No. A122172

(related appeal pending but not yet docketed)

In the Court of Appeal of the State of California
First Appellate District, Division Three

CALIFORNIA OAK FOUNDATION and
PANORAMIC HILL ASSOCIATION et al.,

Petitioners and Appellants,

vs.

SUPERIOR COURT OF ALAMEDA COUNTY,

Respondent;

THE REGENTS OF THE UNIVERSITY OF
CALIFORNIA et al.,

Respondents and Real Parties in Interest.

OPPOSITION TO REQUEST FOR IMMEDIATE STAY AND TO PETITION FOR WRIT OF SUPERSEDEAS, ETC.

Supersedeas Petition And Stay Request In Connection With Appeal From A Judgment
Granting In Part and Denying In Part Consolidated Mandate Petitions
Alameda County Superior Court, Case Nos. RG 06301644 & RG 06302967
The Honorable Barbara J. Miller

Paul D. Fogel (SBN 70859)
Dennis Peter Maio (SBN 99894)
REED SMITH LLP
Two Embarcadero Center,
Suite 2000
San Francisco, CA 94111-3922
Telephone: 415.543.8700
Facsimile: 415.391.8269

Charles F. Robinson (SBN 113197)
Eric K. Behrens (SBN 79440)
Kelly L. Drumm (SBN 172767)
OFFICE OF THE GENERAL COUNSEL
UNIVERSITY OF CALIFORNIA
1111 Franklin Street, 8th Floor
Oakland, CA 94607-5200
Telephone: 510.987.9765
Facsimile: 510.987.9757

John M. Sanger (SBN 49758)
Charles R. Olson (SBN 130984)
SANGER & OLSON,
A Law Corporation
576 Sacramento Street, 7th Fl.
San Francisco, CA 94111-3023
Telephone: 415.693.9300
Facsimile: 415.693.9322

Attorneys for Respondents/RPIs Regents of the University of California, et al.

Court of Appeal
State of California
First Appellate District

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Court of Appeal Case Number: A122172 Division Three

Case Name: California Oak Foundation, et al. v. Super. Ct. (The Regents of the U. of Cal., et al.)

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Signature of Attorney/Party Submitting Form

Printed Name: Paul D. Fogel
Address: Reed Smith LLP, 2 Embarcadero Ctr., Ste. 2000
San Francisco, CA 94111
State Bar No: 70859
Party Represented: Respondents / Real Parties in Int. Regents et al.

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MISCELLANEOUS

I
INTRODUCTION

For far too long, student athletes at the Berkeley campus of the University of California have been training at an aging and seismically-poor facility located on densely-developed urban land at California Memorial Stadium (Stadium). To protect its students and preserve the University's unique preeminence in athletics and academics, the University carefully planned and thoroughly vetted a project to construct a state-of-the-art Student Athlete High Performance Center (Center) adjacent to the Stadium as an initial step toward renovating the Stadium. The project elicited community involvement and opinion, including opposition to the removal of trees the University had planted near the Stadium some 80 years ago. After comprehensive administrative proceedings, The Regents of the University of California approved the project.

Petitioners—a property owner association whose members live near the Stadium, an environmental interest group and individuals seeking to preserve the grove of trees at the site, and the City of Berkeley—then petitioned the Alameda County Superior Court for writs of mandate, primarily alleging violations of the California Environmental Quality Act (CEQA) [Pub. Res. Code § 21000 et seq.] but also alleging violations of the Alquist-Priolo Earthquake Fault Zoning Act (Alquist-Priolo) [*id.* § 2621 et seq.] (All unspecified statutory references are to the Public Resources Code.)

At the outset of the mandate proceedings, to preserve the status quo—and on petitioners' prediction that the proceedings would last only several months—the trial court issued a preliminary injunction, halting construction while the litigation took its course.

After 18 months of exhaustive proceedings in which it aired all of petitioners' claims, the trial court issued a 129-page order, ruling in The Regents' favor on all but two minor claims. On those two, The Regents immediately complied with the court's order, demonstrating—to the court's satisfaction—that there was no reason to continue to hold up construction of the Center. Accordingly, the court entered judgment on July 22, dissolved the preliminary injunction and allowed construction to proceed.

The dissolution of the preliminary injunction, which shifts the balance of equities, makes sense because the basis of that injunction—preserving the status quo until the merits could be decided—no longer applies. The shift is particularly appropriate here because the University has too long been saddled with the continuing earthquake safety risk and the escalating costs of further delaying the Center's construction—all based on petitioners' continuing objections to the project. Now that the trial court has heard those objections and has found them insufficient to bar construction, the time has come for petitioners to assume the risk of further delays.

Accordingly, petitioners must shoulder a heavy burden to justify the extraordinary relief they are seeking—a continued halt to the

Center's construction during the lengthy (20 months or more) appellate process. They have failed, however, to carry that burden.

First, petitioners fail to show, as they must, that the trial court committed probable error. *See Nuckolls v. Bank of California, National Ass'n*, 7 Cal.2d 574, 578 (1936). Instead, they simply reiterate arguments the trial court rejected. Nor can they show probable error: The University's extensive geologic investigations provide substantial-evidence support for the trial court's finding that Alquist-Priolo does not prohibit constructing the Center. Substantial evidence likewise supports the court's CEQA ruling that The Regents properly weighed the environmental impacts of the project and considered mitigation measures and project alternatives, clearing the way for the Center's construction. In addition, the court properly determined that, in all aspects, The Regents acted in a manner consistent with CEQA.

Second, petitioners fail to show, as they must, that without supersedeas, they would be deprived of the benefits of success on appeal. *See Deepwell Homeowners' Protective Ass'n v. City Council of Palm Springs*, 239 Cal.App.2d 63, 65 (1965). That is, they have not shown *either* that the *denial* of supersedeas would cause them irreparable injury *or* that the *granting* of supersedeas would *not* cause the University disproportionate injury.

Indeed, petitioners cannot make that showing. The harm in denying supersedeas would be insubstantial, as the University's plan is merely to re-landscape an urban area that it landscaped earlier, thus

mitigating any potentially significant impact. By contrast, the grant of supersedeas would cause the University and its community substantial harm. Continued delay means that hundreds of people—the University's staff and students and others—must be forced to use a facility that is seismically poor. Further, continued construction delay will cost the University $1,430,000 a month in construction and security costs, including $22,000 *a day* for security (in addition to the $11 million in already-incurred delay costs). And continued delay means that women student-athletes entitled to equal facilities will continue to have to use facilities that are sub-standard.

The seismic risk alone highlights the irony in petitioners' application. Based on their own—now *rejected*—assertions that the project may violate earthquake safety law, petitioners have forced students, staff, and others to expose themselves to the risks of earthquakes, and seek to extend that exposure for what could be years longer. This turns the notion of "irreparable harm" on its head.

The Legislature has expressed concern that, "with their obvious potential for financial prejudice and disruption," challenges like petitioners' "must not be permitted to drag on to the potential serious injury" of an entity like the University or the public at large. *Board of Supervisors v. Super. Ct.*, 23 Cal.App.4th 830, 837 (1994).

Given petitioners' failure to carry their burden and the serious injury that further delay threatens, this Court should summarily deny their supersedeas application and stay request.

II
FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. The Regents Approves The Student Athlete High Performance Center (Center) Project After Extensive Environmental Review Under The California Environmental Quality Act (CEQA) And The Alquist-Priolo Earthquake Fault Zoning Act (Alquist-Priolo)

Most of the academic and research facilities of the University of California are located on the historic Campus Park in the City of Berkeley. (AR 15399-400[1]) The area immediately surrounding the Campus Park is, in pertinent part, densely-developed urban land. (AR 10217, 15399-400) This area includes the Stadium, which is listed on the National Register of Historic Places. (AR 10807, 15399) It also includes the site for the Center, located between the Stadium and Piedmont Avenue. (AR 638-39) The area to the east of the Stadium, known as the Hill Campus, is largely undeveloped and wooded. (AR 10217, 15399-400)

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1 With their petition, petitioners filed three volumes of Exhibits from the record below—two volumes of material from the administrative record (which we cite as "AR") and one volume of additional material (which we cite as "PE"). Petitioners' filing was incomplete, in that they omitted relevant portions of the administrative record and other relevant documents The Regents filed below. *See Sherwood v. Super. Ct.*, 24 Cal.3d 183, 186-87 (1979). The Regents therefore accompanies this Opposition with Respondents/RPIs' Appendix, which includes the omitted material. The pages from the AR appear sequentially in that Appendix (cited here as "AR"), while other documents filed below are sequentially Bates-stamped (and cited here as "RE").

The University had the Stadium constructed in 1923. (AR 8791, 8803, 8807) At that time, the University was aware that the Hayward fault transverses the Stadium. (AR 38336) Upon completion of construction, the University had the area planted with trees, including coast live oaks, as part of an overall landscaping plan. (AR 5390, 5393-96, 5409-11, 5419, 5423-26, 5442)

Since the early 1980's, the interior of the western wall of the Stadium has been built out with offices and athletic facilities to house the football program and other athletic programs. (AR 8808) The Stadium is showing obvious damage from earth movement along the Hayward fault [AR 38335], is seismically poor [AR 673-74, 31585-86], and generally lacks modern facilities and amenities [AR 676, 3460-61, 8987, 10181-88]. In addition, the Stadium lacks sufficient facilities for some women's athletic teams. (AR 8987) Indeed, a number of women's teams, including softball, have no lockers, a circumstance that forces players to change clothes in their automobiles. (AR 8987) Importantly, this lack of facilities hinders the University's ability to continue to maintain full compliance with Title IX, which requires comparable resources for both women's and men's sports. (AR 13449)

In 2004, the University commenced the process that would result in the proposed Southeast Campus Integrated Projects (the Integrated Projects)—seven related projects originally proposed to be implemented in the southeast quadrant of the Berkeley campus between about 2006 and 2012. (AR 630, 693, 9335-37) The first of the seven projects is a three-phase project for the Stadium. (AR 542, 630, 693)

Phase 1 consists of constructing the Center—a self-contained building, separate from the Stadium. (AR 671-72) The Center will house training and meeting facilities for the football team and twelve Olympic men's and women's sports programs, which will move there from the Stadium and from elsewhere on campus to be near training and practice fields. (AR 14-16, 671, 3436) Phase 2 will involve various renovations, including seismic corrections to the Stadium. (AR 672-73) Phase 3 will involve further renovations. (AR 673-74)

In 2005, The Regents certified the 2020 Long Range Development Plan Environmental Impact Report (2020 Long Range Development Plan EIR), which assessed the environmental impacts related to campus development proposed to meet the goals of the campus through academic year 2020-2021. (AR 15157-59) The Regents also approved the University's 2020 Long Range Development Plan, which generally describes the scope and nature of that development. (*Id.*) Campus development must be consistent with the 2020 Long Range Development Plan. (*Id.*)

Later in 2005, The Regents issued a Notice of Preparation and Initial Study for an Integrated Projects Tiered Focused Environmental Impact Report. (AR 542) (A "tiered" environmental impact report is an environmental impact report for a project that incorporates by reference general discussions from an earlier and broader environmental impact report and concentrates solely on issues specific

to the project itself. 14 Cal. Code Regs. § 15152(a).[2] The Initial Study described the Integrated Projects and discussed potential environmental impacts that could result [AR 542-61], and discussed which potential environmental impacts of the Integrated Projects had been adequately analyzed in the 2020 Long Range Development Plan EIR [AR 562-83]. The University held a public "scoping session"—a meeting to obtain input on the proper scope of environmental review for the Integrated Projects. (AR 3501)

In 2006, the University published the Integrated Projects Draft Environmental Impact Report (the Draft EIR), opening a public review period, for private parties and government representatives, running for two months. (AR 596, 1601) In the midst of that period, the University held a public hearing on the Draft EIR. (AR 3665) In addition to the public hearing, the University sponsored an open house at the Stadium, inviting residents and community leaders. (AR 1743, 3417) The University also participated in several meetings with the City of Berkeley. (AR 1743-44, 13100-02, 13105, 13146)

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2 The CEQA Guidelines [14 Cal. Code Regs. § 15000 et seq.] "implement the provisions of CEQA," and must be afforded "great weight ... except when a provision is clearly unauthorized or erroneous under CEQA." *Laurel Heights Imp. Ass'n of San Francisco, Inc. v. Regents of Univ. of Cal.*, 47 Cal.3d 376, 391 n.2 (1988); *accord In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings*, 43 Cal.4th 1143, 1163 n.7 (2008) (*Bay-Delta*) (finding adequate under CEQA programmatic EIR for project to restore ecological health of the California Delta and San Francisco Bay and to improve management of Bay-Delta water for beneficial uses).

Later in 2006, the University published the Integrated Projects Final Environmental Impact Report (the Final EIR), containing all responses to comments received on the Draft EIR. (AR 1481, 1483) The University allowed further public review and comment for private parties and government representatives not mandated by CEQA. (AR 42-56 (City of Berkeley letter to The Regents), 76-77 (minutes of The Regents' Nov. 14, 2006 public comment session), 115-117 (transcript of Regents' Nov. 14, 2006 session, delaying approval of EIR upon City's request) 409-11 (letter from Panoramic Hill to The Regents), 509-11 (minutes of Regents' Dec. 5, 2006 meeting)) In total, the Draft EIR and Final EIR—collectively, the Integrated Projects EIR—contain approximately 1700 pages of environmental analysis. (AR 596-2275)

Finally, at the end of 2006, through its Committee on Grounds and Buildings, The Regents certified the Final EIR and approved the Center project, including a budget of approximately $112 million. (AR 128-29, 511-12, 521)[3] Although the Integrated Projects EIR analyzes the environmental impacts of all of the Integrated Projects, The Regents approved only the Center, having reviewed the Center on at least four previous occasions. (AR 78, 128-29, 509-21, 13326)

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3 Although not reflected in the administrative record—but established by the trial court record—the full Board of Regents subsequently certified the Final EIR and approved the Center in January 2007. (RE 341 n.6)

There are 139 trees in the area between the Stadium and Piedmont Avenue where the Center will be located. (AR 3473) Only four of those trees predate the Stadium's construction in 1923. (AR 3473) Of the 139, 48 will be preserved and 91 removed in constructing the Center; only 2 of the pre-1923 trees will be affected. (AR 3473) Seventy of the 139 are deemed "specimen" trees, i.e., significant for specified reasons including aesthetic, historic, and educational value. (AR 3473, 5422-26, 15561) Of those 70, 27 will be preserved and one will be transplanted. (AR 3473) The remaining 42 will be removed [*id.*]; three trees will replace each tree that is removed, with one of the three in each group a mature tree [AR 15561].

Given their surroundings, the trees do not constitute a unique biological resource. (AR 726, 5410, 15551, 15557-58) Although they are important as a cultural resource that contributes to the Stadium's historic character, they are not by themselves eligible for listing on the National Register of Historic Places. (AR 5433)

Lastly, and contrary to a single e-mail message from a self-styled "historian" [AR 17479], there is no evidence of any "sacred Native American burial ground" on the site [AR 17480].

B. Petitioners Seek Mandate, Claiming The Center Project Violates CEQA And Alquist-Priolo, And Extensive Proceedings Ensue

Later in December 2006, after The Regents certified the Final EIR and approved the Center project, the Panoramic Hill Association,

the City of Berkeley, and the California Oak Foundation et al. filed separate petitions for writs of traditional and/or administrative mandate in the Alameda County Superior Court, claiming The Regents violated CEQA and Alquist-Priolo. (RE 1-132) The trial court partially consolidated the matters. (RE 145-148)

In February 2007, the trial court granted petitioners' motion and issued a preliminary injunction, prohibiting The Regents and the University from proceeding with implementation of any of the Integrated Projects, including the Center. (PE 16-19) During the summer of 2007, the parties filed extensive briefing on the issues, and in September and October 2007, the trial court held full-day hearings, conducted a tour of the site, heard argument, and took the matter under submission. (RE 504-506) Then, in December 2007, reopening the matter and to assist it in interpreting the plans and construction drawings, the court ordered all parties to submit expert declarations explaining whether design documents in the administrative record show the Center would be structurally independent from the Stadium and the significance, if any, of that independence. (PE 20-26)

In March 2008 (all further dates are in 2008 unless otherwise noted), having received the parties' evidence and other submissions, the trial court heard argument on the Alquist-Priolo issues and again took the matter under submission. (RE 594-595)

C. The Trial Court Largely Denies The Petitions; After The Regents Complies With The Two Outstanding Issues, The Court Enters Judgment For The Regents But Grants A Temporary Stay To Permit Petitioners To Appeal

On June 18, more than 18 months after this litigation began, the trial court issued a 129-page Order Granting in Part and Denying in Part Petitions for Writ of Mandate (June 18 Order). (PE 43-171) In its order, the court stated it had considered the administrative record (198 volumes consisting of 40,055 pages), the expert declarations (110 pages), and the parties' written (440 pages) and oral (eight days of hearings) submissions. (PE 49-51) The court then rejected all but two of petitioners' claims—one under Alquist-Priolo, the other under CEQA. The court determined that Alquist-Priolo (1) applies to The Regents; (2) allows the University to construct the Center as part of Phase 1 of the Integrated Projects because the Center is "not on an active fault or branch of a fault, and is not an addition or overall an alteration" of the Stadium; but (3) prohibits the University from beginning construction of Phase 1 involving the Center before it valued certain elements of the Stadium, including a grade beam (i.e., a horizontal foundation element below earth grade), because such elements constitute "alterations" of the Stadium and as such may not exceed 50 percent of its value. (PE 59-60)

The court also determined that CEQA similarly prohibits beginning construction of the Center. It reasoned that the administrative record "lacks support for findings and conclusions in the EIR that doubling the number of capacity events" to be held at the

Stadium as part of the subsequent Phase 2 of the Stadium project—which would postdate the Center's construction—"will cause significant environmental effects that are *unavoidable*." (PE 163 (orig. ital.))

In its June 18 Order, the trial court directed petitioners to submit a proposed writ and judgment by June 24, and allowed the University to submit objections to petitioners' proposed writ and judgment and a proposed writ and judgment of its own by June 27. (PE 170) On June 24, petitioners submitted their proposed writ of mandate and judgment. (PE 172-79)

On June 27, the University filed objections to petitioners' proposed writ of mandate and judgment and a proposed writ and judgment of its own. (PE 180-85; RE 892-899) It also responded to the June 18 Order in anticipation of the forthcoming peremptory writ, accepting the court's determinations and reporting that it (1) had removed from Phase 1 the grade beam and other elements the court found to constitute alterations of the Stadium; and (2) removed from Phase 2 the additional capacity events at the Stadium that would cause significant environmental effects whose unavoidability the court determined unsupported by the administrative record. (RE 768-891)

Finally, the University moved to modify the preliminary injunction to allow the Center's construction to proceed, based on the University's removal of those aspects of the project that the court had noted in its June 18 order as not complying with CEQA or Alquist-

Priolo. (RE 596-615) The court agreed to hear that motion on shortened time, and set briefing and a hearing accordingly. (RE 900-902)

Petitioners filed opposition to the motion and a response to the University's response and the University filed a reply (the latter of which was accompanied with several declarations responsive to new points made in petitioners' opposition). (PE 186-210; RE 903-1076)

On July 17, the trial court heard the matter—including the parties' competing forms of judgment and the University's prejudgment compliance with the June 18 order—and took the matter under submission. (RE 1077-1124)

On July 22, the trial court issued an order and entered judgment. (PE 211-19) In its order, the court announced it would enter judgment immediately but would stay the judgment's effectiveness and enforcement until June 29 by keeping the preliminary injunction in place, to permit petitioners an opportunity to seek a stay or other remedy from this Court. (PE 217-18) The court directed the clerk to issue a writ of mandate but to deem the University's response to the June 18 Order to constitute its return demonstrating compliance. (PE 217-20) The court authorized the University, at its option, to submit a supplemental return within 30 days demonstrating that the cost to construct the grade beam and other elements the court found to constitute alterations of the Stadium would not exceed 50 percent of the Stadium's value. (PE 220) Finally, the court "dropped" the motion to

modify the preliminary injunction as moot on the ground that the preliminary injunction would be dissolved when the judgment becomes effective and enforceable on July 30. (*Id.*)

In its judgment, the trial court incorporated its June 18 Order, rejecting all of petitioners' many claims except the minor CEQA and Alquist-Priolo claims identified above, rendering judgment for the University on the petitions except as to those two claims. (PE 211-13) The court also directed the clerk to issue a writ of mandate and deemed the University's response to the June 18 Order as constituting its return demonstrating compliance. (PE 213-14) Lastly, the court found that the University prevailed on the bulk of petitioners' claims and accordingly awarded the University 85 percent of its costs, to be borne one-third by each of the petitioners. (PE 214-15) That same day, the clerk issued the peremptory writ. (PE 221-22)

Also on July 22, petitioners filed a motion for new trial [RE 1125-1135], which the court rejected for failure to reserve a hearing date [RE 1136]. The following day, they filed a motion to vacate the judgment and for new trial, claiming that before the University commences construction of the Center, the University must, under Alquist-Priolo, value the shoring and tieback system designed for the Stadium, which they asserted was an "alteration" of the Stadium, to determine whether it exceeds 50 percent of the Stadium's value. (RE 1137-1144) The hearing on the motion is presently set for August 12. (RE 1137-1144)

On July 24, the same day the City of Berkeley announced it would not appeal [*see* http://www.berkeley.edu/news/media/releases/-2008/06/stad-update.shtml (visited 7/29/08)], petitioners Panoramic Hill Association and California Oak Foundation, et al. filed a notice of appeal from the judgment. (PE 224-27) Because the trial court's stay was in effect when the appeal was noticed, it was continued by operation of law for 20 days, i.e., until August 13. Civ. Proc. Code § 1094.5(g). The following day, petitioners filed the present petition for writ of supersedeas and request for an immediate stay.

III
THIS COURT SHOULD DENY PETITIONERS' PETITION AND STAY REQUEST

A. Supersedeas Is Unavailable Unless Petitioners Shows They Will Be Able To Raise Substantial Questions On Appeal And Would Otherwise Be Deprived Of The Fruits Of An Appellate Success

The writ of supersedeas is "not a writ of right, but is one resting in the discretion of the appellate court." *Homestake Mining Co. v. Super. Ct.*, 11 Cal.App.2d 488, 492 (1936). "[S]ince the only power to issue the writ is when it is necessary to aid the appellate jurisdiction of the court, it is incumbent upon him who seeks it to carry the burden of showing that necessity." *Id.*

If a judgment or order appealed from does not prohibit the respondent from taking action, the appellant may prohibit the respondent from doing so only by obtaining a stay in the nature of

supersedeas. *See People ex rel. San Francisco Bay Conservation & Develop. Comm'n v. Town of Emeryville*, 69 Cal.2d 533, 536-39 (1968) (appellate court has "jurisdiction to stay" party conduct); *see also* Civ. Proc. Code § 1094.5(g) (appellate court may stay "order or decision of [an] agency" after trial court denies administrative mandate petition). The issuance of such a stay is "controlled by the same principles" as supersedeas. *Town of Emeryville*, 69 Cal.2d at 538.

To obtain supersedeas, the appellant must show it will raise "substantial questions" on appeal. *Deepwell Homeowners' Protective Ass'n*, 239 Cal.App.2d at 67; *accord Homestake Mining*, 11 Cal.App.2d at 492. This requires a showing that the trial court committed "probable error." *Nuckolls*, 7 Cal.2d at 578. After all, an appellate court "cannot presume error," and it must "contemplate[ ]" "affirmances ... as well as reversals; in fact, until the contrary is shown, the presumption is in favor of the lower court's decision." *Id.*

In addition, the appellant must show that, in the absence of supersedeas, it would be "depriv[ed]" of the "fruits" of a successful appeal. *Deepwell Homeowners' Protective Ass'n*, 239 Cal.App.2d at 65; *e.g., Solorza v. Park Water Co.*, 80 Cal.App.2d 809, 814 (1947) (supersedeas denied in absence of such a showing). To make *that* showing, the appellant must demonstrate *both* the existence of some "irreparable injury [it] will necessarily sustain in the event [its] appeal is deemed meritorious" *and* the nonexistence of any "disproportionate injury to respondent in the event of an affirmance." *Mills v. County of Trinity*, 98 Cal.App.3d 859, 861 (1979).

But during an appeal, the respondent, like the appellant, "may need protection" as well. *Estate of Murphy*, 16 Cal.App.3d 564, 568 (1971). If the balance between the protections that each party needs is close, the reviewing court must strike that balance in the respondent's favor. *See Building Code Action v. Energy Resources Conservation and Development Commission*, 88 Cal.App.3d 913, 922 (1979) (supersedeas denied when the "scales do not noticeably dip" one way or the other). After all, "[e]quity demands that, as between respondent and [petitioner], the [petitioner] who seeks the stay should assume the risk." *Estate of Murphy*, 16 Cal.App.3d at 568. It follows that if supersedeas "can be granted only at the risk of destroying rights which would belong to the respondent if the judgment is affirmed," it may not be granted at all. *Nuckolls*, 7 Cal.2d at 578.[4]

B. Because Supersedeas Would Threaten Serious Injury, Petitioners Must Carry An Especially Heavy Burden To Obtain It; Here They Fail To Show That In The Absence Of Supersedeas, They Would Be Deprived Of The Fruits Of Success Should They Prevail On Appeal

Petitioners have a heavy burden generally to show probable error by the trial court and a "noticeable" tipping of the potential injury "scale" in their favor. That burden is especially heavy in a proceeding like this one, which was brought primarily under CEQA.

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4 Petitioners inexplicably ignore the law on supersedeas (and the heavy burden they must carry under CEQA, *see* text, *post*), but focus instead on preliminary injunctions. (Petn. 14-19)

"CEQA requires assessment of the environmental consequences of activities approved or carried out by public agencies. ... Allegations that the public agency failed in its duty to make an adequate environmental assessment must be expeditiously resolved, and CEQA contains a number of procedural provisions evidencing legislative intent that the public interest is not served unless CEQA challenges are promptly filed and diligently prosecuted." *Nacimiento Regional Water Mgt. Advis. Com. v. Monterey Co. Water Resources Agency*, 122 Cal.App.4th 961, 965 (2004) (citations omitted).

Among CEQA's procedural provisions is the requirement that all courts—both reviewing and trial—in which such a proceeding is pending must give the proceeding preference over all other civil proceedings. § 21167.1(a). The preference requirement grows out of the "legislative concern that CEQA challenges, with their obvious potential for financial prejudice and disruption, must not be permitted to drag on to the potential serious injury" of the public agency or of the public at large. *Board of Supervisors*, 23 Cal.App.4th at 837.

This concern increases the already heavy burden a supersedeas petitioner must carry. And unless the petitioner carries that burden, the reviewing court should deny supersedeas.

To carry their especially heavy burden, petitioners must show *both* that they would suffer irreparable injury if supersedeas did not issue *and* that the University would not suffer comparable injury if

supersedeas did issue. As we demonstrate below, petitioners cannot show *either*.

1. Petitioners Fail To Demonstrate They Would Suffer Irreparable Injury If Supersedeas Did Not Issue

Although petitioners recycle their trial court mantra of "earthquake safety," "trees," and the supposed "sacred Native American burial ground" [petn. 19 n.10, 22-23], each rings hollow.

As for earthquake safety, as explained *post*, the Center would not be located across the trace of any active fault. It would also not constitute an alteration of or an addition to the Stadium, but would be a separate structure. As a result, the Center's construction would appreciably *enhance* rather than reduce seismic safety for persons in the area of the Stadium. No injury would result from denying supersedeas.

As for the trees, as explained *ante*, they do not constitute a unique biological or cultural resource. (AR 3473, 5422-26, 15561) Indeed, they are a far cry from a biologically significant stand of old-growth trees, and are not even considered to be among the more significant ones, culturally or otherwise, on the heavily-wooded campus. (AR 15400, 15544-58) Of the 139 trees in question, only 4 predate the Stadium's construction in 1923 and only 2 of the 4 will be affected. Of the 139, 48 will be preserved and 91 removed. And of the 70 specimen, i.e., significant, trees, 27 will be preserved, one transplanted, and 42 removed and replaced with three trees, one mature,

replacing each tree that is removed. Thus, the University will merely re-landscape an urban area it landscaped 85 years ago, mitigating any potentially significant impact. Here too, the denial of supersedeas would cause petitioners no injury.

Also as explained *ante*, no evidence supports the supposed "sacred Native American burial ground." Rather, there was only a single e-mail allegation of an "historian." (AR 17479-80) Indeed, the absence of such evidence is unsurprising. Given the long development history of the area dating back more than 80 years, the survival of a burial ground would be unlikely. (AR 8801) If the remnants of any archaeological artifacts were discovered, both the 2020 Long Range Development Plan EIR and the Integrated Projects EIR establish a comprehensive set of mitigation measures to address the issue. (AR 811, 15631) The efficacy of these mitigation measures has not been challenged and must therefore be considered satisfactory. *See* § 21167(c). Again, the denial of supersedeas would cause petitioners no injury.

2. Petitioners Also Fail To Demonstrate The Nonexistence Of Any Disproportionate Injury To The University

Petitioners also fail to show the University would not suffer comparable injury if supersedeas issued.

The trial court litigation has delayed construction of the Center for more than 18 months. That delay has harmed the University in several economic and non-economic ways—and further delay (which

The Regents conservatively estimates at 20 months (17 months from notice of appeal to opinion and another three or four months for the Supreme Court to consider review)) will prolong that harm.[5]

Most importantly, every day of delay further postpones the relocation of the approximately 350 student-athletes and approximately 75 full-time University staff from the seismically-poor Stadium to a seismically-safe facility. (RE 707-708 at ¶¶ 17-18) These students and staff use the Stadium seven days a week, throughout the year, typically from 6 a.m. to 7 p.m. (*Id.*) The users include students on the football, lacrosse, rugby, field hockey, soccer, gymnastics, golf, and softball teams, as well as coaches and staff for the football, field hockey and lacrosse programs, and staff in athletic facilities management, sports medicine, food service, and equipment management. (*Id.*)

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5 The last available Judicial Council statistics (2005-06) indicate that the median time between the filing of a notice of appeal and the filing of an opinion in a civil appeal in this Division is 512 days, with 90 percent of this Division's civil cases decided within 800 days. *See 2007 Court Statistics Report: Statewide Caseload Trends*, 1996-1997 through 2005-2006, at 17, Fig. 4-A (Cal. Judic. Council, 2005), available at http://www.courtinfo.ca.gov/reference/documents/-csr2007.pdf (visited 7/29/08). This statistic presumably factors in small record, one-issue cases as well as cases involving tens-of-thousand-page-records and multiple issues like this one. The Supreme Court can take as long as 90 days after the filing of a petition for review (which is not even due until 40 days after the filing of the Court of Appeal opinion) to act on a petition for review. See Cal.R.Ct. 8.512(b)(1). Twenty months for this appeal to run its course would therefore not be unusual.

Delay additionally means continued jeopardizing of the vitality of the University's inter-collegiate athletic programs in terms of funding, morale, on-the-field performance, and, ultimately, the quality of experience that the University can offer its student-athletes, undermining the University's ability to attract and retain the top student-athletes and coaches on which the programs depend. (RE 712 at ¶¶ 31-32) And delay means increased threat to the University's reputation among its donors as the steward of funds they have contributed. (RE 713 at ¶ 33) Finally, delay impedes the University's efforts to continue to maintain full compliance with Title IX by providing equal facilities for women student-athletes. (RE 706 at ¶9)

Delay also means a continuation of the illegal, dangerous, disruptive and often-violent conduct of protestors and tree-sitters at the Center's site—conduct in which at least one petitioner is complicit. (RE 721-723 at ¶¶ 5-15; 724-728 at ¶¶22-23, 29; 34-35; 618-623 at ¶¶ 6-8; 1010-1012 at ¶¶ 4, 6-11) The problems caused by protestors and tree-sitters will soon become even harder to handle when football season opens on August 30 [California Golden Bear Football Schedule, *available at* http://cal.rivals.com/schedule.asp (visited 7/29/08)] and more than 65,000 spectators make their way to the Stadium [RE 707 at ¶ 17].

The impact of these effects should not be underestimated. The University competes for the best students and athletes, and its donors constantly receive competing demands for their funds. Even a marginal slip in any aspect of its operations can affect the preeminent position

that the University has worked hard to ascend to over the last 125 years. (RE 705 at ¶7; 711-712 at ¶¶ 30-32) The more than 18 months that this project has been stalled represent almost one half of an average student's tenure at the University. Further delay will all but ensure that an entire class of students, and perhaps more, will be deprived of the opportunity to benefit from the project, including enhanced safety and security.

Finally, there is the economic harm that further delay will cause. The delay occasioned by the trial court proceedings increased construction costs by more than $11 million. (RE 706 at ¶13; 752 at ¶9) It increased security costs in and around the site by more than $729,000. (RE 724 at ¶¶ 17-18; 727 at ¶¶31-32) Further delay will cost the University about $1,430,000 a month in increased construction and security costs, including $22,000 in daily security costs. (RE 706 at ¶13; 727 at ¶10; 752 at ¶32) Assuming conservatively 20 months for this appeal to run its course, this delay translates to approximately $28 million in additional costs.

As to all this, what do petitioners have to say? A mere five sentences hardly filling half a page. (Petn. 2, 23)

Petitioners assert that delay during their appeal will be "modest, at most." (*Id.*) Experience, however, has proven them poor judges of time, as they estimated the trial court litigation would conclude by the summer of 2007 [RE 159:9-28; 250:4-7; 251:28-252:3], when it did not conclude until a year after that.

Petitioners also assert the increased construction and security costs will be "offset by the interest earned through delayed expenditures." (Petn. 23) Sad to say, they are worse judges of the market than of time. (*See* Rates and Bonds, *available at* http://www.-bloomberg.com/markets/rates (visited 7/29/08))

Petitioners additionally assert that the continuing non-economic costs imposed on users of the Stadium can be made to disappear simply by "moving" them "out of the ... Stadium." (Petn. 23) Such relocation, however, would be no panacea, since it would impose costs of its own, including building expensive new temporary facilities. (RE 753 at ¶13)

Petitioners finally—and sarcastically—dismiss the Center as a "stepping stone to gridiron greatness for the University's beleaguered football team." (Petn. 2) This remark ignores the facts—the University's football team has achieved remarkable success in recent years and is needed to support the University's 26 other men's and women's intercollegiate sports programs, including crew, gymnastics, cross-country, soccer, swimming, volleyball, and water polo—programs that do not generate sufficient revenues to be self-sufficient. (RE 710-712 at ¶¶ 24-31)

If the balance between irreparable injury to petitioners and disproportionate injury to the University were close, this Court would be required to strike that balance in the University's favor. But the balance is *not* close. Injury to the University, as detailed above, far

outweighs any injury to petitioners, precluding supersedeas. The Court should deny the petition and stay request for this reason alone.

C. Petitioners Cannot Show Probable Evidentiary Or Procedural Error On Appeal

Since a judgment "is presumed to be correct on appeal" [*In re Marriage of Arceneaux*, 51 Cal.3d 1130, 1133 (1990)], petitioners have the burden of proving error. Here, they cannot even show that the trial court committed probable error in its evidentiary, procedural, CEQA, or Alquist-Priolo procedural rulings. This, too, dooms their petition.

Petitioners claim or suggest the trial court erred on certain evidentiary and procedural issues. (Petn. 10, 41) Wrong.

1. The Trial Court Properly Solicited And Received Expert Declarations

Before The Regents approved the Center project, the University, through Vice Chancellor Edward J. Denton, determined that the Center complied with Alquist-Priolo and communicated that determination to The Regents. (AR 112-14, 119, 534) Alquist-Priolo prohibits locating "structures for human occupancy across the trace of active faults" [§ 2621.5(a)], but under an exception permits the "alteration" of, or the "addition" to, any such "structure[ ]," so long as its value "does not exceed 50 percent of the value of the structure" [§ 2621.7(c)]. Based on extensive geological testing, Vice Chancellor Denton determined that the Center was not located across the trace of any active

earthquake fault and, implicitly, that it did not constitute an alteration of or an addition to the Stadium, but was an independent structure.

As noted, to assist it in interpreting design documents in the administrative record, the trial court solicited expert declarations from all parties as to the Center's structural independence from the Stadium. (PE 20-26) Without any supporting argument—which alone dooms their claim, *see Badie v. Bank of America*, 67 Cal.App.4th 779, 784-85 (1998) (failure to offer argument waives claim)—petitioners claim this was error. (Petn. 10) Wrong.

Under decisions including *Western States Petroleum Assn. v. Super. Ct.*, 9 Cal.4th 559, 566-67 (1995), review of agency action is by traditional mandate rather than administrative mandate whenever the action in question does *not* arise from a proceeding in which, by law, a hearing must be given, evidence must be taken, and the decision-maker is vested with discretion in the determination of the facts. Agency action under Alquist-Priolo does not arise from such a proceeding [*see* § 2621 et seq.], and hence is reviewed by traditional mandate.

The determination that the Center complied with Alquist-Priolo constituted a ministerial act by Vice Chancellor Denton as the Campus Building Official, similar to like acts by the local building official of a city or county. Under *Western States Petroleum*, evidence outside the administrative record is admissible in "traditional mandamus actions challenging ministerial ... administrative actions." 9 Cal.4th at 576. Such evidence includes the expert declarations the trial court solicited

and received here explaining design documents in the administrative record.

Western States Petroleum holds only that evidence outside the administrative record is inadmissible in a traditional mandate proceeding to *challenge* quasi-legislative agency action. 9 Cal.4th at 576 ("extra-record evidence is generally not admissible in traditional mandamus actions *challenging quasi-legislative administrative decisions*" (ital. added)). On this point, *Western States Petroleum*'s reasoning rested on two grounds. One is that courts owe deference to the agency in question in conformity with the "separation of powers" doctrine and out of respect for the agency's "expertise." *Id.* at 572. The other is that courts lack "scientific" and similar knowledge and other "resources" that the agency possesses. *Id.* at 574 (internal quotation marks omitted).

The trial court, of course, did not solicit or receive the expert declarations to *challenge* The Regents' action, but to *interpret* it. In doing so, the court did not trench on the separation-of-powers doctrine, but respected it; it did not ignore The Regents' expertise, but acknowledged it; and it did not bull ahead without the requisite knowledge and resources, but solicited expert assistance. In soliciting and receiving the expert declarations, the court merely obtained evidence, as it were, from a "translator" of a "foreign language"—an altogether apt analogy for the design documents at issue. *See Correa v. Super. Ct.*, 27 Cal.4th 444, 448 (2002) (a "translator simply serves as a 'language conduit' ").

2. The Trial Court Properly Accepted The University's Compliance With The Writ Of Mandate

As noted, in its June 18 Order, the trial court determined that Alquist-Priolo prohibited the University from beginning construction of the Center before it valued certain elements of the Stadium because they constitute "alterations" of the Stadium and as such may not exceed 50 percent of its value. (PE 59-60) The court also determined that CEQA imposed a similar prohibition because the administrative record "lacks support for findings and conclusions in the EIR that doubling the number of capacity events" to be held at the Stadium postdating the Center's construction "will cause significant environmental effects that are *unavoidable*." (PE 163 (orig. ital.))

Anticipating the trial court's intended issuance of a writ, the University responded to the June 18 Order by accepting the court's determinations and reporting that it had removed from the project *both* the grade beam and other elements of the Center project the court found to constitute "alterations" of the Stadium *and* the additional capacity events to be held there. (RE 770-772) In its judgment, the trial court directed issuance of a writ ordering the University to satisfy CEQA and Alquist-Priolo and at the same time deemed the University's response to constitute its return demonstrating compliance. (PE 211-14)

Petitioners suggest the trial court erred by accepting the University's compliance. (Petn. 41; *see* PE 196-202) But petitioners' focus is not on the court's *acceptance* of the University's compliance but the *compliance itself*.

Only a "party aggrieved" may be heard to complain. *Estate of Colton*, 164 Cal. 1, 5 (1912). Petitioners are not aggrieved by the trial court's determination that the University did not satisfy CEQA and Alquist-Priolo in the two respects the court found wanting. Nor are they aggrieved by the University's compliance, which gave them what they demanded—satisfaction of what they claimed to be Alquist-Priolo's and CEQA's requirements. (*See* PE 174, 178)

Even if petitioners were aggrieved, their challenge would fail. Below, petitioners claimed the University *could not* comply before a writ issued. (PE 199-200) But compliance before a writ's issuance "is among the acceptable responses" and "terminates the litigation." *Save Oxnard Shores v. California Coastal Com'n*, 179 Cal.App.3d 140, 149 (1986) (compliance with alternative writ in advance of peremptory writ); *see* Civ. Proc. Code § 1087. Nothing required the *delayed* post-writ compliance that petitioners urged instead of (or in addition to) the *immediate* pre-writ compliance the University accomplished. To demand issuance of a writ and *post-issuance* compliance *again* would have been an "idle act[ ]," which our law frowns on. Civ. Code § 3532.

Falling back, petitioners then asserted below that the University did not effectively comply. (PE 199-202) Their argument was that The Regents *itself* had to act to achieve compliance, and in any case did not delegate authority to others to do so on its behalf. But no law requires action by The Regents itself. *See, e.g.*, 14 Cal. Code Regs. § 15356 ("decision-making body" for CEQA purposes may include the "public agency" itself and also "any person or group of persons" with the

agency). In addition, all the evidence established the existence of a properly-delegated authority. (RE 1018-1022 at ¶¶ 5, 9, 11-17)

Falling back yet further, petitioners finally asserted below that the University's compliance with the writ deprived them of due process. (RE 1100-1103) As the trial court concluded, petitioners failed to "articulate[ ] the nature of the process they would be entitled to under the present circumstances." (PE 219) They will be no more successful here, since they can hardly complain of effectuating compliance with CEQA and Alquist-Priolo sooner rather than later.

D. Petitioners Cannot Show Probable Error Under CEQA

CEQA is "primarily a procedural statute." 1 Stephen L. Kostka & Michael H. Zischke, *Practice Under the California Environmental Quality Act* § 1.19 at 17 (2d ed. 2008). Indeed, the statute's "purpose" is simply "to inform the public and its governmental officials of the environmental consequences of their decisions before they are made." *Cadiz Land Co., Inc. v. Rail Cycle, L.P.*, 83 Cal.App.4th 74, 84 (2000).

In the first instance, the trial court must "determine whether the agency acted in a manner contrary to law and whether its determinations were supported by substantial evidence." *Woodward Park Homeowners Ass'n, Inc. v. City of Fresno*, 150 Cal.App.4th 683, 705 (2007). This Court then "reviews the trial court's decision de novo, applying the same standards to the agency's action as the trial court applies." *Id.*

Specifically, as to whether the agency acted in a manner contrary to law in adopting an EIR, a court may not demand "absolute perfection." *Dusek v. Anaheim Redevt. Agen.*, 173 Cal.App.3d 1029, 1039 (1985) (internal quotation marks omitted). Instead, the court may ask only "whether an objective, good faith effort . . . is demonstrated" [*id.* (internal quotation marks omitted)] and must follow the "presumption that official duty was regularly performed" [*Gilroy Citizens for Responsible Planning v. City of Gilroy*, 140 Cal.App.4th 911, 925 (2006)]. Even if some error appeared, that would not end the matter, since "there is no presumption that error is prejudicial." § 21005.

In determining whether substantial evidence supports an agency's determinations, a court asks whether there is "enough relevant information and reasonable inferences" from the information before the agency "so that a fair argument can be made to support a conclusion even though other conclusions might also be reached." 14 Cal. Code Regs. § 15384(a). In answering that question, the court may not substitute its judgment for the agency's or reweigh the evidence the agency relied on. *Citizens of Goleta Valley v. Board of Supervisors*, 52 Cal.3d 553, 564 (1990). Instead, the court must pay deference to the agency [*Environmental Coun. of Sacramento v. City of Sacramento*, 142 Cal.App.4th 1018, 1028 n.3 (2006)] and resolve reasonable doubts in the agency's favor" [*Galante Vineyards v. Monterey Peninsula Water Mgt. Dist.*, 60 Cal.App.4th 1109, 1117 (1997) (internal quotation marks omitted)]. A party challenging evidentiary sufficiency must set forth "*all* the material evidence on the point *and not merely [its] own*

evidence. Unless this is done the error is deemed to be waived." *State Water Resources Control Bd. Cases*, 136 Cal.App.4th 674, 749 (2006) (ital. orig.; internal quotation marks omitted).

Petitioners raised a host of CEQA claims below, at times challenging the manner in which The Regents certified the Integrated Projects EIR and approved the Center project and in others attacking the sufficiency of the evidence underlying The Regents' findings. In all, they largely ignored that the Integrated Projects EIR did not stand alone, but was tiered from the 2020 Long Range Development Plan EIR, incorporating by reference its general discussions and concentrating solely on issues specific to the Integrated Projects. *See* 14 Cal. Code Regs. § 15152; AR 602-04.

With a single exception rendered immaterial by The Regents' compliance with the writ of mandate, the trial court rejected all of petitioners' CEQA claims. Although petitioners claim error, here they fail to show even *probable* error.

1. The Regents Properly Delegated Authority To Review And Certify The Final EIR

The trial court found The Regents properly delegated to its Committee on Grounds and Buildings the authority to review and certify the Final EIR. (PE 79-91)

The conclusion was correct. First, "The Regents" includes its "standing and special committees," including its Committee on

Grounds and Buildings. (RE 138-139) Second, CEQA permits The Regents, as the "lead agency," to make a delegation to its Committee on Grounds and Buildings. *See* §§ 21063, 21067 (defining "lead agency" so as to include The Regents); 14 Cal. Code Regs. §§ 15025(b), 15356 (lead agency may delegate responsibility to decision-making body within agency to review and consider EIRs, make CEQA findings, adopt mitigation measures, and approve projects). Third, The Regents made a delegation to that Committee effective to cover the Final EIR. (RE 136 at ¶ 7)

Relying on three cases, petitioners challenge this conclusion as erroneous. (Petn. 23-25) To no avail. The three cases hold only that a lead agency's decision-making body must review and certify the EIR. *See Kleist v. City of Glendale*, 56 Cal.App.3d 770, 779 (1976) (addressing delegation and stating that the body that "takes action having an effect upon the environment" must also review and certify the EIR); *Vedanta Society of So. Cal. v. California Quarter, Ltd.*, 84 Cal.App.4th 517, 526-28 (2000) (same, but without addressing delegation); *Planning & Conservation League v. Department of Water Resources*, 83 Cal.App.4th 892, 888-89 (2000) (addressing selection of the correct agency as lead agency, but without addressing delegation). Here, The Regents' decision-making body, its Committee on Grounds and Buildings, reviewed and certified the EIR.

2. The Regents Did Not Approve The Budget For The Center Prematurely

The trial court found The Regents did not approve the budget for the Center prematurely. (PE 91-93) This conclusion was also correct.

It is true that The Regents approved the Center's budget before certifying the Final EIR. (AR 141-42, 511-21) Such approval was not prohibited. *See Mount Sutro Defense Comm. v. Regents of Univ. of Cal.*, 77 Cal.App.3d 20, 42 (1978) (CEQA does not require Regents to "support its request for funds to be appropriated in the Budget Act by simultaneous submission of a completed EIR"). Although The Regents may have been barred from approving the *expenditure of funds* at that time [§ 21102], it did not approve any such expenditure merely by approving the budget [AR 15462-63 (The Regents must comply with CEQA prior to bidding and construction of a project)].

It is also true that The Regents could not "approve" the Center project before certifying the Final EIR. *See* 14 Cal. Code Regs. § 15004(a). But The Regents was granted the discretion to define the time of "approval" of a project [*id.* § 15352(a)]—and reasonably defined it as the time of approval of its "*design*" [RE 140; 442]. Thus, The Regents was authorized to approve the Center's budget before certifying the Final EIR so long as *budget* approval preceded *design* approval—and it did. (AR 128-29)

Petitioners fare no better in challenging this conclusion by asserting that "budget approval" equals "expenditure approval." (Petn.

25-27) It does not. *See Mount Sutro*, 77 Cal.App.3d at 42 (request for appropriation may precede EIR certification).

3. Substantial Evidence Supported The Regents' Finding That It Was Not Required To Recirculate The Final EIR With Its Geologist's Report

The trial court concluded that substantial evidence supported The Regents' finding that it was not required to recirculate the Final EIR after receiving a report by its geologist. (PE 93-99)

Administrative determinations like The Regents' are presumed legally adequate and supported by substantial evidence. *See Sequoyah Hills Homeowners Association v. City of Oakland*, 23 Cal.App.4th 704, 717 (1993) (administrative determinations "come[ ] ... with a strong presumption of regularity"); *see also Topanga Ass'n for a Scenic Community v. County of Los Angeles*, 11 Cal.3d 506, 514 (1974) (reasonable doubts must be resolved in favor of the adequacy of administrative findings and the existence of supporting substantial evidence). Petitioners attempt to rebut that presumption [petn. 27-29], but fail to do so.

The facts pertinent here are as follows: The University retained a state-registered geologist, Geomatrix Consultants, Inc., to perform a geological investigation of the site for the Center. (AR 37135) Geomatrix did so in mid-2006, digging four trenches and drilling three large-diameter soil borings. (AR 7283-84, 7323-24) In what became known as the Geomatrix 2006 Report, it concluded that the Center

would not be located across the trace of any active fault. (AR 7277, 7312-13) William Lettis & Associates (WLA), another state-registered geologist, performed a peer review of Geomatrix's investigation and report, and concurred in its methodology and conclusion. (AR 37136) This information was summarized in the Final EIR.

The Final EIR devoted five pages to issues related to geological and seismic impacts [AR 1605-09], added on to 25 pages in the Draft EIR [AR 815-39], and tiered from 27 more pages in the 2020 Long Range Development Plan EIR [AR 15639-66]. It identified as significant the exposure of persons or structures to the risk of loss, injury, or death from fault rupture and ground shaking. (AR 836-37) The Stadium is seismically poor. (AR 31585-86) The Center will be seismically safe, enhancing the safety of persons who will use it instead of the Stadium. (AR 673-74) The Center will not exacerbate the Stadium's poor seismic rating, which is an unrelated existing condition. (AR 1735, 31585-86) *After* completing the Center *but before* completion of the Stadium's seismic improvements, there remains a risk of damage to the Stadium from an earthquake. (AR 3617)

There was no evidence that this risk would *increase* after the Center's completion as opposed to before. The only measure to mitigate the impacts in question—which The Regents subsequently adopted [AR 511-12, 521]—consisted of delaying scheduling additional events at the Stadium before completing seismic improvements. (AR 836-37) This measure, however, would achieve only partial mitigation. (*Id.*) Partly as a result of this circumstance, the

geological and seismic impacts were deemed potentially significant and unavoidable. (AR 836-37, 1502)

"Recirculation [of an EIR] is not required where the new information added to the EIR merely clarifies, amplifies or makes insignificant modifications to an adequate EIR." 14 Cal. Code Regs. § 15088.5(b). The threshold for "new information" significant enough to require recirculation is high, since "[r]ecirculation was intended to be an exception, rather than the general rule." *Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal.*, 6 Cal.4th 1112, 1132 (1993). Otherwise, the "rules regulating the protection of the environment" could be "subverted into an instrument for the oppression and delay of social, economic, or recreational development and advancement." *Goleta Valley*, 52 Cal.3d at 576.

Here, The Regents found the Geomatrix 2006 Report did not constitute significant new information that required recirculation of the Final EIR. (AR 450, 1717)

Substantial evidence supported that finding. The Geomatrix 2006 Report concluded there was no evidence of active faulting within the Center's footprint. (AR 7313) It did not identify any new, or substantially more severe, significant impact than the Draft EIR; it simply amplified the Draft EIR's discussion of geology and seismicity impacts, confirming the Draft EIR's statement that "active faults are *not* known to be located within" the Center's footprint. (AR 836 (ital. added)) Although the Report referred to "inferred faults," such

references were irrelevant, since CEQA requires EIRs to discuss seismic impacts of "known" faults. *See* 14 Cal. Code Regs. § 15000 et seq., Appen. G. Moreover, the Report confirmed that one of the "inferred faults" was a trace of the Hayward fault and the other was non-existent. (AR 7312-13)

Petitioners claim the finding was not supported by substantial evidence. (Petn. 27-29) Here, as elsewhere, they fail to set forth "all" the material evidence, instead selectively citing merely their own. *State Water Res.,* 136 Cal.App.4th at 749. That omission effectuates a waiver of this substantial evidence claim and the others that follow. *Id.* Even if there is no waiver, none of the claims is meritorious.

Petitioners argue the Geomatrix 2006 Report constituted "new information" significant enough to require recirculation of the Final EIR because it changed the EIR is a way that would deprive the public of a meaningful opportunity to comment. (Petn. 27-29)

It is undisputed that the public had such an opportunity during the public comment period that followed the Draft EIR's publication. The Draft EIR contains a comprehensive assessment of seismic and geologic impacts. (AR 833-37) It describes and assesses eight hazards related to seismicity [AR 820-24], concluding that even though "active faults are not known to be located" within the Center's "footprint" [AR 836], the "danger posed by possible earthquake fault rupture is "significant and unavoidable" [AR 836-37].

It is also undisputed that the public took advantage of the comment opportunity. The University received letters, petitions, and other public comment addressing seismic impacts, many of which discussed the issue at the heart of the Geomatrix 2006 Report—the danger posed by surface fault rupture. (*E.g.*, AR 1820, 1838-39, 1846-48, 1875, 1893-2015, 2207-10, 2252, 2256-59)

Given the fact that the Geomatrix 2006 Report essentially "reveal[ed] comforting news," additional public comment would not have furthered CEQA's purposes. *Laurel Heights Improvement Ass'n*, 6 Cal.4th at 1138 (Regents' finding that health-risk study regarding cumulative toxic air contaminant releases did not constitute "significant new information" requiring EIR's recirculation because study did not reveal "new adverse environmental impact").

4. The Regents Was Not Required To Recirculate The Final EIR With A Discussion Of Letters Addressing Its Geologist's Report

The trial court similarly concluded that substantial evidence supported The Regents' finding that it was not required to recirculate the Final EIR with a discussion of letters from the United States Geological Survey (USGS) and the California Geological Survey (CGS), both of which addressed the Geomatrix 2006 Report. (PE 99-101) This too was a correct conclusion.

Mere hours before The Regents certified the Final EIR and approved the Center project, and in identical letters solicited by the

City of Berkeley to review Geomatrix's report [AR 40017-24], the USGS and the CGS concluded that most of the Center would not be located across the trace of any active fault, but expressed uncertainty about a small portion (5% to 8%) of the site. (AR 40020, 40024)

New information need not be added to an EIR if it is not significant enough to require the EIR's recirculation. *See Western Placer Citizens for an Agric. & Rural Ent'v v. County of Placer*, 144 Cal.App.4th 890, 899 (2006). The USGS and CGS letters did not rise to that level. As noted, the letters generally concurred with the Geomatrix 2006 Report but suggested some additional investigation in a small portion of the site. As such, they did not provide *significant* "new information" not already in the Draft and Final EIRs, which had fully analyzed the potential for seismicity impacts and concluded that the Integrated Projects could result in two significant unavoidable impacts as a result of their proximity to the Hayward fault. (AR 836-37)

Petitioners claim this conclusion too was erroneous [petn. 29-30], but they merely *assume* the "new information" in the letters was significant enough to require the Final EIR's recirculation. As explained, that assumption was unfounded. Again, since it is undisputed that the public had and took advantage of a meaningful opportunity to comment, additional comment would not have furthered CEQA's purposes.

5. Substantial Evidence Supported The Regents' Finding That Biological Impacts Were Adequately Analyzed

The Regents found the 2020 Long Range Development Plan EIR adequately analyzed biological impacts of all 2020 Long Range Development Plan projects, including the Integrated Projects, and that consequently the EIR did not need to contain additional analysis. (AR 604, 1058-60)

The trial court concluded that The Regents' finding was supported by substantial evidence. (PE 101-07) Again, this was a correct conclusion.

As noted, the Integrated Projects EIR is tiered from the 2020 Long Range Development Plan EIR. The latter contains a 37-page analysis of the biological impacts of all development contemplated by the 2020 Long Range Development Plan. (AR 15540-15576) Much of its analysis relates to the Hill Campus and the Campus Park, which contain the campus' sensitive biological resources—and not the site for the Center, which does not. (AR 15551, 15557-58) That site consists of planting beds separated by seven 15-foot-wide asphalt pedestrian pathways sloping toward and connecting to the eastern sidewalk along Piedmont Avenue. The pathways leading from Gates 2, 3, and 5 of the Stadium have two sets of 15-foot-wide concrete stairs with galvanized steel handrails at the top and bottom of the paths. To the east of the site is the 70,000-seat Stadium, while to the west is a heavily-traveled city roadway (the main north-south thoroughfare on the campus's eastern edge). To the south is a 37-car parking lot; and to the north is a 181-car

parking lot. (AR 726, 928-29, 5410) Despite the absence of sensitive biological resources at the Center's site, The Regents adopted mitigation measures in the 2020 Long Range Development Plan EIR regarding specimen trees there. (AR 15565) The efficacy of these mitigation measures has not been challenged and must therefore be considered satisfactory. *See* § 21167(c).

In claiming the trial court's conclusion was erroneous [petn. 30-33], petitioners again merely *assume* what they did not prove—that the Center site contains sensitive biological resources. Moreover, *Protect the Historic Amador Waterways v. Amador Water Agency*, 116 Cal.App.4th 1099 (2004), on which they rely, does not make up for their failure of proof. There, the court could not determine why a potential impact of a project was found "less than significant," and accordingly set aside an agency's certification of a final EIR dependent on that finding. *Id.* at 1111-12. Here, this Court, like the trial court, *can* determine the potential biological impact of the Center project. That impact was less than significant because the site contains no sensitive biological resources and because The Regents adopted mitigation measures in the 2020 Long Range Development Plan EIR regarding specimen trees there.

6. Substantial Evidence Supported The Regents' Finding That Archaeological Impacts Were Adequately Analyzed

The trial court similarly concluded that The Regents adequately analyzed archaeological impacts and that its finding in this regard was supported by substantial evidence. (PE 107-10)

Petitioners challenge this conclusion [petn. 33-34], but fail to establish the point. There was *no* evidence of any "unique archaeological resources" [*id.* at 33] comprising any "sacred Native American burial ground." There was instead only the "historian's" e-mail *allegation* of a sacred burial ground. (AR 17479-80) Moreover, both the 2020 Long Range Development Plan EIR and the Integrated Projects EIR establish comprehensive mitigation measures in the unlikely event the remnants of a burial ground are discovered in this area. (AR 811, 15631)

7. The Regents' Description Of The Integrated Projects Was Legally Adequate And Supported By Substantial Evidence

The trial court concluded that The Regents' description of the Integrated Projects was legally adequate and supported by substantial evidence. (PE 79-91)

A project description must contain four elements: (1) the project's "precise location and boundaries"; (2) a "statement of objectives"; (3) a "general description of the project's technical,

economic, and environmental characteristics"; and (4) a brief description of the EIR's "intended uses[.]" 14 Cal. Code Regs. § 15124. The description "should not supply extensive detail beyond that needed for evaluation and review of the [project's] environmental impact." *Id.*

The description of the Integrated Projects here satisfied these requirements. It delineated the projects' locations and boundaries on local and regional maps [AR 635-36] and delineated the boundaries for each project site [AR 638-45]. It stated the objectives. (AR 630-33, 697) It provided the site and circulation plans for the projects as a whole, described each individual project, and where available, provided design drawings illustrating environmental and technical characteristics. (AR 644-90) And it contained a statement of the EIR's intended uses, listing the relevant agencies and approvals necessary for implementation. (AR 699)

Petitioners complain about the detail the Integrated Projects' description furnished for aspects of later projects. (Petn. 34-35) They criticize the description for "suggest[ing]" that the "Law and Business Connection Building ... *may* include facilities like a 300-person auditorium and 200-person café," on the ground that the description "avoids committing the University to any predictable course of action." (Petn. 34 (ital. orig.)) And they criticize the description as giving "little information" about a "parking structure to be located underneath the Maxwell Family Fields." (Petn. 34-35) But these are mere quibbles that demand the sort of "extensive detail" a description "should not

supply" [14 Cal. Code Regs. § 15124] and, in any event, had no effect on the environmental analysis.

8. The Regents' Objectives And Alternatives Analysis For The Integrated Projects Were Legally Adequate And Supported By Substantial Evidence

The trial court concluded that The Regents' objectives and alternatives analysis for the Integrated Projects were legally adequate and supported by substantial evidence. (PE 135-55)

In arguing to the contrary, petitioners first claim the Integrated Project's objectives are too vague to be legally adequate. (Petn. 35-36) But the Integrated Projects are broad—permissibly so—and as a result, their objectives may be similar. A cursory review of the objectives (set out in the margin) shows that breadth does not equal vagueness.[6]

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6 "I. Provide seismically safe facilities for students, staff and visitors.

"II. Plan the Integrated Projects to promote and inspire relationships vital to the health of the University: between athletics and academics, among academic units, and between the University and the public, including community and neighbors, alumni, prospective students and donors.

"III. Enhance remarkable historic places, and create extraordinary new spaces, in the southeast campus.

"IV. Facilitate access to, between, and through the Integrated Projects for vehicles, transit, bicycles, pedestrians, the disabled, and emergency services and vehicles.

(fn. continued on following page)

(fn. continued from previous page)

"V. Increase the functionality of existing spaces and facilities in the Southeast Campus.

"VI. Consolidate parking, reducing the prevalence of surface parking in the landscape of the southeast campus.

"VII. Implement policies of the 2020 LRDP [i.e., 2020 Long Range Development Plan], among others:

"(a) Seismic safety policies of the 2020 LRDP: Eliminate poor and very poor seismic ratings in campus buildings through renovation or replacement.

"(b) Collaborative and interactive program policies of the 2020 LRDP: Build a campus that fosters intellectual synergy and collaborative endeavors both within and across disciplines. Create places of interaction at key nodes of activity. Prioritize campus park spaces for programs that directly engage students in instruction and research. Prioritize space on the adjacent blocks for other research, cultural and service programs that require campus park proximity.

"(c) Parking policies of the 2020 LRDP: Increase the supply of parking to accommodate existing unmet demand and future campus growth. Minimize private vehicle traffic in the Campus Park. Locate new campus parking at the edge or outside the Campus Park. Replace and consolidate existing university parking displaced by new projects.

"(d) Stewardship policies of the 2020 LRDP: Plan every new project as a model of resource conservation and environmental stewardship. Maintain and enhance the image of the campus, and preserve our historic legacy of landscape and architecture. Preserve and maintain significant views, natural areas, and open spaces in the Campus Park.

"(e) Access policies of the 2020 LRDP: Ensure the Campus Park provides full access to users at all levels of mobility." (AR 630-31 (ital. omitted))

Second, petitioners claim that the "Reduced Size Alternative" for the Center in the alternatives analysis was legally inadequate because it did not quantify the reduction in size contemplated. (Petn. 36)

Alternatives analysis is subject to a rule of reason. *See Residents Ad Hoc Stadium Committee v. Board of Trustees of the California State University and Colleges*, 89 Cal.App.3d 274, 286 (1979) ("discussion of alternatives is subject to a construction of reasonableness"). "Absolute perfection is not required; what is required is the production of information sufficient to permit a reasonable choice of alternatives so far as environmental aspects are concerned. It is only required that the officials and agencies make an objective, good-faith effort to comply." *Id.* at 287.

The analysis of the Reduced Size Alternative was reasonable, showing The Regents' objective, good-faith effort to comply. A center built "at the same proposed site" [AR 994], of any size would significantly impact the landscape west of the Stadium, require the removal of trees, and impede Stadium program improvements and seismic retrofitting. (AR 997) The "failure" of the analysis to "discuss the obvious is not fatal." *Mira Mar Mobile Community v. City of Oceanside*, 119 Cal.App.4th 477, 488 (2004).

Third, petitioners claim that the "Dispersed Program—Albany Alternative," which would have constructed the Center and a new stadium at Golden Gate Fields in Albany, was similarly legally inadequate. (Petn. 36-37) But the analysis of this alternative was also

reasonable. The primary reason for finding it *infeasible* was that it would likely mean the demolition of the Stadium, a treasured campus and historic resource, and result in the construction of a new stadium distant from the campus. (AR 1011) Petitioners cannot challenge the latter point, but attempt to challenge the former—unsuccessfully. The Stadium's demolition would be likely because (1) efficient use of the University's limited land resources is one of the objectives of the 2020 Long Range Development Plan [AR 15404], (2) the University does not need two 60,000-seat stadiums, and (3) if the Stadium were not seismically upgraded, it would present an unacceptable safety hazard and financial liability. In short, the analysis nevertheless discusses this alternative in sufficient detail [AR 1006-11] "to allow meaningful evaluation, analysis, and comparison" with the Integrated Projects [14 Cal. Code Regs. § 15126.6(d)].[7]

9. The Regents' Findings and Its Statement Of Overriding Considerations Were Legally Adequate And Supported By Substantial Evidence

Lastly, the trial court concluded that The Regents' findings on significant environmental effects and its statement of overriding considerations balancing its various benefits against its unavoidable

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7 Citing evidence in the administrative record, petitioners declare that The Regents "ignored [its] own evidence that, whatever the fate of the existing Stadium, the old Stadium would continue to exist." (Petn. 36) Petitioners ignore the truth. The cited evidence states that the "*playing field* at the [Stadium] would likely continue as a practice field in any eventuality" [AR 268 (ital. added)], *not* that *the Stadium* would continue in any form.

environmental risks were legally adequately and supported by substantial evidence. (PE 155-69) This conclusion, like the others, was correct.

The Regents adopted a thorough set of findings. (AR 447-508) The Regents also adopted a detailed statement of overriding considerations, identifying the impacts that remain significant and unavoidable and explaining why the Integrated Projects should proceed despite those impacts. (AR 503-08)

Contrary to petitioners' complaint about the trees [petn. 37], The Regents' findings were legally adequate and supported by substantial evidence. The trees are a far cry from a biologically significant stand of old-growth trees, and are not even considered to be among the more significant ones, culturally or otherwise, on the heavily-wooded campus. (AR 15400, 15544-58) The impacts of tree removal would be insignificant after implementation of mitigation measures and continuing best practices adopted as part of the 2020 Long Range Development Plan EIR, to which the Integrated Projects EIR is tiered. (AR 565-67, 585-86)

Similarly, contrary to petitioners' complaint about cumulative impacts to cultural resources [petn. 37-38], The Regents' findings were legally adequate. A relatively small element of the Integrated Projects involves the potential removal of two houses at 2241 and 2243 College Avenue at some time in the future. The EIR addressed that potential as a potentially significant impact and was the subject of two mitigation

measures The Regents adopted. (AR 461, 807-08) That potential might become a potential *cumulative* impact when considered together with the potential removal of a house at 2526 Durant Avenue, over which the City of Berkeley, not the University, has control. (AR 812) The City, not the University, will ultimately determine whether that house will be removed, whether its removal will cause a significant cumulative impact, or whether it will be avoided.

And contrary to petitioners' complaint about alternatives to the Integrated Projects [petn. 38], The Regents' findings were legally adequate. Petitioners assert that the findings "cannot give the public any reassurance that alternatives to the Integrated Projects were considered in any meaningful way." (*Id.*) The administrative record, with its more than 40,000 pages, alone gives the lie to this assertion.

As for The Regents' statement of overriding considerations, petitioners' complaint is merely a repetition of claims about the trees and biological resources. (Petn. 38-39) Those claims have been addressed and shown to be wanting, and need not be revisited.

* * * * *

Whether or not The Regents achieved "absolute perfection" in the CEQA process, it demonstrated an "objective, good faith effort." *Dusek*, 173 Cal.App.3d at 1039 (internal quotation marks omitted). Any conceivable deficiency would have been harmless, since it cannot seriously be denied that the process achieved CEQA's purpose of informing the public—and The Regents—of the environmental consequences of the relevant decisions before they were made.

In sum, the trial court did not commit probable error in concluding that The Regents did not violate CEQA.

E. Petitioners Cannot Show Probable Error Under Alquist-Priolo

Unlike CEQA, Alquist-Priolo is primarily a substantive statute. *See, e.g.*, 14 Cal. Code Regs. § 3603(d)-(f) (Alquist-Priolo does not require that geological reports be published and circulated for public review or that hearings on such reports occur). It prohibits locating structures for human occupancy across traces of active faults, but under an exception, it permits altering or adding to such structures as long as the alteration's or addition's value does not exceed 50 percent of the structure's value. §§ 2621.5(a), 2621.7(c).

To the extent the trial court's determinations under Alquist-Priolo involved construing and applying the statute, this Court reviews them de novo. *Trujillo v. North County Transit Dist.*, 63 Cal.App.4th 280, 284 (1998) (review of statutory interpretation and application of statutory language is de novo). But to the extent the trial court's determinations reflected factual findings by The Regents, this Court reviews them deferentially for substantial evidence. *Better Alternatives For Neighborhoods v. Heyman*, 212 Cal.App.3d 663, 672 (1989). That is, it considers the evidence in the light most favorable to the administrative decision, giving it the benefit of every reasonable inference, resolving conflicts in support of the decision, and

disregarding evidentiary conflicts. *See id.* at 672-73; *Paykar Constr., Inc. v. Spilat Constr. Corp.*, 92 Cal.App.4th 488, 494 (2001).

The trial court rejected all but one of petitioners' Alquist-Priolo claims—and that one was rendered moot by The Regents' compliance with the writ. Petitioners claim error [petn. 39-45], but again, they cannot show even *probable* error.

1. The Regents Is Not Subject To Alquist-Priolo

First, The Regents did not violate Alquist-Priolo because it is not subject to that statute in the first place. The Regents acknowledges the trial court's disagreement on that point, but is confident it would persuade this Court otherwise if the appeal proceeded. (RE 487-493)[8]

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8 In *Better Alternatives*, this Division upheld a judgment denying mandate to certain neighborhood groups that challenged The Regents' approval of a student housing project located on the Berkeley campus. The project was to be located near an earthquake fault that The Regents determined was "inactive" so as to render unnecessary compliance with the set-backs from *active* faults that Alquist-Priolo requires. 212 Cal.App.3d at 668-73. The Court noted that "[t]he parties agree[d] that the lead agency responsible for developing a project—in this case the University—has the ultimate responsibility to determine whether a project complies with the Alquist-Priolo Act and its implementing regulations." *Id.* at 671. The Court went on to conclude that the University properly discharged its responsibility. *Id.* at 672-73.

Better Alternatives did not *hold* The Regents was subject to Alquist-Priolo, but merely *assumed* The Regents was. That assumption was of little moment, since, of course, decisions are "not authority for propositions not considered." *People v. Ault*, 33 Cal.4th 1250, 1268 n.10 (2004).

(fn. continued on following page)

2. In Any Event, The University Did Not Violate Alquist-Priolo

Even assuming The Regents was subject to Alquist-Priolo, the trial court did not commit probable error in concluding the University did not violate that statute.

a. The University Properly Found The Center Would Not Alter Or Add To California Memorial Stadium

The trial court concluded that the University found that the Center would not constitute an alteration of or an addition to the Stadium. (PE 67-76 & esp. 74-75) This was a correct conclusion, despite petitioners' claim to the contrary. (Petn. 40-41)

(fn. continued from previous page)

Petitioners may claim The Regents was judicially estopped from claiming below that Alquist-Priolo did not apply based on its position in *Better Alternatives*. But one of judicial estoppel's elements is that a party is taking a position in litigation inconsistent with one it took previously to the opposing party's detriment. *See Law Offices of Ian Herzog v. Law Offices of Joseph M. Fredrics*, 61 Cal.App.4th 672, 678 (1998). Petitioners would be hard-pressed to claim The Regents has been inconsistent, since in *Better Alternatives*, The Regents, like this Court, merely *assumed* it was subject to Alquist-Priolo. That assumption was understandable given the University Policy on Seismic Safety, which was identical to the statute in prohibiting the construction of "[n]ew University buildings ... on the trace of an active geological fault" [AR 16045]. (A similar assumption, evidently resting on the same basis, is reflected in language in the University's CEQA Handbook stating that "proposed development must comply with Alquist-Priolo ... which restricts the construction of buildings on or near active earthquake faults." (RE 144) In any event, petitioners did not rely to their detriment, so any judicial estoppel claims fails.

The University found the Center would not be located across the trace of any active fault. (AR 112-13, 7277, 7312-13, 37138) As explained *post*, substantial evidence supported that finding. Because that finding avoided Alquist-Priolo's prohibition, the University had no need to determine whether the statute's exception applied—i.e., whether the Center would constitute an alteration of or an addition to the Stadium and if so, whether the Center's value would exceed 50 percent of the Stadium's value.

In any event, the University implicitly found the Center would not constitute an alteration of or an addition to the Stadium. In his report, Vice Chancellor Denton concluded the Center complied with Alquist-Priolo, noting that "we designed [the] ... Center to be a stand-alone building"—not an alteration of or an addition to the Stadium—"[a]nd I can tell you that it is." (AR 112-13) Had the University designed the Center to be attached to or to alter the Stadium, it would have had to conclude that it, like the Stadium, was located across the Hayward Fault. By finding the Center was designed to be an independent building, it effectively found it would neither alter nor be attached to the Stadium.

Relying solely on *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova*, 40 Cal.4th 412 (2007), petitioners also claim the University committed a "procedural violation" of Alquist-Priolo by finding the Center would not constitute an alteration of or an addition to the Stadium. (Petn. 41) But Alquist-Priolo is primarily a substantive statute, not a procedural one. *Vineyard*

Area Citizens does not hold otherwise, as it addresses only CEQA, not even mentioning Alquist-Priolo—which does not require findings.

b. Substantial Evidence Supported The University's Finding That The Center Was Not An Alteration Of Or An Addition To The Stadium

Substantial evidence supported the University's finding that the Center would not constitute an alteration of or an addition to the Stadium. (PE 67-76 & esp. 71-72, 75) Petitioners claim to the contrary [petn. 40-41], but the claim fails.

Alquist-Priolo does not define the terms "alteration," "addition," or "structure." But a "plain and commonsense meaning" of those terms, in context, reveals the answer. *See Coalition of Concerned Communities, Inc. v. City of Los Angeles*, 34 Cal.4th 733, 737 (2004) (court examines plain meaning of statutory words in context to determine their purpose and scope).

Alquist-Priolo's purpose is to "assist cities and counties" in "functions" including "building-regulation." § 2622(a). In this regard, the statute assumes a working knowledge of terms in such sources as the California Building Code (CBC), which regulates building in California. The CBC defines a "structure" as "that which is built or constructed, an edifice or building of any kind, or any piece of work artificially built up or composed of *parts joined together* in some definite manner." 24 Cal. Code Regs. § 220 (ital. added). Accordingly, under the CBC, an "alteration" of a "structure" is a

change in *joined-together parts*. Similarly, an "addition" to a "structure" is an augmentation of *joined-together parts* entailing an "extension or increase in floor area or height." *Id.* There is no basis for discerning a different definition under Alquist-Priolo.

Design development drawings for the Center depict the facility as a stand-alone structure that is *not* joined to the Stadium, and hence does *not* extend or increase its floor area or height. The Center shares no structural elements with the Stadium—no beams, no footings, no wall elements, no columns, etc.—and does not have any structural connection, or even any direct contact, with the Stadium. (AR 13781-819; *see* AR 553, 671-72, 1735; RE 511-519 at ¶¶8-11, 13-21; 530-532 at ¶¶13-18; 542-544 at ¶¶11-15) There is no joining of parts—and, therefore, no "alteration" or "addition."

Petitioners argue the Center and Stadium will be adjacent to each other and "functionally" linked. (Petn. 42) So are innumerable other structures in California, yet that configuration does not make them alterations of or additions to each other. (RE 515-517 at ¶¶17-18)

c. The University Was Not Required To Select The Method Of Valuation Of The Stadium Or To Determine Its Value

The University discussed the valuation of the Stadium in the Draft and Final EIRs and in other material in the administrative record. (AR 112-13, 119, 280, 827, 1607-08) Selecting replacement cost as the appropriate valuation method, the University determined the Stadium's

value to be $593 million. (AR 37086-87) The University presented the foregoing to The Regents before The Regents certified the Final EIR and approved the Center project. (AR 38, 112-13, 119, 280)

The trial court concluded that the University did not select an appropriate method of valuation for the Stadium or determine its value. (PE 76) Although that conclusion contradicted the evidence in the administrative record cited above, it became moot when the University complied with the writ and removed the grade beam and other elements of the Center project the court found to constitute "alterations" of the Stadium. The Stadium's value would be material only if there were to be some alteration to it. There will be now be none.

Echoing the trial court's conclusion, petitioners claim the University did not select an appropriate method of valuing the Stadium. (Petn. 43) Although factually that is erroneous, the claim ultimately became irrelevant, as the trial court concluded. That conclusion was not even probable error.

d. The University Was Not Required To Determine The Cost Of Future Phases Of The Stadium Project At This Time

The trial court found the University was not required, at this time, to determine the cost of Phases 2 and 3 of the Stadium project—which will proceed only *after* both the Center's construction and action by The Regents on Phases 2 and 3. (PE 77-78) In claiming error [petn. 43-44], all petitioners do is assert that The Regents had to determine the

cost of Phases 2 and 3 now. They cite *Vineyard Area Citizens* and section 2621.5, but neither supports their assertion. As noted, *Vineyard Area Citizens* is a CEQA decision and does not mention Alquist-Priolo. For its part, Section 2621.5 defines the purpose and applicability of Alquist-Priolo, but says nothing bearing on the determination of costs.

e. Substantial Evidence Supported The University's Finding That The Center Was Not Located Across The Trace Of Any Active Fault

The trial court found that substantial evidence supported the University's finding that the Center would not be located across the trace of any active fault. (PE 63-67) Petitioners' challenge to this finding fails. (Petn. 44-45)

The 2006 Report by Geomatrix, a state-registered geologist, concluded the Center would not be located across the trace of any active fault. (AR 7277, 7312-13) WLA, another state-registered geologist, concurred in Geomatrix's conclusion and its methodology. (AR 37136) This was more than substantial evidence that supported the University's finding and that consequently supports the trial court's ruling on this point.

It is true that while the USGS and CGS letters concluded that most of the Center would not be located across the trace of any active fault, they expressed uncertainty about between 5 and 8 percent of the site. (AR 40020, 40024) This uncertainty did not constitute a true "conflict" with Geomatrix and WLA. Even if it did, it would not

matter. Under substantial evidence review, such a "conflict" is insufficient to overturn a finding. *Paykar Construction*, 92 Cal.App.4th at 494 (substantial evidence review permits decision-maker to "disregard conflicting evidence").

* * * * *

In short, the trial court did not commit probable error in concluding that the University did not violate Alquist-Priolo. This aspect of petitioners' merits challenge therefore fails.

F. This Court Should Deny Appellants' Stay Request

In an appropriate case, this Court may issue a stay pending determination of a supersedeas petition. *See* Civ. Proc. Code § 923 (reviewing court has power "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"); *cf.* Cal.R.Ct. 8.112(c), 8.116 (setting out procedures for such a stay).

But this is not an appropriate case for a stay. Petitioners have not shown they would be deprived of the benefits of success on appeal in the absence of supersedeas. They have independently failed to show probable error on appeal. And The Regents has shown substantial harm to the Berkeley campus community and others in delaying the Center's construction further. The Court thus has ample basis for summarily denying supersedeas and, consequently, for denying a stay.

G. If The Court Is Inclined To Grant Supersedeas, It Should Do So Only On Condition That Petitioners Post A Substantial Bond And That The Appeal Be Expedited

Because supersedeas is a discretionary and equitable remedy, a reviewing court may issue supersedeas "on any conditions it deems just" to protect the respondent during pendency of the appeal. Cal.R.Ct. 8.112(d)(1). Here, if this Court is inclined to grant supersedeas, it should do so only on condition that petitioners post a substantial bond. It is well within the Court's power to require one from non-governmental parties like petitioners. *Cf. Venice Canals Resident Home Owners Assn. v. Super. Ct.*, 72 Cal.App.3d 675, 679-80, 683 (1977) (denying mandamus to vacate stay conditioned on bond). Although supersedeas would cause the University economic and non-economic detriment, a bond would offer some hope that the costs of delayed construction of the Center might be partially compensated when this litigation ends.

As noted, assuming (conservatively, given the record and the issues) that this appeal would proceed to conclusion in 20 months—the 512-day median life of a civil appeal in this Division plus the Supreme Court review period—the delay will increase the costs of the Center by $28,600,000 (or $1,430,000 a month). (RE 706 at ¶13; 727 at ¶10; 752 at ¶32 (cost of delay about $1,430,000 a month)); fn.5, *ante*) A bond in that amount would therefore be appropriate. A lower bond amount would be appropriate only if the Court ordered expedited briefing—but even then, the appeal (including the Supreme Court review period) would still likely take ten months (three months for briefing, three

months until decision, and four months for Supreme Court review); in that instance, a bond of $14,300,000 would be appropriate.

Invoking *Mangini v. J.G. Durand Int'l*, 31 Cal.App.4th 214 (1994), petitioners argue this Court should require only a nominal bond. (Petn. 46-47) *Mangini*, however, declined to decide whether California law, which generally requires a trial court require a bond as a condition for issuance of a preliminary injunction, allows only a nominal bond in "environmental" litigation. 31 Cal.App.4th at 216-20.

Petitioners also play on their status as non-profit entities. But they ignore that notwithstanding their status, their actions have imposed substantial costs on the University and threaten to impose even more substantial costs during their appeal. The law does not and should not give them a warrant to act with impunity. A nominal bond would not be appropriate.

IV
CONCLUSION

CEQA requires public entity environmental decisions to be "informed, and therefore balanced." *Goleta Valley*, 52 Cal.3d at 576. And as noted, the "rules regulating the protection of the environment must not be subverted into an instrument for the oppression and delay of social, economic, or recreational development and advancement." *Id.* Delay and oppression, however, is what petitioners are seeking, and without good reason.

As the trial court held in a thorough opinion after exhaustive inquiry, The Regents' decision here was informed and balanced under CEQA. And although The Regents is not subject to Alquist-Priolo, it did not violate that statute, since the Center is not located across the trace of any active fault. It is highly *improbable* that petitioners' arguments on appeal will undermine, much less undo, either of these conclusions. At the same time, supersedeas would cause the University substantial harm—by threatening student, staff, and community safety, denying top-flight athletic facilities to those who need and are entitled to them, hurting the University's legitimate recruiting and fundraising efforts, and increasing the costs of the Center by more than $25 million. Any harm to petitioners that the denial of supersedeas would cause does not even begin to match up, nor do their merits arguments compensate.

This project has been delayed long enough, and no reason exists to put a stay in place. The Court should therefore deny petitioners' supersedeas application and stay request.

DATED: August 1, 2008.

OFFICE OF THE GENERAL COUNSEL - UNIVERSITY OF CALIFORNIA
SANGER & OLSON, A LAW CORPORATION
REED SMITH LLP

By _____
Paul D. Fogel

By _____
Dennis Peter Maio

Attorneys for Respondents/Real Parties In Interest The Regents of the University of California, et al.

Panoramic Hills Association v. Regents of University of California
Cal. App. 1/3 No. A122172 (Alameda Super. Case No. RG 06301644)

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is REED SMITH LLP, P.O. Box 7936, San Francisco, CA 94120. On August 1, 2008, I served on adverse parties a copy of the following document by the method indicated below:

OPPOSITION TO REQUEST FOR IMMEDIATE STAY AND TO PETITION FOR WRIT OF SUPERSEDEAS, ETC.

RESPONDENTS'/REAL PARTIES IN INTEREST'S EXHIBITS IN OPPOSITION TO REQUEST FOR IMMEDIATE STAY AND TO PETITION FOR WRIT OF SUPERSEDEAS, ETC.

☒ by placing the document(s) listed above in a sealed envelope(s) and by causing personal delivery of the envelope(s) to the person(s) at the address(es) set forth below.

[Opposition and Exhibits]

Michael R. Lozeau, Esq.
LOZEAU DRURY, LLP
1516 Oak Street, Suite 216
Alameda, California 94501
F: 510-749-9103
Attorneys for Petitioner Panoramic Hills Association

[Opposition and Exhibits]

Stephan C. Volker, Esq.
LAW OFFICES OF STEPHAN C. VOLKER
436 – 14th Street, Suite 1300
Oakland, CA 94612
F: 510-496-1366
Attorneys for Petitioners California Oak Foundation, et al.

[Opposition only; no Exhibits]

Alameda Superior Court
1225 Fallon Street
Oakland, CA 94612

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on August 1, 2008 at San Francisco, California.

Victoria Fedoroff