IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION FIVE

BERKELEY CITIZENS FOR A BETTER PLAN, Appellant and Petitioner, v. THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al., Respondents, RESOURCES FOR COMMUNITY DEVELOPMENT, HELEN DILLER FOUNDATION, et al., Real Parties In Interest.	Appeal No. A 166164 Superior Court Case Nos. RG21110142, RG21109910, RG21110157 21CV001919 21CV000995 (Consol. for trial, only)

APPEAL FROM THE SUPERIOR COURT OF ALAMEDA COUNTY

Honorable Frank Roesch, Judge

APPELLANT'S OPENING BRIEF

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STATEMENT OF APPEALABILITY

This appeal follows a final judgment denying a petition for issuance of a writ of mandate in a proceeding brought under the California Environmental Quality Act ("CEQA" – Public Resources Code section 21000, et seq.) It is therefore authorized by Code of Civil Procedure Section 1094.5.

STATEMENT OF THE CASE

On August 26, 2021, Berkeley Citizens For A Better Plan (BC4BP) timely filed a CEQA First Amended Petition for Writ of Mandate challenging Respondent Regents' decision adopting the 2021 Long Range Development Plan (LRDP), certifying its accompanying Environmental Impact Report (EIR), and approving the Anchor House Project #1 (AH1). (AUG 76, Exhibit (Exh. 2), Superior Court Case No. RG21109910.)[1]

After the Regents later approved People's Park Housing Project # 2 (PP2), relying on the previously challenged LRDP EIR, BC4BP filed a new CEQA Petition on October 27, 2021, challenging the LRDP EIR and both AH1 and PP2 (the Project). (AUG 114, Exh. 3, Case No. 21CV000995.)

Two other parties filed CEQA Petitions related to the same Project, the first of which this Court is already familiar – MUAGN (Action No. A165451; Case No. RG21110142) and American Federation of State and Municipal Employees Local

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[1] On November 21, 2022, Petitioner BC4BP filed its Motion requesting to augment the record. "AUG" references the Index and documents attached to that motion.

3299 (AFSCME). On August 20, 2021, AFSCME filed its original CEQA Petition. (AUG 7, Exh. 1, Case No. RG21110157.) On November 1, 2021, AFSCME filed its second Petition following the Regents' approval of PP2. (AUG 150, Exh. 4., Case No. 21CV001919.) AFSCME did not file an appeal. However, in this appeal, BC4BP raises AFSCME's wildfire evacuation challenge that it raised in the trial court.

Real Party in Interest Helen Diller Foundation, et al. filed their Answer to BC4BP's petitions on November 12, 2021, and Respondents Regents, et al. answered BC4BP's Petitions on March 25, 2022. (AUG 222, 247, Exhs. 5, 6.)

BC4BP, MUAGN, and AFSCME filed their consolidated[2] Opening Briefs on April 18, 2022. (JA 62-126, Tabs 4-6; AUG 279, Exh. 8.) Respondents and Real Parties in Interest filed their Joint Opposition Briefs on June 17, 2022. (JA 133, 164, 223, Tabs 8,9, and 11.)

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[2] To stay within the trial court's 60-page limit and avoid repeating one another's briefs, Petitioners each wrote a brief and incorporated most, but not all, of one another's briefs. On the day of trial (July 29, 2022), the court orally granted a motion allowing the Petitioners to incorporate from one another's briefs. (JA 349-350, Exh. 2.)

Immediately following a court trial on July 29, 2022, the court denied all three Petitions. (JA 495; Minute Order, AUG 468, Exh. 12.) It issued its final Judgment on August 2, 2022. (JA 313-329, Tab 17.)

BC4BP timely appealed the Judgment on September 21, 2022. (AUG 470, Exh. 13.)

STATEMENT OF FACTS

No doubt, this court is familiar with the Project's specifics from having read the briefing in the MUAGN case. Suffice it to say that the Project primarily involves greatly increasing the UC, Berkeley student population and providing more student housing, in part, to deal with earlier student enrollment increases with insufficient housing to meet students' needs. AH1 and PP2 are mixed use high-rises with a second residential building on PP2 to serve homeless persons.

BC4BP's participation in the CEQA litigation deals exclusively with the Project EIR, which fails to adequately identify and analyze environmental impacts of the project and mitigate them as required by CEQA. BC4BP raises the following issues:

1) The EIR did not address the shadow impacts from PP2 on two landmarks, illegally asserted an aesthetics exemption, and improperly withheld a shadow study from the public and decision-makers
2) Although Respondents have acknowledged the dangers from noise and below-ground vibrations while pile driving foundations, the EIR failed to adequately mitigate those impacts
3) The EIR failed to adequately address the admitted danger of wildfires, did not provide specific plans for evacuation in case of a wildfire, and did not address the need for further city fire facilities due to the Project
4) The EIR failed to adequately provide baselines for several topics and thus, its analyses and findings of insignificance were faulty from the start
5) The EIR was inadequate procedurally and did not fulfill its informational role under CEQA

A. Under Aesthetics and Cultural Resources, the EIR Failed to Describe PP2's Shading Two Landmarks, Instead Improperly Asserting A CEQA Exemption

PP2's block borders Haste, Bowditch, and Dwight Way. The National Landmark First Church of Christ Scientist (FCCS) (1910), also known as "Bernard Maybeck's Masterpiece" is across Bowditch from PP2's planned high-rise. The National Historic Places list includes the Anna Head School campus (AHS) (1892-1927), designed by Soule Edgar Fisher, Walter Ratcliff, and others, and is between Haste and PP2. (AR9801, 37593-96.) UC

owns and uses the campus; it rents out its Alumnae Hall and Courtyard.

The DEIR incorrectly states that shadow impacts due to PP2 are exempt from CEQA under Public Recourses Code (PRC) section 21099, which includes its streamlined provision for infill and mixed use housing development in transit priority areas. "Thus, this EIR does not consider aesthetics in determining the significance of the impacts of [PP2] under CEQA." (AR9638.) However, it overlooked PRC section 21099, subd. (d)(B), an exception to the statutory exemption for historic resources. It also did not consider the effect of shading in the EIR cultural section.

The EIR's retained Architectural Resources Group's (ARG) expert report, dated March 2021, did not support the EIR's claimed exemption. "CEQA equates a substantial adverse change in the significance of a historical resource with a significant effect on the environment ([PRC] Section 21084.1)." (AR37632.) Citing the Secretary of Interior's standards, it concluded that the much greater height and larger footprint of PP2 "than any of its historic neighbors. . . would likely not be compatible with those [neighboring] historical resources" and potentially would have

"an adverse effect on those resources." (AR37632-38.) It recommended two mitigations, i.e., making informal presentations to the Berkeley Planning Commission and consulting with an architect to review design issues when final plans were ready. (AR37638-39.)

On July 6, 2021, the Berkeley Architectural Heritage Association (BAHA) wrote to UC requesting that they reduce the height of the proposed PP2 high-rise and not pile-drive to avoid harming adjacent or nearby historic resources. (AR364-370.) BAHA disagreed with the claimed exemption and demanded a shadow study in the EIR documentation. (AR14912.) It reminded UC that upon introduction of the project to the public, its planners represented no building would be over 12 stories and would not create shadows on landmarks. Now that the DEIR included a description of a much taller 17-story structure, "shading is a serious concern." (AR14912-15, 37633-34.) After giving various examples of how shadowing could harm the adjacent historic resources, and citing from the ARG study, attached to the DEIR, for support of its points, BAHA concluded that the "[PP2] Towers are just too tall." (AR14917.) It also

explained that the mitigation proposed by ARG was inadequate: "Needless to say, meeting with the City will not overcome the design aspects of [PP2] that will dwarf, shadow, and destroy important materials and aspects of the adjacent historic properties." (AR14918-19.)

In response, the FEIR acknowledged that the ARG Report, concluded that [PP2] posed both design- and construction-related impacts to nearby historical resources." (AR14514.) However, it continued to claim that "the effects of shade/shadow are not a CEQA topic." (AR14912.) "Furthermore, shade and shadow studies are not required by any UC or UC Berkeley project environmental evaluation or approval procedures. Therefore, consideration of the effects of shade and shadow are outside of the scope of this CEQA analysis." (AR14523-24.) In short, no shadow study would be forthcoming.

On September 9, 2021, less than a month before the Regents' approval of PP2 on September 30, 2021, the EIR preparer sent a shadow study to UC planners. (AR3,103761-82, Exh. A attached to Petitioner's Opening Brief – AUG 304-310, AR103761-76.) The Regents' findings did not mention an

exemption or a shadow study under Aesthetics or Cultural Resources. Petitioner did not see any shadow study until UC provided it during February 2022 as part of the Administrative Record. (Decl. of LHM, AUG 272, Exh. 7.) Unknown to the public that UC in fact had possession of a shadow study, Ms. Olson, an expert on Berkeley historic resources, wrote to the Regents on September 26, 2021, seeking a shadow study and explained again that PP2's high-rise would shade the FCCS and AHS structures, reducing their historical significance. (AR93-99.)

The shadow study affirmed ARG's opinion that the height of PP2 will adversely affect at least FCCS and AHS with the most dramatic shading covering the southwest part of the AHS campus, which will be in shadow all day all winter. (AR103770-74.) From sunup to sundown the AHS Alumnae Hall's (AH) ranks of south-facing windows that illuminate the impressive volume of this community-gathering room – the most significant part of the AHS campus, which is available for public event rental and has recently been restored – will be in shadow. Further, during the winter months

AH South-facing façade in sun *AH interior*

from 11:00 am to 2:30 pm, when one might expect maximum warmth and light, the whole AHS campus will be in complete shadow, dark and cold. (AR103770-74, 9388.)

The study shows that PP2 will face FCCS's signature Bowditch Street façade and will cause some shading late in the day during the winter, and complete shadow 5 pm to 8 pm in the summer. (AR103763.) The west-facing Belgian-glass windows fill the sanctuary with light especially late in the day, the wisteria adding interest and color from the interior. (AR9385.)

B. The EIR Failed to Adequately Mitigate Ground-borne Vibrations Due to Pile Driving

The DEIR states that AH1[3] will require pile driving to create two subterranean floors and that PP2 will require it for sinking foundation columns. (AR10088-90.) It may also be used for future projects related to the LRDP. Pile driving could present a "potentially significant impact" due to excessive ground borne vibrations to nearby sensitive receptors." (AR10084-85.) The DEIR proposes mitigation NOI-2, a three-step measure: Step 1 – Investigate if the pile driving presents a danger from vibrations due to nearby sensitive receptors. Step 2 – If so, choose different equipment and, Step 3 – monitor the vibrations and do pre-and post-condition surveys leading to damage payments for neighboring structures. It states that NOI-2 will reduce the vibration impacts to less than significant. (AR10084-92.)

UCB received many comments and articles warning about pile driving's potentially devastating impacts on historic resources, other above-ground structures, and below-ground utilities in dense urban areas, including from BAHA and Art

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[3] AH1 is substantially constructed at this point and BC4BP is not requesting that the Court stay construction. It's inclusion in this brief is for context, only.

History Professor Lovell. (AR2907-2922, 2007-2027.) BAHA's geotech expert Wayne Magnusen explained that pile driving had not been "used as a method of foundation installation in downtown Berkeley or Southside in recent memory." (AR349.) He described the dangers of using pile driving, especially when other better and safer methods and tools were available. (AR350-352.) He agreed with UC's expert, ARG, which stated in its report that vibrations from the proposed pile driving for the PP2 student housing project could compromise the structural stability of nearby landmarks. (AR37639, 352-353.) He described how pile driving could irrevocably damage FCCS, partly because the structural and internal materials were no longer available to make repairs. (AR352-355.)

On May 3, 2021, the UCB project manager sought confirmation from Tipping Structural Engineers (TSE), that pile driving would not be used for PP2. "Apparently public comments received in response to the [DEIR] have focused on noise and ground-borne vibration impacts from driven piles." TSE confirmed that "our proposed design relies on auger-cast piles

and that driven piles will not be used for the project." (AR109870.)

Despite the seeming end of the pile driving issue with a promise not to use it, the FEIR and its accompanying MMRP brought the issue back into the picture because mitigation measure NOI-2 was inadequate to prevent or mitigate its use. Mr. Magnusen commented on July 12, 2021, that:

> The decision-making structure and mitigation actions outlined in [the FEIR mitigation measure] NOI-2 are fundamentally flawed as they would allow construction projects to proceed without any consideration being given to construction vibrations, less-impactful alternative methods, or construction-phase vibration monitoring even in cases where there are historical resources nearby or directly adjacent. (AR372.)

He provided a flowchart in his comment letter, followed by text illustrating the deficiencies in the mitigation measure. (AR373-374, Exh. B, attached to Petitioner's Opening Brief, AUG 311-315.) For example, one step allowed the project manager to list alternative equipment on plans that could be used "where feasible," without any vibration monitoring. "In essence, showing non-specified "alternative" methods/equipment on the plans relieves the University of any obligation to conduct construction

vibration monitoring regardless of whether there are sensitive and/or historic resources nearby (or even directly adjacent to) planned construction." (AR374.)

Furthermore, Mr. Magnusen commented that on page 3-36 (AR14110) of the FEIR, it made a significant change from the DEIR that weakened its mitigation for pile driving in the LRDP area. (See also, AR15308.) Mr. Magnusen explained the change between the DEIR and the FEIR:

> *"[a]lternatives to impact hammers, such as oscillating or rotating pile installations systems will be used where possible*" and [the FEIR] amended it by replacing the word "*possible"* with "*feasible*." In common usage, possible applies to anything that is not impossible, whereas feasible includes considerations such as cost. The FEIR neglects to define the word "feasible" or the thresholds by which less impactful alternative method/equipment can be deemed infeasible. (AR376.)

The change from "possible" to "feasible" suggested that UC was not accepting that pile driving in the LRDP EIR study area was potentially dangerous for sensitive receptors including historic resources:

> This change in language appears deliberate and seems to open the door to pile driving on University projects, if it is argued that less impactful alternative methods/equipment are more

> costly. We believe there to be no University sites within the EIR Study Area where pile driving using high-energy impact hammers would be appropriate and question the purpose for this change. (AR376.)

The MMRP reflected the same problems described above by Mr. Magnusen in his report. (AR15282-83, 15274, 15262-63.) Further, while the text of the FEIR does state in many places that pile driving will not occur at either PP2 or AH1 sites, its MMRP includes mitigation NOI-2 for pile driving in PP2 (not for AH1) and for the LRDP. (AR15262-15266, 15281-15285). The Regent's finding for the LRDP assumed that pile driving would occur and omitted NOI-2 as a mitigation. (AR189-190.) (Going forward Petitioner will only discuss the EIR as it pertains to the LRDP on this topic.) The FEIR responses about pile driving also were confusing as to whether it was no longer a construction method for PP2 or not. (AR14961.) Nevertheless, the Regents found that NOI-2 would reduce the Project impacts to less than significant as to PP2. (AR174, 1257.) Its finding for the LRDP assumed that pile driving would occur and then omitted NOI-2 as a mitigation. (AR189-190.)

C. The EIR's Analysis of Wildfire Safety and Evacuation Impacts Is Inadequate

A majority of the Project site has been designated as either "Very High" or "High" Wildfire Hazard Severity Zone.[4] (AR 10333 [map], 10332.) Parts of the Hill Campus East are adjacent to residential neighborhoods in the Berkeley/Oakland Hills, which are also in Very High Fire Severity Zones. (AR10342.) While AH1 and PP2 are just outside of high fire hazard areas, the EIR acknowledges "[t]hey are still close enough to be vulnerable to wildfires that start in the East Bay hills and spread, as has happened before." (AR10338.)

Few areas of California are more vulnerable to wildfires than the hills of Berkeley and Oakland, having been overtaken by wildfires numerous times in the past. (AR10332 [explaining major fires occurred in the Project area in 1905, 1923, 1980, and 1991].) Most recently, in the 1991 Tunnel Fire, 25 people tragically lost their lives, and more than 3,000 houses were

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[4] Hill Campus East, Hill Campus West, and Clark Kerr Campus are fully within High or Very High Wildfire Hazard Severity Zones, as is the eastern edge of Campus Park and some of the UCB properties within the City Environs. (AR10332-33.)

destroyed. (*Id*.) The Project site features numerous wildfire risk factors, including wild vegetation, steep slopes, strong winds, and its location directly over the Hayward Fault. (AR10332, 10337.) Steep hills and canyons, like those found in Hill Campus East and adjacent residential areas, increase the rate of wildfire spread. (AR10335.) Further increasing the risk to public safety, this area suffers from a limited water supply, and narrow and windy roads that limit access and egress routes. (AR10332.)

Unlike weather, wildfire is heavily influenced by human activity. If and where development occurs affects the frequency, duration, location, and impacts of wildfire. Humans are the number one cause of wildfire ignitions in California, responsible for 84 percent of wildfires. (AR10330.) Abundant evidence has demonstrated that adding humans and new development to undeveloped wildfire-prone areas (often called the "wildland-urban interface" or "WUI") *increases* the risk of ignitions and exacerbates the resulting hazards. (AR 10331, 57699-704, 59683-88.)

A majority of the LRDP is located in, and would expand development within, the wildland-urban interface. (AR10335,

10336 [map of WUI areas].) However, the EIR does not analyze the significance of the Project's effects on wildfire from bringing new development and thousands of people into undeveloped, fire-prone areas and expanding the wildland-urban interface. The Project's impact on wildfire ignition and spread presents a risk not only to the environment and the campus population, but also beyond the site, including the surrounding neighborhoods.

UC purported to address all of the Project's wildfire-related impacts. (See AR10322-351.) It considered whether the Project would expose people to post-fire landslides, slope instability or flooding (AR10342-45) and whether new roads or power lines would exacerbate fire risks (AR10345-47). Crucially, however, the EIR did not assess the Project's potential to *increase* wildfire risk in the area by adding additional people and development. UC did not acknowledge its obligation under Guideline § 15126.2(a) to consider the "effects the project might cause or risk exacerbating by bringing development and people into the area affected" including "impacts of locating development in areas susceptible to hazardous conditions (e.g.,…wildfire risk areas…)." It did not evaluate or disclose

whether the Project would result in an increased risk of wildfire ignition and spread as compared to existing environmental conditions on the Project site, or whether this increased risk may affect the lands surrounding the site.

The EIR does disclose that portions of the site are located within wildland-urban interface areas and describes what a WUI is (AR10331), but it only discusses the connection between human development in the WUI in the existing conditions section of the wildfire discussion, never analyzing the potential for this Project to increase the risk of a wildfire. (AR10322-351.) The EIR also includes discussion of generalized wildfire risks and risks related to construction of infrastructure or the site's environmental characteristics (slope, wind.) (AR10330, 10342-45.) But these discussions do not include the missing analysis. The public, including the public and the City of Berkeley, explained these shortcomings and provided extensive evidence of this impact. (AR16924-25 [public comment], 15882-85 [City of Berkeley], 16893, 16907 [Southside Neighborhood Consortium].) UC's response in the FEIR merely reiterates what the DEIR says. (AR14268-69, 14560-61, 14589-90.)

D. The EIR Ignored the Project's Obvious Impacts On Wildfire Evacuation and Community Safety

In areas highly susceptible to wildfires, as most of the Project site is, successful evacuation can mean the difference between life and death. Here, wildfire and evacuation risks indisputably exist, with the majority of the site being within a very high fire severity zone – the most hazardous rating. (AR10332-33.) The Project would exacerbate this risk by placing additional people, housing, cars, academic life space, and other development within the wildland urban interface. (See AR10336, 10342, 9559-61, 9572, 9574-80.) Compounding the problem, Hill Campus East and the surrounding residential community are accessible only by windy and narrow roads with limited points of ingress and egress. Given these circumstances, consideration of impacts on evacuations is imperative.

Nonetheless, the EIR lacks even the most basic Project-specific information about evacuation plans or impacts. For example, the EIR never discloses: (1) which evacuation route(s) the campus population and surrounding neighbors will use, (2) the number of new vehicles expected as a result of the LRDP, (3) existing evacuation times for campus users and surrounding

neighbors and how those times will be changed with the Project, (4) the roadway capacity for all of the roads in and around campus that would be relied upon in case of a wildfire, particularly while emergency response vehicles are simultaneously attempting to access the area. The EIR is silent on whether it is possible for the existing campus and surrounding neighborhood populations plus an additional 12,071 people added by the LRDP to safely evacuate in the event of a wildfire, including the tens of thousands of people who will access campus without cars. As a leading evacuation expert explained, "the additional population will increase evacuation times in an urgent wildfire. The key questions to address are how much and where?" (AR862-88.) The EIR does not provide the public with enough information to answer these questions. (*Id.*)

The EIR contains scattered information and conclusions regarding evacuation, including a cursory and unsupported discussion of conflicts with adopted evacuation plans (see Section E, *ante*), but the EIR never actually *analyzes* the LRDP's potential to impact evacuation and community safety in the event

of a wildfire.[5] Instead, the EIR provides vague and unsupported justifications for why it alleges evacuation should not be a concern. (AR9980-81, 10338-51.)

Without conducting an analysis, the EIR dismisses the possibility of evacuation impacts on the grounds that: (1) most new development under the LRDP would be infill, (2) increases in population would be gradual, over the next 15 years, and (3) people could continue to use existing roads because the LRDP would not change "circulation patterns, modes of transportation, or emergency access routes and would not block or otherwise interfere with use of evacuation routes." (AR10339-40 [DEIR], 14268 [FEIR].) None of these excuses are supported by any evidence, nor is any explanation provided as to why a denser infill development, a gradual increase in population, or the ability to use existing roads and emergency routes would

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[5] The inadequacy of the EIR's analysis of the Project's fire evacuation risk was raised by many. (AR 849-53, 862-88 [Petitioner] 15883-84 [City of Berkeley: "DEIR's analysis of fire evacuation risk is utterly deficient"]; 284.) In response to comments, UC does nothing more than restate the justifications listed in the DEIR. (AR14268-69.)

preclude an impact on public safety in the event of an evacuation, given the LRDP will add more than 12,000 people to any evacuation scenario.

The EIR finds the LRDP's wildfire impacts WF-2 and WF-3 significant and unavoidable. (AR10342-47.) The City of Berkeley commented that the Draft EIR acknowledges that Alameda County has an updated Community Wildfire Protection Plan ("CWPP") that includes specific recommendations for reducing wildfire risk, but that the EIR fails to incorporate these to further reduce the Project's wildfire impacts. (AR15884.) Without evidence of infeasibility, UC refused to adopt these measures, claiming it was not required to implement the CWPP because, as a constitutional entity, UC is not subject to Alameda County's regulations. (AR14271-72.) UC's response is irrelevant. Regardless of whether or not UC is bound by the policies of Alameda County because of its constitutional autonomy, it can still implement the additional mitigation measures that make up the CWPP to further reduce wildfire impacts and ensure the safety of its students and Berkeley residents, and was required

to do so unless substantial evidence demonstrated it was infeasible. (Pub. Res. Code §21081(a)(3); 14 CCR, §15091(a)(3).)

E. The EIR's Analysis of the Project's Impacts on Emergency Access and Interference with Emergency Response and Evacuation Plans Is Inadequate

Although the EIR purports to address the Project's impact on emergency access (TRAN-4) and adopted emergency response and evacuation plans (HAZ-5 and WF-1), the analyses are incomplete, unsupported by substantial evidence, and render the EIR inadequate as an informational document.[6]

Emergency Access (Impact TRAN-4): The EIR claims that an emergency access analysis was conducted to determine if the LRDP would create conditions that would substantially affect the ability of drivers to yield to right-of-way to emergency vehicles or preclude emergency vehicles from accessing streets (AR10233), but the EIR does not actually conduct such an analysis. (See AR 10233-34.) The EIR admits that "additional vehicles associated with implementation of the proposed LRDP Update could

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[6] Whether the Project will impact evacuation is a distinct question from whether the Project will interfere with an adopted evacuation plan. The former is addressed in section D., *supra*.

increase delays for emergency response vehicles during peak commute hours." (AR10233.) But then it dismisses the significance of this impact because drivers are required by law to yield the right-of-way to emergency vehicles, because "emergency responders maintain response plans that include use of alternate routes, sirens, emergency vehicle preemption at traffic signals, and other methods to bypass congestion and minimize response times," and because the City of Berkeley is required to ensure the Berkeley Fire Department maintains adequate emergency response times. (AR10233-34.) The record contains no evidence that these existing requirements would render the admitted increase in delays less-than-significant.

The EIR does not disclose where emergency access routes are located or the baseline conditions along those routes. (*Id.*) It then never discloses the amount of traffic the Project will add to those routes, the capacity of those streets, and their ability to handle additional traffic and emergency vehicles simultaneously. (*Id.*) This information is particularly vital to portions of the Project and surrounding areas in the East Bay hills that are

most susceptible to wildfires, which emergency responders can only access via narrow winding roads, with limited capacity.

Emergency Response and Evacuation Plans (Impacts HAZ-5 and WF-1):[7] Similarly, inadequate and unsupported is the EIR's finding that the Project's impact on adopted emergency response and emergency evacuation plans will be less-than-significant. (AR9981, 10340.) The EIR makes this conclusion while providing no detail on what applicable emergency response plans require (AR10325-29), and failing to either disclose the existence of applicable evacuation plans or note that there are none (AR 9980-81, 10325-29, 10338-40). Lacking this basic information, it is impossible to determine the Project's impact on these plans. Moreover, the EIR's discussion of the LRDP's interference with emergency response and

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[7] The standards of significance for impact HAZ-5 and WF-1 are nearly identical, but the supporting analyses are different. (*Compare* impact AR9980 [impact HAZ-5 significant impact if project will "Impair implementation of or physically interfere with an adopted emergency response plan or emergency evacuation plan"] *to* AR10338 [WF-1: significant impact if project will "Substantially impair an adopted emergency response plan or emergency evacuation plan"].)

evacuation plans contains no analysis of how the LRDP's increased traffic and population would impact the timing or effectiveness of any of the applicable plans. (*Id.*) It provides no information about baseline conditions along emergency access or evacuation routes, fails to disclose the level of traffic and congestion expected under the LRDP in the event of an evacuation or the capacity of access and evacuation routes.

The EIR concedes that the LRDP would increase the campus population, and "traffic congestion may increase" such that "in the event of an accident or natural disaster, evacuation plans and routes could be adversely affected." (AR9980; see AR 10340.) Relying again on a number of unsubstantiated excuses, the EIR dismisses this impact as insignificant without providing the facts or analysis necessary to make such a determination. First, the EIR dismisses any potential conflict with an emergency response or evacuation plan because "[m]ost potential development under the proposed LRDP Update would be infill development, and increases in population would be gradual over the buildout horizon of the proposed LRDP Update." (AR10339.) Next, the EIR attempts to justify its conclusion on the grounds

that the LRDP "would not result in substantial changes to circulation patterns or emergency access routes and would not block or otherwise interfere with use of evacuation routes. (AR10340.) The EIR provides no evidence that either of these facts would render the LRDP's interference with adopted emergency response or evacuation plans insignificant.

The EIR also claims that the LRDP includes various "objectives" that would allegedly "reduce the risk of a wildfire emergency and ensure adequate emergency response and evacuation." (AR10340 [e.g. LRDP includes objective to "[r]educe risk to life property, and natural resources by managing vegetation and by improving emergency evacuation and access routes …"].) These are nothing more than aspirational goals and do nothing to analyze or limit impacts on evacuations.

Finally, the EIR dismisses a potential impact because UC anticipates the LRDP will not "substantially increase vehicle miles traveled." (AR10340.) Regardless of the accuracy of the statement, the relevant information needed but lacking includes, *inter alia*, the number of cars that will be on the road in the event of an evacuation, the capacity of roads designated for

evacuation and emergency access routes, and the time it will take for evacuation and emergency access. The number of miles traveled by any of those cars is irrelevant to this analysis.

None of the above justifications amount to substantial evidence showing that buildout of the LRDP will not interfere with an adopted emergency response or evacuation plan.

F. The EIR Fails to Consider the Environmental Impacts of Expanded Fire Protection Services Needed to Support the Project

The vast majority of fire and emergency services are provided to the UC Berkeley Campus by the City of Berkeley's Fire Department ("Fire Department"). (AR10136.) It is undisputed that the Berkeley Fire Department will need new and expanded equipment and facilities in order to serve the campus population growth associated with the LRDP and buildings of greater height planned under the LRDP, such as those associated with AH1 and PP2. (AR10140; see also 15886-86; 54552-60.) To serve the Project, Berkeley's Fire Chief indicated that the Fire Department would need a new facility "close to the Campus Park to house. . . additional resources" and the "Division of Training building would need to be expanded to

meet additional training demands of a larger department." (*Id.*) In addition, the Fire Department would need an "aerial ladder truck, type 1 fire engine, ambulance, mobile air supply truck, and battalion chief to accommodate the increased density and height of projects." (*Id.*)

Rather than analyzing the environmental impacts involved in constructing and operating these new and expanded facilities, as required by CEQA, the EIR dismissed the potential impacts as insignificant (AR10141) based on conclusory and unsupported claims.[8] (AR 10139-41.) For example, the EIR claims UC Berkeley will "continue its partnership" with various fire departments, thereby "ensur[ing] adequate fire and emergency service levels to UC Berkeley facilities." (AR 10140.) Yet any "partnership" has no bearing on the environmental impacts stemming from the new facilities that the Berkeley Fire Department will require because of the Project. Finally, there is no evidence to support the EIR's conclusory claim that the

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[8] The City of Berkeley raised this issue in comments on the Draft EIR, but in response in the Final EIR, UC merely repeated the DEIR's justifications. (AR14273-75, 14258-60.)

impact would not be significant because the Berkeley Fire Department would expand to meet the needs of the growing community and UC Berkeley population with or without the LRDP Update. (AR 10141.)

G. The EIR Lacked Baselines or Evidence Supporting Them

In some instances, the DEIR fails to adequately analyze post-project environmental conditions relative to pre-project conditions, a necessary step to determining impacts of a project. A good example is the EIR's discussion of wildfire safety and evacuation issues. (See Section F, above.) The EIR failed to inform the public and decision makers about the current conditions of the roadways, fire prevention methods, and available evacuation routes. It did not explain and analyze how those conditions would change with the increased enrollment and LRDP expected buildout, a necessary step to deciding the extent of any project impacts.

Another example of missing baselines can be found in the DEIR where it fails to describe below-ground conditions to reduce the risk of vibrations damaging two landmarked structures adjacent to PP2. Instead, it refers us to Appendix H for where we

can find the necessary baseline data. Petitioner's expert geotech, Mr. Magnusen, pointed out that Appendix H was not a substitute for a geology workup: "Appendix H (titled: Geology and Soils Data) is overly broad, sometimes inaccurate, and contains no actual data about subsurface conditions at the site [of PP2] making it impossible to assess the reasonableness of proposed mitigations." (AR349.)[9]

The DEIR attempted to get around the missing below-ground data by providing information focused everywhere, except on AH1 and PP2, which Mr. Magnusen pointed out. (AR355.) Appendix H then included nonexistent data, according to Mr. Magnusen. First, he quotes from Appendix H:

> [Appendix H] states that: *(i) "A new spreadsheet was created using the representative database records with pdf report data for each of the zones utilized"; (ii) "The reviewed reports were particularly useful in relation to describing the soils present, the bedrock depths, the groundwater*

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[9] Mr. Magnusen's criticism of missing below-ground studies also applied to AH1. However, a month before the trial, Respondents produced a geotech report that was not included in the EIR or Appendix H – it is unsigned and stamped DRAFT on every page. UC's attorney filed a declaration stating that this was the "final" report and that it was inadvertently left out of the EIR, but was referenced in footnotes in various places in the EIR. (AUG 336-433, Exh. 9, SAR 110287-110380; see also JA 426.)

> *depths, and the existing building-foundation types in the study site"; and (iii) "All of the resources utilized are listed in the references at the end of this document."* (AR355.)

Then, he shows why Appendix H was not the same as a study of pre-project below-ground conditions and was inadequate:

> However, a spreadsheet of the type described is not provided, there is no reference list, and what is provided is simply a tabulation of the "*number of pdf reports*" in each of seven defined "*zones*". Again, no soils data is presented that would allow environmental impacts or proposed mitigations at any specific site to be adequately assessed. (AR355.)

After UC provided the administrative record, Petitioner learned from documents that UC impliedly agreed it was necessary to obtain below-ground data for PP2 to set the baseline conditions. It had hired a contractor to obtain the below ground conditions data through at least boring holes, but was interrupted due to protests. The contractor recommended deep foundations at the PP2 site, in part, to address "the potential impact due to the unknown alignment of a buried creek." (AR25296-97.) Another memo dated May 17, 2021, similarly described the incomplete borings "because the work was

interrupted by protests on site." Also, "[t]here is a historic creek that has not yet been reliably located, although [the contractor] has a rough idea of the location. They were probing to see if there is an indication of the creek, but had to stop the exploration due to the protests." (AR25283.) There is no explanation in the record for why the contractor did not return to complete collecting the baseline condition data and definitively locate the creek below ground. There also do not appear to be any reports in the Administrative Record of findings from the initial work. (For an example of what a below-ground study looks like, see the report for AH1 attached to Decl. of Charles Olson, AUG 336-433, Exh. 9, SAR 110287-110380. There is none for PP2.)

Another example of failing to establish baselines in the DEIR is the discussion of increased traffic and other noise generated by AH1. It informs us that the project location is near housing, classes, and the like, which are sensitive receptors. Admittedly, this high-rise project that takes up an entire city block could cause increased traffic noise, but the DEIR concludes that the increase will be less than significant, based mostly on a traffic engineering model in table 5-11-13. This model purports to

show existing traffic noise compared with increased noise due to the project. The DEIR also provides a model in table 5.11-14 to support that the project's increased noise from rooftop mechanical equipment will be less than significant. (AR10072-75.) It refers us to Appendix J, which does not include any sound readings or an acoustics engineering report. (AR13840-87.)

Wilson Ihrig acoustics engineer Deborah Jue commented that the "baseline noise levels [were] not clearly established in the DEIR" because it did not include sound measurements over several days. Instead, the DEIR merely reported on modeling results that did not reflect noise from traffic conditions around the Project planned sites:

> The Draft EIR should be revised and recirculated to include an updated baseline analysis that incorporates noise measurements taken at key locations over a multi-day period, and to provide supporting information for the DEIR's TNM analysis. Comments should include any professional judgement regarding the effects of any unusual traffic patterns during the COVID-19 pandemic. (AR17013-17019.)

She stated that the DEIR made unsubstantiated, conclusory statements by failing to obtain baseline noise readings. It also overlooked completely measuring HVAC baseline noise, although

many of UC Berkeley properties are located near downtown and "could be substantially affected by noise from rooftop equipment." (AR17013-14.) She concluded that the DEIR's impact significance determination was:

> based on increases in ambient noise levels over the baseline noise environment, but lacks the necessary baseline data to show how the impact modeling compares to the real life conditions. The DEIR's analysis of baseline conditions is therefore not supported by substantial evidence, and its resulting impact conclusions are equally unsupported. (AR17016.)

In response to Ms. Jue's comments, the FEIR refers us to response B5-22 (AR10640), excusing its failure to obtain real-life noise baseline measurements due to Covid-19 because due to the pandemic "and its effect on traffic patterns, the collection of ambient noise data in the EIR Study Area would not be prudent." The FEIR was released in July 2021 (AR14017), over 6 months after vaccinations began. Instead of obtaining sound measurements when traffic patterns resumed or waiting a few months to make sure traffic patterns had returned, it relied on a "hypothetical scenario" to support its less than significant finding. (AR14595-6.) As to the stationary equipment, the FEIR stated, "Where project-level details were available for the two

housing sites, operational stationary noise impacts were found to be less than significant in the Draft EIR." (AR14643.) The insignificant finding was unsupported by a comparison of baseline conditions with post-project conditions.

H. Relevant Facts of the Trial

On July 29, 2022, the court held the trial and gave each party a chance to state its position on each issue raised in their briefs. (JA 345-542.)[10] Respondents repeatedly claimed that Petitioners' contentions were premature because the trial court was only dealing with a programmatic EIR, not specific future projects when Petitioners could then raise CEQA objections for each LRDP construction project. (The door to that option was closed on September 28, 2022, due to enactment of Public Resources Code section 21080.58, discussed in section I.A., *infra*.) The trial court also commented:

> Now, does it make any difference that this isn't a project EIR, that it is a programmatic EIR and, as part of the program, they say that we don't know exactly where we're going to put it, putting the onus

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[10] This is the Reporter's Transcript and is identified in the MUAGN case Joint Appendix Index as its "Designation of Record, Exhibit 2" and is located behind Tab 20, JA 345-542.

> on them when they do decide where they're going to put it, to prepare specific project EIR's that gives you all of that information? (JA 354.)

I. Failure to Analyze PP2's Shading on AHS and FCCS

During argument, BC4BP's attorney disagreed that, despite commentator requests for a shadow study, UC could legally refuse to obtain one and instead assert a statutory exemption under PRC § 21099.) UC had refused to recognize the exception to the exemption. (PRC § 21099 subd. (d)(B)) and analyze PP2's shadow impacts on landmarks AHS and FCCS. (JA 406.) UC stuck to its guns and refused to provide one until after it released its administrative record and then, never explained why they withheld it. (JA 406- 408.)

BC4BP's attorney continued to assert that the exception to the aesthetics exemption in Public Resources Code section 21099, subdivision (d)(B) precluded UC from relying on it to avoid analyzing PP2's impact on AHS and FCCS. (JA 406-407.) She explained that in UC's Opposition Brief, it had seemingly conceded this point when it agreed that the statutory exception "does say what it means and that actually the exception does mean that there wasn't an exemption under that [21099] code

section that they cited for them to not do anything about the shadow study."[11] (JA 407.)

The attorney also disagreed with Respondents' position, stated in their opposition brief that Section 21099, subdivision (d)(B) was irrelevant since CEQA did not recognize aesthetic impacts. She referred the trial court to BC4BP's Reply Brief, listing cases that said otherwise.[12] (JA 407.) BC4BP had shown that there was substantial evidence, including from UC's own expert (ARG) that PP2's shading of the landmarks would have a significant negative impact on their historical value. (JA 407.) She disagreed that the only issue raised during public comments was about possible shading of wisteria on the FCCS building as there were also comments about shading the AHS landmark. (JA 407-408.)

In response, UC's attorney contended that the EIR explained that the Section 20199 exemption applied to all aesthetic impacts. (JA 410.) He accused opposing counsel of

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[11] See Respondents' Opposition Brief, lines 13-19 for Respondent's statement. (JA 238.)
[12] See BC4BP's Reply Brief. (AUG 456-457.)

conflating that position to say that Respondents have alleged that "aesthetic impacts are not required to be analyzed under CEQA." (JA 410.)

> That's never been the respondent's position. That's not what was said in our opposition brief. We were simply pointing out what the Public Resources Code Section 21099 says and how the EIR treated those impacts accordingly. (JA 410-411.)

The attorney went on to criticize the absence of any law supporting BC4BP's position:

> Petitioner, in their opening brief raised what they thought was an exception to the exemption under subpart DB of Section 21099, citing no case law support for that because none exists. ¶ We pointed out in our opposition brief what we believe that section says. And then furthermore, that the EIR fully analyzed impacts on cultural resources, particularly near the People's Park project. (JA 411.)

He stated that Respondents "have not argued that aesthetics impacts are not subject to CEQA" and claimed that the EIR discusses aesthetic impacts for the "general LRDP program analysis." (JA 411.)

UC's attorney went on to incorrectly state:

> [O]n the shadow study, although not required, UC Berkeley did require a shadow analysis for Anchor House and for People's Park project and included that information in the final EIR. That's at AR 103761 through 76. There's another study at 14523 through

> 24 and further discussion at AR 14912 through 13 and AR 15184. (JA 412-413.)

[Note: In fact, the shadow study at AR107361-76 was not part of the FEIR and was not disclosed until February 2022 when the administrative record was provided to Petitioners as part of the litigation. (See Declaration of Leila H. Moncharsh, AUG 272, Exh. 7.) The last page of the FEIR text is AR15316, long preceding AR103761. It is not in the FEIR appendices, either – the last page of the appendices appears to be AR24295.

The attorney's reference to "another study at AR14523 through 24" is also incorrect as there is no study mentioned – those two pages are about how shadows are created generally and then states that "shade and shadow studies are not required by any UC or UC Berkeley project. . ." It concludes that "consideration of the effects of shade and shadow are outside the scope of this CEQA analysis." (AR14523-24.)

There also was no "further discussion" of any study at AR14912-13, as claimed above by UC's attorney. These pages were in a response to a BAHA comment. The EIR response stated that "the effects of shade/shadow are not a CEQA topic" and that PP2's shadows would not harm wisteria on FCCS. (AR14912-13.)

AR15184 is also not a discussion of any study and states: "No mitigation for shade is warranted as there is no nexus to a CEQA impact."]

BCBP's attorney replied that it would be up to the trial court to interpret Section 21099, subdivision (d)(B) under the de novo review standard. (JA 414.) The EIR failed to describe PP2's shadow impact, mitigate it or find an alternative and the shadow on AHS is substantial. (JA 415.)

b. Pile-Driving

BC4BP's attorney stated that AH1 and PP2 were not involved in the pile-driving issue because UC no longer planned to use that method at either site, but the Mitigation Monitoring Reporting Plan (MMRP) and the Regents' findings still strangely reflected that pile-driving would occur at PP2 and throughout the LRDP EIR study area. (JA 417-418.) She requested that in the court's writ, it order that there would be no pile-driving on PP2 since the parties agreed that none would occur there. (JA 418.)

The attorney also referenced the report of her expert geotech who opined that the proposed EIR mitigation for damage related to pile-driving was inadequate because it did not mitigate

anything. (JA 419.) As to the LRDP, the EIR changed the mitigation between the Draft EIR and the Final EIR to state that UC would use equipment, other than pile-drivers, *where possible* to that they would use equipment other than pile drivers *where feasible*. (JA 419-420.) The Final EIR did not show that using equipment other than pile-drivers to sink piers was *infeasible* as legally required and the change weakened the mitigation. (JA 420.)

In response, UC's attorney clarified that the pile-driving's noise and vibrations were adequately addressed through the EIR proposed mitigation, with its three-step process and would apply to the LRDP, not to AH1 and PP2. (JA 422.) As to the concern about the contrary language in the MMRP and the Regents' findings, it was "just a leftover between the draft and the final." As to whether the mitigation measure was appropriate in light of the EIR's analysis:

> Again, we believe that at this stage of programmatic review, it's impossible to know what construction methods might be feasible in all cases. And it's impractical to develop specific feasibility findings for the use of alternative methods and equipments other than pile driving at this point in time as future projects are not yet developed and are speculative and new alternative methods and equipment will

> undoubtedly be developed during the 16-year planning horizon. (JA 423-424.)

The basis for using the word "infeasible, and switching from impossible to where feasible [was] to be consistent with CEQA terminology." (JA 424.)

UC's attorney disregarded Petitioner's geotech expert's opinions about the pile driving mitigation as already addressed in the EIR and as nothing more than a dispute between experts. (JA 424.)

c. Wildfire Safety and Evacuation

AFSCME's attorney summarized the points in her opening and reply briefs, demonstrating that the EIR's wildfire safety analysis was inadequate. (JA 381-390.) UC's attorney responded that the EIR relied on Appendix G with its four "standards" to analyze the LRDP's potential wildfire impacts. (JA 391.) It then adopted numerous mitigations:

> The university concluded in some cases that the impacts would be less than significant and in others they found that they were potential (*sic*) significant and unavoidable, in large part because again, this is a program level EIR, and that it was uncertain how much, if any, development would occur in the areas that are actually most susceptible to wildfire. . . . (JA 391-392.)

He stated that the LRDP proposed development areas were not in the fire hazard areas shown in AR10333, 34, and 36, which are "mostly the eastern portion of the campus," including portions of the Clark Kerr campus that "are in high fire hazard zones." (JA 392.) The attorney admitted that a fire could expand from the high fire areas and if so, there could be significant impacts that would not be fully mitigated by the EIR's adopted mitigation measures. (JA 392.) The LRDP EIR contemplates that most development will occur in the west area with multiple egress and access points. (JA 392-393.) UC's attorney again emphasized that if UC decided to put buildings in the high fire area, it would implement mitigations and best practices, "and those projects would be subject to future tiered environmental review, including analysis of all these four or five wildfire impact categories over again." (JA 393.)

The attorney went on to list numerous programs that "are in place to address this [wildfire] issue." (JA 394.) For example, there are many existing plans by the state, the city, and UC for addressing street width as it relates to wildfire safety. (JA 394.)

He denied that UC solely relied on other entities' plans and then he listed their plans. (JA 395-396.) He also listed other portions of EIR topics that touched on wildfire safety. (JA 396.) AH1 and PP2 are both outside the high fire risk areas. (JA 396-397.) The attorney disputed that the EIR was inadequate because it did not adopt the Alameda County Community Wildlife Protection Plan (ACCWP) since the EIR stated that UC's existing procedures adopted "all the same elements as the county plan and it would have been redundant to adopt the mitigation measure[s] in existing plans." (JA 397.)

As to emergency access, UC's attorney stated that the EIR addressed it in various places and ways, and adopted mitigations. (JA 397.) "And despite those mitigation measures, the EIR conservatively found that those impacts could be significant and unavoidable in the future if there's development in the high-risk wildfire areas." (JA 398.) Evacuation depends on people's specific locations during a wildfire event, the location of the fire and other details of the situation. (JA 398.) Further:

> So between all those categories, we believe that wildfire, which is a newer issue in CEQA, was adequately addressed, and future projects will be subject to, in all likelihood, new regulations and new policies that are

> developed in the future as they are subject to project-level environmental review. (JA 398.)

The EIR stated that UC would pay its fair share of any mitigation related to the construction of a fire station, if in fact it ever gets built and then concluded that regardless of the LRDP buildout, the Berkeley Fire Department would need a new fire station due to deficiencies in its fire services. "The city will do environmental review of that fire stations, and it will be speculative for the university to attempt to do that." (JA 399.)

AFSCME's attorney responded that as to wildfire ignition, UC erred by assuming that it was sufficient to only cover the topics listed in Appendix G in its EIR analysis because it does not limit the impacts that a project may have. (JA 402.) "And there's ample case law showing that adopting and applying Appendix G questions as thresholds of significance" does not presumptively establish that an EIR has considered all the project's potential impacts. (JA 402.)

> Lead agencies are required to augment or add to those appendix G questions when it's necessary to ensure that a project's potentially significant impacts are adequately addressed. And that's from the

> Protect the Historic Amador Waterways case.[13] (JA 402-403.)

She argued that UC has mentioned many times in the EIR and in briefing that it has an emergency preparedness program and an emergency operation plan. However:

> [N]o one has seen this emergency operations plan. It is not part of the record. ¶We tried to obtain it during the administrative process. There's a website for it, and the website simply says that UC Berkeley is working to update the plan. (JA 403.)

UC did not submit the plan through a request for judicial notice but the printout for the website is in the record at AR924. Nobody knows what the plans are, which is another reason the EIR is incomplete. (JA 403.)

The attorney stated that UC still has not explained how any impact analysis of evacuation or emergency response could possibly be complete without disclosing how much additional traffic will result from the Project. (JA 404.) It is true that, as UC claims, impacts depend on where people are located at the time of a wildfire because no one ever knows where they will be when an

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[13] *Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1109-12.

emergency strikes. (JA 404.) "[Y]et, experts routinely prepare analyses of potential emergency evacuation scenarios. They're able to model various scenarios. . . . That's why experts are hired." (JA 404.)

As to potential later review, the attorney noted that this was the only opportunity to evaluate the LRDP "and address the scenario as a whole and the campus as a whole in order to mitigate" potentially significant impacts. (JA 404.)

In response to UC's position that the Berkeley Fire Department needed another fire station but had deficiencies, AFSCME's attorney responded:

> [T]he fact that [the] Berkeley Fire Department had existing deficiencies has nothing to do with the impact this project will have on the Berkeley Fire Department. ¶There's not a single piece of evidence in the record that new facilities and expanded training facilities would not be required, specifically because of the [LRDP]. (JA 405.)

The attorney then referenced the evidence in the record showing new facilities would be needed as a result of the LRDP:

> The comments of the battalion chief are at pages 54552 to 60, and the fire chief is very specific that it is this project, the expanded population of the campus and the increased heights of the buildings, that are the reason that the Berkeley Fire Department will need more equipment, additional

> and new facilities, and expanded facilities to accommodate the increased growth from this project. (JA 405.)

d. Missing Baselines

BC4BP's attorney argued that because the EIR never included a study of below ground conditions at PP2, there was nothing available for Petitioner's expert or the public to vet. (JA 424.) It was not impossible to do the evaluation with boring holes, but the EIR preparer never arranged to have a contractor come back after protesters left and do the work. (JA 425-426.)

She also stated that the lack of a baseline came up as to noise. A Petitioner's expert commented that there were no sound readings or an acoustics report to determine the baseline conditions before AH1 became occupied. (JA 427.) UC's response was that it used a traffic engineering company that prepared a model, instead of an acoustics expert. (JA 427.) The absence of baseline data left the public to just accept whatever conclusory statements the EIR said. (JA 427-428.)

UC's attorney argued that the noise analysis showed existing and project noise levels. (JA 431.) As to Petitioner's statement in her brief that the work was done by a traffic

engineer instead of an acoustics expert, she did not exhaust this challenge and waived it. (JA 432.)

The attorney for the Helen Diller Foundation, et al. (Diller) stated that as to the noise issue, it is a substantial evidence question and whether the evidence meets that test. (JA 434.) There was nothing wrong with using traffic modeling to then feed into a Federal Highway Administration model to depict existing noise levels. (JA 435.) It was used and approved of by a court for Chase Arena. (JA 437.) As to BC4BP's reply brief, the EIR added six decibels to the data, based on Ms. Jue's comment that since you are using a model, the noise level could be six decibels higher. (JA 435-436.) The EIR ran the model with the extra six decibels and found that noise at AH1 was not a problem. (JA 436.)

Diller's attorney disagreed with BC4BP's reply brief and contended that sound readings were taken on University and Oxford streets, both adjacent to AH1, which was the corret methodolgy. (JA 436-437.) Finally, he looked at administrative record citations provided by BC4BP's attorney in her reply brief and did not find any that any of them involved questioning the

qualifications of the environmental consultant who did the noise analysis, and so the issue was waived. (JA 437-438.)

BC4BP's attorney responded that both attorneys had bypassed the issue of why the shadow study and a geotech workup for PP2 never appeared in the EIR although both involved setting baselines, or why the EIR sent readers to Appendix H when there was nothing relevant to baselines in there. (JA 438-439.) Instead, they jumped directly to the substantial evidence standard of proof, but CEQA required that the EIR start at step one with the documentation [of baselines]. (JA 439.) She also disagreed with the claim that she had waived her argument about qualifications of an expert. (JA 439-440.)

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ARGUMENT

I.THE EIR WAS LEGALLY INADEQUATE

A. Newly Enacted PRC § 21080.58 Applies to This Case and Exempts UC from CEQA review of Future LRDP Projects

As a preliminary matter and as shown above, Petitioner has raised CEQA challenges that Respondents have repeatedly claimed were premature and contended that Petitioner would have to wait to raise them until after the LRDP buildout begins. Contrary to Respondents' position, Petitioner cannot legally challenge single projects "tiering" from the current UC LRDP EIR that was certified after January 1, 2018, because under Public Resources Code section 21080.58, enacted on September 28, 2022, there is now a CEQA exemption for those tiered projects. (Public Resources Code section 21080.58, subdivisions (b)(1)(A)(ii), Motion for Judicial Notice (JN), Exhs. A, D, AR1.) Accordingly, other than UC failing to comply with standard building conditions, enumerated in the new law, UC housing developments that rely on the current inadequate EIR are now exempt from any further CEQA review.

Petitioner's appeal here will be the only opportunity for this Court to address the inadequacies of the EIR, keeping in mind

that "[t]he 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*).

This Court considers whether the EIR met the requirement that it 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*); Guidelines [Cal. Code Regs., tit. 14] § 15151.)

In reviewing an EIR, courts determine whether an 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*).) If an EIR fails to address an issue or omits essential information, courts employ de novo review to determine whether the agency violated the statute's disclosure requirements. (*Banning Ranch Conservancy v. City of Newport Beach* (2017) 2 Cal.5th 918, 935 (*Banning*).) Similarly, the sufficiency of an EIR's discussion of environmental impacts is reviewed de novo. (*County of Fresno*, *supra*, 6 Cal.5th at 512-16.)

An EIR must analyze every issue for which the record contains substantial evidence supporting a "fair argument" of a significant impact. (*Visalia Retail, LP v. City of Visalia* (2018) 20 Cal.App.5th 1, 13 (*Visalia*); *Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1109 (*Protect*). 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.)

Courts use the "substantial evidence" test to review an agency's "substantive factual conclusions." (*Vineyard*, *supra*, 40 Cal.4th at 435.) But "the existence of substantial evidence supporting the agency's ultimate decision ... is not relevant when one is assessing a violation of [CEQA's] information disclosure provisions." (*Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 82 (*Communities*).) While substantial evidence review requires some deference to the agency's role as fact-finder, such deference does not mean abdication of vigorous judicial review. (*Laurel Heights I, supra,* 47 Cal.3d at 409 ["We do not suggest that a court must uncritically rely on every study or analysis presented by a project proponent in support of its position..."]; *Horwitz v. City of Los Angeles* (2004) 124 Cal.App.4th 1344, 1354.)

B.The Project Did Not Fit the Terms of the PRC 21099 Statutory Exemption Because the Statute Includes an Aesthetics Exception for Historic Resources

As shown in section H.a., *supra*, it has been impossible to pin down UC's position regarding whether it accepts or does not accept that it improperly applied an aesthetics exemption to PP2, relying on PRC §21099. It is a mystery why UC does not

simply agree that there was an exception for historic resources requiring it to analyze the shadow impacts of PP2 on AHS and FCCS.

Understanding the aesthetics exception in Section 21099, subdivision (d)(B) is not complicated. It requires de novo review by the Court and follows a four-prong process: 1) the court ascertains the intent of the Legislature by turning first to the words of the statute itself and seeks to give the words employed by the Legislature their usual and ordinary meaning. 2) The statute's language "must be construed in the context of the statutory framework as a whole, keeping in mind the policies and purposes of the statute" and 3) "where possible the language should be read so as to conform to the spirit of the enactment." 4) "If the statutory language permits more than one reasonable interpretation, courts may consider other aids, such as the statute's purpose, legislative history, and public policy." (*Smith v. LoanMe, Inc.* (2021) 11 Cal.5th 183, 190.)

Here, the Court need not go past the first prong as even UC has said that the phrase in subdivision (d)(B)—"aesthetic impacts do not include impacts on historical or cultural resources"—

means what it says: an impact on a historical or cultural resource is not an exempt aesthetic impact under Section 21099. (JA 238 – Opposition Brief, lines 13-19, see also JA 407.)

Statutory exemptions, such as PRC §21099 applied to PP2's shading of at least the FCCS and AHS landmarks are normally absolute "which is to say that the exemption applies if the project fits within its terms." (*Great Oaks Water Co. v. Santa Clara Valley Water Dist.* (2009)170 Cal.App.4th 956, 966, fn. 8 (*Great Oaks*).) The first question is the proper construction of section 21099, an issue of law that falls within de novo review. (*Id.* at p. 969.)

> We so begin because if a procedural violation of CEQA is shown by the [lead agency's] failure to have complied with the statutory exemption language (due to insufficient findings as to the basis for the claim of exemption), we need not proceed to the second issue-whether substantial evidence supports the findings.

(*Id.* at p. 969; see also *San Lorenzo Valley Community Advocates for Responsible Education v. San Lorenzo Valley Unified School Dist.* (2006) 139 Cal.App.4th1356, 1384 ["if a procedural violation of CEQA is shown, the substantial evidence prong of the statutory standard of review does not come into play."].)

Here, PP2 did not fit "within the terms" of section 21099 because subdivision (d)(B) provided an exception to the exemption for aesthetic impacts on historical resources. Accordingly, there was a "procedural violation of CEQA" when UC refused to analyze the shadow impacts on historical resources. (*Great Oaks*, *supra*, 170 Cal.App.4th 956, at p. 969.) The assertion of an inapplicable exemption was prejudicial. (*Rural Landowners Assn. v. City Council* (1983) 143 Cal.App.3d 1013, 1023 ["We conclude that where [the] failure to comply with the law results in a subversion of the purposes of CEQA by omitting information from the environmental review process, the error is prejudicial."] The lead agency used the exemption to cut off any further discussion when it emphatically and wrongly insisted the shadows were "not a CEQA topic." (14912.) The prejudice was exacerbated by the lead agency having possession of a shadow study months before the Regents approved PP2 and refusing to produce it until much later and only then in the administrative record. (AR103761-82; Decl. of LHM, AUG 272, Exh. 7.)

As it happened, the shadow study, the ARG report and various comments described in section A (statement of facts) demonstrated that substantial evidence supported a fair argument that the shading from PP2 would reduce the significance of the historic FCCS and AHS landmarks.

Furthermore, aesthetics falls within CEQA. Again, it was unclear during trial whether UC is admitting that fact or not. However, the case law not only shows aesthetics may, under various circumstances, fall within CEQA but also at the same time fall within cultural resources as occurred here. *Protect Niles v. City of Fremont* (2018) 25 Cal. App. 5th 1129, 1135 (*Niles*).

Not only will the shading reduce the historical significance of FCCS and AHS, but so will the pile driving as explained below.

B. There Was No Significant Evidence That Mitigation Measure NOI-2 Would Mitigate the Impacts of Pile Driving. There Was Inadequate Evidence Supporting the Less Than Significant Finding

a. Mitigation Measure NOI-2 Was Factually and Legally Inadequate

The EIR failed to reduce the significant environmental impacts of pile driving in the EIR Study Area because mitigation measure NOI-2 does not avoid the significant impacts described

in the EIR, ARG report, in Mr. Magnusen's letters, and in his flowchart, showing that in reality the NOI-2 mitigation does nothing to prevent damage from below ground vibrations. (AUG 312-315; AR372-375.) CEQA legally required that it must do so to satisfactorily reduce the impact to less than significant. (PRC (§§ 21002.1, subd. (a), 21100, subd. (b), *King And Gardiner Farms, LLC v. County of Kern* (2020) 45 Cal.App.5th 814, 851 (*King*).)

Further, the "mitigation measures discussed in the EIR should be feasible," meaning that they are "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors." (*King, supra,* 45 Cal.App.5th at p. 852.) Finally, "the public agency shall adopt a reporting or monitoring program for the ... conditions of project approval, adopted in order to mitigate or avoid significant effects on the environment." (PRC § 21081.6, subd. (a)(1).) The purpose of a [mitigation] monitoring program is to ensure compliance with the mitigation measures imposed as conditions of the project approval." (*Id.*, at p. 853, cites omitted.)

As described by Mr. Magnusen in his report (AUG 312-315, AR372-375), the three-step mitigation process does not make logical sense and provides several opportunities to do nothing effective about avoiding damage to nearby structures and underground utilities from pile driving. The EIR does not contain evidence showing that NOI-2 is capable of accomplishing "in a successful manner" or even avoiding the use of pile driving, which makes no sense. The Tipping engineers specifically told UC that it was feasible to use another method than pile driving as to PP2. (AR109870.) Presumably, UC could have asked about its use in the LRDP area, as well.

Accordingly, based on the evidence in section II.B. above, UC should have abandoned pile driving completely for anywhere in the EIR Study Area, including potential LRDP future projects. Instead, UC further exacerbated a faulty mitigation measure by lessening the standard for when pile driving could be used.

b. The Change in the Wording Regarding Use of Alternative Equipment Other than Pile Driving from "Where Possible" to "Where Feasible" Impermissibly Increased the Potential for Pile Driving with Its Detrimental Impacts on the Surrounding Environment

There was no evidence in the EIR or anywhere that using alternative equipment methods instead of pile driving would be *infeasible*. CEQA Guidelines § 15096(g)(2) states: "When an EIR has been prepared for a project, the Responsible Agency shall not approve the project as proposed if the agency finds any feasible alternative or feasible mitigation measures within its powers that would substantially lessen or avoid any significant effect the project would have on the environment." (See also PRC § 21002.)

The Supreme Court has described the alternatives and mitigation sections of CEQA as 'the core' of an EIR." (*Uphold Our Heritage v. Town of Woodside* (2007) 147 Cal.App.4th 587, 597-603 – cite omitted.) Also:

> In furtherance of this policy, section 21081, subdivision (a), contains a substantive mandate requiring public agencies to refrain from approving projects with significant environmental effects if there are feasible alternatives or mitigation measures that can substantially lessen or avoid those effects.
>
> (*Ibid*. – quotation marks and cites omitted [appellate court upheld city's refusal to grant demolition permit where there was no showing of infeasibility to preserving historic resource].)

As in *Uphold,* UC made no infeasibility finding, and there was no evidence to support one. The only evidence was that everyone: Tipping, Magnusen, and the EIR all stated that alternative methods, not pile driving, could be used to construct

student housing safely. Accordingly, the court should require a new EIR with legally adequate mitigation measures.

C. The EIR Violated CEQA Because It Failed to Adequately Analyze and Mitigate Potential Wildfire Impacts Caused by the Project

CEQA requires agencies to analyze "any significant environmental effects the project might cause or risk exacerbating by bringing development and people into the area affected" including "any potentially significant direct, indirect, or cumulative environmental impacts of locating development in areas susceptible to hazardous conditions (e.g.,… wildfire risk areas)…" (14 CCR, § 15126.2(a); *Cal. Bldg. Indus. Assn. v. Bay Area Air Quality Mgmt. Dist.* (2015) 62 Cal.4th 369, 385; *see also Clews Land & Livestock, LLC v. City of San Diego* (2017) 19 Cal.App.5th 161, 193 [recognizing potential for significant environmental effects when project brings new development to a wildfire-prone area]; CEQA Guidelines Appendix G, §§ IX(g), XX.)

While UC's attorney during trial made much of the fact that quite a bit of the LRDP study area is not in the high or very high fire risk area, but potentially could be impacted by spread of fire, CEQA does not split hairs this way. (JA 392.) Fire travels as we all know – and over large areas at great speeds. Here, the Project's impact on wildfire ignition and spread presents a risk not only to the environment and the campus population, but also

beyond the site, including the surrounding neighborhoods. These risks must also be analyzed, disclosed, and mitigated. (See *County Sanitation Dist. No. 2 v. County of Kern* (2005) 127 Cal.App.4th 1544, 1581, 1588 [CEQA requires an analysis of on- and off-site impacts]; Pub. Res. Code, § 21060.5 [defining the area of analysis as "the area which will be affected by a proposed project."].)

Instead, the EIR fails to fully inform the reader of all the hazards potentially caused by the Project. Like the EIR invalidated in *Sierra Club v. County of Fresno*, the EIR here fails to serve as an adequate informational document because its discussion of increased ignition risk resulting from increased development in the WUI, and the wildfire hazards the risk may exacerbate, is absent from the EIR. (*Sierra Club*, *supra*, 6 Cal.5th at 516.) The EIR merely includes a "general description" of WUIs, noting that ignitions are associated with increased human activity, but it fails to connect that risk to the Project. (*Id.* at 510, 519, 522.) Absent from the EIR is any "effort to explain the nature and magnitude of the impact," or why it is not feasible to do so. (*Id.* at 519, quoting *Cleveland Nat. Forest Found.*, *supra*, 3

Cal.5th at 514-15.) "After reading the EIR[], the public would have no idea of the [] consequences that result" when adding the LRDP's increased population and development to a very high severity wildfire risk area and its surroundings. (*Id.* at 518.) The EIR's failure to identify and describe with any particularity the Project's potential to exacerbate wildfire risks and hazards failed to inform the public of the nature of these impacts, their significance, and how they could be effectively mitigated, rendering the EIR legally inadequate, obscuring the Project's undisclosed environmental impacts.

The extremely high risk of wildfire in the area and the past history of large-scale repeated burnings at the Project site make it especially imperative that UC prepare an EIR that adequately discloses and analyzes the Project's wildfire impacts, and considers mitigation and alternatives to reduce these impacts. Unfortunately, UC fell far short of what CEQA requires and what the public deserved.

Another equally serious flaw with the EIR was its failure to discuss the Project's obvious impacts on evacuation during a wildfire. As explained above, CEQA requires agencies to analyze

any significant environmental effects a project might cause or risk exacerbating by bringing development and people into the area affected. (14 CCR, § 15126.2(a); *Cal. Bldg. Indus. Assn.*, *supra*, 62 Cal.4th at 385.) This includes effects not only to flora, fauna, and other natural resources in the vicinity of the project, but also to *humans*. (Pub. Res. Code § 21083(b)(3) [agency must find impacts significant if project "will cause substantial adverse effects on human beings, either directly or indirectly"]; 14 CCR, § 15065 [project's potential to cause "substantial adverse effects on human beings, either directly or indirectly" must be evaluated under CEQA].) The EIR violated this mandate by ignoring the Project's impacts to wildfire evacuation and community safety.

Put simply, the EIR does not contain "sufficient detail to enable those who did not participate in its preparation to understand and consider meaningfully" the Project's impact on the ability of the campus and community to safely evacuate. (*County of Fresno*, *supra*, 6 Cal.5th at 516.) Nearby residents and current and future students, faculty, and staff have a right to know the LRDP's impacts on evacuation. Without this crucial

information, the EIR fails as an informational document. (*Id*. at 515.)

Moreover, UC cannot get around its legal obligation to fully analyze substantial environmental impacts of its Project by just claiming that it was infeasible to provide any further mitigation measures that would reduce wildfire impacts. When an EIR has identified significant environmental effects that have not been mitigated, an agency may not approve the project unless it first finds additional mitigation infeasible due to "[s]pecific economic, legal, social, technological, or other considerations . . ." (Pub. Res. Code §21081(a)(3); *see* 14 CCR, §15091(a)(3).) An agency rejecting a mitigation measure as infeasible must be supported by substantial evidence in the record and "must explain in meaningful detail the reasons and facts supporting that conclusion." (*Marin Mun. Water Dist. v. KG Land Cal. Corp.* (1991) 235 Cal.App.3d 1652, 1664; see Pub. Res. Code, §21081.5; 14 CCR, §15091(b).) Conclusory statements are inadequate. (*Village Laguna of Laguna Beach v. Bd. of Sups.* (1982) 134 Cal.App.3d 1022, 1034-1035.)

Furthermore, the EIR's findings that wildfire impacts WF-2 and WF-3 were significant and unavoidable is irrelevant without any evidence, not conclusory statements, that it really was infeasible to do so. UC could have implemented additional mitigation measures despite its position that it was not required to do so and was not bound by the Alameda County CWPP. It could have done so to further reduce wildfire impacts to ensure the safety of its students and Berkeley residents, and was required to do so unless substantial evidence demonstrated that it was infeasible. (Pub. Res. Code § 21081 (a)(3); 14 CCR, § 15091(a)(3).)

As discussed above and during the trial, the EIR also gave short shrift to analyzing emergency access both for people to escape a wildfire and for emergency vehicles to access the fire. We now know that one of the major problems during the 1991 wildfire that engulfed parts of Oakland and Berkeley was the lack of adequate means for simultaneous exit by fleeing residents and entry by fire personnel. Despite how important this issue has been in the past, and regardless of the dependence by fire personnel in the LRDP area having to rely on narrow winding

roads with limited capacity, the EIR does not tell us its plan for solving that very problem. The public and decision makers lacked the information necessary to assess whether the LRDP would result in inadequate emergency access. (*See County of Fresno*, *supra*, 6 Cal.5th at 516.)

The EIR's so-called "objectives" to reduce the risk of wildfire emergencies are nothing more than wishes rather than analysis. (AR10340.) It does not even inform us how many cars will likely be on the roads during a potential evacuation, the capacity of the roads to handle evacuation, and the how long it will take for evacuation to occur. The EIR contains very little information, indicating that there was any thought put into the specifics of a possible evacuation plan. (*League to Save Lake Tahoe Mountain etc. v. County of Placer* (2022) 75 Cal.App.5th 63, 134-143 [3DCA found adequate an EIR's analysis and mitigations for wildfire safety and evacuation because it contained many specifics supporting its analysis and its mitigation plans].)

In sum, the EIR's analysis of impacts on emergency response and evacuation plans contains only bare conclusions

and opinions, with no reference to evidence or facts. CEQA requires more, and UC's approval of the inadequate EIR violated CEQA as a matter of law. (See *Banning Ranch Conservancy v. City of Newport Beach* (2017) 2 Cal.5th 918 935-36 [EIR's omission of essential information is a procedural violation subject to de novo review].)

Finally, the EIR failed to analyze environmental impacts of needing more fire protection facilities due to the Project. EIRs must determine whether a project will: (1) result in the "need for new or physically altered governmental facilities," (2) "the construction of which could cause significant environmental impacts." (CEQA Guidelines, Appx. G, §XV; *City of Hayward v. Bd. of Trustees of Cal. State Univ.* (2015) 242 Cal.App.4th 833, 842 [EIR properly analyzed potential environmental impacts of constructing new fire station needed to serve project.)].) UC violated CEQA because the EIR admits the Project will result in the need for new and expanded fire protection facilities, but never analyzes or discloses the potential environmental impacts stemming therefrom.

The EIR should have analyzed the impacts of constructing the new facilities that the Berkeley Fire Chief stated were necessary due to the Project. Just saying that there will be a continued "partnership" between UC and Berkeley's Fire Department is not sufficient. A partnership does not ensure adequate wildfire evacuation and safety.

Similarly, UC's reliance on its compliance with various codes and regulations pertaining to fire prevention to justify the EIR's less than significant determination also fails because compliance with applicable regulations is not sufficient to conclude a project will not have a significant impact, and it does not relieve UC of its duty under CEQA to disclose project impacts. (*Kings County*, *supra*, 221 Cal.App.3d 692, 716-17; *Amador Waterways*, *supra*, 116 Cal.App.4th at 1108-09.) Finally, there is no evidence to support the EIR's conclusory claim that the impact would not be significant because the Berkeley Fire Department would expand to meet the needs of the growing community and UC Berkeley population with or without the LRDP Update. (AR 10141.)

UC failed to comply with CEQA by failing to disclose the environmental impacts of constructing new facilities for the Berkeley Fire Department, which are required as a result of the Project. This omission is prejudicial because it precluded the public from understanding the environmental impacts of the entire Project, including indirect but foreseeable impacts. (See 14 CCR, §§ 15126(a), 15064(d), 15358(a)(2).)

Accordingly, this Court should require grant the writ.

D. Missing Baselines Through Withholding A Shadow Study From the Public and Failing to Obtain A Below Ground Conditions Geotech Report Undermined the Public's Ability to Vet the Project

DEIR commentators, especially experts like Mr. Magnusen and Ms. Jue, pointed out that there were missing baselines in the EIR. Establishing a baseline at the beginning of the CEQA process is a fundamental requirement so that changes brought about by a project can be seen in context and significant effects can be accurately identified. (*Save our Peninsula Committee v. Monterey County Board of Supervisors* (2001) 87 Cal.App.4th 99, 125 ["baseline determination is the first rather than the last step in the environmental review process"]; see also *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 89.) When an EIR omits relevant baseline environmental information, the agency cannot make an

informed assessment of the project's impacts. (*County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 952.)

In *Vineyard Area Citizens For Responsible Growth, Inc. v. City Of Rancho Cordova* (2007) 40 Cal.4th 412, 442 (*Vineyard*), our Supreme Court stated:

> The data in an EIR must not only be sufficient in quantity, it must be presented in a manner calculated to adequately inform the public and decision makers, who may not be previously familiar with the details of the project. (*Ibid.* – quotation marks and cites omitted.)

Here, the EIR was missing altogether the pre-project geotechnical workup for PP2 and the shadow study. These items belonged as part of the EIR and not somewhere else:

> Information scattered here and there in EIR appendices or a report buried in an appendix, is not a substitute for a good faith reasoned analysis. To the extent the County, in certifying the FEIR as complete, relied on information not actually incorporated or described and referenced in the FEIR, it failed to proceed in the manner provided in CEQA. (*Ibid.* – quotation marks and cites omitted.)

UC certified an EIR that prevented the public from understanding the basis of the EIR's less than significant findings because it relied "on information not actually incorporated or described" in the FEIR. Therefore, UC failed to proceed "in the manner provided in CEQA." (*Vineyard*, *supra*, at p. 442.) Furthermore, to the extent that the above-described baselines were missing, the EIR's less than significant findings were without substantial evidence.

Also, the acoustics data was not supported by any expert, other than a traffic consultant. Thus, the less than significant finding was

also unsupported. Substantial evidence under CEQA includes expert opinion "supported by fact." (PRC § 21080, subd. (e)(1).) Here, a traffic engineering company put together a table with information on the number of vehicles that traveled near AH1. Then, some unidentified person, apparently not an acoustics expert, used a model to extrapolate from that data to a finding of traffic noise insignificance. However, there was no showing that the person handling that extrapolation had any expertise in doing so. (Evidence Code section 720.) A lay person would not have been qualified to do so.

As to the shadow study of impacts from PP2 on AHS and FCCS, that was not released until the litigation was ongoing and therefore, it undermined the integrity of the EIR. Hiding it from the public after commentators had requested it did not comply with CEQA's demand that there be a good faith effort at full disclosure. (14 C.C.R. §15151.) "The integrity of the [CEQA] process is depending on the adequacy of the EIR." (*Berkeley Keep Jets Over the Bay Committee v. Board of Port Commissioners of the City of Oakland* (2001) 91 Cal.App.4th 1344, 1355 (*Berkeley Keep Jets*).)

CONCLUSION

For all the foregoing reasons, the court should reverse the judgment, remand the matter to the trial court for issuance of a writ that, by its terms, will assure that an EIR is prepared that complies with CEQA.

Respectfully submitted,

DATED: November 21, 2022

Veneruso & Moncharsh

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CERTIFICATE OF LENGTH

I, Leila H. Moncharsh, counsel for appellant certify pursuant to the California Rules of Court, that the word count for this document is 13,638 words, excluding the tables, this certificate, and any attachment permitted under rule 8.204(c)(1). This document was prepared in Word, and this is the word count generated by that program.

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

Executed at Oakland, California, on November 21, 2022.

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Berkeley Citizens for a Better Plan v. The Regents of the University of California et al.
Alameda County Superior Court Case No. RG21109910, 21CV000995

PROOF OF SERVICE

I, Leila H. Moncharsh, am employed in the County of Alameda. My business address is Veneruso & Moncharsh, 5707 Redwood Road, Oakland, CA 94619. I am over the age of 18 years and not a party to the above-entitled action.

I am familiar with Veneruso & Moncharsh's practice for collection and processing mail whereby mail is sealed, given the appropriate postage and placed in a designated mail collection area. Each day mail is collected and deposited in a USPS mailbox after the close of each business day.

On November 21, 2022, I served the following: Appellant's Opening Brief

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I declare under penalty of perjury that the foregoing is true and correct. Executed on November 21, 2022, at Oakland, California.

Leila H. Moncharsh

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