Civil Case No. S214061

SUPREME COURT
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IN THE SUPREME COURT OF CALIFORNIA

FRIENDS OF THE COLLEGE OF SAN MATEO GARDENS,

Plaintiff and Respondent,

v.

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

Defendants and Appellants.

After an Unpublished Decision by the Court of Appeal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 Case No.: CIV 508656

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INTRODUCTION

The conflict in this case between the San Mateo Community College District ("the District") and the Friends of the College of San Mateo Gardens ("Friends") centers on who – public agencies or the courts – should make the essentially factual determination of whether a proposed activity is a change to a previously reviewed project under the California Environmental Quality Act ("CEQA") or a "new" project. In its Answer Brief ("AB"), Friends argues that, because agencies cannot be trusted to make such decisions – misconceived as pure questions of *law* – the courts should make them instead, without *any* deference to agencies. (AB, pp. 31, 58-59.) This position, is contrary to the CEQA statute, the CEQA Guidelines, and all but one appellate opinion dealing with CEQA's subsequent review provisions. In fact, to take this position, Friends asks this Court to invalidate two Guidelines sections and to overrule four appellate cases. The extreme result is a telling sign that Friends' arguments lack merit.

The fundamental flaws in Friends' argument are twofold: first, the operative statutes and regulations do not support the contention that pure questions of law are involved; and second, Friends would have the courts usurp the agencies' role and become de facto finders of fact. Conceptually, Friends' approach ignores the well-established principle that, in reviewing the merits of agency actions in mandamus proceedings, courts act in an appellate capacity, not as ultimate finders of fact. Under Friends' approach agencies would face of considerable uncertainty because courts may interpret detailed factual questions differently. Risk-averse agencies may decline to carry out or shy away from the clear mandate of Public Resources Code section 21166 and parallel provisions of the Guidelines (sections 15162 through 15164), which create a high bar for requiring public agencies and private applicants to start over with a second round of environmental review after previously completing CEQA review of an earlier version of the project.

California law, specifically CEQA, imposes challenging procedural hurdles to development. Finality after CEQA review is successfully completed by limiting review of changes to approved projects so that they are not sent back to square one by endless

rounds of CEQA review. Imposing the independent judicial judgment on agencies' fact-based decisions will quash the Legislature's intended finality in section 21166.

The case at hand concerns a small building complex and its surrounding landscape within a long-developed college campus. The District originally planned to renovate Building 20 when it approved a detailed set of facility improvements at the College of San Mateo (the "CSM Project"), which it reviewed in a mitigated negative declaration ("MND") adopted in 2007. During the course of the CSM Project, the District did not obtain anticipated funding to renovate Building 20 and enrollment in the horticulture program greatly decreased, so the District reevaluated its need for this facility in light of the overall CSM Project. The District determined the best, most cost effective course of action to achieve its educational mission would be to demolish the obsolete building and related structures and to increase the amount of parking in this area of the campus. The CSM Project originally planned for the demolition of up to 16 buildings and the renovation of others on the campus. The District also decided to not demolish two other buildings and instead renovate them. The District determined that demolition of the Building 20 Complex instead of renovation was appropriately considered a change to the CSM Project, and on balance, the environmental impacts of the CSM Project would not change, so the change could be appropriately analyzed in an addendum to the CSM MND.

Friends disagrees, and would have the District prepare an expensive, time-consuming environmental impact report ("EIR") to study the demolition of an unused, outdated building, a dilapidated and unused greenhouse and lath house, and removal of, at most, 10,000 square feet of landscaping. Friends has not identified why an EIR is necessary, perhaps because Friends appears not to be interested in the EIR itself. Rather, Friends seems merely to want to stop the project because its members disagree with the Board of Trustees' policy decisions for this area.

This policy conflict exemplifies the importance of applying the deferential substantial evidence standard of review where agencies proceed with revisions to a previously-approved project. In this case, the District explained why it believed the

change to the Building 20 Complex was a change to the CSM Project, not a new project; and it analyzed the potential environmental impacts associated with its proposed actions. Because substantial evidence indicated that no new significant or substantially more severe impacts not previously studied in the MND would result, the District determined that no supplemental or subsequent EIR or MND was required. But Friends argues that the District's analysis, substantial evidence, and conclusions are entirely irrelevant if a court disagrees with an agency's threshold characterization of an action as a change to a previously approved project. CEQA and its Guidelines do not support this activist vision of the courts' function in such instances. There is no indication that the Legislature intended courts to be arbiters of the inherently factual inquiry established by Public Resources Code section 21166 and Guidelines section 15162, and that result would contradict the policy and purpose of section 21166. This Court should therefore decline to adopt the so-called "new project" test proposed by Friends.

CLARIFICATION OF THE FACTS

The District previously summarized the facts relevant to the issue for which this Court granted review. In its Answer Brief, Friends misstates several factual propositions for which certain record citations stand. The District provides this supplemental discussion to clarify these mistatements.

When describing the CSM Project, Friends minimizes the extensive detail included in the previously-adopted MND. (AB, pp. 8-10.) In describing the CSM Project and its mitigation measures, Friends refers only to the minutes for the January 24, 2007, Board meeting. (AB, p. 9, citing Administrative Record ["AR"] 1:438.) In fact, the MND described the CSM Project in detail. (AR 1:245-246 [renovate or replace Building 1; renovate Buildings 2, 3, 4, 8, 12, 14, 16, 19, and 20; renovate Parking Lots 1 and 2; renovate plazas and pedestrian corridors; demolish and replace Buildings 5, 6, 10, 11, 15 and 17; and demolish Buildings 21-29].) The MND identified a specific time-frame for these improvements (AR 1:250) and included detailed mitigation measures (compare AR 1:251-256 [describing measures AQ-1, N-1, WQ-1, CR-1, H-1, H-2, H-3, and T-1] with AB, p. 9 ["Project mitigation measures were very general"]).

Friends also questions the District's stated reasons for approving the actions challenged in this case. (AB, p. 11.) It is not clear what point Friends tries to make by insinuating there were other motivations for the plans to demolish Building 20 and construct a parking lot. The record contains a discussion of the proposed demolition of Building 20 and the four state criteria against which bid proposals were evaluated. (AR 3:1136; see also, 1:71-72; 2:723-724.) In any event, the District's reasons for its decision to demolish the Building 20 Complex are irrelevant to the question of whether the District complied with CEQA before making that decision.

The District acknowledges its proposal generated substantial public controversy during the planning process. But Friends' caricature of the District as uncompromising and dismissive is inaccurate. (AB, pp. 12-24.) The District engaged project opponents in open dialogue and considered their input and concerns, which resulted in several beneficial plan changes, although the Board questioned the propriety of opponents' tactics. (See, e.g., AR 2:609-611, 625-626, 719-724.) These numerous revisions were insufficient to satisfy Friends. (Compare AB, p. 57 ["the demolition plan depicts the destruction of all that the Friends care about"] with AR 1:92-94, 79-80; 2:625-627, 719-721.)

ARGUMENT

A. Standard of review: The Court should apply the substantial evidence standard to the question of whether an agency has correctly determined that a proposed action represents a "change" to a previously approved project.

The issue certified for review is the appropriate standard of review to apply to the District's decision to proceed with the demolition of the Building 20 Complex as a change to the previously-approved CSM Project. Friends asserts the demolition is actually a "new" project and that courts may (or must) make a determination of whether a project is "new" or "supplemental" each time an agency proceeds with environmental review under Public Resources Code section 21166. (AB, pp. 27-43.) This position, which would have the courts treat the question as one of law for which no deference to agencies is appropriate, is unsupported by the language of Public Resources Code section 21166 and the Guidelines.

The plain language of section 21166 establishes a presumption *against* requiring subsequent or supplemental EIRs absent the existence of certain facts. The section 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.

(Emphasis added.) Guidelines section 15162 employs similar language (e.g. "substantial changes," "major revisions"). By using vague, subjective, and elastic terms such as "substantial changes" and "major revisions," section 21166 and Guidelines section 15162 invite agencies to exercise their judgment based on the facts before them: Are *substantial* changes proposed to a previously-approved project? If so, will the previously-completed environmental review require *major* revisions? Because neither the Legislature, in enacting section 21166, nor the Resources Agency, in promulgating section 15162, has defined these italicized terms, these questions necessarily call for factual, not legal, determinations. In this case, the District prepared an addendum and administrative record answering these factual questions. Based on the facts in its record, the District determined that demolishing, rather than renovating, the Building 20 Complex during the course of the CSM Project did *not* involve substantial changes in the CSM Project or in the circumstances surrounding it, and that the changes involved would *not* necessitate major revisions to the prior MND. (AR 1:92-109.)

When the answer to a question necessarily depends on the specific facts surrounding a project and its record, this is exactly the type of question upon which courts have deferred to agencies. (See *Laurel Heights Improvement Assn. v. Regents of Univ. of Cal.* (1993) 6 Cal.4th 1112, 1134-1135 ("*Laurel Heights II*") [deferring to agency's substantial evidence regarding significance of new information arising after circulation of draft EIR].) Under Friends' proposed approach, however, a reviewing court would essentially ignore an agency's factual determinations and would review them instead as though the court, and not the agency, were a finder of fact. It is well-established, though, that "the standard of review [in CEQA cases] does not permit the reviewing court to make its own factual findings." (*Burbank-Glendale-Pasadena Airport Authority v. Hensler* (1991) 233 Cal.App.3d 577, 590.) Rather, as this Court has emphasized, "on factual questions, our task 'is not to weigh conflicting evidence and determine who has the better argument.'" (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 4345 ("*Vineyard*").) Thus, "the substantial evidence standard of review [in CEQA cases] . . . is analogous to the substantial evidence standard of review applied by appellate courts to evaluate the findings of fact made in trial courts." (*Western States Improvement Assn. v. Sup. Ct.* (1995) 9 Cal.4th 559, 565.)

Friends' proposed approach is also at odds with CEQA's overall policy framework, which includes competing but equally important policies, depending on the stage of environmental review. As noted by Friends, CEQA calls for robust environmental review in the first instance. (AB, p. 33.) This Court helped establish this principle nearly 40 years ago in its seminal decision in *No Oil, Inc. v. City of Los Angeles* (1975) 13 Cal.3d 68, which articulated the "fair argument" standard now enshrined in Guidelines section 15064, subdivision (f)(1). But once environmental review has been completed in that first instance, CEQA favors the need for finality in agency actions and mandates expedited litigation. (*Laurel Heights II, supra,* 6 Cal.4th at p. 1130 ["[a]fter certification, the interests of finality are favored over the policy of encouraging public comment"]; Pub. Resources Code, § 21167.1, subd. (a) [giving CEQA cases calendaring

priority over all other civil cases]; see also *Bd. of Supervisors v. Sup. Ct.* (1994) 23 Cal.App.4th 831, 836 [citing CEQA "provisions which require that a CEQA action, once filed, be diligently prosecuted and heard as soon as reasonably possible"].)

After legal challenges are resolved and CEQA review is successfully complete, as discussed above, section 21166 sets a strong presumption against a second round of review: "*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." Turning reviewing courts into de facto retroactive finders of fact, on questions for which there are no clear guiding legal standards, would undermine the interests of finality and economic efficiency set by the Legislature's high bar for second rounds of environmental review.

If, as Friends urges, this Court embraces the reasoning of *Save Our Neighborhood v. Lishman* (2006) 140 Cal.App.4th 1288, agencies faced with opposition to proposals to modify previously-approved projects would proceed under section 21166 and sections 15162 through 15164 of the Guidelines with the very substantial risk that a reviewing court, acting as a de facto fact-finder, might reach different conclusions, even if the agency's decision was reasonable and supported by substantial evidence. After all, reasonable minds may certainly reach different conclusions in applying such vague, general, and elastic concepts as "substantial changes" to a project and "major revisions" to an existing environmental document. Building on the distinction made in *Vineyard* between the "procedural" and "factual" issues arising during CEQA litigation (see 40 Cal.3d at p. 435), this Court should use thus case to emphasize that a factual determination cannot be "procedural" – and thus be subject to de novo review – except where the purported procedural legal duty is sufficiently clear and concrete to be discerned by diligent agencies acting in good faith.

B. The presumption against subsequent environmental review applies equally to EIRs and negative declarations.

Friends argues that cases involving revisions or changes to EIRs under section 21166 are inapplicable to this case because the District previously adopted a negative

declaration. (AB, p. 34.) Friends is mistaken on the law, and the District's discussion of section 21166 cases dealing with EIRs is entirely relevant. (Opening Brief, pp. 16-28.). The Guidelines state that the standard articulated in section 21166 applies with just as much force where an agency originally approved a negative declaration. (Guidelines, § 15162, subd. (a) ["When an EIR has been certified *or a negative declaration adopted* for a project, no subsequent EIR shall be prepared…].) Friends asks the Court to find the plain language of Guidelines section 15162 invalid, and it should decline to do so. The Guidelines are to be afforded great weight unless a provision is clearly unauthorized or erroneous under CEQA. (*Laurel Heights Improvement Assn. v. Regents of Univ. of Cal.*(1988) 47 Cal.3d 376, 291, n.2) ("Laurel Heights I").

1. Guidelines section 15162 is valid.

In *Benton v. Board of Supervisors* (1991) 226 Cal.App.3d 1467, the court upheld Guidelines section 15162 as valid when the prior environmental document is a negative declaration. Friends dismisses the appellate court's reasoning in *Benton* as incorrect. (AB, pp. 36-37.)

This exact issue was recently addressed in *Abatti v. Imperial Irrigation Dist.* (2012) 205 Cal.App.4th 650, which Friends ignores, but this Court should embrace. The *Abatti* court agreed with the persuasive reasoning in *Benton*. The principles of section 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, original italics.) Like the petitioners in those cases, Friends does not meet its burden of demonstrating section 15162 is inconsistent with section 21166's purpose. (*Benton, supra,* 226 Cal.App.3d. at p. 1479-1481; *Abatti, supra,* 205 Cal.App.4th at 672.)

Friends further misstates the discussion in *Benton,* falsely arguing that the court decided the project was not a "new" project as a "matter of law." (AB, p. 36.) The

Bentons argued that the county was required to treat a relocated winery as a new project because the county approved a new permit rather than a formal modification of the applicant's original permit. (*Benton, supra*, 226 Cal.App.3d at pp. 1475-1476.) Relying on *Fund for Environmental Defense v. County of Orange* (1988) 204 Cal.App.3d 1538, 1542-1548, the *Benton* court held that the county "consistently treated the new application as if it were a request for modification of the already permitted project." (226 Cal.App.3d at p. 1476.) For the environmental analysis of the revised project in *Benton*, the county counsel advised the county's decision makers "to review the project before them in a limited way, by comparing what had already been approved with what was being proposed." (*Ibid.*) Here, District likewise compared what it had already approved in the 2006 MND with the proposed revisions for the Building 20 area. The *Benton* court did not treat the review of the revisions as a matter of law, but rather, deferred to the agency on a fact-based inquiry, as should the Court here.

2. Guidelines section 15164 is valid.

Friends also questions the validity of Guidelines section 15164 through its criticisms of addenda and the lack of a requirement to circulate them for public review and comment. (AB, pp. 46-47, 50-51.) Again, as this Court has emphasized, the Guidelines are afforded great weight unless a provision is clearly unauthorized or erroneous under CEQA. (*Laurel Heights I, supra*, 47 Cal.3d at p. 391, n.2).)

Guidelines section 15164, subdivision (b) provides:

> (b) 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 Section 15162 calling for the preparation of a subsequent EIR or negative declaration have occurred.***

(Emphasis added.) Because section 15164 references the conditions described in section 15162, the many appellate cases considering agency decisions under section 15162 are highly relevant to an agency's decision to prepare an addendum to a negative declaration. Further, the appellate courts have reviewed and upheld addenda under numerous factual situations. (*Mani Brothers, supra,* 153 Cal.App.4th at p. 1398-1399 [citing cases

upholding the use of addenda].) Nor is the adequacy of an addendum to a negative declaration suspect "perhaps because no in-depth review has yet occurred." (AB, p. 47.) The *Abatti* court rejected similar denigrating characterizations of negative declarations by petitioners. (*Abatti, supra,* 205 Cal.App.4th at pp. 672-673.)

Friends further argues section 15164 is invalid because it does not require public review for addenda, contrasting it to the recirculation requirement under Guidelines section 15088.5. (AB, p. 48.) Friends' comparison is inapt. Recirculation of revised EIRs and negative declarations for additional public review and comment is required only where "significant new information" is added to the document before certification or adoption, where the public would otherwise be deprived of a "meaningful opportunity to comment on a substantial adverse environmental effect of the project or a feasible way to mitigate or avoid such an effect." (Guidelines, § 15088.5, subd. (a).) Agencies may make nonsignificant revisions to environmental review documents without recirculation as long as such decisions are supported by substantial evidence in the record. (*Id.,* subd. (e).) As with decisions not to recirculate a document after nonsignificant revisions, addenda are only authorized where there *is no such new or worse environmental impact;* therefore the public is not deprived of an opportunity to comment on such effects or how to avoid them. (Guidelines, § 15164.)

Moreover, the analogy to recirculation is also inopposite to Friends argument as to the standard of review. As this Court held, agencies are to be afforded deference in decisions on recirculation. (*Laurel Heights II, supra,* 6 Cal.4th at p. 1134-1135) [deferring to agency's substantial evidence regarding significance of new information arising after circulation of draft EIR].) These decisions are similar and agencies should be afforded the same deference in determining whether further environmental review is required.

C. *Save Our Neighborhood v. Lishman's* "new project" test is an unsupportable outlier.

Friends relies heavily on *Save Our Neighborhood v. Lishman* to support the application of a threshold, "new project" test to circumstances when an agency applies

section 21166 and the implementing Guidelines, which is understandable since it is the only published appellate decision sanctioning the otherwise novel approach Friends urges this Court to follow. However, *Save Our Neighborhood* has been widely criticized, and Friends' reliance is misplaced.

The "new project" test does not find support in well-reasoned cases decided prior to or since *Save Our Neighborhood.* Contrary to Friends' assertion, the *Save Our Neighborhood* court did not understand *Benton* to be applying a "new project" test as a matter of law. (AB, pp. 37-38.) The *Save Our Neighborhood* court makes no such statement and hardly addresses *Benton* at all, merely distinguishing *Benton* as a case that "involved only one project that underwent changes after completion of the initial environmental review." (*Save Our Neighborhood, supra*, 140 Cal.App.4th at p. 1300-1301.) The "new project" test was described and applied for the first time in *Save Our Neighborhood*, not in *Benton*.

The court in *Mani Brothers Real Estate Group v. City of Los Angeles* (2007) 153 Cal.App.4th 1385 did not misconstrue the *Benton* decision. (AB, p. 40.) The *Mani Brothers* court noted that *Benton* appropriately focused on "an assessment of the environmental effects of the proposed project revisions." (*Mani Brothers, supra,* 153 Cal.App.4th at p. 1401.) Further, contrary to Friends' statements, the *Mani Brothers* court directly addressed the "new project" test and strongly – and persuasively – criticized its fundamental analysis without regard to whether a prior EIR or MND was at issue. (Compare *id.* at p. 1400 ["Even if *Save Our Neighborhood* was not distinguishable on its facts, its fundamental analysis is flawed."] with AB, p. 40 [*"Mani Brothers*...further found *Save Our Neighborhood* 'distinguishable and inapplicable' because it dealt with an addendum following a negative declaration rather than an addendum following an EIR"].)

The *Mani Brothers* court identified many of the same criticisms of the "new project" test that the District raised in its Petition for Review and Opening Brief in this case. For example, the court noted that the "novel 'new project' test does not provide an objective or useful framework." (153 Cal.App.4th at p. 1400.) The court noted that the

"new project" test invites arbitrary results due to the language of section 21166 because "[d]rastic 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." (*Ibid.*, italics original.) The arbitrary nature of this inquiry is evident in both *Save Our Neighborhood* and the unpublished opinion from which the District appealed, neither of which offers useful guidance on how to identify a "new" project. (*Save Our Neighborhood, supra,* 140 Cal.App.4th at p. 1300 [identifying two factors not stated anywhere in section 21166 or the Guidelines: new applicant and project plans]; Slip Opinion, pp. 10-11.)

Friends asserts incorrectly that the court in *Moss v. County of Humboldt* (2008) 162 Cal.App.4th 1041 endorsed *Save Our Neighborhood's* "new project" test. Friends exaggerates and ignores much of the *Moss* court's discussion. In fact, the *Moss* court applied the question of law approach only to the legal effect of expiration of a project's tentative map on CEQA review. (*Id.* at p. 1053.) The court determined this was "not a factual question" or "a matter that would typically be within a local agency's realm of expertise." (*Ibid.*) In contrast, the court deferentially reviewed the county's fact-based findings under section 21166 for substantial evidence. The court rejected the county's section 21166 findings that it determined were not supported by substantial evidence in the record, but otherwise deferred to the findings which were supported by facts. (*Id.* at pp. 1058-1067.)

Friends also criticizes *Latinos Unidos de Napa v. City of Napa* (2013) 221 Cal.App.4th 192, 201. In *Latinos*, the court noted agreement with the *Moss* court's application of the substantial evidence test to the agency's decision to proceed under section 21166. (Compare *ibid.* with AB, p. 42.)

In *Lincoln Place Tenant's Association v. City of Los Angeles* (2005) 130 Cal.App.4th 1491, 1503, the court considered whether the city proceeded in the manner required by CEQA when it issued demolition permits for a project without requiring compliance with pre-demolition conditions. The court held that the conditions needed to be enforced or further CEQA review would be required to determine if the conditions

were no longer feasible. (*Id.* at pp. 1507-1509.) The question of law of whether an agency procedurally required compliance with a previously adopted mitigation measure is not, as Friends suggests, similar to the question in this case. (AB, p. 38.)

D. Case law related to tiering is not applicable.

Friends also relies on *Center for Sierra Nevada Conservation v. County of El Dorado* (2012) 202 Cal.App.4th 1156 ("*Center*") in support of its contention that the "new project" test created in *Save Our Neighborhood* finds support among other courts. (AB, pp. 38-39.) Friends' reliance on this case is misplaced. *Center* is inapplicable here as it involved an agency's decision to adopt a negative declaration *tiered* from an earlier program EIR. (*Center, supra,* 202 Cal.App.4th at p. 1166, 1173; see also Pub. Resources Code, § 21094, subd. (c); Guidelines, § 15152, subd. (f).) In *Center,* the trial court determined a second-tier EIR was not required, as the potential impacts of a habitat management plan had been adequately addressed in a prior program EIR. (*Id.* at pp. 1173-1174.) The appellate court disagreed and determined that the plan did not fall within the scope of a 2004 program EIR as a mitigation measure under the general plan. (*Id.* at pp. 1175-1177, 1180-1181.) As a result, the court determined a second-tier EIR, rather than a second-tier negative declaration, was required to examine the management plan. (*Id.* at p. 1184.)

Here, in contrast, the District prepared and adopted an MND for the original CSM Project. That environmental document was not labeled a "program" negative declaration, nor did the District announce any intention in the document that it would be used as a "first-tier" or program document, consistent with Guidelines sections 15152 and 15168. To the contrary, the MND addressed the specific disposition of every facility on campus, included project assumptions, design features, and environmental commitments, and described construction activities, equipment, and timeframes, all of which demonstrate that it was (and continues to be) the *project-specific* review for the CSM Project. (AR 1:245-256.) Friends cites no evidence, and cannot, indicating that the District intended the MND for the CSM Project to serve as programmatic or first-tier review, with more

specific review to follow before commencing work on individual buildings under the CSM Project.

Sierra Club v. County of Sonoma (1992) 6 Cal.App.4th 1307 is similarly inapplicable because it also involved a program EIR and tiering. (AB, p. 39.) In *Sierra Club*, the real party mining company argued, wrongly, that Public Resources Code "section 21166 applies whenever the question is whether a second EIR should be prepared, even if the first EIR was a program EIR." The court explained the appropriate procedure for tiering, noting that Public Resources Code section 21094, subdivision (c) requires an initial study be prepared to analyze whether the later project may cause significant effects on the environment that were not examined in the prior program EIR. (*Id.* at p. 1319.) The court noted the language in section 21094 "is unlike that of the restrictive wording of section 21166, and is instead nearly identical to that of section 21151." (*Ibid.*) Therefore, the same low threshold "fair argument" standard applies to the agency's determination to prepare an EIR in the first instance under section 21151, or to an agency's determination whether to prepare "a new EIR on a *later new project which follows certification of a program or plan EIR.*" (*Ibid.*, italics added.)

In supplemental briefing regarding section 21094, the mining company in *Sierra Club* claimed it was only modifying a plan studied under a program EIR. The court disagreed and found mining was proposed on land designated for agricultural use at the time the plan and program EIR were developed. Therefore, evidence did not support the company's assertion that the proposed site-specific project was within the scope of the earlier program EIR. (*Id.* at pp. 1320-1321.) The court explicitly found that section 21166 was inapplicable and the County was obliged to consider, under section 21094, whether, under the fair argument standard, the site-specific project might cause significant effects on the environment that were not examined in the prior program EIR. (*Id.* at 1321.)

E. The administrative record supports the District's decision to use an addendum.

This Court's order granting review directs the parties to address the appropriate standard of review to apply to an agency's actions taken under section 21166, but Friends

also asks this Court to rule on the validity of the District's addendum. (AB, pp. 49-51.) In doing so, Friends completely disregards the detailed environmental review and substantial evidence contained within the District's addendum.

1. **Friends' argument that the demolition of Building 20 is a "new project" is contrary to the purpose of Section 21166.**

Friends asserts that the demolition of Building 20 is a "new project" because both the District's 2006 Master Plan and the 2007 CSM Project envisioned retaining Building 20. (AB, p. 52.) Friends repeatedly points to "the District's longstanding intentions not to demolish but instead to rehabilitate and save the Building 20 Complex." (AB, pp. 50, 10.) This original plan for Building 20, according to Friends, "is the most important fact" indicating the District approved a new project. (AB, p. 52.) Under this flawed reasoning, *any* change to an approved plan constitutes an entirely new project. This reasoning is entirely contrary to the basic purpose of section 21166—to facilitate review of *changes or revisions* to previously approved projects. Friends itself acknowledges that the change in disposition of Building 20 resulted from changes in the District's "program needs" that occurred *after* the 2007 CSM Project was approved. (AB, pp. 52-53.)

2. **Friends' substantive arguments against the addendum fail because many issue were waived and the arguments are only supported by unsubstantiated opinion.**

Friends contends that the District's description of the proposed demolition of the Building 20 Complex is misleading. Friends quibbles with the addendum's characterizations and calculations of open space and landscaped areas, arguing about their location and whether they are used recreationally. (AB, pp. 54-57.) This tactic fails to demonstrate that the District's addendum is unsupported by substantial evidence.

First, the court need not consider this argument because Friends failed to exhaust its administrative remedies on this argument. Project opponents cannot raise an issue in litigation unless that same issue was first presented to the agency. (Pub. Resources Code, § 21177, subd. (a).) The requirement to exhaust administrative remedies is a "jurisdictional prerequisite." (*Sierra Club v. San Joaquin LAFCO* (1999) 21 Cal.4th 489, 496.) Concerns must first be presented to the agency so it has "its opportunity to act and

to render litigation unnecessary." (*Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 535.) Project opponents must show their issues were first raised with the agency when there has been an opportunity to do so, such as a public hearing. (*Tomlinson v. County of Alameda* (2012) 54 Cal.4th 281, 290.) Friends has waived its criticisms of the addendum's open-space calculations, as these claims were not presented to the District at or prior to its public hearings on the Building 20 Complex. Additionally, these arguments should be deemed waived for failure to cite to the record. (*Inyo Citizens for Better Planning v. Inyo County Bd. of Supervisors* (2009) 180 Cal.App.4th 1, 16.)

Even if not waived, unsubstantiated opinion and argument by a petitioner's attorney does not constitute substantial evidence, even under the fair argument standard. (*Pala Band of Mission Indians v. County of San Diego* (1998) 68 Cal.App.4th 556, 580, citing Guidelines, § 15384, subd. (a).) The record is also devoid of contrary evidence from qualified experts.

Friends has failed to carry its burden, instead making unsubstantiated claims, such as asserting the District's numbers regarding retained space "are misleading." Friends offers only unsupported opinion that the District does not distinguish between "new" and "old" garden areas, "major" areas versus "small side-pathway" areas, and planted areas within berms and along walkways. (AB, pp. 54-57.) Friends also falsely claims the District did not count open space within the Building 20 interior courtyard. The record demonstrates that the District did consider and include both the courtyard and landscaping islands when calculating the total square footage of landscaping in the Building 20 Complex. (AR 1:80 (Table 1).) Neither the description of the change to the Building 20 Complex (AR 1:71-72) nor any other place in the addendum makes distinctions regarding landscaped and open space on campus. (AR 1:58-228). It is only Friends' counsel's opinion, unsupported by *any* record citation, that the hillside/berm area is "unusable." Moreover, Friends ignores that these "mini-ecosystems" were designed by some of the very same faculty who initially criticized the first addendum.

The berm areas will be planted with the landscaping plan designed by faculty. (AR 1:85-86 (describing teaching garden), 87-91 (Conceptual Plan).) [1]

3. The District appropriately presented the revisions to the project-specific IS/MND in the addendum.

Friends misleadingly minimizes the extent of environmental analysis contained within the addendum. (AB, pp. 57-60.) Friends first incorrectly accuses the District of relying only upon square footage comparisons to measure the impacts of demolition. (AB, p. 58.) These comparisons were an important part of measuring certain demolition-related impacts of the revision, such as air quality impacts. (AR 1:81-82, 1:95-97, 1:122-181.) But the square footage comparison was not the only analysis included in the addendum.

In addition to quantitative assessments of air quality and greenhouse gases, the District also considered site impacts, including potential historic value of the complex. The District's environmental consultant conducted a cultural resources inventory of the CSM campus. The exhaustive analysis considered the ethnographic and historic context of the area. (AR 1:283-286.) The revised addendum also specifically considered the potential historicity of the Building 20 Complex. (AR 1:101-102.) The District did not rely solely on square footage comparisons in concluding there would not be any significant new impacts. Friends' comparison of the demolition of Building 20 to San Francisco's City Hall is inapt and dishonest rhetoric. (AB, p. 58.)

Friends continues the hyperbole when it suggests the District might approve new campus construction projects "as 'supplemental' projects—forever!" (AB, p. 58.) The District's future actions with respect to its other facilities are not at issue here.

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[1] The District understood the difference between the berms to be planted and the South Garden; the addendum totaled the square footage of these areas separately. (Compare AR 1:80 [Tables 1 and 2 noting "sloped landscape areas" and "South Garden" separately] with AB, p. 57.) Additionally, the District considered the need for the greenhouse and determined more than 50% of the greenhouse footage was being used by UC-Berkeley for its fundraisers and not to the benefit of the CSM's campus, educational mission, or its students. (AR 2:626.) Thus, the record contradicts Friends' assertion of the greenhouse's importance.

Here, the District, unlike the mining company in *Sierra Club v. County of Sonoma, supra*, did not rely on tiering to claim the Building 20 Complex demolition was within the scope of a prior programmatic review. But this is what Friends implies when it incorrectly suggests that the MND for the CSM Project addressed a "long-term management plan." (AB, p. 59.) In fact, the MND was a project-level analysis of specific improvement projects intended to upgrade and modernize (rather than expand) existing facilities and services. (AR 1:236.) The MND described the proposed improvements in detail and identified and discussed the various demolition and renovation projects in specific terms. (AR 1:245-247.) This specificity distinguishes these circumstances from those in *Sierra Club v Sonoma.*

The CSM Project originally envisioned retention of the Building 20 Complex. (AR 1:9-10, 64-66.) But because of low student demand and the loss of state funding, the District later reconsidered its needs and made a discretionary decision based on program enrollment and facility needs to *modify* the CSM Project. (AR 1:12, 65, 71, 396; 2:658.) Cases dealing with tiering and program review are utterly irrelevant to this case. The Court need not consider whether the District appropriately used tiering under Public Resources Code section 21094; instead, the issue is the appropriate standard of review to apply to an agency's decision to review a revised project under section 21166.

F. Substantial evidence supports the District's conclusion that the changes to the CSM Project would result in no new or substantially more severe impacts.

This Court granted review in this case on the issue of the appropriate standard of review to apply to an agency's determination to proceed with subsequent or supplemental environmental review under section 21166. Friends uses this opportunity, however, to also attack the adequacy of the District's addendum. Assuming the Building 20 Complex demolition is a change to the CSM Project, the substantial evidence standard of review clearly applies to judicial review of the District's conclusions regarding the severity of the impacts resulting from that change. (Guidelines, § 15064, subd. (f)(7).) Friends, though, wrongly frames all of its attacks on the impact conclusions reached in the addendum under the inapplicable fair argument standard. Moreover, even if the fair

argument standard applies, which it does not, Friends failed to present a fair argument that the demolition of Building 20 and some of its surrounding landscaping may cause a significant environmental impact.

1. Substantial evidence supports the District's aesthetic and recreational impact conclusions.

Friends fails to carry its burden to show the District did not rely on *any* substantial evidence when it found the Building 20 Complex modification would not worsen the aesthetic impacts considered in IS/MND. (AB, pp. 65-70.) Friends ignores the evidence supporting the District's position and offers only its own non-expert opinion to support the demand for an EIR. Friends cannot meet its burden with this cherry-picking approach. (*Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1266 [challenger must lay out the evidence favorable to the other side and show why it is lacking].)

Friends ignores the District's substantial evidence and instead cites *Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903 to suggest that here, project opponents presented a fair argument that the District's actions would result in significant aesthetic impacts. (AB, pp. 65-66.) *Pocket Protectors* involved a challenge to a lead agency's *initial* decision to prepare an MND instead of an EIR for a project of first impression. (124 Cal.App.4th at p. 911.) It does not stand for the principle that any aesthetic impact could be supported by lay opinion.

Friends critiques the aesthetics analysis in the addendum, claiming views and aesthetics from "individual buildings" were not discussed. (AB, p. 66.) When exercising its discretion to make a policy decision on the merits of the proposed action, however, the District properly considered the campus setting. The campus core is developed with classroom labs and operations buildings, parking lots, pedestrian walkways, athletic facilities, faculty housing, and large sports fields. The campus also contains landscaped and undeveloped areas. (AR 1:236; see also 1:359-365 [campus photos and diagram of photo locations].) The Board specifically considered the aesthetics of the Building 20 Complex itself, inside and out. (AR 1:76-78, 418-435.) Based on this record, the Board concluded the proposed change to the Building 20 Complex would not result in new or

substantially more severe aesthetic impacts to the campus aesthetic environment than disclosed in the earlier IS/MND. (AR 1:92-95.) As held in *Bowman v. City of Berkeley* (2004) 122 Cal.App.4th 572, 592, lay opinion about the aesthetic impact of a project that is consistent with the existing environment does not constitute a fair argument of a potentially significant impact.

Friends' bare claim that the District failed to review comments provided by project opponents is contradicted by the record. (Compare AB, p. 47 and AR 3:1566; see also 1:71-72, 79-80; 3:1601-1602 [noting improvements made to project design after student input].) [2] The District was allowed, in its discretion, to rely on the substantial evidence presented before it in the record and the addendum. (*Ebbetts Pass Forest Watch v. California Dept. of Forestry and Fire Protection* (2008) 43 Cal.4th 936, 944.) Friends fails to carry its burden of proof to show the District had *no* substantial evidence to support its conclusions, and it failed to raise even a fair argument of a potentially significant impact. (*Citizens for Responsible Equitable Environmental Development v. City of San Diego* (2011) 196 Cal.App.4th 515, 526-527.)

2. Substantial evidence supports the District's biological impact conclusions.

Friends wrongly argues it presented evidence that the addendum did not study certain potentially significant impacts to plants and wildlife. (AB, pp. 61-64.) In fact, the addendum relied on a thorough study of potential biological impacts.

A long-developed, urbanized college campus is typically not ideal special status wildlife habitat. The entire CSM campus area was cleared during its original

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[2] The comments do not acknowledge the final proposed physical changes or the project area. Friends cites a comment claiming the gardens include over 100,000 square feet of "contiguous green space." (AR 4:1971.) The second addendum determined, however, that the area provides only 55,995 square feet of landscaping, gardens, and courtyards. Buildings, asphalt parking, and sidewalks comprise the remaining 48,840 square feet of space. (AR 1:80.) And while Friends cites one comment from student trustee Barry Jointer discussing the comment, Friends fails to cite another comment from Mr. Jointer noting "the first thing he noticed was that Building 20 was run-down and out of place...it would have to be flattened and rebuilt." (Compare AB, p. 67, citing AR 2:757, with 2:723.)

construction; no natural vegetation exists at the Building 20 Complex. (AR 1:98-99, 278-282.) The District still conducted expert biological studies to update and support the addendum. (AR 1:211-213, 97-100.) Friends fails to identify any inadequacy in these studies showing no significant wildlife or habitat on campus.

Instead, Friends cites generally to the tree assessment (AR 1:182-207) and takes a quote from the assessment out of context regarding the dawn redwood tree, but fails to explain how the assessment and adopted preservation plan do not constitute substantial evidence that potential impacts to the dawn redwood will be minimized. (AB, p. 61.) The protection plan indicates "there *may* be some future health problems." (AR 1:191 [italics added].) However, the plan further states that "[t]he impact level is moderate and the tree can tolerate the changes in the long term if proper steps are taken and future maintenance is performed." (*Ibid.*) The assessment further concluded that the tree "is in good overall condition, has strong structural components, and is in good health. The proposed construction impact on the tree would be moderate and the suitability for preservation is good." (AR 1:194.) The tree will be retained in its current location consistent with the arborist's protection recommendations. (AR 1:98.)

Friends also mischaracterizes the citation to AR 1:212-213 in asserting that birds may nest in the greenhouse and a recommended follow-up survey "has not been done." (AB, p. 62.) The addendum includes an updated nesting bird/roosting bat survey, which found no nesting birds, nest structures or bird activity in any portion of the greenhouse complex. (AR 1:212-213.) A follow-up survey was recommended only if construction, which has not begun yet, is delayed into a new nesting season. (*Ibid.*) The prior MND included mitigation for potential nesting impacts, and the addendum noted these measures would continue to be applied to the demolition activities at the Building 20 Complex. (AR 1:69, 225.) Thus, Friends' assertion is simply wrong.

Friends' other citations consist only of unsupported or lay opinion. The District was allowed to rely on its own expert evidence reaching different conclusions. (AB, pp. 62-64; see *Laurel Heights I, supra,* 47 Cal.3d at pp. 407-408.) Professional biologists determined the gardens provide only limited habitat that is not unique to the campus or

region. (AR 1:98.) Finally, as discussed above, any trees removed will be replaced pursuant to the mitigation adopted with the 2006 IS/MND. (Compare AB, p. 64, citing AR 4:1972, with 1:282.)

As the foregoing arguments and the whole of the record evidence regarding biological resources impacts demonstrate, Friends fails to show that the District's conclusions are unsupported by substantial evidence, nor have they raised a fair argument of potentially significant impacts.

3. Substantial evidence supports the District's cultural resource impact conclusions.

Friends likewise disregards the substantial evidence in the District's record regarding potential cultural resource impacts. (AB, pp. 70-72.) That evidence shows the revised project will not result in new or worse cultural resource impacts.

The District specifically considered the potential historicity of the Building 20 Complex, including its environmental setting. (AR 1:101-102.) No component of the Building 20 Complex was found to be of historical or cultural significance, and there is no evidence the demolition of these structures would result in new or worse cultural resource impacts than the previous MND disclosed. (AR 1:102.) The gardens and accompanying walkway are simply not a unique historical, cultural, or archaeological resource. (*Ibid.*, citing Pub. Resources Code, § 21083.2, subd. (h).)

First, Friends' reliance on *League for Protection of Oakland's Historic Resources v. City of Oakland* (1997) 52 Cal.App.4th 896 is inapplicable to these circumstances because that case dealt with whether a city properly dispensed with preparation of an EIR when reviewing a project in the first instance. (AB, p. 71.)

Second, the letters cited by Friends do not negate the substantial evidence relied upon by the District. The letter from Linton Bowie, cited by Friends (AB, pp. 71-72), was submitted on May 14, 2011, and was a comment on the District's first addendum, which was rescinded and replaced with the addendum actually challenged in this case. (AR 4:1971-1974.) Ms. Bowie's letter does not address the adequacy of the second, substantially revised addendum, and the letter contains significant misstatements of fact.

For example, the District determined that the circular walkway Ms. Bowie calls a "Hopi meditation maze" has neither cultural nor historical origins. (AR 1:102.) Additionally, the opinions presented in the letter from Lucy Tolmach are not based on fact. (AR 4:2247-2248.). Ms. Tolmach makes a bare assertion that the Building 20 Complex is qualified for listing on the California Register of Historical Resources, but she offers no supporting analysis or facts. (*Ibid.*) Her testimony is neither that of an established expert nor a reasonable assumption predicated upon fact. (Pub. Resources Code, § 21080, subd. (e).) The testimony utterly fails to indicate how the evidence relied upon by the District to support its conclusion that the Complex lacks historical status is deficient. (AR 1:101-102; 3:1564, 1582-1584.)

Because the substantial evidence standard applies to the District's determination, Friends fails to carry its burden by merely pointing to contrary opinions in the record. (*Laurel Heights I, supra,* 47 Cal.3d pp. at pp. 407-408.) Nor has Friends raised even a fair argument of potentially significant impacts.

CONCLUSION

The question accepted for review by this Court is critically important: When a lead agency prepares a subsequent environmental review such as an addendum, is the agency's decision reviewed under a substantial evidence standard of review, or is it subject to a threshold determination whether the modification of the project constitutes a "new project altogether," as a matter of law?

Unless the California courts are to become the ultimate fact-finders in all CEQA challenges involving section 21166 review, the substantial evidence standard of review must apply at all stages in such circumstances. Section 21166 presents a series of inherently factual questions, much like the issue addressed by the agency in *Laurel Heights II.* There, the agency considered the evidence in its record to determine if new information in a final EIR was "significant" pursuant to section 21092.1 (6 Cal.4th at p. 1135.) Here, the District considered the evidence in its record to determine that the changes to the CSM Project were not "substantial" and did not require "major" revisions to the previously adopted IS/MND, pursuant to section 21166. The Pandora's box that

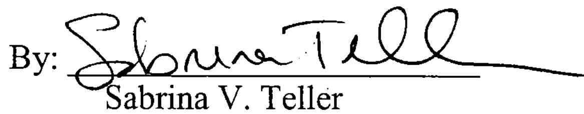
determinations is unsupported speculation and hyperbole. The substantial evidence standard is searching enough to rein in the kinds of abuses that Friends claims could result from affording agencies their customary deference. Friends seeks a broader role for the courts to provide an opportunity to stymie and delay development by subjecting changes to approved plans to further rounds of review and litigation.

The question in this case is whether the District complied with CEQA when it approved the demolition of the Building 20 Complex. To answer this question, however, this Court must inquire whether substantial evidence supports the District's conclusion under section 21166 and Guidelines section 15164, both as to the question of whether the action is a change to a previously reviewed project and as to the sufficiency of the District's environmental conclusions. Courts should not, and may not, step into the shoes of the agency decision-makers and determine for themselves whether the characterization of an action is properly that of a "new" project or a change to a previously reviewed project. The CEQA statute and its implementing Guidelines do not provide any indication that such a non-deferential role for the courts was intended by the Legislature on such questions.

Respectfully submitted,

Dated: April 29, 2014

REMY MOOSE MANLEY, LLP

By: 
Sabrina V. Teller
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CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, Rule 8.520(c)(1)

I, Sabrina V. Teller, declare as follows:

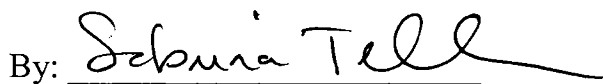
1. I am an attorney at law duly licensed to practice before the courts of the State of California, and am the attorney of record for the Appellants/Defendants in this action.

2. California Rules of Court, rule 8.504(d)(1), states that reply 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 Reply to Answer to Petition for Review consists of 8,374 words, including footnotes but excluding the caption page, tables and this certificate, as counted by the word processing program.

Dated: April 29, 2014

REMY MOOSE MANLEY, LLP

By: 
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Friends of the College of San Mateo Gardens v.
San Mateo County Community College District
Supreme Court Case No.: S214061
(Court of Appeal, First Appellate District, Div. 1, Case No.: A135892,
San Mateo County Superior Court Case No.: CIV508656)

PROOF OF SERVICE

I, Rachel Jackson, am a citizen of the United States, employed in the City and County of Sacramento. My business address is 555 Capitol Mall, Suite 800, 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 April 29, 2014, I served the following:

REPLY BRIEF

☑ 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 electronically delivered via the internet to the following person(s) or representative at the address(es) listed below:

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury that the foregoing is true and correct and that this Proof of Service was executed this 29th day of April, 2014, at Sacramento, California.

____
Rachel N. Jackson

Friends of the College of San Mateo Gardens v.
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