Case No. S199557

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

CITY OF SAN DIEGO AND REDEVELOPMENT AGENCY OF THE CITY OF SAN DIEGO,

Petitioners and Appellants,
vs.

BOARD OF TRUSTEES OF THE CALIFORNIA STATE UNIVERSITY

Defendant and Respondent,

From the Court of Appeal of the State of California
Fourth Appellate District, Division One, Case No. D057446

LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA STATE ASSOCIATION OF COUNTIES' JOINT APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONERS AND APPELLANTS CITY OF SAN DIEGO AND SANDAG AND MTS

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APPLICATION TO FILE *AMICUS CURIAE* BRIEF AND STATEMENT OF INTEREST OF *AMICUS CURIAE*

TO THE HONORABLE CHIEF JUSTICE AND JUSTICES OF THE SUPREME COURT:

The League of California Cities and California State Association of Counties, pursuant to Rule 8.520, subdivision (f), of the California Rules of Court, respectfully request permission to file the accompanying *amicus curiae* brief in support of the City of San Diego, San Diego Association of Governments, and San Diego Metropolitan Transit System, Petitioners and Appellants below.

A. Interests of League of California Cities

The League of California Cities ("League") is an association of 467 California cities dedicated to promoting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys representing all regions of the state. The committee monitors litigation of concern to municipalities and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

B. Interests of California State Association of Counties

The California State Association of Counties ("CSAC") is a non-profit corporation with membership consisting of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the state. The Litigation Overview Committee monitors litigation of concern to counties statewide and has

determined that this case involves issues affecting all counties.

The issue of fundamental importance to both the League and CSAC is ultimately a question of fairness – Does California State University ("CSU") have to play by the same rules under the California Environmental Quality Act ("CEQA") as all other public agencies? We believe the answer is yes. CSU disagrees.

CSU posits that in *City of Marina v. Board of Trustees of the California State University* (2006) 39 Cal.4th 341 this Court created a "safe harbor" of sorts for CSU with respect to its requirement to mitigate significant impacts under CEQA. CSU claims that its duty to mitigate significant environmental impacts is satisfied by simply asking for funds from the Legislature to mitigate those impacts, even when there was no evidence that the Legislature would act to grant the funds. In fact, CSU itself predicted that the Legislature would not. CSU nonetheless disavows any responsibility to consider other options to mitigate or avoid the impacts identified in its environmental impact report ("EIR"). (See Pub. Res. Code § 21002.1(a).) CSU's position undermines its responsibility under CEQA's substantive mandate to mitigate or avoid significant impacts where feasible and subverts CEQA's purpose to disclose information about options to avoid or mitigate impacts.

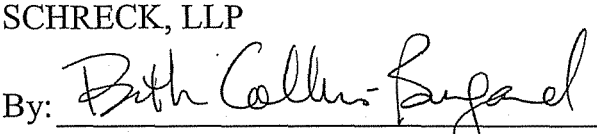
If this Court accepts CSU's position, members of both the League and CSAC and their citizens will suffer. In the short term, cities and counties that are the homes to CSU's 23 campuses will be faced with the impossible choice between funding millions of dollars to mitigate impacts caused by CSU or allowing their citizens to suffer the significant environmental impacts resulting from CSU's projects. In the long run, cities and counties could face similar arguments from all State agencies, claiming their duty to mitigate significant impacts ends with requesting

funds from the Legislature.

In an effort to avoid such a result, *amici curiae*, as representatives of local agencies across the state, request leave to submit the following brief.

Dated: November 29, 2012

BROWNSTEIN HYATT FARBER SCHRECK, LLP

By: 

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BRIEF OF AMICUS CURIAE

I. INTRODUCTION AND STATEMENT OF THE CASE

This case stems from confusion by the Board of Trustees of the California State University ("CSU") as to its duty under CEQA with respect to mitigation of significant environmental effects and the findings required when an agency believes mitigation is economically infeasible.

With much bluster, CSU claims it is illegal for this Court and Petitioners[1] to "second guess how CSU and the Legislature allocate spending." (Reply at 1-15.) CSU argues that local agencies should "recogniz[e] the need for shared sacrifice" and that it is improper for local agencies to ask the courts to evaluate whether they "agree with a state university's determination whether dollars spent on educational facilities *would be better spent* upgrading regional transit and transportation facilities." (Reply at 3-4 [emphasis added].)

Herein lies the crux of CSU's confusion. The question for this Court is not whether dollars "would be better spent" on education or transportation – that is a false choice. The question is not one of "shared sacrifice," as CSU would leave local agencies to cover the tab for or suffer the consequences of its unmitigated environmental impacts if the Legislature refuses CSU's funding request. This is an issue of fairness: When implementing its mission, must CSU comply with CEQA in the same way that other state and local agencies must?

To answer this question, this Court must address two central issues:

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[1] Petitioners include City of San Diego and Redevelopment Agency of the City of San Diego (collectively the "City"), San Diego Association of Governments ("SANDAG"), and San Diego Metropolitan Transit System ("MTS").

(1) Did CSU consider a reasonable range of traffic mitigation measures to mitigate each of the 38 significant off-site traffic impacts for its master plan project; and (2) Did CSU comply with CEQA when it steadfastly relied on a misinterpretation of *City of Marina v. Board of Trustees of the California State University* (2006) 39 Cal.4th 341 ("*City of Marina*") when crafting and then finding infeasible the mitigation? The answer to both questions is no, for a number of reasons.

CSU's EIR does not propose one single feasible and enforceable mitigation measure to address any of the 38 significant traffic impacts its master plan project will cause. Infeasible and uncertain mitigation is not mitigation at all. CSU had a duty to propose and analyze a reasonable range of mitigation measures for each significant impact, including alternative on-campus mitigations to address the traffic impacts or alternative sources of funding for off-site mitigation. It was a procedural error not to do so. This is especially true when multiple commenters criticized CSU's dogged reliance on a single source of uncertain funding for much of its the proposed mitigation.

Second, CSU crafted its mitigation too narrowly, based on a misreading of its duty under CEQA and *City of Marina.* CSU reads an isolated sentence without harmonizing it with the rest of the opinion and CEQA. Instead, CSU presses its interpretation of this sentence beyond reason to conclude that CSU's duty to mitigate off-site impacts is satisfied by simply asking for funding from the Legislature. This interpretation conflicts with the rest of the opinion and undermines CEQA's major purposes. To rely on it was an error of law and abuse of discretion.

Finally, CSU's bluster about CEQA being improperly marshaled against it has no basis in fact or the law. CSU would interpret *City of Marina* to mean that CSU can circumvent its duty to mitigate the significant off-site impacts of its project when other mitigation may be

feasible. This interpretation leaves local cities and counties and other agencies to pick up the tab for millions of dollars of unmitigated impacts. CSU's interpretation creates a false choice between CEQA compliance and agencies exercising their discretion or implementing their mandates. CSU, like all other public agencies, can and must fulfill its mandate *and* comply with CEQA. CSU can make necessary policy decisions and comply with CEQA. There are numerous bases upon which CSU can find mitigation and alternatives infeasible; but when CSU does so, its findings must be based on substantial evidence, not an error of law.

II. STATEMENT OF FACTS

Factual information along with citations to the record is included where appropriate in this brief. Additional background facts are included in the Court of Appeal's opinion and in the City's Answer Brief, which is incorporated herein by reference.

III. STANDARD OF REVIEW

"In reviewing agency actions under CEQA, Public Resources Code section 21168.5 provides that a court's inquiry 'shall extend only to whether there was a prejudicial abuse of discretion. Abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence.'" (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564; see also *Cherry Valley Pass Acres and Neighbors v. City of Beaumont* (2010) 190 Cal.App.4th 316, 327 ["When the informational requirements of CEQA are not met but the agency nevertheless certifies the EIR as meeting them, the agency fails to proceed in a manner required by law and abuses its discretion."].) When an agency fails to proceed as required by CEQA, the error is necessarily prejudicial. (*Cherry Valley*, *supra*, 190 Cal.App.4th

at 328.)

Therefore, where the EIR certified by CSU in this case failed to comply with CEQA's procedural or informational requirements, or is based on an error of law, CSU has abused its discretion in preparing and certifying the EIR, and such abuse is necessarily prejudicial. This brief also incorporates by reference the Standard of Review section in the SANDAG and MTS Answer Brief.

IV. MANY LOCAL AGENCIES HAVE IMPORTANT MISSIONS AND ALL OF THEM, LIKE CSU, MUST COMPLY WITH CEQA

CSU's briefing repeatedly refers to the import of its educational mission, suggesting that this mission cannot be met if CSU must also comply with CEQA. (See, e.g., Opening Brief at 48-49, 61; Reply at 2, 3, 37.) Many local and state agencies, including members of the League and CSAC, have important missions.

CEQA was enacted in 1970 to require state and local governments to consider the environmental implications of their projects. (See Pub. Res. Code § 21065(a) [defining project to include an "activity directly undertaken by any public agency"]; § 21063 [defining "public agency" as "any state agency, board, or commission, any county, city and county, city, regional agency ...."]; see also *Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 259 [extending CEQA from government projects to include private projects necessitating government approval].)

Since 1970, local and state public agencies of all types (all with critical missions) have had to comply with CEQA, mitigating their fair share of the environmental impacts caused by their projects. (See *Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190, 190 [finding CEQA applicable to Fish and Game Commission]; see also *Laurel Heights Improvement Ass'n.*

v. Regents of University of California (1988) 47 Cal.3d 376 ("*Laurel Heights I*") [CEQA applies to University of California Regents relocation plan]; *Friends of Sierra Madre v. City of Sierra Madre* (2001) 25 Cal.4th 165 [finding CEQA applicable to initiative measure generated by city council]; *City of Coronado v. California Coastal Zone Conservation Com.* (1977) 69 Cal.App.3d 570 [finding CEQA applicable to Coastal Zone Conservation Commission].)

CSU's educational mandate, although of course critical, does not trump the mandate requiring all state and local agencies, for the past 40 years, to comply with CEQA. In fact, this Court held as much, repeatedly, in *City of Marina*. (See *City of Marina*, *supra* 39 Cal.4th at 357, 363, 366; *id.* at 361 ["[w]hile education may be CSU's core function, to avoid or mitigate the environmental effects of its projects is also one of CSU's functions."].)

V. IF CSU IS EXCUSED FROM CEQA'S MANDATE TO MITIGATE IMPACTS WHERE FEASIBLE, IT WILL UNDULY BURDEN LOCAL AGENCIES AND THE PUBLIC

If CSU's interpretation of *City of Marina* is allowed to stand and CSU is excused from its fair share of mitigation, local agencies and the public will be left "holding the bag." (See *Woodward Park Homeowners Ass'n. v. City of Fresno* (2007) 150 Cal.App.4th 683, 690.) Cities and counties cannot charge developers or other project applicants more than their "fair share" of the cost of mitigation for the impacts they cause. (See *Ehrlich v. City of Culver City* (1996) 12 Cal.4th 854; CEQA Guidelines[2] §§

[2] References to the "CEQA Guidelines" refer to title 14 of the California Code of Regulations. "At a minimum, ... courts should afford great weight to the Guidelines except when a provision is clearly unauthorized or erroneous under CEQA." (*Laurel Heights I*, 47 Cal.3d at 391 n.2 [citation omitted].)

15041(a), 15126.4(a)(4)(B) [mitigation measure must be "roughly proportional" to impacts of project] [citing *Dolan v. City of Tigard* (1994) 512 U.S. 374 and *Ehrlich, supra*, 12 Cal.4th.].) Local agencies will be left to pick up the tab for CSU's unmitigated impacts or citizens will be left to live with the environmental consequences. This will undermine the missions of cities and counties, which provide critical local public services – a patently unfair result. This is a bitter pill to swallow for local agencies at any time, but especially in the current economic conditions.

The stakes are high. In this case, CSU's argument applies to 38 significant traffic impacts that CSU admits its master plan project will create. The estimated cost to mitigate CSU's impacts is tens of millions of dollars. CSU has campuses in or near more than 23 cities and 16 counties across California. (See Map of CSU Campuses, at www.calstate.edu/datastore/campus_map.shtml.) A CSU campus is not an "island unto itself," especially when it is surrounded by urban development. (See *County of San Diego v. Grossmont-Cuyamaca Community College Dist.* (2006) 141 Cal.App.4th 86, 104.) The cost of CSU's potentially unmitigated off-site traffic impacts to these local agencies could be astronomical.

Furthermore, if this Court accepts CSU's argument, the implications are even more far reaching. If CSU is to be believed and the Legislature is the source of all CSU's funds for on-site and off-site mitigation, CSU's reasoning would apply to all other types of off-site mitigation and it could be applied to on-site mitigation as well. CSU could be abdicated of its responsibility to mitigate significant impacts by doing what it did here, making the mitigation dependent on funding from the Legislature. This could leave significant unmitigated impacts with regard to issues such as species, habitat, archaeological resources, historic resources, sewer services, water supply, water quality, and fire and police services.

Following this line of reasoning a step further, it is not difficult to envision State agencies funded by the Legislature with equally compelling missions making the same arguments. Local agencies could be left to shoulder the impacts of state universities and community colleges, major state water conveyance facilities, prisons, and other state projects. Such a result would be untenable for local agencies with budgets that are already stretched to the limit. This is also the thread that could unravel CEQA.

It is well settled that under CEQA that

> there are two things an agency cannot do: it cannot acknowledge a significant impact, refuse to do or find anything else about it, and approve the project anyway. And it cannot acknowledge a significant impact and approve the project after imposing a mitigation measure not shown to be adequate by substantial evidence.

(*Woodward Park*, *supra*, 150 Cal.App.4th at 724.) Such actions are forbidden under CEQA because it leaves others to pay the environmental price, and the public and decision-makers without information, when it may have been feasible for the lead agency to avoid or mitigate the impacts. CEQA was designed to avoid just these circumstances.

VI. CSU ABUSED ITS DISCRETION AND VIOLATED CEQA BY FAILING TO ANALYZE A REASONABLE RANGE OF MITIGATION MEASURES

CEQA's "two major purposes" are to (1) fulfill CEQA's substantive mandate by "requir[ing] public agencies to adopt feasible mitigation measures to lessen the environmental impacts of the projects they approve" and (2) "inform the public and decision makers of the consequences of environmental decisions before those decisions are made." (*Woodward Park*, *supra*, 150 Cal.App.4th at 690-91, review denied.)

CSU's failure to consider a reasonable range of mitigation measures contravenes CEQA's two major purposes and leaves local cities and counties, and other public agencies such as Caltrans, to deal with the fallout. CSU's conduct also fails under CEQA because it rationalized its actions based upon multiple errors of law, while ignoring comments suggesting alternative mitigation for CSU's extensive off-site traffic impacts.

A. CSU's Failure Undermines CEQA's Substantive Mandate and Is An Abuse of Discretion

1. An EIR Must Consider a Reasonable Range of Mitigation Measures to Fulfill CEQA's Substantive Mandate

CEQA contains a "substantive mandate" to mitigate environmental impacts where feasible. (See *Mountain Lion Foundation v. Fish and Game Commission* (1997) 16 Cal.4th 134 [CEQA contains a "substantive mandate" requiring public agencies to refrain from approving projects with significant environmental effects if "there are feasible alternatives or mitigation measures" that can substantially lessen or avoid those effects].) The Legislature proclaimed this CEQA rule to be California state policy: "The Legislature finds and declares that it is the *policy of the state* that public agencies should not approve projects as proposed if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects...." (Pub. Res. Code § 21002 [emphasis added].)

The Legislature goes on to find and declare that in order to "achieve the objectives set forth in Section 21002" and realize the substantive mandate, the policy is that "***[t]he purpose of an environmental impact report is*** to identify the significant effects on the environment of a project,

to identify alternatives to the project, and ***to indicate the manner in which those significant effects can be mitigated or avoided***." (Pub. Res. Code § 21002.1(a) [emphasis added].)

An EIR cannot discharge its purpose and fulfill CEQA's substantive mandate however without describing a "reasonable range" of feasible mitigation measures for each significant impact identified in the document. (See Pub. Res. Code § 21100(b)(3); CEQA Guideline § 15126.4(a)(1)(A) [an EIR's discussion of mitigation measures "shall identify mitigation measures for each significant environmental effect identified in the EIR."] [note use of plural "mitigation measures"]; see also *Bowman v. City of Petaluma* (1986) 185 Cal.App.3d 1065, 1083-84 ["the requirement that the EIR identify alternatives and mitigating measures 'must be judged against a rule of reason.'"]; *League for Protection of Oakland's Architectural and Historic Resources v. City of Oakland* (1997) 52 Cal.App.4th 896, 909 ["An EIR is required to identify and examine the full range of feasible mitigation measures and alternatives" to a proposed project.] [citation omitted].)

Although "[a]n environmental impact report must identify proposed mitigation measures as well as alternatives to the proposed project" (citing Pub. Res. Code § 21100(c), (d).), "CEQA does not require analysis of every *imaginable* alternative or mitigation measure; its concern is with feasible means of reducing environmental effects." (*Bowman*, *supra*, 185 Cal.App.3d at 1083 [emphasis added].) "Mitigation may consist of a number of measures, including (1) avoiding an impact by not taking certain action, (2) minimizing impacts by limiting the degree or magnitude of the action; (3) rectifying the impact by repairing, rehabilitating, or restoring the impacted environment; (4) reducing or eliminating the impact over time by preservation and maintenance operations during the life of the action; or (5) compensating for the impact by replacing or providing substitute

resources or environments." (*Mira Mar Mobile Community v. City of Oceanside* (2004) 119 Cal.App.4th 477, 495 [paraphrasing CEQA Guideline § 15370].)

In *Laurel Heights I*, this Court found an EIR "defective under CEQA" where the University of California Regents dismissed alternatives as infeasible without disclosing the "'analytic route the ... agency traveled from evidence to action.'" (*Laurel Heights I*, *supra*, 47 Cal.3d at 404.) This Court reasoned that "the use of the word 'or' in section 21002 supports the view that alternatives and mitigation measures must be discussed in an EIR because, if an agency is to assess thoroughly whether environmental effects can be alleviated by either mitigation or alternatives, the EIR must discuss both." (*Id.* at 401.) The court then concluded that "[w]ithout meaningful analysis of alternatives in the EIR, neither the courts nor the public can fulfill their proper roles in the CEQA process." (*Id.* at 404.)

2. CSU Proposes Only Infeasible and Illusory Mitigation Measures To Address Its Master Plan's Significant Off-Site Traffic Impacts, Which Constitutes an Abuse of Discretion

The EIR certified by CSU in this case identifies 38 traffic impacts that CSU's master plan will cause to roads, intersections, and freeways in the City. (AR 238: 14864-14865.) Not one of the mitigation measures identified in the EIR is feasible and enforceable. (See AR 275: 17594-17602). CSU's EIR did not disclose or consider any feasible and enforceable mitigation, such as on-site traffic mitigation or an alternative funding source for off-site mitigation for 38 significant off-site impacts. CSU therefore has abused its discretion by not meeting its duty to consider a reasonable range of mitigation measures.

Most central to this case, for 21 significant traffic impacts, CSU drafted a single, incredibly narrow mitigation measure, stating that

"[s]ubject to funding by the state Legislature, [CSU] shall contribute" CSU's fair share into the City's established mitigation fund for various road improvements and expansions. (See AR 275: 17594-17601 [significant impacts at A-1, A-3, A-4, A-5, B-1, B-2, B-3, E-2, E-3, E-4, E-7, E-8, E-9, E-10, E-11, E-12, E-13, F-4, F-5, F-6, F-8].)

Similarly, for 14 significant traffic impacts, CSU merely states that it "shall support Caltrans in its effort to obtain funding from the state Legislature for the fair share of the costs ...." (See AR 275: 17594-17601 [significant impacts at A-2, A-6, C-1, E-1, E-5, E-6, E-14, E-15, F-3, G-1, H-1, H-2, H-3, H-4].) The EIR also identifies three other significant impacts and provides a single mitigation measure which is then dismissed immediately as infeasible, with no alternative mitigation proposed or discussed. (See AR 275: 17598-17600 [significant impacts at F-1, F-2, F-7].) CSU added a Traffic Demand Management program mitigation measure at the last minute,[3] but this measure constitutes deferred mitigation because it does not commit to any enforceable standards. (See SANDAG Brief at 48-52.)

Mitigation measures included in an EIR must be feasible. (CEQA Guideline § 15126.4(a)(1) ["The EIR shall describe feasible measures which could minimize significant adverse impacts...."]; *Napa Citizens for Honest Government v. Napa County Bd. of Supervisors* (2001) 91 Cal.App.4th 342, 360 ["Mitigation measures must be feasible and enforceable."].) Drafting mitigation measures to depend on funding that is not only uncertain, but unexpected, is an error in law. (See CEQA Guideline § 15126.4(a)(2) ["Mitigation measures must be fully enforceable through permit conditions, agreements, or other legally binding

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[3] The measure states simply that SDSU shall develop a TDM in consultation with SANDAG and MTS to be implemented not later than the 2012/2013 academic year. (AR 275:17602.)

instruments."].) Measures that the agency suspects will not be funded and therefore not implemented cannot be considered feasible measures. (See *City of Marina*, *supra*, 39 Cal.4th at 365 ["'Of course a commitment to pay fees without any evidence that mitigation will actually occur is inadequate.'"]; *Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 785, review denied [finding mitigation measure insufficient because there was no evidence of what improvements fee program would fund nor that it would achieve required level of service].)

CSU considers only one of the five approaches to mitigation detailed in CEQA Guideline section 15370 and paraphrased above – payment from the Legislature to make traffic upgrades to rectify the off-site impact. Reliance on one form of mitigation could meet CEQA's standard to consider a reasonable range of mitigation if the single mitigation measure was clear, enforceable, and would fully mitigate the significant impacts. In this case however it was not.

The Legislature's refusal to fund the proposed off-site mitigation was reasonably foreseeable, making the mitigation measure infeasible. This is evidenced by the fact that CSU found the mitigation infeasible before it ever made its budgetary request and before the EIR was certified. (AR 297: 18473-18474.) Even if CSU were justified in assuming that the Legislature would not appropriate funds to CSU to pay its fair-share fees given the current economic climate, CSU is not excused from failing to consider other mitigation measures for its extensive off-site traffic impacts.

The EIR does not consider strategies to avoid or reduce CSU's off-campus traffic impacts by phasing project construction or increases in the student body until mitigation can be funded. (See *Mira Mar Mobile*, *supra*, 119 Cal.App.4th at 495 [upholding habitat mitigation measures because they represented three of the five types of mitigation measures listed in

CEQA Guideline § 15370]; *League for Protection*, *supra*, 52 Cal.App.4th at 909 [overturning mitigated negative declaration and ordering City to prepare an EIR so that the City could consider a full range of mitigation measures to "reduce the effects of the demolition to less than a level of significance."].)

This is also evidenced by the fact that CSU itemized its off-site mitigation separately, but lumped the rest of the master plan project and funds required for design, construction, and on-site mitigation together. (See, e.g., AR 322: 20081, 20052-53.) CSU proposes and funds a number of on- and off-site measures to mitigate other project impacts. (See, e.g., AR 268: 17531, 17534 [creating and enhancing wetland and/or purchasing mitigation credits, purchasing and preserving uplands habitat]; 234: 14680, 14681 [construction of noise barriers, potential use of sound-rated windows]; 271: 17544 [incorporation of flow control measures to prevent erosion].) In short, CSU treated other mitigation measures as part of the project, as required by CEQA (see CEQA Guideline § 15126.4(a)(1)(D)), while improperly separating out the traffic mitigation measures. (See *Grossmont-Cuyamaca Community College Dist.*, *supra*, 141 Cal.App.4th at 102 [rejecting community college district's attempt to abdicate responsibility to mitigate traffic impacts while accepting responsibility to mitigate air quality, aesthetic, biological, and other impacts].)

CSU's refusal to consider alternative forms of funding is also surprising in light of the fact that some of the off-site traffic impacts are caused by projects with private developer partners. For example, the project includes the Alvarado Hotel, a four story, 60,000 square foot building with up to 120 rooms and studio suites. (AR 222:14243-67 [describing project components].) The Hotel and other privately funded aspects of the project, such as the Adobe Falls housing, are expected to result in traffic impacts to several intersections, street segments, and

freeway mainlines that will experience significant impacts as a result of the project. (AR 238: 14808-14813, 14864-14865.) CSU however does not consider using mitigation funding from these other sources. (See AR 1:109 [describing funding of Hotel by "outside development interest"]; 322: 20245-46 [describing various project components, including rentable retail space, 12-plex movie theater, and conference center and describing funding sources, including bonds, "partnership arrangement" with private developer for Hotel, and "outside development interest who would lease [Adobe Falls housing] from the university, finance, and own and operate the project for lease term with eventual transfer of ownership to the university"].) CSU would leave local cities and counties to suffer the costs of mitigation or the ramifications of unmitigated impacts, while leaving unmitigated impacts from projects funded in part by private developers.

An agency undermines CEQA's substantive mandate if it fails to disclose and analyze a reasonable range of mitigation measures for each significant environmental effect. Said another way, "[i]f, as so many courts have said, the EIR is the heart of CEQA, then to continue the anatomical metaphor, mitigation is the teeth of the EIR." (*Environmental Council of Sacramento v. City of Sacramento* (2006) 142 Cal.App.4th 1018, 1039.) Simply disclosing significant impacts, without considering a reasonable range of mitigation for those impacts, extracts the teeth from an EIR and frustrates CEQA's substantive mandate. (See *Environmental Council of Sacramento v. City of Sacramento* (2006) 142 Cal.App.4th 1018, 1039 ["A gloomy forecast of environmental degradation is of little or no value without pragmatic, concrete means to minimize the impacts and restore ecological equilibrium."].)

CSU's perfunctory approach to mitigating its significant impacts fails to consider a reasonable range of real and enforceable mitigation measures, undermining CEQA's entire substantive mandate. CSU

committed to paying fees, but only if the funds were appropriated by the Legislature. Foreseeing that the Legislature would not appropriate the funds, CSU found the fair-share contributions infeasible. Therefore, there was never a chance that the fair-share program would actually mitigate the traffic impacts and the fair-share program is illusory. The EIR failed as a matter of law by relying exclusively on a fee-based mitigation program that would not actually mitigate the impacts of the project for significant traffic impacts and ignoring other potentially feasible sources of mitigation.

CSU's conduct therefore constitutes a failure to proceed as required by law under CEQA and a prejudicial abuse of discretion. (*City of Marina*, *supra*, 39 Cal.4th at 356 [invalidating action under CEQA for failure to proceed as required by law where agency improperly dismissed mitigation as infeasible]; *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 444 [invalidating action under CEQA for failure to proceed as required by law where EIR failed to discuss any mitigation measures for potentially significant impact].) This Court therefore should find CSU's failure to consider a reasonable range of mitigation measures a violation of CEQA's substantive mandate and an abuse of discretion.

B. CSU's Failure Also Undermines CEQA's Mandate to Inform Decision-Makers, Other Agencies, and the Public and Is an Abuse of Discretion

CSU had a duty to inform decision-makers and the public by discussing a reasonable range of mitigation in its EIR. "The EIR process protects not only the environment but also informed self-government." (*Laurel Heights I*, *supra*, 47 Cal.3d at 392.) As "the heart of CEQA," the EIR serves as an "environmental 'alarm bell' whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return." (*County of Inyo v. Yorty*

(1973) 32 Cal.App.3d 795, 810; see also CEQA Guidelines § 15002(a)(1), (4), 15003(a)-(e).)

An EIR that fails to discuss and analyze a reasonable range of potentially feasible mitigation for each potentially significant impact identified in the EIR fails to provide the information CEQA requires to foster informed decision-making and public participation. (See *City of Marina*, *supra*, 39 Cal.4th at 356 ["An EIR that incorrectly disclaims the power and duty to mitigate identified environmental effects based on erroneous legal assumptions is not sufficient as an informative document."]; *Vineyard Area Citizens*, *supra*, 40 Cal.4th at 444, 449 [finding abuse of discretion where EIR failed to discuss mitigation measures for a potentially significant impact and therefore did not fulfill its "function [] to ensure that governmental officials who decide to build or approve a project do so with a full understanding of the environmental consequences and, equally important, that the public is assured those consequences have been taken into account."].)

CSU's decision to persistently cling to infeasible or illusory mitigation measures completely undermines CEQA's purpose to inform the public and decision-makers. Neither the public nor other agencies, such as Petitioners, had any real opportunity to consider a reasonable range of mitigation measures to address CSU's 38 off-site traffic impacts. As to 35 impacts, CSU doggedly repeated a single source of mitigation – funding from the Legislature – without discussing any other alternative. Any finding that this approach fulfills CEQA's purpose would also undermine CEQA's "foremost principle" to "'afford the fullest possible protection to the environment within the reasonable scope of the statutory language.'" (See *Laurel Heights I*, *supra*, 47 Cal.3d at 390 [quoting *Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 259.].) This Court therefore should find CSU's failure to consider a reasonable range of

mitigation measures a violation of CEQA's mandate to inform the public and decision makers and, as a result, an abuse of discretion.

C. CSU Justifies Its Actions Based On Errors of Law, Another Abuse of Discretion

CSU justifies its actions by forwarding its flawed interpretation of *City of Marina* and claiming that any other interpretation would contravene the Education Code and the Constitution. These arguments are based on errors of law.

1. CSU Misinterprets Its Duty Under *City of Marina*

Throughout the EIR, most importantly in the discussion of mitigation measures and responses to comments, CSU consistently raises the Court's holding in *City of Marina* as a kind of talisman to ward off the requirements of CEQA. (See, e.g., AR 275: 17592-17602; 264: 17149-50, 17241, 17249-53.) Ironically, this Court made it clear in *City of Marina* that relying on an error of law, as CSU does with its mistaken interpretation of *City of Marina*, to restrict an agency's duty under CEQA constitutes an abuse of discretion. (See *City of Marina*, *supra*, 39 Cal.4th at 365.) Nonetheless, in another apparent attempt to circumvent its duty to mitigate its off-site traffic impacts under CEQA, CSU has again abused its discretion by pressing an untenable interpretation of its duty under CEQA, which, as discussed above, will eviscerate two of CEQA's major purposes.

CSU essentially asserts that *City of Marina* creates a "safe harbor" for CSU regarding off-site mitigation. CSU alleges that its duty to mitigate off-site impacts in neighboring local jurisdictions is satisfied just by asking the Legislature for funding for payment into a local agency's mitigation fund. (AR 264: 17149-50, 17241, 17249-53.) With respect to impacts on Caltrans facilities, CSU goes a step further and finds that it need not even request funding for mitigation for impacts to those facilities; it need only

"support" Caltrans when it seeks funds. (AR 264: 17157-58.) In both cases, however, CSU disavows any duty to disclose and analyze a reasonable range of mitigation measures to address the significant traffic impacts, even when it is reasonably foreseeable that the Legislature will not fund the off-site mitigation.

CSU's misunderstanding of its duty under CEQA springs from its misinterpretation of a single sentence in *City of Marina*.[4] In light of CEQA's larger statutory scheme and the decision as a whole, CSU's forced reading of an isolated sentence cannot be the law. CEQA itself reiterates the duty of lead agencies to consider a reasonable range of mitigation measures and to mitigate impacts where feasible. (See Pub. Res. Code §§ 21002, 21002.1, 21100(b)(3).) *City of Marina* indicates that CSU must consider a range of mitigation measures (both on-site and off-site) by stating that "if the Trustees cannot adequately mitigate or avoid CSUMB's off-campus environmental effects by performing acts on the campus, then to pay a third party such as FORA to perform the necessary acts off campus may well represent a feasible alternative." (*City of Marina*, *supra*, 39 Cal.4th at 367.) Simply stated, requesting funding for off-site mitigation is within the reasonable range of mitigation measures that CSU should consider, but the request alone does not satisfy CSU's duty to mitigate where feasible.

This conclusion is supported by the fact that in *City of Marina* this Court repeatedly underscores "the Trustees' *independent obligation* under CEQA to protect the physical environment from the effects" of their campus expansion. (*City of Marina*, *supra*, 39 Cal.4th at 362 [emphasis

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[4] "[A] state agency's power to mitigate its project's effects through voluntary mitigation payments is ultimately subject to legislative control; if the Legislature does not appropriate, the power does not exist." (*City of Marina* at 367.)

added]; see also *id.* at 357, 363 [finding duty to mitigate]; see also *id.* at 366 [rejecting CSU's interpretation of its duty under CEQA because such a reading would be "contrary to the strong policy [requiring the mitigation or avoidance of significant environmental effects] declared in Sections 21002 and 21002.1 of the statute."].)

Finally, the trial court in the *City of Marina* case interpreted this Court's ruling to require mitigation of off-site impacts. Following the Supreme Court's remand, the Superior Court issued a peremptory writ of mandate that required CSU to develop a program to achieve mitigation of "all significant off-campus effects" for the period from the Notice of Preparation for the 1998 Master Plan EIR to the Notice of Preparation for the 2007 Plan Update Supplementary EIR. (RJN at 5 [*City of Marina v. Board of Trustees of the California State University*, Superior Court for the County of Monterey, Case No. M 41781, Peremptory Writ of Mandate (May 11, 2007).].) The writ did not state that CSU's duties to mitigate are subject to the Legislature appropriating the necessary funds. Instead it imposed an absolute duty to mitigate.

CSU has an independent obligation to comply with CEQA's substantive mandate. To fulfill this mandate, CSU may request funds from the Legislature to pay its fair share of off-site traffic impacts. If the Legislature does not fund the request, that form of mitigation is infeasible. Such a request alone however does not make all other forms of potential mitigation infeasible. Such an interpretation of *City of Marina* would pull all of the teeth from CEQA's substantive mandate.

2. CSU Misinterprets the Education Code

CSU indicates that the Legislature codified its "safe harbor" in *City of Marina* in Education Code section 67504(d). (See Opening Brief at 23.) This too is a misinterpretation of the law.

Education Code section 67504(d) requires CSU to take steps to

reach agreements with local agencies regarding the mitigation of off-site impacts. (Ed. Code § 67504(d)(1).) It also requires CSU to report on the status of these negotiations to the Legislature. (Ed. Code § 67504(d)(2).) Section 67504(d) in no way conflicts with any requirements of CEQA. CSU can, and must, comply with both. (See *Bozung v. Local Agency Formation Com.* (1975) 13 Cal.3d 263, 282, 287 [finding LAFCO must comply with CEQA while fulfilling its mandate]; *Wildlife Alive*, *supra*, 18 Cal.3d at 190 [finding Fish and Game Commission must comply with CEQA while fulfilling its mandate].) In fact, the Education Code provision is complimentary to CEQA by facilitating the payment for mitigation of off-site impacts. (See *Mountain Lion Foundation*, *supra*, 16 Cal.4th at 123 [finding CEQA enhances California Endangered Species Act overall species protection goals so there is no irreconcilable conflict between the laws].)

The amendment to the Education Code adding section 67504(d) does not change CEQA's substantive mandate with respect to CSU. The Legislature is well aware of how to exempt certain entities and projects from CEQA's purview, and it has done so repeatedly. (See Pub. Res. Code § 21080(b).) The Legislature did not include CSU campus expansion projects within the list of exemptions included in CEQA, nor did it expressly exempt CSU from funding off-site mitigation in the Education Code. (See *Mountain Lion Foundation*, *supra*, 16 Cal.4th [finding Legislature included exemptions in 21080(b) but did not exempt Fish and Game Commission actions under the California Endangered Species Act so such actions must comply with CEQA].)

Neither *City of Marina* nor Education Code section 67504 changed the requirement for lead agencies to mitigate environmental effects where feasible and consider a reasonable range of mitigation measures. CSU's reliance on a mistaken interpretation of *City of Marina* and the Education

Code constitutes an abuse of discretion.

D. CSU Failed to Respond to Comments Requesting a More Fulsome Range of Mitigation Measures, Another Abuse of Discretion

CSU doggedly relied on its misinterpretation of the law, even in the face of comments by neighbors, SANDAG, and the City of San Diego – people and agencies that would be left dealing with CSU's unmitigated environmental impacts. This too constitutes an abuse of discretion.

A lead agency must evaluate and respond to comments relating to significant environmental issues in an EIR. (*Laurel Heights Improvement Ass'n. v. Regents of University of California* (1993) 6 Cal.4th 1112, 1124 ("*Laurel Heights II*").) "In particular, the lead agency must explain in detail its reasons for rejecting suggestions and proceeding with the project despite its environmental effects. (*Id.* at 1124, citing CEQA Guideline, § 15088(b).) "'There must be good faith, reasoned analysis in response [to the comments received]. Conclusory statements unsupported by factual information will not suffice.'" (*Id.*) "The discussion of mitigation measures shall distinguish between the measures which are proposed by project proponents to be included in the project and other measures proposed by the lead, responsible or trustee agency or other persons which are not included but the lead agency determines could reasonably be expected to reduce adverse impacts if required as conditions of approving the project." (CEQA Guideline § 15126.4(a)(1)(A).)

In *Flanders Foundation v. City of Carmel-by-the-Sea*, the court found the Final EIR for the sale of a City-owned historic residence inadequate because it failed to respond to a comment suggesting the City consider the alternative of selling the residence with a smaller parcel to mitigate environmental harm. (*Flanders Foundation v. City of Carmel-by-the-Sea* (2012) 202 Cal.App.4th 603, 616-617.) The court held that the

failure to respond undermined CEQA's purpose to "inform both the public and decision-makers, *before the decision is made*, of any reasonable means of mitigating the environmental impact of a proposed project." (*Id.*) CSU's EIR suffers from the same defect. Here, commenters raised several points regarding mitigation of traffic impacts that the EIR neglected to respond to with a good-faith, reasoned analysis. (See 263: 16951 [R-2-3]; 16955 [Comment L-1-3]; 16961-16963 [Comment L-2-4]; 16984 [Comment O-2-25]; 16985 [Comment O-2-35]; 16998 [Comment O-5-3]; 17036 [Comment I-15-7]; 17126 [Comment I-61-3].) Instead, the EIR repeatedly falls back on a misinterpretation of *City of Marina.*

For example, one commenter stated that if the Legislature is unable to fund mitigation for project impacts, affected parts of the project should not be built until associated mitigations are provided. (AR 263: 16984 [Comment O-2-26].) In response, CSU relied on its standard refrain, stating *City of Marina* provides that if the Legislature does not provide funds CSU has no duty to mitigate and that the law does not require CSU to abandon parts of the project. (AR 264: 17291-17292.) The EIR provides a nearly identical response to the comment that CSU should guarantee it will pay its fair share for infrastructure before any building starts. (AR 264: 17354-17355.) The first commenter also stated that unless the Legislature provides funding for off-site mitigation, the 5,000 FTS alternative should be selected. (AR 263: 16985 [Comment O-2-35].) CSU responded that the "comment expresses the opinions of the commenter and does not raise any environmental issues within the meaning of CEQA." (AR 264: 17296.)

The above responses from CSU to legitimate comments regarding avenues to mitigate environmental impacts from the project are insufficient. They do not provide a reasoned analysis responding to the comments and are conclusory. CSU could have provided an explanation of why proceeding with the 5,000 FTS alternative would not be appropriate, but

instead chose to characterize this comment as not raising an environmental issue. Furthermore, as discussed above, the responses involving *City of Marina* are also inaccurate as far as they rely on a misinterpretation of CSU's duty under *City of Marina* and CEQA.

The responses to comments failed to meet CEQA's purpose of informing the public and decision-makers of reasonable means to mitigate the project's environmental impacts before project approval. This constitutes an abuse of discretion.

VII. CSU MISCONSTRUES WHAT CEQA REQUIRES TO DISMISS A MITIGATION MEASURE AS INFEASIBLE – AN AGENCY NEED NOT OPEN ITS BUDGET TO PUBLIC REVIEW

CSU improperly paints itself as a victim of meddling. CSU argues that Petitioners and this Court have no right to insert themselves into CSU's budgetary process; however, CSU itself made its budget an issue when it claimed infeasibility due to lack of funding. Specifically, CSU argues that the "question is ...whether compliance with CEQA requires CSU and the Legislature to submit the state university's budget to local agencies for review and oversight whenever mitigation is not otherwise funded." (Reply at 5.) The answer is no. But when any agency claims infeasibility, it makes the basis for this finding subject to comment and even litigation by local agencies and review by the courts. (See *City of Marina*, *supra*, 39 Cal.4th at 355 [analyzing and overturning infeasibility finding because it was based on error of law].) When CSU claims economic infeasibility due to lack of Legislative funding, therefore, it puts its own budget and alternative funding sources at center stage.

CSU's argument sets up a false choice – between (a) CSU satisfying its educational mandate by implementing its master plan and (b) CSU

losing "sole discretion" over the use of its "limited funds" and being subjected to "ad-hoc administrative review [by local agencies] of CSU's entire budget to determine from which educational purposes it is 'feasible' to redirect these funds." (See Reply at 2.) This black and white approach ignores the many ways CSU could, in a future administrative process, comply with CEQA by describing a reasonable range of mitigation measures in its EIR and then, if appropriate and supported by substantial evidence, dismiss mitigation measures as infeasible.

A. Agencies Can Demonstrate Infeasibility In Many Ways

CEQA does not require an analysis of an agency's budget. During the administrative process, mitigation measures and alternatives can be dismissed as infeasible due to economic issues, clash with basic project objectives, or certain other issues, as long as the finding is based on substantial evidence. An economic analysis is not even required. (See Pub. Res. Code § 21081(a)(3); CEQA Guideline § 15091(a)(3).) Public Resources Code section 21081 provides:

> Pursuant to the policy stated in Sections 21002 and 21002.1, no public agency shall approve or carry out a project for which an EIR has been certified which identifies one or more significant effects on the environment that would occur if the project is approved or carried out unless ... (a) The public agency makes one or more of the following findings with respect to each significant effect: ... (3) Specific economic, legal, social, technological, or other considerations... make infeasible the mitigation measures or project alternatives identified in the environmental impact report.

(Pub. Res. Code § 21081; see also CEQA Guideline § 15091.) This truth is evidenced by CSU's own conduct. There are numerous mitigation measures and alternatives in CSU's master plan EIR for which funding sources and economics are not discussed because economic infeasibility is not the basis for CSU dismissing the mitigation or alternatives as infeasible

in its findings. (E.g., AR 297:18460-61 [aesthetic mitigation measures found infeasible], AR 297:18465 [air quality mitigation measures found infeasible], AR 297:18518-21 [alternatives found infeasible].) CSU misleads the Court therefore when it claims that its budget must be at center stage.

B. When An Agency Claims Economic Infeasibility, That Conclusion Must Be Supported By Substantial Evidence, But That Evidence Can Come in Many Forms

When a lead agency makes a determination based on economic infeasibility it must proceed in a manner required by law and "support its conclusion by applying the correct standard to the applicable facts." (*Save Round Valley Alliance v. County of Inyo* (2007) 157 Cal.App.4th 1437, 1462 n.13.) It cannot base its determination on errors of law. (*City of Marina*, *supra*, 39 Cal.4th at 365.) Contrary to CSU's claims, however, an agency need not discuss alternative funding mechanisms to support a claim of economic infeasibility. Applicants, including public agencies, can establish economic infeasibility in various ways, most of which are unrelated to the budget or financial resources.

(1) A public agency can use an expert report on the local real estate market to demonstrate that "the marginal costs of the alternative [or mitigation] as compared to the cost of the proposed project are so great that a *reasonably prudent property owner* would not proceed ...." (See *Flanders Foundation*, *supra*, 202 Cal.App.4th at 622.) In *Flanders Foundation*, the Court upheld the City's finding that two leasing alternatives were economically infeasible where the agency's expert report concluded that the City "would be required to restore the Mansion property, at a cost of exceeding $1 million, before the property could be leased," "it would be very difficult, if not impossible, for the City to lease the Mansion property, and that the revenue that the City could expect to receive from a

lease would not recompense the City for the cost of restoring the Mansion property ... for nearly a decade or more." (*Id.* at 621-622.)

(2) An applicant can demonstrate that the cost of mitigation [or alternative] is disproportionate to the project. (See *Uphold Our Heritage v. Town of Woodside* (2007) 147 Cal.App.4th 587, 599 n.6 [upholding finding that mitigation is economically infeasible where "the $5 million cost of the mitigation measure (relocation and renovation) [of a single family home] would be in addition to the cost of building a new home...."]

(3) A public agency can demonstrate that the mitigation or alternative is infeasible due to inability to raise sufficient funds to mitigate the impact. (See *Napa Citizens*, *supra*, 91 Cal.App.4th at 364 [upholding finding that mitigation is economically infeasible due to inability to raise sufficient funds where "it cannot reasonably be argued that the funds that the County already has raised or that it reasonably can expect to raise in the future, will be enough to mitigate the effect on traffic that will result from the cumulative conditions" and the record "fully supports the conclusion that the mitigation fee will not, cannot, and should not pay for the roadway improvements needed to obtain acceptable levels of service along the highways adjacent to the Project area."].)

(4) An applicant can demonstrate that the cost of the mitigation or alternatives render the project "impractical." (See *Citizens of Goleta Valley v. Board of Supervisors* (1988) 197 Cal.App.3d 1167, 1181 [rejecting finding that mitigation is economically infeasible where the applicant failed to provide sufficient economic evidence to demonstrate that "the additional costs or lost profitability are sufficiently severe as to render it impractical to proceed with the project."].)

(5) An applicant can present evidence to demonstrate that the project mitigation or alternative would result in a negative economic return. (See *Association of Irritated Residents v. County of Madera* (2003) 107

Cal.App.4th 1383, 1400 [upholding economic infeasibility finding rejecting reduced-herd-size alternative for a dairy farm where letter from the lender stated that the alternative would not be economically feasible because it would not "'generate enough cash flow to service debt on the startup operation' and that [the lender] would not finance construction" of the alternative if approved.].)

Any demonstration of economic infeasibility must be done before the final agency action and must be reflected in findings that "bridge the analytic gap between the raw evidence and ultimate decision" so as to allow a reviewing court to "trace and examine the agency's mode of analysis." (*Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515-516; see also CEQA Guideline § 15091(a) [requiring findings of infeasibility to be "accompanied by a brief explanation of the rationale for each finding."] An infeasibility finding must be based on substantial evidence and the explanation must be sufficient to enable meaningful public participation and criticism. (See *Stand Tall on Principles v. Shasta Union High Sch. Dist* (1991) 235 Cal.App.3d 772, 786, disapproved of on other grounds by *Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116.)

Although post-hoc rationalizations in CSU's briefing cannot remedy infeasibility findings that are not based on substantial evidence in the record that was not before the decision-maker (see, e.g., *Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296 [finding post hoc rationalizations of agency actions have repeatedly been condemned in cases construing CEQA]), CSU's own briefing may even provide the type of information that if included in CSU's EIR would support an infeasibility finding. (See Opening Brief at 41-46 [describing various sources of CSU's funding and how each of these sources could not serve as viable funding for the traffic mitigation.].)

Ultimately all of the methods to demonstrate economic infeasibility described above may not apply to CSU's master plan project. The point is to demonstrate that consideration of CSU's various funding sources is not required to demonstrate economic infeasibility. In fact, as described further below, such information has been declared irrelevant in some cases. For these reasons, CEQA's substantive mandate does not create the false choice decreed by CSU.

C. An Analysis of Budget, Funding Capabilities, or Wealth Is Not Required to Demonstrate Economic Infeasibility and CSU Need Not Forfeit Discretion Over Its Budget

CSU incorrectly claims that Petitioners are turning CEQA "into an all-purpose regulation for oversight of how CSU obtains and uses funds." (Reply at 18.) As described above, CSU's budget and funding capabilities need not be evaluated under CEQA to demonstrate economic infeasibility. Furthermore, some Courts have found such issues irrelevant. (See *Flanders Foundation*, *supra*, 202 Cal.App.4th at 622 ["The City's 'budget and funding capabilities' were not relevant" to economic infeasibility analysis] [citing *Uphold Our Heritage v. Town of Woodside* (2007) 147 Cal.App.4th 587, 600].)

In *Uphold Our Heritage*, when considering the economic feasibility of alternatives to Steve Jobs' proposed demolition of his historic residence, the Court of Appeal "rejected the claim that the financial wherewithal of the project applicant bears upon the feasibility of mitigation measures and project alternatives," reasoning that "CEQA should not be interpreted to allow discrimination between project applicants for an identical project based upon the financial status of the applicant." (*Uphold Our Heritage*, *supra*, 147 Cal.App.4th at 599-600 [citing *Maintain Our Desert Environment v. Town of Apple Valley* (2004) 124 Cal.App.4th 430, 448-49].) Instead, the Court asked whether a reasonably prudent property

owner would proceed with the alternative. (*Uphold Our Heritage*, *supra*, 147 Cal.App.4th at 600.) On the other hand, when analyzing a Wal-Mart project, another Court held that if a project can be economically successful with mitigation, then "CEQA requires that mitigation, regardless of the proponents financial status." (*Maintain our Desert Environment v. Town of Apple Valley* (2004) 124 Cal.App.4th 430, 449 [citing *Citizens of Goleta Valley v. Board of Supervisors* (1988) 197 Cal.App.3d 1167, 1181.) These cases demonstrate that contrary to CSU's assertion, an exploration of an agency's budget, funding capabilities, and wealth need not be the basis of an economic infeasibility finding. The issue has become central here because CSU relied on a single uncertain funding source without considering a reasonable range of alternative mitigation.

Similarly and contrary to CSU's assertions, CEQA does not require public agencies like CSU to forfeit their budgetary discretion and ability to set funding priorities. (See *Flanders Foundation*, *supra*, 202 Cal.App.4th at 621 ["City explicitly found that the financial drain on the City's resources made these alternatives [of rehabilitation and leasing a historic mansion] infeasible."].) The Court upheld the City of Carmel's determination that it had "'priorities' for its funds that were more important and 'of greater value to the public' than rehabilitating and maintaining the Mansion property." (*Id.* at 620.)

These cases elucidate the level of CSU's misunderstanding with regard to its duty under CEQA. CSU claimed economic infeasibility, making economic considerations an issue. CSU based its economic infeasibility finding on repeated claims that it fulfilled its duty under CEQA to mitigate significant off-site impacts by simply asking the Legislature for funding for off-site mitigation, with no consideration of the likelihood of the funding being granted or a reasonable range of other mitigation measures that could minimize the significant impacts. CSU's dogged

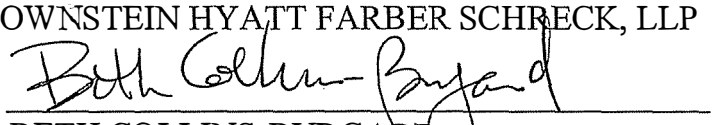
reliance on one funding source for mitigation naturally led to questions about other sources of funding. (See *City of Marina* Concurring Opinion by Chin at 372-73 [discussing potential alternative funding sources for off-site mitigation if not funded by the Legislature].) In the future, if CSU complies with its duty to consider a reasonable range of mitigation and finds that some of that mitigation is infeasible (based on economic or other considerations), it need only include sufficient evidence to support such a finding in the record when it makes that determination. In this case, as discussed above, CSU misunderstands its duty under CEQA. CSU failed to consider a reasonable range of mitigation and CSU improperly based its infeasibility finding on errors of law.

VIII. CONCLUSION

CSU has abused its discretion by relying on a misinterpretation of *City of Marina* to justify its failure to include a reasonable range of mitigation measures in its EIR to address 38 significant traffic impacts, subverting two main purposes of CEQA: avoiding or mitigating environmental harm and fostering informed decision-making. To prevent leaving local agencies and their citizens to shoulder the burdens of funding the mitigation themselves or suffering the environmental impacts of CSU's projects, this Court should require CSU to comply with CEQA, as must all other public agencies.

Dated: November 29, 2012

BROWNSTEIN HYATT FARBER SCHRECK, LLP

By: 

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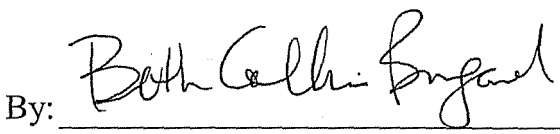
CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, Rule 8.520(c))

The text of this the LEAGUE OF CALIFORNIA CITIES CALIFORNIA STATE ASSOCIATION OF COUNTIES' APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF IN SUPPORT OF CITY OF SAN DIEGO'S ANSWER BRIEF AND SANDAG AND MTS' ANSWER BRIEF consists of 9,339 words as counted by the Microsoft Word word-processing program used to generate the brief.

Dated: November 29, 2012

BROWNSTEIN HYATT FARBER SCHRECK, LLP

By: 

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PROOF OF SERVICE BY MAIL

I am over the age of eighteen years and not a party to this action. My business address is 21 East Carrillo Street, Santa Barbara, California. I am readily familiar with this firm's practice for collection and processing of correspondence for mailing with the United States Postal Service. On November 29, 2012, I placed with this firm at the above address for deposit with the United States Postal Service a true and correct copy of the within document(s):

LEAGUE OF CALIFORNIA CITIES AND CALIFORNIA STATE ASSOCIATION OF COUNTIES' JOINT APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF AND *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONERS AND APPELLANTS CITY OF SAN DIEGO AND SANDAG AND MTS

in a sealed envelope, postage fully paid, addressed as follows:

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Following ordinary business practices, the envelope was sealed and placed for collection and mailing on this date, and would, in the ordinary course of business, be deposited with the United States Postal Service on this date.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on November 29, 2012, at Santa Barbara, California.

Melissa Eldridge

SERVICE LIST
City of San Diego v. Trustees of the California State University
Case Number S199557

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