SUPREME COURT COPY

In the Supreme Court of the State of California

FRIENDS OF THE COLLEGE OF SAN MATEO GARDENS,

Plaintiff and Respondent,

v.

SAN MATEO COUNTY COMMUNITY COLLEGE DISTRICT et al.,

Defendants and Appellants.

Case No. S214061

SUPREME COURT
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First Appellate District, Div. 1, Case No. A135892
San Mateo County Superior Court, Case No. CIV508656
The Honorable Clifford Cretan, Judge

SUPPLEMENTAL BRIEF OF THE CALIFORNIA NATURAL RESOURCES AGENCY AND THE GOVERNOR'S OFFICE OF PLANNING AND RESEARCH

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TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

TABLE OF AUTHORITIES
(continued)

Page

STATUTES

TABLE OF AUTHORITIES
(continued)

Page

INTRODUCTION AND ISSUES PRESENTED

This Court posed the following questions to the California Natural Resources Agency (Resources) and the Governor's Office of Planning and Research (OPR) (collectively, Natural Resources Agency):

> (1) Under California Environmental Quality Act (CEQA) Guidelines section 15162, what standard of judicial review applies to an agency's determination that no environmental impact report (EIR) is required as a result of proposed modifications to a project that was initially approved by negative declaration or mitigated negative declaration? (See generally *Benton v. Board of Supervisors* (1991) 226 Cal.App.3d 1467, 1479-1482.)
>
> (2) Does CEQA Guidelines section 15162, as applied to projects initially approved by negative declaration or mitigated negative declaration rather than EIR, constitute a valid interpretation of the governing statute? (Compare *Bowman v. City of Petaluma* (1986) 185 Cal.App.3d 1065, 1073-1074 with *Benton* at pp. 1479-1480.)

Answering the Court's first question, the substantial evidence standard applies to judicial review of an agency's determination, under Guidelines section 15162,[1] that no EIR or subsequent EIR is required, regardless of whether the project was initially approved by EIR, negative declaration, or mitigated negative declaration. Answering the Court's second question, Guidelines section 15162 is a longstanding and correct interpretation of the governing statute, Public Resources Code section 21166,[2] and related provisions of CEQA.

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[1] The CEQA Guidelines are found in the California Code of Regulations, title 14, § 15000 et seq. This brief will refer to them as "Guidelines sections" (e.g., Guidelines section 15162).

[2] Unless otherwise stated, statutory references are to the California Public Resources Code (e.g., Section 21166).

Applying the substantial evidence standard is consistent with the language of Section 21166, the legislative purposes of CEQA, and decades of California jurisprudence. Guidelines section 15162 implements and carries out the intent of Section 21166 by incorporating limitations on subsequent environmental review of a project, not only when the initial environmental document relevant to that project is an EIR, but also when that document is a negative declaration or mitigated negative declaration. Both the substantial evidence standard and Guidelines section 15162 serve CEQA's policies of finality, certainty, efficiency, and early environmental review, while still maintaining and supporting CEQA's fundamental goal of "afford[ing] the fullest possible protection to the environment within the reasonable scope of the statutory language." (*Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 259.) This Court should uphold the tested and proven validity of Guidelines section 15162, and the judicially endorsed application of the substantial evidence standard of review to that Guideline.

STATUTORY AND REGULATORY BACKGROUND

I. CEQA'S USE OF "SUBSTANTIAL EVIDENCE" AND "FAIR ARGUMENT"

In reviewing a lead agency's compliance with CEQA, courts will apply one of two standards of review. These two standards derive from the two different prongs of Sections 21168 and 21168.5, which provide that a court may only overturn an agency's decision if: (1) the agency has not proceeded in the manner required by law, or (2) the agency's determination is not supported by substantial evidence in the record. (See also Code Civ. Proc., § 1094.5, subd. (b) [required to be applied pursuant to Section 21168, and providing that "abuse of discretion is established if the respondent has not proceeded in the manner required by law . . . ."].) The former is a

question of law on which courts owe agencies no deference. (*Ballona Wetlands Land Trust v. City of Los Angeles* (2011) 201 Cal.App.4th 455, 468.) In reviewing an agency's factual findings and conclusions under the latter standard, however, "'the reviewing court must resolve reasonable doubts in favor of the administrative finding and decision.'" (*Laurel Heights Improvement Assn. v. Regents of Univ. of California* (1988) 47 Cal.3d 376, 393 [hereafter *Laurel Heights I*], quoting *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 514.)

Courts apply the first standard, asking whether the agency has proceeded in the manner required by law, when reviewing an agency's initial determination under Section 21151 as to whether an EIR must be prepared. (*Friends of "B" Street v. City of Hayward* (1980) 106 Cal.App.3d 988, 1002.) Section 21151 "commands that an EIR must be prepared whenever a project '*may* have a significant effect on the environment.'" (*Laurel Heights Improvement Assn. v. Regents of Univ. of California* (1993) 6 Cal.4th 1112, 1134-1135 [hereafter *Laurel Heights II*].) Because Section 21151 requires preparation of an EIR whenever a project "may" have a significant effect, a lead agency may not weigh the evidence when making the preliminary determination as to whether an EIR is required. Instead, the lead agency, and any reviewing court, ask only whether any substantial evidence in the record supports a "fair argument" that the project may have significant effects, thus requiring an EIR. (*Laurel Heights II*, *supra*, 6 Cal.4th at pp. 1134-1135.) Because the existence of evidence in the record supporting a fair argument – regardless of contrary evidence – presents a legal question, courts do not defer to an agency's determination as to whether such evidence exists.

Because that "fair argument" standard of judicial review derives solely from Section 21151, it has been applied *only* to the initial determination of a project's environmental effects, which in turn governs

whether an environmental document is required and, if one is required, whether to prepare an EIR or a negative declaration. (*Laurel Heights II, supra*, at p. 1135; see also *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1115-1116.)[3] This Court has declined to extend the "fair argument" standard beyond the context of that initial environmental review. (*Laurel Heights II, supra*, at p. 1135.) In all other contexts, the substantial evidence standard of judicial review applies and resolves doubts in favor of the agency's decision. (*Id.* at pp. 1134-1135; *Bowman, supra*, 185 Cal.App.3d at p. 1073.)

Judicial review of agency determinations under Section 21166 is one context in which courts apply the substantial evidence standard and resolve doubts in favor of the agency's decision. (*Bowman, supra*, 185 Cal.App.3d at pp. 1073-1075.) As discussed below, Section 21166 differs from Section 21151 in that, instead of *requiring* an EIR in certain circumstances, Section 21166 *prohibits* preparation of a subsequent EIR unless the lead agency

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[3] In *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1115-1116, this Court applied the "fair argument" standard of judicial review to a determination, under Guidelines section 15300.2, subdivision (c), that a project is categorically exempt from CEQA and that there is no "reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances." That determination, like a determination that no EIR is required under Section 21151, is part of a project's initial environmental review. This Court reasoned, in part, that "reasonable possibility" closely resembles the language in Section 21151 that an EIR must be prepared whenever a project "may" have a significant environmental effect. This Court applied the substantial evidence standard, however, to the threshold question of whether unusual circumstances existed. (*Berkeley Hillside Preservation, supra*, at p. 1115.) The "fair argument" standard has also been applied to the determination of whether additional environmental review is required under the "tiering" provisions of Section 21094, but, again, only because that section uses the phrase "may cause significant effects on the environment." (*Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307, 1319.)

makes certain factual determinations about project modifications. The lead agency does not evaluate whether any substantial evidence in the record supports a fair argument that a condition exists requiring a subsequent EIR, but instead makes a judgment call that must be supported by substantial evidence in the record. Reviewing courts, in turn, ask only whether the agency's judgment call was so supported.[4]

II. CURRENT SECTION 21166 AND GUIDELINES SECTION 15162

Section 21166, as amended in 1977, provides that, "[w]hen 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 of three events occurs. Those events include "substantial changes" to the project or its circumstances that "will require major revisions of the [EIR]," and the availability of "new information." (Pub. Resources Code, § 21166, subds. (a)-(c).) Section 21166 does not provide criteria for identifying "substantial changes," or for determining what quality of "new information" requires preparation of a subsequent EIR.

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[4] Similarly, the determination that an activity is a modification to a previously approved project, or is instead a new project, is a factual determination that should be upheld if supported by substantial evidence in the record. The decision in *Sierra Club v. County of Sonoma*, *supra*, 6 Cal.App.4th at pp. 1320-1321, illustrates this principle. In that case, the county prepared an EIR on a plan that set aside an area as an agricultural preserve. The county later amended the plan to allow mining in that preserved area, but failed to conduct additional environmental review. The county argued that Section 21166 applied, prohibiting a subsequent EIR, because the amendment to allow mining was not a separate project, but rather a minor modification of the existing project. The court disagreed, finding that "the evidence does not support [the county's] determination that [the amendment to allow mining] was either the same as or within the scope of the project, program, or plan described in the program EIR." (*Ibid.*)

Guidelines section 15162, implementing Section 21166, fills in those gaps, and properly provides guidance regardless of whether the initial environmental document is an EIR or a negative declaration. Guidelines section 15162, subdivision (a), states that, "[w]hen an EIR has been certified or a negative declaration adopted for a project, no subsequent EIR shall be prepared for that project unless the lead agency determines, on the basis of substantial evidence in the light of the whole record," that one or more conditions has occurred. Consistent with Section 21166, those conditions include "substantial changes" in the project or its circumstances, or "new information of substantial importance." (Cal. Code Regs., tit. 14, § 15162, subd. (a)(1-3).) Guidelines section 15162 also provides guidance as to what an agency should do if it determines that a subsequent EIR is not necessary, and what is required of responsible agencies faced with substantial project changes or new information after the lead agency's role in project approval is complete. (Cal. Code Regs., tit. 14, § 15162, subds. (b-c).)

III. ADOPTION AND AMENDMENT OF GUIDELINES SECTION 15162

Section 21083 delegates to OPR the responsibility to "prepare and develop proposed guidelines for the implementation of [CEQA] by public agencies." (Pub. Resources Code, § 21083, subd. (a).) OPR transmits proposed guidelines to the Secretary of the Resources Agency (now the Natural Resources Agency), who certifies and adopts the proposed guidelines in compliance with the Administrative Procedure Act (APA) (Gov. Code, § 11340 et seq.). (Pub. Resources Code, § 21083, subd. (d).) "The APA subjects potential agency interpretations [of governing statutes] to procedural safeguards that foster accuracy and reliability," and "[t]he Guidelines are a product of this process, promulgated in accordance with these important safeguards." (*Cal. Bldg. Industry Assn. v. Bay Area Air*

Quality Management Dist. (2015) 62 Cal.4th 369, 390 ("*CBIA*").) In delegating to the Natural Resources Agency the responsibility to promulgate the Guidelines, Section 21083 "recognizes the primacy of the [Natural Resources Agency]" to "certify and adopt the Guidelines that bind public agencies as they navigate the often technical and complex waters of CEQA." (*CBIA*, *supra*, 62 Cal.4th at p. 390.)

The Guideline that eventually became section 15162 was originally adopted in 1973, as Guidelines section 15067. (Natural Resources Agency's Request for Judicial Notice (RJN), Exh. 3.) It implemented Section 21166, enacted in 1972. (RJN, Exh. 2.) Section 21083 originally authorized the Guidelines to "include objectives and criteria for . . . the preparation of environmental impact reports . . . ." (RJN, Exh. 1.) The 1973 version of Section 21083 did not discuss negative declarations. As a result, the original version of Guidelines section 15067 established two conditions for the preparation of an "additional EIR" after an EIR had been "prepared,"[5] but did not reference substantial project changes following adoption of a negative declaration, because Section 21083 did not authorize the Guidelines to provide criteria for negative declarations until 1976 . (RJN, Exh. 3.)

The Legislature amended Section 21083 in 1976, authorizing the Guidelines to "include objectives and criteria for . . . the preparation of environmental impact reports and negative declarations . . . ." (RJN, Exh. 4.) In 1977, the Legislature amended Section 21166 to add a third condition triggering the requirement of a subsequent or supplemental EIR. (RJN, Exh. 5.) Also in 1977, the Legislature enacted Section 21080.1,

[5] Guidelines section 15162 now applies after an EIR has been "certified," or a negative declaration has been "adopted."

affording negative declarations the same degree of finality as EIRs. (RJN, Exh. 6.)

The Natural Resources Agency amended Guidelines section 15067 in 1978 to implement the Legislature's inclusion of negative declarations into Section 21083 and to include the third condition added to Section 21166 in 1977. As amended, Guidelines section 15067 provided three conditions under which an "additional EIR" (now "subsequent EIR") would need to be prepared following the preparation of an EIR or a negative declaration. (RJN, Exh. 7.) Substantially that same regulatory interpretation of Sections 21083 and 21166, first embodied in Guidelines section 15162 and its predecessor, Guidelines section 15067, has remained in place for the last 38 years. (RJN, Exh. 8.)

In 1994, the Natural Resources Agency further amended Guidelines section 15162 without changing its application to negative declarations. In that amendment, the Natural Resources Agency added language indicating that a lead agency's determination that a subsequent EIR is required must be based on "substantial evidence in the light of the whole record." (RJN, Exh. 10.) The rulemaking history of that amendment indicates that the Natural Resources Agency intended, by that language, to confirm that courts should apply the substantial evidence standard when reviewing agency determinations as to whether a subsequent EIR must be prepared. In its Final Statement of Reasons for the amendment, the Natural Resources Agency cited *Bowman v. City of Petaluma*, *supra*, 185 Cal.App.3d at pp. 1070-1074, and *Benton v. Board of Supervisors*, *supra*, 226 Cal.App.3d at pp. 1479-1480, noting that the amendment "reflects recent case law" and "applies the substantial evidence standard of review to the decision whether to prepare a subsequent EIR." (RJN, Exh. 12 at pp. 13-14.) The official note to Guidelines section 15162 likewise cites *Bowman* and *Benton*, and, in Guidelines section 15064, subdivision (f)(7), the Natural Resources

Agency further clarified that, "[u]nder case law, the fair argument standard does not apply to determinations of significance [of environmental effects] pursuant to sections 15162, 15163, and 15164."

ANALYSIS

I. ANSWERING THE COURT'S FIRST QUESTION: THE SUBSTANTIAL EVIDENCE STANDARD OF JUDICIAL REVIEW APPLIES TO AGENCY DETERMINATIONS UNDER GUIDELINES SECTION 15162

The substantial evidence standard of judicial review – specifically, the substantial evidence prong of the "abuse of discretion" standard required by Sections 21168 and 21168.5 – is the appropriate standard for a court's review of agency determinations that no subsequent EIR is required under Guidelines section 15162. The substantial evidence standard applies regardless of whether the original environmental document was an EIR or a negative declaration. The "fair argument" test, which derives from Section 21151 and applies only to the initial evaluation of a project's environmental effects,[6] does not govern judicial review of an agency's decision about whether additional environmental review is required under Section 21166 or Guidelines section 15162.

These conclusions reflect decades of consistent and unambiguous California jurisprudence addressing review of an agency's determination concerning additional CEQA documentation. Moreover, the courts have reached the correct decision. Application of the substantial evidence standard to determinations under Guidelines section 15162 is supported by the legislative purposes underlying CEQA and by harmonizing Guidelines

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[6] *Berkeley Hillside Preservation v. City of Berkeley*, *supra*, 60 Cal.4th at pp. 1115-1116; *Laurel Heights II*, *supra*, 6 Cal.4th at p. 1135.

section 15162 with "the whole system of law of which it is a part." (*Moore v. Panish* (1982) 32 Cal.3d 535, 541.)

A. Decades of California Appellate Jurisprudence Support Application of the Substantial Evidence Standard

Thirty years ago, the Court of Appeal, First Appellate District held that decisions under Section 21166 (whether to prepare a subsequent EIR) are judicially reviewed by asking "whether the record as a whole contains substantial evidence to support" the agency's determination. (*Bowman v. City of Petaluma*, *supra*, 185 Cal.App.3d at p. 1075.) If the record does contain such evidence, the agency's determination must stand. (*Id.* at p. 1072; Cal. Code Regs., tit. 14, § 15384, subd. (a).) The court stated that the "fair argument" test, "drawn from section 21151," answers the question of whether the initial environmental review may proceed by negative declaration or, instead, requires an EIR. (*Bowman*, *supra*, at p. 1073.) Conversely, the court reasoned, "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." (*Id.* at p. 1074.) Due to these different statutory purposes, and the lack of any authority equating Sections 21151 and 21166, the court applied the substantial evidence standard, not the "fair argument" standard, to the agency's determination that no subsequent EIR was required.

In *Bowman*, the original environmental document was an EIR. (*Bowman*, *supra*, 185 Cal.App.3d at p. 1070.) In 1991, the First Appellate District held that the substantial evidence standard of judicial review also applies to decisions under Guidelines section 15162 when the original environmental document is a negative declaration. (*Benton v. Board of Supervisors* (1991) 226 Cal.App.3d 1467, 1481-1482.) The *Benton* court reasoned that:

> The application of [Guidelines section] 15162 when a project proponent seeks to modify a project that originally received a negative declaration parallels the application of section 21166 and [Guidelines section] 15162 when a project proponent seeks to modify a project on which an EIR has already been certified. Therefore, the same standard of review should apply in both situations.

(*Id.* at p. 1482.)

In the context of evaluating the validity of Guidelines section 15162, rather than the standard of judicial review, the *Benton* court also noted:

> If a limited review of a modified project is proper when the initial environmental document was an EIR, it stands to reason that no greater review should be required of a project that initially raised so few environmental questions that an EIR was *not* required, but a negative declaration was found to satisfy the environmental review requirements of CEQA. To interpret CEQA as requiring a greater level of review for a modification of a project on which a negative declaration has been adopted and a lesser degree of review of a modified project on which an EIR was initially required would be absurd.

(*Benton, supra*, 226 Cal.App.3d at p. 1480.) The court's reasoning applies equally well to the standard of judicial review under Guidelines section 15162. No greater standard of review – for example, the "fair argument" standard – should be required of a project for which a negative declaration initially satisfied CEQA than is required of a project for which an EIR was prepared. This is discussed in greater detail below, at Section I.C., pp. 14-18.

In *Snarled Traffic Obstructs Progress (STOP) v. City and County of San Francisco* (1999) 74 Cal.App.4th 793, the First Appellate District reaffirmed *Bowman* and *Benton*. The court was, again, faced with the argument that project modifications, following a negative declaration, required a subsequent EIR under Guidelines section 15162. (*STOP, supra*, 74 Cal.App.4th at pp. 795-796.) Supporting its application of the

substantial evidence standard of judicial review, the court wrote that, "[i]n an obvious sense, an EIR and a negative declaration are the two sides of the same coin, the either/or options available to a public agency considering a project." (*Id.* at p. 797.) The court also invoked CEQA's "concerns for finality and presumptive correctness" protecting both EIRs and negative declarations. (*Ibid.*, citing Section 21167.2 and *Laurel Heights II*, *supra*, 6 Cal.4th at p. 1130.)

The *STOP* court addressed *Bowman* and *Benton* by noting that, regardless of whether the initial environmental document was an EIR or a negative declaration, "the project had already received 'full,' 'in-depth,' and 'final CEQA review'" by the agency. (*STOP*, *supra*, 74 Cal.App.4th at p. 799; see also *STOP* at p. 800 [citing *Bowman* while stating: "*Benton* gives us authority to treat the . . . agency actions as merely the approval of a modified version of the project, a project that had already undergone in-depth environmental review."].) The court held that the "fair argument" standard of judicial review did not apply, because "the time for challenging the . . . adoption of the negative declaration has long since passed." (*Id.* at p. 800.) Instead, the court reviewed whether substantial evidence supported the municipal agency's "determination that the proposed modifications for the project did not require either changes in the 1988 negative declaration or preparation of an EIR," resolving all reasonable doubts in favor of that determination. (*Id.* at p. 798.)

More recently, in *Abatti v. Imperial Irrigation Dist.* (2012) 205 Cal.App.4th 650, the Court of Appeal, Fourth Appellate District, Division One applied the substantial evidence standard when reviewing a determination, made under Guidelines section 15162, that no subsequent EIR was required following a final negative declaration. (*Id.* at pp. 653, 675, 676-677, 682.) The *Abatti* court extensively analyzed and approved *Benton*'s finding that Guidelines section 15162 is a valid implementation of

Section 21166. (*Id.* at pp. 669-674.) The court apparently accepted as settled that, where the initial environmental document is a negative declaration, the substantial evidence standard governs judicial review of agency determinations under Guidelines section 15162. (*Id.* at pp. 675, 676-677, 682.)

B. The Legislature Has Acquiesced in the Longstanding California Appellate Jurisprudence and Guidelines

In the 38 years since the predecessor to Guidelines section 15162 incorporated negative declarations, no published decision has held that any standard, other than the substantial evidence standard, governs judicial review of agency decisions not to require a subsequent EIR. "The Legislature is deemed to be aware of existing laws and judicial decisions in effect at the time legislation is enacted and to have enacted and amended statutes 'in the light of such decisions as have a direct bearing upon them.'" (*People v. Overstreet* (1986) 42 Cal.3d 891, 897, quoting *Estate of McDill* (1975) 14 Cal.3d 831, 839.) Although Section 21166 has not been amended since 1977, the Legislature has amended many other CEQA statutes in the 25 years since *Benton*.

Most notably, since *Benton*, the Legislature amended Section 21083 in 2002 and 2004, and Section 21080.1 in 1993 and 1994. (RJN, Exh. 9.)[7] At any time in those 25 years post-*Benton*, the Legislature could have disapproved *Benton* and its progeny by expressly providing a different standard of review when enacting multiple amendments to CEQA. For example, in Sections 21083.01 and 21083.09, the Legislature exercised its ability to require changes to the Guidelines where it deems such changes

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[7] As noted above at pp. 6-7, Section 21080.1 provides for the finality of both EIRs and negative declarations, and Section 21083 authorizes the Guidelines.

necessary. That the Legislature did not mandate changes to the standard of judicial review applied by *Benton* shows that the substantial evidence standard in Guidelines section 15162 is reflective of, and carries out, the Legislature's intent. This Court should not upset what the Legislature has chosen to leave alone, overturning 25 years of judicial and regulatory certainty by holding that, under Guidelines section 15162, the judicial standard of review differs depending on whether the initial environmental document was an EIR or a negative declaration.

C. The Legislative Purposes Behind CEQA, and Harmonizing the Relevant Statutes and Guidelines, Support the Substantial Evidence Standard

The "fundamental rule" of construing legislation "is that the court should ascertain the legislative intent so as to effectuate the purpose of the law." (*Moore v. Panish*, *supra*, 32 Cal.3d at p. 541.) "To this end, every statute should be construed with reference to the whole system of law of which it is a part, so that all may be harmonized and have effect." (*Ibid.*) Evaluating Section 21166 and Guidelines section 15162 within the overall context of CEQA supports the longstanding judicial precedent applying the substantial evidence standard, not the "fair argument" standard, when reviewing agency determinations made pursuant to those sections.

It is well-settled that "[t]he foremost principle under CEQA is that the Legislature intended the act 'to be interpreted in such a manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.'" (*Laurel Heights I*, *supra*, 47 Cal.3d at p. 390, quoting *Friends of Mammoth v. Board of Supervisors*, *supra*, 8 Cal.3d at p. 259.) But, after a final environmental document has been certified or adopted, the question shifts from the nature of the initial review under Section 21151 to whether further review should be required under Section 21166; at that point, this Court has found that "the interests of finality are

favored over the policy of encouraging public comment." (*Laurel Heights II*, *supra*, 6 Cal.4th at p. 1130; see also *STOP*, *supra*, 74 Cal.App.4th at p. 797.) That interpretation simply follows the statutory language and applies whether the final environmental document was an EIR or a negative declaration.

Section 21080.1, subdivision (a), provides that an agency's determination whether to require an EIR or a negative declaration "shall be final and conclusive on all persons, including responsible agencies," unless an action challenging the environmental document is timely filed under Section 21167. Thus, Section 21080.1 accords negative declarations the same degree of finality as EIRs. This makes sense because, as the First Appellate District noted, negative declarations and EIRs are "two sides of the same coin," both resulting from the same initial project review by the lead agency required by Section 21151 and its "fair argument" test. (*STOP*, *supra*, 74 Cal.App.4th at p. 797.)[8]

CEQA's presumption of finality is grounded in the fact that all projects must necessarily receive this same threshold analysis; it is not based on the length, nor the volume, of a particular environmental review document. Rather, that presumption attaches because the public, as well as responsible and trustee agencies, have had the opportunity to review the evidence before the lead agency and to offer additional or contrary

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[8] Section 21080.1, and the final amendment to Section 21166, were enacted in 1977 as part of the same bill that enacted the Permit Streamlining Act, Government Code section 65920 et seq. (RJN, Exh. 11.) One "statewide need" expressed in the Permit Streamlining Act is to expedite decisions on approval of development projects. (Gov. Code, § 65921.) That this statewide need was identified in the same bill that amended Section 21166 and enacted Section 21080.1 further supports the conclusion that courts should not interpret Section 21166 in a way that makes the project approval process more cumbersome.

evidence. The lead agency's conclusions flowing from that evidence, moreover, could have been tested in court. These opportunities for review and challenge exist for both EIRs and negative declarations. Once the agency's analysis is complete, and it has made its determination about what type of document is required, Section 21080.1 renders that determination final unless timely challenged under Section 21167, regardless of whether the resulting environmental document is an EIR, a negative declaration, or a mitigated negative declaration.

Affording finality to negative declarations that have not been timely challenged as required by Section 21167 also serves the Legislature's stated goal of efficiency in the environmental review process. Project financing is often tied to the finality of project approvals, and delays can result in significant costs and can interfere with project objectives. Recognizing these practicalities, Section 21003, subdivision (f), declares the State's policy that:

> All persons and public agencies involved in the environmental review process be responsible for carrying out the process in the most efficient, expeditious manner in order to conserve the available financial, governmental, physical, and social resources with the objective that those resources may be better applied toward the mitigation of actual significant effects on the environment.

Similarly, in Section 21003.1, subdivision (a), the Legislature declared the State's policy that:

> Comments from the public and public agencies on the environmental effects of a project shall be made to lead agencies as soon as possible in the review of environmental documents, including, but not limited to, draft environmental impact reports and negative declarations, in order to allow the lead agencies to identify, at the earliest possible time in the environmental review process, potential significant effects of a project, alternatives, and mitigation measures which would substantially reduce the effects.

Allowing "final" negative declarations to be reopened, and subsequent EIRs required, based solely on a "fair argument" that project modifications may have new significant environmental effects, would not only extend the "fair argument" standard beyond Section 21151, but would also defeat the policies of finality and efficiency embodied in Sections 21080.1, 21003, and 21003.1.[9]

Those policies of finality and efficiency are reflected in the language of Guidelines sections 15162 and 15164. Guidelines section 15162, subdivision (a), provides that "no subsequent EIR shall be prepared for [a] project unless the lead agency determines, on the basis of substantial evidence in the light of the whole record," that one or more of the enumerated circumstances exists. Guidelines section 15164, subdivision (e), provides:

> A brief explanation of the decision not to prepare a subsequent EIR pursuant to Section 15162 should be included in an addendum to an EIR, the lead agency's required findings on the project, or elsewhere in the record. The explanation must be supported by substantial evidence.

Both sections require that the *agency's determination* be supported by substantial evidence; they do not ask whether the record includes substantial evidence supporting the possibility that one of section 15162's conditions exists.[10] Therefore, Guidelines section 15384, defining

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[9] Additionally, Section 21083.1 states the Legislature's intent that courts not interpret CEQA or the Guidelines "in a manner which imposes procedural or substantive requirements beyond those explicitly stated" therein. Extending the "fair argument" standard of judicial review to Guidelines section 15162 would, contrary to Section 21083.1, impose a requirement beyond those explicitly stated in CEQA and the Guidelines.

[10] Likewise, Guidelines section 15064, subdivision (f)(7) explicitly provides that "the fair argument standard does not apply to determinations of significance [of environmental effects] pursuant to [Guidelines] section[] (continued...)

"substantial evidence," requires that an agency's decision under section 15162 be upheld unless the record lacks "enough relevant information and reasonable inferences from this information that a fair argument can be made to support" the decision, "even though other conclusions might also be reached." (Cal. Code Regs., tit. 14, § 15384, subd. (a).)[11]

Both the overarching purpose of CEQA and the applicable statutes, regulations, and case law establish that the substantial evidence standard applies to judicial review of an agency's determination, under Guidelines section 15162, that no subsequent EIR is required as a result of proposed modifications to a project that was initially approved by negative declaration or mitigated negative declaration.

II. ANSWERING THE COURT'S SECOND QUESTION: GUIDELINES SECTION 15162 IS A VALID INTERPRETATION OF PUBLIC RESOURCES CODE SECTION 21166, AND A PROPER EXERCISE OF THE NATURAL RESOURCES AGENCY'S RULEMAKING AUTHORITY

Guidelines section 15162, as applied to projects initially approved after a negative declaration or mitigated negative declaration rather than an EIR, constitutes a valid interpretation of Section 21166 and related sections of CEQA.

(...continued)
15162," but that such determinations "shall be based on substantial evidence in the record of the lead agency."

[11] As noted above at pp. 8-9, the rulemaking history of Guidelines section 15162 also confirms that the Natural Resources Agency intended courts to apply the substantial evidence standard.

A. The Guidelines, Reflecting the Natural Resources Agency's Interpretation of CEQA, Are Given Great Weight, and Guidelines Section 15162 Should Be Upheld as Reasonable and Valid

"A regulation will not be invalidated unless it is arbitrary, capricious or patently unreasonable." (*Benton*, *supra*, 226 Cal.App.3d at p. 1479.) Courts must also afford the Natural Resources Agency's interpretation of CEQA, embodied in the Guidelines, "great weight . . . unless a provision is clearly unauthorized or erroneous under the statute." (*CBIA v. Bay Area Air Quality Management Dist.*, *supra*, 62 Cal.4th at p. 381.) This Court recently acknowledged the Natural Resources Agency's "longstanding statutory role as the agency with primary responsibility for statewide implementation of CEQA," observing that the Natural Resources Agency "is precisely the kind of agency that accumulates specialized knowledge of such an intricate statute and the trade-offs involved in its implementation." (*CBIA*, *supra*, 62 Cal.4th at p. 390.) In according the Guidelines "great weight," this Court also emphasized that "[t]he Guidelines are a product of [the APA] process, promulgated in accordance with [the APA's] important safeguards." (*Id.* at pp. 381, 390)

Most regulations clarify or make more specific the terms of a statute. CEQA goes further, expressly providing a broader role for the Guidelines. This Court explained, in *CBIA*:

> Reflecting the need for further elaboration of [CEQA's] requirements in implementation, CEQA entrusts to [OPR] the responsibility of drafting the [CEQA] Guidelines. . . . Section 21083 provides the Guidelines "shall include objectives and criteria for the orderly evaluation of projects and the preparation of [EIRs] and negative declarations in a manner consistent with [CEQA]." (§ 21083, subd. (a).) The Guidelines therefore serve to make the CEQA process tractable for those who must administer it, those who must comply with it, and ultimately, those members of the public who must live with its consequences.

* * *

> Through these Guidelines, the Resources Agency gives public agencies a more concrete indication of how to comply with CEQA . . . . The Guidelines also prove consequential given that under section 21082, CEQA requires agencies subject to its provisions . . . to adopt "objectives, criteria and procedures" for evaluating projects and preparing environmental documents. . . . The Guidelines, in effect, enable the Resources Agency to promote consistency in the evaluation process that constitutes the core of CEQA. And because these Guidelines allow the Resources Agency to affect how agencies comply with CEQA, they are central to the statutory scheme.

(*CBIA*, *supra*, 62 Cal.4th at pp. 383-385.) Thus, CEQA contemplates that the Guidelines will fill gaps left in the terms of the statutes to guide agencies in a variety of contexts.

Section 21166 does not specifically address what agencies should do when the initial CEQA document was a negative declaration. Because modifications of projects and project circumstances can happen regardless of the underlying document, Guidelines section 15162 appropriately fills the gap left in Section 21166. Section 21083 authorizes such gap filling "in a manner consistent with [CEQA]." To that end, Guidelines section 15162 applies the same policies protecting finality and efficiency, and limiting subsequent EIRs, regardless of whether the initial CEQA document was an EIR or a negative declaration. Guidelines section 15162 is not arbitrary, capricious, or patently unreasonable, nor is it clearly unauthorized or erroneous. Therefore, it should be afforded great weight, and upheld in its entirety.

B. Previous Judicial Analyses Correctly Validated Guidelines Section 15162

No published decision has invalidated Guidelines section 15162. To the contrary, the First Appellate District and the Fourth Appellate District, in *Benton* and *Abatti*, correctly concluded that Guidelines section 15162

validly incorporates instructions for subsequent environmental review where the initial environmental document was a negative declaration. (*Abatti v. Imperial Irr. Dist.*, *supra*, 205 Cal.App.4th at pp. 668-674; *Benton*, *supra*, 226 Cal.App.3d at pp. 1477-1481.)

The *Benton* court concluded that Guidelines section 15162 "promotes the purposes of section 21166, rather than violating the intent of the statute." (*Benton*, *supra*, at p. 1481.) The court reasoned that Guidelines section 15162 furthers the policies of efficiency and early environmental review, expressed in Section 21003.1, by limiting the re-review of an entire project when modifications to the project must be approved after a negative declaration has been finalized. (*Id.* at p. 1480.) As noted above, the *Benton* court also reasoned that "requiring a greater level of review for a modification of a project on which a negative declaration has been adopted and a lesser degree of review of a modified project on which an EIR was initially required," as may be the case if Guidelines section 15162 only limited subsequent review following preparation of an EIR, "would be absurd." (*Ibid.*)

The Fourth Appellate District, in *Abatti*, adopted the *Benton* court's reasoning and holding. (*Abatti*, *supra*, 205 Cal.App.4th at pp. 669-674.) The court was particularly persuaded by "the central premise of *Benton* 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.) The court also emphasized that the Guidelines were adopted pursuant to Section 21083, including "'objectives and criteria for . . . the preparation of environmental impact reports and negative declarations *in a manner consistent with this division*.'" (*Abatti*, *supra*, at p. 672 [quoting Section 21083].) The court

properly found that Guidelines section 15162 is consistent with Section 21166.

C. Construing Section 21166 and Guidelines Section 15162 Within the Context of Related CEQA Statutes Further Demonstrates the Validity of Guidelines Section 15162

As previously noted, "every statute should be construed with reference to the whole system of law of which it is a part." (*Moore v. Panish*, *supra*, 32 Cal.3d at p. 541.) A further review of CEQA statutes related to Section 21166 and Guidelines section 15162 augments and supports the analyses and holdings of *Benton* and *Abatti*. Sections 21083, 21080.1, 21003, and 21003.1 are particularly relevant, for reasons largely already discussed above regarding the appropriate standard of review under Guidelines section 15162.

Section 21083 was amended in 1976 to authorize the Guidelines to include "objectives and criteria" for both EIRs *and* negative declarations. (RJN, Exh. 4.) Similarly, when Section 21080.1 was enacted in 1977, it accorded the same finality to negative declarations as to EIRs, and it still does. (RJN, Exh. 6.) According equal finality to those different environmental documents serves the policies of efficient and early environmental review embodied in Sections 21003 and 21003.1. (See also *Benton*, *supra*, 226 Cal.App.3d at p. 1480 [noting that Guidelines section 15162 furthers the purposes of Section 21003.1].) Based on these statutes, the Natural Resources Agency justifiably carried out the charge in Section 21166, and, more generally, its obligation under Section 21083 to prepare guidelines to "implement[]" CEQA, by incorporating limitations on subsequent environmental review, not just when the initial environmental document is an EIR, but also when that document is a negative declaration or mitigated negative declaration.

D. The Legislature's Longstanding Awareness of Guidelines Section 15162 Supports the Guideline's Validity

As previously noted, "[t]he Legislature is deemed to be aware of existing laws and judicial decisions in effect at the time legislation is enacted and to have amended statutes 'in the light of such decisions as have a direct bearing on them.'" (*People v. Overstreet*, *supra*, 42 Cal.3d at p. 897, quoting *Estate of McDill*, *supra*, 14 Cal.3d at p. 839.) Likewise, "a presumption that the Legislature is aware of an administrative construction of a statute should be applied if the agency's interpretation of the statutory provisions is of such longstanding duration that the Legislature may be presumed to know of it." (*Moore v. Cal. State Bd. of Accountancy* (1992) 2 Cal.4th 999, 1017-1018.) These principles support the validity of Guidelines section 15162.

The Legislature should be deemed aware of both the longstanding administrative interpretation embodied by Guidelines section 15162, and the longstanding judicial validation of section 15162 embodied by *Benton* and *Abatti*. As noted above, the Legislature has amended CEQA – and, specifically, Sections 21083 and 21080.1 – multiple times in the 38 years since the predecessor to Guidelines section 15162 incorporated negative declarations, and in the 25 years since *Benton* first judicially validated that incorporation.[12] Nonetheless, the Legislature has never enacted any change that would invalidate the longstanding authorities embodied in Guidelines section 15162, *Benton*, and *Abatti*. Given the Legislature's apparent

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[12] Since 1978, the Legislature has amended Section 21083 in 1981, 2002, and 2004, and has amended Section 21080.1 in 1993 and 1994. (RJN, Exh. 9.) The Legislature has not amended Section 21166 since 1977. Also, as discussed above at p. 13, Sections 21083.01 and 21083.09 are examples of the Legislature exercising its ability to require changes to the Guidelines where it deems such changes necessary.

acquiescence, this Court should uphold the last 38 years of regulatory certainty, relied upon by countless agencies, project applicants, and the public over those many years. Guidelines section 15162 validly interprets, implements, and serves the purposes of Section 21166.

III. THE SUBSTANTIAL EVIDENCE STANDARD OF JUDICIAL REVIEW ALSO APPLIES TO AN AGENCY'S DETERMINATION THAT AN ACTIVITY IS A MODIFICATION TO A PREVIOUSLY APPROVED PROJECT, AND THAT THE LIMITATIONS IN SECTION 21166 APPLY

The parties argued a related point at oral argument: how courts should review an agency's determination that its action is a modification to a previously approved project, and is therefore subject to Section 21166's limitation, or is instead a wholly new project to which Section 21166 does not apply. Although the Court of Appeal, Third Appellate District, in *Save Our Neighborhood v. Lishman* (2006) 140 Cal.App.4th 1288, treated this as a question of law, it is instead a factual determination addressed by Section 21166. The agency's determination should be upheld if supported by substantial evidence in the record.

Section 21166 limits further review "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. . . ." (Pub. Resources Code, § 21166, subd. (a), italics added.) The italicized words in the statute are inherently factual in nature.[13] The occurrence of an "event" is a fact. To determine whether a "substantial change" has occurred, an agency must evaluate facts and reach a conclusion based upon them (i.e., did a "change" occur, and was that change "substantial"). Similarly, determining the degree of revision needed in an existing

[13] The Natural Resources Agency quotes subdivision (a) by way of example, but the other two conditions identified in Section 21166 are also inherently factual in nature.

environmental document requires the agency to draw conclusions based on a review of facts. Often, this determination will require a lead agency to review and interpret its own environmental document – an exercise as to which courts typically defer to the agency's judgment. (See, e.g., *Sequoyah Hills Homeowners Assn. v. City of Oakland* (1993) 23 Cal.App.4th 704, 719 ["Once a general plan is in place, it is the province of elected city officials to examine the specifics of a proposed project to determine whether it would be 'in harmony' with the policies stated in the plan."]; *Stone v. Board of Supervisors* (1988) 205 Cal.App.3d 927, 934-937 [agency's interpretation of conditions in its own permit is reviewed under a deferential "reasonableness" standard].)

In *Lishman*, the Third Appellate District adopted a different view. Citing *Benton*, the court treated the question as one of law. (*Lishman*, *supra*, 140 Cal.App.4th at p. 1297, citing *Benton*, *supra*, 226 Cal.App.3d at pp. 1475, 1477.) Notably, the court in *Benton* did not state that this question is one of law. Instead, it examined the facts in the administrative record and found evidence supporting the agency's conclusion that the project at issue was a modification to a previously approved project, rather than a brand new project. (*Benton*, *supra*, 226 Cal.App.3d at pp. 1475-1477 [noting that, "[o]n this record, we are satisfied that the project before the board was a modification of the existing winery project, not an entirely new project," consistent with the agency's treatment of the project].) That the court in *Benton* examined the administrative record, and highlighted facts supporting the agency's conclusion, suggests that it actually reviewed the question under a substantial evidence standard.

The decision in the *Lishman* case should not, therefore, persuade this Court, if this Court chooses to address this issue in its written opinion. Rather, because the language of Section 21166 calls on public agencies to make a factual determination regarding its applicability to a given activity,

this Court should find that determination to be subject to the substantial evidence standard of review.

IV. GUIDELINES SECTION 15162, AND APPLYING THE SUBSTANTIAL EVIDENCE STANDARD TO IT, AFFORDS ADEQUATE SAFEGUARDS AGAINST ABUSE OF DISCRETION

The substantial evidence standard embodied in Guidelines section 15162 does not weaken the environmental review and public comment requirements of CEQA. First, as discussed above, any project potentially subject to Guidelines section 15162 must necessarily have already gone through the "fair argument" assessment by the lead agency required by Section 21151. By definition, if a project has reached the point where Guidelines section 15162 is applicable, the result of the agency's initial assessment of impacts under Section 21151 is beyond challenge, regardless of whether that culminated with an EIR or a negative declaration. (*STOP v. City and County of San Francisco*, *supra*, 74 Cal.App.4th at pp. 799-800.) Nothing about Guidelines section 15162 strips away or alters the initial "fair argument" assessment under Section 21151.

Further, the agency's initial "fair argument" assessment under Section 21151 inherently protects against failures to evaluate reasonably foreseeable project modifications that could have significant environmental effects. As part of that initial process, an agency must consider the environmental effects of future expansion of a project, or other action on a project, if: "(1) it is a reasonably foreseeable consequence of the initial project; and (2) the future expansion or action will be significant in that it will likely change the scope or nature of the initial project or its environmental effects." (*Laurel Heights I*, *supra*, 47 Cal.3d at p. 396.) This protects against the possibility that reasonably foreseeable project modifications, that may have significant environmental effects, will be

ignored or otherwise not properly analyzed during the initial environmental review.

Even after the initial environmental review is complete, and "the interests of finality [become] favored over the policy of encouraging public comment," (*Laurel Heights II, supra*, 6 Cal. 4th at p. 1130), safeguards remain to ensure CEQA's environmental protection goals. For example, this Court has acknowledged the protection built into Section 21166 and Guidelines section 15162. In *Laurel Heights I*, this Court noted that, "[o]f course," if a future significant project modification is not considered during the initial environmental review under Section 21151, "it will have to be discussed in a subsequent EIR before the future action can be approved under CEQA." (*Laurel Heights I, supra*, 47 Cal.3d at p. 396.)[14]

The effectiveness of this safeguard is illustrated in *American Canyon Community United for Responsible Growth v. City of American Canyon* (2006) 145 Cal.App.4th 1062 ("*American Canyon*"). In *American Canyon*, the city adopted a mitigated negative declaration for a multi-use development project and then decided, under Section 21166, that modifications to the project did not require a subsequent EIR. (*Id.* at p. 1066.) The modifications included changing "the size and type of retail development . . ., replacing a shopping center with a 24-hour supercenter that combined a big-box discount store and a full grocery store." (*Ibid.*) The appellate court held that the city's determination was not supported by substantial evidence, and remanded to the trial court to issue a writ

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[14] Additionally, as noted above at p. 17, Guidelines section 15164, subdivision (e), provides that, if an agency determines that no further environmental review is necessary, it should explain its rationale and evidence "in an addendum to an EIR, [its] required findings on the project, or elsewhere in the record," and that "explanation must be supported by substantial evidence."

requiring the city to comply with Section 21166. (*Id.* at pp. 1066, 1077-1081, 1083, 1085.)[15]

Guidelines section 15162, subdivision (c), provides another safeguard, applying even after the lead agency's role in project review and approval is complete:

> If after the project is approved, any of the conditions described in subdivision (a) occurs, a subsequent EIR or negative declaration shall only be prepared by the public agency which grants the next discretionary approval for the project, if any. *In this situation, no other responsible agency shall grant an approval for the project until the subsequent EIR has been certified or subsequent negative declaration adopted.*

(Italics added.) Thus, subdivision (c) requires responsible agencies, making discretionary approvals of a project, to act as a backstop ensuring subsequent environmental review where necessary. Any decision under subdivision (c) would, as with subdivision (a), be reviewed for substantial evidence. However, although that standard is more deferential to the agency than is the "fair argument" test, it is not a judicial rubber stamp. It appropriately requires the agency to substantially support its decision, while still serving the interests of finality, certainty, and efficiency that take precedence once the initial environmental review is beyond challenge.

In *Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929, this Court articulated another safeguard that

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[15] Examples are easy to imagine, in which the record could not contain substantial evidence supporting a determination that project modifications did not create new significant impacts not previously analyzed in the original environmental document. One such example could be where a project originally had no impacts to biological resources, but a modified project footprint would impact a wetland. In that example, there would likely not be substantial evidence in the record to support a determination that impacts to biological resources would be no more severe than previously analyzed.

exists after the initial environmental review is final. In that case, the public received no notice of substantial changes to an amphitheater project until after the amphitheater was constructed and in use.[16] The Court created a form of discovery rule, tolling the statute of limitations where a project is substantially modified without public notice. Specifically, the Court held that "an action challenging noncompliance with CEQA may be filed within 180 days of the time the plaintiff knows or should have known that the project under way differs substantially from the one described in the initial EIR." (*Id.* at p. 933.)[17]

Finally, although the standard of judicial review applicable to decisions under Guidelines section 15162 is the same regardless of whether the initial environmental document is a negative declaration or an EIR, practical application of the Guideline may be more likely to result in subsequent environmental review where the initial document is a negative

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[16] When an agency approves a project, it must file a notice with OPR (if the approving agency is a state agency) or with the clerk of the county in which the project will be located (if the approving agency is a local agency). The notice must indicate the agency's determination whether the project will, or will not, have a significant effect on the environment, and whether an EIR has been prepared. (Pub. Resources Code, §§ 21108, 21152.) This notice causes the statute of limitations to begin running on most challenges to the agency's approval. (Pub. Resources Code, § 21167, subds. (b)-(e).) The administrative record for the project should support the agency's decisions and provide the public with sufficient information about the project. (See, e.g., Guidelines section 15164, subd. (e).)

[17] To the Natural Resources Agency's knowledge, in the 38 years since the predecessor to Guidelines section 15162 incorporated negative declarations, there have been no cases wherein a public agency initially misidentified a project for the purposes of evading "fair argument" review with the intent to subsequently modify the project and take advantage of the more deferential substantial evidence standard. However, if such a case were to occur, substantial evidence likely would not support the agency's action, and this Court's *Costa Mesa* decision inspires confidence that the courts could review and rectify the abuse.

declaration. This is because an EIR must consider project alternatives, and the significant environmental effects of those alternatives, whereas a negative declaration need not describe alternatives. (Cal. Code Regs., tit. 14, §§ 15063, 15071, 15126.6.) Therefore, any new significant effect resulting from a project modification might already appear, and be sufficiently discussed, as a project alternative in an EIR. Conversely, because a negative declaration and accompanying initial study are often by their nature limited in scope, and need not discuss alternatives, that same new significant effect would be less likely to have been previously and sufficiently discussed. Ultimately, the substantial evidence standard, as applied to agency decisions under Guidelines section 15162, does not serve to hide or prevent review of significant environmental effects, but instead properly defers to the agency's determination about whether the previous environmental document remains adequate, provided that determination has the requisite support.

CONCLUSION

The substantial evidence standard of judicial review applies to an agency's determination, under Guidelines section 15162, that no subsequent EIR is required on a project's modification where the previous document is a negative declaration. Further, Guidelines section 15162 is a valid interpretation of Section 21166. The Natural Resources Agency respectfully requests that this Court so hold.[18]

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[18] Alternatively, if the Court is not convinced of the validity of Guidelines section 15162, the Natural Resources Agency respectfully requests that, rather than invalidate the Guideline outright on a short briefing schedule and sparse record, where the relevant agency is not even a party, the Court instead remand the question for an appropriate challenge, on a complete administrative rulemaking record, pursuant to Government Code section 11350.

Dated: June 14, 2016

Respectfully submitted,

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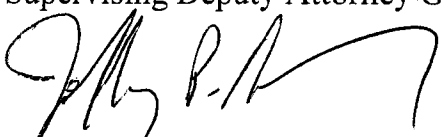

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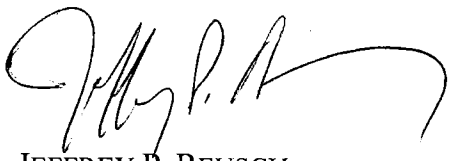
CERTIFICATE OF COMPLIANCE

I certify that the attached **SUPPLEMENTAL BRIEF OF THE CALIFORNIA NATURAL RESOURCES AGENCY AND THE GOVERNOR'S OFFICE OF PLANNING AND RESEARCH** uses a 13 point Times New Roman font and contains 8,956 words.

Dated: June 14, 2016

KAMALA D. HARRIS
Attorney General of California



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DECLARATION OF SERVICE

Case Name: **FRIENDS OF THE COLLEGE OF SAN MATEO GARDENS v. SAN MATEO COUNTY COMMUNITY COLLEGE DISTRICT**

Case No.: **S214061**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550.

On June 15, 2016, I served the attached **SUPPLEMENTAL BRIEF OF THE CALIFORNIA NATURAL RESOURCES AGENCY AND THE GOVERNOR'S OFFICE OF PLANNING AND RESEARCH** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Mail at Sacramento, California, addressed as follows:

California Supreme Court Earl Warren Building 350 McAllister Street, Room 1295 San Francisco, CA 94102	Original + 8 copies Sent via Overnight (Golden State Overnight)
California Court of Appeal First Appellant District 350 McAllister Street San Francisco, CA 94102	1 copy Sent via Overnight (Golden State Overnight)
Hon. Clifford Cretan San Mateo County Superior Court 222 Paul Scannell Drive San Mateo, CA 94402	1 copy Sent via Overnight (Golden State Overnight)
Susan Lynne Brandt-Hawley Brandt-Hawley Law Group P.O. Box 1659 Glen Ellen, CA 95442	Attorney for Friends of the College of San Mateo Gardens : Plaintiff and Respondent Sent via First-Class U.S. Mail

Sabrina Vansteenki Teller Remy Moose and Manley LLP 555 Capitol Mall, Suite 800 Sacramento, CA 95814 James Grether Moose Remy Moose and Manley LLP 555 Capitol Mall, Suite 800 Sacramento, CA 95814	Attorney for San Mateo Community College District : Defendant and Appellant Sent via First-Class U.S. Mail
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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on June 15, 2016, at Sacramento, California.

Erika Thompson
Declarant

Signature