12:5 21:2
city 8:4 15:24 16:1 20:24
31:5,5,7 33:25
civil 27:28
claim 4:4 12:6,6 30:6,9
32:14,15,19,23
claims 16:28
class 31:15
clear 6:8 18:17 22:17
34:2
clearly 7:7 10:16 22:9
client 15:28
clients 10:5 11:7 15:22
Code 6:12
come 5:25 29:8
comfortable 26:11
comment 19:23 33:1
comments 6:4
commitment 29:11
community 10:23
compel 30:11 33:6
compensate 22:11
complaint 4:1,3 5:18 7:7
15:24 16:2 18:19 29:3
29:6 30:12,17 31:3,26
32:15,21
complied 28:11
complies 31:26
component 7:1
components 11:2

concept 6:7
concern 29:23
concerned 12:5 29:20
concerns 9:1 19:26 21:2
26:18 29:19
concert 19:27
conclusion 29:8
confer 29:1,5
conferred 28:27 29:16
confused 6:26
confusing 31:19
connection 24:7,9
conservative 12:22
contains 35:11
continue 10:22
continuing 30:25
controls 27:14
corporation 1:8
correct 9:25 10:5 12:4
14:12 24:14 35:12,22
correctly 27:16
cost 22:13
Costa 9:1 12:5 21:2
costs 22:12
counsel 3:7 13:4
county 1:2 33:12
couple 18:28 27:4 32:2
course 4:22 8:11
court 1:1 3:5,18 6:23
7:18,27 8:21 9:6,10,20
9:26 10:7 11:17,27
12:12 13:10 14:10,13
15:9,13,16,19,21 16:8
16:12 17:4,16,24 18:1
18:8,14 20:5 21:9 22:1
22:22,27 23:7 24:1,15
24:21,23 25:3,6,11,23
25:28 26:7,12,19,27
27:8 28:5,16 29:7,19
29:26 30:9,16 31:22
31:27,28 32:6,17 33:2
33:23 34:5,13,22
Court's 8:19 11:22,25
18:11 19:22 23:14,23
30:15 32:11
Courthouse 1:24
creep 20:13
creeping 20:8
Cremin 2:7 3:12,13 25:3
25:5,9,18,26 26:5,9,20
27:3 30:4,24 32:3
33:14 34:20,23
CSR 1:28 35:3,28
Currently 27:2

D

D 3:1
date 10:3 27:6
day 15:28 31:14 32:12
34:18 35:24
days 5:16 10:3 14:13,17
16:2 17:25 20:27 27:9
27:10 28:24 29:13
deal 3:18
dealing 23:18
DECEMBER 1:23 3:2
35:24
decides 16:12,17 25:6

decision 7:13,15 9:5,22
9:27 10:26 11:24,28
12:2 13:17 14:22,23
14:25 15:7,7 16:6 17:2
17:18,21 18:6 21:3,24
25:13,17,24 29:10
30:20 33:24 34:7,11
decision-makers 13:17
decision-making 14:3
decisions 7:13 10:9,11
10:15 11:13,15 16:21
17:1 21:18 24:28
25:18 32:8
declaration 32:23
declaratory 32:15,17
declare 35:20
DEFENDANT 2:7
Defendants 1:20
defending 16:25
definition 3:26
deliberation 29:18
demands 22:7
demonstrate 14:25
demur 26:28 27:1
demurrer 15:18,20 20:28
26:23 28:16 29:1,18
31:25
denied 34:18
deny 33:5
DEPARTMENT 1:4
described 12:17
describing 30:22
description 7:2
determination 5:12,16
5:17 23:1 32:11 33:28
34:8
determine 4:24
determined 29:28
development 3:25,27
4:9,15,27 5:8,10 6:15
7:23 19:9 22:5 24:10
24:12,13
different 9:4 34:14
difficult 19:10
difficulty 3:19,21 18:22
direction 9:3,4,9
directly 21:21,27
disagree 22:22
disclosed 6:9 9:2 14:15
14:16
disclosure 7:10 16:6
discover 17:10
discovered 8:15 17:6,8
17:12
discovery 5:24 8:23
10:13 14:28 15:1
16:19 17:11 18:4 23:5
26:16 27:3,6,8,22,26
28:12,28 29:21 30:19
31:20 33:3
discrete 33:24
discretionary 13:17 23:1
34:8
discussion 18:20 26:15
document 7:24 10:17,28
14:2 18:4 24:8
documentary 10:26 11:4
16:27

documents 3:24 5:20
7:14 10:10,19 11:8,10
13:16,27 14:24 16:20
16:21 18:17 19:13,18
19:20 21:7,17 23:10
23:15,21 27:16 28:10
28:14,20,26 30:12
33:21,27 34:10
doing 22:14
download 14:1
draw 4:14 16:17 26:3

E

E 2:1,1 3:1,1
easier 33:26
east 15:14
echoes 28:15
effect 28:4
EIR 4:13,17,21 6:10 7:9
7:22 9:23 21:6,10,15
23:22 24:4
EIR's 31:10
either 13:18 16:25 30:6
elected 11:7 28:8 33:18
Emeryville 8:2,5
employee 35:17
enacted 22:2
enforce 19:15
enforced 33:4
engineering 25:15 26:2
enrolled 14:9
enrollment 4:10,12 5:1,4
5:13 6:14,17,20 9:18
9:22 10:2 11:14 14:15
14:17,26 15:26 16:7
16:10,13 17:25 18:9
19:2 21:8,19,20,28
22:18,18 23:27
entirely 3:22
environment 22:25
environmental 6:6 7:25
10:23 20:6 21:19,24
23:28 24:8
escalating 30:15
ESQ 2:2,7
establishes 12:13
estimated 4:13
evaluate 4:23 9:18 13:13
14:14
evaluated 7:22
evaluates 7:25
event 16:9
events 24:16
everybody 16:15
evidence 5:24 11:17,17
12:15 13:2,7,12,14
26:11
evidentiary 9:16 10:14
exact 32:22
exactly 4:3 13:23 16:18
23:1
example 30:28
exceed 7:15
exceeded 4:20 5:4 8:16
17:25 18:23 19:8,8
EXECUTED 35:24
exist 14:25
existed 22:19

exists 30:13
expedition 27:24
expressed 29:19,23
extra 11:16 19:3,4 22:12

F

facing 9:3,4 15:14 19:28
fact 9:20,21 12:16 18:23
22:6
facts 11:26 15:20 18:12
19:2 33:5
factual 15:17 18:10
20:14,18 32:10
failure 9:17 12:7
fair 12:19 21:13 30:4
fall 8:24
fancy 16:14
far 21:15 30:10
fatal 26:25
feel 26:10
feet 4:16,19 31:2
field 13:13,14,22,22
figure 3:19 9:26 14:21
15:19 18:15 20:23
22:28 28:18 33:26
34:6
figured 20:25
figuring 19:11 34:6
file 10:3 11:5 29:17
31:25
filed 5:15 14:10 21:11
27:12 33:18
files 29:6,12
filing 3:27 27:10
fill 10:13
fill-out 8:3
finally 20:21
financially 35:18
find 30:24 34:1
first 4:8 11:5,19,22 14:14
15:9,13 23:9 31:14
fishing 27:23
five 7:21 8:6 24:18 34:10
flaws 26:25
Flr 2:4
flush 13:21 18:11
focus 6:4 34:13
follow-up 34:21
foot 12:14,16 18:26,27
19:6
foregoing 35:6,22
formal 9:5 10:11 15:7
16:5 21:24
formally 26:10
forth 35:13
forward 10:3 13:1 16:25
found 5:17,21 10:6
Francisco 2:5
FRANK 1:3
frankly 18:21 32:25
full 35:11
further 4:17 33:1 35:16
fuzzy 22:28

G

G 3:1
gap 10:14

getting 6:27 8:19,21
16:19
GIANA 1:28 35:3
go 5:13,20 11:15 12:27
13:1 14:13 15:3 16:4
16:15 17:20 26:2
27:20 29:24
goal 4:9,11
goes 24:23
going 4:16,25 5:13 6:19
7:6 8:2,3,4,5,24 12:14
13:4 14:4 15:17,19
16:13 17:14,19,20
18:24 20:23,25,26
21:14 22:13 23:3 25:7
25:14,24 26:1,28 27:1
27:4,26 30:11,16 31:6
32:6,11,25 34:1,17,23
good 3:11,12 23:4 33:8,9
33:11,13
gradually 20:7
great 3:18
guess 16:8
guessing 30:6

H

happened 7:12 8:1 17:5
17:14 23:11 24:16
happens 16:11
head 14:19 20:22
hearing 12:27
hears 31:7
held 10:24
helpful 6:3
highly 17:22
history 7:15 10:10
honestly 30:24
Honor 3:12 6:2,26 12:20
17:28 21:14 22:15
28:21 33:1,12,16
34:19,20
HONORABLE 1:3
housing 20:10

I

identified 8:27,27 26:25
28:17,19
identify 28:9,20,26
ignored 5:2
imagining 19:1
immediately 24:16
impact 7:25
impacts 10:23 20:6
21:20,25 23:28
implementation 14:22
important 28:22
impose 22:10
improper 31:20,23
include 6:22 7:10
included 4:28 7:1
increase 5:1 6:8 7:2,10
9:18,22 10:1 11:14
16:6 21:8,18 34:15
increased 4:12
increases 10:21,22
20:21 21:20 22:18
23:27,28

increasing 4:9 20:2
incrementalism 20:8
inescapable 33:3
informal 7:13 11:13,16
15:6 18:6 33:28 34:7
34:12
information 15:26 20:15
25:2 31:17
intended 4:7,20 10:13
13:24
interested 35:18
internal 26:12
investigate 20:12
investigation 15:23
invoking 10:15
irrelevant 21:10
issue 4:3 19:3 27:7

J

Janet 1:13 3:14
January 33:10
Judge 1:3 29:22 33:10
Judge's 6:3
judgment 12:24

K

kind 5:18,24 9:13 11:28
12:21 20:8 22:11
kinds 31:17
knew 9:8 18:1 20:26
know 7:13 8:7 10:5,8
11:11,14,20 13:3,9,18
16:14 17:19 18:3 19:2
20:19 23:7,11,12,12
23:13,18,21 26:11,17
27:24 28:12,25 29:13
29:24 30:1 31:12,18
32:17,25 34:1
known 9:9 13:18 30:28
31:4

L

language 12:4,13
larger 6:18 7:26
launch 27:26
law 2:3 4:23 13:7 15:5
22:20
law's 22:16
laws 35:21
lawsuit 5:15 9:11 10:4
10:25 13:1 16:3 20:27
21:11,22
laying 7:15
lead 5:23
learn 13:6
leave 31:22
left 34:17
Let's 20:23
level 4:10 5:1,3 17:26
liberal 25:16
library 4:17,18 7:20
11:25 12:15,17 18:25
18:26 19:24
Limitation 19:5
limitations 4:24 9:7 15:6
17:3 19:20 32:10
limited 13:13,14,22

limits 28:28
linchpin 7:9
line 16:17 26:4
Lippe 2:2,3 3:9,9 6:1,2
6:25 7:24 8:18,26 9:11
9:25 10:5,8 12:19
13:21 14:12 15:5,11
15:16 16:10,18 17:16
17:27 18:3,10 19:22
20:7 21:13 22:15,23
23:6,9 24:14,18,22,25
29:16 30:2 31:28 32:2
32:14,28 33:11,16
34:4,9,19
listening 26:15
litigate 11:20
litigation 18:4
little 29:20 34:14
local 22:12 28:4,7,13
33:19
long 3:28 20:20 24:28
long-range 4:15,27 5:10
6:15 22:4 24:6,10,12
24:13
longer 30:13,19
look 11:10 12:4 17:11
21:19 26:19 28:22
looked 10:18 31:10
32:20
lot 12:28 16:16 28:6
LRDP 4:8 6:9,16 7:8
10:20 12:10,13 21:6
24:20

M

making 5:12 7:15 10:26
34:8,11
management 33:17
mandate 13:10 18:16
19:21 27:14 28:1
mark 14:23
math 27:9
matter 30:21
mean 14:7 24:3,13 25:9
26:9 27:18 30:7 31:3
meant 20:2 26:10
meet 28:27 29:1,5
merits 12:27
Mesa 9:1 12:5 21:3
met 29:16
methodical 12:21
Meyers 2:8
mind 6:7
missed 32:9
Mission 2:4
mixed 6:27
moment 30:10
moot 8:20,22 30:20
motion 3:20 12:24 13:21
13:24 25:10 26:16
29:21 30:11 33:5
move 16:25
municipalities 22:12

N

N 2:1,2 3:1
named 35:8

Napolitano 1:13 3:15
narrowly 34:14
Nave 2:8
necessary 23:24
need 11:3,15 12:12,18
14:27
neighborhood 20:9
neighborhoods 1:6 3:5
3:10 20:10
new 12:2 33:10
news 33:8,9,11,13
noise 20:12
non-noticed 11:13
non-related 5:23
nonprofit 1:7
note 33:17
notes 35:15
notice 9:5,10 10:12 15:8
15:13 20:6,7,16 25:1
noticed 17:2 18:7
number 7:4,6,17 17:19
31:1,15
numbers 5:14 6:27 22:8

O

O 3:1
o0o-- 2:12 3:3 34:28
o0o--- 1:5
Oakland 1:24 2:10
oath 26:7
objection 5:21,27
obligation 30:8
obsolete 12:1
obviously 29:13
occur 33:14
occurred 14:23 23:2
October 15:27 16:5 17:6
offer 25:20
offered 25:20
offers 25:24 26:1
Offices 2:3
Oh 8:21
okay 3:18 8:7,8 20:22
21:13 25:3,14 26:1
27:7 29:4 30:24 32:14
once 11:12
ongoing 12:9
opposed 20:10
opposing 13:4
opposition 13:5 31:23
option 5:9
options 11:23
order 31:27 34:22
orders 28:16
original 8:10 19:8,8
35:14
ought 34:3
outside 11:10
overbroad 5:22 23:26
24:27 27:17 33:4
overwhelmingly 19:14

P

P 2:1,1 3:1
P.M 3:2
page 1:26 10:19
paper 13:26 17:22

papers 31:23
part 5:8 6:10,11,14,17
7:4,22 13:19 25:26,26
particular 25:8
particularity 26:24
parties 20:11 35:18
pattern 32:16
penalty 35:20
people 16:16 17:9 20:7
20:12,13,22 25:14,15
26:2
percent 32:18
period 9:7 20:19 24:19
periods 23:25
perjury 35:20
permit 16:13
permitted 5:3
person 20:3 31:9,13
petition 11:6 25:22
26:26,28 27:11,12
28:10 29:3 30:18
petitioner 28:8 30:7,21
Petroleum 5:26 8:25
19:19
ph 28:6
physical 22:25
picture 12:1
piece 13:26 17:22
place 26:4 35:7,13,13
placed 26:22
plain 12:12
plaintiff 1:9 2:2 28:8
plaintiffs 3:9,23 20:16
plan 3:25,27 4:15,27
5:10 7:23 8:10,13
12:18 19:9 22:5 24:6
24:10,12,13
planned 9:2 29:17
planning 6:15
plans 6:14,17 21:28
play 12:11
played 19:28
pleading 21:1 22:26
28:25 29:21 30:1
31:19
pled 26:22
plus 5:3
point 5:13 7:16 11:9
14:15 27:16 28:3
position 30:6
possibility 4:26 11:27
possible 4:6 23:16
possibly 4:6 8:24 21:11
practice 13:7 32:16
preceding 23:21
preparation 21:6,9
prepare 11:7 28:9 33:19
prepared 9:15 21:18
24:6,9
preparing 11:6
president 1:14 3:15
PRESIDING 1:3
prior 14:17,22
problem 32:5
problems 29:2
proceed 13:3
proceeding 35:6
proceedings 1:22 35:11

35:12
process 6:15 25:27,27
26:13 28:21
producing 34:3
production 18:17 19:13
27:15 30:12
program 6:18,21,24,28
project 6:10,11,18,21
7:1,1,8 8:27,28 11:24
12:8,9 22:21 28:17
29:9,11
projection 5:3
promised 18:24,26
proper 9:24 15:2 18:13
18:15
properly 26:22
propounded 29:27
prosecuting 16:26
prove 9:16 13:8
proved 11:3
provide 13:24 15:26 22:7
provided 13:26 15:27
provides 33:21
providing 26:11
proving 11:2
provisions 33:20
prudent 13:3 23:17
public 1:7 6:12 9:5,28
10:12 15:8 16:6 22:20
25:1
purposes 22:26 26:14
put 9:23 30:5,9 31:16
32:4
puts 31:16
putting 17:13 23:15

Q

question 7:19 8:19 9:7
9:12 12:20 14:26
15:17 16:18 17:13
18:10 19:16,17 20:3
20:14 23:4,8 25:4,11
30:27 34:14,21
questions 20:18

R

R 2:1 3:1
ran 17:24
Raquel 1:28 35:3,27,28
read 4:2 22:6 24:24 29:7
29:14
reading 4:2 22:1 27:19
30:1
reads 29:7
real 19:10 23:11
really 8:19 11:5 16:24
17:10,17 19:13 20:5
21:5,21 26:17 27:24
reason 12:3
reasonable 14:24 20:2
reasonably 9:8 17:12
20:16,17 22:24 30:27
31:4
reasons 31:22
receiving 30:8
Recess 34:27
record 9:15 11:4,10,11
11:12,13,19 13:15,20

13:23 14:6 16:21,27
16:28 28:14 33:19,22
34:7 35:10,12
records 10:26 11:6
13:19
reduced 35:8
referenced 11:28 15:23
references 14:3
referred 24:11
referring 24:1
regard 19:5
Regents 1:12 3:6,13
10:9,24 13:26
regroup 13:1
relate 21:18 24:22 34:11
related 3:25 5:23 28:10
relating 21:7
relative 35:17
relevant 17:15,23 19:19
21:21,22 30:19
relief 32:15,18
remedies 8:16
remedy 7:23,24,26 9:13
remember 22:3
remotely 17:15
remotest 5:25
repealed 28:6
Reporter 35:4
REPORTER'S 1:22 35:1
reports 22:11
request 5:20 15:25
18:16 19:12,15 21:5
23:20 27:4,15 28:22
34:9
required 6:14,16 10:28
28:9
requires 22:7
Resources 6:12
respect 23:20 34:4
respond 29:14,24 32:2
respondent 28:8
respondents 3:13
response 28:15 30:27
review 12:7
RG18902751 1:10
right 3:7 10:7 11:18
13:25 15:9,11 31:28
33:2
ROESCH 1:3
RPR 1:28 35:3,28
rule 18:2
Rules 28:4,7,13 33:19
ruling 26:23 30:17 32:6
34:18
run 14:18
running 30:2

S

S 2:1 3:1
San 2:5
sat 31:8
Save 1:6 3:5,10
saw 4:5
saying 25:13 30:17
says 6:13 8:13 17:22
21:3,27 24:3 25:28
29:3 31:4
scenario 18:5

school 16:15 25:15
31:13
schools 25:16
scrap 17:19
second 4:26 6:5 26:26
29:6
secret 25:1 34:5
Section 6:12
see 10:18 15:3 16:14
17:16 19:25,27 23:10
34:2
seek 18:16
semester 16:11 25:8
send 26:1 34:22
sent 25:24
series 13:27
served 27:6,8,15,22
serves 28:12
set 6:5 7:4 35:13
setting 6:7
share 26:17
Sharp 1:28 35:3,27,28
shorthand 35:4,7
shot 12:22
Show 16:20
shown 35:14
simply 34:10
sit 3:22 5:5 26:5 29:20
situation 15:12
six 24:18 34:10
size 8:7
small 20:21
somebody 11:7 14:26
17:21 26:3,3
Sorry 27:10 33:7
sort 5:28 8:1,23 28:15
sought 3:24 33:3
south 15:15
specific 5:16 6:19,20
13:27,28 24:19 33:20
specifically 23:26
square 4:16,19 12:14,16
18:26,27 19:6
stadium 15:14
stand 26:20
standard 22:20
standpoint 20:28 21:1
start 11:6 21:15
started 19:4 20:12
starting 16:20 33:9
starts 19:3,6 31:13
state 1:1 3:8 35:4,21
stated 4:27
statements 22:17
states 5:26 7:7 8:25
19:19 27:14 31:21
status 31:19
statute 4:23 9:6,12 14:18
15:5 17:3,24 19:5
21:26 22:2,6 32:9
stenographic 35:15
step 11:19 23:9
stipulate 29:4
stood 20:22
stories 18:28 19:3,4
Street 2:4,9
stuck 31:18
student 4:9 20:9

students 5:14 6:9 7:2,11 7:16 11:26 14:4,8 25:6 25:19 31:15 34:16

studied 4:21

subject 21:28 22:17 28:18,19

subjected 21:25 22:24

subsequent 22:4

substance 25:12

succeed 12:27

suggestion 23:14

Suite 2:9

summary 12:24

SUPERIOR 1:1

supervision 35:9

supplemental 9:23

supports 5:18

suppose 12:25

Supposed 29:5

supposition 18:12

Supreme 9:6

sure 4:7 5:5 14:27 17:8 18:1 19:3 23:3 25:5

surplus 32:22

suspenders 32:26,27

system 21:27

T

T 1:16

tailored 23:26

take 22:13

taken 34:27 35:6

talk 28:28

talking 7:27 8:12,13 11:23 18:5 34:16

talks 12:5

taller 31:2

tear 8:17

tell 4:2,5 17:4 28:13 29:2

tells 27:23 31:8,8

ten 17:20 29:13 31:11

tend 12:21

terms 9:13 14:2 21:4 22:19 23:17,19,24

testify 26:5

testifying 26:8

Thank 6:2,26 34:19,25

theories 29:27,28

theory 5:18 27:25

thereto 35:14

thing 8:11 11:5 28:3 30:26 33:15

things 19:11 21:22 22:27 27:4 32:3

think 6:5,7 7:3,4,6 8:18 11:1,1,9 12:3,19 18:11 18:12 21:13 22:16 23:20,25 24:26,27 25:9 26:24 28:21 29:26 30:5,10,28 31:19,24,26 32:26,28

thinking 14:19

third 4:1 5:9,17 7:7 11:27 15:24 18:19 26:27 29:12,14 31:3 31:25 32:20

Thomas 2:2,3

thorough 23:17

thought 6:23 32:21

thoughts 6:4

thousands 25:19

three 4:5 8:4 27:12,13,21 29:27

THURSDAY 1:23 3:2

tied 24:15

Tim 3:13

time 3:27 5:2 9:7 10:7 19:11 20:13,19,21 23:24 24:19,28 28:5,7 35:7,13

times 7:21

TIMOTHY 2:7

today 3:22 5:5 24:17 26:11,14 27:8 28:23 29:19 30:11

today's 25:10 32:6 34:18

told 28:23,24

Tom 3:9

top 14:19

totally 5:26 32:18,22

transcript 1:22 35:10

trash 20:11

true 20:20 24:25 35:10 35:11,22

try 13:8 14:21 15:19

trying 3:19 16:19 18:11 18:14 22:28

turn 16:16

two 7:4 12:26

typewriting 35:9

U

UC 15:25 21:27 22:17 25:27,27 26:13 31:6,7 31:8,16 32:4,7

ultimately 25:19

uncertain 3:22 29:22

unclear 30:25

underpinning 4:4,13 30:17

understand 16:22 20:4 25:10

Understood 23:6

university 1:12,15,17 3:14,15,17 4:10 5:2,12 6:13 22:7,10 25:7 33:25

university's 22:14

use 18:25

usually 33:19,23

utterly 21:10

V

valid 5:26

vehicle 15:2

venue 9:24

versus 3:6

violating 32:24

violation 5:6 9:17

vs 1:10

W

wait 31:6

want 26:2 28:3 30:14 32:1,23

wanted 18:28

wants 16:15

Wasn't 18:8

way 5:25 10:24 11:25 13:3,6 15:4 18:16 24:23,24 27:19 33:4,4 34:6

we'll 8:8 11:14 15:20 29:4 34:22

we're 4:15 7:27 8:2,3,12 8:13 9:13 11:9,18,18 15:19 16:19 17:19,20 18:5 23:18 25:14 26:1 30:7 31:6,18 32:12

we've 8:26,27 10:18 28:23 33:12

web 10:19

website 14:1 31:10,13 32:9

week 29:12

weeks 27:13,13,21

went 5:2 8:10 19:2 20:24 31:10

weren't 13:19

Western 5:25 8:25 19:19 27:14 31:21

witnesses 13:12

words 15:7 18:6

works 29:5

world 23:11

writ 18:15 19:20 27:13 28:1

writings 24:4,5,6,8

wrong 16:8 27:10

wrote 32:20

X

X 5:13 8:13,14,16

Y

Y 8:14,15

year 6:20 22:3 25:8 31:14,14,15

years 17:21 31:11

yesterday 29:17

Z

0

1

1 1:19

1,650 6:8 7:2

10,000 4:16 12:14 18:26

100 32:18

10619 1:28 35:3,28

12th 2:4,9

13th 35:24

15 6:25

15-year 6:23

1500 2:9

1650 7:10,16 9:19 17:19

180 5:15 10:3 14:13,17 16:2 17:25 20:27

180-day 9:10 14:23 17:2

18th 27:9

2

20 1:19

20-year 6:21

2005 3:25,27 4:8,26 5:10 5:21 6:9,10 10:20 11:24,28 12:10 14:5 15:4 16:7 21:6,10,16 22:4 23:21 24:13,16 24:20 27:20

2006 17:5,14,18

2007 22:2

2008 22:3

2009 22:3

201 2:4

2010 18:27 22:8

2011 22:8

2012 22:8

2013 22:9

2015 18:28

2017 15:27 16:5 17:7

2018 1:23 3:2 14:11 21:12 35:24

2020 6:16,27 7:8 10:20 24:11,20

21 27:10

21080.09 6:12 21:26

23 27:9

24 1:4

3

30 28:24

30th 15:27

4

4:00 3:2

4:43 34:27

5

50,000 4:19 12:16 18:27 19:6

555 2:9

6

6 1:23 3:2

7

8

8,000 7:17 17:20

800 26:1

9

94105 2:5

94607 2:10

SUPERIOR COURT IN THE STATE OF CALIFORNIA
FOR THE COUNTY OF ALAMEDA

- - -

SAVE BERKELEY'S NEIGHBORHOODS,)
)
Plaintiff,)
)
vs.)
)
THE REGENTS OF THE UNIVERSITY OF)
CALIFORNIA, JANET NAPOLITANO,)
CAROL T. CHRIST,)
)
Defendants.)
)

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Case No.:
RG18902751

TRANSCRIPT OF HEARING
OAKLAND, CALIFORNIA
JANUARY 24, 2019
BEFORE HON. NOEL WISE

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SUPERIOR COURT IN THE STATE OF CALIFORNIA
FOR THE COUNTY OF ALAMEDA

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| SAVE BERKELEY'S NEIGHBORHOODS, |) | |
| |) | |
| Plaintiff, |) | |
| |) | Case No.: |
| vs. |) | RG18902751 |
| |) | |
| THE REGENTS OF THE UNIVERSITY OF |) | |
| CALIFORNIA, JANET NAPOLITANO, |) | |
| CAROL T. CHRIST, |) | |
| |) | |
| Defendants. |) | |
| _____ |) | |

TRANSCRIPT OF HEARING, taken on behalf of
Defendants, at 1221 Oak Street, Department 24, Oakland,
California 94612, commencing at 3:55 p.m., Thursday,
January 24, 2019, before Nancy E. Presant, CSR No. 9906.

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17
18
19
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21
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23
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OAKLAND, CALIFORNIA; THURSDAY, JANUARY 24, 2019

3:55 P.M.

- - -

THE COURT: Because of the court reporter situation, I will start with Save Berkeley's Neighborhood versus The Regents, Case Number RG-18902751.

Can I get an appearance, please, from petitioner's counsel?

MR. LIPPE: Good afternoon, Your Honor. Tom Lippe for Save Berkeley's Neighborhoods.

MR. CREMIN: Good afternoon, Your Honor. Tim Cremin on behalf of all the respondents, defendants, Regents of the University of California, President Napolitano of the University of California, and Chancellor Christ of the University of California Berkeley.

THE COURT: Thank you. Please go ahead and take a seat.

So I take it, Counsel, you would like to be heard?

MR. LIPPE: Yes, Your Honor, thank you, and thank you for the tentative ruling. It helps me focus my comments on what the Court might be thinking.

I would like to ask the Court to take another look at the tentative ruling on a couple of different grounds, and to set the context for my argument, one, I want to talk about CEQA projects that are long-term programs as opposed to a one-off type of construction

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1 project, and that would describe the 2020 LRDP. It's a
2 15-year program that includes the building of buildings,
3 and the enrollment of students, and the 2020 LRDP in this
4 case included as a project component an increase in the
5 enrollment of students of 650 students.

6 So the petition does discuss those allegations
7 that it's a program-type CEQA project, and it cites the
8 relevant CEQA guidelines, but I didn't actually brief
9 this issue in the opposition brief on this demurrer. I
10 did brief it in the opposition on the previous demurrer.
11 This one didn't seem to raise the issue in the same way,
12 but Mr. Cremin's reply brief and the Court's tentative, I
13 think, bring the distinction between a program and a
14 one-off project front and center to the analysis.

15 So just briefly to recap the CEQA Guideline
16 15168, which is cited in the petition describes when a
17 program EIR is appropriate, a program EIR is an EIR which
18 may be prepared on a series of actions that can be
19 characterized as one large project and are related either
20 geographically or as logical parts in the chain of
21 contemplated actions so that describes the LRDP. That's
22 what we're dealing with.

23 I also cited in the previous brief the
24 Stanislaus National Heritage Project versus County of
25 Stanislaus case at 48 Cal.App.4th 182, jump cite 195
26 because it provided a good --

27 THE COURT: Can I either have you repeat that or
28 just get it read back, the citation?

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1 MR. LIPPE: I'll read it more slowly. I
2 apologize. Stanislaus Natural Heritage Project versus
3 County of Stanislaus, 48 Cal.App.4th at 182, specific
4 page is 195.

5 It's a good case for providing background
6 discussion on how program EIRs work for program-type CEQA
7 projects, but specifically to this case, Public Resources
8 Code Section 21080.09 requires that UC's long-range
9 develop plans include enrollment increases as part of the
10 CEQA project, and I would point the Court to subdivision
11 (b) which is cited in my brief:

12 "Environmental effects relating to
13 changes in enrollment levels shall be
14 considered for each campus in the
15 environmental impact report prepared for the
16 long-range development plan for the campus."

17 And alluding to the tentative ruling, it doesn't
18 say to do it year by year or annually or every two
19 semesters using a two-semester average. It says to do it
20 for the long-range development plan. Doing it being a
21 CEQA review analyzing environmental impacts using the
22 environmental impact report for the entire program.

23 THE COURT: And when do you think they should
24 have done that?

25 MR. LIPPE: When should they have done that?

26 THE COURT: Yes.

27 MR. LIPPE: Well, they should have -- well, they
28 did do it in 2005 which is what they should have done,

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1 and they did. We're not challenging the 2005 EIR because
2 at that time they did analyze the effect of adding 1,650
3 students, but when they should have done additional CEQA
4 review to analyze the effect of a substantial increase
5 should have been done when the increase in the enrollment
6 above the 1650 was substantial.

7 THE COURT: When was that?

8 MR. LIPPE: Well, that's a fact question
9 ultimately for the trier of fact. The increase was
10 started in 2007 as the petition alleges. Plaintiffs do
11 not contend that as soon as you get one student more than
12 1650 you have to do a new EIR. That would be
13 unreasonable. That's why the Concerned Citizens of Costa
14 Mesa case talks about a substantial change in the
15 project, and that triggers the need for additional CEQA
16 review. So plaintiffs have not taken a position on when
17 that change became substantial. It's primarily relevant
18 to the statute of limitations question, and what the test
19 there is whether plaintiffs knew or reasonably should
20 have known that the increase was substantial, and when
21 they knew or reasonably should have known that the
22 increase was substantial. So the Court's tentative
23 ruling doesn't actually address the claim as it's been
24 alleged which is that this program type of CEQA project
25 has been substantially changed since the 2005 EIR without
26 additional CEQA review. I mean, that's the claim that's
27 been alleged. The Court doesn't actually address Mr.
28 Cremin's contention that the statute of limitations has

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1 run on that claim and doesn't really address whether that
2 claim is moot; instead, the Court addresses two other
3 claims. One is whether the challenge to the 2005 EIR is
4 barred which plaintiffs agree. We're not challenging
5 that. We can't. It's too late. Notice of the
6 termination was filed for. There was a formal decision.
7 You had 30 days to challenge it. It wasn't done. It
8 can't be done, but these increases that occurred later
9 and which eventually became substantial at some point
10 were done informally. No notice of the termination. No
11 public notice, and so now I'm talking about the statute
12 of limitations question which is a slightly different
13 question than just the validity of the claim as a claim,
14 and the validity of the claim as a claim as something
15 that can be alleged is governed by the Concerned Citizens
16 of Costa Mesa case which clearly states that one can, in
17 fact, bring that kind of claim.

18 Now, this case applies the Concerned Citizens
19 logic to a program-type EIR; whereas, Concerned Citizens
20 involved a specific construction project for a new
21 amphitheater and concert venue. There's a similarity,
22 though, because in that case there was a construction
23 phase and then the operational phase. In that case, the
24 operational phase is very much like a program because the
25 plaintiffs -- not to get too much into the statute of
26 limitations, but they said we didn't find out until the
27 first concert was held and now all of the sudden the
28 stage is facing our neighborhood. Well, that was just

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1 one concert, and so there are going to be more concerts
2 so that's the construction of a venue to carry out a
3 program of concerts and other events that would cause
4 noise. The noise only happens when there is an event.
5 It's a repeating pattern similar to what we have here
6 which is a repeating academic year or two-semester
7 average. The way the EIR in 2005 counted student
8 enrollment was not by academic year, per se, it was
9 two-semester average which for an academic year would be
10 one two-semester average with summer, spring, and fall
11 which is not an academic year.

12 But in any case, so the tentative ruling talks
13 about the 2005 EIR. We're not bringing that claim. It
14 also talks about a year-by-year challenge and says that
15 all the years looked at individually since 2007 or since
16 the increase became substantial, however you want to look
17 at it, are moot, but the California for Alternatives to
18 Toxics' decision really is on point in thinking about
19 mootness of the CEQA claims as attached to those years.

20 THE COURT: How far do you think you can go
21 back?

22 MR. LIPPE: We can go back -- the plaintiff can
23 go back to -- what plaintiffs' burden is, is to show that
24 it exercised reasonable diligence in discovering when the
25 increase in enrollment above the 1650 became substantial,
26 and plaintiff has included --

27 THE COURT: When was that?

28 MR. LIPPE: Plaintiffs have not tried to take a

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1 position on that. I think that's up to the trier of
2 fact, but if the Court is going to --

3 THE COURT: Well, I think what I have heard you
4 say is, you agree the 2005 is off the table; is that
5 correct?

6 MR. LIPPE: That's correct.

7 THE COURT: So when I'm looking at bookends,
8 really all I have right now is 2005 is off the table. I
9 can't really tell you anything after that. So I might be
10 entitled to anything after that that's a question of
11 fact; is that your position?

12 MR. LIPPE: I think what's important to keep a
13 focus on is the nature of the claim that plaintiffs are
14 bringing. The plaintiffs are not challenging each year
15 individually as standalone projects which is kind of
16 where the Court's tentative goes with it. What
17 plaintiffs are challenging is the failure to update the
18 programmatic environmental review of a 15-year program,
19 and the obligation to do that, occurred when that
20 increase became a substantial change in what was analyzed
21 in 2005.

22 THE COURT: I understand this is a question of
23 fact, but from the plaintiffs' position, when did that
24 happen?

25 MR. LIPPE: I hesitate to give an answer
26 because --

27 THE COURT: I can see that.

28 MR. LIPPE: Yeah. I think that the question is

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1 not actually germane to the analysis because the Court
2 would have to find based on all the facts in terms of
3 what information was available for plaintiffs to learn
4 about any changes substantial or not in enrollment, and
5 then compare the availability of that information and
6 when it was available to plaintiffs' efforts to find out
7 when any changes occurred, and then determine did
8 plaintiffs do enough to be reasonably diligent, and when
9 did they actually have access -- reasonable access to
10 information about what the changes were, regardless of
11 whether they were substantial. Then the Court would have
12 to decide, well, it was substantial enough at this point,
13 and then plaintiffs either did have enough information
14 and didn't file suit within 180 days, or at the point in
15 time when it was substantial and they had information
16 was, in fact, within 180 days of filing the case.

17 THE COURT: I would actually -- I would like to
18 hear from the defense about this, too. I suspect there
19 are a few other things that you want to say.

20 MR. LIPPE: I do.

21 THE COURT: But at least with regard to this
22 point and the timing on this, could I get a response,
23 Counsel?

24 MR. CREMIN: Yes, Your Honor. I just want to
25 clarify that from defendants we did contest the portion
26 of the ruling relating to leave to amend. So I just did
27 want to state that. I know we sent notice to the Court.

28 I want to get your point --

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1 THE COURT: I appreciate, actually, at this
2 point that neither side actually liked the tentative
3 which might mean that I am not too far off, but we'll
4 see.

5 MR. CREMIN: Okay. And I would like to get to
6 your point, but before I get there, I do want to bring
7 one thing to your attention which is that we're on the
8 third amended complaint, and I think part of the issue
9 that continues to plague this case is that even today it
10 seems like plaintiffs' claim continues to be a moving
11 target, and you know, he even mentioned at the beginning
12 of his argument, well, I didn't exactly brief this, but I
13 want to say that the LRDP is a program EIR and then
14 framed some potential argument around that. So where
15 we're stuck -- and I think where the Court is stuck --
16 and why we think there should be no further leave to
17 amend is at some point in time plaintiff needs to state
18 what its case is, and it needs to at least allege the
19 facts to support that case, and I can go through our
20 argument of why they have failed to state a claim and why
21 they cannot state a claim, but to answer your question
22 about statute of limitations which your tentative ruled
23 on the basis of mootness just to put that out there. So
24 now they are introducing the statute of limitations. The
25 standard under their framing of the case which we don't
26 agree with, but under their framing is, you know,
27 180 days runs from the time the plaintiff should have
28 reasonably known facts about the action, and so my

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1 response to his failure to tell you when that would be is
2 that it's a fundamental element of his case if that's
3 what they are alleging to at least allege those facts.
4 You can't just say as he just did, well, I'm not really
5 sure. I don't think that's a satisfactory answer. I
6 think it's the burden on them especially after this issue
7 has been raised from the beginning, and we're now talking
8 about a potential fourth amendment, and there is still no
9 answer to your question. You know, I would like the
10 opportunity to say why there can be no answer to that
11 question and why the answer to that question is
12 irrelevant to determining whether or not there should be
13 leave to amend.

14 THE COURT: Do you have anything to add on that
15 isn't in your brief?

16 MR. CREMIN: Well, I would like to respond to
17 his framing of the issue on the LRDP being a program EIR.

18 THE COURT: Okay.

19 MR. CREMIN: If I could address that -- you're
20 right. I don't want to reargue my brief. I assume that
21 you have read it, but if you would let me just argue the
22 point about his framing of the LRDP as a program EIR, I
23 would like to do that.

24 THE COURT: Go ahead.

25 MR. CREMIN: He mentioned the Public Resources
26 Code Section 21080.09, and I think both sides agree that
27 that's the controlling statute of CEQA review for an
28 LRDP. Now, where we have the fundamental disagreement,

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1 and what's critical here is that he has argued today,
2 argued in his brief that enrollment plans are part of
3 that LRDP. That issue is legally not correct. If you go
4 to that statute and you look at the definition of a
5 long-range development plan, and I'll quote from
6 subsection (2) -- I mean subsection A(2) of that statute:

7 "Long-range development plan means a
8 physical development and land use plan to
9 meet the academic and institutional
10 objectives for a particular campus or medical
11 center of higher public education."

12 Physical development and land use plan, there is
13 no enrollment word in there at all. The paragraph he
14 cited was paragraph (b) which states that the
15 environmental impacts related to changes in enrollment
16 level shall be considered for each campus in the
17 environmental impact report prepared for the LRDP.

18 So what I really want to emphasize for the Court
19 is that his whole case including what he's arguing today
20 says that enrollment changes are changes to the LRDP
21 project, in fact, his briefing in section -- says that,
22 you know, talking about the Concerned Citizens of Costa
23 Mesa case and the Ventura Foothills Neighbors case, that
24 it was quote -- this is his language: "The project
25 changed that gives rise to the plaintiffs' CEQA claim."
26 And that's on page 4, line 21 through 25, of his
27 opposition.

28 THE COURT: Remind me of the number of students

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1 that are at the campus -- that were at the campus at 2004
2 levels?

3 MR. CREMIN: Hold on. Let me see. It's
4 attached to the complaint. Give me one moment.

5 MR. LIPPE: I can give you that. Before the
6 1650 addition, it was about 31,000 plus, and with the
7 1650 projection in 2005, that brought it to 3350 -- three
8 thousand three hundred and fifty -- I'm sorry --
9 30,000 --

10 THE COURT: If you have the numbers, I'll take
11 them.

12 MR. CREMIN: Yeah. I was going to say I'm just
13 reading off. This is attachment one -- Exhibit 1 to the
14 complaint. It's a chart of enrollment levels starting in
15 the fall of 2005 through the fall of 2017. I'm sorry.
16 Your Honor, which year did you ask for?

17 THE COURT: My question was: What was the
18 enrollment in 2004 approximately?

19 MR. CREMIN: Okay.

20 MR. LIPPE: About 31,000.

21 THE COURT: Generally speaking is that correct?

22 MR. CREMIN: I mean, it says the fall of 2005
23 and it's 33-, but okay. I don't have 2004 in front of
24 me.

25 MR. LIPPE: The projection brought it up to
26 about 33,000 plus adding the 1650 in 2005, and now it's
27 about 40,000.

28 MR. CREMIN: That --

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1 THE COURT: Now, meaning in two thousand --

2 MR. CREMIN: '17.

3 MR. LIPPE: So it's higher.

4 MR. CREMIN: Fall of 2017 the numbers are about
5 41,000.

6 MR. LIPPE: 41-? So it's even higher now
7 because it continues to go up.

8 MR. CREMIN: There is no facts in the record
9 about it continuing to go up, Your Honor.

10 But can I just end by this last statement? If
11 he's claiming that the basis of the CEQA claim is a
12 change in the LRDP project, that fails as a matter of law
13 because the LRDP project as defined under the statute is
14 not an enrollment plan. The requirement was to analyze
15 the impacts of enrollment just like you would forecast
16 population or traffic. It's an estimate. In other
17 words, you are making a physical plan. You are doing
18 CEQA review. As part of that CEQA review, analyze your
19 projection, your estimate of what you think enrollment
20 is. So what he's trying to say is, we have a plan that
21 required a CEQA analysis of a projection, and he's
22 converting that into, no, it's an enrollment plan that
23 set an exact number, and in the future when we change
24 that enrollment number, we're changing the plan and that
25 triggers supplemental environmental review. It does not
26 as a matter of law.

27 THE COURT: Is there anything that is not in
28 your brief that you want to mention as it relates to why

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1 there should be no leave to amend?

2 MR. CREMIN: That's not in our brief?

3 THE COURT: Yes.

4 MR. CREMIN: Okay. I will just say in
5 relationship to the Court's ruling on mootness, that I
6 think the leave to amend to present allegations relating
7 to the 2018/2019 academic year walks right into the
8 mootness problem because the fall 2018 semester is
9 complete. The spring 2019 semester has just begun as of
10 last week, and basically, if the Court is concerned in
11 the tentative about mootness arguments of how do you deal
12 with past enrollment events -- in other words, we're not
13 talking about a physical building, right? Like his case
14 is in Concerned Citizens --

15 THE COURT: No, I understand.

16 MR. CREMIN: So that's what I would add. I'm
17 not then going to reargue my brief. I will add that I
18 think it walks into the mootness problem.

19 THE COURT: Counsel, is there anything further
20 that are not in your brief?

21 MR. LIPPE: There are a couple of points.

22 THE COURT: Okay. I would just ask you to be
23 mindful to be reasonably quick just because of the number
24 of folks that I have here on a couple of other cases.

25 MR. LIPPE: Understood, Your Honor.

26 From a CEQA standpoint, the legislature knows
27 that if the environmental impact report has to consider
28 the environmental effect of enrollment plans, that that's

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1 part of the CEQA project. Now, this statute does have a
2 definition that Mr. Cremin quoted it correctly in terms
3 of what the LRDP is, but the very next sentence talks
4 about enrollment plans as part of it, and from a CEQA law
5 standpoint, you can't have an EIR analyze the effect of
6 something, and then change that something in a way that
7 is substantial enough to cause new significant effects
8 without updating your CEQA analysis. So it's kind of a
9 semantic point that Mr. Cremin is making whether it's a
10 part of the project, and I'm making the same semantic
11 point on the other side, and we're kind of contesting
12 around this issue of this technicality part of the
13 project, but when you look at CEQA as a whole, if you
14 have to analyze something, you have to keep analyzing it,
15 you can't just stop when that something, in fact, changes
16 in a way that causes environmental impacts, and so --
17 just to finish the point about the programmatic nature of
18 the plaintiffs' claim and the programmatic nature of the
19 LRDP, and of the 2005 EIR, subdivision (d) of that
20 section that we're talking about, 21080.09, refers to the
21 fact that the enrollment plans have to be analyzed either
22 in an enrollment -- I'm sorry -- in an EIR, environmental
23 impact report, or in a subsequent tiered analysis, in
24 tiering is key. Tiering is the way in which a subsequent
25 CEQA document relates to the original CEQA document, and
26 so a case that would be useful for the Court to look at
27 it if the Court is going to take another look would be
28 Vineyard Area Citizens for Responsible Growth versus City

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1 of Rancho Cordova. It's at 40 Cal.4th 412 at page 440,
2 and there the Court goes into detail about what tiering
3 is and what the rules are that govern it, but the use of
4 the word "tiering" by the legislature means that they
5 are looking at updates to the CEQA document that was
6 originally done for the LRDP as a way to do the
7 subsequent environmental review.

8 Now, the one thing that I do agree with Mr.
9 Cremin on is that the Court's tentative ruling results in
10 an anomalous result. It allows the plaintiffs to contest
11 the current academic year for failure to do additional
12 CEQA review, but it has already ruled that all previous
13 years are moot -- CEQA claims as to previous years are
14 moot. That mootness problem will occur with respect to
15 this year if that's the rule because this year will end
16 before this case gets to final judgment. Even if the
17 Court and the parties were able to get this Court's
18 judgment before the end of the year if the case is
19 appealed, mootness can be brought up on appeal as well.
20 So as a practical matter, we're looking at the California
21 for Alternatives to Toxics problem which is the annual
22 renewal of pesticide registrations in California. If you
23 sue on 2002's annual renewal of the pesticide as the
24 plaintiffs in that case did, by the time you get to
25 judgment it's 2003, and they have been renewed again, and
26 you have to dismiss that case and file a new case, and
27 the Court said --

28 THE COURT: So I'm just going to stop you for a

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1 moment. I'm actually going to ask both of you to
2 provide, to the extent that you think it would be
3 helpful, a very modest additional briefing no more than
4 three pages. I don't want a repetition of anything
5 that's in there. The two things that have come up that I
6 would like to just slightly better understand is the
7 difference between to the extent that you believe there
8 is or there is not between the impact of enrollment
9 versus the impact of physical changes. You seem to have
10 different perspectives on that that have bubbled to the
11 surface a little bit here. I would like to better
12 understand that and your respective positions. I would
13 also like to better understand, you both seem to agree
14 but want an opposite conclusion about the potential
15 perpetual or cyclical nature of the mootness. I think
16 that that leads the defense to believe that there should
17 be no leave to amend, and it leads the plaintiff to
18 believe it's not moot. I'm still not clear how far back
19 you think it's not moot. I would really like it if you
20 were able to tell me with a greater specificity
21 specifically when you believe this case begins. I'm not
22 sure if you are able to do that. If you are able to
23 include something I think that that would be helpful.

24 How much time reasonably do both of you need to
25 accomplish that?

26 MR. LIPPE: Especially on the last point, I do
27 appreciate the Court's willingness to allow the plaintiff
28 to come back and address the hard question which is when

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1 did the change become substantial. I need to talk to my
2 client about that. He's out of town, and I'm not sure
3 exactly when he's coming back. I would request ten days
4 if that's not too much.

5 MR. CREMIN: We will take whatever period is
6 acceptable to the Court. We don't need 10 days.

7 THE COURT: I also -- to be clear, I'm not
8 inviting further argument at this point. I'm just going
9 to use it to further inform the research that I'll do,
10 and the further thoughts that I have about this. I would
11 also like to get a copy of the transcript from today.
12 Ten days would take you to -- what would we be looking
13 at? Around the beginning of the week of February 4th.

14 MR. LIPPE: That would be -- February 4th would
15 be ten days.

16 THE COURT: How about close of business for both
17 of you for February 4th? I would ask, please, that you
18 deliver a courtesy copy here, too, so that I can have
19 that. Sometimes if you just file it, it can take some
20 time before it's imaged, and I see it, and then, Venus,
21 can you just put on our calendar something for me only
22 for February 8th to be sure that I've reviewed, and I can
23 issue something on this?

24 THE CLERK: Yes, Your Honor.

25 MR. CREMIN: Your Honor, can I ask just a
26 procedural question?

27 THE COURT: Sure.

28 MR. CREMIN: We have a further case management

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1 conference on February 8th. In fact, we filed our
2 statement that was due today, and obviously, the case has
3 been influx. So I need to know if the Court wanted to
4 address --

5 THE COURT: Oh, I can use that time.

6 MR. CREMIN: Okay. So would that be a court
7 hearing date, or should we just leave it that we appear
8 for the case management conference? How would you like
9 to --

10 THE COURT: Right now you should plan to appear
11 for the case management conference. If I have issued
12 something before then that changes that, obviously,
13 you'll know. I am not going to have a lot of time in
14 between when I receive those materials and when you come
15 in on the 8th, but I should be able to get it done by
16 then, okay?

17 MR. CREMIN: Okay.

18 MR. LIPPE: Thank you, Your Honor.

19 THE COURT: Thank you very much.

20 (Time ending: 4:24 p.m.)
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REPORTER'S CERTIFICATE

I, NANCY E. PRESANT, CSR No. 9906, Certified
Shorthand Reporter, certify:

That the foregoing proceedings were taken before
me at the time and place therein set forth;


That all statements made at the time of the
proceedings were recorded stenographically by me and were
thereafter transcribed;

That the foregoing is a true and correct
transcript of my shorthand notes so taken.

I further certify that I am not a relative or
employee of any attorney of the parties, nor financially
interested in the action.

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

Dated this 25TH day of JANUARY, 2019.


NANCY E. PRESANT, C.S.R. No. 9906



Document received by the CA 1st District Court of Appeal.

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|--|--|--|--|--|
| <p>A</p> <p>A(2) 15:6 able 20:17 21:20,22,22 23:15 academic 10:6,8,9,11 15:9 18:7 20:11 acceptable 22:6 access 12:9,9 accomplish 21:25 action 13:28 24:15 actions 6:18,21 AD0031A 1:28 add 14:14 18:16,17 adding 8:2 16:26 addition 16:6 additional 8:3,15,26 20:11 21:3 address 8:23,27 9:1 14:19 21:28 23:4 addresses 9:2 afternoon 5:9,11 agree 9:4 11:4 13:26 14:26 20:8 21:13 ahead 5:17 14:24 ALAMEDA 1:2 2:2 allegations 6:6 18:6 allege 13:18 14:3 alleged 8:24,27 9:15 alleges 8:10 alleging 14:3 allow 21:27 allows 20:10 alluding 7:17 Alternatives 10:17 20:21 amend 12:26 13:17 14:13 18:1,6 21:17 amended 13:8 amendment 14:8 amphitheater 9:21 analysis 6:14 12:1 17:21 19:8,23 analyze 8:2,4 17:14,18 19:5,14 analyzed 11:20 19:21 analyzing 7:21 19:14 annual 20:21,23 annually 7:18 anomalus 20:10 answer 11:25 13:21 14:5 14:9,10,11 apologize 7:2 appeal 20:19 appealed 20:19 appear 23:7,10 appearance 5:7 applies 9:18 appreciate 13:1 21:27 appropriate 6:17 approximately 16:18 Area 19:28 argue 14:21 argued 15:1,2 arguing 15:19 argument 5:26 13:12,14 13:20 22:8 arguments 18:11 assume 14:20 ATKINSON-BAKER 1:23</p> | <p>attached 10:19 16:4 attachment 16:13 attention 13:7 attorney 24:14 availability 12:5 available 12:3,6 average 7:19 10:7,9,10</p> <p>B</p> <p>b 4:2 7:11 15:14 back 6:28 10:21,22,23 21:18,28 22:3 background 7:5 barred 9:4 based 12:2 basically 18:10 basis 13:23 17:11 beginning 13:11 14:7 22:13 begins 21:21 begun 18:9 behalf 2:15 5:12 believe 21:7,16,18,21 Berkeley 5:16 Berkeley's 1:4 2:4 5:5,10 better 21:6,11,13 bit 21:11 bookends 11:7 brief 6:8,9,10,12,23 7:11 13:12 14:15,20 15:2 17:28 18:2,17,20 briefing 15:21 21:3 briefly 6:15 bring 6:13 9:17 13:6 bringing 10:13 11:14 brought 16:7,25 20:19 bubbled 21:10 building 6:2 18:13 buildings 6:2 burden 10:23 14:6 business 22:16</p> <p>C</p> <p>C 3:1 C.S.R 24:23 Cal.4th 20:1 Cal.App.4th 6:25 7:3 calendar 22:21 California 1:1,7,16 2:1,7 2:17 3:6,14 5:1,13,14 5:15 10:17 20:20,22 24:17 campus 7:14,16 15:10 15:16 16:1,1 CAROL 1:8 2:8 carry 10:2 case 1:5 2:5 5:6 6:4,25 7:5,7 8:14 9:16,18,22 9:23 10:12 12:16 13:9 13:18,19,25 14:2 15:19,23,23 18:13 19:26 20:16,18,24,26 20:26 21:21 22:28 23:2,8,11 cases 18:24 cause 10:3 19:7 causes 19:16</p> | <p>center 6:14 15:11 CEQA 5:27 6:7,8,15 7:6 7:10,21 8:3,15,24,26 10:19 14:27 15:25 17:11,18,18,21 18:26 19:1,4,8,13,25,25 20:5 20:12,13 CERTIFICATE 24:1 Certified 24:4 certify 24:5,13 chain 6:20 challenge 9:3,7 10:14 challenging 8:1 9:4 11:14,17 Chancellor 5:15 change 8:14,17 11:20 17:12,23 19:6 22:1 changed 8:25 15:25 changes 7:13 12:4,7,10 15:15,20,20 19:15 21:9 23:12 changing 17:24 characterized 6:19 chart 16:14 Christ 1:8 2:8 5:15 citation 6:28 cite 6:25 cited 6:16,23 7:11 15:14 cites 6:7 Citizens 8:13 9:15,18,19 15:22 18:14 19:28 City 19:28 claim 8:23,26 9:1,2,13 9:13,14,14,17 10:13 11:13 13:10,20,21 15:25 17:11 19:18 claiming 17:11 claims 9:3 10:19 20:13 clarify 12:25 clear 21:18 22:7 clearly 9:16 CLERK 22:24 client 22:2 close 22:16 Code 7:8 14:26 come 21:5,28 23:14 coming 22:3 commencing 2:17 comments 5:23 compare 12:5 complaint 13:8 16:4,14 complete 18:9 component 6:4 concerned 8:13 9:15,18 9:19 15:22 18:10,14 concert 9:21,27 10:1 concerts 10:1,3 conclusion 21:14 conference 23:1,8,11 consider 18:27 considered 7:14 15:16 construction 5:28 9:20 9:22 10:2 contemplated 6:21 contend 8:11 contention 8:28 contest 12:25 20:10 contesting 19:11</p> | <p>context 5:26 continues 13:9,10 17:7 continuing 17:9 controlling 14:27 converting 17:22 copy 22:11,18 Cordova 20:1 correct 11:5,6 15:3 16:21 24:11,18 correctly 19:2 Costa 8:13 9:16 15:22 counsel 5:8,19 12:23 18:19 counted 10:7 County 1:2 2:2 6:24 7:3 couple 5:25 18:21,24 court 1:1,24 2:1 3:2 5:4 5:4,17,23,24 6:27 7:10 7:23,26 8:7,27 9:2 10:20,27 11:2,3,7,22 11:27 12:1,11,17,21 12:27 13:1,15 14:14 14:18,24 15:18,28 16:10,17,21 17:1,27 18:3,10,15,19,22 19:26,27 20:2,17,27 20:28 22:6,7,16,27 23:3,5,6,10,19 Court's 6:12 8:22 11:16 18:5 20:9,17 21:27 courtesy 22:18 Cremin 3:11 5:11,12 12:24 13:5 14:16,19 14:25 16:3,12,19,22 16:28 17:2,4,8 18:2,4 18:16 19:2,9 20:9 22:5 22:25,28 23:6,17 Cremin's 6:12 8:28 critical 15:1 CSR 1:27 2:18 24:4 current 20:11 cyclical 21:15</p> <p>D</p> <p>d 3:11 4:1 19:19 date 23:7 Dated 24:19 day 24:19 days 9:7 12:14,16 13:27 22:3,6,12,15 deal 18:11 dealing 6:22 decide 12:12 decision 9:6 10:18 declare 24:16 defendants 1:9 2:9,16 3:9 5:12 12:25 defense 12:18 21:16 defined 17:13 definition 15:4 19:2 deliver 22:18 demurrer 6:9,10 Department 2:16 describe 6:1 describes 6:16,21 DESCRIPTION 4:3 detail 20:2 determine 12:7</p> | <p>determining 14:12 develop 7:9 development 7:16,20 15:5,7,8,12 difference 21:7 different 5:25 9:12 21:10 diligence 10:24 diligent 12:8 disagreement 14:28 discovering 10:24 discuss 6:6 discussion 7:6 dismiss 20:26 distinction 6:13 document 19:25,25 20:5 doing 7:20 17:17 due 23:2</p> <p>E</p> <p>E 1:27 2:18 3:1,1 4:1,2 24:4,23 education 15:11 effect 8:2,4 18:28 19:5 effects 7:12 19:7 efforts 12:6 EIR 6:17,17,17 8:1,12,25 9:3,19 10:7,13 13:13 14:17,22 19:5,19,22 EIRs 7:6 either 6:19,27 12:13 19:21 element 14:2 emphasize 15:18 employee 24:14 enrollment 6:3,5 7:9,13 8:5 10:8,25 12:4 15:2 15:13,15,20 16:14,18 17:14,15,19,22,24 18:12,28 19:4,21,22 21:8 entire 7:22 entitled 11:10 environmental 7:12,15 7:21,22 11:18 15:15 15:17 17:25 18:27,28 19:16,22 20:7 especially 14:6 21:26 ESQ 3:5,11 estimate 17:16,19 event 10:4 events 10:3 18:12 eventually 9:9 exact 17:23 exactly 13:12 22:3 exercised 10:24 Exhibit 16:13 extent 21:2,7</p> <p>F</p> <p>facing 9:28 fact 8:8,9 9:17 11:2,11 11:23 12:16 15:21 19:15,21 23:1 facts 12:2 13:19,28 14:3 17:8 failed 13:20 fails 17:12</p> |
|--|--|--|--|--|

| | | | | |
|---|--|--|---|--|
| <p>failure 11:17 14:1 20:11 fall 10:10 16:15,15,22 17:4 18:8 far 10:20 13:3 21:18 February 22:13,14,17,22 23:1 fifty 16:8 file 1:28 12:14 20:26 22:19 filed 9:6 23:1 filing 12:16 final 20:16 financially 24:14 find 9:26 12:2,6 finish 19:17 first 9:27 Floor 3:6 focus 5:22 11:13 folks 18:24 Foothills 15:23 forecast 17:15 foregoing 24:6,11,17 formal 9:6 forth 24:7 fourth 14:8 framed 13:14 framing 13:25,26 14:17 14:22 Francisco 3:6 front 6:14 16:23 fundamental 14:2,28 further 13:16 18:19 22:8 22:9,10,28 24:13 future 17:23</p> <hr/> <p>G</p> <p>Generally 16:21 geographically 6:20 germane 12:1 give 11:25 16:4,5 gives 15:25 go 5:17 10:20,22,23 13:19 14:24 15:3 17:7 17:9 goes 11:16 20:2 going 10:1 11:2 16:12 18:17 19:27 20:28 21:1 22:8 23:13 good 5:9,11 6:26 7:5 govern 20:3 governed 9:15 greater 21:20 grounds 5:26 Growth 19:28 Guideline 6:15 guidelines 6:8</p> <hr/> <p>H</p> <p>H 4:2 happen 11:24 happens 10:4 hard 21:28 hear 12:18 heard 5:20 11:3 hearing 1:15 2:15 23:7 held 9:27 helpful 21:3,23</p> | <p>helps 5:22 Heritage 6:24 7:2 hesitate 11:25 higher 15:11 17:3,6 Hold 16:3 HON 1:18 3:3 Honor 5:9,11,21 12:24 16:16 17:9 18:25 22:24,25 23:18 hundred 16:8</p> <hr/> <p>I</p> <p>imaged 22:20 impact 7:15,22 15:17 18:27 19:23 21:8,9 impacts 7:21 15:15 17:15 19:16 important 11:12 include 7:9 21:23 included 6:4 10:26 includes 6:2 including 15:19 increase 6:4 8:4,5,9,20 8:22 10:16,25 11:20 increases 7:9 9:8 individually 10:15 11:15 influx 23:3 inform 22:9 informally 9:10 information 4:7 12:3,5 12:10,13,15 institutional 15:9 interested 24:15 introducing 13:24 inviting 22:8 involved 9:20 irrelevant 14:12 issue 6:9,11 13:8 14:6 14:17 15:3 19:12 22:23 issued 23:11</p> <hr/> <p>J</p> <p>JANET 1:7 2:7 January 1:17 2:18 5:1 24:19 judgment 20:16,18,25 jump 6:25</p> <hr/> <p>K</p> <p>keep 11:12 19:14 key 19:24 kind 9:17 11:15 19:8,11 knew 8:19,21 know 12:27 13:11,26 14:9 15:22 23:3,13 known 8:20,21 13:28 knows 18:26</p> <hr/> <p>L</p> <p>land 15:8,12 language 15:24 large 6:19 late 9:5 law 3:4 17:12,26 19:4 laws 24:17 leads 21:16,17</p> | <p>learn 12:3 leave 12:26 13:16 14:13 18:1,6 21:17 23:7 legally 15:3 legislature 18:26 20:4 level 15:16 levels 7:13 16:2,14 liked 13:2 limitations 8:18,28 9:12 9:26 13:22,24 line 4:8 15:26 Lippe 3:4,5 5:9,10,21 7:1 7:25,27 8:8 10:22,28 11:6,12,25,28 12:20 16:5,20,25 17:3,6 18:21,25 21:26 22:14 23:18 lippelaw@sonic.net 3:7 little 21:11 logic 9:19 logical 6:20 long-range 7:8,16,20 15:5,7 long-term 5:27 look 5:25 10:16 15:4 19:13,26,27 looked 10:15 looking 11:7 20:5,20 22:12 lot 23:13 LRDP 6:1,3,21 13:13 14:17,22,28 15:3,17 15:20 17:12,13 19:3 19:19 20:6</p> <hr/> <p>M</p> <p>making 17:17 19:9,10 management 22:28 23:8 23:11 materials 23:14 matter 17:12,26 20:20 mean 8:26 13:3 15:6 16:22 meaning 17:1 means 15:7 20:4 medical 15:10 meet 15:9 mention 17:28 mentioned 13:11 14:25 Mesa 8:14 9:16 15:23 MEYERS 3:10 mindful 18:23 Mission 3:5 modest 21:3 moment 16:4 21:1 moot 9:2 10:17 20:13,14 21:18,19 mootness 10:19 13:23 18:5,8,11,18 20:14,19 21:15 moving 13:10</p> <hr/> <p>N</p> <p>N 3:1,4,5 4:1 Nancy 1:27 2:18 24:4,23 Napolitano 1:7 2:7 5:14 National 6:24</p> | <p>Natural 7:2 nature 11:13 19:17,18 21:15 NAVE 3:10 need 8:15 21:24 22:1,6 23:3 needs 13:17,18 neighborhood 5:5 9:28 Neighborhoods 1:4 2:4 5:10 Neighbors 15:23 neither 13:2 new 8:12 9:20 19:7 20:26 NOEL 1:18 3:3 noise 10:4,4 notes 24:12 notice 9:5,10,11 12:27 number 4:3 5:6 15:28 17:23,24 18:23 numbers 16:10 17:4</p> <hr/> <p>O</p> <p>Oak 2:16 Oakland 1:16 2:16 3:14 5:1 objectives 15:10 obligation 11:19 obviously 23:2,12 occur 20:14 occurred 9:8 11:19 12:7 OFFICES 3:4 Oh 23:5 okay 13:5 14:18 16:19 16:23 18:4,22 23:6,16 23:17 one-off 5:28 6:14 operational 9:23,24 opportunity 14:10 opposed 5:28 opposite 21:14 opposition 6:9,10 15:27 original 19:25 originally 20:6</p> <hr/> <p>P</p> <p>P 3:1,1 p.m 2:17 5:2 23:20 page 4:3,8 7:4 15:26 20:1 pages 21:4 paragraph 15:13,14 part 7:9 13:8 15:2 17:18 19:1,4,10,12 particular 15:10 parties 20:17 24:14 parts 6:20 pattern 10:5 penalty 24:16 period 22:5 perjury 24:16 perpetual 21:15 perspectives 21:10 pesticide 20:22,23 petition 6:6,16 8:10 petitioner's 5:8 phase 9:23,23,24</p> | <p>physical 15:8,12 17:17 18:13 21:9 place 24:7 plague 13:9 plaintiff 1:5 2:5 3:4 10:22,26 13:17,27 21:17,27 plaintiffs 8:10,16,19 9:4 9:25 10:28 11:13,14 11:17 12:3,8,13 20:10 20:24 plaintiffs' 10:23 11:23 12:6 13:10 15:25 19:18 plan 7:16,20 15:5,7,8,12 17:14,17,20,22,24 23:10 plans 7:9 15:2 18:28 19:4,21 please 5:7,17 22:17 plus 16:6,26 point 7:10 9:9 10:18 12:12,14,22,28 13:2,6 13:17 14:22 19:9,11 19:17 21:26 22:8 points 18:21 population 17:16 portion 12:25 position 8:16 11:1,11,23 positions 21:12 potential 13:14 14:8 21:14 practical 20:20 prepared 6:18 7:15 15:17 Presant 1:27 2:18 24:4 24:23 present 18:6 President 5:13 previous 6:10,23 20:12 20:13 primarily 8:17 problem 18:8,18 20:14 20:21 procedural 22:26 proceedings 24:6,9 program 6:2,13,17,17 7:6,22 8:24 9:24 10:3 11:18 13:13 14:17,22 program-type 6:7 7:6 9:19 programmatically 11:18 19:17,18 programs 5:28 project 6:1,4,7,14,19,24 7:2,10 8:15,24 9:20 15:21,24 17:12,13 19:1,10,13 projection 16:7,25 17:19 17:21 projects 5:27 7:7 11:15 provide 21:2 provided 6:26 providing 7:5 public 7:7 9:11 14:25 15:11 put 13:23 22:21</p> |
|---|--|--|---|--|

| | | | | |
|---|--|--|--|---|
| Q question 8:8,18 9:12,13 11:10,22,28 13:21 14:9,11,11 16:17 21:28 22:26 quick 18:23 quote 15:5,24 quoted 19:2 | 17:25 20:7,12 reviewed 22:22 RG-18902751 5:6 RG18902751 1:6 2:6 right 11:8 14:20 18:7,13 23:10 rise 15:25 rule 20:15 ruled 13:22 20:12 rules 20:3 ruling 5:22,25 7:17 8:23 10:12 12:26 18:5 20:9 run 9:1 runs 13:27 | stenographically 24:9 stop 19:15 20:28 Street 2:16 3:5,12 stuck 13:15,15 student 8:11 10:7 students 6:3,5,5 8:3 15:28 subdivision 7:10 19:19 subsection 15:6,6 subsequent 19:23,24 20:7 substantial 8:4,6,14,17 8:20,22 9:9 10:16,25 11:20 12:4,11,12,15 19:7 22:1 substantially 8:25 sudden 9:27 sue 20:23 suit 12:14 Suite 3:13 summer 10:10 SUPERIOR 1:1 2:1 supplemental 17:25 support 13:19 sure 14:5 21:22 22:2,22 22:27 surface 21:11 suspect 12:18 | tiering 19:24,24 20:2,4 Tim 5:11 time 8:2 12:15 13:17,27 20:24 21:24 22:20 23:5,13,20 24:7,8 timing 12:22 TIMOTHY 3:11 today 13:9 15:1,19 22:11 23:2 Tom 5:9 town 22:2 Toxics 20:21 Toxics' 10:18 traffic 17:16 transcribed 24:10 transcript 1:15 2:15 22:11 24:12 tried 10:28 trier 8:9 11:1 triggers 8:15 17:25 true 24:11,17 trying 17:20 two 7:18 9:2 17:1 21:5 two-semester 7:19 10:6 10:9,10 type 5:28 8:24 | week 18:10 22:13 willingness 21:27 WISE 1:18 3:3 word 15:13 20:4 words 17:17 18:12 work 7:6 www.depo.com 1:25 |
| R R 3:1 raise 6:11 raised 14:7 Rancho 20:1 read 6:28 7:1 14:21 reading 16:13 really 9:1 10:18 11:8,9 14:4 15:18 21:19 reargue 14:20 18:17 reasonable 10:24 12:9 reasonably 8:19,21 12:8 13:28 18:23 21:24 recap 6:15 receive 23:14 record 17:8 recorded 24:9 refers 19:20 regard 12:21 regardless 12:10 Regents 1:7 2:7 5:6,13 registrations 20:22 related 6:19 15:15 relates 17:28 19:25 relating 7:12 12:26 18:6 relationship 18:5 relative 24:13 relevant 6:8 8:17 Remind 15:28 renewal 20:22,23 renewed 20:25 repeat 6:27 repeating 10:5,6 repetition 21:4 reply 6:12 report 7:15,22 15:17 18:27 19:23 REPORTED 1:27 reporter 5:4 24:5 REPORTER'S 24:1 REPORTERS 1:24 request 22:3 REQUESTED 4:7 required 17:21 requirement 17:14 requires 7:8 research 22:9 Resources 7:7 14:25 respect 20:14 respective 21:12 respond 14:16 respondents 5:12 response 12:22 14:1 Responsible 19:28 result 20:10 results 20:9 review 7:21 8:4,16,26 11:18 14:27 17:18,18 | S S 3:1 4:2 San 3:6 satisfactory 14:5 Save 1:4 2:4 5:5,10 says 7:19 10:14 15:20,21 16:22 se 10:8 seat 5:18 section 7:8 14:26 15:21 19:20 see 11:27 13:4 16:3 22:20 semantic 19:9,10 semester 18:8,9 semesters 7:19 sent 12:27 sentence 19:3 series 6:18 set 5:26 17:23 24:7 shorthand 24:5,12 show 10:23 side 13:2 19:11 sides 14:26 significant 19:7 similar 10:5 similarity 9:21 situation 5:5 slightly 9:12 21:6 slowly 7:1 soon 8:11 sorry 16:8,15 19:22 speaking 16:21 specific 7:3 9:20 specifically 7:7 21:21 specificity 21:20 spring 10:10 18:9 stage 9:28 standalone 11:15 standard 13:25 standpoint 18:26 19:5 Stanislaus 6:24,25 7:2,3 start 5:5 started 8:10 starting 16:14 state 1:1 2:1 12:27 13:17 13:20,21 statement 17:10 23:2 statements 24:8 states 9:16 15:14 statute 8:18,28 9:11,25 13:22,24 14:27 15:4,6 17:13 19:1 | T T 1:8 2:8 4:2 table 11:4,8 take 5:17,19,24 10:28 16:10 19:27 22:5,12 22:19 taken 2:15 8:16 24:6,12 talk 5:27 22:1 talking 9:11 14:7 15:22 18:13 19:20 talks 8:14 10:12,14 19:3 target 13:11 tcremin@meyersnave... 3:16 technicality 19:12 tell 11:9 14:1 21:20 ten 22:3,12,15 tentative 5:22,25 6:12 7:17 8:22 10:12 11:16 13:2,22 18:11 20:9 termination 9:6,10 terms 12:2 19:2 test 8:18 thank 5:17,21,22 23:18 23:19 thing 13:7 20:8 things 12:19 21:5 think 6:13 7:23 10:20 11:1,3,12,28 13:8,15 13:16 14:5,6,26 17:19 18:6,18 21:2,15,19,23 thinking 5:23 10:18 third 13:8 THOMAS 3:4,5 thoughts 22:10 thousand 16:8 17:1 three 16:7,8 21:4 Thursday 2:17 5:1 tiered 19:23 | U UC's 7:8 ultimately 8:9 understand 11:22 18:15 21:6,12,13 Understood 18:25 University 1:7 2:7 5:13 5:14,15 unreasonable 8:13 update 11:17 updates 20:5 updating 19:8 use 15:8,12 20:3 22:9 23:5 useful 19:26 | X X 4:1,2 |
| | | | Y Yeah 11:28 16:12 year 7:18,18 10:6,8,9,11 11:14 16:16 18:7 20:11,15,15,18 year-by-year 10:14 years 10:15,19 20:13,13 | Z |
| | | | 0 | 1 1 4:9 16:13 1,650 8:2 10 22:6 1221 2:16 12th 3:6,12 15-year 6:2 11:18 1500 3:13 15168 6:16 1650 8:6,12 10:25 16:6,7 16:26 17 17:2 180 12:14,16 13:27 182 6:25 7:3 195 6:25 7:4 |
| | | | V validity 9:13,14 Ventura 15:23 venue 9:21 10:2 Venus 22:20 versus 5:6 6:24 7:2 19:28 21:9 Vineyard 19:28 vs 1:6 2:6 | 2 2 15:6 2002's 20:23 2003 20:25 2004 16:1,18,23 2005 7:28 8:1,25 9:3 10:7,13 11:4,8,21 16:7 16:15,22,26 19:19 2007 8:10 10:15 201 3:5 2017 16:15 17:4 2018 18:8 2018/2019 18:7 2019 1:17 2:18 5:1 18:9 24:19 2020 6:1,3 21 4:9 15:26 21080.09 7:8 14:26 19:20 24 1:17 2:16,18 5:1 25 15:26 25TH 24:19 288-3376 1:24 |
| | | | W walks 18:7,18 want 5:27 10:16 12:19 12:24,27,28 13:6,13 14:20 15:18 17:28 21:4,14 wanted 23:3 wasn't 9:7 way 6:11 10:7 19:6,16,24 20:6 we'll 13:3 we're 6:22 8:1 9:4 10:13 13:7,15 14:7 17:24 18:12 19:11,20 20:20 | 3 3:55 2:17 5:2 30 9:7 |

30,000 16:9
31,000 16:6,20
33- 16:23
33,000 16:26
3350 16:7

4

4 15:26
4:24 23:20
40 20:1
40,000 16:27
41- 17:6
41,000 17:5
412 20:1
415 3:7
440 20:1
48 6:25 7:3
4th 22:13,14,17

5

510 3:15
555 3:12

6

650 6:5

7

777-5604 3:7

8

800 1:24
808-2000 3:15
8th 22:22 23:1,15

9

94105 3:6
94607 3:14
94612 2:17
9906 1:27 2:18 24:4,23

1 SUPERIOR COURT OF THE STATE OF CALIFORNIA

2 COUNTY OF ALAMEDA

3
4 SAVE BERKELEY'S NEIGHBORHOODS,
5 a California nonprofit public
6 benefit corporation,

7 Petitioner and Plaintiff,

8 vs.

Case No. RG18902751

9 THE REGENTS OF THE UNIVERSITY
10 OF CALIFORNIA, et al.,

11 Respondents and Defendants.
12 _____/

13
14 Reporter's Transcript of Proceedings

15 Thursday, April 18, 2019

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18 1221 Oak Street, Department 24

19 Oakland, California

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24 Reported By: Sheila Pham, CSR No. 13293
25

CERTIFIED
TRANSCRIPT

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1 Oakland, California, Thursday, April 18, 2019

2 9:07 a.m. - 9:25 a.m.

3
4 THE COURT: I'm going to begin with the matter
5 of Save Berkeley's Neighborhoods versus UC Regents. It
6 is Case Number RG-18-902751.

7 Can I get appearances, please, starting with
8 petitioner.

9 MR. LIPPE: Good morning, Your Honor. Tom
10 Lippe for plaintiff, Save Berkley's Neighborhoods. And
11 my last name is spelled L-I-P-P-E.

12 THE COURT: Thank you.

13 MR. CREMIN: Good morning, Your Honor. Timothy
14 Cremin, C-R-E-M-I-N, on behalf of all of the respondents
15 and defendants, The Regents of the University of
16 California, President Napolitano of the University of
17 California, and Chancellor Christ of the University of
18 California Berkeley.

19 THE COURT: Thank you. Please go ahead and be
20 seated.

21 Just as a preliminary matter, I apologize for
22 the fact that this case has bumped around a little bit.
23 There was some question about which department it was
24 going to be in based on things that had nothing to do
25 with your case, but it had to do with just some movement

1 of various judges that are in our court. And so this
2 case actually is back with Judge Roesch, but because I
3 heard the preliminary aspects of this particular
4 argument as it related to this request, I am finishing
5 that. But all other requests and the remainder of the
6 case, in whatever form it's in, will be back with Judge
7 Roesch.

8 From my perspective, the only issue, really,
9 for the Court to consider is whether the Court is going
10 to provide leave to amend. I understand that the
11 petitioner may see it differently, but that's really the
12 issue that I have that's left, whether that makes sense
13 or whether there should be no leave further to amend.

14 So I assume you would like to be heard on that.

15 MR. LIPPE: Well, I would, Your Honor. I guess
16 the question of leave to amend has to be attached to
17 some legal issue that the Court has in mind. And just
18 judging from the Court's April 2nd order, that issue is
19 whether the plaintiffs can state a valid claim of the
20 nature that they are attempting to state, which is that
21 the Regents had an obligation -- once they substantially
22 exceeded the projected enrollment increase from the 2005
23 document, whether they had an obligation to engage CEQA
24 again for purposes of -- for viewing the environmental
25 impact of that additional increase.

1 THE COURT: What I would say is: This appears
2 to be, in my mind, the same issue that has repeatedly
3 come up in this case, which is that if the Court
4 provides you leave to amend, what is the project that
5 you will clearly identify that is being challenged in
6 this action?

7 MR. LIPPE: The project is the additional
8 increase over and above the 1,650 that was projected in
9 2005.

10 THE COURT: So give me the date and the events
11 of the project that would be alleged. Because that's
12 really the continuing issue that's here.

13 MR. LIPPE: Well, if you go to the actual
14 merits of this kind of claim, it's based on 21167,
15 Subdivision (a), which is the failure to determine
16 whether an activity or a project will have a significant
17 effect on the environment. And I say "activity or
18 project" because "project" is defined for purposes of a
19 public agency that's carrying out its own project. As
20 opposed to approving a permit, it is the carrying out of
21 an activity that may have a substantial impact on the
22 environment. And so the project here is an activity of
23 increasing enrollment.

24 THE COURT: And when did that activity occur?

25 MR. LIPPE: Well, it occurred for every year

1 since about 2007. And the question then becomes -- and
2 a good case on this, which is not in my brief,
3 unfortunately, but for the Court's consideration, is
4 Stockton Citizens. I can get you the cite on that.
5 Stockton Citizens for Sensible Planning versus City of
6 Stockton, a 2010 case, Supreme Court, 48 Cal.4th 481.

7 And at Page 511, it talks about the subdivision
8 of 21167, which is Subdivision (a). It says -- and
9 refers to its use in the Concerned Citizens of Costa
10 Mesa case, which I have cited. It says, "... the claims
11 of substantial changes to a previously approved project
12 bore on both the merits of the action and the period
13 within which suit can be brought."

14 So looking at the merits of the action, which
15 is what we're talking about now, the Regents
16 substantially changed their project to increase
17 enrollment by increasing it more than they said they
18 would. And so --

19 THE COURT: What are you going to do
20 differently if the Court gives you leave to amend other
21 than what has specifically been alleged in each of the
22 prior times where the motion had been granted?

23 MR. LIPPE: On the merits of the claim,
24 nothing. On the statute of limitations, possibly more
25 amendments, depending on how that discussion goes. But

1 on the merits of the claim, we have alleged a claim
2 under Concerned Citizens that has been further clarified
3 by the Stockton Citizens case under Subdivision (a),
4 which is: There has been a substantial change in a
5 previously adopted project that was subject to a
6 previously certified EIR and that the agency had an
7 obligation to revisit CEQA -- to reapply CEQA and say,
8 "Does this substantial change have a significant effect
9 on the environment?"

10 THE COURT: Is it fair to say, then, that if
11 given the opportunity to amend, you are going to provide
12 essentially exactly the same thing that has been
13 provided so far, and your basis for that is: You
14 essentially think the Court is incorrect?

15 And I'm not trying to put you in a box with
16 regards to that. I'm really just trying to understand.
17 Your position is that the Court is looking at this in an
18 erroneous way, and that you don't need to allege
19 something different than what you have because it is
20 equally sufficient.

21 MR. LIPPE: On the merits, that is correct,
22 Your Honor.

23 THE COURT: Okay.

24 MR. LIPPE: I think the Court is incorrect in
25 thinking that there's no CEQA claim on these facts. And

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1 if the Court would entertain a moment of argument on
2 that, I have a little bit more to say than what's in my
3 supplemental brief. And if the Court would not --

4 THE COURT: I would say, you know, very briefly
5 because at this point, I think I understand your
6 position. And then I will provide an opportunity for
7 response.

8 MR. LIPPE: Okay. So there is another Supreme
9 Court decision called Wildlife Alive versus Chickerling,
10 and it's a 1976 decision at 17 Cal.3d 190. And what it
11 talks about is a rule that where there is a list of
12 exceptions in a statute, then additional exceptions
13 should not be implied.

14 And I think what the Court's tentative does is:
15 It implies that Section 21080.09 actually provides an
16 exception from a very standard CEQA requirement, which
17 is that at the most basic level, if an agency is going
18 to carry out an activity that would have a substantial
19 impact on the environment, or that may have such an
20 impact, it must apply CEQA. It must do something.

21 In a normal situation, it starts with a
22 preliminary review. It might go to an initial study and
23 then to a negative declaration or an EIR. In this
24 situation, it's typically looked at under 21166 as is
25 another EIR needed? And what the --

1 THE COURT: But when is another EIR needed?
2 Because going back to the repeating issue in this case,
3 what I'm hearing is: There's no specific activity that
4 you can point to. It's just a pattern of conduct that
5 occurred month in, month out, year in, year out for
6 years. Is that fair?

7 MR. LIPPE: No, it's not fair.

8 THE COURT: Okay.

9 MR. LIPPE: It's close to being fair, but I
10 think what's missing -- well, it is a pattern of
11 conduct, and that is sufficient basis to allege a
12 violation of law. For a declaratory relief claim, you
13 can use a pattern and practice of conduct to show that
14 an agency has, in fact, a policy that's illegal.

15 For the mandamus claim here, the same thing is
16 at play here, which is: We have not been able to do
17 discovery of the internal documents. So in terms of who
18 made what decision when, we can't tell that. All we
19 know is that it was not a formal decision because it
20 wasn't publicized. There was no hearing where that was
21 discussed as being something that they were going to do.

22 So it's a matter of inference from what's
23 happening with enrollment when the plaintiffs actually
24 -- or sort of segueing into the limitations question.
25 But the plaintiffs eventually, through their work,

1 figured out that enrollment had increased dramatically,
2 and was provided with information that showed that year
3 by year, happening of either this one decision for a
4 change to go beyond the 1,650 or for a series of
5 decisions unknown at this point.

6 But regardless, standard CEQA law would be that
7 when you change a project in that way, you have to do
8 some additional environmental review under CEQA.

9 THE COURT: When? When they enrolled two
10 additional students? When they enrolled 50 additional
11 students? When would they have needed to do that?

12 MR. LIPPE: When the change became substantial
13 in the sense that it would have environmental impacts
14 that needed to be reviewed.

15 THE COURT: And when was that?

16 MR. LIPPE: Well, it's hard to say. And it's
17 not required that plaintiffs allege that because the
18 only points in time that are relevant here are when the
19 increase exceeded the 1,650. And then at the other end,
20 when plaintiffs found out that the increase had gone up,
21 was it substantial at that point? And certainly, we
22 allege that it was substantial at that point.

23 And then going -- and then I suppose when we
24 get into the facts of the case, if we get there, there
25 would be a factual inquiry, which we then have the right

1 to take depositions and call witnesses as to whether,
2 when plaintiffs filed the lawsuit, they should have
3 known more than 180 days before that filing that the
4 increase had become substantial.

5 So there's a number of factual questions that
6 are simply not appropriate to address on a demurrer
7 because the allegation is, is that they could not
8 exercise reasonable diligence had found out before they
9 did find out. And so it's up to the trier of fact,
10 which we're not there yet, to make that determination.

11 THE COURT: Okay. Is there a response?

12 MR. CREMIN: Yes, Your Honor. Thank you. I'd
13 just like to focus on the leave to amend question the
14 Court presented and his response, which was a little bit
15 hard to follow, but let me try to respond to it.

16 The Court's ruling says as a matter of law, as
17 a matter of statutory interpretation, that an enrollment
18 plan is not part of the LRDP, and the statute at issue
19 is 21080.09. I think the Court properly worked through
20 the statute. It defines "long-range development plan"
21 as a physical plan. Nothing in that definition mentions
22 enrollment. Subdivision (b) of that section says that
23 environmental effects relating to enrollment levels
24 shall be considered in the EIR, not the LRDP. And then
25 that statute also says, under Subsection (c), that if

1 you rely on that EIR in the future for the approval of a
2 development project, you can tier off of it, but then
3 the standards of supplemental environmental review
4 apply.

5 And that goes to our request for judicial
6 notice that was already granted in November of this case
7 of a pending development project. As part of that
8 development project, they are analyzing the change in
9 enrollment from what was analyzed in the LRDP EIR.

10 So if you march through the statute and then
11 you pivot to the leave to amend, I don't see how they
12 can plead facts that change the interpretation of the
13 statute. They've already said that the LRDP is an
14 enrollment plan is not as a matter of law. So they've
15 already pled that. We're in the third amended
16 complaint.

17 And to, you know, the Court's point, the prior
18 sustain of the demurrer with leave to amend asked them
19 to clearly identify the project that is being challenged
20 in this action as well as the date that the
21 discretionary approval for that project was granted and
22 when that project commenced. That was the ruling that
23 led to them filing the third amended complaint. We
24 argued in our demurrer that they failed to establish
25 those three elements in the prior Court's order.

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1 And what I hear from the Court this morning, if
2 I'm listening correctly, is: We still have the same
3 problem we had before. On top of that, the last time we
4 appeared before you on January 24th, you ordered
5 supplemental briefing on three issues, including,
6 including, specifically when does this increase become
7 substantial?

8 I mean, you said that already and you said it
9 again today. And the response in the supplemental
10 briefing was no response, and you're getting no response
11 again today.

12 THE COURT: Well, hold on a second. I do think
13 that I'm getting a response and I really do appreciate
14 the sincerity of it, which is that petitioner believes
15 the Court has it wrong. That the previous decision was
16 incorrect and that the tentative decision of this Court
17 is incorrect.

18 And there is a mechanism to address this if, in
19 fact, the Court has repeatedly gotten it wrong, but I
20 think they've made it quite clear that if given the
21 opportunity to amend, that what would be presented is
22 essentially what has already been presented because they
23 believe the Court has erred as a matter of law.

24 So I appreciate your concern on this point. I
25 don't think it changes the direction that the Court is

1 going to go. Obviously, I'm going to look at these last
2 couple of cases that have been mentioned.

3 What was the year of the first case?

4 MR. LIPPE: That was -- Stockton Citizens is
5 2010.

6 THE COURT: Okay. I don't think at this
7 juncture that I need to hear anything further on this
8 point.

9 MR. CREMIN: Just one minor issue. I mean, he
10 cited two cases for the first time today before the
11 Court that is outside of the briefing that we've had no
12 opportunity to respond to. The cases are not on point
13 and they deal with a different situation.

14 So I don't -- I don't know how to address that
15 with the Court, but he's bringing something up that
16 isn't in the brief.

17 THE COURT: I appreciate that and he
18 acknowledged as much.

19 MR. CREMIN: Okay.

20 THE COURT: Okay.

21 MR. LIPPE: Just on the "when" question in
22 terms of leave to amend, I do not see any point in
23 amending for the merits claim. In other words, can we
24 state this claim? On the question of whether we're
25 late, whether the claim is barred by the statute of

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1 limitations, then I have a request for leave to amend in
2 the supplemental brief to try to figure out when it
3 became substantial. If that's what the Court is -- I
4 don't think that's the right focus, but if that is the
5 Court's focus, then I do request leave to amend to try
6 to figure out when my clients would believe it was
7 substantial.

8 And I must say, it's a difficult exercise
9 because they're using hindsight just like the trier of
10 fact would be doing. Because they found out when they
11 found out, and at that point, it was substantial. For
12 them to go back and try to pick a point in the timeline
13 and say, "Oh, this is the entries that was the tipping
14 point," you know, that requires a judgment.

15 And I don't think it's plaintiff's role to do
16 that, but we would request the opportunity to do that if
17 the Court believes that that's necessary to state this
18 claim and to survive the bar of the limitations.

19 THE COURT: Okay.

20 MR. CREMIN: I'll just say the ruling doesn't
21 address statute of limitations.

22 THE COURT: All right. Thank you very much.

23 MR. LIPPE: Thank you.

24 MR. CREMIN: There's also a next -- I'm sorry,
25 Your Honor.

1 THE COURT: There was an ex parte. The Court
2 is not going to take that ex parte today. I'm going to
3 address this issue. Again, what I want to keep in mind
4 is that I don't actually have this matter for anything
5 other than finishing the argument that was presented in
6 January.

7 So this issue actually needs to go before Judge
8 Roesch. Whether it would be in the form of an ex parte
9 or in the form of a law and motion, that would be
10 something you would need to take up, but I can't hear it
11 here.

12 MR. LIPPE: Your Honor, just so you know, I did
13 file in Department 17 with Judge Roesch initially
14 because it was assigned for all purposes there. And
15 then when we showed up, he said, "Well, the demurrer is
16 actually handled in Department 24, so I'm going to drop
17 it here and you need to take it there." Just so you
18 know. And I wrote that in my papers, but perhaps you
19 didn't see that.

20 THE COURT: It's a bit of a chicken-and-egg
21 problem, but I'm going to finish addressing what I
22 started addressing in January. And then to the extent
23 that that issue is still ripe and needs to be addressed,
24 then you would take it up there.

25 MR. LIPPE: Thank you.

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1 THE COURT: Okay.

2 MR. CREMIN: Thank you, Your Honor.

3 (Proceedings concluded at 9:25 a.m.)

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REPORTER'S CERTIFICATION

I, Sheila Pham, a Certified Shorthand Reporter, do hereby certify:

That the foregoing proceedings were taken before me at the time and place therein set forth, that the proceedings were reported stenographically by me and were thereafter transcribed under my direction and supervision, and that the foregoing pages contain a full, true and accurate record of all proceedings and testimony to the best of my skill and ability.

In witness whereof, I have subscribed my name.

Dated: May 1, 2019



Sheila Pham
CSR No. 13293

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1 **PROOF OF SERVICE**

2 I am a citizen of the United States, employed in the City and County of San Francisco, California.
3 My business address is 201 Mission Street, 12th Floor, San Francisco, CA 94105. I am over the age of 18
4 years and not a party to the above entitled action. On June 19, 2019, I served the following document on
5 the parties below, as designated:

6 • **APPELLANT'S NOTICE DESIGNATING RECORD ON APPEAL**

7
8 **MANNER OF SERVICE**
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10 ☒ By E-mail: I caused such document to be served via electronic mail equipment
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12 service list by transmitting a true copy to the following E-mail
13 addresses listed under each addressee below. I did not receive, within
14 a reasonable time after the transmission, any electronic message or
15 other indication that the transmission was unsuccessful.

16 I declare under penalty of perjury under the laws of the State of California that the foregoing is true
17 and correct. Executed on June 19, 2019, in the City and County of San Francisco, California

18 
19 Kelly Marie Perry

20 **SERVICE LIST**

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