

A165451

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT
DIVISION FIVE

MAKE UC A GOOD NEIGHBORHOOD, et al.,
Petitioners and Appellants

v.

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

RESOURCES FOR COMMUNITY DEVELOPMENT,
Real Party in Interest

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

APPELLANTS' OPENING BRIEF

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I. INTRODUCTION

Appellants Make UC A Good Neighbor and The People’s Park Historic District Advocacy Group (“Appellants”) challenge the University of California’s (“UC”) massive build-out program proposed in its 2021 Long Range Development Plan (“LRDP”) Update, Housing Project # 1, and Housing Project # 2 (collectively the “Project”) and UC’s certification of its Final Environmental Impact Report (“EIR”) on grounds that these decisions violate the California Environmental Quality Act (“CEQA”).¹

The project has two primary drivers of significant environmental harm, i.e., population increase and new student housing construction in a historic landmark. Yet, the EIR fails to analyze any alternatives that would reduce either driver of harm. This is patently unreasonable, in violation of one of the core principles of CEQA. (*In Re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings* (2008) 43 Cal.4th 1143, 1162 (*Bay-Delta*) [“The EIR is the heart of CEQA, and the mitigation and alternatives discussion forms the core of the EIR”].)

The EIR unlawfully piecemeals analysis of construction at UC’s Albany and Richmond properties. The EIR argues that these properties are “sufficiently distant” from the main campus, but the relevant test is whether the excluded activity has “substantial independent utility.” (*Del Mar Terrace Conservancy, Inc. v. City Council* (1992) 10 Cal.App.4th 712, 736 (*Del Mare Terrace*).) Here,

¹Public Resources Code section 21000 et seq.

the Albany and Richmond projects do not have independent utility from development at and near the main campus. because their purpose is to house UC Berkeley students.

The EIR fails to assess noise impacts from locating a large population of college students in a residential neighborhood, despite substantial evidence supporting a fair argument that such impacts may be significant. (*Visalia Retail, LP v. City of Visalia* (2018) 20 Cal.App.5th 1, 13 (*Visalia Retail*) [“An EIR must analyze every issue for which the record contains substantial evidence supporting a “fair argument” of significant impact”].)

The EIR's discussion of housing displacement impacts is legally inadequate because it limits its analysis to residents directly displaced by UC building projects, ignoring indirect displacement caused by adding unhoused population to communities without available housing. It fails to assess physical effects of displacement including human health effects, aesthetic impacts associated with increasing homelessness, and the need for construction of replacement housing.

Housing Project #2 proposes to demolish People’s Park, a historic landmark, thereby ending its role as a vibrant center for political assembly and activism — and for which it is recognized as a historical landmark. Instead, it will become a memory, memorialized in photographs and literature, but absent from the daily life of the nation, the state and the local community. As shown herein, UC’s decision to demolish People’s Park is unlawful; therefore, UC cannot find that the resulting

environmental harm is acceptable.

II. STATEMENT OF FACTS

A. The Parties.

Respondents The Regents of the University of California, Michael V. Drake, in his capacity as President of the University of California (“UC”); the University of California, Berkeley (“UCB”); and Carol T. Christ, in her capacity as Chancellor of the University of California, Berkeley (collectively, “UC”) are respondents in the action.

Real Party in Interest Resources for Community Development, identified as a “party carrying out the project” in Respondents’ CEQA Notice of Determination for Housing Project #2, is named in the action below as a real party in interest.

B. The Project.

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

The LRDP Update proposes a massive building program to accommodate UCB’s large projected increase in population through 2037. The LRDP Update proposes to demolish or renovate an astonishing number and array of buildings and other properties that the EIR and UC’s Findings concede are historically and culturally significant, eligible for listing on the California Register of Historic Resources or already listed, for which the demolition or renovation is a significant environmental

impact. (AR9803-04 [46 listed, eligible, and potentially eligible resources identified as redevelopment or renovation sites]; 9796; 9808; 9810-11; 185-88; 1258-62.)

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

Between 2005 and 2037, UC has added and plans to add almost 16,000 students, for a total population increase of about 20,000. Housing this steadily increasing population is a primary driver of the LRDP Update’s construction program, including Housing Project #2. (AR9551-53; 10353-54; 14194-95].) The EIR identifies substantial past and proposed increases in campus population:

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

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

The EIR projects that UCB will substantially increase

²“AR” refers to the certified Administrative Record lodged with the trial court and this Court.

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

In discussing impacts of UCB's 2007-2019 population growth, which was not evaluated in the 2005 LRDP EIR, the EIR acknowledges that certain impacts are caused by physical development, while others are caused directly by population increases, i.e., "population is a metric of analysis." (AR14194-95.) The EIR concludes that impacts related to air quality, greenhouse gas ("GHG"), noise, population and housing, public services, and parks and recreation are population-driven. (AR14195, 14787.) For these impacts, the EIR and Findings found an unavoidably significant impact to air quality. (AR9702, 180.) They also found significant impacts to GHG"), population and housing, and transportation, reducible to less-than-significant by mitigation. (AR9931, 10118, 10121, 10221, 172, 177-179.)

C. Procedural History.

On or about July 22, 2021, UC certified the EIR for the 2021 LRDP Update for the UC Berkeley campus, Housing Project #1, and Housing Project #2 and approved the LRDP and Housing Project #1. (AR1-2.) On or about September 30, 2021, UC approved Housing Project #2. (AR3.)

On October 28, 2021, Appellants filed their First Amended

and Supplemental Petition for Writ of Mandate challenging the Project, including Housing Project #2. (Joint Appendix (“JA”) 7.)

On June 9, 2022, the trial court denied without prejudice Appellants’ application for a temporary restraining order enjoining demolition of People’s Park. (JA131.)

On June 14, 2022, Appellants filed a Notice of Appeal of the June 9 Order. (JA331.)

On June 23, 2022, the trial court denied Appellants’ second application for a temporary restraining order enjoining demolition of People’s Park. (JA253.)

On June 27, 2022, Appellants filed their Amended Notice of Appeal to include appeal of the trial court’s June 23 Order in Appeal No. A165451, in addition to the trial court’s June 9 Order denying application for temporary restraining order and order to show cause. (JA331.)

On July 29, 2022, the trial court heard the merits of the underlying petition for writ of mandate. At the end of the hearing, the trial court indicated that it would deny the Appellants’ petition for writ of mandate and directed UC to prepare an order. (Reporter’s Transcript (“RT”), 150.)

On August 2, 2022, the trial court entered its order and judgment denying Appellants’ petition for writ of mandate (“Judgment”). (JA313.)

On August 2, 2022, Appellants filed their Second Amended Notice of Appeal to include appeal of the trial court’s August 2 Order, in addition to the trial court’s June 9 and June 23, orders denying temporary restraining orders. (JA331.)

On August 3, 2022, Appellants' filed a third petition for writ of superseadeas and request for immediate stay. This Court granted the immediate stay in part by order dated August 4, 2022. (JA337.)

On August 11, 2022, Appellants abandoned their appeals of the Superior Court's June 9, 2022, and June 23, 2022, orders denying their applications for temporary restraining orders (JA549.)

After supplemental briefing of the petition for writ of supersedeas (JA558, 572), this Court granted the petition in part by order dated August 19, 2022. (JA337.)

D. The Historical Significance of People's Park.

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

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

The EIR describes the historic significance of People's Park:

People's Park's historic significance stems from its association with social and political activism in Berkeley between 1969 and 1979, described above. ... People's Park was designated as City of Berkeley Landmark #84 in 1984. ... The Historical Resources Technical Report ... identified the following character-defining features that contribute to People's Park's ability to convey its historic significance:

- Location in Berkeley's Southside neighborhood, in close proximity to the University of California campus and commercial development along Telegraph Avenue.
- Relatively flat topography, at grade with the street and with no fencing, barriers, or other features that would control pedestrian movement into and through the park.
- Informal, improvisational design not adhering to any specific design philosophy or master plan.
- Varied landscape incorporating grassy open areas, trees, and gardens.

Presence of public art installations and park furniture including benches, play equipment, and the People's Park Stage (1978).

- Public park characterized by community-driven development, use, and programming.
- Unrestricted public access with the right to assembly and free speech.

Furthermore, the Historical Resources Technical Report found that the People's Park satisfies Criterion A of the National Register and Criterion 1 of the California Register at the local level of significance for its association with social and political activism between 1969 and 1979.

(AR9800-01; 11994-12049; 12036-38.)

The EIR finds that demolition “would remove [People’s Park’s] ability to convey its historic significance” and “result in a significant impact [and] substantial adverse change to a historic resource.” (AR9810.) The EIR describes the significant harmful effects that demolition will have:

Housing Project #2 would require demolition of existing structures, which currently include a public restroom, basketball courts, and stage, and would reconfigure the existing open space. An effort would be made to preserve significant trees in good condition in place where possible, but trees ... in the way of building construction would be removed. These proposed changes would leave the park without integrity of design, materials, workmanship, feeling, or association, that is, it would remove its ability to convey its historic significance. Therefore, demolition of the site would result in a significant impact.

(AR9810.)

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

III. STANDARD OF REVIEW

“The foremost principle under CEQA is that the Legislature intended the act ‘to be interpreted in such manner as to afford the

fullest possible protection to the environment within the reasonable scope of the statutory language.” (*Sierra Club v. County of Fresno* (2018) 6 Cal.5th 502, 511 (*County of Fresno*) (citations omitted).) An EIR must reflect a good faith effort at full disclosure, including “detail sufficient to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project.” (*Laurel Heights Improvement Assn. v. Regents of the Univ. of Cal.* (1988) 47 Cal.3d 376, 405 (*Laurel Heights I*); Cal. Code Regs., tit. 14 (“Guidelines”), § 15151.)

In reviewing an EIR, courts determine whether the agency prejudicially abused its discretion by: (1) failing to proceed in the manner required by law, or (2) reaching a decision or determination that is not supported by substantial evidence. (*Laurel Heights I, supra*, 47 Cal.3d at 392.) “A reviewing court must adjust its scrutiny to the nature of the alleged defect, depending on whether the claim is predominantly one of improper procedure or a dispute over the facts.” (*Vineyard Area Citizens for Responsible Growth v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435 (*Vineyard*).)

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

proposed project The inquiry ... is generally subject to independent review.” (*County of Fresno, supra*, 6 Cal.5th at 516.)

An EIR must analyze every issue for which the record contains substantial evidence supporting a “fair argument” of significant impact. (*Visalia Retail, supra; Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1109 (*Amador Waterways*)). The fair argument standard is met when a “lead agency is presented with a fair argument that a project may have a significant effect on the environment, ... even though it may also be presented with other substantial evidence that the project will not have a significant effect.” (*Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1111; Guidelines, § 15064(f)(1).) This presents a question of law reviewed de novo. (*Id.* at 1112.)

By contrast, courts use the “substantial evidence” test to review an agency’s “substantive factual conclusions.” (*Vineyard Area Citizens, supra*, 40 Cal.4th at 435.) But “the existence of substantial evidence supporting the agency’s ultimate decision ... *is not relevant* when one is assessing a violation of [CEQA’s] information disclosure provisions.” (*Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 82 (*CBE v. Richmond*) (italics added).) While substantial evidence review involves deference to the agency’s role as fact-finder, such deference does not mean abdication of vigorous judicial review. (*Laurel Heights I, supra*, 47 Cal.3d 376, 409 [“We do not suggest that a court must uncritically rely on every study or analysis presented by a project proponent in support of its position...”].)

“One of [an EIR’s] major functions ... is to ensure that all reasonable alternatives to proposed projects are thoroughly assessed by the responsible official.” (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 565.) “The EIR is the heart of CEQA, and the mitigation and alternatives discussion forms the core of the EIR.” (*Bay-Delta, supra*, 43 Cal.4th at 1162.) Therefore, CEQA requires that an EIR analyze a range of reasonable alternatives to the proposed project. (Guidelines, § 15126.6.)

Here, the project EIR fails to analyze a two potentially feasible alternatives that could substantially reduce significant impacts: a lower enrollment increase alternative for the LRDP Update and alternative locations for Housing Project #2. For these claims, “[t]he statutory requirements for consideration of alternatives must be judged against a rule of reason.” (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 565 (*Goleta II*)). This standard includes de novo review of legal errors (*City of Marina v Board of Trustees of Cal. State Univ.* (2006) 39 Cal.4th 341, 355-356 (*City of Marina*) and substantial evidence review of the agency’s factual determinations for excluding an alternative from analysis. (*Bay-Delta, supra*, 43 Cal.4th at 1165 (*Bay-Delta*)).

Thus, review of an EIR’s selection of alternatives to analyze is similar to other informational sufficiency claims under CEQA, where, the “[a] reviewing court must adjust its scrutiny to the nature of the alleged defect, depending on whether the claim is predominantly one of improper procedure or a dispute over the

facts.” (*Vineyard, supra.*)

“In determining whether the agency complied with the required procedures and whether the agency’s findings are supported by substantial evidence, the trial court and the appellate courts essentially perform identical roles.”

(*Environmental Protection Information Center v. Cal. Dept. of Forestry & Fire Protection* (2008) 44 Cal.4th 459, 479 [“We review the record de novo and are not bound by the trial court’s conclusions.”])

Here, the trial court’s August 2, 2022, Order and Judgment briefly summarizes Respondents’ contentions on the contested merits issues briefed here. Therefore, this brief does not separately discuss the trial court’s order.

IV. ARGUMENT

A. The EIR Fails to Analyze a Lower Enrollment Increase Alternative.

1. Pertinent Facts.

The purpose of the LRDP Update is physical development to accommodate increased population. (CEQA, § 21080.09(a)(2); AR9549.) Therefore, the LRDP Update’s significant impacts are caused directly or indirectly by that population increase. (AR14194-95.) Yet the EIR fails to analyze a lower enrollment/population increase alternative to reduce these impacts.

The DEIR analyzed four alternatives, including the “No Project,” “Reduced Development Program,” “Reduced VMT,” and “Increased Faculty and Student Housing” alternatives.

(AR10358-59.) The DEIR also formulated, but rejected without evaluation, five other alternatives. (AR10355-58.) These include a “Reduced Graduate Program and Research” alternative, which would reduce “graduate student enrollment and reduce or eliminate graduate programs, professional schools, academic research functions, and policy institutes, as well as associated faculty, staff, housing, and facilities.” (AR10355.) Thus, none of the alternatives analyzed in the EIR included a reduced enrollment/population alternative, despite the fact that these factors directly or indirectly drive the nature and magnitude of significant environmental impacts. (AR 10356,10360.)

The EIR refused to analyze a lower enrollment increase alternative based on two errors of law. For graduate and non-resident undergraduate students, the EIR incorrectly assumes that reducing the projected enrollment increase is not a potentially feasible alternative because doing so would be inconsistent with one of fourteen objectives of the LRDP Update. For resident undergraduate students, the EIR incorrectly asserts that reducing the projected enrollment increase is not a potentially feasible alternative because the Regents lack discretion to limit the enrollment increase. These are legal errors reviewed de novo. (*City of Marina, supra.*)

The DEIR admits that UC can limit its graduate student population, research programs and associated faculty and staff, but contends that such limitation “would conflict with the objective of maintaining, supporting, and enhancing UC Berkeley’s status as an internationally renowned public

research-intensive institution and center for scientific and academic advancement” (the “academic status objective”), which it considers to be “a core project objective.” (AR10355-56, 9551-52.)

The EIR also contends that UC cannot control undergraduate enrollment because targets “are established to ensure UC is meeting commitments to the State, as required in the State of California Education Code and identified in the California Master Plan for Higher Education.” (AR10355.) The EIR asserts that the LRDP merely “accommodates enrollment projections that occur under separate processes” (AR14218), i.e., the annual campus enrollment targets set by University of California Office of the President (UCOP). (AR14175.) As discussed below, the contention that the Regents cannot control UCB enrollment is legally erroneous.

DEIR comments objected to its failure to evaluate an alternative that reduced, capped, or phased population and enrollment to a level that could be accommodated by provision of local housing and public services. (AR14261-64, 14360, 14535, 14541-42, 14554-55, 14561-63, 14564-66, 14773-76, 14788-90, 15046.) In response, the Final EIR (“FEIR”) argues that there are statutory constraints on resident undergraduate admissions and that reducing graduate students would conflict with one project objective, but admits that the Regents may limit, and have previously limited, non-resident undergraduates. (AR14218, 14175-14177.)

Thus, to provide a rationale for refusing to analyze an

alternative limiting *non-resident* undergraduate enrollment, the FEIR adopts the same rationale the DEIR used to reject enrollment restrictions for graduate students, contending that limitations on non-resident undergraduates would conflict with the LRDP Update's academic status objective because some non-residents are "highly qualified" and "may advance into graduate programs and faculty positions." (AR14218.) UC's Findings adopt the EIR's arguments. (AR203.)

Also, none of the EIR's mitigations include reducing or phasing population increases to match housing capacity. (AR9501-47.) Comments objected to this omission. (AR14260, 14334, 14388, 14391-92, 15045.) The FEIR responds that such mitigation is infeasible for resident undergraduates because UC "is expected to provide adequate spaces to accommodate all eligible California resident students" and "UC Berkeley has limited authority to restrict student population growth." (AR15045, 14391.) The FEIR and Findings also contend that the "intent of the LRDP is to ensure that UC Berkeley is meeting its undergraduate enrollment commitments to the State" and that measures to match student population growth to housing capacity would be "contrary to the objectives of the proposed project and the obligation that UC Berkeley has to the State." (AR14391, 14393-94; AR200.)

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2. An alternative need not meet all project objectives to require EIR analysis.

The feasibility of alternatives arises at two junctures in the

EIR process: “(1) in the assessment of alternatives in the EIR; and (2) during the agency’s later consideration of whether to approve the project;” and “different factors come into play at each stage.” (*California Native Plant Society v. City of Santa Cruz* (2009) 177 Cal.App.4th 957, 981 (*CNPS*), citing *Mira Mar Mobile Community v. City of Oceanside* (2004) 119 Cal.App.4th 477, 489 (*Mira Mar*)). When selecting alternatives to analyze in an EIR, the standard is whether the alternative is “potentially feasible.” (*Mira Mar, supra*, 119 Cal.App.4th at 489; Guidelines, § 15126.6(a).) In the second project approval phase, the decision-maker evaluates whether alternatives are actually feasible, and may reject alternatives on grounds of actual infeasibility even though the EIR found them potentially feasible and analyzed them. (*Watsonville Pilots Assn. v. City of Watsonville* (2010) 183 Cal.App.4th 1059, 1087 (*Watsonville*) [citing *CNPS, supra*, at 981, 999-1000 and *Mira Mar, supra*, at 489]; Guidelines, § 15091(a)(3).)

It is an abuse of discretion for an agency to exclude a potentially feasible alternative that would substantially reduce significant impacts from analysis in the EIR simply because it does not meet all project objectives. (*Habitat & Watershed Caretakers v. City of Santa Cruz* (2013) 213 Cal.App.4th 1277, 1304 (*Caretakers*) [“limited-water alternative could not be eliminated from consideration solely because it would impede to some extent the attainment of the project’s objectives”]; *Watsonville, supra*, 183 Cal.App.4th at 1087 [agency’s refusal to analyze a reduced development alternative because it failed to

meet two of 12 project objectives was legal error].)

The EIR rejected a lower enrollment alternative from analysis based on its assertion that fewer graduate and non-resident undergraduate students than projected would be inconsistent with a single one of the LRDP's fourteen objectives, i.e., its academic status objective. This is legal error because “[i]t is virtually a given that the alternatives to a project will not attain all of the project’s objectives. (*Watsonville, supra*, 183 Cal.App.4th at 1087; accord, *Caretakers, supra*; *Association of Irrigated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, 1400 [alternative need not fully achieve project’s “fundamental objective”]; Guidelines §§ 15126.6(a) [alternative need only “feasibly attain most of the basic objectives of the project”]; 15126.6(c) [“The range of potential alternatives to the proposed project shall include those that could feasibly accomplish most of the basic objectives of the project”].)³

The purpose of the alternatives analysis is to “identify alternatives that meet most of the project’s objectives but have a reduced level of environmental impacts.” (*Watsonville, supra*, 183 Cal.App.4th at 1089.) Because significant impacts are driven by Project-related population increase, the refusal to analyze any

³To be analyzed in a draft EIR, an alternative need not meet “every key objective” or even the “primary” objective of the project to require analysis. (*CNPS, supra*, 177 Cal.App.4th at 991 [upholding EIR’s inclusion of alternatives for analysis that do not meet “every key objective” even where agency ultimately rejected them as infeasible]; *Mira Mar, supra*, 119 Cal.App.4th at 488-489 [need not meet “primary objective”].)

alternative that limits that growth deprives the public and decision-makers of comparative information regarding environmental costs and benefits needed to evaluate which alternative to later adopt. (*Id.*, [failure to consider reduced growth General Plan alternative]; see also *Cleveland Nat.’l Forest Foundation v. San Diego Ass’n of Governments* (2017) 17 Cal.App.5th 413, 436 (*Cleveland National Forest*).)⁴

Below, UC cited *Bay-Delta* to argue that an EIR need not evaluate an alternative that “cannot achieve the project’s underlying fundamental purpose.” (JA143:4-5, citing *Bay-Delta, supra*, 43 Cal.4th at 1167.) This principle does not help UC here for several reasons.

First, unlike the EIR in *Bay-Delta*, there is no evidence in the EIR that maintaining UCB’s academic status is the project’s “underlying fundamental purpose.” Unlike here, in *Bay-Delta* the agency had developed substantial evidence that there was one underlying goal that required each of the four primary objectives to be met to make an alternative even potentially feasible. (*Id.* at 1167.) The Regents made no comparable determination. Unlike *Bay-Delta*, here the EIR identifies 14 distinct project objectives without priority between them.

In *Bay-Delta*, CALFED determined that its project had one “underlying goal of reducing conflicts and providing a solution

⁴The EIR’s “Reduced Development Program” alternative would reduce the construction of housing and academic space, but not the population growth that drives significant impacts. (Ex, Tab 10, pp. 311-12 [AR10358-59].)

that competing interests could support” and CALFED made this determination after a 15-month public process to develop alternatives based on identifying the four primary project objectives, each of which had to be met to make the project feasible at all in light of “conflicting interest groups and stakeholders.” (*Id.* at 1164 [integrated attainment of the four objectives is “the very foundation of the Program”]; 1165, 1167 1157-1159.)

Bay-Delta upholds CALFED’s choice of alternatives precisely because the agency had developed substantial evidence that there was one underlying goal that required each of the four primary objectives to be met to make an alternative even potentially feasible. (*Id.* at 1167.) Thus, *Bay-Delta* is not relevant because here UC made no comparable determination that the feasibility of the LRDP depended on the integrated attainment of each of its 14 project objectives, that the academic status objective is essential to attainment of the other 13 objectives, or that it is “the underlying fundamental purpose.”

To the extent the LRDP Update has one “underlying fundamental purpose” it is the construction of housing to accommodate projected enrollment increases.

The proposed LRDP Update analyzed in this EIR ... includes projections of student and faculty and staff populations The purpose of the horizon year of the 2036–37 school year is to provide a defined period for identifying the development needed to accommodate projected enrollment and population growth

(AR9549; CEQA § 21080.09(a)(2) [definition of LRDP].) A reduced

enrollment increase alternative is not inconsistent with this stated purpose of the LRDP Update.

3. UC has authority to limit resident undergraduate enrollment at UCB.

An agency abuses its discretion if it rejects an alternative or mitigation based on a legally erroneous understanding of its legal authority. (*City of San Diego v. Board of Trustees of Cal. State Univ.* (2015) 61 Cal.4th 945, 959-961; *City of Marina, supra*, 39 Cal.4th at 355-62.) In both of these cases, the Court emphasized the prejudicial effect of mistakenly foreclosing effective mitigation of off-campus impacts.

Here, UC abused its discretion by relying on the erroneous premise that it lacks discretion to reduce or phase resident undergraduate admissions at UCB as a mitigation or alternative. (AR200, 203, 15045, 14391, 14393-94; 14218, 14175-77.) In fact, the Regents do have the legal authority and discretion to cap or phase undergraduate enrollment at a particular campus. UC's admissions obligation to resident undergraduates is system-wide, not specific to an individual campus, and DEIR comments show that UC has repeatedly agreed to cap or phase undergraduate enrollment at particular campuses in connection with LRDP adoptions. (AR14559, 14509, 14535, 14502, 15204-05, 1306-09, 1348-49.)

The FEIR's assertion that "enrollment growth at each campus is driven by a directive to absorb a reasonable proportion of the increasing enrollment in the UC system as a whole" (AR14176) does not identify any legally binding "directive"

governing UCB's "proportion." Furthermore, the record suggests that a reduced population growth alternative is potentially feasible without disproportionately burdening the other UC campuses. The state projects that the number of California public high school graduates and K-12 students will decrease during the 15-year LRDP planning horizon, reducing the number of UC admissions needed to satisfy this obligation. (AR1136-37, 1561-68].)

The FEIR admits that "[o]ther UC campuses have entered into similar agreements with local jurisdictions and community groups to address issues around land use planning, public services, housing, and transportation, among others." (AR14509.) UC agreed to cap enrollments at UC Santa Cruz (AR14559, 1306-09) and UC Santa Barbara (AR14559;AR1348-49) and to match housing to enrollment at UC Davis (AR14559;1383-85).

Further, the EIR admits UC has discretion to limit enrollment to match housing capacity, explaining UC "develops annual enrollment targets for each university" based upon the "capacity of each campus." (AR10098.) The EIR also concedes UC's discretion to limit enrollment by stating "population projections are for planning purposes to establish the LRDP's physical development program, and do not mandate or commit UC Berkeley to any specific level of student enrollment or overall growth." (AR14176.)

Indeed, the FEIR does not dispute that UC has authority to control and maintain fixed enrollment at any given UC campus while meeting its system-wide obligations for admission of

resident undergraduates, e.g., by assigning students to the UC campuses not suffering critical housing shortages. (AR14773-76, 14789-90, 14174-78.) Presumably, UC's annual enrollment targets for UCSC and UCSB honor the Regents' 2008 and 2010 enrollment limit agreements. The Regents can exercise the same discretion to limit UCB enrollment.

In sum, the assertion in the EIR and Findings that UC lacks discretion to control admissions at UCB is legally erroneous. (AR203, 10355; 14176.) Since that was UC's sole basis to refuse analysis of an alternative or mitigation that limited resident undergraduates, UC abused its discretion in finding such restrictions infeasible and the EIR is informationally inadequate. (*City of Marina, supra*, 39 Cal.4th at 356 ["An EIR that incorrectly disclaims the power and duty to mitigate identified environmental effects based on erroneous legal assumptions is not sufficient"].)

B. The EIR Fails to Analyze Alternative Locations for the Housing Proposed at People's Park.

While UC's consultants studied many potentially feasible alternative sites to build housing close to campus, UC refused to analyze any of these alternative locations in the EIR or to compare their relative environmental costs and benefits to Housing Project #2 and its harm to People's Park and its surroundings. Since the EIR and Findings concede that Housing Project #2 will have a significant and unavoidable adverse effects on the historic significance of People's Park and at least 10 historically significant buildings in the area, it is inconceivable

that the EIR would fails to analyze alternative locations that could reduce or avoid the loss of People's Park.

It is an abuse of discretion for the EIR to omit analysis of potentially feasible alternatives that could substantially reduce or avoid significant impacts, including alternative locations. (*Citizens of Goleta Valley v. Board of Supervisors* (1988) 197 Cal.App.3d 1167, 1179-80 (*Goleta I*.) An EIR cannot omit analysis of off-site alternatives based on the preferences of a project proponent just as a reduced-size project cannot be rejected for that reason. (*Uphold Our Heritage v. Town of Woodside* (2007) 147 Cal.App.4th 587, 602; *Preservation Action Council v. City of San Jose* (2004) 141 Cal.App.4th 1336, 1355-56 (*Preservation Action*)).) Otherwise, CEQA's requirement for analyzing off-site alternatives would be meaningless.

Comments objected to the EIR's failure to analyze nearby alternative locations to develop housing. (AR14360, 14578-79, 14788-89, 15074, 15117, 15146, 15177.) A comment letter from Lesley Emmington and Gale Garcia noted that UCB owns at least four other large, nearby, properties that are potentially feasible sites for student housing and provide a brief description and photographs of these properties. The letter comments that they "deserve consideration as alternatives to the Project 1 and Project 2 sites," noting that they are "grossly underutilized, and would require no destruction of historic resources." (AR24147-51.)

Three of these properties are parking lots/garages: (1) Channing Ellsworth, bordered by Channing Way, Haste Street and Ellsworth Street, covering most of the city block (AR24149;

see also, AR9575-76); (2) the Golden Bear Center parking lot at 1995 University Avenue, between University Avenue, Berkeley Way, Milvia Street and Bonita Avenue (AR 24148 [“The Center’s parking lot covers half of the block” and “was originally approved with the intention of building over the lot, and the parking structure is therefore designed to support construction above”], see also, AR9575-76); (3) Lower Hearst parking garage (AR24150).⁵

The EIR’s omission of analysis of alternative sites for the housing proposed at People’s Park is patently unreasonable considering UC had its consultants study many potentially feasible alternative sites close to and within the “Campus Park.” (AR28187-292). Sites near the Campus Park include the Anna Head school site (AR28195-99); 2000 Carleton (AR28214-17); Oxford Tract (AR28226-28); Channing Ellsworth (AR28249-51); Unit 3 (AR28260-62); Foothill North (AR28271-74); and Clark Kerr (AR28286-90). Sites within the Campus Park include Alumni House, Bancroft Parking Structure, and North Field (AR25540); Dwinelle Parking Lot (AR25558); Cesar Chavez Student Center (AR25576-78); Tolman Hall (AR25557); Evans Hall (AR25569); and Edwards Field (AR25581).

The Draft EIR briefly mentions, but excludes from its

⁵Other comments requested analysis of an alternative housing site at University Village in Albany (“UVA”). (AR14242, 14360, 14538, 14545, 14739-40.) Comments also suggested several other locations including the Richmond Field Station (RFS), the Mills College Campus, satellite UC Berkeley campuses, or other off-campus sites. (AR14242.)

analysis, two alternatives that could avoid building in People's Park, including the Historic Resources Avoidance alternative and the Housing Projects #1 and #2 Alternate Locations alternative. (AR10356.)

Regarding the former, the EIR states: "Housing Projects #1 and #2 could not be developed under this alternative, as both projects were found to result in significant and unavoidable impacts to historic resources." (AR10356.) This is legal error. Because the impacts of the housing projects would be significant, the EIR must consider potentially feasible alternate sites.

Regarding the latter, the EIR states:

Development of Housing Projects #1 and #2 at one or more alternative sites would be constrained by site access and parcel size, as many of the eligible sites are smaller than the proposed development sites. Therefore, the development programs would need to either be reduced, or the housing projects would require multiple sites, further diminishing the total number of beds described in the proposed LRDP development program.

(AR10356.) This statement is conclusory. The EIR offers no facts or analysis to conclude that UC could not provide the same bed count using multiple alternate sites. Moreover, the fact that an alternative that reduces significant impacts might not accomplish all project objectives is not a legally sufficient reason to exclude the alternative from analysis in the Draft EIR. (*Watsonville, supra*, 183 Cal.App.4th at 1087.)

Moreover, the EIR's description of Housing Project #2's

objectives does not include building housing in People’s Park. (AR9552-53.) Therefore, UC cannot defend the EIR’s failure to analyze alternative locations for this housing on grounds it would not achieve the project’s objectives.

The FEIR also responds that analysis of suggested alternative sites was not necessary because

these locations are not included in the EIR Study Area because they are not part of the LRDP Update. ... If UC Berkeley were to consider any expansion to one of these suggested locations, or another location outside of the LRDP Planning Area, such an expansion would occur under a separate planning and environmental review process.

(AR14212.) This response does not address the 15 alternate sites studied by UC’s consultant that are within the EIR Study Area.

Also, even as applied to the more distant sites, the response is legally incorrect because the correct standard is “whether the proponent can reasonably acquire, control or otherwise have access to the alternative site (or the site is already owned by the proponent)” (Guidelines, § 15126.6(f)(1)), not whether alternative sites fell outside the EIR’s self-selected study area. UC’s reasoning would lead to absurd results because a lead agency could avoid analyzing alternative sites simply by self-selecting an unduly narrow EIR study area.⁶

⁶UC considers the campus core, UVA and RFS as one campus for many governmental purposes. See, e.g., AR109996 [2017 Climate Registry includes RFS and UVA in campus GHG inventory]; AR106974-75 [2018 Climate Registry]; AR106915 [GSPP EIR

“[T]he duty of identifying and evaluating potentially feasible project alternatives lies with the proponent and the lead agency, not the public.” (*Goleta II, supra*, 52 Cal.3d at 568 “[T]he duty of identifying and evaluating potentially feasible project alternatives lies with the proponent and the lead agency, not the public”].) That said, the EIR’s handling of the Emmington/Garcia comment letter mentioned, *ante*, illustrates how the EIR failed analyze a range of reasonable alternatives.

Channing Ellsworth is one of three UC owned parking lots/garages referenced in the Emmington/Garcia comment. Channing Ellsworth is potentially feasible because (1) the EIR identified it as a “potential area of new development and redevelopment” (AR9573-9576 (Table 3-2 [No. CE7]; see also AR28323); (2) it could provide 2,980 beds (AR 9575 [No. CE7], which is substantially more than the 1,187 beds planned for the People’s Park site (AR14028); (3) it is only three blocks from the campus core (AR9576 [Figure 3-3, CE7]; AR28323); (4) it would meet UC’s preference that “housing in the Southside should be focused on undergraduate students” (AR29155); and (5) it would require no destruction of historic resources (AR9793; 24147.)

Also, UC’s housing study consultant viewed Channing Ellsworth as potentially feasible, stating: “Elements of the building and land use strategy that are consistent across the hybrid options include ... Housing: Additional student housing is

GHG inventory]; AR108977 [stormwater permit includes RFS and UVA]; AR109553-54 [transferring operations from core to RFS].

constructed on the following sites: 2556 Haste Street (People’s Park) and Anchor House, currently in development; and Clark Kerr, Channing Ellsworth, Anna Head (excluding Buildings E & F), east and west sides of Channing-Bowditch, and 2000 Carleton.” (AR28486 (emphasis added).) This report also describes Channing Ellsworth as a “previously identified housing site.” (AR28493.)

The FEIR responds to the Emmington/Garcia letter by cross referencing Response B11-8 and Master Response 18. (AR15180.) Neither Response B11-8 nor Master Response 18 specifically address the potential feasibility of Channing Ellsworth (or any of the other sites proposed by the comment.) (AR15033, 14209-14221.)

Instead, Master Response 18 makes three general assertions about fifty-seven (57) “Potential Areas of New Development and Redevelopment” listed in Table 3-2 and Figure 3-3 (AR9574-76) and twenty-two (22) “Potential Areas of Renovation” listed in Table 3-3 and Figure 3-4 (AR9577-78.)

These three general assertions are: (1) using them would result in fewer beds; (2) using them could reduce the significant historic resource impacts at the Housing Project #1 and #2 sites, but could also introduce new historic resource impacts at many of the sites; and (3) accommodating the same number of beds on multiple sites would cause greater potential for ground disturbance and thus consequently, greater construction impacts. (AR14215.)

The FEIR does not tell the reader which properties on these

lists suffer from any of these disadvantages.

Nor does the FEIR provide any evidence that using multiple sites from this list would “diminish the total number of beds.” In fact, the evidence in the EIR is to the contrary. The following table summarizes the record evidence regarding the bed capacity of several locations that UC’s consultants included in UC’s Housing Capacity Study or presented to UC’s Design Review Committee and that the EIR presents in Table 3-2 and Figure 3-3 (AR 9574-76), with People’s Park added as a point of reference.

Alternative Sites - (blocks from Campus Core)	UC bed estimate	AR pages
Channing Ellsworth (3)	2,980; 2,330-2,904	9575-76; 24772; 28328
Oxford Tract (1)	1,640; 749-2660	9575-76; 28329; 28232
Unit 3 (1)	net+ 836; net+600	9575-76; 24772
Fulton-Bancroft: (0)	1,200	9575-76; 28326
1995 University (2)	550	9575-76
2000 Carleton (9)	330; 821-860	9575-76; 28220; 28167
People’s Park (4)	1,187	14028

Additional sites are potentially feasible because they would, singly or in combination, provide enough beds to match the number of beds proposed at People’s Park. These sites include:

- Fulton Bancroft, which could accommodate 1,200 beds just across Bancroft Avenue from the campus core. (AR575-76.)
- Oxford Tract, which could accommodate 1,640 beds only one block from the campus core. (AR575-76.)

The record contains voluminous evidence of UC evaluating potential housing sites as part of the LRDP, but there is no evidence that UC undertook any such analysis for the purpose of

identifying alternative locations for the housing proposed for People's Park. Even in the early stage of LRDP planning, as evidenced by the minutes of a February 20, 2020, meeting of the Design Review Committee, there is no discussion of alternatives to People's Park. In a Pre-Read Memorandum LRDP/CMP Advisory Group, People's Park is shown as "currently in development." (AR24717-23.)

UC engaged a consultant to prepare a Housing Capacity Study consisting of "an integrated housing study to confirm the capacity and physical planning and design considerations of seven potential housing sites." (AR28186). People's Park does not appear on this list as a site to be evaluated and was therefore not part of the consultant's scope of analysis to allow analysis of alternatives for Housing Project #2. (AR28137-85)

Finally, a review of the record related to housing or People's Park shows no evidence that UCB considered alternative sites for Housing Project #2 (see Index to Administrative Record, pp. 23-25, § VI.B [Agendas, Minutes, and Reports (Design Review Committee)]; pp. 26-27, § VI.D [Agendas, Minutes, and Reports (LRDP & Campus Master Plan ("CMP") Advisory Group)]; AR29027-28; 29153-183; 29308-309; 29330-333); 29342-345; and 29357-358).

The lead agency's analysis of a range of reasonable alternatives is required to be in the EIR; it cannot be buried in an appendix or elsewhere in the administrative record. (Guidelines, §15126.6.) "Whatever is required to be considered in an EIR must be in that formal report; what any official might have known from

other writings or oral presentations cannot supply what is lacking in the report.” (*Laurel Heights I, supra*, 47 Cal.3d at 405.)

Omitting analysis of these alternate location alternatives is prejudicial because it deprives the public of essential information. Such an analysis would identify the affected historic resources and the nature and extent of these alternatives’ significant effects on them, and would compare these impacts with those of the proposed project. (Guidelines, §§ 15126.6 (c), (d), (f)(1).) This is exactly the information the Regents need to inform their decision whether to adopt the project in its proposed location or an alternate location. The public also needs this information to hold UC to account for its decision to favor protection of unnamed historic resources over People’s Park. “The EIR is the heart of CEQA, and the mitigation and alternatives discussion forms the core of the EIR.” (*Bay-Delta, supra*, 43 Cal.4th at 1162.) Without analysis of these alternatives, both the Regents and the public are left in the dark about whether Housing Project #2’s significant impacts are more or less “acceptable” than the significant impacts of the alternatives. (Guidelines, § 15093.)

C. The EIR’s failures to analyze a lower-enrollment alternative or alternative locations for the housing proposed at People’s Park are prejudicial.

Analyzing a potentially feasible alternative that decision-makers later find to be actually infeasible is not an idle act. CEQA imposes a substantive duty on agencies not to “approve projects as proposed if there are feasible alternatives ... that would substantially lessen their significant environmental

effects.” (CEQA, § 21002.) The purpose of an EIR is practical: it is “intended to assist public agencies” in identifying significant impacts and harm-reducing alternatives. (CEQA, §§ 21002; 21002.1(a); *Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 123, 134.) Once an agency adopts all feasible mitigations or alternatives that substantially reduce significant impacts, the agency may not approve the project unless it finds that further harm reducing mitigation or alternatives are infeasible (CEQA § 21081(a)(3); Guidelines, §§ 15091(a); 15092(b)(2)(A))⁷ and that overriding public benefit outweighs the significant environmental harm. (CEQA, § 21081(b); Guidelines, §§ 15091(a)(2); 15092(b)(2)(B); 15093.) These findings must be made separately and in sequence. (*City of Marina, supra*, 39 Cal.4th at 350, 368-69.) CEQA’s substantive duty to adopt feasible alternatives that reduce significant impacts is *preceded* by the duty to analyze potentially feasible alternatives in the Draft EIR.

An EIR “is a document of accountability.” (*Laurel Heights I, supra*, 47 Cal.3d at 392.) Therefore, CEQA requires that EIRs not only assess and mitigate impacts, but also “disclose to the public the rationale for governmental approval of a project that may significantly impact the environment.” (*Cal. Bldg. Industry Ass’n. v. Bay Area Air Quality Management Dist.* (2015) 62 Cal.4th 369, 382.) An EIR’s assessment of alternatives ultimately rejected as

⁷*City of Marina, supra*, 39 Cal.4th at 359; *Preservation Action, supra*, 141 Cal.App.4th at 1350.

infeasible is essential because it provides “the decisionmakers with information about how most of the project’s objectives could be satisfied without the level of environmental impacts that would flow from the project.” (*Watsonville, supra*, 183 Cal.App.4th at 1089-90.) Accountability requires that agency decision makers, not staff, determine actual infeasibility. (*CNPS, supra*, 177 Cal.App.4th at 992, 999.) Here, UC’s premature rejection of potentially feasible alternatives from analysis denied the public the opportunity to see how the Board of Regents, not its consultants, would make infeasibility findings.

D. The EIR’s Analysis of Social Noise Impacts is Legally Inadequate.

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

1. Facts regarding social noise impacts.

The EIR’s five sentence treatment of potential social noise

impacts related to the LRDP Update consists of the statement in the stationary noise section that “noise generated by residential ... users” is “generally short and intermittent” and the identification of various “noise reduction initiatives” for student parties, including the Happy Neighbors program, the CalGreeks Alcohol Taskforce, and the City’s Exterior Noise Standards. (AR10067.) The EIR provides no discussion of baseline social noise conditions, the effects of increasing student housing and population in affected neighborhoods, increased attendance at off-campus parties by increasing numbers of students housed on- and off-campus, or the efficacy of noise abatement efforts. The EIR’s stationary noise significance conclusion is based on mitigation for mechanical equipment noise sources and simply does not address social noise. (AR10067.)

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

Accordingly, Appellants asked noise consultant Derek Watry to comment on this issue. (AR1587-1743 [Lippe, Watry, Bokovoy, Exhibits].) In Watry’s professional opinion, vocal noise from house parties and from late-night pedestrians will exceed the residential Exterior Noise Limits adopted by the EIR as a threshold of significance. (AR1600-03.) Watry notes the growth in off-campus mini-dorms and points out that students in UC housing, with its strict alcohol and party policies, will attend off-campus parties at unregulated locations. (AR1599-600.) Watry projects that the increase in student beds in the EIR study area “portends a 103% increase in unruly parties.” (AR1602, citing AR9580, 10114 [DEIR population projections].) Watry concludes that there is no effective physical or regulatory mitigation to avoid these increased incidences of significant impacts from late night drunken pedestrians or unruly student parties. (AR1602-03.)

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

Bokovoy documents his history. He provides City Council findings for its “Second Response Ordinance” that inadequately

supervised parties “frequently become loud and unruly to the point that they constitute a threat to the peace, health, safety and general welfare.” (AR1666.) Despite this ordinance, the Council later found for that noise disturbances “have become chronic” due to the “heavy demand for student housing” in off-campus mini-dorms where there are “numerous loud and unruly parties” that “involve the consumption of large amounts of alcoholic beverages,” which “contributes to the nuisance conditions affecting the surrounding neighborhood,” “frequently” requiring police officers to respond “to disperse uncooperative participants.” (AR1715-16.)

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

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

Watry explains that the LRDP will increase the UCB population by 22%, i.e., 12,071 persons, including 5,068 undergraduates. (AR1596, citing AR10114 [DEIR].) Watry explains that, contrary to the FEIR, it is not “speculative” to conclude on the basis of documented past experience that some in this large new student population will “get drunk and make a lot of noise.” (AR1596.) Furthermore, “[i]f the population gets bigger, the propensity for noise gets bigger.” (AR1598.) This finding is consistent with the City Council’s findings. (AR1715-16, 1666.)

2. The EIR fails to analyze non-cumulative social noise impacts.

The Watry and Bokovoy letters provide substantial evidence supporting a fair argument that student-generated noise is a significant impact because it will result in repeated and increased numbers of incidents of exceedance of noise standards adopted by the EIR as thresholds of significance. Therefore, UC’s certification of the EIR without analysis of social noise impacts is an abuse of discretion. (*Visalia Retail, supra; Amador Waterways, supra.*)

Even if the Court considers the EIR’s cursory comments on student noise (AR10067, 10074-75, 10080-81) to be an “analysis,” the discussion is informationally deficient. The EIR’s non-cumulative analysis of LRDP lacks even a qualitative assessment of baseline social noise conditions; it lacks any assessment of the impacts of increased sources of social noise and the potential for increased noise disturbances from student parties and late-night pedestrian excursions; and it lacks any discussion of the efficacy

of noise abatement efforts, particularly the noise from unsupervised off-campus parties. (AR10067 [5 sentence discussion].)⁸ CEQA requires all of this. (Guidelines, §§ 15125 [baseline conditions], 15126.2 [assessment of significance of project's effects], 15126.4 [description of mitigation via measures included in the project or imposed as conditions of approval].) Thus, the EIR is inadequate because it omits required facts and analysis to support its analysis of impacts. (*Laurel Heights I, supra*, 47 Cal.3d at 404 [EIR requires facts and analysis showing analytic route to conclusions].)

Further, the EIR is informationally inadequate because it relies on the unsupported assumption, challenged by factually documented comments, that existing measures (e.g., Happy Neighbors, CalGreeks Alcohol Taskforce, enforcement of the Berkeley Municipal Code) would reduce noise impact to less-than-significant. While the DEIR mentions the existence of these noise-abatement initiatives (AR10046-47, 10067), these measures are not required as mitigation and, more problematically, the EIR fails to provide any analysis of their efficacy, an analysis that is required in light of their evident uncertainty. In fact, neither the DEIR nor the FEIR make any claim that these measures are

⁸The EIR's discussion of social noise from Housing Project #1 and #2 considers only noise at these sites and does not discuss their residents' contributions to social noise at other off-campus venues. (AR10074-75, 10080-81 [social use at Housing Project #1 and Housing Project #2 must meet City noise standards]; 1599-600 [UC housing alcohol and noise policies will push party seekers to off-site parties].)

effective. (*Id.* [DEIR]; AR14545-46, 14566, 15060, 14540 [FEIR].)

When the effectiveness of mitigation is uncertain or not apparent, the EIR must include facts and analysis supporting the claim that the measure “will have a quantifiable ‘substantial’ impact on reducing the adverse effects.” (*County of Fresno, supra*, 6 Cal.5th at 522 [facts required re support mitigation efficacy]; *King & Gardiner Farms, LLC v County of Kern* (2020) 45 Cal.App.5th 814, 866-867 (*King & Gardiner Farms*) [independent review appropriate as to whether EIR provides requisite facts and analysis to support mitigation efficacy], 868-69 [more detailed facts and analysis required where effectiveness uncertain].)

Even if the noise-abatement measures mentioned in the EIR were effective, the EIR fails to separately assess the significance of social noise with and without that mitigation as required. (*Lotus v. Department of Transportation* (2014) 223 Cal.App.4th 645, 653-58 [EIR must specify whether impacts are significant without mitigation so the need for mitigation and the sufficiency of proposed mitigation are separately evaluated].)

3. The EIR’s analysis of cumulative social noise impacts is legally inadequate.

The EIR is also deficient because it fails to consider or disclose the cumulative effects of increased student social noise. (Guidelines, § 15130.) The EIR’s cumulative noise analysis makes no reference to noise from student parties and late-night pedestrians. (AR10093-95.) Yet the LRDP will add 5,068 undergraduates, and it will do so in the cumulative context of ongoing noise complaints from existing, dense, off-campus

student housing and the projected future doubling of student housing in the campus vicinity — from 8,722 undergraduate beds to 17,730 beds. (AR10114.)

Cumulative analysis is a two-step process that requires an agency to first determine the severity of the cumulative impact from all sources — past, present, and foreseeable future projects — and then, as a second step, to determine whether this project’s incremental contribution is considerable in light of that severity. (Kostka and Zischke, *Practice Under the Cal. Environmental Quality Act* (2nd Ed., 2019 Update), § 13.39, citing Guidelines, §§ 15126(a), 15126.2(a), 15130(a).) The agency must determine and disclose the severity of the cumulative condition because “the greater the existing environmental problems are, the lower the threshold should be for treating a project’s contribution to cumulative impacts as significant.” (*Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 120.)

Here, the EIR’s cumulative analysis is informationally inadequate because it fails to assess the magnitude of existing and projected future student party and pedestrian noise disturbances and thus fails to identify either the existence or the severity of the cumulative social noise impacts from all student housing in Berkeley through a step-one analysis. The EIR is also informationally inadequate because it fails to provide a step-two analysis to determine whether the incremental student party and pedestrian noise due to the new LRDP is a considerable contribution in light of the severity of existing conditions. (*City of*

Long Beach v. City of Los Angeles (2018) 19 Cal.App.5th 465, 490 (*City of Long Beach*); *Los Angeles Unified School Dist. v. City of Los Angeles* (1997) 58 Cal.App.4th 1019, 1024-1026 (*Los Angeles Unified*) [EIR must consider “whether any additional amount of traffic noise should be considered significant in light of the serious nature of the traffic noise problem already existing around the schools”]; *Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 718-721 (*Kings County*).

E. The EIR Unlawfully Piecemeals CEQA Review of UCB Projects.⁹

CEQA’s conception of the term “project” is broad to maximize protection of the environment. (*Friends of the Sierra Railroad v. Tuolumne Park & Recreation Dist.* (2007) 147 Cal.App.4th 643, 653.) “This big picture approach to the definition of a project (i.e., “the whole of an action”) prevents a proponent or a public agency from avoiding CEQA requirements by dividing a project into smaller components which, when considered separately, may not have a significant environmental effect.” (*Nelson v. County of Kern* (2010) 190 Cal.App.4th 252, 270-271 (Nelson).)

Here, the project described and analyzed in the EIR is impermissibly piecemealed. UCB plans extensive development at many of its properties located outside the “campus park” area, including 105 new graduate student housing units and a combined community clinic and continuing education facility at

⁹These issues were exhausted in public comments. (AR14251, 14538, 14739-40, 14789, 14799-813.)

its Emeryville property; a 6-story, 700-bedroom building at UVA (approved on July 21, 2021 [AR 24394-97]); a life science incubator with private labs, wet, and dry open lab benches for faculty and student start-up researchers at its City Environs properties; and many more. (AR9633 [Table 5-3].) Yet, the EIR fails to include these activities in its project-level impact analysis because they are “outside of the study area.” Instead, they are identified as mere “cumulative projects.” (AR9633.)

Relegating a project component to a cumulative project status frustrates informed decision-making and public participation because analysis of cumulative impacts “need not provide as great detail as is provided for the effects attributable to the project alone” (Guidelines, § 15130, subd. (b)) and did not do so in this EIR. Several examples illustrate this fact. The EIR’s energy analysis quantifies transportation energy demand of the Project but does not do so for the cumulative projects. (AR9840, 9850-51.) The cumulative construction noise analysis does not quantify noise from any cumulative project, including the UVA expansion, despite its proximity to existing nearby sensitive receptors. (AR10094; 14824.) The construction phase air quality analysis quantifies health risk for Housing Project #1 (AR9722-24) and Housing Project #2 (AR9726-29), but not for the UVA expansion (AR732-33). The UVA, a 58-acre property that provides more than 10 percent of all UCB on-campus housing (AR10107), is a major component of UCB’s physical development addressing enrollment (AR14227 [UVA adds 825 students]). So including the UVA and other UCB developments outside the campus core

within the scope of the project and the EIR's impacts analysis would have resulted in more complete environmental review and complete disclosure of the environmental impacts of UCB's development plans. As the City of Berkeley explains:

[T]he UC Berkeley population lives and works not only in the Campus area, but throughout the City and in surrounding cities within the region. Impacts from the LRDP, such as those related to transportation, air quality, housing, public services, and utilities are not limited to the arbitrary boundary delineated in the DEIR.

(AR14250.)

The EIR argues that these areas are "sufficiently distant from the Campus Park and its environs." (AR9555.) This rationale is legally incorrect. The test for excluding an activity from analysis in an EIR is not whether it is "sufficiently distant," but whether the excluded activity has "substantial independent utility." (*Del Mar Terrace, supra*, 10 Cal.App.4th at 736.)

Developments on the other UCB properties do not have independent utility from development of the campus core because all of the development are part of UCB's program to accomplish its educational mission. The LRDP Update plans to increase the graduate student population by 3,424 by the year 2036.

(AR10110.) To house those students, UC must build housing, such as the UVA and Intersection Graduate Student Housing ("Emeryville"). (AR9633.) These projects would provide approximately 865 beds, or roughly 25 percent, of UCB's guaranteed housing for new graduate students. (AR9633; 24394-

97.) The minutes of the Regents' meeting approving expansion of graduate student housing at the UVA explains, "The [UVA] project would deliver 25 percent of the Berkeley campus' goal of guaranteed housing availability for one year for entering graduate students and double the existing inventory of University-owned graduate student housing on the Berkeley campus." (AR24394.) These projects do not have "independent utility" from the LRDP and its purpose to provide beds for graduate students. (AR24394; 9633.)

Distancing itself from both the EIR's actual analysis and UC's briefing, the Trial court substitutes its own rationale, asserting: "The 2021 LRDP EIR discloses that both projects are outside the EIR Study Area (AR9633) because they are outside the City of Berkeley." (Order, 10:10-11.) There are at least two flaws with this analysis.

First, the trial court misconstrues the record. While the EIR notes the location of certain UCB projects (AR9633 [table entitled "Pending UC Berkeley Projects"]), it does not purport to define the scope of the project. As explained above, the EIR's analysis is set forth at AR9555, which asserts that these areas are "sufficiently distant from the Campus Park and its environs" without *any* further explanation or support.

Second, the trial court's rationale is inconsistent with CEQA. The lead agency is UC, not the City of Berkeley. Therefore, the City's boundaries are irrelevant. Neither UC nor the trial court cite any authority indicating that a project description cannot encompass interdependent activities located

two or three miles away from each other. (See, e.g.; *Bay-Delta* (2008) 43 Cal.4th at 1156 [EIR covering the entire Sacramento-San Joaquin Delta]; *North Coast Rivers Alliance v. Kawamura* (2015) 243 Cal.App.4th 647, 653 [EIR to control an invasive species in nine counties].) Indeed, the cities of Albany and Berkeley both objected to the EIR’s truncated project description. (AR14250-14251 [Berkeley], 14227 [Albany].) Further, using Berkeley’s boundaries to define the scope of the project is inconsistent with the EIR’s inclusion of the 751-acre Hill Campus East area since the vast majority of that area is located in the City of Oakland and unincorporated Contra Costa County. (AR9555-9556.) In short, neither facts in the record nor legal authority support arbitrarily limiting the scope of the project to Berkeley’s city limits.

UC and the trial court assert that UCB projects in Albany and Emeryville “can be implemented independent of the specific projects analyzed in the 2021 LRDP EIR.” (Order, 10:11-12.) However, no explanation or facts are offered for this assertion. The correct legal test is whether other projects have “independent utility.” (*Del Mar Terrace, supra*, 10 Cal.App.4th at 736.) UC and the trial court fail to explain how projects providing roughly 25 percent of UCB’s guaranteed housing for entering graduate students have independent utility from UCB’s campus park. (AR9633; AR24394-97.) The cities of Berkeley and Albany contend they are not independent. (AR14227, 14250-14251.)

Finally, the trial court ruled that piecemealing did not occur because the UVA “was approved by the Regents as part of a

separate CEQA process on July 21, 2021.” (Order, 10:13-14, italic added.) The existence of a “separate” CEQA approval in no way refutes piecemealing here since the very concept assumes that the agency performs separate CEQA processes for the different project components. (*Nelson, supra*, 190 Cal.App.4th at 270-271 [“dividing a project into smaller components which, when considered separately, may not have a significant environmental effect”].) Further, UC’s approval of the UVA, based only on a CEQA Addendum, at the same hearing as the 2021 LRDP approval suggests that UC’s piecemealing indeed resulted in minimizing impacts for the larger, unanalyzed campus development plan. (AR24393.)

F. THE EIR FAILS TO LAWFULLY ASSESS OR MITIGATE HOUSING DISPLACEMENT IMPACTS.

Berkeley has a severe housing shortage (AR14232-33) and the EIR admits that the Bay Area has been in “a housing crisis” for decades (AR10105). UC projects that increasing enrollment, faculty, and staff will add another 8,173 residents to Berkeley and nearby jurisdictions where UC will not provide housing, including 2,291 new unhoused Berkeley residents. (AR10116.) Like any public agency in California, CEQA requires UC to analyze and mitigate the environmental impacts of its growth. Here, UCB plans to significantly increase the campus population under the LRDP, which will exacerbate an already unaffordable housing market and disproportionately impact low- and middle-income residents. UC, however, has refused to provide sufficient housing to accommodate the growth. Affordable housing will need

to be constructed, or more people will be homeless. Despite this, UC failed to grapple with the foreseeable consequences of the LRPD by improperly truncating its analysis of housing and population impacts and relying on illusory and unenforceable mitigation in violation of CEQA.

The EIR defines Impact POP-2 as “displace substantial numbers of existing people or housing, necessitating the construction of replacement housing elsewhere.” (AR10109.) The EIR finds Impact POP-2 significant and requires mitigation (AR10109, 10120-22); and applies Mitigation Measure POP-2 (“MM-POP-2”), which merely requires adherence to the UC Relocation Assistance Act Policy, which would “assist existing residents with finding replacement housing.” (AR10121.) The EIR’s analysis of Impact POP-2 is legally invalid because (1) it limits its analysis of displacement to those tenants directly displaced by UC building projects, ignoring indirect displacement caused by adding unhoused population to communities without available housing; (2) it fails to assess physical effects of displacement including health effects of crowding and homelessness and the need for construction of replacement housing; and (3) it bases its finding that the impact is less-than-significant on adoption of a mitigation measure that does not reduce these unanalyzed effects. Further, the EIR’s mitigation for Impact POP-1 is inadequate.

- 1. The POP-2 analysis ignores displacement caused by adding unhoused population.**

The EIR’s analysis of Impact POP-2 considers only

displacement directly caused by elimination of existing housing for UC building projects. (AR10120-10122.)

The EIR's analysis of population growth distinguishes so-called "direct" and "indirect" population growth, where direct growth is the new population for which UC will provide 11,731 net new units of housing and the indirect growth is the 8,173 new persons for whom UC will not provide housing.¹⁰ (AR10103-05 [Tables 5.12-7, 5-12-8], 10113-18 [Table 5.12-11].) However, the POP-2 analysis of displacement caused by the LRDP Update references only the displacement of "existing residents not affiliated with UC Berkeley" at sites where UC would construct the "11,731 net new beds," i.e., the displacement due to the so-called "direct" population growth. (AR10120-21.)

Further, MM-POP-2 (i.e., UC's Relocation Assistance Policy) applies only to these residents are displaced by UC housing projects, not to other persons unable to find housing due to competition from UC's 8,173 new unhoused persons. (AR10121, 10099 [relocation policy applies only where people must vacate "as a result of acquisition or lease by the UC Regents"], 14184-85 [FEIR].)

¹⁰It is not clear why the EIR considers the 8,173 unhoused person increase to be "indirect" population growth, since it is no more "indirect" than the increase in population who will be housed. The terms "direct" and "indirect" more appropriately modify two types of housing displacement that may occur. The project causes "direct" displacement when UC evicts tenants. The project causes "indirect" displacement by increasing population without building enough housing, thereby causing increased housing prices leading to lower income people being forced by economic pressure to move.

Thus, the POP-2 analysis utterly fails to discuss or disclose the “indirect” displacement caused by increasing population without building enough housing for that increase, thereby causing increased housing prices leading to lower income people being forced by economic pressure to move (i.e., gentrification.)

There is substantial evidence that adding 8,173 residents to Berkeley and nearby jurisdictions for whom UC will not provide housing will in fact cause displacement. Expert comments by Berkeley’s Planning Director, showed that “available and planned housing stock in the City is not sufficient to serve the existing gap between supply and demand, much less the increased demand that will occur with the projected enrollment increase.” (AR15878, see also AR15863 [“adding thousands of new residents in a City that already has a housing shortage would exacerbate challenging conditions by increasing demand for housing and displacing non-student residents”]; AR15879-80 [UC housing trends “effectively displace non-student Berkeley residents”].) The EIR itself admits that because it is difficult for lower- and middle-income people to compete for market rate housing in the Bay Area, existing residents may be displaced. (AR14187-88.) Three studies cited in comments demonstrate increased student populations have a disproportionate impact on availability of affordable housing. (AR2030-2033.) As Berkeley’s Planning Director and others objected, limiting the displacement analysis to the effects of UC housing projects rather than the effects of the population increase associated with the LRDP Update is a failure of analysis. (AR15880, 2033 [citing Judge Seligman at AR1166],

14265, 14567, 14559.) Given this substantial evidence, the EIR’s failure to analyze displacement caused by UC’s unhoused population growth is a prejudicial abuse of discretion. (*Visalia Retail, supra; Amador Waterways, supra.*)

2. The POP-2 analysis fails to assess physical effects of displacement including health effects of crowding and homelessness and the need for construction of replacement housing.

The EIR also fails to discuss or disclose the physical effects on the environment of both direct and indirect displacement, including adverse impacts on people’s health, community impacts from increased homelessness, and construction of replacement housing. Because there is substantial evidence supporting a fair argument that the project will cause these undisclosed physical effects, the EIR’s failure to analyze them is a prejudicial abuse of discretion. (*Visalia Retail, supra; Amador Waterways, supra.*)

This substantial evidence includes the following.

- Expert comments by Berkeley’s Planning Director explained that

Homelessness—whether it results from students who are unable to afford housing or residents who are displaced by students living off campus and driving up rents—also leads to physical impacts on parks, streets and other public spaces, public safety issues related to homeless encampments locating in unsafe locations, and an increase in public health problems.

(AR15880.)

- Comments showed that “the University’s Housing Survey found that 10 percent of students have experienced homelessness

while attending UC Berkeley, while the number for doctoral students is twenty percent.” (AR15878; SAR110254-55)¹¹

- The San Francisco Department of Public Health (SFDPH) has published guidance for assessing the effects of housing displacement caused by development projects, finding that physical effects of displacement include stress, a variety of human health impacts, unsafe housing, crowding, homelessness, unmet transport needs, and increased service needs. (AR16623-33.)
- Citing the SFDPH findings and guidance for assessing the effects of housing displacement caused by development projects, the Berkeley Planning Director explains that “[u]nmet housing needs can also result in significant health costs by forcing residents into crowded and substandard housing.” (AR16558.)
- Homelessness leads to an increase in public health problems, along with public safety issues related to homeless encampments located in unsafe locations. (AR16591 [Planning Director].)
- The Planning Director and the SFDPH guidance confirm that displacement causes significant health impacts by forcing residents into crowded and substandard housing. (AR16558 [Planning Director]; AR16631 [SFDPH].)
- Increasing homelessness causes physical impacts to parks, streets, and other public places (AR15880 [Planning Director].)
- Displacement can result in human health impacts that include stress, poverty-induced health impacts, overcrowding-related infections, reliance on unsafe housing, asthma, and health

¹¹Supplemental Administrative Record (SAR).

impacts caused by the loss of social support and cohesion and by increased segregation. (AR16629-16635 [SFDPH guidance].)

The FEIR contends that these effects are merely social and economic impacts not within CEQA's purview. (AR14187-89.) This is incorrect. CEQA recognizes a "significant effect on the environment" where "effects of a project will cause substantial adverse effects on human beings, either directly or indirectly." (Pub. Resources Code § 21083(b)(3).) Thus, the indirect displacement impacts on the environment and human health of increased homelessness and disruption of existing communities must be analyzed and mitigated. (*County of Fresno, supra*, 6 Cal.5th at 521 [EIR must discuss human health impacts associated with project's environmental impacts]; *California Building Industry Assn. v. Bay Area Air Quality Management District, supra*, 62 Cal.4th at 386 ["Section 21083(b)(3) ... requires a finding of a 'significant effect on the environment' [citation] whenever the 'environmental effects of a project will cause substantial adverse effects on human beings, either directly or indirectly"]; *California Building Industry Assn. v. Bay Area Air Quality Management District* (2016) 2 Cal.App.5th 1067, 1077-78; Guidelines, § 15131(a) ["An EIR may trace a chain of cause and effect from a proposed decision on a project through anticipated economic or social changes resulting from the project to physical changes caused in turn by the economic or social changes"]; CEQA, § 21000(g) [CEQA policy goals include "providing a decent home and satisfying living environment"].)

Moreover, CEQA contemplates that displacement may

cause cognizable physical impacts to the environment because it requires that an EIR include a detailed statement of the growth-inducing impact of a proposed project. (Pub. Resources Code § 21100(b)(5); 14 CCR, § 15126.2(e) [an EIR must “[d]iscuss the ways in which the proposed project could foster economic or population growth, or the construction of additional housing, either directly or indirectly, in the surrounding environment”].) A project has significant impacts if it would “induce substantial population growth in an area, either directly ... or indirectly...” or if it would “[d]isplace substantial numbers of people, necessitating the construction of replacement housing elsewhere.” (Guidelines, Appendix G, §§ XIV(a), (b).)

Guidelines section 15064 subdivision (e) explains the interplay between a project’s socio-economic and physical effects:

If the physical change causes adverse economic or social effects on people, those adverse effects may be used as a factor in determining whether the physical change is significant. For example, if a project would cause overcrowding of a public facility and the overcrowding causes an adverse effect on people, the overcrowding would be regarded as a significant effect.

(See also, *Citizen’s Assn. for Sensible Development v. County of Inyo* (1985) 172 Cal.App.3d 151, 170-71 [“the lead agency shall consider the secondary or indirect environmental consequences of economic and social changes”].)

The EIR fails and refuses to analyze the impact of displacement on people’s health, safety and well-being and from

construction of new housing to meet increased demand, and the disproportionate effect these impacts will have on low- and middle-income households, despite substantial evidence of significant health and community impacts and despite availability of impact assessment methods and guidelines used by numerous agencies set out in the SFPHD guidance. (AR16642-16648; see *Berkeley Keep Jets Over the Bay v. Board of Port Commissioners* (2001) 91 Cal.App.4th 1344, 1370 [lack of a single universal methodology cannot excuse failure of analysis; thorough investigation required before impact can be dismissed as speculative].)

Further, impact assessment POP-2 (AR10120-10122) also fails to assess whether displacement will necessitate “the construction of replacement housing elsewhere,” which is its ostensible standard of significance (AR10109). Despite the conclusory heading in this section, it contains no discussion of the need for replacement housing, even though the LRDP Update will add 8,173 unhoused persons to the region, 2,291 to Berkeley (AR10116), even though the EIR admits a decades long regional “housing crisis” (AR10105), and even though Berkeley’s Planning Director explained that “[a]dding thousands of new residents in a City that already has a housing shortage would exacerbate challenging conditions by increasing demand for housing and displacing non-student residents. (AR14233.) Instead of assessing the need to construct replacement housing, the assessment merely explains that UC’s Relocation Assistance Policy will assist displaced persons to find replacement housing, assuming without

evidence or discussion that sufficient replacement housing exists. Failure to apply the EIR's significance threshold to make a determination of significance is error. (*Lotus v. Department of Transportation, supra*, 223 Cal.App.4th at 655.) By entirely ignoring the ostensible threshold of significance in its analysis, UC failed to "use its best efforts to find out and disclose all that it reasonably can." (Guidelines, § 15144.)

3. Mitigation Measure POP-2 is inadequate because it does not address the need for replacement housing.

The EIR's analysis of Impact POP-2 is also legally invalid because it bases its less-than-significant finding on adoption of inadequate mitigation. First, as explained above MM-POP-2 applies only to residents evicted to make way for UC projects; it does not apply to people who are indirectly displaced by UC's addition of 8,173 unhoused persons. (AR10121, 10099, 14184-85.)

Second, the EIR does not explain how assisting directly displaced residents find replacement housing could possibly avoid the significant impact of "necessitating the construction of replacement housing elsewhere," which is the ostensible impact at issue. (AR10109.) If UC does not provide housing for the LRDP's projected 8,173 person increase in campus population, the options are either construction of affordable replacement housing elsewhere or homelessness. (AR14261-65.) As commenters objected, MM-POP-2 is meaningless because it does nothing to tie

the increase in campus population to housing production.¹²

An EIR cannot use a mitigation measure that does not actually avoid or substantially reduce a significant impact as a basis for finding the impact is reduced to less-than-significant. (*King & Gardiner Farms, supra*, 45 Cal.App.5th at 875; *Cleveland National Forest Foundation, supra*, 17 Cal.App.5th at 433.) When mitigation effectiveness is not apparent, the EIR must include facts and analysis supporting the claim that the measure “will have a quantifiable ‘substantial’ impact on reducing the adverse effects.” (*County of Fresno, supra*, 6 Cal.5th at 511.) The EIR cannot explain how MM-POP-2 avoids the adverse effect, i.e., the need for replacement housing construction, because the mitigation is directed only at tenant relocation, not at reducing the need to build replacement housing.¹³

4. The EIR’s Analysis of Impact POP-1 is Legally Inadequate.

The EIR’s analysis of Impact POP-1 is legally invalid because it bases its finding that the Impact is less-than-significant on adoption of an unenforceable mitigation measure. The EIR defines Impact POP-1 as “substantial unplanned population growth in an area”; finds it is significant unless mitigated; and applies a mitigation that consists solely of

¹²UC has in fact done this in connection with LRDP updates for three other campuses. (AR14535, 14558-59, 15038, 1306-1309 [UCSC Agreement], 1348-49 [UCSB Agreement], 1383-85 [UCD Agreement].)

¹³The FEIR’s response to these comments merely repeats the information in the DEIR. (AR14185-87.)

notifying the City of Berkeley and the Association of Bay Area Governments (“ABAG”) of “enrollment projections and housing production projections... for the purpose of ensuring that local and regional planning projections account for UC Berkeley-related population changes.” (AR10110-18.) The implicit assumption that providing such notice changes “substantial unplanned population growth” to “substantial planned population growth,” and thereby reduces an admitted significant impact to less-than-significant, is unsupported and unsupportable.

MM-POP-1 is unenforceable because it does not require Berkeley or ABAG to actually engage in planning or otherwise reduce the significant population growth or address the housing shortage it will contribute to. It merely calls for providing information to these agencies. It does not and cannot compel them to plan to accommodate the unaccommodated UC population. Planning to accommodate its own population growth is UC’s responsibility. But UC has refused to undertake, as evidenced by its intent to increase the local population by over 8,000 people without providing housing for them.¹⁴ CEQA requires that mitigation measures be enforceable. (*Lincoln Place Tenants Assn. v. City of Los Angeles* (2005) 130 Cal.App.4th 1491; *Federation of Hillside & Canyon v. City of Los Angeles* (2000) 83 Cal.App.4th 1252, 1261; Pub. Resources Code § 21081.6(b); 14 CCR, § 15126.4(a)(2).) Where the lead agency lacks jurisdiction to

¹⁴Further, the planning is unlikely to occur because UCB’s population is “not formally coordinated” with ABAG and Berkeley’s General Plan is twenty years old. (AR10101.)

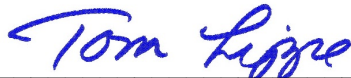
compel another agency to mitigate a significant impact and other effective mitigation is infeasible, it must admit the impact is significant and unavoidable. (*Tracy First v. City of Tracy* (2009) 177 Cal.App.4th 912, 937-938; 14 CCR, § 15091(a)(2).)¹⁵ Since UC cannot compel the City and ABAG to mitigate population growth or alleviate the impacts of reduced affordable housing on residents, UC violated CEQA by finding impact POP-1 less-than-significant based on improper mitigation MM-POP-1.

V. CONCLUSION

For the reasons stated above, the Court should reverse the trial court's Order and Judgment and remand the case to the Superior Court with directions to issue a peremptory writ of mandate requiring that UC void its approval of the LRDP Update and Housing Project #2 pursuant to CEQA section 21168.9(a)(1), and suspend further demolition, construction, or landscape alteration at People's Park in furtherance of Housing Project #2 until UC complies with CEQA pursuant to CEQA section 21168.9(a)(2).

DATED: September 6, 2022

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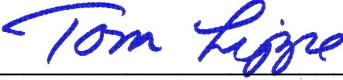
¹⁵Further, the Regents did not find that the mitigation is within the responsibility and jurisdiction of ABAG and the City of Berkeley and that they can and should revise their plans in response to UCB's provision of information. (AR177; see 14 CCR, § 15091(a)(2).)

Certificate of Compliance - Word Count

I, Thomas N. Lippe, counsel for Appellants Make UC A Good Neighbor and The People's Park Historic District Advocacy Group, hereby certify that the word count of Appellants' Opening Brief is 13,561 words according to the word processing program (i.e., Corel Wordperfect) used to prepare the brief.

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