Save Berkeley's Neighborhoods v. Regents of the University of California
(June 25, 2020) __ Cal.App.5th __

In 2005, UC Berkeley adopted a long range development plan (LRDP) to guide its future development based on its academic goals and projected that enrollment would increase by 1,650 students by 2020. The University certified an EIR for the LRDP upon its adoption. Public Resources Code Section 21080.09 requires an EIR to be certified prior to the adoption of an LRDP in order to evaluate the "environmental effects related to enrollment levels."

After adoption of the 2005 LRDP, beginning in 2007 and then every two years, UC Berkeley made a series of discrete decisions to increase its enrollment. By April 2018, as a result of these decisions, "the actual student enrollment had grown by a total of approximately 8,300 students—a five-fold increase over the 2005 projection." No additional CEQA review was done to address these enrollment increases.

Save Berkeley sued the University in 2018, alleging that the University had failed to comply with Section 21080.09. Save Berkeley alleged that it could not have known of the excessive enrollment increases until late 2017. It also alleged that an EIR must be prepared in order to examine the impacts of the increased enrollment. The University countered that the increases in enrollment were not a "project" under CEQA and, in any case, the statute of limitation for litigation had already run.

The trial court held in the University's favor, concluding that the suit was time barred, the increase in enrollment was not a change in the 2005 LRDP's project description, and issued a demurrer dismissing the case. The Court of Appeal reversed and vacated the trial court's decision, opening the path for litigation to continue.

In the published portion of its opinion, the Court concluded that "[t]he statute does not shield public universities from complying with CEQA when they make discretionary decisions to increase enrollment levels." The Court explained:

> This is made obvious by section 21080.09, subdivision (c), which potentially addresses enrollment decisions made after the approval of a development plan EIR. That section states that the approval of a "project" on a campus is "subject to [CEQA]" and "may be addressed, subject to other provisions of [CEQA]," in an EIR that tiers from a development plan EIR. This, too, easily harmonizes with traditional CEQA rules. As explained above, a public university's decision to increase enrollment levels can be a "project" subject to CEQA whether or not it is related to a development plan. (§ 21065.) When tiering is appropriate, the agency has the option of analyzing that project in a tiered EIR. (See Guidelines, § 15152; § 21080.09, subd. (c).) Given Save Berkeley's allegations of a project change in this case, however, "other provisions" of CEQA (§ 21080.09, subd. (c)) may require a subsequent or supplemental EIR instead of a tiered EIR. (See § 21094, subd. (b)(3) [when section 21166 applies, the agency must prepare a subsequent or supplemental EIR rather than a tiered EIR]; *Natural Resources Defense Council, Inc. v. City of Los Angeles* (2002) 103 Cal.App.4th 268,

> 282 ["Sometimes a 'tiered' EIR is required (§ 21094), sometimes a 'subsequent or supplemental' EIR is required (§ 21166), and sometimes a 'supplement' to an EIR is required"].) In short, subsection (c) confirms that public universities must comply with CEQA before they approve actions—including, potentially, decisions to increase enrollment levels—that qualify as a project under the traditional definition.

The Court addressed the question of whether the statute of limitations applied to this case in the unpublished portion of the case (which means that it does not serve as precedent). It concluded that:

> … at the demurrer stage, we cannot resolve the factual issues underlying respondents' statute of limitations defense. Save Berkeley has alleged it lacked actual or constructive notice of the enrollment increases before October 30, 2017, an allegation we must accept as true on demurrer. Accordingly, Save Berkeley has alleged sufficient facts to survive demurrer. (See *Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929, 939, italics added ["if the agency makes substantial changes in a project after the filing of the EIR and fails to file a later EIR in violation of section 21166, subdivision (a), an action challenging the agency's noncompliance with CEQA may be filed within 180 days of the time the plaintiff *knew or reasonably should have known that the project under way differs substantially* from the one described in the EIR"].)