Law Offices of
THOMAS N. LIPPE, APC

50 California Street
Suite 1500
San Francisco, California 94111

Telephone: 415-777-5604
Facsimile: 415-777-5606
Email: Lippelaw@sonic.net

January 3, 2023

Clerk of the First District Court of Appeal, Division Five
350 McAllister Street
San Francisco, CA 94102-7421

Re: *Make UC A Good Neighbor v. Regents of the University of California*, Appeal No. A165451

Dear Clerk:

This office represents Appellants Make UC A Good Neighbor and The People's Park Historic District Advocacy Group ("Appellants"). Appellants submit this letter brief in response to the Court's December 22, 2022, Order.

Appellants' goals include encouraging UC to match housing with enrollment to reduce impacts on the community caused by the shortage of student housing; a shortage UC created by increasing enrollment without building housing. The Court should not allow UC to leverage that shortage to avoid considering alternative locations for new housing or any limits on enrollment.

1. The EIR Fails to Analyze a Lower Enrollment Increase Alternative.

a. Alternatives are not disqualified from analysis in an EIR just because they call for actions that are not expressed in the EIR's purposes and objectives.

Regarding Appellants' claims that the EIR is informationally deficient because it fails to analyze a lower enrollment increase alternative, the Court's tentative opinion reflects several factual and legal errors.

First, the opinion would establish a novel criterion unsupported by CEQA precedent to judge whether alternative activities must be analyzed in a draft EIR, i.e., whether the project's objectives refer to those activities.[1] (See e.g., Op., 15 ["None of the objectives would have helped the Regents craft alternatives to address the public policy considerations, institutional values, or tradeoffs involved in limiting enrollment at its premier campus"].) CEQA case law has established several criteria for this analysis, i.e., whether the alternative activity is potentially feasible, whether it would reduce potentially significant impacts, whether it is consistent with a majority of project objectives, and whether it would impede the project's fundamental underlying purpose.[2] The criteria are judged by a "rule of reason" based on the facts of the case.[3] There is no

[1]See CEQA, section 21065 ["project means an activity"].

[2]See Appellants' Opening Brief ("AOB"), 27-30; Appellants' Reply Brief ("ARB"), 18-25; *Habitat & Watershed Caretakers v. City of Santa Cruz* (2013) 213 Cal.App.4th 1277, 1304;

authority for the opinion's proposed new rule and it is flatly inconsistent with CEQA. (See AOB 27-30.) Further, such a rule would only encourage lead agencies to draft their objectives to avoid mention of activities they do not want to analyze as a project alternative.

Second, assuming *arguendo* that this novel criterion is consitent with CEQA, the opinion narrowly limits its inquiry to the EIR's formal statement of objectives, suggesting that where the EIR's formal statement of objectives does not reference alternative actions that are potentially feasible, could substantially reduce significant impacts, and meet most project objectives, the EIR may exclude the alternative from analysis in the EIR.

Legally, there is no authority for limiting the project's purposes to those stated in the EIR's formal statement of objectives, especially where, as here, the EIR freely admits that the LRDP Update has another purpose, which is to accommodate a specific projected increase in enrollment and population. (AOB, 30, citing AR 9549; ARB, 30-31; AR9486-87;[4] AR14218;[5] CEQA, § 21080.09(a)(2).) UC concedes this point. (Respondent's Brief ("RB"), 25 [the LRDP's enrollment projection "guides land development and physical infrastructure to support enrollment projections"].)

The opinion incorrectly suggests that a lower enrollment increase alternative would represent or require changing "the nature of the project" (Opinion ("Op."),13), or the "purpose or objectives" of the project. (Op., 14 ["The purpose is to guide future development *regardless* of the actual amount of future enrollment"] (italics added); 17 ["Here, the annual process for setting enrollment levels has little to do with the project objectives or land use"].) This is factually incorrect because, as noted, the EIR admits that the purpose of the LRDP Update is to accommodate a specific projected increase in enrollment and population.

Third, in tentatively ruling that no reduced enrollment alternative was required because

---

Watsonville Pilots Assn. v. City of Watsonville (2010) 183 Cal.App.4th 1059, 1089 (*Watsonville*); *In Re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings* (2008) 43 Cal.4th 1143, 1157-59, 1164-67 (*Bay-Delta*); Guidelines, § 15126.6(a), (c).

[3]*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 565 (*Goleta II*).

[4]"The proposed LRDP Update does not determine future UC Berkeley enrollment or population, or set a future population limit for UC Berkeley, but guides land development and physical infrastructure to support enrollment projections and activities coordinated by the University of California Office of the President."

[5]"[T]he proposed LRDP Update ... guides land development and physical infrastructure to support enrollment projections and activities coordinated by the University of California Office of the President. As such, the proposed project accommodates enrollment projections that occur under separate processes".

the EIR's formal statement of objectives does not include enrollment levels, the opinion unaccountably ignores the fact that the EIR does contain an objective that the EIR and UC contend is directly related to, and dependent on, increasing enrollment. Here, the LRDP Update's academic status objective depends (to an unspecified extent) on achieving UC's specific enrollment projections. (AR10355-56, 9551-52; RB 29-30; Op., 15, n. 2.)[6]

Further, alternatives, like mitigation measures, are not disqualified from analysis in an EIR just because they call for actions that are not expressed in the EIR's formal statement of objectives. An EIR's selection of alternatives is similar to its selection of mitigation measures for analysis because both serve the same function of reducing impacts.[7] It is settled that mitigation actions need not be part of the project proposed by proponents or directly expressed in the EIR's statement of project objectives; they can include "other measures proposed by the lead ... agency or other persons which are not included but the lead agency determines could reasonably be expected to reduce adverse impacts ...." (Guidelines § 15126.4(a)(1)(A).) There is no authority that an alternative, like a mitigation measure, cannot include "other measures" not stated in the EIR's purposes or objectives.

The cases cited in the opinion, i.e., *Marin Mun. Water Dist. v. KG Land California Corp.* (1991) 235 Cal.App.3d 1652, 1666 (*Marin Municipal*) and *Rio Vista Farm Bureau Center v. County of Solano* (1992) 5 Cal.App.4th 351, 378-379 (*Rio Vista*), are consistent with the law cited by Appellants, and they do not establish a rule of law that a proposed alternative cannot include actions that are not expressed in the EIR's formal statement of objectives.

In *Marin Municipal*, the agency rejected proposed alternatives for reasons that do not apply here: they were infeasible, or were without environmental advantage, or entirely failed to meet the objective to prevent a short-term over-commitment of water supply. Specifically, the agency rejected alternatives that addressed long-term water supply not because they would "serve a different purpose or objective" but because they simply would not serve the immediate objective. Here, the proposed reduced enrollment alternative was feasible, reduced impacts, and met the majority (i.e., 13 of 14) of project objectives. This is all that is required.

In *Rio Vista*, the agency, focusing on waste disposal site selection criteria in a program

---

[6]Appellants also argue that the EIR errs as a matter of law by contending that the academic status objective operates as a *dispositive* constraint on the EIR's selection of alternatives for analysis because any reduced enrollment alternative would not meet that single objective and by failing to identify what level of enrollment is necessary to meet that objective. (AOB 24-30; ARB 21-24, 29-30.)

[7]ARB 30; CEQA § 21002.1(a); *City of Rancho Palos Verdes v. City Council* (1976) 59 Cal..App.3d 869, 893 ["description of the option as a 'mitigating measure,' rather than an 'alternative,' is not significant"].

EIR, properly rejected site-specific alternatives because assessment of these sites was premature, uninformative, and speculative. (*Id*. at 378.) Here, there is no speculation required: the EIR acknowledges that certain significant impacts are determined directly by population increases and others are determined indirectly by the building plan to accommodate that population. (AR14194-14195 [categorizing impacts determined by population vs. built environment].) The impacts of both population increases and a building program can be evaluated at the program level, and no one argues that assessment of a reduced population alternative would be speculative.

In sum, the holdings of both *Marin Municipal* and *Rio Vista* are explained by reference to infeasiblity, failure to meet any project objective, reduction of impacts, and speculation, none of which preclude consideration of a reduced enrollment alternative here. These cases do not establish that an alternative is disqualified from analysis in an EIR where it calls for actions that are not expressed in the EIR's formal statement of objectives.

The opinion's attempt to distinguish *Watsonville* is not persuasive. Like the EIR here, the *Watsonville* EIR included updated growth projections. (*Id*. at 1087.) Like the project here, the Watsonville project was intended to accommodate those projections. (*Id*.) And like the EIR here, the *Watsonville* EIR was flawed for failure to consider a "reduced growth alternative that would meet most of the objectives of the project but would avoid or lessen these significant environmental impacts." (*Id*. at 1090.)

Contrary to the opinion, Alternative B is not an adequate reduced growth alternative because it does not "provide[] decisionmakers with information about how most of the project's objectives could be satisfied without the level of environmental impacts that would flow from the project." (*Id*. at 1090.) Population growth directly or indirectly drives all impacts. (AOB at 15, 23, citing AR14194-14195.) While Alternative B would reduce housing and academic space, it would not reduce population growth. (AR10355-56, 9551-52.) Thus, no alternative considered reduced population growth. Indeed, by reducing housing and academic space without reducing population, Alternative B would actually increase impacts to population and housing (unplanned growth, physical impacts from homelessness and overcrowding, and need for new construction) and impacts to air quality, GHG, and transportation (increased VMT). As in *Watsonville*, decisionmakers were prejudicially denied information about how a reduced enrollment alternative could reduce these impacts.

Most important, analyzing a lower enrollment increase alternative would serve CEQA's purpose to reduce impacts while meeting most project objectives. (AOB 28-29; ARB 33-35.)

b. Appellants' do not contend that the EIR must analyze an alternative to UC's normal enrollment decision-making "process."

The opinion implies that Appellants' legal claim is that the EIR must analyze an alternative to UC's normal enrollment decision-making "process." (See e.g., 14 ["the Regents . . .

made a reasoned decision to exclude the enrollment *process* from the scope of the project"] (italics added)]; 17 ["Here, the annual *process* for setting enrollment levels has little to do with the project objectives or land use"] (italics added)]; 18 ["If anything, this indicates that the Legislature does not intend to force the Regents to consider alternatives to its *process* for setting enrollment levels."] (italics added)].)

This is incorrect. Appellants' claim is that the EIR must analyze an alternative consisting a lower enrollment projection, not that the EIR must analyze an alternative consisting of a different process than UC's normal enrollment decision-making process.

If, after analyzing a lower enrollment alternative, UC decides to adopt that projection to guide its UCB land use and development decisions, it would make this decision at the project approval stage of the LRDP Update, in complying with CEQA section 21081. A decision to limit enrollment increases or to match them to housing increases in approving an LRDP update would not interfere with UC's normal enrollment decision-making process because UC has repeatedly made such decisions when adopting LRDPs at other campuses. (AR1306-09, 1348-49, 1383-85,14559.)

c. CEQA section 21080.09 does not authorize the EIR to exclude from analysis an alternative consisting of a lower enrollment projection.

The opinion asserts: "We reject the notion that CEQA requires the Regents to treat student enrollment as a land use planning tool." (Op., 17.) The premise of this rejection is both legally and factually incorrect, because UC already uses student enrollment as a land use planning tool and CEQA requires that it do so. As noted, *ante*, the stated purpose of the LRDP Update is to accommodate a specific projected increase in enrollment and population and UC uses this projection to guide its land use and development decisions. Also, CEQA requires that UC's "approval of a long-range development plan" requires "the preparation of an environmental impact report" that must analyze "the environmental impact of academic and campus population plans." (CEQA § 21080.09(b), (d); see also, Ed. Code § 67504.)

The opinion suggests that SB 118 "indicates that the Legislature does not intend to force the Regents to consider alternatives to its process for setting enrollment levels." (Op.,18.) As noted, Appellants do not claim that CEQA requires analysis of a different decision making process.

The opinion incorrectly suggests that, even though CEQA section 21080.09, as amended by SB 118, requires an EIR to analyze the environmental impacts of a campus population plan, it exempts the EIR from analyzing any alternative to that population plan. There is no support in the text or structure of SB 118 or its legislative history for this analytic leap of faith. Since "[t]he EIR is the heart of CEQA, and the mitigation and alternatives discussion forms the core of the EIR" (*Bay-Delta, supra*, 43 Cal.4th at 1162), it is not plausible the Legislature would *expressly* require that each campus prepare an EIR to evaluate the *impacts* of projected population growth,

but also exempt that EIR — without expressly saying so — from CEQA's *core* requirement to analyze mitigation and alternatives to projected population growth. There is no statutory or case law precedent for cleaving an EIR in two in this fashion.

The legislative history of section 21080.09 supports Good Neighbors' argument. The State Resources Agency's Enrolled Bill Report to the Governor states: "the intent behind the bill [adding this section to CEQA] was solely to avoid a potential argument that changes in student enrollment levels, and any environmental impacts therefrom, must be addressed on a statewide or system-wide basis, rather than at each campus or other location individually:"

> The bill is supported by the University of California (U.C. or University) and was apparently introduced to allay U.C. concerns over threatened litigation. The University asserts that the intent behind the bill is solely to avoid a potential argument that changes in student enrollment levels, and any environmental impacts therefrom, must be addressed on a statewide or system-wide basis, rather than at each campus or other location individually. *The University indicates that it does not seek to be excused from the ordinary requirements of CEQA*. Rather, the bill is being sought in order to avoid threatened litigation asserting that in considering increased enrollment at one campus, the University's environmental analysis must consider enrollment in the system as a whole and *alternatives such as expansion at other campuses*. A matter of concern and sensitivity to communities adjacent to university campus or medical centers, however, would be the manner in which these enrollment decisions would be made.

(Exhibits to Motion and Request for Judicial Notice, Exhibit 1, pp. MRJN 5-6 (italics added).) Thus, the Legislature has never suggested, either in adopting section 21080.09 or amending it with SB 118, that an LRDP EIR is exempt from CEQA's core requirement to analyze mitigation or alternatives to such campus population plans.

If the opinion's view became law, there would be no occasion for CEQA review of enrollment levels at any scale, because section 21080.09, as adopted in 1989, precludes a claim that UC's statewide enrollment decision-making process is subject to CEQA.

2. The EIR Unlawfully Piecemeals CEQA Review of UCB Projects.

The opinion states, "We won't second guess the Regents' decision to group the campus-area properties together for planning purposes." (Op., 31.) Appellants do not ask the court to second guess a policy decision by UC. Appellants' claim is that the EIR commits legal error by treating developments at satellite campuses as if they have "independent utility" when they do not. This is a mixed question of fact and law that the Court reviews de novo. (Op., 28.) This standard does not include deference to the wisdom of a UC policy decision.

The opinion acknowledges that projects are not piecemealed when they "serve different

purposes or can be implemented independently" (Op., 29), but does not apply this rule to the facts. (See AOB 52-54.) Instead, the opinion finds that it is "perfectly rational" for UC to develop "separate plans for more remote properties." (Op., 29) But Appellants do not challenge UC's use of separate "plans" for separate properties; they challenge the EIR's failure to analyze developments at these properties that do not have independent utility from the LRDP Update.

Appellants do not dispute that the "campus park" properties "comprise all of UC Berkeley's major instruction facilities and are the primary locations used by nearly all the members of the campus population for instruction, research, and extra-curricular activities." (Op., 30.) The point is that the "remote" properties provide the housing for a significant number of UCB's students. (AR 9633, 24394-97 [Albany and Emeryville provide roughly 25 percent of UCB's guaranteed housing for new graduate students].) The opinion does not explain how student housing projects intended solely to serve UCB could be "implemented independently" from the campus they serve.

The opinion discusses *Communities for Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 99 (*CBE*) as an example where related projects served different purposes. (Op., 29.) *CBE* is inapposite. The hydrogen pipeline in that case had independent utility from the Chevron refinery upgrade because "[t]he principal purpose of the hydrogen pipeline project is to provide a way for Praxair to transport excess hydrogen that is not required for Chevron's operations to other hydrogen consumers in the Bay Area." (*CBE, supra*, 184 Cal.App.4th at 101.) Therefore, "Chevron's efforts to process a larger percentage of California fuel at the Refinery does not 'depend on' construction of the hydrogen pipeline." (*Ibid*.) Here, by contrast, the "remote" housing projects depend on "campus park" for their justification and the "campus park" depends on these projects to house UCB students. (AR 9633, 24394-97.)

Unlike *CBE*, the projects here "depend on" each other. *CBE* would be analogous to the instant case if the "remote" student housing projects served another purpose or other universities; but there is nothing in the record suggesting this is the case and UC has never made this claim.

The opinion also cites to *Jones v. Regents of the University of California* (2010) 183 Cal.App.4th 818, 829. That case, however, addressed a different issue, i.e., whether substantial evidence supported UC's conclusion that an offsite alternative would not meet certain project objectives. It does not address whether development projects intended to meet UCB's student housing goals have independent utility from the university campus that those students attend.

The opinion interprets Education Code section 67504 as "allow[ing] the Regents a measure of discretion" concerning whether certain UCB properties may be excluded from the UCB LRDP. (Op., 30.) But Appellants' claim does not arise under this statute nor does it contest UC's discretion to decide what properties to include in its LRDP. It arises under CEQA, which imposes a functional standard governing the scope of the *EIR*, i.e., independent utility, that is not constrained by an arbitrary physical distance or UCB's administrative decisions regarding the number of "plans" it prepares for its properties.

Very Truly Yours,

Thomas N. Lippe

D:\UC LRDP\Appeal\010323 filing\MB320k Supp Letter Brief.wpd