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FILED  
ALAMEDA COUNTY

AUG 23 2021

CLERK OF THE SUPERIOR COURT

By Ami Carter Deputy

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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; MICHAEL V. DRAKE, in his  
19 capacity as President of the University of  
20 California; UNIVERSITY OF CALIFORNIA,  
21 BERKELEY; CAROL T. CHRIST, in her capacity  
22 as Chancellor of the University of California,  
23 Berkeley; and DOES 1 through 20,

24 Respondents,  
25  
26

27 AMERICAN CAMPUS COMMUNITIES;  
28 COLLEGIATE HOUSING FOUNDATION;  
AMERICAN CAMPUS COMMUNITIES  
SERVICES, INC.; AMERICAN CAMPUS  
COMMUNITIES OPERATING PARTNERSHIP  
LP; and DOES 23 through 40,

Real Parties in Interest.

Case No. RG19022887

Related Cases:

RG18902751

RG19023058

~~[Proposed Second-Corrected]~~ JUDGMENT

[California Environmental Quality Act]

Assigned for All Purposes to the Honorable Brad  
Seligman, Dept. 23

Action Filed: June 13, 2019

Trial: April 16, 2021

1 The Second Amended Petition for Writ of Mandate filed in this matter on December 21, 2020, came  
2 on regularly for hearing on April 16, 2021, before the Honorable Brad Seligman, Judge Presiding. Counsel  
3 Thomas N. Lippe appeared on behalf of Petitioner Save Berkeley's Neighborhoods. Counsel Charles Olson  
4 appeared on behalf of Respondents.

5 Having reviewed the record of proceedings in this matter, the briefs submitted by the parties, and  
6 hearing the arguments of counsel, the Court, on July 9, 2021, issued an Order Granting Petitions for Writ  
7 of Mandate (Order). The Order is attached hereto as Exhibit 1 and is incorporated herein by reference as if  
8 set forth in full. The Court enters the following JUDGEMENT.

9 IT IS ORDERED AND ADJUDGED that:

10 1. For the reasons stated in the Order Petitioner Save Berkeley's Neighborhoods', petition for writ of  
11 mandate is granted in part.

12 2. The clerk is directed to issue a peremptory writ of mandate ("Writ"), in the form attached hereto as  
13 Exhibit 2, directed to Respondents the Regents of the University of California; Janet Napolitano, in her  
14 capacity as President of the University of California; University of California, Berkeley; and Carol T. Christ,  
15 in her capacity as Chancellor of the University of California, Berkeley (hereinafter collectively referred to  
16 as "Respondents").

17 3. Pursuant to Public Resources Code section 21168.9(a)(1):

18 a. Respondents are ordered to void any decision or decisions they may have made prior to entry  
19 of this Judgment to increase student enrollment in academic year 2022-2023 or later above the level  
20 of student enrollment at UC Berkeley in academic year 2020-2021.

21 b. Respondents are ordered to void their decision to carry out the Upper Hearst Development  
22 for the Goldman School of Public Policy and Housing Project.

23 c. Respondents are ordered to decertify the Final Supplemental Environmental Impact Report  
24 for the Upper Hearst Development Plan for the Goldman School of Public Policy and Minor  
25 Amendment to the 2020 Long Range Development Plan ("SEIR").

26 4. Pursuant to Public Resources Code section 21168.9(a)(2), the Court finds that further increases in  
27 enrollment will prejudice the consideration or implementation of particular mitigation measures or  
28 alternatives to the project, such as the Reduced Enrollment Alternative discussed at page 21 of the Order,  
and that further increases in student enrollment above the current enrollment level at UC Berkeley could  
result in an adverse change or alteration to the physical environment; therefore, Respondents are ordered

1 to suspend any further increases in student enrollment at UC Berkeley, in academic years 2022-2023 and  
2 later, above the level of student enrollment in academic year 2020-2021 until Respondents have  
3 demonstrated full compliance with this Judgment and Writ and the Court orders discharge of the Writ.

4 5. Pursuant to Public Resources Code section 21168.9(a)(3), Respondents are ordered to revise the  
5 SEIR to remedy the deficiencies identified in this Judgment and to ensure that the SEIR complies with the  
6 California Environmental Quality Act (CEQA); and with respect to the revised SEIR, to comply with all  
7 procedures set forth CEQA Guidelines 15084 through 15097, and to certify the revised SEIR pursuant to  
8 CEQA Guideline 15090, ~~by June 30, 2022~~.

9 6. The Court hereby retains jurisdiction over the parties and the subject matter of this action, including  
10 Respondents compliance with this Judgment and Writ.

11 7. To enforce this Judgment or Writ, Petitioner may file a motion to enforce or use any other method  
12 of enforcement authorized by law.


13 8. If Petitioner objects to Respondents' certification of the revised SEIR on grounds that the revised  
14 SEIR fails to comply with CEQA's legal requirements, Petitioner may seek judicial review of its objections  
15 on these grounds by filing a motion to enforce this judgment.

16 9. Within 30 days after taking any of the actions ordered by this Judgment and Writ, Respondents shall  
17 file and serve a partial return to the Writ informing the Court and the parties of the date and nature of the  
18 action taken. After taking all of the actions ordered by this Judgment and Writ, Respondents may file a  
19 motion to discharge the Writ.

20 10. Pursuant to California Rule of Court, Rule 3.1700, Petitioner may file a memorandum of costs.

21 11. The Court reserves jurisdiction to consider any motion by Petitioner for an award of attorneys' fees  
22 and expenses.

23 Dated: 8/23/21

  
\_\_\_\_\_  
Judge of the Superior Court

24 F:\TL\Goldman EIR\Trial\Orders\OR077 Prop Second Corrected Judgment.wpd

## **EXHIBIT 1**

*Order Granting Petitions for Writ of Mandate,  
Case No. RG19022887  
Case No. RG19023058*



ENDORSED  
FILED  
ALAMEDA COUNTY

JUL 0 9 2021

CLERK OF THE SUPERIOR COURT

By JHALISA CASTANEDA  
Deputy

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

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

Petitioner,

v.

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

Respondents.

CITY OF BERKELEY,

Petitioner,

v.

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

Respondents.

Case No. RG19022887

Case No. RG19023058

ORDER GRANTING PETITIONS FOR  
WRIT OF MANDATE

1           Petitioners City of Berkeley and Save Berkeley's Neighborhoods commenced two actions  
2 seeking a writ of mandate from the Court directing respondent The Regents of the University of  
3 California ("UC") to set aside a determination of May 16, 2019. (AR1.) UC approved a new  
4 development project to create additional academic and residential space for UC Berkeley's  
5 Goldman School of Public Policy ("GSPP") on Hearst Avenue (the "Upper Hearst  
6 Development"). (AR1.) To document its considerations of the environmental impact of its  
7 project under the California Environmental Quality Act ("CEQA"), UC certified a Supplemental  
8 Environmental Impact Report, which tiered from its 2020 Long Range Development Plan  
9 Environmental Impact Report ("2020 LRDP EIR") and made minor amendments to it. (AR1.)

10           For the following reasons, the court grants the writs of mandate. The parties vigorously  
11 debate whether the project description was consistent or appropriately defined. UC Berkeley's  
12 concession that both the project and its "baseline" are subject to judicial review makes much of  
13 this debate besides the point. The court concludes that the environmental analysis was legally  
14 insufficient in several respects, and that it cannot accordingly endorse the failure to consider a  
15 reduced enrollment alternative.

## 16   **I.     LEGAL STANDARDS**

17           The Legislature intended CEQA "to be interpreted in such a manner as to afford the  
18 fullest possible protection to the environment within the reasonable scope of the statutory  
19 language." (*Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 511, quoting *Laurel Heights*  
20 *Improvement Assn. v. The Regents of the Univ. of Cal.* (1988) 47 Cal.3d 376, 390.) "With  
21 narrow exceptions, CEQA requires an EIR whenever a public agency proposes to approve or to  
22 carry out a project that may have a significant effect on the environment." (*Ibid.*, citing same at  
23 pp.390-391.) "Because the EIR must be certified or rejected by public officials, it is a document  
24 of accountability." (*Id.* at p.512, citing same at p.392.) The general public, "being duly  
25 informed, can respond accordingly to action with which it disagrees." (*Ibid.*, citing same.)  
26 When the Court finds a violation of CEQA, a writ must issue. (Pub. Res. Code § 21168.9(b).)

1 When the Court is asked to review the decision of a public agency for compliance with  
2 CEQA, its review “extend[s] only to whether there was a prejudicial abuse of discretion.” (Pub.  
3 Res. Code § 21168.5.) A public agency has abused its discretion if either (1) the agency “has not  
4 proceeded in a manner required by law” or (2) the agency’s decision is “not supported by  
5 substantial evidence.” (*Ibid.*) “Judicial review of these two types of error differs significantly:  
6 While we determine de novo whether the agency has employed the correct procedures,  
7 “scrupulously enforc[ing] all legislatively mandated CEQA requirements” [citation], we accord  
8 greater deference to the agency’s substantive factual conclusions.” (*Sierra Club, supra*,  
9 6 Cal.5th at p.512, quoting *Vineyard Area Citizens for Responsible Growth, Inc. v. City of*  
10 *Rancho Cordova* (2007) 40 Cal.4th 412, 435.) Reviewing factual findings, the Court “will  
11 resolve reasonable doubts in favor of the administrative decision[] and will not set aside an  
12 agency’s determination on the ground that the opposite conclusion would have been equally or  
13 more reasonable.” (*Id.* at p.515.)

## 14 **II. INCREASES IN STUDENT ENROLLMENT AND CAMPUS POPULATION**

### 15 **A. ENROLLMENT – “UPDATED BASELINE”**

16 In the SEIR, UC Berkeley undertook to study the environmental impacts of the existing  
17 higher-than-projected campus population as part of the description of an “updated baseline.”  
18 The SEIR states that its study of past population increase is not as part of the “project” as that  
19 term is used in CEQA. (*See* AR60, 101-103; AR847; *see* Guidelines § 15378 [defining “Project”  
20 as “the whole of an action, which has a potential for resulting in either a direct physical change  
21 in the environment, or a reasonably foreseeable indirect physical change in the environment” and  
22 subject to direction, funding, or discretionary permission by a public agency].) According to the  
23 SEIR, UC Berkeley studied the impacts of the increase in its population leading to its “updated  
24 baseline”—even though that increase was not part of the project—because “in its response to  
25 comments to the 2020 LRDP EIR, UC Berkeley made a commitment to the City of Berkeley  
26

1 that, if enrollment increased beyond the projections set forth in the 2020 LRDP, it would  
2 undertake additional review under CEQA.” (AR60.)

3 It is important to distinguish the SEIR’s “updated baseline” analysis from the normal use  
4 of the term “baseline” under CEQA. Ordinarily, an environmental impact report studies the  
5 impacts of a project on the environment. To determine and measure those impacts, the lead  
6 agency must determine the environmental conditions as they exist at the time it files its notice of  
7 preparation for the project. (Cal. Code Regs., tit. 14, div. 6, ch.3, [“Guidelines”] § 15125(a).)  
8 Under Guidelines section 15125, “[a]n EIR must include a description of the physical  
9 environmental conditions in the vicinity of the project.” (Guidelines § 15125(a).) “This  
10 environmental setting will normally constitute the baseline physical conditions by which a lead  
11 agency determines whether an impact is significant.” (*Ibid.*) “The purpose of this requirement is  
12 to give the public and decision makers the most accurate and understandable picture practically  
13 possible of the project’s likely near-term and long-term impacts.” (*Ibid.*)

14 The “updated baseline” discussion in the SEIR serves to serve two purposes. First, the  
15 SEIR describes the current campus population as the baseline for its environmental impact  
16 analyses of the Upper Hearst Development, including the impact of further population increases.  
17 Second, the SEIR includes an analysis for purely informational purposes to “update” the 2020  
18 LRDP EIR’s projected population-related impacts analyses to analyze the impacts of the increase  
19 in campus population above the level studied in the 2020 LRDP EIR (the “Excess Population”).  
20 The SEIR discusses the potential impacts of the Excess Population and finds that it has had no  
21 significant environmental impacts. (See AR101-103.) The SEIR does not consider alternatives  
22 to the enrollment levels that led to Excess Population and does not adopt mitigation measures  
23 beyond those already adopted in the 2020 LRDP EIR.

24 The unusual structure of the SEIR’s “update” analysis stems at least partly from an issue  
25 of legal interpretation. When it was certified in 2005, the 2020 LRDP EIR had projected that  
26 student enrollment at UC Berkeley would stabilize at around 33,450 students. (AR2134

1 ["[O]nce our current target is reached, at an estimated two-semester average of 33,450 students,  
2 enrollment at UC Berkeley should stabilize."]; *see also* AR101.) But UC Berkeley's headcount  
3 did not stabilize. It continued to increase and quickly exceeded those projections, with student  
4 enrollment in the 2017-2018 school year reaching 40,955, "exceed[ing] the 2020 LRDP  
5 projection by approximately 7,500 students." (AR101.) The record in this action does not  
6 include any evidence that UC Berkeley studied the potential effects of the Excess Population  
7 before its decision to enroll the additional students who make up the bulk of the increase to its  
8 campus population since the 2020 LRDP EIR.

9         Several community members and organizations, including SBN and the City of Berkeley,  
10 responded to UC Berkeley's Draft Supplemental Environmental Impact Report ("DSEIR") for  
11 the Upper Hearst Development by requesting that UC Berkeley separate its "updated baseline"  
12 analysis from the analysis of the Upper Hearst Development into a separate EIR. (AR847-848.)  
13 Many commenters found the DSEIR confusing and unusual because it combined a future land  
14 development project with a seemingly unrelated increase in student population that has already  
15 happened. UC Berkeley responded to these comments in its Final Supplemental Environmental  
16 Impact Report ("FSEIR"), arguing that an increase in enrollment or population categorically  
17 cannot constitute a "project" under CEQA. (AR847, citing Pub. Res. Code § 21080.09.) The  
18 FSEIR reasons, it is not possible to produce a meaningful EIR for the population increase  
19 because it would not be tethered to an "approval" of a "project." (AR847-848.) The FSEIR also  
20 notes that the GSPP project requires a minor amendment to the 2020 LRDP, and that the EIR  
21 analysis for that land-use plan would therefore need to be brought up to date. (*Ibid.*) The FSEIR  
22 concluded based on those premises that the Excess Population portion of its updated baseline  
23 analysis must be included in the SEIR for the Upper Hearst Development because it could go  
24 nowhere else.

25         That conclusion stood on a false premise. UC Berkeley was under the misapprehension  
26 that increases in student enrollment only needed to be considered in the context of the long-range

1 development plan process, and then only to the extent such projections would “assist in  
2 determining the amount of physical development required.” (See AR847-878.) In 2018, before  
3 the DSEIR for the Upper Hearst Development was published, Petitioner Save Berkeley’s  
4 Neighborhoods sued UC for failing to study the impacts of these increases in enrollment,  
5 alleging that the enrollment increases constituted an unstudied project in violation of CEQA.  
6 (See *Save Berkeley’s Neighborhoods v. The Regents of the Univ. of Cal.* (2020) 51 Cal.App.5th  
7 226, 233.) In June 2020, after the DSEIR and FSEIR were published, the Court of Appeal held  
8 that UC Berkeley’s interpretation of CEQA was incorrect. “CEQA requires public universities  
9 to mitigate the environmental impacts of their growth and development.” (*Id.* at p.231.) “In this  
10 context, growth includes student enrollment increases, which the Legislature has acknowledged  
11 ‘may negatively affect the surrounding environment.’” (*Ibid.*) “[W]hen a public university  
12 prepares an EIR for a development plan, [Public Resources Code] section 21080.09 requires  
13 universities to expand the analysis to include a related feature of campus growth, future  
14 enrollment projections, which is entirely consistent with the traditional, broad definition of a  
15 CEQA project.” (*Id.* at p.239.) “It does not say that subsequent changes to enrollment plans—  
16 with new or increased environmental effects that have not been analyzed and addressed—are  
17 exempt from CEQA.” (*Ibid.*)

#### 18 **B. ENROLLMENT – HOW TO REVIEW THE “UPDATED BASELINE”**

19 The “updated baseline” is a novel concept under CEQA, and it was included because UC  
20 Berkeley misunderstood its legal obligations to study the impacts of student enrollment. Yet the  
21 inclusion of an erroneous legal analysis in the SEIR does not necessarily require the EIR  
22 certification be set aside. An EIR serves to structure the public consideration of environmental  
23 impacts. Courts review an EIR for prejudicial abuse of agency discretion. (*Sierra Club, supra*, 6  
24 Cal.5th at pp.511-512.) But a false legal analysis, like noncompliance with CEQA, is grounds to  
25 grant a writ setting aside the agency approval only if the noncompliance resulted in “a  
26 subversion of the purposes of CEQA by omitting information from the environmental review



1 process.” (*See Schenck v. County of Sonoma* (2011) 198 Cal.App.4th 949, 959.) In other words,  
2 so long as the EIR still correctly identifies, analyzes, discusses alternatives, and proposes  
3 mitigation for substantial environmental impacts, it fulfills its public purpose as an informational  
4 document, notwithstanding the inclusion of a mistaken legal analysis, and its certification is not  
5 an abuse of discretion for that reason. (*See* Pub. Res. Code § 21168.5 [standard of review is  
6 prejudicial abuse of discretion]; Guidelines § 15151 [“The courts have looked not for perfection  
7 but for adequacy, completeness, and a good faith effort at full disclosure.”].)

8       The next step would normally be to determine whether UC Berkeley’s updated baseline  
9 analysis is part of the project being studied. An EIR must study and mitigate the impacts of a  
10 “project” and consider reasonable alternatives to that “project.” (*See* Pub. Res. Code § 21002.1  
11 [“The purpose of an environmental impact report is to identify the significant effects on the  
12 environment of a project, to identify alternatives to the project, and to indicate the manner in  
13 which those significant effects can be mitigated or avoided.”]; Guidelines § 15126.2(a) [“An EIR  
14 shall identify and focus on the significant effects of the proposed project on the environment.”];  
15 *see also* Guidelines § 15358 [defining “effects” and “impacts” as including only those direct and  
16 indirect environmental impacts “caused by the project”].) In their briefs, the parties argued about  
17 whether UC Berkeley was estopped from denying that the population increase was part of the  
18 “project.” At the hearing on the petition, however, the parties stipulated that the SEIR’s analysis  
19 of the impacts of the increase in enrollment was subject to judicial review in this proceeding  
20 without resolving the issue of whether the increases to student enrollment that led to the Excess  
21 Population were a part of the project studied in the SEIR. Given this stipulation, the Court does  
22 not need to determine whether that past increase was part of the project under study here.

23       But what standard does the Court review the SEIR’s analysis of the past increases in  
24 student enrollment? CEQA provides only one standard for review for an EIR—the Court will  
25 grant the writ if it finds that an agency “has not proceeded in a manner required by law” or its  
26 conclusions are “not supported by substantial evidence.” (*See* Pub. Res. Code § 21168.5.) The

1 Court does not decide whether the “updated baseline” analysis or the decision to increase  
2 enrollment are a part of the project. But because CEQA provides only one standard of review,  
3 this Order reviews the factual determinations and procedural conformity under the same  
4 standards as if they were a part of a project. The parties’ arguments in the briefs regarding  
5 estoppel, waiver, and admission are moot given the parties’ stipulation at hearing.

6 **C. ENROLLMENT – DESCRIPTION OF THE UPDATED BASELINE**

7 Both SBN and the City object to the SEIR on the grounds that it offers an inadequate,  
8 shifting description of the project under study as sometimes including the population increase,  
9 sometime not. “An accurate, stable, and finite project description is the [s]ine qua non of an  
10 informative and legally sufficient EIR.” (*See County of Inyo v. City of Los Angeles* (1977)  
11 71 Cal.App.3d 185, 193, 199.) An EIR is “fundamentally inadequate and misleading” if it offers  
12 “conflicting signals to decision-makers and the public about the nature and scope of the activity  
13 being proposed.” (*San Joaquin Raptor Rescue Ctr. v. County of Merced* (2007) 149 Cal.App.4th  
14 645, 655-656.)

15 The public environmental review process begins with the issuance of a Notice of  
16 Preparation (“NOP”). (Pub. Res. Code § 21092.) A NOP must provide “sufficient information  
17 describing the project and the potential environmental effects to enable the responsible agencies  
18 to make a meaningful response.” (Guidelines § 15082(a)(1).) In this case, UC Berkeley’s NOP  
19 describes the “project” as “a public-private partnership that would provide additional academic  
20 space for GSPP’s undergraduate, graduate, and Global Executive Education programs, and  
21 housing geared toward campus affiliates, principally faculty, graduate and post-doctoral  
22 students” including “two separate buildings – an academic building and a residential building  
23 . . . .” (AR51, 53.) It also notes that the project “would involve minor text amendments to the  
24 2020 LRDP” to “address the fact that . . . the proposed project conflicts with the existing  
25 applicable land use plan[] and is not consistent with the 2020 LRDP housing element.” (AR52.)  
26 The NOP announces that a supplemental EIR, rather than some other kind of informational

1 document, would be prepared because of "changes to the [2020 LRDP] land use plan" and "an  
2 increase in current and foreseeable campus population levels above those analyzed in the 2020  
3 LRDP EIR, based on a general increase in student enrollment and employee levels and growing  
4 the GSPP program(s)." (AR52.) The NOP also notes that growing enrollment is part of a  
5 continuing trend, as least in the foreseeable future: "UC Berkeley may continue to expand  
6 enrollment", which "depends on various factors including . . . legislative mandates, University  
7 and State of California policies, available resources, and demographic trends" with an estimated  
8 growth of "about 1.5 percent annually, on an average, in the near-term." (AR51.) UC Berkeley  
9 eventually circulated a Draft SEIR, which described the project as both (1) "the Upper Hearst  
10 Development for GSPP" that "would have residential and academic components," and (2) a  
11 "Minor LRDP Amendment to accommodate the proposed land uses on the Project site."  
12 (AR76.) The evaluation of existing population levels above the levels previously studied were  
13 described in the DSEIR not as part of the project but as part of an updated baseline for campus  
14 population. (*See, e.g.*, AR60, 64, 848.)

15 The "updated baseline" analysis does not fit well within a traditional CEQA framework.  
16 As discussed above, the SEIR itself consistently describes the project under study: the "Upper  
17 Hearst Development" involving residential and academic buildings and a minor amendment to  
18 the 2020 LRDP's land use plan to allow for that construction. (*See, e.g.*, AR59-60, 69-98, etc.)  
19 In its discussion of student enrollment levels, the SEIR distinguishes the impacts of new student  
20 enrollment at the Upper Hearst Development from the impacts of the prior and projected  
21 enrollment growth not attributable to the GSPP project. Its apparent goal in doing so is to  
22 provide an environmental analysis for that previously unstudied population increase sufficient to  
23 inform the public without having to study the increase as an actual project.

24 Petitioners argue that the SEIR's use of an "updated baseline" to sometimes discuss and  
25 sometimes ignore the Excess Population is analogous to the misleading project descriptions in  
26 *County of Inyo* and *City of Santee*. (*See County of Inyo, supra*, 71 Cal.App.3d 185; *City of*

1 *Santee v. County of San Diego* (1989) 214 Cal.App.3d 1438.) But it does not present the same  
2 problems as an informational document as the EIRs in those cases. In *County of Inyo*, the City of  
3 Los Angeles abused its discretion by certifying an EIR that discussed an increase in ground  
4 water pumping from city-owned land in the Owens Valley for in-valley use while failing to  
5 discuss and analyze its vaguely defined “recommended project,” a plan to divert surface and  
6 groundwater for export to the City of Los Angeles. Los Angeles defined its “project” narrowly  
7 while still purporting to disclose and discuss environmental impacts of increased water exports to  
8 the City as “not part of the project” because those flows were to be directed through an aqueduct  
9 that had been approved before CEQA was enacted—

10       At one point of the Final EIR the contradiction becomes explicit: ‘In the  
11       process of preparing this environmental impact report, other aspects of  
12       Aqueduct System operation have been reevaluated. This includes a  
13       reappraisal of the rate of export through the Los Angeles Aqueducts. Thus,  
14       the project description presented below includes references to the rate of  
15       export, even though the rate of export was not part of the project . . . .’  
16       (*County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 196.)

17 Here, UC Berkeley narrowly described its project as the Upper Hearst Development, but also  
18 purports to discuss the environmental impacts of the Excess Population as “not part of the  
19 project” because all previous unstudied increases in student enrollment were supposedly exempt  
20 from CEQA under UC’s misreading of Section 21080.09. Upper Hearst Development includes a  
21 small increase in projected student enrollment at the GSPP, but that increase is one part of a  
22 continuing trend of increasing student enrollment with potential cumulative effects. But that is  
23 not the end of the analysis. Unlike the EIR in *County of Inyo*, UC Berkeley’s SEIR discusses,  
24 describes, and considers the impacts of the larger trend in student enrollment in the SEIR.

25       In *City of Santee*, the Court analyzed a project by the County of San Diego to build a  
26 “temporary” jail facility to ease overcrowding in its jail system and analyzed the impacts over  
seven years. (*City of Santee v. County of San Diego* (1989) 214 Cal.App.3d 1438.) The Court  
emphasized that the County had inappropriately “chopp[ed] a large project into many little ones”  
because “[n]ot only does a reading of the record support a conclusion that some future action on

1 the temporary project was contemplated, it also reflects the EIR here could be considered one  
2 small part of the larger project to ease jail crowding in the entire county." (*Id.* at p.1454.) "Thus  
3 it is reasonably foreseeable that the project will continue for a longer term than seven years, and  
4 it is likewise reasonably foreseeable that the temporary male detention facility will be moved to  
5 East Mesa either before the end of seven years or at that time." (*Ibid.*) "These future uses  
6 should have been included in the EIR and their cumulative effects discussed." (*Ibid.*) The SEIR  
7 in this case does consider increase in student enrollment on its own, but it does divorce that  
8 analysis from its context in its discussion of the "updated baseline."

9 In short, the SEIR attempts to analyze an increase in student enrollment without  
10 admitting that increasing student enrollment is a project subject to review. The SEIR describes  
11 the Upper Hearst Development as the relevant project. That project description does not shift  
12 from one part of the SEIR to another. The SEIR situates that project within its larger context of  
13 increasing student enrollment and it discusses cumulative effects. The SEIR's definition is clear  
14 enough that reasonable members of the public would not be misled about the scope of the project  
15 under review, and it is not so "curtailed, enigmatic or unstable" that it "draws a red herring  
16 across the path of public input." (*County of Inyo, supra*, 71 Cal.App.3d at p.198.)

#### 17 **D. ENROLLMENT -IMPACTS FROM GROWING CAMPUS POPULATION**

##### 18 *1. Induced Housing Demand and Population Growth*

19 The CEQA Guidelines mandate that a lead agency should consider impacts to population  
20 and housing when analyzing a project. (Guidelines § 15126.2(a), (e) [EIR must discuss "changes  
21 induced in population distribution" "population concentration" and must "[d]iscuss the ways in  
22 which the proposed project could foster economic of population growth, or the construction of  
23 additional housing, either directly or indirectly, in the surrounding environment."].) The  
24 Guidelines' Environmental Checklist Form asks the lead agency to determine whether the project  
25 (a) would "[i]nduce substantial unplanned growth in an area, either directly (for example, by  
26 proposing new homes and businesses) or indirectly (for example, through extensions of roads or



1 other infrastructure)” or (b) would “[d]isplace substantial numbers of existing people or housing,  
2 necessitating the construction of replacement housing elsewhere.” (Guidelines, appx. G, § XIV,  
3 subds. (a), (b).)

4 UC Berkeley’s DSEIR identified population and housing as an area in which further  
5 analysis was required. (AR206.) It projected that student enrollment at UC Berkeley in the  
6 2022-2023 academic year would exceed the projections in the 2020 LRDP EIR by more than a  
7 third, but employees (and members of their households) were under projections. (AR207.) The  
8 DSEIR attributes this increase to an increase in California’s college-age population and the  
9 state’s Master Plan for Higher Education. (AR207.) The DSEIR “assume[s] that most of the  
10 additional campus population would live in Berkeley or nearby parts of the Bay Area. (AR207.)  
11 It compares the net population increase a projected increase to population for the entire  
12 metropolitan Bay Area and concludes that its increased campus population would not  
13 substantially affect the region as a whole. (AR207.) The DSEIR also noted that UC Berkeley  
14 had created only 1,119 of the 2,600 new student beds authorized or anticipated in the 2020  
15 LRDP EIR, and that UC Berkeley therefore had excess capacity to accommodate additional  
16 student housing to offset any impacts. (AR208.) The DSEIR did not analyze effects on the  
17 housing market, reasoning that such impacts were “not in themselves environmental impacts.”  
18 (AR208.) It concluded that the increase in population “would generally be accommodated  
19 without significant adverse impacts” and would not result in new impacts beyond those studied  
20 by the 2020 LRDP EIR. (AR208.)

21 The City of Berkeley submitted comments disputing this analysis. The City argued that  
22 the DSEIR’s comparison to the entire Bay Area was inappropriate because “new students,  
23 faculty, and staff would be drawn to living in Berkeley due to the city’s proximity to campus and  
24 the campus’ location in the heart of the City” but that the net increase of roughly 11,000 students  
25 is approximately nine percent of the City’s population. (AR1186.) The City also referenced a  
26 2017 survey conducted by UC Berkeley’s chancellor’s office showing that demand for campus



1 housing at UC Berkeley outpaces supply and that UC Berkeley has the lowest percentage of beds  
2 to its student body of any UC campus in the state. (AR1185.) The same report found that ten  
3 percent of students had experienced homelessness while attending UC Berkeley, including 20  
4 percent of doctoral students. (AR1185.) The City asserted that this increase in population  
5 without an increase in on-campus housing had led to “increased pressure for development in the  
6 City” as evidenced by a “marked increase in development applications over prior years  
7 particularly for the development of multi-unit housing developments typically marketed to  
8 students.” (AR1186.) These new buildings, the City argued—when combined with UC  
9 Berkeley’s practice of master-leasing off-campus apartments for student housing—reduce the  
10 housing available for non-student residents and displace existing residents, particularly in  
11 historically lower-income neighborhoods in South Berkeley and West Berkeley. (AR1186.) The  
12 City also argues the imbalance between rapidly increased student enrollment with little  
13 additional student housing development exacerbated student and nonstudent homelessness and  
14 caused additional significant environmental impacts, including physical impacts to parks, streets,  
15 and public places and increased demand for public safety and public health services due to the  
16 unsafe living conditions in homeless encampments. (AR1187.) The City faulted the DSEIR for  
17 not considering these indirect impacts from development, displacement, and homelessness.

18 As part of the Southside Neighborhood Consortium (“SNC”), SBN also submitted  
19 comments on the topic of housing and population. (See AR1656 [Southside Neighborhood  
20 Consortium letter signed by Philip Bokovoy on behalf of SBN].) Like the City, SNC objected  
21 that population impacts were compared to population growth in entire Bay Area, not just  
22 Berkeley. (AR1654.) It argued that the increased student population causes “pressure on the  
23 local housing market with higher rents and more displacement” and increased “gentrification.”  
24 (AR1655.) SNC also argued that the increased student population will increase demands for  
25 City services—including police protection, fire and emergency medical services, parks and open  
26 space—more late-night noise and traffic and more incidences of improper refuse disposal and

1 "moving day trash." (AR1655.) Finally, SNC also argued that the DSEIR's conclusion that the  
2 fact that the City "already accommodates" a large number of student residents "is the equivalent  
3 of saying: 'students over the baseline are already here so there is no impact.'" (AR1656.)

4 UC Berkeley responded to these comments in the FSEIR, which reports that  
5 approximately 65% of UC Berkeley students live on campus or within a mile of campus.  
6 (AR845.) This statistic does not support the university's comparison of the increase in campus  
7 population to population growth in the greater Bay Area rather than the local area in which the  
8 majority of its students reside. The FSEIR also finds that the total increase of 11,285 students by  
9 the end of the 2022-2023 academic year (that is, both the Excess Population and the projected  
10 increase from the Upper Hearst Development) would exceed the projected growth in UC  
11 Berkeley-provided housing. (AR846.) It concludes that the University's 2020 LRDP planned  
12 for a substantial increase in student housing that has not yet been built: "After construction of up  
13 to 150 housing units in the proposed Upper Hearst Development, substantial capacity for  
14 additional student housing would remain under the 2020 LRDP," and Development of additional,  
15 affordable student housing "is consistent with the 2020 LRDP's development plans." (AR855.)  
16 The FSEIR does not analyze whether exceeding the 2020 LRDP student enrollment projections  
17 had indirect environmental impacts that were exacerbated leaving significant amounts of planned  
18 student housing undeveloped.

19 The FSEIR's responded in part to the City's comments by noting that concerns about  
20 increased campus population are about the "updated baseline," not the proposed Upper Hearst  
21 Development. (See AR1185 [City's concern regarding impacts of "substantial increase in  
22 campus population"]; AR882 [FSEIR's response].) The FSEIR concluded that no response was  
23 required because the "updated baseline" was not the project under consideration: "[T]he student  
24 population has now increased beyond 2020 LRDP projections with little or no analysis of the  
25 potential environmental impacts of this increase in students over the number analyzed in the  
26 2020 LRDP EIR." (AR882.) "CEQA [only] requires that UC Berkeley compare the potential

1 impacts of the housing project, such as the Upper Hearst Development, with existing  
2 environmental conditions at the time CEQA review occurs, including current campus  
3 population.” (AR882.) “Review of population increases are typically done as part of an overall  
4 LRDP and its EIR.” (AR882.) Here, the SEIR dismisses the displacement and indirect  
5 population impacts of the “update” portion of the updated baseline as outside the scope of its  
6 study. The Court cannot meaningfully review the SEIR’s analysis of population impacts when  
7 the SEIR declines to reach those conclusions itself in the first place. If the “update” were a  
8 project, UC Berkeley’s refusal to consider potentially significant environmental impacts would  
9 be a prejudicial abuse of discretion, and the Court finds it to be so here. This abuse of discretion  
10 is exacerbated because the analysis does not clearly address the impact of the future student  
11 enrollment increase attributed to the “project.”

12       The FSEIR responds to the City and SNC’s concerns about student and induced  
13 nonstudent homelessness by asserting that “CEQA was enacted to protect the environment and  
14 speculation about increased housing insecurity is beyond its scope.” (AR883.) “The potential  
15 displacement of existing tenants in Berkeley also could result in an incremental increase in the  
16 population of homeless people living in Berkeley, although the social impacts of displacement  
17 are beyond the scope of environmental review under CEQA.” (AR856.) In the FSEIR, UC  
18 Berkeley also argues that it need not consider the impacts of induced demand for non-University  
19 housing because another agency will consider the environmental impacts of individual  
20 development projects induced by economic forces. “Greater housing demand would increase the  
21 incentive to construct additional private housing that caters to UC Berkeley students.” (AR856.)  
22 “If future projects are proposed that would require the displacement of substantial numbers of  
23 people or existing housing, necessitating the construction of replacement housing elsewhere,  
24 their environmental impacts would be evaluated as required by CEQA on a project-specific  
25 basis.” (AR856, citing AR2535 [2020 LRDP Vol. 1 at p.4.10-10].) This analysis fails to  
26 consider whether its past increase in student enrollment caused population displacement.

1 Increases in campus population foreseeably lead to direct and indirect impacts on housing,  
2 population, and displacement, and the failure to consider those impacts constitutes a prejudicial  
3 abuse of discretion.

4 The FSEIR concludes that no new displacement impacts would result from the  
5 construction of new University housing. "The proposed increase in headcount also may  
6 necessitate the construction of new UC Berkeley-provided housing; however, such construction  
7 would not require substantial displacements because the 2020 LRDP's land use strategy  
8 prioritizes the siting of new housing on UC Berkeley's current property and, where necessary,  
9 acquiring other sites where the displacement of existing tenants can be minimized." (AR856.)  
10 This portion of the analysis also fails to consider indirect displacement impacts.

11 2. *Demand for Public Services by Excess Population*

12 The City argues that UC Berkeley erred in considering the population impacts by  
13 concluding, without substantial evidence, that the increased population would not substantially  
14 increase the demand for public services. The Guidelines require a lead agency to consider "other  
15 aspects of the resource base such as . . . public services." (Guidelines § 15126.2(a).) The  
16 Environmental Checklist Form asks the lead agency to determine whether the project would  
17 "result in substantial adverse physical impacts associated with the provision of new or physically  
18 altered government facilities, the construction of which would cause significant environmental  
19 impacts, in order to maintain acceptable service ratios, response times or other performance  
20 objectives" for various public services. (Guidelines, appx. G, § XV.) In response to the Draft  
21 SEIR, the City of Berkeley submitted comments and evidence arguing that the increase in  
22 student enrollment had created a significant increase in police services, fire and emergency  
23 medical services, and public health services. (AR1187-1193.)

24 The City offered UC Berkeley a report by Economic and Planning Systems, Inc. (the  
25 "EPS Report") as part of its public comments on the project. (AR1221-1309.) The EPS Report  
26 broadly analyzes the fiscal impact on the City of being home to UC Berkeley. The Report states

1 that calls for police service from UC Berkeley and its immediate surroundings increased from 14  
2 percent to 19 percent of the citywide total from 2003 to 2018. (AR1223.) The EPS Report also  
3 states that, although UC Berkeley has its own code enforcement and fire inspection personnel, it  
4 does not maintain its own fire and emergency medical response teams and, as a result, the City's  
5 fire department provides the vast majority of fire and emergency medical response protection for  
6 UC Berkeley's campus. (AR1223.) It also states that the City's fire department must undertake  
7 special training because of high-density buildings (*e.g.*, student dormitories) and specialized  
8 buildings with dangerous contents (*e.g.*, laboratories). (AR1189; *see also* AR6128 ["UC  
9 Berkeley relies on local public safety agencies to provide medical, fire, and emergency response" but  
10 provides information about "hazardous materials [responders] may encounter and how to deal with  
11 them . . .".]) The EPS Report also notes that increased enrollment has increased demand for the  
12 City's public health services. (AR1191.)

13 In the FSEIR, UC Berkeley reasoned that staffing and equipment purchases are "fiscal  
14 matters," whereas "CEQA analysis . . . focuses on environmental impacts that could result from  
15 construction of new facilities that are required to provide fire department services." (AR846; *see*  
16 *also* AR877 at Response A 8.4 ["As to comments related to how increased student population  
17 places additional burdens on already overtaxed city services, while this is a matter of concern,  
18 under CEQA, staffing and support needs for public services are relevant only to the extent that  
19 they result in physical changes that have environmental impacts."].) Regarding fire department  
20 response times, UC stated that it would continue to abide by "Continuing Best Practice PUB-2.3"  
21 from the 2020 LRDP EIR: to "continue [its] partnership with [Lawrence Berkeley National  
22 Laboratory], [Alameda County Fire Department], and the City of Berkeley to ensure adequate  
23 fire and emergency service levels to the campus and UC facilities," including "consultation on  
24 the adequacy of emergency access routes to all new University Buildings." (AR847.) The  
25 FSEIR did not expressly mention public health services in its response. (*See* AR884.)  
26 Importantly, the FSEIR based its conclusion on an absence of evidence produced by the City. It

1 found that its analysis in the DSEIR was adequate because “[the City] did not provide  
2 information or analysis to suggest that new or physically altered fire protection facilities, the  
3 construction of which could cause significant environmental impacts, would be required as a  
4 result of the proposed project or increased headcount.” (AR884, at Response 8.22.)

5 The City did, in fact, provide information indicating that increased service calls “will  
6 result in a need for additional personnel and new facilities to accommodate them.” (AR1190.)  
7 After UC Berkeley released the Final SEIR, the City submitted additional evidence of physical  
8 impacts. (See SAR239 [letter from City to UC Board of Regents dated May 13, 2019].) The  
9 City identified its current plans for a new fire station in South Berkeley, a new ambulance it  
10 already purchased, and its pressing need for larger space for its 911 emergency response call  
11 center. (SAR249, SAR340.) The same letter argues that, because Berkeley police spend an  
12 increasing proportion of their time responding to an increasing number of student calls, their  
13 activities necessarily result in increased air pollution, greenhouse gas emissions, and traffic.  
14 (SAR248.) The Court found no substantial contradictory evidence that might show that the  
15 increased demand on City of Berkeley services caused by from the Excess Population has not  
16 contributed to the City’s plans or purchase of new facilities with an impact on the environment,  
17 and the SEIR does not cite or discuss any. The Court finds that it was a prejudicial abuse of  
18 discretion to certify the SEIR on the basis of this inadequate analysis.

19 3. *Noise and Aesthetic Impacts from Excess Population*

20 The DSEIR noted that “additional student enrollment could indirectly result in an  
21 increase in student rentals of private off-campus housing in Berkeley’s residential  
22 neighborhoods,” which might result in “incrementally greater noise generated from existing  
23 sources such as human conversations on sidewalks and residential yards, especially during social  
24 gatherings.” (AR208.) It dismissed this concern because the “increased headcount would not  
25 introduce new sources of noise that may disturb residents, since neighborhoods near UC  
26 Berkeley already accommodate a high proportion of off-campus student rentals.” (AR208.)



1 "Continued implementation of the Berkeley Noise Ordinance would also minimize exposure to  
2 high noise levels generated on properties in the city." (AR208.) "Therefore, the Project,  
3 accounting for the updated campus headcount projections, would not result in significant indirect  
4 environmental impacts in off-campus neighborhoods." (AR208.)

5 Residents living near campus expressed concern with this analysis. SNC commented that  
6 the DSEIR did not consider evidence of the noise impacts of increasing student enrollment by  
7 11,285 students who live primarily in off-campus private housing. (AR1653-1654.) Groups of  
8 students living off campus are associated with "increases in noise, late-night traffic, and  
9 improper refuse disposal." (AR1654.) Individual commenters also expressed this concern: "The  
10 increase in traffic (and in aggressive driving), difficulties in parking, increase in noise from  
11 groups of students, and increase in improperly discarded trash and street dumping are only a few  
12 of the changes I have seen." (AR1837.) "[M]ini-dorms frequently generate extreme party noise,  
13 often into the wee hours of morning," but "calling the police when one is kept awake by party  
14 noise is often useless, as they are too busy to go to each screaming party." (AR1861.)  
15 Commenters attached pictures of improperly disposed refuse on "move-out day." (AR1865.)

16 The FSEIR repeated assertions from the DSEIR. "[A]dditional student enrollment could  
17 result in an increase in student rentals of private off-campus housing in Berkeley's residential  
18 neighborhoods." (AR845.) "However, increased headcount would not introduce new sources of  
19 noise that may disturb residents, since neighborhoods near UC Berkeley *already accommodate a*  
20 *high proportion of off-campus student rentals.*" (AR845, emphasis added.) The FSEIR reasons  
21 that neighborhoods near campus *currently* accommodate large numbers of students. This  
22 analysis is an abuse of discretion. The FSEIR compares the its current student enrollment  
23 numbers to the present, post-increase status quo and concludes that the increased in student  
24 enrollment will not have any effects. That is, the SEIR fails to compare its increased enrollment  
25 to a baseline before the increase. In this, the SEIR fails in its own stated goal of studying the  
26 impacts of its earlier increases in student enrollment. The Court also cannot find substantial

1 evidence in the record supporting FSEIR's conclusion that a further marginal increase in student  
2 enrollment would not exacerbate noise issues or have cumulative impacts.

3 The FSEIR also concludes that other factors will offset or mitigate any noise impacts  
4 from increased student enrollment. "Continued implementation of the Berkeley Noise Ordinance  
5 would also minimize exposure to high noise levels generated on properties in the city."  
6 (AR845.) "Good neighbor relations programs and activities established by the [sic] UC  
7 Berkeley, like Happy Neighbors, which educates students and their neighbors about community  
8 expectations and relevant policies and laws, will also help to minimize exposure to high noise  
9 levels." (AR846.) The SEIR refers to no evidence on which it based a conclusion that these  
10 programs reduce the impact of the increase in students residing off-campus in private housing on  
11 community noise levels, much less a finding that, if there were a noise impact, these programs  
12 effectively reduce the impact to insignificance. The SEIR does not propose that UC adopt these  
13 programs as mitigation measures to minimize the ongoing impact of its increased student  
14 enrollment levels.

15 In response to community comments regarding moving-day trash, the FSEIR also asserts  
16 that "[s]poradic littering does not rise to the level of a significant aesthetic impact under CEQA."  
17 (AR846, 911, 1055.) It also similarly references university programs meant to mitigate the  
18 impact: "Other issues, such as the visual effect of littering caused by students living off-campus,  
19 are also addressed through programs such as Cal Move [I]n and Move Out, which is a program  
20 established to decrease the environmental and social impacts of illegal dumping in near-campus  
21 neighborhoods at the start and end of the academic year, and to educate students about  
22 responsible disposal and reuse strategies." (AR846.) A "significant effect on the environment"  
23 is "a substantial, or potentially substantial, adverse change in any of the physical conditions  
24 within the area affected by the project . . ." (Guidelines § 15382.) Under the substantial  
25 evidence standard, UC Berkeley could reasonably conclude, based on the reported once-a-year  
26 nature of this problem, that it was not a "substantial" effect on the environment.

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1 Berkeley and Oakland.” (AR2312; AR2316 [describing Berkeley landmark ordinance]; *see also*  
2 AR2324-2325 [listing designated buildings in the adjacent blocks north of campus]. The DSEIR  
3 discussed the historical context of the First Bay Tradition, a style of architecture represented by  
4 numerous buildings in Daley’s Scenic Park (also called Daley’s Scenic Tract), near the Upper  
5 Hearst Development site. (AR131-140.) The DSEIR found that the Upper Hearst Development  
6 project would require the demolition of a parking structure, which UC Berkeley had determined  
7 not to be a historical resource. (AR147.) The Upper Hearst Development would also require the  
8 demolition and replacement of “most of the primary site design of the Beta Theta Pi house”  
9 including removal of 32 feet of a stream-rock training wall and numerous landscaping features.  
10 (AR147-148.) The Upper Hearst Development would also “envelop [the Beta Theta Pi house]  
11 within the site plan of the adjacent academic building, which bears little resemblance to the  
12 historic property in terms of materials, design, scale/mass, and setting.” (AR148.) Additionally,  
13 the “scale, mass, and architectural design/materials of the new buildings” would not be  
14 “compatible with the massing, size, scale, and architectural features” of the Beta Theta Pi house,  
15 Cloyne Court, or Phi Kappa Psi because “the new buildings would be significantly higher and of  
16 greater mass and scale than all buildings in the immediate vicinity.” (AR149.)

17 The DSEIR concluded that the Upper Hearst Development would “impair the integrity of  
18 two historical resources identified in the 2020 LRDP” and “would impair the integrity of a third  
19 . . . immediately north of the Project site.” (AR150.) It proposed a mitigation measure  
20 (designated “MM-CUL-1”) requiring that, “[p]rior to approval of final design plans for the  
21 Upper Hearst Development, UC Berkeley shall retain a historic architect meeting the National  
22 Park Service Professional Qualification Standards for historic architecture to review plans for the  
23 proposed academic and residential buildings” who would “provide input and refinements to the  
24 design team regarding modifications to the palette of exterior materials to improve compatibility  
25 with neighboring historical resources and compliance with” national standards. (AR150.) The  
26 DSEIR found that the Upper Hearst Development would “degrade the integrity of feeling and

1 setting of historical resources adjacent to the Project site” as a “significant and unavoidable  
2 cumulative impact on historical resources” and that MM-CUL-1 would “reduce this impact to  
3 the extent feasible.” (AR150.)

4 Several public commenters expressed concern about the DSEIR’s description of the  
5 Upper Hearst Development’s historical context. (*E.g.*, AR1206 [City of Berkeley]; AR1150-  
6 1151 [Berkeley Landmark Preservation Commission]; AR1634-1639 [Berkeley Architectural  
7 Heritage Association].) One particularly thorough letter from the Berkeley Architectural  
8 Heritage Association (“BAHA”) identified an additional 25 buildings in the neighboring  
9 blocks—eleven of them designated landmarks by the City of Berkeley Landmark Preservation  
10 Commission. (AR1638-1639.) It also argued that the DSEIR analysis did not recognize Daley’s  
11 Scenic Park as an independently significant historical resource. (AR1634, 1639.) The eleven  
12 listed buildings are “presumptive” historic resources because they are listed on a local historic  
13 registry. (AR1638-1639; *see* Pub. Res. Code § 21084.1; Guidelines § 15064.5(a)(2).) One  
14 building, the Phi Delta Theta chapter house, is listed on the National Register of Historic Places.  
15 (AR1638.) The other buildings (and Daley’s Scenic Park as an area) may constitute historical  
16 resources, subject to the discretion of UC Berkeley, based on the evidence. (*See* Guidelines  
17 § 15064.5(a)(3) [“Any . . . building, structure, site, area, [or] place . . . which a lead agency  
18 determines to be historically significant . . . may be considered to be an historical resource,  
19 provided the lead agency’s determination is supported by substantial evidence in light of the  
20 whole record.”].)

21 The FSEIR responded to comments by noting that the Upper Hearst Development is not  
22 situated in a designated historic district (AR897) and that the DSEIR “is not intended as a  
23 comprehensive survey or original scholarship on the history of the project site and its  
24 surroundings.” (AR862.) The FSEIR noted that many of the buildings that BAHA identified are  
25 located several blocks from the project site and that, “[i]n keeping with standard CEQA and  
26 professional practice,” the DSEIR analyzed the potential impacts on historical resources located

1 within or directly adjacent to the project site. (AR898.) The FSEIR notes that, although the  
2 remaining buildings were not discussed in the DSEIR by name, they are part of the historical  
3 context and of the nearby neighborhood, which was discussed in some detail. (AR898; *see*  
4 AR131-140.)

5 In its follow-up letter to the FSEIR, the City of Berkeley communicated a concern that  
6 MM-CUL-1 was an inadequate mitigation measure because it did not reduce the severity of the  
7 impact to a "less than significant" level. (SAR257.) The City also objected that it "relegates the  
8 input of a historical architect to the status of unenforceable best practices, and delays this input  
9 until a later unspecified date" because it "would merely result in recommendations for exterior  
10 building materials that would be forwarded to University decision-makers to 'consider,' without  
11 any demonstrable enforceability to avoid or reduce the severity of the impact." (SAR257-258.)  
12 The City argued that "[t]he deferred input of an historical architect on future proposed redesigns  
13 following CEQA review fails to avoid or substantially reduce this impact," which, "contrary to  
14 the University's assertions, . . . is not unavoidable." (SAR259.)

15 In its findings adopting the SEIR and approving the project, the University found that the  
16 Upper Hearst Development would "degrade the integrity of feeling and setting of historical  
17 resources adjacent to the Project site, which will contribute to a significant and unavoidable  
18 cumulative impact on historical resources" and that adopting MM-CUL-1 was feasible and  
19 would "reduce this impact to the extent feasible." (AR24-25.) It also found that, "even with  
20 implementation of this measure, significant unavoidable impacts [would] occur" and that  
21 "specific economic, legal, social, technological, or other considerations make it infeasible to  
22 reduce this impact to a less than significant level." (AR25.)

23 The DSEIR's inventory of four potentially affected buildings as historical resources is  
24 supported by substantial evidence, the inventories consulted for the DSEIR and the 2020 LRDP  
25 EIR. (*See* AR862 [describing "due diligence" steps taken, including site visits, records research,  
26 and experts consulted]; *see also* AR130, 141-145.) The DSEIR also discusses the major



1 historical events and aesthetic and architectural features that give the area north of campus its  
2 historical context and value and feeling. In so doing it describes the historical environmental  
3 setting of the surrounding area, including the First Bay Tradition and the structures that survived  
4 1923 Berkeley Fire.

5 UC Berkeley's decision to exclude the buildings on BAHA's list from consideration is  
6 also not an abuse of discretion. The resources in the list may qualify as "historical resources."  
7 (See Guidelines § 15064.5(a)(1)-(4).) But CEQA only requires a lead agency to consider as an  
8 impact a "substantial adverse change in the significance of an historical resource." (Guidelines  
9 § 15064.5(b).) A "substantial adverse change in [] significance" means "physical demolition,  
10 destruction, relocation, or alteration of the resource or its immediate surroundings such that the  
11 significance of an historical resource would be materially impaired." (Guidelines  
12 § 15064.5(b)(1).) The City and SBN argue that the Upper Hearst Development might "alter[]"   
13 the "immediate surroundings" of the additional historical resources identified by BAHA and that  
14 UC Berkeley abused its discretion by failing to consider the project's potential impacts on those  
15 buildings. The unconsidered buildings are as close as a block away to several blocks away.

16 UC Berkeley did not abuse its discretion in determining that buildings in the "immediate  
17 vicinity" of the project site means buildings within the project side or immediately adjacent to  
18 it—that is, buildings across the street were included; those a block away were not. The type of  
19 impact being discussed here (a mismatch of scale and architectural style) may affect the  
20 historical feel of a building, but proposed plans and the description of the environmental setting  
21 are substantial evidence from which a reasonable person could conclude that the impact of the  
22 project would be insignificant for all but the closest buildings. There is no evidence that the  
23 addition of a new building would have a material impact on the historical significance of the  
24 nearby historical structures. (*Cf. Taxpayers for Accountable School Bond Spending v. San Diego*  
25 *Unified School Dist.* (2013) 215 Cal.App.4th 1013, 1045 [finding no abuse of discretion when  
26

1 school district failed to consider impact of increased field lighting from new football stadium on  
2 historical significance of nearby neighborhood].)

3 UC Berkeley's decision not to consider Daley's Scenic Tract as a historical district is also  
4 not an abuse of discretion. The FSEIR found by substantial evidence that Daley's Scenic Tract  
5 is not listed in a national, state, or local historic register. It is therefore not a "mandatory" or  
6 "presumptive" historical resource. (See Pub. Res. Code § 21084.1; Guidelines § 15064.5(a)(1),  
7 (2); see also *Valley Advocates v. City of Fresno* (2008) 160 Cal.App.4th 1039, 1051 [discussing  
8 "mandatory," "presumptive," and "discretionary" as common labels for three categories of  
9 treatment for historical resources under CEQA].) SBN argues that UC Berkeley abused its  
10 discretion by failing to consider whether Daley's Scenic Tract constitutes a discretionary  
11 historical resource. SBN analogizes this to the *Valley Advocates* case, arguing that the Court  
12 should grant the writ because UC Berkeley "did not, in fact, exercise its discretion" to determine  
13 whether Daley's Scenic Tract is a historical resource. (*Valley Advocates v. City of Fresno* (2008)  
14 160 Cal.App.4th 1039, 1061.) In that case, however, "the City Council [of Fresno] was  
15 misinformed about its discretion" because it had previously denied an application for historical  
16 recognition for the same building. (*Id.* at p.1061.) And although the SEIR does not expressly  
17 consider the regulatory factors for weighing whether a resource could, in UC's discretion, be  
18 considered a historical resource, there is no indication that UC Berkeley was under a  
19 misapprehension of its ability to do so here. Instead, it appears to have been aware of the history  
20 and significance of the scattering of First Bay Tradition homes surviving in Daley's Scenic  
21 Tract. (See, e.g., AR134-135, 862, 897.) The SEIR discussed the importance of the  
22 neighborhood as context but did not find the area itself to be a historical resource independent of  
23 the collection of historical buildings within it.

24 SBN argues that mitigation measure MM-CUL-1 improperly defers mitigation because it  
25 only requires that the architect "provide input and refinements" but no actual requirements. The  
26 DSEIR proposed, and UC Berkeley adopted, MM-CUL-1, which provides as follows:

1 Prior to approval of final design plans for the Upper Hearst Development,  
2 UC Berkeley shall retain a historic architect meeting the National Park  
3 Service Professional Qualifications Standards for historic architecture to  
4 review plans for the proposed academic and residential buildings. The  
5 historic architect shall provide input and refinements to the design team  
6 regarding modifications to the palette of exterior materials to improve  
compatibility with neighboring historical resources and compliance with the  
Secretary of Interior's Standards. This review shall include, but not be  
limited to, suggestions for incorporating exterior materials, such as wood or  
brick, in the design. (AR150.)

7 UC Berkeley argues that its adoption of MM-CUL-1 should not be judged against the usual  
8 standards for mitigation measures because it does not purport to reduce the impact to a "less than  
9 significant" level. (Resps.' Opp. to Petr. SBN's Opening Merits Brief, at p.35 [citing AR150];  
10 see also AR25 [findings of significant and unavoidable impact]; AR2367 [2020 LRDP EIR ] .)  
11 This argument is contrary to the text and policy underlying CEQA: "Each public agency shall  
12 mitigate or avoid the significant effects on the environment of projects that it carries out or  
13 approves whenever it is feasible to do so." (Pub. Res. Code § 21002.1; see also Pub. Res. Code  
14 § 21002 ["[I]t is the policy of the state that public agencies should not approve projects as  
15 proposed if there are feasible alternatives or feasible mitigation measures available which would  
16 substantially lessen the significant environmental effects of such projects."].) Even if a lead  
17 agency finds that environmental impacts would remain significant, it still must adopt feasible  
18 measures to mitigate or avoid those impacts.

19 That said, UC Berkeley did not abuse its discretion by adopting MM-CUL-1. UC  
20 Berkeley argues that it is not deferring mitigation because MM-CUL-1 requires it to take specific  
21 steps, because those steps are to be guided by the Secretary of the Interior's standards, and  
22 because mitigation to historical impacts is inherently subjective and does not lend itself to  
23 objective criteria. As the term is used in CEQA, "[m]itigation' includes: [¶] (a) Avoiding the  
24 impact altogether by not taking a certain action or parts of an action[; and] [¶] (b) [m]inimizing  
25 impacts by limiting the degree or magnitude of the action and its implementation . . . ."  
26 (Guidelines § 15370.) To ensure that mitigation measures are adequate, an "EIR shall describe

1 feasible measures which could minimize significant adverse impacts." (Guidelines  
2 § 15126.4(a)(1).) "Formulation of mitigation measures shall not be deferred until some future  
3 time." (Guidelines § 15126.4(a)(1)(B).) "The specific details of a mitigation measure, however,  
4 may be developed after project approval when it is impractical or infeasible to include those  
5 details during the project's environmental review provided that the agency (1) commits itself to  
6 the mitigation, (2) adopts specific performance standards the mitigation will achieve, and (3)  
7 identifies the type(s) of potential action(s) that can feasibly achieve that performance standard  
8 and that will be considered, analyzed, and potentially incorporated in the mitigation measure."  
9 (*Ibid.*) UC Berkeley's adopted mitigation measure MM-CUL-1 meets these standards because it  
10 commits the University to hiring a qualified historical architect, because it requires the  
11 University to adopt the Secretary of Interior's Standards as a performance standard (see  
12 Guidelines § 15064.5(b)(3)), and because it identifies changes to exterior materials as the kinds of  
13 changes that will be considered and potentially incorporated in the mitigation measure.

14 UC Berkeley also did not abuse its discretion by concluding that the Upper Hearst  
15 Development's impact on the historical resources would be significant and unavoidable and that  
16 the benefits of the project outweigh the historical impacts. (*See* AR25, 40.) SBN argues that UC  
17 Berkeley abused its discretion by rejecting a reduced scale alternative. (AR38.) UC's factual  
18 findings included a finding that:

19 The Reduced Scale Alternative would meet most of the Project objectives,  
20 but to a lesser extent than would the Project. The Alternative would better  
21 meet objectives to maintain the character and setting of surrounding historic  
22 buildings and to build facilities that are compatible with the surrounding  
23 neighborhood. However, by reducing the scale of the new GSPP, the  
24 Alternative would not fully meet objectives related to fulfilling the  
25 academic needs of the School's program. Similarly, because the residential  
26 building includes fewer residential units than proposed, the alternative  
would not fully meet objectives to provide housing on-site to serve current  
market demand and to address the shortage of campus housing. By  
reducing the scale of development, the Alternative would meet the objective  
of accommodating increased School enrollment to a lesser extent than  
would the Project. The potential removal of additional parking spaces also  
would not meet the objective of maintaining as much parking as possible

1 on-site. Because the Reduced Scale Alternative would meet Project  
2 objectives to a lesser extent than would the Project, the University rejects  
this alternative. (AR38.)

3 SBN argues that UC Berkeley did not actually find that the reduced scale alternative was  
4 infeasible. UC Berkeley's findings noted that a reduced scale alternative would lessen some  
5 impacts but exacerbate others. (See also AR251-254 [discussion in DSEIR reaching same  
6 conclusion].) Substantial evidence supports the university's decision that the environmental  
7 benefits of the reduced scale alternative were outweighed by its downsides and that it is  
8 infeasible to reduce that impact to a less-than-significant level. (AR24-25.)

#### 9 **IV. UPPER HEARST DEVELOPMENT –TRAFFIC AND NOISE IMPACTS**

10 The City also argues that the SEIR's analysis of the Upper Hearst Development failed to  
11 adequately analyze potential traffic and noise impacts. The City objected to the DSEIR's traffic  
12 analysis, arguing that the DSEIR assumed without evidence that reducing existing parking at the  
13 Upper Hearst Development site would reduce trip generation rather than shift parking demand  
14 elsewhere. (See AR1194.) Responding to the City's comment, the FSEIR justified its reliance  
15 on indirect measures of trip generation because alternatives to university parking, such as street  
16 parking and off-campus parking lots, are open to the public and University-affiliated parking  
17 cannot be isolated from general public parking at those locations, so direct observation of trip  
18 generation is infeasible. (AR884-885.) Instead the FSEIR, like the 2020 LRDP EIR from which  
19 it tiers, relies on indirect data, such as survey data, intersection traffic data, on-campus parking  
20 permits and parking lot occupancy rates. (AR885.) "[T]he UC Berkeley-operated parking  
21 supply decreased by about 1,130 spaces (about 15 percent) from 2001-2002 to 2016-2017, and  
22 during the same period, the drive-alone mode share for all population groups, as well as Campus  
23 Park trip generation, decreased." (AR885.) The data behind these statements are substantial  
24 evidence from which a reasonable agency could conclude that a marginal decrease in parking  
25 availability will marginally decrease car commutes by inducing more students, faculty, and staff  
26



1 to commute by public transportation, bicycle, or foot. This conclusion was not an abuse of  
2 discretion.

3 The City also argues that the SEIR failed to consider traffic impacts related to  
4 construction of the Upper Hearst Development. (See AR1195.) It did, however, consider those  
5 impacts, and it concluded that they “would be less than significant and no mitigation is therefore  
6 required.” (AR879.) The City argues that the SEIR’s continuing best practices, which were  
7 adopted from the 2020 LRDP EIR, “do not include, as they should, City review and approval of  
8 the Construction Traffic Management Plans.” (AR1195.) The SEIR expressly adopted  
9 continuing best practices from the 2020 LRDP EIR, which mandate that the university require  
10 contractors to prepare of a construction traffic management plan early in the planning process—  
11 including proposed truck routes, construction hours, employee parking, and equipment staging—  
12 and schedule projects to minimize overlap between excavation and other truck-heavy portions of  
13 construction projects. (AR879, 886 [responding to City’s comment at AR1195]; see AR221  
14 [describing continuing best practices TRA-3-a, TRA-3-b, and TRA-3-c].) These best practices  
15 do not mandate that the University get City approval for its traffic and construction parking  
16 plans, but the City provides no evidence of a legal requirement to do so or evidence that a failure  
17 to do so would result in a significant impact to the environment. UC Berkeley’s decision to  
18 certify the traffic analysis of the Upper Hearst Development in the SEIR was not an abuse of  
19 discretion.

20 The City also objected to the SEIR’s analysis of noise impacts of the Upper Hearst  
21 Development’s potential noise impacts on nearby noise-sensitive land uses like nearby  
22 multifamily housing developments, student housing, and academic buildings. The City argues  
23 that the SEIR’s analysis was flawed because it measured the baseline noise level during the  
24 evening commute, resulting in an artificially high baseline for noise impacts. The City also  
25 argues that the SEIR failed to describe the sources of noise that might result from the Upper  
26 Hearst Development, including both ongoing sources of noise like HVAC operations and

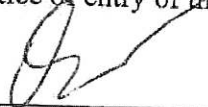


1 sporadic sources of noise such as outdoor activities or special events. The City objects that the  
2 SEIR reached its conclusion that no significant noise impacts would result without considering  
3 the number, size, time, and frequency of events to be held at the event center at the Upper Hearst  
4 Development. The City presented these arguments in its comments to the DSEIR. (See  
5 AR1202.) In response, the FSEIR noted that peak-hour ambient noise measurements are used to  
6 characterize "the worst daily noise exposure near a Project site" and is a "more conservative  
7 approach to assume that new residents on the Project site would be exposed too this noise level."  
8 (AR890.) The FSEIR also concluded that "the noise associated with outdoor events would not  
9 cause City of Berkeley Noise Ordinance limits to be violated at nearby sensitive receptors and  
10 therefore[] would be less than significant." (AR908; *see also* AR201-202 [discussing noise from  
11 HVAC and outdoor events, concluding less than significant impact on nearby sensitive  
12 receptors].) Certification of the SEIR on this issue was therefore not an abuse of discretion.

13 **V. ORDER**

14 SBN's petition for writ of mandate is **GRANTED**. The City of Berkeley's petition for  
15 writ of mandate is **GRANTED**. SBN and Berkeley shall meet and confer to draft a proposed  
16 judgment and form of writ consistent with this Order and shall jointly file the proposed judgment  
17 and form of writ within 10 court days of service of notice of entry of this order.

18 Dated: July 9, 2021

19   
20 \_\_\_\_\_  
21 Brad Seligman  
22 Judge of the Superior Court  
23  
24  
25  
26

SUPERIOR COURT OF CALIFORNIA  
COUNTY OF ALAMEDA

Case Number: RG19022887 (Related to RG19023058)

Case Name: Save Berkeley's Neighborhoods v. The Regents of the University of California

RE: ORDER GRANTING PETITIONS FOR WRIT OF MANDATE

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CLERK'S CERTIFICATE OF SERVICE

I certify that I am not a party to this cause and that a true and correct copy of the foregoing document was mailed first class, postage prepaid, in a sealed envelope, and that the mailing of the foregoing and execution of this certificate occurred at 1225 Fallon Street, Oakland, California.

Executed: 7/9/2021

*Jhalisa Castaneda*  
Courtroom Clerk, Dept. 23

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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; UNIVERSITY OF CALIFORNIA,  
21 BERKELEY; CAROL T. CHRIST, in her capacity  
22 as Chancellor of the University of California,  
23 Berkeley; and DOES 1 through 20,

24 Respondents,  
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29 AMERICAN CAMPUS COMMUNITIES;  
30 COLLEGIATE HOUSING FOUNDATION;  
31 AMERICAN CAMPUS COMMUNITIES  
32 SERVICES, INC.; AMERICAN CAMPUS  
33 COMMUNITIES OPERATING PARTNERSHIP  
34 LP; and DOES 23 through 40,

35 Real Parties in Interest.  
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**Case No. RG19022887**

Related Cases:  
RG18902751  
RG19023058

**[~~Proposed-Corrected~~] PEREMPTORY WRIT  
OF MANDATE**

**[California Environmental Quality Act]**

Assigned for All Purposes to the Honorable Brad  
Seligman, Dept. 23

Action Filed: June 13, 2019

Trial: April 16, 2021

1 To Respondents the Regents of the University of California; JANET NAPOLITANO, in her capacity  
2 as President of the University of California; University of California, Berkeley; and Carol T. Christ, in her  
3 capacity as Chancellor of the University of California, Berkeley (hereinafter collectively referred to as  
4 “Respondents”):

5 1. Pursuant to Public Resources Code section 21168.9(a)(1):

6 a. Respondents are ordered to void any decision or decisions they may have made prior to entry  
7 of this Judgment to increase student enrollment in academic year 2022-2023 or later above the level  
8 of student enrollment at UC Berkeley in academic year 2020-2021.

9 b. Respondents are ordered to void their decision to carry out the Upper Hearst Development  
10 for the Goldman School of Public Policy and Housing Project.

11 c. Respondents are ordered to decertify the Final Supplemental Environmental Impact Report  
12 for the Upper Hearst Development Plan for the Goldman School of Public Policy and Minor  
13 Amendment to the 2020 Long Range Development Plan (“SEIR”).

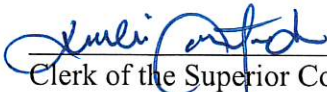
14 2. Pursuant to Public Resources Code section 21168.9(a)(2), the Court finds that further increases in  
15 enrollment will prejudice the consideration or implementation of particular mitigation measures or  
16 alternatives to the project, such as the Reduced Enrollment Alternative discussed at page 21 of the Order,  
17 and that further increases in student enrollment above the current enrollment level at UC Berkeley could  
18 result in an adverse change or alteration to the physical environment; therefore, Respondents are ordered  
19 to suspend any further increases in student enrollment at UC Berkeley, in academic years 2022-2023 and  
20 later, above the level of student enrollment in academic year 2020-2021 until Respondents have  
21 demonstrated full compliance with this Judgment and Writ and the Court orders discharge of the Writ.

22 3. Pursuant to Public Resources Code section 21168.9(a)(3), Respondents are ordered to revise the  
23 SEIR to remedy the deficiencies identified in this Judgment and to ensure that the SEIR complies with the  
24 California Environmental Quality Act (CEQA); and with respect to the revised SEIR, to comply with all  
25 procedures set forth CEQA Guidelines 15084 through 15097, and to certify the revised SEIR pursuant to  
26 CEQA Guideline 15090 by June 30, 2022.

27 4. Within 30 days after taking any of the actions ordered herein, Respondents shall file and serve a  
28 partial return to the Writ informing the Court and the parties of the date and nature of the action taken. After  
taking all of the actions ordered by this Judgment and Writ, Respondents may file a motion to discharge the  
Writ.



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4 Clerk of the Superior Court

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SUPERIOR COURT OF CALIFORNIA  
COUNTY OF ALAMEDA

Case Number: RG19022887 (Related to RG19023058)

Case Name: Save Berkeley's Neighborhoods v. The Regents of the University of California

RE: JUDGMENT

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CLERK'S CERTIFICATE OF SERVICE

I certify that I am not a party to this cause and that a true and correct copy of the foregoing document was mailed first class, postage prepaid, in a sealed envelope, and that the mailing of the foregoing and execution of this certificate occurred at 1225 Fallon Street, Oakland, California.

Executed: 8/24/2021

*Jhalisa Castaneda*  
Courtroom Clerk, Dept. 23

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