COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION

CALIFORNIA OAK FOUNDATION, et al.
PANORAMIC HILL ASSOCIATION, et al.

Petitioners/Appellants

vs.

Respondents/Respondents

PETITION FOR WRIT OF SUPERSEDEAS, MANDATE, PROHIBITION OR OTHER APPROPRIATE RELIEF; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF (EXHIBITS FILED UNDER SEPARATE COVER: VOLUMES I THROUGH III)

Appeal from Alameda County Superior Court, Consolidated Case No. RG 06301644, RG 06302934, RG 06302967
Honorable Barbara J. Miller, Judge of the Superior Court
Department 512, (510) 690-2721

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATUTES

REGULATIONS

OTHER AUTHORITY

INTRODUCTION

More than 116,000 Americans made the ultimate sacrifice in World War I. In their honor, in 1923 the University of California set aside spacious grounds adjacent to the newly-constructed California Memorial Stadium on which reposed several stately California Coast Live Oaks and on which were planted scores of additional oaks, bay-laurels, a redwood tree and other native flora as a permanent, living memorial to those who had given their lives to protect our nation's freedom.[1] This case will decide whether this Memorial Oak Grove may be chopped down to make way for a student gym intended to serve a seismically unsafe stadium that lies astride the Bay Area's most dangerous earthquake hazard – the Hayward fault – and whose repair is forbidden by law if its as yet undetermined cost exceeds 50 percent of the as yet undetermined value of the frayed and crumbling California Memorial Stadium.

Casting logic to the winds, the University approved construction of this gym[2] – the first of three phases of the Stadium Project – without first determining, as required by California's Alquist-Priolo Earthquake Fault Zoning Act, whether it and the next two phases of the Stadium Project (which would retrofit respectively that portion of the Stadium on the west side of the Hayward fault and that portion located on its east side) would exceed the Alquist-Priolo Act's prohibition aggainst additions or alterations

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[1]A stirring account of the importance of the Memorial Oak Grove to the veteran community appears in a recent Letter to the Editor of the Contra Costa Times by Frank Woodruff Buckles, the last surviving veteran of World War I from the United States. http://www.contracostatimes.com/berkeleyvoice/ci_9120925 (published May 1, 2008 as the fourth letter on the page).

[2]The gym was hopefully styled the "Student Athlete High Performance Center," or "SAHPC."

to the Stadium if their cost exceeds 50 percent of the Stadium's depreciated value. Adding insult to injury, the University approved the gym without ever considering the biological impact of cutting down the Memorial Oak Grove, a palpable violation of the California Environmental Quality Act (CEQA).[3]

The University's unlawful conduct did not stop there. In further, fundamental violation of CEQA and the University's own regulations, the University approved the project's funding before, rather than after, it certified the Environmental Impact Report (EIR) for the project. Worse yet, the University's ultimate decision-maker, the Regents, never actually certified the EIR, and instead erroneously delegated that pivotal CEQA decision to a subcommittee that lacked CEQA authority to do so. The University persisted in short-cutting these and other procedures required by CEQA and Alquist-Priolo despite warnings from expert agencies such as the U.S. Geological Survey and the California Geological Survey, and repeated pleas from the public, that caution, prudence and objective science should be observed, rather than pushed aside in the rush to construct a facility touted as the stepping stone to gridiron greatness for the University's beleaguered football team.

So extensive were the University's legal errors that the California Oak Foundation, the Panoramic Hill Association (comprising the neighbors most adversely affected by the project), and the City of Berkeley all filed suit to secure the University's compliance with CEQA and Alquist-Priolo. Thereafter the trial court found several violations of these laws but

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[3]The EIR for the SAHPC (and the other components of the Southeast Campus Integrated Project, or "SCIP") stated that all biological resource impacts were addressed in the programmaticEIR on the University's 2005 Long Range Development Plan ("LRDP"). The LRDP EIR, however, never said a word about the SAHPC, much less its impacts on biological resources, as the SAHPC had not even been conceived back in 2005.

nonetheless allowed the University to proceed with most of its project.

The important seismic safety and environmental protection issues raised in these consolidated proceedings are now before this Court for resolution. To assure that this Court's appellate jurisdiction does not succumb to the University's chainsaws and bulldozers, petitioners respectfully request this Court's Writ of Supersedeas to preserve the status quo until the weighty questions posed have been fully and fairly resolved by this Court.

For these reasons, as explicated more fully in the following Petition and Memorandum of Points and Authorities, petitioners respectfully request that this Court maintain the trial court's stay – which otherwise expires July 29 – of the University's approval of the project until its lawfulness has been finally determined.

PETITION FOR WRIT OF SUPERSEDEAS, MANDATE, PROHIBITION, OR OTHER APPROPRIATE RELIEF

A. The related appeal.

1. As authorized by Code of Civil Procedure ("CCP") §904.1, on July 24 petitioners filed a Notice of Appeal from the trial court's judgment and order dissolving its preliminary injunction effective July 29, 2008.

B. Request for immediate, temporary stay.

2. As authorized by CCP §§923 and 1094.5(g), and CRC 8.112(c)(1) and 8.116, petitioners request an immediate, temporary stay of the University's decision to chop down the Memorial Oak Grove to make way for the Athlete Center. This Court has broad authority to "preserve the status quo [and] the effectiveness of the judgment to be entered" under CCP §923. Additionally, under CCP §1094.5(g), petitioners are entitled to an automatic stay of the University's threatened construction activities for at least 20 days after the filing of petitioners' Notice of Appeal on July 24,

2008. That section reads: "In cases where a stay is in effect at the time of filing the Notice of Appeal, the stay shall be continued by operation of law for a period of 20 days from the filing of the notice." *Id.* The University admitted below that section 1094.5 applies to its challenged proceedings, since they were made as the result of hearings required by law.

C. Beneficial Interest of petitioners and capacity of respondents.

3. Petitioners are two non-profit public benefit corporations, the California Oak Foundation and the Panoramic Hill Association, who together with other petitioning community organizations and concerned citizens,[4] are directly affected by the University's challenged decisions. Respondents are the Regents of the University of California, its governing body under article IX, section 9 of the California Constitution, and Edward J. Denton, Vice Chancellor of UC Berkeley for Facilities Services. Petitioners have a "beneficial interest" in this lawsuit because they are parties directly and prejudicially affected by the University's approval of the Athlete Center and purported certification of their EIR on the challenged projects.[5] Petitioners also have standing under the "citizen suit" exception to the beneficial interest test to enforce statutes adopted to protect

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[4]The other petitioners are Save the Oaks at the Stadium (SOS), and the McGee-Spaulding-Hardy Historic Interest Group, unincorporated associations of Berkeley residents who use and enjoy, and seek to protect and preserve, Berkeley's natural and cultural history and features, including the Memorial Oak Grove, and individual Berkeley residents Doug A. Buckwald, Sara Shumer, Henry Knorr, Lindsay Vurek, Patricia Edwards, Anna Marie Taylor, Stan Sprague and Carrie Sprague, all of whom use and enjoy the natural and cultural resources that the challenged project would harm.

[5]*See Burlingame v. Justice's Ct. of City of Berkeley* (1934) 1 Cal.2d 71, 74-75.

public safety and environmental quality.[6]

D. Authenticity of exhibits.

4. All exhibits accompanying this petition are true copies of original documents on file or lodged with the court below, and are incorporated herein by reference. The excerpted pleadings have letter tabs and their pages are numbered consecutively beginning with page 1. The excerpts from respondents' Administrative Record retain their original pagination to avoid confusion.

E. Procedural history.

5. The facts and procedural history set forth in the accompanying memorandum are true and correct and are hereby incorporated by reference into this petition.

F. Basis for relief.

6. As the accompanying Memorandum explains, CCP §1094.5(g) maintains the trial court's stay in effect when petitioners' Notice of Appeal was filed on July 24, 2008, for at least another 20 days. CCP section 923 authorizes this Court to grant petitioners' request for a writ of supersedeas because, as demonstrated in the accompanying memorandum, petitioners' related appeal presents substantial questions for review and will be rendered ineffective unless this Court grants the writ. A writ of supersedeas issues to preserve the status quo and to protect this Court's jurisdiction during the pendency of the related appeal, and to assure that petitioners receive the full benefit of a meritorious appeal.

G. Inadequacy of remedy by appeal.

7. As demonstrated in the accompanying Memorandum,

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[6]*Environmental Protection and Information Center v. California Department of Forestry and Fire Protection* (June 18, 2008) ___ Cal.4th ___, 2008 DJDAR10971, 10975-76, citing *Waste Management of Alameda County, Inc. v. County of Alameda* (2000) 79 Cal.App.4th 1223, 1238.

petitioners have raised substantial issues regarding the University's failure to comply with CEQA and the Alquist-Priolo Act. Furthermore, petitioners demonstrate that their appeal will be rendered ineffective unless this Court acts now to preserve the status quo and to protect this Court's jurisdiction until petitioners' appeal is heard and finally determined.

PRAYER

Wherefore, petitioners pray that this Court:

1. Grant an immediate, temporary stay of the University's threatened construction-related activities pending determination of this petition;

2. Grant an immediate, 20-day extension of the trial court's preliminary injunction pursuant to CCP section 1094.5(g);

3. Issue a writ of supersedeas forbidding the University from removing any trees from the Memorial Oak Grove or otherwise commencing any construction-related activities implementing its approval of the Athlete Center and purported certification of its EIR on the Integrated Projects challenged herein until the merits of petitioners' appeal can be heard; and

4. Award petitioners their costs of suit herein; and

5. Grant any further relief as may be just and proper.

Dated: July 25, 2008

Respectfully submitted,

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for

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VERIFICATION

I, Janet S. Cobb am the Executive Officer of petitioner California Oak Foundation. I have read the foregoing Verified Petition for Writ of Supersedeas, Mandate, Prohibition, or Other Appropriate Relief and the supporting Memorandum and know their contents. The facts therein alleged are true and correct, and are based on documents within respondents' record underlying the Superior Court's judgment and orders challenged herein.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct, and that this Verification was executed in Oakland, California on July 25, 2008.

JANET S. COBB

MEMORANDUM OF POINTS AND AUTHORITIES

I. REQUEST FOR IMMEDIATE STAY

Pursuant to Rules 8.54 and 8.112 of the California Rules of Court and Code of Civil Procedure section 923, plaintiffs and appellants California Oak Foundation, *et al.*, and Panoramic Hill Association (collectively, "petitioners") hereby petition this Court for an immediate stay (1) maintaining the trial court's existing stay of the respondents' approval of Phase I (the SAHPC) of the Stadium portion of the Integrated Projects, (2) preventing construction activities on those projects by the University, and (3) thereby preserving the status quo while petitioners appeal the trial court's judgment.[7] If allowed to proceed, respondents' actions would cause irreparable harm to petitioners by destroying the Memorial Oak Grove

[7]Respondents' counsel has repeatedly stated that the University intends to commence construction immediately after the trial court's stay expires. RT July 17, 2008 (transcript ordered).

adjacent to the Stadium before this Court determines respondents' compliance with the Alquist-Priolo Earthquake Fault Zoning Act ("Alquist-Priolo Act"), Public Resources Code section 2621, *et seq.* and the California Environmental Quality Act ("CEQA"), Public Resources Code section 21000 *et seq.* Respondents' construction activity threatens to moot the issues on appeal by implementing a primary component of the very project and its impacts that are the subject of this proceeding.

Petitioners are entitled to the automatic 20-day stay protection afforded by Code of Civil Procedure section 1094.5, subdivision (g), which provides in pertinent part as follows:

> If an appeal is taken from a denial of the writ [of administrative mandamus], the order or decision of the agency shall not be stayed except upon the order of the court to which the appeal was taken. *However, in cases where a stay is in effect at the time of filing the notice of appeal, the stay shall be continued by operation of law for a period of 20 days from the filing of the notice.*

Id., emphasis added. The superior court's Order After Hearing filed July 22, 2008, directs that "[t]he preliminary injunction entered on February 9, 2007, shall remain in effect until 7 calendar days after the date of entry of judgment," which was July 22. *Id.* Appendix Volume I, Tab 13, page 3 (App.I:13:3"); App.I:12. Since petitioners filed their Notice of Appeal on July 24, 2008, while the trial court's "stay is in effect," the 20-day stay protection provided by Code of Civil Procedure section 1094.5, subd. (g) applies.[8] App.I:15.

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[8]Respondents agree that the provisions of C.C.P. section 1094.5 apply to this proceeding. As respondents explained in their Respondent's Brief filed August 20, 2007:

Further, under CCP §923 this Court may "stay proceedings during the pendency of an appeal . . . or to make any order appropriate to preserve the status quo, the effectiveness of the judgment subsequently to be entered, or otherwise in aid of its jurisdiction." *Id.* Petitioners request a stay to "preserve the status quo" and the effectiveness of this Court's future determination of the legal sufficiency of respondents' approvals.

II. SUMMARY OF ARGUMENT

Petitioners seek a stay from this Court under CCP §§923 and 1094.5 to preserve the status quo pending final adjudication of this case because: (1) commencement of construction activities, including cutting down trees in the Memorial Oak Grove, will have the immediate and irreversible effect of rendering moot significant portions of petitioners' cause of action and denying them the relief sought in this appeal, and of depriving this Court of its jurisdiction in adjudicating respondents' CEQA compliance; (2) the balance of equities favors petitioners in view of the irreparable harm construction of the Integrated Projects would cause and the absence of harm a minor delay would cause to the respondents; (3) petitioners are likely to

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> [Public Resources Code[s] section 21168 governs review of The Regents' action under CEQA in this case. That section provides that "[a]ny action to attack, [or] review . . . a determination, finding or decision by a public agency made as a result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken and discretion in the determination of the facts is vested in a public agency, on the grounds of non-compliance [with CEQA] shall be in accordance with . . . Section 1094.5 of the Code of Civil Procedure. . . .
>
> Here the decisions being attacked are The Regents' certification of the EIR and approval of the SAHPC [Student Athlete High Performance Center], both of which require hearings pursuant to The Regents' and University's policies. AR3:509-41, 15:3665.

prevail on the merits of their claims that the Regents' approval of the EIR and the SAHPC violates CEQA and the Alquist-Priolo Act; and (4) the public interest strongly favors preservation of the status quo until the Court has adjudicated the merits of petitioners' case.

The Regents violated the Public Alquist-Priolo Act because (1) it never determined whether the SAHPC is an addition to or alteration of the Stadium (2) the SAHPC was indeed an addition or alteration to the Stadium; (3) the Regents never determined whether Phases II and III of the Stadium Project will cost more than 50 percent of the Stadium's value; (4) the Regents never determined whether the SAHPC will cost more than 50 percent of the value of the Stadium, and (5) the Regents' seismic review was incomplete. The Superior Court additionally erred by relying on extra-record evidence prepared *after* respondents approved the project.

The Integrated Projects' EIR violates CEQA because (1) it assumes that Phases II and III of the Stadium Project will be built without determining whether their cost would exceed one half of the value of the Stadium and thus be forbidden under the Alquist-Priolo Act, Public Resources Code ("PRC") §2621.7, subd. (c) and the State Mining and Geology Board's regulations thereunder, 14 C.C.R. §3603(a); (2) it was never approved by the Regents, but instead by a subordinate committee; (3) the Integrated Projects were approved before the Final EIR ("FEIR") had been certified; (4) the Regents failed to recirculate for public review and comment significant new information contained for the first time in the EIR; (5) the Regents' EIR fails to address the SAHPC's impacts to biological resources; (6) the EIR's project description relies upon conflicting and vague project objectives and (7) summarily rejects feasible alternatives to the proposed project that would reduce its impacts.

Additionally, only a nominal (if any) bond should be imposed in granting this relief because citizen enforcement of environmental statutes is

in the public interest, and the University will benefit as will all citizens from this Court's review.

III. FACTUAL BACKGROUND

Petitioners and the City of Berkeley filed three lawsuits challenging Respondents' EIR for the Southeast Campus Integrated Projects ("SCIP") and approval of the first phase (the SAHPC) of one of its seven projects, the Stadium Project. App.I:7:7. Petitioners asked the trial court to issue a writ of mandate ordering the University to vacate and set aside each of its approvals and findings that the SCIP and the SAHPC comply with CEQA and Alquist-Priolo.

The SCIP comprises seven separate projects: (1) the California Memorial Stadium Seismic Corrections and Program Improvements, the first phase of which is the SAHPC; (2) the Maxwell Family Field Parking Structure and Sports Field; (3) the Law and Business Connection Building; (4) the Southeast Campus and Piedmont Avenue Landscape Improvements; (5) the School of Law Program Improvements; (6) the Haas School of Business Program Improvements; and (7) the Renovation and Restoration of five houses at 2222 to 2240 Piedmont Avenue. Administrative Record ("AR"[9]) 606-607; *see* AR190, 630. The EIR for the Integrated Projects tiers from a programmatic EIR certified by the University in January 2005 for the Berkeley campus' 2020 Long Range Development Plan ("2020 LRDP"). *Id.*

The first of the seven projects includes proposed additions and upgrades to the Stadium (the "Stadium Project"). AR670-82. The Stadium was built in 1923. AR13. The Hayward Fault runs through it, from end zone to end zone. AR1504, 7323, 7324. The Berkeley campus has rated the Stadium "seismically poor," which is a rating applicable to structures

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[9]"AR" refers to the Administrative Record below, excerpted in Volumes II and III of the accompanying Appendix.

expected to sustain significant structural and non-structural damage and/or result in falling hazards in a major seismic disturbance, representing appreciable life hazards. AR1609.

The Stadium Project is divided into three phases. AR671-73. The first phase is called "Student Athlete High Performance Center with West Plaza and Half of Grant Stair," and involves the construction of a 158,000 square-foot athlete training facility and roof-top plaza along the western side of the Stadium to house the SAHPC. AR671. The second phase is called "Stadium West with Press Box, North and South Plazas and Stadium retrofit, Field Lighting and Sound System," and includes the construction of a new and expanded press box above the western rim of the Stadium, seismic upgrades to the west side of the Stadium and the installation of permanent lighting also above the rim. AR672-73. The third phase of the project is called "Stadium East, New Concourse and East Seating Structure with Lighting Incorporated," and includes seating expansion above the eastern rim of the Stadium and seismic upgrades to the eastern side of the Stadium. AR673.

The University caused a Draft EIR for the Integrated Projects to be prepared and circulated from May 8, 2006 through July 7, 2006. AR605. The EIR for the Integrated Projects included seven objectives: (1) provide seismically safe facilities; (2) promote and inspire relationships vital to the University's health between athletics and academics, among academic units, and between the University and the public; (3) enhance remarkable historic places and create extraordinary new spaces in the southeast campus; (4) facilitate access to, between, and through the Integrated Projects; (5) increase the functionality of existing spaces and facilities in the Southeast campus; (6) consolidate parking; and (7) implement policies of the 2020 LRDP including seismic safety policies and parking policies. AR631.

The Final EIR was completed on October 31, 2006. AR1481. On

November 14, 2006, Respondent Regents' Committee on Grounds and Buildings ("Buildings Committee") considered an agenda item recommending that the Regents sitting as a whole approve the budget for the Integrated Projects, certify the EIR, make findings on the proposed projects, adopt a mitigation and monitoring plan, and approve the SAHPC portion of the Stadium Project. AR10, 25. That same day, the full Board of Regents heard public comments on the proposed Integrated Projects and SAHPC. AR76-77, 90-91. Also on November 14, 2006, the Committee adopted a recommendation to the Regents to approve the $111,948 million budget for the SAHPC, but deferred consideration of the EIR and SAHPC until the Board of the Regents sitting as a whole adopted the recommendation. AR128-129, 131-142 (minutes). On December 5, 2006, following a public hearing, the University's Buildings Committee resolved to certify the adequacy of the EIR, adopt findings of fact, and approve construction of the SAHPC. AR509-521 (minutes), 522-540 (transcript).

IV. LEGAL BACKGROUND.

A. The Alquist-Priolo Earthquake Fault Zoning Act.

Enacted in 1972, the Alquist-Priolo Earthquake Fault Zoning Act (§§2621 *et seq.*) sets strict limitations on the construction of new structures or changes to old structures on and near active earthquake faults in California. The intent of the Act is twofold. First, the Act is intended "to assist cities, counties, and state agencies in the exercise of their responsibility to prohibit the location of developments and structures for human occupancy across the trace of active faults." §2621.5(a). In furtherance of that primary objective, the California State Geologist promulgated regulations implementing the Act.14 CCR §3603(a) (which "prohibits the location of developments and structures for human occupancy across the trace of active faults in accordance with the provisions of . . . [the]

Alquist-Priolo Earthquake Fault Zoning Act"). The Act presumes that branches of an active fault exist out to 50 feet on each side of the fault "unless proven otherwise by an appropriate geologic investigation and report." *Id.* Likewise, the Act requires the California Geological Survey ("CGS") to delineate earthquake fault zones. §2621.5(b). The Act, including its prohibitions, applies to any delineated earthquake fault zone. *Id.* The Act's prohibition thus extends out 50 feet from any active fault or the boundary of a delineated fault zone unless the project proponent proves, based on substantial evidence, that no active fault is located under its project. *Id.*; *Better Alternatives for Neighborhoods v. Heyman* (1989) 212 Cal.App.3d 663, 670-71.

The second purpose of Alquist is "to provide the citizens of the state with increased safety and to minimize the loss of life during and immediately following earthquakes by facilitating seismic retrofitting to strengthen buildings, including historical buildings, against ground shaking." §2621.5(a). That goal is implemented by a limited exception to the Act's prohibition on new structures near an active fault which allows for "an alteration or addition to any structure if the value of the alteration or addition does not exceed 50 percent of the value of the structure." §2621.7(c).

B. The California Environmental Quality Act.

CEQA manifests the Legislature's intent that the "government of the state take immediate steps to identify critical thresholds for the health and safety of the people of the state and to prevent such thresholds from being reached." §21000(d); *see Mountain Lion Foundation v. Fish and Game Com.* (1997) 16 Cal.4th 105, 112. CEQA requires that a lead agency prepare and certify an EIR for any discretionary project that may have a significant adverse effect on the environment. §§21002.1(a), 21067 ("lead agency" is "the public agency which has principal responsibility for carrying out or

approving a protect"), 21100(a), 21151(a); 14 CCR §§15064(a)(1), (f)(1), 15367.

1. The EIR is a public informational document that must contain a clear project description and statement of objectives.

An EIR should be a comprehensive "informational document" whose purpose is to "provide public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment; to list ways in which the significant effects of such a project might be minimized; and to indicate alternatives to such a project." §21061; 14 CCR §15003(b)-(e). The EIR must include a project description that sets forth (a) the precise boundaries of the proposed project, (b) a "clearly written" statement of objectives, (c) a description of the project's technical, economic, and environmental characteristics, and (d) a statement of the EIR's intended uses. 14 CCR §15124(a)-(d). Clear written objectives are essential because compatibility with project objectives is one of the primary concerns when considering project alternatives. *Id.*

CEQA and the CEQA Guidelines allow for different types of EIRs that may be developed to meet an agency's current obligations. 14 CCR §§15161, 15165, 15167, 15168. The most common is the "project EIR" that focuses on a single, specific project. *Id.* §15161. The lead agency may develop a "program EIR" where multiple individual projects or phased (or "tiered") projects are to be undertaken, and the individual projects are linked geographically, temporally, or in an otherwise logical manner. *Id.* §§15165, 15168. Each type of EIR must meet CEQA's requirements. 14 CCR §15160.

2. The EIR must describe the existing physical conditions at the project site.

To assist public understanding of the project's impacts, the EIR "must include a description of the physical environmental conditions in the vicinity

of the project." 14 CCR §15125(a). "All phases of a project must be considered when evaluating its impact on the environment: planning, acquisition, development, and operation." *Id.* §15126. The EIR's discussion of the project's impacts "should include relevant specifics of the area, the resources involved, physical changes, and other aspects of the resource base such as . . . historical resources, scenic quality, and public services." *Id.* §15126.2(a). "The EIR shall also analyze any significant environmental effects the project might cause by bringing development and people into the area affected." *Id.* For example, an EIR on a project "astride an active faultline should identify as a significant effect the seismic hazard to future occupants" because the project "would have the effect of attracting people to the location and exposing them to the hazards found there." *Id.*

3. The EIR must include a reasonable range of alternatives.

The lead agency's EIR must analyze a reasonable range of alternatives to the proposed project. §21100(b)(2)(B)(4); 14 CCR §15126.6(f). It must describe a range of alternatives that would "feasibly attain most of the basic objectives of the project but would avoid or substantially lessen . . . the significant effects of the project . . . ." 14 CCR §15126.6(a). The analysis must focus on any alternatives to the project or its location that are capable of avoiding or lessening any significant environmental effects of the project, even where the alternatives may impede project objectives or be more costly. *Id.*§15126.6(b). The EIR must include sufficiently comprehensive information about the alternatives to ensure informed decision-making and public participation. *Id.* §15126.6(a). Decision-makers reviewing the EIR must be able to fully evaluate the alternatives and compare them to the proposed project. *Id.* The EIR must also include a "no project" alternative that discusses the expected outcome if the project is not approved, including any developments or projects that are

reasonably expected to occur if the project does not proceed. 14 CCR §15126.6(e).

4. An EIR may only be certified after the lead agency makes findings based on substantial evidence.

Ultimately, the lead agency must find with respect to each significant effect identified in the EIR: (1) that changes have been made to the project which mitigate or avoid the identified effect; (2) that the changes required to mitigate or avoid the effect are within the jurisdiction of another agency and that such changes should be adopted by that agency; or (3) that specific economic, legal, social, technological, or other considerations make infeasible the mitigation measures or alternatives identified in the EIR. § 21081(a); 14 CCR §15091(a). The agency may only select the third option after it has complied with the requirements to implement all feasible mitigation measures that would substantially lessen or reduce to insignificance the project's significant impacts.

If the agency finds that measures necessary to mitigate or avoid negative effects are infeasible, it must issue a statement of overriding considerations that provides a proper basis for approving a project despite the existence of unmitigated environmental effects. §21081(b); 14 CCR §15093. "CEQA does not authorize an agency to proceed with a project that will have significant, unmitigated effects on the environment, based simply on a weighing of those effects against the project's benefits, unless the measures necessary to mitigate those effects are truly infeasible." *City of Marina v. Bd. of Trustees of Cal. State University* (2006) 39 Cal.4th 341, 368-369.

V. STANDARD OF REVIEW FOR INJUNCTIVE RELIEF

In *Cohen v. Board of Supervisors*, the Supreme Court stated the test for granting preliminary injunctive relief:

> This court has traditionally held that trial courts should evaluate two interrelated factors when deciding whether or not to issue a preliminary injunction. The first is the likelihood that the plaintiff will prevail on the merits at trial. The second is the interim harm that the plaintiff is likely to sustain if the injunction were denied as compared to the harm that the defendant is likely to suffer if the preliminary injunction were issued.

(1985) 40 Cal.3d 277, 286, citing *IT Corp. v. County of Imperial* (1983) 35 Cal.3d 63, 69-70. This Court must therefore evaluate the likelihood that petitioners will prevail, and the relative harm to the parties of the granting or denial of the injunction. *Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 441-442; *IT Corp., supra* 35 Cal.3d at 69-70. "[T]he clearer the violation, the less the trial court need be concerned with the balancing of harm." *IT Corp., supra,* 35 Cal.3d at 72, fn. 5.

Where, as here, petitioners' harm cannot be adequately redressed by a legal remedy, such as money damages, injunctive relief is proper. *See Jessen v. Keystone Savings & Loan Assn.* (1983) 142 Cal.App.3d 454, 458; *Voorhies v. Greene* (1983) 139 Cal.App.3d 989, 997. The ultimate goal under the law is to *minimize the harm that a potentially erroneous interim decision may cause*. *IT Corp, supra*, 35 Cal.3d at 72-73. "Under CEQA, an injunction should be granted to protect against adverse and possibly irreparable alteration [of the status quo] prior to full and accurate assessment and disclosure of the scope and environmental impacts of the . . . project and to ensure adequate consideration of alternative[s] . . . and additional mitigation measures that may be identified [pursuant to CEQA]." *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1994) 27 Cal.App.4th 713, 741.

Here, since both the balance of equities favors petitioners[10] *and* petitioners are likely to prevail on the merits, this Court should maintain the trial court's stay to "protect against adverse and possibly irreparable alteration" of the status quo prior to this Court's resolution of this appeal.

VI. PROCEDURAL BACKGROUND

This appeal arises from the decision of the Superior Court in Alameda County, Hon. Barbara J. Miller presiding, in consolidated case nos. RG 06301644, RG 06302934, and RG 06302967. In December 2006 petitioners initiated these proceedings in three separate actions. App.I:7:49. Petitioners sought a preliminary injunction, which was granted on February 9, 2007, following consolidation of the cases. *Id.* 49-50.

Between March 1 and September 4, 2007, parties lodged the Administrative Record and submitted trial briefs, reply briefs, and other related filings in anticipation of trial. App.I:50. On September 19, 2007, the trial commenced and continued until October 11, 2007.

On December 10, 2007, the court requested the parties to submit expert evidence outside the Administrative Record regarding respondents' compliance with Alquist-Priolo. App.I:7:50-51. On December 26, petitioners filed a Motion for Reconsideration, arguing that the evidence sought was irrelevant and the agency record was sufficient. App.I:5:27. On January 23, 2008, the court denied the Motion for Reconsideration, and scheduled a hearing on the expert evidence for March 7,2008. App.I:6:40.

On June 18, 2008, the trial court issued its Order Granting in Part and Denying in Part Petitions for Writ of Mandate ("Statement of Decision").

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[10]The accompanying Declaration of Michael Kelly ("Kelly Dec.") describes the extraordinary beauty and historic significance of the Memorial Oak Grove, which is an integral feature of this National Register of Historic Places site. *Id.* at ¶¶2-5 and Exhibit A thereto, a photograph of a part of this grove.

App.I:7:43. Per its direction, on June 24, petitioners jointly submitted a proposed Judgment and Peremptory Writ of Mandate. App.I:8-9:172-179. On June 27, respondents submitted their proposed judgment and writ, and on July 11 petitioners submitted their opposition thereto. App.I:10-11:180-210. After a hearing on July 17, on July 22 the Court issued its Order After Hearing, Judgment and Peremptory Writ, directing that the Court's Preliminary Injunction be dissolved on July 29, 2008. App.I:12-14:211-223. On July 24, petitioners appealed. App.I:15:224.

VII. ARGUMENT

A. COMMENCEMENT OF CONSTRUCTION WOULD SUBSTANTIALLY MOOT PETITIONERS' CAUSE OF ACTION BEFORE THE COURT ADJUDICATES THE MERITS.

CEQA requires agencies to identify, disclose, and prevent or mitigate any significant or potentially significant environmental effects of a project to be undertaken, financed or approved by that agency. PRC §21100, 14 CCR §15002(a). Petitioners' appeal seeks to compel the Regents to remedy the deficiencies in its FEIR and SCIP approval. If construction commences, it will moot several of the key issues raised in the appeal. Most notably, the Memorial Oak Grove will be cut down before the Regents have identified and addressed this significant biological impact in the EIR. Likewise, the SAHPC on which construction is imminent is part of the larger Stadium Project whose compliance with Alquist-Priolo has not been determined. Therefore, this Court should stay approval of SCIP and construction thereunder pending resolution of the appeal.

B. THE BALANCE OF EQUITIES FAVORS PETITIONERS.

1. The Regents' Threatened Construction Would Cause Irreparable Harm to Petitioners by Subverting CEQA and the Alquist-Priolo Act.

If respondents are allowed to build before this Court decides this appeal, *the CEQA process itself will suffer*. CEQA is designed to ensure that an informed decisionmaking process takes place before a project is approved, and before it gains too much "bureaucratic and financial momentum" to be changed or halted later. *Laurel Heights Improvement Assn. of San Francisco v. Regents of the University of California* (1988) 47 Cal.3d 376, 395 (*"Laurel Heights I"*). California courts recognize "the steamroller effect of development." *Environmental Council of Sacramento v. City of Sacramento* (2006) 142 Cal.App.4th 1018, 1031. The court in *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* feared that "if [surveying and construction] proceed pending preparation of an adequate EIR, momentum will build and the project will be approved, *no matter how severe the environmental consequences identified in the new EIR*." (1994) 27 Cal.App.4th 713, 742, emphasis added.

Here, as in *San Joaquin Raptor*, "injunctive relief is necessary both to protect the site from adverse and possibly irreparable alteration prior to full and accurate assessment and disclosure of the scope and environmental impacts of the development project, and to ensure adequate consideration of alternative sites and additional mitigation measures which must be identified upon preparation of the required EIR." *Id.* at 741. As discussed below, respondents failed to properly assess project-specific impacts and avoided serious consideration of less harmful alternatives. If construction commences before this Court rules, these requirements will be violated.

Instead of the environmental analysis shedding its invaluable light on

the decision at hand, the pre-determined decision will dictate the outcome of the analysis. In order to preserve the integrity of the environmental analysis process, this Court should use its "ancient and purposeful instrument of injunction" to assure "effective equitable action" to achieve CEQA's objectives and fairness to the parties. *Friends of "B" Street v. City of Hayward* (1980) 106 Cal.App.3d 988, 998.

2. Petitioners Will Suffer Direct Harm.

Petitioners would be directly harmed by the loss of unique and irreplaceable environmental, aesthetic and historic resources if construction is allowed to proceed during the pendency of the appeal. The Memorial Oak Grove has furnished an area of beauty and quiet solicitude to the members of the Berkeley community - students, faculty, and residents - for more than 80 years, as well as providing habitat for a variety of species of flora and fauna. AR801, 5266, 11400, 16928. Many of the trees slated for removal are part of an historic stand of native Coast Live Oak trees, some of which antedate construction of the Stadium. *Id.*; App.I:1:01-03; Kelly Dec. ¶2-5. This remnant stand of native oak trees is an integral part of the original design of the Stadium, and as such, is included within and identified for protection under the Stadium's listing on the National Register of Historic Places. *Id.* Construction would eliminate this unique and irreplaceable community resource.

Furthermore, the Stadium Project will be built astride a known fault line, putting tens of thousands of people in danger. AR820, 821, 37412, 37996. CEQA and Alquist-Priolo are designed to prevent unsafe development, and to identify safer, feasible alternatives. 14 CCR 15126.2(a), PRC §2621.5.

Thus, unless a stay is granted, the Stadium Project will destroy unique and irreplaceable cultural, aesthetic, historical and environmental resources,

and place tens of thousands of people in harm's way.

3. The Regents Would Suffer No Harm If the Project Is Stayed Pending Review of The Present Appeal.

The Regents would suffer relatively little, and certainly reparable, harm should this Court enjoin construction pending disposition of this matter. The project is not time sensitive. Since this appeal is expedited under PRC §§21167.1 and 21167.6 (g), (h) and (i), potential delays in the project would be modest, at most. Any rise in construction costs is offset by the interest earned through delayed expenditures. Public safety concerns should be met by moving staff and athletes out of the unsafe Stadium rather than compounding the problem by building even more facilities at this unsafe location.

The only conceivable purpose served by respondents' construction now would be to trump this Court's jurisdiction by causing the very irreparable harm feared by petitioners, mooting key aspects of their appeal. Such would thwart the judicial process.

C. PETITIONERS ARE LIKELY TO PREVAIL ON THE MERITS OF THEIR CLAIMS THAT THE REGENTS VIOLATED CEQA AND THE ALQUIST-PRIOLO ACT.

1. The Regents' EIR violates CEQA.

Petitioners are likely to prevail on the merits of the underlying appeal.

a. The Regents Improperly Delegated Lead Agency Responsibility to the Committee on Grounds and Buildings in Violation of CEQA and the Regents' Own Bylaws.

The trial court held and respondents will argue that the UC Regents did not violate CEQA by delegating their CEQA duties to the Committee on Grounds and Buildings. App.I:7:78-91. The CEQA Guidelines, however, make clear that "[t]he decisionmaking body of a public agency shall not delegate the following functions:

(1) Reviewing and considering a FEIR or approving a negative declaration prior to approving a project.

(2) The making of findings as required by Sections 15091 and 15093."

14 CCR §15025(b)(1)-(2). And, "[p]rior to approving a project the lead agency *shall certify* that: (1) The FEIR has been completed in compliance with CEQA; (2) The FEIR was presented to the decisionmaking body of the lead agency and that *the decisionmaking body reviewed and considered the information contained in the FEIR* prior to approving the project; and (3) *The FEIR reflects the lead agency's independent judgment and analysis."* 14 CCR §15090(a), emphasis added.

Courts have affirmed that the role of the lead agency in determining the adequacy of EIRs and of proposed mitigation measures is so significant "that CEQA proscribes delegation." *Planning & Conservation League v. Department of Water Resources* (2000) 83 Cal.App.4th 892, 907. 14 CCR §15090(a)(3). Delegation of decisionmaking functions to another body "is inconsistent with the purpose of the review and consideration function since it insulates the members of the [decisionmaking body] from public awareness and possible reaction to the individual members' environmental and economic values. Delegation is inconsistent with the purposes of the EIR itself." *Kleist v. City of Glendale* (1976) 56 Cal. App. 3d 770, 779 (*"Kleist"*); *Vedanta Society v. California Quartet, Ltd.* (2000) 84 Cal.App.4th 517, 526-529 (same). *Kleist* held that a city council could not delegate certification of an EIR to a planning board.

Accordingly, as the admitted "lead agency" for the project (AR605, 699, 1769, 1829), the Regents cannot delegate that same responsibility to the

Committee on Grounds and Buildings[11] and must itself determine the adequacy of this EIR. The Regents violated this mandate by delegating this responsibility to certify the Integrated Projects EIR, adopt Findings, a Statement of Overriding Considerations and Mitigation Monitoring Program, and approve the design of the Athlete Center to the Regents' Committee on Grounds and Buildings. AR509-511, 540-541.

b. The Regents Improperly Committed Funds for the Athlete Center Before Reviewing and Certifying the Integrated Projects EIR.

The trial court held and respondents will argue that the University did not violate CEQA by approving the budget for the Project prior to completing its CEQA review of the impacts of the Project. App.I:91-93. To the contrary, the CEQA Guidelines require that "*before* granting *any* approval of a project subject to CEQA, every lead agency . . . shall consider a FEIR . . . ." 14 CCR §15004(a), emphasis added. "A fundamental purpose of an EIR is to provide decisionmakers with information they can use in deciding *whether* to approve a proposed project, not to inform them of the environmental effects of projects that they have already approved." *Laurel Heights I, supra,* 47 Cal.3d at 394. "No state agency . . . shall . . . authorize funds for expenditure for any project . . . which may have a significant effect on the environment unless such request or authorization is accompanied by an environmental impact report." 14 Cal. Pub. Res.§21102.

The Regents violated this fundamental tenet of CEQA law when, sitting as a Committee of the Whole, it approved *funding* for the project while the EIR was still pending. AR143, 120, 256. On November 16, 2006, the Regents approved financing for the Integrated Projects by approving the

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[11]The Committee on Grounds and Buildings has only 11 members (AR6) of whom just 7 voted to certify the EIR on December 5, 2006. AR509. The full Board of Regents has 26 members. Cal. Const. Art. IX, §9.

Committee's prior adoption on November 14 of "an amendment to the budget to include the [Athlete Center] project at a total project cost of $111,948,000 . . . ." AR256, 78, 88. The Committee's approval further authorized the President to "obtain standby financing not to exceed $12 million prior to awarding a construction for any gift funds not received . . . ." AR116. Having already approved the funding, the two remaining elements, design approval and certification of the EIR, "were deferred at the request of the Regents until [December 5th's] special meeting." *Id.* The Regents as a whole failed to certify the EIR. Instead, its subordinate Committee on Grounds and Buildings met on December 5, 2006 to hear comments, discuss and vote on the certification of the EIR. AR509. The Committee then certified the Integrated Projects' FEIR and the design of the Athlete Center. AR541.

The Regents, sitting as a Committee of the Whole, thus effectively approved the project on November 16, 2006, by setting aside funds for the project in the University budget. AR143, 256, 120, 116, 78, 88. The (legally inadequate) certification of the EIR on December 5, 2006 was an afterthought. AR509. This premature budget approval violates CEQA. The exercise of post-approval environmental review renders an EIR "nothing more than *post hoc* rationalizations to support action already taken." *Laurel Heights I, supra,* 47 Cal.3d at 394.

The University, by funding the project *before* certifying its EIR, rendered moot the public comments made on December 5, 2006. "Public participation is an essential part of the CEQA process." 14 CCR §15201. "[P]ublic review provides the dual purpose of bolstering the public's confidence in the agency's decision and providing the agency with information from a variety of experts and sources." *Schoen v. Department of Forestry & Fire Protection* (1997) 58 Cal.App.4th 556, 573. The Director

of Planning and Development for the City of Berkeley, the President of the Berkeley Architectural Heritage Association, a member of the Panoramic Hills Association, graduates of the University, Berkeley citizens and others each voiced concerns and issues at the December 5th meeting. AR522-540. Their comments almost certainly fell upon deaf ears as the project had been effectively approved nearly three weeks earlier. AR143, 256, 116. By approving the project before officially certifying the EIR, the public was denied the right to meaningfully participate in the decisionmaking process.

c. The Draft EIR Should Be Recirculated Because Its Review of Seismic and Geologic Impacts Was Superseded by the Subsequent Geomatrix Report.

The trial court held and respondents will argue that the University's decision not to recirculate the EIR is supported by substantial evidence and therefore does not violate CEQA. APP.I:7:93-101. CEQA, however, "provides that when a lead agency adds 'significant new information' to an EIR after completion of consultation with other agencies and the public . . . but before certifying the EIR, the lead agency must pursue an additional round of consultation." *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 447, citing section 21092.1. New information is "significant," within the meaning of section 21092.1, if "the EIR is changed in a way that deprives the public of a meaningful opportunity to comment upon a *substantial* adverse environmental effect of the project or a feasible way to mitigate or avoid such an effect." *Laurel Heights Improvement Assn. v. Regents of the University of California* (1995) 6 Cal.4th 1112, 1129 (*Laurel Heights II*). *Accord*, 14 CCR 15088.5(a). As to seismic impacts, the CEQA Guidelines require the disclosure of the fault line as an indirect significant effect:

> an EIR on a subdivision astride an active fault line should identify as a significant effect the seismic hazard to future

> occupants of the subdivision. The subdivision would have the effect of attracting people to the location and exposing them to the hazards found there.

14 CCR §15126.2, subd. (a).

When the University released its Draft EIR on May 8, 2006, it lacked any current geological assessment of the Athlete Center's potential seismic risks. AR596. Later, after the comment period had closed, the University's seismic consultant, Geomatrix, released its "Fault Rupture Hazard Evaluation" for the Athlete Center site on October 23, 2006. AR7277-7417. The FEIR relies exclusively on this belated report to conclude that "[t]he fault rupture 'risk' is quantitatively understood and the seismic design incorporates this understanding . . . [and] provides complete protection of life safety . . . ." AR1502, 1607. Instead of recirculating the Draft EIR with this information, the University used the tardy Geomatrix report to dismiss the public's concerns about seismic safety, citing it for the first time in the FEIR. AR1605-08. Respondents' finding that "no new significant information was added to the EIR following public review and thus, recirculation of the EIR is not required by CEQA," does not even acknowledge the tardy Geomatrix report and is thus readily refuted by the record. AR193.

Adding insult to injury, the Draft EIR asserted that "active faults are not known to be located within the footprint of the [SAHPC]" (AR836), despite the fact that the University knew, but failed to disclose in the Draft EIR, that a previous "Fault Rupture Hazard Evaluation" prepared by Geomatrix for the Stadium on October 1, 2001 included a map *showing an inferred active fault underlying the proposed SAHPC site*. AR7214. This map is not an aberration; other seismic reports also inferred the presence of an active fault at or near this location. AR4286, 7091, 37031. None were disclosed in the Draft EIR.

Instead of fully disclosing the scientific uncertainty surrounding the project's seismic risks, the University hid the ball throughout the public comment period. Presented with the University's assurance that the Athlete Center "would not be located on a known active fault" (AR826, 836), but deprived of any underlying seismic study to support that conclusion, the public was (1) given no warning that an active fault might underlie the site, while at the same time it was (2) provided no specific documentation to review and critique. As a consequence, the public was deprived of an opportunity to meaningfully review and comment on the Project's potential seismic risks. Thus, in violation 14 CCR §15126.2, the Draft EIR did not fully "identify and focus on" the significant effects of the project.

d. The Regents failed to include the differing opinions of experts and explain its rationale for choosing one over the other.

If experts in a subject area disagree with the conclusions reached by an EIR, the EIR must summarize the points of disagreement and explain the agency's reason for adopting one expert's conclusion over another's. *Eureka Citizens for Responsible Govt. v. City of Eureka* (2007) 147 Cal.App.4th 357, 372. *Accord* 14 CCR §15151. This serves the EIR's purposes of good faith full disclosure, adequacy and completeness. *Id.*, citing *Rio Vista Farm Bureau Center v. County of Solano* (1992) 5 Cal.App.4th 351, 368. In letters dated December 4, 2006, the U.S. Geological Survey ("USGS") and California Geological Survey ("CGS") each wrote: "We believe that the data presented in the Geomatrix report do not definitively rule out the possibility of Holocene faulting beneath the northeastern-most footprint of the proposed SAHPC . . . ." AR40017, 40021. The agencies noted several areas where Geomatrix interpreted data to reach a conclusion that no faults existed, even though the data were incomplete:

We disagree with the conclusion in the Geomatrix report that

> Holocene age faulting within the footprint of the SAHPC northeast of T-1 can be ruled out on the basis of available subsurface data included in the report. In our opinion, additional subsurface investigations, particularly in the gaps between existing borings, would go a long way towards answering the questions and issues raised here regarding the presence or absence of a Holocene fault at the northeastern and southeastern ends of the SAHPC footprint.

AR40020, 40024. The University's FEIR never referenced the letters from the USGS and the CGS, despite CEQA's call for reconciliation of contractory expert opinions.

e. The EIR Fails to Fully Disclose and Address the Integrated Projects' Adverse Impacts on Biological Resources.

The CEQA Guidelines direct that a finding of significant impact is mandatory if the project "has the potential to degrade the quality of the environment, substantially reduce the habitat of a fish or wildlife species, cause a fish or wildlife population to drop below self-sustaining levels, threaten to eliminate a plant or animal community, [or] reduce the number or restrict the range of a rare or endangered plant or animal. . . ." 14 CCR §15065. If an agency concludes that various impacts of a project do not reach a level of significance, the agency must provide a statement describing the basis of that conclusion. Cal. Pub. Res. §21100(c). "Mere conclusions simply provide no basis for judicial review." *Citizens Ass'n. for Sensible Development of Bishop Area* (1985) 172 Cal.App.3d 151, 171.

Although CEQA encourages the use of tiered EIRs, tiering does not permit agencies to ignore significant environmental impacts. 14 CCR §15152. A project-level EIR may only rely on a previous EIR's analysis where significant effects have been "adequately addressed" in the prior document. 14 CCR §15152(f). Thus, the prior EIR must have either mitigated or avoided impacts, or examined them in a sufficient level of detail

that the project's impacts can be mitigated through subsequent project-specific measures. *Id.* "A decision to 'tier' environmental review does not excuse a governmental entity from complying with CEQA's mandate to prepare, or cause to be prepared, an environmental impact report on any project that may have a significant effect on the environment, with that report to include a detailed statement setting forth '[a]ll significant effects on the environment of the proposed project." *Stanislaus Natural Heritage Project v. County of Stanislaus* (1996) 48 Cal.App.4th 182, 197, quoting §21094(e).

Phase I construction of the Stadium Project will remove most of the trees in the Memorial Oak Grove, one of only three remaining intact woodland areas on the Berkeley campus. *See* AR801 (loss of the trees at CMS "would reduce the number of "rustic" landscapes on campus to two"), 1623, 520. In violation of CEQA's unambiguous language, the EIR *never* addresses the biological significance of this impact. Instead, the EIR refers the reader to the Regents' "2020" LRDP EIR, adopted in 2005. AR604. However, the 2020 LRDP EIR expressly states that it did *not* consider any impacts to biological resources outside of U.C. Berkeley's Campus Park and Hill Campus, such as the Memorial Oak Grove: "Given the absence of any sensitive biological or wetland resources, no additional discussion or analysis is provided for other land use zones in this section of the EIR." AR15558. Thus, *no analysis of biological resources, impacts and mitigations is provided for the Memorial Oak Grove.*

This violates CEQA. A project-level EIR cannot legally tier from a program EIR that has not "adequately addressed" potentially significant effects of the project. 14 CCR §15152(f). It was an abuse of discretion for the Regents to ignore the biological impact of the project on the Memorial Oak Grove. AR450-506 (*Findings do not even mention this impact*); §21100(c); *Protect the Historic Amador Waterway v. Amador Water Agency*

(2004) 116 Cal.App.4th 1099, 1112 (agency must explain basis for assumption that potential project impact is insignificant).

Respondents will attempt to refocus the absence of analysis of biological resources on their implementation of the University's "specimen trees program." However, the specimen trees program is not designed to address the biological resources associated with any woodland on campus. Indeed, with the exception of the natural areas within the Campus Park, specimen trees are not selected based on their importance to biological resources or the local ecology. AR15561 (outside of campus' three designated natural areas, specimen trees selected based on their aesthetic, historic, educational importance or importance to erosion control). Thus, to the extent the 2020 LRDP's Continuing Best Practice BIO-1 mitigates for removing specimen trees near the Stadium, that claimed mitigation is only for removal of specimen trees and not for impacts to biological resources.

Respondents may contend that the loss of trees at the Athlete Center site is covered in two appendices to the Draft EIR. AR1276-1405. Appendix G-1 states which trees are slated to be removed, and G-2 gives a description of each tree. *Id.* They do not purport to address the *biological impact* of the loss of these trees. Furthermore, readers who wish to piece together an accurate picture of the true impact on the grove must flip back and forth between the two separate appendices and a map on a third page. *Id.* at App. G-1, G-2, and map at G-2, fig.III-13. "Information 'scattered here and there in EIR appendices,' or a report 'buried in an appendix,' is not a substitute for 'a good faith reasoned analysis in response.'" *Vineyard Area* Citizens, *supra*, 40 Cal.4th at 442. "An adequate EIR requires more than raw data; it requires also an analysis that will provide decision makers with sufficient information to make intelligent decisions. *See, e.g.*, Guidelines §15151." *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 955. Like the EIR faulted in *Vineyard,* the Draft EIR

buried its treatment of the loss of trees in appendices. Like the EIR decertified in *County of Amador*, the appended data requires the reader to cobble together information in order to gain any understanding of how the grove will be impacted. Such an extraordinary effort should not be necessary. *Id.* Without proper analysis in either the EIR or its appendices, the EIR is deficient and must be decertified. *Vineyard, supra*, 40 Cal.4th at 442.

f. The EIR Fails to Fully Disclose and Address the Project's Adverse Impacts on Archaeological Resources.

CEQA section 21083.2 requires that "if the lead agency determines that the project may have a significant effect on unique archaeological resources, the [EIR] shall address the issue of those resources." *Id.*, subd. (a). Furthermore, "if it can be demonstrated that a project will cause damage to a unique archaeological resource, the lead agency may require reasonable efforts to be made to permit any or all of these resources to be preserved in place or left in an undisturbed state." *Id.*, subd. (b). Mitigation measures are required to the extent that unique archaeological resources cannot be preserved in place or left in an undisturbed state. §21083.2(c). "Public agencies should, whenever feasible, seek to avoid damaging effects on any historical resources of an archaeological nature." 14 CCR §15126.4(b)(3). "Preservation in place is the preferred manner of mitigating impacts to archaeological sites." 14 CCR §15126.4(b)(3).

When the University first constructed the Stadium in 1923, 18 Indian burial sites were unearthed on-site. AR17479. However, the EIR did not even disclose this fact, much less address the potential archaeological impacts of the adjacent Athlete Center. Instead, the University simply noted in response to public comment requesting this disclosure and analysis that it was "aware of the burials . . . as well as other known resource locations on

and adjacent to campus." AR17480. But instead of assessing the possible presence of such remains, and preparing specific mitigation measures or alternatives to building on the site, the University sidestepped the issue, stating that "if any ground-disturbing activities are proposed in any . . . areas where burials have previously been unearthed, then UC Berkeley will take *appropriate steps* to ensure any resources that may be present are properly treated in accordance with archaeological protection laws." AR17480 (emphasis added). Contrary to CEQA, the EIR fails to provide the public any understanding of the likelihood that known burial sites will be disturbed or that additional burial sites will be found, and evades creation of a specific and comprehensive mitigation plan.

g. The EIR Lacks Adequate Project-Level Specificity.

The trial court determined and respondents will argue that the EIR described the Project in sufficient detail and therefore does not violate CEQA. But an EIR's project description must contain a detailed map depicting the precise location of the project, a statement of the objectives of the project, and a description of the project's technical, economic, and environmental characteristics. 14 CCR §15124. "An accurate, stable, and finite project description is the *sine qua non* of an informative and legally sufficient EIR." *County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 193

In spite of its acknowledgment that the Integrated Projects EIR is a project-level document and CEQA's corresponding requirements for specificity, the approved EIR lacks the detail required in a project-level EIR. AR671. For example, the Design Description of the Law and Business Connection Building also suggests that it *may* include facilities like a 300-person auditorium and 200-person café, but avoids committing the University to any predictable course of action. AR686. The parking

structure to be located underneath the Maxwell Family Fields is covered by barely a page of text within the EIR, and little information is given about the five-story structure and its impacts. AR682-683

h. The EIR Contains Improperly Vague Project Objectives and Fails to Adequately Analyze Alternatives.

The trial court determined and respondents will argue that the EIR contained an adequate set of project objectives and alternatives analyses. Decision, pp. 93-113. The objectives and alternatives analyses, however, violate CEQA.

Project descriptions must contain a statement of objectives, which is meant to aid the agency as it seeks out alternatives to the project. *Eureka Citizens for Responsible Govt. v. City of Eureka* (2007) 147 Cal.App.4th 357, 371 n. 18, citing 14 CCR §15124. This statement, in turn, must explain the underlying purpose of the project. *Id.* Agencies do not satisfy CEQA by performing their analysis at the most general level of analysis possible; to the contrary, "the courts have favored specificity and use of detail in EIRs." *Whitman v. Board of Supervisors* (1979) 88 Cal.App.3d 397, 411. This includes an EIR's discussion of project objectives.

Yet, to the extent that the EIR lays out any objectives at all, they are so vague and amorphous that they could be fulfilled by almost any project. AR630-1. For example, "increasing the functionality of existing spaces and facilities" does not describe a specific objective of any of the Integrated Projects. AR630-1. Similarly, the Project plans to "create extraordinary new spaces" and to "promote and inspire relationships." *Id.* These types of goals do not describe what the University desires to be accomplished through the construction of the Integrated Projects.

Because the objectives of the Integrated Projects are impossible to

nail down – multifaceted and divergent as they (collectively) are – the alternatives section of the EIR failed to address alternatives to each of the projects actually being proposed. AR989-1006. Instead, the alternatives section includes only all-or-nothing alternatives to the entire collection of projects that by their very nature are bound to fail. By combining so many disparate projects under one umbrella, the Regents has virtually guaranteed that no other proposal could possibly be satisfactory. It seems that only the combination of projects that respondents had selected as the "Integrated Projects" will fit respondents' amorphous goals and would maintain the undefined "basic nature of the project."

The alternatives section highlights the incongruous and unmanageable nature of the basic structure of the EIR. Alternatives purportedly considered include a reduced size alternative that does not state what reduction in size is being contemplated, leaving it entirely to the imagination of the reader. *Id.* Similarly, in evaluating the one alternative that would move the Stadium to an off-campus location, the Regents ignored their own evidence that, whatever the fate of the existing Stadium, the old Stadium would continue to exist: "[t]he playing field at the CMS [Stadium] would likely continue as a practice field in any eventuality." AR268. Despite that awareness, the "Dispersed Program - Albany" alternative includes the poison-pill of completely demolishing the existing Stadium, including all of that activity's attendant cultural and environmental impacts. Likewise, nothing in the record explains why it would be an inefficient use of campus space to relocate a facility that will only be used seven to fourteen days a year to an off-campus location. Nor is there any record evidence supporting the assertion in the EIR that constructing a Stadium at the Albany site would somehow "severely impact public views" or that a 12-acre facility located within an existing 120 acre facility would have any impacts on

sensitive wetland areas. Nor is there substantial evidence to support the EIR's conclusion that worse traffic impacts, or even comparable traffic impacts, would occur at an Albany site compared to the existing Stadium site's substantial traffic disruptions on game days. The rule of reason remains elusive for the alternatives' designs and analyses.

i. The Regents' Findings and Statement of Overriding Considerations Were Inadequate.

The trial court determined and respondents will argue that respondents' findings and statement of overriding considerations was adequate. App.I:7:155-169. However, "[w]hen a FEIR identifies one or more significant effects, the lead agency . . . shall make a finding under Section 15091 for each significant effect and may need to make a statement of overriding considerations under Section 15093 for the project." 14 CCR §15064. The agency must find for each significant impact identified that either: 1) the project has been altered in a way to either avoid or mitigate the impacts; 2) another agency has the responsibility to adopt project changes; or 3) technological, economic or other considerations render alterations infeasible, but project benefits outweigh the environmental impacts. PRC §21081. If a possible significant effect is deemed not significant, the EIR must contain a statement indicating the agency's reasons for so deciding. 14 CCR §15128.

The Regents violated the spirit and express language of CEQA by adopting Findings unsupported by substantial evidence. For example, at *no point* do the Findings mention the planned destruction of one-half of the specimen trees that give the area west of the Stadium its unique, rustic character and the overall loss of more than 62 percent of trees at the Athlete Center site. AR450-497. As described previously, this impact is significant and must be fully disclosed in the Findings.

The Findings' cumulative impacts analysis for cultural resources also

demonstrates the fatal flaws of the Regents' analysis. First, the Regents concludes that campus projects will not have cumulative impacts on cultural resources after mitigation. AR463. In the same paragraph, the Regents then finds that "[o]ne possible exception is the demolition or moving of houses at 2526 Durant Avenue and 2241 and 2243 College Avenue. These three houses are examples of a declining stock of 19th century homes in the central Berkeley area, and their removal could represent a significant cumulative impact on cultural resources." *Id.* Yet this impact is not included in the Regents' list of significant or potentially significant impacts, no mitigation measures are proposed for it, and the Regents makes no express Finding that it is outweighed by the Integrated Projects' benefits. AR455-463.

Further, the Regents' Findings cannot give the public any reassurance that alternatives to the Integrated Projects were considered in any meaningful way. The Findings defend the EIR's approach to alternatives as allowing for a "'mix-and-match' approach, in which components from different alternatives may be substituted for one another." AR503. The Findings' Alternatives discussion wholly undercuts this argument, however, because it, as the EIR had done, rigidly adheres to an all-or-nothing approach to each considered alternative. AR499-503. There is no analysis in the Findings of, for example, altering the order of construction projects and seismic retrofitting, creatively combining aspects of various alternatives, or reducing or eliminating some component projects while moving forward with others.

In addition to requiring adequate findings, CEQA requires that if an agency chooses to proceed with a project despite its unavoidable, significant or potentially significant environmental impacts, it must weigh those impacts against the specific economic, legal, social, technological, or other benefits of the project and adopt a Statement of Overriding Considerations

that deems those impacts "acceptable." 14 CCR § 15093(a). A Statement of Overriding Considerations under section 21081(b) must be made in writing and supported by substantial evidence in the administrative record. 14 CCR §15093(b).

The Regents abused its discretion by adopting a Statement of Overriding Consideration wholly unsupported by substantial evidence. AR505-506. The Statement rests on findings that *never mention* the destruction of more than 40 specimen Coast Live Oak trees and other unique flora, a significant impact under CEQA Guidelines. AR450-497. CEQA Guidelines, Appendix G, section XVII. Neither the Findings, as discussed below, nor the Statement, acknowledge the significant biological impacts of the Athlete Center. AR505-506.

2. The Regents' Approval of the Project Violates the Alquist-Priolo Act.

The California Legislature passed the Alquist-Priolo Act in 1972 to mitigate the hazard of surface faulting to structures for human occupancy. §2621 *et seq*. The Act prohibits the construction of buildings used for human occupancy across the trace of a delineated active fault or within fifty feet of a delineated active fault. §2621.5; 14 CCR §3603. The Act's accompanying regulations define a "structure for human occupancy" as "any structure . . . which is expected to have a human occupancy rate of more than 2,000 person-hours per year." 14 CCR §3601(e).

The regulations reiterate the Act's policy that "[n]o structure for human occupancy . . . shall be permitted to be placed across the trace of an active fault." 14 CCR §3600. The area "within fifty (50) feet of such active faults shall be presumed to be underlain by active branches of that fault unless proven otherwise by an appropriate geologic investigation and report. . . ." 14 CCR §3603. The regulations define an "active fault" as "a fault that has had surface displacement within Holocene time (about the last

11,000 years), hence constituting a potential hazard to structures that might be located it across it." 14 CCR Guidelines §3601(a). A "'fault trace'" is that line formed by the intersection of a fault and the earth's surface." 14 CCR §3601, subd. (b). Alterations or additions to an existing structure and new construction upon active faults are prohibited if the value of the alteration or addition exceeds 50 percent of the value of the structure. §2621.7(c).

The Hayward fault passes through the eastern part of the UC Berkeley campus, directly under the Stadium, where it intersects with the Louderback fault. AR817. The Bay Area is "highly likely to experience a damaging earthquake in the next 30 years, with a 62 percent probability for one or more events of magnitude 6.7 or higher." AR820. "Among the Bay Area faults, the Hayward fault has the highest probability of generating an earthquake of magnitude 6.7 or higher before 2032 ." *Id.* The Stadium project is the site with the "highest risk for stronger ground shaking," as it straddles the Hayward fault. AR821. The Stadium also lies in a liquefaction hazard zone. AR822. These extreme hazards were never adequately addressed. AR42, 1608, 1838-39, 1848, 2025.

a. The Regents Never Determined Whether the Athlete Center Is an Addition or Alteration to the Stadium.

The Alquist-Priolo Act contains a provision allowing alterations or additions to structures built prior to 1975 within 50 feet of an active fault, so long as the value of the alteration or addition does not exceed 50 percent of the value of the original structure. §2621.7. The FEIR claimed in response to comments that the Athlete Center is a separate facility from the Stadium (AR28) but at no point in the Draft EIR were members of the public or decisionmakers made aware of this claim, and the FEIR does not explain its basis. AR671. In fact, as shown below, the SAHPC is an alteration to the

Stadium. AR13669-70, 13687, 13688-89, 13740. Yet, the Regents never circulated an updated seismic review for public review, or took any of the analytical steps – such as deciding whether the Athlete Center is an "addition" to or "alteration" of the Stadium – necessary to a determination whether the project complies with Alquist-Priolo. This plain procedural violation of the Alquist-Priolo Act not only sidesteps compliance with the Act's requirements, but defies informed public and judicial review of the Regents' absent determination. *Vineyard, supra*, 40 Cal.4th at 435.

b. The Record Shows that the Athlete Center Was Indeed an Addition or Alteration to the Stadium.

The FEIR contends that the Athlete Center would be constructed as a separate building, and does not fall under the Alquist-Priolo Act, but the EIR indicates otherwise. AR28. The trial court held that certain components of the Project constitute alterations to the Stadium and that the University had thus violated the Alquist-Priolo Act. App.I:7:75-78. Subsequently, however, respondents submitted changes to the project plans that, according to the trial court, removed any alterations to the Stadium and thereby cured respondents' Alquist-Priolo violations. App.I:12:214. The record clearly shows that the Athletic Center, as a whole, would be an addition or alteration to the Stadium.

The EIR identifies the Stadium and the Athlete Center as a single project. AR601. In fact, the Athlete Center is not mentioned or described as a project separate from the Stadium improvements. *Id.* The University admits that "the new [Athlete Center] will provide a "strengthened foundation at the base of the existing west wall of the Stadium." AR28. The roof of the Athlete Center is intended to "act as a de facto discharge element," providing at-grade exits from the Stadium. AR2018. The Athlete Center will act as both a concourse and concession area for the Stadium, and

provide emergency access thereto. AR671, 13237. Plans indicated that the plaza formed by the Athlete Center's roof will extend into the Stadium wall and entrances. AR13710, 13712. A grade beam along the entire stretch of the Stadium's west wall will link it to the Athlete Center, and concrete features will link the southern end of the Athlete Center to the Stadium. AR13669-13670, 13820-13824. Further, the EIR explains that one benefit of the Athlete Center is that it will "provide a 'buttress' to the foundation of the [Stadium] west wall." AR1653. Indeed, the very language of the EIR concedes that the Athlete Center *is* an addition to the Stadium. *See* AR671 ("The SAHPC would have a gently curved landform shape and be an addition located to the west of and below the existing stadium structure"); AR657 (describing student use of the "Phase 1 (SAHPC) addition roof); AR802 ("The effect of the design [of the SAHPC] would be for the addition to act as a base to the CMS").

The EIR also shows that the Regents viewed the Stadium and the Athlete Center as schematically linked. The EIR explains that the Athlete Center also is intended to "integrate" the Stadium with the campus and "decant" the Stadium to allow for seismic retrofitting. AR671. Thus the Athlete Center is neither structurally nor functionally separate from the Stadium. Its primary and secondary purposes are to support and serve the Stadium and its functions. In recognition of this fact, the EIR's Alternatives analysis generally treats the Athlete Center and Stadium retrofit as conjoined items. AR988-992. For example, the Dispersed-Projects Albany alternative shifts the Stadium and Athlete Center to the Golden Gate Fields site. AR1006. The Athlete Center is both an alteration and addition to the Stadium. The Regents thus violated the Alquist-Priolo Act.

c. The Regents Never Determined Whether the Athlete Center Will Cost More than 50 Percent of the Value of the Stadium.

Respondents further violated the Alquist-Priolo Act because they never determined the present value of the Stadium. This vital detail is simply glossed over in the EIR's impacts analysis. AR827. At no point in the EIR's project description or environmental setting does it commit itself to a numerical value for either the Stadium or for the planned retrofit. AR640. The EIR claims that the University *will* create a "just and equitable" method to value the Stadium. AR1608. "Will" is too late. A "just and equitable" method of valuation would have begun by determining the values *before* approval of the Integrated Projects and accompanying EIR. The EIR instead appears to place restrictions on the Stadium retrofit by limiting its budget to 50 percent of the undisclosed value of the Stadium: "[U]ltimately, the cost of the seismic retrofit and program improvements to the [Stadium] will be dependent on . . . the scope of the seismic retrofits and program improvements that can be developed without exceeding 50% of the value of the [Stadium]." AR1608. The Regents is stacking the deck, to the public's peril.

d. The Regents Never Determined Whether Phases II and III of the Stadium Project Are An Addition or Alteration to the Stadium.

Despite Alquist-Priolo's clear mandate proscribing the University's construction of the Stadium Project unless the cost of its additions or alterations to the Stadium are less than the Stadium's current value, it is undisputed that the University never determined the cost of those additions and alterations nor the current, depreciated value of the Stadium. Just as CEQA mandates a full assessment of a project's impacts at full build-out *before* its first phase may be approved, so too Alquist-Priolo requires agencies to examine the full cost of additions or alterations to an existing

structure that sits astride an active fault trace before determining whether the 50 percent valuation limitation is met. *Vineyard Area Citizens*, *supra*, 40 Cal.4th at 432; PRC §2621.5. Because the University failed to make this essential determination before purporting to approve the SAHPC, that approval must be set aside.

e. The Regents' Seismic Review Was Incomplete.

The Alquist-Priolo Guidelines require that a state-registered geologist must produce a report evaluating the potential of surface fault throughout the project site for any proposed project within a delineated earthquake fault zone. 14 CCR §3603(d). Active traces are presumed to underlie areas within 50 feet of an active fault line unless proven otherwise by a geologic investigation and report. 14 CCR §3603(a). The EIR concedes that "the standard practice in performing fault rupture hazard investigations to satisfy the Act is to show that active faults are not present within the footprint of a proposed development project." AR836. Both the proposed Athlete Center and the Stadium Project are located over or near recently-active earthquake faults that present a rupture hazard. AR1710. These faults are part of the system of fault traces commonly known as the Hayward fault. *Id.* The FEIR relied on a report belatedly prepared by Geometrix to conclude that no active faults lie beneath the proposed footprint of the Athlete Center. AR7277-7417. However, according to CGS and USGS, the Geomatrix report was incomplete. AR40017-40024. Hence it *did not* conclusively show that there is no active fault trace beneath the proposed Athlete Center.

The Geomatrix report did not fully investigate the entire Athlete Center footprint where active fault traces may be found. USGS and CGS each concluded that "the data presented in the Geomatrix report do not definitively rule out the possibility of Holocene faulting beneath the northeastern-most footprint of the proposed SAHPC." AR40017, 40021.

Both agencies noted several areas where Geometrix interpreted data to reach a conclusion that no faults existed, whereas the data could also support the opposite conclusion. AR40019 (explaining that changing elevations of serpentine could be a product of *faulting*, not erosion); AR40022 (suggesting that the sheared contact between serpentinite and alluvium layers is consistent with *faulting* as well as a landslide). The agencies concluded that further investigation, particularly in as-yet unexplored gaps between existing boreholes, was necessary to better understand whether Holocene faults exist within the Athlete Center footprint. AR40020, 40024. Therefore, the Geomatrix study is not "sufficiently credible" to support the conclusions reached by the EIR. *Better Alternatives*, *supra*, 212 Cal. App. 3d at 673, n. 8. Active traces have not been proven not to exist, as required by the Alquist-Priolo Act and its implementing regulations. 14 CCR §3603(a).

The FEIR *does not mention the questions raised by the USGS and CGS.* AR1606.

Respondents' approval of the Stadium Phase I retrofit/Athlete Center project therefore violates the Alquist-Priolo Act and must be set aside.

D. THE PUBLIC INTEREST FAVORS A STAY PENDING APPEAL TO PROTECT THE STATUS QUO.

The public's interest in full protection of the state's valuable natural resources through proper and complete application of CEQA requires this Court to enjoin the Regents' construction of the project. CEQA's precautionary principle requires that this Court err on the side of affording "the fullest possible protection to the environment" by issuing an injunction to stop construction activity on the Integrated Projects until the merits can be decided. *Napa Valley Wine Train, Inc. v. Public Utilities Com.* (1990) 50 Cal.3d 370, 376. If instead the Regents is allowed to begin construction before completion of the required environmental analysis, the Project's many adverse impacts – including irreparable removal of historic trees and threats

to public safety – will occur before an informed public decision, and full consideration of alternatives, take place.

E. IF GRANTED INJUNCTIVE RELIEF, PETITIONERS SHOULD BE REQUIRED TO POST ONLY A NOMINAL BOND.

This Court should not require a bond here. In *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 77 n.4 and 79, the Court stayed oil drilling activity without requiring a bond. In *Bozung v. Ventura County LAFCO* (1975) 13 Cal.3d 263, 271 n.5, the Supreme Court stayed issuance of any conditional use permits, building permits or grading permits without requiring any undertaking. In *Burger v. County of Mendocino* (1975) 45 Cal.App.3d 322, 325-327, the injunction bond set by the trial court at $100,000 was reduced to a nominal bond of $500.

In *Mangini v. J.G. Durand International* (1994) 31 Cal.App.4th 214, 218, the court cited the extensive federal case law respecting the appropriate amount of a preliminary injunction bond as providing much-needed guidance for California courts, stating:

> Where the plaintiff has established a probability of success on the merits and has persuaded a trial court to grant injunctive relief, the federal courts conclude that to require a plaintiff to post a substantial bond could severely impair legitimate environmental challenges, particularly from relatively impecunious plaintiffs. Any bond other than a nominal one could "effectively deny access to judicial review" or "close the courthouse door in public interest litigation by imposing a burdensome security requirement on plaintiffs who otherwise have standing" to raise an environmental challenge. (*Tahoe Regional Plan, supra*, 766 F.2d at p. 1325; *Corps of Engineers, supra*, 411 F.Supp. at p. 1276.)

Id. Among the applicable federal authorities on this point is *The Wilderness Society v. Tyrrel*, 701 F.Supp. 1473, 1490 (E.D. Cal. 1988). In *Tyrrel*, the Federal District Court for the Eastern District of California held that only a nominal bond, in the amount of $100.00, was required for a preliminary

injunction halting a 17,000 acre timber sale, despite the logging company's request for a far larger bond.

Additionally, Federal courts have distinguished the equities of *private* defendants from those of governmental entities. In *Natural Resources Defense Council v. Morton*, the District Court of the District of Columbia explained that "[i]t would be a mistake to treat a revenue loss to the Government the same as pecuniary damage to a private party." 337 F.Supp. 167, 169 (1971). Not only are most agencies more able to absorb any material price increases or carrying costs, they also have an institutional interest in ensuring the complete and proper administration of the law.

Here, petitioners have no economic stake in the governmental approval challenged in the action. If the approval is set aside, petitioners would receive no direct economic benefit. Rather, the benefit from an order requiring the Regents' compliance with CEQA would accrue to the public. This Court should be "unwilling to close the courthouse door in public interest litigation by imposing a burdensome security requirement." *Id.*

This Court should therefore require, at most, that petitioners post only a nominal bond to preserve their right to secure this Court's effective determination on the merits of their appeal.

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VIII. CONCLUSION

For the foregoing reasons, this Court should grant this petition for a writ of supersedeas to preserve the status quo until this Court can rule on the merits of petitioners' appeal.

Dated: July 25, 2008

Respectfully submitted,

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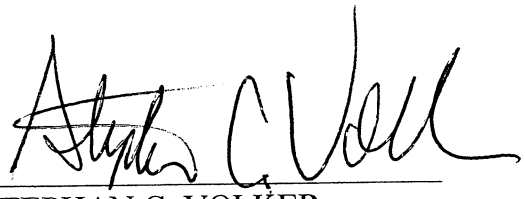
CERTIFICATE OF WORD COUNT

(California Rules of Court, Rule 8.204(c)(1))

The text of this brief is in Font 13 and consists of 13, 775 words as counted by the Corel WordPerfect version 12 word processing program used to generate this brief.

Dated: July 25, 2008



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PROOF OF SERVICE BY PERSONAL DELIVERY

I am a citizen of the United States of America; I am over the age of 18 years and not a party to the within entitled action; my business address is 436 14th Street, Suite 1300, Oakland, CA 94612.

On July 25, 2008, I served a true copy of the following documents entitled:

PETITION FOR WRIT OF SUPERSEDEAS, MANDATE, PROHIBITION, OR OTHER APPROPRIATE RELIEF; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF (EXHIBITS FILED UNDER SEPARATE COVER, VOLUMES I THROUGH III)

in the above-captioned matter on each of the persons listed below by personal delivery addressed as follows:

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I declare under penalty of perjury that the foregoing is true and correct. Executed on July 25, 2007 at Oakland, California.

Teddy Ann Fuss