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Case No. S_____

IN THE SUPREME COURT OF CALIFORNIA

FRIENDS OF THE COLLEGE OF SAN MATEO GARDENS

Petitioners and Respondents,

v.

SAN MATEO COUNTY COMMUNITY COLLEGE DISTRICT; SAN MATEO COUNTY COMMUNITY COLLEGE DISTRICT BOARD OF TRUSTEES; and DOES 1 THROUGH 5,

Respondents and Appellants

After a Decision by the Court of Appeal,
First Appellate District, Division One, Case No.: A135892

Appeal from the Superior Court of the State of California
for the County of San Mateo, The Honorable Clifford Cretan
San Mateo County Superior Court No.: CIV 508656

PETITION FOR REVIEW

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I. PETITION

In January 2007, after completing project-level environmental review under the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.), Respondents San Mateo Community College District and its Board of Trustees (together, "the District") approved a set of detailed facility improvements at the College of San Mateo ("the CSM project"). Plaintiff Friends of the College of San Mateo Gardens ("Friends") did not participate in that public process. However, more than four years later, Friends sued the District over modest actions it took in August 2011 to implement portions of CSM Project. Although the actions deviated somewhat from what was assumed in the Mitigated Negative Declaration ("MND") the Board of Trustees had adopted in 2007, the environmental effects of the changes were addressed in a detailed addendum to the MND.

Surprisingly, the First Division of the First Appellate District, in an unpublished Opinion dated September 26, 2013 ("Opinion", Ex. A, attached), has ordered that the District's actions be set aside. In doing so, the court treated the changes to the previously approved CSM Project as themselves constituting an entirely new "project" for purposes of CEQA, rather than as a modification to a previously approved project. The distinction is very important because changes to approved projects (as opposed to new projects) are subject to the policies embodied in Public Resources Code section 21166, the CEQA provision governing the preparation of subsequent Environmental Impact Reports ("SEIRs") and supplements to EIRs. In contrast, new projects are subject to the low threshold "fair argument" standard for preparing EIRs as set forth in Public Resources Code section 21080, subdivision (d). (See also Cal. Code Regs., tit. 14, div. 6., ch. 3 ["CEQA Guidelines" or "Guidelines"], § 15064, subd. (f)(1).)

In choosing to exhibit no deference whatsoever to the District's reasonable conception of its own actions, the Court of Appeal relied on a heavily criticized 2006 decision of the Third District Court of Appeal called *Save Our Neighborhood v. Lishman* (2006) 140 Cal.App.4th 1288 (*Save Our Neighborhood*). In *Mani Brothers Real Estate Group v. City of Los Angeles* (2007) 153 Cal. App. 4th 1385, 1399-1401 ("*Mani Brothers*"), Division Two of the Second District Court of Appeal had the following to say about *Save Our Neighborhood*:

> Even if *Save Our Neighborhood* was not distinguishable on its facts, its fundamental analysis is flawed. The court in *Save Our Neighborhood* tackled what it perceived to be the "threshold question [of] whether we are dealing with a change to a particular project or a new project altogether," and declared that "section 21166 and Guidelines section 15162 apply to the former but not the latter." (*Save Our Neighborhood, supra*, 140 Cal.App.4th at p. 1301.) This novel "new project" test does not provide an objective or useful framework. Drastic changes to a project might be viewed by some as transforming the project to a *new* project, while others may characterize the same drastic changes in a project as resulting in a dramatically *modified* project. Such labeling entails no specific guidelines and simply is not helpful to our analysis.
>
> The "new project" test in *Save Our Neighborhood*, also inappropriately bypassed otherwise applicable statutory and regulatory provisions (i.e., § 21166; Guidelines, § 15162) when it considered it "a question of law for the court" whether the changed project was to be reviewed under section 21166 at all. (*Save Our Neighborhood, supra*, at p. 1297.) We disagree with that approach and view the issue of whether an agency proceeded properly in treating a project as subject to section 21166 *not* as a question of law, but rather as a question of the adequacy of evidence in the record to support the agency's determination.
>
> The question of law approach employed in *Save Our Neighborhood* conflicts with the customary substantial evidence test discussed above and long used in all other cases. * * *
>
> Treating the issue as a question of law, as the court did in *Save Our Neighborhood*, inappropriately undermines the deference due the agency in administrative matters. That principle of deference is otherwise honored by the substantial evidence test's resolution of any "'reasonable doubts in favor of the administrative finding and decision.'" (*Laurel Heights Improvement Assn. v. Regents of University of California, supra*, 47 Cal.3d at p. 393.)

(Italics in original.)

Even though the Court of Appeal opinion in this case is unpublished, both the outcome and the court's reasoning clearly reveal a lack of "uniformity" amongst the appellate districts with respect to the interpretation and application of Public Resources Code section 21166 and parallel provisions of the Guidelines, sections 15162, 15163, and 15164. This case also raises "an important question of law," for reasons explained in detail below. Review in this case is thus appropriate under subdivision (b)(1) of Rule 8.500 of the California Rules of Court. In an age in which on-line legal services make unpublished appellate opinions available to all, even an unpublished case can do much mischief, not to mention create a needlessly harsh and unjust result on the losing party (here a Community College District with a limited budget and mission to serve its students).

As is well known, CEQA has been the subject of much public debate and discussion in recent years, as both government agencies and private entrepreneurs in California have struggled to recover from staggering economic and fiscal challenges. In this case, the Court of Appeal has ordered the District to undertake an expensive, time-consuming, and duplicative environmental process that the District and its legal counsel thought was unnecessary based on years of statutory interpretation going back to the First District's own decision in *Bowman v. City of Petaluma* (1986) 185 Cal.App.3d 1065 (*Bowman*).

In candor, both *Save Our Neighborhood* and the unpublished Opinion in this case are judicial outliers that are flatly inconsistent with the notion, stated in *Bowman*, that the Legislature, in enacting section 21166, meant to set a high bar for the preparation of SEIRs. As Division Four of the First District said in 1986, "Section 21166 is intended to provide a balance against the burdens created by the environmental review process and to accord a reasonable

measure of finality and certainty to the results achieved. This purpose appears not only from its prohibitory language ("*no* subsequent or supplemental environmental impact report . . . *unless* . . .") but also from legislative context and history." (*Bowman, supra*, 185 Cal.App.3d at p. 1074.)

This Court has not squarely interpreted and applied section 21166 since 1986, when the court explored statute of limitations issues arising under the statute in *Concerned Citizens of Costa Mesa, Inc. v. 32nd District Agricultural Assoc.* (1986) 42 Cal.3d 929, 936-940. However, the court did discuss the statute again in 1993 in dealing with analogous but distinct issues arising under section 21092.1, which governs the recirculation of EIRs. (*Laurel Heights Improvement Association v. Regents of the University of California* (1993) 6 Cal.4th 1112, 1125, fn. 7, 1126-1130; see also Guidelines, § 15088.5.) In that context, this court had the following to say about section 21166:

> In the case of a certified EIR, which is a prerequisite for application of section 21166, section 21167.2 mandates that the EIR be conclusively presumed valid unless a lawsuit has been timely brought to contest the validity of the EIR. This presumption acts to preclude reopening of the CEQA process even if the initial EIR is discovered to have been fundamentally inaccurate and misleading in the description of a significant effect or the severity of its consequences. After certification, the interests of finality are favored over the policy of encouraging public comment.
>
> (6 Cal.4th at p. 1130.)

The Natural Resources Agency, through the CEQA Guidelines, and at least two Courts of Appeal have extended the application of section 21166 to cover situations in which the prior environmental document at issue was a negative declaration. (See Guidelines, §§ 15162-15164; *Benton* v. *Board of Supervisors* (1991) 226 Cal.App.3d 1467, 1477-1481 (*Benton*); *Abatti v. Imperial Irrigation Dist.* (2012) 205 Cal.App.4th

650, 651 (*Abatti*).) The District looks to this Court to expunge *Save Our Neighborhood* from CEQA case law.

II. ISSUE PRESENTED

Under CEQA[1], lead agencies often approve projects that are later subject to changed priorities or design plans. When such changes are necessary, an agency must determine whether to prepare subsequent environmental review under section 21166, and if so, which type of document is appropriate. Section 21166 establishes a presumption *against* the preparation of subsequent environmental impact reports, unless new or substantially worse environmental impacts would occur as a result of the changes to the previously reviewed project. If no new or substantially more severe significant impacts are identified, the lead agency need not prepare a subsequent EIR (or a supplement to an EIR). A lead agency may instead prepare a subsequent negative declaration, addendum, or no further documentation at all. (Pub. Resources Code, § 21166; Guidelines, §§ 15162, 15164.)

In this case, in early 2007, the District approved the CSM project after adopting an MND. That CEQA document was never challenged in court. Subsequently, due to changed circumstances and a lack of state funding, the District revised its plans for three of the buildings on campus, deciding to keep two buildings that were originally planned to be demolished, and later, to demolish a building and associated greenhouse, lath house, and landscaping (the Building 20 complex) that were originally planned to be renovated. The existing parking lot on the site would be expanded into Building 20 complex area instead, displacing about half of the existing landscaped area. The District considered the changes to the Building 20 complex in an

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[1] All further unspecified statutory references are to the California Public Resources Code. All references to the "Guidelines" are to the CEQA Guidelines.

addendum prepared pursuant to Guidelines section 15164. The addendum concluded no new or substantially more severe significant environmental impacts would result from these revisions to the campus renovation plan. In fact, as a result of the revisions, less total building area would be demolished than originally planned in 2007. The District concluded that substantial evidence supported its environmental conclusions and its ultimate decision not to prepare a subsequent EIR.

The issue presented in this petition is the following: If a lead agency approves modifications to a previously reviewed and approved project through an addendum, may a court disregard the substantial evidence underlying the agency's decision to treat the proposed action as a change to a project rather than a new project, and go on to decide as a matter of law that the agency in fact approved a "new" project rather than a modification to a previously approved project, even though this "new project" test is nowhere described in CEQA or the Guidelines?

III. WHY REVIEW IS WARRANTED

The Court of Appeal's Opinion creates a need to secure uniformity of decision and settle a critical question law under CEQA: What is the appropriate level of deference due to agencies in subsequent review situations? CEQA, the Guidelines, and the great weight of relevant authority strongly suggests agencies are due significant deference under the substantial evidence standard when making determinations under Public Resources Code section 21166 and its implementing Guidelines. But a single outlier case (*Save Our Neighborhood*) and now this Opinion instead suggest, based on no authority, that a court may ignore substantial evidence in the record and entirely pass over the deferential section 21166 framework by finding, as a matter of law, that the agency has approved a new project, not a change to a previously reviewed project.

To avoid both public and private development being caught in an endless labyrinth of environmental review, CEQA and the Guidelines establish a presumption *against* requiring further environmental review once a lead agency has adopted or certified a review document in the first instance. When an agency has completed environmental review of a project, its decision whether to require additional review for modifications to the previously approved project is governed by section 21166 and Guidelines sections 15162, 15163, and 15164. But the Opinion nullifies the subsequent review test set out in section 21166 and its corresponding Guidelines. In nullifying this process, the Opinion will have an immediate and negative impact on the District and other public agencies and project applicants within the First Appellate District that must attempt to navigate the increasingly complex and multiple layers of CEQA review in the face of flatly contradictory Court of Appeal precedents.

IV. BACKGROUND

The District adopts the Court of Appeal's recitation of the factual and procedural background (Opn. 3-6), with the following additions and clarifications.

A. Statement of facts

The controversy in this case originates from the District's decision to approve what it believed were modifications to its previously studied and approved facility improvements across the whole of the College of San Mateo ("CSM Project"). These improvements included: enhancement of the campus entrance, pedestrian corridors, and plazas; internal traffic circulation improvements; renovation of existing buildings; demolition of obsolete buildings; construction of new and/or replacement buildings; and renovation and construction of new parking lots. [AR 1:3, 1:245-246.] In analyzing the CSM Project, the District considered the disposition of *every* building on the campus. In total, the District envisioned the demolition of up to 16 buildings.

[Administrative Record (AR) 1:245-246 (renovate or replace Building 1; demolish and replace Buildings 5, 6, 10, 11, 15 and 17; demolish Buildings 21-29).] The Project also described the construction of a new Wellness/Workforce/Aquatics Center and a new Student Center; and up to 10 buildings (including Building 20) were identified for renovation. [*Ibid.*] The IS/MND concluded that, with the implementation of mitigation measures, the CSM Project would not have a significant effect on the environment. [AR 1:341.] The Board adopted an IS/MND for the CSM Project on January 24, 2007, after circulating it for public comment. [AR 1:64, 1:393-394.] No member of the public commented during the review period. [AR 1:394.]

Several years after certification of the IS/MND for the CSM Project, the District failed to acquire state funding as originally contemplated for the Building 20 complex remodel. The District then revaluated the CSM Project and determined the space in the Building 20 complex was no longer needed for the College's current programs. [AR 1:12, 65, 396, 2:658.] The District determined that further environmental review of the possible impacts of these changes was required, and that an addendum was the proper document for that purpose. [AR 1:4-57.]

The proposed changes to the CSM Project at the Building 20 complex generated controversy. After drawing an initial lawsuit in June 2011, the District supplemented the analysis in its addendum to better explain the potential scope of the physical changes and to respond to the Plaintiff/Petitioner's concerns. [AR 1:65-66.] The revised addendum concluded that the Building 20 complex activities would not create new or substantially more severe significant aesthetic impacts because only a minor amount of landscaping loss was involved. [AR 3:1563.] The changes to the Building 20 complex included substantial retention and rehabilitation of existing landscaped areas surrounding Building 20. [AR 1:65-66, 3:1563.] The Building 20 complex currently contains approximately 55,995 square feet of lawn and landscaped area. [AR

1:80.] Under the District's proposal, the lawn and landscaped area will be reduced to approximately 45,565 square feet. [*Ibid.*] This 10,430-square-foot loss of landscaped area represents about 0.24 acres, or less than 0.33% (one third of one percent), of the total landscaped/open space area available on campus. [AR 1:72.] Less total building demolition would also occur than was assumed in the 2007 IS/MND because of the District's intervening decision to remodel rather than demolish Buildings 15 and 17. [AR 1:65, 1:245-246, 3:1563.]

A total of 13,000 square feet of asbestos-containing structures in the Building 20 complex would be demolished. [AR 1:72.] Compared to the amount of demolition originally envisioned for the CSM project in 2007, the proposed changes to the Building 20 complex would result in fewer buildings and less square footage of structures being demolished.

Under current conditions, impervious surfaces—buildings, asphalt parking, and sidewalks—cover approximately 48,840 square feet of the Building 20 complex. [AR 1:80.] Under the District's proposal, new asphalt parking and sidewalks would cover approximately 59,270 square feet, meaning only about 10,000 square feet of existing lawn/landscaped area will be displaced for paved surfaces. [*Ibid.*] For all of these reasons, the District concluded that an addendum, rather than a subsequent MND or EIR, would be appropriate for the proposed modification to the CSM Project concerning the disposition of the Building 20 complex.

The addendum was made available to the public along with the Board of Trustees' standard public meeting materials prior to the August 24, 2011, Board meeting.[2] [AR 4:2208 (email re: availability of Board packet, including addendum), 3:1397, 3:1398-1400, and 3:1401-1555 (August 24, 2011 Board packet).] The Board voted to adopt the revised addendum and

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[2] CEQA Guidelines section 15164, subdivision (c), provides that "[a]n addendum need not be circulated for public review."

approve demolition of the Building 20 complex following public discussion at its August 24, 2011, meeting. [AR 3:1566.]

B. Procedural history

Friends again challenged the District's revised addendum, alleging that the District's approval of the modifications to the IS/MND prepared for the CSM Project via an addendum violated CEQA. The trial court granted the petition for writ of mandate and the District appealed. The First Appellate District, Division One, upheld the trial court's judgment, finding that the demolition of Building 20 must be treated as a "new project." The Court of Appeal did not reach the merits of Friends' contentions regarding the adequacy of the impacts analysis in the addendum.

V. THE COURT SHOULD GRANT REVIEW TO CLARIFY THE STANDARD OF REVIEW THAT APPLIES TO A LEAD AGENCY'S DECISION TO UTILIZE CEQA'S SUBSEQUENT REVIEW PROVISIONS.

CEQA is intended to function as an information disclosure statute by revealing to decision makers and the public the potential significant and adverse environmental impacts of an action proposed by a public agency. To facilitate this purpose, an agency proposing a project subject to CEQA must study and analyze the potential consequences of the action through one of several potential environmental review documents. This environmental review document could take the form of a simple negative declaration or a detailed and expansive environmental impact report ("EIR").

CEQA sets a relatively low threshold for requiring the preparation of an EIR for a project of first impression. Under this low threshold, if a fair argument based on substantial evidence can be made that a proposed project may have potentially significant and adverse environmental impacts, the lead agency must prepare an EIR. (Guidelines, § 15064, subd (a); see also *No Oil,*

Inc. v. City of Los Angeles (1974) 13 Cal.3d 68, 75.) But where a lead agency has already completed environmental review and approved a project, CEQA establishes a presumption *against* further environmental review. Under this higher threshold, a subsequent EIR is not required absent the occurrence of new significant impacts or significant impacts that are substantially more severe than previously indicated, requiring major revisions of the previous EIR or negative declaration. (Pub. Resources Code, § 21166; Guidelines, § 15162, subd. (a).)

If major revisions to the previous document are required due to new or substantially more severe environmental impacts, the lead agency must prepare a subsequent EIR. Otherwise, the lead agency may decide whether to prepare a subsequent negative declaration, an addendum, or no further documentation. (Guidelines, § 15162, subd. (b).) An addendum to an adopted negative declaration is the appropriate document where a project undergoes some modifications or changes but "none of the conditions . . . calling for the preparation of a subsequent EIR or negative declaration have occurred." (Guidelines, § 15164, subd. (b).) An agency's decision not to require a subsequent EIR is subject to the substantial evidence standard of review. (Guidelines, § 15064, subd. (f)(7)["The fair argument standard does not apply to determinations of significance pursuant to sections 15162, 15163, and 15164"].) In other words, if the agency's decision to rely on an addendum, or to prepare no further documentation rather than a subsequent EIR, is supported by substantial evidence in the record, courts must defer to the agency's decision even if a contrary conclusion could be reached. (Pub. Resouces Code, §§ 21168, 21168.5.)

Only a single, outlier case, *Save Our Neighborhood v. Lishman,* supports the non-deferential "new project" inquiry used in the Opinion. This approach is not sanctioned anywhere in CEQA or the Guidelines. The Court of Appeal's choice to rely on *Save Our Neighorhood*

furthers the split among the appellate districts regarding the appropriate standard of review to apply to an agency's conclusions under section 21166. The result has troubling implications for lead agencies attempting in good faith to comply with CEQA. Public agencies reliant on fluctuating public funding, such as the District, are especially vulnerable to arbitrary judicial second-guessing of their decisions under section 21166.

A. The role of section 21166 in CEQA's environmental review process

Public Resources Code section 21166 is intended to offset the very low threshold CEQA establishes for requiring preparation of an EIR in the first instance. The section "provide[s] a balance against the burdens created by the environmental review process and to accord a reasonable measure of finality and certainty to the results achieved." (*Bowman*, *supra*, 185 Cal.App.3d at p. 1074.) Specifically, section 21166 provides:

> When an environmental impact report has been prepared for a project pursuant to this division, no subsequent or supplemental environmental impact report shall be required by the lead agency or by any responsible agency, unless one or more of the following events occurs:
>
> (a) Substantial changes are proposed in the project which will require major revisions of the environmental impact report.
>
> (b) Substantial changes occur with respect to the circumstances under which the project is being undertaken which will require major revisions in the environmental impact report.
>
> (c) New information, which was not known and could not have been known at the time the environmental impact report was certified as complete, becomes available.

The Guidelines expand upon section 21166 to and provide further detail and guidance for the subsequent review process. Guidelines section 15162 mirrors the language of section 21166 while offering additional detail, laying out three circumstances under which a subsequent EIR must be prepared for a project:

> (1) Substantial changes are proposed in the project which will require major revisions of the previous EIR or negative declaration due to the involvement of new significant

environmental effects or a substantial increase in the severity of previously identified significant effects;

(2) Substantial changes occur with respect to the circumstances under which the project is undertaken which will require major revisions of the previous EIR or negative declaration due to the involvement of new significant, environmental effects or a substantial increase in the severity of previously identified significant effects; or

(3) New information of substantial importance, which was not known and could not have been known with the exercise of reasonable diligence at the time the previous EIR was certified as complete or the negative declaration was adopted, shows any of the following:

(A) The project will have one or more significant effects not discussed in the previous EIR or negative declaration;

(B) Significant effects previously examined will be substantially more severe than shown in the previous EIR;

(C) Mitigation measures or alternatives previously found not to be feasible would in fact be feasible and would substantially reduce one or more significant effects of the project, but the project proponents decline to adopt the mitigation measure or alternative; or

(D) Mitigation measures or alternatives which are considerably different from those analyzed in the previous EIR would substantially reduce one or more significant effects on the environment, but the project proponents decline to adopt the mitigation measure or alternative.

(Guidelines, § 15162, subd. (a).)

Because this case involves changes to an approved project rather than changed circumstances or "new information of substantial importance," the relevant inquiry here is whether the District's project changes would "require major revisions of the previous . . . negative declaration due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects." The District proposed only the following changes to its previously reviewed CSM Project (which dictated the disposition of *every building* on campus): it would demolish rather than renovate Building 20, the greenhouse, and lath house, and install a new parking lot. The District prepared an addendum because the available evidence identified no "new significant environmental effects or a

substantial increase in the severity of previously identified effects." (Guidelines, § 15162, subd. (a)(1).) An addendum is one of the several CEQA tools developed by the Office of Planning and Research for use by agencies. (Guidelines, §§ 15000, 15164.)

Guidelines section 15164, subdivision (b), describes the circumstances in which an agency may prepare an addendum to an adopted negative declaration. It sets forth two scenarios in which an addendum to an MND is appropriate: (1) "if only minor or technical changes or additions [to the prior analysis] are necessary," *or* (2) a subsequent EIR or negative declaration is not required under Guideline section 15162. Thus, if the conditions under section 15162 triggering a subsequent EIR or negative declaration the agency are not met, an addendum is appropriate. (See *Bowman, supra,* 185 Cal.App.3d at p. 1081 ["The question...is not whether an addendum was authorized, but whether a supplemental EIR was required"].) Courts review the agency's determination based on substantial evidence, regardless of the type of environmental review document initially certified. (Guidelines, § 15064, subd. (f)(7); see also *Benton, supra,* 226 Cal.App.3d at pp. 1473-1474, 1480-1481; *Snarled Traffic Obstructs Progress v. City and County of San Francisco* (1999) 74 Cal.App.4th 793, 795-796, 800-802.)

As discussed in further detail below, many other cases support substantial evidence review of an agency's section 21166 conclusions. But the Opinion ignores this established standard and prior precedent from its own court to instead apply a "new project" test with no articulation of the factors the court considers relevant to the inquiry. This non-deferential "new project" test has no basis in the CEQA statute or Guidelines.

B. The Opinion exacerbates a split in authority by ignoring the great weight of cases interpreting section 21166 and instead relying on the sole outlier case, *Save Our Neighborhood v. Lishman*.

The Opinion applies a "new project" test described and applied in only a single published case addressing section 21166 review, *Save Our Neighborhood v. Lishman*. In doing so, the Opinion ignores the long line of cases holding that the substantial evidence standard of review applies to an agency's decision made under to section 21166. Further, the Opinion mischaracterizes the facts of the single section 21166 case it acknowledges and attempts to distinguish, *Fund for Environmental Defense v. County of Orange* (1988) 204 Cal.App.3d 1538. This Opinion leaves all agencies within the First Appellate District (and specifically, the community college district) with considerable uncertainty regarding the relevant circumstances to consider in deciding when the preparation of an addendum is appropriate.

1. The Opinion ignores numerous cases holding substantial evidence applies to the review of an agency's 21166 determinations, including the decision to prepare an addendum.

An earlier decision of the First District provides an example of proper application of the substantial evidence standard of review to an agency's determination under section 21166. In *Bowman, supra*, 185 Cal.App.3d 1065, after certification of an EIR for a residential project, the respondent city proposed modifications to the project's traffic design, updated its environmental package, including a traffic report, and reapproved the original EIR as amended. Although the trial court held that subsequent environmental review was required, the Court of Appeal disagreed, noting that "[t]he trial court made no attempt to distinguish between noise effects attributable to the project as a whole and those caused by project revisions." (*Id.* at p. 1079.) Instead, the court determined that nothing in the record indicated modifications to the project were responsible for any significant increase in adverse impacts. (*Id.* at pp. 1079-1080.) The city's conclusions under section 21166 were upheld based on substantial evidence in the record.

(*Id.* at pp. 1081-1082, 1085.) The Opinion challenged here fails to distinguish or even discuss *Bowman*, despite the District's references to it in briefing.[3]

In *Santa Teresa Citizens Action Group v. Santa Clara Valley Water District* (2003) 114 Cal.App.4th 689, a recycled water pipeline project was revised to follow an entirely different route than previously assumed and studied. The respondent city evaluated the new route and concluded that previously adopted mitigation measures would avoid groundwater impacts. The city found there were no new significant environmental effects, nor any substantial increases in the severity of previously identified effects, and adopted an addendum to an existing EIR for the recycled water system. (*Id.* at pp. 698-699.) The petitioners argued the previous EIR did not consider the geologic differences between the old and new pipeline routes or the presence of certain toxic substances in the recycled water. The Court of Appeal held that the deferential substantial evidence standard applied to the petitioners' claims. (*Id.* at p. 703.) The court then compared the old and new pipeline routes and concluded that neither the petitioners nor the record demonstrated the changed route or circumstances surrounding the project were so significantly different that new or more severe impacts would result. (*Id.* at pp. 704-705.)

Here, similarly, the District argued an addendum was appropriate because the District was changing its plans for one area of its campus that had been previously analyzed for its CSM Project, and substantial evidence showed no new or more severe environmental impacts would result from the changes. The Opinion fails to address how the circumstances at hand are distinguishable from those at issue in *Santa Teresa*.

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[3] The Opinion also fails to cite or distinguish its own decisions in the *Benton* and *STOP* cases (see section V.A, *supra*).

The project changes in *River Valley Preservation Project v. Metropolitan Transit Development Board* (1995) 37 Cal.App.4th 154 were also substantial. There, the revisions to two light-rail line alignments in the 100-year flood plain of the San Diego River involved doubling the height and increasing the slope of the segment of the berm upon which the lines would run. This change increased the fill in the flood plain and decreased the area available for spreading flood flows. The lead agency approved an addendum to its certified EIR, concluding that the revisions would not involve new environmental impacts. The court noted the key issue was whether the changes "created *substantial environmental ramifications* that will require major revisions of the EIR." (*Id.* at p. 175, emphasis added.) The changes did not require preparation of a supplemental EIR because the same or similar impacts caused by the changes had been discussed in the original EIR, and mitigation measures applied to the project were equally applicable to the revised project. (*Id.* at pp. 177-178.)

Here, similarly, the District pointed out that its decision to demolish the Building 20 complex instead of renovating it would result in impacts the same as, or similar to, those that were anticipated and disclosed in the previously adopted 2007 MND. Again, the Opinion fails to offer any guidance to agencies attempting to distinguish the District's circumstances from those discussed in the great majority of the subsequent review cases. The District has no way to understand why its decision to change the disposition of one building out of the many structures previously considered must be considered a "new project" and subject to no judicial deference at all.

The Opinion also declines to distinguish *Mani Brothers Real Estate Group v. City of Los Angeles* (2007) 153 Cal.App.4th 1385 from the present case, other than to reject the Second Appellate District's "harsh" criticism of the *Save Our Neighborhood* decision, discussed below.

In *Mani Brothers,* the original EIR for the project considered the impacts caused by five buildings with approximately 2.7 million square feet of development. Later, the project increased to 3.2 million square feet, an 18.5 percent increase in size, and was significantly reconfigured to accommodate mixed-use development. (153 Cal.App.4th at pp. 1392-93.) Despite these substantial changes, the court upheld the use of an addendum for all but one distinguishable issue. (*Id.* at p. 1403.)

The Fourth Appellate District recently recognized and affirmed this concept of focusing on the extent of environmental *impacts* rather than the extent of changes to the project for the purpose of section 21166 review. In *Abatti, supra,* 205 Cal.App.4th 650, the petitioners challenged an irrigation district's adoption of revised water distribution regulations without preparing subsequent environmental review. The irrigation district's originally adopted its regulations based on a negative declaration. (*Id.* at pp. 653-655.) The later plan adopted by the irrigation district was intended to control the distribution of water in the event of water shortages. (*Id.* at p. 653.) The petitioners argued that Guidelines section 15162 inappropriately applied Public Resources Code section 21166 to negative declarations and that as a result, *Benton v. Board of Supervisors* was wrongly decided. (*Id.* at pp. 668-674.) The *Abatti* court rejected this argument. It agreed with *Benton*'s reasoning that the principles of 21166 "apply with even greater force in a case...in which the initial environmental review resulted in the issuance of a negative declaration rather than an EIR." (*Id.* at p. 670.) *Abatti* notes that "it makes little sense to set a *lower* threshold for further environmental review of a project that is determined *not* to have a significant effect on the environment than *section 21166* sets for a project that *may* have significant effects on the environment." (*Id.* at p. 673, emphasis original.) The court reviewed the irrigation district's revisions to the water distribution regulations under the substantial evidence

standard. It determined substantial evidence supported the irrigation district's conclusions that the revisions would not result in "new environmental effects or a substantial increase in the severity of previously identified effects." (*Id.* at p. 683.)

Here, the Opinion failed to address this recently published case on section 21166 review applied to a similar situation where the original document was a negative declaration.

The Opinion does address *Fund for Environmental Defense v. County of Orange* (1988) 204 Cal.App.3d 1538, one of the leading CEQA cases concerning addenda. However, the Opinion mischaracterizes the facts of that case to minimize the significance of the project changes that were analyzed in the addendum there. But the changes were by no means minor in that case. The original project was a 308,000-square-foot complex comprised of 22 one-story buildings, served by 825 mostly underground parking spaces. The applicant revised the project substantially by expanding it to 331,000 square feet, increasing the number of two-story buildings, eliminating underground parking, and adding 75 parking spaces. (*Id.* at pp. 1545-1546.) The revised project required *increased* grading and result in *greater* storm water runoff, but included similar mitigation that, like the mitigation for the earlier project, would adequately address those impacts. Since no new or substantially more severe impacts were identified, the court upheld the county's decision not to prepare a supplemental EIR. (*Id.* at p. 1552.) But rather than address this compelling analysis, the Opinion here simply argues the case is distinguishable because the required changes only increase coverage of the project site from 7 to 7.6 percent (0.60%). (Opn., p. 9.) Applying the same metric of change in percentage of project size that the court found relevant in *Fund for Environmental Defense*, the Building 20 complex project results in an even smaller change in the previously reviewed CSM Project – reducing the amount of landscaped and open space on campus by just one-third of one percent (0.33%).

The implications of the Opinion and *Save Our Neighborhood* reach further than just the use of addenda. Under the nondeferential "new project" test, a court could conceivably order an agency to re-evaluate an action as a new project even where that agency prepared a subsequent EIR as opposed to a whole new EIR written from scratch. The danger of such an outcome creates substantial risks for agencies that want to rely on the streamlined subsequent review tools authorized by the Legislature and the Natural Resources Agency.

2. *Save Our Neighborhood v. Lishman* is an outlier case and should not be followed.

The 2006 *Save Our Neighborhood* decision was startling to many CEQA practitioners, as it deviated from the deferential analysis historically applied to an agency's conclusions under section 21166. In that case, the respondent city prepared an MND for the "North Point" project consisting of a 106-unit motel, restaurants, lounge, gas station, convenience store, and car wash. But this project was never constructed. (140 Cal.App.4th 1288, 1291-1292.) Later, a substantially similar project was proposed by a different applicant for the same property. The city initially circulated a new MND for this similar "Gateway" project, but later recast the project as a modification to the previously reviewed and approved North Point project and prepared an addendum to the original MND. (*Ibid.*) The city approved the project after determining there would be no new or substantially more severe significant environmental impacts than were identified in the MND prepared for the North Point project. (*Id.* at 1293.) The appellate court rejected the city's approach.

The Third Appellate District identified two factors critical to its analysis. First, the court found it compelling that the two projects had different proponents. Second, the court stated that the latter project did not use any of the drawings or other materials connected with the earlier project as a basis for the new configuration of uses. (*Save Our Neighborhood, supra,* 140

Cal.App.4th at p. 1300.) The court adopted a "new project" test by determining that, prior to considering the agency's section 21166 conclusions, the court could decide for itself as a threshold matter of law whether the project was a change to a particular project or a new project altogether. (*Id.* at p. 1301.) The court reached this decision without pointing to any basis for it in the CEQA statute or Guidelines. Petitions for rehearing and review were denied and agencies waited to see if the Third District's novel "new project" test would be followed by other appellate districts.

Rather than follow *Save Our Neighborhood*, the next year, in *Mani Brothers, supra,* 153 Cal.App.4th 1385, the Second Appellate District sharply criticized the analysis employed in the case, for reasons quoted at length earlier. By emphatically rejecting the Third District's reasoning, the Second District's decision created a sharp split between the two districts and confusion throughout California.

Though *Mani Brothers* has been the most critical of the *Lishman* holding, other courts (including, as explained below, the First Appellate District) have also declined to adopt the "new project" test articulated for the first time in *Save Our Neighborhood.*

The First Appellate District itself, in *Moss v. Humboldt* (2008) 162 Cal.App.4th 1041 (*Moss*), only applied the question of law standard after noting that the challenge to the addendum at issue "[did] not raise or depend upon any *factual* assertions about the nature of the project." (*Id.* at p. 1052, emphasis added.) In fact, the *Moss* court emphasized the project at issue "*had not changed in any way.*" (*Id.* at p. 1053, emphasis in original.) The project was challenged only because the previously approved tentative map for the project had expired. (*Id.*) Therefore, the *Moss* court found "the legal effect that expiration of a project's tentative map has on CEQA review of that project is not a factual question, nor is it a matter that would typically be within a

local agency's real of expertise." (*Id.* at p. 1053.) "*Mani Brothers* was particularly concerned about courts drawing their own conclusions about what is essentially a factual question—i.e., whether the effect of changes to a project render it so drastically changed as to constitute a 'new' project." (*Moss, supra* 162 Cal.App.4th at p. 1052.) The holding in the *Moss* court suggested deference to the agency is appropriate where factual questions are at issue, impliedly rejecting the nondeferential approach used in *Save Our Neighborhood.*

But as discussed above, this Opinion reverses the *Save Our Neighborhood*-rejecting course set by *Mani Brothers,* and to a lesser extent, *Moss,* by applying *Save Our Neighborhood's* "new project" test in a seemingly arbitrary way. The Opinion is curiously disapproving of the District's position that it may change any components of its previously reviewed campus renovation plan (which was subject to a project-specific CEQA review) without treating such changes as new projects. (Opn., pp. 9-10.)

Even more surprisingly, just two weeks later, the same division of the First Appellate District *again* reversed course under section 21166 shortly after issuing the Opinion at issue here. In the unpublished opinion *Latinos Unidos de Napa v. City of Napa* (2013 Cal.App.Unpub.LEXIS 7318 (Case No. A134959), Exh. B hereto), issued on October 10, 2013, the court considered whether a city properly approved revisions to the housing element of its general plan without preparing any further environmental review. The decision addresses the split in authority between *Save Our Neighborhood* and *Mani Brothers* and the discussion in *Moss* regarding the confusion among courts regarding when to apply section 21151 versus 21166. (2013 Cal.App.Unpub.LEXIS 7318, *14-16; Slip Opn., pp. 8-10) Quoting from *Moss,* Division One notes that "a court should tread with extraordinary care before reversing a local agency's determination about the environmental impact of changes to a project." The court then

proceeded to review the project under section 21166 using the substantial evidence standard of review. (*Ibid.*) The District is totally baffled as to how Division One could apply section 21166 so differently in two unpublished cases issued within just two weeks of each other.

Here, notably, the District's previously adopted MND for the CSM Project was not an example of programmatic review, but rather was a *project-specific* review that considered the disposition of *every building on the campus*. (AR 1:245-246.) Yet the Opinion treats the CSM Project as if it were only reviewed programmatically, as was the long-term regional mining plan at issue in *Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307, 1316, on which the court relies heavily. The Opinion erroneously characterized the District's previous MND as a "large-scale environmental document" covering a "complex long-term management plan" such as the mining plan in *Sierra Club*. (Opn., pp. 9-10.) The court therefore concluded that, with respect to the District's changed approach to the Building 20 complex, it could "find a material alteration in that plan regarding a particular site or activity to be a new project triggering new environmental review." (Opn., p. 10, citing *Sierra Club, supra,* 6 Cal.App.4th at pp. 1313-1314, 1320-1321.) The court was troubled that the District could be "empowered to change various components of the CSM project at will over the years, with inadequate review." (Opn., p. 10.)

As noted below, the court never reached the issue of whether the actual analysis the District adopted was, in fact, "inadequate." Rather, the court stopped after it made the policy determination that the District could not be allowed to change its previously reviewed CSM Project without treating such changes as a new project. The court's determination sharply conflicts with the traditional deference afforded to public agencies by the courts, pursuant to CEQA and the Guidelines, to exercise their discretion regarding factual determinations such as whether proposed activities are changes to previously reviewed projects.

As evident by the outcome of the District's case, the Courts of Appeal are all over the map when reviewing agencies' actions under Public Resources Code section 21166 and the parallel sections of the CEQA Guidelines. This sharpening split of authority directly harms public agencies by adding further uncertainty, complexity and confusion to the environmental review process.

C. The Opinion circumvents 21166 and misinterprets that section's corresponding Guidelines sections.

In this case, the District determined that a subsequent EIR or negative declaration was not required under Guideline section 15162 and that section 15164, subdivision (b), applied to its proposed action. Section 15164, subdivision (b), provides that "[a]n addendum to an adopted negative declaration may be prepared if only minor technical changes or additions are necessary or none of the conditions described in Section 15162 calling for the preparation of a subsequent EIR or negative declaration have occurred." The Opinion misunderstands section 15164, subdivision (b), thereby committing a basic error in statutory construction.

It is a well-established maxim of statutory construction that "significance should be given to every word, phrase, sentence and part of an act in pursuance of the legislative purpose." (*DuBois v. Workers' Comp. Appeals Bd.* (1993) 5 Cal.4th 382 at p. 388.) In other words, when engaging in statutory construction, a court should not rewrite the law, add to it what has been omitted, or omit from it what has been inserted. (*Kleitman v. Superior Court* (1999) 74 Cal.App.4th 324, 334.) But that is precisely what the Opinion does.

The court appears to believe that the "minor technical changes or additions" described in section 15164, subdivision (b), refer to changes in the previously reviewed *project.* (Opn., pp. 8, 10.) That is not correct. This language refers to changes in the prior *analysis.* Section 21166 and the implementing Guidelines are focused on changes in the previous environmental analysis and

offer no support for the court's determination that its role is to independently determine whether the proposed changes in the project are "minor."

D. The Opinion fails to identify any prejudicial error committed by the District.

The Opinion fails to identify any prejudice as a result of the District's decision, whether correct or incorrect, to characterize the demolition and repurposing of the Building 20 complex as a change to the CSM Project and analyze it under section 21166. Yet Public Resources Code section 21005, subdivision (b), states that "courts shall continue to follow the established principle that there is no presumption that error is prejudicial." Notably, the Opinion fails to find any lack of substantial evidence supporting the District's environmental analysis and conclusions in its addendum. In fact, this addendum is quite robust. (AR 1:58-213.) It included updated biological studies, a tree protection plan, potential cultural resource analysis, and a detailed aesthetic impact analysis. (AR 1:92-95, 97-100, 182-210, 211-213.)

The court said it was not ordering the District to prepare an EIR. (Opn., p. 10.) But since a new negative declaration would be vulnerable to the "low threshold" fair argument standard, almost no more deferential than the Opinion's "new project" test, the District will most certainly have to prepare an EIR in light of the Friends' persistent opposition and litigation against the District. Because neither the trial court nor Court of Appeal identified any flaws in the *analysis* presented in the addendum, any EIR for a "new" Building 20 complex project is very likely to look substantially the same as the addendum prepared for the project. Essentially, the Opinion forces the District into a pure paper-generating exercise. Even if the District erred in the way the Opinion asserts, the Opinion identifies no prejudice resulting from this mistake.

A recent line of cases reinforces the importance that an agency's error be found prejudicial in order to overturn its challenged action. In *Mount Shasta Bioregional Ecology*

Center v. County of Siskiyou (2012) 210 Cal.App.4th 184, the respondent county approved the expansion of a facility for which an EIR was prepared. The petitioners argued overall water usage attributable to the project was understated in the EIR. But the petitioners could point to nothing suggesting the discrepancy would result in a significant environmental impact. The court noted that "noncompliance with CEQA's information disclosure requirements is not per se reversible; prejudice must be shown." (*Id.* at p. 226.) The Court upheld the EIR despite this inaccuracy.

More recently, in *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013), three justices of this court noted that, under CEQA, there is no presumption that error is prejudicial. (57 Cal.4th 439, 463-464, citing Pub. Resources Code, § 21005, subd. (b).) Although a majority of this Court found that the challenged EIR had improperly relied solely on a "future baseline" for assessing environmental impacts, the court let stand the respondent agency's actions in certifying its EIR and approving its project. (*Id.* at p. 446.)

Even if it were procedural error for the District to treat the Building 20 demolition as a changed project instead of a new project, the Court of Appeal never explained how the public or decision makers were deprived of substantial information by that approach. By failing to identify *any* prejudice but rejecting the addendum anyway, the Opinion raises form above substance, creating needless expense for the District, and ultimately, the State's taxpayers.

VI. CONCLUSION

In this case, Division One of the First Appellate District has misunderstood the intentions of the Legislature when it enacted both section 21166 and section 21083.1. The Legislature has not only set a high bar for the preparation of subsequent EIRs, it has also firmly declared that it is not the role of the courts to develop new law or procedures under CEQA. But that is exactly

what the court did in this case. The court ordered the District to treat the Building 20 plans as a "new project, rather than a *minor or technical amendment* to the overall CSM Project." (Opn. p. 10.) In reaching this decision, the court misinterprets Guidelines section 15164, subdivision (b), to hinge on the degree of changes in the previously reviewed project, rather than the prior environmental analysis.

More importantly, though, the Opinion exemplifies the harm caused by the continuing split in authority between the appellate districts regarding judicial review of agency decisions under Public Resources Code section 21166 and sections 15162, 15163, and 15164 of the Guidelines. Unless this court intervenes, the result of the continuing confusion generated by the *Save Our Neighborhood* decision could well be that the District (and the taxpayers) will bear the cost of hundreds of thousands of dollars in attorney's fees and EIR preparation costs. But the end result of a new CEQA review is very likely to be the same as the outcome being contested herein.

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Because neither the trial court nor the appellate court found fault with the impact conclusions in the addendum, any new EIR will likely reach the same conclusions found in the addendum, and the Building 20 complex will still be demolished, just with substantially increased cost and delay. It is precisely to avoid this kind of wasteful scenario in the future that lead agencies desperately need this Court to provide some uniformity in the law.

Respectfully submitted,

Dated: November 4, 2013

REMY MOOSE MANLEY, LLP

By: Sabrina V. Teller
SABRINA V. TELLER

Attorneys for Defendant/Petitioner SAN MATEO COUNTY COMMUNITY COLLEGE DISTRICT

CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, Rule 8.504(d)(1)

I, Sabrina V. Teller, declare as follows:

1. I am an attorney at law duly licensed to practice before the courts of the State of California, and am the attorney of record for the Appellants/Defendants in this action.

2. California Rules of Court, rule 8.504(d)(1), states that briefs produced on a computer must not exceed 8,400 words, including footnotes.

3. This Petition for Review was produced on a computer using a word processing program. This Petition for Review consists of 8,383 words, including footnotes but excluding the caption page, tables and this certificate, as counted by the word processing program.

Dated: November 4, 2013

REMY MOOSE MANLEY, LLP

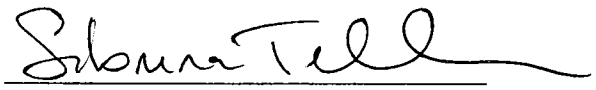
By: 

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EXHIBIT A

Filed 9/26/13 Friends of the College of San Mateo Gardns v. San Mateo Cty. Com. College Dist. CA1/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

FRIENDS OF THE COLLEGE OF SAN MATEO GARDENS, Plaintiff and Respondent, v. SAN MATEO COUNTY COMMUNITY COLLEGE DISTRICT et al., Defendants and Appellants.	A135892 (San Mateo County Super. Ct. No. CIV 508656)

Defendants San Mateo Community College District and its Board of Trustees (District) deviated from its district-wide, three-college-campus master plan[1] with regard to a project on the College of San Mateo campus. This project involved the College of San Mateo's Building 20 complex (the Building 20 complex), which includes gardens popular with faculty and students. The Master Plan called for renovation of the Building 20 complex, but District decided to demolish it. District stated its new intent in an addendum to a negative declaration.

Plaintiff Friends of the College of San Mateo Gardens (Friends) petitioned the superior court for a writ of mandate, arguing the demolition project violated the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.) (CEQA) and seeking to compel District to prepare an environmental impact report (EIR) for the demolition project. The trial court granted the petition and ordered District to comply

[1] A "Facilities Master Plan" (Master Plan) was adopted by the District in 2006.

with CEQA with regard to the demolition project. District contends an addendum was appropriate and was sufficient environmental review of the demolition project. We disagree because the demolition project is a new project not subject to an addendum and requiring additional environmental review. Accordingly, we affirm.

I. PROCEDURAL BACKGROUND & FACTS

The Building 20 complex consists of five components. The first is Building 20 itself, which is described in the record as a small cast-in-place concrete building, dating to 1963, housing one classroom and laboratory facilities. It had been used for floristry and horticultural instruction and some student services. The second component consists of three parking lots with a total of 40 parking spaces. The third and fourth components are a greenhouse containing plant specimens for horticulture and certain science courses, and a lath house used for storage and the cultivation of seedlings.

The fifth component of the Building 20 complex consists of the North and South Gardens. The North Garden is an open area containing perimeter landscaping, a lawn, a walking path, a picnic area, and a circular walkway. The South Garden has two sections: a demonstration garden consisting of ground level planting beds which contain a wide variety of native and ornamental plantings used for instructional purposes, and which are separated by paved walkways; and a landscaped area which includes a semi-mature nonnative *Metasequoia glyptostroboides* (dawn redwood) tree.

In 2006, District adopted the Master Plan for all three of its community college campuses: the College of San Mateo (CSM), Cañada College, and Skyline College. The Master Plan was designed to "set a broad vision" for District's campuses "for the next thirty years." The portion of the Master Plan devoted to CSM described several buildings as "requiring some level of modernization or remodel," including Building 20.

In January 2007, District certified an Initial Study and adopted the 2006 Mitigated Negative Declaration (IS/MND) for the facility improvements at the College of San Mateo project (CSM project). Like the Master Plan, the IS/MND for the CSM project contemplated renovation of the Building 20 complex. The Initial Study states, Building

20 "would be renovated," and "currently house[d] . . . horticulture[] and student service programs."

Despite the fact both the 2006 Master Plan and the 2006/2007 IS/MND anticipated renovation of the Building 20 complex, District abandoned renovation and opted for demolition. In May 2011, District issued a notice of determination that it had approved the Building 20 demolition project. It also proposed a CEQA addendum (May Addendum) for the project, which concluded the Building 20 complex was "no longer needed." Instructional and other functions of the Building 20 complex would be relocated to other campus facilities. Building 20, the greenhouse, and the lath house would be destroyed. The May Addendum stated, "There is a need for additional parking on the east side of the campus where the Building 20 complex is located. . . . The Building 20 complex would be replaced with a parking lot and landscaping." An additional 125–200 parking spaces would be built. Unspecified numbers of 11 species of plants or trees would be removed or relocated or "replaced with a new plant"—presumably resulting in the destruction of the existing plant.

The May Addendum concluded: "[T]he project changes would not result in a new or substantially more severe impact than disclosed in the 2006 IS/MND. Therefore, an addendum to the 2006 MND is the appropriate CEQA documentation. An addendum need not be circulated for public review but can be included in or attached to the adopted MND."

The demolition project triggered considerable public controversy. Members of the public, mostly faculty and students, stressed the aesthetic value of the gardens.[2] Nevertheless, District approved the demolition project and the May Addendum. Friends challenged the approval by filing a petition for writ of mandate (initial mandate petition).

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[2] At a public hearing on the demolition project, a horticulturist described the gardens as a "historic vernacular landscape," i.e., a landscape that has "evolved through use by the people whose activities shaped it" and "reflects the physical, biological, and cultural character of everyday lives."

District prepared a revised addendum (August Addendum). The August Addendum reflects District's decision to rescind the May Addendum in response to Friends' initial mandate petition and proceed with the August Addendum.

The August Addendum noted funding had not been obtained for the Building 20 complex renovation, and that Building 20 was vacant, in great disrepair, noncompliant with the Americans with Disabilities Act, and known to contain asbestos. "Therefore, instead of renovating the Building 20 complex as analyzed in the 2006 IS/MND, [District] proposes to demolish the Building 20 complex and replace it with parking lot, accessibility, and landscaping improvements." Demolition of the Building 20 complex buildings "would allow for the expansion of the existing parking lots in the Building 20 complex to accommodate between 140 and 160 additional parking spaces." This would constitute a three-to-four percent increase in campus-wide parking availability.

The August Addendum points out the 2006 IS/MND for the CSM project contemplated the demolition of 16 buildings, and the new project simply substitutes Building 20 for Buildings 15 and 17 on the list of buildings to be demolished. The August Addendum also stated: "The majority of the garden and landscaped areas included in the existing Building 20 complex would be retained and improved as part of the proposed change to the CSM Project. Over eighty percent . . . of the North Garden would be retained and improved. In the South Garden, approximately forty-five percent . . . of the South Garden would be retained including the [dawn redwood] tree and lawn area surrounding it. The remaining approximately fifty-five [percent] of the South Garden—consisting of the demonstration garden, paved walkways and a portion of the lawn area—would be removed."

With regard to the aesthetic impact of the proposed demolition project, the August Addendum noted there were "no established, objective criteria for evaluating the aesthetic effect resulting from removal of a portion of the gardens." As such, "subjective personal opinions regarding the impact on the gardens may vary." The August Addendum concluded the reduction of the existing garden area in the Building 20 complex, including the demonstration garden, "does not result in a new significant

aesthetic impact." It would result in a reduction of only less than one-third of one percent of the garden, landscaped, and open space areas on the CSM campus. The remaining garden areas "would be rehabilitated with new walkways and new plantings," as well as proposed "mini-ecosystems," which "would enhance the aesthetics of . . . these garden areas."

In a similar fashion to the May Addendum, the August Addendum concluded: "[T]he project change would not result in a new or substantially more severe impact than disclosed in the 2006 IS/MND. Therefore, this revised addendum to the 2006 MND is the appropriate CEQA documentation. An addendum need not be circulated for public review but can be included in or attached to the adopted MND."

After public comment, District approved the August Addendum and reapproved the demolition project. Friends filed a new petition for writ of mandate.[3] Friends alleged District approved the demolition project without preparing an EIR, in violation of CEQA. Friends alleged, inter alia, the demolition project was "a new project that is not within the scope of the 2006 Facilities Master Plan that provided for [the Building 20 complex's] rehabilitation and retention," and District approved the project without adequately analyzing the aesthetic impact of the demolition of the gardens. Friends prayed for the issuance of a peremptory writ of mandate ordering District to set aside its approval of the demolition project and prepare an EIR.

After briefing and oral argument, the trial court granted the petition for writ of mandate. In its judgment granting the petition, the trial court ruled that District "violated [CEQA] in basing approval on an Addendum to the 2006 [MND] for the Facilities Improvement [CSM] Project." The court found "the demolition project is inconsistent with both the 2006 Facilities Master Plan and the 2006 CSM Project, and the impacts of demolishing the Building 20 Complex and North and South Gardens were not addressed in the 2006 MND."

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[3] Presumably, the initial petition was dismissed.

The court issued a peremptory writ of mandate commanding District to "rescind [its] approvals of the . . . Building 20 Complex . . . [d]emolition . . . [p]roject and Addendum." The writ also recited that "[n]o consideration of project approval may occur without fully complying with the requirements of [CEQA]."[4]

II. DISCUSSION

The purpose of CEQA is "to protect and maintain California's environmental quality." (*Communities for a Better Environment v. California Resources Agency* (2002) 103 Cal.App.4th 98, 106 [fn. omitted].) CEQA requires a public agency to "consider measures that might mitigate a project's adverse environmental impact, and adopt them if feasible. [Citations.]" (*Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 123.)

Generally, when a public agency proposes to approve or carry out a project it must prepare and certify an EIR if the project may have a significant effect on the environment. (Pub. Resources Code §§ 21080, subd. (a), 21100, subd. (a), 21151, subd. (a); see *Moss v. County of Humboldt* (2008) 162 Cal.App.4th 1041, 1048 (*Moss*).)[5]

If the agency's initial study of the project reveals no substantial evidence the project may have a significant effect on the environment, the agency may adopt a negative declaration. (*Center for Sierra Nevada Conservation v. County of El Dorado*

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[4] District complains the trial court's order lacks specificity. District is the author of its own self-styled predicament.

Following oral argument, the trial court issued a proposed order which only stated the August Addendum "provides inadequate analysis of the change in the project in violation of CEQA, where the Building 20 Complex is now planned to be demolished rather than renovated. Consequently, the Court sets aside all of [District's] approvals of the demolition of the Building 20 Complex." District requested clarification of the proposed order. Apparently, this request went unanswered. Friends submitted a proposed judgment containing fairly specific CEQA findings. District revised Friends' proposed order, and with Friends' approval the proposed revisions were also submitted to the court. District's revision *deleted* proposed specific findings, including a finding that the demolition project was a new project and a finding that the August Addendum did not adequately analyze environmental impacts. The trial court signed District's revised proposed order, which is the language quoted in the text.

[5] Subsequent statutory citations are to the Public Resources Code.

(2012) 202 Cal.App.4th 1156, 1170–1171 (*Center for Sierra Nevada Conservation*); § 21080, subd. (c)(1); Cal. Code Regs., tit. 14, § 15064, subd. (f)(3).)[6] "[I]f the project has potentially significant environmental effects but these effects will be reduced to insignificance by mitigation measures that the project's proponent has agreed to undertake, CEQA requires the . . . agency to prepare a mitigated negative declaration." (*Moss, supra,* 162 Cal.App.4th at p. 1048, citing § 21080, subd. (c)(2) and Guidelines, § 15064, subd. (f)(2).)

We deal here with a purported modification to a project after the initial environmental document, i.e., the 2006 MND, has been adopted. "Where a project for which an EIR or negative declaration has been prepared is later modified or the circumstances under which it is to be carried out change, a subsequent or supplemental EIR or negative declaration may be required." (*Save Our Neighborhood v. Lishman* (2006) 140 Cal.App.4th 1288, 1295 (*Save Our Neighborhood*).) Section 21166, which addresses only projects where the initial environmental document was an EIR, provides that a subsequent or supplemental EIR shall be required if substantial changes are proposed in the project, or occur with respect to the circumstances under which the project will be undertaken, which require major revisions to the EIR, or if new and previously unknown information becomes available.

Section 21166 is augmented by Guidelines section 15162, which "imposes the same obligation on a project for which a negative declaration was prepared." (*Save Our Neighborhood, supra,* 140 Cal.App.4th at p. 1295.) In other words, a subsequent or supplemental EIR need not be prepared for a project for which the agency has adopted a negative declaration unless substantial changes are proposed in the project, or occur with

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[6] California's CEQA Guidelines are found in California Code of Regulations, title 14, section 15000 et seq. We will henceforth cite them as "Guidelines." Our Supreme Court "has not decided the issue of whether the Guidelines are regulatory mandates or only aids to interpreting CEQA," the court instructs us that "[a]t a minimum, . . . courts should afford great weight to the Guidelines except when a provision is clearly unauthorized or erroneous under CEQA. [Citation.]" (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 391, fn. 2.)

respect to the circumstances under which the project will be undertaken, which require major revisions to the EIR, or if new and previously unknown information becomes available.

If the changes to the project are not sufficiently substantial to require a subsequent or supplemental EIR, the agency may prepare a subsequent negative declaration, an addendum, or no further documentation. (Guidelines, § 15162, subd. (b).) Of particular interest to the present case, the Guidelines provide: "An addendum to an adopted negative declaration may be prepared if only minor technical changes or additions are necessary or none of the conditions described in [Guidelines] Section 15162 calling for the preparation of a subsequent EIR or negative declaration have occurred." (Guidelines, § 15164, subd. (b).) An addendum need not be circulated for public review or public comment. (See Guidelines, § 15164, subd. (c).)

The August Addendum clearly does far more than make "minor technical changes or additions" to the 2006 Master Plan and the 2006 MND for the CSM project. The addendum changes "renovation" of the Building 20 complex to "demolition" of the complex's buildings and a substantial portion of the gardens. As was the case in *Save Our Neighborhood*, the latest proposed project "is not a modification of the [initial] project but a new project altogether." (*Save Our Neighborhood, supra,* 140 Cal.App.4th at p. 1297.) Whether or not a proposed modification is a "new project" is a question of law for the court. (*Ibid.*) We conclude the demolition project is a "new project" that has not been subjected to adequate environmental review, and the trial court correctly ordered District to comply with CEQA and conduct such review.

We realize the typical standard of review in CEQA cases is limited to whether the agency has abused its discretion, by failing to proceed in the manner required by law or reaching a decision not supported by substantial evidence. (See, e.g., *Center for Sierra Nevada Conservation, supra,* 202 Cal.App.4th at p. 1172.) But in the narrow circumstances of the present case, where it is clear from the record that the nature of the project has fundamentally and qualitatively changed to the point where the new proposal is actually a new project altogether, we believe *Save Our Neighborhood*'s standard is

both workable and sound. We also realize *Save Our Neighborhood* was criticized in *Mani Brothers Real Estate Group v. City of Los Angeles* (2007) 153 Cal.App.4th 1385 (*Mani Brothers*), as vague and undermining the typical deference to agency decisions embodied by the substantial evidence standard. (*Id.* at pp. 1400–1401.) We conclude *Mani Brothers* was too harsh in its criticism of *Save Our Neighborhood*, and at least under the straightforward facts of the present case we can decide, as a matter of law, that the demolition project is a "new project."

District cites us to several cases in which addendums were used with judicial approval. But those cases did indeed involve minor changes to a project, and not an entirely new project substituted for the initial project which had been environmentally reviewed. But these cases did indeed involve relatively minor changes in the scale or composition of a project, and not an entirely new project substituted for the initial project which had been environmentally reviewed. For example, in *Fund for Environmental Defense v. County of Orange* (1988) 204 Cal.App.3d 1538, the appellate court concluded no supplemental EIR was required where the project under consideration was expanded in scale from 7 percent coverage of the site to 7.6 percent coverage and building heights and parking configurations were modified. (*Id.* at pp. 1545–1546.)

District also resists the characterization of the Building 20 complex demolition project as a separate project, and argues it is only one component of the entire CSM project which can, in essence, be entirely altered with only addendum review. District notes Building 20 is being demolished in the place of Buildings 15 and 17, which were slated for destruction, but will now be renovated. District also argues the *types* of environmental changes—such as parking lot reconfiguration and landscaping alterations —were previously considered in the 2006 MND.

District takes too narrow a view of the concept of a "project." In general terms, CEQA defines a "project" as "an action which [may cause] either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment . . . ." (Guidelines, § 15378, subd. (a).) Where, as here, an agency adopts a large-scale environmental document, such as the 2006 MND, that does not "focus[]

narrowly on a specific development project," but "addresse[s] the environmental effects of a complex long-term management plan . . . ." (*Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307, 1316), a court can find a material alteration in that plan regarding a particular site or activity to be a new project triggering new environmental review. (See *id.* at pp. 1313–1314, 1320–1321.)

To adopt District's concept, it would be empowered to change various components of the CSM project at will over the years, with inadequate environmental review. This case focuses on the changed intent with regard to a building complex and its attached gardens—from renovation to substantial destruction. As the trial court held, this is inconsistent with the Master Plan and the MND and amounts to a new project requiring CEQA review.

We decline Friends' request to order the preparation of an EIR on remand. Such a request is premature. District must change its focus on the demolition project, and view it as a separate, new project rather than a minor or technical amendment to the overall CSM project. It must then evaluate the demolition project, fully and adequately examine potential environmental impacts, and determine whether substantial evidence supports a fair argument that the demolition project may have a significant effect on the environment. If there is such evidence, District would then have to prepare an EIR. (See *San Bernardino Valley Audubon Society v. Metropolitan Water Dist.* (1999) 71 Cal.App.4th 382, 389.)

III. DISPOSITION

The judgment is affirmed.

Sepulveda, J.*

We concur:

Margulies, Acting P.J.

Dondero, J.

* Retired Associate Justice of the Court of Appeal, First Appellate District, Division Four, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

EXHIBIT B

Filed 10/10/13 Latinos Unidos De Napa v. City of Napa CA1/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

LATINOS UNIDOS DE NAPA, Plaintiff and Appellant, v. CITY OF NAPA et al., Defendants and Respondents.	A134959 (Napa County Super. Ct. No. 26-49634)

Affordable housing advocates Latinos Unidos de Napa (plaintiff) filed a petition for writ of mandate against the City of Napa (City), its city manager, and its community development director seeking to set aside the City's approval of revisions to the housing element of its general plan, and related general plan and zoning amendments (the Project), on the ground that an environmental impact report (EIR) for the Project is required. The City had concluded the Project would not result in any new significant environmental effects that were not identified and mitigated in its 1998 General Plan Program EIR, and filed a notice of determination to that effect. After the trial court erroneously dismissed plaintiff's petition on statute of limitations grounds, we reversed the judgment in *Latinos Unidos de Napa v. City of Napa.* (2011) 196 Cal.App.4th 1154. The trial court subsequently denied the petition on its merits, agreeing with the City's legal analysis and concluding plaintiff had waived its right to challenge the sufficiency of the evidence. We find no error and affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

I. *The Parties*

Plaintiff identifies itself as "an unincorporated association which advocates for environmentally sound and legally adequate development policies that address the housing needs of all economic segments of the population in the City of Napa and surrounding areas." The City is the "lead agency" for the subject approvals for the purposes of the California Environmental Quality Act (CEQA) (Pub. Resources Code, § 21000 et seq.)[1] and is charged with duties to disclose, analyze, and mitigate significant impacts from the Project. (§§ 21067, 21165.)

II. *CEQA*

Under CEQA, an EIR must be prepared before a public agency approves any project that may have a significant effect on the environment. (*San Franciscans Upholding the Downtown Plan v. City and County of San Francisco* (2002) 102 Cal.App.4th 656, 687–688.) CEQA and its related regulations—ordinarily referred to as "Guidelines" (Cal. Code Regs., tit. 14, § 15001 et seq. (Guidelines))—define an EIR as "an informational document" whose purpose "is to provide public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment; to list ways in which the significant effects of such a project might be minimized; and to indicate alternatives to such a project."[2] (Pub. Resources Code, § 21061; Guidelines, § 15003, subds. (b)–(e).)

Public Resources Code section 21166 and Guidelines section 15162[3] mandate that once a public agency has prepared an EIR for a project, no further EIR is required unless either (1) substantial changes are proposed in the project that will require major revisions

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[1] All subsequent statutory references are to the Public Resources Code except as otherwise indicated.

[2] "The Guidelines are developed by the Office of Planning and Research and adopted by the Secretary of the Resources Agency. [Citations.] 'In interpreting CEQA, we accord the Guidelines great weight except where they are clearly unauthorized or erroneous.' [Citation.]" (*Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, 276, fn. 10.)

[3] Guidelines section 15162 implements Public Resources Code section 21166. (See *Benton v. Board of Supervisors* (1991) 226 Cal.App.3d 1467, 1479–1481.)

of the EIR, or (2) substantial changes occur with respect to the circumstances under which the project will be undertaken that will require major revisions in the EIR, or (3) new information, which was not known and could not have been known when the EIR was certified, becomes available.[4] Additionally, where an agency prepares a "program EIR" for a broad policy document such as a local general plan, Guideline section 15168, subdivision (c)(2) allows agencies to limit future environmental review for later activities that are found to be "within the scope" of the program EIR.

III. *The City's General Plan*

The Planning and Zoning Law (Gov. Code, § 65000 et seq.) requires each city and county to "adopt a comprehensive, long-term general plan for the physical development of the county or city, and of any land outside its boundaries which in the planning agency's judgment bears relation to its planning." (Gov. Code, § 65300.) A city's general plan is its " ' "constitution" for future development' . . . 'located at the top of the hierarchy of local government law regulating land use.' " (*DeVita v. County of Napa* (1995) 9 Cal.4th 763, 772–773.) " '[T]he propriety of virtually any local decision affecting land use and development depends upon consistency with the applicable general plan and its elements.' [Citations.]" (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 570–571.) The Planning and Zoning Law requires that each general plan include seven mandatory elements, including a land use element, a circulation element, a housing element, a conservation element, an open-space element, a noise element, and a safety element. (Gov. Code, § 65302.)

State law imposes many requirements for housing elements, including a requirement that they be periodically updated pursuant to a statutory schedule. (Gov. Code, § 65580 et seq.) The Housing Element Law provides: "The housing element shall consist of an identification and analysis of existing and projected housing needs and a

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[4] The Guidelines generally define "new information" as information that shows the project will have new or more severe "significant effects" on the environment not disclosed in the prior EIR. (Guidelines, § 15162, subd. (a).) A "significant effect" is further defined in the Guidelines as a "substantial, or potentially substantial, adverse change." (Guidelines, § 15382.)

statement of goals, policies, quantified objectives, financial resources, and scheduled programs for the preservation, improvement, and development of housing. The housing element shall identify adequate sites for housing, including rental housing, factory-built housing, and mobilehomes, and emergency shelters, and shall make adequate provision for the existing and projected needs of all economic segments of the community." (Gov. Code, § 65583.) The City was required to have adopted updates to its housing element by December 31, 2003 (third revision) and by June 30, 2009 (fourth revision). (Gov. Code, § 65588, subd. (e)(1)(F)).[5]

The City adopted a comprehensive update of its general plan—entitled *Envision Napa 2020*—in December 1998 (2020 General Plan). As its name suggests, the 2020 General Plan sets forth the City's future plans for development through the year 2020. The 2020 General Plan includes updates to all elements of the City's general plan except for the Housing Element, which at the time the City anticipated updating in 2001.

Prior to approving the 2020 General Plan, the City prepared, circulated, and ultimately certified a program EIR (1998 Program EIR). The 1998 Program EIR analyzed the environmental impacts of future projected growth within the City through the year 2020, in accordance with the 2020 General Plan, including analysis of environmental impacts relating to land use, transportation, community services and utilities, cultural resources, visual quality, biological resources, geology, soils, seismicity, hydrology, air quality, noise, and public health and safety. The City updated and/or amended its Housing Element in 2001 and in 2005.

IV. The 2009 Housing Element Update Project

In April 2008, the City began the process of again updating its Housing Element, a course of action that resulted in the Project. This process ultimately included 28 public meetings, including community workshops and other opportunities for public input.

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[5] Government Code section 65588 has been amended many times, resulting in some shifting of the dates. As of the time the City prepared the 1998 Program EIR, the City considered the third revision due in 2001.

On April 20, 2009, City staff prepared an Initial Study to analyze the Project.[6] The Initial Study identified all changes that the Project would make to the existing Housing and Land Use Elements. The Initial Study first summarized the overall policy changes to the Housing Element, including policies to increase housing densities to provide additional housing opportunities, to "maintain and improve neighborhood livability," to "expand community involvement and outreach," to "address housing needs and affordability," and other policy changes to comply with current state requirements.

The Initial Study then further described the specific new actions contemplated by the Project, including: (1) changes to the Land Use Element to increase *the minimum* residential densities in seven areas zoned as "mixed use" or "community commercial" from 10 to 40 residential units per acre to 20 to 40 residential units per acre, (2) changes to the Land Use Element to increase the permitted density for eight multi-family sites located in three areas of the City by a total of 88 units, (3) various zoning amendments to comply with current state laws regarding emergency shelters and transitional, supportive, and farm worker housing, (4) zoning amendments to require a use permit for conversion of certain types of stores and to provide for "co-housing," and (5) Land Use Element and zoning amendments to permit single family detached homes at the same densities of single family attached homes.

The Initial Study then analyzed the extent to which these changes contemplated by the Project could result in any new or different environmental impacts not already analyzed with respect to the 2020 General Plan, specifically and separately analyzing the issues of aesthetics, agricultural resources, air quality, biological resources, cultural resources, geology and soils, greenhouse gas emissions, hazards and hazardous materials, hydrology and water quality, land use and planning, mineral resources, noise, population and housing, public services, recreation, transportation/traffic, and utilities and service systems. Based on its analysis, the Initial Study concluded that the Project was "within

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[6] An "initial study" is used by an agency to determine whether a project will have a significant effect on the environment under CEQA. (Guidelines, § 15063.)

the scope" of the City's 1998 Program EIR, such that the Project required no further environmental review.

On May 22, 2009, the City received a 24-page comment letter from David Graves objecting to the Initial Study and making various arguments that the City should instead prepare a supplemental EIR. The comment letter attached a seven-page letter prepared by traffic engineer Daniel T. Smith, who asserted that the information in the 1998 Program EIR relating to traffic impacts was outdated.

On June 15, 2009, the City's Principal Planner and Public Works Director prepared a 10-page memorandum response to the two letters, disputing the claims made therein. This memorandum included two and a half pages of analysis from the City Public Works Department explaining why it disagreed with the traffic-related comments in the two letters and found them to be "misleading and inaccurate" insofar as they were based on information that was "incorrect and/or incomplete."

On June 17, 2009, the City Council adopted detailed findings restating the Initial Study's determinations summarized above, including findings that the Project was within the scope of the 1998 Program EIR prepared for the 2020 General Plan, and that it would "not result in any new significant environmental effects that were not identified, evaluated and mitigated through [the 1998 Program EIR.]" The council approved the Project, adopting the amendments to the Land Use Element, the updated Housing Element, and, later, approving the various zoning amendments.

V. The Petition for Writ of Mandate

On October 9, 2009, plaintiff filed a first amended petition for writ of mandate challenging the City's compliance with CEQA in adopting the updated Housing Element and the related conforming changes.[7] As noted above, after the trial court dismissed the action on statute of limitations grounds, we reversed the judgment and the case was returned to the trial court.

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[7] The present matter pertains to the first cause of action of the first amended petition. The petition originally contained seven causes of action. On June 22, 2010, plaintiff voluntarily dismissed the remaining causes of action.

On February 1, 2012, the trial court issued a tentative ruling denying the petition, finding that the City properly applied section 21166 in determining that the Project was within the scope of the 1998 Program EIR. The court also found plaintiff had waived its substantial evidence challenges because it "failed to set forth in its opening brief all the evidence which might have a bearing on the administrative decision," and that, even if these challenges were not deemed waived, the City's findings were, in fact, supported by substantial evidence.

On February 21, 2012, the trial court filed its judgment denying plaintiff's petition for the reasons stated in its tentative ruling. This appeal followed.

DISCUSSION

I. *Standard of Review*

A. *General Standard of Review*

"The standard of review in an action to set aside an agency determination under CEQA is governed by section 21168 in administrative mandamus proceedings, and section 21168.5 in traditional mandamus actions. The distinction between these two provisions 'is rarely significant. In either case, the issue before the trial court is whether the agency abused its discretion. Abuse of discretion is shown if (1) the agency has not proceeded in a manner required by law, or (2) the determination is not supported by substantial evidence.' [Citations.]" (*County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 945.)

B. *"Fair Argument" Versus "Substantial Evidence" Tests*

Relying in part on *Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307 (*Sierra Club*), an opinion authored by this court, plaintiff claims the "fair argument" test applies to the City's decision to refrain from preparing a new EIR because the Project was not adequately covered or mitigated in the 1998 Program EIR. "The 'fair argument' test is derived from section 21151, which requires an EIR on any project which 'may have a significant effect on the environment.' That section mandates preparation of an EIR in the first instance 'whenever it can be fairly argued on the basis of substantial evidence that the project may have significant environmental impact.' [Citation.] If

there is substantial evidence of such impact, contrary evidence is not adequate to support a decision to dispense with an EIR." (*Id.* at p. 1316.) The fair argument standard creates a "low threshold" for requiring an EIR, reflecting a legislative preference for resolving doubts in favor of environmental review. (*Id.* at pp. 1316–1317.)

The City contends, and the trial court agreed, that the substantial evidence standard of review applies here because the Project falls under section 21166. "[W]hen a court reviews an agency decision under section 21166 not to require a subsequent or supplemental EIR on a project, the traditional, deferential substantial evidence test applies. The court decides only whether the administrative record as a whole demonstrates substantial evidence to support the determination that the changes in the project or its circumstances were not so substantial as to require major modifications of the EIR." (*Sierra Club, supra,* 6 Cal.App.4th at p. 1318; accord, *Snarled Traffic Obstructs Progress v. City and County of San Francisco* (1999) 74 Cal.App.4th 793, 800) Thus, "the statutory presumption flips in favor of the [agency] and against further review." (*Moss v. County of Humboldt* (2008) 162 Cal.App.4th 1041, 1049–1050 (*Moss*).) " '[S]ection 21166 comes into play precisely because in-depth review has already occurred, [and] the time for challenging the sufficiency of the original EIR has long since expired . . . .' " (*Id.* at p. 1050.)

C. *Standard of Review Applicable to the City's Environmental Review Process Here*

As the court in Division Three of our appellate district has observed, "[a]lthough the standards for judicial review of an agency's decision under sections 21151 and 21166 are well settled, the issue is not so clear with respect to the agency's decision about *which* of these statutes governs the environmental review process. Courts have reached different conclusions about the appropriate level of judicial scrutiny to be applied to an agency's determination about whether a project is 'new,' such that section 21151 applies, or whether it is a modification of a previously reviewed project, such that section 21166 applies." (*Moss, supra,* 162 Cal.App.4th at p. 1051.)

In *Save Our Neighborhood v. Lishman* (2006) 140 Cal.App.4th 1288, 1297 (*Save Our Neighborhood*) the Third District Court of Appeal held that this "threshold question"

(*id.* at p. 1301) is a question of law for the court. (*Id.* at p. 1297.) Subsequently, in *Mani Brothers Real Estate Group v. City of Los Angeles* (2007) 153 Cal.App.4th 1385 (*Mani Brothers*), Division Two of the Second District Court of Appeal strongly disagreed with this aspect of *Save Our Neighborhood,* particularly in cases in which there is a previously certified EIR: "Treating the issue as a question of law, as the court did in *Save Our Neighborhood,* inappropriately undermines the deference due the agency in administrative matters. That principle of deference is otherwise honored by the substantial evidence test's resolution of any ' "reasonable doubts in favor of the administrative finding and decision." ' [Citation.]" (*Mani Brothers, supra,* at p. 1401.)

In *Moss,* the appellate court noted these two opposing cases and did not take a direct stand on the issue, finding it unnecessary to do so under the circumstances of that case. (*Moss, supra,* 162 Cal.App.4th at pp. 1052–1053). However, the court did state in a footnote that it agreed with *Mani Brothers* "to the extent its discussion meant to suggest that a court should tread with extraordinary care before reversing a local agency's determination about the environmental impact of changes to a project." (*Moss, supra,* at p. 1052, fn. 6.) We agree with our colleagues in Division Three, and elect to evaluate the City's decision to proceed under section 21166 using the substantial evidence test.[8]

We also observe that the facts of this case are not analogous to the facts at issue in *Sierra Club.* In *Sierra Club,* the county had certified a program EIR for a resource management plan that regulated mining. The plan specified lands available for future mining and provided for preservation of identified agricultural lands. (*Sierra Club, supra,* 6 Cal.App.4th at pp. 1313–1314.) Years later, a mining company proposed to amend the EIR to designate for mining a large parcel that had been identified as agricultural in the EIR. (*Id.* at p. 1314.) We held that the deferential review provided by

[8] We note CEQA includes express legislative intent that the courts shall not interpret its provisions or the Guidelines "in a manner which imposes procedural or substantive requirements beyond those explicitly stated" therein. (Pub. Resources Code, § 21083.1.) And the Guidelines also make clear that it is CEQA policy that decisions be "informed and balanced. [CEQA] must not be subverted into an instrument for the oppression and delay of social, economic, or recreational development or advancement." (Guidelines, § 15003, subd. (j); *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 576.)

section 21166 did not apply in this context because the proposed project was not "either the same as or within the scope of" the program described in the EIR, which had expressly exempted the agricultural land from future mining. (*Sierra Club, supra,* at p. 1321.) In the present case, the most recent Project is the same as, or within the scope of, that which is described in the 1998 Program EIR. Unlike *Sierra Club* this case does not involve any site-specific plans or any other actual changes to a designated area.

D. *Substantial Evidence Supports the Decision to Proceed Under Section 21166*

Plaintiff relies on *Center for Sierra Nevada Conservation v. County of El Dorado* (2012) 202 Cal.App.4th 1156 (*County of El Dorado*) in arguing that the Project is not covered by the 1998 Program EIR. In *County of El Dorado,* the county's 2004 general plan and attendant EIR required on-site mitigation of the loss of oak woodland habitat, but anticipated the option of allowing developers to pay a conservation fee under an oak woodland management plan instead. (*Id.* at p. 1165.) Since neither the general plan nor the EIR specified the fee rate or how the collected fees should be used to mitigate the impact on oak woodlands, the appellate court held the county was required to prepare a tiered EIR before it adopted the oak woodland management plan and implemented the fee. (*Id.* at p. 1162.) Plaintiff argues that the Project, like the later approved oak woodland management plan in *County of El Dorado,* was *anticipated* by the 1998 Program EIR, but that the "high density residential units" approved as part of the Project were neither addressed, known, nor adequately covered. We disagree.

Here, the entire Project consists of (1) limited amendments to the Housing Element and the Land Use Element of the 2020 General Plan, and (2) relatively minor amendments to the City's zoning ordinances. In contrast to the facts in *County of El Dorado,* no aspect of the Project involves any approval (site specific or otherwise) of any actual development or other activity. To the extent the Project amends the City's 2020 General Plan, Guidelines section 15162 clearly applies and explicitly requires additional environmental review only for amendments that represent "[s]ubstantial changes . . . proposed in the project which will require *major revisions* of the previous EIR . . . ." (Guidelines, § 15162, subd. (a)(1), italics added.) As to the zoning amendments, those

amendments merely incorporate the density revisions already made to the Land Use Element and make other minor changes to comply with current state law. ~(1 AR 369, 33-48)~ Thus, these changes are "within the scope" of the 1998 Program EIR. (See Guidelines, § 15168, subd. (c)(2) ["If the agency finds that pursuant to [Guidelines] Section 15162, no new effects could occur or no new mitigation measures would be required, the agency can approve [a subsequent] activity as being within the scope of the project covered by the program EIR, and no new environmental document would be required."].)

Plaintiff primarily relies upon the fact that, while the City modified every other element of its general plan when it adopted the 2020 General Plan in 1998, it did not change the Housing Element at that time because the City had anticipated updating that element in 2001. Thus, plaintiff asserts that the Housing Element revisions were not a part of the 1998 environmental review and planning process. However, while the City did not change the Housing Element at the time it approved the 2020 General Plan, the 1998 Program EIR analyzed the effects of the then-existing Housing Element. For example, the project description chapter of the 1998 Program EIR summarized all of the general plan goals from each of the elements, including the Housing Element. Thus, the Housing Element was not excluded from consideration.[9] Further, as the City aptly notes, the environmental impacts associated with a community's housing element are necessarily addressed in the land use element. Under Government Code section 65583, the housing element consists of housing-related policies whose site-based objectives must be accounted for in the land use element.[10]

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[9] An addendum to the final version of the 1998 Program EIR observes: "It should be noted that the housing element update, due in 2001, will provide the City with an opportunity to *refine* the housing numbers based on a systematic review and consideration of the most current information available at that time . . . ." (Italics added.)

[10] Under Government Code section 65302, subdivision (a), a land use element must include "the proposed general distribution and general location and extent of the uses of the land for housing."

All of the alleged changes resulting from the Project that plaintiff complains will result in significant impacts—primarily the changes in density—are changes that the Project makes to the Land Use Element, not the Housing Element. There is no dispute that the 2020 General Plan as adopted in 1998 included a fully revised and updated Land Use Element, and there thus can be no dispute that this aspect of the Project clearly is a modification to the 2020 General Plan that was analyzed in the 1998 Program EIR and therefore is properly analyzed under Guidelines section 15162. Thus, substantial evidence supports the City's decision to proceed under Public Resources Code section 21166.

The same standard applies to the amendments to the zoning ordinance: "Once an agency has prepared an EIR, its decision not to prepare a supplemental or subsequent EIR for a later project is reviewed under the deferential substantial evidence standard. [Citations.] 'This rule applies to determinations regarding whether a new EIR is required following a program-EIR level of review.' [Citations.]" (*Citizens for Responsible Equitable Environmental Development v. City of San Diego Redevelopment Agency* (2005) 134 Cal.App.4th 598, 610, fn. omitted.) Accordingly, we conclude the City properly determined that sections 15162 and 15168, subdivision (c) of the Guidelines applied to its CEQA review of the Project.

II. *Plaintiff Has Failed to Demonstrate That the Decision to Refrain From Preparing an EIR Is Unsupported by Substantial Evidence*

We review the City's conclusion that the Project did not require any further environmental review to determine whether there is substantial evidence to support it. (E.g., *Citizens for a Megaplex-Free Alameda v. City of Alameda* (2007) 149 Cal.App.4th 91, 110 (*Citizens for a Megaplex-Free Alameda*) [stating that an agency's determination concerning whether to prepare EIR under Pub. Resources Code, § 21166 is reviewed for substantial evidence].) In reviewing an agency's decision not to require additional environmental review "pursuant to section 21166, courts 'are not reviewing the record to determine whether it demonstrates a possibility of environmental impact, but are viewing it in a light most favorable to the [agency's] decision in order to determine whether

substantial evidence supports the decision not to require additional review.' [Citation.]" (*Mani Brothers, supra,* 153 Cal.App.4th at p. 1398.)

As noted above, the Initial Study determined the Project would not create any new or more severe environmental impacts over those analyzed in the 1998 Program EIR. While the Project incrementally raises maximum densities in limited areas of the City, the Initial Study indicates that this will not increase total potential development above what was already analyzed in the 1998 Program EIR. This is largely because "(a) many project approvals have permitted less development than would have been allowed under the applicable 2020 General Plan designations, and (b) the [C]ity's rate of growth has been less than anticipated by the Plan's 1994 projections." The City resultingly concluded that the Project would not require any major revisions to the 1998 Program EIR, was "within the scope" of the 2020 General Plan, and required no further environmental review under CEQA. The trial court found this determination to be supported by substantial evidence.

As a threshold matter, the City contends that because plaintiff, in its opening brief on appeal, failed to fairly summarize the evidence in the administrative record supporting the City's findings, it has waived its right to challenge those findings. For example, the City states that "instead of addressing the City's actual analysis of the impacts of the density changes, [plaintiff] simply asserts that the City did not study it." The City also observes that plaintiff failed to fairly summarize the City Public Works Director's "detailed response" to Smith's traffic report, instead falsely asserting Smith's "expert" evidence is "undisputed."[11] As noted above, the trial court found plaintiff had waived its right to bring a substantial evidence challenge, though it nevertheless reached the merits of plaintiff's substantial evidence contentions.

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[11] "[S]ubstantial evidence includes fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact." (§ 21080, subd. (e)(1).) It includes the opinion of a city's "expert planning personnel" on matters within their expertise, even in the absence of "additional evidence or consultation." (*Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1380.)

Plaintiff concedes it was the City that provided detailed evidentiary arguments to the trial court, including citing to specific documents as substantial evidence supporting the City's findings. Plaintiff essentially admits it made no effort to carry its burden, stating: "[C]entral to [plaintiff's] argument, here and in the lower court, is that [the City] abused its discretion by failing to proceed in the manner required by law. [Citation.] That being a legal issue, *judicial review need not reach the issue of whether [the City's] factual findings are supported by 'substantial evidence.'* " (Italics added.) The obvious flaw with this argument is that we have ruled against plaintiff on the issue of whether the City erred in conducting its environmental review of the Project pursuant to section 21166. In effect, plaintiff thus concedes that, having lost its legal argument, there are no further issues for us to address.

As our colleagues in Division Five have explained, the petitioner bears the burden of demonstrating that the record does not contain sufficient evidence justifying a contested project approval. "To do so, an appellant must set forth in its brief all the material evidence on the point, not merely its own evidence. [Citation.] A failure to do so is deemed a concession that the evidence supports the findings." (*Citizens for a Megaplex-Free Alameda, supra,* 149 Cal.App.4th at pp. 112–113.) The court further stated, " '[I]f the appellants fail to present us with all the relevant evidence, then the appellants *cannot* carry their burden of showing the evidence was insufficient to support the agency's decision because support for that decision may lie in the evidence the appellants ignore.' [Citation.] This failure to present all relevant evidence on the point 'is fatal.' [Citation.] 'A reviewing court will not independently review the record to make up for appellant's failure to carry his burden.' [Citation.]" (*Id.* at p. 113.)

In its reply brief, plaintiff contends that it did cite to relevant evidence supporting the City's findings and claims it has not waived a substantial evidence challenge. Regardless, we agree with the trial court that substantial evidence supports the City's decision not to proceed with any additional environmental review. The 1998 Program EIR analyzed among other things the environmental impacts of land use designations pertaining to housing density, including impacts on traffic, air quality, biological

resources, population, public services, and other resources. As noted above, the general plan amendments and zoning changes here at issue increase the *minimum* density of development allowed in certain areas, and allow for 88 potential new units to certain designated locations. Residential density was addressed in the 1998 Program EIR, and the changes made by the Project in narrowing density ranges do not fall outside of the ranges therein discussed.

As to the additional 88 units, the 2020 General Plan anticipated development of slightly more than 300 residential units per year from 1994 to 2020. As of 2009, however, the City had issued about 700 fewer residential building permits for neighboring properties than what was anticipated. In the Initial Study, the City also noted that "many residential projects have developed at less than the maximum than would have been allowed under the applicable 2020 General Plan designations." In light of these facts, plaintiff does not satisfactorily explain how the Project's impacts are so different from, or more severe than, the impacts identified in the 1998 Program EIR so as to require further review. Its assertions that the Project will result in "unmitigated impacts" does not show that the analysis in the EIR is inadequate for the present project, but only hypothesizes that it must be.[12] Even if plaintiff has pointed to contradictory evidence, (Smith's traffic report, for example), it is not our task to weigh this evidence against the evidence relied on by the City. (See *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435.)

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[12] As a court of law, we lack the resources and the scientific expertise to evaluate the merits of plaintiff's assertions. Thus, we defer to the lead agency's findings in cases involving the substantial evidence standard of review. (See *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 393 ["A court's task is not to weigh conflicting evidence and determine who has the better argument when the dispute is whether adverse effects have been mitigated or could be better mitigated. We have neither the resources nor scientific expertise to engage in such analysis, even if the statutorily prescribed standard of review permitted us to do so. Our limited function is consistent with the principle that 'The purpose of CEQA is not to generate paper, but to compel government at all levels to make decisions with environmental consequences in mind. CEQA does not, indeed cannot, guarantee that these decisions will always be those which favor environmental considerations.' [Citation.]"].)

III. *Other Challenges*

Plaintiff claims the substantial evidence standard of review does not apply because the City "failed to comply with CEQA's informational disclosure requirements, such that the decision makers and public could not make a meaningful assessment of potentially significant environmental impacts." Plaintiff goes on to cite to various alleged deficiencies in the Initial Study that, in essence, amount to an attack on the City's decision to refrain from preparing a new EIR.[13] However, as previously discussed, the administrative record contains substantial evidence that the revised project will not cause any new significant impacts. In conclusion, we find no abuse of discretion in City's approval of the Project.[14]

DISPOSITION

The judgment is affirmed.

Dondero, J.

We concur:

Margulies, Acting P. J.

Banke, J.

[13] For example, plaintiff asserts that the City failed to disclose and analyze the Project's impacts and cumulative impacts to traffic and greenhouse gases, failed to incorporate mitigation measures, geographically segmented the Project's impacts, and failed to provide relevant information and analysis as to how the Project's impacts are offset by the overall reduction in residential housing.

[14] Plaintiff's remaining challenges relating to environmental setting and the statement of overriding considerations are procedurally barred for failure to raise them in the administrative proceedings before the City and because plaintiff did not raise them in the trial court.

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Supreme Court of California
Case No. S_____
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Case No. A135892)
(San Mateo County Superior Court No. CIV 508656)

PROOF OF SERVICE

I am a citizen of the United States, employed in the City and County of Sacramento. My business address is 455 Capitol Mall, Suite 210, Sacramento, California 95814. I am over the age of 18 years and not a party to the above-entitled action.

I am familiar with Remy Moose Manley, LLP's practice whereby the mail is sealed, given the appropriate postage and placed in a designated mail collection area. Each day's mail is collected and deposited in a U.S. mailbox after the close of each day's business.

On November 4, 2013, I served the following:

PETITION FOR REVIEW

☒ On the parties in this action by causing a true copy thereof to be placed in a sealed envelope with postage thereon fully prepaid in the designated area for outgoing mail addressed as follows; or

☒ On the parties in this action by causing a true copy thereof to be delivered via Federal Express to the following person(s) or their representative at the address(es) listed below; or

☐ On the parties in this action by causing a true copy thereof to be delivered by facsimile machine number (916) 443-9017 to the following person(s) or their representative at the address(es) and facsimile number(s) listed below; or

☐ On the parties in this action by causing a true copy thereof to be electronically delivered via the internet to the following person(s) or representative at the address(es) listed below:

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First Appellate District of California Division One 350 McAllister Street San Francisco, California 94102	**VIA REGULAR MAIL**
San Mateo County Superior Court Honorable Clifford Cretan 400 County Center Redwood City, California 94063	**VIA REGULAR MAIL**

I declare under penalty of perjury that the foregoing is true and correct and that this Proof of Service was executed this 4th day of November, 2013, at Sacramento, California.

Rachel N. Jackson