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First District Holds U.C. Berkeley Campus's Decision To Increase Student Enrollment Above Maximum Projected Level Analyzed In EIR for Long Range Development Plan Is A "Project" Under CEQA And Not Exempt Under Public Resources Code § 21089.09

By Arthur F. Coon on July 2, 2020

In a partially published opinion filed June 25, 2020, the First District Court of Appeal (Division 5) reversed the trial court's judgment entered after sustaining a demurrer without leave to amend; it held that a non-profit group's petition and complaint for declaratory relief adequately stated a cause of action on the basis that U.C. Berkeley's approval of student enrollment increases far beyond those projected in its 2005 Long Range Development Plan ("LRDP"), and analyzed in the related 2005 Program EIR ("PEIR"), constituted a "project" requiring CEQA review and mitigation. (*Save Berkeley's Neighborhoods v. The Regents of the University of California, et al.* (2020) ___ Cal.App.5th ___.) The published portion of the opinion also held that the enrollment increases were not statutorily exempt under Public Resources Code § 21080.09, which requires an EIR for LRDPs. (In the *unpublished* part of the opinion, the Court held Petitioner had alleged sufficient facts to overcome Respondents' statute of limitations argument for purposes of demurrer, that the case was not shown to be moot on the basis of the record before the Court, and that Petitioner had failed to show the trial court erred in denying its motion to compel production of documents pursuant to requests the trial court had found overbroad in scope.)

A Public University's Discretionary Decision to Increase Student Enrollment To Levels Not Previously Analyzed Under CEQA Is A "Project" Requiring CEQA Review Under Ordinary CEQA Rules.

While the litigation itself has not progressed beyond the pleading stage, it did not need to for the appellate court to issue an important published opinion resolving the most significant legal issues presented as a matter of law.

After reviewing the case's background and basic CEQA principles, the Court stated: "[W]e have no trouble concluding [Petitioner] Save Berkeley has stated a valid cause of action."

The Court based this conclusion largely on well established law and CEQA's ordinary rules. It observed that "CEQA requires public universities to mitigate the environmental impacts of their growth and development" (citing *City of Marina v. Board of Trustees of California State University* (2006) 39 Cal.4th 341, 349) and that "[i]n this context, growth includes student enrollment increases, which the Legislature has acknowledged "may negatively affect the surrounding environment."" (Quoting Cal. Ed. Code, § 67504(b)(1).) For each separate U.C. Campus, the University is required to periodically develop a LRDP to guide campus development based on academic goals and projected development (Ed. Code, § 67504(a)(1)); the LRDP must be analyzed in an EIR under CEQA, and the EIR is expressly required by statute to analyze environmental impacts related to "changes in enrollment levels." (Pub. Resources Code, § 21080.09(b), (d).)

U.C. Berkeley's last operative LRDP was adopted in 2005, and Petitioner's Petition and Complaint alleged that since then it has increased levels of enrollment well beyond those projected in the LRDP and studied in the related PEIR, with resulting significant off-campus environmental impacts including increased noise, trash, displacement of tenants and consequent increased homelessness, increased traffic, and increased public safety services (police, fire, ambulance) impacts. Specifically, Petitioner alleged in its operative pleading that the 2005 PEIR's project description included an increase in enrollment of 1,650 students (beyond the 2001-2002 level of 31,000-33,450), and the addition of 2,500 student beds, whereas by April 2018 actual enrollment had increased by 8,300 students – a five-fold increase over what was projected and studied in 2005 under CEQA – and the University had failed to conduct any environmental analysis of or adopt any mitigation addressing this change. In its declaratory relief claim, "[Petitioner] seeks a judicial declaration that respondents' policy of increasing student enrollment without environmental review violates CEQA."

The Court of Appeal rejected the University respondents' and the trial court's position "that informal, discretionary decisions to increase student enrollment beyond that anticipated in the [2005 LRDP]" did not constitute project or program changes requiring subsequent CEQA review.

Petitioner duly alleged the LRDP "project" (as broadly defined by CEQA under Public Resources Code § 21065) that was analyzed in the 2005 PEIR "included a plan to stabilize enrollment and projected a modest enrollment increase of 1,650 students between 2005 and 2020." It also alleged "Respondents later made several discretionary decisions to change the project by increasing enrollment beyond 1,650 students" and that the resulting increases caused significant environmental impacts that were not analyzed in the 2005 PEIR and that have not been mitigated. Per the Court – as "a routine application of basic CEQA requirements" – Petitioner adequately pleaded for purposes of withstanding demurrer "that Respondents made substantial changes to the original project that trigger the need for a subsequent or supplemental EIR." (Citing Pub. Resources Code, § 21166(a); CEQA Guidelines, §§ 15162(a), 15153(a); *American Canyon Community United for Responsible Growth v. City of American Canyon* (2006) 145 Cal.App.4th 1062, 1077.)

Public Resources Code § 21080.09 Does Not Exempt From CEQA Review A Public University's Discretionary Decision To Increase Enrollment Levels

The Court of Appeal next disposed of the University respondents' "main argument. . . that section 21080.09 effectively exempts them from analyzing the changed increases in enrollment unless or until a *physical development project* is approved." (Emph. added.) After setting out relevant portions of the

statute at length, the Court rejected "Respondents' rather confusing interpretation of [the statute's] . . . definition of [LRDP]" to exclude consideration of enrollment changes and to include only the physical development plan. Per the Court, the "statute does nothing of the kind[,]" but, rather, easily harmonizes with CEQA's "traditional definition" of a project. The Court observed that "[t]he Legislature has recognized that both enrollment levels and physical development are related features of campus growth that must be mitigated under CEQA." (Citing Ed. Code, § 67504(a)(1).) Public Resources Code § 21080.09(b), after providing that approval of a LRDP is subject to CEQA, expressly provides: "Environmental effects relating to changes in enrollment levels shall be considered for each campus or medical center of public higher education in the environmental impact report prepared for the [LRDP] for the campus or medical center." Thus, far from excluding enrollment increases from CEQA's broad "project" definition, "section 21080.9 requires universities to *expand* the analysis [for LRDPs] to include a related feature of campus growth, future enrollment projections . . . ." Further, "the statute does not say that enrollment changes need *only* be analyzed in an EIR for a development plan or physical development" and the statute "does not address subsequent enrollment decisions [following certification of the EIR for a LRDP], much less exempt them from CEQA review." (Citing *Citizens for a Responsible Caltrans Decision v. Department of Transportation* (2020) 46 Cal.App.5th 1103, 1125 [courts recognize only express CEQA exemptions]; my April 1, 2020 post on this decision can be found *here*.) All other portions of the statute were consistent with CEQA's "traditional rules" and "project" definition, and with the conclusion that a university's projects – including, potentially, discretionary decisions to increase enrollment made after approval of a development plan EIR – could require additional CEQA review, including a tiered, subsequent or supplemental EIR.

The Court also pointedly noted that the University Respondents' position – i.e., that they could lawfully make "a series of decisions to increase enrollment fivefold [above CEQA analyzed projected increases] with no public notice, no CEQA analysis, and no mitigation of environmental impacts" – "undercuts the fundamental premise of CEQA to ensure informed decision making and meaningful public participation by disclosing" environmental impacts *before* decisions are made and to require mitigation of significant impacts when feasible.

While the Court based its interpretation of section 21080.09 on its plain language, it found the statute's legislative history supported the same conclusion. The enacting bill's "modest intent," as reflected by a key enrolled bill report, was "*solely* to avoid a potential argument that changes in student enrollment levels, and any environmental impacts therefrom, must be addressed on a statewide or system-wide basis, rather than at each campus . . . individually." The Report further stated: "The University [apparently the bill's proponent] . . . *does not seek to be excused* from the ordinary requirements of CEQA." (Quoting Cal. Natural Resources Agency, Enrolled Bill Report on S.B. 896 (1989-1990 Reg. Sess.) at p. 2, emph. added by Court.) In what might qualify as an understatement, the Court of Appeal observed: "The legislative history is completely at odds with respondents' interpretation."

Finally, the published portion of the Court's opinion concluded by rejecting the University Respondents' "arguments that applying ordinary CEQA principles to enrollment increases would require annual CEQA review of enrollment levels, would turn enrollment projections into an enrollment cap and would interfere with the Regents' authority over public higher education." Per the Court, Respondents could avoid annual CEQA review by preparing an adequate program EIR "giving them CEQA coverage for year-to-year variability and for increases within the range." And the Court's decision in no way capped enrollment or obstructed the Regents' authority, but merely required them to comply with CEQA. (Citing *City of Marina, supra,* 39 Cal.4th at 360 ["[W]hile education may be [the UC's] core function, to avoid or mitigate the environmental effects of its projects is also one of [its] functions."].)

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