

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION FIVE

MAKE UC A GOOD NEIGHBOR et
al.,

Plaintiffs and Appellants,

v.

REGENTS OF UNIVERSITY OF
CALIFORNIA et al.,

Defendants and Respondents,

RESOURCES FOR COMMUNITY
DEVELOPMENT et al.,

Real Parties in Interest.

A165451

(Alameda County Super. Ct. No.
RG21110142)

BY THE COURT:

This case is scheduled for oral argument on the court's January 12, 2023 calendar at 9:00 a.m. On its own motion, the court has decided to distribute a draft tentative opinion to the parties before argument pursuant to Local Rules of the Court of Appeal, First Appellate District, Rule 15, subdivision (b). Following argument, the reasoning and results of this draft tentative opinion are subject to revision. Each side will be permitted 25 minutes to argue.

In addition, the parties may each file one supplemental letter brief not to exceed seven pages, single spaced, on or before January 3, 2023. The parties may not file response or reply briefs.

Dated: 12/22/2022

Jackson, P.J., P. J.

TENTATIVE DECISION

This case concerns the adequacy of an environmental impact report, or EIR, for (1) the long range development plan for the University of California, Berkeley through the 2036-2037 academic year; and (2) the university's immediate plan to build student housing on the current site of People's Park, a historic landmark and the well-known locus of political activity and protest. Appellants Make UC a Good Neighbor and The People's Park Historic District Advocacy Group (collectively, Good Neighbor) challenge the EIR's sufficiency as to both.

As we will explain, we are unpersuaded by Good Neighbor's contention that the EIR was required to analyze an alternative to the long range development plan that would limit student enrollment. We also find meritless Good Neighbor's view that the EIR improperly restricted the geographic scope of the plan to the campus and nearby properties, excluding several more distant properties.

Good Neighbor's remaining arguments, however, find more traction. The EIR failed to justify the decision not to consider alternative locations to the People's Park project. In addition, it failed to adequately assess the impacts of student-generated noise on residential neighborhoods near the campus and impacts related to the displacement of local residents by the university's growing population. These shortcomings require us to reverse the judgment and remand the matter to the superior court for further proceedings.

We are, of course, aware of the public interest in this project—the controversy around developing People's Park, the university's urgent need for student housing, the town-versus-gown conflicts in Berkeley on noise, displacement, and other issues, and the broader public debate about legal obstacles to housing construction. We do not take sides on policy issues. Our

task is modest. We must apply the laws that the Legislature has written to the facts in the record. In each area where the EIR is deficient the EIR skipped a legal requirement, or the record did not support the EIR's conclusions, or both.

BACKGROUND

A.

Each UC campus is required periodically to adopt a long range development plan, a high-level planning document that helps guide the university's decisions on land and infrastructure development. (See Ed. Code, § 67504, subd. (a)(1).) The plan at issue here, adopted in 2021, estimates future enrollment for planning purposes but does not determine future enrollment levels or set a limit on the campus's future population. It does, however, establish a maximum amount of new growth that the university may not substantially exceed without amending the plan and conducting additional environmental review.

UC Berkeley provides housing for only 23 percent of its students, by far the lowest percentage in the UC system. For years, enrollment increases have outpaced new housing (or "beds"). The prior long range development plan, adopted in 2005, called for construction of just 2,600 beds through 2021. This was 10,000 beds short of the projected enrollment increases over the same period. The university only constructed 1,119 of those planned beds. Making matters worse, within two years of adopting the 2005 plan, the university increased enrollment beyond the plan's 2021 projection. By the 2018-2019 academic year, student enrollment exceeded the 2005 projections by more than 6,000 students. With a population of 39,708 students, the university provides housing for fewer than 9,000.

This has transpired in the midst of a decades-long regional housing crisis. A report by a UC Berkeley task force convened to address this "matter of urgent concern" identified a menu of

options that could significantly expand student and faculty housing, including numerous potential housing development sites. Informed by the report, the UC Berkeley chancellor's office launched a housing initiative to improve existing housing and construct new housing for students, faculty, and staff.

The 2021 plan encompasses a general strategy for meeting the housing goals identified in the chancellor's initiative. It anticipates (but is not committed to) constructing up to 11,731 net new beds to accommodate a projected increase in the campus population (students, faculty, and staff) of up to 13,902 new residents. In addition, the plan projects that another 8,173 students, faculty and staff will be added to the population by the 2036-2037 academic year who will not be provided with university housing.

B.

Good Neighbor's lawsuit is based on the California Environmental Quality Act (CEQA).¹ The "foremost principle" under CEQA is that the Legislature intended that it " 'be interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.' " (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 390 (*Laurel Heights*).

An EIR, the "heart of CEQA," (Guidelines, § 15003, subd. (a)), is, with narrow exceptions, required whenever a public agency proposes to undertake or approve a project that may have a significant effect on the environment. (*Laurel Heights, supra*,

¹ All references to "CEQA" are to the California Environmental Quality Act. (Pub. Resources Code, § 21000 et seq.) All references to "Guidelines" are to the state CEQA Guidelines, which implement the provisions of CEQA. (Cal. Code Regs., tit. 14, § 15000 et seq.)

47 Cal.3d at p. 390.) Its purpose is to provide public agencies and the general public with detailed information about the proposed project's likely environmental impacts; to list ways those effects might be minimized; and to identify alternatives to the project as proposed. (CEQA, § 21061; *Save Berkeley's Neighborhoods v. Regents of University of California* (2020) 51 Cal.App.5th 226, 235 (*Save Berkeley's Neighborhoods*)). The EIR protects the environment and helps ensure enlightened public debate by “ ‘inform[ing] the public and its responsible officials of the environmental consequences of their decisions *before* they are made.’ ” (*Save Berkeley's Neighborhoods*, at pp. 235-236; *Friends of College of San Mateo Gardens v. San Mateo County Community College Dist.* (2016) 1 Cal.5th 937, 944.)

The most common type of EIR, a project EIR, examines the environmental impacts of all phases of a specific development project, including planning, construction, and operation. (Guidelines, § 15161; *In re Bay-Delta etc.* (2008) 43 Cal.4th 1143, 1169 (*Bay-Delta*)). A program EIR, in contrast, is often used at a relatively early stage of the planning process, before specific components of the program are ready for approval. (See Guidelines, § 15168, subs. (a)-(c).) “An advantage of using a program EIR is that it can ‘[a]llow the lead agency to consider broad policy alternatives and program wide mitigation measures at an early time when the agency has greater flexibility to deal with basic problems or cumulative impacts.’ ” (*Bay-Delta*, at p. 1169; Guidelines, § 15168, subs. (a), (b)(4).) Program EIRs are commonly employed in conjunction with “tiering,” the use of project EIRs to analyze the environmental impacts of detailed proposals that were not addressed by the program-level planning document. (*Bay-Delta*, at p. 1170.)

C.

The EIR at issue here is a hybrid: it encompasses both a program EIR intended to identify and assess potential

environmental impacts from the approval and implementation of the long range development plan and a more detailed, project-level environmental review to analyze the potential impacts of two specific developments proposed for People's Park (Housing Project No. 2) and a site not at issue in this appeal, the Helen Diller Anchor House (Housing Project No. 1). While these housing projects are conceptually part of the university's long range development plan, they are also separate projects for purposes of CEQA (see CEQA, § 21065) and are analyzed separately in the EIR when required.

Respondents Regents of the University of California certified the EIR and approved the housing projects in July and September 2021. In October 2021, Good Neighbor filed a (first amended) petition for writ of mandate naming the Regents, University of California President Michael Drake, and UC Berkeley Chancellor Carol Christ (collectively, Regents). The writ petition alleges multiple CEQA violations and asks the court to void the approvals of the development plan and housing projects, void the certification of the EIR, and suspend all related activities pending compliance with CEQA.

Following various procedural skirmishes, in August 2022 the trial court denied the writ petition and entered judgment in favor of the Regents. Good Neighbor appealed and filed a petition for writ of supersedeas and request for immediate stay in this court, seeking to preserve People's Park from demolition pending resolution of its appeal. We granted the stay and subsequently issued a writ of supersedeas ordering that all construction and further demolition, tree-cutting, and landscape alteration activities at People's Park be stayed pending resolution of the appeal. We now turn to Good Neighbor's appellate challenges to the adequacy of the EIR.

DISCUSSION

A.

Alternatives to the development plan

Good Neighbor argues the Regents violated CEQA by failing to analyze an alternative to the development plan that would limit student enrollment. We disagree.

1.

As noted, the purpose of an EIR is to provide the government and the public with enough information to make informed decisions about the environmental consequences of a project and ways to avoid or reduce its environmental damage. (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564-565 (*Goleta*).

To that end, an EIR must consider potentially feasible alternatives to a project. (*Goleta, supra*, 52 Cal.3d at p. 565; see Guidelines, §§ 15126.6, subd. (a), 15364.) The lead agency—not the public—is responsible for proposing the alternatives. (*Goleta*, at p. 568.) The lead agency need not consider every conceivable alternative but instead a reasonable range of alternatives to the project, or to the project’s location, that could reduce a project’s significant environmental impacts, meet most of the project’s basic objectives, and are at least potentially feasible. (Guidelines, § 15126.6, subds. (a)-(c), (f); see generally, 1 Kostka & Zischke, Practice Under the Cal. Environmental Quality Act (Cont.Ed.Bar 2022) §§ 15.7-15.9 (Kostka & Zischke).)

When reviewing a challenge to the alternatives, courts apply the rule of reason: “ ‘the EIR [must] set forth only those alternatives necessary to permit a reasoned choice’ and . . . ‘examine in detail only the ones that the lead agency determines could feasibly attain most of the basic objectives of the project.’ ” (*Bay-Delta, supra*, 43 Cal.4th at p. 1163, quoting Guidelines, §

15126.6, subd. (f).) Courts presume an EIR complies with this rule; it is a petitioner's burden to demonstrate it does not. (*California Native Plant Society v. City of Santa Cruz* (2009) 177 Cal.App.4th 957, 987 (*California Native Plant Society*)). We must defer to the Regents' selection of alternatives unless Good Neighbor (1) demonstrates the alternatives selected by the Regents are “ “ “ manifestly unreasonable and . . . do not contribute to a reasonable range of alternatives’ ” ’ ” and (2) identifies evidence of a potentially feasible alternative that meets most of the basic project objectives. (*South of Market Community Action Network v. City and County of San Francisco* (2019) 33 Cal.App.5th 321, 345 (*South of Market*)). The inquiry concerns predominantly factual issues, to which we apply the substantial evidence standard. (*Cleveland National Forest Foundation v. San Diego Assn. of Governments* (2017) 17 Cal.App.5th 413, 435 (*Cleveland National Forest*)).

2.

Below, we provide further background on the alternatives evaluated in the EIR as well as information on the university's enrollment process.

The plan's purpose is to provide general guidance for future land development and physical infrastructure that could be built to support a projected level of future enrollment. (See Ed. Code, § 67504, subd. (a)(1) [Legislature intends long range development plans to “guid[e] . . . physical development, including land use designations, the location of buildings, and infrastructure systems, for an established time horizon”].) The plan does not set enrollment levels, require enrollment increases, or commit to any amount of development. The EIR lists 14 objectives, mostly comprising broad goals for land use, landscapes, open space, mobility, and infrastructure.

Based on the purpose and objectives, the EIR identifies eight alternatives for the development plan. It excluded four

alternatives from full consideration for various reasons, and it fully analyzed the remaining four.

In the fully analyzed group, alternative A (the no project alternative) would entail continuing to implement the old (2005) development plan. That plan includes constructing up to 1,530 additional beds as well as 2,476,929 square feet of academic and other space—far less than the proposed development plan (11,731 beds and over three million square feet of other space). The old plan omits Housing Project Nos. 1 and 2 as well as features in the proposed plan to reduce vehicle miles traveled, upgrade utilities, increase energy efficiency, and add renewable energy systems.

Alternative B is described as a reduced development plan. It envisions a 25 percent reduction in new undergraduate beds and academic square footage (9,479 total new beds and 1,713,441 square feet of academic space) compared with the proposed plan. The two housing projects would be included but would be reconfigured and smaller, with a commensurate reduction in beds.

Alternative C focuses on features that would reduce vehicle miles traveled and greenhouse gas emissions through numerous projects to increase remote learning and working, limit parking, and build 500 more faculty and staff beds to reduce commuting.

Alternative D prioritizes more housing for faculty and staff compared to the proposed development plan—an additional 1,000 beds in two campus locations.

The EIR analyzes each alternative's environmental impacts topic-by-topic, compares them to the proposed plan, measures them against the objectives, and determines which alternative is environmentally superior. The EIR concludes that alternative A (no project) would be the environmentally superior alternative, followed by alternative C (reduced vehicle miles). Except for alternative A, which would conflict with many of the plan's

objectives, the remaining alternatives would meet most of the objectives.

Among the four alternatives that were eliminated from consideration without a detailed analysis in the EIR, the Regents considered an alternative that focused on reducing the number of future graduate students. This alternative was rejected because, according to the EIR, it would undercut a “core” project objective—to support and enhance UC Berkeley’s status as a leading public research institution.

In comments on the draft EIR, members of the public urged the Regents to consider an alternative that reduced, capped, or otherwise limited undergraduate enrollment. The Regents responded, in the final EIR, that the plan does not set enrollment, increase enrollment, or commit the campus to any particular enrollment level; enrollment is determined annually in a separate process.

As the EIR explains, the process for setting enrollment levels in the UC system is complicated, with multiple players, interests, and trade-offs. By statute, the UC system (as a whole) must plan for adequate space to accept all eligible California resident students who apply as well as eligible transfer students. (See Ed. Code, §§ 66011, subd. (a), 66202.5, 66741.) The California Master Plan for Higher Education requires the system to accept the top 12.5 percent of the state’s public high school graduates and eligible transfer students from community colleges. The Legislature sometimes uses the budget process to inject itself into the enrollment debate, as it did in 2016, prompting the largest annual enrollment increase in resident students since World War II, and in 2017, when the university agreed to cap enrollment of nonresident students.

To find places for these students, the university’s Office of the President coordinates enrollment annually in an iterative process with 10 UC campuses, each of which has different

enrollment goals and different demands for its academic programs. UC Berkeley is the second-largest campus in the system. The physical capacity of a campus is just one factor in setting enrollment levels; in recent years, four UC campuses, including UC Berkeley, together exceeded their planned capacity by 12,000 students. The Office of the President tracks existing and projected enrollment data, as well as annual and long range plans for the numbers and types of students that can be accommodated at each campus. The university prepared its last long range enrollment plan in 2008 for a 13-year period; it is currently developing a new long range plan.

3.

The main issue is whether Good Neighbor has demonstrated that the range of alternatives in the EIR is manifestly unreasonable. (*South of Market, supra*, 33 Cal.App.5th at p. 345.) Good Neighbor does not really quarrel with the EIR's alternatives as far as they go. Rather, it argues that the EIR's range is too narrow without at least one alternative that would limit student enrollment. It observes that the number of students is a major driver of environmental impacts. Fewer students would mean, for example, fewer cars and new buildings, which, in turn, would mean fewer impacts to resources protected by CEQA such as air, water, and cultural resources. Good Neighbor also points to other UC campuses that have settled disputes with neighboring communities by agreeing to link enrollment increases to housing—for example, UC Davis's agreement to provide on-campus housing for new students over a baseline figure.

The problem with Good Neighbor's argument is that it ignores the plan's limited purpose and scope. The plan deliberately keeps separate the complex annual process for setting student enrollment levels.

An agency is generally not required to consider alternatives that would change the nature of the project. (*Marin Mun. Water Dist. v. KG Land California Corp.* (1991) 235 Cal.App.3d 1652 (*Marin Municipal*); see Kostka & Zischke, *supra*, § 15.8.) In *Marin Municipal*, a water agency adopted a moratorium on new water connections in response to a drought that caused an acute water shortage. In its EIR, aside from the no-project alternative, the agency considered just one alternative to address the crisis—mandatory water conservation. (*Id.* at pp. 1657, 1665.) The petitioners argued the agency should have considered more comprehensive alternatives such as adopting a tiered rate system, developing reclaimed water, or securing other new supplies. The court rejected the argument, emphasizing that the agency’s objective was “not to solve the [agency’s] long-term water supply problems; rather, its more modest goal was to prevent an immediate over-commitment of the [agency’s] water supply.” (*Id.* at p. 1666.) It held that the range of alternatives was reasonable. (*Ibid.*; compare *Cleveland National Forest*, *supra*, 17 Cal.App.5th at pp. 435-437 [concluding range of alternatives was unreasonable when the purpose of a plan was to reduce greenhouse gas emissions but the EIR included no alternative designed to reduce driving, the primary source of emissions].)

Rio Vista Farm Bureau Center v. County of Solano (1992) 5 Cal.App.4th 351 (*Rio Vista*) is also helpful. A county adopted a program EIR for a hazardous waste management plan. The county limited the scope of the plan to a high-level assessment of its need for new facilities and siting criteria for potential facilities. It deliberately stopped short of proposing specific sites or development of actual facilities. (*Id.* at pp. 370-372.) The EIR analyzed three similarly high-level alternatives. (*Id.* at p. 378.) The court rejected the petitioner’s argument that the county must consider more detailed alternative plans relating to site-specific issues, such as locating facilities outside the county or limiting

the size of facilities. (*Ibid.*) The court observed that the alternatives in the EIR were “tailored to the nature of the Plan, in which site selection criteria, not specific sites, were proposed.” (*Id.* at pp. 378-379.) It held that the high-level alternatives in the EIR offered decisionmakers sufficient information to make a reasoned choice. (*Id.* at p. 379.)

The holdings in *Marin Municipal* and *Rio Vista* are reinforced by the process that agencies use to develop the alternatives. A lead agency begins by determining the project’s purpose and objectives. (Guidelines, § 15124, subd. (b).) It then uses the purpose and objectives to develop a reasonable range of alternatives to analyze in the EIR. (*Ibid.*; *Bay-Delta, supra*, 43 Cal.4th at p. 1163.) This exercise would be meaningless if, long after the EIR is certified, a court tells the agency that it was also required to consider alternatives that serve *different* purposes and objectives. When an agency decides to pursue a limited project, and it properly drafts the purpose and the objectives accordingly, the agency should not be required to consider alternatives that address a much bigger problem (*Marin Municipal*) or that add difficult issues the agency deliberately excluded from the scope of the project (*Rio Vista*).

Here, like in *Rio Vista*, the Regents adopted a program EIR for a limited, high-level land use plan and made a reasoned decision to exclude the enrollment process from the scope of the project. The EIR is quite clear that setting enrollment levels is *not* the plan’s purpose. The purpose is to guide future development regardless of the actual amount of future enrollment. The plan leaves enrollment decisions to the existing long range and annual planning processes. It estimates future enrollment only for purposes of developing a land use and infrastructure plan that could meet its possible future needs, consistent with the Legislature’s instruction to develop long

range plans based on the campus’s “academic goals and projected enrollment levels.” (Ed. Code, § 67504, subd. (a)(1).)

Likewise, nearly all of the 14 project objectives in the EIR relate to land use and development goals, not enrollment policy for a public university.² 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. (See Guidelines, § 15124, subd. (b).) Given the complexity and competing interests in setting enrollment levels, the Regents would presumably need to *add* objectives to the EIR to develop workable alternatives for limiting enrollment—which only emphasizes that Good Neighbor’s favored alternative is a horse of a different color.

Notably, Good Neighbor does not argue that the objectives themselves are too narrowly drawn, which could certainly expand the nature and scope of the alternatives. (See *North Coast Rivers Alliance v. Kawamura* (2015) 243 Cal.App.4th 647, 669.) Nor does it argue that CEQA requires the Regents to combine the two processes (development and enrollment planning) into a single project. In any case, we would reject that argument. (See *Aptos Council v. County of Santa Cruz* (2017) 10 Cal.App.5th 266, 279-282 [agencies may separate related projects when they serve

² A typical objective is: “Maintain natural areas as well as generous natural and built open spaces on the Campus Park and the Clark Kerr Campus.” Other objectives concern bicycle and pedestrian networks and mobility; car access and parking; designing facilities for sustainability, efficiency, and seismic safety; efficient use of resources; open space; improving the housing portfolio; infrastructure; and historic landscapes and architecture. The only objective arguably relevant to enrollment—at least for graduate students—calls for supporting UC Berkeley’s status as an internationally renowned public research university by expanding its graduate schools and research programs.

different purposes or can be implemented independently]; *Rio Vista*, *supra*, 5 Cal.App.4th at pp. 371-373.)

As in *Rio Vista* and *Marin Municipal*, the alternatives in the EIR are tailored to the plan's limited purpose. The alternatives presented the Regents with a variety of ways to meet the plan's objectives while reducing the plan's significant impacts. The range of alternatives include less development (Alternative B); strategies to reduce carbon emissions by building more housing near the campus, reducing parking, and increasing remote instruction and working (Alternative C); and more housing for faculty and staff located on the campus itself (Alternative D). Importantly, although the alternatives do not include *reducing* the total campus population, they do include *managing* the campus population in ways that could lessen or avoid its impacts by, for example, reducing car travel to the campus; providing more housing for people on campus rather than the surrounding community; and reducing the daily campus population through remote working and instruction. In text, tables, and charts, the EIR explains how, to varying degrees, the alternatives would meet or conflict with different objectives, analyzes the impacts, and proposes mitigation measures. Other than making the general point that some impacts could also be mitigated or avoided by an alternative that reduces the future campus population, Good Neighbor does not explain what is wrong with the alternatives in the EIR.

We do not find Good Neighbor's remaining arguments persuasive.

First, Good Neighbor attacks the Regents' arguments that the Regents were excused from evaluating enrollment alternatives because either the alternatives would conflict with the objectives or they are infeasible. We need not reach those issues. Even assuming that an enrollment alternative poses no such conflict and is potentially feasible, we still must determine

whether the range of alternatives that the EIR *did* analyze meets the rule of reason. (See *South of Market, supra*, 33 Cal.App.5th at p. 345; *City of Maywood v. Los Angeles Unified School Dist.* (2012) 208 Cal.App.4th 362, 420-421; Guidelines, § 15126.6, subd. (f).) Put another way, if the range of alternatives is reasonable, it does not become unreasonable simply because another potential alternative exists.

Second, Good Neighbor argues that the EIR must consider reducing enrollment as a means of reducing development and the impacts associated with development. It cites *Watsonville Pilots Assn. v. City of Watsonville* (2010) 183 Cal.App.4th 1059, 1087-1090 (*Watsonville Pilots*), in which a city rejected, without analysis, a reduced development alternative in its EIR for a general plan update. The court held that a reduced development alternative should have been included because it would meet most of the project objectives, reduce many of the project's environmental impacts (largely caused by growth), and address a gap in the range of alternatives. (*Ibid.*)

Unlike *Watsonville Pilots*, however, this EIR *did* include a reduced development alternative—alternative B, which would reduce housing and academic space development by 25 percent. More importantly, Good Neighborhood's argument ignores the problem that reducing enrollment would change the nature and scope of the project. In *Watsonville Pilots*, a reduced growth alternative met most of the project objectives, which all related to land use. (*Watsonville Pilots, supra*, 183 Cal.App.4th at pp. 1087-1088.) Here, the annual process for setting enrollment levels has little to do with the project objectives or land use. We reject the notion that CEQA requires the Regents to treat student enrollment as a land use planning tool.

Third, and finally, Good Neighbor notes that CEQA requires the Regents to consider future campus population estimates when they prepare an EIR for a long range

development plan and to mitigate significant impacts. (See CEQA, § 21080.09, subds. (b), (d); Ed. Code, § 67504, subds. (a)(1) and (b)(1).) Good Neighbor then suggests that, because the Legislature requires the Regents to mitigate impacts from campus population increases, it must also consider alternative ways to avoid or reduce impacts when setting enrollment levels.

We do not see it that way. We agree that the Legislature has directed the Regents to consider, and mitigate, projected campus population increases when the Regents prepare an EIR for a long range development plan, as we held in *Save Berkeley's Neighborhoods, supra*, 51 Cal.App.5th at pp. 237-241. The EIR does so. Recently, however, the Legislature exempted enrollment and enrollment increases from the definition of a project under CEQA. (Sen. Bill No. 118 (2021-2022 Reg. Sess.), Stats. 2022, ch. 10, § 1, eff. March 14, 2022; CEQA, § 21080.09, subd. (d).) If anything, this indicates that the Legislature does not intend to force the Regents to consider alternatives to its process for setting enrollment levels.³

Good Neighbor has not met its burden of demonstrating that the range of alternatives for the long range development plan is manifestly unreasonable.

B.

Alternatives to Housing Project No. 2

We now turn to Good Neighbor's challenge to the alternatives analysis for Housing Project No. 2, which would be

³ For clarity, we note that the Legislature also recently exempted from CEQA student and faculty housing projects that meet certain criteria. (CEQA, § 21080.58.) The legislation (which became effective January 1, 2023) applies to site-specific housing projects that are consistent with a long range development plan. (CEQA, § 21080.58, subd. (b)(1)(A)(i).) It does not exempt long range development plans, which remain subject to CEQA. (CEQA, § 21080.09, subd. (b).)

built on the present site of People's Park. As noted, although this site-specific project is related to the long range development plan, and part of the same EIR, it is a separate project (for CEQA purposes) from the plan, and the EIR separately discusses alternatives to the plan and the housing project.

As explained in the previous section, CEQA requires that an EIR consider and analyze a reasonable range of potentially feasible alternatives to the project, or its location, that would attain most of its basic objectives but reduce its environmental impacts. (Guidelines, § 15126.6, subd. (a); *Bay-Delta, supra*, 43 Cal.4th at p. 1163.) Good Neighbor contends the EIR violated this mandate by failing to analyze any alternative locations for Housing Project No. 2 that would spare People's Park from demolition.

We agree, to a point. We do not hold the Regents must necessarily study an alternative site or sites for the People's Park project. We are mindful that an analysis of alternative sites is not required in all cases. (*California Native Plant Society, supra*, 177 Cal.App.4th at p. 993.) Here, however, the Regents not only declined to analyze any alternative locations; they failed to provide a valid reason for that decision. (Guidelines, § 15126.6, subd. (f)(2)(B).) There is plenty of evidence that alternative sites exist—the development plan identifies several other university-owned properties as potential student housing sites. (See *Goleta, supra*, 52 Cal.3d at p. 574 [public agency's access to alternative sites may expand the range of feasible alternative locations].) Under these circumstances, we are constrained to find the EIR failed to consider and analyze a reasonable range of alternatives.

1.

In the 1960's, the university acquired and cleared the parcel that eventually became People's Park, intending to develop it for parking, student housing, and office space. Funding for the project ran short, and the site remained undeveloped. Over the

following year, residents, students, and community organizers transformed it into an unofficial community gathering space—People’s Park.

The park’s historic significance stems from its association with social and political activism in Berkeley. A hub of protest against the Vietnam War, in 1969 the park was the site of both violent confrontations between protesters and law enforcement and peaceful demonstrations. Through the early 1970’s, People’s Park grew to symbolize anti-war activism and suppression of the counterculture movement. Since those times, various proposals by the Regents to develop the site have been met with protest and/or community opposition.

The park is currently used as a venue for occasional special events, including concerts, fairs, basketball tournaments, and theatrical performances. Its predominant use, however, is by transient and unhoused people in multiple encampments. The park is also afflicted with crime, ranging from disturbing the peace and drug and alcohol violations to much more serious offenses including sexual assault, arson, and attempted murder.

The City of Berkeley designated the park as a landmark in 1984. There are 10 historic structures in its immediate vicinity, buildings of two to four stories dating from the 19th- and early 20th-century. These include two National Register-listed resources: the First Church of Christ, Scientist, and Anna Head School for Girls.

To build the housing project, the Regents propose demolishing the park and its amenities and constructing two new buildings. The new buildings would provide approximately 1,113 student beds, eight staff and faculty beds, and 125 beds for lower-income and formerly homeless persons. The project would include a public market, a clinic, and some 1.7 acres of publicly accessible, landscaped green space that would commemorate the history and legacy of People’s Park.

The EIR determined the project would result in a substantial adverse change to a historic resource: “Housing Project [No.] 2 would require demolition of existing structures, which currently include a public restroom, basketball courts, and stage, and would reconfigure the existing open space. . . . These proposed changes would leave the park without integrity of design, materials, workmanship, feeling, or association, that is, it would remove its ability to convey its historic significance. Therefore, demolition of the site would result in a *significant* impact.” Nobody disputes that, under CEQA, the Regents properly identified this as a significant impact on the environment. (Guidelines, § 15064.5, subds. (a)(2), (b)(2)(A)-(b)(2)(B).)

In addition, Housing Project No. 2 could have significant and unavoidable impacts on the 10 historic resources in the vicinity because its proposed scale and proportion, with a larger footprint and height of up to 17 stories, would likely be incompatible with the smaller structures.

The EIR does not analyze in detail any alternatives to Housing Project No. 2. In the EIR scoping process, the staff identified two alternatives before rejecting them. The first was intended to preserve the park by designing buildings that would maintain the park’s key features. The EIR explains that staff concluded this was not possible and rejected the idea. The parties focus on the second rejected alternative, which suggested locating the housing project on one of the many other university-owned properties in the area.

The EIR gives three reasons for rejecting the alternative location proposal. First, “[l]ocating [the project] on other UC Berkeley properties in the City Environs Properties or the Clark Kerr Campus that are designated for future student housing could reduce the total projected number of beds within the proposed LRDP Update development program . . . , or could

require UC Berkeley to identify additional housing sites that are not currently UC Berkeley properties for housing.”

Second, development of the project at a different location “would be constrained by site access and parcel size, as many of the eligible sites are smaller than the proposed development sites. Therefore, the development programs would need to either be reduced, or the housing projects would require multiple sites, further diminishing the total number of beds described in the proposed [long range] development program.”

Third, the EIR suggested that relocating the project would not avoid adverse historical impacts: “While a potential alternate site alternative would reduce the significant historic resource impacts at both [Anchor House and Peoples’ Park] sites, they would also have the potential to introduce new historic resource impacts at many of the sites in the City Environs Properties and the Clark Kerr Campus, as both contain historic resources or are adjacent to such resources.”

In comments on the draft EIR, members of the public asked what specific sites were considered as potential alternatives for Housing Project No. 2. The final EIR responded by identifying numerous potential housing sites that the plan also proposes for new development, redevelopment, and renovation. Like the draft EIR, the final EIR stated that developing Housing Project No. 2 on one or more of those sites would result in fewer beds and potentially introduce new historic resource impacts. In addition, the final EIR stated that “accommodating the same number of beds on multiple sites would cause greater potential for ground disturbance and thus consequently, greater construction impacts.” The Regents adopted the conclusions stated in the draft EIR.

2.

The Regents' strategy is puzzling. It can be risky to adopt an EIR that analyzes *no* potentially feasible alternatives. It is especially risky here given that the university owns several other nearby properties that it has designated, in its development plan, as sites for student housing. So if the Regents wanted to consider potentially feasible sites for student housing that would avoid impacts to the park, there are some obvious candidates.

Moreover, the Regents concede that, if there are no feasible alternative locations for the project, the EIR should state the reasons for that conclusion. (Guidelines, § 15126.6, subds. (c), (f)(2)(B); *Laurel Heights, supra*, 47 Cal.3d at p. 404 [agency cannot expect the public to accept its determination on blind trust].) But the EIR devotes just half a page to the topic, and the reasons are flimsy. In their briefs, the Regents merely recite the reasons without trying to defend them. Instead, they emphasize reasons that are not stated in the EIR.

The EIR's first reason, again, is that developing an alternative site instead of People's Park "*could*" either reduce the total number of beds that would be built under the long range development plan or require the university to acquire additional properties. This vague, equivocal statement falls short of a conclusion, based on facts and analysis, that no potentially feasible sites exist. (See Guidelines, §§ 15126.6, subds. (c), (f)(2)(B) ["If the Lead Agency concludes that no feasible alternative locations exist, it must disclose the reasons for this conclusion"], 15364 [defining feasibility as "capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, legal, social, and technological factors"], 15126.6, subd. (f)(1) [feasibility includes assessing whether the developer "can reasonably acquire, control or otherwise have access to [an] alternative site"]

or already owns one].) Nor do the Regents point to evidence in the record that would shore up this assertion.

Moreover, the rationale is based on a nonexistent conflict with the long range plan. The plan sets no minimum number of beds to be built. Its objective for housing is to “[i]mprove the existing housing portfolio” and “support” the Chancellor’s housing initiative by providing “additional” beds. The total number of beds discussed in the plan—11,731—is not a hard number but, instead, merely “the estimated potential envelope of net new development that may occur over time,” depending on actual enrollment growth, available financing, and other factors. The EIR acknowledges as much in considering a reduced development alternative—alternative B—that proposed 2,500 fewer beds. The Regents are careful to say, repeatedly, that the plan is not a commitment to build anything, much less 11,731 beds. After adopting the previous long range development plan, in 2005, the Regents built fewer than half the number of beds contemplated in the plan.

Similarly, the Regents cite no evidence that acquiring new properties conflicts with the plan or is infeasible. (See *Goleta*, *supra*, 52 Cal.3d at p. 574; Guidelines, § 15126.6, subd. (f)(1).) The plan expressly contemplates acquiring additional properties in the future; it even sets guidelines for doing so.

The second reason also is a non-starter. The EIR explained that relocating the project to an alternate site or sites would result in fewer new beds, or require multiple sites, because “*many*” of the eligible sites are smaller than People’s Park. Again, this is not a finding that there are *no* alternative sites that could support an equivalent project. Nor does the EIR or administrative record supply evidence to support such an assertion. (See *Goleta*, *supra*, 52 Cal.3d at p. 569; Guidelines, § 15126.6, subd. (c).) In fact, the EIR indicates that at least three of the nearby sites identified for student housing could provide

more beds than the 1,113 beds at the People's Park site: Clark Kerr – Central (1,439 net new beds); Channing Ellsworth (2,980 beds); and Fulton-Bancroft (1,200 beds).

The third reason is similarly flawed. The EIR ruled out consideration of alternate locations in part because re-siting the project from People's Park would “have the *potential*” to adversely affect other historic resources at “*many* of the sites in the City Environs Properties and the Clark Kerr Campus,” as both areas “contain . . . or are adjacent to [historic] resources.” (Italics added.) In other words, relocating Housing Project No. 2 from People's Park, where it will definitely destroy a significant historic resource, to many (but not all) of the sites in those areas might (but might not) affect some different historical resource because such a resource might (or might not) be on or near the site. This artfully drafted language, yet again, cannot substitute for a conclusion based on facts in the record that there are no potentially feasible alternative sites where the project would cause less damage to historic resources.

The EIR's rationale here is questionable for another reason as well: it treats potential adverse environmental impacts on People's Park and various other, unnamed historical resources as if they were interchangeable. Historical places and structures are rarely, if ever, fungible items of equivalent historical significance and value. Even were we to assume re-siting the project would cause adverse impacts to some other historic resource, those impacts would almost necessarily differ in quality and degree from Housing Project No. 2's impacts on People's Park.

The Regents cite no evidence to support the final EIR's additional reason that alternative sites would have a “greater potential for ground disturbance.” We deem this point abandoned. (See *State Water Resources Control Bd. Cases* (2006) 136 Cal.App.4th 674, 836.)

While an EIR need not exhaustively explain its reason for excluding an alternative from analysis (Guidelines, § 15126.6, subds. (c), (f)(2)(B)), unsupported conclusory statements do not suffice. (*Laurel Heights, supra*, 47 Cal.3d at p. 404.) The Regents' explanation, premised as it is on ambiguous generalizations rather than analysis and evidence, failed to serve the purpose of enabling informed decision-making and public discussion. (See *San Bernardino Valley Audubon Society, Inc. v. County of San Bernardino* (1984) 155 Cal.App.3d 738, 750-751 [EIR's statement that development at another site "may" result in similar adverse impacts without discussing whether there actually were other potentially suitable sites held insufficient]; *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 735-736 (*San Joaquin Raptor*)).

3.

In their briefs, the Regents spend most of their time developing new reasons for declining to analyze any alternative sites for Housing Project No. 2. The Regents do not explain why the EIR failed to include these reasons.

First, they argue that a "primary objective" of the project is to revitalize the People's Park site, and therefore developing any other site would conflict with that objective. (See Guidelines, § 15152, subd. (a); *Jones v. Regents of University of California* (2010) 183 Cal.App.4th 818, 827-828 [upholding rejection of alternative site because it would conflict with most project objectives].) The Regents point to one of the EIR's seven objectives for Housing Project No. 2: "[r]edevelop and revitalize a UC Berkeley property to provide safe, secure, high quality, and high density student housing to help meet the student housing needs of UC Berkeley." While they acknowledge the reference to "a" UC Berkeley property does not convey a site-specific objective

of addressing problems unique to People's Park, they maintain the record "clearly" demonstrates that this is what it meant.

We disagree. The objective applies equally to many of the potential sites that the university has identified for redevelopment in its development plan. This is unsurprising. One of the plan's objectives is to provide "renovated safe, secure, accessible, and high-quality housing." The plan therefore identifies a host of underutilized, university-owned properties as potential sites to redevelop as student housing, including the three alternative properties mentioned above (Clark Kerr – Central, Channing Ellsworth and Fulton-Bancroft) and Housing Projects Nos. 1 and 2, all of which the EIR categorizes as redevelopment housing projects. The record simply does not support the Regents' position that its objective to redevelop "a" UC Berkeley property fatally conflicts with redeveloping all other UC Berkeley properties.

Finally, the Regents summarily assert it is infeasible to construct Housing Project No. 2 on a different site because the university must utilize *all* of the proposed housing sites near Campus Park to achieve its objective of maintaining that area as the central location for academic, research and student life uses. The Regents identify nothing in the EIR or the record supporting their claim that the objective cannot be achieved without developing every potential site in the area. As noted, the Regents disclaimed any commitment to build anything other than the two housing projects; the other proposed sites, according to the EIR, are simply a "menu of possible options" for future development. In any event, the Regents may not exclude a potentially feasible alternative from analysis simply because it does not fully meet all project objectives. (*Habitat & Watershed Caretakers v. City of Santa Cruz* (2013) 213 Cal.App.4th 1277, 1304; *Watsonville Pilots, supra*, 183 Cal.App.4th at p. 1087.)

In sum, we conclude that, absent a viable explanation for declining to consider alternative locations, the range of alternatives in the EIR was unreasonable. (See *Watsonville Pilots, supra*, 183 Cal.App.4th at pp. 1087-1090.) The error precluded informed public participation and decision-making, so it is prejudicial regardless of whether a different outcome would otherwise have resulted.⁴ (CEQA, § 21005, subd. (a).)

C.

Piecemealing

We reject Good Neighbor’s argument that the Regents improperly “piecemealed” the long range development plan by limiting its scope geographically to the campus and neighboring properties, thereby excluding several properties further away. We review piecemealing claims de novo. (*Banning Ranch Conservancy v. City of Newport Beach* (2012) 211 Cal.App.4th 1209, 1224 (*Banning Ranch*)).

Piecemealing concerns the scope of the project analyzed in the EIR. CEQA requires that a lead agency describe and analyze the entire project rather than split one large project into smaller ones, resulting in piecemeal environmental review that obscures the project’s full environmental consequences. (Guidelines, § 15378; *Banning Ranch, supra*, 211 Cal.App.4th at p. 1222.) It is not simply a matter of whether two projects are related. The projects must be linked in a way that logically makes them one project, not two. A classic example is *Laurel Heights*, where a

⁴ We note, again, that recent legislation exempts certain student and faculty housing projects from CEQA. (CEQA, § 21080.58, added by Sen. Bill No. 886 (2021-2022 Reg. Sess.), Stats. 2022, ch. 663, § 1, eff. Jan. 1, 2023.) Among other limitations, the legislation does not apply to student housing projects that would require the demolition of a structure listed on a local historic register. (CEQA, § 21080.58, subd. (d)(1)(D).) People’s Park is a local historic landmark.

university described the project only as its initial plan to occupy part of a building, omitting its future plan to occupy the entire building. (*Laurel Heights, supra*, 47 Cal.3d at p. 396.) Another example is a county's truncated description of a housing development that neglected to include the sewer lines and related facilities designed to serve the project. (*San Joaquin Raptor, supra*, 27 Cal.App.4th at pp. 729-731.)

But two projects may be kept separate when, although the projects are related in some ways, they serve different purposes or can be implemented independently. (See *Banning Ranch, supra*, 211 Cal.App.4th at pp. 1223-1224 [summarizing the case law]). An example is *Communities for a Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 99, where the court concluded that a proposed hydrogen production facility at an oil refinery served a different purpose than a pipeline to transport excess hydrogen from same facility, and thus could be evaluated in a separate EIR.

Here, Good Neighbor argues that the geographic distinction is “arbitrary” and that there is no “independent utility” to adopting separate plans for the remote properties because ultimately they are all part of the UC Berkeley campus and serve its educational mission.

In our view, however, it is perfectly rational for the university to develop a coherent vision for the campus and its adjacent properties while developing separate plans for more remote properties. When a group of projects are related geographically, the Guidelines encourage agencies to analyze them together as one large project in a program EIR, which is precisely what the Regents have done. (See Guidelines, § 15168, subd. (a)(1) [agency may prepare program EIR for a series of actions that can be characterized as one large project and are related geographically].) While the Regents could have chosen to include all its properties in a single plan, that is far different

from saying that separate plans serve no logical purpose or could not be implemented independently.

As the EIR explains, the properties in the plan comprise all of UC Berkeley's major instructional facilities and are the primary locations used by nearly all the members of the campus population for instruction, research, and extracurricular activities. The plan itself sets goals and principles that focus on how the campus and adjacent properties function together (e.g., accessibility, connectivity), contribute to the university's institutional objectives (e.g., fostering collaboration), and will be used by the university community. We won't second guess the Regents' decision to group the campus-area properties together for planning purposes. (Cf. *Jones v. Regents of University of California*, *supra*, 183 Cal.App.4th at p. 829 [rejecting argument that university was required to consider off-site alternative locations for campus laboratory, given university's goals to foster collaboration and a culture of interdisciplinary problem-solving].)

Good Neighbor suggests that, because the Legislature requires each UC "campus" to have a long range development plan (Ed. Code, § 67504, subd. (a)(1)), all of UC Berkeley's properties must be included in a single plan, regardless of their proximity to the actual campus. The statute does not say so. (*Ibid.*) We think it allows the Regents a measure of discretion on this point.

D.

Noise impacts

Good Neighbor contends the EIR is deficient—as to both the development project and Housing Project No. 2—because it failed to analyze existing and cumulative impacts from "social noise" generated by off-campus student parties and late-night pedestrians. The Regents contend no such analysis was required because there was no substantial evidence showing the long

range development plan or Housing Project No. 2 might produce significant social noise impacts. Beyond that, they assert noise impacts from human socializing are not subject to CEQA regulation and, in any event, that Good Neighbor has forfeited this claim. The Regents' arguments are meritless. The EIR failed to adequately address the impacts of student-generated social noise.

1.

If a lead agency determines a project's environmental impact will be insignificant, the draft EIR must briefly explain why. (CEQA, § 21100, subd. (c); *Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1109 (*Amador*); Guidelines, § 15128.) But if substantial evidence is later presented showing the impact might be significant, the final EIR must provide an analysis of the potential effects. (Kostka & Zischke, *supra*, § 13.32; see *Visalia Retail, LP v. City of Visalia* (2018) 20 Cal.App.5th 1, 9-10, 13, 17 (*Visalia*); *Amador*, at pp. 1109, 1111-1112.)

The draft EIR briefly touched on social noise impacts related to the development plan and Housing Project No. 2. With respect to the development plan, it said this: "Noise generated by residential or commercial uses is generally short and intermittent. . . . SNAC [the Advisory Council on Student-Neighbor Relations] is dedicated to improving the quality of life in the neighborhoods adjacent to UC Berkeley properties and supports good neighbor initiatives, campaigns, and programs, such as Happy Neighbors [a pilot program to study the impacts of students in the Clark Kerr Campus neighborhood], to engage and serve students and neighbors. Noise reduction initiatives focus on, but are not limited to, parties, sports, and rental spaces. The CalGreeks Alcohol Taskforce provides noise data from CalGreeks events. Happy Neighbors educates students and their neighbors about community expectations, relevant policies and laws, and

police and student conduct procedures for possible party and noise-related violations.”

The EIR does not address baseline social noise conditions, the effect of increasing the student population, or the efficacy of the noise reduction initiatives it identified. It concludes, however, that the impact of “stationary sources” of noise from residential, commercial, and mechanical sources—including social noise—would be less than significant without mitigation.

Addressing Housing Project No. 2, the EIR reports the dominant stationary noise sources would come from mechanical equipment and people talking at the park planned for the People’s Park site. Again without discussing existing off-campus student-generated noise, the cumulative effect of adding over 1,000 undergraduates to the area, or mitigation measures, it found the noise impact from both sources would be insignificant.

Multiple individuals and organizations submitted comments objecting to the EIR’s failure to address impacts from student-generated social noise. For example, one resident of Berkeley’s South Side area wrote that the increase in noise levels over the past five years’ growth in student enrollment was “off the charts,” and that the noise increased every year the university increased enrollment. “I have paid off my house in what was a quiet residential neighborhood. Now there are screaming yelling students who return home from 10 pm til midnight” and students playing “beer pong in their backyard, yelling the whole time.” Others more generally objected that the university was proposing to greatly increase enrollment without addressing the existing problem of student-generated noise in neighborhoods near the campus.

The South Side Neighborhood Consortium (South Side) is a consortium of neighborhood associations and civic groups formed in 2011 to reduce the impact on residents of increased student density and unsupervised off-campus “mini-dorms,” private

homes converted to unofficial high-density student housing (e.g., four-bedroom homes housing 12 to 14 students). South Side submitted extensive comments on the draft EIR on behalf of its individual and organizational members. It observed that noise, usually late at night, from large groups of students coming and going from parties and other social events, already had severe negative impacts on residential neighborhoods near campus. The development plan nonetheless proposed to triple the number of undergraduates living at the Clark Kerr Campus without studying the impacts of such noise on the surrounding neighborhoods. Based on the existing situation, South Side warned those impacts would be significant.

The final EIR rejected the commenters' request for a social noise study. It gave the following reasons: (1) it was "speculative to assume that an addition of students would generate substantial late night noise impacts simply because they are students;" (2) it was also "speculative" to assess negative noise impacts from late-night student foot traffic and students living in off-campus private housing; and (3) "information concerning noise generated by pedestrians . . . is not germane to the environmental evaluation." The final EIR concluded, like the draft, that the impacts of stationary noise from all sources would be insignificant.

South Side then objected that the final EIR failed to address the noise concerns raised in its previous comments—concerns, it observed, it had also raised in recent litigation challenging an EIR for the university's Upper Hearst Development. In those proceedings, as here, South Side had objected to the EIR for failing to adequately address noise from groups of students and "‘extreme’" late night party noise from mini-dorms. The trial court agreed and granted a peremptory writ of mandate, noting the absence of any findings or evidence that programs like Happy Neighbors or the City of Berkeley's

noise ordinance would effectively mitigate the social noise impact from an increased number of students living in off-campus private housing.

South Side also submitted a 2014 report on the Happy Neighbors Project that summarized its efforts to reduce the incidence and impact of neighborhood disruptions from loud parties and other alcohol-fueled behavior. The report noted the number of such incidents had stayed the same or increased in all but one member neighborhood since 2011. Moreover, the project's efficacy had suffered from inconsistent university commitment and leadership. In addition, South Side submitted a three-year survey of neighborhood residents documenting ongoing problems with student transient noise, public intoxication, and disruptive parties.

The Regents certified the EIR and approved the long range development plan on July 22, 2021.

On September 25, 2021, in advance of the Regents' meeting to approve Housing Project No. 2, South Side wrote again to object to the project's approval. This time, it provided an expert report on student-generated noise prepared by Derek Watry, an engineer with almost 30 years of experience with an acoustical consulting firm that had prepared hundreds of noise studies for EIRs. Watry had reviewed the EIR, public comments on noise issues, and City of Berkeley findings and legislation regarding noise disturbances and mini-dorms. He also reviewed a letter from Phillip Bokovoy, the president of Save Berkeley's Neighborhoods and a leader in community efforts to mitigate student noise, that provided background information on the problem and attempted solutions.

Watry opined the EIR's stance that it was " 'speculative' " to assume an increased student population meant increased late-night partying and noise betrayed an ignorance of inferential statistics. "While it would be speculative to assume that a

particular student would generate substantial noise, it is not speculative to assume that some in a large population of students will generate substantial noise. The latter, quite frankly, is the basis of actuarial tables that serve as the foundation of the entire insurance industry. Will a particular driver have an accident? Hard to say. Will some in a large population of drivers have accidents? Absolutely, without question. Will a particular student get drunk and make a lot of noise? Hard to say. Will some in a large population of students get drunk and make a lot of noise? Absolutely, without question.”

Comparing the decibel levels of the average male voice at various levels to the exterior noise limits adopted in the EIR, Watry determined that vocal noise from late-night pedestrians already exceeded, and, from house parties, far exceeded, the EIR’s threshold of significance for nighttime noise. Moreover, the incidence of loud and unruly student parties could be expected to increase commensurately with the projected 9,008 increase in undergraduate beds within the plan study area and, specifically, the 1,179 beds pegged for Housing Project No. 2. “Presuming that the percentage of new students who will party and make noise is the same as that of the existing student body – an eminently reasonable presumption – this portends a 103% increase in unruly parties. Housing Project [No.] 2 will contribute considerably to this increased concentration of undergraduates living in the area.”

Watry concluded an analysis of the noise generated by the influx of undergraduates projected in the plan and from Housing Project No. 2 would show a significant and unavoidable noise impact.

Bokovoy’s letter, submitted with Watry’s report, described the impacts of student noise and relatively unsuccessful efforts to mitigate them over the prior years. In 2007, the City of Berkeley adopted a “Second Response Ordinance” to deal with the

increasing number of unsupervised, excessively loud parties at fraternities and elsewhere near campus. Three years later, the city and university police implemented a joint public safety patrol and weekly reporting process to monitor such parties.

Nonetheless, city staff reported 120 noise warning letters and 14 citations between September 2011 and May 2012; police posted 77 notices of noise violations in a 28-week period in 2015-2016.

In or around 2016, the City of Berkeley took further steps to regulate loud and unruly parties by implementing operating standards for mini-dorms. The city council's findings for those standards and for the noise ordinance expressly acknowledged the problems with noise, particularly noise generated by unruly parties and excessive drinking, that had resulted from the increased density of students living in residential neighborhoods. Nevertheless, the frequency and intensity of disturbances from student parties and late-night student pedestrians increased with growing student enrollment through 2021.

The Regents approved Housing Project No. 2 on September 30, 2021.

2.

Good Neighbor contends the EIR was required to assess the impact of student-generated noise because the information provided to the Regents presented substantial evidence supporting a fair argument that student-generated noise may cause significant noise impacts. (See *Visalia, supra*, 20 Cal.App.5th at pp. 13-14 [fair argument standard applies where EIR entirely omits analyses of a possible significant impact].) The Regents maintain there was inadequate evidence to require an analysis of social noise impacts. We agree with Good Neighbor: the evidence amply supported a fair argument that noise impacts from the increased student population associated with the plan and Housing Project No. 2 might be substantial.

The comments, letters, and other materials discussed above chronicle a persistent problem with student-generated noise in Berkeley as well as unsuccessful efforts by the university, the City of Berkeley, and neighborhood groups to deal with the problem. This was sufficient to require an analysis in the EIR of the potential noise impacts from an increased student population. (See Kostka & Zischke, *supra*, § 13.32.) The EIR's mere identification of programs like Happy Neighbors Project and CalGreeks without any evidence of their efficacy, let alone a discussion of existing or cumulative social noise impacts, cannot substitute for that analysis. The omission is inexplicable.

The Regents' arguments are unconvincing.

First, they attempt to discredit Mr. Watry's report. They maintain his opinion that the increased student population will generate a significant noise impact is "pure speculation" because "[n]ewer students could just as well spend more time studying or socializing quietly on the internet compared to prior students." The record, however, establishes that UC Berkeley students have a long and well-documented history of disturbing Berkeley residents with loud noise. It is reasonable to assume that it will continue. (See Guidelines, § 15384, subd. (b) [substantial evidence includes reasonable assumptions predicated on facts].) What *is* speculative is the Regents' notion that thousands of additional students placed in the same social environment will behave differently.

The Regents also fault Watry's acoustical analysis because it relied on decibel level averages for only male voices, based on the assumption that male students are more likely to generate the noise. While the assumption may leave Watry's analysis open to some dispute, it does not deprive it of evidentiary value. In any event, Watry's conclusions are based on many other sources, including city and university records; numerous public comments on the current EIR; and the city's official recognition of

those problems in enacting the noise ordinance and mini-dorm regulations. More fundamentally, the administrative record contained substantial evidence of social noise impacts beyond Watry's expert opinion—observations and complaints from affected neighbors; surveys and reports documenting repeated problems with excessive student noise and ineffective attempts at mitigation and enforcement; and the City of Berkeley's findings correlating social noise impacts with off-campus mini-dorms, parties, and alcohol use. There is nothing speculative about any of this.

Second, without citing pertinent authority, the Regents suggest environmental impacts from social noise are not subject to CEQA. That is incorrect. Noise impacts are expressly included among the environmental effects subject to CEQA. (CEQA, §§ 21060.5, 21068.) Nothing in the statutes or Guidelines carves out noise from human socialization as an exception to this, and the case law suggests the contrary is true. (See *Keep Our Mountains Quiet v. County of Santa Clara* (2015) 236 Cal.App.4th 714, 734 [substantial evidence that crowd noise might have significant noise impacts on surrounding residents]; cf. *Jensen v. City of Santa Rosa* (2018) 23 Cal.App.5th 877, 898 [no substantial evidence that noise from basketball court, community garden and pottery-making required an EIR]). Until the Legislature says otherwise, noise is noise.

Third, the Regents assert Good Neighbor waived any challenge to the EIR's noise analysis of the plan because it presented the materials from Watry and Bokovoy after the Regents approved the plan (but before they approved Housing Project No. 2). This claim is also meritless. The Regents are correct that Good Neighbor cannot challenge the EIR's analysis of the long range development plan on the basis of evidence submitted after the plan was approved. (See CEQA, § 21177, subd. (a); *Central Delta Water Agency v. State Water Resources*

Control Bd. (2004) 124 Cal.App.4th 245, 273 [grounds for noncompliance with CEQA must be presented during public comment period or before the close of the public hearing on the project].) But that does not amount to a waiver here. As discussed above, extensive comments submitted *before* the plan was approved identified social noise impacts from increased enrollment and objected to the inadequacy of the EIR's analysis of it. The issue was timely raised. (CEQA, § 21177, subds. (a), (b).)

The Regents do not seriously contend the EIR adequately addressed the impacts of student-generated noise. Indeed, they acknowledge the EIR did not (because, in their view, it was not required to) analyze existing or cumulative student noise impacts or the efficacy of mitigation measures. In view of the evidence those impacts might be significant, the EIR was legally inadequate. (See Guidelines, §§ 15125 [EIR must describe baseline conditions], 15126.2 [assessment of significant project effects], 15126.4 [description of mitigation measures].) It should have, but did not, analyze the noise impacts of increasing enrollment by thousands of students, as well as housing over a thousand of them at Housing Project No. 2. (*Kostka & Zischke, supra*, § 13.32; see *Visalia, supra*, 20 Cal.App.5th at pp. 9-10, 13, 17; *Amador, supra*, 116 Cal.App.4th at pp. 1109, 1111-1112.)

E.

Housing displacement impacts

Good Neighbor contends the EIR is inadequate because it failed to properly address the impacts of unplanned population growth and consequent displacement of existing residents on an area that already suffers from a severe housing shortage. We agree.

1.

CEQA requires that an EIR address the project's growth-inducing impacts and discuss how it could directly or indirectly foster population growth or the construction of additional housing in the surrounding environment. (CEQA, § 21100, subd. (b)(5); Guidelines, § 15126.2, subd. (e).) The EIR's discussion of significant environmental impacts should address, among other things, changes induced in "population distribution, population concentration, the human use of the land (including commercial and residential development), [and] health and safety problems caused by the physical changes." (Guidelines, § 15126.2, subd. (a).) A project may have significant environmental impacts if it would "[i]nduce substantial [unplanned] population growth in an area" or "[d]isplace substantial numbers of people, necessitating the construction of replacement housing elsewhere[.]" (Guidelines, Appendix G, § XII, subds. (a), (c).)

Before approving a project for which the EIR has identified significant environmental impacts, a public agency must make one or more of the following findings: (1) the project's significant environmental effects have been mitigated or avoided; (2) the measures necessary for mitigation "are within the responsibility and jurisdiction of another public agency and have been, or can and should be, adopted by that other agency"; and/or (3) mitigation is infeasible. (CEQA, § 21081, subd. (a).) When the agency finds mitigation infeasible, it must also find the project's overriding economic, legal, social, technological, or other benefits outweigh its significant environmental impacts. (CEQA, § 21081, subd. (b).)

2.

The EIR projects that the long range development plan will add up to 13,902 residents to Berkeley for whom the university plans to provide housing. This population is comprised primarily of undergraduate and graduate students, graduate student

family members, faculty, and staff. In addition to this “[d]irect” population growth, the EIR anticipated “[i]ndirect” population growth of another 8,173 residents in Berkeley and surrounding cities—students, faculty, staff and family members for whom the university would not provide housing.

The EIR’s Population and Housing analysis concluded this influx of residents would result in two significant impacts if unmitigated.⁵ First, the plan would induce substantial unplanned population growth “either directly (for example, by proposing new homes and businesses) or indirectly (for example, through extension of roads or other infrastructure).” (“Impact POP-1.”) As mitigation, the university would provide Berkeley and the Association of Bay Area Governments (ABAG) with annual summaries of enrollment projections and housing production data to “ensur[e] that local and regional planning projections account for UC Berkeley-related population changes.” As so mitigated, the plan’s POP-1 impacts would be less than significant.

Second, the EIR found the development projects anticipated by the plan could result in displacing substantial numbers of existing residents, houses or businesses. (“Impact POP-2.”) This impact was also found to be significant, but less than significant if mitigated by implementing the UC Relocation Assistance Act Policy to help displaced residents find replacement housing. Pursuant to that policy, the university would survey and analyze relocation needs, employ minimum notice requirements, pay moving expenses and relocation

⁵ The EIR noted that other consequences of project-driven growth such as impacts on transportation infrastructure, utilities, public services, recreational facilities, noise levels, air and water pollution, and greenhouse gas emissions were evaluated elsewhere in the document.

payments, and provide “other aspects of relocation assistance” including, in some cases, “last-resort housing.”

3.

Good Neighbor asserts the EIR inadequately analyzed POP-1 impacts (substantial unplanned population growth) because the mitigation measure it identified is unenforceable. They are correct.

“Mitigation measures must be fully enforceable through permit conditions, agreements, or other legally-binding instruments.” (Guidelines, § 15126.4, subd. (a)(2); CEQA, § 21081.6, subd. (b); *Federation of Hillside & Canyon Associations v. City of Los Angeles* (2000) 83 Cal.App.4th 1252, 1261 [purpose of mitigation requirements is to ensure that mitigation measures will actually be implemented]; Kostka & Zischke, *supra*, § 14.22.)

The mitigation measure proposed for POP-1 is unenforceable: while the Regents can ensure the university provides Berkeley and ABAG with summaries of annual enrollment and construction information, they have no authority to compel either entity to undertake planning for university-driven population growth. (*See Sierra Club v. California Coastal Com.* (2005) 35 Cal.4th 839, 859 [CEQA does not expand the authority of public agencies; agencies must rely on their existing powers to mitigate environmental impacts].)

Nor does the record establish any basis to find either the city or regional association had agreed to or would take on planning for the university’s growth. (*See CEQA*, § 21081, subd. (a)(2); *Tracy First v. City of Tracy* (2009) 177 Cal.App.4th 912, 938 (*Tracy First*) [payments by developer to county for infrastructure improvements were not a feasible mitigation measure where city could not ensure county would implement the improvements]; *cf. City of Marina v. Board of Trustees of California State University* (2006) 39 Cal.4th 341, 365 [payment

of share of improvement costs was valid mitigation measure where evidence established recipient agency would construct the needed infrastructure].) Here, Berkeley has not updated its general plan since 2002, while, according to ABAG, “population at UC Berkeley is indirectly accounted for” and “not formally coordinated” between it and the university. On the other hand, the Regents have identified no evidence that the POP-1 mitigation measure will ensure that ABAG and/or Berkeley bear the responsibility for, and will, plan for the university’s future growth. (See CEQA, § 21081, subd. (a)(2).) Good Neighbor suggests that the Regents could alternatively have made findings that they cannot compel these other agencies to mitigate the impacts, that other mitigation is infeasible, and that the impact is significant and unavoidable. (*Tracy First*, at pp. 937-938; CEQA, § 21081, subd. (a)(2)). However, the Regents made none of those findings. We conclude the measure is unenforceable, and therefore invalid.

4.

Impact POP-2, as noted above, concerned the “direct” displacement of existing tenants when university-owned buildings were demolished to make way for new development. “Though the proposed LRDP Update, at full development, would result in a substantial net increase in housing at UC Berkeley (11,731 beds), it is possible that housing development will be less than the total projected, or that individual future housing projects may involve the displacement of existing people or housing.” Therefore, “this impact is considered *significant*.” However, that impact would be reduced to less than significant when mitigated by adherence to the Relocation Assistance Policy’s procedures for helping displaced residents obtain new housing.

Good Neighbor contends this analysis is legally inadequate for two related reasons. First, it fails to address “indirect”

displacement, i.e., displacement caused by adding over 8,000 people to an already congested area without building housing to accommodate them. Second, it fails to assess the environmental impacts of direct and indirect displacement, including health and safety effects of crowding and homelessness and the need for construction of replacement housing.

Comments on the EIR indicated that adding 8,173 unhoused residents to the area would result in displacement. The City of Berkeley's planning director commented: "[t]he lack of adequate campus housing for students reduces available supply of housing for nonstudent residents and displaces existing residents," while the available and planned housing stock in Berkeley was "not sufficient to serve the existing gap between supply and demand, much less the increased demand that will occur with the projected enrollment increase." Multiple members of the public commented on the displacement of long-time tenants by students "all over the city." The EIR itself acknowledges that existing residents may be displaced due to the failure of housing stock to keep pace with population and commensurately rising housing costs.

The Regents do not claim the EIR addresses the effects of indirect displacement. Rather, they contend such impacts (which they refer to as "gentrification") are not cognizable under CEQA because they are social and economic, not environmental. They are correct in part: CEQA does not treat a project's social and economic effects as significant environmental impacts. (Guidelines, §§ 15064, subd. (e), 15131, subd. (a).) But the analysis is more nuanced when a project's social or economic effects in turn produce significant physical impacts.

"Where a physical change is caused by economic or social effects of a project, the physical change may be regarded as a significant effect in the same manner as any other physical change resulting from the project." (Guidelines, § 15064, subd.

(e); see also Guidelines, § 15131, subd. (a) [“An EIR may trace a chain of cause and effect from a proposed decision on a project through anticipated economic or social changes resulting from the project to physical changes caused in turn by the economic or social changes”].) Conversely, where economic and social effects result from a physical change that was itself caused by a proposed project, those economic and social effects may be used to determine that the physical change constitutes a significant effect on the environment. (Guidelines, § 15064, subd. (e).) Where there is substantial evidence a project will cause substantial adverse effects on humans, the lead agency must consider them whether they are direct or indirect. (Guidelines, §§ 15065, subd. (a)(4), 15064, subd. (d).)

Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo (1985) 172 Cal.App.3d 151, 169-170 (*Bishop*) is instructive. There, the appellate court found the adoption of negative declarations for a large regional shopping center violated CEQA. (*Id.* at p. 167.) Citing Guidelines section 15064, subdivision (d), it held that on remand the lead agency must consider “whether the proposed shopping center will take business away from the downtown shopping area and thereby cause business closures and eventual physical deterioration of downtown Bishop.” (*Bishop*, at p. 169; see also *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1205-1206 [following *Bishop*] (*Bakersfield*).)

El Dorado Union High School Dist. v. City of Placerville (1983) 144 Cal.App.3d 123, superseded by statute as stated in *Chawanakee Unified School Dist. v. County of Madera* (2011) 196 Cal.App.4th 1016, 1021-1022, also has bearing here. There, an EIR found without meaningful discussion that a proposed subdevelopment’s contribution of students to an overcrowded high school would have no significant environmental effect. (*El Dorado*, at pp. 127-128.) The court held the potential increased

enrollment and overcrowding was an environmental effect that required consideration in the EIR because, whether or not itself subject to CEQA review, there was substantial evidence that it could lead to the need to build a new school. The EIR, accordingly, was required to evaluate that impact. (*Id.* at pp. 131-132.)

Here, the EIR omitted any meaningful consideration of whether displacement would trigger social or economic consequences that could cause significant environmental impacts. Good Neighbor maintains, and we agree, the record supports a fair argument it would. (See *Visalia, supra*, 20 Cal.App.5th at pp. 13-14.)

Comments and studies submitted in response to the draft EIR observed that the university's expanding population has displaced long-term residents and increased homelessness. Berkeley's planning director focused on the issue. In the context of an already critical housing shortage, he explained, displacement of residents resulting from unplanned and unmitigated population growth would exacerbate the city's existing homeless crisis. Homelessness, in turn, whether resulting from students unable to afford housing⁶ or residents displaced by students, "leads to physical impacts on parks, streets and other public spaces, public safety issues related to homeless encampments locating in unsafe locations, and an increase in public health problems." These potential impacts on public spaces are no less physical than the urban decay held to trigger CEQA review in *Bishop, supra*, 172 Cal.App.3d 151 and *Bakersfield, supra*, 124 Cal.App.4th 1184. The EIR should have, but did not, address them. (Guidelines, § 15126.2, subd. (a).)

⁶ According to the university's housing survey, approximately 10 percent of undergraduates and approximately 20 percent of doctoral students had experienced homelessness while attending the university.

The EIR also failed to assess whether indirect displacement will necessitate “the construction of replacement housing elsewhere,” even though the EIR adopted that as a standard of significance. While the EIR says Impact POP-2 would not necessitate building replacement housing, its reasoning is solely that the limited number of residents evicted from university-owned properties slated for demolition would be offered relocation assistance. As to needs for replacement housing caused by adding thousands of unhoused persons to an area already experiencing an acute housing crisis, however, it says nothing.

5.

The Regents’ counterarguments are unpersuasive. They assert there was no need for the EIR to assess the impacts of indirect displacement because the total number of unhoused undergraduates is projected to *decrease* under the plan. While factually supported as to undergraduates, this is misleading. Factoring in the thousands of unaccommodated graduate students, faculty, staff, and family members who will be added to the region, the EIR anticipates a total net population *gain* of over 8,000 unhoused persons notwithstanding the lower number of unhoused undergraduates.

The Regents also argue substantial evidence supports the EIR’s analysis of the impacts of *direct* displacement because the university will help existing residents evicted to make way for new construction projects find replacement housing. As Good Neighbor observes, such assistance to a limited pool of current university tenants has no bearing on the broader impacts of indirect displacement.

Finally, the Regents assert there is “substantial evidence the [plan] will *not* cause or exacerbate any economic or social impacts” that would affect the environment. The argument betrays a faulty understanding of the evidentiary standard. The

substantial evidence standard applies to conclusions reached in an EIR and to findings based on those conclusions. (*Bakersfield, supra*, 124 Cal.App.4th at p. 1208.) Here, Good Neighbor is not challenging a conclusion or finding. Its position, rather, is that the EIR simply did not address the issue, notwithstanding substantial evidence supporting a fair argument that there could be significant impacts. We agree.

We conclude that (1) the mitigation measure identified for Impact POP-1 is unenforceable, and therefore inadequate; and (2) the EIR was required to, but did not, assess potential environmental impacts of indirect displacement.

DISPOSITION

The judgment is reversed. The matter is remanded to the superior court with directions to vacate its order and judgment denying Good Neighbor's petition for writ of mandate and enter a modified judgment consistent with our conclusions that the EIR inadequately analyzed potential alternatives to Housing Project No. 2 and impacts from noise and displacement.

The superior court shall issue a peremptory writ of mandate directing the Regents to set aside certification of the final EIR and approvals of the 2021 long range development plan and Housing Project No. 2. (CEQA, § 21168.9, subd. (a)(1).)

Good Neighbor is entitled to costs on appeal. (Cal. Rules of Court, rule 8.278.)