Civil Case No. S214061

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After an Unpublished Decision by the Court of Appeal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

DEFENDANT/APPELLANT'S SUPPLEMENTAL BRIEF

James G. Moose, SBN 119374
*Sabrina V. Teller, SBN 215759
REMY MOOSE MANLEY, LLP
555 Capitol Mall, Ste. 800
Sacramento, CA 95814
Telephone: 916-443-2745
Facsimile: 916-443-9017
Email: jmoose@rmmenvirolaw.com
steller@rmmenvirolaw.com

Attorneys for Defendants and Appellants
SAN MATEO COUNTY COMMUNITY COLLEGE DISTRICT, et al.

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I. INTRODUCTION

In its order for supplemental briefing, this Court asked: Under CEQA Guidelines section 15162, what standard of judicial review applies to an agency's determination that no EIR is required as a result of proposed modifications to a project that was initially approved by negative declaration or mitigated negative declaration? Defendant and Appellant San Mateo County Community College District (the District) respectfully contends that section 15162 must be understood as unequivocally providing that the substantial evidence standard applies to an agency's determination supporting the ultimate conclusion that no subsequent EIR is required as a result of proposed modifications to a project, regardless of whether the previous document was an EIR or a negative declaration. As explained below, and in the District's prior briefing, such a result would give effect to the important policies and legislative goals embodied in Public Resources Code section 21166 and further developed in section 15162.

In addition to asking what standard of judicial review applies under section 15162 where the prior environmental review document was a negative declaration, the Court also asked the parties to address a separate question: Whether section 15162, as applied to projects initially approved by negative declaration or mitigated negative declaration rather than an Environmental Impact Report (EIR), constitutes a valid interpretation of the governing statute? On this question, the District answers "yes," and urges the Court to uphold section 15162 as a legitimate regulation formulated by the Office of Planning and Research (OPR) and adopted by the Resources Agency (now called the Natural Resources Agency).

In the 1970s, the Legislature included within CEQA a directive that OPR draft and Resources Agency adopt the CEQA Guidelines to facilitate the orderly preparation and review of both EIRs and negative declarations. (Pub. Resources Code, § 21083, subd. (a).) Based on the quasi-legislative

nature of the agencies' rule-making process, this court has repeatedly affirmed that the CEQA Guidelines are afforded "great weight" except where clearly unauthorized or erroneous.[1] CEQA Guidelines section 15162 is neither. Rather, it balances the goals of facilitating informed public participation with the need to provide finality and certainty in the administrative review process upon project approval. Notably, this Court has previously recognized the existence of this balancing of competing policies. (*Laurel Heights Improvement Assn. v. Regents of the University of California* (1993) 6 Cal.4th 1112, 1130 ("*Laurel Heights II*") ["[a]fter certification, the interests of finality are favored over the policy of encouraging public comment"].)

CEQA includes numerous provisions demonstrating the importance of finality once statutes of limitations have run without challenge on EIRs and negative declarations. For example, Public Resources Code section 21080.1, subdivision (a), mandates that an agency's determination that an EIR, negative declaration, or mitigated negative declaration shall be prepared is "final and conclusive on all persons" unless timely challenged. CEQA also includes numerous provisions requiring expedited litigation. As one Court of Appeal has noted, CEQA "contains a number of provisions evidencing the clear 'legislative determination that the public interest is not served unless challenges under CEQA are filed promptly' [citation], and the same policy must certainly be said for similar provisions which require that a CEQA action, once filed, be diligently prosecuted and heard as soon as reasonably possible." (*Board of Supervisors v. Superior Court* (1994) 23 Cal.App.4th 830, 836.)

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[1] / See *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116, 128, fn.7 (*Save Tara*); *Laurel Heights Improvement Assn. v. Regents of the University of California* (1993) 6 Cal.4th 1112, 1123, fn.4. ("*Laurel Heights II*").

In the chapter of CEQA titled "Limitations," Public Resources Code section 21166 prohibits a supplemental or subsequent EIR from being required by any agency after the certification of an EIR unless "substantial changes" in the project or surrounding circumstances or new information comes to light that would require "major revisions" in that prior analysis. Guidelines section 15162, as applied to projects initially approved with a negative declaration in addition to those approved based on an EIR, constitutes a valid interpretation of the governing statute, section 21166. Although section 21166 only mentions EIRs, the legislative history for that section does not support a view that the omission of negative declarations was intentional. Section 15162 reasonably fills that void to extend the scope of section 21166 and the deferential substantial evidence standard that applies in subsequent review circumstances to situations in which an agency's previously approved environmental document is a negative declaration or mitigated negative declaration rather than an EIR.

Section 15162 is a reasonable exercise of the broad quasi-legislative authority granted to OPR and the Resources Agency in Public Resources Code section 21083, subdivision (a). It gives effect to the Legislature's stated goals of finality and certainty articulated in section 21080.1 by putting negative declarations on equal footing with EIRs after they are adopted and the time to challenge them has passed. The regulatory history shows that negative declarations did not yet exist when section 21166 was first enacted in 1972 and the Resources Agency was validly exercising its broad grant of authority in promulgating regulations when it added negative declarations to section 15162's predecessor section in 1978. The application of section 15162 to negative declarations should not be invalidated, as the regulation in its current form is not clearly erroneous or unsupported by the statute. In fact, the existing language and scope of

section 15162 is absolutely necessary in order to harmonize all of the stated purposes of CEQA.

Negative declarations[2] are not "second-class citizens" under CEQA. They serve the fundamental goals or objectives of CEQA and in fact are required under circumstances where the impacts of a project can be fully mitigated. (See Pub. Resources Code, § 21080, subd. (c)(2).) An agency should earn the same presumption of validity and finality for its action when the agency approves a project after adopting a negative declaration (or mitigated negative declaration) as it does after it certifies an EIR. Once a negative declaration has been prepared and adopted and the statute of limitations has passed, there is no authority under CEQA to apply any standard other than the substantial evidence standard in reviewing an agency's subsequent review process under CEQA Guidelines section 15162.

If the Court were to invalidate section 15162 as applied to projects that were reviewed previously in a negative declaration, the Court would be overturning a regulation that has been in place for nearly 40 years. Two Courts of Appeal have already carefully considered and rejected arguments against 15162 in well-reasoned holdings: *Benton v. Board of Supervisors* (1991) 226 Cal.App.3d 1467, 1477-1481 and *Abatti v. Imperial Irrigation District* (2012) 205 Cal.App.4th 650, 668-674. Because *Benton* was decided 25 years ago, the Court would also create havoc across the state if it invalidated section 15162's application to negative declarations, as agencies have considered the validity of section 15162 to be bedrock CEQA law. For all of these reasons, the Court should not change the fundamental review process for modifications to projects that lead agencies,

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[2] / Where the difference between a negative declaration and a mitigated negative declaration is not material to an argument, this Supplemental Brief often refers generically just to negative declarations.

project proponents, and reviewing courts have relied upon in good faith for many decades.

Over these many decades, section 15162 has been demonstrated to be an appropriate review method. The facts of this case demonstrate that application of section 21166 to negative declarations does not frustrate CEQA's fundamental goals or purposes. These same facts also illustrate why the achievement of finality and a presumption against repeating the process anew should *not* be limited only to those projects for which agencies have prepared full EIRs. Here, the District provided a full and fair review process under CEQA when it analyzed its original campus renovation plan in a mitigated negative declaration. No one opposed that project or timely challenged the content of that negative declaration, so that analysis was presumed to be adequate and final. (Pub. Resources Code, § 21080.1, subd. (a); CEQA Guidelines, § 15231.) Years later, the District proposed to change the disposition of just one small area of its 153-acre campus. In reliance again on its prior review in the mitigated negative declaration adopted for the campus renovation plan, the District carefully considered the incremental changes to that analysis that would result from implementation of the changes to the Building 20 Complex. The District determined based on substantial evidence – as set forth in an addendum that was publically available for review and discussed at several public hearings – that the changes would not cause any new significant impacts not previously considered and mitigated.

These circumstances are of exactly the type that the subsequent review scheme in Public Resources Code section 21166 and Guidelines section 15162 are intended to govern. That scheme flips the initial presumption in favor of more environmental review into a presumption against such additional review, because the time to challenge the conclusions of the original negative declaration elapsed long ago, and the

only determination to be made is regarding the significance to the environment of the increment of change proposed. The agency's determination should be afforded deference under this legislative scheme as the Legislature's goals of ensuring certainty and finality cannot be fulfilled by disregarding the substantial evidence standard indicated by Section 21166 and expressly mandated in Guidelines section 15162 and instead applying the fair argument standard simply because the prior environmental document was a negative declaration.

The "fair argument" standard that triggers a duty under CEQA to prepare an EIR in some instances is an anomaly in administrative law, in that it provides an exception to normal, long-established principles of judicial deference to administrative agency decisions involving scientific and technical issues. As this Court has recognized in *Laurel Heights Improvement Assn. v. Regents of the University of California* (1988) 47 Cal.3d 376, 393 ("*Laurel Heights I*"), the Judiciary has "neither the resources nor the scientific expertise" to "weigh conflicting evidence" regarding technical and factual conclusions found in EIRs. Indeed, even in applying the fair argument concept, courts merely enforce a legal duty and do not engage in any kind of weighing of conflicting evidence. The agency's duty is to prepare an EIR in the face of substantial evidence that a proposed project's impacts may be significant. (*Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 319; *Friends of "B" Street v. City of Hayward* (1980) 106 Cal.App.3d 988, 1002; *Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307, 1317-1318; see also Pub. Resources Code, § 21080, subd. (d).)

The anomalous fair argument concept arises from the Legislature's intentional use of the word "may" (as opposed to "will") in Public Resources Code section 21151, subdivision (a), which provides, in

pertinent part, that local agencies must prepare EIRs for proposed projects that "*may* have a significant effect on the environment." (Italics added.) In *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 83, fn. 16 (*No Oil*), this Court interpreted "may," as used in that statute, as connoting a "reasonable possibility" of a significant effect. The court reasoned that "'[t]he very uncertainty created by the conflicting assertions made by the parties as to the environmental effect ... underscores the necessity of the EIR to substitute some degree of factual uncertainty for tentative opinion and speculation.'" (*Id.* at p. 85.) The Court therefore announced that "the act requires the preparation of an EIR whenever it can be fairly argued on the basis of substantial evidence that the project may have significant environmental impact." (*Id.* at p. 75; see also *id.* at p. 85.)

Because the fair argument concept is an exception to the normal deferential approach to reviewing agency factual and technical conclusions, the substantial evidence standard applies to judicial review of all such conclusions in CEQA challenges except where the fair argument language ("may cause" a significant effect) is used in specific statutory provisions and CEQA Guidelines sections. Absent such language, the traditional, deferential approach to judicial review applies. (See, e.g., *Laurel Heights II*, *supra*, 6 Cal.4th at p. 1135 ["the fair argument test has been applied *only* to the decision whether to prepare an original EIR or a negative declaration"] [original italics].)

Crucially for the instant case, the words "may cause a significant effect" do not appear in Public Resources Code section 21166. Indeed, the Legislature's choice of words in that statute evince a legislative intention far different from that embodied in section 21151, discussed above. Section 21166 *prohibits* the preparation of a subsequent EIR *unless* specified events occur. There is simply no way to read the fair argument concept into such

language, and the prohibition against further review indicates a deferential standard must apply.

Importantly, CEQA Guidelines section 15162, subdivision (a), states that an agency's determination under that section should be based on "substantial evidence in the light of the whole record[.]" This language echoes language in Public Resources Code section 21168, which governs judicial review in administrative mandamus cases under CEQA, though this court has held that the same standard of review applies under section 21168.5, which governs traditional mandamus cases under CEQA. (*Laurel Heights I, supra*, 47 Cal.3d at p. 392, fn. 5.) Section 21168 states that "the court shall not exercise its independent judgment on the evidence but shall only determine whether the act or decision is supported by substantial evidence in the light of the whole record." Section 21168 also provides that judicial review "shall be in accordance with the provisions of Section 1094.5 of the Code of Civil Procedure[,]" which governs administrative mandamus cases generally. (See also *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 568-569 (*WSPA*).)

For these reasons, and as explained in further detail below, the District respectfully requests that this Court affirm the validity of CEQA Guidelines sections 15162 and interpret section 21166 and section 15162 as requiring agencies to engage in a fact-based inquiry subject to the traditional "substantial evidence" standard of review, regardless of whether the prior environmental review document was an EIR or a negative declaration.

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II. ARGUMENT

A. The substantial evidence standard applies to an agency's determination under Guidelines section 15162 because of the wording of Public Resources Code section 21166 and to effectuate section 21080.1 and the legislative purpose of finality after CEQA review has been completed.

1. The wording of Public Resources Code section 21166 and Guidelines section 15162 indicate that the substantial evidence standard of review applies to subsequent review of projects analyzed in negative declarations.

As explained above, the substantial evidence standard is the default standard of judicial review for all factual and technical determinations in all CEQA actions. (See Pub. Resources Code, §§ 21168, 21168.5.)[3]

In contrast, the "fair argument" standard is a narrow question of law applicable only to whether a negative declaration is the correct type of environmental review document in a given situation. That question is, has the requisite evidentiary showing been made to mandate the preparation of an EIR? (*League for Protection of Oakland's Architectural and Historic Resources v. City of Oakland* (1997) 52 Cal.App.4th 896, 904-905 [the question of whether a fair argument can be made such that an EIR must be prepared is one of law, "i.e., 'the sufficiency of the evidence to support a fair argument'"], quoting *Bowman v. City of Petaluma* (1986) 185 Cal.App.3d 1065, 1073.)

The fair argument standard applies only in specific situations where the CEQA statutes use the phrase, "may have [or cause] a significant effect on the environment." (See, e.g., Pub. Resources Code, §§ 21080, subd. (d),

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[3] / See *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435 (interpreting section 21168.5 by distinguishing between "factual conclusions" and required "procedures").

21094, subd. (c), 21100, subd. (a), 21151, subd. (a)[4]; see also *Latinos Unidos de Napa v. City of Napa* (2013) 221 Cal.App.4th 192, 200-201.) The phrase "may have a significant effect" from section 21151 or any similar language is absent from section 21166. As this Court has previously recognized, "the 'fair argument' test has been applied *only* to the decision whether to prepare an original EIR or a negative declaration." (*Laurel Heights II*, *supra*, 6 Cal.4th at p. 1135, original italics, citing *Benton*, *supra*, 226 Cal.App.3d at pp. 1481–1483, and *Bowman*, *supra*, 185 Cal.App.3d at pp. 1071–1072.) As the *Bowman* court noted in the portion of the decision this Court referenced in its order requesting supplemental briefing, Public Resources Code sections 21151 and 21166:

> serve quite different purposes and have correspondingly different effects. The question addressed by section 21151 is whether *any* environmental review is warranted. CEQA procedures reflect a preference for resolving doubts in favor of such review. [citations.] In the present case, however, section 21166 comes into play precisely because in-depth review has already occurred, the time for challenging the sufficiency of the original EIR has already expired [citation], and the question is whether circumstances have *changed* enough to justify *repeating* substantial portion of the process. Thus, while section 21151 is intended to create a "low threshold requirement for preparation of an EIR" [citation], section 21161 [sic] indicates a quite different intent, namely, to restrict the powers of agencies "by prohibiting [them] from requiring a subsequent or supplemental environmental impact report" unless the stated conditions are met.

(*Bowman*, *supra*, 185 Cal.App.3d at p. 1073, italics in original.) Although the prior environmental document at issue in *Bowman* was an EIR, the legislative intent discussed in *Bowman* applies equally where the prior environmental document was a negative declaration.

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[4] / The District described the distinction between section 21151 and section 21166 in its prior briefs. (Opening Brief, pp. 35-36; Reply Brief, p. 14.)

The language of Public Resources Code section 21166 and Guidelines section 15162 indicate that courts must apply the substantial evidence standard of review. The language signaling the application of the fair argument test (e.g., "may cause") is nowhere to be found in either section. CEQA Guidelines section 15064, subdivision (f)(7), further states that "the fair argument standard does not apply to determinations of significance pursuant to sections 15162, 15163, and 15164." There are no other provisions in CEQA that dictate which standard applies in circumstances where a project was previously reviewed, the statute of limitations has run for the original approval, there is another discretionary agency approval required for the project, and the project or circumstances surrounding the project have changed. There is no support anywhere in the statute or the Guidelines for applying the fair argument standard (or a "new project" question of law) in such circumstances just because the original environmental review document was a negative declaration and not an EIR. By the plain language of the statute and Guidelines, the substantial evidence standard of judicial review must apply. Such an outcome is in fact dictated by the general standard of review found in Public Resources Code sections 21168 and 21168.5. As explained below, the application of this standard is the only way to give effect to the Legislature's intent both that subsequent environmental review is discouraged unless new significant impacts are implicated, and that all CEQA procedures be implemented in an efficient manner (see Pub. Resources Code, § 21003, subd. (f)).

2. Negative declarations are subject to the same presumption of finality as EIRs under section 20180.1 and thus should be reviewed under section 21166.

Public Resources Code section 21080.1, subdivision (a), establishes a statutory presumption of compliance and finality under CEQA for EIRs *and* negative declarations once the limitations period described in section

21167 has run. A parallel presumption can be found in Public Resources Code section 21167.2 for EIRs, and it was extended to negative declarations by regulation in CEQA Guidelines section 15231.

Public Resources Code 21167.3, which applies to both EIRs and negative declarations, creates a similar, if slightly different, presumption where timely litigation has been filed. Whereas section 21080.1, subdivision (a) creates a conclusive presumption of finality for EIRs and negative declarations due to the passage of a 30-day limitations period without challenge, section 21167.3 instructs responsible agencies to treat both EIRs and negative declarations under challenge as being legally valid unless and until a *final* judicial determination to the contrary is reached. (See also CEQA Guidelines, §§ 15231, 15233.) This policy of keeping the inter-agency CEQA process moving forward even during litigation is consistent with the normal legal effect of the passage of all kinds of limitations periods: to create certainty that future legal attacks are no longer available. (See *City of Redding v. Shasta County Local Agency Formation Com.* (1989) 209 Cal.App.3d 1169, 1179-1181.)

As this Court has emphasized, CEQA's statutes of limitations serve to encourage the prompt enforcement of substantive law, reduce the volume of litigation, and ensure finality and predictability in public land use planning decisions. (*Stockton Citizens for Sensible Planning v. City of Stockton* (2010) 48 Cal.4th 481, 499.) Whether an agency certifies an EIR or adopts a negative declaration, a suit claiming noncompliance with CEQA must be filed within 30 days after the filing and posting of the notice of determination following a project approval. (*Id.* at p. 500, citing Pub. Resources Code, § 21167, subds. (c), (e).) CEQA establishes finality through its statutes of limitations and is not based on whether an agency has prepared an EIR or negative declaration. If an agency has filed a valid notice of determination, "*any* challenge to that decision under CEQA must

be brought within 30 days, regardless of the nature of the alleged violation." (*Committee for Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32, 48, italics original (*Committee for Green Foothills*).) As this Court has held, "the interests of finality are favored over the policy of encouraging public comment." (*Laurel Heights II, supra*, 6 Cal.4th at p. 1130.)

In order to give meaning and effect to Public Resources Code sections 21080.1, subdivision (a), courts, agencies, project proponents, and the interested public must be able to presume that a project has undergone sufficient CEQA review once the review process has been completed and the statute of limitations period has run. The Legislature adopted the strict, 30-day limitation period precisely to avoid potential future uncertainty regarding an agency's land-use decision. (*Committee for Green Foothills, supra*, 48 Cal.4th at pp. 50-51.) Therefore, agencies and project applicants may presume that a negative declaration complies with CEQA once the 30-day statute of limitations has run.

These are the reasons why negative declarations provide an appropriate basis for subsequent or supplemental review as described by section 21166 and are afforded the same deferential substantial review standard under Guidelines section 15162 as applied to EIRs. To hold otherwise – that the fair argument evidentiary standard somehow applies in perpetuity to negative declarations – would not be consistent with, nor give meaning and effect to, the Legislature's directive in sections 21080.1, subdivision (a) to provide finality and certainty to environmental review embodied in negative declarations.

Moreover, if the Court were to determine that the substantial evidence standard does not apply to reviews of changed projects where the previous review was in a negative declaration, the Court would need to identify authority elsewhere in CEQA requiring the application of the fair

argument standard to all future reviews of those projects. No such authority exists. As noted above, and as this Court recognized in *Laurel Heights II*, *supra*, 6 Cal.4th at p. 1135, the Legislature has used the language indicating the application of the fair argument – "may cause" effects – only in specific, limited circumstances. There is no indication anywhere in the statute that the Legislature intended the fair argument standard to persist beyond the expiration of the statute of limitations for a challenge to a project reviewed in a negative declaration.

B. Guidelines section 15162 is valid because it serves the important Legislative objectives of certainty, finality, and an efficient review process once statutes of limitations have run, and it should be upheld by the Court.

For regulations to be valid, there must be valid rule-making authority. For an agency to legitimately "fill the gap" in a statute with a regulation, the regulation must not exceed the scope, alter, amend, conflict with or be inconsistent with the statute. It must be reasonably necessary to effectuate the purpose of the statute. (Gov. Code, § 11342.2.) Whether the regulation is within the scope of the authority conferred by the enabling statute is a question of law for the Court. Here, the Legislature's broad grant of authority to the Natural Resources Agency in Public Resources Code section 21083, subdivision (a), confers substantial latitude to the Natural Resources Agency to promulgate regulations that appropriately fill any gaps in the CEQA statute that are not inconsistent or in conflict with the statute. Guidelines section 15162 as it applies to negative declarations is not inconsistent or in conflict with Public Resources Code section 21166, and it effectuates section 21080.1 and other important policies and objectives of the Legislature for the CEQA process as a whole.

1. The Natural Resources Agency deserves deference when drafting the CEQA Guidelines because of the Legislature's broad grant of authority to implement CEQA.

The Legislature granted the Natural Resources Agency broad authority to "prepare and develop proposed guidelines for the implementation" of CEQA. (Pub. Resources Code, § 21083, subd. (a).) More specifically, section 21083 requires that the resulting guidelines "'include objectives and criteria for... the preparation of environmental impact reports *and negative declarations*[.]'" (*Abatti, supra*, 205 Cal.App.4th at p. 672, quoting Pub. Resources Code, § 21083, italics added.) In light of this very broad authority, this Court has accorded the CEQA Guidelines "great weight except where they are clearly unauthorized or erroneous." (*Save Tara, supra*, 45 Cal.4th at p. 128 fn.7; *Laurel Heights II, supra*, 6 Cal.4th at p. 1123 fn. 4; see also *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1197.)

In *City of Santa Ana v. City of Garden Grove* (1979) 100 Cal.App.3d 521, 529, the Court of Appeal held that Public Resources Code section 21083 is a proper delegation of legislative power. An administrative agency with quasi-legislative powers may adopt regulations to fill in details of statutes enacted by legislature. (*Helene Curtis, Inc. v. Assessment Appeals Bd.* (1999) 76 Cal.App.4th 124, 129-130 [rule prohibiting amendments requesting additional or different relief after a certain period of time was valid where enabling legislation neither permitted or prohibited amendment of applications]; *Fox v. San Francisco Residential Rent Stabilization and Arbitration Bd.* (1985) 169 Cal.App.3d 651, 655 [board adopted limitations on rent increases found to be a reasonable interpretation of legislative intent to protect tenants from excessive rent increases].)

"The absence of any specific [statutory] provisions regarding the regulation of [an issue] does not mean that such regulation exceeds

statutory authority." (*Marshall v. McMahon* (1993) 17 Cal.App.4th 1841, 1848-1489 [regulation providing protective supervision for mentally but not physically impaired persons found consistent with statute where statute did not define "protective supervision"].) "An administrative agency is not limited to the exact provisions of a statute in adopting regulations to enforce its mandate." (*Ford Dealers Assn. v. Department of Motor Vehicles* (1982) 32 Cal.3d 347, 362-363 [DMV had authority adopt regulations setting specific limits on advertising and sales by car dealers to "fill up the details" of a statutory scheme prohibiting dissemination of false or misleading statements to the public, even though Vehicle Code section 1173 was silent as to rulemaking authority; however, DMV had broad rulemaking authority to effect]; see also *Masonite Corp. v. County of Mendocino Air Quality Management Dist.* (1996) 42 Cal.App.4th 436, 446-449 [finding board properly acted to "fill up details" of an air quality statute by defining statutory provision for "data used to calculate emissions" included "emissions factors"]; *PaintCare v. Mortenson* (2015) 233 Cal.App.4th 1292, 1306-1308 [agency's broad authority to adopt regulations to carry out the Waste Management Act included the authority to adopt regulations for statutory programs within the act even though the specific statutory program is silent as to rulemaking authority].)[5]

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[5] / While federal administrative law is, of course, not controlling on this Court, it is worth noting that the federal courts must afford similarly substantial deference and latitude to federal agencies' rulemaking actions. The U.S. Supreme Court in the seminal decision *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.* (1984) 467 U.S. 837, 843, held that where there is an express delegation of power, an agency interpretation is given controlling weight unless it is arbitrary, capricious, or manifestly contrary to the statute. Even where Congress is silent or ambiguous on a particular issue, an agency's interpretation of the statute will be upheld so long as it is a reasonable interpretation of the statute. In questions involving an agency's interpretations of the statutes it administers, courts use the *Chevron* analysis affording deference to an agency that has the general

With the breadth of the quasi-legislative rulemaking authority delegated to them by the Legislature in Public Resources Code section 21083, OPR and the Natural Resources Agency have both a mandate and the discretion to carefully examine the CEQA statute and determine whether gaps in the statute, such as the lack of mention in section 21166 of negative declarations, should be reasonably filled in a manner consistent with the requirements in the rest of the statute and in service of CEQA's other policy objectives of ensuring certainty and finality for all review decisions. By extending Public Resources Code section 21166's presumption against subsequent or supplemental EIRs to negative declarations as well as EIRs, OPR and the Natural Resources Agency properly exercised their authority to give effect to the Legislature's goals of providing certainty and finality in the CEQA process.

2. The Natural Resources Agency's inclusion of negative declarations in section 15162 was a reasonable exercise of its authority to create objectives and criteria for the orderly evaluation of revisions to projects in a manner consistent with CEQA.

Section 15162 has existed in some form since 1973, when it was first promulgated as section 15067, which read then:

> Where an EIR has been prepared, no additional EIR need be prepared unless: (a) substantial changes are proposed in the project which will require major revisions of the EIR, due to the involvement of new environmental impacts not considered in a previous EIR on the project; (b) there are substantial changes with respect to the circumstances under which the project is to be undertaken, such as a change in the proposed location of the project, which will require major revisions in the EIR due to the involvement of new environmental impacts not covered in a previous EIR.

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power to make rules carrying the force of law. (*U.S. Corp. v. Mead* (2001) 533 U.S. 218, 234; *The Wilderness Society v. U.S. Fish & Wildlife Service* (9th Cir. 2003) 353 F.3d 1051, 1059; *Sierra Club v. U.S. EPA* (9th Cir. 2012) 671 F.3d 955, 962-63.)

(Joint Request for Judicial Notice [JRJN], Vol. II, p. 314.)

In 1978, just eight years after CEQA was adopted, section 15067 was amended to read: "Where an EIR *or Negative Declaration* has been prepared, no additional EIR need be prepared unless...." (JRJN, Vol. II, pp. 331-332, italics added to indicate new text.) Between 1978 and 1983, section 15067 was apparently renumbered as 15162 as part of a larger set of revisions to the Guidelines.

In 1994, section 15162 was amended again to add negative declarations to the title of the regulation ("Subsequent EIRs *and Negative Declarations*"), to make explicit the application of the substantial evidence standard, and to add a "subsequent negative declaration" as an environmental review option for an agency proceeding under section 15162:

> (a) When 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, one or more of the following . . . .*
>
> *(b) If changes to a project or its circumstances occur or new information becomes available after adoption of a negative declaration, the lead agency shall prepare a subsequent EIR if required under subsection (a). Otherwise the lead agency shall determine whether to prepare a subsequent negative declaration, an addendum, or no further documentation.*

(JRJN, Vol. II, pp. 508-509 [showing proposed revisions in redline/strikeout format attached to notice of publication of regulations], italics added here to indicate relevant new text.)

Unfortunately, the 1978 rulemaking package in the archives of OPR and the Natural Resources Agency does not include a statement of reasons

detailing the agencies' original reasoning for adding negative declarations to the Guideline section implementing Public Resources Code section 21166. In a later rulemaking effort by the Resources Agency in 1994, however, in response to a comment on amendments to Guidelines section 15162, subdivisions (a)(1)-(3), the Agency explained:

> The terms "negative declaration" and "EIR" are appropriately used in tandem in sections (a) (1), (2) and (3). P.R.C. section 21166 which sets the rules for subsequent EIRs *is an old section dating from before the statute referred to negative declarations*. At that time the Guidelines provided for negative declarations as the document to use when the agency determined that an EIR would not be required because the project would not have a significant effect on the environment. The courts recognized the validity of the negative declaration document, and later the statute added references to negative declarations. In the meantime the courts interpreted references in the statute to an EIR as meaning an EIR or a negative declaration depending on whether the agency found that there would or would not be a significant effect on the environment.
>
> *Accordingly, we have interpreted the references in Section 21166 as including either an EIR or a negative declaration and applying where a public agency had previously prepared a CEQA environmental document for the project at hand. If the agency prepared a negative declaration previously, and any of the circumstances described in Section 21166 occur, we believe that the standards in the section control.* The agency's decision as to whether to prepare a subsequent EIR would be subject to the substantial evidence standard of review rather than the more stringent "fair argument" standard that applies to a decision to prepare a first EIR or negative declaration for a project. We believe the language in the section is appropriate.

(JRJN, Vol. II, p. 613, italics added.)

The Natural Resources Agency explained at length the reasons for its addition of the substantial evidence standard in 1994, as necessary and intended to reflect case law and to clarify the standards for preparation of a

subsequent EIR based on the three factors identified in Public Resources Code section 21166. (JRJN, Vol. II, pp. 561-563.)

The available legislative history for Public Resources Code section 21166 does not indicate any intent to exclude negative declarations from the presumption against subsequent review. Indeed, as the Resources Agency notes, the section is so old that negative declarations did not exist at the time section 21166 was originally introduced as part of Assembly Bill 889 in 1972. (JRJN, Vol. 1, p. 5; Vol. II, p. 613.) Other sections of the statute were substantially amended from the time that the bill was first introduced, in reaction to this Court's seminal decision in *Friends of Mammoth v. Bd. of Supervisors* (1972) 8 Cal.3d 247 finding that CEQA applied to private as well as public projects. (JRJN, Vol. I, p. 124.) But the form of section 21166 stayed the same throughout that legislative session. (JRJN, Vol. I, p. 65 [final, enrolled version of statute], compare to introduced bill at Vol. I, p. 5.)

Section 21166 was amended again in 1977 to state that "no subsequent *or supplemental* EIR shall be required *by the lead agency or by any responsible agency*" unless substantial changes were proposed in the project that was previously reviewed or substantial changes in the circumstances surrounding the project had occurred that required major revisions in the prior EIR. (JRJN, Vol. I, p. 152, italics in original indicating revised text.) The 1977 amendments also added a third criterion triggering a subsequent or supplemental EIR in a new subdivision (c): new information which was not known and could not be known at the time the prior EIR was certified. (JRJN, Vol. I, p. 180.) The Assembly Committee on Resources, Land Use and Energy explained that the bill containing these and other revisions to CEQA was proposed in response to criticism about the "cumbersome and time-consuming procedures" associated with the

preparation of EIRs and that its purpose was to "expedite" those procedures and project approvals. (JRJN, Vol, I, p. 208.)

If this Court were to invalidate section 15162 it would overturn a regulation that is consistent with the purpose and intent of the statute and has existed without a single case indicating it is invalid for twenty-five years. This would create not only havoc in addressing substantive review under 15162, it would also be completely counter to the deference afforded the Guidelines and thereby call into question the validity of all the Guidelines and the Natural Resources Agency's authority.

3. The courts' reasoning in both *Benton* and *Abatti* in upholding section 15162 as a valid interpretation of section 21166 are sound and convincing.

The extension of the policies of section 21166 to situations in which an agency's prior environmental review was a negative declaration rather than an EIR in Guidelines section 15162 balances CEQA's objective of facilitating informed public participation in the environmental review process when a project is first undergoing review with the need for finality and certainty in land-use planning decisions once the initial environmental review process has been completed. (See *Benton*, *supra*, 226 Cal.App.3d at p. 1478.) In *Benton*, on which public agencies and CEQA practitioners have relied for more than 25 years, the First Appellate District persuasively reasoned as follows:

> 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.

(226 Cal.App.3d at p. 1480, original italics.) The Fourth Appellate District reiterated and affirmed this reasoning just a few years ago. (*Abatti*, *supra*, 205 Cal.App.4th 668-674.)

Notwithstanding the dismissive characterizations of the legitimacy of negative declarations by Friends of the College of San Mateo Gardens and their aligned amici, the reasoning of the *Benton* and *Abatti* courts is sound. In an environmental review, lead agencies must go where the substantial evidence takes them. If the available evidence indicates that a project will not have any significant impacts or that all such impacts can be fully mitigated, the agencies *must* adopt a negative declaration or mitigated negative declaration. (Pub. Resources Code, § 21080, subd. (c).) Such a project is by definition relatively benign from an environmental standpoint, compared with one that requires a full EIR. CEQA mandates a public review and comment process for negative declarations to provide the public an opportunity to contest the agency's evidence and make a case for preparation of an EIR instead. (Pub. Resources Code, § 21080, subds. (c), (f); CEQA Guidelines, §§ 15072, 15073.) Negative declarations are not "second-class citizens" under CEQA. (*Abatti*, *supra*, 205 Cal.App.4th at p. 672 [rejecting petitioner's characterization of a negative declaration as "almost no environmental review whatsoever"].) They are legitimate, cost-effective, and useful review tools that are mandated in certain circumstances. Thus, the *Benton* court was entirely correct in its reasoning that negative declarations are typical and appropriate for projects for which no significant impacts have been found, and that it makes little sense to subject them to a higher level of suspicion or skepticism indefinitely.

The interests of finality are favored after the expiration of a statute of limitations regardless of whether an agency previously certified an EIR

or adopted a negative declaration. (*Moss v. County of Humboldt* (2008) 162 Cal.App.4th 1041, 1049-1050 ["after a project has been subjected to environmental review, the statutory presumption flips in favor of the developer and against further review"].)

Moreover, as reasoned in *Benton*, it would not make any sense to have less finality for, usually simpler and smaller projects that have fewer impacts compared to larger, more impactful projects that required an EIR in the first review. (*Benton, supra,* 226 Cal.App.3d at p. 1480.)

4. Section 15162 as applied to projects initially reviewed in negative declarations promotes CEQA's requirement to carry out review in an efficient manner.

Requiring the same presumption against further review after the statute of limitations has run for an initial environmental review document, whether that is an EIR or a negative declaration, gives effect to the Legislature's stated intent that "[a]ll persons and public agencies involved in the environmental review process be responsible for carrying out the process in the most efficient, expeditious manner 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." (Pub. Resources Code, § 21003, subd. (f).) It would not promote efficiency to take away the certainty that Guidelines section 15162 currently provides lead agencies with respect to projects originally reviewed in negative declarations and to revive the fair argument evidentiary standard for all future changes that may be proposed in a project. Such a result would lead to needless paper generation and a significant waste of limited agency resources to perform repetitive environmental reviews when projects approved with negative declarations are later proposed to be modified because of changed economic or practical considerations.

The Resources Agency also recognized this point in adopting the revisions to section 15162 in 1994, noting in responses to comments on its proposed amendments that "the application of the section to projects for which a negative declaration had been prepared previously" "should decrease the cost of compliance to lead agencies." (JRJN, Vol. II, p. 577.)

III. CONCLUSION

The subsequent review scheme established by the CEQA statute and CEQA Guidelines furthers the Legislature's policy that lead agencies facilitate public participation in the environmental review process at an early stage of planning while respecting project proponents' need for certainty or finality after initial project approvals are granted. The Legislature has authorized, and indeed commanded, agencies to adopt negative declarations under appropriate circumstances. The Legislature also created a short statute of limitations and expedited litigation procedures for legal challenges to agencies' project approvals based on negative declarations. Such documents therefore deserve the same presumption of finality as EIRs do.

In clarifying that the presumption against preparing a subsequent EIR applies to projects analyzed in prior EIRs or negative declarations, OPR and the Resources Agency properly exercised the broad discretion the Legislature delegated to them to create and implement regulations to effectuate *all* of the Legislature's goals and policies for CEQA. CEQA Guidelines section 15162, which gives effect to the presumption of finality for negative declarations and requires that decisions regarding subsequent review must be assessed under the deferential substantial evidence standard, is not clearly unauthorized or erroneous. Striking down this section of the CEQA Guidelines would upend over twenty-five years of stable precedent on the issue and create substantial uncertainty and additional costs and delays in the land-use planning process.

Respectfully submitted,

REMY MOOSE MANLEY, LLP

Date: June 14, 2016

By: Sabrina Teller

SABRINA V. TELLER
Attorneys for Defendant/Appellant
San Mateo County Community
College District

CERTIFICATE OF WORD COUNT

Pursuant to Rule 8.520(c) of the California Rules of Court, I hereby certify that this **SUPPLEMENTAL BRIEF** contains 7271 words, according to the word counting function of the word processing program used to prepare this petition.

Executed on this 14th day of June 2016, at Sacramento, California.

Sabrina Teller

SABRINA V. TELLER

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

PROOF OF SERVICE

I, Rachel N. 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 and email address is rjackson@rmmenvirolaw.com. 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.

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DEFENDANT/APPELLANT'S SUPPLEMENTAL 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

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I declare under penalty of perjury that the foregoing is true and correct and that this Proof of Service was executed this 14th day of June, 2016, at Sacramento, California.

Original Signed By

Rachel N. Jackson

Friends of the College of San Mateo Gardens v.
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SERVICE LIST

Susan L. Brandt-Hawley BRANDT-HAWLEY LAW GROUP 13760 Arnold Drive/ P.O. Box 1659 Glen Ellen, CA 95442 Tel.: (707) 938-3900 Fax: (707) 938-3200 Email: susanbh@preservationlawyers.com	Attorney for Plaintiff and Respondent *Friends of the College of San Mateo Gardens* **VIA FEDERAL EXPRESS**
Jeffrey Reusch OFFICE OF THE ATTORNEY GENERAL, DEPARTMENT OF JUSTICE 1300 I Street Sacramento, CA 95814 Tel: (916) 327-7851 Fax: (916) 327-2319 Email: Jeffrey.reusch@doj.ca.gov	Attorney for *Natural Resources Agency* **VIA FEDERAL EXPRESS**
Sara Hedgpeth-Harris LAW OFFICE OF SARA HEDGPETH-HARRIS, INC. 2125 Kern Street, Suite 301 Fresno, CA 93721 Tel.: (559) 233-0907 Fax: (310) 798-2402 Email: sara.hedgpethharris@shh-law.com	Attorney for Amici Curiae *Association of Irritated Residents, Madera Oversight Coalition, Revive the San Joaquin, and Sierra Club* **VIA U.S. MAIL**

Michael W. Graf
LAW OFFICES
227 Behrens Street
El Cerrito, CA 94530
Tel.: (510) 525-1208
Fax: (510) 525-1208
Email: mwgraf@aol.com

Attorney for Amicus Curiae
High Sierra Rural Alliance

VIA U.S. MAIL

Jan Chatten-Brown
Amy Minteer
CHATTEN-BROWN & CARSTENS
2200 Pacific Coast Highway, Suite 318
Hermosa Beach, CA 90254
Tel.: (310) 798-2400
Fax: (310) 798-2402
Email: jcb@cbcearthlaw.com

Attorneys for Amicus Curiae
California Preservation Foundation

VIA U.S. MAIL

Andrew B. Sabey
Linda C. Klein
COX, CASTLE & NICHOLSON LLP
555 California Street, 10th Floor
San Francisco, CA 94104
Tel.: (415) 262-5100
Fax: (415) 262-5199
Email: asabey@coxcastle.com

Attorneys for Amici Curiae
California Building Industry Association, Building Industry Association of the Bay Area, and California Business Properties Association

VIA U.S. MAIL

Amanda Monchamp
HOLLAND & KNIGHT LLP
50 California Street, 28th Floor
San Francisco, CA 94111
Tel.: (415) 743-6900
Fax: (415) 743-6910
Email:
amanda.monchamp@hklaw.com

Attorney for Amicus Curiae
The Regents of the University of California

VIA U.S. MAIL

Christian L. Marsh
Amanda M. Pearson
DOWNEY BRAND LLP
333 Bush Street, Suite 1400
San Francisco, CA 94104
Tel.: (415) 848-4800
Fax: (415) 848-4831
Email: apearson@downeybrand.com

Attorneys for Amici Curiae
League of California Cities, California State Association of Counties, and Association of California Waste Water Agencies

VIA U.S. MAIL

Clerk of the Court
First District Court of Appeal
Division One
350 McAllister Street
San Francisco, CA 94102
Tel. (415) 865-7300

VIA U.S. MAIL

Clerk of the Court
San Mateo County Superior Court
400 County Center
Redwood City, CA 94063
Tel.: (650) 261-5201

VIA U.S. MAIL