STATE OF CALIFORNIA ARNOLD SCHWARZENEGGER, *Governor*

COMMISSION ON STATE MANDATES
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October 23, 2009

Mr. Michael Johnston
Clovis Unified School District
1450 Herndon Avenue
Clovis, CA 93611-0599

And Interested Parties and Affected State Agencies (See Enclosed Mailing List)

RE: Draft Staff Analysis and Hearing Date
California Environmental, Quality Act, 03-TC-17
Education Code Section 17025, et al.
Clovis Unified School District, Claimant

Dear Mr. Johnston:

The draft staff analysis of this test claim is enclosed for your review and comment.

Written Comments

Any party or interested person may file written comments on the draft staff analysis by **Friday, November 13, 2009**. You are advised that comments filed with the Commission are required to be simultaneously served on the other interested parties on the mailing list, and to be accompanied by a proof of service. (Cal. Code Regs., tit. 2, § 1181.2.) If you would like to request an extension of time to file comments, please refer to section 1183.01, subdivision (c)(1), of the Commission's regulations.

Hearing

This test claim is set for hearing on **Friday, January 29, 2010,** at 9:30 a.m. in Room 447 of the State Capitol, Sacramento, California. The final staff analysis will be issued on or about January 14, 2010. Please let us know in advance if you or a representative of your agency will testify at the hearing, and if other witnesses will appear. If you would like to request postponement of the hearing, please refer to section 1183.01, subdivision (c)(2), of the Commission's regulations.

Please contact Heather Halsey at (916) 445-9429 if you have questions.

Sincerely,

PAULA HIGASHI
Executive Director

Enc. Draft Staff Analysis

Hearing Date: January 29, 2010
J:\MANDATES\2003\TC\03-tc-17\TC\DSA

ITEM ____
TEST CLAIM
DRAFT STAFF ANALYSIS

Education Code Section 17025 added by Statutes 1996, Chapter 1562

Government Code Sections 66031 and 66034 as amended by Statutes 1994, Chapter 300, and Statutes 1990, Chapter 1455

Public Resources Code Sections 21002.1, 21003, 21003.1, 21080.09, 21080.1, 21080.3, 21080.4, 21081, 21082, 21082.1, 21082.2, 21083, 21083.2, 21091, 21092, 21092.1, 21092.2, 21092.3, 21092.4, 21092.5, 21092.6, 21094, 21100, 21102, 21150, 21151, 21151.2, 21151.8, 21152, 21153, 21154, 21157, 21157.1, 21157.5, 21158, 21161, 21165, 21166, 21167, 21167.6, 21167.6.5, 21167.8, 21168.9 as added or amended by Statutes 1970, Chapter 1433; Statutes 1972, Chapter 1154; Statutes 1975, Chapter 222; Statutes 1976, Chapter 1312; Statutes 1977, Chapter 1200; Statutes 1983, Chapter 967; Statutes 1984, Chapter 571; Statutes 1985, Chapter 85; Statutes 1987, Chapter 1452; Statutes 1989, Chapter 626; Statutes 1989, Chapter 659; Statutes 1991, Chapter 905; Statutes 1991, Chapter 1183; Statutes 1991, Chapter 1212; Statutes 93, Chapter 375; Statutes 1993, Chapter 1130; Statutes 1993, Chapter 1131; Statutes 1994, Chapter 1230; Statutes 1994, Chapter 1294; Statutes 1995, Chapter 801; Statutes 1996, Chapter 444; Statutes 1996, Chapter 547; Statutes 1997, Chapter 415; Statutes 2000, Chapter 738; Statutes 2001, Chapter 867; Statutes 2002, Chapter 1052; Statutes 2002, Chapter 1121

California Code of Regulations, Title 5, Sections 14011 and 57121 as added or amended by Register 77, Nos. 01 & 45; Register 83, No. 18;
Register 91, No. 23; Register 93, No. 46; and, Register 2000, No. 44

California Code of Regulations, Title 14, Sections 15002, 15004, 15020, 15021, 15022, 15025, 15041, 15042, 15043, 15050, 15053, 15060, 15061, 15062, 15063, 15064 15064.5, 15064.5, 15064.7 15070, 15071, 15072, 15073, 15073.5, 15074, 15074.1, 15075, 15081.5, 15082, 15084, 15085, 15086, 15087, 15088, 15088.5, 15089, 15090, 15091, 15092, 15093, 15094, 15095, 15100, 15104, 15122, 15123, 15124, 15125, 15126, 15126.2, 15126.4, 15126.6, 15128, 15129, 15130, 15132, 15140, 15142, 15143, 15145, 15147, 15148, 15149, 15150, 15152, 15153, 15162, 15164, 15165, 15167, 51568, 15176, 15177, 15178, 15179, 15184, 15185, 15186, 15201, 15203, 15205, 15206, 15208, 15223, 15225, 15367 as added or amended by register 75, No. 01; Register 75, Nos. 05, 18 & 22; Register 76, Nos. 02, 14 & 41; Register 77, No. 01; Register 78, No. 05; Register 80, No. 19; Register 83, Nos. 29; Register 86, No. 05; Register 94, No. 33; Register 97, No. 22; Register 98, No. 35; Register 98, No. 44; Register 2001, No. 05; Register 2003, No. 30

California State Clearinghouse Handbook
Governor's Office of Planning and Research (January 2000)

California Environmental Quality Act

03-TC-17

Clovis Unified School District, Claimant

EXECUTIVE SUMMARY

This test claim addresses the activities required of school districts, county offices of education and community college districts pursuant to the California Environmental Quality Act (CEQA) and related statutes and regulations.[1] To assist the reader, there is a glossary of frequently used CEQA related terms and acronyms on page 54.

CEQA provides a process for evaluating the environmental effects of a project, and includes statutory exemptions, as well as categorical exemptions that can be found in CEQA and the CEQA regulations. If a project is not exempt from CEQA, an initial study is prepared to determine whether a project may have a significant effect on the environment. If the initial study shows that there would not be a significant effect on the environment, the lead agency must prepare a negative declaration (ND). If the initial study shows that the project may have a significant effect on the environment, the lead agency must prepare an environmental impact report (EIR). If the EIR includes finding of significant environmental impacts, CEQA imposes a substantive requirement to adopt feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of the project.[2] The EIR requirement, which effectively accomplishes the above purposes, is "the heart of CEQA."[3]

The project proponent is generally responsible for the costs of CEQA compliance, including the costs of preparing the EIR, if required. Generally, an EIR must accurately describe the proposed project, identify and analyze each significant environmental impact expected to result from the proposed project, identify mitigation measures to reduce those impacts to the extent feasible, and evaluate a range of reasonable alternatives to the proposed project. Prior to approving any project that has received environmental review, a lead agency must make certain findings. If mitigation measures are required or incorporated into a project, the lead agency must adopt a reporting or monitoring program to ensure compliance with those measures. If a mitigation measure would cause one or more significant effects in addition to those that would be caused by the proposed project, the effects of the mitigation measure must be discussed but in less detail than the significant effects of the proposed project.

Staff concludes that the test claim statutes, regulations and alleged executive orders do not impose a reimbursable state-mandated program within the meaning of article XIII B, section 6 of the California Constitution because:

1. The California State Clearinghouse Handbook is not an executive order subject to Article XIII B, Section 6.
2. The Commission does not have jurisdiction over statutes adopted prior to January 1, 1975.
3. The statutes and regulations listed below, which generally require compliance with the CEQA process, do not mandate school districts or community college districts to perform any activities because:

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[1] Note that, as discussed in the staff analysis, staff finds that the California State Clearinghouse Handbook is not an executive order.

[2] Public Resources Code section 21002.

[3] *County of Inyo v. Yorty* (1973) 32 Cal. App. 3d 795.

A. The plain language of Public Resources Code section 21083 imposes requirements on OPR and the Secretary of the Resources Agency, not school districts or community college districts.

B. Although school districts and community college districts are required to undertake maintenance projects, including emergency repair projects, CEQA contains specific exemptions for maintenance projects and emergency projects.

C. For all other school district and community college district projects, CEQA is triggered by the district's voluntary decision to undertake a project or accept state funding for a project.

Education Code Section 17025 added by Statutes 1996, Chapter 1562; Government Code Sections 66031 and 66034 as amended by Statutes 1994, Chapter 300, and Statutes 1990, Chapter 1455; Public Resources Code Sections 21002.1, 21003, 21003.1, 21080.09, 21080.1, 21080.3, 21080.4, 21081, 21082.1, 21082.2, 21083, 21083.2, 21091, 21092, 21092.1, 21092.2, 21092.3, 21092.4, 21092.5, 21092.6, 21094, 21100, 21151, 21151.2, 21151.8, 21152, 21153, 21157, 21157.1, 21157.5, 21158, 21161, 21165, 21166, 21167, 21167.6, 21167.6.5, 21167.8, 21168.9 as added or amended by Statutes 1975, Chapter 222; Statutes 1976, Chapter 1312; Statutes 1977, Chapter 1200; Statutes 1983, Chapter 967; Statutes 1984, Chapter 571; Statutes 1985, Chapter 85; Statutes 1987, Chapter 1452; Statutes 1989, Chapter 626; Statutes 1989, Chapter 659; Statutes 1991, Chapter 905; Statutes 1991, Chapter 1183; Statutes 1991, Chapter 1212; Statutes 93, Chapter 375; Statutes 1993, Chapter 1130; Statutes 1993, Chapter 1131; Statutes 1994, Chapter 1230; Statutes 1994, Chapter 1294; Statutes 1995, Chapter 801; Statutes 1996, Chapter 444; Statutes 1996, Chapter 547; Statutes 1997, Chapter 415; Statutes 2000, Chapter 738; Statutes 2001, Chapter 867; Statutes 2002, Chapter 1052; Statutes 2002, Chapter 1121; California Code of Regulations, Title 5, Sections 14011 and 57121 as added or amended by Register 77, Nos. 01 & 45; Register 83, No. 18; Register 91, No. 23; Register 93, No. 46; and, Register 2000, No. 44 and California Code of Regulations, Title 14, Sections 15002, 15004, 15020, 15021, 15025, 15041, 15042, 15043, 15050, 15053, 15060, 15061, 15062, 15063, 15064 15064.5, 15064.5, 15064.7 15070, 15071, 15072, 15073, 15073.5, 15074, 15074.1, 15075, 15081.5, 15082, 15084, 15085, 15086, 15087, 15088, 15088.5, 15089, 15090, 15091, 15092, 15093, 15094, 15095, 15100, 15104, 15122, 15123, 15124, 15125, 15126, 15126.2, 15126.4, 15126.6, 15128, 15129, 15130, 15132, 15140, 15142, 15143, 15145, 15147, 15148, 15149, 15150, 15152, 15153, 15162, 15164, 15165, 15167, 51568, 15176, 15177, 15178, 15179, 15184, 15185, 15186, 15201, 15203, 15205, 15206, 15208, 15223, 15225, 15367 as added or amended by register 75, No. 01; Register 75, Nos. 05, 18 & 22; Register 76, Nos. 02, 14 & 41; Register 77, No. 01; Register 78, No. 05; Register 80, No. 19; Register 83, Nos. 29; Register 86, No. 05; Register 94, No. 33; Register 97, No. 22; Register 98, No. 35; Register 98, No. 44; Register 2001, No. 05; Register 2003, No. 30.

4. Public Resources Code section 21082, as amended by Statutes 1976, chapter 1312 and California Code of Regulations, title 14, section 15022, as amended by Register 83, No. 29 do not impose a new program or higher level of service on school districts and community college districts because:

A. The Public Resources Code section 21082 requirement for school districts and community college districts to adopt objectives, criteria, and procedures, consistent with CEQA and the CEQA regulations, for the preparation of NDs by ordinance, resolution, rule or regulation, added in 1976, was a clarification of existing law regarding "evaluation of projects" and therefore does not impose a new program or higher level of service.

B. The requirement to adopt objectives, criteria, and procedures, for the evaluation of projects and the preparation of environmental documents pursuant to CEQA was required by the law as it existed immediately prior to the date that California Code of Regulations, title 14, section 15022 was adopted and has been continuously required by the Public Resources Code Section 21082 since January 1, 1973 and therefore does not impose a new program or higher level of service.

Staff Recommendation

Staff recommends that the Commission adopt this staff analysis to deny the test claim.

STAFF ANALYSIS

Claimant

Clovis Unified School District

Chronology

09/25/2003	Claimant, Clovis Unified School District, filed test claim with the Commission on State Mandates ("Commission")[4]
10/08/2003	Commission staff issued completeness review letter and requested comments from state agencies
10/28/2003	Department of Finance (DOF) requested an extension from the November 11, 2003 deadline to file comments in February, 2004
11/07/2003	The Commission granted DOF's request allowing an extension to February 7, 2004 to file comments on test claim
02/13/2004	DOF requested an additional 30-day extension to file comments
02/18/2004	The Commission granted DOF's request for an extension to March 19, 2004 to file comments on test claim
03/08/2004	DOF submitted comments on the test claim
03/31/2004	Claimant submitted a response to DOF's comments on the test claim
06/30/2008	Claimant submitted a supplement to the test claim filing (i.e. the history of Title 5 and 14 CCR sections pled in the test claim)

Background

This test claim addresses the activities required of school districts, county offices of education and community college districts pursuant to the California Environmental Quality Act (CEQA) and related statutes and regulations.[5]

CEQA OVERVIEW

CEQA was enacted in 1970 and is currently contained in Public Resources Code sections 21000-21177. There are also numerous statutory provisions relating to CEQA that are contained in other codes. Those pled in this test claim include Education Code section 17025 as added by Statutes 1996, chapter 1562 and Government Code sections 66031 and 66034 as amended by Statutes 1994, chapter 300, and Statutes 1990, chapter 1455. In addition to these code sections, interpretive regulations for implementing CEQA, officially known as "the CEQA Guidelines," were first adopted in 1973 and have been amended numerous times since then. The CEQA Guidelines are located in California Code of Regulations, title 14, sections 15000-15387. This

[4] Based on the filing date of September 25, 2003, the potential period of reimbursement for this test claim begins on July 1, 2002.

[5] Note that, as discussed in the analysis below, staff finds that the California State Clearinghouse Handbook is not an executive order.

analysis will refer to the Public Resources Code sections 21000-21177 collectively as "CEQA" and the CEQA Guidelines (i.e. California Code of Regulations, title 14, sections 15000-15387) collectively as "the CEQA regulations."

The purposes of CEQA are:

- to inform decisionmakers and the public about project impacts;
- identify ways to avoid or significantly reduce environmental damage;
- prevent environmental damage by requiring feasible alternatives or mitigation measures;
- disclose to the public reasons why an agency approved a project if significant environmental effects are involved, involve public agencies in the process; and,
- increase public participation in the environmental review and the planning processes.[6]

CEQA provides a process for evaluating the environmental effects of a project, and includes statutory exemptions, as well as categorical exemptions that can be found in CEQA and the CEQA regulations. If a project is not exempt from CEQA, an initial study is prepared to determine whether a project may have a significant effect on the environment. If the initial study shows that there would not be a significant effect on the environment, the lead agency must prepare a negative declaration (ND). If the initial study shows that the project may have a significant effect on the environment, the lead agency must prepare an environmental impact report (EIR). If the EIR includes finding of significant environmental impacts, CEQA imposes a substantive requirement to adopt feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of the project.[7] The EIR requirement, which effectively accomplishes the above purposes, is "the heart of CEQA."[8]

The project proponent is generally responsible for the costs of CEQA compliance, including the costs of preparing the EIR, if required. Generally, an EIR must accurately describe the proposed project, identify and analyze each significant environmental impact expected to result from the proposed project, identify mitigation measures to reduce those impacts to the extent feasible, and evaluate a range of reasonable alternatives to the proposed project. Prior to approving any project that has received environmental review, a lead agency must make certain findings. If mitigation measures are required or incorporated into a project, the lead agency must adopt a reporting or monitoring program to ensure compliance with those measures. If a mitigation measure would cause one or more significant effects in addition to those that would be caused by the proposed project, the effects of the mitigation measure must be discussed but in less detail than the significant effects of the proposed project.

[6] Public Resources Code section 21002, California Code of Regulations, title 14, section 15002.

[7] Public Resources Code section 21002.

[8] *County of Inyo v. Yorty* (1973) 32 Cal. App. 3d 795.

PUBLIC AGENCY ROLES IN THE CEQA PROCESS

Lead Agencies

Existing law, pursuant to CEQA, requires public and private projects to be subject to the same level of environmental review.[9] In keeping with the recognition of the diverse conditions throughout the state and out of deference to local control over local land use decisions,[10] CEQA generally provides for a local agency to take responsibility for CEQA compliance for projects within its jurisdiction. Specifically, CEQA requires a local agency, such as a school district or a community college district,[11] to conduct an analysis of the environmental impacts associated with projects within its jurisdiction. A district acting in this capacity would be referred to as the "lead agency." A lead agency for a private project is the agency with the greatest responsibility for supervising or approving the project; usually the city or county.[12] However, in the case of public projects, such as a school project, the lead agency is the project proponent,[13] in this case, the school district or community college district. This is true even when the project is in another agency's jurisdiction.[14]

Responsible Agencies

A public agency, other than the lead agency, that has some discretionary power to approve or carry out a project (usually the authority to grant a needed permit) for which the lead agency is preparing an EIR or ND is known as a "responsible agency."[15] With few exceptions, responsible agencies are bound by the lead agency's determination of whether to prepare an EIR or ND and by the document prepared by the lead agency.[16] In certain instances, responsible agencies can

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[9] Public Resources Code section 21001.1; California Code of Regulations, title 14, 15002.

[10] Note that most of California's environmental laws (see e.g. the California Clean Air Act and the Planning and Zoning Law) specifically recognize local agency control over land use decisions and impose mainly procedural requirements on local agency decision making. See also *Bownds v. City of Glendale* (1980) 113 Cal.App.3d 875, 879 [""Land use regulation in California has historically been a function of local government under the grant of police power contained in California Constitution, article XI, section 7." (We have recognized that a city's or county's power to control its own land use decisions derives from this inherent police power, not from the delegation of authority by the state. [Citations]".]

[11] The CEQA regulations define "local agency" to mean "any public agency other than a state agency, board, or commission. Local agency includes but is not limited to cities, counties, charter cities and counties, *districts*, *school districts*, special districts, redevelopment agencies, local agency formation commissions, and any board, commission, or organizational subdivision of a local agency when so designated by order or resolution of the governing legislative body of the local agency." (Tit. 14, Cal. Code of Regs., § 15368, emphasis added.)

[12] California Code of Regulations, title 14, section 15051(b).

[13] California Code of Regulations, title 14, section 15051(a).

[14] Id.

[15] California Code of Regulations, title 14, section 15381.

[16] See Public Resources Code section 21080.1(a); California Code of Regulations, title 14, section 15050(c).

challenge lead agency determinations, assume the lead agency role, or participate in other ways in the CEQA process. Generally, responsible agencies have two sets of responsibilities:

(1) responding to the lead agency's request for information or comments as the lead agency determines whether to prepare an EIR or ND and commenting on any CEQA documents that are prepared; and,

(2) responsibilities related to approving or acting on the project.[17]

Specifically, in its role as consultant to the lead agency, the responsible agency:

(1) Makes a recommendation on whether to prepare an EIR or ND.[18]

(2) Sends a written reply within 30 days after receiving a notice of preparation (NOP) of an EIR specifying the scope and content of information, germane to the responsible agency's statutory responsibilities, which should be included in the EIR.[19]

(3) Designates a representative to attend meetings requested by the lead agency regarding scope and content of the EIR.[20]

(4) Provides comments, limited to the project activities within the responsible agency's area of expertise, on the draft EIR (DEIR) or ND focusing on any shortcomings in the document or any additional alternatives or mitigation measures that should be considered.[21] The comments must be specific as possible and supported by specific oral or written documentation.[22]

(5) Provides the lead agency with performance standards for mitigation measures proposed by the responsible agency. The responsible agency may also request project changes or specific mitigation measures but then must also prepare the mitigation monitoring or reporting program for those changes if requested to do so by the lead agency.[23]

With regard to its responsibilities related to approving or acting on its own project, the responsible agency must:

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[17] See generally Public Resources Code section 21080.3; California Code of Regulations, title 14, section 15096.

[18] California Code of Regulations, title 14, section 15096, subdivision (b)(1).

[19] Public Resources Code section 21080.4, subdivision (a); California Code of Regulations, title 14, section 15096, subdivision (b)(1).

[20] California Code of Regulations, title 14, section 15096, subdivision (c).

[21] Public Resources Code section 21153(c); California Code of Regulations, title 14, sections 15086, subdivision (c) and 15096, subdivision (d).

[22] Id.

[23] Public Resources Code section 21081.6, subdivision (c); California Code of Regulations, title 14, 15086, subdivision (d).

(1) Consider environmental effects of the project as shown in the EIR or ND and feasible mitigation measures within the responsible agency's powers.[24]

(2) Decide whether the EIR or ND is adequate for its use and, if not:

a. take the issue to court within 30-days after the lead agency has filed the notice of determination (NOD);

b. prepare a subsequent EIR if permissible under California Code of Regulations, title 14, section 15162; or,

c. assume the lead agency role if permissible under California Code of Regulations, title 14, section 15052, subdivision (a)(3).[25]

(3) Make findings, adopt a reporting or monitoring program (if required) and file a NOD with the Office of Planning and Research (OPR) if a state agency, or the county clerk if a local agency.[26]

Trustee Agencies

A "trustee agency" is a state agency that has jurisdiction by law over natural resources affected by a project that are held in trust for the people of the State of California. Trustee agencies include:

a. The California Department of Fish and Game with regard to the fish and wildlife of the state, to designated rare or endangered native plants, and to game refuges, ecological reserves, and other areas administered by the department.

b. The State Lands Commission with regard to state owned "sovereign" lands such as the beds of navigable waters and state school lands.

c. The State Department of Parks and Recreation with regard to units of the State Park System.

All of the lead agency consultation requirements that apply with regard to responsible agencies also apply to trustee agencies and trustee agencies may only make substantive comments regarding project activities within their area of expertise.[27] For any project where a ND is proposed and a state agency is a trustee agency, the draft ND must be sent to OPR for state agency review.[28]

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[24] California Code of Regulations, title 14, 15096; see also California Code of Regulations, title 14, section 15050, subdivision (b) regarding certification.

[25] California Code of Regulations, title 14, section 15096, subdivision (e).

[26] Public Resources Code sections 21108, 21152 and 21081.6; California Code of Regulations, title 14, sections 15096 and 15097.

[27] Public Resources Code sections 21080.3, 21080.4, 21104, and 21153; California Code of Regulations, title 14, sections 15082, 15086, 15104.

[28] Public Resources Code section 21091; California Code of Regulations, title 14, sections 15073, subdivision (c) and 15205, subdivision (b).

Other Agencies That Must be Consulted

a. The University of California with regard to sites within the Natural Land and Water Reserves System.[29]

b. Transportation planning agencies, for projects of statewide, regional or areawide significance.[30]

c. Planning commissions, for school site acquisition projects.[31]

d. Air quality agencies, for school construction projects.[32]

The Office of Planning and Research

The CEQA regulations are unique in that they are prepared by OPR and then adopted by the Resources Agency pursuant to Public Resources Code section 21083. Therefore, the regulations are actually regulations of the Resources Agency. However, OPR is responsible for carrying out various state level environmental review activities pursuant to CEQA, including:

(1) Preparing and developing proposed CEQA Guidelines and reviewing the adopted CEQA Guidelines, at least once every two years, and recommending proposed changes or amendments to the Secretary of Resources.[33]

(2) Receiving, evaluating and making recommendations to the Secretary of the Resources Agency for changes to the list of categorically exempt projects.[34]

(3) Upon request from a lead agency, assisting the lead agency in determining which agencies are responsible agencies.[35]

(4) Upon request from a lead agency, assisting the lead agency in determining which public agencies have responsibility for carrying out or approving a proposed project and notifying responsible agencies regarding meetings requested by the lead agency.[36]

(5) Resolving disputes over which agency is the lead agency.[37]

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[29] California Code of Regulations, title 14, section 15386.

[30] Public Resources Code section 21092.4.

[31] Public Resources Code section 21151.2.

[32] Public Resources Code section 21151.8.

[33] Public Resources Code sections 21083 and 21087.

[34] Public Resources Code section 21086.

[35] Public Resources Code section 21080.3.

[36] Public Resources Code section 21080.4.

[37] Public Resources Code section 21165.

(6) Receiving for filing the following notices and CEQA documents:

a. A state agency notice of exemption (NOE).[38]

b. DEIRs, NDs and other environmental documents to be reviewed by state agencies.[39]

c. Notices of Completion (NOCs) for state or local agency DEIRs and final EIRs (FEIRs).[40]

d. NODs if:

i. a state agency is the lead agency and the project was approved using an ND or an EIR;[41] or,

ii. a local agency is the lead agency but the project requires a discretionary approval from a state agency.[42]

(7) Coordinating state-level review of CEQA documents including:

a. Receiving for filing the following notices and CEQA documents:

i. A state agency NOE.[43]

ii. NOPs for projects where a state agency is a responsible or trustee agency.[44]

iii. DEIRs, NDs and other environmental documents to be reviewed by state agencies or for projects of statewide, regional or areawide significance.[45]

iv. NOCs for state or local agency DEIRs and FEIRs.[46]

v. NODs if:

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[38] Public Resources Code section 21080.4 subdivision (d); California Code of Regulations, title 14, section 15023 subdivision (e).

[39] California Code of Regulations, title 14, section 15025 subdivision (b).

[40] Public Resources Code section 21108 subdivision (b): California Code of Regulations, title 14, section 15062 subdivisions (b) and (c).

[41] Public Resources Code section 21108, subdivision (a); California Code of Regulations, title 14, section 15075 and 15094.

[42] California Code of Regulations, title 14, sections 15075 and 15094.

[43] Public Resources Code section 21080.4 subdivision (d); California Code of Regulations, title 14, section 15023 subdivision (e).

[44] California Code of Regulations, title 14, section 15082 subdivision (d).

[45] California Code of Regulations, title 14, sections 15205, subdivision (b) and 15206, subdivision (a).

[46] Public Resources Code section 21108, subdivision (b); California Code of Regulations, title 14, section 15062, subdivisions (b) and (c).

- A state agency is the lead agency and the project was approved using an ND or an EIR; [47] or,
- A local agency is the lead agency but the project requires a discretionary approval from a state agency.[48]

b. Receiving certain CEQA documents and notices from state and local agencies and distributing them to appropriate state agencies (i.e. responsible and trustee agencies) for review and comment.[49]

c. Ensuring that responsible and trustee agencies provide necessary information in response to NOPs.[50]

(8) Establishing, maintaining, and making available through the Internet, a central repository for NOEs, NOPs, NOCs, and NODs.[51]

(9) Providing the California State Library with copies of any CEQA documents submitted in electronic format to OPR. The California State Library serves as the repository for such electronic documents and must make them available for viewing to the general public, upon request.[52]

The Resources Agency

The Secretary of the Resources Agency is responsible for fulfilling the following duties:

(1) Adopting and amending the CEQA Guidelines.[53]

(2) Adopting categorical exemptions from CEQA.[54]

(3) Certifying state environmental programs that qualify as certified regulatory programs and receiving and filing notices filed by certified regulatory programs.[55]

ADOPTION OF AGENCY PROCEDURES TO IMPLEMENT CEQA

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[47] Public Resources Code section 21108, subdivision (a); California Code of Regulations, title 14, section 15075, and 15094.

[48] California Code of Regulations, title 14, sections 15075 and 15094.

[49] Public Resources Code section 21091; California Code of Regulations, title 14, section 15023, subdivision (c).

[50] Public Resources Code sections 21080.4 subdivision (d); California Code of Regulations, title 14, section 15023.

[51] Public Resources Code section 21159.9, subdivision (c); California Code of Regulations, title 14, section 15023, subdivision (h). These notices may be found at www.ceqanet.ca.gov.

[52] Public Resources Code section 21159.9, subdivision (d).

[53] Public Resources Code section 21083; California Code of Regulations, title 14, section 15024.

[54] Public Resources Code section 21084; California Code of Regulations, title 14, section 15024.

[55] Public Resources Code section 21080.5; California Code of Regulations, title 14, section 15024.

Both CEQA and the CEQA regulations require public agencies to adopt their own objectives, criteria, and procedures, consistent with CEQA and the CEQA regulations, for implementing CEQA by ordinance, resolution, rule or regulation.[56] In adopting its procedures, the public agency has a choice of the following approaches:

(1) Adopting the CEQA regulations by reference.

(2) Adopting the CEQA regulations by reference and adopting some of its own provisions, specifically tailored to the agency's criteria that are consistent with CEQA and the CEQA regulations.

(3) Adopting a detailed set of its own objectives, criteria and procedures that are consistent with CEQA and the CEQA regulations.[57]

If the agency adopts its own procedures without incorporating the CEQA regulations by reference, the agency's objectives, criteria and procedures must incorporate all of the necessary requirements.[58] A school district, community college district, or any other district, whose boundaries are coterminous with a city, county, or city and county, may utilize the objectives, criteria, and procedures of the city, county, or city and county, as may be applicable, in which case, the school district or other district need not adopt objectives, criteria, and procedures of its own.[59]

THE CEQA PROCESS[60]

Types of Projects Subject to CEQA

Under CEQA, "project" means an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, *and* which is any of the following:

(a) An activity directly undertaken by any public agency.

(b) An activity undertaken by a person which is supported, in whole or in part, through contracts, grants, subsidies, loans, or other forms of assistance from one or more public agencies.

(c) An activity that involves the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies.[61]

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[56] Public Resources Code section 21082, California Code of Regulations, title 14, section 15022, subdivision (a).

[57] California Code of Regulations, title 14, section 15022, subdivision (d).

[58] Id.

[59] Public Resources Code section 21082.

[60] Note that this background on the CEQA process is based upon the current requirements of CEQA and the CEQA regulations/CEQA Guidelines and is meant only to provide the reader with an overview of the CEQA process. It in no way distinguishes the test claim statutes and regulations from the requirements of pre-1975 law or from any changes that have been made to those statutes and regulations since the filing of the test claim.

[61] Public Resources Code section 21065.

A CEQA analysis is required only for discretionary projects, that is, projects that may or may not be approved at the district's discretion. Ministerial projects, meaning projects that must be approved if all applicable legal criteria are met, do not require CEQA analysis.[62] Under CEQA, a project is "ministerial" if it "involv[es] little or no personal judgment by the public official as to the wisdom or manner of carrying out the project."[63]

Additionally, a project is not subject to CEQA if it can be seen with certainty that there is no possibility of a significant effect on the environment.[64] ""Significant effect on the environment" means a substantial, or potentially substantial, adverse change in any of the physical conditions within the area affected by the project, including land, air, water, minerals, flora, fauna, ambient noise, and objects of historic or aesthetic significance.[65]

Preliminary Review

The lead agency must complete a preliminary review of a proposed activity to determine:

(1) Whether the application (for a private project) is complete.

(2) Whether the activity is subject to CEQA.

(3) Whether the activity is exempt from CEQA, and if so, whether to prepare and file an optional notice of exemption (NOE).[66] The filing of an NOE has no significance except that it triggers a 35-day statute of limitations.[67] Note that K-12 school districts are required, as a condition of receipt of state funding, to self-certify that they have filed the appropriate CEQA document.

Initial Study

If the lead agency determines that no exemptions apply to a project subject to CEQA and decides not to proceed directly to the preparation of an EIR, it must conduct an initial study which considers all phases of project planning, implementation, and operation to determine whether the project may have a significant effect on the environment.[68] Before making this determination,

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[62] See Public Resources Code section 21080, subdivisions (a) and (b)(1): California Code of Regulations, title 14, sections 15357 and 15369.)

[63] California Code of Regulations, title 14, section 15369.

[64] California Code of Regulations, title 14, section 15060.

[65] Public Resources Code section 21068; California Code of Regulations, title 14, section 15382.

[66] Public Resources Code Sections 21108 and 21152; California Code of Regulations, title 14, sections 15060, 15061 and 15062. See also *San Lorenzo Valley Community Advocates for Responsible Education v. San Lorenzo Valley Unified School District* (2006) 139 Cal.App.4th 1356, 1385 (A school district need not: prepare a detailed written evaluation to determine whether project is exempt, provide any notice or opportunity to review or comment on the exemption to any other agency or to the public, and, it need not hold a hearing on its exemption determination.)

[67] Id.

[68] California Code of Regulations, title 14, section 15063.

the lead agency must consult with responsible agencies and trustee agencies.[69] The purposes of an initial study are to provide the lead agency with information to use as the basis for deciding whether to prepare an EIR or negative declaration; enable an applicant or lead agency to modify a project, mitigating adverse impacts before an EIR is prepared, thereby enabling the project to qualify for a mitigated negative declaration (MND); assist in the preparation of an EIR, if one is required, by focusing the EIR on the effects determined to be significant, identifying the effects determined not to be significant, explaining the reasons for determining that potentially significant effects would not be significant, and identifying whether a program EIR, tiering, or another appropriate process can be used for analysis of the project's environmental effects; facilitate environmental assessment early in the design of a project; provide documentation of the factual basis for the finding in a negative declaration (ND) that a project will not have a significant effect on the environment; eliminate unnecessary EIRs; and, determine whether a previously prepared EIR could be used with the project.[70]

Negative Declaration

If the lead agency proposes to adopt an ND or an MND, it must:

(1) Prepare and distribute a notice of intent (NOI) to adopt an ND or MND.[71]

(2) Prepare the proposed ND and distribute it, together with the initial study for public and agency review.[72]

(3) Consider the proposed ND and comments and approve or disapprove the ND.[73]

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[69] Public Resources Code section 21080.3, subdivision (a). Note also that under CEQA and related statutes, school districts have additional special consultation requirements which include: Public Resources Code section 21151.2 (requirement to give the planning commission with jurisdiction over the site written notice of the district's intent to acquire title to property for a new or expanded school site); Public Resources Code section 21151.8 and Education Code section 17213 (requirement to include in any ND or EIR an analysis of hazardous substances on the site and requirement to consult with administering agency for hazardous material [generally the county health department]); Public Resources Code section 21151.8, subdivision (a)(2) and California Code of Regulations, title 14, section 15186, subdivision (c) (requirement to consult with local air pollution control district to ascertain whether any facilities within a quarter mile of the proposed site might emit hazardous materials, substances or waste; Education Code section 17213.1 (as a condition of receiving state funds, the requirement to consult with an environmental assessor to conduct a Phase I environmental assessment (and potentially a Phase II to determine whether hazardous materials are present, the extent of their release or threat of release) before acquiring an school site or before beginning construction of a project.

[70] California Code of Regulations, title 14, section 15063.

[71] Public Resources Code section 21092(a); California Code of Regulations, title 14, section 15072, subdivision (a).

[72] California Code of Regulations, title 14, section 15073.

[73] California Code of Regulations, title 14, section 15074.

(4) File and post a NOD, if the ND is adopted.[74] The filing and posting of the NOD triggers a 30-day statute of limitations, if it is not properly filed and posted, the statute of limitations is 180-days.

A lead agency may hold public hearings regarding the proposed ND at its option, but such hearings must be properly noticed.[75]

Prepare Draft Environmental Impact Report (DEIR)

A lead agency that determines that an EIR is required must complete the following steps:

(1) Draft and distribute a NOP stating that an EIR will be prepared.[76]

(2) Receive information and comments on the NOP and consider incorporating them into the DEIR.[77]

(3) Consult with other agencies and hold scoping meetings (scoping meetings can be voluntary or mandatory depending on the situation) with responsible and trustee agencies, other interested state and local agencies, and, with members of the public.[78]

(4) Consult with and request comments on the DEIR from:

a. Responsible agencies.

b. Trustee agencies with resources affected by the project.

c. Any other state, federal, and local agencies which have jurisdiction by law with respect to the project or which exercise authority over resources which may be affected by the project.

d. Any city or county which borders on a city or county within which the project is located.

e. For a project of statewide, regional, or areawide significance, the transportation planning agencies and public agencies which have transportation facilities within their jurisdictions which could be affected by the project. "Transportation facilities" includes: major local arterials and public transit within five miles of the project site, and freeways, highways and rail transit service within 10 miles of the project site.[79]

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[74] See generally Public Resources Code section 21080, subdivision (c); California Code of Regulations, title 14, section 15075.

[75] Public Resources Code section 21092.5, subdivision (b).

[76] Public Resources Code section 21080.4, subdivision (a); California Code of Regulations, title 14, section 15082, subdivision (a).

[77] California Code of Regulations, title 14, section 15084, subdivision (c).

[78] Public Resources Code section 21080.4, subdivision (b)

[79] Public Resources Code section 21081.7; California Code of Regulations, title 14, section 15086.

(5) Prepare or hire a consultant to prepare the DEIR.[80]

(6) Prepare a NOC when the DEIR is complete, file it with OPR, provide public notice in a newspaper of general circulation that the DEIR is available for review and comment, and, distribute the DEIR.[81]

Prepare Final Environmental Impact Report (FEIR)

(1) Receive and review comments on the DEIR, prepare written responses to each public agency that commented and to all comments on significant environmental issues for inclusion in the FEIR.[82]

(2) Determine whether any new "significant" information (including any new findings of significant impact) have been added to the FEIR after the DEIR was circulated and, if so, re-circulate the EIR for public review and comment.[83]

(3) Certify that the FEIR:

a. Has been completed in compliance with CEQA.

b. Was presented to the decision-making body of the lead agency, and that the decision-making body reviewed and considered the information contained in the final EIR prior to approving the project.

c. Reflects the lead agency's independent judgment and analysis.[84]

Project Approval Decision-making Process

(B) Once the FEIR has been certified the lead agency must consider the FEIR and decide whether or how to approve or carry out the project.[85]

(C) CEQA prohibits the approval of a project for which the EIR has identified one or more significant effects[86] on the environment unless it makes one of the following findings supported by substantial evidence in the record:

a. Changes or alterations have been required in, or incorporated into, the project which avoid or substantially lessen the significant environmental effect as

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[80] Public Resources Code sections 21082.1, subdivision (a) and 21151, subdivision (a); California Code of Regulations, title 14, sections 15085 and 15087.

[81] Public Resources Code section 21161; California Code of Regulations, title 14, section 15084, subdivision (a).

[82] Public Resources Code section 21092.5; California Code of Regulations, title 14, section 15088.

[83] Public Resources Code section 21092.1.

[84] California Code of Regulations, title 14, section 15090.

[85] California Code of Regulations, title 14, section 15092, subdivision (a).

[86] Note that CEQA and the CEQA regulations use the words "effects" and "impacts" interchangeably.

identified in the final EIR. (Note: If this finding is made, a mitigation monitoring reporting program must also be adopted.)

b. Such changes or alterations are within the responsibility and jurisdiction of another public agency and not the agency making the finding. Such changes have been adopted by such other agency or can and should be adopted by such other agency.

c. Specific economic, legal, social, technological, or other considerations, including provision of employment opportunities for highly trained workers, make infeasible the mitigation measures or project alternatives identified in the final EIR.[87]

(D) If there are unavoidable significant impacts, and the lead agency wants to approve the project anyway, it must adopt a statement of overriding considerations supported by substantial evidence in the record.[88]

Post Project Approval Requirements

(1) After approving the project the lead agency must:

a. File a copy of the FEIR with the appropriate planning agency of any cities or counties where significant effects on the environment may occur.

b. Retain one or more copies of the FEIR as public records for a reasonable period of time.

c. Require the applicant to provide a copy of the certified, FEIR to each responsible agency.[89]

(2) If mitigation measures were adopted for the project, the lead agency is responsible for implementing the mitigation monitoring or reporting program.[90]

(3) If there are substantial changes in the project or certain types of new information become available, a supplemental or subsequent EIR may be required.[91]

Special Rules Related to CEQA Litigation

(1) Any action brought in the superior court relating to any act or decision of a public agency made pursuant to CEQA may be subject to a mediation proceeding.[92]

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[87] Public Resources Code section 21002; California Code of Regulations, title 14, section 15091.

[88] California Code of Regulations, title 14, section 15093.

[89] California Code of Regulations, title 14, section 15095.

[90] Public Resources Code section 21081.6, subdivision (a); California Code of Regulations, title 14, section 15097.

[91] Public Resources Code section 21166; California Code of Regulations, title 14, sections 15162-15164.

[92] Government Code section 66031.

(2) If the mediation does not resolve the action, the court may, in its discretion, schedule a settlement conference before a judge of the superior court. If the action is later heard on its merits, the judge hearing the action shall not be the same judge who conducted the settlement conference, except in counties with only one judge of the superior court.[93]

Costs of CEQA Compliance

In general, the project proponent (also known as the applicant) bears 100 percent of the lead agency's costs for CEQA compliance, which often includes the cost of hiring a consultant to prepare the CEQA document. A lead agency is authorized to "charge and collect a reasonable fee from any person proposing a project subject to [CEQA] in order to recover the estimated costs incurred by the lead agency" for preparing a ND or an EIR for the project and for procedures necessary to comply with CEQA on the project.[94] Additionally, the lead agency may require an applicant to provide data and information for CEQA compliance purposes.[95] These costs are generally considered a part of the cost of the project. For public projects, the cost is born by the public project proponent unless the project proponent has fee authority or qualifies for one of the many state or federal construction grants which authorize CEQA expenses as part of the cost of the project.

Claimant's Position

Claimant alleges reimbursable state-mandated costs to school districts and community college districts for "developing, adopting and implementing policies and procedures, and periodically revising those policies and procedures, to comply with the requirements of [CEQA], and related statutes and regulations."[96] Claimant additionally asserts that the test claim statutes and regulations impose a list, approximately 100 pages long, of reimbursable state-mandated activities relating to CEQA compliance. The specific activities claimed can be found in the test claim filing and the declarations of William C. McGuire, Clovis Unified School District and Thomas J. Donner, Santa Monica Community College District.[97]

In claimant's response to DOF's comments, claimant asserts that "DOF is mistaken" in its interpretation that CEQA is entirely a law of general application. Specifically, claimant cites to Education Code section 17025, subdivision (b) which provides that the applicant district is the lead agency for purposes of CEQA with regard to projects funded under the State School Building Lease-Purchase Law of 1976.[98] Thus, the claimant asserts, a school district, "when

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[93] Government Code section 66034.

[94] Public Resources Code section 21089, subdivision (a); California Code of Regulations, title 14, section 15045.

[95] Public Resources Code section 21082.1, subdivision (b); California Code of Regulations, title 14, section 15084, subdivision (b).

[96] Declarations of William C. McGuire, Clovis Unified School District and Thomas J. Donner, Santa Monica Community College District, p. 2.

[97] See Test Claim filing, pp. 4-185 and Declarations of William C. McGuire, Clovis Unified School District and Thomas J. Donner, Santa Monica Community College District, pp. 2-101.

[98] Claimant, Response to DOF Comments, March 31, 2004, p.2. Note also that claimant asserts on page 1 that "[t]he comments of DOF are incompetent and should be excluded." However,

constructing any new school or reconstructing or altering any existing building, is not only required to comply with CEQA, it is also required to fulfill the governmental duties of a lead agency. Other persons and entities are not required to do so."[99]

Claimant also disputes DOF's argument that school districts are not compelled to construct additional school facilities or acquire any site for the purposes of constructing a school building. Claimant cites to the following:

1. *Butt v. State of California*, which discusses the duty of the Legislature to "provide for a system of common schools, by which a school be kept up and supported in each district."[100]

2. A report of the California Research Bureau which states in part that one challenge public schools face ". . . .is the anticipated growth of nearly 2 million K-12 students during the next decade that will require many districts to build new schools to meet burgeoning student demand." [101] That report also discusses the shortfall of available funds to meet the need for public school construction and rehabilitation.

3. The March 2004 Proposition 55 ballot information pamphlet which discusses the "need to construct new schools to house nearly 1 million pupils and modernize schools for an additional 1.1 million pupils.[102]

Claimant states that "a finding of legal compulsion is not an absolute prerequisite to a finding of a reimbursable mandate"[103] and discusses the case law regarding practical compulsion. Claimant concludes that "[i]n light of the finding that there is a need to construct new schools to house 1.1 million pupils and the need to modernize schools for an additional 1.1 million pupils, it is beyond the realm of practical reason to opportunistically argue that there is no state law or regulation which requires a school district to construct additional school facilities or acquire any site for the purpose of constructing a school building."[104]

Claimant also disputes DOF's argument that the costs incurred under CEQA are allowable costs for the use of new construction grants provided by the State Allocation Board under the School Facilities Program (SFP). Specifically, Claimant argues:

DOF's comments on the test claim do not make any factual assertion and, in any event, are supported by the declaration of Walt Schaff. (See DOF, Comments on the Test Claim, dated March 8, 2004, p. 4.

[99] Claimant, Response to DOF Comments, supra, p.2

[100] Claimant, Response to DOF Comments, supra, p.2, citing *Butt v. State of California* (1992) 4 Cal. 4th 668, p. 680.

[101] Id, p.3, citing *School Facility Financing – A History of the Role of the State allocation Board and Options for the Distribution of Proposition 1A Funds* (Cohen, Joel, February 1999).

[102] Id.

[103] Id, p. 4.

[104] Id, p. 7.

> The district's necessary costs of CEQA are not funded out of the [State's share of] 50 percent given to school districts to construct or modernize schools. CEQA is a separate statutory program. In fact, Education Code section 17025, subdivision (a) provides that the State Allocation Board shall not authorize a contract for the construction of any new school, or for the addition to, or reconstruction or alteration of, any existing building, for lease-purchase to any school district unless the applicant district has submitted plans therefor [sic] to the Department of General Services and obtained the written approval of the department pursuant to Article 3 (commencing with Section 17280) of Chapter 3 of part 10.5.
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> DOF's argument in this regard is bereft of logic or legal foundation.[105]

Finally, claimant disagrees with DOF's position that Education Code Part 1, Chapter 6, Title 1, Division, 1 provides schools with authority to impose development fees and that therefore Government Code section 17556, subdivision (d) prohibits reimbursement for any state-mandated activities. Claimant argues: "Government Code section 17556(d) refers to 'service charges, fees or assessments.' Education Code 17620 refers to a 'fee, charge, dedication or other requirement.' They are not the same."[106] Claimant includes a discussion of the limitations on the purposes for which a "fee, charge or dedication" may be used (i.e. to fund the construction or reconstruction of school facilities but not for maintenance) pursuant to Government Code section 17620, subdivision (a) (1).

Department of Finance's Position

DOF, in its comments on the test claim, states that "[CEQA] requirements are not unique to local government.[107] In support of this argument DOF cites to Public Resources Code section 21001.1 and California Code of Regulations, title 14, section 15002. Public Resources Code section 21001.1 provides:

> The Legislature further finds and declares that it is the policy of the state that projects to be carried out by public agencies be subject to the same level of review and consideration under this division as that of private projects required to be approved by public agencies.

Moreover, DOF argues, CEQA applies to discretionary, school district proposed, projects and school facilities construction projects.[108] In support of this assertion DOF writes:

> Nothing in State law or regulation requires a school district to construct additional school facilities or to acquire any site for the purpose of constructing a school building. Instead, the law provides school districts with flexibility, discretion, and choice over the manner in which districts elect to house their student populations. For example, school districts have the discretion to operate year round multi-track schools or two kindergarten sessions per day, use portable classrooms or transport

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[105] Claimant, Response to DOF Comments, supra, pp. 7-8.

[106] Claimant, Response to DOF Comments, supra, p. 9.

[107] DOF, Comments on the Test Claim, March 8, 2004, p.1.

[108] DOF, Comments on the Test Claim, supra, p. 2.

students to underused schools. It is the district's voluntary decision to construct a school facility rather than using the aforementioned alternative that forced the district to carry out the activities required under CEQA.[109]

DOF also cites to the *Kern*[110] case for the proposition that "where a local government entity voluntarily participates in a statutory program, the State may require the entity to comply with reasonable conditions without providing additional funds to reimburse the entity for [the] increased level of activity."[111]

Next, DOF argues that the costs incurred under CEQA are allowable costs for the use of new construction grants provided by the State Allocation Board.[112] Specifically, DOF states "[t]he State Allocation Board provides new construction grants through the State School Facilities Program (SFP) to cover the State's share of all necessary project costs, which include costs incurred under CEQA. According to DOF, the State's share "is typically 50 percent, but may be up to 100 percent if a district receives hardship funding. Therefore, any necessary costs of CEQA are, in fact, funded through voluntary participation in the SFP."[113]

Finally, DOF argues that "school districts have the authority to charge development fees to finance construction projects."[114] Specifically, DOF asserts that Education Code sections 17620-17626 "authorize school districts to levy fees against any construction within its district boundaries for the purpose of funding school construction."[115] DOF concludes with a discussion of the prohibition against finding a reimbursable mandate in a statute or executive order ". . . .if the affected local agencies have authority to levy service charges, fees, or assessments sufficient to pay for the mandated program in the statute or executive order."[116]

Discussion

The courts have found that article XIII B, section 6, of the California Constitution recognizes the state constitutional restrictions on the powers of local government to tax and spend. "Its purpose is to preclude the state from shifting financial responsibility for carrying out governmental functions to local agencies, which are 'ill equipped' to assume increased financial responsibilities because of the taxing and spending limitations that articles XIII A and XIII B impose."[117] A test claim statute or executive order may impose a reimbursable state-mandated program if it orders or commands a local agency or school district to engage in an activity or

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[109] Id.

[110] *Department of Finance v. Commission on State Mandates* (*Kern*) (2003) 30 Cal. 4th 727.

[111] DOF, Comments on the Test Claim, supra, p. 2.

[112] Id.

[113] Id.

[114] DOF, Comments on the Test Claim, supra, p. 2.

[115] Id.

[116] Id.

[117] *County of San Diego v. State of California* (1997) 15 Cal.4th 68, 81.

task.[118] In addition, the required activity or task must be new, constituting a "new program," or it must create a "higher level of service" over the previously required level of service.[119]

The courts have defined a "program" subject to article XIII B, section 6, of the California Constitution, as one that carries out the governmental function of providing public services, or a law that imposes unique requirements on local agencies or school districts to implement a state policy, but does not apply generally to all residents and entities in the state.[120] To determine if the program is new or imposes a higher level of service, the test claim statutes and executive orders must be compared with the legal requirements in effect immediately before the enactment.[121] A "higher level of service" occurs when the new "requirements were intended to provide an enhanced service to the public."[122] Finally, the newly required activity or increased level of service must impose costs mandated by the state.[123]

The Commission is vested with exclusive authority to adjudicate disputes over the existence of state-mandated programs within the meaning of article XIII B, section 6.[124] In making its decisions, the Commission must strictly construe article XIII B, section 6, and not apply it as an "equitable remedy to cure the perceived unfairness resulting from political decisions on funding priorities."[125]

This analysis addresses the following issues:

1. Is the California State Clearinghouse Handbook an executive order subject to Article XIII B, section 6 of the California Constitution?
2. Does the Commission have jurisdiction over statutes adopted prior to January 1, 1975?
3. Do the test claim statutes and executive orders impose state-mandated duties on school districts and community college districts within the meaning of Article XIII B, section 6 of the California Constitution?

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[118] *Long Beach Unified School Dist. v. State of California* (1990) 225 Cal.App.3d 155, 174.

[119] *San Diego Unified School Dist. v. Commission on State Mandates* (2004) 33 Cal.4th 859, 878, (*San Diego Unified School Dist.)*; *Lucia Mar Unified School Dist. v. Honig* (1988) 44 Cal.3rd 830, 835 *(Lucia Mar)*.

[120] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 874-875 (reaffirming the test set out in *County of Los Angeles v. State of California* (1987) 43 Cal.3d 46, 56; see also *Lucia Mar, supra,*

[121] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878; *Lucia Mar, supra,* 44 Cal.3d 830, 835.

[122] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878.

[123] *County of Fresno v. State of California* (1991) 53 Cal.3d 482, 487; *County of Sonoma v. Commission on State Mandates* (2000) 84 Cal.App.4th 1265, 1284 (*County of Sonoma*); Government Code sections 17514 and 17556.

[124] *Kinlaw v. State of California* (1991) 54 Cal.3d 326, 331-334; Government Code sections 17551 and 17552.

[125] *County of Sonoma, supra,* 84 Cal.App.4th 1265, 1280, citing *City of San Jose v. State of California* (1996) 45 Cal.App.4th 1802, 1817.

4. Do the activities mandated by the test claim statutes and executive orders impose a new program or higher level of service on school districts and community college districts?

Issue 1: The California State Clearinghouse Handbook is Not an Executive Order Subject to Article XIIIB, Section 6

At the outset, staff finds that the California State Clearinghouse Handbook (Handbook) is not an executive order. An executive order is "any order, plan, requirement, rule or regulation" issued by the Governor or any official serving at the pleasure of the Governor.[126] Although the Handbook is issued by the Governor's Office of Planning and Research (OPR) and the director of OPR serves at the pleasure of the Governor, the Handbook does not impose an "order, plan, requirement, rule or regulation." Because the Handbook does not require districts to do anything and is not a plan, it is not an executive order. The Handbook merely explains the functions of the State Clearinghouse under CEQA and provides an overview of the environmental review process, summarizing requirements that have been established pursuant to statutory and regulatory provisions, including the test claim statutes and test claim regulations. The Handbook does not add any additional requirements above what is required by the relevant statutes and regulations but rather provides a tool to make compliance easier. Specifically, the Handbook is designed to make CEQA compliance easier for local agencies and school districts by laying things out in a simple step-by-step process. However, local agencies and school districts are free to refer solely to CEQA, the CEQA regulations and related statutes and regulations and to consult with their attorneys to determine how to navigate the CEQA process if that is their preference. Nonetheless, given the fact that courts have cited to the Handbook as a guide to how the CEQA process works in practice,[127] it has value as a guide to the process.

Issue 2: The Commission Does Not Have Jurisdiction and Reimbursement is Not Required for Statutes Enacted Prior to January 1, 1975

Before beginning a mandates analysis on the test-claim statutes and regulations, a determination of which statutes the Commission has jurisdiction over must be made. California Constitution Article XIII B, section 6, subdivision (a) requires the state to reimburse local governments for any state-mandated new program or higher level of service imposed on any local government with few exceptions. One of the exceptions to the reimbursement requirement provided in article XIII B, section 6 of the California Constitution is for "[l]egislative mandates enacted prior to January 1, 1975, or executive orders or regulations initially implementing legislation enacted prior to 1975."[128]

Staff finds that the Commission does not have jurisdiction over Public Resources Code sections 21082, 21083, 21100, 21102, 21150, 21151, 21152, 21153, 21154, 21165, 21166, or 21167 as added or amended by Statutes 1970, chapter 1433; and, Statutes 1972, chapter 1154 since these statutes were enacted prior to January 1, 1975. Staff also finds that Public Resources Code sections 21102, 21150 and 21154 have not been amended since 1972. Therefore, no

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[126] Government Code section 17516.

[127] *Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo* (1985) 172 Cal.App.3d 151. (Cited to show how the CEQA process works in practice.)

[128] California Constitution Article XIII B, Section 6 subdivision (a)(3); see also Government Code Section 17514.

constitutional or statutory provision mandates reimbursement to local governments for costs incurred in complying with these statutes.

Issue 3: Do the Remaining Test Claim Statutes and Regulations Impose State-Mandated Duties on School Districts and Community College Districts Within the Meaning of Article XIII B, Section 6 of the California Constitution?

For the test claim statutes or regulations to impose a state-mandated program, the language must order or command a school district or community college district to engage in an activity or task. If the language does not do so, then article XIII B, section 6 is not triggered. Moreover, where program requirements are only invoked after the district has made an underlying discretionary decision causing the requirements to apply, or where participation in the underlying program is voluntary, courts have held that resulting new requirements do not constitute a reimbursable state mandate.[129] Stated another way, a reimbursable state mandate is created when the test claim statutes or regulations establish conditions under which the state, rather than a local entity, has made the decision requiring the district to incur the costs of the new program.[130]

Staff finds that the statutes and regulations listed below, which generally require compliance with the CEQA process discussed at length in the background above on pages 5-19 do not mandate school districts or community college districts to perform any activities because:

A. The plain language of Public Resources Code section 21083 imposes requirements on OPR and the Secretary of the Resources Agency, not school districts or community college districts.

B. Although school districts and community college districts are required to undertake maintenance projects, including emergency repair projects, CEQA contains specific exemptions for maintenance projects and emergency projects.

C. For all other school district and community college district projects, CEQA is triggered by the district's voluntary decision to undertake a project or accept state funding for a project.

Education Code Section 17025 added by Statutes 1996, Chapter 1562; Government Code Sections 66031 and 66034 as amended by Statutes 1994, Chapter 300, and Statutes 1990, Chapter 1455; Public Resources Code Sections 21002.1, 21003, 21003.1, 21080.09, 21080.1, 21080.3, 21080.4, 21081, 21082.1, 21082.2, 21083, 21083.2, 21091, 21092, 21092.1, 21092.2, 21092.3, 21092.4, 21092.5, 21092.6, 21094, 21100, 21151, 21151.2, 21151.8, 21152, 21153, 21157, 21157.1, 21157.5, 21158, 21161, 21165, 21166, 21167, 21167.6, 21167.6.5, 21167.8, 21168.9 as added or amended by Statutes 1975, Chapter 222; Statutes 1976, Chapter 1312; Statutes 1977, Chapter 1200; Statutes 1983, Chapter 967; Statutes 1984, Chapter 571; Statutes 1985, Chapter 85; Statutes 1987, Chapter 1452; Statutes 1989, Chapter 626; Statutes 1989, Chapter 659; Statutes 1991, Chapter 905; Statutes 1991, Chapter 1183; Statutes 1991, Chapter 1212; Statutes 93, Chapter 375; Statutes 1993, Chapter 1130; Statutes

[129] *City of Merced v. State of California* (1984) 153 Cal.App.3d 777, 783; *Kern High School Dist., supra,* 30 Cal.4th 727, 727.

[130] *San Diego Unified School Dist., supra* (2004) 33 Cal.4th 859, 880.

1993, Chapter 1131; Statutes 1994, Chapter 1230; Statutes 1994, Chapter 1294; Statutes 1995, Chapter 801; Statutes 1996, Chapter 444; Statutes 1996, Chapter 547; Statutes 1997, Chapter 415; Statutes 2000, Chapter 738; Statutes 2001, Chapter 867; Statutes 2002, Chapter 1052; Statutes 2002, Chapter 1121; California Code of Regulations, Title 5, Sections 14011 and 57121 as added or amended by Register 77, Nos. 01 & 45; Register 83, No. 18; Register 91, No. 23; Register 93, No. 46; and, Register 2000, No. 44 and California Code of Regulations, Title 14, Sections 15002, 15004, 15020, 15021, 15025, 15041, 15042, 15043, 15050, 15053, 15060, 15061, 15062, 15063, 15064 15064.5, 15064.5, 15064.7 15070, 15071, 15072, 15073, 15073.5, 15074, 15074.1, 15075, 15081.5, 15082, 15084, 15085, 15086, 15087, 15088, 15088.5, 15089, 15090, 15091, 15092, 15093, 15094, 15095, 15100, 15104, 15122, 15123, 15124, 15125, 15126, 15126.2, 15126.4, 15126.6, 15128, 15129, 15130, 15132, 15140, 15142, 15143, 15145, 15147, 15148, 15149, 15150, 15152, 15153, 15162, 15164, 15165, 15167, 51568, 15176, 15177, 15178, 15179, 15184, 15185, 15186, 15201, 15203, 15205, 15206, 15208, 15223, 15225, 15367 as added or amended by register 75, No. 01; Register 75, Nos. 05, 18 & 22; Register 76, Nos. 02, 14 & 41; Register 77, No. 01; Register 78, No. 05; Register 80, No. 19; Register 83, Nos. 29; Register 86, No. 05; Register 94, No. 33; Register 97, No. 22; Register 98, No. 35; Register 98, No. 44; Register 2001, No. 05; Register 2003, No. 30.

However, staff finds that Public Resources Code section 21082, as amended by Statutes of 1976, chapter 1312 and California Code of Regulations, title 14 section 15022 as amended by Register 83, No. 29 mandate school districts and community college districts to adopt objectives, criteria, and procedures, consistent with CEQA and the CEQA regulations, for the preparation of NDs, by ordinance, resolution, rule or regulation, no later than 60 days after the Secretary of the Resources Agency adopts the CEQA regulations or amendments thereto. This requirement to adopt objectives, criteria, and procedures for NDs is not triggered by an underlying voluntary decision of a school district or community college district.

A. The plain language of Public Resources Code section 21083 imposes requirements on OPR and the Secretary of the Resources Agency, but does not impose mandated duties on school districts or community college districts.

Public Resources Code section 21083 provides:

(a) The Office of Planning and Research shall prepare and develop proposed guidelines for the implementation of this division by public agencies. The guidelines shall include objectives and criteria for the orderly evaluation of projects and the preparation of environmental impact reports and negative declarations in a manner consistent with this division.

(b) The guidelines shall specifically include criteria for public agencies to follow in determining whether or not a proposed project may have a "significant effect on the environment." The criteria shall require a finding that a project may have a "significant effect on the environment" if one or more of the following conditions exist:

(1) A proposed project has the potential to degrade the quality of the environment, curtail the range of the environment, or to achieve short-term, to the disadvantage of long-term, environmental goals.

(2) The possible effects of a project are individually limited but cumulatively considerable. As used in this paragraph, "cumulatively considerable" means that the incremental effects of an individual project are considerable when viewed in connection with the effects of past projects, the effects of other current projects, and the effects of probable future projects.

(3) The environmental effects of a project will cause substantial adverse effects on human beings, either directly or indirectly.

(c) The guidelines shall include procedures for determining the lead agency pursuant to Section 21165.

(d) The guidelines shall include criteria for public agencies to use in determining when a proposed project is of sufficient statewide, regional, or areawide environmental significance that a draft environmental impact report, a proposed negative declaration, or a proposed mitigated negative declaration shall be submitted to appropriate state agencies, through the State Clearinghouse, for review and comment prior to completion of the environmental impact report, negative declaration, or mitigated negative declaration.

(e) The Office of Planning and Research shall develop and prepare the proposed guidelines as soon as possible and shall transmit them immediately to the Secretary of the Resources Agency. The Secretary of the Resources Agency shall certify and adopt the guidelines pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, which shall become effective upon the filing thereof. However, the guidelines shall not be adopted without compliance with Sections 11346.4, 11346.5, and 11346.8 of the Government Code.

(f) The Office of Planning and Research shall, at least once every two years, review the guidelines adopted pursuant to this section and shall recommend proposed changes or amendments to the Secretary of the Resources Agency. The Secretary of the Resources Agency shall certify and adopt guidelines, and any amendments thereto, at least once every two years, pursuant to Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code, which shall become effective upon the filing thereof. However, guidelines may not be adopted or amended without compliance with Sections 11346.4, 11346.5, and 11346.8 of the Government Code.

Based on the plain language of this statute, Public Resources Code section 21083 requires OPR and the Secretary of Resources to perform activities but it does not mandate school districts or community college districts to perform any activities.

B. Although school districts and community college districts are required to undertake maintenance projects, including emergency repair projects, CEQA contains specific exemptions for maintenance projects and emergency projects.

Maintenance projects, including emergency repair projects, are the only projects over which districts do not have discretion. However, maintenance projects and emergency projects are among the many exemptions from CEQA that have been provided for school projects. School districts enjoy many exemptions from CEQA not only for maintenance and emergencies, but also for major reconstruction projects and additions to schools that include up to ten new class rooms.[131] Although school districts and community college districts are required to keep schools and colleges in good repair, staff finds that school and community college projects to maintain facilities in good repair, including emergency repair projects, are statutorily or categorically exempt from CEQA.

1. *School Districts and Community College Districts are Required to Keep Schools in Good Repair Which Includes Making Emergency Repairs*

Education Code section 17593 requires school districts to keep schools in repair:

> The clerk of each district except a district governed by a city or city and county board of education shall, under the direction of the governing board, keep the schoolhouses in repair during the time school is taught therein, and exercise a general care and supervision over the school premises and property during the vacations of the school.

Moreover, Education Code section 17565 requires the governing board of any school district to "furnish, repair, insure against fire, and in its discretion rent the school property of its districts."

Prior to 2006, "good repair" was not defined in statute. Education Code section 17002 was amended by Statutes 2006, chapter 704 to define "good repair" to mean:

> [T]he facility is maintained in a manner that assures that it is clean, safe, and functional as determined pursuant to an interim evaluation instrument developed by the Office of Public School Construction and approved by the board or a local evaluation instrument that meets the same criteria. . . .In order to provide that school facilities are reviewed to be clean, safe, and functional, the school facility inspection and evaluation instrument and local evaluation instruments shall include at least the following criteria:

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[131] There are also several exceptions available for discretionary school projects including: Statutory exceptions: Public Resources Code section 21102 and 21150; California Code of Regulations, title 14, section 15262 (feasibility and planning studies); Government Code section 65995.6 (school facilities needs analysis); Categorical exceptions: California Code of Regulations, title 14, section 15323 (normal operations of existing facilities for public gatherings); California Code of Regulations, title 14, section 15322 (educational or training programs involving no physical changes); California Code of Regulations, title 14, section 15312 (sales of surplus government property); California Code of Regulations, title 14, section 15327 (leasing of new facilities); California Code of Regulations, title 14, 21080, subdivision (b)(5); California Code of Regulations, title 14, section 15270 (disapproved projects).

(A) Gas systems and pipes appear and smell safe, functional, and free of leaks.

(B) (i) Mechanical systems, including heating, ventilation, and air-conditioning systems, are functional and unobstructed.

(ii) Appear to supply adequate amount of air to all classrooms, work spaces, and facilities.

(iii) Maintain interior temperatures within normally acceptable ranges.

(C) Doors and windows are intact, functional and open, close, and lock as designed, unless there is a valid reason they should not function as designed.

(D) Fences and gates are intact, functional, and free of holes and other conditions that could present a safety hazard to pupils, staff, or others. Locks and other security hardware function as designed.

(E) Interior surfaces, including walls, floors, and ceilings, are free of safety hazards from tears, holes, missing floor and ceiling tiles, torn carpet, water damage, or other cause. Ceiling tiles are intact. Surfaces display no evidence of mold or mildew.

(F) Hazardous and flammable materials are stored properly. No evidence of peeling, chipping, or cracking paint is apparent. No indicators of mold, mildew, or asbestos exposure are evident. There is no apparent evidence of hazardous materials that may pose a threat to the health and safety of pupils or staff.

(G) Structures, including posts, beams, supports for portable classrooms and ramps, and other structural building members appear intact, secure, and functional as designed. Ceilings and floors are not sloping or sagging beyond their intended design. There is no visible evidence of severe cracks, dry rot, mold, or damage that undermines structural components.

(H) Fire sprinklers, fire extinguishers, emergency alarm systems, and all emergency equipment and systems appear to be functioning properly. Fire alarm pull stations are clearly visible. Fire extinguishers are current and placed in all required areas, including every classroom and assembly area. Emergency exits are clearly marked and unobstructed.

(I) Electrical systems, components, and equipment, including switches, junction boxes, panels, wiring, outlets, and light fixtures, are securely enclosed, properly covered and guarded from pupil access, and appear to be working properly.

(J) Lighting appears to be adequate and working properly. Lights do not flicker, dim, or malfunction, and there is no unusual hum or noise from light fixtures. Exterior lights onsite appear to be working properly.

(K) No visible or odorous indicators of pest or vermin infestation are evident.

(L) Interior and exterior drinking fountains are functional, accessible, and free of leaks. Drinking fountain water pressure is adequate. Fountain water is clear

and without unusual taste or odor, and moss, mold, or excessive staining is not evident.

(M) (i) Restrooms and restroom fixtures are functional.

(ii) Appear to be maintained and stocked with supplies regularly.

(iii) Appear to be accessible to pupils during the school day.

(iv) Appear to be in compliance with Education Code Section 35292.5.

(N) The sanitary sewer system controls odor as designed, displays no signs of stoppage, backup, or flooding, in the facilities or on school grounds, and appears to be functioning properly.

(O) Roofs, gutters, roof drains, and downspouts appear to be functioning properly and are free of visible damage and evidence of disrepair when observed from the ground inside and outside of the building.

(P) The school grounds do not exhibit signs of drainage problems, such as visible evidence of flooded areas, eroded soil, water damage to asphalt playgrounds or parking areas, or clogged storm drain inlets.

(Q) Playground equipment and exterior fixtures, seating, tables, and equipment are functional and free of significant cracks, trip hazards, holes, deterioration that affects functionality or safety, and other health and safety hazards.

(R) School grounds, fields, walkways, and parking lot surfaces are free of significant cracks, trip hazards, holes, deterioration that affects functionality or safety, and other health and safety hazards.

(S) Overall cleanliness of the school grounds, buildings, common areas, and individual rooms demonstrates that all areas appear to have been cleaned regularly, and are free of accumulated refuse and unabated graffiti. Restrooms, drinking fountains, and food preparation or serving areas appear to have been cleaned each day that the school is in session.

With regard to community college districts, Education Code section 81601 states:

> The governing board of a community college district shall furnish, repair, insure against fire, and in its discretion rent the school property of its districts. ...

Education Code section 81601 does not define "good repair" nor is it defined elsewhere under Title 3 of the Education Code, which contains the provisions regarding community college districts. However, since "property" includes "any external thing over which the rights of possession, use, and enjoyment are exercised,"[132] the requirement to repair includes real property as well as facilities owned by the district. Moreover, because the term "repair" is defined as "to restore to sound condition after damage or injury" and "to renew or refresh,"[133] staff finds that "repair" includes "maintenance" for purposes of these provisions. Thus, both school districts

[132] Black's Law Dictionary, Seventh Edition, 1999, page 1232, column 2.

[133] Webster's II, New Collegiate Dictionary, 1999, page 939, column 2.

and community college districts are required by statute to maintain their property.[134] The requirement to keep school facilities in good repair necessarily includes making necessary emergency repairs, such as those caused by, among other things, earthquakes, floods, and fires.

Moreover, school and community college maintenance projects, including emergency repair projects, are projects subject to CEQA. Note also that, as will be discussed in greater detail below, though emergency repairs are part of "maintenance" for the purposes of Education Code sections 17002, 17565, 17593 and 81601, "maintenance" and "emergency" projects are treated differently from one another, for purposes of CEQA.

2. *But Emergency Projects and Other Projects Related to Maintenance are Statutorily Exempt From CEQA.*

There are two kinds of exemptions from CEQA: statutory and categorical. Statutory exemptions describe types of projects which the Legislature has decided are not subject to CEQA procedures and policies and these exemptions are absolute. Statutory exemptions are found in various places in the California Code and are comprehensively listed in Article 18 of the CEQA Guidelines. Categorical exemptions, on the other hand, are descriptions of types of projects which the Secretary of the Resources Agency has determined do not usually have a significant effect on the environment. These exemptions are not absolute; there are exceptions to categorical exemptions. Under CEQA the filing of a NOE is discretionary; however, it triggers a 35-day, statute of limitations for a legal challenge to the lead agency's decision that the project is exempt.[135]

Statutory exemptions take several forms. Most statutory exemptions are complete exemptions from CEQA. Other exemptions apply to only part of the requirements of CEQA, and still other exemptions apply only to the timing of CEQA compliance. Examples of some of the statutory exemptions potentially applicable to school projects include:

- THE CLOSING OF OR THE TRANSFER OF STUDENTS FROM ANY PUBLIC SCHOOL. This includes the transfer of K-12 grade students to another school as set forth in section 21080.18 of the Public Resources Code so long as the resulting physical changes are categorically exempt from CEQA.[136]
- ESTABLISHING OR MODIFYING FEES.[137]
- ISSUING OR REFUNDING BONDS UNDER THE CALIFORNIA EDUCATIONAL FACILITIES AUTHORITY ACT. Note though that development projects funded by these bonds are still subject to CEQA unless they fall under an exemption.
- EMERGENCY PROJECTS.
    - Projects to maintain, repair, restore, demolish, or replace property or facilities damaged or destroyed as a result of a disaster in a disaster stricken area in which a state of emergency has been proclaimed by the Governor pursuant to the

[134] Note that this analysis uses the words "maintenance" and "repair" interchangeably.

[135] California Code of Regulations, title 14, section 15062.

[136] California Code of Regulations, title 14, section 15282.

[137] Public Resources Code section 21080, subdivision (b)(8).

California Emergency Services Act, commencing with Section 8550 of the Government Code. This includes projects that will remove, destroy, or significantly alter an historical resource when that resource represents an imminent threat to the public of bodily harm or of damage to adjacent property or when the project has received a determination by the State Office of Historic Preservation pursuant to Public Resources Code section 5028, subdivision (b).

- Emergency repairs to publicly or privately owned service facilities necessary to maintain service essential to the public health, safety or welfare.
- Specific actions necessary to prevent or mitigate an emergency. This does not include long-term projects undertaken for the purpose of preventing or mitigating a situation that has a low probability of occurrence in the short-term.[138]

3. *Maintenance Projects Are Categorically Exempt from CEQA.*

The following are some of the categorical exemptions that can be utilized by school districts and community college districts for maintenance projects:

- OPERATION, REPAIR, MAINTENANCE, AND RECONSTRUCTION. This exemption covers the operation, repair, permitting, leasing, licensing, or minor alteration of existing structures or facilities, mechanical equipment, or topographical features. This exemption is limited to negligible or no expansion of previous use and may includes among other things:
  - Interior or exterior repairs and alterations
  - Facilities used to provide public utilities services
  - Small additions
  - Addition of safety or health protection devices
  - Maintenance of certain facilities to protect fish and wildlife resources.[139]
- REPLACEMENT OR RECONSTRUCTION OF EXISTING FACILITIES OR STRUCTURES. This exemption is limited to structures on the same site with substantially the same purpose and capacity as the existing structure. One example given is the replacement or reconstruction of schools with earthquake resistant structures that do not increase the structural capacity by more that 50 percent.[140]
- CONSTRUCTION OR PLACEMENT OF ACCESSORY STRUCTURES. Examples are on-premises signs, small parking lots, and seasonal or temporary use structures in facilities designed for public use such as lifeguard towers, mobile

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[138] Public Resources Code sections 21080(b)(2), (3), and (4), 21080.33 and 21172; California Code of Regulations, title 14, section 15269; See also *Castaic Lake Water Agency v. City of Santa Clarita* (1995) 41 Cal.App.4th 1257; and *Western Municipal Water District of Riverside County v. Superior Court of San Bernardino County* (1987) 187 Cal.App.3d 1104.

[139] California Code of Regulations, title 14, section 15301.

[140] California Code of Regulations, title 14, section 15302.

food units and portable restrooms.[141]

- MINOR ALTERATIONS TO LAND, WATER, OR VEGETATION. The alterations may not involve removal of mature, scenic trees. Examples include grading on land with less than 10 percent slope that does not involve an environmentally sensitive area or severe geological hazards; new landscaping or gardening; minor trenching or backfilling of previously excavated earth with compatible material; minor temporary uses of land having negligible effects on the environment (e.g. carnivals and Christmas tree sales).[142]
- MINOR ADDITIONS TO SCHOOLS. Limited to additions (including permanent or temporary classrooms) within current school grounds and must not increase student capacity by more than 25 percent or ten classrooms, whichever is less.[143]
- COMMON SENSE EXCEPTION. This exemption is based on the general rule that CEQA only applies to projects which have a potential for causing a significant effect on the environment. Under this exemption a lead agency may find a project exempt if "it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment."[144] This exemption acts as a "catchall" exception in that projects that do not fit under any of the statutory or categorical exemptions may nonetheless be exempt under this provision.

There is no evidence in the record to dispute the conclusion that school district and community college district maintenance projects and emergency repair projects are exempt from CEQA. Moreover, staff searched the CEQAnet database maintained by OPR at www.ceqanet.ca.gov, for school district and community college district environmental documents filed between 1982 to the present and did not find an instance in which a school has prepared an ND or EIR for an emergency or maintenance project.

Based upon the forgoing discussion of the applicable exemptions, staff finds that for school district and community college district maintenance and emergency projects, CEQA does not impose a state-mandated program.

C. For all other school district and community college district projects, CEQA is triggered by the district's voluntary decision to undertake a project or accept state funding for a project.

As discussed in the background, under CEQA a "project" is an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and which is, in the context of school district and community college district projects:

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[141] California Code of Regulations, title 14, section 15311.

[142] California Code of Regulations, title 14, section 15304.

[143] California Code of Regulations, title 14, section 15314.

[144] California Code of Regulations, title 14, section 15061, subdivision (b)(3).

- an activity directly undertaken by the district, or,
- an activity undertaken by a district which is supported, in whole or in part, through contracts, grants, subsidies, loans, or other forms of assistance from one or more public agencies.

The decision to undertake such projects could arise in a myriad of ways, from a district-level decision to an initiative enacted by the voters. Likewise, there are a number of funding sources that a school district or community college district might utilize to fund discretionary school construction projects. When a state funding source is used, proof of compliance with CEQA is a condition of funding.

1. *All non-maintenance, non-emergency school projects are at the discretion of the school districts or community college districts and thus, compliance with CEQA for these projects is not legally compelled by the state.*

Aside from the statutory requirement to maintain school and college facilities in good repair, the state has not required districts to undertake other construction projects that *do not* involve repair or maintenance. In comments filed March 31, 2004, however, claimant argues that "constructing new school facilities is not optional."[145] In support of this contention, claimant cites to *Butt v. State of California*[146] for the propositions that the state has a responsibility to "provide for a system of common schools, by which a school shall be kept up and supported in each district" and that those schools are required to be "free."

Staff disagrees with the claimant's argument that "constructing new school facilities is not optional." With regard to new construction of school buildings, the Second District Court of Appeal has stated: "[w]here, when or how, if at all, a school district shall construct school buildings is within the sole competency of its governing board to determine."[147]

It is true, as claimant states, that courts have consistently held public education to be a matter of statewide rather than a local or municipal concern, and that the Legislature's power over the public school system is plenary.[148] These conclusions are true for every Education Code statute that comes before the Commission on the question of reimbursement under article XIII B, section 6 of the California Constitution. It is also true that the state is the beneficial owner of all school properties and that local school districts hold title as trustee for the state.[149]

Nevertheless, article IX, section 14 of the California Constitution allows the Legislature to authorize the governing boards of all school districts to initiate and carry on any program or activity, or to act in any manner that is not in conflict with state law. In this respect, it has been and continues to be the legislative policy of the state to strengthen and encourage local

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[145] Claimant's Response to DOF Comments, March 31, 2004, p. 2.

[146] *Butt v. State of California* (1992) 4 Cal. 4th 688.

[147] *People v. Oken* (1958)159 Cal.App.2d 456, 460.

[148] See *Hayes v. Commission on State Mandates* (1992) 11 Cal.App.4th 1564, 1579, fn. 5; *California Teachers Assn. v. Hayes* (1992) 5 Cal.App.4th 1513, 1524 (formerly known as *California Teachers Assn. v. Huff*); *Hall v. City of Taft* (1956) 47 Cal.2d 177, 179.

[149] *Hayes v. Commission on State Mandates, supra*, 11 Cal.App.4th 1564, 1579, fn. 5.

responsibility for control of public education through local school districts.[150] The governing boards of K-12 school districts may hold and convey property for the use and benefit of the school district.[151] Governing boards of K-12 school districts have also been given broad authority by the Legislature to decide when to build and maintain a schoolhouse and, "when desirable, may establish additional schools in the district."[152] Governing boards of community college districts are required to manage and control all school property within their districts, and have the power to acquire and improve property for school purposes.[153] Thus, under state law, the decision to construct a school facility lies with the governing boards of school districts and community college districts, and is not legally compelled by the state.

Additionally, there are no statutes or regulations requiring the governing boards of school districts to construct new buildings or reconstruct unsafe buildings. The decision to reconstruct, or even abandon an unsafe building, is a decision left to the discretion of a school district. In *Santa Barbara School District v. Superior Court*, the California Supreme Court addressed a school district's decision to abandon two of its schools that were determined unsafe, instead of reconstructing a new building, as part of its desegregation plan.[154] The court held that absent proof that there were no school facilities to absorb the students, the school district, "in the reasonable exercise of its discretion, could lawfully take this action."[155] The court describes the facts and the district's decision as follows:

> On August 12, 1971, the Board received a report that the Jefferson school was structurally unsafe within the requirements of section 15503 [a former statute with language similar to Education Code sections 17367 and 81162]. The report recommended that a structural engineer be retained to determine whether the school should be repaired or abandoned, since if it cannot be repaired, it must be abandoned pursuant to section 15516. On May 15, 1972, three days before the final meeting of the Board, the superintendent received a report concerning the rehabilitation or replacement costs of the Jefferson school. The report found that it would cost $621,800 to make the existing structure safe and $655,000 to build an entirely new building. Accordingly, in fashioning the Administration Plan, the superintendent made provision therein for closing the Jefferson school. The Board would certainly be properly exercising its discretion in a reasonable

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[150] *California Teachers Assn., supra*, 5 Cal.App.4th 1513, 1523; Education Code section 14000.

[151] Education Code sections 35162.

[152] Education Code sections 17340, 17342.

[153] Education Code sections 81600, 81606, 81670 et seq., 81702 et seq.

[154] *Santa Barbara School District v. Superior Court* (1975) 13 Cal.3d 315, 337-338. As a side note, the decision to abandon or reconstruct a school is exempt from CEQA. See Public Resources Code section 21080.17, California Code of Regulations, title 14, sections 15282, subdivision (i) and 15302. See also *San Lorenzo Valley Community Advocates for Responsible Educ. v. San Lorenzo Valley Unified School District* (2006) 139 Cal.App.4th 1356 (decision to close school and transfer students exempt from CEQA).

[155] Id, p. 338.

> manner were it to approve abandoning this building in view of the extreme cost. The determination of the questions whether a new school was needed to replace this structure or whether existing facilities could handle the Jefferson school students due to an expected drop in elementary enrollment, was properly within the Board's discretion.[156]

Thus, school districts are not legally compelled to construct new school facilities in these circumstances. Based on the above analysis, staff finds that CEQA is triggered by the district's voluntary decision to undertake a project or accept state funding for a project subject to CEQA and thus, school districts and community college districts are not legally compelled to comply with CEQA.

2. *Although CEQA compliance is a downstream activity required as a condition of receipt of state funding, school districts and community college districts are not required or legally compelled by the state to request or accept state funding or to comply with CEQA under these circumstances.*

Since 1972, Public Resources Code section 21102 has specifically prohibited a state agency, board or commission from authorizing expenditure of funds for any project, except feasibility or planning studies, which may have a significant effect on the environment unless such request or authorization is accompanied by an EIR. Public Resources Code section 21102, which has not been amended since 1972 specifies:

> No state agency, board, or commission shall request funds, nor shall any state agency, board, or commission which authorizes expenditures of funds, other than funds appropriated in the Budget Act, authorize funds for expenditure for any project, other than a project involving only feasibility or planning studies for possible future actions which the agency, board, or commission has not approved, adopted or funded, which may have a significant effect on the environment unless such request or authorization is accompanied by an environmental impact report.
>
> Feasibility and planning studies exempted by this section from the preparation of an environmental impact report shall nevertheless include consideration of environmental factors.

Additionally, and also since 1972, Public Resources Code section 21150 has specified that:

> State agencies, boards, and commissions, responsible for allocating state or federal funds on a project-by-project basis to local agencies for any project which may have a significant effect on the environment, shall require from the responsible local governmental agency a detailed statement setting forth the matters specified in Section 21100 prior to the allocation of any funds other than funds solely for projects involving only feasibility or planning studies for possible future actions which the agency, board, or commission has not approved, adopted, or funded.

Thus, if a school district or community college district wishes to receive state or federal funding through the state for a project, compliance with CEQA is a prerequisite.

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[156] Id, p. 337.

Consistent with the Public Resource Code 21102 and 21150 requirements, Education Code section 17025, subdivision (b) requires certification of CEQA compliance as a condition of bond funding for K-12 school districts. Similarly, Education Code section 17268, subdivision (b) requires school districts to comply with CEQA as a condition of receiving state funds for the construction of new school buildings.

Public Resources Code sections 21102 and 21150 make clear that state agencies must require compliance with CEQA and the CEQA regulations (i.e. the requirements of the test claim statutes and regulations) as a condition of providing state funding for any school district or community college district project that is subject to CEQA. However, there is no requirement that a school district or community college district seek funding from the state.

In 2003, the California Supreme Court decided the *Kern High School Dist.* case and considered the meaning of the term "state mandate" as it appears in article XIII B, section 6 of the California Constitution. The school district claimants in *Kern* participated in various funded programs each of which required the use of school site councils and other advisory committees. The claimants sought reimbursement for the costs from subsequent statutes which required that such councils and committees provide public notice of meetings, and post agendas for those meetings.[157]

When analyzing the term "state mandate," the court reviewed the ballot materials for article XIII B, which provided that "a state mandate comprises something that a local government entity is required or forced to do."[158] The ballot summary by the Legislative Analyst further defined "state mandates" as "requirements imposed on local governments by legislation or executive orders."[159] The court also reviewed and affirmed the holding of *City of Merced,*[160] determining that, when analyzing state-mandate claims, the underlying program must be reviewed to determine if the claimant's participation in the underlying program is voluntary or legally compelled.[161] The court stated the following:

> In *City of Merced*, the city was under no legal compulsion to resort to eminent domain-but when it elected to employ that means of acquiring property, its obligation to compensate for lost business goodwill was not a reimbursable state mandate, because the city was not required to employ eminent domain in the first place. Here as well, if a school district elects to participate in or continue participation in any underlying *voluntary* education-related funded program, the district's obligation to comply with the notice and agenda requirements related to that program does not constitute a reimbursable state mandate.[162] (Emphasis in original.)

Thus, the Supreme Court held as follows:

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[157] *Kern High School Dist., supra*, 30 Cal.4th 727.

[158] Id. at p. 737.

[159] Ibid.

[160] *City of Merced v. State of California* (1984) 153 Cal.App.3d 777.

[161] *Kern High School Dist., supra*, 30 Cal.4th 727, 743.

[162] Ibid.

> [W]e reject claimants' assertion that they have been legally compelled to incur notice and agenda costs, and hence are entitled to reimbursement from the state, based merely upon the circumstance that notice and agenda provisions are mandatory elements of education-related programs in which claimants have participated, *without regard to whether claimant's participation in the underlying program is voluntary or compelled.* [Emphasis added.][163]

Based on the plain language of the statutes creating the underlying education programs in *Kern*, the court determined that school districts were not legally compelled by the state to establish school site councils and advisory bodies, or to participate in eight of the nine underlying state and federal programs and, hence, not legally compelled to incur the notice and agenda costs required under the open meeting laws. Rather, the districts elected to participate in the school site council programs to receive funding associated with the programs.[164]

Similarly here, school districts and community college districts are not legally compelled to request and accept state funds for discretionary construction projects. However, if districts choose to receive state funds then, based upon the plain language of Public Resources Code section 21150, the state must require compliance with CEQA and the CEQA regulations as a condition of receiving state funding for school district and community college district projects. Public Resources Code section 21150 states: "State agencies. . . .responsible for allocating state or federal funds . . . . to local agencies for any project which may have a significant effect on the environment, *shall require from the responsible local governmental agency a detailed statement setting forth the matters specified in Section 21100 prior to the allocation of any funds* other than funds solely for projects involving only feasibility or planning studies for possible future actions." (Emphasis added.)

The financing of school facilities has traditionally been the responsibility of local government, with *assistance* provided by the state. In 1985, the California Supreme Court decided *Candid Enterprises, Inc. v. Grossmont Union High School District*, which provides a good historical summary of school facility funding up until that time.[165]

> In California the financing of public school facilities has traditionally been the responsibility of local government. "Before the *Serrano v. Priest* decision in 1971, school districts supported their activities mainly by levying ad valorem taxes on real property within their districts." [Citation omitted.] Specifically, although school districts had received some state assistance since 1947, and especially since 1952 with the enactment of the State School Building Aid Law of 1952 (Ed. Code, § 16000 et seq.), they financed the construction and maintenance of school facilities through the issuance of local bonds repaid from real property taxes.
>
> After the *Serrano* decision [citation omitted] and to the present day, local government remained primarily responsible for school facility financing, but has often been thrust into circumstances in which it has been able to discharge its responsibility, if at all, only with the greatest difficulty. In these years, the burden

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[163] Id. at p. 731.

[164] Id. at pp. 744-745.

[165] *Candid Enterprises, Inc. v. Grossmont Union High School Dist.* (1985) 39 Cal.3d 878.

on different localities has been different: extremely heavy on those that have experienced growth in enrollment, light on those that have experienced decline, and somewhere in between on those that have remained stable.

In the early 1970's, because of resistance to increasing real property taxes, localities throughout the state began to experience greater difficulty in obtaining voter approval of bond issues to finance school facility construction and maintenance. As a result, a number of communities chose to impose on developers school-impact fees ... in order to make new development cover the costs of school facilities attributable to it. [Citation omitted.]

With the passage of Proposition 13 in 1978 the burden of school financing became even heavier. "Proposition 13 prohibits ad valorem property taxes in excess of 1% except to finance previously authorized indebtedness. Since most localities have reached this 1% limit, school districts cannot raise property taxes even if two-thirds of a district's voters wanted to finance school construction." [Citation omitted.] Moreover, although Proposition 13 authorizes the imposition of "special taxes" by a vote of two-thirds of the electorate, such special taxes have rarely been imposed, remain novel, and as consequence are evidently not perceived as a practical method of school facility financing – especially in view of the need for a two-thirds vote of the electorate to approve them. [Citation omitted.]

In the face of such difficulties besetting local governments, the state has not taken over any substantial part of the responsibility of financing school facilities, less still full responsibility. To be sure, in order to implement the *Serrano* decision the Legislature has significantly increased assistance to education. But it has channeled by far the greater part of such assistance into educational programs and the lesser part into school facilities; in fiscal year 1981-1982, for example, only 3.6 percent went for such facilities. [Citation omitted.][166]

State assistance for construction of school facilities comes almost exclusively from statewide general obligation bonds, and is implemented through the State Allocation Board.[167] Before Proposition 13, the state bond funds provided to school districts were provided through loan programs in which districts were required to repay their assistance with property tax revenues or local bond funds. After Proposition 13, the State Allocation Board shifted its policy of providing bond fund assistance from a loan-based program to a grant-based program.[168] Today, the grant funds are provided through the School Facility Program (SFP), under the provisions of the Leroy F. Greene School Facilities Act of 1998.[169] Under the SFP, state bond funding is provided in the form of per pupil grants, with supplemental grants for site development, site acquisition, and

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[166] Id, pp. 881-882. See also "School Facility Financing, A History of the Role of the State Allocation Board and Option for the Distribution of Proposition 1A Funds," supra.

[167] See also "School Facility Financing, A History of the Role of the State Allocation Board and Option for the Distribution of Proposition 1A Funds," supra.

[168] "School Facility Financing, A History of the Role of the State Allocation Board and Option for the Distribution of Proposition 1A Funds," supra, pp. 12, 13, 20.

[169] Education Code, section 17170.10 et seq.

other project specific costs when warranted.[170] New construction grants provide funding on a 50/50 state and local match basis. Modernization grants provide funding on a 60/40 basis. Districts that are unable to provide local matching funds and are able to meet the financial hardship provisions may be eligible for state funding of up to 100 percent.[171]

Though there is substantial funding made available to school districts through state grants, not all school districts elect to receive assistance from state funds for construction of school buildings. The "School Facility Financing" handbook prepared in February 1999 states, that:

> If a school district wants state funding for construction or repair of a school, it must apply to the State Allocation Board for the money. *There are school districts that repair and construct school buildings without the assistance from the State Allocation Board* (i.e., San Diego Unified School District, San Luis Unified School District). (Emphasis added.)[172]

Therefore, staff finds that school districts are not legally compelled to request or accept state funding or to comply with CEQA requirements under these circumstances.

3. *There is no evidence in the record that school districts or community college districts are practically compelled to undertake non-maintenance or non-emergency projects or receive state funding.*

In comments filed March 31, 2004, claimant notes that "a finding of legal compulsion is not an absolute prerequisite to a finding of a reimbursable mandate" and cites to *Sacramento II* as controlling case law.[173] Claimant relies on a study and Proposition 55 ballot language, both of which state a need to build more schools in California, to demonstrate that school districts are practically compelled to construct new school facilities when existing facilities become inadequate.[174] However, the question before the Commission is not whether additional school facilities are needed, but whether school districts are legally compelled by a state statute or regulation or practically compelled to build them and thus mandated by the state to comply with CEQA. As discussed above, staff finds that school districts and community college districts are not legally compelled to build new facilities or receive state funding for such facilities.

Claimant argues that school districts and community college districts are practically compelled to construct new facilities. Staff finds that school districts are not practically compelled by the state to construct new facilities or use state funds. The proper standard for determining whether

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[170] School Facility Program Handbook, supra, p. 23.

[171] Id. p. 61.

[172] School Facility Program Handbook, February 1999, endnote 2, p. 39.

[173] Claimant's Response to DOF Comments, supra, p. 4, citing *City of Sacramento v. State of California* (1990) 50 Cal.3rd. 51 (*Sacramento II*).

[174] Claimant's Response to DOF Comments, supra, pp. 3-4, citing "School Facility Financing-A History of the Role of the State Allocation Board and Options for the Distribution of Proposition 1A Funds" (Cohen, Joel, February 1999.) and Proposition 55 Ballot Pamphlet from 2004, which identified a need to construct schools to house one million pupils and modernize schools for an additional 1.1 million students.

school districts and community college districts are practically compelled to undertake school construction projects is the *Kern*[175] standard.

Absent legal compulsion, the courts have ruled that at times, based on the particular circumstances, "practical" compulsion might be found. The Supreme Court in *Kern* addressed the issue of "practical" compulsion in the context of a school district that had participated in optional funded programs in which new requirements were imposed. In *Kern,* the court determined there was no "practical" compulsion to participate in the underlying programs, since a district that elects to discontinue participation in a program does not face "certain and severe ... penalties" such as "double ... taxation" or other "draconian" consequences.[176] Rather, local entities that have discretion will make the choices that are ultimately the most beneficial for the entity and its community:

> As to each of the optional funded programs here at issue, school districts are, and have been, free to decide whether to (i) continue to participate and receive program funding, even though the school district also must incur program-related costs associated with the [new] requirements or (ii) decline to participate in the funded program. Presumably, a school district will continue to participate only if it determines that the best interests of the district and its students are served by participation – in other words, if, *on balance*, the funded program, even with strings attached, is deemed beneficial. And, presumably, a school district will decline participation if and when it determines that the costs of program compliance outweigh the funding benefits. (Emphasis in original.)[177]

Here, there is no evidence in the law or in the record that school districts or community college districts that elect not to construct new facilities or use state funds, which would trigger the requirement to comply with CEQA, face certain and severe penalties such as double taxation or other draconian consequences. Instead, school and college facilities projects that are undertaken for purposes other than repair and maintenance are discretionary decisions of the district, analogous to the situation in *City of Merced.* There, the issue before the court was whether reimbursement was required for new statutory costs imposed on the local agency to pay a property owner for loss of goodwill, when a local agency exercised the power of eminent domain.[178] The court stated:

> Whether a city or county decides to exercise eminent domain is, essentially, an option of the city or county, rather than a mandate of the state. The fundamental concept is that the city or county is not required to exercise eminent domain. If, however, the power of eminent domain is exercised,

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[175] *Department of Finance v. Commission on State Mandates* (2003) 30 Cal.4th 727, hereinafter "*Kern*".

[176] *Kern,* supra, 30 Cal.4th 727, 754.

[177] Id, p. 753.

[178] *City of Merced, supra,* (1984) 153 Cal.App.3d 777, 777.

then the city will be required to pay for loss of goodwill. Thus, payment for loss of goodwill is not a state-mandated cost.[179]

The Supreme Court in *Kern* reaffirmed the *City of Merced* rule in applying it to voluntary education-related funded programs:

> The truer analogy between [*Merced*] and the present case is this: In *City of Merced*, the city was under no legal compulsion to resort to eminent domain – but when it elected to employ that means of acquiring property, its obligation to compensate for lost business goodwill was not a reimbursable state mandate, because the city was not required to employ eminent domain in the first place. Here as well, if a school district elects to participate in or continue participation in any underlying *voluntary* education-related funded program, the district's obligation to comply with the notice and agenda requirements related to that program does not constitute a reimbursable state mandate.[180]

The Code of Civil Procedure provision that was cited in *City of Merced* states:

> Nothing in this title requires that the power of eminent domain be exercised to acquire property necessary for public use. Whether property necessary for public use is to be acquired by purchase or other means or by eminent domain is a decision left to the discretion of the person authorized to acquire the property.[181]

The Law Revision Commission's comment on this provision stated:

> Section 1230.030 makes clear that whether property is to be acquired by purchase or other means, or by exercise of the power of eminent domain, is a discretionary decision. Nothing in this title requires that the power of eminent domain be exercised; but, if the decision is that the power of eminent domain is to be used to acquire property for public use, the provisions of this title apply except as otherwise specifically provided by statute. ...[182]

The holding in *City of Merced* applies in this instance. Any costs incurred under CEQA or the CEQA regulations sections pled (excepting Public Resources Code section 21082, as amended by Statutes 1976, chapter 1312 and California Code of Regulations, title 14, section 15022, as amended by Register 83, No. 29) result from the school district's or community college district's decision to undertake a project to construct or reconstruct school facilities, rather than from a decision made by the state. Under such circumstances, reimbursement is not required.[183]

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[179] Id. at 783.

[180] *Kern, supra,* 30 Cal.4th 727, 743.

[181] Code of Civil Procedure section 1230.030.

[182] California Law Revision Commission comment on Code of Civil Procedure section 1230.030, 2009 Thomson Reuters.

[183] *San Diego Unified School Dist.*, supra, 33 Cal.4th 859, 880.

Therefore, based on the above discussion, staff finds that the state has required school districts and community college districts are not practically compelled to undertake discretionary projects subject to CEQA.

D. The Plain Language of Public Resources Code Section 21082, as Amended by Statutes of 1976, chapter 1312 and California Code of Regulations, Title 14 Section 15022, Subdivision (a), as Amended by Register 83, No. 29, Imposes a State-Mandated Activity.

Staff finds that Public Resources Code section 21082, as amended by Statutes of 1976, chapter 1312, and California Code of Regulations, title 14 section 15022, subdivision (a), as amended by Register 83, No. 29, mandate school districts and community college districts to adopt objectives, criteria, and procedures, consistent with CEQA and the CEQA regulations, for the preparation of NDs, by ordinance, resolution, rule or regulation, no later than 60 days after the Secretary of the Resources Agency adopts regulations (i.e. the CEQA Guidelines) pursuant to Public Resources Code section 21083.

As stated under Issue 2, above, the Commission does not have jurisdiction over Public Resources Code section 21082, as added by Statutes of 1972, chapter 1154 which provided:

> All public agencies shall adopt by ordinance, resolution, rule, or regulation, objectives, criteria, and procedures for the evaluation of projects and the preparation of environmental impact reports pursuant to this division. The objectives, criteria, and procedures shall be consistent with the provisions of this division and with the guidelines adopted by the Secretary of the Resources Agency pursuant to Section 21083. Such objectives, criteria, and procedures shall be adopted by each public agency no later than 60 days after the Secretary of the Resources Agency has adopted guidelines pursuant to Section 21083.

Current law, Public Resources Code section 21082, as amended by Statutes of 1976, chapter 1312, provides:

> All public agencies shall adopt by ordinance, resolution, rule, or regulation, objectives, criteria, and procedures for the evaluation of projects and the preparation of environmental impact reports *and negative declarations* pursuant to this division. A school district, or any other district, whose boundaries are coterminous with a city, county, or city and county, may utilize the objectives, criteria, and procedures of the city, county, or city and county, as may be applicable, in which case, the school district or other district need not adopt objectives, criteria, and procedures of its own. The objectives, criteria, and procedures shall be consistent with the provisions of this division and with the guidelines adopted by the Secretary of the Resources Agency pursuant to Section 21083. Such objectives, criteria, and procedures shall be adopted by each public agency no later than 60 days after the Secretary of the Resources Agency has adopted guidelines pursuant to Section 21083. (Italics added to indicate amended language.)

Public Resources Code section 21082 has been amended twice since its enactment in 1972: in 1975 and 1976. Statutes 1975, chapter 242, which was not pled in this test claim, amended Public Resources Code section 21082, adding the second full sentence which allows districts

(including school districts and community college districts) whose boundaries are coterminous with a city, county, or city and county, to utilize the objectives, criteria, and procedures of the city, county, or city and county, in lieu of adopting its own. The 1975 amendment merely provides an optional alternate means of compliance, and does not mandate any new activities. However, Public Resources Code section 21082 was amended by Statutes 1976, chapter 1312, which has been pled in this test claim and which the Commission does have jurisdiction over, to add the words "and negative declarations" to what must be included in a public agency's objectives, criteria and procedures.

Similarly current California Code of Regulations, title 14 section 15022, subdivision (a), as amended by Register 83, No. 29, states:

> Each public agency shall adopt objectives, criteria, and specific procedures consistent with CEQA and these Guidelines for administering its responsibilities under CEQA, including the orderly evaluation of projects and preparation of environmental documents. The implementing procedures *should* contain at least provisions for: . . . .

(List of subjects recommended for inclusion omitted; emphasis added.)

CEQA has required OPR to review the CEQA regulations and prepare amendments to CEQA regulations and has required the Secretary of the Resources Agency to adopt the regulations since 1972.[184] Public Resources Code section 21083 requires OPR to review the CEQA regulations at least every two years and to prepare amendments to the regulations. It also requires the Secretary of Resources to adopt the regulations which triggers the requirement of Public Resources Code section 21082 as amended by Statutes of 1976, chapter 1312, for school districts and community college districts to adopt objectives, criteria, and procedures for NDs. This continuing requirement is not triggered by any action of a school district or community college and is not dependant on the existence of any development project.[185]

However, the California Code of Regulations, title 14, section 15022, subdivision (a) list of what the implementing procedures "should" include is advisory and thus does not impose any mandated activities. California Code of Regulations, title 14, section 15005 defines words as "mandatory, advisory or permissive." Specifically, it defines "must" or "shall" as mandatory, "should" as advisory and "may" as permissive for purposes of the CEQA regulations. With regard to the word "should" California Code of Regulations, title 14, section 15005, subdivision (b) provides:

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[184] See the requirements of Public Resources Code section 21087, as adopted by Statutes of 1972, chapter 1154 which were amended into Public Resources Code section 21083 by Statutes 2004, chapter 945; note that the amendment to Public Resources Code section 21087 requiring review at least every two years (rather than periodic review) was adopted by Statutes of 1993, chapter 1130.

[185] Note however, that the Public Resources Code section 21083 requirement for OPR to review and propose amendments to the CEQA regulations at least every two years was supported by local agencies because of concerns that the regulations were not being revised often enough to keep up with the statutory changes and case law developments that local agencies are required to comply with. (See Senate Floor Analysis, Assembly Bill 1888 (Sher), September 9, 1993.)

"Should" identifies *guidance* provided by the Secretary of Resources based on policy considerations contained in CEQA, in the legislative history of the statute, or in federal court decisions which California courts can be expected to follow. Public agencies are *advised* to follow this guidance in the absence of compelling, countervailing considerations.

"Advisory" means "counseling, suggesting, or advising, but not imperative or conclusive."[186] Therefore, because the list provided by 15022, subdivision (a) of what the implementing procedures "should" include is advisory, it does not impose any mandated activities.

Staff finds that the plain language of Public Resources Code section 21082 as amended by Statutes of 1976, chapter 1312 and California Code of Regulations, title 14, section 15022, subdivision (a) as amended by Register 83, No. 29, imposes the following state-mandated activity on school districts and community college districts:

Adopting objectives, criteria, and procedures, consistent with CEQA and the CEQA regulations, for the preparation of NDs, by ordinance, resolution, rule or regulation, no later than 60 days after the Secretary of the Resources Agency adopts the CEQA regulations pursuant to Public Resources Code section 21083.

Issue 4: Do Public Resources Code Section 21082, as Amended by Statutes of 1976, Chapter 1312, or California Code of Regulations, Title 14, Section 15022 as Amended by Register 83, No. 29 Impose a New Program or Higher Level of Service on School Districts or Community College Districts Within the Meaning of Article XIII B, Section 6 of the California Constitution?

Staff finds that the plain language of Public Resources Code section 21082 as amended by Statutes of 1976, chapter 1312 and California Code of Regulations, title 14, section 15022, subdivision (a), as amended by Register 83, No. 29 mandate school districts and community college districts to adopt objectives, criteria, and procedures, consistent with CEQA and the CEQA Guidelines, for the preparation NDs, by ordinance, resolution, rule or regulation, no later than 60 days after the Secretary of the Resources Agency adopts the CEQA regulations (i.e. the CEQA Guidelines) pursuant to Public Resources Code section 21083. However, staff finds that Public Resources Code section 21082, as amended by Statutes of 1976, chapter 1312, and California Code of Regulations, title 14, section 15022, as amended by Register 83, No. 29 do not impose a new program or higher level of service on school districts and community college districts because:

- The Public Resources Code Section 21082 requirement for school districts and community college districts to adopt objectives, criteria, and procedures, consistent with CEQA and the CEQA regulations, for the preparation of NDs by ordinance, resolution, rule or regulation, added in 1976, was a clarification of existing law regarding "evaluation of projects" and therefore does not impose a new program or higher level of service.
- The requirement of California Code of Regulations, title 14, section 15022, as amended by Register 83, No. 29, for school districts and community college districts to adopt objectives, criteria, and procedures, for the evaluation of projects and the preparation of

[186] Black's Law Dictionary, Sixth edition.

environmental documents pursuant to CEQA was required by CEQA before January 1, 1975 and therefore does not impose a new program or higher level of service.

In 1987, the California Supreme Court in *County of Los Angeles v. State of California* expressly stated that the term "higher level of service" must be read in conjunction with the phrase "new program." Both are directed at *state-mandated increases in the services* provided by local agencies.[187] In 1990, the Second District Court of Appeal decided the *Long Beach Unified School District* case, which challenged a test claim filed with the Board of Control on executive orders issued by the Department of Education to alleviate racial and ethnic segregation in schools.[188] The court determined that the executive orders did not constitute a "new program" since schools had an existing constitutional obligation to alleviate racial segregation.[189] However, the court found that the executive orders constituted a "higher level of service" because the requirements imposed by the state went beyond constitutional and case law requirements. The court stated in relevant part the following:

> The phrase "higher level of service" is not defined in article XIII B or in the ballot materials. [Citation omitted.] A mere increase in the cost of providing a service which is the result of a requirement mandated by the state is not tantamount to a higher level of service. [Citation omitted.] However, a review of the Executive Order and guidelines shows that a higher level of service is mandated because the requirements go beyond constitutional and case law requirements. . . .While these steps fit within the "reasonably feasible" description of [case law], the point is that these steps are no longer merely being suggested as options which the local school district may wish to consider but are *required acts. These requirements constitute a higher level of service.* We are supported in our conclusion by the report of the Board to the Legislature regarding its decision that the Claim is reimbursable: "Only those costs that are above and beyond the regular level of service for like pupils in the district are reimbursable."[190] [191]

Thus, in order for Public Resources Code section 21082 as amended by Statutes of 1976, chapter 1312, or California Code of Regulations, title 14, section 15022, as amended by Register 83, No. 29, to impose a new program or higher level of service, the Commission must find that the state is imposing new required acts or activities on school districts and community college districts to adopt objectives, criteria and procedures for NDs beyond those already required by law.

A. The Statutes of 1976, Chapter 1312 Amendment of Public Resources Code Section 21082, Adding "Negative Declarations," Was A Clarification of Existing Law

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[187] *County of Los Angeles, supra*, 43 Cal.3d at page 56.

[188] *Long Beach Unified School District, supra,* 225 Cal.App.3rd 155.

[189] Id, p. 173.

[190] Ibid, emphasis added.

[191] See also, *County of Los Angeles v. Commission on State Mandates* (2003) 110 Cal.App.4th 1176, 1193-1194, where the Second District Court of Appeal followed the earlier rulings and held that in the case of an existing program, reimbursement is required only when the state is divesting itself of its responsibility to provide fiscal support for a program, or is forcing a new program on a locality for which it is ill-equipped to allocate funding.

Regarding "Evaluation of Projects" and Therefore Does Not Impose a New Program or Higher Level of Service.

Current law, Public Resources Code section 21082, as amended by Statutes of 1976, chapter 1312, provides:

> All public agencies shall adopt by ordinance, resolution, rule, or regulation, objectives, criteria, and procedures for the evaluation of projects and the preparation of environmental impact reports *and negative declarations* pursuant to this division. A school district, or any other district, whose boundaries are coterminous with a city, county, or city and county, may utilize the objectives, criteria, and procedures of the city, county, or city and county, as may be applicable, in which case, the school district or other district need not adopt objectives, criteria, and procedures of its own. The objectives, criteria, and procedures shall be consistent with the provisions of this division and with the guidelines adopted by the Secretary of the Resources Agency pursuant to Section 21083. Such objectives, criteria, and procedures shall be adopted by each public agency no later than 60 days after the Secretary of the Resources Agency has adopted guidelines pursuant to Section 21083. (Italics added to indicate amended language.)

This amendment added the words "and negative declarations" which requires school districts and community college districts to address NDs in the objectives, criteria and procedures that they must adopt by ordinance, resolution, rule, or regulation.

In order for the Statutes of 1976, chapter 1312 amendment, which requires school districts and community college districts to address NDs in the objectives, criteria and procedures that they must adopt by ordinance, resolution, rule, or regulation to impose a new program or higher level of service, the Commission must find that the state is imposing new required acts or activities on school districts and community college districts beyond those already required by law. For the reasons described below, staff finds that school districts and community college districts have been required to adopt objectives, criteria, and procedures, consistent with CEQA and the CEQA regulations, for the preparation of NDs by ordinance, resolution, rule or regulation under CEQA since 1972, before the enactment of the Statutes of 1976, chapter 1312.

The intent to change the law may not always be presumed by an amendment. The courts have recognized that changes in statutory language can be intended to clarify the law, rather than change it.

> We assume the Legislature amends a statute for a purpose, but that purpose need not necessarily be to change the law. [Citation.] Our consideration of the surrounding circumstances can indicate that the Legislature made ... changes in statutory language in an effort only to clarify a statute's true meaning. [Citations omitted.][192]

Under the rules of statutory construction, the first step is to look at the statute's words and give them their plain and ordinary meaning. Where the words of the statute are not ambiguous, they must be applied as written and may not be altered in any way. Moreover, the intent must be

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[192] *Western Security Bank v. Superior Court* (1997) 15 Cal.4th 232, 243.

gathered with reference to the whole system of law of which it is a part so that all may be harmonized and have effect.[193]

Public Resources Code section 21082, as added by Statutes of 1972, imposed the requirement to "adopt by ordinance, resolution, rule, or regulation, objectives, criteria, and procedures for the evaluation of projects and the preparation of environmental impact reports pursuant to [CEQA]."[194] Section 21082 does not specify exactly what is meant by "the evaluation of projects." However, when read in context with the whole system of law, of which this statute is a part, it becomes clear that under prior law, preparation of NDs was a required activity when a lead agency evaluated a project which was not exempt from CEQA, but which the lead agency determined would not have a significant effect on the environment.

To "evaluate" means "to determine the value of."[195] In the context of CEQA, the possible values assigned to activities or approvals of the lead agency are:[196]

- Project or not.[197]
- If a project, exempt or not.[198]
- If not exempt, whether it may have a significant effect on the environment or will not have a significant effect on the environment.[199]
- ND or EIR.[200]

Thus, the determination regarding whether to prepare an EIR or an ND is a part of project evaluation. In *No Oil,* the California Supreme Court, in a decision regarding a 1972 project approval by the Los Angeles City Council, held that:

- an agency must determine whether a project may have a significant environmental impact, and thus whether an EIR is required, before it approves the project; and,
- a determination that a project does not require an EIR, when that project is not exempt from CEQA, must take the form of a written ND. [201]

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[193] *People v. Thomas* (1992) 4 Cal.4th 206, 210.

[194] See Public Resources Code Section 21082, as enacted in Statutes 1972, chapter 1154.

[195] Webster's II New Riverside Dictionary.

[196] For a good overview of the CEQA project evaluation process see the California Resources Agency, CEQA Process Flowchart. http://ceres.ca.gov/ceqa/flowchart/index.html.

[197] Public Resources Code section 21065; California Code of Regulations, title 14, section 15378.

[198] Public Resources Code sections 21080-21080.33, 21084; California Code of Regulations, title 14, sections 15300-15329.

[199] Public Resources Code sections 21080, 21080.1; California Code of Regulations, title 14, sections 15060 subdivision (c), 15063, 15064, 15064.7, 15065, 15365.

[200] Public Resources Code section 21080; California Code of Regulations, title 14, section 15070.

[201] *No Oil Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, pp. 79-80. (Hereinafter, *No Oil*).

In reaching these holdings, the *No Oil* court considered federal court opinions construing the National Environmental Policy Act (NEPA) on which CEQA was modeled, the federal NEPA guidelines, and California Code of Regulations, title 14, section 15083, regarding NDs, which did not take effect until 1973. The *No Oil* court stated that these holdings were consistent with "the unanimous view of the federal courts construing [NEPA], and the explicit requirement of both federal and state guidelines."[202] With regard to consideration of the CEQA regulations, the court stated "we do not apply these [regulations] retroactively to the decisions of the court or the city council rendered before the [regulations] went into effect. We make use of the [regulations], however, as a suggested interpretation of the statute, and as an illustration of the procedures which the resources agency finds necessary to the enforcement of the statute."[203] Moreover, the court stated, "the requirement that a finding of no significant impact take the form of an express written determination, however, is implicit in the act itself, and could have been deduced in October of 1972 from examination of the act, from our decision in *Friends of Mammoth* [citations] and from the federal cases cited in that decision."[204]

Additionally, California Code of Regulations, title 14, Article 7 (entitled Evaluating Projects), section 15083 (Register 73, No. 50) was adopted in 1973. Section 15083 addressed the requirement to prepare a negative declaration and the procedures that must be followed for projects that are not exempt from CEQA which the lead agency finds will not have a significant effect on the environment.[205] Thus, the requirement to address NDs is not new. In fact, if a school district or community college district prior to the 1976 amendment of Public Resources Code section 21083, had prepared objectives, criteria, and procedures, for the evaluation of projects preparation of EIRs by ordinance, resolution, rule or regulation, without addressing NDs, its objectives, criteria, and procedures would not have been consistent with CEQA and the CEQA regulations. Therefore, because the requirement for school districts and community college districts to address NDs in their objectives, criteria, and procedures, for the evaluation of projects preparation of EIRs by ordinance, resolution, rule or regulation clarifies existing law that pre-dates January 1, 1975, Public Resources Code section 21082 as amended by Statutes of 1976, chapter 1312 does not impose a new program or higher level of service.

B. California Code of Regulations, Title 14, Section 15022 Does Not Impose a New Program or Higher Level of Service.

The current interpretative regulation for Public Resources Code section 21082, California Code of Regulations, title 14, section 15022, subdivision (a), as adopted by Register 83, No. 29, provides:

> Each public agency shall adopt objectives, criteria, and specific procedures consistent with CEQA and these Guidelines for administering its responsibilities under CEQA, including the orderly evaluation of projects and preparation of

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[202] Id, p. 80.

[203] Id, p. 80.

[204] Id, p. 81.

[205] Title 14 California Code of Regulations, Article 7 (Evaluating Projects), section 15083 (Register 73, No. 50.)

environmental documents. The implementing procedures *should* contain at least provisions for: . . . . [List of what the procedures should contain omitted.]

To determine whether California Code of Regulations, title 14, section 15022, as amended by Register 83, No. 29 imposes a new program or higher level of service, we must first look at the law as it existed immediately prior to July 16, 1983, the effective date of that amendment, to determine whether the amendment mandates new activities.[206] Utilizing the same principles of statutory construction and analysis as applied under "A." above, staff finds that school districts and community college districts have been continuously required to adopt objectives, criteria, and procedures that are consistent with CEQA and the CEQA regulations, by ordinance, resolution, rule, or regulation, for the evaluation of projects and the preparation of EIRs pursuant to CEQA since January 1, 1972.

The requirements of California Code of Regulations, title 14, section 15022, were originally adopted in Register 73, No. 50 in California Code of Regulations, title 14, section 15050. California Code of Regulations, title 14, section 15050, as originally adopted in Register 73, No. 50 simply said:

> All public agencies are responsible for complying with the CEQA according to these Guidelines. They must develop their own procedures consistent with these Guidelines. Where a public agency is a lead agency and prepares an EIR itself or contracts for the preparation, that public agency is responsible entirely for the adequacy and objectivity of the EIR.

California Code of Regulations, title 14, section 15050 was subsequently amended several times, each time adding more specificity. (See Registers 75, No.1; 76, No. 41; and, 80, No. 19.) The following language, which, with minor, non-substantive modifications appears in the current California Code of Regulations, title 14, section 15022, was amended into section 15050 by Register 76, No. 41:[207]

> Public agenc[ies] shall adopt objectives, criteria, and specific procedures consistent with CEQA and these Guidelines for . . .the orderly evaluation of projects and preparation of environmental documents. The[se] implementing procedures *should* contain at least [the following] provisions. . . . [List of what the procedures should contain omitted.]

As discussed in "A." above, the CEQA statutory provisions in place prior to January 1, 1975, required a school district or community college district to adopt objectives, criteria, and procedures consistent with CEQA and the CEQA regulations for administering its responsibilities under CEQA, including the orderly evaluation of projects and preparation of environmental documents. Therefore the requirement to adopt objectives, criteria, and procedures consistent to address the evaluation of projects and preparation of environmental documents (i.e. NDs and EIRs) is not new. The addition of the language "objectives, criteria, and specific procedures" and "evaluation of projects and preparation of environmental documents" though adding greater specificity to the regulation, simply reflects the language of

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[206] *San Diego Unified School Dist., supra,* 33 Cal.4th 859, 878; *Lucia Mar, supra,* 44 Cal.3d 830, 835.

[207] Note that the prior iterations of California Code of Regulations, title 14, section 15050 as amended by Registers 75, No.1; 76, No. 41; and, 80, No. 19 were also pled in this test claim.

the pre-existing statutory requirement under 21082 and thus does not impose a new program or higher level of service.

CONCLUSION

Staff concludes that the test claim statutes, regulations and alleged executive orders do not impose a reimbursable state mandated program within the meaning of article XIII B, section 6 of the California Constitution because:

1. The California State Clearinghouse Handbook is not an executive order subject to Article XIII B, Section 6.
2. The Commission does not have jurisdiction over statutes adopted prior to January 1, 1975.
3. The statutes and regulations listed below, which generally require compliance with the CEQA process, do not mandate school districts or community college districts to perform any activities because:
   A. The plain language of Public Resources Code section 21083 imposes requirements on OPR and the Secretary of the Resources Agency, not school districts or community college districts.
   B. Although school districts and community college districts are required to undertake maintenance projects, including emergency repair projects, CEQA contains specific exemptions for maintenance projects and emergency projects.
   C. For all other school district and community college district projects, CEQA is triggered by the district's voluntary decision to undertake a project or accept state funding for a project.

   Education Code Section 17025 added by Statutes 1996, Chapter 1562; Government Code Sections 66031 and 66034 as amended by Statutes 1994, Chapter 300, and Statutes 1990, Chapter 1455; Public Resources Code Sections 21002.1, 21003, 21003.1, 21080.09, 21080.1, 21080.3, 21080.4, 21081, 21082.1, 21082.2, 21083, 21083.2, 21091, 21092, 21092.1, 21092.2, 21092.3, 21092.4, 21092.5, 21092.6, 21094, 21100, 21151, 21151.2, 21151.8, 21152, 21153, 21157, 21157.1, 21157.5, 21158, 21161, 21165, 21166, 21167, 21167.6, 21167.6.5, 21167.8, 21168.9 as added or amended by Statutes 1975, Chapter 222; Statutes 1976, Chapter 1312; Statutes 1977, Chapter 1200; Statutes 1983, Chapter 967; Statutes 1984, Chapter 571; Statutes 1985, Chapter 85; Statutes 1987, Chapter 1452; Statutes 1989, Chapter 626; Statutes 1989, Chapter 659; Statutes 1991, Chapter 905; Statutes 1991, Chapter 1183; Statutes 1991, Chapter 1212; Statutes 93, Chapter 375; Statutes 1993, Chapter 1130; Statutes 1993, Chapter 1131; Statutes 1994, Chapter 1230; Statutes 1994, Chapter 1294; Statutes 1995, Chapter 801; Statutes 1996, Chapter 444; Statutes 1996, Chapter 547; Statutes 1997, Chapter 415; Statutes 2000, Chapter 738; Statutes 2001, Chapter 867; Statutes 2002, Chapter 1052; Statutes 2002, Chapter 1121; California Code of Regulations, Title 5, Sections 14011 and 57121 as added or amended by Register 77, Nos. 01 & 45; Register 83, No. 18; Register 91, No. 23; Register 93, No. 46; and, Register 2000, No. 44 and California Code of Regulations, Title 14, Sections 15002, 15004, 15020, 15021, 15025, 15041, 15042, 15043, 15050, 15053, 15060, 15061, 15062, 15063, 15064 15064.5, 15064.5,

15064.7 15070, 15071, 15072, 15073, 15073.5, 15074, 15074.1, 15075, 15081.5, 15082, 15084, 15085, 15086, 15087, 15088, 15088.5, 15089, 15090, 15091, 15092, 15093, 15094, 15095, 15100, 15104, 15122, 15123, 15124, 15125, 15126, 15126.2, 15126.4, 15126.6, 15128, 15129, 15130, 15132, 15140, 15142, 15143, 15145, 15147, 15148, 15149, 15150, 15152, 15153, 15162, 15164, 15165, 15167, 51568, 15176, 15177, 15178, 15179, 15184, 15185, 15186, 15201, 15203, 15205, 15206, 15208, 15223, 15225, 15367 as added or amended by register 75, No. 01; Register 75, Nos. 05, 18 & 22; Register 76, Nos. 02, 14 & 41; Register 77, No. 01; Register 78, No. 05; Register 80, No. 19; Register 83, Nos. 29; Register 86, No. 05; Register 94, No. 33; Register 97, No. 22; Register 98, No. 35; Register 98, No. 44; Register 2001, No. 05; Register 2003, No. 30.

4. Public Resources Code Section 21082, as amended by Statutes 1976, chapter 1312 and California Code of Regulations, title 14, section 15022, as amended by Register 83, No. 29 Do Not Impose a New Program or Higher Level of Service on School Districts and Community College Districts because:

   A. The Public Resources Code Section 21082 requirement for school districts and community college districts to adopt objectives, criteria, and procedures, consistent with CEQA and the CEQA regulations, for the preparation of NDs by ordinance, resolution, rule or regulation, added in 1976, was a clarification of existing law regarding "evaluation of projects" and therefore does not impose a new program or higher level of service.

   B. The requirement to adopt objectives, criteria, and procedures, for the evaluation of projects and the preparation of environmental documents pursuant to CEQA was required by the law as it existed immediately prior to the date that California Code of Regulations, title 14, section 15022 was adopted and has been continuously required by the Public Resources Code Section 21082 since January 1, 1973 and therefore does not impose a new program or higher level of service.

Staff Recommendation

Staff recommends that the Commission adopt this staff analysis to deny the test claim.

Glossary of Frequently Used CEQA Related Terms and Acronyms:

CEQA: California Environmental Quality Act	An Act with the purposes of informing decisionmakers and the public about project impacts, identifying ways to avoid or significantly reduce environmental damage, preventing environmental damage by requiring feasible alternatives or mitigation measures, disclosing to the public reasons why an agency approved a project if significant environmental effects are involved, involving public agencies in the process, and increasing public participation in the environmental review and the planning processes.
Categorical Exemption	An exemption from the requirement to prepare an EIR or negative declaration for classes of projects based on a finding that the listed classes of projects do not have a significant effect on the environment. See also statutory exemption below. (Pub. Resources Code §§ 21080(b)(10) and 21084; Cal. Code Regs., tit. 14, § 15354.)
Certification	The lead agency's determination that an EIR has been completed in compliance with CEQA, was reviewed and considered by the lead agency's decision-making body before action on the project, and reflects the agency's independent judgment and analysis.
Cumulative Impacts	Two or more individual effects which, when considered together, are considerable or which compound or increase other environmental impacts. The individual effects may be changes resulting from a single project or a number of separate projects. The cumulative impact from several projects is the change in the environment which results from the incremental impact of the project when added to other closely related past, present, and reasonably foreseeable probable future projects. (Pub. Resources Code § 21083(b); Cal. Code Regs., tit. 14, § 15355.)
EIR: Environmental Impact Report	A detailed statement prepared in accordance with CEQA whenever it is established that a project may have a potentially significant effect on the environment. The EIR describes a proposed project, analyzes potentially significant environmental effects of the proposed project, identifies a reasonable range of alternatives, and discusses possible ways to mitigate or avoid the significant environmental effects. EIR can refer to the draft EIR (DEIR) or the final EIR (FEIR) depending on context.

	(Pub. Resources Code §§ 21061, 21100 and 21151; Cal. Code Regs., tit. 14, § 15362.)
Initial Study	A lead agency's preliminary analysis of a project to determine whether it may have a significant effect on the environment. If it may have a significant effect, an EIR is required. If not, the project may be approved based on a negative declaration. (Pub. Resources Code §§ 21080.1, 21080.2, 21080.3 and 21100; Cal. Code Regs., tit. 14, § 15365.)
Lead Agency	The agency with primary responsibility for approving or carrying out a project. (Pub. Resources Code § Section 21165; Cal. Code Regs., tit. 14, § 15367.)
Local Agency	Any public agency other than a state agency, board, or commission. Local agency includes but is not limited to cities, counties, charter cities and counties, districts, *school districts*, special districts, redevelopment agencies, local agency formation commissions, and any board, commission, or organizational subdivision of a local agency when so designated by order or resolution of the governing legislative body of the local agency. (Pub. Resources Code § 21062 and 21151; Cal. Code Regs., tit. 14, § 15368.)
MND: Mitigated Negative Declaration	A negative declaration prepared when a project will not have a significant effect on the environment because the project's adverse effects have been mitigated by measures incorporated into the project. (Pub. Resources Code § 21064.5; Cal. Code Regs., tit. 14, § 15369.5.)
ND: Negative Declaration	A written statement by the lead agency that briefly states why a project subject to CEQA will not have a significant effect on the environment. A ND precludes the need for an EIR. (Pub. Resources Code § 21064; Cal. Code Regs., tit. 14, § 15371.)
NOC: Notice of Completion	A brief notice filed with the Office of Planning and Research (OPR) by a lead agency when it completes preparation of the DEIR and is prepared to make it available for public review. The filing of the NOC begins the public review period for the DEIR. (Pub. Resources Code § 21161; Cal. Code Regs., tit. 14, § 15372.)

32 Cal.App.3d 795, 108 Cal.Rptr. 377, 5 ERC 1431, 3 Envtl. L. Rep. 20,513
(Cite as: 32 Cal.App.3d 795)

COUNTY OF INYO, Plaintiff and Appellant,
v.
SAM YORTY, as Mayor, etc., et al., Defendants and Respondents
Civ. No. 13886.

Court of Appeal, Third District, California.
June 5, 1973.

SUMMARY

The County of Inyo filed a complaint in the trial court seeking to enjoin the City of Los Angeles from extracting subsurface water from lands in the county pending the filing of an environmental impact report as required by the Environmental Quality Act, and a determination of the environmental effect of the continued and expanded extraction of subsurface water. The city had started acquiring water rights and land in the area shortly after 1900 and began receiving water through its first aqueduct in 1913. It had continually expanded its well drilling and pumping activities and had placed a second aqueduct in operation before the effective date of the Environmental Quality Act. At the time the action was filed, however, half of the funds estimated as necessary to complete drilling activities for the extraction of additional water remained unspent. A preliminary injunction was denied and a temporary restraining order was dissolved. (Superior Court of Sacramento County, No. 228928, William A. White, Judge.)

On the county's petition for a writ of supersedeas, treated as a petition for a writ of mandate, the Court of Appeal held that the expanded tapping and extraction of water was a severable project and that the filing of an environmental impact report was therefore required. In so holding, the court referred to the guidelines for implementation of the act issued as contemplated thereby by the Secretary of the California Resources Agency. It concluded that the expanded water extraction activity was an "ongoing project" within the meaning of section 15070, of the guidelines in that it might have a significant effect on the environment and a substantial portion of the funds allocated therefor had not been spent. In view of the prior continued modification in the constantly increased intensity and scope of actual and projected ground water withdrawals, the court further concluded that the project fell within another clause of the same section referring to proposed modifications "such that the project might have a new significant effect on the environment." The objectives of the act, the court reasoned, required inclusion of the planning agencies of the county among the places for filing the report. Extensive directions for staying increased extraction of water pending the filing of an impact report and appropriate action thereon were given. No merit was found in the city's defenses of the statute of limitations and laches. (Opinion by Richardson, P. J., with Friedman and Janes, JJ., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Public Works and Contracts § 1.5--Environmental Considerations.
Expanded tapping and extraction of underground water by the City of Los Angeles from lands owned by it in Inyo County required the filing of an environmental impact report as required by the Environmental Quality Act in Pub. Resources Code, § 21151, where the county asserted various harmful environmental effects arising from present and proposed increased groundwater pumping of the underground reservoir, where, though a second aqueduct constructed by the city was operative before the effective date of the act, it would only be used to capacity for transportation of subsurface water after escalation of well drilling and pumping, and where only half of the estimated cost of construction of additional wells to bring the subsurface extraction to its full projected capacity had been spent. Thus the expanded extraction of water was an "ongoing project" requiring the filing of a report within the meaning of the guidelines promulgated pursuant to the act for its implementation, as a "project which may have significant effect on the environment," having a substantial portion of its allotted funds remaining unspent, as well as a plan involving continued modification that "might have a

new significant effect on the environment."
[See **Cal.Jur.2d,** Conservation, § 2.]
(2) Public Works and Contracts § 1.5--Environmental Considerations.
The objectives of the Environmental Quality Act, including the alerting of the public and its responsible officials to environmental changes before they have reached ecological points of no return, could be met only if the places of filing of an environmental impact report required of the City of Los Angeles with respect to its expanded extraction of underground water in Inyo County included the county planning agencies.

(3) Public Works and Contracts § 1.5--Environmental Considerations.
The 180-day limitation provided by Pub. Resources Code, § 21167, subd. (a), for filing an action alleging that a public agency is carrying out or has approved a project having a significant environmental effect without the filing of an environmental impact report and a determination whether such effect exists is inapplicable to an action filed and pending before the effective date of the statute.

(4) Public Works and Contracts § 1.5--Environmental Considerations.
The defense of laches could not be raised by the City of Los Angeles in an action by Inyo County seeking to halt the city's increased extraction of subsurface waters from lands in the county pending the filing of an environmental impact report under the Environmental Quality Act and a determination of the environmental effect involved, despite the county's knowledge for some four years prior to filing the action of the city's intention to withdraw additional groundwater. In addition to the severability of the continuing activities from prior activities, the city made no showing of prejudice from the delay, and there was evidence that the county had acted with reasonable dispatch under the circumstances. Moreover, public policy requires public officials to obey statutes, and the litigation involved issues as to which the Legislature has declared a clear and all encompassing public interest.

COUNSEL

Frank H. Fowles, District Attorney, and L. H. Bray, Deputy District Attorney, for Plaintiff and Appellant.

Fredric P. Sutherland, Brent N. Rushforth, Carlyle W. Hall, Jr., Mary D. Nichols, John R. Phillips, Ralph Winter and Richard E. Gutting, Jr., as Amici Curiae on behalf of Plaintiff and Appellant.

Roger Arnebergh, City Attorney, Edward C. Farrell, Chief Assistant City Attorney, Kenneth W. Downey, Assistant City Attorney, and Gilbert W. Lee, Deputy City Attorney, for Defendants and Respondents.

RICHARDSON, P. J.

Petitioner (hereinafter "County") sought a writ of supersedeas which we treated as a petition for writ of mandate, and thereupon issued an alternative writ. Respondents filed appropriate reply to the petition and have also in the trial court interposed their demurrer and answer.

These proceedings follow the filing of a complaint by County in the County of Inyo against respondent City of Los Angeles, a municipal corporation, its department of water and power, the president and secretary of the department and commission, its chief engineer who is also ***798** general manager, and Does 1 through 20 (all hereinafter "City"). The complaint sought a temporary restraining order, preliminary injunction and permanent injunction to halt the extraction of subsurface waters from the Owens Valley in Inyo County until the filing by defendants of an Environmental Impact Report (hereinafter "EIR") required by the California Environmental Quality Act of 1970 (hereinafter "CEQA"), and a determination of the environmental effect of the continued and expanded extraction of subsurface water. A temporary restraining order was issued by the Inyo County Superior Court limiting any increase in the withdrawal of water in the affected area.

Subsequently, a motion by City for change of venue from Inyo to Sacramento County was granted. A hearing was held in Sacramento County Superior Court which resulted in denial of the application for preliminary injunction and dissolution of the temporary restraining order, from which action the present petition stems. County has also filed notice of appeal.

32 Cal.App.3d 795, 108 Cal.Rptr. 377, 5 ERC 1431, 3 Envtl. L. Rep. 20,513
(Cite as: 32 Cal.App.3d 795)

County generally asserts "error by the trial court in application of the Environmental Quality Act to the respondents' activities within petitioner's county." More specifically, County alleges: (1) The order dissolving the temporary restraining order is an appealable order but to await the formal resolution of the appeal, with its attendant delays, will render the substantial questions of law moot in that irreversible environmental damage will have resulted. (2) The trial court erred in its determination that CEQA did not apply to City's activities because of its view that such action was a continuation of a pre-existing activity or project born before the effective date of CEQA.

Narrowly stated, the issue before us is whether City is required to file an EIR with reference to its continued extraction of subsurface waters from the Owens Valley area of County.

Resolution of this issue and an evaluation of the conflicting legal and factual considerations bearing on it require a brief review of the geography of the area and of the history and character of the pertinent relationships between the two public entities involved.

The Owens Valley is located in east central California along the eastern edge of the Sierra Nevada Mountains, and runs in a general north and south direction through Mono and Inyo Counties. The valley is approximately 120 miles in length and from 15 to 30 miles wide, comprising a total area exceeding 3,000 square miles, approximately the size of Belgium. The valley's elevation varies from 3,500 feet to more than 10,000 feet. It is semi-arid but receives in the late spring and early summer, from both the ***799** Sierra Nevada on the west and the Inyo and White Mountains on the east, substantial but varying flows of surface water from the melting snowfields. It lies in an area contiguous to and immediately south of Mono County recently described by the Supreme Court in the following manner: "[N]ature's bountiful gifts of majestic mountains, lakes, streams, trees and wildlife have produced in the area one of the nation's most spectacularly beautiful and comparatively unspoiled treasures." (*Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 253 [104 Cal.Rptr. 761, 502 P.2d 1049].) The Owens River is the principal drainage course in the basin, flowing in a parallel north-south axis along the westerly side of the Valley and into Owens Lake which has no natural outlet.

City, faced with the necessity of importing water to serve the needs of a growing metropolitan population in the Los Angeles Basin, began the systematic acquisition of water rights and land in the Owens Valley shortly after 1900. These acquisitions were made for the purpose of acquiring control of the water supply in the area, and at the present time City owns approximately 300,000 acres in Inyo and Mono Counties, comprising roughly 97 percent of the available privately held land. Between the years 1908 and 1913 City constructed a surface aqueduct (the "first aqueduct") between the Owens Valley and City and began receiving Owens Valley water in 1913.

In 1941 City completed what is known as the "Mono Basin Project." This project was designed to gather the natural runoff in the Mono Basin area and to direct it by gravity flow and pumping operations through the Mono Lake watershed into the Owens River system through the Tinemaha Reservoir to the Haiwee Reservoir. The project is a complex of sources, tributaries, conduits, tunnels and storage areas extending 349 miles from Lee Vining to Los Angeles. At a relatively early date, as an auxiliary to the natural precipitation in the area, City commenced the drilling of a large number of wells to tap the subsurface pools of underground water in Owens Valley. These wells were heavily used during dry years to assure, as a supplementary source, a continuous and adequate flow through the first aqueduct. Since 1917 City has drilled more than 360 wells, of which it has pumped 190. Seven of them have been placed in operation since November 1970. Of more significance, as noted below, is the recent great acceleration of pumping operations from existing wells. Further, of the 11 wells drilled since 1963, seven were pumped for public use for the first time and a number of older wells had their capacity increased after the effective date of CEQA.

By 1963 City, prompted by the increasing water needs of a continued ***800** rapidly expanding population, had caused the preparation of a long-term report entitled "Availability and Utilization of Inyo-Mono Water" ("Report"). The Report noted that as of 1963

32 Cal.App.3d 795, 108 Cal.Rptr. 377, 5 ERC 1431, 3 Envtl. L. Rep. 20,513
(Cite as: 32 Cal.App.3d 795)

there had been 21 separate water rights filings by the State of California on streams and lakes in Inyo and Mono Counties for the purpose of providing domestic and recreational uses of water. The Report further indicated the growing and competing interests in Owens Valley water among various public entities and the increasing challenge to the City's beneficial utilization of it. It noted that in 1934 City had filed on 200 cubic feet per second (cfs) of water in the Mono Basin, but the first aqueduct was not of sufficient capacity to carry all such water to City. According to the Report, City had proposed in 1959 the construction of a second aqueduct to carry water from Owens Valley to the City for the purpose of completing "the development of our Inyo-Mono supply that began over fifty years ago" and to insure that City would not lose certain water rights on which it had filed primarily in the Mono Basin development.

Historically, the first aqueduct conveyed most of the available surface runoff from Owens Valley. It was planned that the second aqueduct would be filled largely from three sources: increased surface diversion from Mono Basin, reduced irrigation of City-owned lands in the affected counties and increased pumping of groundwater reservoirs in Owens Valley.

The cost of the second aqueduct was approximately $91,000,000 of which 96 percent had been expended when the operation of the aqueduct commenced in 1970. Of the approximately $2,000,000 appropriated for construction of additional wells for increased groundwater extraction about 50 percent had been expended prior to the commencement of litigation.

Both the projection and actual utilization of groundwater extraction from Mono and Inyo Counties have steadily increased in the past 40 years. Some understanding of the measure and rapidly increasing tempo at which the groundwater reservoirs have been tapped may be gained from the fact that during 1972 four new wells were constructed in the Independence Well Field alone, having an aggregate present pumping capacity exceeding 40 cfs, and in the same field during 1971-1972 the pumping capacity of existing wells was measurably increased. It appears that using as a base the 35-year period from 1930 to 1965 a long-term average of 10.3 cfs was extracted from the Owens Valley subsurface pools. In 1963 the estimated long-term average groundwater extraction was 89 cfs. This has increased to a present pumping capacity of 240 cfs. City envisions a proposed ultimate pumping capability of 485 cfs. This would result in an ***801** average long-term groundwater extraction of 147 cfs. This continual upward revision of pumping capacity and long-term average extraction was directed to the constant outflow of 666 cfs - the design capacity of the two aqueducts.

The parties substantially disagree on the environmental impact, if any, of this major increase. City, while accepting the possibility of moderate falls in the water table in the affected area, considers this a seasonal and cyclical effect only, manifesting itself to a measurable degree only in excessively dry years. City in its answer to the petition for writ of mandate denied that "any irreparable harm and damage will result to the environment of Inyo County by reason of Respondents' pumping operations and ... [asserted] that the alleged harm to the environment of Inyo County, if any, is a result of an Act of God, to wit, two consecutive drought years."

County, on the other hand, insists that a series of detrimental effects upon the environment necessarily must follow City's continued implementation of the groundwater management policy. It submits an "Evaluation" prepared by its engineering staff describing such effects in the following language: "The implementation of the Department of Water and Power's groundwater management plan will reduce the available water to natural plants and wildlife habitat, with the exception of minor selected areas, to such an extent as to effectively change the natural environment of the Owens Valley. Over a longer period of time, the 'safe yield,' if there is such a quantity, will be consistently exceeded and a permanent decreasing water table will result. The benefits to the people of the Owens Valley from the pumping is negligible." Further, the "Evaluation" states "The initial program of lowering the water table to eliminate the losses due to evapo-transpiration would also eliminate a large portion of our local natural vegetation which fall into the phreatophyte classification. Many of these types of plants (willows, saltgrass, tules, cattails, cottonwoods) require a water table or capillary fringe of not deeper than 10 feet. A continuing decline of the water table would eventually

eliminate sagebrush, rabbit brush, and bitter brush, which make up the remainder of our natural vegetation.

"Eventually, only the selected environmental areas and the areas adjacent to water courses would be able to sustain the natural vegetation of the valley.

"Bird migration - With the drop in the water table, historical ponds and areas of surface water will be eliminated, thus eliminating feed and resting areas for water fowl population. ***802**

"Local animal population - With the reduction of vegetation and available water, bird and animal populations will also diminish."

Although the narrow central issue presented is whether City's subsurface extraction of water requires the filing of an EIR, a number of component elements may be severally stated as follows: (1) Is City's ground water management program, i.e., its increased groundwater extraction, a "project" within the meaning of CEQA, and, if so, is it an "ongoing project" within the definition established by the Guidelines for Implementation of CEQA adopted by the Secretary of the Resources Agency? In short, is CEQA applicable? (2) As to the EIR, who are its authors and recipients, and what is its effect? (3) Is County barred in these proceedings by either a statute of limitations or the doctrine of laches?

We consider the stated elements sequentially.

The Applicability of CEQA

(1) In response to a general and growing awareness and acceptance of the importance of the natural environment in the lives of its citizens, and the vital necessity of its protection and preservation, the Legislature enacted the Environmental Quality Act of 1970. (Pub. Resources Code, § 21000 et seq. [FN1]) CEQA has been described by the Supreme Court as "a milestone in the campaign for 'maintenance of a quality environment for the people of this state now and in the future ....'" (

FN1 All code references are to the Public Resources Code unless otherwise noted. *Friends of Mammoth* v. *Board of Supervisors, supra*, 8 Cal.3d 247, 252.) Its preamble (§§ 21000 and 21001) contains a broad expression of legislative policy and recognition that the maintenance of a quality environment, present and prospective, "is a matter of statewide concern"; that "[i]t is necessary to provide a high-quality environment that at all times is healthful and pleasing ..."; that "[t]he capacity of the environment is limited ..."; and it is the legislative intent and policy to "take immediate steps to identify any critical thresholds for the health and safety of the people ...," to "take all action necessary to protect, rehabilitate, and enhance the environmental quality of the state," and to "[e]nsure that the long-term protection of the environment shall be the guiding criterion in public decisions." To that end the Act adopted a comprehensive plan requiring, among other things, that state and local agencies follow a broad program of governmental action designed to assure that in both the planning and construction phases of "man's activities" primary consideration be given to the effect of such activities on man's environment. In *Mammoth* these requirements were construed to cover the private sector as well. Among CEQA's requirements ***803** are those contained in Public Resources Code section 21151, providing that "All local agencies shall prepare, or cause to be prepared by contract, and certify the completion of an environmental impact report on any project they intend to carry out or approve which may have a significant effect on the environment." Such a report is required to contain a detailed description of any adverse environmental impact and effect of the proposed action, together with any alternative and minimum options available. (§ 21100.)

CEQA received substantial and clarifying amendment in 1972 by the adoption, as an urgency measure, of AB 889, which was responsive to the *Friends of Mammoth* decision cited above. As contemplated by CEQA, certain "Guidelines for Implementation of the

California Environmental Quality Act of 1970" ("Guidelines") were issued in 1973 by the Secretary of the California Resources Agency for the purpose of providing "public agencies with principles, objectives, criteria, and definitions ... to be used in the implementation of" CEQA. These Guidelines consider and define "ongoing projects," in terms pertinent to our consideration, as activities instituted but not completed prior to the effective date of CEQA. It has been suggested that California has a "three-tier system" - The Act, the Guidelines and local regulations, of which the first two are uniformly applied and to which the third must conform under section 21082. (See Seneker, *The Legislative Response to Friends of Mammoth* (1973) 48 State Bar J. 127.) In ascertaining whether City's activities constitute a "project" and an "ongoing project," we scrutinize the Act, the Guidelines and helpful interpretive decisions.

CEQA in section 21065 defines a project as "(a) Activities directly undertaken by any public agency." The Guidelines (§ 15037) read in pertinent part: (a) *Project* means the whole of an action, resulting in physical impact on the environment, directly or ultimately, that is any of the following:

"(1) an activity directly undertaken by any public agency including but not limited to public works construction and related activities, clearing or grading of land, improvements to existing public structures, enactment and amendment of zoning ordinances, and the adoption of local General Plans or elements thereof."

The Supreme Court in *Mammoth, supra* (8 Cal.3d at p. 259) faced the definitional problem of "project," albeit in connection with a determination whether a privately funded activity requiring a public permit was a "project" within the meaning of CEQA, and used the following significant language: "In resolving the conflict on intent, as we must, we conclude ***804** that the Legislature intended the EQA to be interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language." The court continued: "As noted previously, the EQA does not attempt to define 'project.' Because the legislative intent provisions dictate that we give a broad interpretation to the act's operative language, we begin from that vantage point. Once a particular legislative intent has been ascertained, it must be given effect "'even though it may not be consistent with the strict letter of the statute.'" [Citation.] As we stated nearly a half century ago in *In re Haines* (1925) 195 Cal. 605, 613 [234 P. 883]: "'The mere literal construction of a section in a statute ought not to prevail if it is opposed to the intention of the legislature apparent by the statute; and if the words are sufficiently flexible to admit of some other construction it is to be adopted to effectuate that intention. The intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act.'"'

After concluding that dictionary definitions were of no assistance to the task before it, the Supreme Court in *Friends of Mammoth v. Board of Supervisors, supra*, at page 260, resorted to the rule which it had declared in *People* ex rel. *S. F. Bay etc. Com. v. Town of Emeryville* (1968) 69 Cal.2d 533, 543-544 [72 Cal.Rptr. 790, 446 P.2d 790]: "A principle 'which must be applied in analyzing the legislative usage of the word "project," is that "the objective sought to be achieved by a statute as well as the evil to be prevented is of prime consideration in [the word's] interpretation, and where a word of common usage has more than one meaning, the one which will best attain the purposes of the statute should be adopted, even though the ordinary meaning of the word is enlarged or restricted and especially in order to avoid absurdity or to prevent injustice.'"'

It is, therefore, apparent that the ascertainment of the intent of the Legislature in enacting CEQA is vital in the search for a meaningful definition of "project" within this context. The stated policy and intent of the Legislature, clearly expressed in sections 21000 and 21001, to which we have previously adverted, direct that highest priority shall be given to environmental considerations.

County has asserted a catalogue of harmful environmental effects arising from the present and proposed increased groundwater pumping of the Owens Valley underground reservoir, some of which are summarized above. It describes these effects in its "Evaluation" prepared by and attached to the declaration of Ronald Redmond, employed by County's engineering department to study the effects of implementation of

City's groundwater management plan. County supports its contentions by referring *805 to certain challenges by the California Department of Water Resources to the techniques and conclusions of City's report on Water Resources Management Plan. It also supports its claims with a series of declarations by residents of Inyo County which, taken together, indicate a general drying of the natural streams and consequent damage to vegetation, foliage and wildlife in the affected area. Under the legislative mandate above expressed, while we need not accept the foregoing as factually established, neither can we ignore the allegations or implications to the environment necessarily flowing therefrom.

City urges strongly that its groundwater extraction program, involving as it does the utilization and pumping of the underground pools in question for purposes of filling the second aqueduct authorized, constructed and operative before the advent of CEQA, and that the second aqueduct and underground pumping are a single, integrated operation and thereby exempt from application of CEQA.

If the two activities are severable, we are thus presented with an issue of somewhat broader implication, namely, since the pumping admittedly has been expanded and accelerated after the effective date of CEQA, to what extent, generally, does CEQA have application to projects commenced before but not completed until after its effective date? This is a problem of first impression in California, and we find guidance in its solution from two principal sources: (1) the Guidelines promulgated February 3, 1973, by the secretary for California Resources Agency to "implement, interpret, or make specific" CEQA, and (2) certain federal cases interpreting the National Environmental Policy Act (42 U.S.C. §§ 4321-4347) (hereinafter "NEPA").

The issue is treated in section 15070 of the Guidelines, denominated "ongoing Project," as follows:

"(a) A project covered by Section 15037(a)(1) definition of project specified by these Guidelines, approved prior to November 23, 1970, shall not require an Environmental Impact Report or a Negative Declaration - unless it is a project which may have a significant effect on the environment, and

"(1) A substantial portion of public funds allocated for the project have not been spent and it is still feasible to modify the project in such a way as to mitigate against potentially adverse environmental effects, or to choose feasible alternatives to the project, including the alternative of 'no project' or halting the project; or

"(2) The responsible agency proposes a modification to the project *806 plan, such that the project might have a new significant effect on the environment."

Bearing in mind the foregoing definition of "project" appearing in section 15037, subdivision (a)(1), of the Guidelines, we observe that while it is true that the second aqueduct was planned, constructed and utilized before the effective date of CEQA, the following are equally true: (1) The water to be used in the second aqueduct has three principal sources - increased surface diversions from Mono Basin, decreased spreading and irrigation of City-owned land in Mono and Inyo Counties, and increased pumping of groundwater reservoirs in the Owens Valley. Further, both aqueducts draw from the Haiwee Reservoir at the southern extremity of the Mono Basin Development which is filled with water drawn from those sources. (2) The second aqueduct can be, and has been, filled entirely by surface runoff from Owens Valley only, without the utilization of any subsurface extraction whatever. (3) While the capacity of both aqueducts was known and presumably fixed irrevocably from the period of planning and design onward (666 cfs), the actual extraction of subsurface water has steadily increased from a long-term average 10.3 cfs during the 35-year period 1935 to 1969, to an estimated 89 cfs in 1963, to an existing capacity of 248 cfs in 1971, to an ultimate capacity of 415 cfs estimated in 1971, to an ultimate pumping capacity of 485 cfs estimated in October 1972. In short, while the capacity of the second aqueduct was fixed and known for a number of years before CEQA, the effect of its construction on subsurface water extraction has been a variable but steady escalation, dependent in large part, no doubt, upon the extent of seasonal rain and snowfall from year to year. Thus the ecological impact of the second aqueduct, viewed in conjunction with the underground pumping and measured by the quantity of extraction, has not been fixed but has sub-

stantially increased in severity in the period before, during and after its construction. (4) As of the present time, although approximately 95 percent of the estimated cost of construction of the second aqueduct has been expended, only 50 percent of the estimated cost of construction of additional wells to bring the subsurface extraction to its full projected capacity has been spent.

We conclude from the foregoing that the legislative intent so strongly expressed in CEQA can be met only by considering the expanded ground-water extraction as a "project" separate and divisible from the second aqueduct, and we so treat it.

With reference to the groundwater extraction project, we note that as of the present time approximately half of the moneys appropriated for ***807** well drilling and pumping have been expended, and of this sum a substantial amount has been spent since the effective date of CEQA. We further note that the "project" to date has involved a continued "modification" in the constantly increased intensity and scope of actual and projected groundwater withdrawals. We have before us clear evidence that continuance of the subsurface extractions "might have a new significant effect on the environment." Inescapable, in our view, is the conclusion that under either subsection of section 15070 of the Guidelines an EIR is required.

The Supreme Court in *Friends of Mammoth, supra*, has pointed to the identity of purpose of NEPA and CEQA and utilized federal court rulings in reaching its conclusions, using the following language (8 Cal.3d at pp. 260-261): "Not only ... [do] the timing and the titles of the two acts tend to indicate that the EQA was patterned on the federal act, the key provision of the two acts, the environmental impact report, is the same. (Compare 42 U.S.C. § 4332, subd. (2)(C) with Pub. Resources Code, § 21100; see also Pub. Resources Code, §§ 21101, 21102, 21105, 21150, 21151.) Indeed, much of the phraseology of the EQA is either adopted verbatim from or is clearly patterned upon the federal act. As one commentator had observed, the EQA is 'much like the Federal NEPA.' (Powell, *The Courts as Protectors of the Environment* (1972) 47 L.A. Bar Bull. 215, 218.)

"Accordingly, in construing 'project' in the EQA, the definition of that word in the federal act and regulations becomes relevant. It is significant to note, in this regard, the Court of Appeals for the District of Columbia has emphasized that in construing the federal act the judicial role is active and that the NEPA must be interpreted broadly. (See *Calvert Cliffs' Coord. Com. v. United States A. E. Com'n., supra*, 449 F.2d 1109, 1111.) This is consonant with the mandate of the California Legislature that the EQA be given a liberal construction."

In interpreting NEPA several federal cases have applied the requirement of an environmental impact statement (identical to an EIR) to projects which although planned and commenced had reached a point of varying completion. (*Arlington Coalition on Transportation v. Volpe* (4th Cir. 1972) 458 F.2d 1323, highway construction, with completion of roughly 80 percent of property acquisitions, and 80 percent of acquisition moneys expended; *Keith v. Volpe* (1972) 4 ERC 1562, highway construction, $100,000,000 expended; *Morningside-Lenox Park Association* v. *Volpe* (N.D.Ga. 1971) 334 F.Supp. 132, highway construction, "substantial actions" yet to be taken; *Environmental Defense Fund v. Corps of Eng. of U.S. Army* (E.D.Ark. 1971) 325 F.Supp. 749, dam construction, approximately 65 percent completed.) ***808**

No single standard can be gleaned from the federal cases on the issue of the point in time or the degree of completion at which, in the language of *Arlington, supra* (at p. 1331), "the costs of altering or abandoning the project could so definitely outweigh whatever benefits that might accrue therefrom that it might no longer be 'possible' to change the project ...." The *Arlington* court, referring to NEPA, continues: "The congressional command that the Act be complied with 'to the fullest extent possible' means, we believe, that an ongoing project was intended to be subject to Section 102 until it has reached that stage of completion, and that doubt about whether the critical stage has been reached must be resolved in favor of applicability." We have no doubt that the project of underground-water extraction herein presented has not reached such point of effective and practical economic or ecological finality as to render meaningless any enforcement of CEQA.

32 Cal.App.3d 795, 108 Cal.Rptr. 377, 5 ERC 1431, 3 Envtl. L. Rep. 20,513
(Cite as: 32 Cal.App.3d 795)

It follows, accordingly, that City's expanded tapping and extraction of the underground water is an "ongoing project," requiring an EIR within the contemplation of section 15070 of the Guidelines. We think such a conclusion is consistent with the letter and spirit of the legislative purpose strongly asserted and variously expressed in CEQA.

The Report

(2) Concluding, as we do, that CEQA is applicable to the project in question, we review the nature of the EIR and inquire to whom it is directed, its effect and its purpose.

We consider the pertinent language of several key sections of CEQA in determining the character of EIR. It is defined in section 21061 as "an informational document," whose purpose "is to provide public agencies with detailed information about the effect which a proposed project is likely to have on the environment; to list ways in which any adverse effects of such a project might be minimized; and to suggest alternatives to such a project."

Section 21100 requires that an environmental impact report shall contain the following: "(a) The environmental impact of the proposed action. (b) Any adverse environmental effects which cannot be avoided if the proposal is implemented. (c) Mitigation measures proposed to minimize the impact. (d) Alternatives to the proposed action. (e) The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity. (f) Any irreversible environmental changes which would be involved in the proposed action should it be implemented. (g) The growth-inducing impact of the proposed action." ***809**

Section 21104 mandates the responsible state agency to consult with public agencies having jurisdiction by law with respect to the project. The section further states that the responsible state agency "may consult with any person who has special expertise with respect to any environmental impact involved." Section 21153 applies similarly to local agencies. Section 15012 of the Guidelines describes the effect of the EIR as a means of informing public decision makers and the general public of the environmental byproducts of anticipated projects, and indicates in the following language the weight of force to be given to it: "The EIR process is intended to enable public agencies to evaluate a project to determine whether it may have a significant effect on the environment, examine and institute methods of reducing adverse impacts, and consider alternatives to the project as proposed. ... An EIR may not be used as an instrument to rationalize approval of a project, nor do indications of adverse impact, as enunciated in an EIR, require that a project be disapproved - public agencies retain existing authority to balance environmental objectives with economic and social objectives."

Section 21151 contains the critical language in the following form: "All local agencies shall prepare, or cause to be prepared by contract, and certify the completion of the environmental impact report on any project they intend to carry out or approve which may have a significant effect on the environment. When a report is required by Section 65402 of the Government Code, the environmental impact report may be submitted as a part of that report."

It is therefore apparent the law requires a local agency to prepare an EIR when two conditions are satisfied: (1) It is carrying out a "project," and (2) the project may have a significant effect on the environment. In the case before us, as we have indicated, the expanded groundwater extraction program is a project within the meaning of the Act. In our view, the second criterion is met by the presence of some substantial evidence that the project "may have a significant effect" environmentally.

The necessity for knowledge of the contemplated action of an agency is treated in section 21152, which provides: "Whenever a local agency approves or determines to carry out a project which is subject to the provisions of this division, it shall file notice of such approval or such determination with the county clerk of the county, or counties, in which the project will be located. Such notice shall indicate the determination of the local agency whether the project will, or will not, have a significant effect on the environment and shall indicate whether an environmental impact report has been prepared pursuant to the provisions of this division." ***810**

Several authoritative expressions indicate the purpose of EIR and the manner in which it is to be prepared. The Supreme Court in *Friends of Mammoth, supra*, has indicated: "The impact report must be specially prepared in written form before the governmental entity makes its decision. This will give members of the public and other concerned parties an opportunity to provide input both in the making of the report and in the ultimate governmental decision based, in part, on that report." (8 Cal.3d at p. 263, fn. 8.) In this connection the paramount facts to be considered in preparation of EIR have recently been voiced by the appellate court in *Environmental Defense Fund, Inc. v. Coastside County Water Dist.*, 27 Cal.App.3d 695, 704-705 [104 Cal.Rptr. 197], as follows: "The preparation of the EIR demands thoughtful consideration of public interests transcending such necessary elements as always have been present, e.g., engineering and economic feasibility. Those who prepare the EIR may not limit their vision by the boundaries of the district, nor by purely physical auxiliaries or obstacles to a project's success which may be found beyond the borders. Moreover, the planning agency by criticism and adverse comment may persuade the directors of a district to revise an EIR. Revision of a project itself, or even abandonment, may follow, not by the use of any authority of the planning commission which is not given by the act, but by reason of thoughtful reconsideration.

"But the EIR has another function: the informing of the executive and legislative branches of government, state and local, and of the general public of the effect of the project on that revered resource which we call 'The Environment.' Obviously, the impact often must be deleterious to some extent to virgin land, to air, to beauty of unspoiled places because of the needs of the times. But the EIR must fulfill the role of disclosure of qualified estimations of the best way, all things considered, of meeting the demands of the present while preserving and, if possible, enlarging an ample inheritance for the future."

It is apparent from a review of the foregoing sections and the interpreting decisions that the Legislature in CEQA has enacted a logical and carefully devised program of wide application and broad public purpose. In many respects the EIR is the heart of CEQA. The report referred to in the sections may be viewed as an environmental "alarm bell" whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return.

CEQA provides no answer, however, to the question, with whom is EIR filed? Although City is required under section 21152 to file with ***811** County a "notice" of its approval of a project subject to its provisions, which notice must indicate the existence of any significant environmental effects and whether an EIR has been prepared, there is no statutory requirement that City file its EIR with County. Yet County is the site of the project, the area in which the ecological damage, if any, will occur, and in which reside those citizens most directly concerned by any such adverse effect upon the environment. The answer to the question posed is suggested by the above cited language from *Environmental Defense Fund, Inc. v. Coastside County Water Dist., supra* (27 Cal.App.3d at p. 704) that "Those who prepare the EIR may not limit their vision by the boundaries of the district, nor by purely physical auxiliaries or obstacles to a project's success which may be found beyond the borders." Furthermore, such a requirement of filing with the planning agency of the affected county is binding upon state agencies (Guidelines, § 15085, subds. (c) and (h), Pub. Resources Code, § 21105), and we observe no reasons of policy requiring a different or lesser performance by a local agency.

Pertinent sections of the Guidelines also suggest certain objectives to be followed by the public agency in preparation of its EIR. Section 15161, for example, insures that public agencies receive adequate comment on their EIR's. Section 15164 provides for public participation as follows: "[I]t is a widely accepted desirable goal of this process to encourage public participation. All public agencies adopting implementation procedures in response to these Guidelines should make provisions in their procedures for wide public involvement, formal and informal, consistent with their existing activities and procedures, in order to properly receive and evaluate public reactions, adverse and favorable, based on environmental issues."

The foregoing directives suggest the importance of the widest possible local participation in the public

decision making process by those authorities charged with the administration of the project. This will be most readily assured by the filing of a copy of the EIR in the particular locality most adversely affected by the project. We think the clear objectives of CEQA, in a case where, as here, the agency required to file is outside of the county most affected, can be met only if the filings of EIR include the planning agencies of the county or counties where the project is to be constructed and where significant ecological impact may occur.

The Statute of Limitations

(3) City asserts as an additional defense section 21167, subdivision (a), of the Public Resources Code, establishing a 180-day period from ***812** approval or commencement of a project within which an action or proceeding may be filed alleging that a public agency is carrying out or has approved a project having a significant environmental effect without a report and determination whether such effect exists. Subdivisions (b) and (c) of section 21167 impose 30-day time limitations, running from the filing of notice, on actions alleging either an improper determination whether a project may have a significant environmental effect or that the EIR does not comply with CEQA. These amending statutes were enacted in 1972, becoming effective December 5, 1972. The present action was filed on November 15, 1972, preceding the effective date of the statutes.

We note that the Legislature by these amendments specifically validated projects which, under section 21065, subdivision (c) (involving issuance of a lease, permit, license, certificate or other entitlement for use by one or more public agencies) were "undertaken, carried out or approved" by private agencies on or before the effective date of the section. (§ 21169.) It adopted no similar "saving" clause as to projects carried out by public agencies. (§ 21065, subd. (a).) Furthermore, by section 21170, subdivision (a), the amendatory statutes are expressly inapplicable to proceedings pending and undetermined on the effective date of the section.

Accordingly, we conclude that the 1972 legislation contains no express intent to protect solely public agency projects, as defined in section 21065, subdivision (a), from the application of CEQA. The limitation periods of section 21167 are not applicable to actions of the character herein presented which were filed and pending before the effective date of section 21167.

Laches

(4) City predicates its defense of laches upon the theory that the second aqueduct and the groundwater extraction were and are a single, identical project and that County had been aware since 1968 of City's intention to withdraw groundwater, yet took no affirmative action relative to it until 1972.

In addition to our conclusion that the two activities are severable, we are persuaded to the contrary view by the following:

(1) There is a general public policy in requiring public officials to obey statutes. (*Environmental Defense Fund v. TVA* (1972) 4 ERC 1850, 1861; *City of New York* v. *United States*, 337 F.Supp. 150, 160.)

(2) Laches is available as a defense to an action brought by a public entity (***813***City of Los Angeles v. County of Los Angeles* (1937) 9 Cal.2d 624, 630 [72 P.2d 138, 113 A.L.R. 370].) Indeed the Supreme Court has recognized the possible defense of laches in the application of the very act in question. (*Friends of Mammoth v. Board of Supervisors, supra*, 8 Cal.3d 247, 272.) In the circumstances before us, however, contrary to those usually presented wherein the application of laches is sought, there has been no showing of prejudice to the City by whatever delay has been occasioned. Such a disadvantage or prejudice must be present to establish laches. (*Newport v. Hatton* (1924) 195 Cal. 132 [231 P. 987]; *Environmental Defense Fund v. TVA, supra*, 4 ERC at p. 1861.)

(3) The parties before us are both public entities in litigation involving issues as to which the Legislature has declared, as previously noted, a clear and all encompassing public interest. In *Arlington Coalition on Transportation, supra* (458 F.2d 1323), the court had before it the application of NEPA relative to a freeway far advanced in its planning stages, with most of

the acquisition costs expended. NEPA became effective January 1, 1970, and the action involving its requirement of an impact report was filed February 19, 1971. Defendants urged laches as a defense, but the federal court rejected such contention, using the following language: "Nevertheless, we decline to invoke laches against appellants because of the public interest status accorded ecology preservation by the Congress. We believe that [the freeway] has not progressed to the point where the costs of altering or abandoning the proposed route would *certainly* outweigh the benefits that might accrue therefrom to the general public. In their reconsideration of the proposed route, the Secretary of Transportation and the Commissioner of the Virginia Department of Highways may decide, of course, that the costs do outweigh the benefits. If the opposite conclusion is a reasonable possibility, however, as it is here, the congressional declaration of policy in the relevant statutes of the importance of the benefits that might accrue demands that the merits of the question be considered by the appropriate agencies." (Pp. 1329-1330.) We find no less strong the explicit legislative expression of public interest in CEQA. The expenditures for the groundwater extraction project approximate only 50 percent of the total planned appropriation for that purpose, and of this a substantial amount, doubtless, was for construction undertaken after the effective date of CEQA.

(4) We also note a vast disparity in the population, staff, budget and research and planning resources available to the two entities before us, which, while not controlling in itself, may be considered by us as one factor in viewing an equitable defense such as laches. There is evidence that County acted with reasonable dispatch once it possessed the report prepared by City's engineers relating to the effect of City's extraction ***814** project, and when it had been able to assemble, collate and evaluate its own staff findings on the environmental effect of the augmented pumping. We therefore reject the defense of laches as a bar to County's action.

Conclusion

The very uncertainty created by the conflicting assertions made by the parties as to the environmental effect of City's expanded groundwater extraction underscores the necessity of the EIR to substitute some degree of factual certainty for tentative opinion and speculation. Where local agency activities "may have" a significant adverse effect on the environment, CEQA contemplates a sequence of formal governmental actions, commencing with an EIR. Such report presumably will stimulate public interest and discussion and the contribution and observations of interested persons and groups, both expert and lay. The major product thereof will be a careful weighing and balancing of all factors by the appropriate public officials. The bases for this process will be the EIR and the opportunity afforded for reasoned discussion. "[M]ajor consideration [will be] given to preventing environmental damage." (§ 21000, subd. (g).) The hoped for result of this process will be a considered policy judgment.

We conclude that City's underground-water extraction constitutes a project within the meaning of CEQA and the filing of an Environmental Impact Report is accordingly required. Public agencies must undertake a searching scrutiny of their action with the long term protection of the environment as the guiding criterion. In response to the legislative mandate, they must now, for the purpose of applying such criterion, pause, even though belatedly, to focus their attention upon and give primacy to ecological considerations. Only if such careful and balanced review precedes their action can they assure that the inheritance of nature from man's yesterday is not subjected to the unintended abuse of today to the irreversible loss of tomorrow.

The Stay Order

The formulation of an appropriate stay order in this matter presents problems of considerable difficulty. We are mindful, on the one hand, of the continued responsibility heavily resting upon City in assuring the continued and adequate flow of water, through fluctuating annual and seasonal changes of precipitation, to a major population center from an area presently furnishing 80 percent of its water. We are also sensitive to the legislative expression, above alluded to, indicating the public policy of this state to "[e]nsure that the long-term protection of the environment ***815** shall be the *guiding criterion* in *public decisions*" (§ 21001, subd. (d)) and to "[r]equire gov-

ernmental agencies at all levels to develop standards and procedures necessary to protect environmental quality" (§ 21001, subd. (f)). (Italics added.) We have thus a classic confrontation of two competing public entities, each asserting legitimate but conflicting public interests. Furthermore, we are fully aware of the limitations on this court in terms of both its accessibility to the parties and its ability to supervise and "police" its orders in this connection and to conduct evidentiary hearings thereon.

We cannot speculate on the probable duration of time required in the preparation of the EIR and those procedural steps necessary to the formulation of a responsible and considered judgment in the light of the EIR. We envision the probable need for further evidentiary hearing on the nature and extent of the environmental impact occasioned by City's activities, and other related matters not presently foreseeable. For this purpose the trial court is particularly suited and equipped, and to that end we enlist its aid. We will direct the preparation and certification by City of an EIR in accordance with Public Resources Code section 21151 and will direct also the prompt filing of a copy thereof with the planning agency of Inyo County.

Meanwhile, the augmented and expanded pumping continues, and we are told that observable ecological damage is being sustained daily. County, while not asking for a cessation of Owens Valley groundwater extraction, seeks, pending the filing of an EIR, a limit to the pumping fixed by the quantity of subsurface water extracted November 23, 1970, the effective date of CEQA. A possible alternative is to fix the limit of the amount of the subsurface draw by averaging it over a period of years. Two difficulties inhere in the "averaging" approach. The expanded pumping for the second aqueduct has continued only since 1970, with the result that a mere three-year average is available. Furthermore, in the "averaging" there may be an excess of wet years when the subsurface draw was low or dry years when the extraction was high. Although we recognize that in either formula, the arbitrary selection of a year or the averaging method, standing alone, may create unfairness, we elect to utilize elements of both.

Forthwith and in aid of this court's original jurisdiction to issue its writ of mandate, we stay further extraction of underground water from the Owens Valley Ground Water Basins in excess of the average being taken on November 23, 1970, pending a determination by the trial court of that figure which is found to be the mean or average of the extraction during the years of highest and lowest precipitation from July 1, 1970, to date. When such latter ***816** figure is ascertained, it will be fixed as the maximum allowable withdrawal from the subsurface pool in Owens Valley Ground Water Basins until the filing of an EIR and appropriate action thereon as provided by law. City is directed to modify its extraction in accordance with the stay outlined above. City is further directed to proceed with the preparation and filing of an EIR in accordance with the views herein expressed. The trial court is directed, to the extent necessary or appropriate, to supervise compliance with the Act.

Let a writ of mandate issue, directing City to prepare, certify and file in accordance with law an EIR, and further directing City, pending such preparation, certification and filing to limit forthwith its underground-water extraction in the affected area to the level and for the period hereinabove described.

Friedman, J., and Janes, J., concurred.
On June 29, 1973, the opinion was modified to read as printed above. ***817**

Cal.App.3.Dist.
County of Inyo v. Yorty
32 Cal.App.3d 795, 108 Cal.Rptr. 377, 5 ERC 1431, 3 Envtl. L. Rep. 20,513

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CCHARLES BOWNDS et al., Plaintiffs and Appellants
v.
CITY OF GLENDALE et al., Defendants and Respondents; STEVENSON-DILBECK DEVELOPMENT COMPANY, etc., et al., Real Parties in Interest and Respondents.
Civ. No. 58910.

Court of Appeal, Second District, Division 2, California.
Dec 23, 1980.

SUMMARY

A tenant in an apartment building which was approved by a city for conversion to condominium ownership brought proceedings in mandamus to compel the city council to vacate and set aside all approvals granted after a certain date for the conversion of existing apartment houses to condominium ownership and to declare a moratorium on such conversion pending certain actions by the city in the area of planning. The trial court entered judgment denying the petition for mandate. (Superior Court of Los Angeles County, No. C 248344, Charles H. Phillips, Judge.)

The Court of Appeal affirmed. With respect to petitioner's contention that the general plan adopted by the city was inadequate because the housing element of the plan did not discuss in specific terms the subject of condominium conversion and did not comport with the guidelines of the State Department of Housing and Community Development, the court held the decision-making power in the area of land use and planning rested with the local governmental agencies to be exercised within the constraints prescribed by enactments of the state Legislature. The court held that guidelines promulgated by the department were not self-executing and did not have the binding effect of law. The court also held that when any attack is made on the exercise of a local government's decision-making power and the adequacy of the general plan within which it is to be exercised a presumption of validity attaches to the actions of the governmental agency. The court held the subject of conversion of condominiums is of such importance that the authority of the local government to regulate in the area should not hinge on subjective interpretation by courts or administrative boards of the vague or general language to be found in the planning and land use law. The court noted that since the commencement of the action, the Legislature amended Gov. Code, § 65302, specifically providing that any guidelines or findings adopted by the department are advisory only, and that judicial review of a local plan is limited to a determination of whether there is "reasonable compliance" with the statutes. (Opinion by Compton, J., with Fleming, Acting P. J., and Beach, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Zoning and Planning § 5--Constitutional and Statutory Provisions--Land Use Plans.
The State Planning and Zoning Law (Gov. Code, § 65000 et seq.) requires that cities and counties adopt a general plan for the future development, configuration and character of the city and county, and require that future land use decisions be made in harmony with that general plan. Except for mandating the development of a plan, specifying the elements to be included therein, and imposing on the cities and counties the general requirement that land use decisions be guided by that plan, the Legislature has not preempted the decision-making power of local legislative bodies as to the specific contours of the general plan or actions taken thereunder. The thrust of the statutory scheme is to insure that decisions made by local governmental entities, which affect future growth of their communities, will be the result of considered judgment in which due consideration is given to the various interrelated elements of community life. The statutes make clear, however, that local control is at the heart of the process.
[See **Cal.Jur.3d,** Zoning and Other Land Controls, § 6; **Am.Jur. 2d,** Zoning and Planning, § 69.]
(2a, 2b, 2c) Zoning and Planning § 13--Content and

Validity of Zoning Ordinances, Planning Enactments and Orders--Legislative Discretion and Judicial Review--General Plans.
In mandamus proceedings brought by a tenant in an apartment building which was approved by a city for conversion to condominium ownership, seeking to vacate all approvals granted after a certain date for condominium conversion and to declare a moratorium on such conversions on the ground the housing element of the city's general plan did not discuss in specific terms the subject of condominium conversions and did not comport with guidelines of the State Department of Housing and Community Development, the trial court properly denied relief, where the housing element of the city's master plan contained an extremely comprehensive analysis of the present housing inventory and future needs, and where the overall plan and its ordinances in the area of land use regulation represented an honest and reasonable effort to comply with the state's statutory requirements (State Planning and Zoning Law, Gov. Code, § 65000 et seq.). Moreover, the decision-making power in the area of land use and planning rests with the local governmental agencies to be exercised within the constraints prescribed by enactments of the state Legislature. When any attack is made on the exercise of that decision-making power and the adequacy of the general plan within which it is to be exercised, a presumption of validity attaches to the actions of the local governmental agency. Guidelines promulgated by the State Department of Housing and Community Development are not self-executing and do not have the binding effect of law.

(3) Zoning and Planning § 13--Content and Validity of Zoning Ordinances, Planning Enactments and Orders--Legislative Discretion and Judicial Review--Local Plans.
While a reviewing court may conclude that in form and general content a local plan fails to meet the general requirements of the State Planning and Zoning Law (Gov. Code, § 65000 et seq.), the court cannot and should not involve itself in a detailed analysis of whether the elements of the plan are adequate to achieve its purpose. To do so would involve the court in the writing of the plan. That issue is one for determination by the political process and not by the judicial process.

(4a, 4b) Constitutional Law § 68--Property and Occupation--Right to Sell, Acquire, and Hold Property--Condominium Conversion--Police Power.
In regulating condominium conversion or land use generally, the police power is in direct confrontation with Cal. Const., art. I, § 1, concerning the right to acquire or possess property, and Cal. Const., art. I, § 19, prohibiting the taking of private property without just compensation. In areas of such critical importance and sensitivity as impairing private property rights and mandating the expenditure of public funds, the delegation of legislative authority to an administrative agency would violate the doctrine of separation of powers in Cal. Const., art. III, § 3, and would be invalid. Accordingly, guidelines promulgated by the State Department of Housing and Community Development concerning land use and housing are not self-executing and do not have the binding effect of law. The subject of conversion of condominiums is of such importance to property owners and tenants alike that the authority of the local government to regulate in the area should not hinge on subjective interpretation by courts or administrative boards of vague or general language to be found in the planning and land use law (Gov. Code, § 65000 et seq.)

COUNSEL

Jones & Jones and Arthur T. Jones for Plaintiffs and Appellants.

George Deukmejian, Attorney General, Michael Franchetti, Chief Deputy Attorney General, R. H. Connett, Assistant Attorney General, Daniel P. Selmi, Sylvia O. Cano, Deputy Attorneys General, and Carlyle W. Hall, Jr., as Amici Curiae on behalf of Plaintiff and Appellant.

Frank R. Manzano, City Attorney, and Peter C. Wright, Assistant City Attorney, for Defendants and Respondents.

Roger A. Grable, City Attorney (Irvine), William H. Keiser, Assistant City Attorney, Leonard A. Hampel and Rutan & Tucker as Amici Curiae on behalf of Defendants and Respondents and Real Parties in Interest and Respondents.

Melby & Anderson, Jarrett Anderson, Selvin & Weiner, Beryl Weiner, Morton C. Devor, Alan I. White, Philip W. Green and Drummy, Garrett, King & Harrison and Allan M. Kassirer for Real Parties in Interest and Respondents.

COMPTON, J.

Proceedings in mandamus to compel the City Council of the City of Glendale (City), inter alia, to vacate and set aside all approvals granted subsequent to July 20, 1978, for the conversion of existing apartment houses to condominium ownership and to declare a moratorium on such conversions pending certain actions by the City in the area of planning which, according to petitioner, are required by law.***879** The State Department of Housing and Community Development (Department) and the Sierra Club have filed amicus curiae briefs in support of petitioner. An amicus brief in support of City and real parties in interest has been filed on behalf of the City of Irvine and 45 other California cities.

Petitioner is a tenant in an apartment building which was approved by City on July 20, 1978, for conversion to condominium ownership. In this action he purports to represent an unincorporated association of tenants who are similarly situated.

The real parties in interest are owners of apartment buildings who, subsequent to July 20, 1978, have applied for and received approval for conversion to condominiums. The trial court entered judgment denying the petition for mandate. Petitioner has appealed. We affirm.

Code of Civil Procedure section 1085 provides that a writ of mandate may be issued to compel a public official to perform an act which the law specifically requires him to perform. Petitioner contends that City is required by law and should be mandated to perfect what he describes as an "inadequate" general plan and that the failure to take such action renders the City powerless to approve condominium conversions. Hence, according to petitioner, such previously granted approvals must be vacated.

While the immediate goal of petitioner is to prevent the accomplishment of a number of specific condominium conversion projects, the fundamental issue involved is the decision-making power in the area of land use and planning.

Land use regulation in California has historically been a function of local government under the grant of police power contained in California Constitution, article XI, section 7. [FN1] The exercise of that power has traditionally been accomplished through zoning ordinances and regulation of subdivisions under the Subdivision Map Act (formerly Bus. & Prof. Code, § 11500 et seq., now Gov. Code, §§ 66410 through 66499.30).***880**

> FN1 California Constitution, article XI, section 7 provides: "A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws."

(1)In recent years the Legislature has enacted a number of statutes as part of the State Planning and Zoning Law, (Gov. Code, § 65000 et seq.) the combined effect of which is to require that cities and counties adopt a general plan for the future development, configuration and character of the city or county and require that future land use decisions be made in harmony with that general plan.

The general plan is required to contain elements dealing with specific areas such as housing, land use and circulation. (Gov. Code, § 65302.)Subdivision map approval and zoning decisions must be consistent with the general plan. (Gov. Code, §§ 66473.5, 66479 and 65860.)

The Department is authorized to develop and publish guidelines for the preparation of the housing element of the plan (Gov. Code, § 65040.2; Health & Saf. Code, § 50459) and the Office of Planning and Research is authorized to do the same for other elements of the plan (Gov. Code, § 65040.2). The Department's guidelines were promulgated in 1973 and codified in California Administrative Code, title 25, sections 6300 through 6350.

Except for mandating the development of a plan,

specifying the elements to be included in the plan, and imposing on the cities and counties the general requirement that land use decisions be guided by that plan, the Legislature has not preempted the decision making power of local legislative bodies as to the specific contours of the general plan or actions taken thereunder.

As we will discuss, petitioner's contentions in this case, as supported by amicus curiae, if accepted, would result in that decision making power being usurped by the Department or the courts.

These contentions are that the guidelines promulgated by the Department are binding on local governments and have the force of law and that the courts should assume the role of determining the "adequacy" with which a local plan addresses all of the various societal factors.

The thrust of the statutory scheme embodied in the state planning and zoning law is to insure that decisions made by local governmental entities, which affect future growth of their communities, will be the result of considered judgment in which due consideration is given to the various interrelated elements of community life. The statutes make clear, however, that local control is at the heart of process. ***881**

Government Code section 65030.1 provides in part: "The Legislature also finds that decisions involving the future growth of the state, *most of which are made and will continue to be made at the local level*, should be *guided* by an effective planning process, including the local general plan, and should proceed within the *framework* of officially approved statewide goals and policies...to land use, population growth and distribution, development, open space, resource preservation and utilization, air and water quality, and other related physical, social and economic development factors." (Italics added.)

Government Code section 66411 provides in part: "Regulation and control of the design and improvement of subdivisions are vested in the legislative bodies of local agencies. *Each local agency shall by ordinance, regulate and control subdivisions for which this division requires a tentative and final or parcel map....*" (Italics added.)

The general plan which a city or county is required to adopt is simply a statement of policy. A general plan or policy, whether it be adopted by governmental entity or private organization serves to provide a standing consistent answer to recurring questions and to act as a guide for specific plans or programs. (*O'Loane v. O'Rourke* (1965) 231 Cal.App.2d 774 [42 Cal.Rptr. 283].)

Here the City has adopted a master plan and the housing element, which became mandatory by virtue of an amendment to Government Code section 65302, subdivision (c), effective January 1, 1972, was completed by mid-1975. That element was undergoing study and revision commencing in early 1978 and a revision was adopted August 1, 1978. The instant action was not commenced until August 21, 1978.

Since 1954, City has also had an ordinance regulating the design and construction of all phases of subdivision development. In December of 1978, it adopted a specific ordinance dealing with condominium development which is applicable to both new development and conversions.

(2a)Petitioner's contention is that the City ordinance regulating condominium conversion is invalid and that any approval of such conversions pursuant thereto is void because the housing element of the *general plan* is "inadequate." The argument goes that any subdivision regulation, including regulation of condominium conversion, cannot be consistent with the general plan as required by ***882**Government Code sections 66473.5 [FN2] and 66474, [FN3] if the general plan itself is defective or inadequate.

FN2 Government Code section 66473.5 reads as follows: "No local agency shall approve a map unless the legislative body shall find that the proposed subdivision, together with the provisions for its design and improvement, is consistent with the general plan required by Article 5 (commencing with Section 65300) of Chapter 3 of Division 1 of this title, or any specific plan adopted pursuant to Article 8 (commencing with Section 65450) of Chapter 3 of Divi-

> sion 1 of this title. ¶ A proposed subdivision shall be consistent with a general plan or a specific plan only if the local agency has officially adopted such a plan and the proposed subdivision or land use is compatible with the objectives, policies, general land uses and programs specified in such a plan."
>
> FN3 Government Code section 66474 reads in part as follows: "A legislative body of a city or county shall deny approval of a final or tentative map if it makes any of the following findings: (a) That the proposed map is not consistent with applicable general and specific plans. (b) That the design or improvement of the proposed subdivision is not consistent with applicable general and specific plans."

Both petitioner and amicus rely heavily on *Save El Toro Assn. v. Days* (1977) 74 Cal.App.3d 64 [141 Cal.Rptr. 282]. In that case the Court of Appeal invalidated a city's approval of a subdivision map because the court determined that the city had adopted neither a general plan nor a local open space plan. It was there held that a subdivision could not be consistent with a nonexistent plan.

Here, there is no question but what the City of Glendale has adopted a general plan with all of the required elements. The claim is simply that, according to petitioner, it is "inadequate" because the housing element of the plan does not discuss in specific terms the subject of condominium conversion and that it does not comport with the Department's guidelines, which, in our opinion, are nothing more than the Department's interpretation of the Legislature's desires. We think it important to note that with one exception neither the statutes themselves nor the guidelines make any specific mention of condominium conversion.

While condominiums, since their recent advent in California, have been treated as subdivisions of airspace and thus subject to the same general type of regulation as traditional land subdivision, it is apparent that conversion of an existing apartment building to condominium ownership does not involve the land use considerations inherent in the traditional land subdivision.

In obvious recognition of this distinction the Legislature has exempted condominium conversions from certain requirements applicable to ***883** other types of subdivisions. Government Code section 66427.2 provides that condominium conversions, which do not include the addition of new units, are *not* required to be consonant with the general plan unless that plan contains "definite objectives and policies" relating thereto.

Government Code section 66427, a part of the Subdivision Map Act, exempts condominium projects from a requirement of providing detailed maps of the building being subdivided.

Petitioner and the Department concede that an otherwise adequate general plan need not contain any reference to condominium conversions because such silence implies a finding that conversions pose no obstacle to implementation of the general plan and to require such reference and the procedure that would flow therefrom would be simply a bureaucratic exercise.

What then is the basis for the claim that the City's plan is not otherwise adequate? In short, it is that the City's plan fails to comport with the Department's guidelines which it interprets as requiring an exhaustive inventory of available housing and an "action" program to insure adequate housing for all economic segments of the community, and which in light of the housing situation in Glendale, must necessarily include reference to the subject of condominium conversions.

The trial court found, on the basis of evidence presented, that the plan, and more specifically the housing element, was adequate and that no special conditions existed which would make it mandatory for the City to include specific provisions concerning condominium conversions. The trial court also found that in each case the approval of the specific conversion project was consistent with the general plan.

The actions of the City are presumed to be valid and a regular performance of official duty. The burden is

on petitioner to demonstrate that the City has failed to perform a specific duty mandated by law.

Planning is at best an inexact science. General plans or policy statements are often semantical exercises which require considerable interpretation on the part of persons charged with implementing them.

In the area of planning and land use the Legislature has promulgated its own general policies and mandated that local governments in turn adopt plans which comport with the Legislature's policies. ***884**

Absent a complete failure or at least substantial failure on the part of a local governmental agency to adopt a plan which approximates the Legislature's expressed desires, the courts are ill-equipped to determine whether the language used in a local plan is "adequate" to achieve the broad general goals of the Legislature. (3)In short, while a court, such as in *Save El Toro Assn. v. Days, supra.*, 74 Cal.App.3d 64, may conclude that in form and general content, a local plan fails to meet the general requirements of the statute, a court cannot and should not involve itself in a detailed analysis of whether the elements of the plan are adequate to achieve its purpose. To do so would involve the court in the writing of the plan. That issue is one for determination by the political process and not by the judicial process.

A perfect example of the problem is presented in this case. Government Code section 65302, subdivision (c) states in part that the housing element should contain "...standards and plans for the improvement of housing and for provision of adequate sites for housing. This element of the plan shall make adequate provision for the housing needs of all economic segments of the community. Such element shall consider all aspects of current housing technology, to include provisions for not only site-built housing, but also manufactured housing, including mobile-homes and modular homes."

Petitioner and the Department interpret that language as requiring the cities and counties to affirmatively plan in terms of "who, what and when" for the *creation* of housing. Implicit in this is the requirement of the expenditure of public funds for the purpose. The City contends there is no legislative mandate to affirmatively acquire or produce housing.

In the absence of more specific legislation, it would ill-behoove any court to indirectly mandate such a specific "action" program under the guise of declaring an otherwise complete and comprehensive plan to be inadequate, basing its decision on nothing more than a subjective interpretation of such nonspecific language.

(2b)Contrary to the contention of petitioner, we conclude that the housing element of the City's master plan contains an extremely comprehensive analysis of the present housing inventory and future needs. The City's overall plan and its ordinances in the area of land use regulation represent an honest and reasonable effort to comply with the state's statutory requirements. ***885**

Finally, we turn to the contention that the guidelines promulgated by the department have the effect of law, are binding on the cities and counties and thereby limit the legislative prerogative of the city councils and boards of supervisors.

In our opinion, this is a startling concept indeed. As noted earlier, planning guidelines are developed by two bodies under two separate statutory authorizations. Government Code section 65040.2 specifically provides that the guidelines promulgated by the Office of Planning and Research are advisory only.

Health and Safety Code section 50459, which provides for the authority of the Department to promulgate guidelines concerning the housing element in local planning, does not, however, specifically declare such guidelines to be advisory only. The statute does, however, authorize that department to review local housing elements for conformity with Government Code section 65302 and *report its findings*. The clear implication is that the Department has no authority on its own to compel compliance according to its own notion of what constitutes compliance. The term "guidelines" itself suggests an absence of compulsion.

To carry the argument to its logical extreme, if the Department could promulgate regulations or guide-

lines having the effect of law it could simply adopt a regulation banning all condominium conversions or spelling out the Department's own regulatory scheme. Further, the Department could, according to its interpretation of the statute, require public funding for housing developments.

(4a)In regulating condominium conversion or, in fact, in regulating land use generally, the police power is in direct confrontation with article I, section 1 of the California Constitution (right to acquire or possess property) and article I, section 19 (prohibition against the taking of private property without just compensation). In areas of such critical importance and sensitivity as impairing private property rights and mandating the expenditure of public funds, a delegation of legislative authority to an administrative agency would violate the doctrine of separation of powers, article III, section 3 and would be invalid.

(2c)In summary, the decision making power in the area of land use and planning still rests with the local governmental agencies to be exercised within the constraints prescribed by enactments of the state ***886** Legislature. When any attack is made upon the exercise of that decision making power and the adequacy of the general plan within which it is to be exercised, a presumption of validity attaches to the actions of the local governmental agency.

(4b)Guidelines promulgated by the Department are not self-executing and do not have the binding effect of law. The subject of conversion of condominiums is of such importance to property owners and tenants alike that the authority of the local government to regulate in the area should not hinge upon subjective interpretation by courts or administrative boards of the vague or general language to be found in the planning and land use law. If the Legislature desires to preempt the decision making power of local governments in the field, it should specifically say so.

Our conclusion is borne out by the fact that since the commencement of this action, the Legislature has enacted Assem. Bill No. 2853, which amends Government Code section 65302 and adds article 10.6 to chapter 3 of division 1 of title 7 of the Government Code.

The effect of this legislation is to codify many of the provisions of the Department's former guidelines, and to require compliance by October 1, 1981. The new enactment specifically provides that any guidelines or findings adopted by the Department are advisory only, and that judicial review of a local plan be limited to a determination of whether there is "reasonable compliance" with the statutes.

This indicates to us a recognition by the Legislature that the Department's guidelines have always been advisory only, that any such drastic impairment of the legislative prerogative of local government should be undertaken only by specific legislative action and judicial review for compliance be limited in scope.

The judgment is affirmed.

Fleming, Acting P. J., and Beach, J., concurred.
Petitions for a rehearing were denied January 9, 1981, and appellant's petition for a hearing by the Supreme Court was denied March 11, 1981. ***887**

Cal.App.2.Dist.
Bownds v. City of Glendale
113 Cal.App.3d 875, 170 Cal.Rptr. 342

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139 Cal.App.4th 1356, 44 Cal.Rptr.3d 128, 209 Ed. Law Rep. 290, 06 Cal. Daily Op. Serv. 4493, 2006 Daily Journal D.A.R. 6509
(Cite as: 139 Cal.App.4th 1356, 44 Cal.Rptr.3d 128)

C

Court of Appeal, Sixth District, California.
SAN LORENZO VALLEY COMMUNITY ADVOCATES FOR RESPONSIBLE EDUCATION, Plaintiff and Appellant,
v.
SAN LORENZO VALLEY UNIFIED **SCHOOL** DISTRICT, Defendant and Respondent.
No. H028147.

May 26, 2006.

Background: Education advocates association brought action to challenge **school** district's decision to close two elementary **schools** and to transfer students from those **schools** to district's other elementary **schools**. After bench trial, the Superior Court, Santa Cruz County, No. CV147109,Irwin Joseph, J., entered judgment for district. Association appealed.

Holdings: The Court of Appeal, McAdams, J., held that:
(1) district's closure decision constituted "project" under California Environmental Quality Act (**CEQA**);
(2) substantial evidence supported determination that district's decision was exempt from **CEQA**;
(3) district's use of proceeds from local **school** facilities bond did not violate bond law provision on ballot requirements;
(4) district's expenditures did not violate bond laws;
(5) substantial evidence did not show district violated California Public Records Act (CPRA);
(6) district did not violate community involvement statutes; and
(7) association was not entitled to attorney fees.

Affirmed.

West Headnotes

[1] Environmental Law 149E 582

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek580 Preliminary Assessment or Report
149Ek582 k. Necessity. Most Cited Cases
If a project is not exempt from California Environmental Quality Act (**CEQA**) requirements-either because it does not fall within an exempt category or because an exception makes the exemption unavailable-then the agency must conduct an initial study to choose between a negative declaration or an environmental impact report (EIR). West's Ann.Cal.Pub.Res.Code § 21000 et seq.; 14 CCR § 15063.

[2] Environmental Law 149E 589

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek584 Necessity for Preparation of Statement, Consideration of Factors, or Other Compliance with Requirements
149Ek589 k. Significance in General. Most Cited Cases

Environmental Law 149E 615

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek612 Evidence
149Ek615 k. Weight and Sufficiency. Most Cited Cases
California Environmental Quality Act (**CEQA**) excuses the preparation of an environmental impact report (EIR) and allows the use of a negative declaration when an initial study shows that there is no substantial evidence that the project may have a significant effect on the environment. West's Ann.Cal.Pub.Res.Code § 21000 et seq.; 14 CCR §§ 15063, 15070.

[3] Environmental Law 149E 690

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek690 k. Harmless Error. Most Cited Cases
Generally, an agency's failure to comply with the

procedural requirements of the California Environmental Quality Act (**CEQA**) is prejudicial when the violation thwarts **CEQA's** goals by precluding informed decision-making and public participation. West's Ann.Cal.Pub.Res.Code § 21000 et seq.

[4] Environmental Law 149E 689

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek677 Scope of Inquiry on Review of Administrative Decision
149Ek689 k. Assessments and Impact Statements. Most Cited Cases

Environmental Law 149E 692

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek692 k. Questions of Law and Fact. Most Cited Cases
Questions of interpretation or application of the requirements of the California Environmental Quality Act (**CEQA**) are matters of law subject to de novo review by the court. West's Ann.Cal.Pub.Res.Code § 21000 et seq.

[5] Environmental Law 149E 595(2)

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek584 Necessity for Preparation of Statement, Consideration of Factors, or Other Compliance with Requirements
149Ek595 Particular Projects
149Ek595(2) k. Land Use in General. Most Cited Cases
School district's decision to close two elementary **schools** and to transfer students from those **schools** to district's other elementary **schools** constituted a "project" under the California Environmental Quality Act (**CEQA**); possibility of environmental effects from closure itself, although not high, could not be rejected, and transfer of students could change bus routes, alter traffic patterns, increase traffic congestion and parking problems, with attendant environmental effects. West's Ann.Cal.Pub.Res.Code § 21065; 14 CCR § 15061.

See 12 Witkin, Summary of Cal. Law (10th ed. 2005) Real Property, § 832 et seq.; 9 Miller & Starr, Cal. Real Estate (3d ed. 2001) § 25:186; Cal. Jur. 3d, Pollution and Conservation Laws, § 511 et seq.; Cal. Civil Practice (Thomson/West 2003) Environmental Law, § 8:7.

[6] Environmental Law 149E 587

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek584 Necessity for Preparation of Statement, Consideration of Factors, or Other Compliance with Requirements
149Ek587 k. Major Government Action. Most Cited Cases
To maximize environmental protection, the concept of a "project" subject to the California Environmental Quality Act (**CEQA**) is broadly defined. West's Ann.Cal.Pub.Res.Code § 21065; 14 CCR §§ 15002, 15378.

[7] Environmental Law 149E 692

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek692 k. Questions of Law and Fact. Most Cited Cases
Where the facts in the record are undisputed, the court decides as a matter of law whether the challenged activity falls within the definition of a "project" under the California Environmental Quality Act (**CEQA**). West's Ann.Cal.Pub.Res.Code § 21065; 14 CCR §§ 15002, 15378.

[8] Environmental Law 149E 592

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek584 Necessity for Preparation of Statement, Consideration of Factors, or Other Compliance with Requirements
149Ek592 k. Categorical Exclusion; Exemptions in General. Most Cited Cases
Each class of categorical exemptions from California Environmental Quality Act (**CEQA**) embodies a finding by the State Resources Agency that the project will not have a significant environmental impact. West's Ann.Cal.Pub.Res.Code § 21080; 14 CCR §§

15061, 15301-15333.

[9] Environmental Law 149E 592

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek584 Necessity for Preparation of Statement, Consideration of Factors, or Other Compliance with Requirements
149Ek592 k. Categorical Exclusion; Exemptions in General. Most Cited Cases
Under California Environmental Quality Act (**CEQA**) guideline providing that categorical exemptions shall not be used for activity where there is reasonable possibility that activity will have significant effect on environment due to unusual circumstances, term "unusual circumstances" refers to feature of project that distinguishes it from others in exempt class. 14 CCR § 15300.2(c).

[10] Environmental Law 149E 689

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek677 Scope of Inquiry on Review of Administrative Decision
149Ek689 k. Assessments and Impact Statements. Most Cited Cases
The scope of an exemption from California Environmental Quality Act (**CEQA**) may be analyzed as a question of statutory interpretation and thus subject to independent review. West's Ann.Cal.Pub.Res.Code § 21080; 14 CCR §§ 15061, 15301-15333.

[11] Environmental Law 149E 689

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek677 Scope of Inquiry on Review of Administrative Decision
149Ek689 k. Assessments and Impact Statements. Most Cited Cases
Substantial evidence test governs judicial review of agency's factual determination that a project falls within a categorical exemption from California Environmental Quality Act (**CEQA**). West's Ann.Cal.Pub.Res.Code § 21080; 14 CCR §§ 15061, 15301-15333.

[12] Environmental Law 149E 592

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek584 Necessity for Preparation of Statement, Consideration of Factors, or Other Compliance with Requirements
149Ek592 k. Categorical Exclusion; Exemptions in General. Most Cited Cases
Because California Environmental Quality Act (**CEQA**) exemptions operate as exceptions to **CEQA**, they are narrowly construed. West's Ann.Cal.Pub.Res.Code § 21080; 14 CCR §§ 15061, 15301-15333.

[13] Environmental Law 149E 689

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek677 Scope of Inquiry on Review of Administrative Decision
149Ek689 k. Assessments and Impact Statements. Most Cited Cases
If a procedural violation of California Environmental Quality Act (**CEQA**) is shown, the substantial evidence prong of the statutory standard of judicial review does not come into play. West's Ann.Cal.Pub.Res.Code § 21168.5.

[14] Environmental Law 149E 592

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek584 Necessity for Preparation of Statement, Consideration of Factors, or Other Compliance with Requirements
149Ek592 k. Categorical Exclusion; Exemptions in General. Most Cited Cases
In granting an exemption from California Environmental Quality Act (**CEQA**), the agency must proceed in the manner prescribed by law, i.e., **CEQA** statutes, **CEQA** Guidelines, and judicial gloss on both, lest it be charged with abusing its discretion. West's Ann.Cal.Pub.Res.Code §§ 21080, 21168.5; 14 CCR §§ 15061, 15301-15333.

[15] Environmental Law 149E 592

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek584 Necessity for Preparation of Statement, Consideration of Factors, or Other Compliance with Requirements
149Ek592 k. Categorical Exclusion; Exemptions in General. Most Cited Cases
In determining whether a project is exempt from California Environmental Quality Act (**CEQA**), the agency should proceed with considered awareness of purposes and policy that underlie **CEQA**, and should not undertake mechanical application of exemption criteria in reaching its decision. West's Ann.Cal.Pub.Res.Code § 21080; 14 CCR §§ 15061, 15301-15333.

[16] Environmental Law 149E 610

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek610 k. Time Requirements. Most Cited Cases
In California Environmental Quality Act (**CEQA**) cases where a negative declaration or an environmental impact report (EIR) is necessary, environmental issues must be considered and resolved before a project is approved, but preliminary determinations of applicability of **CEQA** are not formalized until after project has been approved. West's Ann.Cal.Pub.Res.Code § 21000 et seq.; 14 CCR § 15062.

[17] Environmental Law 149E 594

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek584 Necessity for Preparation of Statement, Consideration of Factors, or Other Compliance with Requirements
149Ek594 k. Negative Declaration; Statement of Reasons. Most Cited Cases
While California Environmental Quality Act (**CEQA**) guideline expressly requires that agency render a written determination whether project requires environmental impact report (EIR), there is no requirement that agency put its decision that project is exempt from **CEQA** in writing. 14 CCR § 15362.

[18] Environmental Law 149E 596

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek584 Necessity for Preparation of Statement, Consideration of Factors, or Other Compliance with Requirements
149Ek596 k. Proceedings. Most Cited Cases
Although California Environmental Quality Act (**CEQA**) provides for public comment on a negative declaration and an environmental impact report (EIR), **CEQA** does not provide for a public comment period before an agency decides a project is exempt. West's Ann.Cal.Pub.Res.Code § 21092.

[19] Environmental Law 149E 592

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek584 Necessity for Preparation of Statement, Consideration of Factors, or Other Compliance with Requirements
149Ek592 k. Categorical Exclusion; Exemptions in General. Most Cited Cases
Where a project is categorically exempt from California Environmental Quality Act (**CEQA**), it is not subject to **CEQA** requirements and may be implemented without any **CEQA** compliance whatsoever. West's Ann.Cal.Pub.Res.Code § 21080; 14 CCR §§ 15061, 15301-15333.

[20] Environmental Law 149E 595(2)

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek584 Necessity for Preparation of Statement, Consideration of Factors, or Other Compliance with Requirements
149Ek595 Particular Projects
149Ek595(2) k. Land Use in General. Most Cited Cases
Substantial evidence contained in **school** closure committee's report supported determination that **school** district's decision to close two elementary **schools** and to transfer students from those **schools** to district's other elementary **schools** was categorically

exempt from California Environmental Quality Act (**CEQA**); additional student populations and additional classrooms in receptor **schools** fell within **CEQA** exemption guideline, and evidence did not support applicability of exception to exemption for project's potential for significant adverse environmental impacts from mold, geologic hazards, septic failure, or traffic-related issues. West's Ann.Cal.Pub.Res.Code § 21080.18; 14 CCR §§ 15061, 15314.

[21] Environmental Law 149E 615

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek612 Evidence
149Ek615 k. Weight and Sufficiency. Most Cited Cases
There must be substantial evidence, such as that found in the information submitted in connection with the project, including at any hearings that the agency chooses to hold, that the project is within category exemption from California Environmental Quality Act (**CEQA**). West's Ann.Cal.Pub.Res.Code § 21080; 14 CCR §§ 15061, 15301-15333.

[22] Environmental Law 149E 689

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek677 Scope of Inquiry on Review of Administrative Decision
149Ek689 k. Assessments and Impact Statements. Most Cited Cases
When called upon to review an agency's decision that a project is exempt from California Environmental Quality Act (**CEQA**), the court's task is to determine whether, as a matter of law, the activity meets the definition of a categorically exempt project; to do this, court applies de novo standard of review, not substantial evidence standard. West's Ann.Cal.Pub.Res.Code §§ 21080, 21168.5; 14 CCR § 15061.

[23] Environmental Law 149E 592

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek584 Necessity for Preparation of Statement, Consideration of Factors, or Other Compliance with Requirements
149Ek592 k. Categorical Exclusion; Exemptions in General. Most Cited Cases
For California Environmental Quality Act (**CEQA**) exemption for transfer of students from one public **school** to another public **school** where the addition does not increase original student capacity by more than 25 percent or 10 classrooms, "student capacity" means the number of students that can be accommodated physically at the receptor **school**. West's Ann.Cal.Pub.Res.Code § 21080.18; 14 CCR § 15314.

[24] Environmental Law 149E 614

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek612 Evidence
149Ek614 k. Presumptions, Inferences, and Burden of Proof. Most Cited Cases

Environmental Law 149E 615

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek612 Evidence
149Ek615 k. Weight and Sufficiency. Most Cited Cases
At the administrative level, once an agency determines, based on substantial evidence in the record, that the project falls within a categorical exemption from California Environmental Quality Act (**CEQA**), the burden shifts to the challenging party to produce substantial evidence that one of the exceptions to categorical exemption applies. West's Ann.Cal.Pub.Res.Code § 21080; 14 CCR §§ 15061, 15300.2(c), 15301-15333.

[25] Environmental Law 149E 689

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek677 Scope of Inquiry on Review of Administrative Decision
149Ek689 k. Assessments and Impact Statements. Most Cited Cases
A party challenging an agency's decision that a pro-

ject is exempt from California Environmental Quality Act (**CEQA**) must produce substantial evidence that the project has the potential for a substantial adverse environmental impact. West's Ann.Cal.Pub.Res.Code § 21080; 14 CCR §§ 15061, 15300.2(c), 15301-15333.

[26] Schools 345 97(1)

345 **Schools**
345II Public **Schools**
345II(G) Fiscal Matters
345k97 Bonds
345k97(1) k. Authority to Issue Bonds in General. Most Cited Cases
Generally, **school** bond financing is restricted to projects of a capital or permanent character. West's Ann.Cal. Const. Art. 13A, § 1(b)(3), Art. 16, § 18(b); West's Ann.Cal.Educ.Code § 15146(b).

[27] Schools 345 97(4)

345 **Schools**
345II Public **Schools**
345II(G) Fiscal Matters
345k97 Bonds
345k97(4) k. Submission of Question of Issue to Popular Vote. Most Cited Cases
Elements that made up relationship between **school** district and electorate arising from **school** bond measure were authorizing legislation, district's formal resolution to submit issue to the electorate, the ballot proposition itself, and assent or ratification by the electors. West's Ann.Cal.Educ.Code §§ 15100, 15122.

[28] Schools 345 97(5)

345 **Schools**
345II Public **Schools**
345II(G) Fiscal Matters
345k97 Bonds
345k97(5) k. Sale or Other Disposition of Bonds by **School** District. Most Cited Cases
In determining whether **school** district violated bond law by using proceeds from local **school** facilities bond issue approved by local voters for closing two elementary **schools** and transferring students from those **schools** to district's other elementary **schools**, ballot arguments on bond measure were not part of analysis. West's Ann.Cal.Educ.Code § 15100.

[29] Schools 345 97(4)

345 **Schools**
345II Public **Schools**
345II(G) Fiscal Matters
345k97 Bonds
345k97(4) k. Submission of Question of Issue to Popular Vote. Most Cited Cases
School district's expenditures of proceeds from local **school** facilities bond issue approved by local voters did not violate statute providing that ballot for project funded by bonds requiring state matching funds must contain statement that project was subject to state approval, even though purpose of measure was to make district eligible to receive state matching funds; neither measure nor any other evidence suggested bond-financed projects required state matching funds. West's Ann.Cal.Educ.Code § 15122.5.

[30] Schools 345 90

345 **Schools**
345II Public **Schools**
345II(G) Fiscal Matters
345k90 k. Power to Incur Indebtedness and Expenditures. Most Cited Cases
Permissible administrative costs under **school** bond measure approved by voters included salaries and associated training costs of **school** district personnel acting as construction project administrators for project to close two elementary **schools** and to transfer students from those **schools** to district's other elementary **schools**. West's Ann.Cal. Const. Art. 13A, § 1(b)(3)(A); West's Ann.Cal.Educ.Code § 15100; West's Ann.Cal.Gov.Code § 16727.

[31] Schools 345 97(5)

345 **Schools**
345II Public **Schools**
345II(G) Fiscal Matters
345k97 Bonds
345k97(5) k. Sale or Other Disposition of Bonds by **School** District. Most Cited Cases

School district's use of bond funds for printing expenses and attorney fees incurred in preparing the bond did not violate statutes on permitted use of proceeds of sale of bonds. West's Ann.Cal.Educ.Code § 15145; West's Ann.Cal.Gov.Code § 16727.

[32] Schools 345 ⚿97(5)

345 **Schools**
345II Public **Schools**
345II(G) Fiscal Matters
345k97 Bonds
345k97(5) k. Sale or Other Disposition of Bonds by **School** District. Most Cited Cases
School district's use of bond funds for deferred maintenance and repair of septic tank on certain campus did not violate state bond laws, in absence of showing that district paid for current maintenance with deferred maintenance bond funds, or showing that district may improper transfers within its accounts. West's Ann.Cal. Const. Art. 13D, § 2; West's Ann.Cal.Educ.Code §§ 15100, 17582.

[33] Schools 345 ⚿97(5)

345 **Schools**
345II Public **Schools**
345II(G) Fiscal Matters
345k97 Bonds
345k97(5) k. Sale or Other Disposition of Bonds by **School** District. Most Cited Cases
School district's use of bond funds for demographic and geo-coding studies, consultants, mold reports, California Environmental Quality Act (**CEQA**) study, and moving and leasing of portable classrooms, in connection with decision to close two elementary **schools** and to transfer students to district's other elementary **schools**, did not violate bond statutes. West's Ann.Cal.Educ.Code §§ 17357, 17404; West's Ann.Cal.Gov.Code § 16727; West's Ann.Cal.Pub.Res.Code § 21000 et seq.

[34] Records 326 ⚿50

326 Records
326II Public Access
326II(B) General Statutory Disclosure Requirements
326k50 k. In General; Freedom of Information Laws in General. Most Cited Cases
California Public Records Act (CPRA) was enacted for the purpose of increasing freedom of information by giving members of the public access to information in the possession of public agencies. West's Ann.Cal.Gov.Code § 6250 et seq.

[35] Records 326 ⚿50

326 Records
326II Public Access
326II(B) General Statutory Disclosure Requirements
326k50 k. In General; Freedom of Information Laws in General. Most Cited Cases
California Public Records Act (CPRA) embodies a strong policy in favor of disclosure of public records. West's Ann.Cal.Gov.Code § 6250 et seq.

[36] Records 326 ⚿52

326 Records
326II Public Access
326II(B) General Statutory Disclosure Requirements
326k52 k. Persons Entitled to Disclosure; Interest or Purpose. Most Cited Cases

Records 326 ⚿54

326 Records
326II Public Access
326II(B) General Statutory Disclosure Requirements
326k53 Matters Subject to Disclosure; Exemptions
326k54 k. In General. Most Cited Cases
Unless exempted by the California Public Records Act (CPRA), all public records may be examined by any member of the public, often the press, but conceivably any person with no greater interest than idle curiosity. West's Ann.Cal.Gov.Code §§ 6254, 6255.

[37] Records 326 ⚿63

326 Records
326II Public Access

326II(B) General Statutory Disclosure Requirements
326k61 Proceedings for Disclosure
326k63 k. Judicial Enforcement in General. Most Cited Cases
An order of the trial court under the California Public Records Act (CPRA), which either directs disclosure of records by a public official or supports the official's refusal to disclose records, is immediately reviewable by petition to the appellate court for issuance of an extraordinary writ. West's Ann.Cal.Gov.Code §§ 6258, 6259.

[38] Records 326 ⚿63

326 Records
326II Public Access
326II(B) General Statutory Disclosure Requirements
326k61 Proceedings for Disclosure
326k63 k. Judicial Enforcement in General. Most Cited Cases
Standard for appellate review of an order under the California Public Records Act (CPRA) is an independent review of the trial court's ruling; factual findings made by the trial court will be upheld if based on substantial evidence. West's Ann.Cal.Gov.Code §§ 6258, 6259.

[39] Counties 104 ⚿52

104 Counties
104II Government
104II(C) County Board
104k52 k. Meetings. Most Cited Cases

Municipal Corporations 268 ⚿92

268 Municipal Corporations
268IV Proceedings of Council or Other Governing Body
268IV(A) Meetings, Rules, and Proceedings in General
268k92 k. Rules of Procedure and Conduct of Business. Most Cited Cases

Schools 345 ⚿57

345 **Schools**
345II Public **Schools**
345II(C) Government, Officers, and District Meetings
345k51 District Boards
345k57 k. Meetings. Most Cited Cases
Ralph M. Brown Open Meeting Act provides for open meetings for local legislative bodies such as city councils, boards of supervisors, and **school** boards. West's Ann.Cal.Gov.Code § 54950 et seq.

[40] Administrative Law and Procedure 15A ⚿124

15A Administrative Law and Procedure
15AII Administrative Agencies, Officers and Agents
15Ak124 k. Meetings in General. Most Cited Cases
A major objective of the Ralph M. Brown Open Meeting Act is to facilitate public participation in all phases of local government decisionmaking and to curb misuse of democratic process by secret legislation by public bodies. West's Ann.Cal.Gov.Code § 54950.

[41] Administrative Law and Procedure 15A ⚿816

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(F) Determination
15Ak816 k. Annulment, Vacation or Setting Aside of Administrative Decision. Most Cited Cases
Even where a plaintiff has satisfied the threshold procedural requirements to set aside an agency's action, Ralph M. Brown Open Meeting Act violations will not necessarily invalidate a decision, in the absence of a showing of prejudice. West's Ann.Cal.Gov.Code § 54950 et seq.

[42] Records 326 ⚿62

326 Records
326II Public Access
326II(B) General Statutory Disclosure Re-

quirements
326k61 Proceedings for Disclosure
326k62 k. In General; Request and Compliance. Most Cited Cases
Substantial evidence did not show **school** district violated California Public Records Act (CPRA) concerning requests for records connected to district's decision to close two elementary **schools** and to transfer students to district's other elementary **schools**; evidence showed only that district personnel were unaware of e-mails requesting documents, requesting attorney's failure to specify certain files, and district superintendent's testimony that she had never seen requested geologic report but that it "likely" was in certain location. West's Ann.Cal.Gov.Code § 6250 et seq.

[43] Records 326 65

326 Records
326II Public Access
326II(B) General Statutory Disclosure Requirements
326k61 Proceedings for Disclosure
326k65 k. Evidence and Burden of Proof. Most Cited Cases
In hearing to determine whether **school** district violated California Public Records Act (CPRA) by failing to provide education advocates association with records concerning decision to close two **schools**, testimony of individual resident who also alleged CPRA violations was irrelevant, where resident did not purport to act as member of association, and his testimony did not address any collateral matter. West's Ann.Cal.Gov.Code § 6258.

[44] Appeal and Error 30 970(2)

30 Appeal and Error
30XVI Review
30XVI(H) Discretion of Lower Court
30k970 Reception of Evidence
30k970(2) k. Rulings on Admissibility of Evidence in General. Most Cited Cases
Generally, an appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence.

[45] Appeal and Error 30 970(2)

30 Appeal and Error
30XVI Review
30XVI(H) Discretion of Lower Court
30k970 Reception of Evidence
30k970(2) k. Rulings on Admissibility of Evidence in General. Most Cited Cases
An appellate court examines for abuse of discretion a decision on admissibility that turns on the relevance of the evidence in question.

[46] Witnesses 410 319

410 Witnesses
410IV Credibility and Impeachment
410IV(A) In General
410k319 k. Right to Impeach Witness in General. Most Cited Cases
Though not directly germane, a matter collateral to an issue in the action may nevertheless be relevant to the credibility of a witness who presents evidence on an issue, but the admissibility of such collateral matter lies within the trial court's discretion. West's Ann.Cal.Evid.Code § 210.

[47] Records 326 63

326 Records
326II Public Access
326II(B) General Statutory Disclosure Requirements
326k61 Proceedings for Disclosure
326k63 k. Judicial Enforcement in General. Most Cited Cases
(Formerly 118Ak300)
California Public Records Act (CPRA) provision authorizing plaintiff to enforce his or her right to inspect or to receive a copy of any public record contemplates a declaratory relief proceeding commenced only by the individual or entity seeking disclosure of public records. West's Ann.Cal.Gov.Code § 6258.

[48] Schools 345 74

345 **Schools**
345II Public **Schools**
345II(D) District Property

345k66 **School** Buildings
345k74 k. Sale or Other Disposition. Most Cited Cases
School district's superintendent's **school** closure committee, appointed prior to decision to close two elementary **schools** in district, did not violate community involvement statutes; statutes did not dictate what information must be provided to advisory committees, district made good faith attempt to provide committee with information that was complete and accurate, and no prejudice was demonstrated from absence of any pertinent reports. West's Ann.Cal.Educ.Code §§ 17387-17391.

[49] Appeal and Error 30 970(2)

30 Appeal and Error
30XVI Review
30XVI(H) Discretion of Lower Court
30k970 Reception of Evidence
30k970(2) k. Rulings on Admissibility of Evidence in General. Most Cited Cases
A trial court's exercise of discretion in admitting or excluding evidence will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice. West's Ann.Cal.Evid.Code §§ 353, 354.

[50] Trial 388 55

388 Trial
388IV Reception of Evidence
388IV(A) Introduction, Offer, and Admission of Evidence in General
388k55 k. Exclusion of Improper Evidence. Most Cited Cases

Trial 388 105(1)

388 Trial
388IV Reception of Evidence
388IV(C) Objections, Motions to Strike Out, and Exceptions
388k105 Effect of Failure to Object or Except
388k105(1) k. In General. Most Cited Cases
Where questions are asked which are improper, the court acts within the scope of its duty in refusing to allow them to be answered, even though no objection is made.

[51] Evidence 157 505

157 Evidence
157XII Opinion Evidence
157XII(B) Subjects of Expert Testimony
157k505 k. Matters of Opinion or Facts. Most Cited Cases
In bench trial of association's challenge to **school** district's use of bond funds, testimony of district's bond counsel about propriety of bond expenditures was admissible, where testimony was his percipient testimony rather that his conclusions of law.

[52] Costs 102 194.42

102 Costs
102VIII Attorney Fees
102k194.42 k. Public Interest and Substantial Benefit Doctrine; Private Attorney General. Most Cited Cases
Education advocates association, that unsuccessfully appealed adverse judgment in its action to challenge **school** district's decision to close two elementary **schools** and to transfer students from those **schools** to district's other elementary **schools**, was not prevailing party entitled to attorney fees under private attorney general doctrine. West's Ann.Cal.C.C.P. § 1021.5.

[53] Records 326 68

326 Records
326II Public Access
326II(B) General Statutory Disclosure Requirements
326k61 Proceedings for Disclosure
326k68 k. Costs and Fees. Most Cited Cases
Plaintiff prevails within meaning of California Public Records Act (CPRA) fee provision when he or she files action which results in defendant releasing copy of previously withheld document; conversely, plaintiff has not prevailed where substantial evidence supported finding that litigation did not cause agency to

139 Cal.App.4th 1356, 44 Cal.Rptr.3d 128, 209 Ed. Law Rep. 290, 06 Cal. Daily Op. Serv. 4493, 2006 Daily Journal D.A.R. 6509
(Cite as: 139 Cal.App.4th 1356, 44 Cal.Rptr.3d 128)

disclose any of documents ultimately made available. West's Ann.Cal.Gov.Code § 6259.
****135** Dawson, Passafuime, Bowden & Martinez, Gerald Bowden, Kathleen Morgan-Martinez, Scotts Valley, for Appellant.

Burton, Volkmann & Schmal, Timothy R. Volkmann, Santa Cruz, John P. Loringer, for Respondents.

McADAMS, J.

***1368** This action arises out of a decision by the defendant **school** district to close two elementary **schools** in the **San Lorenzo** Valley area of Santa Cruz County. Plaintiff seeks to overturn the closure decision, alleging that it violates various state laws, including the California Environmental Quality Act, the Public Records Act, the Brown Act, provisions of the Education Code, and **school** bond financing laws. The trial court rejected all of the plaintiff's contentions. We shall affirm.

BACKGROUND

This suit was brought by plaintiff and appellant **San Lorenzo** Valley Community Advocates for Responsible Education, an unincorporated association (SLV CARE). SLV CARE challenges a **school** closure decision made by defendant and respondent **San Lorenzo** Valley Unified **School** District (the District). At issue is the District's April 2003 decision to close two of its elementary **schools** and to transfer students from those **schools** to the District's other two elementary **school** campuses. Plaintiff SLV CARE challenges that decision on various legal grounds.

Factual Summary

The District made the challenged decision in response to declining enrollment and fiscal difficulties. The initial decision to close one or more **schools** was approved by District's Board of Trustees (Board) in December 2002. From December 2002 to June 2003, the District entertained public comment on the issue at its regular and special board meetings.

January 2003-March 2003: First Advisory Committee

The District also convened a task force-called the Superintendent's **School** Closure Committee (SSCC)-to consider the **school** closure question ***1369** and make a recommendation to the Board. The SSCC was composed of 17 people representing all of the affected **schools**; task force ****136** members included seven parents, four teachers, four classified employees, and two community members.

Between mid-January and mid-March 2003, the SSCC met formally eight times; ad hoc subcommittees also met separately. In mid-March 2003, after considering an extensive body of information about the **schools**, the SSCC recommended the closure of Redwood and Quail Hollow Elementary **Schools**. To consolidate student populations at the north end of the **San Lorenzo** Valley, in Boulder Creek, Redwood students would be transferred to Boulder Creek Elementary **School** (BCE). At the south end of the valley, in Felton, Quail Hollow students would be transferred to **San Lorenzo** Elementary **School** (SLE).

April 2003: Closure Decision

At a public meeting held on April 8, 2003, the District's Board considered and ultimately adopted the recommendation of the SSCC. Thus, as to the north valley elementary **schools**, the Board voted to close Redwood, and keep BCE open. As for the south valley, the Board voted to close Quail Hollow and keep SLE open.

In May 2003, a community group proposed private fundraising to keep Redwood Elementary **School** open for the upcoming **school** year. The Board rejected that proposal the following month.

June 2003-October 2003: Requests for Public Records

Starting in June 2003, various written requests for public records relating to the closure decision were made by attorney Steven A. Greenburg, acting as counsel for plaintiff SLV CARE.

In July 2003, the District forwarded more than 400

139 Cal.App.4th 1356, 44 Cal.Rptr.3d 128, 209 Ed. Law Rep. 290, 06 Cal. Daily Op. Serv. 4493, 2006 Daily Journal D.A.R. 6509
(Cite as: 139 Cal.App.4th 1356, 44 Cal.Rptr.3d 128)

pages of records to Greenburg. The following month, acting through its counsel, the District provided Greenburg with additional documents. After October 2003, document requests were addressed through formal discovery.

An additional request for documents was e-mailed to the District by **San Lorenzo** Valley resident David Churchill, with a copy to attorney Greenburg. The principal subject of Churchill's request was the District's use of money from Measure S, a multimillion-dollar **school** facilities bond issue that had been approved by local voters in 2000.

***1370 June 2003-October 2003: Consideration of Environmental Impacts**

In early August 2003, in response to public concerns-and notwithstanding its receipt of earlier legal advice that the **school** closure decision was exempt under the California Environmental Quality Act (**CEQA**)-the District retained consultants to evaluate possible environmental impacts, including traffic. The District retained environmental consultant Stephen Graves & Associates (Graves). The District also hired traffic consultant Keith Higgins & Associates (Higgins).

Graves, the environmental consultant, confirmed that the **school** consolidation decision was exempt from **CEQA**. On August 19, 2003, the District formally approved the filing of a notice of exemption from **CEQA**. Despite the exemption, the District authorized Graves to prepare an initial study of environmental effects. The initial study concluded that the **school** closures and transfers would not create any significant environmental impacts, and that potential traffic impacts, though insignificant, could be minimized with recommended project conditions. After public comment and response, Graves stood by the conclusions in the initial study.

As for traffic, by June 2003, the Public Works Department of Santa Cruz County ****137** had advised the Board of Supervisors of the need for an ordinance to reroute traffic in the **San Lorenzo** Valley following the **school** closure decision. The initial study by environmental consultant Graves incorporated a report by traffic consultant Higgins. That report identified anticipated traffic and parking problems resulting from the **school** consolidations. Nevertheless, the traffic report concluded, mitigation measures were not mandatory because those impacts would not exceed historic levels. With respect to BCE, however, the report noted that the District was "planning on implementing several strategies to improve traffic and parking operations" as described in the report. The District implemented those strategies.

By October 2003, having considered the issues, the District was prepared to approve the adoption of a negative declaration, thus confirming the absence of significant environmental impacts. No environmental impact report was prepared.

Fall 2003: Second Advisory Committee

In August 2003, the District's Board voted to convene a Surplus Property Advisory Committee (SPAC). At the same time, it approved an application form for membership on the committee. In October 2003, the District's Board approved the proposed roster of SPAC members. The Board meeting minutes of November 4, 2003, state: "The Board has declared the District Office and ***1371** Redwood Elementary **School** surplus property as a result of the Board decision to close Redwood Elementary and Quail Hollow Elementary **Schools** and move the District Office from the Felton site to Quail Hollow." Those minutes further state that the purpose of the public hearing on the SPAC was "to provide input to the committee for the purpose of determining acceptable uses of these properties." The SPAC met three times, from late October to mid-November 2003. In December 2003, the SPAC presented its recommendations for Redwood Elementary and the District Office, which included commercial, community, and educational uses.

Procedural History

Plaintiff SLV CARE brought this action, challenging the District's closure decision. As amended in August 2004, the complaint states five causes of action, all asserting statutory violations by the District. The first cause of action is for breach of statutory duties arising out of **school** bond financing laws. The second cause of action alleges **CEQA** violations. The third cause of action asserts breach of Education Code

mandates for community input on certain decisions. The final two causes of action allege violation of the California Public Records Act, which requires disclosure of public records, and of the Brown Act, which compels open public meetings.

The court conducted a six-day bench trial, which started on August 30, 2004, and concluded on September 8, 2004. At the close of evidence and argument, the court took the matter under submission. It issued a statement of decision on September 13, 2004, finding for the District on all claims.

In November 2004, the court entered judgment for the District. This appeal by SLV CARE followed.

CONTENTIONS

On appeal, SLV CARE renews its trial court claims that the District violated **CEQA**, bond financing laws, the Public Records Act, the Brown Act, and the Education Code. In addition, SLV CARE asserts that the trial court made certain ****138** erroneous evidentiary rulings and that it demonstrated bias. Appellant SLV CARE also seeks an award of attorney fees and costs. The District opposes all of appellant's arguments.

DISCUSSION

We consider each issue in turn, beginning with the claims of statutory violation.

*1372 I. CEQA

SLV CARE asserts that the District violated **CEQA**. To establish the proper framework for assessing that contention, we begin by summarizing the governing legal principles.

A. General Principles

The California Environmental Quality Act is codified at Division 13 of the Public Resources Code, beginning with section 21000.[FN1] As an aid to carrying out the statute, the State Resources Agency has issued a set of regulations, called Guidelines for the California Environmental Quality Act (Guidelines).[FN2]

FN1. In this section of the opinion (I), which discusses **CEQA**, further unspecified statutory references are to the Public Resources Code.

FN2. The Guidelines are contained in the California Code of Regulations, Title 14, Division 6, Chapter 3, starting at section 15000. Further unspecified guideline references are to those regulations.

CEQA embodies our state's policy that "the long-term protection of the environment ... shall be the guiding criterion in public decisions." (§ 21001, subd. (d). See *Davidon Homes v. City of San Jose* (1997) 54 Cal.App.4th 106, 112, 62 Cal.Rptr.2d 612.) As this court has observed, "the overriding purpose of **CEQA** is to ensure that agencies regulating activities that may affect the quality of the environment give primary consideration to preventing environmental damage." (*Save Our Peninsula Committee v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 117, 104 Cal.Rptr.2d 326.) Together, the statute and accompanying regulatory guidelines protect a variety of environmental values. Human health is among them. (See Guidelines, § 15065, subd. (a)(4).)

1. The Three-Step CEQA Process

Consistent with California's strong environmental policy, whenever the approval of a project is at issue, the statute and regulations "have established a three-tiered process to ensure that public agencies inform their decisions with environmental considerations." (*Davidon Homes v. City of San Jose, supra,* 54 Cal.App.4th at p. 112, 62 Cal.Rptr.2d 612. See also *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1371, 43 Cal.Rptr.2d 170.)

a. Threshold Determination of CEQA's Applicability

"The first tier is jurisdictional, requiring that an agency conduct a preliminary review in order to determine whether **CEQA** applies to a proposed activity. (Guidelines, §§ 15060, 15061.)" ***1373**(*Davidon Homes v. City of San Jose, supra,* 54 Cal.App.4th at

p. 112, 62 Cal.Rptr.2d 612.) **CEQA** applies if the activity is a "project" under the statutory definition, unless the project is exempt. (See §§ 21065, 21080.) "If the agency finds the project is exempt from **CEQA** under any of the stated exemptions, no further environmental review is necessary." (*Davidon Homes*, p. 113, 62 Cal.Rptr.2d 612.) In such cases, the agency may file a notice of **CEQA** exemption, if it chooses to do so. (Guidelines, § 15062, subd. (a); see ****139***Apartment Assn. of Greater Los Angeles v. City of Los Angeles* (2001) 90 Cal.App.4th 1162, 1171, 109 Cal.Rptr.2d 504.)

[1] If the project is not exempt-either because it does not fall within an exempt category or because an exception makes the exemption unavailable-then the agency must proceed to the second tier and conduct an initial study. (*Santa Monica Chamber of Commerce v. City of Santa Monica* (2002) 101 Cal.App.4th 786, 792, 124 Cal.Rptr.2d 731; see Guidelines, § 15063.)

b. Initial Study

The second tier of the process, the initial study, serves several purposes. One purpose is to inform the choice between a negative declaration and an environmental impact report (EIR). (Guidelines, § 15063, subd. (c)(1); *Lighthouse Field Beach Rescue v. City of Santa Cruz* (2005) 131 Cal.App.4th 1170, 1180, 31 Cal.Rptr.3d 901.) Another of the initial study's purposes is to eliminate unnecessary environmental impact reports. (Guidelines, § 15063, subd. (c)(7).)

[2] " **CEQA** excuses the preparation of an EIR and allows the use of a negative declaration when an initial study shows that there is no substantial evidence that the project may have a significant effect on the environment." (*San Bernardino Valley Audubon Society v. Metropolitan Water Dist.* (1999) 71 Cal.App.4th 382, 389-390, 83 Cal.Rptr.2d 836, citing Guidelines, § 15070. See also Pub. Resources Code, §§ 21064, 21080, subd. (c).) In certain situations where a straightforward negative declaration is not appropriate, the agency may permit the use of a mitigated negative declaration. (See § 21064.5; Guidelines, § 15064, subd. (f)(2); *San Bernardino Valley Audubon Society*, at p. 390, 83 Cal.Rptr.2d 836.)

c. Environmental Impact Report

If the project does not qualify for a negative declaration, "the third step in the process is to prepare a full environmental impact report...." (*Davidon Homes v. City of San Jose, supra*, 54 Cal.App.4th at p. 113, 62 Cal.Rptr.2d 612, citing §§ 21100 and 21151, and Guidelines, §§ 15063, subd. (b)(1) & 15080; *Gentry v. City of Murrieta, supra*, 36 Cal.App.4th at p. 1372, 43 Cal.Rptr.2d 170.)

The California Supreme Court has "repeatedly recognized that the EIR is the 'heart of **CEQA**.' " ***1374**(*Laurel Heights Improvement Assn. v. Regents of University of California* (1993) 6 Cal.4th 1112, 1123, 26 Cal.Rptr.2d 231, 864 P.2d 502 (*Laurel Heights II*).) As the court observed more than three decades ago, "since the preparation of an EIR is the key to environmental protection under **CEQA**, accomplishment of the high objectives of that act requires the preparation of an EIR whenever it can be fairly argued on the basis of substantial evidence that the project may have significant environmental impact." (*No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 75, 118 Cal.Rptr. 34, 529 P.2d 66, criticized on another point in *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 576, 38 Cal.Rptr.2d 139, 888 P.2d 1268.) Other cases have since confirmed the statutory preference for resolving doubts in favor of an EIR. (See, e.g., *Santa Teresa Citizen Action Group v. City of San Jose* (2003) 114 Cal.App.4th 689, 703, 7 Cal.Rptr.3d 868; *League for Protection of Oakland's etc. Historic Resources v. City of Oakland* (1997) 52 Cal.App.4th 896, 905, 60 Cal.Rptr.2d 821.)

2. Timing

"Choosing the precise time for **CEQA** compliance involves a balancing of competing factors. EIRs and negative declarations****140** should be prepared as early as feasible in the planning process to enable environmental considerations to influence project program and design and yet late enough to provide meaningful information for environmental assessment." (Guidelines, § 15004, subd. (b). See also, e.g., *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 395, 253 Cal.Rptr. 426, 764 P.2d 278.) As a general rule,

"public agencies shall not undertake actions concerning the proposed public project that would have a significant adverse effect or limit the choice of alternatives or mitigation measures, before completion of **CEQA** compliance." (Guidelines, § 15004, subd. (b)(2).)

When a project is exempt, however, a somewhat different timing rule applies. "When a public agency decides that a project is exempt from **CEQA** ..., the agency may file a notice of exemption. The notice shall be filed, if at all, *after* approval of the project." (Guidelines, § 15062, subd. (a), italics added.) "A notice of exemption may be filled out and may accompany the project application through the approval process" but it "shall not be filed ... until the project has been approved." (*Id.*, subd. (b). See also Guidelines, § 15061, subd. (d).)

3. Judicial Review

At issue here are **CEQA** challenges to a quasi-legislative action taken by the District, in a procedural setting where no administrative hearing was required. (See ***1375***No Oil, Inc. v. City of Los Angeles, supra,* 13 Cal.3d at p. 74, fn. 3, 118 Cal.Rptr. 34, 529 P.2d 66; *City of South Gate v. Los Angeles Unified* ***School*** *Dist.* (1986) 184 Cal.App.3d 1416, 1423-1424, 229 Cal.Rptr. 568 (*South Gate*); *Dehne v. County of Santa Clara* (1981) 115 Cal.App.3d 827, 835-836, 171 Cal.Rptr. 753.) Judicial review of such challenges is governed by well-established rules.

a. Prejudicial Abuse of Discretion

[3] Where a party seeks judicial review of a quasi-legislative decision "on the grounds of noncompliance with [**CEQA**], the inquiry shall extend only to whether there was a prejudicial abuse of discretion. Abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence." (§ 21168.5. See also, e.g., *No Oil, Inc. v. City of Los Angeles, supra,* 13 Cal.3d at p. 88, 118 Cal.Rptr. 34, 529 P.2d 66; *Lighthouse Field Beach Rescue v. City of Santa Cruz, supra,* 131 Cal.App.4th at p. 1182, 31 Cal.Rptr.3d 901.) Generally speaking, an agency's failure to comply with the procedural requirements of **CEQA** is prejudicial when the violation thwarts the Act's goals by precluding informed decision-making and public participation. (See, e.g., *Lighthouse Field Beach Rescue,* at pp. 1182, 1202, 31 Cal.Rptr.3d 901 [deficient initial study]; *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1198, 22 Cal.Rptr.3d 203 [deficient EIR].)

"The determinations that an agency makes during a preliminary review are subject to judicial review under the abuse of discretion standard contained in section 21168.5." (*Association for a Cleaner Environment v. Yosemite Community College Dist.* (2004) 116 Cal.App.4th 629, 636, 10 Cal.Rptr.3d 560; *City of Pasadena v. State of California* (1993) 14 Cal.App.4th 810, 821, 17 Cal.Rptr.2d 766, disapproved on another point in *Western States Petroleum Assn. v. Superior Court, supra,* 9 Cal.4th at p. 576, fn. 6, 38 Cal.Rptr.2d 139, 888 P.2d 1268.)

****141** *b. Independent Review*

[4] The foregoing review standard applies to case-specific issues of compliance with the law and sufficiency of the evidence. But "questions of interpretation or application of the requirements of **CEQA** are matters of law." (*Save Our Peninsula Committee v. Monterey County Bd. of Supervisors, supra,* 87 Cal.App.4th at p. 118, 104 Cal.Rptr.2d 326. Accord, *Bakersfield Citizens for Local Control v. City of Bakersfield, supra,* 124 Cal.App.4th at p. 1207, 22 Cal.Rptr.3d 203.) Thus, for example, interpreting the scope of a **CEQA** exemption presents "a question of law, subject to de novo review by this court." (*Fairbank v. City of Mill Valley* (1999) 75 Cal.App.4th 1243, 1251, 89 Cal.Rptr.2d 233. Accord, *Santa Monica Chamber of Commerce v. City of Santa Monica, supra,* 101 Cal.App.4th at p. 792, 124 Cal.Rptr.2d 731; see also, e.g., *Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1165, 1192, 61 Cal.Rptr.2d 447.)

***1376 B. Application**

Addressing the first tier of the analysis, we consider whether **CEQA** applies to the **school** consolidation decision at issue here. That inquiry involves two threshold questions: Is this a project under **CEQA**? If

so, is it exempt?

1. The District's School Closure Decision Is a Project Under CEQA.

[5] At the threshold, for **CEQA** to apply, the activity or decision at issue must constitute a "project" under the statute. **CEQA** applies only to "discretionary *projects* proposed to be carried out or approved by public agencies ...." (§ 21080, subd. (a), italics added.) "If there was no 'project,' there was no occasion to prepare either a negative declaration or an EIR." (*Simi Valley Recreation & Park Dist. v. Local Agency Formation Com.* (1975) 51 Cal.App.3d 648, 663, 124 Cal.Rptr. 635. Accord, *Prentiss v. Board of Education* (1980) 111 Cal.App.3d 847, 852, 169 Cal.Rptr. 5 (*Prentiss*), questioned on another point in *Fullerton Joint Union High School Dist. v. State Bd. of Education* (1982) 32 Cal.3d 779, 796, 187 Cal.Rptr. 398, 654 P.2d 168, fn. 16 (*Fullerton*).)

a. Definition

"A 'project' is an activity subject to **CEQA**." (Guidelines, § 15002, subd. (d).) As relevant here, "project" means activity by a public agency that "may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment ...." (Pub. Resources Code, § 21065, subd. (a).) [FN3] "The word 'may' in this context connotes a reasonable possibility." (*Citizen Action to Serve All Students v. Thornley* (1990) 222 Cal.App.3d 748, 753, 272 Cal.Rptr. 83.) " 'Environment' means the physical conditions which exist within the area which will be affected by a proposed project, including land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance." (§ 21060.5.)

> FN3. Section 21065 provides in full as follows: " 'Project' means an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and which is any of the following: [¶] (a) An activity directly undertaken by any public agency. [¶] (b) An activity undertaken by a person which is supported, in whole or in part, through contracts, grants, subsidies, loans, or other forms of assistance from one or more public agencies. [¶] (c) An activity that involves the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies."

1377 The statutory definition of a **CEQA project "is amplified in the Guidelines," ****142** which clarify that a project means " '*the whole of an action,* which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment....' (Guidelines, § 15378, subd. (a), italics added.)" (*Association for a Cleaner Environment v. Yosemite Community College Dist., supra,* 116 Cal.App.4th at p. 637, 10 Cal.Rptr.3d 560. See also, e.g., *Lighthouse Field Beach Rescue v. City of Santa Cruz, supra,* 131 Cal.App.4th at p. 1180, 31 Cal.Rptr.3d 901.)

[6] To maximize environmental protection, the concept of a "project" is broadly defined under **CEQA**. (*Lighthouse Field Beach Rescue v. City of Santa Cruz, supra,* 131 Cal.App.4th at p. 1180, 31 Cal.Rptr.3d 901.)

b. Judicial Determination

"Exactly what constitutes a project within the meaning of **CEQA** is a question which has been addressed by California courts on several occasions since the enactment of **CEQA** in 1970." (*Kaufman & Broad-South Bay, Inc. v. Morgan Hill Unified School Dist.* (1992) 9 Cal.App.4th 464, 472, 11 Cal.Rptr.2d 792.)

As articulated in recent case authority, there is a two-pronged test for determining whether a public agency's action qualifies as a project under **CEQA**: The first consideration is "whether there has been an 'activity directly undertaken by any public agency.' (§ 21065, subd. (a).)" (*Association for a Cleaner Environment v. Yosemite Community College Dist., supra,* 116 Cal.App.4th at p. 639, 10 Cal.Rptr.3d 560.) "The second test for a 'project' is whether the activities have a 'potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment....' (Guidelines, § 15378, subd. (a).)" (*Ibid.*)

139 Cal.App.4th 1356, 44 Cal.Rptr.3d 128, 209 Ed. Law Rep. 290, 06 Cal. Daily Op. Serv. 4493, 2006 Daily Journal D.A.R. 6509
(Cite as: 139 Cal.App.4th 1356, 44 Cal.Rptr.3d 128)

[7] Where the facts in the record are undisputed, the court decides as a matter of law whether the challenged activity falls within **CEQA's** definition of a project. (*Fullerton, supra,* 32 Cal.3d at pp. 794-795, 187 Cal.Rptr. 398, 654 P.2d 168; *Association for a Cleaner Environment v. Yosemite Community College Dist., supra,* 116 Cal.App.4th at p. 637, 10 Cal.Rptr.3d 560.)

*c. **School** Closures and Student Transfers*

Several published appellate cases have addressed the issue of **CEQA's** applicability to decisions involving **school** closures, the transfer of students between **schools**, or both.

In *Prentiss,* a case decided in 1980, the court held that a **school** closure decision was not a project under **CEQA**. ***1378**(*Prentiss, supra,* 111 Cal.App.3d at p. 851, 169 Cal.Rptr. 5.) The *Prentiss* court reasoned that the **school** district's decision to close an elementary **school** was not "a necessary step in the development of property for a new and different use" and thus was not subject to **CEQA**. (*Id.* at p. 853, 169 Cal.Rptr. 5.) But the California Supreme Court has since questioned that holding in a plurality opinion. (See *Fullerton, supra,* 32 Cal.3d at p. 796, fn. 16, 187 Cal.Rptr. 398, 654 P.2d 168. But see *Board of Supervisors v. Local Agency Formation Com.* (1992) 3 Cal.4th 903, 918, 13 Cal.Rptr.2d 245, 838 P.2d 1198 [criticizing *Fullerton* on another point, and further noting that as a plurality opinion, it "lacks authority as precedent"].) As the plurality said in *Fullerton:* "The decision in *Prentiss* [ ], that the closure of a **school** is not a 'project' because the **school** board had not decided whether to put the land to a different use, is questionable. It may be unlikely that the closure of a single elementary ****143 school** would have a significant environmental impact apart from its effect on the use of the property-the **school** board in *Prentiss* filed a negative declaration-but the possibility cannot be rejected categorically." (*Fullerton, supra,* 32 Cal.3d at p. 796, fn. 16, 187 Cal.Rptr. 398, 654 P.2d 168.)

In a 1986 case, *South Gate,* the challenged action was the transfer of students from one campus to another, though without a **school** closure. (*South Gate, supra,* 184 Cal.App.3d at pp. 1423-1424, 229 Cal.Rptr. 568.) At issue in *South Gate* was the **school** district's use of a pupil attendance boundary adjustment, a mechanism used to "distribute student population over the District so as to relieve **school** overcrowding." (*Id.* at p. 1420, 229 Cal.Rptr. 568.) In concluding that **CEQA** did not apply to the transfer, the *South Gate* court conflated the two threshold concepts-project and exemption. As the court put it: "The District's action creating the boundary adjustment is not a project requiring an EIR because it is exempt under **CEQA** guidelines...." (*Id.* at p. 1423, 229 Cal.Rptr. 568.)

A 1989 case, *East Peninsula,* involved the decision to close a high **school** and transfer its students to other campuses. (*East Peninsula Ed. Council, Inc. v. Palos Verdes Peninsula Unified **School** Dist.* (1989) 210 Cal.App.3d 155, 258 Cal.Rptr. 147 (*East Peninsula*).) Again, both threshold issues were at issue: "whether the [**school**] closure [ ] and transfer of students is a project subject to **CEQA**" and "whether such action is statutorily exempt...." (*Id.* at p. 165, fn. 5, 258 Cal.Rptr. 147.) And again, the court conflated the two questions. In the court's view, the two issues involved "the same analysis" under the statutory language. (*Ibid.*) Furthermore, the court said: "In this case, for all practical purposes, the two concepts merge." (*Ibid.*) The court concluded that **CEQA** applied, that the **school** board used an "incorrect legal standard" in making the exemption determination, and that its failure to comply with **CEQA** was prejudicial. (*Id.* at p. 174, 258 Cal.Rptr. 147; cf., *Citizen Action to Serve All Students v. Thornley, supra,* 222 Cal.App.3d at p. 752, 272 Cal.Rptr. 83 [**school** district did not "consider the closure exempt from **CEQA**" but instead proceeded with a negative declaration]; *Fullerton, supra,* 32 Cal.3d at pp. 797, 798, 187 Cal.Rptr. 398, 654 P.2d 168 [**school** district's reconfiguration and secession plan was a project under **CEQA**; it "is an essential step leading ***1379** to ultimate environmental impact" as it "necessarily entails building a new high **school** and other actions which may have an environmental effect"].)

d. Analysis

Although some courts have conflated the issues presented in the first tier of the **CEQA** analysis, we shall

separately address the first question first: Is this a project?

To answer that question, we turn to the two-pronged test for defining a project under **CEQA**, described above. (See *Association for a Cleaner Environment v. Yosemite Community College Dist., supra,* 116 Cal.App.4th at p. 639, 10 Cal.Rptr.3d 560.) As to the first prong, there is no dispute that the decision challenged in this case is an "activity directly undertaken by any public agency." (§ 21065, subd. (a).)

Our focus is on the second prong-"whether the activities have a 'potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment....' (Guidelines, § 15378, subd. (a).)" ****144***(Association for a Cleaner Environment v. Yosemite Community College Dist., supra,* 116 Cal.App.4th at p. 639, 10 Cal.Rptr.3d 560.) As noted above, "project" is defined broadly for these purposes. *(Lighthouse Field Beach Rescue v. City of Santa Cruz, supra,* 131 Cal.App.4th at p. 1180, 31 Cal.Rptr.3d 901.) But "the broad definition of project is tempered by the requirement that **CEQA** applies only to those activities which 'may have a significant effect on the environment.' " *(Kaufman & Broad-South Bay, Inc. v. Morgan Hill Unified* ***School*** *Dist., supra,* 9 Cal.App.4th at p. 471, 11 Cal.Rptr.2d 792.) Applying those principles to the case at hand, we conclude that the District's **school** closure decision constitutes a project for **CEQA** purposes.

The consequences of the decision challenged here can be broken down into two components: (1) the closure of two **schools** (Redwood and Quail Hollow); and (2) the transfer of students from those **schools** to the District's two other campuses (BCE and SLE).

Concerning the first component, as a plurality of our state's high court recognized in *Fullerton,* while it "may be unlikely that the closure of a single elementary **school** would have a significant environmental impact apart from its effect on the use of the property ... the possibility cannot be rejected categorically." *(Fullerton, supra,* 32 Cal.3d at p. 796, fn. 16, 187 Cal.Rptr. 398, 654 P.2d 168.) As the *Fullerton* opinion stated: "Implementation of the secession Plan in the present case involves the possibility of a significant impact. Secession will likely require the construction of a new high **school** in Yorba Linda and may result in abandonment of some facilities in the remaining portion of the Fullerton HSD." *(Id.* at p. 794, 187 Cal.Rptr. 398, 654 P.2d 168, fn. omitted.)

1380** As for the second component, transferring students may "change bus routes and schedules, and affect traffic patterns." *(Fullerton, supra,* 32 Cal.3d at p. 794, 187 Cal.Rptr. 398, 654 P.2d 168.) The transfer could increase traffic congestion and parking problems, with attendant environmental effects. (See, e.g., *Citizen Action to Serve All Students v. Thornley, supra,* 222 Cal.App.3d at pp. 755, 756, 272 Cal.Rptr. 83.) The transfer component also may pose some possibility of "increased physical harm to relocated [ ]students because of (1) the likelihood of a major earthquake ... and (2) altercations with students at **schools** receiving transferred [ ] pupils." *(Id.* at p. 757, 272 Cal.Rptr. 83 [stating party's contention].) Under the circumstances, at least at the threshold, the "possibility that the activity in question may have a significant effect on the environment" cannot be positively ruled out. (Cf., Guidelines § 15061, subd. (b)(3); *Kaufman & Broad-South Bay, Inc. v. Morgan Hill Unified* ***School *Dist., supra,* 9 Cal.App.4th at p. 471, 11 Cal.Rptr.2d 792.)

In sum, both tests for defining a **CEQA** project are satisfied. We thus conclude that the **school** consolidation decision falls within the broad definition of a **CEQA** project. That conclusion finds further support in the very existence of a categorical exemption for **school** closures. As a matter of logic alone, if such closures were not **CEQA** projects, there would be no need for an exemption.

2. The Project Is Exempt.

Our conclusion that the challenged decision is a project brings us to the second part of the preliminary review analysis: Is the project exempt from **CEQA**? (See § 21080, subd. (a) [**CEQA** "shall apply to discretionary projects ... unless the project is exempt"]; Guidelines, § 15061, subd. (a) [once the "agency has determined that an activity is a project subject to **CEQA**," it "shall determine whether the project is exempt from **CEQA**"]; ****145***Association for a Cleaner Environment v. Yosemite Community Col-*

lege Dist., supra, 116 Cal.App.4th at p. 640, 10 Cal.Rptr.3d 560 [exemption is the "second issue arising in connection with the preliminary review"].)

a. CEQA Exemptions: General Principles

CEQA does not apply to projects that are statutorily or categorically exempt. (Guideline § 15061, subd. (b).) The Legislature has specified a number of statutory **CEQA** exemptions. (See, e.g., § 21080, subd. (b)(1)-(15); § 21080.18; § 21084; see *Sierra Club v. State Bd. of Forestry* (1994) 7 Cal.4th 1215, 1230-1231, 32 Cal.Rptr.2d 19, 876 P.2d 505.) The Legislature also has authorized the State Resources Agency to identify other categories of exemptions, which are contained in the Guidelines. (See *Sierra Club,* at pp. 1230-1231, 32 Cal.Rptr.2d 19, 876 P.2d 505.) As to these, **CEQA** does not apply where there is "a ***1381** categorical exemption [in the Guidelines] and the application of that categorical exemption is not barred by one of the exceptions set forth in [Guidelines] Section 15300.2." (Guideline § 15061, subd. (b)(2).)

[8] The Guidelines contain 33 classes of categorical exemptions. (Guidelines, §§ 15301-15333.) Each class embodies a "finding by the Resources Agency that the project will not have a significant environmental impact." (*Davidon Homes v. City of San Jose, supra,* 54 Cal.App.4th at p. 116, 62 Cal.Rptr.2d 612. See also, *Magan v. County of Kings* (2002) 105 Cal.App.4th 468, 475, 129 Cal.Rptr.2d 344; Pub. Resources Code, § 21084, subd. (a).) In addition to the categorical exemptions, the Guidelines also incorporate a " 'common sense exemption,' " which " 'provides a short way for agencies to deal with discretionary activities which could arguably be subject to the **CEQA** process but which common sense provides should not be subject to the Act.' " (*Davidon Homes,* at pp. 112-113, 62 Cal.Rptr.2d 612, citing Guidelines § 15061, subd. (b)(3), and quoting the accompanying discussion.)

[9] There are exceptions to the categorical exemptions. (See Guidelines § 15300.2.) Among other things, a "categorical exemption shall not be used for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances." (*Id.,* subd. (c). See *East Peninsula, supra,* 210 Cal.App.3d at p. 164, 258 Cal.Rptr. 147.) This is sometimes called either the "significant effects" exception or the "unusual circumstances" exception. (See *City of Pasadena v. State of California, supra,* 14 Cal.App.4th at p. 824, 17 Cal.Rptr.2d 766; *Santa Monica Chamber of Commerce v. City of Santa Monica, supra,* 101 Cal.App.4th at p. 795, 124 Cal.Rptr.2d 731.) "The Guidelines do not define the term 'unusual circumstances.' " (*City of Pasadena v. State of California, supra,* 14 Cal.App.4th at p. 826, 17 Cal.Rptr.2d 766.) As explicated in case law, an unusual circumstance refers to "some feature of the project that distinguishes it" from others in the exempt class. (*Fairbank v. City of Mill Valley, supra,* 75 Cal.App.4th at p. 1260, 89 Cal.Rptr.2d 233.) In other words, "whether a circumstance is '*unusual* ' is judged relative to the *typical* circumstances related to an otherwise typically exempt project." (*Santa Monica Chamber of Commerce,* at p. 801, 124 Cal.Rptr.2d 731.)

b. Judicial Determination

[10][11] As noted above, the court reviews decisions made during an agency's preliminary review for a prejudicial abuse of discretion. (*Association for a Cleaner Environment v. Yosemite Community College Dist., supra,* 116 Cal.App.4th at p. 636, 10 Cal.Rptr.3d 560 [reviewing determination that there was no project].) ****146** When faced with a challenge to an agency's exemption determination, the court considers whether the agency proceeded in the manner required by law and whether its determination is supported by substantial evidence. (§ 21168.5; see, e.g., *East Peninsula, supra,* 210 Cal.App.3d at p. 165, 258 Cal.Rptr. 147 [holding that **school** district failed to proceed in manner required by law]; ***1382** *Dehne v. County of Santa Clara, supra,* 115 Cal.App.3d at p. 837, 171 Cal.Rptr. 753 [holding that "planning commission's grant of a categorical exemption" for reconstruction of existing structures was "supported by substantial evidence"].) The scope of an exemption may be analyzed as a question of statutory interpretation and thus subject to independent review. (See e.g., *Fairbank v. City of Mill Valley, supra,* 75 Cal.App.4th at pp. 1258-1259, 89 Cal.Rptr.2d 233 [interpreting the scope of a categorical exemption]; cf., *Santa Monica Chamber of Commerce v. City of Santa Monica, supra,* 101 Cal.App.4th at p. 795, 124

Cal.Rptr.2d 731 [same]; *Centinela Hospital Assn. v. City of Inglewood* (1990) 225 Cal.App.3d 1586, 1600, 275 Cal.Rptr. 901 [finding that the proposed facility was exempt as a matter of law].) But "the substantial evidence test governs our review of the [agency's] factual determination that a project falls within a categorical exemption." (*Fairbank*, at p. 1251, 89 Cal.Rptr.2d 233.)

[12] Because the exemptions operate as exceptions to **CEQA**, they are narrowly construed. (See, e.g., *Santa Monica Chamber of Commerce v. City of Santa Monica, supra*, 101 Cal.App.4th at p. 793, 124 Cal.Rptr.2d 731.) "Exemption categories are not to be expanded beyond the reasonable scope of their statutory language." (*Mountain Lion Foundation v. Fish & Game Com.* (1997) 16 Cal.4th 105, 125, 65 Cal.Rptr.2d 580, 939 P.2d 1280.)

*c. **School** Closure Exemption*

At issue here is the categorical exemption applicable to public **school** closures. Pursuant to section 21080.18, **CEQA** "does not apply to the closing of any public **school** in which kindergarten or any of grades 1 through 12 is maintained or the transfer of students from that public **school** to another **school** if the only physical changes involved are categorically exempt under Chapter 3 (commencing with Section 15000)" of the Guidelines. Of the 33 classes of categorical exemptions set forth in the Guidelines, one applies to the situation presented here: "Class 14 consists of minor additions to existing **schools** within existing **school** grounds where the addition does not increase original student capacity by more than 25% or ten classrooms, whichever is less. The addition of portable classrooms is included in this exemption." (Guidelines, § 15314.)

So far as we are aware, this particular exemption has been the subject of only one prior judicial decision, *East Peninsula.*[FN4] In that case, the defendant **school** board approved a high **school** closure and transfer of students. (*East Peninsula, supra*, 210 Cal.App.3d at pp. 161-162, 258 Cal.Rptr. 147.) The board made an ***1383** express determination that its decision was exempt from **CEQA**, under section 21080.18 and Guideline section 15314. (*Id.* at p. 162, 258 Cal.Rptr. 147.) But it did so without undertaking any environmental review. ****147**(*Id.* at pp. 172, 173, 258 Cal.Rptr. 147.) The trial court issued a peremptory writ of mandate, commanding the district to void its closure decision and to suspend all related activity "until the District has first analyzed the cumulative environmental effects of this and other **school** closures and transfers in compliance with **CEQA**." (*Id.* at pp. 162-163, 258 Cal.Rptr. 147.) In the trial court's view, "the District did not properly evaluate whether its proposed action was exempt from **CEQA**, a step preliminary to a determination of whether an EIR is required." (*Id.* at p. 163, 258 Cal.Rptr. 147.)

> FN4. As to the other two **school** cases discussed above, neither reached the exemption issue. The *Prentiss* court held that the **school** closure decision was not a project under **CEQA**. (*Prentiss, supra*, 111 Cal.App.3d at p. 851, 169 Cal.Rptr. 5.) The *South Gate* case involved a transfer of students without a **school** closure. (*South Gate, supra*, 184 Cal.App.3d at pp. 1423-1424, 229 Cal.Rptr. 568.)

On appeal, the *East Peninsula* court addressed this question: Is the **school** closure categorical exemption subject to the exception for significant cumulative effects? (*East Peninsula, supra*, 210 Cal.App.3d at pp. 160, 164-165, 258 Cal.Rptr. 147.) Framing its analysis as a matter of statutory interpretation, the court answered the question in the affirmative. (*Id.* at p. 166, 258 Cal.Rptr. 147.) Thus, the court held, "the plain language of section 21080.18[ ] requires an agency to consider the issue of significant effects and cumulative impacts of a transfer of students from a closed **school** in determining whether the project is exempt from **CEQA** under that statute." (*Id.* at p. 173, 258 Cal.Rptr. 147.) As the court recognized, its "interpretation of section 21080.18 leads to a situation where the amount of analysis and study involved at the preliminary review stage of determination of whether a project is exempt from **CEQA** may be similar to that involved at the 'second' stage where the agency conducts an initial study to determine whether the project has a significant effect on the environment [citation]. However, such result is mandated by the statutory language and does not appear to be repugnant to legislative policy." (*Ibid.*)[FN5]

> FN5. As the court that decided *East Peninsula* later clarified, however, "we did not hold in *East Peninsula* an agency always must conduct an 'initial study' before declaring a project exempt from **CEQA** review. Such a holding would run counter to the three-tiered structure of **CEQA** review under which, if a project is categorically exempt 'no further agency evaluation is required' and no 'initial study' takes place." (*Apartment Assn. of Greater Los Angeles v. City of Los Angeles, supra,* 90 Cal.App.4th at p. 1172, 109 Cal.Rptr.2d 504.)

Turning to the specific case before it, the *East Peninsula* court concluded that the **school** board "used an incorrect legal standard" in making its exemption determination because it failed to consider the cumulative environmental impacts of its decision. (*East Peninsula, supra,* 210 Cal.App.3d at p. 174, 258 Cal.Rptr. 147.) Furthermore, the court held, the board's "failure to comply with **CEQA**" was "prejudicial because meaningful information and analysis of cumulative effects and significant environmental effects not occurring at the receptor **schools** were omitted from the environmental review process." (*Id.* at p. 174, 258 Cal.Rptr. 147.)

***1384** *d. Analysis*

[13] We analyze the District's preliminary determination that its decision is exempt from **CEQA** (1) for compliance with procedural requirements and (2) for evidentiary support. (§ 21168.5; *Association for a Cleaner Environment v. Yosemite Community College Dist., supra,* 116 Cal.App.4th at p. 636, 10 Cal.Rptr.3d 560.) They are distinct issues: "if a procedural violation of **CEQA** is shown, the substantial evidence prong of the statutory standard of review does not come into play." (*Laurel Heights II, supra,* 6 Cal.4th at p. 1133, 26 Cal.Rptr.2d 231, 864 P.2d 502 [stating party's contention]. See ****148***No Oil, Inc. v. City of Los Angeles, supra,* 13 Cal.3d at pp. 74-75, 118 Cal.Rptr. 34, 529 P.2d 66; *Bakersfield Citizens for Local Control v. City of Bakersfield, supra,* 124 Cal.App.4th at p. 1208, 22 Cal.Rptr.3d 203; *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 945-946, 91 Cal.Rptr.2d 66.)

SLV CARE challenges the exemption on both grounds. On the first question-procedural compliance-the key issue is timing: the District made its closure decision in April 2003; it approved the filing of a notice of **CEQA** exemption more than four months later, in August 2003. SLV CARE asserts a procedural violation of **CEQA** because the District failed to formally invoke the exemption in advance of its closure decision. As to the second question, SLV CARE challenges the evidentiary basis for the decision. We consider each point in turn.

Procedural compliance

[14][15] "In granting an exemption, the agency must proceed in the manner prescribed by law, lest it be charged with abusing its discretion." (*Dehne v. County of Santa Clara, supra,* 115 Cal.App.3d at p. 842, 171 Cal.Rptr. 753.) "That law consists of **CEQA** statutes, the Guidelines, and the judicial gloss on both." (*Id.* at pp. 842-843, 171 Cal.Rptr. 753. Cf., *Kennedy v. City of Hayward* (1980) 105 Cal.App.3d 953, 962, 165 Cal.Rptr. 132 [in quasi-adjudicatory proceeding, due process principles apply].) Generally speaking, the agency should proceed with a "considered awareness of the purposes and policy" that underlie **CEQA**; it should not undertake "a mechanical application of the exemption criteria" in reaching its decision. (*Dehne v. County of Santa Clara, supra,* 115 Cal.App.3d at p. 843, 171 Cal.Rptr. 753.)

Several legal principles are relevant to the issue of **CEQA** compliance, including requirements related to timing, documentation, and public comment. In applying these precepts, it is important to distinguish between an exemption determination such as the one made here, which is part of the agency's preliminary review, and a negative declaration or an EIR, which comes into play later in the **CEQA** analysis.

[16] As indicated above, the timing rules depend on which step of the **CEQA** process is involved. In cases involving the second and third tiers of ***1385** **CEQA** analysis, where a negative declaration or an EIR is necessary, the law requires "that environmental issues be considered and resolved *before* a project is approved." (*No Oil, Inc. v. City of Los Angeles, supra,* 13 Cal.3d at p. 75, 118 Cal.Rptr. 34,

529 P.2d 66, italics added.) In such cases, courts condemn attempts at after-the-fact rationalizations. (*Id.* at p. 81, 118 Cal.Rptr. 34, 529 P.2d 66.) By contrast, determinations made as part of a preliminary, first-tier **CEQA** review are not formalized until after the project has been approved. Under the Guidelines, a notice of **CEQA** exemption "shall be filed, if at all, *after* approval of the project." (Guidelines, § 15062, subd. (a), italics added. See *County of Amador v. El Dorado County Water Agency, supra,* 76 Cal.App.4th at p. 962, 91 Cal.Rptr.2d 66 [notice of exemption was not valid, where it was filed before agency approved the project]; see also, e.g., *Magan v. County of Kings, supra,* 105 Cal.App.4th at pp. 470, 472, 129 Cal.Rptr.2d 344 [notice of exemption filed one day after action taken]; *Fairbank v. City of Mill Valley, supra,* 75 Cal.App.4th at pp. 1249, 1250, 89 Cal.Rptr.2d 233 [same].) Since the District's exemption determination was made as part of a preliminary, first-tier **CEQA** review, it was not untimely.

[17] As with timing rules, documentation requirements are different for first-tier assessments than for those undertaken**149 later in the **CEQA** process. When a negative declaration or an EIR is required, it must be in writing. " **CEQA** impliedly requires (and the guidelines expressly require) that the agency render a written determination whether a project requires an EIR before it gives final approval to that project." (*No Oil, Inc. v. City of Los Angeles, supra,* 13 Cal.3d at p. 75, 118 Cal.Rptr. 34, 529 P.2d 66 [post hoc negative declaration]. See Guidelines, § 15362 [defining "environmental documents"].) By contrast, there is no requirement that the agency put its exemption decision in writing. According to the Guidelines, "the agency *may* file a notice of exemption." (Guidelines, § 15062, subd. (a), italics added.) But it is not required to do so: "A notice of exemption has no significance other than to trigger the running of the limitations period." (*Apartment Assn. of Greater Los Angeles v. City of Los Angeles, supra,* 90 Cal.App.4th at p. 1171, 109 Cal.Rptr.2d 504.) For that reason, "it is irrelevant" whether an exemption notice contains "all that it should under the **CEQA** guidelines." (*Id.* at p. 1171, fn. 23, 109 Cal.Rptr.2d 504.)

[18] There are other procedural differences between first-tier review and later **CEQA** evaluations, including the opportunity for public comment. " **CEQA** provides for public comment on a negative declaration and an EIR. (Pub. Resources Code, § 21092.) By contrast, **CEQA** does not provide for a public comment period before an agency decides a project is exempt." (*Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster, supra,* 52 Cal.App.4th at p. 1210, 61 Cal.Rptr.2d 447.) "Similarly, where an agency approves a project and simultaneously decides that the project is exempt from **CEQA**, there is no 'public hearing ... before the issuance of the notice of determination.' " (*Ibid.* See *City of Pasadena v. State of California, supra,* 14 Cal.App.4th at p. 821, 17 Cal.Rptr.2d 766 [agency "not required to hold a hearing prior to filing the notice of exemption"].)

[19] ***1386** Underlying these differences in procedural rules is a more fundamental concept: **CEQA** does not apply to exemption decisions. By definition, a "project falling within [ ] a categorical exemption is not subject to **CEQA**." (*Mountain Lion Foundation v. Fish & Game Com., supra,* 16 Cal.4th at p. 124, 65 Cal.Rptr.2d 580, 939 P.2d 1280.) For that reason, compliance with the Act is not required. "Where a project is categorically exempt, it is not subject to **CEQA** requirements and 'may be implemented without any **CEQA** compliance whatsoever.' " (*Association for Protection etc. Values v. City of Ukiah* (1991) 2 Cal.App.4th 720, 726, 3 Cal.Rptr.2d 488 (*Ukiah*). Accord, *Magan v. County of Kings, supra,* 105 Cal.App.4th at p. 475, 129 Cal.Rptr.2d 344.) "Once this determination of threshold exemption is made, ... none of the **CEQA** requirements or procedures apply." (*Kennedy v. City of Hayward, supra,* 105 Cal.App.3d at p. 962, 165 Cal.Rptr. 132.)

To sum up, **CEQA** has no application to exemption determinations made during an agency's preliminary review, such as the one at issue here. Since **CEQA** does not apply, compliance with its procedural requirements is not required. Applying that principle here, there is no basis for overturning the District's exemption determination based on claims that it failed to proceed in the manner required by law.

Substantial evidence

[20] That brings us to the question of whether the challenged categorical exemption is supported by substantial evidence in the administrative record. Our

analysis of that question proceeds in two steps: first, we consider the factual predicate for the **150 District's exemption determination; next, we examine evidence supporting the appellant's claim of exceptions to the exemption.

Exemption: The first step of the analysis concerns the exemption.

[21] At the administrative level, the agency determines whether the project qualifies for a statutory or categorical exemption from **CEQA**. (Guidelines, § 15061, subd. (a).) There must be "substantial evidence that the [activity is] within the exempt category of projects." (*Magan v. County of Kings, supra,* 105 Cal.App.4th at p. 475, 129 Cal.Rptr.2d 344.) That evidence may be found in the information submitted in connection with the project, including at any hearings that the agency chooses to hold. (See *Dehne v. County of Santa Clara, supra,* 115 Cal.App.3d at p. 843, 171 Cal.Rptr. 753 [record of **CEQA** compliance included applicant's "detailed report" and information presented at five public hearings, "none of which were required by law"].)

[22] When called upon to review an agency's exemption decision, the court's task is to "determine whether, *as a matter of law,* the [activity meets] the definition of a categorically exempt project." *1387(*Santa Monica Chamber of Commerce v. City of Santa Monica, supra,* 101 Cal.App.4th at p. 792, 124 Cal.Rptr.2d 731.) As to that question, "we apply a de novo standard of review, not a substantial evidence standard." (*Ibid.* See also, e.g., *Western States Petroleum Assn. v. Superior Court, supra,* 9 Cal.4th at p. 573, 38 Cal.Rptr.2d 139, 888 P.2d 1268 ["the substantiality of the evidence supporting [quasi-legislative] administrative decisions is a question of law"].) But in undertaking our independent analysis, we bear in mind the "highly deferential" review standard that applies to the agency's factual determinations. (*Western States Petroleum Assn.,* at p. 572, 38 Cal.Rptr.2d 139, 888 P.2d 1268.) As our high court has said, "the factual bases of quasi-legislative administrative decisions are entitled to the same deference as the factual determinations of trial courts...." (*Id.* at p. 573, 38 Cal.Rptr.2d 139, 888 P.2d 1268.) That deference limits the *scope* of judicial review as well. Generally speaking, the court "may consider only the administrative record in determining whether a quasi-legislative decision was supported by substantial evidence within the meaning of Public Resources Code section 21168.5." (*Ibid.,* fn. omitted.)

Turning to the case at hand, we begin by interpreting the exemption, starting with its plain language. In doing so, we keep in mind that **CEQA** is concerned only with physical changes to the environment. (Guidelines, § 15358, subd. (b); see, e.g., *City of Pasadena v. State of California, supra,* 14 Cal.App.4th at p. 829, 17 Cal.Rptr.2d 766.) The interpretation of the exemption presents a question of law. (*Fairbank v. City of Mill Valley, supra,* 75 Cal.App.4th at p. 1251, 89 Cal.Rptr.2d 233.)

By statute, **CEQA** "does not apply to the closing of [a] public **school** ... or the transfer of students from that public **school** to another **school** if the only physical changes involved are categorically exempt" under the Guidelines. (§ 21080.18.) From the Guidelines, the pertinent categorical exemption is Class 14, which covers "minor additions to existing **schools** within existing **school** grounds where the addition does not increase original student capacity by more than 25% or ten classrooms, whichever is less. The addition of portable classrooms is included in this exemption." (Guidelines, § 15314.)

[23] The critical phrase here is *original student capacity.* (Guidelines, § 15314.) Because **CEQA** is concerned solely with physical changes to the environment,**151 "student capacity" must refer to the receptor **school's** physical space for housing students. (Cf., 2 Cal.Code of Regs. § 1859.35 ["existing **school** building capacity" is determined by multiplying number of classrooms times number of students]; compare, *East Peninsula, supra,* 210 Cal.App.3d at p. 175, 258 Cal.Rptr. 147 [in dicta, equating receptor **school's** original student capacity with "previous enrollment"].) We therefore interpret "student capacity" to mean the number of students that can be accommodated physically at the receptor **school**. That interpretation is bolstered by the juxtaposition of the term "original student *1388 capacity" with the portion of the guideline specifying the maximum number of classrooms: The exemption is available where the addition to the **school** "does not increase original

student capacity by more than 25% *or* ten classrooms, *whichever is less.*" (Guidelines, § 15314, italics added.) By this juxtaposition, the guideline equates student capacity and number of classrooms. That comparison makes no sense unless "student capacity" refers to physical space for housing students. As for the modifier ("original"), we take that to mean the receptor **school's** capacity as it exists prior to any structural additions to the campus resulting from the project.

To sum up our legal interpretation of the pertinent exemption: A **school** closure and accompanying transfer of students is exempt from **CEQA** so long as any resulting physical changes are categorically exempt. (§ 21080.18.) Minor additions to the receptor **school** are categorically exempt. (Guidelines, § 15314.) A minor addition is defined as the lesser of: (1) the addition of 10 or fewer classrooms; or (2) an increase in original student capacity of 25 percent or less. (*Ibid.*) In this context, original student capacity means the receptor **school's** preexisting physical ability to house students.

With that interpretation in mind, we next examine the evidence supporting the District's exemption determination. As explained above, the substantiality of that evidence presents a question of law for our independent review. (*Western States Petroleum Assn. v. Superior Court, supra,* 9 Cal.4th at p. 573, 38 Cal.Rptr.2d 139, 888 P.2d 1268; *Santa Monica Chamber of Commerce v. City of Santa Monica, supra,* 101 Cal.App.4th at p. 792, 124 Cal.Rptr.2d 731.)

To a large extent, the relevant evidence is contained in the March 2003 report of the SSCC task force, which made the closure recommendations. That report contains data about the four individual elementary **schools**, including their capacity, their student populations, and the number of additional portable classrooms that would be required at each campus for it to operate as a receptor **school**.

As for the north valley **schools**, BCE's "current capacity" was listed at 675. BCE's student population then stood at 403; adding Redwood's 288 students would bring the total to 691 pupils at the consolidated campus.[FN6] The transfer of Redwood students to BCE thus represented an increase in BCE's original student capacity amounting to less than 2.4 percent-far below the 25 percent ceiling spelled out in the Class 14 guideline. (Guidelines, ***1389** § 15314.) In terms of classrooms, BCE would need one additional portable to ****152** accommodate consolidation, plus replacements for two others in poor condition. That number likewise falls far below the ceiling of 10 additional classrooms in the guideline. (*Ibid.*)

> FN6. The initial study, which was later prepared by the environmental consultant, reflects slightly different student population numbers than the SSCC reported. The initial study indicates that BCE would gain 249 students, bringing its total enrollment to 649, while SLE would add 350 pupils, for a total enrollment of 718 students. These differences do not affect the availability of the Class 14 categorical exemption.

In the south valley, SLE's indicated capacity was 700. With a student population of 338, plus the transfer of Quail Hollow's 397 students, SLE would end up with 735 pupils.[FN7] The consolidation of students at SLE thus resulted in an increase in its original student capacity of 5 percent-again, well below the 25 percent maximum set forth in the guideline. (*Ibid.*) As for classrooms, SLE would need three additional portables to accommodate consolidation, plus replacements for another three. That number likewise is below the guideline's ceiling of 10 additional classrooms. (*Ibid.*)

> FN7. See footnote 6, *supra.*

As a matter of law, the foregoing constitutes substantial evidence supporting the District's determination that its closure decision qualifies for a Class 14 categorical exemption from **CEQA**. (Cf., e.g., *Fairbank v. City of Mill Valley, supra,* 75 Cal.App.4th at p. 1259, 89 Cal.Rptr.2d 233 [proposed "5,855-square-foot retail/office" qualifies for Class 3 exemption, which allows up 10,000 square feet in urban area].)

Exception: The second step in the analytic process addresses exceptions to the categorical exemption.

[24] At the administrative level, once an agency "de-

termines, based on substantial evidence in the record, that the project falls within a categorical exemption ..., the burden shifts to the challenging party ... to ' "produce substantial evidence..." ' ... that one of the exceptions to categorical exemption applies." (*Santa Monica Chamber of Commerce v. City of Santa Monica, supra,* 101 Cal.App.4th at p. 796, 124 Cal.Rptr.2d 731, internal quotation marks and citation omitted.)

[25] The exceptions are contained in Guidelines section 15300.2. As relevant here, that section provides: "A categorical exemption shall not be used for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances." (Guidelines, § 15300.2, subd. (c).) Thus, a "party challenging an agency's exemption decision must produce substantial evidence that the project has the potential for a substantial adverse environmental impact." (*Ukiah, supra,* 2 Cal.App.4th at p. 728, 3 Cal.Rptr.2d 488.)

In order to warrant application of the exception, the claimed environmental impact must satisfy certain substantive requirements. First, the ***1390** impact must constitute a *change* in environmental conditions. (Guidelines, § 15382.) "When reviewing the evidence, we will not consider evidence or arguments about the impact from the *existent* [ ] plant." (*Silveira v. Las Gallinas Valley Sanitary Dist.* (1997) 54 Cal.App.4th 980, 993, 63 Cal.Rptr.2d 244 [affirming negative declaration, where there was no evidence that the project would alter the existing effects]. See also, e.g., *Ukiah, supra,* 2 Cal.App.4th at p. 735, 3 Cal.Rptr.2d 488 [affirming exemption, where there was "no evidence that construction of the house would have any additional effect on runoff"].) Second, the impact must affect the *environment.* For that reason, "we must differentiate between adverse impacts upon particular persons and adverse impacts upon the environment of persons in general." (*Ukiah, supra,* 2 Cal.App.4th at p. 734, 3 Cal.Rptr.2d 488.) For the exception to apply, there must be evidence that the project "would adversely affect the environment of ****153** persons in general." (*Ibid.*) Third, the impact must constitute a *physical* environmental change, as opposed to a social or economic one. (See, e.g., *Citizen Action to Serve All Students v. Thornley, supra,* 222 Cal.App.3d at p. 758, 272 Cal.Rptr. 83.) "The decision to close a popular [ ] **school** is a decision of educational policy with political and social overtones" but our review of that decision "is delimited by the confines of environmental law." (*Id.* at p. 759, 272 Cal.Rptr. 83.) Fourth, there must be a reasonable possibility that the environmental impact will be *significant.* As defined in the Guidelines, that means "a substantial, or potentially substantial, adverse change" resulting from the project. (Guidelines, § 15382.)

Moreover, for the exception to apply, there must be substantial evidence of qualifying environmental impacts. Under the rule generally applicable to **CEQA** issues, "substantial evidence includes fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact." (§ 21080, subd. (e)(1). See also Guidelines, § 15384, subd. (b).) "Substantial evidence is not argument, speculation, unsubstantiated opinion or narrative, [or] evidence that is clearly erroneous or inaccurate ...." (§ 21080, subd. (e)(2). See also Guidelines, § 15384, subd. (a).)

When disputes over the evidentiary basis for an exception become the subject of litigation, the proper review standard must be applied. "There is a split of authority on the appropriate standard of judicial review" when the issue is "the applicability of the Guidelines section 15300.2(c) exception to a project that has been found to fall within a categorical exemption." (*Fairbank v. City of Mill Valley, supra,* 75 Cal.App.4th at p. 1259, 89 Cal.Rptr.2d 233.) "Some courts have relied on cases involving review of a negative declaration, holding that a finding of categorical exemption cannot be sustained if there is a 'fair argument' based on substantial evidence that the project will have significant environmental impacts, even where the agency is presented with substantial evidence to the contrary." (*Ibid.*) "Other courts apply an ordinary substantial evidence test ..., deferring to the express or implied findings of the local agency that has found a categorical exemption applicable." ***1391**(*Id.* at pp. 1259-1260, 89 Cal.Rptr.2d 233. See also, e.g., *Ukiah, supra,* 2 Cal.App.4th at p. 728, fn. 7, 3 Cal.Rptr.2d 488; *Santa Monica Chamber of Commerce v. City of Santa Monica, supra,* 101 Cal.App.4th at p. 796, 124 Cal.Rptr.2d 731; *Banker's Hill, Hillcrest, Park West Community Preservation Group v. City of San Diego* (2006) 139 Cal.App.4th

249, 42 Cal.Rptr.3d 537, 545-546.) We need not resolve that dispute here.

In the case at hand, regardless of what review standard we apply, we find no substantial evidence to support the exception claimed by appellant SLV CARE here. (See *Santa Monica Chamber of Commerce v. City of Santa Monica, supra,* 101 Cal.App.4th at p. 796, 124 Cal.Rptr.2d 731 [even under fair argument standard, challenger failed to demonstrate reasonable possibility of significant environmental effect]; *Fairbank v. City of Mill Valley, supra,* 75 Cal.App.4th at p. 1260, 89 Cal.Rptr.2d 233 [same].)

With respect to much of the evidence cited by SLV CARE in support of its claims of environmental impacts, it is not clear that it was part of the administrative record, which confines our review. (*Western States Petroleum Assn. v. Superior Court, supra,* 9 Cal.4th at p. 573, 38 Cal.Rptr.2d 139, 888 P.2d 1268.) The scope of our review is properly limited to the administrative**154 record, even though **CEQA** procedures may limit a challenger's "opportunity to create a record evidencing potential adverse impacts on the environment." (*Magan v. County of Kings, supra,* 105 Cal.App.4th at p. 477, 129 Cal.Rptr.2d 344.) But as we now explain, even when all of appellant's evidence is considered, regardless of its source, it does not support a fair argument of significant environmental effects.

We address each ground put forth by SLV CARE as a basis for the claimed exception: (1) mold; (2) geologic hazards; (3) septic failure; and (4) traffic hazards and related issues (parking and emergency access).

(1) Mold: SLV CARE posits a potential "increase in mold due to more bodies [and] opening more rooms," as well as the "potential for adverse reactions to mold due to increase in sensitive receptors." As evidentiary support for those claims, SLV CARE points to a series of letters and reports concerning indoor air quality tests at BCE and other District **schools**, which were prepared by MACS Lab and signed by its Director of Field Services, Maheen B. Doctor. In early April 2003, Doctor confirmed "slightly elevated levels of some fungal elements," but stated that "the level of elevation is not considered significant." Acknowledging that there are "no established regulatory standards for the determination of 'acceptable' levels of mold" and that "individual sensitivities vary from person-to-person," Doctor continued to recommend "more vigilant housekeeping" to counteract the problem. The presence of mold and mildew in some portable classrooms at BCE also was noted by the SSCC task force in its report.

***1392** Having analyzed the foregoing evidence, we conclude that neither the SSCC information nor the MACS Lab correspondence supports the environmental impact claim urged by SLV CARE. The cited evidence fails on three grounds. First, there is no indication that the presence of mold is a *change* in environmental conditions. The mold was a preexisting condition at BCE, and there is no evidence that it will be exacerbated by the presence of additional pupils. A change in physical conditions is a necessary predicate for a finding of environmental impact. (See *Silveira v. Las Gallinas Valley Sanitary Dist., supra,* 54 Cal.App.4th at p. 993, 63 Cal.Rptr.2d 244; *Ukiah, supra,* 2 Cal.App.4th at p. 735, 3 Cal.Rptr.2d 488.) Second, as to the indoor air quality reports and letters, which were signed by Doctor on behalf of MACS Lab, while they suggest that particular individuals may have adverse reactions to mold, they do not demonstrate that **school** consolidation "would adversely affect the environment of persons in general." (*Ukiah,* at p. 734, 3 Cal.Rptr.2d 488.) Finally, there is no evidence that any possible environmental impact from the mold will be *significant.* In fact, the evidence is to the contrary-Doctor's letter states that the level of indoor spores "is not considered significant."

(2) Geologic Hazards: SLV CARE identifies geologic dangers as a significant environmental impact, citing a March 1990 letter to the District from a geological consultant, Woodward-Clyde. That letter acknowledges that the Ben Lomond fault lies approximately 100 feet southwest of the BCE campus. But under the heading "CONCLUSIONS," the letter states: "The information obtained during the course of our studies leading to this review appears to justify further downgrading the already minimal risk assigned to construction adjacent to the Ben Lomond fault, which traverses the general area in which the

School District is located. We are no longer indicating it to be a potential earthquake source."

****155** Assuming that the cited 1990 letter was part of the administrative record, it does not constitute substantial evidence of environmental impact. Neither that letter nor anything else in the appellate record suggests that any geologic hazard is new, so as to constitute a change in environmental conditions. Nor is there any evidence suggesting that the closure decision amplifies any preexisting hazard, either because of the increase in student population at BCE or because of physical changes on that campus, including the addition of portable classrooms. (See *Citizen Action to Serve All Students v. Thornley, supra,* 222 Cal.App.3d at p. 757, 272 Cal.Rptr. 83 [finding "no evidence in the record" that the **school** closure "might cause an increased vulnerability to earthquake-related harm" and characterizing arguments to the contrary as mere speculation that "there *might* be such a danger, without hard fact"]; *Ukiah, supra,* 2 Cal.App.4th at p. 735, 3 Cal.Rptr.2d 488 [rejecting hearsay statements "that the site was on an earthquake fault" and finding that those statements did not constitute substantial evidence to overcome the categorical exemption].)

***1393** (3) Septic: As yet another environmental impact, SLV CARE lists septic problems at both receptor **schools**. As evidentiary support, SLV CARE points to one of the District's five-year maintenance plans; it also cites a February 2002 letter to the District from the California Regional Water Quality Control Board. The maintenance plan, which covers **school** years beginning in 1997 and ending in 2002, describes the septic fields at SLE and BCE as "failing." The February 2002 letter from the Regional Water Quality Control Board refers to septic problems dating back to 1998 at the District's shared high **school** campus in Felton. But the administrative record also contains more recent information, which addresses the then-current condition of the septic systems at each of the receptor **schools**. One such document is an e-mail sent March 31, 2003, from Dave Elliott, the District's Director of Maintenance and Operations, to Julie Haff, the District's Superintendent. In that e-mail, Elliott states: "The septic system at Boulder Creek below the two-story building was replaced in August of 2001 and is working as designed." Elliott also states: "At this time, I see no need for any further improvements to the septic systems at Boulder Creek Elementary." In addition, information presented to the District's Board from the SSCC task force notes both BCE's "new septic" and SLE's "shared septic (new)."

The evidence offered by SLV CARE on this point is deficient in several regards. First, as indicated by the District's more current information, the evidence of septic problems is outmoded. As such, it is "clearly erroneous or inaccurate" and does not constitute substantial evidence. (§ 21080, subd. (e)(2); Guidelines, § 15384, subd. (a).) Second, as with appellant's other claims, the proffered evidence does not represent the requisite *change* in environmental conditions. SLV CARE argues that the District failed to "consider the impact of doubling SLE's enrollment on the already failing septic system." But it offers no *evidence* that the claimed problem would be exacerbated by the presence of additional pupils. (See *Magan v. County of Kings, supra,* 105 Cal.App.4th at p. 477, 129 Cal.Rptr.2d 344 [rejecting challenger's arguments about potential impacts, as "based entirely on speculation"].)

(4) Traffic, Parking, Emergency Access: SLV CARE posits the existence of traffic and parking hazards at both receptor **schools**, citing written public comments by parents of Redwood students. On the issue of traffic, a Redwood parent who routinely ferried children to both of the District's****156** north valley elementary **schools** wrote: "It takes longer to drop off 1 child at Boulder Creek Elementary (excluding travel time) than it does to drop off 7 children at Redwood (excluding travel time). The hills up to Boulder Creek Elementary are steep and very narrow. There are a lot of pedestrians (mostly children) walking on all sides of these roads.... I don't feel this is safe to add more children to this **school** (Boulder Creek Elementary)." On the issue ***1394** of parking, another Redwood parent wrote: "Redwood Elementary has parking for dropping off and picking up students. Parking at Boulder Creek Elementary is minimal, and the facilities for dropping off or picking up students-especially if the student body swells-are both inadequate and dangerous. I expect cars will be lined up around the block." Information from the SSCC's transportation subcommittee reflects some of these same concerns.

On the issue of emergency access, SLV CARE cites a letter with attachments, dated March 25, 2003, from Sam Robustelli, Chief of the Boulder Creek Fire Department. That document includes factual comparisons between the north valley **schools** based on emergency response, fire response, and highway access.

The data and opinions proffered by SLV CARE do not support its claim to the "significant effects" exception to the categorical exemption for **school** consolidation. As explained above, that exception applies "where there is a reasonable possibility that the activity will have a significant effect on the environment *due to unusual circumstances.*" (Guidelines § 15300.2, subd. (c), italics added.) To sustain the exception, the evidence must show "some feature of the project that distinguishes it" from others in the exempt class. (*Fairbank v. City of Mill Valley, supra,* 75 Cal.App.4th at p. 1260, 89 Cal.Rptr.2d 233. See also, e.g., *Santa Monica Chamber of Commerce v. City of Santa Monica, supra,* 101 Cal.App.4th at p. 801, 124 Cal.Rptr.2d 731.)

SLV CARE offers no evidence that the traffic, parking, or access problems cited here are unusual circumstances in the context of **school** consolidations. In that respect, this case resembles *Fairbank v. City of Mill Valley.* There, the plaintiff cited "various comments from the administrative record, by which project opponents voiced concerns about the existing traffic and parking problems in downtown Mill Valley, and the prospect of the project exacerbating those problems." (*Fairbank v. City of Mill Valley, supra,* 75 Cal.App.4th at p. 1260, 89 Cal.Rptr.2d 233.) The court rejected the opponent's claim to an exception, finding "no showing whatsoever of any 'unusual circumstances' surrounding the construction of this small commercial structure giving rise to any risk of 'significant' effects upon the environment. (Guidelines, § 15300.2(c).) While the addition of any small building to a fully developed downtown commercial area is likely to cause minor adverse changes in the amount and flow of traffic and in parking patterns in the area, such effects cannot be deemed 'significant' without a showing of some feature of the project that distinguishes it from any other small, run-of-the-mill commercial building or use. Otherwise, no project that satisfies the criteria set forth in Guidelines section 15303(c) could ever be found to be exempt." (*Ibid.*) As the court concluded, "in the absence of any evidence of unusual circumstances nullifying the grant of a categorical exemption, there can be no basis for a claim of exception under Guidelines section 15300.2(c)." (*Id.* at pp. 1260-1261, 89 Cal.Rptr.2d 233. See also, e.g., *Ukiah, supra,* 2 Cal.App.4th at p. 736, 3 Cal.Rptr.2d 488 [the ***1395** claimed "potential environmental impacts" were "normal and ****157** common considerations in the construction of a single-family residence" and did not constitute unusual circumstances].) The same is true here-there is no evidence of unusual circumstances setting this **school** consolidation apart from others in the exempt class.

C. Summary of Conclusions

In this case, we are required to undertake only the first tier of the **CEQA** analysis. That analysis leads us the following conclusions: (1) The **school** consolidation decision at issue here constitutes a "project" for purposes of **CEQA**. (2) The District properly determined that its decision is exempt from **CEQA**. First, in making that determination, the District did not violate any procedural requirements of **CEQA**, because none apply. Moreover, as a matter of law, substantial evidence supports the District's determination that its closure decision qualifies for categorical exemption from **CEQA** under section 21080.18 and Guideline section 15314. SLV CARE did not carry its burden of showing an exception to the categorical exemption; it failed to offer sufficient evidence of significant environmental impacts on any of the proffered grounds.

II. BOND LAW

SLV CARE next argues that the District violated constitutional and statutory provisions governing use of bond funds. At issue is the District's use of proceeds from Measure S, an $18.5 million **school** facilities bond issue approved by local voters in 2000. As before, we begin by setting forth the relevant legal principles.

A. General Principles

"The usual method of funding new **school** construc-

tion in California has been for **school** districts to obtain voter approval for the issuance of general obligation bonds. The bonds are repaid by an annual levy of an *ad valorem* tax on real (and certain personal) property located within the area of the district." (62 Ops.Cal.Atty.Gen. 209, 210 (1979), fn. and citations omitted.)

Various provisions of law govern **school** bond financing. Some are constitutional. (See, e.g., Cal. Const., art. XIIIA, § 1, subd. (b); *id.*, art XVI, § 18.) Others are statutory. (See, e.g., Ed.Code, §§ 15100 et seq.) [FN8]

> FN8. In this section of the opinion (II), which discusses bond law, further unspecified statutory references are to the Education Code.

[26] ***1396** Generally speaking, **school** bond financing is restricted to projects of a capital or permanent character. (See *Marin U. Junior College Dist. v. Gwinn* (1930) 106 Cal.App. 12, 13-14, 288 P. 799; 87 Ops.Cal.Atty.Gen. 157, 162 (2004).) That restriction is apparent from several constitutional provisions. We mention two such provisions, which are instructive because of their detail, although they do not apply directly to this case. First, under the constitutional provision added by Proposition 39, bond proceeds from voter-approved taxes or special assessments may be used only for "the construction, reconstruction, rehabilitation, or replacement of **school** facilities" and not "for any other purpose, including teacher and administrator salaries and other **school** operating expenses." (Cal. Const., art. XIIIA, § 1, subd. (b)(3).) [FN9] Similarly, bonds issued after***158** voter approval to exceed the debt limit may be used only for "the construction, reconstruction, rehabilitation, or replacement of **school** facilities, including the furnishing and equipping of **school** facilities, or the acquisition or lease of real property for **school** facilities...." (Cal. Const., art XVI, § 18, subd. (b).)

> FN9. Proposition 39, enacted in November 2000, "amended the Constitution to allow the issuance of bonds for the construction of **school** facilities if approved by 55 percent of a **school** district's voters and if specified conditions are met." (87 Ops.Cal.Atty.Gen., *supra*, at p. 157.) "Normally, approval of a **school** district's bonded indebtedness would require a two-thirds approval vote of a district's voters." (*Id.* at p. 157, fn. 1.) Legislation implementing Proposition 39 is codified at sections 15264-15284.

There are additional restrictions, including some that are statutory; for example, proceeds "shall not be applied to any other purposes than those for which the bonds were issued." (§ 15146, subd. (b).)

1. Nature of the Relationship Between the District and the Electorate

According to appellant SLV CARE: "A bond proposition submitted to the voters of a **school** district is a contract between the district and its voters."

Appellant's characterization does not find universal support in the cases. "The relationship arising out of a bond election has been defined in a number of California cases." (*Associated Students of North Peralta Community College v. Board of Trustees* (1979) 92 Cal.App.3d 672, 676, 155 Cal.Rptr. 250 (*Peralta*).) As explained in the *Peralta* case, some "early decisions" found "a contractual relationship between the public entity and individual electors." (*Ibid.*) "However, a later decision, now regarded as the leading case on the subject, retreated from this classification of the relationship as contractual." (*Ibid.*, citing *Peery v. City of Los Angeles* (1922) 187 Cal. 753, 203 P. 992.) In that later decision, the California Supreme Court "concluded that it was unnecessary to consider the relationship between public entity and electorate as strictly contractual, the status being merely *analogous* to a contract." (*Peralta*, at pp. 676-677, 155 Cal.Rptr. 250.)

***1397** In any event, precise characterization of the relationship may be academic. "It is clear that proceeds of a bond issue may be expended only for the purpose authorized by the voters in approving issue of the bonds [citation]. Whether the limitation be deemed to be contractual [citation] or of a status analogous to such relation [citation] or a restriction implied by the requirement of popular approval of the bonds [citation], it does restrict the power of the pub-

lic body in the expenditure of the bond issue proceeds, and hence in the nature of the project to be completed and paid for. The statutes and ordinances under which the public body acts in submitting the bond issue proposal to the voters must be considered with the ballot proposition in determining the extent of this restriction [citations]." (*Mills v. S.F. Bay Area Rapid Transit Dist.* (1968) 261 Cal.App.2d 666, 668, 68 Cal.Rptr. 317.)

2. Elements of the Relationship

In *Peralta,* the court identified four elements that typically comprise the relationship between the entity issuing a bond and its voters. (*Peralta, supra,* 92 Cal.App.3d at pp. 677-678, 155 Cal.Rptr. 250.) First, there are the authorizing statutes, which are "presumptively within the knowledge of each elector...." (*Id.* at p. 677, 155 Cal.Rptr. 250.) Second, the "resolution by which the bonding entity resolves to submit the issue to the District's electors has also been regarded as part of the 'contract' between the entity and its electors." (*Ibid.*) "A third element of the 'contract' is the ballot proposition submitted to the voters." (*Ibid.*) "The fourth and final element is assent or ratification" by the voters. (*Id.* at p. 678, 155 Cal.Rptr. 250.)

**159 Depending on the circumstances of the particular case, there may be other factors beyond the four basic elements described above. (*Peralta, supra,* 92 Cal.App.3d at p. 678, 155 Cal.Rptr. 250.) "Extrinsic documents may be added to the primary elements comprising the relationship." (*Ibid.*) But "no case or statutory authority supports the proposed incorporation into the 'bond contract' of the ballot argument submitted to the voters prior to the election." (*Id.* at pp. 678-679, 155 Cal.Rptr. 250.) To the contrary, at least one case has held that "statements 'disseminated to the general public' before the election ... cannot be deemed to modify the intentionally broad language of the proposition in fact submitted to the voters, the call of election published to them, and the statutes authorizing the procedure adopted [citation]." (*Mills v. S.F. Bay Area Rapid Transit Dist., supra,* 261 Cal.App.2d at p. 669, 68 Cal.Rptr. 317. Cf., *Los Angeles County Transportation Com. v. Richmond* (1982) 31 Cal.3d 197, 203, 182 Cal.Rptr. 324, 643 P.2d 941 [in the case of statewide voter initiatives, "ambiguities may be resolved by referring to the ballot summary, the arguments and analysis presented to the electorate, and the contemporaneous construction of the Legislature"]; *City and County of San Francisco v. Farrell* (1982) 32 Cal.3d 47, 52, 184 Cal.Rptr. 713, 648 P.2d 935 [same].)

***1398 B. Application**

The *Peralta* case provides a useful approach for assessing appellant's argument that the District violated its bond obligations. We therefore begin our analysis by applying each of the elements identified in *Peralta* to the relationship between the District and the voters arising out of the November 2000 bond election. (See *Peralta, supra,* 92 Cal.App.3d at pp. 677-679, 155 Cal.Rptr. 250.) We then discuss the specific violations claimed by SLV CARE. Because the relevant facts are not in dispute, the issues presented are questions of law, which we review de novo. (See, e.g., *Service Employees Internat. Union v. Board of Trustees* (1996) 47 Cal.App.4th 1661, 1665, 55 Cal.Rptr.2d 484 [interpreting Education Code provisions].)

1. Elements

[27] The first of the elements that make up the entity-electorate relationship is the authorizing legislation. (*Peralta, supra,* 92 Cal.App.3d at p. 677, 155 Cal.Rptr. 250.) Here, the relevant statute is section 15100, which permits **school** districts to seek bond financing for a variety of purposes, including: (a) buying **school** land; (b) buying or constructing **school** buildings; (c) making "alterations or additions" to **school** buildings other than "current maintenance, operation, or repairs"; (d) "repairing, restoring, or rebuilding [ ] any **school** building damaged, injured, or destroyed by fire or other public calamity"; (e) acquiring "furniture, equipment, or necessary apparatus of a permanent nature"; and (f) permanently improving **school** grounds. (§ 15100, subds.(a)-(f).) [FN10] The **160 statutorily authorized purposes thus are broad but not limitless, being generally restricted to capital or permanent items.

FN10. Section 15100 provides in full as follows: "Except as otherwise provided by law, the governing board of any **school** district or

community college district may, when in its judgment it is advisable, and shall, upon a petition of the majority of the qualified electors residing in the **school** district or community college district, order an election and submit to the electors of the district the question whether the bonds of the district shall be issued and sold for the purpose of raising money for the following purposes:

(a) The purchasing of **school** lots.

(b) The building or purchasing of **school** buildings.

(c) The making of alterations or additions to the **school** building or buildings other than as may be necessary for current maintenance, operation, or repairs.

(d) The repairing, restoring, or rebuilding of any **school** building damaged, injured, or destroyed by fire or other public calamity.

(e) The supplying of **school** buildings and grounds with furniture, equipment, or necessary apparatus of a permanent nature.

(f) The permanent improvement of the **school** grounds.

(g) The refunding of any outstanding valid indebtedness of the district, evidenced by bonds, or of state **school** building aid loans.

(h) The carrying out of the projects or purposes authorized in Section 17577 or 81613.

(i) The purchase of schoolbuses the useful life of which is at least 20 years.

(j) The demolition or razing of any **school** building with the intent to replace it with another **school** building, whether in the same location or in any other location.

Any one or more of the purposes enumerated, except that of refunding any outstanding valid indebtedness of the district evidenced by bonds, may, by order of the governing board entered in its minutes, be united and voted upon as one single proposition."

The second element is the District's formal resolution to submit the issue to the electors. (*Peralta, supra,* 92 Cal.App.3d at p. 677, 155 Cal.Rptr. 250; see § 5322.) In the preamble of its July 2000 resolution, the District indicated its desire "to improve **school** facilities to benefit students in the District." In the body of the resolution, the District formally determined to submit to the electorate "the question of whether the Bonds shall be issued and sold for the purpose of raising money to finance the **School** Facilities and paying costs incident thereto." The stated purpose of the election was "for the voters in the District to vote on a proposition, a copy of which is attached hereto ... containing the question of whether the District shall issue the Bonds for the purposes stated therein." The resolution thus speaks broadly of funding **school** facilities and incidental costs.

***1399** The third consideration is the ballot proposition itself. (*Peralta, supra,* 92 Cal.App.3d at p. 677, 155 Cal.Rptr. 250; see § 15122 [requirements as to the form of the ballot].) Measure S, put before the voters in the November 2000 election, was phrased as follows: "To acquire, construct, and modernize **school** facilities, build new classrooms to replace 30-year-old portables, construct a permanent Junior High at the current site, upgrade drainage, replace deteriorating plumbing and inadequate electrical systems, improve student access to classroom computers and technology, and make the District eligible to receive over $8 million in state-matching funds, shall the **San Lorenzo** Valley Unified **School** District be authorized to issue $18,500,000 of bonds at an interest rate below the legal limit?"

Those three elements-the statute, the resolution, and the ballot proposition-were before the voters considering Measure S. "The fourth and final element is assent or ratification by the electors, which, of

course, is present here." (*Peralta, supra,* 92 Cal.App.3d at p. 678, 155 Cal.Rptr. 250.)

[28] In this case, there are no other factors that bear on the District-electorate relationship. (See *Peralta, supra,* 92 Cal.App.3d at pp. 678-679, 155 Cal.Rptr. 250.) More specifically, contrary to the contentions of appellant SLV CARE, ballot arguments are not part of the analysis. (*Ibid.*; *Mills v. S.F. Bay Area Rapid Transit Dist., supra,* 261 Cal.App.2d at p. 669, 68 Cal.Rptr. 317; cf., *Los Angeles County Transportation Com. v. Richmond, supra,* 31 Cal.3d at p. 203, 182 Cal.Rptr. 324, 643 P.2d 941 [state voter initiatives].)

****161 *1400 *2. Claimed Violations***

a. Promise of Matching Funds

[29] As set forth in the ballot, one of the purposes of Measure S was to "make the District eligible to receive over $8 million in state-matching funds...." According to appellant SLV CARE, that language triggered the application of section 15122.5, which requires a statement in the sample ballot advising voters that the project is subject to discretionary state approval. In appellant's words: "In promising that approval of the bond measure would bring 'over $8 million in state-matching funds' without the required discretionary approval language, Respondent violated [ ] § 15122.5."

To properly assess appellant's contention, we begin with the statute. In pertinent part, section 15122.5 provides: "Whenever ... the project to be funded by the bonds will require state matching funds for any phase of the project, the sample ballot shall contain a statement ... advising the voters that the project is subject to the approval of state matching funds and, therefore, passage of the bond measure is not a guarantee that the project will be completed." (§ 15122.5, subd. (a).) [FN11]

> FN11. The full text of section 15122.5 reads: "(a) Whenever an election is called on the question of whether bonds of a **school** district shall be issued and sold for the purposes specified in Section 15100 and the project to be funded by the bonds will require state matching funds for any phase of the project, the sample ballot shall contain a statement, as provided in subdivision (b), advising the voters that the project is subject to the approval of state matching funds and, therefore, passage of the bond measure is not a guarantee that the project will be completed.
>
> "(b) The words to appear in the sample ballot in satisfaction of the requirements of subdivision (a) are as follows:
>
> 'Approval of Measure _____ does not guarantee that the proposed project or projects in the _____ **School** District that are the subject of bonds under Measure _____ will be funded beyond the local revenues generated by Measure _____. The **school** district's proposal for the project or projects may assume the receipt of matching state funds, which could be subject to appropriation by the Legislature or approval of a statewide bond measure.'
>
> "(c) This section does not apply to any election to incur bonded indebtedness pursuant to the Mello-Roos Community Facilities Act of 1982 contained in Chapter 2.5 (commencing with Section 53311) of Division 2 of Title 5 of the Government Code."

Based on the statute's plain language, we reject appellant's contention. Section 15122.5 requires voter advisement when "the project to be funded by the bonds *will require state matching funds* ...." (§ 15122.5, subd. (a), italics added.) Neither the language of Measure S, nor any other evidence in the record, suggests that the bond-financed projects *required* state matching funds. Becoming "eligible to receive" state funds for Measure S projects is not the same as requiring such funds.

In short, we find no violation of section 15122.5.

***1401** *b. Expenditures*

SLV CARE challenges a number of the District's expenditures as unauthorized uses of the bond funds.[FN12] To streamline ****162** our discussion of this issue, we group the challenged expenditures into logical categories.

> FN12. In its opening brief, SLV CARE lists the following items as unauthorized expenditures: "a demographic study and 'geocoding' of student addresses used for the **school** closure project; printing the bond measure materials; deferred maintenance ... [¶] costs associated with consolidation [of] **schools** including moving and leasing portable [ ] classrooms, consultants, mold reports, and the belated **CEQA** study; the salary of the ex-Principal of Redwood Elementary, who was hired as Bond Manager, including his attendance and training at conferences, and 15% of the salary of the CFO; payments to consultants, attorneys, and other professionals; and repair of the Felton campus septic system."

[30] *Administrative costs:* The resolution adopted by the District identified the purpose of the bond as "raising money to finance the **School** Facilities and paying costs incident thereto."

Incidental costs include the expense of administering and overseeing construction projects to be funded with bond money. As stated in a 2004 Attorney General opinion, which concerned the use of Proposition 39 bond funds: "Administrative oversight work is an integral part of the construction process." (87 Ops.Cal.Atty.Gen., *supra,* at p. 163.) As the Attorney General further explained, "the phrase 'the construction, reconstruction, rehabilitation, or replacement of **school** facilities' embraces project administrative costs, such as monitoring contracts and project funding, overseeing construction progress, and performing overall project management and accounting that facilitates timely completion of the construction project. A construction project generates not only the costs of materials and equipment, architectural and engineering design work, and construction worker salaries, but also costs of project administration-work that the **school** district would not be required to undertake or to fund *but for* the existence of the construction project." (*Id.* at p. 160.)

As the Attorney General recognized, analogous statutes bolster that conclusion. (See 87 Ops.Cal.Atty.Gen., *supra,* at pp. 162-163.) Among them is Government Code section 16727, which concerns issuance of the state's general obligation bonds. (*Ibid.*) According to subdivision (a) of that section: "Proceeds from the sale of any bonds ... shall be used only for the following purposes: (a) The costs of construction or acquisition of capital assets." (Gov.Code § 16727, subd. (a).) After defining capital assets, subdivision (a) continues: "Costs allowable under this section include costs incidentally but directly related to construction or acquisition, including, but not limited to, planning, engineering, construction management, architectural, and other design work, environmental impact reports and ***1402** assessments, required mitigation expenses, appraisals, legal expenses, site acquisitions, and necessary easements." (*Ibid.*) Under subdivision (d), proceeds also may be used to "pay the costs of a state agency with responsibility for administering the bond program." (*Id.,* subd. (d).)

As relevant to the challenges raised here, permissible administrative costs would include the salaries of in-house personnel acting as construction project administrators. (87 Ops.Cal.Atty.Gen., *supra,* at p. 158.) Administering the project "is an integral part of the construction process." (*Id.* at p. 163.) Administration may be provided by outside contractors or in-house personnel. " **School** district employees with the requisite expertise may be able to perform project management work at less cost to the district than if the work were performed by private consultants." (*Id.* at p. 162.) For these reasons, the prohibition against the use of "Proposition 39 **school** bond proceeds for 'teacher and administrator salaries and other **school** operating expenses' " does not apply "to the payment of salaries of **school** district employees who perform administrative oversight work on construction projects authorized by a voter approved bond measure." (*Id.* at p. 158, quoting Cal. Const., art. XIIIA, § 1, subd. (b)(3)(A). Cf., § 17074.10 [**school** modernization funds available under the Leroy F. Green **School** Facilities Act of 1998 "do not include****163** funding

for administrative and overhead costs"].)

In sum, costs that are "incidentally but directly related to construction or acquisition" may be paid from proceeds of the state's general obligation bonds. (Gov.Code § 16727, subd. (a).) That includes administrative costs, such as salaries for personnel engaged in construction management and oversight. (87 Ops.Cal.Atty.Gen., *supra,* at pp. 162-163.)

Applying those concepts here, to the District's general obligation bonds, we reject the claim by SLV CARE that the salaries and associated training costs of the District's personnel were improper. There is no evidence that those expenditures were made for purposes other than management and oversight of those District construction projects that were funded by bond money. To the contrary, the unrebutted trial testimony shows that the challenged salary expenses in fact represent construction management. For example, District Superintendent Julie Haff testified that the facilities manager was "paid with bond funds" because "his job is strictly to supervise the spending of the construction funds, and it's totally dedicated to construction and our efforts to acquire and modernize our **school** facilities." The facilities manager's own testimony was to the same effect: Bryan Loehr stated that his job was to "manage all of the construction and modernization projects that are funded by the general obligation bonds and by the State modernization fund." In explaining the use of bond funds to pay 15 percent of the salary of the District's assistant superintendent of business services, Edith Henden, ***1403** Superintendent Haff testified, "that's her time dedicated to the expenditure of these bond funds for acquiring and modernizing our facilities."

[31] *Bond preparation costs:* Appellant SLV CARE also challenges expenses incurred in preparing the bonds, such as printing and attorney fees. According to appellant: "Bond proceeds may not be used to pay even the 'soft costs' of the bond measure such as printing, publication and even the bond attorney's opinion."

In support of its argument, appellant relies on a 1958 opinion of the Attorney General. (32 Ops.Cal.Atty.Gen. 249 (1958).) That opinion concludes that the expenses of printing the bonds and related publications, and the cost of the bond attorney's opinion, are "payable out of the general funds of the district, not out of bond proceeds." (*Id.* at p. 249.)

We do not find the proffered authority persuasive. The 1958 Attorney General opinion cited by appellant was based on quoted language of a provision of the 1943 Education Code, which has since been repealed. (Former § 7435; see now § 15145.) Under the repealed provision, expenses incurred for preparation of the bond constituted "a legal charge against the funds of the **school** district issuing the bonds." (Former § 7435.) The Attorney General interpreted the statutory reference to funds to mean the district's *general* funds, not *bond* proceeds. (32 Ops.Cal.Atty.Gen., *supra,* at p. 250.) But the Attorney General did "concede that the matter is not free from doubt." (*Ibid.*) More to the point, subsequent changes in the statutory language completely undermine the Attorney General's interpretation.

In pertinent part, the governing statute now reads: "All expense incurred for the preparation, sale, and delivery of the **school** bonds, including but not limited to, fees of an independent financial consultant, the publication of the official notice of sale of the bonds, the preparation, printing and distribution of the official statement, the obtaining of a rating, the purchase of insurance****164** insuring the prompt payment of interest and principal, the preparation of the certified copy of the transcript for the successful bidder, the printing of the bonds, and legal fees of independent bond counsel retained by the **school** district or community college district issuing the bonds are legal charges against the funds of the district issuing the bonds and *may be paid from the proceeds of sale of the bonds.*" (§ 15145, subd. (a), italics added. Cf., Gov.Code § 16727, subd. (e) [proceeds from the state's general obligation bonds may be applied to the "costs of the Treasurer's office directly associated with the sale and payment of the bonds, including, but not limited to, underwriting discounts, costs of printing, bond counsel, registration, and fees of trustees"].)

***1404** Based on the statute's plain language, we find no merit in appellant's broad challenge to bond prepa-

ration expenses such as printing and counsel fees. Nor does SLV CARE offer evidence that particular expenditures within that category were improper. We therefore reject appellant's claim that these expenditures were unauthorized.

[32] *Construction costs:* Appellant SLV CARE takes issue with the District's use of bond funds for certain construction projects, characterizing them as unauthorized uses of the bond proceeds. Specifically, appellant cites deferred maintenance and repair of the septic system on the Felton campus.

An underlying theme of these challenges is the distinction between permanent, capital improvements on the one hand, and operation and maintenance on the other. (*Marin U. Junior College Dist. v. Gwinn, supra,* 106 Cal.App. at pp. 13-14, 288 P. 799 [**school** bonds restricted to capital projects].) In urging that distinction, appellant directs us to article XIIID of the California Constitution, which defines both concepts: " 'Capital cost' means the cost of acquisition, installation, construction, reconstruction, or replacement of a permanent public improvement by an agency." (Cal. Const., art. XIIID, § 2, subd. (c).) " 'Maintenance and operation expenses' means the cost of rent, repair, replacement, rehabilitation, fuel, power, electrical current, care, and supervision necessary to properly operate and maintain a permanent public improvement." (*Id.,* subd. (f).)

Armed with those concepts, appellant SLV CARE mounts a general challenge to District expenditures that it categorizes as deferred maintenance. As authorized elsewhere in the Education Code, a **school** district "may establish a restricted fund to be known as the 'district deferred maintenance fund' for the purpose of major repair or replacement of plumbing, heating, air conditioning, electrical, roofing, and floor systems, the exterior and interior painting of **school** buildings," for removing asbestos and lead, and for "other items of maintenance approved by the State Allocation Board." (§ 17582, subd. (a).) Money deposited to the deferred maintenance fund "may be received from any source whatsoever," but it must "be accounted for separately from all other funds and accounts...." (*Ibid.*)

According to appellant, the District "made no effort to determine which, if any deferred maintenance projects might qualify for use of bond moneys. Bond money transferred into the deferred maintenance account was used indiscriminately for anything that qualified as deferred maintenance." SLV CARE does not identify specific improper items, however.

***1405** We reject appellant's unfocused substantive challenge, which fails to identify-much less support-specific improper deferred maintenance expenses. Dealing in generalities, as we must, we conclude that ****165** the expenditures for deferred maintenance were proper. First, under the governing statute, authorized bond projects include "alterations or additions to the **school** building or buildings other than as may be necessary for *current* maintenance ...." (§ 15100, subd. (c), italics added.) Appellant fails to demonstrate that the District paid for any *current* maintenance items with *deferred* maintenance bond funds. Second, as to the ballot language, Measure S specifically sought money for "modernization." There is no evidence that any deferred maintenance project falls outside that rubric.

Appellant SLV CARE also alleges the District's misuse of bond funds based on transfers between its accounts. In its opening brief, SLV CARE charges that "a large portion of the bond money transferred into the deferred maintenance account was again transferred into the general fund where it was used for general operational expenses, including salaries." In its reply brief, SLV CARE asserts that the District once "transferred $85,905 in bond money into the general fund to cover a deficit." In support of that assertion, appellant cites testimony by Edith Henden, the District's assistant superintendent of business services, who testified concerning entries in the District's June 2002 audited financial statements.

While the cited evidence does show that funds were transferred between accounts, it does not demonstrate impropriety. As SLV CARE points out, Henden did acknowledge that $104,000 in bond funds had been "transferred out of the building fund and into deferred maintenance account" and also that there had been a transfer "from the deferred maintenance fund to the general fund" amounting to nearly $86,000. But as she explained, the transfer represented an "audit adjustment" entry to avoid an impermissible year-

end deficit, and the money was transferred back.[FN13] SLV CARE cites no other evidence of impropriety, and the trial court found none. Appellant's claim of statutory violations in connection with the District's transfers of deferred maintenance funds thus fails for lack of evidentiary support.

> FN13. Henden was asked: "Would it have been possible to transfer $85,905 into the general account from deferred maintenance if, in fact, this 104,000 from the bond money hadn't been there?" She responded: "I want to say yes, but I think I need to expand a little bit. You can't have-you can't end the year with a deficit in this fund. So the general fund would have-essentially, the transfer would have been made because it's an audit exception, an audit adjustment that needed to be made. So we would have booked it; then we would have transferred funds back from-to the general fund to cover it."

Apart from its deferred maintenance claims, SLV CARE also takes issue with the use of bond funds to repair the septic system at the Felton campus.

***1406** We reject that contention as well. As before, we look first to the statute. Among the permissible purposes for bond funds is the "carrying out of the projects or purposes authorized in Section 17577 ...." (Ed. Code, § 15100, subd. (h).) That section in turn provides that a " **school** district may provide sewers and drains adequate to treat and/or dispose of sewage and drainage on or away from each **school** property." (§ 17577.) It further provides: "The cost thereof may be paid from the building fund, including any bond moneys therein." (*Ibid.*) Repair of the septic system thus is proper under the statute. It is also proper under the language of Measure S, either as a means to "modernize **school** facilities" or under the measure's plan to "replace deteriorating plumbing."

[33] *Consolidation costs:* Appellant's final challenge is to expenses associated with the **school** closures and consolidation: ****166** demographic and geo-coding studies; consultants; mold reports; the **CEQA** study; and the moving and leasing of portable classrooms.

With respect to the consultants and studies, we again find guidance in the state's general obligation bond law. (See Gov.Code § 16727.) It permits bond funds to be used for "costs incidentally but directly related to construction or acquisition, *including, but not limited to, planning,* engineering, construction management, architectural, and other design work, *environmental impact reports and assessments,* required mitigation expenses, appraisals, legal expenses, site acquisitions, and necessary easements." (*Id.,* subd.(a), italics added.) Applying that statute here, the costs for studies and consultants must be upheld. The demographic studies represented planning expenses, which helped the District determine where to construct or improve facilities. The mold reports served a similar planning function. And the **CEQA** study falls within the rubric of an environmental impact assessment.

As for the moving and leasing of portable classrooms, SLV CARE argues: "Bond law does not allow Measure S money to be used to *lease* anything."

That argument cannot be supported. As explained in a 1979 Attorney General opinion, there are various methods of "funding new **school** construction in California...." (62 Ops.Cal.Atty.Gen., *supra,* at p. 210.) One "alternative for constructing new **school** facilities has been the use of 'lease-purchase agreements.' " (*Ibid.,* citing Ed. Code, §§ 39300-39305 [repealed; see now Ed. Code, §§ 17400-17404, 17406].) As that opinion suggests, **school** districts may acquire new **school** facilities through leasing arrangements. Section 17400 thus authorizes "leases and agreements relating to real property and buildings." Section 17405 provides that "relocatable" structures may constitute **school** buildings, and it authorizes the lease of such structures subject to enumerated statutory requirements. ***1407** Other sections likewise implicitly recognize that "construction of a **school** building" may be accomplished with a "factory-built **school** building." (§ 17357. See also, e.g., §§ 17352, 17358.)

In short, there is no legal basis for appellant's argument that the installation of leased portable classrooms does not qualify as construction of **school** facilities. Under the statute, it constitutes the "building ... of **school** buildings." (§ 15100, subd. (b).) Under the language of Measure S, it falls within the stated

purpose to "acquire [or] construct [ ] **school** facilities."

C. Summary of Conclusions

We find no violation of bond law in connection with Measure S. Contrary to the contention of appellant SLV CARE, the fact that one of the express purposes of Measure S was to "make the district eligible to receive over $8 million in state matching funds" did not trigger the advisory requirements of section 15122.5. On the separate question of the District's expenditures from bond proceeds, we likewise reject appellant's challenges to administrative costs, including salaries, bond preparation expenses, specific construction projects, and **school** consolidation expenses. Neither the law nor the record supports those claims.

III. DISCLOSURE OF PUBLIC RECORDS

SLV CARE next contends that the District violated two state statutes requiring the disclosure of public records: the California Public Records Act (CPRA) and the Ralph M. Brown Open Meeting Act **167 (Brown Act).[FN14] As with our analysis of the preceding issues, we start by describing the governing legal principles.

> FN14. In this section of the opinion (III), which concerns the CPRA and the Brown Act, further unspecified statutory references are to the Government Code.

A. General Principles

1. The California Public Records Act

"In 1968, the Legislature clarified the scope of the public's right to inspect public records by enacting the CPRA." (*County of Los Angeles v. Superior Court* (2000) 82 Cal.App.4th 819, 825, 98 Cal.Rptr.2d 564.) The Act is codified at sections 6250 et seq.

a. Policy and Operation

[34][35] The CPRA "was enacted for the purpose of increasing freedom of information by giving members of the public access to information in the possession *1408 of public agencies." (*Filarsky v. Superior Court* (2002) 28 Cal.4th 419, 425-426, 121 Cal.Rptr.2d 844, 49 P.3d 194, citing *CBS, Inc. v. Block* (1986) 42 Cal.3d 646, 651, 230 Cal.Rptr. 362, 725 P.2d 470.) "The CPRA embodies a strong policy in favor of disclosure of public records...." (*California State University, Fresno Assn., Inc. v. Superior Court* (2001) 90 Cal.App.4th 810, 831, 108 Cal.Rptr.2d 870.) Public records are broadly defined. (*Id.* at p. 824, 108 Cal.Rptr.2d 870; see § 6252, subd. (e).)

"A state or local agency, upon receiving a request by any person for a copy of public records, generally must determine within 10 days whether the request seeks public records in the possession of the agency that are subject to disclosure." (*Filarsky v. Superior Court, supra,* 28 Cal.4th at p. 426, 121 Cal.Rptr.2d 844, 49 P.3d 194, citing § 6253, subd. (c).) "The Act includes protections and incentives for members of the public to seek judicial enforcement of their right to inspect public records subject to disclosure." (*Id.* at p. 427, 121 Cal.Rptr.2d 844, 49 P.3d 194. See *id.* at pp. 427-428, 121 Cal.Rptr.2d 844, 49 P.3d 194, discussing § 6259 [fee provisions].)

[36] Despite the strong legislative policy favoring access, "the public's right to disclosure of public records is not absolute. In California, the Act includes two exceptions to the general policy of disclosure of public records: (1) materials expressly exempt from disclosure pursuant to section 6254; and (2) the 'catchall exception' of section 6255, which allows a government agency to withhold records if it can demonstrate that, on the facts of a particular case, the public interest served by withholding the records clearly outweighs the public interest served by disclosure." (*City of San Jose v. Superior Court* (1999) 74 Cal.App.4th 1008, 1017, 88 Cal.Rptr.2d 552, fns. omitted.) But "unless exempted, all public records may be examined by any member of the public, often the press, but conceivably any person with no greater interest than idle curiosity." (*Marylander v. Superior Court* (2000) 81 Cal.App.4th 1119, 1125, 97 Cal.Rptr.2d 439.)

b. Judicial Review

"The Act sets forth specific procedures for seeking a judicial determination of a public agency's obligation to disclose records in the event the agency denies a request by a member of the public." (*Filarsky v. Superior Court, supra,* 28 Cal.4th at p. 426, 121 Cal.Rptr.2d 844, 49 P.3d 194, discussing § 6258.) The Act includes a provision "directing the trial court in a proceeding under the Act to reach a decision as soon as possible (§ 6258)," as well as a "provision for expedited appellate review (§ 6259, subd. (c))," which "reflect a clear legislative intent that the determination**168 of the obligation to disclose records requested from a public agency be made expeditiously." (*Id.* at p. 427, 121 Cal.Rptr.2d 844, 49 P.3d 194.)

[37][38] *1409 As for appellate review, "an order of the trial court under the Act, which either directs disclosure of records by a public official or supports the official's refusal to disclose records, is immediately reviewable by petition to the appellate court for issuance of an extraordinary writ." (*City of San Jose v. Superior Court, supra,* 74 Cal.App.4th at p. 1016, 88 Cal.Rptr.2d 552.) "The standard for review of the order is 'an independent review of the trial court's ruling; factual findings made by the trial court will be upheld if based on substantial evidence.' " (*Ibid.*, citing *Times Mirror Co. v. Superior Court* (1991) 53 Cal.3d 1325, 1336, 283 Cal.Rptr. 893, 813 P.2d 240. Accord, *California State University, Fresno Assn., Inc. v. Superior Court, supra,* 90 Cal.App.4th at p. 824, 108 Cal.Rptr.2d 870.)

2. The Brown Act

[39] "The Brown Act (§ 54950 et seq.) provides for open meetings for local legislative bodies such as city councils, boards of supervisors and **school** boards." (*Ingram v. Flippo* (1999) 74 Cal.App.4th 1280, 1287, 89 Cal.Rptr.2d 60.)

a. Policy and Operation

[40] As the Legislature explicitly declared in enacting the Brown Act, "public agencies in this State exist to aid in the conduct of the people's business. It is the intent of the law that their actions be taken openly and that their deliberations be conducted openly." (§ 54950.) "A major objective of the Brown Act is to facilitate public participation in all phases of local government decisionmaking and to curb misuse of democratic process by secret legislation by public bodies." (*Cohan v. City of Thousand Oaks* (1994) 30 Cal.App.4th 547, 555, 35 Cal.Rptr.2d 782.)

"Numerous provisions of the Act combine to ensure public notice of and access to meetings of legislative bodies." (*Ingram v. Flippo, supra,* 74 Cal.App.4th at p. 1287, 89 Cal.Rptr.2d 60.) As relevant here, the Brown Act accords public record status to certain writings distributed for consideration at the public meeting of an agency's legislative body, including the agenda. (§ 54957.5.)

b. Judicial Review

Several avenues of judicial relief are available to address violations of the Brown Act. "To assist in enforcement of the open meeting laws, the Act provides for criminal penalties and civil injunctive or declaratory relief. (§§ 54959, 54960.)" (*Ingram v. Flippo, supra,* 74 Cal.App.4th at p. 1287, 89 Cal.Rptr.2d 60. See also, e.g., *1410*California Alliance for Utility etc. Education v. City of San Diego* (1997) 56 Cal.App.4th 1024, 1030, 65 Cal.Rptr.2d 833 [plaintiff is entitled to declaratory relief where an actual controversy exists over "past compliance with the Brown Act"].) "In addition, actions taken in violation of the Brown Act may be declared null and void by a court. (§ 54960.1.)" (*Ingram v. Flippo, supra,* 74 Cal.App.4th at p. 1287, 89 Cal.Rptr.2d 60.)

[41] Even where a plaintiff has satisfied the threshold procedural requirements to set aside an agency's action, Brown Act violations will not necessarily "invalidate a decision. [Citation.] Appellants must show prejudice." (*Cohan v. City of Thousand Oaks, supra,* 30 Cal.App.4th at pp. 555-556, 35 Cal.Rptr.2d 782 [no prejudice shown from violation of § 54954.2, subd. (a), which "requires that an agenda be posted at least 72 hours before a regular **169 meeting and forbids action on any item not on that agenda"].)

B. Application

With those principles in mind, we turn to the three specific contentions raised by appellant SLV CARE:

139 Cal.App.4th 1356, 44 Cal.Rptr.3d 128, 209 Ed. Law Rep. 290, 06 Cal. Daily Op. Serv. 4493, 2006 Daily Journal D.A.R. 6509
(Cite as: 139 Cal.App.4th 1356, 44 Cal.Rptr.3d 128)

(1) that the trial court erred in failing to find violations of the California Public Records Act; (2) that the trial court should have granted relief under the Brown Act; and (3) that the trial court committed prejudicial error in excluding testimony from David Churchill about those violations.

1. Background

SLV CARE made a number of written requests for public records relating to the closure decision, initially through its first attorney Steven A. Greenburg. The District responded to those requests. In its statement of decision, the trial court detailed the relevant chronology of request and response. To summarize, Greenburg wrote letters in June, July, and August 2003 requesting documents and demanding that the District cure its claimed disclosure violations. The District forwarded more than 400 pages of records to Greenburg in July, and it provided him with additional documents the following month. A separate request for documents was e-mailed to the District by David Churchill.

There was trial evidence concerning the scope of the requests and the extent of the District's compliance. SLV CARE sought to elicit Churchill's testimony about his request for public records and the District's refusal to comply, but the trial court excluded that evidence because Churchill did not identify himself as a member of SLV CARE when he made the request.

***1411** In its statement of decision, the trial court observed: "There were no complaints of incomplete production in any of the correspondence except Mr. Greenburg's unexplained continued requests for the same exhibits already produced to Greenburg" and to appellant's trial counsel. After describing the District's compliance with respect to specific requested items, the trial court expressly found "insubstantial evidence of failure to produce documents in a timely manner" under either the CPRA or the Brown Act.

2. The California Public Records Act

[42] As to disclosure under the CPRA, SLV CARE asserts that there is "unrebutted evidence" that the District "refused to fully comply with its obligations."

Based on our review of the evidentiary record, we disagree.

As one example of disclosure violations, SLV CARE cites the testimony of the District's superintendent, Julie Haff, asserting: "She admitted to producing e-mails at her deposition that she had not produced in response to the Records Act request." But in the cited testimony, Haff clarified that she had "a practice of reading e-mails and deleting them." As a result of that practice, Haff believed that she "had no e-mails." But she later discovered that her laptop computer "was actually saving some e-mails that I had received that I sent a response to. Those were the only e-mails I had. I did not know that I had them."

As the trial court properly determined, the cited testimony is insubstantial evidence of failure to timely produce available documents.

As a second example, appellant SLV CARE points to testimony by Facilities Manager Loehr that "he had custody of the bond budget file" but that Superintendent Haff "did not ask him to produce that file in response to the record request." Appellant likewise asserts that the District's assistant superintendent, Don Fox, ****170** "had financial documents that were responsive to the records request [ ] but he failed to produce them."

The problem with these contentions is that nothing about the bond budget file or related financial information was ever mentioned in any of the requests made by attorney Greenburg, who was the only person purporting to represent SLV CARE. (David Churchill did request information about bond expenditures, but he did so without mentioning any relationship to SLV CARE.) Initially, Greenburg specified only documents relating to two board meetings: the one in April 2003, when the Board made its closure decision, and the one in June 2003, when the Board rejected private funding to keep ***1412** Redwood Elementary open for another year. His later requests sought tapes, agendas, and minutes from all meetings of the SSCC task force and of the Board held between June 2002 and August 2003. But at no

time did Greenburg's correspondence indicate that he was seeking information about the bond or other financial issues. In the absence of evidence that SLV CARE requested financial documents, there can be no statutory violation with respect to this information.

SLV CARE also charges the District with unlawfully refusing to turn over available geologic reports. As evidentiary support for that claim, appellant again cites testimony by Julie Haff, the District's superintendent. As appellant characterizes that testimony, "her maintenance director had geologic reports that were responsive to Appellant's records request. She asked for these reports, but never obtained them." Haff's trial testimony does not support appellant's characterization. After being shown a 1985 geologic report, Haff was asked whether she had ever seen it before. She responded: "I don't believe I have, no." She was then asked, "where you would likely find that?" Her response was: "This would most likely be found with the Director of Maintenance." Haff then confirmed that she had asked the maintenance director to "turn over his files" prior to the **school** closures, but that he had not done so.

Significantly, however, there is no evidence that the maintenance director's files contained the requested 1985 geologic report. Haff testified only that such a report "likely" would be in those files. There is no evidence that it was.

The final asserted instance of violation relates to internal documents. According to appellant SLV CARE, it "sought internal documents used to evaluate the **schools** being targeted for closure. Ms. Haff testified that she did not produce any internal records in response to the record request." SLV CARE further maintains: "Not until shortly before trial were any internal records produced."

Again, however, the record fails to support appellant's contention. Turning first to the superintendent's testimony, she stated that she had no additional internal documents to produce. She was asked at trial: "Are there no internal District documents on the issue of the closure of Redwood **School** other than what's in the public record?" She answered: "No, there are no other records. I've taken what I-I mean, a year and a half ago, I took what I had and I put it into power point presentations. Those became part of the public record. That's what I maintained." Turning next to appellant's claim that responsive internal documents were available but withheld until shortly before trial, SLV CARE offers no citation to the record to support that claim, and our review of the record reveals no such evidence.

***1413** As explained above, on appellate review of claims under the California Public Records Act, we uphold the trial court's ****171** factual findings to the extent that they are based on substantial evidence. (*City of San Jose v. Superior Court, supra,* 74 Cal.App.4th at p. 1016, 88 Cal.Rptr.2d 552.) Here, the trial court determined that SLV CARE produced "insubstantial evidence" of CPRA violations. On this record, we agree.

3. The Brown Act

Appellant SLV CARE asserts Brown Act violations based on its claim that it was not provided with all of the public records given to members of the District's Board at public meetings. (See § 54957.5.)

Appellant's Brown Act claim fails for the same reasons as its CPRA claim. As just explained, the trial court determined that the District had complied with all of the relevant public records requests, and that determination finds adequate support in the record.

4. Excluded Testimony

[43] Appellant SLV challenges the trial court's decision to exclude David Churchill's proffered testimony to the extent that it concerned his requests to the District for public records.

The trial court's decision was made in response to a defense objection on relevance grounds. The District's counsel urged a "foundational requirement" that Churchill was acting on behalf of SLV CARE, asserting: "Without that, he doesn't have standing to testify here."

In sustaining the defense objection, the court explained that it considered Churchill's request "as be-

ing from an individual and not from the plaintiff in this action." The court acknowledged "that citizens have the right to invoke the protections of the statutes that we've been talking about"; but it concluded that "the evidence must be in some way related to the association [SLV CARE] or described as being from the association; and that's not the case in the instance of the e-mails." The trial court reiterated its reasoning in its statement of decision: "Mr. Churchill wrote his requests as an individual. He never identified himself as a member of SLV CARE. Any failure to produce documents pursuant to the Public Records Act may be actionable by ***1414** him as an individual. However, Mr. Churchill can't request records as an individual and then come into court as a representative of SLV CARE and complain of a failure to produce documents by the District in this action. The court's analysis had nothing to do with Mr. Churchill having to identify himself in order to obtain documents; it was merely a finding of lack of standing to pursue this action (in which he is not a party plaintiff) based on what he did individually."

Appellant assigns the trial court's decision as prejudicial error. According to appellant, its "members had no obligation to notify the District that they were representing themselves as individuals or were acting as members of SLV CARE." It further asserts: "Mr. Churchill had an absolute right to request and obtain public records." In appellant's view, the court's decision "makes sense only if Mr. Churchill had a duty to identify himself ... as an individual or as a member of SLV CARE," which he did not.

[44][45][46] We review the trial court's ruling for an abuse of discretion. "Broadly speaking, an appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence. Speaking more particularly, it examines for abuse of discretion a decision on admissibility that turns on the relevance of the evidence in question." (*People v. Waidla* (2000) 22 Cal.4th 690, 717-718, 94 Cal.Rptr.2d 396, 996 P.2d 46, ****172** citations omitted.) Put another way: "The trial court retains broad discretion in determining the relevance of evidence." (*People v. Garceau* (1993) 6 Cal.4th 140, 177, 24 Cal.Rptr.2d 664, 862 P.2d 664.) Relevance is statutorily defined as "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid.Code, § 210.) Though not directly germane, a "matter collateral to an issue in the action may nevertheless be relevant to the credibility of a witness who presents evidence on an issue...." (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9, 82 Cal.Rptr.2d 413, 971 P.2d 618.) But the admissibility of such collateral matter also lies within the trial court's discretion. (*Id.* at p. 10, 82 Cal.Rptr.2d 413, 971 P.2d 618.)

We first consider the factual component of the trial court's ruling. (Cf., *Johns v. City of Los Angeles* (1978) 78 Cal.App.3d 983, 998, 144 Cal.Rptr. 629 [consideration of the evidence "is essential to a proper exercise of judicial discretion"].) As to that component, "evaluating the factual basis for an exercise of discretion is similar to analyzing the sufficiency of the evidence for the ruling." (*In re Robert L.* (1993) 21 Cal.App.4th 1057, 1067, 24 Cal.Rptr.2d 654.) Here, the pertinent finding is that Churchill did not purport to act in his capacity as a member of SLV CARE when he requested the documents. Substantial evidence in the record supports that finding, in that Churchill's e-mails did not indicate that he was acting on appellant's behalf.

***1415** We next consider the legal basis for the trial court's evidentiary ruling. (Cf., *City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287, 1297, 255 Cal.Rptr. 704 [court must exercise its discretion within the "confines of the applicable principles of law"]; *In re Robert L., supra,* 21 Cal.App.4th at p. 1067, 24 Cal.Rptr.2d 654 ["scope of discretion lies in the particular law to be applied"].) Here, the trial court concluded that any failure on the part of the District to provide documents to Churchill is actionable by him, but not by SLV CARE. We agree.

In affirming the trial court's decision, we acknowledge that "any person" may enforce the CPRA. (See *Connell v. Superior Court* (1997) 56 Cal.App.4th 601, 611, 65 Cal.Rptr.2d 738.) "Thus, when section 6253 declares *every* person has a right to inspect any public record, when section 6257 commands state and local agencies to make records promptly available to *any* person on request, and when section 6258 expressly states *any* person may institute proceedings to enforce the right of inspection, they mean what they say." (*Id.* at pp. 611-612, 65 Cal.Rptr.2d 738.)

[47] By the same token, however, the relevant statutory provision authorizes a plaintiff "to enforce *his or her right* to inspect or to receive a copy of any public record or class of public records under this chapter." (§ 6258, italics added.) That provision "contemplates a declaratory relief proceeding commenced only by an individual or entity seeking disclosure of public records...." (*Filarsky v. Superior Court, supra,* 28 Cal.4th at p. 426, 121 Cal.Rptr.2d 844, 49 P.3d 194, discussing § 6258.) The statute provides neither explicit nor implicit authority for one person to enforce another's inspection rights. (Cf., § 6264 [order allowing inspection or copying of public records by district attorney].) Churchill thus could enforce his own statutory rights, but not those of appellant SLV CARE.

In light of this legal authority, we conclude, the court properly determined that the proffered testimony was irrelevant to *appellant's* claim of disclosure violations. Nor did it have relevance as impeachment evidence relating to the superintendent's ****173** credibility, since Churchill's written requests for public records were not addressed to her. (Cf., *People v. Rodriguez, supra,* 20 Cal.4th at p. 10, 82 Cal.Rptr.2d 413, 971 P.2d 618.)

In sum, the trial court had both an adequate factual basis and appropriate legal justification for its decision to exclude Churchill's testimony on this point. We therefore find no abuse of discretion in the challenged evidentiary ruling.

*1416 C. Summary of Conclusions

Based on the evidence in the record, we affirm the trial court's determination that SLV CARE did not sustain its claim of CPRA and Brown Act violations. We also affirm the court's decision to exclude Churchill's testimony on this point.

IV. COMMUNITY INVOLVEMENT STATUTES

SLV CARE argues that the District violated provisions of the Education Code that mandate community involvement in decisions involving **school** closures and the use of surplus property. As before, we begin by summarizing the applicable law.

A. Governing Statutes

The applicable provisions are contained in the Education Code, Part 10.5 (**School** Facilities), Chapter 4 (Property: Sale, Lease, Exchange), Article 1.5 (Advisory Committees).[FN15] That article comprises sections 17387 through 17391.

> FN15. In this section of the opinion (IV), further unspecified statutory references are to the Education Code.

Section 17387 provides in pertinent part: "It is the intent of the Legislature to have the community involved before decisions are made about **school** closure or the use of surplus space, thus avoiding community conflict and assuring building use that is compatible with the community's needs and desires." (§ 17387.) Section 17388 sets forth the instances in which advisory committees may or must be used. It states: "The governing board of any **school** district may, and the governing board of each **school** district, prior to the sale, lease, or rental of any excess real property, except rentals not exceeding 30 days, shall, appoint a district advisory committee to advise the governing board in the development of districtwide policies and procedures governing the use or disposition of **school** buildings or space in **school** buildings which is not needed for **school** purposes." (§ 17388.) Requirements for the make-up of advisory committees are set forth in section ***1417** 17389. [FN16] The duties of such committees are described in section 17390. [FN17] Finally, ****174**section 17391 authorizes the decision not to appoint a committee in certain limited circumstances, which are not pertinent here.

> FN16. Section 17389 reads as follows: "A **school** district advisory committee appointed pursuant to Section 17388 shall consist of not less than seven nor more than 11 members, and shall be representative of each of the following:
>
> (a) The ethnic, age group, and socioeconomic composition of the district.

(b) The business community, such as store owners, managers, or supervisors.

(c) Landowners or renters, with preference to be given to representatives of neighborhood associations.

(d) Teachers.

(e) Administrators.

(f) Parents of students.

(g) Persons with expertise in environmental impact, legal contracts, building codes, and land use planning, including, but not limited to, knowledge of the zoning and other land use restrictions of the cities or cities and counties in which surplus space and real property is located."

FN17. Section 17390 provides: "The **school** district advisory committee shall do all of the following:

(a) Review the projected **school** enrollment and other data as provided by the district to determine the amount of surplus space and real property.

(b) Establish a priority list of use of surplus space and real property that will be acceptable to the community.

(c) Cause to have circulated throughout the attendance area a priority list of surplus space and real property and provide for hearings of community input to the committee on acceptable uses of space and real property, including the sale or lease of surplus real property for child care development purposes pursuant to Section 17458.

(d) Make a final determination of limits of tolerance of use of space and real property.

(e) Forward to the district governing board a report recommending uses of surplus space and real property."

B. Application

SLV CARE asserts the violation of these provisions, based on the District's appointment of two committees: the Superintendent's **School** Closure Committee (SSCC), which was convened prior to the April 2003 **school** closure decision; and the Surplus Property Advisory Committee (SPAC), which the District's Board appointed in October 2003.

1. Superintendent's School Closure Committee

[48] SLV CARE contends that the SSCC "did not comply with [§] 17387 et seq. The Committee was directed to evaluate four **schools**, but was given incorrect and incomplete information."

We reject that contention on both procedural and substantive grounds.

First, as to procedure, appellant failed to support its argument in its opening brief. Evidentiary support for appellant's contention is offered for the ***1418** first time in its reply brief. As a matter of appellate procedure, we generally do not consider points first raised in an appellant's reply brief. (See, e.g., *Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 894, fn. 10, 93 Cal.Rptr.2d 364.)

Second, on the merits, the contention is not persuasive. For one thing, the statute does not dictate what types or sources of information must be provided to an advisory committee. For that reason alone, SLV CARE has not shown a statutory violation. For another thing, it appears that the District made a good faith attempt to provide the committee with information that was complete and accurate. Although the SSCC might not have received every report in existence addressing the physical condition of the four **schools**, the committee's own reports demonstrate that it had evidence on some of the cited problems,

such as the presence of mold in some classrooms and the current condition of the septic systems. Furthermore, with respect to particular reports that the committee did not have, SLV CARE fails to demonstrate prejudice from their absence. To the contrary, we find nothing in the cited reports to suggest that they would have affected the committee's recommendations. For example, the 1990 geotechnical report dismissed the Ben Lomond fault as "a potential earthquake source."

In short, we find no statutory violation by the District in connection with its Superintendent's **School** Closure Committee.

2. Surplus Property Advisory Committee

SLV CARE attacks the District's use of the SPAC on two grounds. First, it asserts, the District should not have made the decision to declare the property surplus; rather, that decision should have been left up to the committee. (See § 17390.) Second, it contends, the District violated the statute by failing to include representatives from all of the listed ****175** groups. (See § 17389.) On that point, SLV CARE observes, the District made a purposeful decision not to solicit socioeconomic information from the applicants.

In its statement of decision, the trial court refused to rule on the issues, concluding that the claim was not yet ripe. As the court explained: "Education Code [sections] 17387-[173]90 relate to the creation of an Advisory Committee prior to and relating to the 'sale, lease or rental of excess real property....' Those circumstances have not yet arisen."

We agree with the trial court that appellant has no current cognizable claim under the statute. In pertinent part, section 17388 provides that a **school** district's governing board "*may,* and ... prior to the sale, lease, or rental of any excess real property ... *shall,* appoint a district ***1419** advisory committee ...." (§ 17388, italics added.) Given the circumstances herewith no surplus property then proposed to be sold, leased, or rented within the meaning of the statute-the District's use of the committee was discretionary, not mandatory. (See § 75 ["may" is permissive; "shall" is mandatory].) Because the SPAC was not a statutorily mandated committee, the District was not bound by the statutory requirements for its composition or duties.

C. Summary of Conclusions

As to appellant's claims concerning the Superintendent's **School** Closure Committee, even if they are not forfeited, they lack merit. The governing statute does not dictate what information must be provided to an advisory committee, and the record does not support the contention that the information provided was inaccurate or incomplete. Concerning appellant's complaints about the Surplus Property Advisory Committee, they are not cognizable under the statute. Under the circumstances presented here, the District's use of that committee was discretionary, not mandatory.

V. EVIDENTIARY RULINGS

Appellant SLV CARE next takes issue with the trial court's evidentiary rulings. It contends that the court erroneously sustained objections, by relying on grounds other than those stated in counsel's objection, and by relying on grounds that are not recognized under the Evidence Code, such as overbreadth. Taken as a whole, appellant asserts, those rulings demonstrate bias. SLV CARE also contends that the court committed error by allowing the District's bond counsel to testify to legal conclusions.

[49] As explained above, "an appellate court applies the abuse of discretion standard of review to any ruling by a trial court on the admissibility of evidence." (*People v. Waidla, supra,* 22 Cal.4th at p. 717, 94 Cal.Rptr.2d 396, 996 P.2d 46. See also, e.g., *Korsak v. Atlas Hotels, Inc.* (1992) 2 Cal.App.4th 1516, 1523, 3 Cal.Rptr.2d 833 [expert testimony].) "A trial court's exercise of discretion in admitting or excluding evidence ... will not be disturbed except on a showing the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice...." (*People v. Rodriguez, supra,* 20 Cal.4th at pp. 9-10, 82 Cal.Rptr.2d 413, 971 P.2d 618, citations omitted. See Evid.Code, §§ 353, 354.)

Applying those principles in this case, we find no

basis for reversal.

[50] We first address appellant's claim that the court sustained numerous objections on erroneous grounds. Simply put, the record does not support that claim. In nearly all of the cited instances, either the objection or the ruling ***1420** had a cognizable ****176** basis, such as hearsay or lack of foundation. In cases where a question was challenged as overbroad, the court often asked counsel to narrow or rephrase it. Nor did the court's sua sponte rulings exceed the scope of its discretion. "It is well established that where questions are asked which are improper, the court acts within the scope of its duty in refusing to allow them to be answered, even though no objection be made." (*People v. White* (1954) 43 Cal.2d 740, 747, 278 P.2d 9. See also, e.g., *Kimic v. San Jose-Los Gatos Etc. Ry. Co.* (1909) 156 Cal. 379, 390, 104 P. 986, criticized on another point in *Lane v. Pacific Greyhound Lines* (1945) 26 Cal.2d 575, 583, 160 P.2d 21.)

We next consider the assertion that the court demonstrated bias against SLV CARE. The record also belies that assertion. Far from exhibiting bias, the court showed admirable patience and even-handedness. The record is replete with instances where the court accommodated appellant's trial counsel, giving them considerable latitude, accommodating them, and occasionally even suggesting alternate approaches for presenting evidence.

[51] Finally, we turn to appellant's argument that the court erred in permitting the District's bond counsel, William Kadi, to testify about the propriety of bond expenditures. We reject that contention. In this case, "there is no basis for concluding that the trial court relied on [the witness's] alleged legal conclusions...." (*Hankins v. El Torito Restaurants, Inc.* (1998) 63 Cal.App.4th 510, 530, 74 Cal.Rptr.2d 684.) Instead, it appears that "the relevant portion of [his] testimony [was] his percipient testimony." (*Ibid.*) In ruling on the objection by appellant's trial counsel to the proffered testimony, the trial court acknowledged appellant's "right to object to Mr. Kadi expressing an opinion as to what I should find to be the law." But the court also noted Kadi's ability to address "factual issues in the case" and it therefore permitted his testimony. In its statement of decision, the court described Kadi's "opinions" as "somewhat self-serving" but characterized his "testimony" as "instructive to the court nonetheless." Given its comments, the trial court plainly understood its role as arbiter of the law. And because this was a bench trial, there was no danger of jury confusion. In short, we find no error in the court's decision to allow bond counsel to testify. Because we find no error, we need not consider prejudice. (*People v. Rodriguez, supra,* 20 Cal.4th at p. 10, 82 Cal.Rptr.2d 413, 971 P.2d 618.)

To sum up, this record discloses no abuse of discretion by the trial court in connection with the challenged evidentiary rulings.

***1421 VI. ATTORNEY FEES**

[52] Appellant SLV CARE claims entitlement to an award of attorney fees, citing three different statutory provisions. As we now explain, none of those provisions supports appellant's claim for fees.

Appellant first relies on Code of Civil Procedure section 1021.5. That provision, sometimes called the "private attorney general" statute, authorizes an award of attorney fees to the "successful party" in certain actions resulting in the "enforcement of an important right affecting the public interest." (Code Civ. Proc., § 1021.5. See *Graham v. DaimlerChrysler Corp.* (2004) 34 Cal.4th 553, 565, 21 Cal.Rptr.3d 331, 101 P.3d 140.) Here, however, appellant is not the successful party in this litigation. For that reason, there is no basis for a fee award in its favor under this statute.

[53] SLV CARE next claims entitlement to statutory fees under a provision of the California Public Records Act: ****177**Government Code section 6259, subdivision (d). That provision mandates an award of fees and costs to prevailing plaintiffs in CPRA actions, and it also insulates unsuccessful plaintiffs from liability for the agency's defense costs, unless the action is "clearly frivolous." (Gov.Code, § 6259, subd. (d). See *Filarsky v. Superior Court, supra,* 28 Cal.4th at. pp. 427-428, 121 Cal.Rptr.2d 844, 49 P.3d 194.) "A plaintiff prevails within the meaning of the statute 'when he or she files an action which results in defendant releasing a copy of a previously withheld document.' " (*Los Angeles Times v. Alameda Corridor Transportation Authority* (2001) 88

Cal.App.4th 1381, 1391, 107 Cal.Rptr.2d 29.) In other words, "if a public record is disclosed only because a plaintiff filed a suit to obtain it, the plaintiff has prevailed." (*Ibid.*) Conversely, for purposes of the CPRA fee statute, a plaintiff has *not* prevailed where "substantial evidence supported a finding that the 'litigation did *not* cause the [agency] to disclose any of the documents ultimately made available....' " (*Ibid.*) This case falls into the latter category. Although SLV CARE contends that its action against the District resulted in the release of previously withheld public records, it offers no citation to the evidentiary record to support that contention. We therefore affirm the trial court's implied determination that SLV CARE did not prevail on its CPRA claims. We also affirm the trial court's award of costs to the District, as SLV CARE offers no argument that the cost award was improper under the statute. (Gov.Code § 6259, subd. (d).)

In its third and final fee claim, SLV CARE seeks statutory attorney fees pursuant to Government Code section 800. The factual predicate for an award of fees under that provision is "arbitrary or capricious action or conduct by a public entity." (Gov.Code, § 800.) In light of our affirmance of ***1422** the judgment in the District's favor, there is no basis for concluding that the District's actions were arbitrary or capricious, and thus no basis for an award of statutory fees under Government Code section 800.

In sum, there is no basis for any of appellant's claims to attorney fees.

DISPOSITION

The judgment is affirmed. The District shall recover its costs on appeal.

WE CONCUR: ELIA, Acting P.J., and MIHARA, J.
Cal.App. 6 Dist.,2006.
San Lorenzo Valley Community Advocates for Responsible Educ. v. San Lorenzo Valley Unified School Dist.
139 Cal.App.4th 1356, 44 Cal.Rptr.3d 128, 209 Ed. Law Rep. 290, 06 Cal. Daily Op. Serv. 4493, 2006 Daily Journal D.A.R. 6509

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Court of Appeal, Fourth District, Division 2, California.
CITIZENS ASSOCIATION FOR SENSIBLE DEVELOPMENT OF BISHOP AREA, et al., Plaintiffs and Appellants,
v.
COUNTY OF INYO, et al., Defendants and Respondents,
CRUMPLER AND KRUGER COMMERCIAL REAL ESTATE, INC., et al., Real Parties in Interest and Respondents.
E001138, E001340.

Sept. 13, 1985.

Citizens and association challenging proposed shopping center development under the California Environmental Quality Act appealed from judgments of the Superior Court, Inyo County, Donald L. Chapman, J., denying petitions for injunctive relief and for writ of mandate. The Court of Appeal, Morris, P.J., held that: (1) plaintiff had standing; (2) defendants were not prejudiced by addition of association as party plaintiff; (3) owner of subject property was not indispensable party; (4) administrative remedies were exhausted as to all critical substantive issues; (5) county board erred in failing to consider cumulative effect of development project; and (6) plaintiffs established colorable claim to award of attorney fees.

Reversed with directions.

West Headnotes

[1] Mandamus 250 ⚷23(2)

250 Mandamus
250I Nature and Grounds in General
250k21 Persons Entitled to Relief
250k23 Interest in Subject-Matter
250k23(2) k. Interest as Citizens or Taxpayers. Most Cited Cases
A private citizen's beneficial interest required for standing to apply for a writ of mandate is established only when plaintiff has some private or particular interest to be subserved, or some particular right to be preserved or protected, independent of that which he holds with public at large. West's Ann.Cal.C.C.P. § 1086.

[2] Mandamus 250 ⚷23(2)

250 Mandamus
250I Nature and Grounds in General
250k21 Persons Entitled to Relief
250k23 Interest in Subject-Matter
250k23(2) k. Interest as Citizens or Taxpayers. Most Cited Cases
Where a public right is involved, and object of writ of mandate is to procure enforcement of a public duty, plaintiff is not required to have any legal or special interest in result; it is sufficient that as a citizen he is interested in having public duty enforced. West's Ann.Cal.C.C.P. § 1086.

[3] Mandamus 250 ⚷23(1)

250 Mandamus
250I Nature and Grounds in General
250k21 Persons Entitled to Relief
250k23 Interest in Subject-Matter
250k23(1) k. In General. Most Cited Cases

Mandamus 250 ⚷23(2)

250 Mandamus
250I Nature and Grounds in General
250k21 Persons Entitled to Relief
250k23 Interest in Subject-Matter
250k23(2) k. Interest as Citizens or Taxpayers. Most Cited Cases
In a writ of mandate against a municipal entity based on alleged violations of the California Environmental Quality Act [West's Ann.Cal.Pub.Res.Code § 21000 et seq.], a property owner, taxpayer, or elector who establishes a geographical nexus with site of challenged project has standing; moreover, geographical nexus can be attenuated, for instance beyond city limits, because effects of environmental abuse are not contained by political lines. West's Ann.Cal.C.C.P. § 1086.

[4] Mandamus 250 ⚷23(2)

250 Mandamus
250I Nature and Grounds in General
250k21 Persons Entitled to Relief
250k23 Interest in Subject-Matter
250k23(2) k. Interest as Citizens or Taxpayers. Most Cited Cases
Citizens of "very small community" who challenged proposed shopping center development based on alleged violations of the California Environmental Quality Act [West's Ann.Cal.Pub.Res.Code § 21000 et seq.] had standing to apply for writ of mandate. West's Ann.Cal.C.C.P. § 1086.

[5] Limitation of Actions 241 ⚷124

241 Limitation of Actions
241II Computation of Period of Limitation
241II(H) Commencement of Proceeding; Relation Back
241k124 k. Intervention or Bringing in New Parties. Most Cited Cases
When there is an attempt to add a party after statute of limitations has run, relation back to original pleadings is dependent upon whether recovery is sought on same general set of facts as those originally alleged. West's Ann.Cal.C.C.P. § 473.

[6] Limitation of Actions 241 ⚷124

241 Limitation of Actions
241II Computation of Period of Limitation
241II(H) Commencement of Proceeding; Relation Back
241k124 k. Intervention or Bringing in New Parties. Most Cited Cases
Citizens' association was properly added as party in action challenging proposed shopping center development even though statute of limitations had passed where addition of the association did not alter general set of facts originally alleged; thus, defendants were not prejudiced and no reasonable purpose would have been served by dismissing the association. West's Ann.Cal.C.C.P. § 473.

[7] Mandamus 250 ⚷168(4)

250 Mandamus
250III Jurisdiction, Proceedings, and Relief
250k168 Evidence
250k168(4) k. Weight and Sufficiency. Most Cited Cases
Evidence supported conclusion that citizens' association sought and obtained permission to be included as party plaintiff in action challenging proposed shopping center development.

[8] Mandamus 250 ⚷151(1)

250 Mandamus
250III Jurisdiction, Proceedings, and Relief
250k150 Parties Defendant or Respondents
250k151 In General
250k151(1) k. In General. Most Cited Cases
In action challenging proposed shopping center development, petition, which was limited to challenging governmental actions and approvals of general plan amendments and zoning reclassifications, did not require inclusion of owner of subject property; although owner would have been a proper real party in interest, he was not a necessary party because his ability to protect his interest was not impaired or impeded. West's Ann.Cal.C.C.P. § 389(a, b).

[9] Administrative Law and Procedure 15A ⚷669.1

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(A) In General
15Ak669 Preservation of Questions Before Administrative Agency
15Ak669.1 k. In General. Most Cited Cases
(Formerly 15Ak669)
Less specificity is required to preserve an issue for appeal in an administrative proceeding than in a judicial proceeding.

[10] Environmental Law 149E ⚷665

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek665 k. Exhaustion of Administrative Remedies. Most Cited Cases
(Formerly 199k25.15(3.1) Health and Environment)

Requirement of exhaustion of administrative remedies was satisfied with regard to all critical substantive issues relating to challenge to proposed shopping center development.

[11] Environmental Law 149E ⚿689

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek677 Scope of Inquiry on Review of Administrative Decision
149Ek689 k. Assessments and Impact Statements. Most Cited Cases
(Formerly 199k25.15(7) Health and Environment)
Challenge to proposed shopping center development under the California Environmental Quality Act [West's Ann.Cal.Pub.Res.Code § 21000 et seq.] would be reviewed under substantial-evidence standard of West's Ann.Cal.Pub.Res.Code § 21168.

[12] Environmental Law 149E ⚿577

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek577 k. Duty of Government Bodies to Consider Environment in General. Most Cited Cases
(Formerly 199k25.10(4) Health and Environment)
In reviewing challenge under the California Environmental Quality Act to proposed shopping center development, county board improperly failed to consider cumulative effect of development project; instead of being described as a shopping center development for which governmental action consisting of general plan amendments, zone classification, tentative tract map approval, and road abandonment was required, the project was improperly described as two projects consisting of general plan amendments and zone classification, and tentative tract map approval and road abandonment. West's Ann.Cal.Pub.Res.Code § 21000 et seq.

[13] Environmental Law 149E ⚿591

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek584 Necessity for Preparation of Statement, Consideration of Factors, or Other Compliance with Requirements
149Ek591 k. Scope of Project; Multiple Projects. Most Cited Cases
(Formerly 199k25.10(4) Health and Environment)
The California Environmental Quality Act mandates that environmental considerations do not become submerged by chopping a large project into many little ones, each with a minimal potential impact on the environment, which cumulatively may have disastrous consequences. West's Ann.Cal.Pub.Res.Code § 21000 et seq.

[14] Environmental Law 149E ⚿604(2)

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek598 Adequacy of Statement, Consideration, or Compliance
149Ek604 Particular Projects
149Ek604(2) k. Land Use in General. Most Cited Cases
(Formerly 199k25.15(12) Health and Environment)
Upon remand of action challenging proposed shopping center development, county board was to consider reasonably foreseeable probable future projects, if any, that would be added in shopping center area for review as to cumulative environmental effects. West's Ann.Cal.Pub.Res.Code § 21000 et seq.

[15] Environmental Law 149E ⚿604(2)

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek598 Adequacy of Statement, Consideration, or Compliance
149Ek604 Particular Projects
149Ek604(2) k. Land Use in General. Most Cited Cases
(Formerly 199k25.10(6.3) Health and Environment)
In determining whether to grant approval of proposed shopping center development, county board was to consider environmental consequences of economic and social changes; specifically, board was to consider whether proposed shopping center would take business away from downtown shopping area and thereby cause business closures and eventual physical deterioration of the downtown area. West's Ann.Cal.Pub.Res.Code § 21000 et seq.

[16] Environmental Law 149E ⚿667

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek667 k. Record of Administrative Proceeding. Most Cited Cases
(Formerly 199k25.10(6.3) Health and Environment)
Although an initial study relating to proposed development project can identify environmental effects by use of a checklist, it must also disclose data or evidence upon which person(s) conducting the study relied; mere conclusions provide no vehicle for judicial review. West's Ann.Cal.Pub.Res.Code § 21000 et seq.

[17] Environmental Law 149E 689

149E Environmental Law
149EXIII Judicial Review or Intervention
149Ek677 Scope of Inquiry on Review of Administrative Decision
149Ek689 k. Assessments and Impact Statements. Most Cited Cases
(Formerly 199k25.15(10) Health and Environment)
A court reviewing public comment portion of administrative record is limited to evaluating whether there is substantial evidence to support county's decision regarding whether there was adequate evidence produced by plaintiff so that a fair argument could be made that a significant environmental impact could result from challenged proposed project; court may not substitute its own judgment for that of local agency. West's Ann.Cal.Pub.Res.Code § 21000 et seq.

[18] Environmental Law 149E 613

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek612 Evidence
149Ek613 k. In General. Most Cited Cases
(Formerly 199k25.10(5) Health and Environment)
Although even expert opinion may ultimately be rejected because of expert's interest in the matter or for other reasons, an agency evaluating environmental consequences of proposed development project may not refuse to consider uncontradicted testimony based upon objective data. West's Ann.Cal.Pub.Res.Code § 21000 et seq.

[19] Environmental Law 149E 593

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek584 Necessity for Preparation of Statement, Consideration of Factors, or Other Compliance with Requirements
149Ek593 k. Controversy. Most Cited Cases
(Formerly 199k25.10(3) Health and Environment)
Public controversy absent substantial evidence of significant environmental effects does not mandate preparation of environmental impact report. West's Ann.Cal.Pub.Res.Code § 21082.2.

[20] Environmental Law 149E 578

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek578 k. Lead Agency; Responsible Entity. Most Cited Cases
(Formerly 199k25.10(1) Health and Environment)
Transportation Department was responsible agency for purposes of the California Environmental Quality Act [West's Ann.Cal.Pub.Res.Code § 21000 et seq.] and, thus, county board was to file its negative declarations relating to proposed shopping center development with State Clearinghouse.

[21] Environmental Law 149E 595(2)

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek584 Necessity for Preparation of Statement, Consideration of Factors, or Other Compliance with Requirements
149Ek595 Particular Projects
149Ek595(2) k. Land Use in General. Most Cited Cases
(Formerly 199k25.10(2.1), 199k25.10(2) Health and Environment)
Alleged conflict between proposed shopping center project and express policies and land use objectives of city's general plan did not necessarily require preparation of environmental impact report. West's Ann.Cal.Pub.Res.Code § 21000 et seq.

[22] Administrative Law and Procedure 15A 686

15A Administrative Law and Procedure

15AV Judicial Review of Administrative Decisions
15AV(A) In General
15Ak685 Costs
15Ak686 k. Attorney Fees. Most Cited Cases
(Formerly 102k173(1))
Citizens who successfully established on appeal that county board failed to conduct adequate environmental review pursuant to the California Environmental Quality Act in approving proposed shopping center development established colorable claim to award of attorney fees. West's Ann.Cal.C.C.P. § 1021.5.

****895 *155** Leonardini & Associates, Sacramento, and Sharon E. Duggan, Napa, for plaintiffs and appellants.

***156** Dennis L. Myers, County Counsel, Independence, for defendants and respondents.

Ave Buchwald and Myron Blumberg, Long Beach, for real parties in interest and respondents.

OPINION

MORRIS, Presiding Justice.

Plaintiffs, Citizens Association for Sensible Development of Bishop Area, et al. (Citizens), appeal from judgments denying its petitions for injunctive relief and for a writ of mandate setting aside and vacating two actions of the Inyo County Board of Supervisors (Board or Board of Supervisors), to wit: (1) the December 6, 1983 action approving Bishop general plan amendments 83-10 and 83-11, zoning reclassification 83-23, and two negative declarations in support of these actions, and (2) the March 6, 1984 action approving tentative tract map 188, road abandonment 83.2, variance 83.4A, and a negative declaration in support of the tentative tract map and road abandonment. On appeal plaintiffs contend that an adequate environmental review pursuant to the California Environment Quality Act (CEQA) (****896**Pub. Resources Code, § 21000 et seq.) was not conducted.

FACTS

On or about September 27, 1983, Crumpler and Kruger Commercial Real Estate, Inc. (Crumpler and Kruger, Inc.), as the buyer in escrow of property located on the north side of U.S. Route 395 east of Barlow Lane in Bishop, California, filed an application with the County of Inyo for approval of a proposed shopping center. The application described the proposed 9.1 acre shopping center as regionally oriented, with an area of 86,500 square feet, which was to be built in one phase. An additional expansion of 12,000 square feet was anticipated for the Safeway store already at the proposed shopping center location. The application also stated that Inyo County approval would be needed for a general plan amendment, rezoning, a street abandonment, new street alignments, and a zoning variance, and that Caltrans authorization would be needed for an encroachment permit. A transportation study was also filed.

In considering the proposed shopping center, the County of Inyo divided the required approvals, along with corresponding environmental review, into two groups. First, it considered Bishop general plan amendments 83-10 and 83-11 and zone reclassification 83-23, which were to redesignate 3.4 acres from office/professional and highway commercial to retail commercial ***157** and rezone from retail commercial/highway commercial to retail commercial. Second, it considered tentative tract map 188, which was to resubdivide 15 lots on 7 acres into 5 lots and realign portions of 4 streets, and road abandonment 83.2. The variance requested, although not subject to an environmental analysis, was also considered in this second grouping.

Beginning with the general plan amendments and zoning reclassification, the Inyo County Planning Department completed two initial environmental studies on October 5, 1983. The studies, which generally used a check list format, found no significant environmental effects, and recommended issuance of draft negative declarations, which were posted the next day. At the end of the 15 day review and comment period as provided in article 5.6, subdivision (c) of the Inyo County Procedures for Environmental Impact Review (now art. IX, subd. (c)), the planning commission held a public hearing which culminated in its written recommendation that the board adopt the general plan amendments, zoning reclassification, and negative declarations. In the planning commission's discussion of its recommendation it expressly stated that traffic would be evaluated at the time the tentative tract map was submitted, as would the re-

quirements for water, sewer, and fire protection. The recommendation was "formally appeal[ed]" by a letter signed by seven people and received on November 14, 1983. A subsequent letter to the Board detailed the concerns that 39 signers felt justified an environmental impact report (EIR); other letters in support and against the recommendations of the planning commission were also received.

Thereafter, on December 6, 1983, the Board held a public hearing at the end of which it decided to adopt all of the planning commission's recommendations regarding the shopping center project. Notices of determination indicating the adoption of the negative declarations were posted the next day. All plaintiffs except Citizens Association for Sensible Development of Bishop Area (Citizens Association) timely filed a writ of mandate with the trial court; Citizens Association was added as a party plaintiff by amendment to the writ after the statute of limitations had passed. This describes case No. E001138.

The second group of approvals followed a similar path as the first group, only starting a short time later. On December 7, 1983, the planning department completed an initial environmental study, again generally using a check list format, of tentative tract map 188 and road abandonment 83-2. This study also recommended issuance of a draft negative declaration. The planning commission adopted the tentative tract map, road abandonment and negative declaration,**897 as well as variance 83-4, on January 25, 1984. Twenty-one*158 residents of Bishop appealed that decision, providing a lengthy statement of their reasons for that appeal.

The Board conducted a public hearing on March 6, 1984. It was advised by the planning commission that any discussion of the concurrent consideration of the general plan amendments and zoning reclassifications was irrelevant. At the end of the hearing the board of supervisors denied the appeal, with appropriate notices of determination following on May 14, 1984. All plaintiffs timely filed a second writ of mandate which was to become case No. E001340.

In both case No. E001138 and case No. E001340 the trial court denied any relief to the plaintiffs. Two appeals followed. Because of the similarity of the facts and issues in these two cases, this court ordered their consolidation prior to oral argument.

DISCUSSION

THRESHOLD ISSUES

1. *Standing*

Defendants contend that none of the approximately 20 plaintiffs had standing to apply for writs of mandate. We disagree.

[1][2][3] To have standing to apply for a writ of mandate a private citizen must be a "party beneficially interested." (Code Civ. Proc., § 1086.) Generally, a beneficial interest is established only when a plaintiff " '... has some private or particular interest to be subserved, or some particular right to be preserved or protected, independent of that which he holds with the public at large.' " (*Kappadahl v. Alcan Pacific Co.* (1963) 222 Cal.App.2d 626, 643, 35 Cal.Rptr. 354, quoting 32 Cal.Jur.2d, Mandamus, § 55, p. 238, disapproved on other grounds in *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 517, fn. 16, 113 Cal.Rptr. 836, 522 P.2d 12.) However, where a public right is involved, and the object of the writ of mandate is to procure enforcement of a public duty, the plaintiff is not required to have any legal or special interest in the result; it is sufficient that as a citizen he is interested in having the public duty enforced. (*Id.*, citing 35 Am.Jur. 73, § 320.) Accordingly, in a writ of mandate against a municipal entity based on alleged violations of CEQA, a property owner, taxpayer, or elector who establishes a geographical nexus with the site of the challenged project has standing. (32 Cal.Jur.2d, Mandamus, § 56, pp. 239-241; see *159*Bozung v. Local Agency Formation Com.* (1975) 13 Cal.3d 263, 272, 118 Cal.Rptr. 249, 529 P.2d 1017; *Scott v. City of Indian Wells* (1972) 6 Cal.3d 541, 549, 99 Cal.Rptr. 745, 492 P.2d 1137. Moreover, the geographical nexus can be attenuated, for instance beyond the city limits, because "[e]ffects of environmental abuse are not contained by political lines." (*Bozung v. Local Agency Formation Com., supra.*)

[4] Defendants' contention is that despite the ease of establishing standing in a case such as the instant one, plaintiffs have failed to do so. Defendants base this contention on "[t]he general rule ... that in a mandamus proceeding the burden is on the petitioner

to prove every fact that is at the foundation of his proceeding excepting such allegations of the petition as are admitted by the answer. [Citations.]" (*Lotus Car Ltd. v. Municipal Court* (1968) 263 Cal.App.2d 264, 270, 69 Cal.Rptr. 384. Real parties in interest assert that because their answer denied plaintiffs' allegations of standing, and plaintiffs never offered proof of this foundational fact, that plaintiffs' cause of action is fatally deficient in this regard.

In fact, some of the plaintiffs offered proof of their standing and others had their standing established by the first answer of defendants, who filed a separate answer from real parties in interest in each case. In case No. E001138 three parties, Mary Baker, Steve Votaw and Dwayne Wilson, testified as to their standing under oath before the Board. In addition, in case No. E001138 Ms. Baker and Mr. Votaw, as well ****898** as ten other plaintiffs (Russell Adams, Del Harper, Pauline Krueger, Don Lauria, Al Norris, Leslie Riccomini, Rodney Rusco, Dick Solesbee, Joe Wilkerson and Susan Wilson), had their standing established by the answer of defendants, which was filed two days after real parties in interest's less knowledgeable answer.

Moreover, the trial court appeared to have found that all plaintiffs had standing. During the hearing on case No. E001138 the court told plaintiffs' counsel that the action was not frivolous because plaintiffs had "a right to be [t]here and be heard." In a very small community like Bishop, the trial court often has personal knowledge of the standing of the parties where such standing consists merely of a taxpayer's geographical nexus with the subject matter of the dispute. (See Evid. Code, § 452, subd. (g).) The trial court's formal holdings in each case are not inconsistent with our conclusion that the court found plaintiffs to have standing.

2. *Addition of Party After Statute of Limitations had Passed*

Defendants contend that Citizens Association improperly injected itself into the litigation without leave of the court after the statute of limitations ***160** had passed. This contention lacks merit. Even if defendants were correct, the only effect would be the dismissal of Citizens Association from civil case No. E001138, the first of the two consolidated cases.

[5] It is clear that a "... court may, in furtherance of justice, ... allow a party to amend any pleading or proceeding by adding ... the name of any party, ..." (Code Civ. Proc., § 473.) When there is an attempt to add a party after the statute of limitations has run, however, relation back to the original pleadings is "dependent upon whether recovery is sought on the same general set of facts as those [originally] alleged." (*Austin v. Massachusetts Bonding & Insurance Co.* (1961) 56 Cal.2d 596, 601, 15 Cal.Rptr. 817, 364 P.2d 681; see *Lamont v. Wolfe* (1983) 142 Cal.App.3d 375, 381, 190 Cal.Rptr. 874.)

[6] When recovery is sought on the same basic set of facts, the main policy of the statute of limitations, to put defendants on notice of the need to defend against a claim in time to prepare a fair defense on the merits, is satisfied. (*Lamont v. Wolfe, supra,* 142 Cal.App.3d at pp. 380-381, 190 Cal.Rptr. 874.) Here the mere addition of a party plaintiff did not alter the general set of facts originally alleged; thus, defendants were not prejudiced and no reasonable purpose would have been served by dismissing Citizens Association from case No. E001138.

[7] Defendants do not directly contest the applicability of *Austin* and its progency, including *Lamont,* to the instant case. Instead, defendants contend that plaintiffs' first amended petition was properly denied because Citizens Association never sought permission to be included as a petitioner. In support of this contention defendants correctly state that under Code of Civil Procedure section 472 plaintiffs did not have a right to add a party plaintiff as a matter of course. (See *Phoenix of Hartford Ins. Companies v. Colony Kitchens* (1976) 57 Cal.App.3d 140, 147, 128 Cal.Rptr. 893; *Taliaferro v. Davis* (1963) 220 Cal.App.2d 793, 795, 34 Cal.Rptr. 120. Nevertheless, it does not follow from this record that plaintiffs never sought nor obtained permission to add Citizens Association. In adding Citizens Association as the named party plaintiff, by amended petition plaintiffs at least implicitly sought the appropriate judicial authorization. Further, when the trial court told plaintiffs during oral argument that they had a right to be there it appeared to confirm that permission had been granted. Finally, the fact that the trial court did not strike the amended complaint, and thus dismiss Citizens Association from the petition, in combination with the fact that the trial court's ultimate decision not to grant the petition was expressly based on other

grounds, support the conclusion that the court permitted Citizens Association to be included as a party plaintiff.

****899 *161** 3. *Indispensable Party*

[8] Defendants contend that dismissal of case No. E001138 is warranted because of plaintiffs' failure to name an indispensable party, the owner of the subject property, in its petition for writ of mandate. The trial court did not specifically rule on this issue. However, we hold that the petition, which was limited to challenging governmental actions and approvals of general plan amendments and zoning reclassifications, did not require the inclusion of the owner of the subject property.

Code of Civil Procedure section 389 sets out the pertinent law. In relevant part it states that: "(a) A person ... shall be joined as a party in the action if ... he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest .... [¶] (b) If a person as described [above] cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed without prejudice, the absent person being thus regarded as indispensable. The factors to be considered by the court include: (1) to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the person's absence will be adequate; (4) whether the plaintiff or cross-complainant will have an adequate remedy if the action is dismissed for nonjoinder." (Code Civ. Proc., § 389, subd. (a), (b).)

Although the owner of the subject property would have been a proper real party in interest, such owner was not a necessary party because as a practical matter his ability to protect his interest was not impaired or impeded. Instead, that interest was ably argued by Crumpler and Kruger, Inc., as a real party in interest. Moreover, because Crumpler and Kruger, Inc. had an option to purchase the subject property from the owner and was in escrow, its interests were essentially the same as if it had been the owner for the purposes of this litigation. Thus, pursuant to the analogous reasoning of *Hollister Co. v. Cal-L Exploration Corp.* (1972) 26 Cal.App.3d 713, 721, 102 Cal.Rptr. 919, and Code of Civil Procedure section 369, which allow the nonjoinder of interested parties where their interests are adequately represented, we hold that the owner of the subject property was not a necessary party. (See also *Hebbard v. Colgrove* (1972) 28 Cal.App.3d 1017, 1027, 105 CalRptr. 172.) The case cited by real parties in interest, ***162***Sierra Club, Inc. v. California Coastal Com.* (1979) 95 Cal.App.3d 495, 501, 157 Cal.Rptr. 190, is inapposite because there the real party in interest's legal right to a permit was not represented by any party in a similar position.

Even if the owner of the subject property was impaired in his ability to protect that interest, the owner was not indispensable. The Supreme Court provided guidance in this regard when it cautioned against the common blunder of finding any necessary party as indispensable and observed that "... we should ... be careful to avoid converting a discretionary power or a rule of fairness in procedure into an arbitrary and burdensome requirement which may thwart rather than accomplish justice." (*Bank of California v. Superior Court* (1940) 16 Cal.2d 516, 521, 106 P.2d 879; see *Kraus v. Willow Park Public Golf Course* (1977) 73 Cal.App.3d 354, 368-369, 140 Cal.Rptr. 744.)

In "equity and good conscience" we find that pursuant to Code of Civil Procedure section 389 the owner of the subject property was not an indispensable party. The litigation in case No. E001138 generally involved the propriety of the government's actions in approving the general plan amendments and zoning reclassification urged by the developer (and named real party in interest) who had an option to purchase the subject property from the owner and was in escrow. Although the developer has self-servingly declared that it ****900** does not intend to exercise its option to purchase from the owner if judgment is for plaintiffs, none of the other factors listed in Code of Civil Procedure section 389, subdivision (b), favor dismissing this action for nonjoinder of the property owner. Those already parties will not be prejudiced by a judgment rendered in the owner's absence, the judgment will be adequate to fully resolve the dispute (cf. *Sierra Club, Inc. v. California Coastal Com., supra,* 95 Cal.App.3d at p. 501, 157 Cal.Rptr. 190),

and plaintiffs would be without a remedy if the action is dismissed for nonjoinder (see Code Civ. Proc., § 389, subd. (b)).

4. *Exhaustion of Administrative Remedies*

Defendants contend that before an issue may be litigated by plaintiffs it must have been raised by them before the administrative agency. Although we generally agree with this legal principle, we find it to have been satisfied here with regard to all critical substantive issues.

The Supreme Court has applied the doctrine of exhaustion of administrative remedies and its underlying reasoning to environmental legislation. In *Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 267, 104 Cal.Rptr. 761, 502 P.2d 1049, the Supreme Court held that: "[T]he Board is entitled to learn the contentions of interested parties before litigation is ***163** instituted. If [plaintiffs] have previously sought administrative relief ... the Board will have had its opportunity to act and to render litigation unnecessary, if it had chosen to do so." (See also *Wilke & Holzheiser, Inc. v. Dept. of Alcoholic Bev. Control* (1966) 65 Cal.2d 349, 377, fn. 23, 55 Cal.Rptr. 23, 420 P.2d 735; *Borror v. Department of Investment* (1971) 15 Cal.App.3d 531, 545, 92 Cal.Rptr. 525.)

[9] On the other hand, less specificity is required to preserve an issue for appeal in an administrative proceeding than in a judicial proceeding. This is because " '[i]n administrative proceedings, [parties] generally are not represented by counsel. To hold such parties to knowledge of the technical rules of evidence and to the penalty of waiver for failure to make a timely and specific objection would be unfair to them.' (Note (1964) Hastings L.J. 369, 371.) It is no hardship, however, to require a layman to make known what facts are contested." (*Kirby v. Alcoholic Bev. etc. Appeals Bd.* (1970) 8 Cal.App.3d 1009, 1020, 87 Cal.Rptr. 908.)

[10] Because we find that the dispositive issue and all relevant substantive issues save one were sufficiently raised before the administrative body, it is unnecessary to consider whether any exceptions to the exhaustion doctrine are applicable here.

Factually, plaintiffs raised the failure to consider the cumulative effect of the project by articulating their concerns about the deterioration of the downtown area and the increase in traffic in a letter signed by 39 people which was sent to the Board of Supervisors prior to the administrative hearing before the Board on the general plan amendments and zoning reclassification. All other substantive issues except one discussed herein were also introduced by letter or by oral comment at the administrative hearing. Resolution of the one pertinent issue not raised before the administrative body, whether Caltrans was a responsible agency and thus whether copies of any or all of the negative declarations were required to be forwarded to the Commerce Clearinghouse pursuant to California Administrative Code, title 14, section 15073, subdivision (c), is not a necessary part of the judgment of this court.

5. *Standard of Review*

[11] There are two standards of review applicable to legal controversies which involve CEQA: Public Resources Code section 21168 or 21168.5. (*No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 74, fn. 3, 118 Cal.Rptr. 34, 529 P.2d 66.) Despite the fact that both sides to the instant dispute initially stated that section 21168.5 was here applicable (later, in ***164** case No. E001340, plaintiffs alleged that section 21168 was controlling), we conclude that ****901** section 21168 is the correct standard of review.

Public Resources Code section 21168 states that: "Any action or proceeding to attack, review, set aside, void or annul a determination, finding, or decision of a public agency, made as a result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken and discretion in the determination of facts is vested in a public agency, on the grounds of noncompliance with the provisions of this division, shall be *in accordance with the provisions of Section 1094.5 of the Code of Civil Procedure*. [¶] In any such action, the court shall not exercise its independent judgment on the evidence but shall only determine whether the act or decision is supported by substantial evidence in light of the whole record." (Emphasis added.) Here section 21168 is controlling because our review is of a decision of a public agency in which the Inyo County Procedures for Environmental Impact Review, article 7.5 (now art. XV), prescribes a hearing for the administrative appeals that here occurred. Further,

CEQA requires the taking of evidence. (Cal.Admin. Code, tit. 14, § 15064.) Finally, discretion in the determination of facts is vested in the public agency. (*Id.*; *Newberry Springs Water Assn. v. County of San Bernardino* (1984) 150 Cal.App.3d 740, 750, 198 Cal.Rptr. 100; *Brentwood Assn. for No Drilling, Inc. v. City of Los Angeles* (1982) 134 Cal.App.3d 491, 504, 184 Cal.Rptr. 664.)

Having found Public Resources Code section 21168 applicable, it should be noted that the distinction between that section and Public Resources Code section 21168.5 may often be immaterial. (See *Newberry Springs Water Assn. v. County of San Bernardino, supra,* 150 Cal.App.3d at p. 748, 198 Cal.Rptr. 100.) Without deciding whether the distinction is here material, we hold that pursuant to Code of Civil Procedure section 1094.5, subdivision (b), "[a]buse of discretion is established if the [administrative agency] has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence."

DISPOSITIVE ISSUE: FAILURE TO CONSIDER THE CUMULATIVE EFFECT OF THE PROJECT

1. *Overview*

[12] Plaintiff contends because the Board as the lead agency failed to consider the cumulative effect of the development project the trial court erred in ruling that the lead agency proceeded in the manner required by law. We agree.

***165** In evaluating the actions of the lead agency in light of the guidelines provided by CEQA, we note, in the words of the Supreme Court, " 'that the Legislature intended [CEQA] to be interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.' " (*No Oil, Inc. v. City of Los Angeles, supra,* 13 Cal.3d at p. 83, 118 Cal.Rptr. 34, 529 P.2d 66, quoting *Friends of Mammoth v. Board of Supervisors, supra,* 8 Cal.3d at p. 259, 104 Cal.Rptr. 761, 502 P.2d 1049.) Accordingly, "CEQA requires more than merely preparing environmental documents." (Cal. Admin. Code, tit. 14, § 15002, subd. (h).)

2. *Definition of a Project*

[13] Of particular relevance here, CEQA mandates "... that environmental considerations do not become submerged by chopping a large project into many little ones-each with a minimal potential impact on the environment-which cumulatively may have disastrous consequences." (*Bozung v. Local Agency Formation Com., supra,* 13 Cal.3d at pp. 283-284, 99 Cal.Rptr. 745, 492 P.2d 1137; see *Rural Landowners Assn. v. City Council* (1983) 143 Cal.App.3d 1013, 1024, 192 Cal.Rptr. 325.) In part, CEQA avoids such a result by defining the term "project" broadly. (Cal. Admin. Code, tit. 14, § 15002, subd. (d).) " 'Project' means the whole of an action, which has a potential for resulting in a physical change in the environment, directly****902** or ultimately, ..." (Cal. Admin. Code, tit. 14, § 15378, subd. (a).) "The term 'project' refers to the activity which is being approved and which may be subject to several discretionary approvals by governmental agencies. The term 'project' does not mean each separate governmental approval. [¶] ... Where the lead agency could describe the project as either the adoption of a particular regulation ... or as a development proposal which will be subject to several governmental approvals ... the lead agency shall describe the project as the development proposal for the purpose of environmental analysis." (Cal. Admin. Code, tit. 14, § 15378, subd. (c)-(d); see *Fullerton Joint Union High School Dist. v. State Bd. of Education* (1982) 32 Cal.3d 779, 795, 187 Cal.Rptr. 398, 654 P.2d 168; *Bozung v. Local Agency Formation Com., supra,* 13 Cal.3d at pp. 283-284, 99 Cal.Rptr. 745, 492 P.2d 1137; cf. *Rural Landowners Assn. v. City Council, supra,* 143 Cal.App.3d at pp. 1024-1025, 192 Cal.Rptr. 325.)

In the instant case for environmental purposes the project before the lead agency should have been described as a shopping center development for which governmental action consisting of general plan amendments, zone reclassification, tentative tract map approval, and road abandonment was required. Instead, the project was improperly described as "two projects": (1) the general plan amendments and zone reclassification, and (2) the tentative tract map approval and road abandonment. Each of the "two ***166** projects" was submitted to a separate environmental review for which separate negative declarations were approved by the Board on December 6, 1983, and March 6, 1984, respectively.

3. *Failure to Consider Cumulative Effect*

The danger of filing separate environmental documents for the same project is that consideration of the cumulative impact on the environment of the two halves of the project may not occur. This danger was here realized.

In approving the first negative declarations the lead agency considered the general plan amendments and zoning reclassification only; it did not consider the second half of the project. The transmittal letter from the planning commission to the Board of Supervisors stated that "... the property ... is proposed for development with a shopping center....

"...

"At the time the tentative map is considered by the Commission (in December) requirements for water, sewer, fire protection, traffic circulation, curbs, gutters, sidewalks, etc. will be determined. However, at this time we are only considering the General Plan Amendments and the Zoning Reclassification." During the hearing before the Board of Supervisors, Planning Director Hilton, the first speaker, suggested the planning commission's rationale for this division of the shopping center project into two parts with separate negative declarations when he stated that "[i]t would really [be] kind of redundant to get into the details of planning for a tentative tract map and vacating the street if the basic General Plan classifications and rezoning cannot be accomplished." At the end of the hearing the Board, acting as the decision-making body (see Inyo County Procedures for Environmental Impact Review, art. 4.3 (now art. III)) and thus, the lead agency (see Pub. Resources Code, § 21067), approved the first two negative declarations.

In approving the subsequent negative declaration a few months later the same pattern was repeated as with the first two negative declarations, except in reverse. The agency considered the tentative tract map approval and road abandonment only; it did not consider the first half of the project. This time the transmittal letter from the planning commission to the Board of Supervisors stated that "[t]he project before the Planning Commission was not a shopping center since the existing zoning automatically permits that type of land use.... The appeal talks about approval of a shopping center .... The discussion **903 of the Bishop Central Business District; Regional Community Center; Community-Neighborhood Center is totally irrelevant as a *167 shopping center or any other retail commercial development is a permitted use on the site. [¶] The discussion of the concurrent consideration of general plan amendments and zone reclassifications is also irrelevant. These actions, taken by the Board on December 6, 1983 were done properly and legally and are currently under litigation. They have nothing to do with the planning commission's actions of January 25," i.e., adoption of the negative declaration for the tentative tract map and road abandonment. Finally, at the hearing before the Board of Supervisors, when some citizens raised concerns about the general plan amendments and rezoning, Mr. Hilton responded that "... this Board has already approved and the planning commission has approved the general plan change and the rezoning on the property. This is a secondary but important part of the development of the shopping center.... [However], I don't think anything can be gained by rehashing over it." Later in this hearing the Board of Supervisors approved the negative declaration for the second stage of the shopping center project.

The division of the shopping center project into two parts constituted an abuse of discretion by the lead agency. As the portions of the record above vividly demonstrate, although for the same shopping center project, the first two negative declarations and the later negative declaration were considered as mutually exclusive environmental documents. This approach is inconsistent with the mandate of CEQA that a large project shall not be divided into little ones because such division can improperly submerge the aggregate environmental considerations of the total project. (See *Bozung v. Local Agency Formation Com., supra,* 13 Cal.3d at pp. 283-284, 99 Cal.Rptr. 745, 492 P.2d 1137.)

4. *Prejudice*

We further hold that this abuse of discretion requires reversal. In an analogous situation it was held in *Rural Landowners Assn. v. City Council, supra,* 143 Cal.App.3d at p. 1023, 192 Cal.Rptr. 325,"... where that failure to comply with the law results in a subversion of the purposes of CEQA by omitting information from the environmental review process, the error is prejudicial. The trial court may not exercise its independent judgment on the omitted material by

determining whether the ultimate decision of the lead agency would have been affected and the law been followed. The decision is for the discretion of the agency, and not the courts." The same reasoning applies to this case. The purposes of CEQA were subverted because the lead agency never considered whether the environmental effects of the total shopping center project, properly defined, was significantly adverse and thus required an EIR. At this juncture, as in *Rural Land Owners Assn.,* we cannot exercise our independent judgment on whether the ultimate decision of the lead agency would have been different had CEQA been properly ***168** implemented because such a decision is for the discretion of the agency. (See *Cleary v. County of Stanislaus* (1981) 118 Cal.App.3d 348, 362, 173 Cal.Rptr. 390; *People v. County of Kern* (1974) 39 Cal.App.3d 830, 842, 115 Cal.Rptr. 67.)

Nevertheless, we believe there is a reasonable probability that the lead agency would have prepared one EIR instead of two sets of negative declarations if it had properly defined the project. The Bishop community plan recommended a thorough economic-environmental analysis before development of a regional-community shopping center. One of the five Board members voted against the negative declarations for both the general plan amendments/rezoning and tentative tract map/street abandonment approvals. Both sets of negative declarations were appealed and received substantial public criticism. Finally, the aggregate concerns, including physical deterioration of the downtown business area because of business loss and closure due to competition from the new ****904** shopping center and added traffic, were not insignificant.

5. *Reasonably Foreseeable Probable Future Projects*

[14] Upon remand, defendant should also consider the reasonably foreseeable probable future projects, if any, that will be added in the shopping center area. The environmental "effects of probable future projects" are germane to determining whether the impact of the shopping center is "cumulatively considerable." (Cal.Admin. Code, tit. 14, § 15065, subd. (c); see Cal. Admin. Code, tit. 14, § 15355, subd. (b).) In formulating its list of probable future projects for review as to cumulative effects the lead agency should reasonably interpret the guidelines to afford the fullest possible protection of the environment. (See *Friends of Mammoth v. Board of Supervisors, supra,* 8 Cal.3d at p. 259, 104 Cal.Rptr. 761, 502 P.2d 1049; *San Franciscans for Reasonable Growth v. City and County of San Francisco* (1984) 151 Cal.App.3d 61, 74, 198 Cal.Rptr. 634.) There is a "... need for regional environmental consideration at the earliest stage of a planned development before it gains irreversible momentum." (*Bozung v. Local Agency Formation Com., supra,* 13 Cal.3d at p. 284, fn. 28, 104 Cal.Rptr. 761, 502 P.2d 1049.)

Related projects currently under environmental review unequivocally qualify as probable future projects to be considered in a cumulative analysis. (*San Franciscans for Reasonable Growth v. City and County of San Francisco, supra,* 151 Cal.App.3d at p. 74, fn. 13, 198 Cal.Rptr. 634.) In addition, even projects anticipated beyond the near future should be analyzed for their cumulative effect. (*Bozung v. Local Agency Formation Com., supra,* 13 Cal.3d at p. 284, 104 Cal.Rptr. 761, 502 P.2d 1049.) ***169** In the instant case it appears that probable future projects include the development of three of the five lots which will not initially be developed with the proposed shopping center, but "will eventually be developed with satellite buildings (i.e., bank, offices, service station, restaurant)," and the approximately 265 single-family dwelling units "planned for" north of the shopping center. To the extent the lead agency properly considered these projects in the negative declarations under review, this discussion is intended to affirm the need to do so again.

OTHER ISSUES TO BE CONSIDERED ON REMAND

1. *Relevance of Secondary Effects Caused by Economic and Social Changes*

[15] Plaintiffs contend that the environmental consequences of economic and social changes must be considered by the lead agency. Specifically, plaintiffs contend that the lead agency must consider whether the proposed shopping center will take business away from the downtown shopping area and thereby cause business closures and eventual physical deterioration of downtown Bishop. Although the Administrative Code is somewhat ambiguous on this issue, we conclude that it supports plaintiffs' position.

Title 14, section 15064, subdivision (d) of the Cali-

fornia Administrative Code states that, "[i]n evaluating the significance of the environmental effect of a project, the lead agency *shall* consider both primary or direct and secondary or indirect consequences." (Emphasis added.) This is further explained as follows: "Primary consequences are immediately related to the project such as the dust, noise, and traffic of heavy equipment that would result from construction of a sewage treatment plant and possible odors from operation of the plant. [¶] ... Secondary consequences are related more to effects of the primary consequences than to the project itself and may be several steps removed from the project in a chain of cause and effect. For example, the construction of a new sewage treatment plant may facilitate population growth in the service area due to the increase in sewage treatment capacity and may lead to an increase in air pollution." (*Ibid.*)

****905** The unequivocal language just cited becomes less clear in the light of a subsequent passage: "Economic and social changes resulting from a project shall not be treated as significant effects on the environment. Economic or social changes may be used, however, to determine that a physical change shall be regarded as a significant effect on the environment. Where a physical change is caused by economic or social effects of a project, the physical change may be regarded as a significant effect in the same manner as any other physical change resulting from the project. Alternatively, economic ***170** and social effects of a physical change may be used to determine that the physical change is a significant effect on the environment. If the physical change causes adverse economic or social effects on people, those adverse effects may be used as the basis for determining that the physical change is significant. For example, if a project would cause overcrowding of a public facility and the overcrowding causes an adverse effect on people, the overcrowding would be regarded as a significant effect." (Cal. Admin. Code, tit. 14, § 15064, subd. (f).)

These two subsections should be interpreted consistently if possible. (58 Cal.Jur.3d, Statutes, § 106, pp. 481-482.) In this case the most reasonable consistent interpretation is that the lead agency *shall* consider the secondary or indirect environmental consequences of economic and social changes, but *may* find them to be insignificant. Such an interpretation is unequivocally consistent with the mandate that secondary consequences of projects be considered. Moreover, this interpretation is also consistent with subdivision (f). In particular two aspects of subdivision (f) support this conclusion. First, subdivision (f) expressly gives the agency discretion to determine whether the consequences of economic and social changes are significant, which is not the same as discretion to not consider these consequences at all. Indeed, "... the physical change [caused by economic or social effects of a project] may be regarded as a significant effect *in the same manner* as any other physical change resulting from the project [may be regarded as a significant effect]." (Cal. Admin. Code, tit. 14, § 15064, subd. (f), emphasis added.) Second, in the example provided in subdivision (f) of an adverse effect ultimately caused by economic or social changes, subdivision (f) concludes that the physical change "would be [rather than could be] regarded as a significant effect." (Cal. Admin. Code, tit. 14, § 15064, subd. (f).) Consistent with this example is the one provided in subdivision (d), which mandates that secondary consequences be considered, includeing added air pollution (an environmental effect) caused by the population growth (presumable a social change) facilitated by a new sewage treatment plant. (Cal. Admin. Code, tit. 14, § 15064, subd. (d).)

In the instant case plaintiffs have urged the lead agency to consider whether the proposed shopping center would deprive the downtown business district of necessary revenue, forcing business closures and eventual physical deterioration of the downtown area. Two of the four members of the Board of Supervisors who voted for the negative declarations stated that they failed to see how this was an environmental consequence they needed to consider; the other two expressed no opinion. The fifth supervisor believed that an EIR was necessary and therefore voted against the negative declarations.

***171** On remand the lead agency should consider physical deterioration of the downtown area to the extent that potential is demonstrated to be an indirect environmental effect of the proposed shopping center.

2. *Adequacy of Initial Studies*

In administering its responsibilities under CEQA the public agency should implement procedures which contain at least provisions for: conducting initial

studies, preparing negative declarations or drafting final EIRs, assuring adequate opportunity and time for public review and comment, evaluating and responding to those comments, and filing documents required by **906 CEQA. (Cal. Admin. Code, tit. 14, § 15022; see Pub. Resources Code, § 21082.)

An important purpose of the initial study is to "[p]rovide documentation of the factual basis for the finding in a negative declaration that a project will not have a significant effect on the environment; ..." (Cal.Admin. Code, tit. 14, § 15063, subd. (c)(5).) This purpose is particularly relevant to courts reviewing the administrative action pursuant to Public Resources Code section 21168. As discussed above, Public Resources Code section 21168, and thereby Code of Civil Procedure section 1094.5, apply to the instant case. Section 1094.5, subdivision (b), states that "[a]buse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, *or the findings are not supported by the evidence.*" (Emphasis added.) The Supreme Court has elaborated that "... implicit in section 1094.5 is a requirement that the agency which renders the challenged decision must set forth findings to bridge the analytic gap between the *raw evidence* and ultimate decision or order." (*Topanga Assn. for a Scenic Community v. County of Los Angeles, supra,* 11 Cal.3d at p. 515, 113 Cal.Rptr. 836, 522 P.2d 12, emphasis added; see *Myers v. Board of Supervisors* (1976) 58 Cal.App.3d 413, 429-431, 129 Cal.Rptr. 902.)

[16] Therefore, although an initial study can identify environmental effects by use of a checklist (see Cal. Admin. Code, tit. 14, § 15063, subd. (d)-(f)), it must also disclose the data or evidence upon which the person(s) conducting the study relied. Mere conclusions simply provide no vehicle for judicial review. (See *Topanga Assn. for a Scenic Community v. County of Los Angeles, supra,* 11 Cal.3d at p. 516, 113 Cal.Rptr. 836, 522 P.2d 12.)

In the instant case the initial studies are far too conclusionary. It is for the most part impossible to determine whether the findings which ultimately resulted in negative declarations are supported by the evidence because it is unclear that raw evidence, if any, was relied upon in preparing the initial *172 studies. There were three similar initial studies made, two for the general plan amendments and the zoning reclassification, and one for the tentative tract map and road abandonment. The core of the studies was a quasi-checklist format. For each subcategory (e.g., water supply, sewage disposal, fire protection) the planning department indicated by use of letters whether the impact was adverse, beneficial, or none, and then the degree, phase, linkage and duration. To the extent a negative impact was identified, mitigation measures, if any, were described in the margin and summarized later in the study. Neither the source nor the content of the information relied upon for the more than 45 subcategories which required environmental conclusions in each initial study were specifically identified. In the space that was intended to identify the "departments/agencies/groups consulted" and list "comments" the words "to be" [consulted] were added and no comments were listed in any of the three initial studies. Of course, Crumpler and Kruger, Inc., as the developer, submitted information to the planning commission with its applications for the changes eventually made, but, with the notable exception of a traffic study, even this information was conclusionary. For the most part the specific sources and content of the data the developer relied upon in its application were not disclosed. Upon remand the evidence supporting any initial studies should be disclosed.

3. *Sufficiency of Evidence Introduced During Public Review Period*

Plaintiffs and defendants disagree on whether evidence substantial enough to require an EIR was offered during the public review. Although our remand of this case for the reasons stated above makes resolving this specific dispute unnecessary, a few general comments may provide some guidance on remand.

The public comment or review period is a second important informational step to be completed by the lead agency before approving a negative declaration. (See **907Cal. Admin. Code, tit. 14, § 15073, subd. (a).) "[T]he lead agency shall consider ... any comments received during the public review process. The decision-making body shall approve the negative declaration if it finds on the basis of the initial study and any comments received that there is no substantial evidence that the project will have a significant effect on the environment." (Cal. Admin. Code, tit.

14, § 15074, subd. (b); see Pub. Resources Code, § 21083; *Friends of "B" Street v. City of Hayward* (1980) 106 Cal.App.3d 988, 999-1000, 165 Cal.Rptr. 514.)

[17] A court reviewing the public comment portion of the administrative record is limited to evaluating whether there is substantial evidence to support "... the county's decision regarding whether there was adequate evidence***173** produced by plaintiffs so that a fair argument could be made that a significant environmental impact may result from the project." (*Newberry Springs Water Assn. v. County of San Bernardino, supra,* 150 Cal.App.3d at p. 747, 198 Cal.Rptr. 100, see *Friends of "B" Street v. City of Hayward, supra,* 106 Cal.App.3d at p. 1002, 165 Cal.Rptr. 514.) Under this substantial evidence standard of review, the court may not substitute its own judgment for that of the local agency. (*Newberry Springs Water Assn. v. County of San Bernardino, supra,* 150 Cal.App.3d at p. 750, 198 Cal.Rptr. 100; *El Dorado Union High School Dist. v. City of Placerville* (1983) 144 Cal.App.3d 123, 130, 192 Cal.Rptr. 480.)

Nevertheless, if it is clear that considerable evidence was presented and that the evidence was not properly considered by the lead agency the reviewing court may find an abuse of discretion. (*No Oil, Inc. v. City of Los Angeles, supra,* 13 Cal.3d at p. 88, 118 Cal.Rptr. 34, 529 P.2d 66; *Brentwood Assn. for No Drilling, Inc. v. City of Los Angeles, supra,* 134 Cal.App.3d at p. 505, 184 Cal.Rptr. 664.)

[18] In this case the record does not support defendants' contention that all of the public testimony and letters in the administrative record merely represent fears unsupported by any evidence. First, relevant personal observations are evidence. For example, an adjacent property owner may testify to traffic conditions based upon personal knowledge. Although even expert opinion may ultimately be rejected because of the expert's interest in the matter or for other reasons, an agency may not refuse to consider uncontradicted testimony based upon objective data. (See *Brentwood Assn. for No Drilling, Inc. v. City of Los Angeles, supra,* 134 Cal.App.3d at pp. 504-505, 184 Cal.Rptr. 664.)

4. *Relevance of Public Controversy Standing Alone*

[19] Plaintiffs contend that an EIR is required if a substantial public controversy exists. This position is not supported by case law. (See *No Oil, Inc. v. City of Los Angeles, supra,* 13 Cal.3d at pp. 85-86, 118 Cal.Rptr. 34, 529 P.2d 66; *Newberry Springs Water Assn. v. County of San Bernardino, supra,* 150 Cal.App.3d at p. 749, 198 Cal.Rptr. 100.) Moreover, the Legislature, by enacting Public Resources Code section 21082.2, made it clear that public controversy absent substantial evidence of significant environmental effects does not mandate preparation of an EIR. Upon remand, Public Resources Code section 21082.2 is the controlling authority.

5. *State Clearinghouse Filing Requirement*

[20] Plaintiffs contend that because Caltrans is a responsible agency it was mandatory that the lead agency file its negative declarations with the State Clearinghouse. For purposes of remand, we agree.

***174** Plaintiffs failed to raise this issue at the administrative hearing. Nevertheless, because defendants must begin the environmental review process anew, some guidance in this area is appropriate.

The administrative guidelines of CEQA provide that "[w]here one or more state agencies will be a responsible agency or a trustee agency or will exercise jurisdiction ****908** by law over natural resources affected by the project, the lead agency shall send copies of the negative declaration to the State Clearinghouse for distribution to the state agencies." (Cal. Admin. Code, tit. 14, § 15073, subd. (c).) Not only does the State Clearinghouse distribute the negative declaration to the one or more responsible agencies, but also to "[r]eviewing agencies ... selected for their expertise in particular subject matters or expressed interest in particular types of projects." (State Clearinghouse Handbook, Office of Planning and Research, Mar. 1984, at p. 4.) In addition, the Clearinghouse maintains and monitors computerized records on past and current development proposals. (*Id.,* at p. 5.) Major issues monitored by the State Clearinghouse that are pertinent here include project consistency with the appropriate local general plan, and planning objectives such as renewal and maintenance of existing urban areas, cumulative effects of projects, and secondary growth impacts of regional shopping centers. (*Id.,* at p. H-1.)

Despite its importance, the parties agree that the State Clearinghouse must be consulted in this case only if Caltrans is a responsible agency. The shopping center project is planned to be constructed adjacent to U.S. route 395. The project application of Crumpler and Kruger, Inc. stated that the necessary encroachment permit would require Caltrans approval. The central question is thus whether Caltrans has "discretionary approval power over the project," the definition of responsible agency for the purposes of CEQA. (Cal. Admin. Code, tit. 14, § 15381.) Pursuant to Streets and Highways Code section 678, the county "... is entitled as a matter of right to a permit, but is otherwise subject to the provisions of this article and to all reasonable conditions and provisions made by the department in any such permit." This includes such "conditions as to the location and the manner in which the work is to be done as the department finds necessary for the protection of the highway." (Streets & Hwys. Code, § 672.)

Defendants contend that the county's entitlement to a permit as a matter of right necessarily means that Caltrans does not have "discretionary approval power." Defendants' contention ignores the definition provided in the administrative guidelines to CEQA: " 'Discretionary project' means a project which requires the exercise of judgment or deliberation when the public agency or body decides to approve or disapprove a particular activity, ***175** as distinguished from situations where the public agency or body merely has to determine whether there has been conformity with applicable statutes, ordinances, or regulations." (Cal. Admin. Code, tit. 14, § 15357.) In contrast " '[m]inisterial' describes a governmental decision involving little or no personal judgment by the public official as to the wisdom or manner of carrying out the project." (*Id.*, at § 15369.) Therefore, because Caltrans can condition the right to an encroachment permit upon "the location and the manner" of the encroachment, its approval power is more discretionary than ministerial regardless of the right the county has to the permit as conditioned. (See *Johnson v. State of California* (1968) 69 Cal.2d 782, 788, 73 Cal.Rptr. 240, 447 P.2d 352.) This conclusion finds support in the holding by the Third District Court of Appeal that "doubt whether a project is ministerial or discretionary should be resolved in favor of the latter characterization." (*People v. Department of Housing & Community Dev.* (1975) 45 Cal.App.3d 185, 194, 119 Cal.Rptr. 266.)

6. *Inconsistency of Proposed Project with General Plan*

[21] Plaintiffs contend that the proposed project, which they define as a "regionally-oriented shopping center," conflicts with the express policies and land use objectives of the Bishop general plan. Although there is merit in some of the concerns underlying plaintiffs' contention, we do not agree, as plaintiffs contend, that the alleged conflict with the general plan necessarily required the preparation of an EIR.

It is true that a project would normally be considered to have a significant effect ****909** on the environment if it conflicts with the adopted environmental plans and goals of the community where it is located. (Cal. Admin. Code, tit. 14, appen. G, subd. (a).) However, "... it does not necessarily follow that the Board's decision reclassifying the property ... is inconsistent with the broad policy expressed in the general plan...." (*Environmental Council v. Board of Supervisors* (1982) 135 Cal.App.3d 428, 440, 185 Cal.Rptr. 363.) Moreover, our view of such a claim must focus on whether the lead agency acted "arbitrarily, capriciously, or without any evidentiary basis." (*Id.*, at pp. 439-440, 185 Cal.Rptr. 363; see *Karlson v. City of Camarillo* (1980) 100 Cal.App.3d 789, 801, 161 Cal.Rptr. 260.)

The broad objectives of the Bishop community plan (BCP) include (1) retaining and enhancing the downtown area as Bishop's commercial center and (2) encouraging clustering of convenient and mutually compatible commercial activities in desirable locations. It is the tension between these two objectives that is at the crux of whether the proposed shopping center on the outskirts of Bishop is consistent with the BCP. The BCP, anticipating ***176** future population growth, provides for development of four outlying commercial centers, a regional-community center by 1990, two community-neighborhood centers, and a small neighborhood facility. The relatively large regional-community center, according to the BCP, "... should only be developed after a thorough economic-environmental analysis, including a (retail category) market analysis, has concluded that such a facility can successfully co-exist with a vital downtown central business district."

Plaintiffs characterize the proposed shopping center

as a regional-community center that clashes with the BCP for want of an economic-environmental analysis. However, the proposed shopping center is best described as a hybrid or regional-community-neighborhood center, because it is smaller than the regional-community center, yet larger than the community-neighborhood centers described by the BCP. Moreover, the BCP only says that an economic-environmental analysis *should* be undertaken, not that it must be.

ATTORNEYS' FEES

[22] Plaintiffs contend that they are entitled to a reasonable award of attorneys' fees to the extent that their appeal has been successful. Plaintiffs have clearly established a colorable claim to an award of attorneys' fees pursuant to Code of Civil Procedure section 1021.5. We remand to the trial court for that court to determine the propriety of attorneys' fees after a hearing which focuses on the criteria established by section 1021.5.

Code of Civil Procedure section 1021.5 states in pertinent part that: "Upon motion, a court may award attorneys' fees to a successful party against one or more opposing parties in any action which has resulted in the enforcement of an important right affecting the public interest if: (a) a significant benefit, whether pecuniary or nonpecuniary, has been conferred on the general public or a large class of persons, [and] (b) the necessity and financial burden of private enforcement are such as to make the award appropriate, ..." These criteria have been thoroughly discussed by the Supreme Court in *Woodland Hills Residents Assn., Inc. v. City Council* (1979) 23 Cal.3d 917, 934-942, 154 Cal.Rptr. 503, 593 P.2d 200, and its progeny.

Determining whether Code of Civil Procedure section 1021.5 is applicable, and if so, the amount of attorneys' fees that are reasonable, is generally left to the sound discretion of the trial court. (See *Woodland Hills Residents Assn., Inc. v. City Council, supra,* 23 Cal.3d at p. 941, 154 Cal.Rptr. 503, 593 P.2d 200; *Serrano v. Priest* (1977) 20 Cal.3d 25, 49, 141 Cal.Rptr. 315, 569 P.2d 1303; *177 *Brennan v. Board of Supervisors* (1984) 153 Cal.App.3d 193, 197, 200 Cal.Rptr. 192; *Friends of "B" Street v. City of Hayward, supra,* 106 Cal.App.3d at p. 994, 165 Cal.Rptr. 514; but see *Starbird v. County of San Benito* (1981) 122 Cal.App.3d 657, 665, 176 Cal.Rptr. 149.) "[R]eviewing courts are *not* in **910 a position to decide the question [of propriety of attorney fees] in the first instance,' " the trial court is best suited for this task. (*Brennan v. Board of Supervisors, supra,* 153 Cal.App.3d at p. 197, 200 Cal.Rptr. 192, quoting *Woodland Hills Residents Assn., Inc. v. City Council, supra,* 23 Cal.3d at p. 941, 154 Cal.Rptr. 503, 593 P.2d 200.)

DISPOSITION

The judgment is reversed with directions to the superior court to issue a peremptory writ of mandate directing respondent to set aside its orders of December 6, 1983 and March 6, 1984, adopting the negative declarations and related approvals. We also direct the superior court to grant any further relief that should prove appropriate, including the determination of and award of attorneys' fees.

McDANIEL and RICKLES, JJ., concur.
Cal.App. 4 Dist.,1985.
Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo
172 Cal.App.3d 151, 217 Cal.Rptr. 893

END OF DOCUMENT

THE PEOPLE, Plaintiff,
v.
HARRY OKEN et al., Defendants; TONY ALARCON, Appellant; EL MONTE SCHOOL DISTRICT et al., Respondents.
Civ. No. 22496.

District Court of Appeal, Second District, Division 3, California.
Apr. 17, 1958.

HEADNOTES

(1) Appeal and Error § 41--Decisions Appealable--Orders on Motion to Strike.
While an order striking a pleading is not ordinarily appealable, the rule is otherwise where a cross-complaint is directed against cross-defendants not otherwise parties to the action.

(2) Pleading § 171--Amendment--On Leave of Court.
An attempted incorporation of counts or causes of action in an amended cross-complaint without leave of court is ineffective and may not be treated as a part of the pleading in the case.
See **Cal.Jur.2d,** Pleading, § 232; **Am.Jur.,** Pleading, § 291.
(3) Schools § 56, 57--Buildings and Construction.
A private citizen may not maintain an action for a judgment declaring that the public interest and necessity require the construction by a school district of a school building and "the acquisition and appropriation by said school district of a site upon which said building may be erected within that certain tract of land" described in the pleading; where, when or how, if at all, a school district shall construct school buildings is within the sole competency of its governing board to determine.

(4) Eminent Domain § 11, 150(1)--Who May Exercise Right-- IndividualsPleadings.
A private person seeking to exercise the right of eminent domain must not only allege that he proposes to devote the property sought to be acquired to one of the public uses provided in Code Civ. Proc., § 1238, but must also make it appear that he is authorized to devote the property to the public use in question or that he is a person authorized to administer or have "charge of such use."
See **Cal.Jur.2d,** Eminent Domain, §§ 229, 282; **Am.Jur.,** Eminent Domain, § 28.
(5) Pleading § 13--Subject Matter--Facts Judicially Noticed.
An allegation by way of conclusion that the pleader "is a person, competent and qualified to acquire the real property" described in his pleading "as agent of the state and/or person in charge of the uses" therein set forth, should be disregarded, where the appellate court judicially knows it is untrue.

(6) Schools § 2--Legislative Power and Duty.
Const., art. IX, §§ 5, 6, declaring that the Legislature shall provide for "a system of common schools" and "a public school system," make the school system a matter of state care and supervision; the term "system" itself imports a unity of purpose as well as entirety of operation, and the direction to the Legislature to provide "a" system of common schools means one system applicable to all common schools; this duty, so far as the state has by the adoption of the Constitution undertaken it, cannot be delegated to any agency.
See **Cal.Jur.,** Schools, §§ 2, 4.
(7) Pleading § 254--Motion to Strike--Amended Pleading.
An amended cross-complaint was properly stricken by the trial court where it wholly failed to state a cause of action and was patently frivolous and sham.

(8) Pleading § 254--Motion to Strike--Amended Pleading.
Though there is no statutory provision for striking complaints from the files as there is with respect to sham or frivolous answers (Code Civ. Proc., § 453), a court may, by virtue of its inherent power to prevent frustration or abuse of its processes, strike a purported complaint that fails to amend the previous pleading, is not filed in good faith, is filed in disregard of established procedural requirements, or is otherwise violative of orderly judicial administration.

SUMMARY

APPEAL from an order of the Superior Court of Los Angeles County striking a third amended cross-complaint. Aubrey N. Irwin, Judge. Affirmed.

COUNSEL

Alexander Ruiz and Manuel Ruiz, Jr., for Appellant.

Harold W. Kennedy, County Counsel (Los Angeles), and Edwin P. Martin, Deputy County Counsel, for Respondents.

PATROSSO, J. pro tem. [FN*]

FN* Assigned by Chairman of Judicial Council.

This is an appeal by cross-complainant Tony Alarcon from an order striking his third amended cross-complaint as against the cross-defendants El Monte School District and county of Los Angeles. (1) While an order striking a pleading is not ordinarily appealable, the rule is otherwise where, as here, the cross-complaint is directed against cross-defendants not otherwise parties to the action. (*Trask v. Moore* (1944), 24 Cal.2d 365, 373 [149 P.2d 854].)

The action in which the cross-complaint was filed is one instituted on behalf of the People of the State of California by ***458** the district attorney of Los Angeles County against numerous defendants, including cross- defendant, alleged to be the owners or occupants of properties within an area comprising some 24 acres located in the county of Los Angeles and commonly known as "Hick's Camp," to abate a public nuisance alleged to exist upon the properties located therein by reason of the maintenance thereon of dilapidated buildings and unsanitary conditions therein more particularly described.

A demurrer having been sustained with leave to amend to the original cross-complaint, appellant filed a second amended cross-complaint containing four separate causes of action. Demurrers interposed by the respondents to the latter complaint were sustained without leave to amend as to the first, second and fourth cause of action thereof. Thereafter appellant filed a third amended cross-complaint which was stricken upon motion of the respondents as hereinbefore stated.

The third amended cross-complaint, as is likewise true of its predecessors, is in many respects a remarkable document. It purports to incorporate therein by reference, the first, second and fourth causes of action of the second amended cross-complaint to which, as previously stated, demurrers had been sustained without leave to amend. It then alleges that the action is brought by the appellant "on behalf of apprximately [sic] 35 persons similarly situated, named defendants, in the second amended complaint of nuisance on file herein, and also as agent for the State of California, and the person in charge of the public uses hereinafter set forth and requested." It then alleges that the El Monte School District and numerous individually named cross-defendants claim an interest in the property described in Exhibit "A," attached to the cross-complaint, which apparently comprises a portion of the property described in plaintiff's complaint, whereon are located the conditions which are sought to be abated as a public nuisance. It further alleges "that the public interest and necessity require that the said property be acquired by cross complainant as agent of the State of California, as provided in section 1001 of the California Civil Code. That cross complainant, Tony Alarcon, is a person, competent and qualified to acquire the real property and improvements thereon, described herein, as agent of the State and/or person in charge of the uses hereinafter set forth. That cross complainant seeks to take and condemn private property, to wit: Real Estate and improvements, for the public uses hereinafter ***459** set forth. That the plaintiff and cross defendants, El Monte School District, Ernest Roll, District Attorney for Los Angeles County and the County of Los Angeles, are public bodies within the purview of subsection 21 of the section 1238 of the California Code of Civil Procedure, ... to wit: To demolish, clear, abate or remove buildings from the area known as 'Hicks Camp' and herein described in exhibit 'A,' for the reason that the same are detrimental to the health, safety and morals of the people, and because of dilapidation, overcrowding, faulty arrangement or design, or lack of ventilation or sanitary facilities of the dwellings predominating in said area. That the public

interest and necessity require the construction by the El Monte School District of a school building and also the acquisition and appropriation by said school district of a site upon which said building may be erected within that certain tract of land hereinabove described. In conjunction therewith, said public interest and necessity require, that buildings, dwellings and structures within said tract of land be demolished, cleared, abated and/or removed, in the interest of the health, safety and morals of the people, because of dilapidation, overcrowding, faulty arrangement or design, or lack of ventilation or sanitary facilities of the dwellings therein, in a manner that will be most compatible with the greatest public good and the least private injury. ... That there is grave danger of the creation of a public nuisance, unless the public uses herein referred to are provided for and the public interest and necessity stated above be adjuticated [sic]."

The cross-complaint closes with a prayer that the cross-defendants be required to set forth the nature, character, extent and value of their several estates or interest in the parcels of real property sought to be condemned and the severance damage, if any, accruing thereto; that the value of each separate interest or estate sought to be condemned and the severance damages, if any, be ascertained, and that upon payment to the defendants entitled to compensation of the several amounts so ascertained, the court make and enter a final order of condemnation, "conveying to cross complainant, as agent for the state, the properties for the public use above set forth."

We have ignored the allegations contained in the first, second and fourth causes of action, contained in the second amended cross-complaint, which were attempted to be incorporated ***460** by reference in the third amended cross-complaint in view of the fact that the demurrers interposed to these causes of action had, as noted, been sustained without leave to amend. (2) The attempted incorporation of these counts in the third amended cross-complaint without leave of the court is ineffective and they may not be treated as a part of the pleading in the case. (39 Cal.Jur.2d p. 339.) Moreover, without here undertaking to set forth in detail the voluminous allegations of said counts, we are completely satisfied that the trial court properly sustained the demurrers thereto without leave to amend. Each of these three causes of action seemingly undertakes to state a cause of action for monetary and injunctive relief against the respondents upon some undiscernible theory for damages which the cross-complainant and others similarly situated allegedly will sustain if the plaintiff prevails in its action to abate the nuisances alleged to exist upon the properties owned by them.

(3) From the allegations of appellant's pleadings which we have above summarized in some detail, it would appear that the relief which he seeks thereby as against the respondents is a judgment declaring that the public interest and necessity require the construction by the respondent El Monte School District of a school building and "the acquisition and appropriation by said school district of a site upon which said building may be erected within that certain tract of land" in the cross-complaint described. We know of no law, and none has been called to our attention, which authorizes a private citizen to maintain such an action. Where, when or how, if at all, a school district shall construct school buildings is a matter within the sole competency of its governing board to determine. (*Montebello Unified School Dist. v. Keay* (1942), 55 Cal.App.2d 839, 843-844 [131 P.2d 384].)

If, however, the third amended cross-complaint be construed as one whereby appellant as a private citizen seeks to acquire property for the purpose of constructing and operating a public school, it is likewise unauthorized by law. Section 1001 of the Civil Code, upon which appellant assertedly seeks to predicate his action, while authorizing any person, as "an agent of the State" or as "a person in charge of such use" to acquire private property under the power of eminent domain for any of the public uses provided in section 1238 of the Code of Civil Procedure is wholly without application. (4) A private person seeking to exercise the right of eminent domain must not only allege that he proposes to devote the ***461** property sought to be acquired to one of the public uses provided in section 1238, but it must likewise be made to appear that he is authorized to devote the property to the public use in question, or otherwise stated, that he is a person authorized to administer or have "charge of such use." (*Beveridge v. Lewis* (1902), 137 Cal. 619, 621 [67 P. 1040, 70 P. 1083, 92 Am.St.Rep. 188, 58 L.R.A. 581].) (5) While appellant alleges by way of

conclusion that he "is a person, competent and qualified to acquire the real property" described in his pleading "as agent of the State and/or person in charge of the uses" therein set forth, the allegation must be disregarded, because we judicially know it is untrue. (*Wilson v. Loew's Inc.* (1956), 142 Cal.App.2d 183, 187-188 [298 P.2d 152].) (6) "The constitution declares that the legislature shall provide 'for a system of common schools,' or, as expressed elsewhere in the organic law, 'a public school system.' " (23 Cal.Jur. p. 18; Cal. Const., art. IX, §§ 5-6.) "By these two sections, the constitution makes the school system a matter of state care and supervision. The term 'system' itself imports a unity of purpose as well as an entirety of operation, and the direction to the legislature to provide 'a' system of common schools means one system which shall be applicable to all the common schools. And this duty to provide for the education of the children of the state, so far as the state has, by the adoption of the constitution, undertaken it, cannot be delegated to any agency." (23 Cal.Jur. 21-22.) As said in *Piper v. Big Pine School Dist.*, 193 Cal. 664, 669 [226 P. 926]:

"It is in a sense exclusively the function of the state which cannot be delegated to any other agency. The education of the children of the state is an obligation which the state took over to itself by the adoption of the constitution. To accomplish the purposes therein expressed the people must keep under their exclusive control, through their representatives, the education of those whom it permits to take part in directing the affairs of state."

From the allegations of the cross-complaint, it affirmatively appears that "(i)n this case it is the school district, acting through its governing board, that is the agent of the State in charge of the use for which the land was sought." (*Montebello Unified School Dist. v. Keay, supra.*)

(7) The third amended cross-complaint wholly fails to state a cause of action and is patently frivolous and sham. ***462** It was therefore properly stricken by the trial court. (8) As said by this court in *Neal v. Bank of America* (1949), 93 Cal.App.2d 678, 682-683 [209 P.2d 825]:

"It may be conceded that there is no statutory provision for striking complaints from the files, as there is in respect to sham or frivolous answers. (Code Civ. Proc., § 453.) However, the courts have inherent power, by summary means, to prevent frustration, abuse, or disregard of their processes. (41 Am.Jur. §§ 346, 347, p. 527; anno., 13 Am.St.Rep. 640.) ... In *Santa Barbara County v. Janssens*, 44 Cal.App. 318 [186 P. 372], it was held that an order striking an amended cross-complaint from the files was within the jurisdiction of the trial court, and presumably correct in the absence of error disclosed by the record. The fundamental principle running through the cases is that a court is not required to tolerate a purported amended complaint which fails to amend the previous pleading, is not filed in good faith, is filed in disregard of established procedural requirements, or is otherwise violative of orderly judicial administration. ... It cannot be doubted that the court had jurisdiction to strike plaintiff's amended complaint on the ground that it was frivolous and a sham and the order clearly was not an abuse of discretion."

The order appealed from is affirmed.

Shinn, P. J., and Wood (Parker), J., concurred.
A petition for a rehearing was denied May 7, 1958, and appellant's petition for a hearing by the Supreme Court was denied June 11, 1958. Carter, J., was of the opinion that the petition should be granted. ***463**

Cal.App.2.Dist.
People v. Oken
159 Cal.App.2d 456, 324 P.2d 58

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Effective:[See Text Amendments]

West's Annotated California Codes Currentness
Education Code (Refs & Annos)
Title 2. Elementary and Secondary Education (Refs & Annos)
Division 3. Local Administration (Refs & Annos)
Part 21. Local Educational Agencies (Refs & Annos)
Chapter 2. Governing Boards (Refs & Annos)
Article 4. Powers and Duties (Refs & Annos)
➞ § 35162. Power to sue, be sued, hold and convey property

In the name by which the district is designated the governing board may sue and be sued, and hold and convey property for the use and benefit of the school district.

CREDIT(S)

(Stats.1976, c. 1010, § 2, operative April 30, 1977.)

HISTORICAL AND STATUTORY NOTES

2009 Main Volume

Derivation: Education Code 1959, § 1002, added by Stats.1963, c. 629, p. 1518, § 2.

Education Code 1959, § 1702, enacted by Stats.1959, c. 2, p. 675, § 1702.

Education Code 1943, § 2402 (Stats.1943, c. 71, p. 347).

Political Code § 1575.

School Code § 2.141.

CROSS REFERENCES

Conveyance by county, see Government Code §§ 25365, 25560.
Naming of district, see Education Code §§ 35000, 35001.

LIBRARY REFERENCES

2009 Main Volume

Schools 64, 114.
Westlaw Topic No. 345.
C.J.S. Schools and School Districts §§ 356 to 358, 674.

RESEARCH REFERENCES

Encyclopedias

CA Jur. 3d Schools § 51, Designation.

CA Jur. 3d Schools § 165, Management and Control.

NOTES OF DECISIONS

1. Construction and application

School districts in California are "state agencies" for purposes of the Eleventh Amendment; though districts may sue and be sued and own property in their own name and though state has recently given districts more autonomy, California school districts have budgets that are controlled and funded by the state government, so that any judgments would be satisfied with state funds even though local tax revenues are mingled with state funds, and California law treats public schooling as a statewide or central governmental function. Belanger v. Madera Unified School Dist., C.A.9 (Cal.)1992, 963 F.2d 248, certiorari denied 113 S.Ct. 1280, 507 U.S. 919, 122 L.Ed.2d 674. Federal Courts 269

Plaintiff school district had not stated a cause of action justifying either a declaratory judgment or an injunction unless it had alleged facts showing that it itself had an interest affected by invalidity of provisions of the "Unruh School Act" it attacked. Rowland School Dist. v. State Bd. of Ed. (App. 2 Dist. 1968) 70 Cal.Rptr. 504, 264 Cal.App.2d 589. Declaratory Judgment 315; Injunction 118(2)

Pol.C. § 1575 providing that the trustees of every school district could sue and be sued, applied to city boards of education, as well as boards of country school districts. Hancock v. Board of Ed. of City of Santa Barbara (1903) 140 Cal. 554, 74 P. 44. Schools 114

A county could not maintain suit in its own name to recover school district bond taxes levied against the property of a railroad operated in more counties than one. San Bernardino County v. Southern Pac. R. Co. (1902) 137 Cal. 659, 70 P. 782.

A school district cannot sue the superintendent of schools of the county on the ground that he turned over an unexpended balance to the credit of the school district to the unappropriated school fund of the county, as plaintiff has no proprietary right to the money to its credit in the treasury. Gridley School Dist. of Butte County v. Stout (1901) 134 Cal. 592, 66 P. 785. Schools 18

Board of education of City and County of San Francisco is legal body capable of suing for lots conveyed to them by commissioners of funded debt. Board of Education of City and County of San Francisco v. Fowler (1861) 19 Cal. 11. Schools 48(6)

Tax sheltered annuities may be purchased by a school district for both classified and certificated employees who

request a reduction of salary with the amount of the reduction being used to pay the premium, but such purchases may have an adverse effect on the classified employees' retirement benefits. 44 Op.Atty.Gen. 130 (1964).

2. Ejectment

The board of education of San Francisco could, under statutes defining its rights and powers, maintain ejectment for a school lot. Board of Ed. of City and County of San Francisco v. Donahue (1878) 2 P.C.L.J. 168, 53 Cal. 190. Schools 114

3. Holding and conveying property

The beneficial ownership of title to school district property is in the state, and the district holds legal title as trustee, and transfer of legal title from one school district to another is merely a transfer under the same trust from one trustee to another. Butler v. Compton Junior College Dist. of Los Angeles County (App. 1947) 77 Cal.App.2d 719, 176 P.2d 417. Schools 64; Schools 65

Where realty in the City of San Francisco was originally conveyed to the Board of Education of the city and county of San Francisco in 1858 by the commissioners of the funded debt of the City of San Francisco, pursuant to statute enacted earlier in the same year, and subsequently the San Francisco unified school district was created, title to the realty passed under statute to the district. San Francisco Unified School Dist. v. City and County of San Francisco (App. 1 Dist. 1942) 54 Cal.App.2d 105, 128 P.2d 696. Schools 41(1)

The legislature had power to designate school districts as successors in title to school boards which had theretofore held property in trust for school purposes, since public schools are matters of state concern, and the legislature has control over the management and title to school property, at least so long as it is not diverted from school purposes. San Francisco Unified School Dist. v. City and County of San Francisco (App. 1 Dist. 1942) 54 Cal.App.2d 105, 128 P.2d 696. Schools 64

School districts are agents of state in management of schools and trustees holding and devoting property to used directed. Fawcett v. Ball (App. 3 Dist. 1926) 80 Cal.App. 131, 251 P. 679. Schools 65

Where land was deeded to a school district, for school purposes, on condition for forfeiture and reverter, if not used for school purposes, grantor was entitled to possession, though building was still used to store furniture and books, and intermittently by teacher of another school. Richey v. Corralitos Union School Dist. of Santa Cruz County (App. 1 Dist. 1924) 67 Cal.App. 708, 228 P. 348. Schools 65

An action to quiet title to land which school district claimed was dedicated by defendant for school purposes was properly brought in the name of the district. Carpenteria School Dist. v. Heath (1880) 6 P.C.L.J. 898, 56 Cal. 478. Schools 117

4. Service of process

Service of summons in an action against school district on one member of school board, even though he was president of the board, was not service of summons on the district, giving court jurisdiction to enter a default judgment against district, in absence of showing of any peculiar or unforeseen condition making service of summons on each member of board impossible. Gould v. Richmond School Dist. (App. 1 Dist. 1943) 58 Cal.App.2d 497, 136 P.2d 864. Schools 119

West's Ann. Cal. Educ. Code § 35162, CA EDUC § 35162

Current with urgency legislation through Ch. 634 of the 2009 Reg.Sess., Ch. 12 of the 2009-2010 2nd Ex.Sess., Ch. 28 of the 2009-2010 3rd Ex.Sess., and Ch. 24 of the 2009-2010 4th Ex.Sess., Governor's Reorganization Plan No. 1 of 2009, Prop. 1F, approved at the 5/19/2009 election, and propositions on the 6/8/2010 ballot received as of 10/15/2009

END OF DOCUMENT

Effective:[See Text Amendments]

West's Annotated California Codes Currentness
Education Code (Refs & Annos)
Title 1. General Education Code Provisions
Division 1. General Education Code Provisions (Refs & Annos)
Part 10.5. School Facilities (Refs & Annos)
Chapter 3. Construction of School Buildings (Refs & Annos)
Article 4. Building Schoolhouses (Refs & Annos)
➡ **§ 17340. Power of board; district vote**

The governing board of any school district may, and when directed by a vote of the district shall, build and maintain a schoolhouse.

CREDIT(S)

(Added by Stats.1996, c. 277 (S.B.1562), § 3, operative Jan. 1, 1998.)

HISTORICAL AND STATUTORY NOTES

2002 Main Volume

Subordination of legislation by Stats.1996, c. 277 (S.B.1562), to other 1996 legislation, severability of provisions, and nonsubstantive nature of changes made by that Act, see Historical and Statutory Notes under Education Code § 17211.

Derivation: Former § 39180, added by Stats.1988, c. 160, § 22.

Former § 39170, enacted by Stats.1976, c. 1010, § 2.

Educ.C.1959, § 15351 (Stats.1959, c. 2, p. 1077, § 15351).

Educ.C.1943, § 18151 (Stats.1943, c. 71, p. 663).

Political Code § 1608, added by Stats.1917, c. 552, p. 737, § 7, amended by Stats.1919, c. 296, p. 479, § 1; Stats.1921, c. 502, p. 771; Stats.1925, c. 392, p. 727, § 1; Stats.1927, c. 724, p. 1336, § 1.

School Code § 6.40, amended by Stats.1939, c. 216, p. 1470, § 1.

CROSS REFERENCES

"Any school district", "all school districts", defined, see Education Code § 80.

RESEARCH REFERENCES

Encyclopedias

CA Jur. 3d Schools § 160, Establishment and Maintenance of Schools.

CA Jur. 3d Schools § 169, Realty--Purchase and Improvement.

NOTES OF DECISIONS

1. Power of state

The state may provide, in the exercise of its police power and under a general law, for a complete system of regulation for the protection of public health, safety, and comfort in the erection of school buildings. Pasadena School Dist. v. City of Pasadena (1913) 166 Cal. 7, 134 P. 985, Am.Ann.Cas. 1915B,1039. Health 392

2. Zoning regulation

A city had no right to zone against a school district's right of location of a school site, whether such zoning was intended to be temporary or permanent. Town of Atherton v. Superior Court In and For San Mateo County (App. 1958) 159 Cal.App.2d 417, 324 P.2d 328. Zoning And Planning 11.1

Zoning ordinances of a town did not control the right of a school district to acquire land to enlarge the district's school premises within the corporate limits of the town. Landi v. Superior Court In and For San Mateo County (App. 1958) 159 Cal.App.2d 839, 324 P.2d 326. Zoning And Planning 237

3. Local regulation

Provision of charter of City of Berkeley, that all contracts must be in writing, executed in name of city by officer or officers authorized to sign contracts, and must be countersigned by auditor, who shall number and register contracts in book kept for that purpose, did not apply to board of education, which was governing body of Berkeley unified school district, and imposed no limitation on mode of contracting of board of education. Berkeley Unified School Dist. of Alameda County v. James I Barnes Const. Co., N.D.Cal.1953, 112 F.Supp. 396. Schools 80(1)

The state has occupied the field in matter of location of school sites. Town of Atherton v. Superior Court In and For San Mateo County (App. 1958) 159 Cal.App.2d 417, 324 P.2d 328. Municipal Corporations 592(1)

The state has completely occupied the field of regulating public school building construction, and construction of such school buildings by school districts is not subject to the building regulations of a municipal corporation in which the building is constructed. Hall v. City of Taft (1956) 47 Cal.2d 177, 302 P.2d 574. Municipal Corporations 592(1)

4. Construction of buildings

Pol.C. § 1755, relating to proceedings for the construction of a building by a high school district in the September next succeeding its formation or next succeeding a termination of a lease of temporary quarters, was applicable only to the time of organization of the district; and, where a high school district had been organized for a considerable time and had already constructed and maintained a building, the provisions thereof were not available for raising moneys to construct a new one. Posz v. Taylor (App. 1 Dist. 1923) 61 Cal.App. 523, 215 P. 107. Schools 67

On proceedings for a writ of mandate to compel the officers of a school district to rebuild, on the old site, a schoolhouse destroyed by fire, as they had been directed by the electors of the district in school meeting assembled, the officers could not raise the question of the paramount title to the site, as its possession by the district for a number of years for school purposes was prima facie evidence of ownership in the district. Eby v. Board of School Trustees of Red Bank School Dist. (1890) 87 Cal. 166, 25 P. 240. Mandamus 172

School districts are authorized to construct, finance, and maintain bomb, fallout, and blast shelters for students and school personnel. 39 Op.Atty.Gen. 39 (1962).

5. Contracts

School district and board of education lacked authority to adopt "affirmative action policy" requiring that given percentage of school district construction projects be performed by minority or "nonwhite" construction contractors. Associated General Contractors of California v. San Francisco Unified School Dist., N.D.Cal.1977, 431 F.Supp. 854. Schools 71

Approval of school building plans by county superintendent need not be made condition precedent to payment of architect for preparing them. Kistner v. Pomeroy (App. 1 Dist. 1927) 84 Cal.App. 550, 258 P. 619. Schools 85

Since school districts and county superintendents of schools are political subdivisions or agencies of the state within the meaning of Gov.C. § 4200 et seq., labor and material bonding requirements are applicable to contracts let by the school districts and county superintendent of schools. 52 Op.Atty.Gen. 8, 2-4-69.

School construction contracts containing clauses prohibiting discrimination in employment similar to those required by the Governor's Code of Fair Practices in state construction contracts do not contravene state law, and their inclusion in school construction contracts is within the authority of a school board. 42 Op.Atty.Gen. 169 (1963).

6. Elections

Failure to post notices of meeting of election by a school district to vote on the question of erecting a school building and defective publication of notice of bids did not defeat recovery for reasonable value of labor and materials. Chas. R. Chas. R. McCormick Lumber Co. v. Highland School Dist. of San Diego County (App. 1915) 26 Cal.App. 641, 147 P. 1183. Schools 86(2)

7. Taxes

City tax for school building purposes was unwarranted, under charter requiring board of education to submit to council estimate of amounts required from city for adequate "support" of schools. Whitmore v. Brown (1929) 207 Cal. 473, 279 P. 447. Schools 108(2)

8. Private action

Private citizens could not maintain action against school district and county for judgment declaring that public interest and necessity required construction of school buildings and acquisition and appropriation of a site upon which the building was to be erected within described tract of land. People v. Oken (App. 1958) 159 Cal.App.2d 456, 324 P.2d 58. Declaratory Judgment 292

Under CCP § 1086, which provides for the issuance of a writ of mandate "on the application of the party beneficially interested," a taxpayer of the district, whose children attend the school, was a proper party to apply for a writ of mandate to compel the compliance of the officers of the district with a vote of the electors as to the location of the schoolhouse site. Eby v. Board of School Trustees of Red Bank School Dist. (1890) 87 Cal. 166, 25 P. 240. Mandamus 23(2)

West's Ann. Cal. Educ. Code § 17340, CA EDUC § 17340

Current with urgency legislation through Ch. 634 of the 2009 Reg.Sess., Ch. 12 of the 2009-2010 2nd Ex.Sess., Ch. 28 of the 2009-2010 3rd Ex.Sess., and Ch. 24 of the 2009-2010 4th Ex.Sess., Governor's Reorganization Plan No. 1 of 2009, Prop. 1F, approved at the 5/19/2009 election, and propositions on the 6/8/2010 ballot received as of 10/15/2009

END OF DOCUMENT

Effective:[See Text Amendments]

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Title 1. General Education Code Provisions
Division 1. General Education Code Provisions (Refs & Annos)
Part 10.5. School Facilities (Refs & Annos)
Chapter 3. Construction of School Buildings (Refs & Annos)
Article 4. Building Schoolhouses (Refs & Annos)
➡ § 17342. Additional schools

The governing board of any school district, whenever in its judgment it is desirable to do so, may establish additional schools in the district.

CREDIT(S)

(Added by Stats.1996, c. 277 (S.B.1562), § 3, operative Jan. 1, 1998.)

HISTORICAL AND STATUTORY NOTES

2002 Main Volume

Subordination of legislation by Stats.1996, c. 277 (S.B.1562), to other 1996 legislation, severability of provisions, and nonsubstantive nature of changes made by that Act, see Historical and Statutory Notes under Education Code § 17211.

Derivation: Former § 39182, added by Stats.1988, c. 160, § 22.

Former § 39172 added by Stats.1976, c. 1010, § 2.

Educ.C.1959, § 15353 (Stats.1959, c. 2, p. 1077, § 15353).

CROSS REFERENCES

"Any school district", "all school districts", defined, see Education Code § 80.

RESEARCH REFERENCES

Encyclopedias

CA Jur. 3d Schools § 160, Establishment and Maintenance of Schools.

West's Ann. Cal. Educ. Code § 17342, CA EDUC § 17342

Current with urgency legislation through Ch. 634 of the 2009 Reg.Sess., Ch. 12 of the 2009-2010 2nd Ex.Sess., Ch. 28 of the 2009-2010 3rd Ex.Sess., and Ch. 24 of the 2009-2010 4th Ex.Sess., Governor's Reorganization Plan No. 1 of 2009, Prop. 1F, approved at the 5/19/2009 election, and propositions on the 6/8/2010 ballot received as of 10/15/2009

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Title 3. Postsecondary Education (Refs & Annos)
Division 7. Community Colleges (Refs & Annos)
Part 49. Community Colleges, Education Facilities (Refs & Annos)
Chapter 3. Management and Control of Property (Refs & Annos)
Article 1. General Provisions (Refs & Annos)
§ 81600. Management and control of property

The governing board of a community college district shall manage and control school property within its district.

CREDIT(S)

(Stats.1976, c. 1010, § 2, operative April 30, 1977.)

HISTORICAL AND STATUTORY NOTES

2003 Main Volume

Derivation: Education Code 1959, § 15801 (Stats.1959, c. 2, § 15801); Education Code 1943, § 18001 (Stats.1943, c. 71, p. 658); School Code § 6.1; Political Code § 1608, added by Stats.1917, c. 552, § 7, amended by Stats.1919, c. 296, § 1; Stats.1921, c. 502, p. 771; Stats.1925, c. 392, § 1, Stats.1927, c. 724, § 1.

LIBRARY REFERENCES

2003 Main Volume

Colleges and Universities 6(5).
Westlaw Topic No. 81.
C.J.S. Colleges and Universities § 14.

NOTES OF DECISIONS

Food service 1
Incompatible offices 2

1. Food service

School district was not precluded from securing prepared food to be sold in vending machines as part of its food service program. California School Emp. Ass'n v. Sequoia Union High School Dist. (App. 1 Dist. 1969) 77 Cal.Rptr. 187, 272 Cal.App.2d 98. Schools 80(1)

2. Incompatible offices

A trustee of the Lakeside Union School District may not serve simultaneously as a director of the Padre Dam Municipal Water District.Op.Atty.Gen. No. 01-1007 (April 3, 2002), 2002 WL 512491.

West's Ann. Cal. Educ. Code § 81600, CA EDUC § 81600

Current with urgency legislation through Ch. 634 of the 2009 Reg.Sess., Ch. 12 of the 2009-2010 2nd Ex.Sess., Ch. 28 of the 2009-2010 3rd Ex.Sess., and Ch. 24 of the 2009-2010 4th Ex.Sess., Governor's Reorganization Plan No. 1 of 2009, Prop. 1F, approved at the 5/19/2009 election, and propositions on the 6/8/2010 ballot received as of 10/15/2009

END OF DOCUMENT

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Education Code (Refs & Annos)
Title 3. Postsecondary Education (Refs & Annos)
Division 7. Community Colleges (Refs & Annos)
Part 49. Community Colleges, Education Facilities (Refs & Annos)
Chapter 3. Management and Control of Property (Refs & Annos)
Article 1. General Provisions (Refs & Annos)

➡ § 81606. Improvement of real property; acquisition of other property in proximity to school sites

The governing board of any community college district may grade, pave, construct sewers, or otherwise improve streets and other public places in front of real property owned or controlled by it, and also may construct in immediate proximity to any school or site owned or controlled by the district, pedestrian tunnels, overpasses, footbridges, sewers and water pipes when required for school or administrative purposes, may acquire property, easements and rights-of-way for such purpose, and may appropriate money to pay the cost and expense of the improvements, whether made by the board under contract executed by the board, or under contracts made in pursuance of any of the general laws of the state respecting street improvements, or under other contracts made in pursuance of the charter of any county or municipality.

CREDIT(S)

(Stats.1976, c. 1010, § 2, operative April 30, 1977.)

HISTORICAL AND STATUTORY NOTES

2003 Main Volume

Derivation: Education Code 1959, § 15804 (see Derivation under present § 39606).

LIBRARY REFERENCES

2003 Main Volume

Colleges and Universities 6(3).
Westlaw Topic No. 81.
C.J.S. Colleges and Universities § 11.

RESEARCH REFERENCES

Encyclopedias

CA Jur. 3d Universities and Colleges § 130, Community Colleges.

NOTES OF DECISIONS

Construction with other laws 1

1. Construction with other laws

Education Code provision authorizing a community college district to improve streets in front of its property does not prohibit district from undertaking more extensive measures to mitigate off-campus traffic effects of a campus expansion project, as required under the California Environmental Quality Act (CEQA). County of San Diego v. Grossmont-Cuyamaca Community College Dist. (App. 4 Dist. 2006) 45 Cal.Rptr.3d 674, 141 Cal.App.4th 86. Colleges And Universities ⚿5; Environmental Law ⚿604(2)

West's Ann. Cal. Educ. Code § 81606, CA EDUC § 81606

Current with urgency legislation through Ch. 634 of the 2009 Reg.Sess., Ch. 12 of the 2009-2010 2nd Ex.Sess., Ch. 28 of the 2009-2010 3rd Ex.Sess., and Ch. 24 of the 2009-2010 4th Ex.Sess., Governor's Reorganization Plan No. 1 of 2009, Prop. 1F, approved at the 5/19/2009 election, and propositions on the 6/8/2010 ballot received as of 10/15/2009

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Education Code (Refs & Annos)
Title 3. Postsecondary Education (Refs & Annos)
Division 7. Community Colleges (Refs & Annos)
Part 49. Community Colleges, Education Facilities (Refs & Annos)
Chapter 3. Management and Control of Property (Refs & Annos)
Article 4. Community College Property (Refs & Annos)
→ § 81670. Dormitories

The governing board of any community college district may construct and maintain dormitories in connection with any community college within the district for use and occupancy by students in attendance at the community college, and shall fix the rates to be charged the students for quarters in the dormitories.

CREDIT(S)

(Added by Stats.1982, c. 251, p. 805, § 17, eff. June 11, 1982.)

HISTORICAL AND STATUTORY NOTES

2003 Main Volume

Former § 81670, enacted by Stats.1976, c. 1010, § 2, relating to similar subject matter, was repealed by Stats.1981, c. 471, p. 1807, § 85. See this section.

Derivation: Former § 81670, enacted by Stats.1976, c. 1010, § 2.

Education Code 1959, § 25530, added by Stats.1963, c. 100, p. 762, § 2, amended by Stats.1970, c. 102, p. 294, § 498.

Education Code 1959, § 15651, enacted by Stats.1959, c. 2, p. 1085, § 15651.

Education Code 1943, § 18311 (Stats.1943, c. 71, p. 670).

School Code § 6.90a, added by Stats.1929, c. 433, p. 338, § 5, amended by Stats.1935, c. 232, p. 911, § 1; Stats.1941, c. 789, p. 2328, § 2.

CROSS REFERENCES

Community colleges, see Education Code §§ 66700, 71000.
Governing boards, see Education Code §§ 78, 51017, 72000, 72203.5, 81600 et seq.

LAW REVIEW AND JOURNAL COMMENTARIES

"Fee speech": First amendment limitations on student fee expenditures. (1984) 20 Cal.W.L.Rev. 279.

LIBRARY REFERENCES

2003 Main Volume

Colleges and Universities 9.30(3).
Westlaw Topic No. 81.
C.J.S. Colleges and Universities § 37.

RESEARCH REFERENCES

Encyclopedias

CA Jur. 3d Universities and Colleges § 96, Housing and Dormitory Facilities.

West's Ann. Cal. Educ. Code § 81670, CA EDUC § 81670

Current with urgency legislation through Ch. 634 of the 2009 Reg.Sess., Ch. 12 of the 2009-2010 2nd Ex.Sess., Ch. 28 of the 2009-2010 3rd Ex.Sess., and Ch. 24 of the 2009-2010 4th Ex.Sess., Governor's Reorganization Plan No. 1 of 2009, Prop. 1F, approved at the 5/19/2009 election, and propositions on the 6/8/2010 ballot received as of 10/15/2009

END OF DOCUMENT

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Education Code (Refs & Annos)
Title 3. Postsecondary Education (Refs & Annos)
Division 7. Community Colleges (Refs & Annos)
Part 49. Community Colleges, Education Facilities (Refs & Annos)
Chapter 3.5. Design-Build Contracts (Refs & Annos)

➡ § 81702. Authority of board to enter into design-build contracts; findings; expenditure of funds

(a) Upon a determination by a community college district governing board that it is in the best interest of the community college district, the governing board may enter into a design-build contract for both the design and construction of a community college facility if that expenditure exceeds two million five hundred thousand dollars ($2,500,000) if, after evaluation of the traditional design, bid, and build process of community college facility construction and of the design-build process in a public meeting, the governing board makes written findings that use of the design-build process on the specific project under consideration will accomplish one of the following objectives: reduce comparable project costs, expedite the project's completion, or provide features not achievable through the traditional design-bid-build method. The governing board shall also review the guidelines developed pursuant to Section 81706 and shall adopt a resolution approving the use of a design-build contract pursuant to this chapter prior to entering into a design-build contract.

(b) No state funds appropriated for a design-build capital outlay project may be expended until the Department of Finance and the State Public Works Board have approved performance criteria, or performance criteria and concept drawings, for the project to be financed from the appropriation for capital outlay.

CREDIT(S)

(Added by Stats.2002, c. 637 (A.B.1000), § 1. Amended by Stats.2007, c. 471 (S.B.614), § 7.)

APPLICATION

<For application of 2007 amendment, see Stats.2007, c. 471 (S.B.614), § 11.>

REPEAL

<Stats.2002, c. 637 (A.B.1000), § 4, amended by Stats.2006, c. 35 (A.B.127), § 19, eff. May 20, 2006, operative November 7, 2006, and Stats.2007, c. 471 (S.B.614), § 10, provides for repeal of Chapter 3.5 on Jan. 1, 2014.>

HISTORICAL AND STATUTORY NOTES

2009 Electronic Update

2007 Legislation

For application provisions relating to Stats.2007, c. 471 (S.B.614), see Historical and Statutory Notes under Education Code § 17250.20.

2003 Main Volume

For provisions relating to Stats.2002, c. 637 (A.B.1000), regarding exemptions of design-build contracts from applicable provisions of the Public Contract Code, construction with other laws, and providing that the Act shall not apply to contracts in effect prior to the operative date of the Act, see Historical and Statutory Notes under Education Code § 81700.

CROSS REFERENCES

Department of Finance, generally, see Government Code § 13000 et seq.

LIBRARY REFERENCES

2003 Main Volume

Colleges and Universities 5.
Westlaw Topic No. 81.
C.J.S. Colleges and Universities §§ 8, 41.

West's Ann. Cal. Educ. Code § 81702, CA EDUC § 81702

Current with urgency legislation through Ch. 634 of the 2009 Reg.Sess., Ch. 12 of the 2009-2010 2nd Ex.Sess., Ch. 28 of the 2009-2010 3rd Ex.Sess., and Ch. 24 of the 2009-2010 4th Ex.Sess., Governor's Reorganization Plan No. 1 of 2009, Prop. 1F, approved at the 5/19/2009 election, and propositions on the 6/8/2010 ballot received as of 10/15/2009

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SANTA BARBARA SCHOOL DISTRICT et al., Petitioners,
v.
THE SUPERIOR COURT OF SANTA BARBARA COUNTY, Respondent; C. RAYMOND MULLIN et al., Real Parties in Interest.
C. RAYMOND MULLIN et al., Plaintiffs and Respondents,
v.
SANTA BARBARA SCHOOL DISTRICT et al., Defendants and Appellants
L.A. No. 30054., L.A. No. 30086.

Supreme Court of California
January 15, 1975.

SUMMARY

In a class action under a complaint alleging two causes of action concerning the validity of the composition and election of a city board of education and one cause challenging the validity of a desegregation plan adopted at a board meeting, the trial court filed a memorandum of intended decision declaring an intent to enjoin implementation of the plan and also expressing the court's intent with respect to the other causes. However, before findings and conclusions were filed, the Supreme Court issued an alternative writ of prohibition limited in effect to the part of the intended decision concerned with implementation of the plan. Judgment was rendered on the first two causes. (Superior Court of Santa Barbara County, No. 96260, John T. Rickard, Judge.)

The Supreme Court ordered defendants' appeal from the judgment transferred from the Court of Appeal to it for consideration simultaneously with the writ proceeding. The judgment was reversed and the cause remanded with directions to enter judgment for defendants on the two causes relating to validity of the election and composition of the board. And a peremptory writ of prohibition issued to restrain the trial court's intended action in all respects except in enjoining implementation of the desegregation plan which had purportedly been adopted. It was held that the board had been without jurisdiction to adopt the plan at the meeting as a result of the failure of the posted agenda for that meeting to give adequate notice that the particular plan would be considered at the meeting. Additionally, the court held that as enacted in Proposition 21, Ed. Code, § 1009.6, barring the assignment of pupils on the basis of race, is unconstitutional as applied to school districts manifesting segregation, but that the parts of the proposition which repealed Ed. Code, §§ 5002, 5003, declaring state policy of eliminating racial imbalance in schools, were severable from the invalid part and independently valid. And under the view that there is no constitutional right to a separate and elected elementary board of education and no unconstitutional infirmity in designating a city's board of education, elected from the full territory within its jurisdiction, to govern the lesser and wholly included elementary school district, the Supreme Court held that the Santa Barbara Board of Education, which has been designated by the Legislature to govern the city's elementary school district, may lawfully be the common governing board of the city's high and elementary school districts, even though they are not coterminous.

In Bank. (Opinion by Sullivan, J., expressing the unanimous view of the court.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Schools § 10--School Districts--Assignment of Pupils on Basis of Race.
Ed. Code, § 1009.6, which bars assignment of pupils on the basis of race, is unconstitutional as applied to school districts manifesting either de jure or de facto segregation.

(2) Schools § 10--School Districts--Validity of Repealing Provisions of Initiative.
Inasmuch as a policy in favor of neighborhood schools is a reasonably conceivable one and such an expression of policy can in no way limit or affect the constitutional obligations of school districts, the provisions found in §§ 2, 3, and 4 of Proposition 21, repealing Ed. Code, §§ 5002, 5003, which had declared the state policy of eliminating racial imbalance in schools and had delineated factors to be considered in implementing the policy, and also re-

pealing certain administrative guidelines, cannot be struck down as constitutionally impermissible.

(3) Schools § 10--School Districts--Severability of Initiative Provisions.
The fact that, as enacted in Proposition 21, Ed. Code, § 1009.6, barring the assignment of pupils on the basis of race, is unconstitutional as applied to school districts manifesting segregation, does not necessarily invalidate the repealing provisions of the proposition, inasmuch as the repealing provisions are severable from the unconstitutional part not only mechanically, but also as to purpose and method, and are of independent validity and not inconsistent with the elimination of the invalid part.

(4a, 4b) Schools § 51 (5)--Administrative Officers--Boards--Meetings-- Jurisdiction.
Under Ed. Code, § 966, requiring the posting of an agenda 48 hours prior to a proposed meeting of a school board, the board cannot change its posted agenda within the 48-hour period next immediately preceding a regular meeting. If the board wishes to change the agenda substantially within that period, it must postpone a meeting at least 48 hours. Thus, where concerned parents and citizens could reasonably infer from the posted agenda that only those desegregation plans which had been previously presented would be considered at the meeting, the board had no jurisdiction to consider or approve a plan which was not presented until that meeting and which differed substantially from all the previously presented plans.

(5) Schools § 51 (5)--Administrative Officers--Boards--Meetings--Posted Agenda.
The proper posting of a school board meeting agenda, as required by Ed. Code, § 966, cannot be replaced by newspaper publicity.

(6) Schools § 51 (6)--Administrative Officers--Boards--Rights, Powers and Duties--Desegregation.
In desegregating a school system, a school board is not limited in the exercise of its powers to those acts reasonably necessary to effectuating desegregation.

(7) Schools § 77--Actions and Liability--Judicial Control Over Official Acts--Prohibition.
Prohibition was available to prevent the trial court from exceeding its jurisdiction by carrying out its memorandum of intended decision, insofar as the decision would amount to a substitution of the trial court's views for those of a school board with respect to a matter within the board's discretion concerned with the closing down of certain schools.
[See **Cal.Jur.2d, Rev.,** Schools, § 217; **Am.Jur.2d,** Schools, § 52.]
(8) Schools § 51 (1)--Administrative Officers--One Board as Governing Districts Which Are Not Coterminous.
There is no constitutional right to a separate, elected elementary board of education and no constitutional infirmity in designating a city's board of education, elected from the full territory within its jurisdiction, to govern the lesser and wholly included elementary school district. Therefore, the Santa Barbara Board of Education, which has been designated by the Legislature to be the governing board of the city's elementary school district, and which is elected in compliance with the "one man, one vote" rule, may lawfully be the common governing board of the elementary and high school districts despite the fact that they are not coterminous. And election of the board is not subject to attack on the theory that the election is also an election of the governing board of the elementary school district and that such latter election violates the "one man, one vote" rule as causing the dilution of the votes of electors residing in the elementary school district by the votes of non-resident electors.

COUNSEL

George P. Kading, County Counsel, Robert D. Curiel, Chief Assistant County Counsel, Marvin Levine and Don H. Vickers, Deputy County Counsel, for Petitioners and for Defendants and Appellants.

Michael Lawson, A. L. Wirin, Fred Okrand, Laurence R. Sperber, Nathaniel S. Colley, Primo Ruiz, Fred J. Hiestand, Gene Livingston, Jerome B. Falk, Jr., William F. McCabe, Peter Galiano, Robert A. Stafford, Stafford, Buxbaum & Chackmak, Gervaise Davis III, Walker, Schroeder, Davis & Brehmer and Anthony G. Amsterdam as Amici Curiae on behalf of Petitioners.

Price, Postel & Parma, Gary R. Ricks and Hollister, Brace & Angle for Real Parties in Interest and for Plaintiffs and Respondents.

No appearance for Respondent.

Bagley, Bianchi & Sheeks, William T. Bagley, Robert L.

McWhirk, Levy & Van Bourg, Victor J. Van Bourg and Stewart Weinberg as Amici Curiae. *319

SULLIVAN, J.

In this class action brought against two school districts and their common governing board of education, we are called upon to determine the validity of a desegregation plan for elementary schools. Our task also requires us to examine and pass upon the constitutionality of a recent initiative measure enacting certain anti-busing legislation and repealing existing statutes dealing with the prevention and elimination of racial and ethnic imbalance in pupil enrollment. Additionally we must examine the validity of the pertinent statute permitting the board of education in question to be the common governing board of the high school district and the elementary school district here involved. In essence, plaintiffs make two independent but cognate attacks - one against the board's plan and the other against the board itself. We take them up in that order, separately stating the facts proper to each. We first turn our attention to the desegregation plan.

I

Defendant Santa Barbara Board of Education (hereafter Board and referred to as defendant in the singular) is the common governing board of defendants Santa Barbara School District and Santa Barbara High School District. Defendant Norman B. Scharer is the Superintendent of Schools of Santa Barbara (superintendent).

Culminating a period of five years' planning and study aimed at correcting the racial imbalance in elementary schools, the Board on February 3, 1972, resolved "to move immediately toward the total desegregation of all Santa Barbara elementary schools beginning in September 1972." The Board adopted the following four-step procedure to effectuate this resolution: (1) the issuance by February 22, 1972, of a statement of policy on desegregation; (2) the creation of a "Task Force Committee for Desegregation," consisting of 22 members, to develop criteria for the study of proposed desegregation plans and to present such criteria to the Board no later than March 2, 1972; (3) the establishment of an "Education and Integration Study Committee," consisting of more than 100 members, under the chairmanship of the superintendent, to review various plans submitted for carrying out the desegregation-integration policy and to present to the Board, no later than May 4, 1972, two or three alternate plans; and (4) the determination that "[o]n May 18, 1972, this Board of Education will adopt one plan to be implemented as fully as possible in September 1972." *320

Both committees met numerous times and completed all work on schedule. On March 2, 1972, the Board adopted 12 criteria for guidance in reviewing the proposed desegregation plans. One of the criteria stated that any desegregation plan should "provide for optimum use of and be capable of being implemented within existing facilities."

Nine desegregation plans were received and studied initially by the "Task Force" and thereafter by the larger Education and Integration Study Committee. The latter committee by a vote of 74 to 4 recommended to the Board a specific desegregation plan known as the Hord-Mailes-Christian-Belden Plan, named after the four sponsoring elementary school principals. The committee also approved two alternate plans and prior to May 4, 1972, presented all three to the Board. These three plans, together with the West-Anderson plan not recommended by the committee, were formally presented to the Board at its meeting held on May 4, 1972.

Due to various objections raised by members of the Board in the ensuing discussion at that meeting, the superintendent decided to develop his own plan. On May 16, 1972, just two days prior to the Board meeting scheduled for final adoption of a desegregation plan, the superintendent announced, in an article appearing in the Santa Barbara News Press, that he proposed recommending a new desegregation plan at that meeting. The next day the same newspaper contained a longer article describing the general outlines of the so-called "Administration Plan." That night the plan was discussed at a meeting of the Education and Integration Study Committee. However, there was no time for study or review prior to the Board meeting the following night.

At its meeting on the next night - May 18, 1972 - the Board discussed the three plans recommended by the committee, the West-Anderson Plan and the Administration Plan. The last named plan was presented orally because it had not yet been reduced to writing. Despite two petitions signed by 3,000 people requesting a postponement for further study, the Administration Plan was adopted by the Board as orally presented. On June 8, 1972, the plan was summarized in writing and submitted

to the State Department of Education for approval.

On June 9, 1972, C. Raymond Mullin and Howard G. Larson, on behalf of themselves and of all other voters, parents and taxpayers similarly situated, commenced the instant action seeking: (1) a writ of mandate to compel a special election of the Board and (2) declaratory ***321** and injunctive relief to prevent the implementation of the allegedly unlawful and inadequate desegregation plan. The complaint contained three causes of action: The first two which we discuss separately (see Part II, *infra*) concerned the validity of the election and composition of the Board; the third cause of action alleged that the adoption of the Administration Plan by the Board was: (1) invalid for failure to give notice as required by the Education Code and (2) an abuse of discretion, in that the Board hurriedly adopted an inadequately studied plan which failed to desegregate all the elementary schools, despite the closing of two elementary schools altogether and the changing of the kindergarten to grade six pattern in two other schools.

Following an eight-day trial, the court filed a memorandum of intended decision. In respect to the third count [FN1] which attacked the validity of the Administration Plan, the court declared its intention to enjoin implementation of the plan. It rested this contemplated action on two bases. First, the court concluded that the Board had no jurisdiction to close the schools since it had failed to include notice of the proposed closure of two schools in its published agenda as required by section 966 of the Education Code. The court determined that the closure of the schools was such an integral part of the Administration Plan that the whole plan must fall. Secondly, the court concluded that the Board abused its discretion by adopting the Administration Plan requiring the closure of two schools since such closure was not reasonably necessary to the effective desegregation of the elementary schools.

> FN1 The memorandum of intended decision also included a proposed decision on the first two causes of action as well, which is discussed in Part II of this opinion.

Before findings of fact and conclusions of law, based on the court's memorandum of intended decision were filed, defendants presented to this court a petition invoking our original jurisdiction and seeking a writ of prohibition restraining the trial court from entering judgment in accord with the memorandum of intended decision. We issued an alternative writ of prohibition. [FN2] On August 28, 1972, plaintiffs petitioned this court to modify the alternative writ so as to omit any stay of the trial court's proposed order enjoining implementation of the plan. Since in issuing the alternative writ, we had determined that the petition had made a prima facie showing that the proposed action of the trial court ***322** was in excess of its jurisdiction and therefore that its proposed enjoining of the Administration Plan must be prohibited pending our final determination of the issue, we denied the petition for modification.

> FN2 As prayed for in the petition, the alternative writ of prohibition was limited in effect to the intended decision on the third cause of action. The trial court thereafter entered judgment on the first two causes of action and defendants appealed. We ordered such appeal transferred from the Court of Appeal to this court so that we could consider it simultaneously with the writ proceeding.

Subsequently an additional factor was injected into the resolution of the above proceeding with the adoption by the electorate at the general election held on November 7, 1972, of the initiative measure denominated Proposition 21. Section 1 of that proposition added to the Education Code section 1009.6 providing: "No public school student shall, because of his race, creed, or color, be assigned to or be required to attend a particular school." Sections 2 and 3 of Proposition 21 repealed sections 5002 and 5003 [FN3] respectively of the Education Code, which had declared the state policy of eliminating racial imbalance in California schools and had delineated the various factors to be considered in implementing this policy. Section 4 of Proposition 21, repealed the administrative guidelines toward achieving racial balance in the schools adopted by the State Board of Education. (§§ 14020 and 14021 of tit. 5 of the Cal. Admin. Code.) ***323**

> FN3 Section 5002 provides: "It is the declared policy of the Legislature that persons or agencies responsible for the establishment of school attendance centers or the assignment of pupils thereto shall prevent and eliminate racial and ethnic imbalance in pupil enrollment. The prevention and elimination of such imbalance shall be given high priority in all decisions relating to school sites, school attendance areas, and school attendance practices."

dance practices."

Section 5003 provides: "(a) In carrying out the policy of Section 5002, consideration shall be given to the following factors:

"(1) A comparison of the numbers and percentages of pupils of each racial and ethnic group in the district with their numbers and percentages in each school and each grade.

"(2) A comparison of the numbers and percentages of pupils of each racial and ethnic group in certain schools with those in other schools in adjacent areas of the district.

"(3) Trends and rates of population change among racial and ethnic groups within the total district, in each school, and in each grade.

"(4) The effects on the racial and ethnic composition of each school and each grade of alternate plans for selecting or enlarging school sites, or for establishing or altering school attendance areas and school attendance practices.

"(b) The governing board of each school district shall periodically, at such time and in such form as the Department of Education shall prescribe, submit statistics sufficient to enable a determination to be made of the numbers and percentages of the various racial and ethnic groups in every public school under the jurisdiction of each such governing board.

"(c) For purposes of Section 5002 and this section, a racial or ethnic imbalance is indicated in a school if the percentage of pupils of one or more racial or ethnic groups differs significantly from the districtwide percentage.

"(d) A district shall study and consider plans which would result in alternative pupil distributions which would remedy such an imbalance upon a finding by the Department of Education that the percentage of pupils of one or more racial or ethnic groups in a school differs significantly from the district-wide percentage. A district undertaking such a study may consider among feasibility factors the following:

"(1) Traditional factors used in site selection, boundary determination, and school organization by grade level.

"(2) The factors mentioned in subdivision (a) of this section.

"(3) The high priority established in Section 5002.

"(4) The effect of such alternative plans on the educational programs in that district.

"In considering such alternative plans the district shall analyze the total educational impact of such plans on the pupils of the district. Reports of such a district study and resulting plans of action, with schedules for implementation, shall be submitted to the Department of Education, for its acceptance or rejection, at such time and in such form as the department shall prescribe. The department shall determine the adequacy of alternative district plans and implementation schedules and shall report its findings as to the adequacy of alternative district plans and implementation schedules to the State Board of Education. A summary report of the findings of the department pursuant to this section shall be submitted to the Legislature each year.

"(e) The State Board of Education shall adopt rules and regulations to carry out the intent of Section 5002 and this section."

Since the Administration Plan was adopted by the Board pursuant to and in furtherance of the repealed code sections, and since the plan involved the assignment of various ethnic minority students to certain schools in order to create a racial balance among the elementary schools in the district, Proposition 21, if valid, would provide an independent basis to support the trial court's intended invalidation of the Administration Plan. This court has, therefore, allowed various amici curiae to file briefs directed to the question of the validity and constitutionality of Proposition 21.

In 1970 the Legislature had added to the Education Code, [FN4] section 1009.5 which provided: "No governing board of a school district shall require any student or pupil to be transported for any purpose or for any reason without the written permission of the parent or guardian." This court in *San Francisco Unified School Dist.* v. *Johnson* (1971) 3 Cal.3d 937 [92 Cal.Rptr. 309, 479 P.2d 669] observed that this section was reasonably susceptible of two interpretations: "The ambiguity of section 1009.5 inheres in the phrase '*require*ee any student or pupil to be transported.' [Fn. omitted.] (Italics added.) One may 'require' a student to be transported by punishing a refusal or by physically forcing him onto a school bus; in a second sense, one may 'require' a student to be transported by *assigning* him to a school beyond walking distance of his home." (

> FN4 Hereafter, unless otherwise indicated, all section references are to the Education Code. *Id.* at p. 945.) We reasoned that if the section were construed to prohibit assignment of pupils to a school beyond a reasonable walking distance from the pupil's home it would be unconstitutional. Applying the doctrine that where possible a statute will be construed in a manner that would uphold its constitutionality, we accordingly held that "section 1009.5 does no more than prohibit a school district from compelling ***324** students, without parental consent, to use means of transportation furnished by the district." (*Id.* at p. 942.)

Shortly after our decision in *Johnson*, the Legislature passed the Bagley Act adding sections 5002 and 5003 (see fn. 3, *ante*) which directed school districts to "eliminate racial and ethnic imbalance in pupil enrollment" and specified certain factors to be considered in developing plans to achieve racial balance. The proponents of Proposition 21 in their published argument in support of the proposition characterized the Bagley Act as a "forced integration measure ... which could only be accomplished through forced busing ... without regard to neighborhood schools or parental consent." They asserted opposition to "mandatory busing for the sole purpose of achieving forced integration" and to "reassign[ing] pupils from their neighborhood schools to achieve racial and ethnic balance." Proposition 21 purported to eliminate this evil by repealing the Bagley Act (§§ 5002 and 5003), as well as the complementary administrative regulations, and by adding section 1009.6 which would prohibit forced integration and mandatory busing by denying the school district's power to assign pupils to schools on the basis of race.

Defendants and various amici curiae urge that Proposition 21 is unconstitutional in its entirety, both insofar as it added section 1009.6 and as it repealed sections 5002 and 5003 along with the administrative guidelines.

We declared in *Johnson* that section 1009.5, if construed to bar assignment of pupils to a school beyond reasonable walking distance "would be unconstitutional if applied to districts manifesting racial segregation, whether de jure or de facto in character." (*San Francisco Unified School Dist. v. Johnson, supra*, 3 Cal.3d at p. 954.) Section 1009.6 which bars the assignment of pupils on the basis of race is unconstitutional in the same manner and for the same reasons set forth by us in *Johnson*. We deem it unnecessary to repeat here at length our rationale in that case; our opinion speaks for itself. We merely outline here its essentials, and underscore our conclusions with reference to subsequent United States Supreme Court cases.

First: We emphasized in *Johnson* that "Often the most effective program, and at times the only program, which will eliminate segregated schools requires pupil reassignment and busing. ... Since the U.S. Supreme Court has held that under the Constitution school boards in *de jure segregated districts* are 'clearly charged with the affirmative duty to ***325** take whatever steps might be necessary' to eliminate segregation 'root and branch,' a statute which would proscribe a principal, and in some cases essential and exclusive step to achieve that end, must obviously violate constitutional requirements." (*San Francisco Unified School Dist. v. Johnson, supra*, 3 Cal.3d 937, 955.) (Italics added.)

Approximately three months after we expressed these views in *Johnson* in dealing with section 1009.5, the United States Supreme Court in *Board of Education v. Swann* (1971) 402 U.S. 43 [28 L.Ed.2d 586, 91 S.Ct. 1284] struck down a statute virtually identical with section 1009.6 [FN5] (added to the code in 1972 by Proposition 21) with an unmistakably clear and forceful expression of the same constitutional mandate. "Just as the race of students must be considered in determining whether a constitutional violation has occurred, so also must race be con-

sidered in formulating a remedy. To forbid ... all assignments made on the basis of race would deprive school authorities of the one tool absolutely essential to fulfillment of their constitutional obligation to eliminate dual school systems. [¶] Similarly, the flat prohibition against assignment of students for the purpose of creating a racial balance must inevitably conflict with the duty of school authorities to disestablish dual school systems. ... [¶] We likewise conclude that an absolute prohibition against transportation of students assigned on the basis of race, 'or for the purpose of creating a balance or ratio,' will similarly hamper the ability of local authorities to effectively remedy constitutional violations." (

> FN5 North Carolina General Statutes section 115-176.1 (Supp. 1969) provides in relevant part: "No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin, or for the purpose of creating a balance or ratio of race, religion or national origins. Involuntary bussing of students in contravention of this article is prohibited ...." *Id.* at p. 46 [28 L.Ed.2d at p. 589].)

Second: We further held in *Johnson* that section 1009.5 was unconstitutional as applied to school districts manifesting de facto as well as de jure racial segregation. Citing a number of decisions of lower federal courts (3 Cal.3d at p. 956, fns. 21-23), we observed that they had not drawn a clear distinction between de facto and de jure segregation and that some of them had defined de facto segregation as "that resulting from residential patterns in a nonracially motivated neighborhood school system." (*Id.* at p. 956, fn. omitted; citing inter alia, *Keyes v. School District Number One, Denver, Colorado* (D.Colo. 1970) 313 F.Supp. 61, 73-75; *Swann v. Charlotte-Mecklenburg Bd. of Educ.* (4th Cir. 1970) 431 F.2d 138, 141; 3 Cal.3d at p. 956, fns. 21 and 22.) We noted the necessary ***326** influence of school board decisions on the racial composition of residential areas.

Canvassing these federal precedents we concluded: "Thus under the current pattern of court decisions, neither school districts nor lower courts can determine with any confidence whether a pattern of school segregation should be classed as de facto or de jure. Consequently, if we held section 1009.5 unconstitutional only as applied to districts of de jure segregation, no school board in California ... could ascertain whether section 1009.5 could constitutionally apply within its district. Such a holding would, therefore, entail uncertain enforcement of section 1009.5, a confusion which would inhibit and delay school boards in their efforts to bring about full equality of educational opportunity. The *Green* decision [*Green v. County School Board* (1968) 391 U.S. 430 (20 L.Ed.2d 716, 88 S.Ct. 1689)] calls for desegregation now; a statute which imports confusion and delay in the uprooting of de jure segregation violates both the rule prohibiting partial enforcement of legislation, when such enforcement entails the danger of vague future application, and the mandate of the Supreme Court of the United States." (*San Francisco Unified School Dist. v. Johnson, supra*, 3 Cal.3d at p. 957.)

(1) This reasoning has been substantially buttressed by the recent decision of the United States Supreme Court in *Keyes v. School District, No. 1, Denver, Colo.* (1973) 413 U.S. 189 [37 L.Ed.2d 548, 93 S.Ct. 2686]. In *Keyes* the high court defined de jure segregation as "current condition of segregation resulting from intentional state action." (*Id.* at p. 205 [37 L.Ed.2d at pp. 561-562].) As potentially probative of an intentional segregative action on the part of school boards, the court referred to "policies and practices with respect to schoolsite location, school size, school renovations and additions, student-attendance zones, student assignment and transfer options, mobile classroom units, transportation of students, assignment of faculty and staff etc." (*Id.* at pp. 213-214 [37 L.Ed.2d at p. 566].)

The high court further emphasized that segregatory intent on the part of the school board is not limited to actions in the immediate present. "We reject any suggestion that remoteness in time has any relevance to the issue of intent. If the actions of school authorities were to any degree motivated by segregative intent and the segregation resulting from those actions continues to exist, the fact of remoteness in time certainly does not make those actions any less 'intentional.'" (*Id.* at p. 210 [37 L.Ed.2d at p. 564].) We read this to mean that a school board therefore can ascertain ***327** whether the segregation present in its district is de jure or de facto only by examining the full history of acts by the school authorities and determining if, at any time in that course of action, some acts were undertaken with segregatory intent. We think it is clear that no school board or lower court can ascertain with any degree of confidence whether section 1009.6 can constitutionally apply in its district and we further believe that

therefore a determination by this court that section 1009.6 can apply to districts manifesting de facto segregation would involve uncertain enforcement and improperly delay elimination of de jure segregation.

The Supreme Court has continuously reiterated its commitment to eliminating de jure racial segregation and its unwillingness to accept any limitation upon procedures necessary to the resolute and thorough accomplishment of that task. To allow school authorities to rest content in the assumption that the pattern of segregation in their district is de facto and therefore to claim that section 1009.6 prohibits them from eliminating that segregation by pupil assignment on the basis of race implemented through busing, would impermissibly impede the constitutionally mandated task of rooting out de jure segregation. "[I]f a state-imposed limitation on a school authority's discretion operates to inhibit or obstruct the operation of a unitary school system or impede the disestablishing of a dual school system, it must fall; state policy must give way when it operates to hinder vindication of federal constitutional guarantees." (*Board of Education v. Swann, supra,* 402 U.S. at p. 45 [28 L.Ed.2d at p. 589].)

The high court has also recognized the discouraging fact of the "dilatory tactics of many school authorities"; the "failure of local authorities to meet their constitutional obligations [has] aggravated the massive problem of converting from the state-enforced discrimination of racially separate school [s]." (*Swann v. Board of Education* (1971) 402 U.S. 1, 14 [28 L.Ed.2d 554, 565, 91 S.Ct. 1267].) In view of this history, it is all too clear to us that the elimination of de jure segregation would be seriously impeded if school authorities could claim a legal disability to assign or bus pupils merely by asserting that the segregation in their district was de facto in origin.

Consistently with our earlier holding in *Johnson* and indeed under the compulsion of the decisions of the United States Supreme Court in *Swann* and *Keyes* which confirm our views in *Johnson*, we hold, as ***328** indeed we must, that section 1009.6 as applied to school districts manifesting either de jure or de facto segregation is unconstitutional.

We proceed to consider a related issue. It will be recalled that Proposition 21 not only added section 1009.6 but also repealed sections 5002 and 5003 as well as certain administrative guidelines. (See fn. 3, *ante*.) Various amici curiae urge that the repealing provisions of Proposition 21 (i.e., §§ 2, 3 and 4) are also unconstitutional, on two grounds: (1) the repeal of these sections significantly encourages and involves the state in racial discrimination and (2) even if constitutional in themselves, the repealing provisions are tainted by the unconstitutional portion of Proposition 21 and cannot be severed from it.

On the first point amici argue that our holding in *Mulkey v. Reitman* (1966) 64 Cal.2d 529 [50 Cal.Rptr. 881, 413 P.2d 825] compels the conclusion that the repealing provisions are themselves unconstitutional. In *Mulkey* we held unconstitutional as violative of the equal protection clause of the Fourteenth Amendment of the United States Constitution, article I, section 26 of the California Constitution, an initiative measure appearing as Proposition 14 on the statewide ballot in the general election of 1964 and adopted by the electorate. That proposition nullified state statutes aimed at eliminating racial discrimination in housing and barred the state from legislating in the future so as to limit the right of private discrimination in the sale or leasing of property. We there focused on the distinction between racial discrimination resulting from state action and that resulting from the private acts of individuals, framing the issue before us thusly: "The only real question ... is whether the discrimination results solely from the claimed private action or instead results at least in part from state action which is sufficiently involved to bring the matter within the proscription of the Fourteenth Amendment." (*Mulkey v. Reitman, supra,* 64 Cal.2d at p. 536.) Finding the requisite state action, we concluded: "Here the state has affirmatively acted to change its existing laws from a situation wherein the discrimination practiced was legally restricted to one wherein it is encouraged .... Certainly the act of which complaint is made is as much, if not more, the legislative action which authorized private discrimination as it is the final, private act of discrimination itself. ... When the electorate assumes to exercise the lawmaking function, then the electorate is as much a state agency as any of its elected officials." (*Id.* at p. 542.) Amici contend that the repealing portions of Proposition 21 (i.e., §§ 2, 3 and 4) similarly were intended to, and will result in, preserving racial discrimination and ***329** segregation, in this instance in the school systems, and thus that the very passage of Proposition 21 involves the state in racial discrimination.

However, *Mulkey* is actually of no assistance to the amici's argument. The mere fact that the initiative meas-

ures in both instances - Proposition 14 in *Mulkey* and Proposition 21 in the case at bench - represent state action proves nothing, since in the instant case, the state, *independent of the passage of Proposition 21*, is involved in education. Indeed in *Mulkey* we noted this critical difference: "[I]n *Jackson v. Pasadena City School Dist.*, ... the state, because it had undertaken through school districts to provide educational facilities to the youth of the state, was required to do so in a manner which avoided segregation and unreasonable racial imbalance in its schools." (*Mulkey v. Reitman, supra*, 64 Cal.2d at p. 537.) Proposition 21 by repealing the involvement of the state government in discharging the state's duty not to segregate, neither abrogated the school district's constitutional duty not to segregate nor removed the state from involvement through local school districts in the field of education. There is no problem of state involvement under the Fourteenth Amendment - it is simply a question whether the state involvement shall be solely by the local school districts or shall include involvement by the state government as well.

Amici curiae assert that, prior to the adoption of sections 14020 and 14021 of title 5 of the California Administrative Code and the passage of sections 5002 and 5003, local school districts had been very slow in seeking and achieving racial balance in the school system. As a result of the adoption of these sections and their enforcement in the courts, there was a significantly increased activity directed toward preventing, reducing and eliminating racial imbalance in the schools. It appears clear, amici argue, that the repeal pursuant to Proposition 21 (see fn. 3, *ante*, and accompanying test) of sections 5002 and 5003 will have the effect of retarding, if not reversing, this process of establishing racial balance in the schools of California. Finally, it is urged, the avowed purpose of Proposition 21 was opposition to these sections as a "forced integration measure ... which could only be accomplished through forced busing ... without regard to neighborhood schools or parental consent." (Ballot Pamphlet, argument in favor of Proposition 21, as presented to the voters of the State of California, General Election (Nov. 7, 1972).)

In one respect the gist of amici's argument is to ask this court to take judicial notice that local school districts fail to fulfill their constitutional obligation to desegregate, and thus to conclude that the passage of ***330** Proposition 21 constituted state involvement in racial discrimination. Even if it were within our province to take such judicial notice, no facts have been presented to us supportive of amici's contention.

In another respect, the essence of the argument is to assert that the policy of the Legislature declared in sections 5002 and 5003 is inherently invulnerable to change through an initiative measure. On the contrary, since racial balance determined according to a precise statutory formula is not a constitutional prerequisite but a matter of state policy, the people of California through the initiative process, have the power to declare state policy. The repealing provisions of Proposition 21 can conceivably be interpreted as an expression by the people of this state of their preference for a "neighborhood school policy." (See *Keyes v. School Dist. No. 1, Denver, Colo., supra*, 413 U.S. at p. 206 [37 L.Ed.2d at p. 562].) We deem it unnecessary to the resolution of the issues now before us to determine precisely what was the intention of the electorate in this respect and accordingly intimate no views on the subject. (2) We merely conclude that since a policy in favor of neighborhood schools is a reasonably conceivable one and since such an expression of policy can in no way limit or affect the constitutional obligations of school districts, the repealing provisions found in sections 2, 3 and 4 cannot be struck down as constitutionally impermissible. It may be that our assessment of the people's desires in this respect is erroneous; if so, constitutional processes are available to the people to reinstate what has been repealed.

We turn now to the second point of the argument, namely that the repealing sections of Proposition 21 (i.e., §§ 2, 3 and 4) cannot be severed from the unconstitutional portion thereof (i.e., § 1 adding § 1009.6 to the Ed. Code) and therefore the proposition in its entirety must fall as unconstitutional.

The rule on severability is set forth in *In re Blaney* (1947) 30 Cal.2d 643, 655 [184 P.2d 892]: "But if the statute is not severable, then the void part taints the remainder and the whole becomes a nullity. It is also true that in considering the issue of severability, it must be recognized that the general presumption of constitutionality, fortified by the express statement of a severability clause, normally calls for sustaining any valid portion of a statute unconstitutional in part. *This is possible and proper where the language of the statute is mechanically severable*, that is, where the valid and invalid parts can be separated by

paragraph, sentence, clause, phrase, or even single words. [Citations.] On the other hand, where there is no possibility of mechanical severance, as where the ***331** language is so broad as to cover subjects within and without the legislative power, and the defect cannot be cured by excising any word or group of words, the problem is quite different and more difficult of solution." (Italics added.) (In accord: *Villa v. Hall* (1971) 6 Cal.3d 227, 236 [98 Cal.Rptr. 460, 490 P.2d 1148]; *Mulkey* v. *Reitman, supra,* 64 Cal.2d 529, 543-544; *In re Portnoy* (1942) 21 Cal.2d 237, 242 [131 P.2d 1]; *In re Bell* (1942) 19 Cal.2d 488, 498 [122 P.2d 22]; *Bacon Service Corporation* v. *Huss* (1926) 199 Cal. 21, 32-33 [248 P. 235]; *McCafferty* v. *Board of Supervisors* (1969) 3 Cal.App.3d 190, 193 [83 Cal.Rptr. 229].)

Proposition 21 contained a severability clause. [FN6] The valid repealing portions can easily and accurately be mechanically severed from the invalid portion enacting section 1009.6. "Although not conclusive, a severability clause normally calls for sustaining the valid part of the enactment, especially when the invalid part is mechanically severable. [Citation.]" (*McCafferty v. Board of Supervisors, supra,* 3 Cal.App.3d at p. 193.) Such a clause plus the ability to mechanically sever the invalid part while normally allowing severability, does not conclusively dictate it. The final determination depends on whether "the remainder ... is complete in itself and would have been adopted by the legislative body had the latter foreseen the partial invalidation of the statute" (*In re Bell, supra,* 19 Cal.2d 488, 498) or "constitutes a completely operative expression of the legislative intent ... [and] are [not] so connected with the rest of the statute as to be inseparable." (*In re Portnoy, supra,* 21 Cal.2d at p. 242.)

> FN6 "If any provision of this act or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable."

Amici curiae merely assert that the various portions of the proposition are clearly inseparable. However, it seems that the valid and invalid portions of the proposition, while subsumed within an overall purpose to eliminate forced integration by busing without regard to the desirability of maintaining neighborhood schools, reflect separable methods of achieving this purpose. The repealing provisions (the valid part) would eliminate a commitment to achieving racial balance in the schools, leaving local school districts with sole responsibility and without direction other than constitutional mandate; the enactment of section 1009.6 (the invalid part) went further and forced upon the local school districts the neighborhood school concept without forced busing as the only acceptable policy. Even though this restriction of local school ***332** district discretion is unconstitutional and therefore the full purpose of Proposition 21 cannot be realized, it seems eminently reasonable to suppose that those who favor the proposition would be happy to achieve at least some substantial portion of their purpose, namely to eliminate a state commitment to racial balance in the schools regardless of other considerations, and thereby to allow local control subject only to constitutional restriction. (3) Thus, the repealing provisions are not only mechanically severable in that they are physically separate sections of the proposition, but they are also severable as to purpose and method, of independent validity and not inconsistent with the elimination of the invalid part. We hold the repealing portions of Proposition 21 to be severable. We cannot say that these portions must necessarily fall, because we hold section 1009.6 unconstitutional. [FN7]

> FN7 Amici curiae also urge that a different test should be applied to the severability of portions of an initiative measure than the above described test applied to statutes passed by the Legislature. However, in applying settled rules of severability, we can discern no meaningful distinctions between statutes "enacted" by the people and statutes enacted by the Legislature. The cases cited by amici curiae (e.g., *Bennett v. Drullard* (1915) 27 Cal.App. 180 [149 P. 368]; *Alexander* v. *Mitchell* (1953) 119 Cal.App.2d 816 [260 P.2d 261]) involved the question of severability prior to submission to a vote and also tested severability by the degree of integration between the valid and invalid parts. However, integration is determined by the test set forth by us *supra.*

We therefore conclude that Proposition 21 does not provide an independent basis for sustaining the trial court's intended injunction of the implementation of the Administration Plan since section 1009.6 added to the Education Code by the proposition bars assignment of public school

students by race and is therefore unconstitutional and void under the decisional law of the United States Supreme Court and of this court, regardless of the proposition's effective repeal of other sections of the code.

We accordingly proceed to address ourselves to the question whether entry of judgment by the trial court on the third count in accord with its memorandum of intended decision would be an act in excess of its jurisdiction. As we have already stated, the court intended to enjoin implementation of the Administration Plan on two grounds: (1) that the Board had no jurisdiction to close the Garfield and Jefferson Schools because it had failed to include notice of the proposed closure of these schools in its published agenda as required by section 966; (2) that the Board abused its discretion in adopting the Administration Plan which required the closure of the above two schools, when in fact their closure was not reasonably necessary to effective desegregation. ***333**

Section 966 requires a school board to act at meetings open to the public, with certain exceptions relating to personnel and pupil discipline matters, and to post an agenda 48 hours prior to the meeting containing "[a] list of items that will constitute the agenda for all regular meetings." [FN8] In *Carlson* v. *Paradise Unified Sch. Dist.* (1971) 18 Cal.App.3d 196 [95 Cal.Rptr. 650], the court held the provisions of section 966 are mandatory, so that noncompliance therewith by failing to list an item of business on the agenda invalidates the board's action in respect thereto. In *Carlson* the school board's agenda listed as one item "Continuation school site change." The action in fact taken was to move the "continuation school" to the Canyon View school building, to discontinue elementary education at that school, and to transfer the Canyon View elementary pupils to Ponderosa School. The court held that the agenda listing "was entirely inadequate notice to a citizenry which may have been concerned over a school *closure* ... was entirely misleading and inadequate to show the whole scope of the board's intended plans." (*Carlson v. Paradise Unified Sch. Dist., supra*, 18 Cal.App.3d at p. 200.)

> FN8 Section 966 provides in pertinent part: "Except as provided in Section 54957 of the Government Code or in Section 967, all meetings of the governing board of any school district shall be open to the public, and all actions ... shall be taken at such meetings and *shall* be subject to the following requirements: ... (b) A list of items that will constitute the agenda for all regular meetings *shall* be posted at a place where parents and teachers may view the same at least 48 hours prior to the time of said regular meeting ...." (Italics added.)

In the case at bench, the posted agenda of the meeting of May 18, 1972, contained under the heading "Desegregation/Integration Plans" Item No. 3a which read as set forth in the margin. [FN9] At the meeting, the Board adopted the Administration Plan, which among other things, closed the Jefferson School and discontinued elementary school education at the Garfield School.

> FN9 Item 3a headed "Desegregation/Integration Plans" read as follows:
>
> "On February 3, 1972 the Board of Education set the following timetable in regard to a Desegregation/Integration Plan for the Elementary District:
>
> "Thursday, May 4, 1972 - Presentation of plans to the Board
> "Thursday, May 18, 1972 - Adoption of a plan by the Board
> "September 1972 - Implementation of plan as fully as possible
>
> "It is expected that the Board will take action at the meeting."

The trial court in its memorandum of intended decision concluded: "There was no possible way [the Administration Plan was not written and was not on file] that the public could discern from the posted agenda that the Board was about to consider the closure of two elementary schools, namely, Jefferson and Garfield, as indispensable ingredients of ***334** any desegregation plan. ... Any possible reference to such matters in a published newspaper article would in no event suffice to cure the deficiency. ... The Board did not comply with the provisions

of section 966. It therefore lacked jurisdiction to adopt the Administration Plan .... The closure of the Jefferson and Garfield elementary schools is essential to this plan, and invalidates the same."

The Board contends that by listing adoption of a desegregation/integration plan, the posted agenda gave full and adequate notice of a wide range of possible Board actions including possible closure of schools. It is common knowledge that a desegregation/integration plan by its very nature involves a complete reworking of the school system and is likely to involve substantial changes in school attendance patterns, including pupil assignment away from neighborhood schools and busing. Thus, the agenda item gave fair warning to parents of students at any of the elementary schools that the adoption of a plan might result in their children's not attending their neighborhood school, that is Jefferson, Garfield or any other elementary school, as the case might be. The fact that their children might end up attending a different school due to closure of their current school rather than to pupil assignment or school pairing is of little moment. The critical point is that parents were on notice that the Board at its meeting on May 18, 1972, might act in such a way that their children would no longer be able to attend Jefferson or Garfield schools.

This case is therefore clearly distinguishable from *Carlson.* There the item "continuation school site change" would have in no way notified parents of children attending Canyon View Elementary School that their children would be affected by such action and certainly would not have warned them that the school might be closed. It gave fair notice to parents of continuation school students as to impending changes and to people generally concerned about financial expenditures and priorities. However, the item in no way warned Canyon View Elementary School parents that their interests might be vitally affected.

In the case at bench, by contrast, the item concerning the adoption of a "Desegregation/Integration Plan," in our view gives clear notice to parents of students attending Jefferson, Garfield or any other elementary school that their interests might be vitally affected. We do not believe that the agenda item must specify the particular means by which the students involved would be sent to different schools, as for example by pupil assignment, busing, pairing of schools or closure of schools. It ***335** seems to us that all such actions are fairly contained within the comprehensive language of the notice.

Indeed, if the agenda had simply indicated the adoption of a "Desegregation/Integration Plan for the Elementary District," we would entertain no doubt that it would have given adequate notice. However, item 3a on the agenda referred to the sequence of procedures adopted by the Board for formation of an integration plan throughout the year - "Thursday, May 4, 1972 - Presentation of plans to the Board. Thursday, May 18, 1972 - Adoption of a plan by the Board." (See fn. 9, *ante.*) Concerned parents and citizens could reasonably infer from this notice that no new plans were to be presented on May 18 but rather that the Board would adopt one of the plans presented on May 4. If they had no objection to any of these plans, they might reasonably assume there was no need for them to attend the May 18 meeting.

However, the Administration Plan, which had *not* been presented at the May 4 meeting, differed radically from all the previous plans in many respects, most notably in providing for the closure of the Jefferson and Garfield schools. Parents of Jefferson and Garfield elementary school students had no notice that a plan involving closure of those two schools would be considered on May 18. Consequently we think that the notice by referring to the May 4 presentation of plans was misleading, by indicating that only those plans presented on May 4 would be considered for adoption on May 18. This is substantially confirmed by the very elaborate procedures adopted by the Board and participated in by the community in order to prepare and screen plans for presentation to the Board on May 4.

(4a) Section 966 specifies 48 hours' notice with respect to regular meetings. It is a fair construction of the section that a board cannot change its posted agenda within the 48-hour period next immediately preceding a regular meeting; in other words, if a board wishes to change substantially its agenda within that period, it must postpone a meeting at least 48 hours. Since the Administration Plan had not been presented at the May 4 meeting and since it differed substantially from all the other plans, the Board's decision to consider and act upon it represented a substantial deviation from the posted agenda and therefore required an amendment to the agenda and a postponement of the meeting for such a period of time as to provide no less than 48 hours' notice.

It is true that the Board could have adopted a plan involving the *336 closure of schools, if it had posted an agenda merely giving general notice of intention to adopt a desegregation/integration plan. However, once the Board posted notice that it would adopt one of the plans theretofore presented at the May 4 meeting, it thereby limited its power to consider any other substantially different plan since otherwise the posted agenda would be fatally misleading. It then became necessary for the Board to amend the posted agenda and reschedule the meeting so as to afford notice for the period of time specified by the statute.

The Board contends that the misleading effect of the notice was cured by newspaper publicity indicating that a new plan was to be presented at the meeting of May 18. Two newspaper articles appeared explaining some of the details of the new plan. Only one of the two articles was released 48 hours or more before the meeting. (5) Moreover, newspaper publicity cannot replace the proper posting of an agenda. Section 966 requires notice by means of an agenda posted at a specified place. The newspaper article had no official status, its contents had not been checked or authorized by the Board, and there was no guaranty that it would have been read by all persons entitled to notice. On the other hand, under the statute all persons were presumed to know when and where the agenda of a meeting was to be posted and were entitled to rely on the contents of such statutory notice without being required to scour all newspapers and other publications for possible changes.

(4b) Accordingly we conclude that the trial court properly determined, albeit for the wrong reason, that the Board had no jurisdiction to consider or approve the Administration Plan due to its noncompliance with section 966. The trial court would therefore not act in excess of its jurisdiction in enjoining the implementation of the Administration Plan, unless and until the plan was adopted by the Board at a meeting preceded by the posting of an accurate and complete agenda as required by section 966.

The trial court, however, went further in its memorandum of intended decision and purported to permanently enjoin implementation of the Administration Plan on the ground that its adoption was an abuse of discretion by the Board since the closure of the two schools was not reasonably necessary to accomplish desegregation. [FN10] (6) The major premise in the trial court's reasoning - that in desegregating a school *337 system, a school board is limited in the exercise of its powers to those acts reasonably necessary to effectuating desegregation - is utterly without support. The trial court concedes, as indeed it must, that the Board has power to close schools and convert them to other uses. It is, of course true that the Board is not free to exercise this power arbitrarily, but must act reasonably and in accordance with established procedure. "[A] court may not substitute its judgment for that of the administrative board [citation] and if reasonable minds may disagree as to the wisdom of the board's action, its determination must be upheld." (*Manjares v. Newton* (1966) 64 Cal.2d 365, 371 [49 Cal.Rptr. 805, 411 P.2d 901].) We have not found, nor have we been referred to, any authority supportive of the proposition that once a school board undertakes a desegregation/integration plan, its otherwise independent power to close schools becomes limited to closing only those schools which must reasonably be closed in order to accomplish desegregation. Acceptance of such a proposition would blind school boards to the full realities of the world about them, as for example, by directing in effect that they are powerless to close unsafe schools because desegregation might be effectuated without such closure.

> FN10 Plaintiffs also contend that the Board abused its discretion in adopting the Administration Plan because the plan does not meet the requirements of section 5003. Since we have held the repeal of this section valid, this argument must fail.

Indeed the case at bench presents exactly this situation. On August 12, 1971, the Board received a report that the Jefferson school was structurally unsafe within the requirements of section 15503. [FN11] The report recommended that a structural engineer be retained to determine whether the school should be repaired or abandoned, since if it cannot be repaired, it must be abandoned pursuant to section 15516. [FN12] On May 15, 1972, three days before the final meeting of the Board, the superintendent received a report concerning the rehabilitation or replacement costs of the Jefferson school. The report found that it would cost $621,800 to make the existing structure safe and $655,000 to build an entirely new building. Accordingly, in fashioning the Administration Plan, the superintendent made provision therein for closing the Jefferson school. The Board would certainly be properly exercising its discretion in a reasonable manner were it to

approve abandoning this building in view ***338** of the extreme cost. The determination of the questions whether a new school was needed to replace this structure or whether existing facilities could handle the Jefferson school students due to an expected drop in elementary enrollment, was properly within the Board's discretion. We do not think that the Board in exercising this discretion was perforce limited to determining the reasonable necessity of replacing the building and thus automatically precluded from determining the necessity of assigning students in order to achieve desegregation.

FN11 Section 15503, added in 1959 as part of the Field Act, requires all school buildings, not constructed pursuant to the Field Act, to be examined by January 1, 1970, in order to determine whether the building is safe for school use according to the standards set forth in the Field Act (§ 15451 et seq.). If a school building is found to be unsafe, the governing board of that school district must prepare an estimate of the cost necessary to make the building safe.

FN12 Section 15516 provides: "No school building examined and found to be unsafe for school use pursuant to Section 15503 and not repaired or reconstructed in accordance with the provisions of this article shall be used as a school building for elementary and secondary school or community college purposes after June 30, 1975."

In 1969 the Board adopted a master plan to guide the development of the school district. Item 6 of that plan provided: "As soon as funds become available in the Elementary District to provide housing at expanded schools elsewhere, that Garfield School be closed and converted to a Special Education Center to provide for certain parts ... of the Special Education program." The superintendent incorporated this provision into his Administration Plan. Absent proof that there were no school facilities to absorb these students or no need for a special education center, [FN13] the Board, in the reasonable exercise of its discretion, could lawfully take this action. The mere fact that this action was part of a desegregation plan did not automatically strip the Board of its otherwise subsisting authority to act in this area, so that the establishment of an education center was contingent upon it being reasonably necessary to accomplish desegregation .

FN13 School boards have the authority to provide special education programs and facilities. (§§ 6500-6742, 6750-6946.)

(7) Since the trial court proposed to so limit the discretion of the Board, it would be substituting its judgment for that of the school board and therefore acting in excess of its jurisdiction. A writ of prohibition is the appropriate remedy where a threatened judgment of the trial court will be in excess of its jurisdiction. (*City & County of S.F.* v. *Superior Court* (1959) 53 Cal.2d 236, 243 [1 Cal.Rptr. 158, 347 P.2d 294]; 5 Witkin, Cal. Procedure (2d ed. 1971) Extraordinary Writs, §§ 36, 39, pp. 3810-3811, 3813.)

As to the instant writ proceeding (L.A. 30054) which is confined to plaintiffs' third cause of action below, we arrive at these final conclusions: (1) That section 1009.6 being unconstitutional and void does not bar the Board's Administration Plan for desegregation; (2) that the Board's power to close schools exists independently of its constitutional obligation to desegregate and is not contingent upon such closure being ***339** reasonably necessary to effectuate desegregation; (3) that the posted agenda was defective insofar as it related to the closure of the two elementary schools because of the Board's failure to comply with section 966 and that, since said proposed action for closure was an inseparable part of the Administration Plan, the adoption of the plan as a whole was invalid because of such noncompliance; and (4) that in respect to the third count the trial court will not act in excess of its jurisdiction by enjoining the implementation of the Administration Plan upon the basis heretofore set forth by us, namely, for the failure of the Board to comply with section 966 but that in all other respects the intended action of the trial court as set forth in its memorandum of intended decision is in excess of the court's jurisdiction. Nothing herein, of course, shall prevent, or be deemed to prevent, the Board from adopting the Administration Plan at a new meeting held upon proper notice and in compliance with all other legal requirements.

It follows that in L. A. 30054, petitioners (defendants below) are not entitled to a peremptory writ of prohibition restraining respondent court from enjoining the implementation of the Administration Plan for failure of the Board to comply with section 966 but are entitled to such writ restraining the court's intended action in all other

respects. (See *Brown v. Superior Court* (1949) 34 Cal.2d 559, 566 [212 P.2d 878]; see 5 Witkin, Cal. Procedure (2d ed. 1971) p. 3933.) The writ shall issue accordingly.

II

We now turn our attention to the appeal before us. (See fn. 2, *ante*.) This is from a judgment entered on the first two causes of action which were not stayed by our alternative writ of prohibition. The central issue here confronting us is whether the Board may lawfully be the common governing Board of both the Santa Barbara (elementary) School District and the Santa Barbara High School District despite the fact that such districts are not coterminous.

We deem it necessary to set forth the facts in some detail. The original Santa Barbara School District, which was organized sometime in the 1870's, comprised all the public schools within the city limits and conducted classes from kindergarten through high school, under the leadership of the school trustees. The initial charter for the City of Santa Barbara, adopted February 20, 1899, created a school department, consisting of all the public schools in the school district, governed by a ***340** five-man board of education. The charter specified the duties and powers of the board of education in great detail and provided that the board succeeded to all the property and rights of the former school trustees.

In 1902 this single geographical school district was divided functionally into two separate districts: the elementary school district (known as the Santa Barbara School District) and the high school district (known as the Santa Barbara High School District), comprising both junior and senior high schools. The two districts were coterminous; their boundaries were the city limits. The single board of education remained responsible for the governing of all the public schools in the school districts, since the charter was not amended following this functional division into two school districts. Upon the adoption of new charters in 1918 and again in 1927, former provisions dealing with the board of education were revised and simplified by replacing the detailed enumeration of the board's duties and powers with an incorporation of provisions set forth in the general laws of the state. Despite these revisions, nevertheless, the new charters retained a *single* board of education invested with control over all schools in that city. [FN14]

FN14 Section 83 of the Charter of the City of Santa Barbara adopted in 1927 provided:"The Board of Education shall consist of five members. ..."

Section 84 provided: "The Board of Education shall have the entire control and management of the public schools in the city of Santa Barbara in accordance with the constitution and general laws of the state and said board is hereby vested with all the powers and charged with all the duties of such control and management."

Sections 55 and 56 of the charter adopted in 1918 contained virtually identical provisions.

Indeed the 1927 charter specified a single board of education even though the two school districts were no longer coterminous themselves or with the city. From 1902 to 1930 while the elementary school districts remained virtually constant in size, incorporating only minor portions of adjacent unincorporated territory, the high school district annexed large portions of adjacent territory and far outstripped the elementary school district in size. By 1930 the pattern of annexations was complete. The high school district was comprised of the original high school district (i.e., coterminous with the city limits and the elementary school district) plus the geographical area of four additional elementary school districts, Montecito Union School District, Cold Springs School District, Hope School District and Goleta Union School District. These four elementary school districts were annexed solely for the purpose of becoming part of the Santa Barbara High School District. They continued to function as ***341** wholly independent elementary school districts governed by their own elementary school board.

Despite these changes in the composition and size of the elementary and high school districts no change was made in the charter. That instrument continued to direct, as it did upon its adoption in 1927 that there be a single board of education having the entire control and management of all the public schools. In 1939, section 83 of the charter (see fn. 14, *ante*) was amended to provide that the members of the board should serve staggered six-year terms.

No further changes were made in the charter provisions

concerning the board of education until a new charter was adopted in 1967. The new charter retained the provision for a single elective board of education, directed that its adoption should not affect boundaries of existing school districts and generally provided that all other requirements should be "as now or hereafter prescribed by the Education Code." [FN15] Despite the changes in language the new charter provisions continued essentially the same educational scheme. The changes appear to correspond with those introduced into the Education Code in 1963, since section 900 of the charter tracks the language of section 1223 of the code. [FN16] Thus, in short the charter directs that there shall be an elective board of education and leaves other requirements to those found in the code.

FN15 Article IX of the charter headed, Board of Education, provides: "Section 900. State Law Governs. The manner in which, the times at which, and the terms for which the members of the Board of Education shall be elected or appointed, their qualifications, compensation and removal and the number which shall constitute such board shall be as now or hereafter prescribed by the Education Code of the State of California.

"Section 901. Effect of Charter on District. The adoption of this Charter shall not have the effect of creating any new school district nor shall the adoption of this Charter have any effect upon the existence or boundaries of any present school district within the City or of which the City comprises a part."

FN16 Section 1223 of the Education Code provides: "Except as provided in Section 1222, whenever the charter of any city fails to provide for the manner in which, the times at which, or the terms for which the members of the city board of education shall be elected or appointed, for their qualifications, removal, or for the number which shall constitute such board, the provisions of this division shall apply to the matter not provided for."

Section 1224 provides that the members of the board of education shall be elected at large from the territory within the boundaries of the school district or districts under the jurisdiction of the board of education, that for election purposes such territory shall include outside territory annexed to the city for school purposes, and that all qualified electors residing within the full territory shall be eligible to vote for, and ***342** to be a member of, the board of education. [FN17] Therefore all qualified electors residing within the high school district, which is geographically coterminous with the five elementary school districts - the Santa Barbara elementary school district plus the four annexed districts (Montecito, Cold Springs, Hope and Goleta) - are entitled to vote for the city board of education. At the time of trial, there were 80,203 registered voters residing within the high school district, of whom 38, 174 or 47.6 percent resided within the Santa Barbara elementary school district and 42,029 or 52.4 percent resided within the four annexed elementary school districts.

FN17 Section 1224 provides: "The members of any elective city board of education shall be elected at large from the territory within the boundaries of the school district or districts which are under the jurisdiction of the city board of education, whether sitting as a board of education, high school board, or community college board, and any qualified elector of the territory shall be eligible to be a member of such city board of education.

"When outside territory has been annexed to a city for school purposes it shall be deemed a part of the city for the purpose of holding the general municipal election, and shall form one or more election precincts, as may be determined by the legislative authority of the city. The qualified electors of the annexed territory shall vote only for the board of education or the board of school trustees."

The four annexed elementary school districts continued to be governed by four separate elementary school boards elected separately by qualified electors residing within each elementary school district. The Santa Barbara elementary school district, however, did not have its own separate elementary school board. Instead, by virtue of the charter provisions and section 1222 of the Education Code incorporated in the charter (see fn. 15, *ante*), the Santa Barbara elementary school district was governed by the city board of education. [FN18] Thus, an elector residing within one of the four annexed districts, for example Montecito, would be entitled to cast two votes - one to

elect members to the Montecito Elementary School Board from the residents within that district and one to elect members to the city board of education. An elector residing within the Santa Barbara elementary school district would be entitled to cast only one vote - that one being to elect the city board of education.

> FN18 Section 1222 provides: "Whenever the charter of a city comprising in whole or in part an elementary school district, fails to provide for the manner in which, the times at which, and the terms for which the members of the board of education of such city are appointed, and for the number which shall constitute such board, *the governing board of the elementary school district* within which the city is located or with which the city is coterminous *is the board of education of the city.*" (Italics added.)

As mentioned earlier, plaintiffs in their first two causes of action challenge the validity of the law permitting the city board of education to govern both the high school and the elementary school districts, despite the fact that the two districts are not coterminous. The first cause of ***343** action alleged that this system unconstitutionally diluted the vote of each registered voter and taxpayer within the elementary school district by over 100 percent by virtue of the votes cast by that portion of the electorate who live outside the Santa Barbara elementary school district. The second cause of action alleged that this system violated the requirements of section 924 that the governing board of an elementary school district shall consist of members elected at large from the territory comprising the elementary school district.

Following trial by the court on these two causes of action, the court made findings of fact, substantially as recited above and concluded in essence that the above voting scheme was unconstitutional as being violative of the equal protection clause of the Fourteenth Amendment to the United States Constitution. We set forth in pertinent part in the margin the court's detailed conclusions. [FN19] ***344**

> FN19 "4. Insofar as the Board governs the affairs of the Elementary School District the scheme which permits the votes of 38,174 resident electors to be counted equally with the votes of the 42,029 non-resident electors, who are in no way concerned with the government of the Elementary District, constitutes a clear denial, dilution and debasement of the vote of the resident electors of the Elementary District and a deprivation of their constitutional right to the equal protection of the law.
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> "
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> . . . . .
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> "7. The present dual function of the School Board governing a large high school district and much smaller elementary school district does not serve any governmental purpose, but is rather the result of unplanned, irregular annexations to the High School District.
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> "
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> . . . . .
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> "9. The fact in this case that voters who reside outside the boundaries of the Elementary School District, who exceed in number those who reside within the district, are given the right to vote for the School Board which formulates policy for the district, even though they are in no way subject to such policy and do not contribute any tax support thereto, is contrary to the principle that the government is to be chosen by the governed.
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> "10. The equal voting strength principle, which underlies the 'one person, one vote' doctrine, applies in this case to the electoral scheme currently employed in the election of members to the governing board of the Santa Barbara Elementary School District. That principle is violated because the votes of qualified resident electors in the plaintiffs' class are being wrongfully denied, debased and diluted by the votes of non-qualified, non-resident electors in the Elementary District election.
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> "11. There is no State interest sufficiently compelling to justify the voting scheme described herein. That scheme is unconstitutional. It violates the Equal Protection Clause of the Four-

teenth Amendment to the Constitution of the United States.

"

. . . . .

"14. To interpret Section 1224 of the Education Code to sanction the election of a common governing board for two districts whose boundaries are not coterminous, by electing the members of such board at large from the territory of the larger district, which encompasses all of the area of the smaller district plus added territory of the larger district, is to unconstitutionally apply the statute.

"15. Section 1224 of the Education Code must be interpreted to grant common governing powers to an elective city board of education over two or more districts under its jurisdiction only in cases where the boundaries of the governed districts are coterminous. In a case such as here presented, where the boundaries of the districts are not coterminous, Section 1224 may not be so interpreted to grant multiple jurisdiction to such a single elective board."

By way of remedy the court concluded that the Santa Barbara elementary school district must be governed by an independent board of resident electors of the Santa Barbara elementary school district elected at large from the territory within the elementary school district; that the present city board of education should be allowed to continue as the governing board of the high school district; that a new board consisting of five members and governing only the elementary school district should be elected on April 17, 1973, by resident electors within the Santa Barbara elementary school district and take office on July 1, 1973; that the three members with the highest vote should serve until June 30, 1977, and the remaining two members should serve until June 30, 1975, each member of the board thereafter serving a four-year term. Judgment granting a peremptory writ of mandate was entered accordingly. This appeal by defendants followed. [FN20]

FN20 See footnote 2, *ante*, where the procedural history of this appeal as related to the disposition of the third cause of action is explained.

We begin by epitomizing the respective positions of the parties on the appeal. Plaintiffs contend that the method of electing members of the Santa Barbara Board of Education is invalid under the state and federal Constitutions as violative of the "one man, one vote" principle because the votes of *qualified, resident* electors in the elementary school district are debased and diluted by the votes of *nonqualified, nonresident* electors in the elementary district election. Plaintiffs argue that there should be, and the trial court properly ordered, a separate board of education to govern the elementary school district. Defendants, on the other hand, contend that the present method of electing members of the Board complies with applicable state law, that it does not violate the "one man, one vote" rule, and that the trial court's ruling on this issue is in error. (8) As we explain, *infra*, we conclude that there is no constitutional right to a separate, elected elementary board of education, that there is no constitutional infirmity in designating the city board of education, elected from the full territory within its jurisdiction, to govern the lesser, wholly included elementary school district and that the "one man, one vote" principle has no relevancy to this case.

The city board of education is elected. Each qualified elector residing within the high school district, the largest geographical area within the ***345** jurisdiction of the board of education, is eligible to become a member of the board and is entitled to vote in the election. The members are elected at large. Each vote counts equally and is weighted equally. Each qualified elector is governed by the board, subject to the policy adopted by the board, and liable for tax to support the board. It is clear and undeniable that the city board of education is elected in full compliance with the "one man, one vote" principle.

Indeed, as they must, plaintiffs concede the election of the city board of education is valid. However, plaintiffs claim that the election of the city board of education is also an election of the governing board of the Santa Barbara elementary school district and that the *latter* election violates the "one man, one vote" principle because the votes of nonresident electors dilute the votes of the electors residing in the Santa Barbara elementary school district. There is no basis in law or fact to support this claim. There is a single city board of education which is elected in a single election by qualified resident electors. This single city

board of education, by virtue of section 1222, (see fn. 18, *ante*) is the governing board of the Santa Barbara elementary school district. [FN21] The city board of education, which is elected in accordance with section 1224 (see fn. 17 *ante*) is designated by the Legislature in section 1222 to govern the Santa Barbara elementary school district.

FN21 See test accompanying footnotes 15 and 16, *ante*.

Thus, it is abundantly clear that the election of the city board of education is a single election of a single board. The real claim advanced by plaintiffs is that they, the resident voters, taxpayers and parents within the Santa Barbara elementary school district are entitled to be governed by an independent school board, comprised of members who reside within the district and elected solely by voters who reside in the district. The United States Supreme Court has held to the contrary. In *Sailors* v. *Board of Education* (1966) 387 U.S. 105, 108, 110-111 [18 L.Ed.2d 650, 653, 655, 87 S.Ct. 1549], the high court held that there is no constitutional right to elect members of boards of education: "We find no constitutional reason why state or local officers of the nonlegislative character involved here may not be chosen by the governor, by the legislature, or by some other appointive means rather than by an election. ... [¶] Viable local governments may need many innovations, numerous combinations of old and new devices, great flexibility in municipal arrangements to meet changing urban conditions. We see nothing in the Constitution to prevent experimentation. At least as respects nonlegislative ***346** officers, a State can appoint local officials or elect them or combine the elective and appointive system as was done here. ... For while there was an election here for the local school board, no constitutional complaint is raised respecting that election. Since the choice of members of the county school board did not involve an election and since none was required for these nonlegislative offices, the principle of 'one man, one vote' has no relevancy."

The principles announced in *Sailors* were recently applied in California in *O'Keefe v. Atascadero County Sanitation Dist.* (1971) 21 Cal.App.3d 719 [98 Cal.Rptr. 878] to a factual situation so closely analogous to the facts in this case that we regard that case as highly persuasive authority. In *O'Keefe* the residents of the Atascadero sanitation district, which was located in San Luis Obispo County, challenged the procedure by which the directors of the sanitation district were selected. The county is divided into five districts for the purpose of electing the board of supervisors. The sanitation district was located wholly within the boundaries of one of the five supervisorial districts. The population within the sanitation district was approximately 10 percent of the county population. By virtue of state law, the directors of the sanitation district were the board of supervisors. Since the residents of the sanitation district lived wholly within one supervisorial district, they were able to vote for only one director, while the other nonresident voters elected the other four directors of the sanitation district. The sanitation district residents claimed that their votes were diluted and debased by the votes of electors who resided outside the sanitation district but within the county.

The court concluded, however, that the directors of the sanitation district were not elected but designated by the Legislature and that the election of a board of supervisors was a single election of a single board. "The board of directors of a county sanitation district is not elected. Rather, the members of such board are designated in Health and Safety Code section 4730. The composition of the board is determined by the location of the district in relation to other political subdivisions within the county. ... [FN4] [¶] Since the board of directors is not chosen by election, the 'one man, one vote' principle is not applicable .... Appellant argues that the principle nevertheless is applicable under the facts alleged, ***347** because the county board of supervisors is elected [fn. omitted] and the members of the board of directors of the Sanitation District are 'in effect elected once removed.' ... [¶] Under section 4730 the members of the board of directors of a sanitation district are chosen by the Legislature, a method expressly sanctioned in *Sailors*." (*O'Keefe v. Atascadero County Sanitation Dist., supra*, 21 Cal.App.3d at pp. 724-726.)

FN4 "Health and Safety Code section 4730: 'The governing body of a sanitation district is a board of directors of not less than three members. ... If the district includes no territory which is in cities or sanitary districts, then the county board of supervisors is the board of directors of the district.'"

As in *O'Keefe*, the members of the governing board of the Santa Barbara elementary school district are designated by the Legislature. The Legislature in section 1222 (see

fn. 21, *ante*, and accompanying text) designates the city board of education to be the governing board of the Santa Barbara elementary school district. This is an entirely proper procedure under *Sailors*. The fact that the city board of education is elected does not somehow constitute an election "once removed" of the governing board of the Santa Barbara elementary school district just as the election of the county board of supervisors did not constitute an election "once removed" of the directors of the sanitation district in *O'Keefe*.

We discern no constitutional infirmity in a system whereby the Legislature designates an elected city board of education to govern a lesser included elementary school district. We hold therefore that the present method of electing members of the Santa Barbara Board of Education is not violative of either the United States Constitution or the California Constitution and is in all respects valid under applicable state law. [FN22]

> FN22 The second cause of action claiming that the system whereby the city board of education is designated to serve as the governing board of the Santa Barbara elementary school district violated the provisions of section 924 has apparently been abandoned, since the trial court made no mention of it and since it has not been urged on appeal. Moreover, section 1222 rather than section 924 controls where a charter city with a city board of education is involved.

In L.A. 30054 let a peremptory writ of prohibition issue in accordance with the views herein expressed.

In L.A. 30086 the judgment is reversed and the cause is remanded to the trial court with direction to enter judgment in favor of defendants on the first and second stated causes of action set forth in plaintiffs' complaint. ***348**

Petitioners shall recover costs in L.A. 30054 and defendants shall recover costs in L.A. 30086.

Wright, C. J., McComb, J., Tobriner, J., Mosk, J., Clark, J., and Burke, J., [FN*] concurred. ***349**

> FN* Retired Associate Justice of the Supreme Court sitting under assignment by the Chairman of the Judicial Council.

Cal.
Santa Barbara Sch. Dist. v. Superior Court
13 Cal.3d 315, 530 P.2d 605, 118 Cal.Rptr. 637

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CANDID ENTERPRISES, INC., Plaintiff and Respondent,
v.
GROSSMONT UNION HIGH SCHOOL DISTRICT et al., Defendants and Appellants
L.A. No. 31877.

Supreme Court of California
Sep 26, 1985.

SUMMARY

The trial court granted a condominium developer's petition for a writ of mandate ordering a school district to refund fees for construction of additional school facilities, imposed as a condition of granting building permits, and prohibiting the district from collection of further fees. (Superior Court of San Diego County, No. 474776, Joseph A. Kilgarif, Judge.)

The Supreme Court reversed, holding that the School Facilities Act (Gov. Code, § 65970 et seq.), which encourages local school boards to identify and local governments to deal with the problem of overcrowding, and to that end permits the imposition of school-impact fees to finance certain temporary facilities, did not preempt local governments from imposing such fees to finance both temporary and permanent facilities. The court held the school-impact fees did not contradict or duplicate the provisions of the act, and that such fees have not entered an area fully occupied by state law. It further held that, because the act both permitted and recognized local measures, such as the school-impact fees, it did not have implied preemptive effect. The court further held the imposition of the fees did not violate equal protection. (Opinion by Mosk, J., expressing the unanimous view of the court.)

HEADNOTES

Classified to California Digest of Official Reports

(1) Mandamus and Prohibition § 6--Mandamus--Conditions Affecting Issuance-- Acts and Duties Enforceable--Legislation.
The writ of mandate may be used to challenge the validity of a legislative measure.

(2a, 2b, 2c, 2d) Schools § 4--School Districts; Financing; Funds-- School-impact Fees Imposed on Developers--State Preemption.
The imposition by a local government of otherwise valid fees on real property development ("school-impact fees") to cover the cost of constructing and maintaining school facilities attributable to such development, was not preempted by the School Facilities Act (Gov. Code, § 65970 et seq.), where the school-impact fees did not contradict or duplicate the provisions of the act, and where the fees did not enter an area fully occupied by state law. The act does not even purport to deal with the construction of permanent facilities, and does not fully and completely cover the construction of temporary facilities. Moreover, the act recognizes alternative, local financing arrangements.
[See **Cal.Jur.3d,** Municipalities, § 200; **Am.Jur.2d,** Municipal Corporations, Counties, and Other Political Subdivisions, § 375.]

(3) Municipalities § 26--Powers--Police Power--Scope.
Under the police power granted by the Constitution, counties and cities have plenary authority to govern, subject only to the limitation that they exercise this power within their territorial limits and subordinate to state law. (Cal. Const., art. XI, § 7.) Apart from this limitation, the police power of a county or city is as broad as the police power exercised by the Legislature itself.

(4) Municipalities § 55--Ordinances, Bylaws and Resolutions--Validity-- Conflict With Statutes or Charter.
If otherwise valid local legislation conflicts with state law, it is preempted by such law and is void. A conflict exists if the local legislation duplicates, contradicts, or enters an area fully occupied by the general law, either expressly or by legislative implication.

(5) Municipalities § 56--Ordinances, Bylaws and

Resolutions--Validity-- Conflict With Statutes or Charter--Test for Preemption.
In determining whether the Legislature has preempted by implication to the exclusion of local regulation, courts must look to the whole purpose and scope of the legislative scheme. There are three tests: the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become explicitly a matter of state concern; the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the municipality.

(6) Municipalities § 55--Ordinances, Bylaws and Resolutions--Validity-- Conflict With Statutes or Charter--Preemption by Implication.
Preemption of local laws by implication of legislative intent may not be found when the Legislature has expressed its intent to permit local regulations. Similarly, it should not be found when the statutory scheme recognizes local regulations.

(7) Schools § 4--School Districts; Financing; Funds--Fees Imposed on Developers--Validity.
The imposition by the local government of otherwise valid fees on real property development to cover the cost of constructing and maintaining school facilities attributable to such development did not violate equal protection. As an instance of economic regulation, the fees were presumptively constitutional and were validated by their rational relationship to a legitimate public purpose.

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MOSK, J.

The major question we must decide in this case concerns what are commonly referred to as "school-impact fees" - i.e., fees that local ***881** governments impose on real property development to cover the costs of constructing and maintaining school facilities attributable to such development. The precise question is whether the School Facilities Act (sometimes hereafter the Act) (Gov. Code, § 65970 et seq.) [FN1] - which encourages local school boards to identify and local governments to deal with the problem of overcrowding, and to that end permits the imposition of school-impact fees to finance certain temporary facilities - preempts local governments from imposing such fees to finance both temporary and permanent facilities. We answer this question in the negative, and therefore reverse the judgment.

FN1 Unless otherwise noted, all statutory references are to the Government Code.

I

In California the financing of public school facilities has traditionally been the responsibility of local government. "Before the *Serrano* v. *Priest* decision in 1971, school districts supported their activities mainly by levying ad valorem taxes on real property within their districts." (Cal. Building Industry Assn., Financing School Facilities (Apr. 1983) p. 3 (hereafter Financing School Facilities).) Specifically, although school districts had received some state assistance since 1947, and especially since 1952 with the

enactment of the State School Building Aid Law of 1952 (Ed. Code, § 16000 et seq.), they financed the construction and maintenance of school facilities mainly through the issuance of local bonds repaid from real property taxes.

After the *Serrano* decision (5 Cal.3d 584 [96 Cal.Rptr. 601, 487 P.2d 1241, 41 A.L.R.3d 1187]) and to the present day, local government has remained primarily responsible for school facility financing, but has often been thrust into circumstances in which it has been able to discharge its responsibility, if at all, only with the greatest difficulty. In these years, the burden on different localities has been different: extremely heavy on those that have experienced growth in enrollment, light on those that have experienced decline, and somewhere in between on those that have remained stable.

In the early 1970's, because of resistance to increasing real property taxes, localities throughout the state began to experience greater difficulty in obtaining voter approval of bond issues to finance school facility construction and maintenance. As a result, a number of communities chose to impose on developers school-impact fees - such as those at issue here - in order to make new development cover the costs of school facilities attributable to ***882** it. (See, e.g., *Builders Assn. of Santa Clara-Santa Cruz Counties v. Superior Court* (1974) 13 Cal.3d 225 [118 Cal.Rptr. 158, 529 P.2d 582].)

With the passage of Proposition 13 in 1978 the burden of school financing became even heavier. "Proposition 13 prohibits ad valorem property taxes in excess of 1%, except to finance previously authorized indebtedness. Since most localities have reached this 1% limit, school districts cannot raise property taxes even if two-thirds of a district's voters wanted to finance school construction." (Financing School Facilities, *supra*, at p. 4; see Ed. Code, § 17786 ["the Legislature recognizes that the ad valorem tax is no longer available as a source of revenue for the construction of necessary school facilities"].) Moreover, although Proposition 13 authorizes the imposition of "special taxes" by a vote of two-thirds of the electorate, such special taxes have rarely been imposed, remain novel, and as consequence are evidently not perceived as a practical method of school facility financing - especially in view of the need for a two-thirds vote of the electorate to approve them. (Financing School Facilities, *supra*, at pp. 4, 14.)

In the face of such difficulties besetting local governments, the state has not taken over any substantial part of the responsibility of financing school facilities, less still full responsibility. To be sure, in order to implement the *Serrano* decision the Legislature has significantly increased assistance to education. But it has channeled by far the greater part of such assistance into educational programs and the lesser part into school facilities; in fiscal year 1981-1982, for example, only 3.6 percent went for such facilities. (Financing School Facilities, *supra*, at pp. 3, 4, 6.) The Legislature has developed "no long-term, comprehensive solution to the acute and chronic facilities financing needs of local school districts," but rather has enacted merely "a series of stop-gap, patchwork measures." (*Id.* at p. 6.) Moreover, because of, among other things, the state budget crisis in the early 1980's and other factors the Legislature has not adequately funded such measures as it has enacted - indeed, "[i]n the past several years, state-supported construction finance has waned ...." (*Id.* at pp. 6, 16.) Thus, although the burden of financing school facilities appears too heavy for some localities to bear, they continue to bear it in large part alone.

II

In 1974 the Board of Supervisors of San Diego County adopted in the form relevant here a land-use policy, designated Policy I-43 (sometimes hereafter the Policy), to help assure orderly growth in the face of widespread and rapid development and a consequent general increase in population. In the Policy, the board of supervisors described the basic problem: ***883** "In many cases, ... the required public services have not ... been installed by the time the development shows a need. The result has been that residents in the newly developed areas have been inadequately served with schools." It then went on to frame a solution: "Before giving approval to development proposals involving a special use permit or a rezoning, ... the proponent of the development proposal ... [must] make certain provisions, in conjunction with appropriate governmental agencies, to insure: [¶] That the proponent of the development present evidence satis-

factory to the Planning Commission, at the time of its consideration of the matter, and to the Board of Supervisors at the time of its consideration of the matter that public school services will in fact be provided concurrent with the need." As evidence that such services and facilities would be provided, the county accepted so-called "school-availability" letters from the local school districts.

In 1977 respondents Grossmont Union High School District (the District) and its governing board (the Board) recognized that developments being proposed at that time might cause overcrowding, and sent letters to that effect to the county. On the basis of such letters, the planning commission concluded that the District could not in fact provide adequate school facilities concurrent with the need created by the proposed developments, and accordingly permitted few if any such developments to proceed.

In the fall of 1977 the predecessor of petitioner Candid Enterprises, Inc. expressed its willingness to enter into an agreement with the District to permit its development to proceed: it would agree to pay fees for school facilities and the District would issue a school-availability letter to the county indicating that such facilities would be provided. [FN2] The District approved the agreement in principle and, in order to facilitate it and others like it, adopted Revised Policy FF, which allowed for assessment, under Policy I-43, of school-impact fees from developers, to be used for temporary or permanent facilities. In the spring of 1978 the District entered into an agreement with petitioner's predecessor secured by the real property under development. By its terms the developer agreed to pay the established fees at the time it sought building permits, and the District issued a school-availability letter advising the county of the agreement and of its ability to provide adequate school facilities through use of the fees.

FN2 The president of petitioner and its predecessor is one and the same person.

Meanwhile, the School Facilities Act had become effective on January 1, 1978. Under the Act, cities and counties were authorized to enact ordinances to require developers to pay fees for temporary school facilities. ***884** (§ 65974.) In the spring of 1978 the board of supervisors enacted such an ordinance, designated Ordinance 5120. Shortly thereafter, in order to facilitate agreements with developers for the payment of fees for temporary facilities under the Act, the District adopted a resolution finding that conditions of overcrowding existed and that it lacked financial resources to provide additional needed school facilities.

In 1978 and 1979 the District assessed some developers for fees for temporary facilities pursuant to the School Facilities Act and Ordinance 5120; with others it entered into secured agreements for the payment of fees for temporary or permanent facilities, in lieu of School Facilities Act fees, pursuant to Policy I-43 and Revised Policy FF. Because of a districtwide decline in enrollment, in February 1980 the District discontinued collecting School Facilities Act fees. At the same time it also discontinued entering into Policy I-43 secured agreements, although it stated its intent to continue to monitor proposed developments, enter into such agreements when necessary, and collect fees under existing agreements in order to provide adequate facilities concurrent with the need that the subject developments were expected to create.

Petitioner, which had purchased a three-lot condominium project from its predecessor, sought building permits late in 1980. In early 1981 it paid under protest $23,500 in Policy I-43 school-impact fees pursuant to the secured agreement between the District and its predecessor. Petitioner then unsuccessfully sought a refund by a letter to the District. Next it requested to speak to the Board on the matter, and was granted permission. At the meeting petitioner asked that in view of declining districtwide enrollment, the Board refund the fees paid under protest and cancel its secured agreement and all other similar agreements. The Board found that the District (1) discontinued collecting School Facilities Act fees and entering into Policy I-43 secured agreements "since it was projected that funds committed under existing agreements would be sufficient to mitigate future impact[,]" (2) "reserved the right to require the commitment of fees from future developments which promised to upset this condition of balance[,]" and (3) never had "any intention to disregard existing agreements, since the housing from projects covered by those agreements will adversely impact the Dis-

trict at their time of completion." The Board then denied petitioner's request.

Petitioner initiated this proceeding for a writ of mandate pursuant to Code of Civil Procedure sections 1094.5 (administrative mandate) and 1084 (ordinary mandate). Respondents filed a demurrer and an answer. After a hearing the trial court overruled the demurrer and ordered that mandate issue. ***885** From the ensuing judgment respondents appeal, arguing the substantive point that the imposition of Policy I-43 school-impact fees was not invalid on either preemption or equal protection grounds. (1)**(See fn. 3.)** As we explain below, we find their position meritorious. FN3

FN3 Respondents also press the procedural point that their demurrer should have been sustained. This argument, however, is untenable. Although the writ of administrative mandate does not lie because the Board was not required by law to grant petitioner a hearing on its request (Code Civ. Proc., § 1094.5, subd. (a); *Court House Plaza Co. v. City of Palo Alto* (1981) 117 Cal.App.3d 871, 880 [173 Cal.Rptr. 161]), the writ of ordinary mandate is available. Mandate requires that there be no "plain, speedy, and adequate remedy, in the ordinary course of law." (Code Civ. Proc., § 1086.) There was no such remedy here: an action on the contract for refund of fees paid and release from payment of the remainder was inadequate because there were no grounds on which to allege a breach or to seek rescission; no statutory action for a refund then existed, although one now does (§ 65913.5, subd. (e)); and an action for declaratory relief was inappropriate insofar as petitioner was attacking the local legislation as applied (*Mobil Oil Corp. v. Superior Court* (1976) 59 Cal.App.3d 293, 307 [130 Cal.Rptr. 814]). The writ of mandate may of course be used, as it is used here, to challenge the validity of a legislative measure. (E.g., *Jolicoeur v. Mihaly* (1971) 5 Cal.3d 565, 570, fn. 2 [96 Cal.Rptr. 697, 488 P.2d 1].)

III

(2a) Respondents first contend that the imposition of Policy I-43 school-impact fees is not preempted by the School Facilities Act and is accordingly valid. Petitioner concedes as it must that the imposition of school-impact fees is generally valid. (See *Builders Assn. of Santa Clara-Santa Cruz Counties v. Superior Court, supra*, 13 Cal.3d 225, 232, fn. 6.) Respondents proceed to argue successfully that the local legislation is not preempted by the Act on the ground that there is no conflict.

(3) Under the police power granted by the Constitution, counties and cities have plenary authority to govern, subject only to the limitation that they exercise this power within their territorial limits and subordinate to state law. (Cal. Const., art. XI, § 7.) Apart from this limitation, the "police power [of a county or city] under this provision ... is as broad as the police power exercisable by the Legislature itself." (*Birkenfeld v. City of Berkeley* (1976) 17 Cal.3d 129, 140 [130 Cal.Rptr. 465, 550 P.2d 1001].)

(4) If otherwise valid local legislation conflicts with state law, it is preempted by such law and is void. (*People* ex rel. *Deukmejian v. County of Mendocino* (1984) 36 Cal.3d 476, 484 [204 Cal.Rptr. 897, 683 P.2d 1150]; *Lancaster v. Municipal Court* (1972) 6 Cal.3d 805, 807 [100 Cal.Rptr. 609, 494 P.2d 681].) A conflict exists if the local legislation "'duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication.'" (Citations omitted.) (*People* ex rel. *Deukmejian v. County of Mendocino, supra*, 36 Cal.3d at p. 484.) ***886**

(2b) Respondents argue and petitioner concedes that Policy I-43 school-impact fees do not contradict or duplicate the provisions of the School Facilities Act. Respondents further assert that such fees have not entered an area fully occupied by state law. They are persuasive.

First, the area of financing of school facilities needed by new development has not been expressly occupied by state law. The Legislature has not voiced such an intent in any of its enactments, and petitioner admits as much.

Second, the area has not been impliedly occupied by state law. (5) "In determining whether the Legislature has preempted by implication to the exclusion of local regulation we must look to the whole purpose and scope of the legislative scheme. There are three tests: '(1) the subject matter has been so fully and completely covered by general law as to clearly indicate that it has become exclusively a matter of state concern; (2) the subject matter has been partially covered by general law couched in such terms as to indicate clearly that a paramount state concern will not tolerate further or additional local action; or (3) the subject matter has been partially covered by general law, and the subject is of such a nature that the adverse effect of a local ordinance on the transient citizens of the state outweighs the possible benefit to the municipality.'" (*People* ex rel. *Deukmejian v. County of Mendocino, supra*, 36 Cal.3d 476, 485, quoting from *In re Hubbard* (1964) 62 Cal.2d 119, 128 [41 Cal.Rptr. 393, 396 P.2d 809]; accord, *Fisher* v. *City of Berkeley* (1984) 37 Cal.3d 644, 708 [209 Cal.Rptr. 682, 693 P.2d 261] and cases cited.)

(2c) Petitioner concedes, as it must, that the imposition of Policy I-43 school-impact fees does not satisfy the third test, and respondents successfully urge that it satisfies neither of the other two. [FN4]

> FN4 How the relevant field occupied by the allegedly preemptive state legislation is defined is often crucial to the result: "If the definition is narrow, preemption is circumscribed; if it is broad, the sweep of preemption is expanded." (*California Water & Telephone Co.* v. *County of Los Angeles* (1967) 253 Cal.App.2d 16, 27-28 [61 Cal.Rptr. 618]; see *Gregory v. City of San Juan Capistrano* (1983) 142 Cal.App.3d 72, 84 [191 Cal.Rptr. 47].) The issue of definition, however, is not crucial here. Whether the School Facilities Act is held to occupy the narrow field of the financing of temporary facilities (as it evidently should be) or the broad field of the financing of all facilities (as it evidently should not be) is of no consequence in the case before us. As we shall explain, the Act recognizes and in fact permits local action, and thereby fails to occupy either field to the exclusion of local legislation.

First, the subject matter of the local measure - the financing of the construction of both temporary and permanent school facilities to meet the demands imposed by new development - has not been so fully and completely ***887** covered by general law as to clearly indicate that it has become exclusively a matter of state concern.

Taken by itself, the School Facilities Act does not even purport to deal with the construction of permanent facilities (see §§ 65970, subd. (e), 65974), and does not fully and completely cover the construction of temporary facilities. The Act recognizes alternative, local financing arrangements: "One year after receipt of any apportionment pursuant to the Leroy F. Greene State School Building Lease-Purchase Law of 1976 ... for the construction of a school, the city or county shall not be permitted thereafter, pursuant to this chapter *or pursuant to any other school facilities financing arrangement such district may have with builders of residential development*, to levy any fee or to require the dedication of any land within the attendance area of the district." (§ 65979, italics added.) The Act, moreover, clearly permits such arrangements. The school district is required to notify the local legislative body if it finds that "(a) conditions of overcrowding exist in one or more attendance areas within the district which will impair the normal functioning of educational programs including the reason for such conditions existing; and (b) that all reasonable methods of mitigating conditions of overcrowding have been evaluated and no feasible method for reducing such conditions exist [*sic*] ...." (§ 65971.) The Act goes on to define "reasonable methods for mitigating conditions of overcrowding": they "shall include, *but are not limited to*, agreements between a subdivider and the affected school district whereby temporary-use buildings will be leased to the school district or temporary-use buildings owned by the school district will be used." (§ 65973, subd. (b), italics added.)

Even if we consider the School Facilities Act together with other related state legislation, we come to the same conclusion: the subject matter of this local measure has not been fully and completely covered

by state law. Although, as petitioner correctly argues, there are several state and local programs that provide funding for the construction of school facilities, [FN5] the general situation may properly be described in the words already quoted of one of petitioner's principal authorities: "Since the passage of Proposition 13, financing for school construction and facility maintenance has been a series of stop-gap, patchwork measures. There still exists no long-term, comprehensive solution to the acute and chronic facilities financing needs of local school districts." (Financing School Facilities, *supra*, at p. 6.) ***888**

FN5 These include, for example, the School Facilities Act, the Leroy F. Greene State School Building Lease-Purchase Law of 1976 (hereinafter the Greene Act) (Ed. Code, § 17700 et seq.), the Mello-Roos Community Facilities Act of 1982 (§ 53311 et seq.), and the New Schools Relief Act of 1979 (Ed. Code, § 39050 et seq.).

The evident absence of implied preemptive intent in the terms of the School Facilities Act - whether we consider it by itself or with other related legislation - is confirmed by the failure of the Legislature to fully cover the financing of school facilities. First, not all school districts in need of funds for permanent facilities can qualify to receive them under the Greene Act. (See Ed. Code, § 17740.) Second, for a variety of reasons the Legislature has failed to provide adequate funding for even such "stop-gap, patchwork" programs as currently exist. In such circumstances, to construe alternative, local arrangements such as that before us to be preempted would severely impede local governments and school districts in carrying out their responsibilities. It would also frustrate the intent of the Legislature in enacting the School Facilities Act: "Adequate school facilities should be available for children residing in new residential developments." (§ 65970, subd. (a).) Thus, under this test - i.e., whether the subject matter of the local measure has been so fully covered by state law as to clearly indicate that it has become exclusively a matter of state concern - the Act is shown not to be preemptive. [FN6]

FN6 We do not mean to imply that the Legislature may not occupy a field unless it appropriates the funds necessary to carry out its intent. We also note that in some cases the "inadequacy" of state funding may prove to be too speculative or subjective a criterion on which to base a conclusion that the Legislature has not intended to preempt local action.

Second, the subject matter of this local measure has not been partially covered by state law couched in such terms as to indicate clearly that a paramount state concern will not tolerate additional local action. The evidence on which we base our conclusion is compelling: the School Facilities Act, as we have explained, unmistakably recognizes and permits local action. Thus, under this test too the Act is shown not to be preemptive.

(6) To summarize: "Preemption by implication of legislative intent may not be found when the Legislature has expressed its intent to permit local regulations. Similarly, it should not be found when the statutory scheme recognizes local regulations." (*People* ex rel. *Deukmejian v. County of Mendocino, supra*, 36 Cal.3d 476, 485.) (2d) Accordingly, we conclude that the School Facilities Act, because it both permits and recognizes local measures such as this, does not have implied preemptive effect.

To avoid this conclusion, petitioner relies heavily on an opinion by the Attorney General. (62 Ops.Cal.Atty.Gen. 601 (1979).) Among the questions addressed in the opinion is whether the School Facilities Act preempts the imposition of school-impact fees by local government to provide permanent facilities. (*Id.* at p. 601.) To this the Attorney General answered ***889** yes. (*Id.* at pp. 605-609.) The conclusion is erroneous, however, because the analysis is faulty.

First, the opinion reasons that the Act restricts the fees that may be imposed to no more than "'the amount necessary to pay five annual lease payments for the interim facilities,'" and that such a restriction "would be meaningless if a city council or board of supervisors could exact additional developer fees for permanent school facilities." (*Id.* at p. 607, quoting § 65974, subd. (d).) This position might be sound if the Act were intended to limit the authority of local gov-

ernment to make such exactions, but it is not. The purpose of the Act is to encourage local school districts to identify, and local governments to deal with, the effects of residential development on school facilities and to provide local government with "new and improved methods" to cope with the effects of such development "within a reasonable period of time" and on a short-term basis. (See §§ 65970-65971.) Accordingly, the restriction on the amount of fees that may be imposed is properly to be construed as an attempt on the part of the Legislature to ensure that local governments not indefinitely avoid the problem of the construction of permanent facilities by agreeing to the long-term use of temporary facilities.

Second, the opinion reasons that the 1979 addition of section 65980, which expressly limits the scope of the Act to temporary facilities, when as initially enacted it "was arguably broad enough to cover permanent facilities [as well,] ... indicated an intent to restrict the amount and purpose of the fees to be collected from developers." (62 Ops.Cal.Atty.Gen., *supra*, at p. 607.) This position is undermined, however, by the conclusions we reach above: the Legislature evidently intended that local governments use fees authorized by the Act as a short-term solution - *not* that local governments be prohibited from developing and implementing long-term solutions. It is also undermined by the language of section 65979, which was added to the Act at the same time as section 65980: "One year after receipt of an apportionment pursuant to the [Greene Act] .... for the construction of a school, the city or county shall not be permitted thereafter, pursuant to this chapter *or pursuant to any other school facilities financing arrangement such district may have with builders of residential development*, to levy any fee or to require the dedication of any land within the attendance area of the district." (Italics added.) Thus, section 65979 expressly recognizes "other school facilities financing arrangement[s]" between local government and developers, and prohibits exactions pursuant to such arrangements *only* when the locality has received an apportionment for permanent facilities pursuant to the Greene Act. Had the Legislature intended the School ***890** Facilities Act to preempt such "school facilities financing arrangement[s]," the reference to them would have been meaningless.

Third, the opinion reasons by analogy to the Subdivision Map Act that "the express grant of authority to impose school impact fees and dedications upon developers under [the Act], with strict limitations as to amount, evidences an intent by the Legislature to preempt the field to the exclusion of local regulation." (62 Ops.Cal.Atty.Gen., *supra*, at p. 608.) But even if the opinion is correct in concluding that the intent of the Legislature in the Subdivision Map Act is to prohibit local government from making exactions that the Act does not expressly authorize, it errs in reading such an intent into the School Facilities Act. Here the Legislature recognizes (§ 65979) and in fact permits (§§ 65971, 65973, subd. (b)) local legislation, and has accordingly indicated its clear intent that the "new and improved methods of financing for interim school facilities" that the Act provides are merely supplementary to, and not preemptive of, local action (§ 65970, subd. (e)).

IV

(7) Respondents' other contention is that the imposition of Policy I-43 school-impact fees does not violate the equal protection clause and is accordingly valid. This claim too is successful.

The imposition of school-impact fees is an undisputed and indisputable instance of economic regulation. As such, we must review it under "the basic and conventional standard," which "invests legislation ... with a presumption of constitutionality and 'requir[es] merely that distinctions drawn by a challenged [measure] bear some rational relationship to a conceivable legitimate state purpose.'" (*D'Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 16 [112 Cal.Rptr. 786, 520 P.2d 10]; see *Builders Assn. of Santa Clara-Santa Cruz Counties v. Superior Court, supra*, 13 Cal.3d 225, 232-233.) As petitioner implicitly concedes, we may not review the challenged local measure under any stricter standard: developers do not constitute a "suspect class," and development is not a "fundamental interest" (see *Trent Meredith, Inc. v. City of Oxnard* (1981) 114 Cal.App.3d 317, 328 [170 Cal.Rptr. 685]). Under the conventional standard, "the burden of demonstrating the invalidity of a classification ... rests squarely upon *the party who assails it.*" (*D'Amico v. Board of Medical Examiners, supra*, 11 Cal.3d at p. 17, italics

in original.) Petitioner has failed to carry this burden.

If, as respondents argue and we are inclined to hold, the class of similarly situated persons comprises all developers who have entered into a secured ***891** agreement to obtain a school-availability letter, then no discrimination at all appears: the Board has collected fees as they have become due and has stated its intent to continue to collect them. But even if, as petitioner responds, the class comprises all developers who are currently building in the district, still no unlawful discrimination emerges. The Board entered into secured agreements covering certain developments proposed in 1978 and 1979 because it expected them to cause or aggravate overcrowding in neighboring schools. The Board has not entered into such agreements covering developments proposed subsequently because it has not expected them to have such an adverse effect. Thus if developers currently building in the district are treated differently, such difference is reasonable and therefore lawful: developers who are expected to cause or aggravate overcrowding are required to mitigate it, others are not.

The judgment is reversed. [FN7]

> FN7 Because of our disposition we do not reach the question whether petitioner waived its right to the fees it paid under protest by accepting the benefits of the agreement with the District.

Bird, C. J., Kaus, J., Broussard, J., Reynoso, J., Grodin, J., and Lucas, J., concurred. ***892**

Cal.
Candid Enterprises, Inc. v. Grossmont Union High School Dist.
39 Cal.3d 878, 705 P.2d 876, 218 Cal.Rptr. 303, 27 Ed. Law Rep. 950

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C

Effective:[See Text Amendments]

West's Annotated California Codes Currentness
Code of Civil Procedure (Refs & Annos)
Part 3. Of Special Proceedings of a Civil Nature (Refs & Annos)
Title 7. Eminent Domain Law (Refs & Annos)
Chapter 1. General Provisions (Refs & Annos)
→ § 1230.030. Acquisition of property; purchase, eminent domain or other means

Nothing in this title requires that the power of eminent domain be exercised to acquire property necessary for public use. Whether property necessary for public use is to be acquired by purchase or other means or by eminent domain is a decision left to the discretion of the person authorized to acquire the property.

CREDIT(S)

(Added by Stats.1975, c. 1275, p. 3410, § 2, operative July 1, 1976.)

LAW REVISION COMMISSION COMMENTS

1975 Addition

Section 1230.030 makes clear that whether property is to be acquired by purchase or other means, or by exercise of the power of eminent domain, is a discretionary decision. Nothing in this title requires that the power of eminent domain be exercised; but, if the decision is that the power of eminent domain is to be used to acquire property for public use, the provisions of this title apply except as otherwise specifically provided by statute. See Section 1230.020. Compare Govt.Code § 15854 (property acquired pursuant to Property Acquisition Law).

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Assessing the benefits of California's new valuation rule for partial condemnations. Juliet E. Cox, 88 Cal. L. Rev. 565 (2000).

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8 Witkin, California Summary 10th Constitutional Law § 1170, Nature, Organization, and Scope.

UNITED STATES SUPREME COURT

Takings clause, substantial advancement of legitimate state interests test, due process, statute limiting rent paid by dealers leasing company-owned service stations, see Lingle v. Chevron U.S.A. Inc., 2005, 125 S.Ct. 2074, 544 U.S. 528, 161 L.Ed.2d 876, on remand 415 F.3d 1027.

NOTES OF DECISIONS

Effect of land grant 1

1. Effect of land grant

A grant made, with the necessary formalities, by the alcalde of the pueblo of San Francisco, after the acquisition of California by the United States, and before the incorporation of the city, was valid, and operated to deprive the pueblo and its successor, the city, of the right to open streets through the land granted, except upon compensation paid or secured, and in pursuance of proceedings prosecuted for the purpose. Scott v. Dyer (1880) 5 P.C.L.J. 223, 54 Cal. 430. Eminent Domain 95

West's Ann. Cal. C.C.P. § 1230.030, CA CIV PRO § 1230.030

Current with urgency legislation through Ch. 156 of the 2009 Reg.Sess., Ch. 12 of the 2009-2010 2nd Ex.Sess., Ch. 26 of the 2009-2010 3rd Ex.Sess., and Ch. 24 of the 2009-2010 4th Ex.Sess., Governor's Reorganization Plan No. 1 of 2009, Prop. 1F, approved at the 5/19/2009 election, and propositions on the 6/8/2010 ballot received as of 8/1/2009

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Supreme Court of California

WESTERN SECURITY BANK, N.A., Petitioner,

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent;

BEVERLY HILLS BUSINESS BANK et al., Real Parties in Interest. VISTA PLACE ASSOCIATES et al., Petitioners,

v.

THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; WESTERN SECURITY BANK, N.A., et al., Real Parties in Interest.

No. S037504.

Apr 7, 1997.

SUMMARY

After a partnership went into default on a loan it had obtained from a bank, the bank and the partnership modified the terms of the loan, and the general partners obtained unconditional, irrevocable standby letters of credit in favor of the bank as additional collateral. When the partnership again went into default, the bank foreclosed nonjudicially on the real property securing the loan and then presented the letters of credit to the issuer so as to cover the unpaid deficiency. The issuer brought an action for declaratory relief, seeking a declaration that it was not obligated to accept or honor the bank's tender of the letters of credit or, alternatively, a declaration that, if it was required to honor the letters, the partners were obligated to reimburse the issuer. The trial court entered a judgment decreeing that the issuer was required to honor the letters of credit and that the issuer was not barred from severally seeking reimbursement from the partners. (Superior Court of Los Angeles County, No. BC031239, Ernest George Williams, Judge.) The Court of Appeal, Second Dist., Div. Three, No. B066488, reversed, concluding that, under Code Civ. Proc., § 580d, part of the antideficiency law, the issuer of a standby letter of credit, provided to a real property lender by a debtor as additional security, may decline to honor it after receiving notice that it is to be used to discharge a deficiency following the beneficiary-lender's nonjudicial foreclosure on real property. Thereafter, the Legislature enacted urgency legislation (Sen. Bill No. 1612), providing that an otherwise conforming draw on a letter of credit does not contravene the antideficiency laws and that those laws afford no basis for refusal to honor a draw (Code Civ. Proc., § 580.5). After the Supreme Court granted review and returned the matter to the Court of Appeal for reconsideration in light of the urgency legislation, the Court of Appeal concluded the legislation constituted a substantial change in existing law and thus was prospective only and had no impact on the Court of Appeal's earlier conclusions regarding the parties' rights and obligations.

The Supreme Court reversed the judgment of the Court of Appeal and remanded. The court held that the Court of Appeal erred in concluding that the enactment of Sen. Bill No. 1612 had no effect on this case. The Legislature explicitly intended to abrogate the Court of Appeal's prior decision to clarify the parties' obligations when letters of credit support loans also secured by real property. The Court of Appeal mistook standby letters of credit for an attempt to evade the antideficiency and foreclosure laws by seeing them only as a form of guaranty, and also overlooked that the parties specifically intended the standby letters of credit to be additional security. When viewed as additional security for a note also secured by real property, a standby letter of credit does not conflict with the statutory prohibition of deficiency judgments. Further, the Legislature manifestly intended the respective obligations of the parties to a letter of credit transaction to

remain unaffected by the antideficiency laws, whether those obligations arose before or after enactment of Sen. Bill No. 1612. Since the Legislature's action constituted a clarification of the state of the law before the Court of Appeal's decision, rather than a change in the law, the legislation had no impermissible retroactive consequences, and it governed this case. (Opinion by Chin, J., with George, C. J., Baxter, and Brown, JJ., concurring. Concurring and dissenting opinion by Werdegar, J. Concurring and dissenting opinion by Mosk, J., with Kennard, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b, 1c) Letters of Credit § 10--Duties and Privileges of Issuer--Letters Presented to Cover Deficiency--Following Nonjudicial Foreclosure--Retroactivity of New Legislation.
In an action brought by the issuer of letters of credit against a bank that had loaned money to a partnership secured by real property, and against the partnership and its general partners, the Court of Appeal erred in concluding that the Legislature's postjudgment enactment of urgency legislation (Sen. Bill No. 1612), providing that an otherwise conforming draw on a letter of credit does not contravene the antideficiency laws and that those laws afford no basis for refusal to honor a draw (Code Civ. Proc., § 580.5), had no effect on a prior Court of Appeal holding in this case to the effect that, under Code Civ. Proc., § 580d, the issuer of a standby letter of credit, provided to a real property lender by a debtor as additional security, may decline to honor it after receiving notice that it is to be used to discharge a deficiency following the beneficiary-lender's nonjudicial foreclosure on real property. The partners obtained the letters of credit as additional collateral for repayment of the loan and presented the letters for payment to the issuer after the bank foreclosed nonjudicially on the real property. The Legislature explicitly intended to abrogate the Court of Appeal's prior decision to clarify the parties' obligations when letters of credit support loans also secured by real property. The Court of Appeal mistook standby letters of credit for an attempt to evade the antideficiency and foreclosure laws by seeing them only as a form of guaranty, and also overlooked that the parties specifically intended the standby letters of credit to be additional security. When viewed as additional security for a note also secured by real property, a standby letter of credit does not conflict with the statutory prohibition of deficiency judgments. Further, the Legislature manifestly intended the respective obligations of the parties to a letter of credit transaction to remain unaffected by the antideficiency laws, whether those obligations arose before or after enactment of Sen. Bill No. 1612. Since the Legislature's action constituted a clarification of the state of the law before the Court of Appeal's decision, rather than a change in the law, the legislation had no impermissible retroactive consequences, and it governed this case.
[See 3 Witkin, Summary of Cal. Law (9th ed. 1987) Negotiable Instruments, § 11.]
(2) Statutes § 5--Operation and Effect--Retroactivity.
Statutes do not operate retrospectively unless the Legislature plainly intended them to do so. A statute has retrospective effect when it substantially changes the legal consequences of past events. A statute does not operate retrospectively simply because its application depends on facts or conditions existing before its enactment. When the Legislature clearly intends a statute to operate retrospectively, the courts are obliged to carry out that intent unless due process considerations prevent them from doing so.

(3) Statutes § 5--Operation and Effect--Retroactivity--Amendments-- Purpose--Change in Law or Clarification.
A statute that merely clarifies, rather than changes,

existing law does not operate retrospectively even if applied to transactions predating its enactment. The courts assume that the Legislature amends a statute for a purpose, but that purpose need not necessarily be to change the law. The courts' consideration of the surrounding circumstances can indicate that the Legislature made material changes in statutory language in an effort only to clarify a statute's true meaning. Such a legislative act has no retrospective effect because the true meaning of the statute remains the same. One such circumstance is when the Legislature promptly reacts to the emergence of a novel question of statutory interpretation. An amendment that in effect construes and clarifies a prior statute must be accepted as the legislative declaration of the meaning of the original act, where the amendment was adopted soon after the controversy arose concerning the proper interpretation of the statute. In such a case, the amendment may logically be regarded as a legislative interpretation of the original act-a formal change-rebutting the presumption of substantial change. Even so, a legislative declaration of an existing statute's meaning is neither binding nor conclusive in construing the statute. Ultimately, the interpretation of a statute is an exercise of the judicial power that the Constitution assigns to the courts.

(4) Statutes § 5--Operation and Effect--Retroactivity--Legislative Intent-- Change in Law or Clarification.
A subsequent expression of the Legislature as to the intent of a prior statute, although not binding on the court, may properly be used in determining the effect of a prior act. Moreover, even if the court does not accept the Legislature's assurance that an unmistakable change in the law is merely a clarification, the declaration of intent may still effectively reflect the Legislature's purpose to achieve a retrospective change. Whether a statute should apply retrospectively or only prospectively is, in the first instance, a policy question for the legislative body enacting the statute. Thus, where a statute provides that it clarifies or declares existing law, such a provision is indicative of a legislative intent that the amendment apply to all existing causes of action from the date of its enactment. In accordance with the general rules of statutory construction, the court must give effect to this intention unless there is some constitutional objection to it.

(5) Letters of Credit § 10--Duties and Privileges of Issuer--Independence Principle.
The liability of the issuer of a letter of credit to the letter's beneficiary is direct and independent of the underlying transaction between the beneficiary and the issuer's customer. Under the independence principle, a letter of credit is an independent obligation of the issuing bank rather than a form of guaranty or a surety obligation (Cal. U. Com. Code, § 5114, subd. (1)). Thus, the issuer of a letter of credit cannot refuse to pay based on extraneous defenses that might have been available to its customer. Absent fraud, the issuer must pay upon proper presentment, regardless of any defenses the customer may have against the beneficiary based in the underlying transaction.

(6) Letters of Credit § 10--Duties and Privileges of Issuer--Independence Principle--Effect of Draw on Letter of Credit.
A standby letter of credit is a security device created at the request of the customer/debtor that is an obligation owed independently by the issuing bank to the beneficiary/creditor. A creditor that draws on a letter of credit does no more than call on all of the security pledged for the debt. When it does so, it does not violate the prohibition of deficiency judgments.

COUNSEL

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No appearance for Respondent.

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CHIN, J.

This case concerns the extent to which two disparate bodies of law interact when standby letters of credit are used as additional support for *237 loan obligations secured by real property. On one side we have California's complex web of foreclosure and antideficiency laws that circumscribe enforcement of obligations secured by interests in real property. On the other side is the letter of credit law's "independence principle," the unique characteristic of letters of credit essential to their commercial utility.

The antideficiency statute invoked in this case is Code of Civil Procedure section 580d. That section precludes a judgment for any loan balance left unpaid after the lender's nonjudicial foreclosure under a power of sale in a deed of trust or mortgage on real property. (See *Roseleaf Corp. v. Chierighino* (1963) 59 Cal.2d 35, 43-44 [27 Cal.Rptr. 873, 378 P.2d 97].) [FN1] The independence principle, in summary form, makes the letter of credit issuer's obligation to pay a draw conforming to the letter's terms completely separate from, and not contingent on, any underlying contract between the issuer's customer and the letter's beneficiary. (See, e.g., Cal. U. Com. Code, § 5114, subd. (1); *San Diego Gas & Electric Co. v. Bank Leumi* (1996) 42 Cal.App.4th 928, 933-934 [50 Cal.Rptr.2d 20].) [FN2]

FN1 In pertinent part, Code of Civil Procedure section 580d provides: "No judgment shall be rendered for any deficiency upon a note secured by a deed of trust or mortgage upon real property or an estate for years therein hereafter executed in any case in which the real property or estate for years therein has been sold by the mortgagee or trustee under power of sale contained in the mortgage or deed of trust."

FN2 In 1996, the Legislature completely revised division 5 of the California Uniform Commercial Code, which pertains to letters of credit. (Stats. 1996, ch. 176.) The enactment of chapter 176 repealed the former division 5 and added a new division 5. (Stats. 1996, ch. 176, §§ 6, 7.) The new provisions apply to letters of credit issued after the statute's effective date. (Stats. 1996, ch. 176, § 14.) Letters of credit issued earlier are to be dealt with as though the repeal had not occurred. (Stats. 1996,

ch. 176, § 15.) We have no occasion in this case to consider the provisions of the new division 5.

The Legislature (Stats. 1996, ch. 497, § 7) later amended a statutory reference found in California Uniform Commercial Code section 5114 as it existed before chapter 176 was enacted. This second legislative action might appear to restore the prior section 5114 from the repealed former division 5 and possibly leave two sections numbered 5114 in the new division 5. (See Cal. Const., art. IV, § 9; Gov. Code, § 9605.) We have no occasion in this case to address the meaning or effect of this seeming incongruity either.

All references to section 5114 in this opinion are to California Uniform Commercial Code section 5114 as it existed before the 1996 legislation.

The Court of Appeal perceived a conflict between the public policies behind Code of Civil Procedure section 580d and the independence principle under the facts of this case. Here, after nonjudicial foreclosure of the real property security for its loan left a deficiency, the lender attempted to draw on the standby letters of credit of which it was the beneficiary. Ordinarily, the issuer's payment on a letter of credit would require the borrower to reimburse the issuer. (See § 5114, subd. (3).) The Court of Appeal considered that this result indirectly imposed on the borrower the equivalent of a ***238** prohibited deficiency judgment. The court concluded the situation amounted to a "fraud in the transaction" under section 5114, subdivision (2)(b), one of the limited circumstances justifying an issuer's refusal to honor its letter of credit.

The Legislature soon acted to express a clear, contrary intent. It passed Senate Bill No. 1612 (1993-1994 Reg. Sess.) (hereafter Senate Bill No. 1612) as an urgency measure specifically meant to abrogate the Court of Appeal's holding. (Stats. 1994, ch. 611, §§ 5, 6.) In brief, the aspects of Senate Bill No. 1612 we address provided that an otherwise conforming draw on a letter of credit does not contravene the antideficiency laws and that those laws afford no basis for refusal to honor a draw. After the Legislature's action, we returned the case to the Court of Appeal for reconsideration in light of the statutory changes. On considering the point, the Court of Appeal concluded the Legislature's action was prospective only and had no impact on the court's earlier analysis of the parties' rights and obligations. Accordingly, the Court of Appeal reiterated its former conclusions.

We again granted review and now reverse. The Legislature's manifest intent was that Senate Bill No. 1612's provisions, with one exception not involved here, would apply to all existing loans secured by real property and supported by outstanding letters of credit. We conclude the Legislature's action constituted a clarification of the state of the law before the Court of Appeal's decision. The legislation therefore has no impermissible retroactive consequences, and we must give it the effect the Legislature intended.

I. Factual and Procedural Background

On October 10, 1984, Beverly Hills Savings and Loan Association, later known as Beverly Hills Business Bank (the Bank), loaned $3,250,000 to Vista Place Associates (Vista), a limited partnership, to finance the purchase of real property improved with a shopping center. Vista's general partners, Phillip F. Kennedy, Jr., John R. Bradley, and Peter M. Hillman (the Vista partners), each signed the promissory note. The loan transaction created a "purchase money mortgage," as it was secured by a "Deed of Trust and Assignment of Rents" as well as a letter of credit.

Vista later experienced financial difficulties, and the loan went into default. Vista asked the Bank to modify the loan's terms so Vista could continue operating the shopping center and repay the debt. The Bank and Vista agreed to a loan modification in February 1987, under which the three Vista partners each obtained an unconditional, irrevocable standby letter of ***239** credit in favor of the Bank in the amount of $125,000, for a total of $375,000. These were delivered to the Bank as additional collateral security for repayment of the loan. Under the modification agreement, the Bank was entitled to draw on the letters of credit if Vista defaulted or failed to pay the loan in full at maturity.

Western Security Bank, N.A. (Western) issued the letters of credit at the Vista partners' request. Each partner agreed to reimburse Western if it ever had to honor the letters. Under the agreement, each Vista partner gave Western a $125,000 promissory note. FN3

FN3 The parties' arrangements reflected a common use of letters of credit. A letter of credit typically is an engagement by a financial institution (the issuer), made at the request of a customer (also referred to as the applicant or account party) to pay a specified sum of money to another person (the beneficiary) upon compliance with the conditions for payment stated in the letter of credit, i. e., presentation of the documents specified in the letter of credit. (See Gregora, *Letters of Credit in Real Property Finance Transactions* (Spring 1991) 9 Cal. Real Prop. J. 1, 1-2.)

A letter of credit transaction involves at least three parties and three separate and independent relationships: (1) the relationship between the issuer and the beneficiary created by the letter of credit; (2) the relationship between the customer and the beneficiary created by a contract or promissory note, with the letter of credit securing the customer's obligations to the beneficiary under the contract or note; and (3) the relationship between the customer and the issuer created by a separate contract under which the issuer agrees to issue the letter of credit for a fee and the customer agrees to reimburse the issuer for any amounts paid out under the letter of credit. (Gregora, *Letters of Credit in Real Property Finance Transactions*, *supra*, 9 Cal. Real Prop. J. at p. 2; *San Diego Gas & Electric Co. v. Bank Leumi*, *supra*, 42 Cal.App.4th at pp. 932-933; see *Voest-Alpine Intern. Corp. v. Chase Manhattan Bank* (2d Cir. 1983) 707 F.2d 680, 682; and *Colorado Nat. Bank, etc. v. Bd. of County Com'rs* (Colo. 1981) 634 P.2d 32, 36-38, for a discussion of the history and structure of letter of credit transactions.)

Letters of credit can function as payment mechanisms. For example, in sales transactions a letter of credit assures the seller of payment when parting with goods, while the conditions for payment specified in the letter of credit (often a third party's documentation, such as a bill of lading) assure the buyer the goods have been shipped before payment is made. (Gregora, *Letters of Credit in Real Property Finance Transactions*, *supra*, 9 Cal. Real Prop. J. at p. 3.) In the letter of credit's role as a payment mechanism, a payment demand occurs in the ordinary course of business and is consistent with full performance of the underlying obligations. (*Ibid.*)

The use of letters of credit has now expanded beyond that function, and they are employed in many other types of transactions in which one party requires assurances the other party will perform. (Gregora, *Letters of Credit in Real Property Finance Trans-*

> *actions*, *supra*, 9 Cal. Real Prop. J. at p. 3.) When used to support a debtor's obligations under a promissory note or other debt instrument, the so-called "standby" letter of credit typically provides that the issuer will pay the creditor when the creditor gives the issuer written certification that the debtor has failed to pay the amount due under the debtor's underlying obligation to the creditor. (*Ibid.*) Thus, a payment demand under a standby letter of credit indicates that there is a problem-either the customer is in financial difficulty, or the beneficiary and the customer are in a dispute. (*Ibid.*)

In December 1990, the Bank declared Vista in default on the modified loan. The Bank recorded a notice of default on February 13, 1991, and began ***240** nonjudicial foreclosure proceedings. (Civ. Code, § 2924.) It then filed an action against Vista seeking specific performance of the rents and profits provisions in the trust deed and appointment of a receiver.

On June 11, 1991, attorneys for the Bank and Vista signed a letter agreement settling the Bank's lawsuit. In that agreement, Vista promised it would "not take any legal action to prevent [the Bank's] drawing upon [the letters of credit] after the Trustee's Sale of the Vista Place Shopping Center, ... provided that the amount of the draw by [the Bank] does not exceed an amount equal to the difference between [Vista's] indebtedness and the successful bid of the Trustee's Sale." Vista promised as well not to take any draw-related legal action against the Bank after the Bank's draw on the letters of credit.

On June 13, 1991, the Bank concluded its nonjudicial foreclosure on the shopping center under the power of sale in its deed of trust. The Bank was the only bidder, and it purchased the property. The sale left an unpaid deficiency of $505,890.16.

That same day, the Bank delivered the three letters of credit and drafts to Western and demanded payment of their full amount, $375,000. The Bank never sought to recover the $505,890.16 deficiency from Vista or the Vista partners. About the time that Western received the Bank's draw demand, it also received a written notice from the Vista partners' attorney. The notice asserted that Code of Civil Procedure section 580d barred Western from seeking reimbursement from the Vista partners for any payment on the letters of credit, and that if Western paid, it did so at its own risk.

Western did not honor the Bank's demand for payment on the letters of credit. Instead, on June 24, 1991, Western filed this declaratory relief action against the Bank, as well as Vista and the Vista partners (collectively, the Vista defendants). Western's complaint sought: (1) a declaration that Western is not obligated to accept or honor the Bank's tender of the letters of credit; or, alternatively, (2) a declaration that, if Western must pay on the letters of credit, the Vista partners must reimburse Western according to the terms of their promissory notes.

The Vista defendants cross-complained against Western for cancellation of their promissory notes and for injunctive relief. In July 1991, the Bank filed a first amended cross-complaint, alleging Western wrongfully dishonored the letters of credit, and the Vista defendants breached the agreement not to take legal action to prevent the Bank's drawing on the letters of credit.

The Bank, Western, and the Vista defendants each sought summary judgment. After several hearings and discussions with counsel, which produced a stipulation on the key facts, the court issued its decision on January ***241** 23, 1992. By its minute order of that date, the court (l) denied the three motions for summary judgment, (2) severed the Vista defendants' cross-complaint against Western for cancellation of the promissory notes, (3) severed

the Bank's amended cross-complaint against the Vista defendants for breach of the letter agreement, and (4) issued a tentative decision on the trial of Western's complaint for declaratory relief and the Bank's amended cross-complaint against Western for wrongful dishonor of the letters of credit.

The trial court signed and filed the judgment on March 26, 1992. The court decreed the Bank was entitled to recover $375,000 from Western, plus interest at 10 percent from June 13, 1991, the date of the Bank's demand, and costs of suit. The court further decreed Western could seek reimbursement from the Vista partners severally, and each Vista partner was obligated to reimburse Western, pursuant to the promissory notes in favor of Western, for its payment to the Bank. Western appealed, and the Vista defendants cross-appealed.

The Court of Appeal, after granting rehearing and accepting briefing by several amici curiae, issued an opinion reversing the trial court on December 21, 1993. In that opinion, the court concluded: "We hold that, under section 580d of the Code of Civil Procedure, an integral part of California's long-established antideficiency legislation, the issuer of a standby letter of credit, provided to a real property lender by a debtor as additional security, *may* decline to honor it after receiving notice that it is to be used to discharge a deficiency following the beneficiary-lender's *nonjudicial* foreclosure on real property. Such a use of standby letters of credit constitutes a 'defect not apparent on the face of the documents' within the meaning of California Uniform Commercial Code section 5114, subdivision (2)(b), and therefore such permissive dishonor does no offense to the 'independence principle.' " (Original italics, fn. omitted.)

In that first opinion, the Court of Appeal also solicited the Legislature's attention: "To the extent that this result will present problems for real estate lenders with respect to the way they now do business (as the Bank and several amici curiae have strongly suggested), it is a matter which should be addressed to the Legislature. We have been presented with two important but conflicting statutory policies. Our reconciliation of them in this case may not prove as satisfactory in another factual context. It is therefore a matter which should receive early legislative attention." (Fn. omitted.)

We granted review, and while the matter was pending, the Legislature passed Senate Bill No. 1612, an urgency statute that the Governor signed on ***242** September 15, 1994. Senate Bill No. 1612 affected four statutes. Section 1 of the bill amended Civil Code section 2787 to state that a letter of credit is not a form of suretyship obligation. (Stats. 1994, ch. 611, § 1.) Section 2 of the bill added Code of Civil Procedure section 580.5, explicitly excluding letters of credit from the purview of the antideficiency laws. (Stats. 1994, ch. 611, § 2.) Section 3 of the bill added Code of Civil Procedure section 580.7, which declares unenforceable letters of credit issued to avoid defaults on purchase money mortgages for owner-occupied real property containing one to four residential units. (Stats. 1994, ch. 611, § 3.) Section 4 of the bill made "technical, nonsubstantive changes" to section 5114. (Stats. 1994, ch. 611, § 4; Legis. Counsel's Dig., Sen. Bill No. 1612 (1993-1994 Reg. Sess.).)

The Legislature made its purpose explicit: "It is the intent of the Legislature in enacting Sections 2 and 4 of this act to confirm the independent nature of the letter of credit engagement and to abrogate the holding [of the Court of Appeal in this case] .... [¶] The Legislature also intends to confirm the expectation of the parties to a contract that underlies a letter of credit, that the beneficiary will have available the value of the real estate collateral and the benefit of the letter of credit without regard to the order in which the beneficiary may resort to either." (Stats. 1994, ch. 611, § 5.) The same purpose was echoed in the bill's statement of the facts calling for an urgency statute: "In order to confirm and clarify the law applicable to obligations which are secured by

real property or an estate for years therein and which also are supported by a letter of credit, it is necessary that this act take effect immediately." (Stats. 1994, ch. 611, § 6.)

After the Legislature enacted Senate Bill No. 1612, we requested the parties' views on its effect. On February 2, 1995, after considering the parties' responses, we transferred the case to the Court of Appeal with directions to vacate its decision and reconsider the cause in light of the Legislature's action.

On reconsideration, the Court of Appeal determined Senate Bill No. 1612 constituted a substantial change in existing law. Believing there was no clear evidence that the Legislature intended the statute to operate retrospectively, the Court of Appeal thought Senate Bill No. 1612 had only prospective application. Therefore, Senate Bill No. 1612 did not affect the Court of Appeal's prior conclusions on the parties' rights and obligations. The Court of Appeal filed its second opinion on September 29, 1995, mostly repeating its prior reasoning and conclusions. We granted the Bank's petition for review.

II. Discussion

(1a) As the Court of Appeal recognized, we first must determine the effect on this case of the Legislature's enactment of Senate Bill No. 1612. ***243** (2) A basic canon of statutory interpretation is that statutes do not operate retrospectively unless the Legislature plainly intended them to do so. (*Evangelatos v. Superior Court* (1988) 44 Cal.3d 1188, 1207-1208 [246 Cal.Rptr. 629, 753 P.2d 585]; *Aetna Cas. & Surety Co. v. Ind. Acc. Com.* (1947) 30 Cal.2d 388, 393 [182 P.2d 159].) A statute has retrospective effect when it substantially changes the legal consequences of past events. (*Kizer v. Hanna* (1989) 48 Cal.3d 1, 7 [255 Cal.Rptr. 412, 767 P.2d 679].) A statute does not operate retrospectively simply because its application depends on facts or conditions existing before its enactment. (*Ibid.*) Of course, when the Legislature clearly intends a statute to operate retrospectively, we are obliged to carry out that intent unless due process considerations prevent us. (*In re Marriage of Bouquet* (1976) 16 Cal.3d 583, 587, 592 [128 Cal.Rptr. 427, 546 P.2d 1371].)

(3) A corollary to these rules is that a statute that merely *clarifies*, rather than changes, existing law does not operate retrospectively even if applied to transactions predating its enactment. We assume the Legislature amends a statute for a purpose, but that purpose need not necessarily be to change the law. (Cf. *Williams v. Garcetti* (1993) 5 Cal.4th 561, 568 [20 Cal.Rptr.2d 341, 853 P.2d 507].) Our consideration of the surrounding circumstances can indicate that the Legislature made material changes in statutory language in an effort only to clarify a statute's true meaning. (*Martin v. California Mut. B. & L. Assn.* (1941) 18 Cal.2d 478, 484 [116 P.2d 71]; *GTE Sprint Communications Corp. v. State Bd. of Equalization* (1991) 1 Cal.App.4th 827, 833 [2 Cal.Rptr.2d 441]; see *Balen v. Peralta Junior College Dist.* (1974) 11 Cal.3d 821, 828, fn. 8 [114 Cal.Rptr. 589, 523 P.2d 629].) Such a legislative act has no retrospective effect because the true meaning of the statute remains the same. (*Stockton Sav. & Loan Bank v. Massanet* (1941) 18 Cal.2d 200, 204 [114 P.2d 592]; *In re Marriage of Reuling* (1994) 23 Cal.App.4th 1428, 1440 [28 Cal.Rptr.2d 726]; *Tyler v. State of California* (1982) 134 Cal.App.3d 973, 976-977 [185 Cal.Rptr. 49].)

One such circumstance is when the Legislature promptly reacts to the emergence of a novel question of statutory interpretation: " 'An amendment which in effect construes and clarifies a prior statute must be accepted as the legislative declaration of the meaning of the original act, where the amendment was adopted soon after the controversy arose concerning the proper interpretation of the statute.... [¶] If the amendment was enacted soon

after controversies arose as to the interpretation of the original act, it is logical to regard the amendment as a legislative interpretation of the original act-a formal change-rebutting the presumption of substantial change.' (1A Singer, Sutherland Statutory Construction (5th ed. 1993) § 22.31, p. *244 279, fns. omitted.)" (*RN Review for Nurses, Inc. v. State of California* (1994) 23 Cal.App.4th 120, 125 [28 Cal.Rptr.2d 354].) FN4

FN4 The " 'presumption of substantial change' " mentioned in the quoted passage refers to the presumption that amendatory legislation accomplishing substantial change is intended to have only prospective effect. Some courts have thought changes categorized as merely formal or procedural present no problem of retrospective operation. However, as mentioned above, California has rejected this type of classification: "In truth, the distinction relates not so much to the form of the statute as to its effects. If substantial changes are made, even in a statute which might ordinarily be classified as procedural, the operation on existing rights would be retroactive because the legal effects of past events would be changed, and the statute will be construed to operate only in futuro unless the legislative intent to the contrary clearly appears." (*Aetna Cas. & Surety Co. v. Ind. Acc. Com.*, *supra*, 30 Cal.2d at p. 394; cf. *Kizer v. Hanna*, *supra*, 48 Cal.3d at pp. 7-8.)

Even so, a legislative declaration of an existing statute's meaning is neither binding nor conclusive in construing the statute. Ultimately, the interpretation of a statute is an exercise of the judicial power the Constitution assigns to the courts. (*California Emp. etc. Com. v. Payne* (1947) 31 Cal.2d 210, 213 [187 P.2d 702]; *Bodinson Mfg. Co. v. California E. Com.* (1941) 17 Cal.2d 321, 326 [109 P.2d 935]; see *Del Costello v. State of California* (1982) 135 Cal.App.3d 887, 893, fn. 8 [185 Cal.Rptr. 582].) Indeed, there is little logic and some incongruity in the notion that one Legislature may speak authoritatively on the intent of an earlier Legislature's enactment when a gulf of decades separates the two bodies. (Cf. *Peralta Community College Dist. v. Fair Employment & Housing Com.* (1990) 52 Cal.3d 40, 51-52 [276 Cal.Rptr. 114, 801 P.2d 357].) Nevertheless, the Legislature's expressed views on the prior import of its statutes are entitled to due consideration, and we cannot disregard them.

(4) "[A] subsequent expression of the Legislature as to the intent of the prior statute, although not binding on the court, may properly be used in determining the effect of a prior act." (*California Emp. etc. Com. v. Payne*, *supra*, 31 Cal.2d at pp. 213-214.) Moreover, even if the court does not accept the Legislature's assurance that an unmistakable change in the law is merely a "clarification," the declaration of intent may still effectively reflect the Legislature's purpose to achieve a retrospective change. (*Id.* at p. 214.) Whether a statute should apply retrospectively or only prospectively is, in the first instance, a policy question for the legislative body enacting the statute. (*Evangelatos v. Superior Court*, *supra*, 44 Cal.3d at p. 1206.) Thus, where a statute provides that it clarifies or declares existing law, "[i]t is obvious that such a provision is indicative of a legislative intent that the amendment apply to all existing causes of action from the date of its enactment. In accordance with the general rules of statutory construction, we must give effect to this intention unless there is some constitutional objection thereto." (*245*California Emp. etc. Com. v. Payne*, *supra*, 31 Cal.2d at p. 214; cf. *City of Sacramento v. Public Employees' Retirement System* (1994) 22 Cal.App.4th 786, 798 [27 Cal.Rptr.2d 545]; *City of Redlands v. Sorensen* (1985) 176 Cal.App.3d 202, 211 [221 Cal.Rptr. 728].)

With respect to Senate Bill No. 1612, the Legislature made its intent plain. Section 5 of the bill states, in part: "It is the intent of the Legislature in

enacting Sections 2 and 4 of this act [FN5] to confirm the independent nature of the letter of credit engagement and to abrogate the holding in [the Court of Appeal's earlier opinion in this case], that presentment of a draft under a letter of credit issued in connection with a real property secured loan following foreclosure violates Section 580d of the Code of Civil Procedure and constitutes a 'fraud ... or other defect not apparent on the face of the documents' under paragraph (b) of subdivision (2) of Section 5114 of the Commercial Code.... [¶] The Legislature also intends to confirm the expectation of the parties to a contract that underlies a letter of credit, that the beneficiary will have available the value of the real estate collateral and the benefit of the letter of credit without regard to the order in which the beneficiary may resort to either." (Stats. 1994, ch. 611, § 5.)

> FN5 Section 2 of Senate Bill No. 1612 added Code of Civil Procedure section 580.5, which provides in pertinent part: "(b) With respect to an obligation which is secured by a mortgage or a deed of trust upon real property or an estate for years therein and which is also supported by a letter of credit, neither the presentment, receipt of payment, or enforcement of a draft or demand for payment under the letter of credit by the beneficiary of the letter of credit nor the honor or payment of, or the demand for reimbursement, receipt of reimbursement or enforcement of any contractual, statutory or other reimbursement obligation relating to, the letter of credit by the issuer of the letter of credit shall, whether done before or after the judicial or nonjudicial foreclosure of the mortgage or deed of trust or conveyance in lieu thereof, constitute any of the following: [¶] (1) An action within the meaning of subdivision (a) of Section 726, or a failure to comply with any other statutory or judicial requirement to proceed first against security. [¶] (2) A money judgment for a deficiency or a deficiency judgment within the meaning of Section 580a, 580b, or 580d, or subdivision (b) of Section 726, or the functional equivalent of any such judgment. [¶] (3) A violation of Section 580a, 580b, 580d, or 726." (Code Civ. Proc., § 580.5, subd. (b), as added by Stats. 1994, ch. 611, § 2.)
>
> Section 4 of Senate Bill No. 1612 made certain technical, nonsubstantive changes to section 5114, which embodies the independence principle applicable to letter of credit payment obligations. (§ 5114, as amended by Stats. 1994, ch. 611, § 4.)

The Legislature's intent also was evident in its statement of the facts justifying enactment of Senate Bill No. 1612 as an urgency statute: "In order to confirm and clarify the law applicable to obligations which are secured by real property or an estate for years therein and which also are supported by a letter of credit, it is necessary that this act take effect immediately." (Stats. 1994, ch. 611, § 6.) The Legislature's unmistakable focus was the disruptive effect of the Court of Appeal's decision on the expectations of parties to transactions where a letter of credit was issued in connection with a loan secured by real property. By abrogating the Court of Appeal's decision, the ***246** Legislature intended to protect those parties' expectations and restore certainty and stability to those transactions. If the Legislature acts promptly to correct a perceived problem with a judicial construction of a statute, the courts generally give the Legislature's action its intended effect. (See, e.g., *Escalante v. City of Hermosa Beach* (1987) 195 Cal.App.3d 1009, 1020 [241 Cal.Rptr. 199]; *City of Redlands v. Sorensen*, *supra*, 176 Cal.App.3d at pp. 211-212; *Tyler v. State of California*, *supra*, 134 Cal.App.3d at pp. 976-977; but see *Del Costello v. State of California*, *supra*, 135 Cal.App.3d at p. 893, fn. 8 [courts need not accept Legislature's interpretation of statute].)

The plain import of Senate Bill No. 1612 is that the Legislature intended its provisions to apply immediately to existing loan transactions secured by real property and supported by outstanding letters of credit, including those in this case.

We next consider whether Senate Bill No. 1612 effected a change in the law, or instead represented a clarification of the state of the law before the Court of Appeal's decision. As mentioned earlier, Senate Bill No. 1612 amended two code sections (§ 5114; Civ. Code, § 2787) and added two sections to the Code of Civil Procedure (§§ 580.5, 580.7). The two code sections Senate Bill No. 1612 amended plainly made no substantive change in the law. The amendments to section 5114, which concerns the issuer's duty to honor a draft conforming to the letter of credit's terms, were "technical, nonsubstantive changes," as the Legislative Counsel's Digest correctly noted. (See Legis. Counsel's Dig., Sen. Bill No. 1612 (1993-1994 Reg. Sess.).)

In the other section amended, Civil Code section 2787, Senate Bill No. 1612 added a statement reflecting an established formal distinction: "A letter of credit is not a form of suretyship obligation." (Stats. 1994, ch. 611, § 1.) Civil Code section 2787 defines a surety or guarantor as "one who promises to answer for the debt, default, or miscarriage of another, or hypothecates property as security therefor." Generally, a surety's liability for an obligation is secondary to, and derivative of, the liability of the principal for that obligation. (See, e.g., Civ. Code, § 2806 et seq.)

(5) By contrast, the liability of the issuer of a letter of credit to the letter's beneficiary is direct and independent of the underlying transaction between the beneficiary and the issuer's customer. (See *San Diego Gas & Electric Co. v. Bank Leumi, supra*, 42 Cal.App.4th at pp. 933-934; *Paramount Export Co. v. Asia Trust Bank, Ltd.* (1987) 193 Cal.App.3d 1474, 1480 [238 Cal.Rptr. 920]; *Lumbermans Acceptance Co. v. Security Pacific Nat. Bank* (1978) 86 Cal.App.3d 175, 178 [150 Cal.Rptr. 69].) Thus, as the amendment to Civil Code section 2787 made clear, existing law viewed a ***247** letter of credit as an independent obligation of the issuing bank rather than as a form of guaranty or a surety obligation. (See, e.g., Dolan, The Law of Letters of Credit: Commercial and Standby Credits (rev. ed. 1996) § 2.10[1], pp. 2-61 to 2-63 (Dolan, Letters of Credit); 3 White & Summers, Uniform Commercial Code (4th ed. 1995) Letters of Credit, § 26-2, pp. 112-117.) The issuer of a letter of credit cannot refuse to pay based on extraneous defenses that might have been available to its customer. (*San Diego Gas & Electric Co. v. Bank Leumi, supra*, 42 Cal.App.4th at p. 934.) Absent fraud, the issuer must pay upon proper presentment regardless of any defenses the customer may have against the beneficiary based in the underlying transaction. (*Ibid.*)

Senate Bill No. 1612's remaining statutory addition with which we are concerned, [FN6] Code of Civil Procedure section 580.5, specified that letter of credit transactions do not violate the antideficiency laws contained in Code of Civil Procedure sections 580a, 580b, 580d, or 726. (Code Civ. Proc., § 580.5, subd. (b)(3).) In particular, the new section specifies that a lender's resort to a letter of credit, and the issuer's concomitant right to reimbursement, do not constitute an "action" under Code of Civil Procedure section 726, or a failure to proceed first against security, regardless of whether they come before or after a foreclosure. (Code Civ. Proc., § 580.5, subd. (b)(1).) Similarly, letter of credit draws and reimbursements do not constitute deficiency judgments "or the functional equivalent of any such judgment." (Code Civ. Proc., § 580.5, subd. (b)(2).)

FN6 We do not address the effect of section 3 of Senate Bill No. 1612, which added section 580.7 to the Code of Civil Procedure. This section provides, in pertinent part: "(b) No letter of credit shall be enforceable by any party thereto in a loan

> transaction in which all of the following circumstances exist: [¶] (1) The customer is a natural person. [¶] (2) The letter of credit is issued to the beneficiary to avoid a default of the existing loan. [¶] (3) The existing loan is secured by a purchase money deed of trust or purchase money mortgage on real property containing one to four residential units, at least one of which is owned and occupied, or was intended at the time the existing loan was made, to be occupied by the customer. [¶] (4) *The letter of credit is issued after the effective date of this section.*" (Code Civ. Proc., § 580.7, subd. (b), italics added, as added by Stats. 1994, ch. 611, § 3.) The italicized language, not found in the other statutory changes made by Senate Bill No. 1612, suggests the Legislature intended section 580.7 to have prospective effect only. However, this case does not involve any interpretation of this section or its effect, and so we express no view on those matters.

The Court of Appeal saw Code of Civil Procedure section 580.5 as a change in the law, in large part, because of the analogy it employed to examine the use of standby letters of credit as additional support for loans also secured by real property. The Bank argued a standby letter of credit was the functional equivalent of cash collateral. The Court of Appeal disagreed, instead analogizing standby letters of credit to guaranties and emphasizing the similarities of purpose and function: "No matter how it may be regarded ***248** by the beneficiary, a standby letter is certainly not cash or its equivalent from the perspective of the debtor; in reality, it represents his promise to provide *additional funds* in the event of his *future* default or deficiency, thus confirming its use not as a means of payment but rather as an instrument of guarantee." (Original italics.) The Court of Appeal relied on *Union Bank v. Gradsky* (1968) 265 Cal.App.2d 40 [71 Cal.Rptr. 64] (*Gradsky*) and *Commonwealth Mortgage Assurance Co. v. Superior Court* (1989) 211 Cal.App.3d 508 [259 Cal.Rptr. 425] (*Commonwealth Mortgage*).

Gradsky held that a creditor, after nonjudicial foreclosure of the real property security for a note, could not recover the note's unpaid balance from a guarantor. (*Gradsky*, *supra*, 265 Cal.App.2d at p. 41.) Significantly, the court did not find Code of Civil Procedure section 580d's prohibition of deficiency judgments barred the creditor's claim on the guarantor: "It is barred by applying the principles of estoppel. The estoppel is raised as a matter of law to prevent the creditor from recovering from the guarantor after the creditor has exercised an election of remedies which destroys the guarantor's subrogation rights against the principal debtor." (*Gradsky*, *supra*, 265 Cal.App.2d at p. 41.)

The court noted that the guarantor, after payment, ordinarily would be equitably subrogated to the rights and security formerly held by the creditor. (*Gradsky*, *supra*, 265 Cal.App.2d at pp. 44-45; cf. Civ. Code, §§ 2848, 2849.) However, where the creditor first resorts to nonjudicial foreclosure, the guarantor could not acquire any subrogation rights from the creditor because under Code of Civil Procedure section 580d, the nonjudicial sale eliminated both the security and the possibility of a deficiency judgment against the debtor. (*Gradsky*, *supra*, 265 Cal.App.2d at p. 45.) Because the creditor has a duty not to impair the guarantor's remedies against the debtor, the court held the creditor is estopped from pursuing the guarantor after electing a remedy-nonjudicial foreclosure-that eliminated the security for the debt and curtailed the possibility of the guarantor's reimbursement from the debtor. (*Id.* at pp. 46-47.)

However, the rules applicable to surety relationships do not govern the relationships between the parties to a letter of credit transaction. (See Dolan, Letters of Credit, *supra*, § 2.10[1], pp. 2-62 to

2-63.) At the time of this case's transactions, a majority of courts did not grant subrogation rights to an issuer that honored a draw on a credit; the issuer satisfied its own primary obligation, not the debt of another. (*Tudor Dev. Group, Inc. v. U.S. Fid. & Guar. Co.* (3d Cir. 1992) 968 F.2d 357, 361-363; see 3 White & Summers, Uniform Commercial Code, *supra*, Letters of Credit, § 26-15, pp. 211-212; but see Cal. U. Com. Code, § 5117; fn. 2, *ante*, at pp. 237-238.) Nor does the ***249** beneficiary of a credit owe any obligations to the issuer; literal compliance with the letter of credit's terms for payment is all that is required. (Cf. *Paramount Export Co. v. Asia Trust Bank, Ltd.*, *supra*, 193 Cal.App.3d at p. 1480; *Lumbermans Acceptance Co. v. Security Pacific Nat. Bank*, *supra*, 86 Cal.App.3d at p. 178.)

Gradsky contains additional language suggesting a much broader rule than its holding and analysis warranted. Going beyond the subrogation theory underlying its holding, the court observed: "If ... the guarantor ... can successfully assert an action in assumpsit against [the debtor] for reimbursement, the obvious result is to permit the recovery of a 'deficiency' judgment against the debtor following a nonjudicial sale of the security under a different label. It makes no difference to [the debtor's] purse whether the recovery is by the original creditor in a direct action following nonjudicial sale of the security, or whether the recovery is in an action by the guarantor for reimbursement of the same sum." (*Gradsky*, *supra*, 265 Cal.App.2d at pp. 45-46.) The court also said: "The Legislature clearly intended to protect the debtor from personal liability following a nonjudicial sale of the security. No liability, direct or indirect, should be imposed upon the debtor following a nonjudicial sale of the security. To permit a guarantor to recover reimbursement from the debtor would permit circumvention of the legislative purpose in enacting section 580d." (*Id.* at p. 46.) In view of the reasoning of the court's holding, these additional observations were unnecessary to the case's determination.

Commonwealth Mortgage followed *Gradsky* to hold a mortgage guaranty insurer could not enforce indemnity agreements to obtain reimbursement from the debtors for the insurer's payment to the lender after the lender's nonjudicial sale of its real property security. (*Commonwealth Mortgage*, *supra*, 211 Cal.App.3d at p. 517.) The court said the mortgage guaranty insurance policy served the same purpose as the guaranty in *Gradsky,* and thus *Gradsky* would bar the insurer from being reimbursed under subrogation principles. (*Commonwealth Mortgage*, *supra*, 211 Cal.App.3d at p. 517.) The court found the substitution of indemnity agreements for subrogation rights did not distinguish the case from *Gradsky*. Relying on the rule that a principal obligor incurs no additional liability on a note by also being a guarantor of it, the court said the agreements added nothing to the debtors' existing liability. (*Commonwealth Mortgage*, *supra*, 211 Cal.App.3d at p. 517.) Thus, the court said the indemnity agreements could not be viewed as independent obligations. (*Ibid.*) Instead, the court concluded they were invalid attempts to have the debtors waive in advance the statutory prohibition against deficiency judgments. (*Ibid.*)

As did *Gradsky*, *Commonwealth Mortgage* also inveighed against subterfuges that thwart the purposes of Code of Civil Procedure section 580d. ***250** (*Commonwealth Mortgage*, *supra*, 211 Cal.App.3d at pp. 515, 517.) "Although section 580d applies by its specific terms only to actions for 'any deficiency upon a note secured by a deed of trust' and not to actions based upon other obligations, the proscriptions of section 580d cannot be avoided through artifice [citation] .... In determining whether a particular recovery is precluded, we must consider whether the policy behind section 580d would be violated by such a recovery. [Citation.]" (*Commonwealth Mortgage*, *supra*, 211 Cal.App.3d at p. 515.) Thus, as did the *Gradsky* court, the *Commonwealth Mortgage* court augmen-

ted its opinion with concepts unnecessary to its determination of the case.[FN7]

> FN7 The precedential value of such statements in *Commonwealth Mortgage* also is clouded by a factual enigma the court left unresolved. As the Court of Appeal recognized, the lender in that case purchased the real property security at the trustee's sale for a full credit bid, which ought to have satisfied the debt. (*Commonwealth Mortgage*, *supra*, 211 Cal.App.3d at p. 512, fn. 3.) Despite the apparent absence of any deficiency, the court deemed it unnecessary to decide whether a deficiency in fact remained before discussing the effect of Code of Civil Procedure section 580d's prohibition of deficiency judgments. (*Commonwealth Mortgage*, *supra*, 211 Cal.App.3d at p. 515.)

The Court of Appeal in this case extrapolated from the *Gradsky* and *Commonwealth Mortgage* precedents a rule that swept far beyond their origins in guaranty and suretyship relationships: "Not only is a *creditor* prevented from obtaining a deficiency judgment against the debtor, but no other person is permitted to obtain what would, in effect, amount to a deficiency judgment." (Original italics.) The Court of Appeal apparently concluded a transaction has such an effect if it "has the practical consequence of requiring the debtor to pay *additional money* on the debt *after* default or foreclosure." (Original italics.) "Thus, we preserve the principle, clearly established by *Gradsky* and *Commonwealth* [*Mortgage*], that a lender should not be able to utilize a device of any kind to avoid the limitations of section 580d; and we apply that principle here to standby letters of credit." However, as we have seen, neither *Gradsky* nor *Commonwealth Mortgage* established such a principle as a rule of law. Instead, their statements accentuated the courts' vigilance regarding attempted evasions of the antideficiency and foreclosure laws.

(1b) The Court of Appeal mistook standby letters of credit for such an attempt by seeing them only as a form of guaranty. The court analogized the standby letter of credit to a guaranty because of the perceived functional similarities. One consequence of that analogy was that the court applied to standby letters of credit a rule whose legal justifications originated in the subrogation rights owed to sureties. However, as discussed before, letters of credit-standby or otherwise-are not a form of suretyship, and the rights of the parties to these transactions are not governed by suretyship principles. ***251** Further, suretyship involves no counterpart to the independence principle essential to letters of credit.

While analogies can improve our understanding of how and why letters of credit are useful, analogies cannot substitute for recognizing the letters' unique qualities. The authors of one leading treatise aptly summarized the point: "In short, a letter of credit is a letter of credit. As Bishop Butler once said, 'Everything is what it is and not another thing.' " (3 White & Summers, Uniform Commercial Code, *supra*, Letters of Credit, § 26-2, p. 117, fn. omitted.)

By focusing on analogies to guaranties, the Court of Appeal also overlooked that the parties in this case specifically intended the standby letters of credit to be additional security.[FN8] The parties' stipulated facts include that the original loan agreement was secured by a letter of credit, and that "Vista caused [the subsequent letters of credit] to be issued by Western as additional collateral security ...." The Court of Appeal found the letters of credit were not security interests in personal property under California Uniform Commercial Code section 9501, subdivision (4), as the Bank had argued. However, we need not determine whether a standby letter of credit comes within the scope of division 9 of the California Uniform Commercial Code. A letter of credit is sui generis as a means of securing or supporting performance of an obligation incurred in a separate transaction. Regardless of whether this

idiosyncratic undertaking meets the qualifications for a security interest under the California Uniform Commercial Code, it nevertheless is a form of security for assuring another's performance.

> FN8 To the extent that resort to analogy is appropriate for such a singular legal creation as the standby letter of credit, its closest relative would seem to be cash collateral. As one commentator noted: "In view of the relative positions of the beneficiary, the [customer], and the issuing bank, the standby letter of credit is more analogous to a cash deposit left with the beneficiary than it is to the traditional letter of credit or to the performance bond. Because the beneficiary generates all the documents necessary to obtain payment, he has the power to appropriate the funds represented by the standby letter of credit at any time.... [¶] Even though the standby letter of credit is functionally equivalent to a cash deposit, it differs from a cash deposit because the customer does not have to part with its own funds until payment is made and it is forced to reimburse the issuing bank. Because the cash-flow burden might otherwise be prohibitive, this is a great advantage to a party who enters into a large number of transactions simultaneously. Moreover, the beneficiary is satisfied; while it does not actually possess the funds, as it would if a cash deposit were used, it is protected by the credit of a financial institution." (Comment, *The Independence Rule in Standby Letters of Credit* (1985) 52 U. Chi. L.Rev. 218, 225-226, fns. omitted; see Dolan, Letters of Credit, *supra*, § 1.06, pp. 1-24 to 1-25, for a discussion of cases illustrating use of standby credits in lieu of cash, bonds, and other security.)

When viewed as additional security for a note also secured by real property, a standby letter of credit does not conflict with the statutory ***252** prohibition of deficiency judgments. Code of Civil Procedure section 580d does not limit the security for notes given for the purchase of real property only to trust deeds; other security may be given as well. (*Freedland v. Greco* (1955) 45 Cal.2d 462, 466 [289 P.2d 463].) Creditors may resort to such other security in addition to nonjudicial foreclosure of the real property security. (*Ibid.*; *Hatch v. Security-First Nat. Bank* (1942) 19 Cal.2d 254, 260 [120 P.2d 869].) (6) A standby letter of credit is a security device created at the request of the customer/debtor that is an obligation owed independently by the issuing bank to the beneficiary/creditor. (See *San Diego Gas & Electric Co. v. Bank Leumi*, *supra*, 42 Cal.App.4th at pp. 933-934; *Lumbermans Acceptance Co. v. Security Pacific Nat. Bank*, *supra*, 86 Cal.App.3d at p. 178.) A creditor that draws on a letter of credit does no more than call on all the security pledged for the debt. When it does so, it does not violate the prohibition of deficiency judgments.

(1c) The Legislature plainly intended that the sections of Senate Bill No. 1612 we have addressed would apply to existing loan transactions supported by outstanding letters of credit. We conclude the Legislature's action did not effect a change in the law. Before the Legislature passed Senate Bill No. 1612, an issuer could not refuse to honor a conforming draw on a standby letter of credit-given as additional security for a real property loan-on the basis that the draw followed a nonjudicial sale of the real property security. The Court of Appeal created such a basis, but produced an unprecedented rule without solid legal underpinnings or any real connection to the actual language of the statutes involved.

Therefore, the aspects of Senate Bill No. 1612 we have discussed did not effect any change in the law, but simply clarified and confirmed the state of the law prior to the Court of Appeal's first opinion. Because the legislative action did not change the legal

effect of past actions, Senate Bill No. 1612 does not act retrospectively; it governs this case. The Legislature concluded that Senate Bill No. 1612 should be given immediate effect to confirm and clarify the law applicable to loans secured by real property and supported by letters of credit. This conclusion was reasonable, particularly in view of the uncertainties the financial community evidently faced after the Court of Appeal's decision. (See, e.g., Murray, What *Should I Do With This Letter of Credit?* (Cont.Ed.Bar 1994) 17 Real Prop. L. Rptr. 133, 138-140.)

In sum, the Court of Appeal erred in concluding the Legislature's enactment of Senate Bill No. 1612 had no effect on this case. The Legislature explicitly intended to abrogate the Court of Appeal's prior decision and make certain the parties' obligations when letters of credit supported loans also secured by real property. The Legislature manifestly intended the ***253** respective obligations of the parties to a letter of credit transaction should remain unaffected by the antideficiency laws, whether those obligations arose before or after enactment of Senate Bill No. 1612. Accordingly, we conclude the judgment of the Court of Appeal should be reversed. FN9

FN9 Western belatedly claims it should not be liable for prejudgment interest on the amount of the letter of credit it dishonored. It argues it should not be "punished" for seeking a declaration of its rights in a novel and complex case. The Court of Appeal decided that "if it is ultimately determined that Western is liable to the Bank on the letters of credit then it must follow that it is liable for legal interest thereon from and after the day when its obligation to pay on the letters arose. (Civ. Code, § 3287, subd. (a).)" Western did not petition for review of this aspect of the Court of Appeal decision. In any event, Western's liability for prejudgment interest is clear. The award of this interest is not imposed for the sake of punishment. The award depends only on whether Western knew or could compute the amount the Bank was entitled to recover on the letters of credit. (*Fireman's Fund Ins. Co. v. Allstate Ins. Co.* (1991) 234 Cal.App.3d 1154, 1173 [286 Cal.Rptr. 146].) The Court of Appeal correctly assessed Western's liability for prejudgment interest.

Disposition

The judgment of the Court of Appeal is reversed, and the cause remanded for further proceedings consistent with this opinion.

George, C. J., Baxter, J., and Brown, J., concurred.

WERDEGAR, J.,

Concurring and Dissenting.-I concur in the majority's conclusion that California Uniform Commercial Code section 5114, subdivision (2)(b), does not excuse Western Security Bank, N.A. (Western), the issuer, from honoring its letter of credit upon demand for payment by Beverly Hills Business Bank (the Bank), the beneficiary. I would not, however, reach this conclusion under the majority's reasoning that Senate Bill No. 1612 (Stats. 1994, ch. 611) merely declared existing law and that, prior to the bill's enactment, the antideficiency law had no effect on letters of credit. Instead, I agree with Justice Mosk that section 5114 simply does not bear the interpretation that the use of a letter of credit to support an obligation secured by a mortgage or deed of trust constitutes "fraud in the transaction." (Cal. U. Com. Code, § 5114, subd. (2); see conc. & dis. opn. of Mosk, J., *post*, at pp. 262-263.) Thus, Western was obliged to honor the Bank's demand for payment.

The conclusion that the Bank may properly draw upon the letter of credit does not compel the further conclusion that the antideficiency law ultimately

offers no protection to Vista Place Asssociates. This is illustrated by a comparison of the majority opinion and the separate opinion of Justice Mosk, which agree on the former point but disagree on the latter. In my view, the Bank's petition for review of a decision rejecting its claim (as ***254** beneficiary) against Western (as issuer) under superseded law does not present an appropriate vehicle for broader pronouncements on the antideficiency law's effect on other claims and other parties. Because the Legislature in Senate Bill No. 1612 has articulated rules that will govern all future letters of credit, and because letters of credit typically expire after a finite period, the status of residual letters of credit issued before the bill's effective date will soon become an academic question. In contrast, whether the antideficiency law should as a general matter be expansively or narrowly construed remains of vital importance, as demonstrated by the interest in this case shown by amici curiae involved in the purchase and sale of real estate. Under these circumstances, the principle of judicial restraint counsels against the majority's sweeping declaration that the reach of the antideficiency law prior to Senate Bill No. 1612 was too narrow to affect the respective obligations of the parties to a letter of credit transaction.

Underlying the broad declaration just mentioned is the majority's erroneous conclusion that Senate Bill No. 1612 merely clarified existing law and, thus, may be applied to transactions entered into before the bill's operative date. Before that date, the antideficiency law did not distinguish between residential and nonresidential real estate transactions. Now, however, as amended by Senate Bill No. 1612, the antideficiency law does distinguish between residential and nonresidential real estate transactions. New Code of Civil Procedure section 580.7, which the bill added, makes a letter of credit unenforceable when issued to avoid the default of an existing loan and "[t]he existing loan is secured by a purchase money deed of trust or purchase money mortgage on real property containing one to four residential units, at least one of which is owned and occupied, or was intended at the time the existing loan was made, to be occupied by the customer." (*Id.*, subd. (b)(3).)

In light of this provision, we may conclude that letters of credit before Senate Bill No. 1612 either were enforceable in the specified residential real estate transactions but now are not, or were not enforceable in all other real estate transactions but now are. This case does not require us to choose between these possibilities. Either way, Senate Bill No. 1612 went beyond mere clarification to change the effective scope of the antideficiency law. To apply it retroactively would change the legal consequences of past acts. Under these circumstances, it is appropriate to apply the ordinary presumption that a legislative act operates prospectively, and inappropriate to apply to this case the new set of rules articulated in Senate Bill No. 1612.

MOSK, J.,

Concurring and Dissenting.-I agree with the majority that the issue before us is not whether Senate Bill No. 1612 (1993-1994 Reg. Sess.) (hereafter Senate Bill No. 1612) has retrospective application. It does not. ***255** Rather, we must determine what the law was *before* Senate Bill No. 1612 was enacted to provide, in effect, a "standby letter of credit exception" to the antideficiency statutes.

I disagree with the majority that Senate Bill No. 1612 did not change prior law. In my view, far from merely "clarifying" the "true" meaning of prior law-as the majority implausibly assert-its numerous amendments and additions to the statutes reversed what the Court of Appeal aptly referred to as "the fifty years of consistent solicitude which California courts have given to the foreclosed purchase money mortgagee." FN1

FN1 Among other things, Senate Bill No.

1612 amended Civil Code section 2787, added Code of Civil Procedure sections 580.5 and 580.7, and amended California Uniform Commercial Code former section 5114. (See Stats. 1994, ch. 611, §§ 1-6.) It appears, however, that our decision in this matter will have limited application. It will operate only when: (a) a lender obtained a standby letter of credit prior to September 15, 1994, the effective date of Senate Bill No. 1612, to support a transaction secured by a deed of trust against real property; (b) the creditor defaulted on the deed of trust; (c) the lender elected to foreclose on by way of trustee's sale rather than through judicial foreclosure; and (d) the lender thereafter demanded payment under the standby letter of credit. In view of the limited precedential value of this case, a better course would have been to dismiss review as improvidently granted.

As the majority concede, a legislative declaration of an existing statute's meaning is neither binding nor conclusive. "The Legislature has no authority to interpret a statute. That is a judicial task." (*Del Costello v. State of California* (1982) 135 Cal.App.3d 887, 893, fn. 8 [185 Cal.Rptr. 582]; see also *California Emp. etc. Com. v. Payne* (1947) 31 Cal.2d 210, 213 [187 P.2d 702]; *Bodinson Mfg. Co. v. California E. Com.* (1941) 17 Cal.2d 321, 326 [109 P.2d 935].) As the majority also concede, the legislative interpretation of prior law in this case is particularly unworthy of deference: Nothing in the previous legislative history of letter of credit statutes suggests an intent to create an exception to the antideficiency statutes. Indeed, it is apparently only recently that standby letters of credit have been used in real estate transactions.

Accordingly, unlike the majority, I conclude that before Senate Bill No. 1612, standby letters of credit were not exempt from the antideficiency statutes precluding creditors from obtaining a deficiency judgment from a creditor following nonjudicial foreclosure on a real property loan.

I.

As the Court of Appeal emphasized, before Senate Bill No. 1612, the potential conflict between the letters of credit statutes and the antideficiency statutes posed a question of first impression, arising from the relatively recent innovation of the use of standby letters of credit as additional security ***256** for real estate loans. Does the so-called "independence principle"-under which letters of credit stand separate and apart from the underlying transaction-constitute an exception to the antideficiency statutes that bar deficiency judgments after a nonjudicial foreclosure on real property?

The majority conclude that even before Senate Bill No. 1612, there was no restriction on the right of a creditor to demand payment on a standby letter of credit after a nonjudicial foreclosure on real property. They are wrong.

Under the so-called "independence principle," the issuer of a standby letter of credit "must honor a draft or demand for payment which complies with the terms of the relevant credit regardless of whether the goods or documents conform to the underlying contract for sale or other contract between the customer and the beneficiary." (Cal. U. Com. Code, former § 5114, subd. (1), as amended by Stats. 1994, ch. 611, § 4.) In turn, the issuer of a standby letter of credit "is entitled to immediate reimbursement of any payment made under the credit and to be put in effectively available funds not later than the day before maturity of any acceptance made under the credit." (*Id.*, subd. (3).) FN2

FN2 As the reference to "goods or documents" in the statute suggests, the drafters appear to have contemplated use of letters of credit in commercial financial transactions, not as additional security in real es-

tate transactions.

A standby letter of credit specifically operates as a means of guaranteeing payment in the event of a future default. "A letter of credit is an engagement by an issuer (usually a bank) to a beneficiary, made at the request of a customer, which binds the bank to honor drafts up to the amount of the credit upon the beneficiary's compliance with certain conditions specified in the letter of credit. The customer is ultimately liable to reimburse the bank. The traditional function of the letter of credit is to finance an underlying customer's beneficiary contract for the sale of goods, directing the bank to pay the beneficiary for shipment. A different function is served by the 'standby' letter of credit, which directs the bank to pay the beneficiary not for his own performance but upon the customer's default, thereby serving as a guarantee device." (Note, "*Fraud in the Transaction": Enjoining Letters of Credit During the Iranian Revolution* (1980) 93 Harv. L.Rev. 992, 992-993, fns. omitted.)

Thus, in practical effect, a standby letter of credit constitutes a promise to provide additional funds in the event of a future default or deficiency. As such, prior to passage of Senate Bill No. 1612, it potentially came up against the restrictions of the antideficiency statutes barring a creditor from obtaining additional funds from a debtor after a nonjudicial foreclosure. Indeed, as ***257** the parties concede, nothing in the applicable statutes or legislative history prior to the amendments and additions enacted by Senate Bill No. 1612 created any specific exception to the antideficiency statutes for standby letters of credit. Nor did anything in the applicable statutes or legislative history "imply" that the antideficiency statutes must yield to the so-called "independence principle," based on public policy or otherwise.

We have previously summarized the history and purpose of the antideficiency statutes as follows.

"Prior to 1933, a mortgagee of real property was required to exhaust his security before enforcing the debt or otherwise to waive all rights to his security [citations]. However, having resorted to the security, whether by judicial sale or private nonjudicial sale, the mortgagee could obtain a deficiency judgment against the mortgagor for the difference between the amount of the indebtedness and the amount realized from the sale. As a consequence during the great depression with its dearth of money and declining property values, a mortgagee was able to purchase the subject real property at the foreclosure sale at a depressed price far below its normal fair market value and thereafter to obtain a double recovery by holding the debtor for a large deficiency. [Citations.] In order to counteract this situation, California in 1933 enacted fair market value limitations applicable to both judicial foreclosure sales ([Code Civ. Proc.,] § 726) and private foreclosure sales ([*id.*,] § 580a) which limited the mortgagee's deficiency judgment after exhaustion of the security to the difference between the fair [market] value of the property at the time of the sale (irrespective of the amount actually realized at the sale) and the outstanding debt for which the property was security. Therefore, if, due to the depressed economic conditions, the property serving as security was sold for less than the fair [market] value as determined under section 726 or section 580a, the mortgagee could not recover the amount of that difference in this action for a deficiency judgment. [Citation.]

"In certain situations, however, the Legislature deemed even this partial deficiency too oppressive. Accordingly, in 1933 it enacted section 580b [citation] which barred deficiency judgments altogether on purchase money mortgages. 'Section 580b places the risk of inadequate security on the purchase money mortgagee. A vendor is thus discouraged from overvaluing the security. Precarious land promotion schemes are discouraged, for the security value of the land gives purchasers a clue as to its true market value. [Citation.] If inadequacy of se-

curity results, not from overvaluing, but from a decline in property values during a general or local depression, section 580b prevents the aggravation of the downturn that would result if defaulting ***258** purchasers were burdened with large personal liability. Section 580b thus serves as a stabilizing factor in land sales.' [Citations.]

"Although both judicial foreclosure sales and private nonjudicial foreclosure sales provided for identical deficiency judgments in nonpurchase money situations subsequent to the 1933 enactment of the fair value limitations, one significant difference remained, namely property sold through judicial foreclosure was subject to the statutory right of redemption ([Code Civ. Proc.,] § 725a), while property sold by private foreclosure sale was not redeemable. By virtue of sections 725a and 701, the judgment debtor, his successor in interest or a junior lienor could redeem the property at any time during one year after the sale, frequently by tendering the sale price. The effect of this right of redemption was to remove any incentive on the part of the mortgagee to enter a low bid at the sale (since the property could be redeemed for that amount) and to encourage the making of a bid approximating the fair market value of the security. However, since real property purchased at a private foreclosure sale was not subject to redemption, the mortgagee by electing this remedy, could gain irredeemable title to the property by a bid substantially below the fair value and still collect a deficiency judgment for the difference between the fair value of the security and the outstanding indebtedness.

"In 1940 the Legislature placed the two remedies, judicial foreclosure sale and private nonjudicial foreclosure sale on a parity by enacting section 580d [citation]. Section 580d bars 'any deficiency judgment' following a private foreclosure sale. 'It seems clear ... that section 580d was enacted to put judicial enforcement on a parity with private enforcement. This result could be accomplished by giving the debtor a right to redeem after a sale under the power. The right to redeem, like proscription of a deficiency judgment, has the effect of making the security satisfy a realistic share of the debt. [Citation.] By choosing instead to bar a deficiency judgment after private sale, the Legislature achieved its purpose without denying the creditor his election of remedies. If the creditor wishes a deficiency judgment, his sale is subject to statutory redemption rights. If he wishes a sale resulting in nonredeemable title, he must forego the right to a deficiency judgment. In either case his debt is protected.' " (*Cornelison v. Kornbluth* (1975) 15 Cal.3d 590, 600-602 [125 Cal.Rptr. 557, 542 P.2d 981], fns. omitted.)

Over the several decades since their enactment, our courts have construed the antideficiency statutes liberally, rejecting attempts to circumvent the proscriptions against deficiency judgments after nonjudicial foreclosure. "It is well settled that the proscriptions of section 580d cannot be avoided through artifice ...." (***259***Rettner v. Shepherd* (1991) 231 Cal.App.3d 943, 952 [282 Cal.Rptr. 687]; accord, *Freedland v. Greco* (1955) 45 Cal.2d 462, 468 [289 P.2d 463] [In construing the antideficiency statutes, " 'that construction is favored which would defeat subterfuges, expediencies, or evasions employed to continue the mischief sought to be remedied by the statute, or ... to accomplish by indirection what the statute forbids.' "]; *Simon v. Superior Court* (1992) 4 Cal.App.4th 63, 78 [5 Cal.Rptr.2d 428].)

Nor can the antideficiency protections be waived by the borrower at the time the loan was made. (See Civ. Code, § 2953 [such waiver "shall be void and of no effect"]; *Valinda Builders, Inc. v. Bissner* (1964) 230 Cal.App.2d 106, 112 [40 Cal.Rptr. 735] [The debtor's waiver agreement was "contrary to public policy, void and ineffectual for any purpose."].)

In this regard, as the Court of Appeal observed, two decisions are of particular relevance here: *Union*

Bank v. Gradsky (1968) 265 Cal.App.2d 40 [71 Cal.Rptr. 64] (hereafter *Gradsky*), and *Commonwealth Mortgage Assurance Co. v. Superior Court* (1989) 211 Cal.App.3d 508 [259 Cal.Rptr. 425] (hereafter *Commonwealth*).

In *Gradsky*, the Court of Appeal held that Code of Civil Procedure section 580d operated to preclude a lender from collecting the unpaid balance of a promissory note from the guarantor after a nonjudicial foreclosure on the real property securing the debt. It concluded that if the guarantor could successfully assert an action against the borrower for reimbursement, "the obvious result is to permit the recovery of a 'deficiency' judgment against the [borrower] following a nonjudicial sale of the security under a different label." (*Gradsky*, *supra*, 265 Cal.App.2d at pp. 45-46.) "The Legislature clearly intended to protect the [borrower] from personal liability following a nonjudicial sale of the security. No liability, direct or indirect, should be imposed upon the [borrower] following a nonjudicial sale of the security. To permit a guarantor to recover reimbursement from the debtor would permit circumvention of the legislative purpose in enacting section 580d." (*Id.* at p. 46.)

In *Commonwealth*, borrowers purchased real property with a loan secured by promissory notes provided by a bank. At the bank's request, they obtained policies of mortgage guarantee insurance to secure payment on the promissory notes. They also signed indemnity agreements promising to reimburse the mortgage insurer for any funds it paid out under the policy. When the borrowers defaulted on the promissory notes, the bank foreclosed nonjudicially on the real property. It then collected on the mortgage insurance; the mortgage insurer then brought an action for reimbursement on the indemnity agreements. ***260**

The Court of Appeal in *Commonwealth* held that reimbursement was barred by Code of Civil Procedure section 580d. It rejected the argument that the indemnity agreements constituted separate and independent obligations: "The instant indemnity agreements add nothing to the liability [the borrowers] already incurred as principal obligors on the notes .... To splinter the transaction and view the indemnity agreements as separate and independent obligations ... is to thwart the purpose of section 580d by a subterfuge [citation], a result we cannot permit." (*Commonwealth*, *supra*, 211 Cal.App.3d at p. 517.)

The majority's attempt to distinguish *Gradsky* and *Commonwealth*, by characterizing them as grounded in subrogation law, is unpersuasive. Indeed, in *Commonwealth*, subrogation law was not directly in issue; the indemnity obligation provided a contract upon which to base collection. FN3

FN3 In any event, the analogy between standby letters of credit and guarantees is not as "forced" as the majority would suggest. As one commentator recently observed, "upon closer analysis, the borders between standby credits and contracts of guarantee are not so well settled as they may first appear." (McLaughlin, *Standby Letters of Credit and Guaranties: An Exercise in Cartography* (1993) 34 Wm. & Mary L.Rev. 1139, 1140; see also Alces, *An Essay on Independence, Interdependence, and the Suretyship Principle* (1993) 1993 U. Ill. L.Rev. 447 [rejecting distinction between letters of credit and "secondary obligations," i.e., guarantees and sureties].) Moreover, "courts have long recognized that, in a sense, issuers of credits 'must be regarded as sureties.' [Citation.] A seller of goods often insists on a commercial letter of credit because he is unsure of the buyer's ability to pay. The standby letter of credit arises out of situations in which the beneficiary wants to guard against the applicant's nonperformance. In both instances, the credit serves in

> the nature of a guaranty." Dolan, The Law of Letters of Credit: Commercial and Standby Credits (2d ed. 1991) § 2.10[1], pp. 2-61 to 2-62.)

The majority miss the point. As the Court of Appeal in this matter explained: "*Gradsky* and *Commonwealth* reflect the strong judicial concern about the efforts of secured real property lenders to circumvent section 580d by the use of financial transactions between debtors and third parties which involve post-nonjudicial foreclosure debt obligations for the borrowers. Their common and primary focus is on the lender's requirement that the debtor make arrangements with a third party to pay a portion or all of the mortgage debt remaining after a foreclosure, i.e., to pay the debtor's deficiency."

The Legislature, in enacting Senate Bill No. 1612, expressly abrogated the Court of Appeal decision in this matter and gave primacy to the so-called "independence principle" as against the antideficiency protections. Its additions and amendments to the statutes-lobbied for, and drafted by, the California Bankers Association-significantly altered prior law. Senate Bill No. 1612, therefore, should have prospective application only. ***261**

In their strained attempt to reach the conclusion that Senate Bill No. 1612 governs this case, the majority adopt the fiction that a standby letter of credit is an "idiosyncratic" form of "security" or the "functional equivalent" of cash collateral. They offer no sound support for such an approach. There is none. FN4

> FN4 The principal "authority" cited by the majority for the proposition that standby letters of credit are the "functional equivalent" of cash collateral is a student law review note published over a decade ago-and apparently never cited in any case in California or elsewhere. (Comment, *The Independence Rule in Standby Letters of Credit* (1985) 52 U. Chi. L.Rev. 218.) Significantly, the note nowhere discusses the use of standby letters of credit in transactions involving purchase money mortgages or the potential conflict between the so-called "independence principle" and antideficiency statutes. Indeed, it assumes that "[t]hose who engage in standby letter of credit transactions are usually large corporate or governmental entities with access to high-quality counsel and are thus in a position to evaluate and respond to the risks involved." (*Id.* at p. 238.) Needless to say, that is often *not* the case in real property transactions, particularly those involving residential property. As a leading commentator observed: "the motivation of the parties to a real estate secured transaction is frequently other than purely commercial, and their relative bargaining power is often grossly disproportionate." (Hetland & Hansen, *The "Mixed Collateral" Amendments to California's Commercial Code-Covert Repeal of California's Real Property Foreclosure and Antideficiency Provisions or Exercise in Futility?* (1987) 75 Cal.L.Rev. 185, 188, fn. omitted.)

As the Court of Appeal observed, from the perspective of the debtor, a standby letter of credit is not cash or its equivalent. It is, instead, a promise to provide additional funds *in the event of future default or deficiency* and has the practical consequence of requiring the debtor to pay *additional* money on the debt *after* default or foreclosure. FN5 Moreover, unlike cash, which can be pledged as collateral security only once, a standby letter of credit does not require a debtor to part with its own funds until payment is made and thus permits a borrower to use standby letters of credit in a large number of transactions separately. Cash collateral, by contrast, does not impose personal liability on the borrower following a trustee's sale and does not

encourage speculative lending practices.

> FN5 Although it appears to be uncommon, an issuer of a standby letter of credit may demand security from its customer in the form of cash collateral or personal property as a condition for issuing the letter of credit. In the event of a draw on the letter of credit, the issuer would then have recourse to the pledged security, up to the value of the draw, without requiring its customer to pay additional money. Whether a real estate lender's draw on a standby letter of credit backed by security, and not by a mere promise to pay, would fall within the mixed security rule is a difficult question that need not be addressed here.

As the Court of Appeal observed: "For us to conclude that such use of a standby letter of credit is the same as an increased cash investment (whether or not from borrowed funds) is to deny reality and to invite the very overvaluation and potential aggravation of an economic downturn which the antideficiency legislation was originally enacted to prevent." ***262**

II.

The Court of Appeal correctly concluded that, before Senate Bill No. 1612, there was no implied exception to the antideficiency statutes for letters of credit. It erred, however, in holding that Western Security Bank, N.A. (Western) could have refused to honor the letter of credit on the ground that the Beverly Hills Business Bank (Bank), in presenting the letters of credit after a nonjudicial foreclosure, worked an "implied" fraud on Vista Place Associates (Vista).

The Court of Appeal cited former California Uniform Commercial Code former section 5114, subdivision (2)(b), which provides that when there has been a notification from the customer of "fraud, forgery or other defect not apparent on the face of the documents," the issuer "may"-but is not obligated to-"honor the draft or demand for payment."(Cal. U. Com. Code, § 5114, subd. (2)(b) as amended by Stats. 1994, ch. 611, § 4.) FN6 The statute is inapplicable under the present facts.

> FN6 An issuer's obligations and rights are now governed by California Uniform Commercial Code section 5108, enacted in 1996 as part of Senate Bill No. 1599. (Stats. 1996, ch. 176, § 7.) The same legislation repealed section 5114, relating to the issuer's duty to honor a draft or demand for payment, as part of the repeal of division 5, Letters of Credit. (Stats. 1996, ch. 176, § 6.)

Western, presented with a demand for payment on a letter of credit, was limited to determining whether the documents presented by the beneficiary complied with the letter of credit-a purely ministerial task of comparing the documents presented against the description of the documents in the letter of credit. If the documents comply on their face, the issuer must honor the draw, regardless of disputes concerning the underlying transaction. (*Lumbermans Acceptance Co. v. Security Pacific Nat. Bank* (1978) 86 Cal.App.3d 175, 178 [150 Cal.Rptr. 69]; Cal. U. Com. Code, former § 5109, subd. (2) as added by Stats. 1963, ch. 819, § 1, p. 1934.) Thus, in this case, Western was not entitled to look beyond the documents presented by the Bank and refuse to honor the standby letter of credit based on a potential violation of the antideficiency statutes in the underlying transaction.

In my view, the concurring and dissenting opinion by Justice Kitching in the Court of Appeal correctly reconciled the policies behind standby letter of credit law and the antideficiency provisions of Code of Civil Procedure section 580d, as they existed *before* Senate Bill No. 1612. Thus, I would conclude that Western was obligated, under the so-

called "independence principle," to honor the standby letter of credit presented by the Bank. None of the limited exceptions to that rule applied. Western was not, however, without recourse. It was entitled to seek reimbursement from Vista, pursuant ***263** to former California Uniform Commercial Code former section 5114, subdivision (3) and its promissory notes. Vista, in turn, could seek disgorgement from the Bank, if it has not legally waived its protection under Code of Civil Procedure section 580d-an issue that is not before us and should be remanded to the trial court. As Justice Kitching's concurrence and dissent concluded, "[t]his procedure would retain certainty in the California letter of credit market while implementing the policies supporting section 580d."

Kennard, J., concurred. ***264**

Cal. 1997.
Western Security Bank v. Superior Court
15 Cal.4th 232, 933 P.2d 507, 62 Cal.Rptr.2d 243, 32 UCC Rep.Serv.2d 534, 97 Cal. Daily Op. Serv. 2554, 97 Daily Journal D.A.R. 4507

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THE PEOPLE, Plaintiff and Respondent,
v.
DERRICK LEON THOMAS, Defendant and Appellant.
No. S025251.

Supreme Court of California
Dec 14, 1992.

SUMMARY

A complaint charged defendant with robbery (Pen. Code, § 211), and alleged firearm use (Pen. Code, § 12022.5, subd. (a)) and probation ineligibility (Pen. Code, § 1203.06). Defendant negotiated a plea bargain, with the precise term of imprisonment conditioned on the result of his motion to strike the firearm use enhancement. The trial court denied the motion to strike without indicating whether or not it was exercising discretion under Pen. Code, § 1385 (dismissal of action in furtherance of justice). Pursuant to the terms of the plea bargain, the court sentenced defendant to a five-year term of imprisonment. (Superior Court of Santa Clara County, No. 136555, Jeremy D. Fogel, Judge.) The Court of Appeal, Sixth Dist., No. H007449, affirmed, concluding that the trial court lacked authority to entertain a motion under Pen. Code, § 1385, to strike a firearm use enhancement provided for by Pen. Code, § 12022.5.

The Supreme Court affirmed the judgment of the Court of Appeal, holding that the trial court did not err in denying the motion to strike. In amending Pen. Code, § 1170.1, subd. (h), in 1989, the Legislature deleted Pen. Code, § 12022.5, from the list of statutory enhancements that a trial court might, in its discretion, strike if sufficient "circumstances in mitigation" exist. The court held that, although the power to dismiss an "action" "in furtherance of justice" under Pen. Code, § 1385, includes the power to dismiss or strike an enhancement, the Legislature, in deleting reference to Pen. Code, § 12022.5, could not have intended to preserve a power to strike that enhancement under Pen. Code, § 1385. The court held that, at least in the context of striking firearm use enhancements, the "circumstances in mitigation" and "furtherance of justice" standards are essentially identical. (Opinion by Lucas, C. J., expressing the unanimous view of the court.)

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b) Criminal Law § 529.2--Judgment, Sentence, and Punishment-- Imprisonment--Sentence Enhancements--Firearm Use--Trial Court's Power to Strike.
In a prosecution for robbery (Pen. Code, § 211), the trial court did not err in denying defendant's motion to strike a firearm use enhancement (Pen. Code, § 12022.5, subd. (a)). In amending Pen. Code, § 1170.1, subd. (h), in 1989, the Legislature deleted Pen. Code, § 12022.5, from the list of statutory enhancements that a trial court might, in its discretion, strike if sufficient "circumstances in mitigation" exist. Although the power to dismiss an "action" "in furtherance of justice" under Pen. Code, § 1385, includes the power to dismiss or strike an enhancement, the Legislature, in deleting reference to Pen. Code, § 12022.5, could not have intended to preserve a power to strike that enhancement under Pen. Code, § 1385. At least in the context of striking firearm use enhancements, the "circumstances in mitigation" and "furtherance of justice" standards are essentially identical.
[See **Cal.Jur.3d (Rev)**, Criminal Law, § 3410; 3 **Witkin & Epstein,** Cal. Criminal Law (2d ed. 1989) § 1502.]
(2) Statutes § 21--Construction--Legislative Intent.
The fundamental purpose of statutory construction is to ascertain the intent of the lawmakers so as to effectuate the purpose of the law. In order to determine this intent, a court begins by examining the language of the statute. But it is a settled principle of statutory interpretation that language of a statute should not be given a literal meaning if doing so would result in absurd consequences which the Legislature did not intend. Thus, the intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act.

(3) Statutes § 39--Construction--Giving Effect to Statute--Conformation of Parts.
A court does not construe statutes in isolation, but rather reads every statute with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness.

COUNSEL

George L. Schraer, under appointment by the Supreme Court, and Winifred T. Gross, under appointment by the Court of Appeal, for Defendant and Appellant.

Daniel E. Lungren, Attorney General, George Williamson, Chief Assistant Attorney General, Ronald A. Bass and John H. Sugiyama, Assistant Attorneys General, Martin S. Kaye, Laurence K. Sullivan, Herbert F. Wilkinson ***208** and Ronald S. Matthias, Deputy Attorneys General, for Plaintiff and Respondent.

Michael R. Capizzi, District Attorney (Orange) and E. Thomas Dunn, Jr., Deputy District Attorney, as Amici Curiae on behalf of Plaintiff and Respondent.

LUCAS, C. J.

In 1989, the Legislature amended Penal Code section 1170.1, subdivision (h) (all further statutory references are to this code), by deleting section 12022.5 (firearm use enhancements) from the list of statutory enhancements that a trial court might, in its discretion, strike if sufficient "circumstances in mitigation" exist. The question arises whether trial courts nonetheless may continue to strike such firearm use enhancements "in furtherance of justice" under section 1385. Because we find clear legislative intent to withhold such authority, we conclude the Court of Appeal in the present case correctly ruled the trial court herein lacked such authority.

On January 7, 1990, defendant Derrick Leon Thomas (age 18) and his companion (age 17) robbed a store in Palo Alto. Defendant was holding a loaded .22-caliber gun borrowed from his companion, who had taken it from his mother without her knowledge. The robbers took and divided $160 in cash, fled on bicycles, and were arrested a few minutes later.

A complaint charged defendant with robbery (§ 211), and alleged a firearm use (§ 12022.5, subd. (a)) and probation ineligibility (§ 1203.06). Defendant negotiated a plea bargain, the precise term of imprisonment conditioned on the result of his motion to strike the firearm use enhancement. In support of his motion to strike, defendant submitted an evaluation of the interviewing counselor, who concluded that the robbery was an isolated and impulsive act not likely to be repeated by defendant. The People argued the trial court lacked authority to entertain the motion to strike. The court denied defendant's motion, without indicating whether or not it was exercising discretion under section 1385. Pursuant to the terms of defendant's plea bargain, he was then sentenced to a five-year term of imprisonment. Defendant appealed.

The Court of Appeal affirmed, concluding the trial court lacked authority to entertain a motion under section 1385 to strike a firearm use enhancement provided for by section 12022.5. As will appear, we agree. ***209**

1. *The applicable statutes*

Section 12022.5, subdivision (a), in pertinent part provides for an enhanced punishment of three, four or five years' imprisonment for "any person who personally uses a firearm in the commission or attempted commission of a felony ...."

Section 1170.1, subdivision (d), provides that when the court imposes a prison sentence for a felony (see generally § 1170), "the court shall also impose the additional terms provided" in 16 specified sections of the Penal Code and the Health and Safety Code, including section 12022.5, "unless the additional punishment therefor is stricken pursuant to [section 1170.1,] subdivision (h)."

Section 1170.1, subdivision (h), provides that "Notwithstanding any other provision of law, the court may strike the additional punishment for the enhancements provided" in 13 of the 16 enhancement sections set forth in section 1170.1, subdivision (d), "if it determines that there are circumstances in miti-

gation of the additional punishment. ..."

Until 1989, section 12022.5 was one of the sections listed in section 1170.1, subdivision (h). The Legislative Counsel's Digest comment concerning the proposal to delete reference to section 12022.5 explained the amendment as follows: "Existing law relating to sentencing authorizes a court to strike the additional enhancement involving the personal use of a firearm in the commission ... of a felony .... [¶] *This bill would delete that authorization.*" (Legis. Counsel's Dig., Assem. Bill No. 566 (1989-1990 Reg. Sess.), italics added.)

Finally, section 1385, subdivision (a), permits the sentencing authority "in furtherance of justice [to] order an action to be dismissed." In its 1989 amendment to section 1170.1, subdivision (h), the Legislature deleted reference to section 12022.5, but did not alter or refer to the language of section 1385.

2. *Discussion*

(1a) Defendant contends the trial court erred in denying his motion to strike the firearm use enhancement without exercising the court's "furtherance of justice" discretion under section 1385. As defendant observes, the power to dismiss an "action" under section 1385 includes the power to dismiss or strike an enhancement. (See *People v. Fritz* (1985) 40 Cal.3d 227, 229-230 [219 Cal.Rptr. 460, 707 P.2d 833]; ***210***People v. Williams* (1981) 30 Cal.3d 470, 482-483 [179 Cal.Rptr., 637 P.2d 1029]; *People v. Burke* (1956) 47 Cal.2d 45, 50-51 [301 P.2d 241]; *People v. Dorsey* (1972) 28 Cal.App.3d 15, 18-20 [104 Cal.Rptr. 326]; cf. § 1385, subd. (b) [abrogating *Fritz*'s holding that section 1385 may be used to strike "prior serious felony" enhancements under section 667].)

The People, on the other hand, contend that by amending section 1170.1, subdivision (h), to delete the reference to section 12022.5, the Legislature expressed a clear intent to divest the courts of discretion to strike firearm use enhancements. The People suggest further that the Legislature's failure to likewise amend or refer to section 1385 was, at most, a drafting "oversight" of a kind to which we have previously referred. (See, e.g., *People v. Pieters* (1991) 52 Cal.3d 894, 900-901 [210 Cal.Rptr. 623, 694 P.2d 736]; *People v. Jackson* (1985) 37 Cal.3d 826, 837-838, and fn. 15 [276 Cal.Rptr. 918, 802 P.2d 420].)

(2) As we observed in *People v. Pieters, supra,* 52 Cal.3d at pages 898-899, "The fundamental purpose of statutory construction is to ascertain the intent of the lawmakers so as to effectuate the purpose of the law. [Citations.] In order to determine this intent, we begin by examining the language of the statute. [Citations.] But '[i]t is a settled principle of statutory interpretation that language of a statute should not be given a literal meaning if doing so would result in absurd consequences which the Legislature did not intend.' [Citations.] Thus, '[t]he intent prevails over the letter, and the letter will, if possible, be so read as to conform to the spirit of the act.' [Citation.] (3) Finally, we do not construe statutes in isolation, but rather read every statute 'with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness.' [Citation.]"

Defendant cites cases holding that, absent a clear legislative direction to the contrary, a trial court retains its authority under section 1385 to strike an enhancement. (See *People v. Fritz, supra,* 40 Cal.3d at pp. 229-230; *People v. Williams, supra,* 30 Cal.3d at pp. 482-483; *People v. Tanner* (1979) 24 Cal.3d 514, 518 [156 Cal.Rptr. 450, 596 P.2d 328]; see also *People v. Sutton* (1985) 163 Cal.App.3d 438, 445-446 [209 Cal.Rptr. 536] [recognizing authority under section 1385 to strike deadly weapon use enhancement under section 12022.3, despite failure of Legislature to include such enhancements in section 1170.1, subdivision (h)]; *People v. Price* (1984) 151 Cal.App.3d 803, 818-820 [199 Cal.Rptr. 99] [same].) ***211**

(1b) But it is not necessary that the Legislature expressly refer to section 1385 in order to preclude its operation. (See *People v. Rodriguez* (1986) 42 Cal.3d 1005, 1019 [232 Cal.Rptr. 132, 728 P.2d 202] [section 1385 may be held inapplicable "in the face of [a] more specific proscription on the court's power"]; *People v. Tanner, supra,* 24 Cal.3d at pp. 519-521 [specific language of section 1203.06 barring probation contained sufficient indicia of legislative intent to preclude judicial exercise of discretion

under section 1385]; see also *People v. Dillon* (1983) 34 Cal.3d 441, 467 [194 Cal.Rptr. 390, 668 P.2d 697] [deletion of provision indicates legislative intent to change law].) As we stated in *People v. Williams, supra,* 30 Cal.3d at page 482, "Section 1385 permits dismissals in the interest of justice in any situation where the Legislature has not clearly evidenced a contrary intent."

What was the intent of the Legislature in deleting from section 1170.1, subdivision (h), the former reference to section 12022.5? As previously noted, the Legislative Counsel's comment indicated the amendment was intended to "delete" the trial courts' authorization to strike the additional enhancement involving the personal use of a firearm in the commission of a felony. Could the Legislature, in deleting reference to section 12022.5, nonetheless have intended to preserve a power to strike that enhancement under section 1385? We conclude otherwise, and a comparison of the respective standards for striking or dismissing enhancements under section 1170.1, subdivision (h), and section 1385, reinforces that conclusion.

Section 1170.1, subdivision (h), permits a court to strike the punishment for an enhancement "if it determines that there are circumstances in mitigation of the additional punishment ...." Section 1385, on the other hand, permits dismissal of actions (or enhancements) "in furtherance of justice." Are there significant differences between these standards which might have induced the Legislature to leave section 1385 in place as a vehicle for striking firearm use enhancements? It is quite difficult to conceive of any such differences.

The Judicial Council adopted extensive guidelines to assist in determining whether "circumstances in mitigation" exist to justify striking enhancements or reducing sentences to a lower term. (See Cal. Rules of Court, rule 423, and Advisory Com. Comment.) Rule 423 lists a variety of such "circumstances in mitigation," including facts relating to the crime (such as defendant's minor role or laudable motive in the offense, the small likelihood of its recurrence, the presence of duress or coercion by others, or a mistaken claim of right by the defendant), and facts relating to the defendant (including his ***212** insignificant prior record, mental or physical condition reducing his culpability, or restitution or satisfactory performance on probation or parole). Rule 423's list of mitigating circumstances mirrors many of the considerations we have stated are appropriate in determining whether to dismiss an action under section 1385 in furtherance of justice. (See *People v. Superior Court (Howard)* (1968) 69 Cal.2d 491, 505 [72 Cal.Rptr. 330, 446 P.2d 138].)

Defendant suggests that the "furtherance of justice" standard is broader than the "circumstances in mitigation" standard, and would include consideration of matters extrinsic to the offense and the offender, such as protection of the public interest. (See *People v. Orin* (1975) 13 Cal.3d 937, 944 [120 Cal.Rptr. 65, 533 P.2d 193].) Although the public interest may well favor *enhancing* a defendant's sentence by reason of his firearm use, it would be quite rare when the public interest, but not "circumstances in mitigation," would justify *striking* such an enhancement. (Such cases seemingly would be limited to situations wherein the *People* seek to strike an enhancement to enable them to rely on the defendant's gun use as an aggravating sentencing factor.) In most cases, if the public interest favors such relief, that fact readily could be deemed a "circumstance in mitigation of the additional punishment." (See, e.g., *People v. Marsh* (1984) 36 Cal.3d 134, 145, fn. 8 [202 Cal.Rptr. 92, 679 P.2d 1033] [noting for purposes of remand that striking enhancements may be justified under section 1385 by number of "mitigating circumstances" in case].)

In short, we believe that, at least in the context of striking firearm use enhancements, the two standards are essentially identical. This conclusion supports the People's position that the Legislature's deletion of section 12022.5 was intended to divest the courts of their statutory authority to strike firearm use enhancements, whether such power be exercised under section 1170.1, subdivision (h), or under section 1385.

As previously stated, in determining the legislative intent underlying a new provision or amendment, we must consider the entire scheme of law of which it is a part. The 1989 amendment to section 1170.1, subdivision (h), was included in a bill (Assem. Bill No.

566 (1989-1990 Reg. Sess.), the "McClintock Firearms" bill) that contained a variety of measures *expanding or enhancing* criminal liability for unlawful firearm use or possession. These new measures included provisions (1) restricting plea bargaining when a defendant personally used a firearm, (2) elevating certain firearm use or possession offenses from misdemeanor/felony ("wobbler") status to felonies, and (3) increasing the term of imprisonment for personal use of a firearm during a felony, as well as (4) the subject provision deleting section 12022.5 ***213** from section 1170.1, subdivision (h). (See Legis. Counsel's Dig., Assem. Bill No. 566 (1989-1990 Reg. Sess.).)

In light of the fact that the subject provision is included in a "package" of provisions aimed at enhancing criminal liability for unlawful firearm use, we think it highly unlikely the Legislature intended nonetheless to preserve broad judicial authority under section 1385 to strike a firearm use enhancement "in furtherance of justice."

Defendant observes that prior to the adoption of the foregoing amendment, the Attorney General's Office had urged the Legislature to modify section 1385 to preclude a court from striking a firearm use enhancement in furtherance of justice. Evidently, the Legislature did not deem an amendment to section 1385 necessary in light of its deletion of the specific reference to section 12022.5 in section 1170.1, subdivision (h). This conclusion is supported by a synopsis of Assembly Bill No. 566 prepared by the Senate Committee on the Judiciary, which synopsis referred to the prior ability of courts to strike firearm use enhancements "in the interest of justice," and commented: "This bill would provide that the enhancements shall never be stricken."

Finally, the People observe that although section 1385 provides a broad, general power to dismiss "actions" in furtherance of justice, section 1170.1, subdivision (h), provides a *specific* power to strike specified enhancements. Under well-established rules of construction, any inconsistency between the two provisions would be resolved by applying the more specific provision (and any amendments thereto). (E.g., *People v. Tanner, supra,* 24 Cal.3d at p. 521.) Moreover, to accept defendant's argument and hold that section 1385 continues to afford a broad ("furtherance of justice") basis for striking an enhancement under section 12022.5 could effectively negate the 1989 amendment to section 1170.1, subdivision (h). The "furtherance of justice" standard of section 1385 seems broad enough to permit striking an enhancement where mitigating circumstances exist, yet the Legislature in passing the 1989 amendment clearly intended to preclude the exercise of such power. As we previously indicated, a statute should not be given a literal meaning if doing so would result in absurd consequences which the Legislature could not have intended. (See *People v. Tanner, supra,* 24 Cal.3d at pp. 518-520 [construing mandatory language of section 1203.06 as precluding power to strike firearm use finding and grant probation].)

For all the foregoing reasons, we conclude the trial court had no discretion to strike the firearm use enhancement under section 12022.5, and properly ***214** denied defendant's motion for such relief. The Court of Appeal's judgment is affirmed.

Mosk, J., Panelli, J., Kennard, J., Arabian, J., Baxter, J., and George, J., concurred.
Appellant's petition for a rehearing was denied January 28, 1993. ***215**

Cal. 1992.
People v. Thomas
4 Cal.4th 206, 841 P.2d 159, 14 Cal.Rptr.2d 174

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Supreme Court of California,
In Bank.
NO OIL, INC., et al., Plaintiffs and Appellants,
v.
CITY OF LOS ANGELES et al., Defendants and Respondents.
L.A. 30268.

Dec. 10, 1974.
As Modified on Denial of Rehearing Jan. 29, 1975.

Nonprofit corporations brought an action in mandamus challenging the validity of the creation by ordinance by the council of the City of Los Angeles of three informational oil drilling districts within the Pacific Palisades, subject to condition that only two test wells be drilled, without first requiring the preparation and consideration of an environmental impact report. The Superior Court, Los Angeles County, David N. Eagleson, J., entered judgment in favor of defendants, and plaintiffs appealed. The Supreme Court, Tobriner, J., held that city council in approving oil drilling project in October of 1972 without a written determination concerning environmental impact of that project failed to comply with requirements of Environmental Quality Act that agency render a written determination whether project requires an environmental impact report before it gives final approval to project, and belated council resolution in January of 1973, despite its attempt to render determination retroactively, did not suffice to comply with requirement that environmental issues be considered and resolved before project is approved; and that city's use of erroneous test which limited use of an environmental impact report to projects which may have an 'important' or 'momentous' effect of 'semi-permanent' duration constituted prejudicial abuse of discretion.

Judgment reversed and cause remanded.

Clark, J., dissented and filed an opinion in which McComb and Burke, JJ., concurred.

Opinion, Cal.App., 111 Cal.Rptr. 487, vacated.

West Headnotes

[1] Environmental Law 149E 16

149E Environmental Law
149EI In General
149Ek14 Administrative Agencies and Proceedings in General
149Ek16 k. Regulations and Rulemaking in General. Most Cited Cases
(Formerly 199k25.5(1), 199k25.5 Health and Environment)
Guidelines established by State Resources Agency, which took effect on February 10, 1973, were not applied retroactively to decisions of court or city council rendered before guidelines went into effect, but court made use of guidelines as a suggested interpretation of Environmental Quality Act and as an illustration of procedures which Resource Agency finds necessary to enforcement of statute. West's Ann.Public Resources Code, §§ 21001(d), 21050 et seq., 21084, 21085.

[2] Mandamus 250 66

250 Mandamus
250II Subjects and Purposes of Relief
250II(B) Acts and Proceedings of Public Officers and Boards and Municipalities
250k66 k. Municipalities and Municipal Officers in General. Most Cited Cases
Since Los Angeles City Council was not required by law to hold an evidentiary hearing before approving ordinances establishing oil drilling districts, decision of council that an environmental impact report was not required was reviewable by traditional mandamus action. West's Ann.Public Resources Code, §§ 21100, 21151, 21168, 21168.5, 21168.7; West's Ann.Code Civ.Proc. § 1094.5.

[3] Environmental Law 149E 689

149E Environmental Law

149EXIII Judicial Review or Intervention
149Ek677 Scope of Inquiry on Review of Administrative Decision
149Ek689 k. Assessments and Impact Statements. Most Cited Cases
(Formerly 199k25.15(1), 199k25.5 Health and Environment)
Statutes governing judicial review of agency action under Environmental Quality Act apply to all proceedings under Act, including those pending when judicial review sections became effective. West's Ann.Public Resources Code, §§ 21168, 21168.5, 21168.7; West's Ann.Code Civ.Proc. § 1094.5.

[4] Environmental Law 149E ⚿588

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek584 Necessity for Preparation of Statement, Consideration of Factors, or Other Compliance with Requirements
149Ek588 k. Impacting Human Environment. Most Cited Cases
(Formerly 199k25.10(2.1), 199k25.10(2), 199k25.10 Health and Environment)

Environmental Law 149E ⚿589

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek584 Necessity for Preparation of Statement, Consideration of Factors, or Other Compliance with Requirements
149Ek589 k. Significance in General. Most Cited Cases
(Formerly 199k25.10(2.1), 199k25.10(2), 199k25.10 Health and Environment)
Environmental Quality Act requires the preparation of an environmental impact report whenever it can be fairly argued on basis of substantial evidence that project may have significant environmental impact. West's Ann.Public Resources Code, §§ 21001(d), 21050 et seq., 21084, 21085.

[5] Mandamus 250 ⚿172

250 Mandamus
250III Jurisdiction, Proceedings, and Relief
250k172 k. Scope of Inquiry and Powers of Court. Most Cited Cases
In action for administrative mandamus, court reviews administrative record, receiving additional evidence only if that evidence was unavailable at time of administrative hearing, or improperly excluded from record. West's Ann.Code Civ.Proc. § 1094.5.

[6] Mandamus 250 ⚿172

250 Mandamus
250III Jurisdiction, Proceedings, and Relief
250k172 k. Scope of Inquiry and Powers of Court. Most Cited Cases
In a traditional mandamus action, court is not limited to review of administrative record, but may receive additional evidence. West's Ann.Code Civ.Proc. § 1094.5.

[7] Environmental Law 149E ⚿609

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek607 Effect of Deficiency
149Ek609 k. Lack of Statement. Most Cited Cases
(Formerly 199k25.10(2.1), 199k25.10(2), 199k25.10 Health and Environment)
Under Environmental Quality Act, an environmental impact report is required before agency approves project. West's Ann.Public Resources Code, § 21050 et seq.

[8] Environmental Law 149E ⚿594

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek584 Necessity for Preparation of Statement, Consideration of Factors, or Other Compliance with Requirements
149Ek594 k. Negative Declaration; Statement of Reasons. Most Cited Cases
(Formerly 199k25.10(5), 199k25.10 Health and Environment)
Determination that a project does not require an environmental impact report, when that project is not exempt from environmental study under Environmental Quality Act or guidelines, must take form of a written

Negative Declaration. West's Ann.Public Resources Code, § 21050 et seq.

[9] Environmental Law 149E ⚿608

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek607 Effect of Deficiency
149Ek608 k. In General. Most Cited Cases
(Formerly 199k25.10(5), 199k25.10 Health and Environment)
City council in approving oil drilling project in October of 1972 without a written determination concerning environmental impact of that project failed to comply with requirements of Environmental Quality Act that agency render a written determination whether project requires an environmental impact report before it gives final approval to project, and belated council resolution in January of 1973, despite its attempt to render determination retroactively, did not suffice to comply with requirement that environmental issues be considered and resolved before project is approved. West's Ann.Public Resources Code, §§ 21001(d), 21084, 21085, 21100, 21151, 21168.5.

[10] Environmental Law 149E ⚿589

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek584 Necessity for Preparation of Statement, Consideration of Factors, or Other Compliance with Requirements
149Ek589 k. Significance in General. Most Cited Cases
(Formerly 199k25.10(3), 199k25.10 Health and Environment)
Word "significant," within Environmental Quality Act requirement of an environmental impact report only for project whose environmental effect can be described as "significant" is not a term of precision but encompasses a range of meaning. West's Ann.Public Resources Code, §§ 21065, 21151.

[11] Environmental Law 149E ⚿585

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek584 Necessity for Preparation of Statement, Consideration of Factors, or Other Compliance with Requirements
149Ek585 k. In General. Most Cited Cases
(Formerly 199k25.10(2.1), 199k25.10(2), 199k25.10 Health and Environment)
Environmental Quality Act imposes a low threshold requirement for preparation of an environmental impact report. West's Ann.Public Resources Code, § 21151.

[12] Environmental Law 149E ⚿595(5)

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek584 Necessity for Preparation of Statement, Consideration of Factors, or Other Compliance with Requirements
149Ek595 Particular Projects
149Ek595(5) k. Mining; Oil and Gas. Most Cited Cases
(Formerly 199k25.10(2.1), 199k25.10(2), 199k25.10 Health and Environment)
With respect to oil drilling project, test used by city which limited use of an environmental impact report to projects which may have an "important" or "momentous" effect of "semi-permanent" duration was erroneous. West's Ann.Public Resources Code, § 21151.

[13] Environmental Law 149E ⚿589

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek584 Necessity for Preparation of Statement, Consideration of Factors, or Other Compliance with Requirements
149Ek589 k. Significance in General. Most Cited Cases
(Formerly 199k25.10(3), 199k25.10 Health and Environment)
An agency should prepare an environmental impact report when it perceives some substantial evidence that a project may have a significant effect environmentally. West's Ann.Public Resources Code, § 21050 et seq.

[14] Environmental Law 149E ⚿588

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek584 Necessity for Preparation of Statement, Consideration of Factors, or Other Compliance with Requirements
149Ek588 k. Impacting Human Environment. Most Cited Cases
(Formerly 199k25.10(2.1), 199k25.10(2), 199k25.10 Health and Environment)
An environmental impact report should be prepared whenever the action arguably will have an adverse environmental impact. West's Ann.Public Resources Code, § 21050 et seq.

[15] Environmental Law 149E 593

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek584 Necessity for Preparation of Statement, Consideration of Factors, or Other Compliance with Requirements
149Ek593 k. Controversy. Most Cited Cases
(Formerly 199k25.10(2.1), 199k25.10(2), 199k25.10, 199k10 Health and Environment)
The existence of serious public controversy concerning environmental effect of a project in itself indicates that preparation of an environmental impact report is desirable. West's Ann.Public Resources Code, §§ 21050 et seq., 21151.

[16] Statutes 361 226

361 Statutes
361VI Construction and Operation
361VI(A) General Rules of Construction
361k226 k. Construction of Statutes Adopted from Other States or Countries. Most Cited Cases
Since California Environmental Quality Act was modeled on federal statute, judicial and administrative interpretation of federal enactment is persuasive authority in interpreting California act. West's Ann.Public Resources Code, § 21050 et seq.

[17] Environmental Law 149E 594

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek584 Necessity for Preparation of Statement, Consideration of Factors, or Other Compliance with Requirements
149Ek594 k. Negative Declaration; Statement of Reasons. Most Cited Cases
(Formerly 199k25.10(5), 199k25.10 Health and Environment)
A simple resolution or Negative Declaration, stating that project will have no significant environmental effect, cannot serve function of environmental impact report. West's Ann.Public Resources Code, §§ 21050 et seq., 21151.

[18] Environmental Law 149E 606

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek606 k. Effect of Statement or Other Requirements. Most Cited Cases
(Formerly 199k25.10(5), 199k25.10 Health and Environment)
Fact that resolution of city council carried by a bare eight to seven majority compelled conclusion that, with respect to oil drilling project, city's use of erroneous test which limited use of an environmental impact report to projects which may have an important or momentous effect of semipermanent duration, and which excluded presence of disputed factual issues of public controversy as criteria suggesting preparation of a report, constituted prejudicial abuse of discretion. West's Ann.Public Resources Code, § 21050 et seq.

[19] Administrative Law and Procedure 15A 821

15A Administrative Law and Procedure
15AV Judicial Review of Administrative Decisions
15AV(F) Determination
15Ak821 k. Successive Proceedings for Review. Most Cited Cases
When a court remands case to an administrative agency with directions to follow a specific legal test, court must presume that administrators faithfully followed those instructions, but the presumption is rebuttable. West's Ann.Evid.Code, §§ 660, 664.

[20] Environmental Law 149E ⚷577

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek577 k. Duty of Government Bodies to Consider Environment in General. Most Cited Cases
(Formerly 199k25.10(5), 199k25.10 Health and Environment)
Declarations of city councilmen filed prior to trial court's statement, on remand, of its test for determination of environmental impact of project fell short of showing that council subsequently failed to follow court's test. West's Ann.Public Resources Code, § 21050 et seq.

[21] Environmental Law 149E ⚷585

149E Environmental Law
149EXII Assessments and Impact Statements
149Ek584 Necessity for Preparation of Statement, Consideration of Factors, or Other Compliance with Requirements
149Ek585 k. In General. Most Cited Cases
(Formerly 199k25.10(5), 199k25.10, 199k10 Health and Environment)
City council's use of an erroneous legal standard for determination of necessity of environmental impact report constituted a failure to proceed in manner required by law and constituted an abuse of discretion. West's Ann.Public Resources Code, § 21168.5.
***73 ***37 **69** Brent N. Rushforth, Carlyle W. Hall, Jr., Mary D. Nichols, John R. Phillips, A. Thomas Hunt and Fredric P. Sutherland, Los Angeles, for plaintiffs and appellants.

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TOBRINER, Justice.

Plaintiffs appeal from a judgment of the Los Angeles Superior Court ruling that the City of Los Angeles need not prepare an environmental impact report (EIR) before enacting ordinances to permit defendant Occidental Petroleum Corp. to sink two test oil wells in the Pacific Palisades region of the city. This appeal, the first case arising under the California Environmental Quality Act (hereafter CEQA) (Pub. Resources Code, s 21050 et seq.) to reach this court since Friends of Mammoth v. Board of Supervisors (1972) 8 Cal.3d 247, 104 Cal.Rptr. 761, 502 P.2d 1049 compels us to inquire into how an agency should decide whether a pending project requires an EIR.[FN1]

FN1. For a summary of the relationship between CEQA as enacted in 1970, Friends of Mammoth, and the 1972 amended act, see Seneker, The Legislative Response to Friends of Mammoth-Developers Chase the Will-O-The Wisp (1973) 48 State Bar J. 127.

***74** [1] In CEQA, the Legislature sought to protect the environment by the establishment of administrative procedures drafted to 'Ensure that the long-term protection of the environment shall be the guiding criterion in public decisions.' (Pub. Resources Code, s 21001, subd. (d).) To achieve these objectives, CEQA and the guidelines issued by the State Resources Agency to implement CEQA[FN2] establish a three-tiered structure. If a project falls within a category exempt by administrative regulation (see Pub.Resources Code, ss 21084, 21085), or 'it can be seen with certainty that the activity in question will not have a significant effect on the environment' (Cal.Admin.Code, tit. 14, s 15060), no further agency evaluation is required. If there is a possibility that the project may have a significant effect, the agency undertakes an initial threshold study (Cal.Admin.Code, tit. 14, s 15080); if that study demonstrates that the project 'will not have a significant effect,' the agency may so declare in a brief Negative Declaration. (Cal.Admin.Code, tit. 14, s 15083.) If the project is

one 'which may have a significant effect on the environment,' an EIR is required. (Pub. Resources Code, ss 21100, 21151; see Cal.Admin.Code, tit. 14, s 15080.) The parties assume that the drilling project is one which may possibly have a significant effect and thus requires an initial threshold environmental study. The question is whether the city properly determined that no EIR was necessary.

> FN2. The guidelines established by the State Resources Agency took effect on February 10, 1973, shortly after completion of the trial in the present case. We do not apply these guidelines retroactively to decisions of the court or city council rendered before the guidelines went into effect. We make use of the guidelines, however, as a suggested interpretation of the statute, and as an illustration of the procedures which the resources agency finds necessary to enforcement of the statute.

[2][3] Judicial review of the city's decision is governed by Public Resources Code ***38 **70 section 21168.5, which provides that 'In any action or proceeding, other than an action or proceeding under section 21168, to attack, review, set aside, void or annul a determination or decision of a public agency on the ground of noncompliance with this division, the inquiry shall extend only to whether there was a prejudicial abuse of discretion. Abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence.'[FN3] Since, as we shall explain, the judgment *75 of the superior court sustaining the city's decision must be reversed because of the city's failure to proceed in the manner required by law, we do not reach the question whether that decision is supported by substantial evidence.

> FN3. Judicial review of agency action under CEQA is governed by sections 21168 and 21168.5. Section 21168 provides that review of an agency decision 'made as a result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken and discretion in the determination of facts is vested in a public agency' should follow the administrative mandamus procedure of Code of Civil Procedure section 1094.5. Section 21168.5, quoted in the text, provides that other agency decisions should be reviewed by a traditional mandamus action. Since the Los Angeles City Council was not required by law to hold an evidentiary hearing before approving the ordinances establishing the oil drilling districts, section 21168.5 governs the case at bar.
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> Sections 21168 and 21168.5 became effective on December 5, 1972-subsequent to the October city council hearings and to the filing of this action, but before the trial in the superior court and that court's remand of the matter to the city council. Fortunately the Legislature, anticipating that issues might arise concerning the retroactivity of these sections, enacted that 'Sections 21168 and 21168.5 are declaratory of existing law with respect to the judicial review of determinations or decisions of public agencies made pursuant to this division.' (Pub. Resources Code, s 21168.7.) This enactment demonstrates that the Legislature intends section 21168 and 2168.5 to apply to all proceedings under CEQA, including those pending when those sections became effective.

The city council specifically failed to comply with the requirements of CEQA in two respects. First, because an EIR serves to guide an agency in deciding whether to approve or disapprove a proposed project, CEQA impliedly requires (and the guidelines expressly require) that the agency render a written determination whether a project requires an EIR before it gives final approval to that project. The city council, however, approved the drilling project in October of 1972 without a written determination concerning the environmental impact of that project. The belated council resolution in January of 1973, despite its attempt to render a determination retroactively as of the previous October, does not suffice to comply with the requirement that environmental issues be considered and resolved before a project is approved.

[4] Second, since the preparation of an EIR is the key to environmental protection under CEQA, accom-

plishment of the high objectives of that act requires the preparation of an EIR whenever it can be fairly argued on the basis of substantial evidence that the project may have significant environmental impact. The superior court in the present case, however, ordered the city council to follow a far more restrictive test that limited use of an EIR to projects which may have an 'important' or 'momentous' effect of semi-permanent duration. The superior court's instruction, in addition, overlooked the importance of preparing an EIR in cases, such as the present action, in which the determination of a project's environmental effect turns upon the resolution of controverted issues of fact and forms the subject of intense public concern. In the context of this case, we shall point out the bases for our conclusion that the city's use of the erroneous test stated by the trial court constitutes a prejudicial abuse of discretion.

***76** 1. Chronology of events.

In 1966 Occidental Petroleum drilled the Marquez Core Hole in Santa Monica Canyon and discovered oil producing sands at a depth of 9,200 feet. Seeking to determine the extent of the oil field, Occidental *****39 **71** acquired the 'highway drillsite' in Pacific Palisades in 1969. This two-acre site lies across a state highway from Will Rogers State Beach and near the foot of a bluff which has experienced numerous landslides.

In July of 1970, the Office of Zoning Administration of the City of Los Angeles granted Occidental a conditional use permit allowing it to drill a test well at the highway drillsite. The board of zoning appeals overturned that decision, finding that the drilling might trigger a disastrous landslide, that a blowout-an uncontrolled effusion of oil under pressure-would have severe environmental consequences, and that an industrial use of the site would be aesthetically undesirable.

Seeking to circumvent the requirement for a conditional use permit, Occidental petitioned the city in 1972 to establish three oil drilling districts in the Pacific Palisades. Since the oil drilling districts proposed by Occidental would have permitted commercial oil production, the hearing examiner for the city planning commission, concerned about the environmental impact of such production, recommended disapproval of the proposal. Nevertheless the planning commission resolved to approve the proposal on condition that only two test holes be drilled.

On October 10, 1972, the council considered three ordinances which established oil drilling districts in the Pacific Palisades area, subject to the condition that only two test wells could be drilled. At the close of the hearing Councilman Wachs inquired whether the city attorney had examined the proposed ordinances in the light of our opinion in Friends of Mannoth filed three weeks earlier. The city attorney replied that since the city had not yet established procedures to ascertain the environmental impact of measures coming before the council, he had made no such examination.

At the next meeting, on October 17, Councilman Wachs moved to postpone consideration of the ordinances pending preparation of an EIR. No other councilman discussed the motion, which failed by an eight-to-six vote. The council then passed the ordinances by the same eight-to-six vote. Mayor Yorty signed the ordinances into law on October 20.

Plaintiffs, four nonprofit corporations representing persons opposed to oil drilling in Pacific Palisades, filed the instant action on October 27. Their complaint sought a declaration that the ordinances were invalid, ***77** prayed for mandate to compel preparation of an EIR, and requested an injunction against the issuance of a drilling permit by the office of zoning administration.[FN4] The city, in response, contended that no EIR was necessary, supporting this contention with declarations from the eight councilmen who voted for the ordinances; each declared, in the statutory language, his opinion that the drilling project was not such as might have a significant effect on the environment. Occidental, on the other hand, maintained that the reports of the planning commission consitituted a sufficient EIR.

FN4. Before beginning to drill, Occidental was required to secure drilling permits from the office of zoning administration. The office expressly found that issuance of the drilling permits would not require an EIR, and issued the requested permits on January

4, 1973. The board of zoning appeals upheld that decision on January 31, and Occidental commenced drilling operations the same day. We issued a stay order halting the drilling on February 7.

Plaintiffs initially claimed that the 'project' whose impact was at issue encompassed commercial oil production in Pacific Palisades; they argued that it was evident such production would have a significant effect on the environment. The trial court, however, limited the issue to the impact of the drilling of the test wells.[FN5] Plaintiffs presented expert testimony *78 to ***40 **72 show that even this limited 'project' might have a significant environmental effect. Paul Witherspoon, a professor of petroleum geology at the University of California at Berkeley, explained that a blowout, an unavoidable hazard of exploratory drilling, might lead to oil seepage polluting the adjoining state beach and harbor. George Tauxe, a professor of soil mechanics at U.C.L.A., testified that the drilling site was located at the foot of an unstable bluff, a locale of past landslides. Plaintiffs also contend that the drilling operation would be noisy and visually unattractive.

FN5. Plaintiffs contend that the trial court erred in limiting the scope of the 'project' at issue to the drilling of two test wells; they maintain that the scope of inquiry should include the environmental effects of commercial production and exploitation of the oil resources of the Pacific Palisades. They point out that the drilling of the test wells would be a useless waste of money unless commercial production can follow. Thus information on the environmental impact of commercial production is relevant to the council's decision to approve the test wells; if that data proved that commercial production would be harmful, the council might well decide to disapprove the test drilling. Under these circumstances, plaintiffs observe that a narrow definition of 'project' which bars inquiry into the environmental effects of commercial production defeats the objectives of the act.

Defendants protest, however, that the geologic information obtained from the test wells is essential to the preparation of an accurate EIR on the impact of commercial production. As the court pointed out in Scientists' Inst. for Pub. Info., Inc. v. Atomic Energy Com'n (1973) 156 U.S.App.D.C. 395, 481 F.2d 1079, an impact statement prepared before reliable information is available would 'tend toward uninformative generalties' (481 F.2d at p. 1093), but one delayed until after key decisions have been made could not assure that such decisions reflected environmental consideration. 'Thus we are pulled in two directions. Statements must be written late enough in the development process to contain meaningful information, but they must be written early enough so that whatever in formation is contained can practically serve as an input into the decision making process.' (481 F.2d at p. 1094.)

The issue thus narrows to the question whether the city, before drilling of the test wells, has sufficient reliable date to permit preparation of a meaningful and accurate report on the impact of commercial production. Unfortunately the parties have not briefed this question thoroughly, and the record contains little evidence pertinent to its resolution. Since we are persuaded by plaintiffs' other contentions to reverse the judgment against them, we need not and do not decide whether the trial court erred in limiting the scope of inquiry to exclude consideration of commercial production.

In rebuttal, Occidental presented testimony by Ted Bear, a consulting petroleum geologist, that absent human or mechanical failure, there was no danger of a blowout at the highway drillsite. Other geologists employed by Occidental described measures planned to contain a blowout. David Leeds, a consulting seismologist, testified that the drilling vibrations perceived at the base of the bluff would be of lesser magnitude than those caused by existing traffic on the highway west of the drillsite, and even less than the ambient vibrations in the vicinity of the courtroom. Occidental also presented photographs to show

that a drillsite could be constructed to avoid visual blight.

On December 29, 1972, the judge announced an oral ruling. Declaring that the council's actions of October 10 and 17 were equivocal, he resolved to remand the matter to the council for clarification of the council's position on the question: 'Is the present Occidental application to drill two core holes such a project that may have a significant effect on the environment?'

In remanding the matter, the court stated a test for use by the council in determining whether a project 'may have a significant effect on the environment': 'whether there is a reasonable possibility that the project will have a momentous or important effect of a permanent or long enduring nature.'

The council convened on January 8, 1973. At the conclusion of the hearing the council, by an eight-so-seven vote, adopted a resolution stating that 'the Los Angeles City Council specifically declare that at the time it adopted the subject three ordinances it believed, and now specifically finds, that such ordinances and the restricted activities permitted thereby would have no significant effect on the environment.'

[5][6] The superior court found that the council's adoption of this resolution ***41 **73 was supported by substantial evidence in the administrative *79 record both as of October 1972, and as of January 8, 1973.[FN6] It then entered judgment declaring that the council lawfully determined that no EIR was required for the drilling project, and denying plaintiffs' request for mandate and injunctive relief.

> FN6. In an action for administrative mandamus, the court reviews the administrative record, receiving additional evidence only if that evidence was unavailable at the time of the administrative hearing, or improperly excluded from the record. (Code Civ.Proc., s 1094.5.) In a traditional mandamus action, on the other hand, the court is not limited to review of the administrative record, but may receive additional evidence. (Felt v. Waughop (1924) 193 Cal. 498, 504, 225 P. 862; Lassen v. City of Alameda (1957) 150 Cal.App.2d 44, 48, 309 P.2d 520; Cal.Civil Writs (Cont.Ed.Bar 1970) s 17.9.) Hence the issue before the superior court in the present case was whether substantial evidence, on the whole record including the evidence presented to that court, supported the determination that no EIR was required. The superior court's finding-that the council's resolution was supported by substantial evidence 'in the administrative record'-is not responsive to that issue.

Plaintiffs appealed and unsuccessfully sought a stay order from the Court of Appeal.[FN7] Since the appeal presented issues of public importance, which would be mooted if Occidental completed the drilling project pending appeal, we ordered the cause transferred to this court, issued a stay order and returned the cause to the Court of Appeal. (See People ex rel. S.F. Bay etc. Com. v. Town of Emeryville (1968) 69 Cal.2d 533, 537, 72 Cal.Rptr. 790, 446 P.2d 790.) The action is now here on petition for hearing from the Court of Appeal decision.

> FN7. On January 15, 1973, the superior court entered a minute order denying plaintiffs' request for preliminary and final injunctions, declaratory relief, and mandamus. The order also denied plaintiffs' motion for stay of execution, and directed counsel for Occidental to prepare findings and judgment.
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> Plaintiffs appealed from that minute order and any ensuing judgment. Although the order did not constitute a final judgment on the merits, plaintiffs' appeal was timely both with respect to the denial of a preliminary injunction and the denial of stay of execution (see Code Civ.Proc., s 904.1; Brydon v. City of Hermosa Beach (1928) 93 Cal.App. 615, 620, 270 P. 255). Final judgment has now been entered, rendering moot the denial of preliminary relief.

2. The council erroneously failed to render a written determination respecting the environmental effect of the drilling project before it approved that project.

[7] As the superior court recognized, CEQA requires

that an agency determine whether a project may have a significant environmental impact, and thus whether an EIR is required, Before it approves that project. [FN8] *80 Finding the council's action of October 17 ambiguous, the court remanded the matter to the council for clarification. The council passed a resolution stating that it believed, as of October 1972, that the drilling project was not such as might have a significant impact; the court accepted this resolution as constituting the requisite determination of environmental issues before approval of the project.

> FN8. See Friends of Mammoth v. Board of Supervisors, Supra, 8 Cal.3d 247, 262, 104 Cal.Rptr. 761, 502 P.2d 1049. The statutory definition of an EIR requires that the report be considered before a project is approved (see Pub. Resources Code, s 21061), which necessarily implies that the decision whether or not to prepare a report must precede approval of the project. The CEQA guidelines expressly state that 'The EIR process is intended to enable public agencies to evaluate a project to determine whether it may have a significant effect on the environment, to examine and institute methods of reducing adverse impacts, and to consider alternatives to the project as proposed. These things must be done prior to approval or disapproval of the project.' (Cal.Admin.Code, tit. 14, s 15012.) (Emphasis added.)

[8] We conclude, however, that a determination that a project does not require an EIR, when that project is not exempt ***42 **74 from environmental study under the act or guidelines,[FN9] must take the form of a written Negative Declaration. Such is the unanimous view of the federal courts construing the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. s 4321 et seq.),[FN10] and the explicit requirement of both federal and state guidelines. (See Council on Environmental Quality, Guidelines on Preparation of Environmental Impact Statements, s 1500.5, 38 Fed.Reg. 20552 (1973); Cal.Admin.Code, tit. 14, s 15083.)[FN11] Absent such a written determination,*81 there is no way a court can determine whether agency silence represents a decision that a project does not require an EIR or a failure to decide that issue.

FN9. Public Resources Code section 21085 provides that no environmental study is required if a project comes within a category exempt by administrative regulation; the Resource Agency guidelines list seven such categorical exemptions (Cal.Admin.Code, tit. 14, ss 15101-15107.) Guideline 15060 also provides generally that no environmental study is needed if 'it can be seen with certainty that the activity in question will not have a significant effect on the environment.'

FN10. See, e.g., Hanley v. Mitchell (2 Cir. 1972) 460 F.2d 640; Hanly v. Kleindienst (2 Cir. 1972) 471 F.2d 823; cf. Environmental Defense Fund, Inc. v. Ruckelshaus (1971) 142 U.S.App.D.C. 74, 439 F.2d 584, 598.

FN11. Guideline 15083 specifies that a Negative Declaration must include a brief description of the project, a finding that the project will not have a significant effect, and a statement of reasons to support that finding. The city maintains that since section 15083 did not take effect until February of 1973, its specifications should not be applied to the decision of the city council in October of 1972. The requirement that a finding of no significant impact take the form of an express written determination, however, is implicit in the act itself, and could have been deduced in October of 1972 from examination of the act, from our decision in Friends of Mammoth v. Board of Supervisors, Supra, 8 Cal.3d 247, 108 Cal.Rptr. 761, 502 P.2d 1049 and from the federal cases cited in that decision.

Plaintiffs in turn assert that a Negative Declaration should go beyond the specifications of section 15083 and contain a full exposition of all relevant environmental factors; they contend that section 15083, which contemplates only a conclusory one-page document, is invalid under the terms of CEQA. Language in Hixon v. County of Los Angeles (1974) 38 Cal.App.3d 370, 380,

113 Cal.Rptr. 433 notwithstanding, plaintiffs' contention presents a justiciable issue. (See Desert Environment Conservation Assn. v. Public Utilities Com. 1973) 8 Cal.3d 739, 742-743, 106 Cal.Rptr. 31, 505 P.2d 223.) Its resolution, however, should await a case which arises after the effective date of the challenged regulation.

We do not question the power of a trial court to remand a matter to an administrative agency for clarification of ambiguous findings. (See Keeler v. Superior Court (1956) 46 Cal.2d 596, 600, 297 P.2d 967.) This doctrine, however, does not apply to the present case. This is not a case in which an agency rendered ambiguous findings concerning the environmental effect of the project, but a case of total absence of any written determination on the matter; for all the record reveals, the council may have simply ignored CEQA and enacted the ordinances in the same manner to which it was accustomed before CEQA was enacted.[FN12]

FN12. Neither CEQA nor Code of Civil Procedure section 1094.5 require rendition of findings of fact in quasi-legislative proceedings; our opinion imposes no such requirement. We hold only that when the agency makes a determination whether a project requires an EIR, as CEQA requires it to do, it should put that determination in writing.

[9] At the time of the January 8, 1973, resolution, the council had already approved the project. No resolution adopted on that date can constitute that determination of environmental impact prior to approval of the project which the act requires. The resolution adopted at that meeting represents simply an example of that 'post hoc rationalization' of a decision already made, which the courts condemned in Citizens to Preserve Overton Park v. Volpe (1971) 401 U.S. 402, 91 S.Ct. 814, 28 L.Ed.2d 136, 420 and Environmental Defense Fund, Inc. v. Coastside County Water Dist. (1972) 27 Cal.App.3d 695, 706, 104 Cal.Rptr. 197.

In failing to render a written determination of environmental impact before approving***43 **75 the project, the council proceeded in a manner contrary to the requirements of law. (See Pub. Resources Code, s 21168.5.) This failure cannot be excused on the theory that the council might have approved the drilling project anyway; 'to permit an agency to ignore its duties . . . with impunity because we have serious doubts that its ultimate decision will be affected by compliance would subvert the very purpose of the Act.' (City of New York v. United States (E.D.N.Y.1972) 337 F.Supp. 150, 160 (NEPA); Arizona Public Service Co. v. Federal Power Com'n (1973) 157 U.S.App.D.C. 272, 483 F.2d 1275, 1283; see Jones v. District of Columbia Redev. Land Agency (D.C.Cir. 1974) 499 F.2d 502, 512.)

***82** 3. The city council followed an erroneous test in deciding that the drilling project did not require an environmental impact report.

As we have explained, the council's resolution of January 8, 1973, cannot be given retroactive effect to validate the council's actions of the previous October. We now point out that the council's resolution is defective on a second ground, namely, that the council employed incorrect standards in determining that the drilling project did not require an EIR.

Public Resources Code section 21151, as of October 1972, provided that local government agencies not having an officially adopted conservation element of a general plan (such as the City of Los Angeles) 'shall make an environmental impact report on any Project they intend to carry out Which may have a significant effect on the environment.' (Emphasis added.) Although section 21151 was amended effective December 5, 1972,[FN13] the italicized words, the focus of the present controversy, are identical in both the original and amended sections.[FN14]

FN13. Section 21151 now provides that 'All local agencies shall prepare, or cause to be prepared by contract, and certify the completion of an environmental impact report on any project they intend to carry out or approve which may have a significant effect on the environment . . ..' The amendment authorized agencies to contract for preparation of an EIR instead of preparing it themselves, added the requirement for an EIR

when the agency approves a private project (thus codifying the holding in Friends of Mammoth v. Board of Supervisors, Supra, 8 Cal.3d 247, 104 Cal.Rptr. 761, 502 P.2d 1049) and eliminated the exemption for cities with an officially adopted conservation element in their general plan.

FN14. The defendants concede that the test wells constitute a 'project' as defined in Public Resources Code section 21065, and that the enactment of the ordinances establishing oil drilling districts constitutes the carrying out of such a project within the terms of section 21151. Plaintiffs maintain that the scope of the 'project' whose impact is at issue encompasses not only the drilling of the test wells but also the possibility of subsequent commercial production. (See fn. 5, Supra.)

The trial court, on remanding this cause to the city council for clarification, interpreted this section to compel preparation of an EIR only when 'there is a reasonable possibility that the project will have a momentous or important effect of a permanent or long enduring nature.' As we shall explain, this test sets far too high a barrier to the preparation of an EIR. [FN15]

FN15. We do not think this court at this time should draft a substitute test. The responsibility for formulation of such a test is expressly delegated by CEQA to the State Resources Agency. (See Pub. Resources Code, s 21083.) That agency has defined 'significant effect' as 'a substantial adverse impact on the environment' (Cal.Admin.Code, tit. 14, s 15040)-a definition which differs markedly from that advanced by the trial court-and listed those environmental consequences which ordinarily indicate that a project may have a significant effect. (Cal.Admin.Code, tit. 14, s 15081.)

The Attorney General, as amicus curiae, stated his opposition to the guideline's definition of 'significant effect' on the ground that agency action may significantly affect the environment even if the agency believes that effect to be beneficial rather than 'adverse.' (Cf. Hiram Clark Civic Club, Inc. v. Lynn (5th Cir. 1973) 476 F.2d 421, 426-427 (NEPA); Goose Hollow Foothills League v. Romney (D.or.1971) 334 F.Supp. 877, 879 (NEPA).) One writer has also suggested that the term 'substantial' imposes too high a threshold level for the preparation of EIRs. (Comment, Aftermammoth: Friends of Mammoth and the Amended California Environmental Quality Act (1973) 3 Eco.L.Q. 349, 367-368, fn. 111.) In the light of such criticism, the secretary for resources has announced that the resources agency will 'do additional work' on this guideline, and schedule public hearings at a later date. (Letter from N. B. Livermore, dated Feb. 5, 1974, accompanying the issuance of the amended CEQA guidelines.)

Under these circumstances, we believe it would be inappropriate for us to utilize the present case to determine the validity of section 15040, or to preempt the Resources Agency by drafting an alternative definition. Our conclusion that the trial court's definition is patently erroneous is sufficient to decide the present appeal.

***83 ***44 **76** CEQA requires an EIR only for projects whose environmental effect can be described as 'significant.'

[10] This key word, however, is not a term of precision but encompasses a range of meaning.[FN16] It cannot be adequately defined by a random selection of synonyms from a thesaurus. Facing a spectrum of possible meanings, describing a range extending from projects of relatively minor import to those of truly momentous proportions, the court's task is to indicate the point on this spectrum beyond which the seriousness of the foreseeable impact dictates preparation of an EIR.

FN16. As stated by Judge Friendly, construing the phrase 'significantly affecting the quality of the human environment' in NEPA (42 U.S.C. s 4332): 'While . . . determina-

> tion of the meaning of 'significant' is a question of law, one must add immediately that to make this determination on the basis of the dictionary would be impossible. Although all words may be 'chameleons, which reflect the color of their environment,' C.I.R. v. National Carbide Corp., 167 F.2d 304, 306 (2d Cir. 1948) (L. Hand, J.), 'significant' has that quality more than most. It covers a spectrum ranging from 'not trivial' through 'appreciable' to 'important' and even 'momentous.' (Hanly v. Kleindienst (2d Cir. 1972) 471 F.2d 823, 837 (dissenting opinion of Friendly, J.).) (For discussion of Hanly v. Kleindienst, see fn. 18, Infra.)
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> Moreover, CEQA does not speak of projects which Will have a significant effect, but those which May have such effect. Although we agree with the trial court that the word 'may' connotes a 'reasonable possibility,' that phrase again encompasses a range of meaning extending from the most unlikely possibility which might influence the views of a reasonable man to events which fall but a hair short of certainty.

[11] In interpreting section 21151, our principal guide is the fact, recognized in Friends of Mammoth, 'that the Legislature intended (CEQA) to be interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language.' (Friends of Mammoth v. Board of Supervisors, Supra, 8 Cal.3d at p. 259, 104 Cal.Rptr. at p. 768, 502 P.2d at p. 1056, accord, County of Inyo v. Yorty (1973) 32 Cal.App.3d 795, 804, 108 Cal.Rptr. 377; see *84Environmental Defense Fund, Inc. v. Coastside County Water Dist., Supra, 27 Cal.App.3d at p. 701, 104 Cal.Rptr. 197.) The EIR is the 'heart' of CEQA (County of Inyo v. Yorty, Supra, 32 Cal.App.3d at p. 810, 108 Cal.Rptr. 377), the principal method by which environmental data are brought to the attention of the agency and the public. Consequently that interpretation of section 21151 which will 'afford the fullest possible protection to the environment within the reasonable scope of the statutory language' (Friends of Mammoth v. Board of Supervisors, Supra, 8 Cal.3d at p. 259, 104 Cal.Rptr. 761, 768, 502 P.2d 1049, 1056) is one which will impose a low threshold requirement for preparation of an EIR. [FN17]

> FN17. '(I)n view of the clearly expressed legislative intent to preserve and enhance the quality of the environment . . ., the courts will not countenance abuse of the 'significant effect' qualification as a subterfuge to excuse the making of impact reports otherwise required by the act.' (Friends of Mammoth v. Board of Supervisors, Supra, 8 Cal.3d at p. 271, 104 Cal.Rptr. at p. 777, 502 P.2d at p. 1065.)

As stated by Judge Friendly, discussing the federal act, 'It is not readily conceivable that Congress meant to allow agencies to avoid this central requirement by reading 'significant' to mean only 'important,' 'momentous,' or the like. One of the purposes of the impact statement is to insure that the relevant environmental data are before the agency and considered by it prior to the decision to commit Federal resources***45 **77 to the project; the statute must not be construed so as to allow the agency to make its decision in a doubtful case without the relevant data or a detailed study of it.' (Hanly v. Kleindienst, Supra, 471 F.2d at pp. 837-838 (dissenting opinion).) [FN18]

> FN18. The majority opinion in Hanly v. Kleindienst (2d Cir. 1972) 471 F.2d 823 advanced the view that an environmental impact statement is not required in merely close and arguable cases If the agency submits, in lieu of such statement, a fully detailed explanation of its reasons for concluding that the project will not have a significant environmental effect. The majority in Hanly v. Kleindienst then reviewed a 25-page 'Assessment of the Environmental Impact' prepared by a government agency to support its conclusion that a proposed jail would not significantly affect the environment, and held that this assessment was inadequate because it failed to include findings with respect to some relevant environmental considerations. (471 F.2d at p. 834.) Judge Friendly's dissent suggests that the agency could as easily have prepared an en-

vironmental impact statement.

[12] In limiting the use of EIRs to projects which may have an 'important' or 'momentous' effect, the trial court adopted a test which will necessarily bar preparation of an EIR in those close and doubtful cases to which Judge Friendly referred, and will, to that extent, defeat the Legislature's objective of ensuring that environmental protection serve as a guiding criterion in agency decisions. (Pub. Resources Code, s 21000, subd. (d).) Indeed, the trial court test of 'significant impact' imposes a far higher threshold barrier to the preparation of an EIR than any suggested in state or federal guidelines or in any reported decision; its ***85** interpretation affords not the fullest, but the least possible protection to the environment within the statutory language. FN19

FN19. Anderson, NEPA in the Courts (1973) reviews the federal decisions under NEPA and concludes that they have given the act 'the widest possible scope of application' (p. 56) and imposed a 'low threshold' for preparation of an environmental impact statement (the federal equivalent of California's environmental impact report).

In addition, the trial court added the gratuitous stipulation that no EIR is required unless the environmental effect of a project is 'of a permanent or long enduring nature.' We find no statutory warrant for this restriction; although the duration of an environmental effect is one of many facts which affect its significance, nothing in the act suggests that short-term effects cannot be of such significance as to require an EIR.

The trial court's test also erred in its omission of important considerations which called for the preparation of an EIR in the instant case. Evaluation of the environmental impact of the drilling project in the instant case required resolution of a factual dispute concerning the probability that the project might cause landslides or blowouts. In such cases, an EIR-an impartial, detailed, and factual analysis of the project's effect-can perform an invaluable service in aiding the agency's resolution of the dispute. As pointed out in County of Inyo v. Yorty, Supta, 32 Cal.App.3d 795, 814, 108 Cal.Rptr. 377, 390, in such cases of factual controversy 'The very uncertainty created by the conflicting assertions made by the parties as to the environmental effect . . . underscores the necessity of the EIR to substitute some degree of factual certainty for tentative opinion and speculation.'

[13][14] Thus we conclude, as did the court in County of Inyo v. Yorty, that an agency should prepare an EIR whenever it perceives 'some substantial evidence that a project 'may have a significant effect environmentally. " (32 Cal.App.3d at p. 809, 108 Cal.Rptr. at p. 387.) As stated by Judge J. Skelly Wright in Students Challenging Reg. Agency Pro. v. United States (D.D.C.1972) 346 F.Supp. 189, 201, an environmental impact report should be prepared 'whenever the action Arguably will have an adverse environmental impact.' (Emphasis in original.) FN20

FN20. The United States Supreme Court noted jurisdiction in Students Challenging Reg. Agency Pro. v. United States, affirmed the district court's holding that the plaintiff had standing, but ruled that the district court lacked jurisdiction to enjoin the Interstate Commerce Commission. (United States v. S.C.R.A.P. (1973) 412 U.S. 669, 93 S.Ct. 2405, 37 L.Ed.2d 254.) Its opinion does not discuss the standards for preparation of an environmental impact statement.

*****46 **78** [15][16][17] Furthermore, the existence of serious public controversy concerning the environmental effect of a project in itself indicates that preparation***86** of an EIR is desirable.FN21 One major purpose of an EIR is to inform other government agencies, and the public generally, of the environmental impact of a proposed project (see County of Inyo v. Yorty, Supra, 32 Cal.App.3d 795, 810, 108 Cal.Rptr. 377; Environmental Defense Fund, Inc. v. Coastside County Water Dist., Supra, 27 Cal.App.3d 695, 704-705, 104 Cal.Rptr. 197; cf. Jones v. District of Columbia Redev. Land Agency (D.C.Cir. 1974) 499 F.2d 502, 511 (NEPA)), and to demonstrate to an apprehensive citizenry that the agency has in fact analyzed and considered the ecological implications of its action. A simple resolution or Negative Declaration, stating that the project will have no significant environmental effect, cannot serve this function.

FN21. The federal guidelines for NEPA provide that 'Proposed major actions, the environmental impact of which is likely to be highly controversial, should be covered in all cases.' (Council on Environmental Quality, Guidelines on Preparation of Environmental Impact Statements, s 1500.6, 38 Fed.Reg. 20551 (1973).) These guidelines, first adopted in 1971, were in effect at the time of trial in the instant case. Since the California act was modeled on the federal statute, judicial and administrative interpretation of the latter enactment is persuasive authority in interpreting the California act. (See Environmental Defense Fund, Inc. v. Coastside County Water Dist., Supra, 27 Cal.App.3d 695, 701, 104 Cal.Rptr. 197.)

The state guidelines, which took effect while this case was pending on appeal, provide that 'where there is, or anticipated to be, a substantial body of opinion that considers or will consider the effect (of the project) to be adverse, the lead agency should prepare an EIR to explore the environmental effects involved.' (Cal.Admin.Code, tit. 14, s 15081.) Although defendants suggest that this language is intended to imply by omission that public opinion is relevant to the question of whether the project's net effect is 'adverse,' but not to the question whether that effect is 'significant,' this seems a wholly illogical interpretation. The need for a full report to provide information and quiet public apprehension is at least as great in cases, such as the present action, where the controversy concerns the risk of an admittedly adverse effect as in cases in which the controversy concerns whether a predicted effect is adverse or benign.

Having decided that the trial court's instruction to the city council erred both in its definition of 'significant impact' and in its omission of considerations suggesting the need for an EIR in the instant case, we must now determine whether that error prejudicially affected the proceedings before the city council. The principal issue here is whether the city council, on remand, did in fact employ the test stated by the trial court.

Upon the remand of the matter to the council, that body scheduled a public hearing on January 8, 1973, at which it received additional testimony and argument concerning the environmental effect of the drilling project. The council then resolved, by an eight-to-seven vote, not to require an EIR. Several councilmen explained their votes; four councilmen, two who favored and two who opposed the resolution, explicitly *87 phrased their determination in terms of the trial court's test. Another councilman, who had previously voted in favor of the drilling districts, asked the city's assistant administrative officer for petroleum matters whether the effect of a blowout would have a 'permanent long-enduring nature.' Receiving a negative reply, he stated that he had heard nothing to change his mind, and voted for the resolution.

[18] The record of the proceeding before the council on January 8 convinces us, as it did the trial court,[FN22] that the council ***47 **79 employed the trial court's test in resolving against preparation of an EIR. Since that resolution carried by a bare eight-to-seven majority, we are compelled to conclude that the use of a test which limits EIRs to projects of momentous and semi-permanent effect, and which excludes the presence of disputed factual issues of public controversy as criteria suggesting preparation of a report, prejudicially affected the council's decision. [FN23]

FN22. On January 15, the court announced its intention to rule against plaintiffs. The judge observed that '(T)he court formulated a test to be applied in interpreting the language 'may have a significant effect on the environment,' the key phrase in these proceedings. This test is as follows: Is there a reasonable possibility that the project will have a momentous or important effect of a permanent or long-enduring nature? . . . With this test clearly in mind-it was alluded to in one form or another fourteen separate times by the city council-the council on January 8, without remand, adopted a resolution. . . . This court finds that the resolution is synonomous with a statement that the contemplated project is not one which may have a significant effect on the environ-

ment.'

FN23. Pointing to a letter by the city attorney dated October 3, 1973, defendants argue that the council, when it approved the ordinances, was aware that the then unmodified Friends of Mammoth opinion established a test requiring an EIR for all projects with a 'nontrivial' effect. Defendants infer that the council, in approving those ordinances, silently employed that test and found that the drilling project would have only a trivial impact on the environment. Defendants also infer that the resolution of January 1973, stating the council's belief as of October 1972 that the project would not have a significant impact, referred to the definition of 'significant effect' as 'nontrivial effect' which the council inferably followed in October. Piling inference upon inference, defendants conclude that if the council consistently utilized the test of significant effect set out in the unmodified Friends of Mammoth opinion, the trial court's erroneous test could not have influenced the council's decision.

We reject the inferences proposed by the defendants. Our review of the council proceedings of October 10, October 17, and January 8 reveals no instance in which a councilman who voted in favor of the ordinances indicated that he did so on the basis of the 'nontrivial effect' test of the unmodified opinion in Friends of Mammoth.

Defendants point out that the eight councilmen who voted in favor of the resolution filed declarations on December 6, prior to the trial court's pronouncement of its test of 'significant effect,' which stated that the oil drilling districts were not projects such as might have a significant environmental effect. Relying on these declarations, defendants contend that the eight councilmen had made up their minds before the **88 January 8 meeting; defendants imply that no test set out by the trial court-correct or incorrect-would have influenced them.

[19][20] The argument is certainly a strange one. As the Attorney General points out, it is analogous to a contention that an erroneous jury instruction is not prejudicial because the jurors had already resolved to convict the defendant regardless of the court's instructions. When, as here, a court remands a case to an administrative agency with directions to follow a specific legal test, we must presume that the administrators faithfully followed those instructions. (See Evid.Code, s 664.)[FN24] The presumption is rebuttable, but the declarations of the councilmen filed prior to the trial court's statement of its test fall far short of showing that the council subsequently failed to follow that test.

FN24. Evidence Code section 664 states that 'It is presumed that official duty has been regularly performed.' This is a rebuttable presumption going to the burden of proof. (Evid.Code, s 660.)

[21] Section 21168.5 permits a court to reverse a determination of a public agency for 'prejudicial abuse of discretion.' 'Abuse of discretion is established if the agency has not proceeded in a manner required by law.' (Pub. Resources Code, s 21168.5.) The council's use of an erroneous legal standard constitutes a failure to proceed in the manner required by law. (See Gilles v. Department of Human Resources Development (1974) 11 Cal.3d 313, 329, 133 Cal.Rptr. 374, 521 P.2d 110.)

The record in this case demonstrates that this error of law was prejudicial. The present case, in fact, is an excellent example of those close and arguable cases **80 in which an EIR should be prepared. With the council confronting allegations, ***48 supported by expert testimony but controverted by opposing testimony, that the drilling projects could cause an environmental disaster, the value of an impartial environmental analysis cannot be gainsaid. The intense and continuing public concern with these hazards, and with the impact of oil drilling in the vicinity of public beaches and residential neighborhoods, equally suggests the need for a thorough and impartial study. Under these circumstances, we believe that the council, employing a proper test, would have decided to direct preparation of an EIR.

4. Conclusion.

For the reasons stated in parts 2 and 3 of this opinion, we conclude that the judgment of the superior court must be reversed. The superior court shall set aside the ordinances establishing the oil drilling districts on the ground that the city, in enacting these ordinances, failed to comply with the provisions of CEQA. The city, of course, may choose to reenact*89 these ordinances after complying with the requirements of that act.[FN25]

FN25. Occidental suggests that an opinion requiring the trial court to set aside the ordinances will require Occidental to file new applications for the creation of the drilling districts, and compel the city to follow anew all procedural steps preparatory to the enactment of the ordinance. To quiet such apprehensions, we note that our opinion does not compel the trial court to vacate any action, such as the filing of an application for an ordinance, which may lawfully precede the city's determination whether to prepare an environmental impact report. Occidental has not called our attention to any ordinance or rule of the City of Los Angeles which would, under the circumstances of this case, compel repetition of any actions which may lawfully precede that determination.

The judgment is reversed, and the cause remanded to the superior court to proceed in accordance with the views herein expressed.[FN26]

FN26. In view of our disposition of this appeal, plaintiffs' motion for leave to produce new evidence on appeal is moot.

WRIGHT, C.J., and SULLIVAN and MOLINARI,[FN*] JJ., concur.

FN* Assigned by the Chairman of the Judicial Council.

CLARK Justice.

I dissent.

When enacting a zoning ordinance in 1972, the Los Angeles City Council was not required to render a written negative declaration to evidence its determination that the ordinance would have no significant effect on the environment. There was no express requirement of such writing and no basis for implying one. The city council proceeded in a manner required by law, and the evidence before us fully supports the determination that the proposed test holes will have no significant effect on the environment.

In enacting the present zoning ordinances, the city council performed a legislative function. (Johnston v. City of Claremont (1958) 49 Cal.2d 826, 835-836; Clemons v. City of Los Angeles (1950) 36 Cal.2d 95, 98, 222 P.2d 439; Lockard v. City of Los Angeles (1949) 33 Cal.2d 453, 460, 202 P.2d 38.) As recognized by the majority (Ante, p. 38), the city council was not required to hold an evidentiary hearing, and judicial review of the council's action is governed by traditional mandamus principles rather than the administrative mandamus procedure of Code of Civil Procedure section 1094.5. (Pub. Resources Code, ss 21168, 21168.5, 21168.7.) Thus the requirement of administrative findings set forth in section 1094.5 (see Topanga Assn. for a Scenic Community v. County of Los Angeles (1974) 11 Cal.2d 506, 511, 522, 113 Cal.Rptr. 836, 522 P.2d 12) is not applicable to the adoption of the ordinances,[FN1] and no other principle of general law or charter provision has been cited***49 or found requiring the Los Angeles City Council to make findings of fact in adopting ordinances.

FN1. The statement of the majority that Occidental in seeking rezoning was circumventing the requirement of a conditional use permit is misleading and unfortunate. (Ante, p. 39.) In Topanga, this court stated that rezoning was the appropriate method to obtain a special use for a large parcel. (11 Cal.3d at p. 522, 113 Cal.Rptr. 836, 522 P.2d 12.)

*90 **81 There is no express provision in the California Environmental Quality Act (Pub. Resources Code, s 21000 et seq.) (hereinafter CEQA), [FN2] as enacted in 1970 or in its present form, requiring prior to project approval either 'findings' or any written determination that a project will not have a signifi-

cant effect on the environment. To the contrary, the language of CEQA indicates that written findings were not contemplated for such a determination. Section 21168.5 provides that abuse of discretion may be established either by showing that the agency failed to proceed in a manner required by law or by showing that the 'determination or decision' is not supported by substantial evidence. (s 21168.5; italics added.) Clearly the act contemplates Only that the determination be made. If the Legislature had intended written findings, it could easily have said that abuse of discretion is established when the decision is not supported by the Findings, or the Findings are not supported by substantial evidence. (Cf. Code Civ.Proc., s 1094.5; Topanga Assn. for a Scenic Community v. County of Los Angeles, Supra, 11 Cal.3d 506, 113 Cal.Rptr. 836, 522 P.2d 12.)[FN3]

FN2. Unless otherwise stated, all statutory references are to the Public Resources Code.

FN3. The absence of an express statutory requirement of 'findings' distinguishes the instant case from Topanga. In Topanga we determined that the administrative mandamus procedure of Code of Civil Procedure section 1094.5, by providing that abuse of discretion is established if the administrative decision 'is not supported by the findings, or the findings are not supported by the evidence,' required that agencies subject to review by administrative mandamus must set forth specific findings. (11 Cal.3d at p. 515, 113 Cal.Rptr. at p. 841, 522 P.2d at p. 17.)

Our reasoning in Topanga was that the Legislature must have intended specific findings in view of the fact that it established the reviewing court's duty to compare the evidence and ultimate decision to "the findings' . . .' (11 Cal.3d at p. 515, 113 Cal.Rptr. 836, 522 P.2d 12, italics added.) We noted that '(i)f the Legislature had desired otherwise, it could have declared as a possible basis for issuing mandamus the absence of substantial evidence to support the administrative agency's Action.' (11 Cal.3d at p. 515, 113 Cal.Rptr. at p. 841, 522 P.2d at p. 77; italics added.) On the basis of the Topanga rationale we must conclude the Legislatue did Not intend findings in the case of CEQA, for it has provided that the evidence be compared only to the 'determination or decision' of the agency. (s 21168.5.)

The majority disclaims having imposed any requirement of findings on the legislative process, stating that it requires only that the determination of no significant effect on the environment be put in writing. (Ante, p. 42.) The majority reasons that in the absence of such writing there is no way a court can tell if the agency actually made the determination. If this is the case, the requirement would seem fully satisfied by either the declarations of the councilmen submitted prior to trial or the council resolution of 8 January 1973. These eliminate the majoirty's objection to the record, i.e., they show that a determination was in fact made prior to approval of the ordinances.

By the lengthy impeachment of the council resolution (ante, pp. 43-48), however, the majority requires more of a negative declaration than a mere wtitten statement of the fact of determination. The resolution adequately satisfied the only Formal requirement Purportedly imposed by the majority. By going behind the resolution, the majority in effect require not only that the determination be reduced to writing but also that it affirmatively evidence proper supporting reasons.

***91** Further support for the conclusion that CEQA did not require a written negative declaration is furnished by this court's decision in Friends of Mammoth v. Board of Supervisors (1972) 8 Cal.3d 247, 270, 104 Cal.Rptr. 761, 502 P.2d 1049. Friends of Mammoth expressly rejected a requirement of written findings when an agency approves a project after preparation of an environmental impact report. It appears inconsistent to imply a requirement of written findings for a determination that no environmental impact report is necessary when this court refused to imply a requirement for such findings for the more important decision whether to approve a

project in light of the admitted adverse environmental effects disclosed by an environmental impact report.

***50** Sound practical considerations militate against the implication of formalistic requirements into the legislative process. When the legislative body has complied with all substantive requirements and all express formalistic requirements, the majority's**82** will should not be frustrated by adding a formalistic requirement, the necessity for which could only be foreseen by those possessing acute clairvoyance.

The unreasonableness of implying a formalistic requirement into the legislative process is dramatically illustrated by the requirement implied by the majority today. Unless the legislative body somehow anticipated today's implied requirement of a written determination, every ordinance affecting the use of land adopted between the enactment of CEQA in 1970 and the adoption of the guidelines in 1973 has been improperly adopted, including ordinances involving projects where 'it can be seen with certainty that the activity in question will not have a significant effect on the environment.' Although projects coming within the quoted term are presently exempt from the written negative declaration requirement expressly imposed by the guidelines (Cal.Admin.Code, tit. 14, s 15060,) the guidelines with the three-tiered structure relied upon by the majority were not adopted until 1973.[FN4] Probably thousands of ordinances*92 including those coming within the quoted term were not preperly adopted under today's majority opinion.[FN5]

FN4. The 1972 amendments to CEQA provide that the guidelines shall contain a list of classes of projects which the Secretary of the Resources Agency has found do not have a significant effect on the environment. (s 21084.) A project falling within these classes is exempt from the provisions of CEQA. (ss 21084, 21085.) The guidelines presently contain a list of such projects. (Cal.Admin.Code, tit. 14, ss 15100-15112.) However, CEQA itself does not exempt any projects other than ministerial ones and emergency repairs to public service facilities (ss 21080, 21085); hence there were no projects other than those mentioned in CEQA which were exempt until promulgation of the guidelines.

In general the guidelines establish a three-tiered structure-projects for which an EIR is filed; projects for which a negative declaration is filed, and categorically exempt projects. However, only a two-tiered structure is provided as to the type of ordinance before us. Activities for the purpose of 'basic data collection' or 'resource evaluation' are categorically exempt unless the activity will result in a 'serious or major disturbance to an environmental resource.' (Cal.Admin.Code, tit. 14, s 15106.) If the activity would result in a 'serious or major disturbance to an environmental resource,' it would seem perforce that an EIR is required. If not, the activity is exempt. In the instant case, if the city council finds such a disturbance, an EIR must be prepared. If it does not so find, there is not even a requirement of a negative declaration, for the guidelines do Not require filing of a negative declaration when a public agency approves a project that is categorically exempt. (Cf. Cal.Admin.Code, tit. 14, s 15035.5.)

FN5. Since the majority has implied the writing requirement, it could imply the exemption too-once the fabric is woven from thin air, it may be embellished at will. Nevertheless, implication of the requirement and the exemption in the absence of any language dealing with writing requirements or exemptions from them appears a clear invasion of the legislative process.

In imposing the requirement of a written determination on the legislative process, the majority also starts us down a dangerous path which, if followed in the future, will have unfortunate consequences. The majority implies the requirement not on the basis of language dealing with writings; the only language relied on is that set forth in the purposes of the act. However laudable or noble the purposes of a statute, the method to be followed by the city council in adopting ordinances under it should remain the same unless the statute itself or authorized regulations provide for

a different method of enactment. To vary the method of enactment, depending upon judges' opinions as to the virtues of statutory purpose, is an improper interference with the legislative process and can only lead to confusion and frustration of the majority's will.

Since the city council was not required to produce written findings of fact or a written determination in the form of a negative declaration, it must be presumed ***51 **83** that official duty has been regularly performed (Evid.Code, s 664) and that the legislative body has ascertained the existence of those facts essential to its action (e.g., Orinda Homeowners Committee v. Board of Supervisors (1970) 11 Cal.App.3d 768, 775, 90 Cal.Rptr. 88). As the council passed the ordinances without preparing an EIR, it must be presumed it had determined the informational holes would not have a significant effect on the environment.

Evidence of events occurring after the 17 October 1972 passage of the ordinances, including submission of declarations by the councilmen and the council resolution of 8 January 1973 (both of which stated that the ordinances were approved on 17 October 1972, because the council believed the limited drilling would have no significant effect on the environment)*93 does not establish that the council failed to make the determination. If anything the evidence tends to support the presumption that the determination was made. [FN6] In any event it was unnecessary for defendants to prove that the determination was actually made, for the issue should have been resolved in their favor when plaintiffs failed to adduce evidence sufficient to overcome the presumption.

> FN6. In a 17-page letter of 3 October 1972 the city attorney advised the city council that all projects which may have a significant effect on the environment required preparation of an EIR and specifically concluded that all Zone changes should be accompanied by an EIR if the permitted use may have a significant effect on the environment.

I conclude the council proceeded in a manner required by law. The inquiry thus is whether the council's determination is supported by substantial evidence. (s 21168.5.) There is ample evidence in the record to sustain the decision. The ordinances contemplated drilling of extremely limited scope. Only two informational test bore holes were authorized; the entire operation was to last only 90 days, with the rigs to be removed upon completion; and a number of other restrictions and conditions were imposed on the project. Under no circumstances was commercial production of oil to be permitted. With respect to the impact of the drilling vibrations, Occidental produced expert testimony that vibrations from the drilling at a point 150 feet from the drill site would be less than those caused by movement along the nearby highway, and 5 to 10 times less than the ambient vibrations outside the courtroom door. As to the possibility of a 'blowout,' there was evidence that the incidence of blowouts at urban drill sites was only 2/10 ths of 1 percent.[FN7] Occidental also introduced photographs demonstrating methods by which the drill site would be made aesthetically consonant with adjacent land uses. The foregoing represents only a sampling of the evidence marshalled by Occidental to dispel any doubts about the environmental effect of the test holes.

> FN7. The experts for plaintiffs conceded that the incidence of blowouts was 'very low' and that the petroleum industry had developed 'very sophisticated means' of preventing such accidents.

The limited drilling authorized by the ordinances is a 'basic data collection' or 'resource evaluation' activity inasmuch as the object of the drilling is to determine the size and yield of the Riviera oil field and obtain data essential to a thorough environmental assessment of oil production. Unless the city council determines that this activity will result in a 'serious or major disturbance to an environmental resource' the proposed test holes will be Categorically exempt from CEQA under the present guidelines. (Cal.Admin.Code, tit. 14, s 15106.) In the event *94 the council concludes the drilling will not result in a serious or major disturbance to an environmental resource, the city council will Not be required to render a written negative declaration nor any writing whatsoever prior to appproval***52 of the ordinances, for the guidelines **84 do not require Any writing for a determination that a project is categorically exempt from CEQA. The agency 'may' file a

brief notice of exemption but is not compelled to. (Cal.Admin.Code, tit. 14, s 15035.5.) This observation only highlights the futility, as well as the inappropriateness, of the requirement which he majority implies today.

I would affirm the judgment.[FN8]

FN8. The majority balks at resolving a number of questions highly pertinent to cases arising under CEQA, which I feel leaves the disposition of this case and others uncertain to an unfair extent. Specifically, the majority does not decide what is required in a negative declaration and declines to formulate a more definite test for determining what constitutes a 'significant effect' on the environment. Thus, while the city council must now redetermine the environmental issues involved, it does not even have assurance that adherence to the standards set forth in the guidelines is the proper course to pursue. The majority remands the case without informing the council what is expected of it in future deliberations.

The unwarranted aspersions cast by the majority on the application of the political process in this case perhaps explain the majority's willingness to reach its desired result without confronting the important questions of law. The record, however, provides no basis for believing the political channels were abused in any manner.

McCOMB and BURKE,[FN*] JJ., concur.

FN* Retired Associate Justice of the Supreme Court sitting under assignment by the Chairman of the Judicial Council.

Rehearing denied; CLARK, J., dissenting.
MOSK, J., did not participate.
Cal. 1974.
No Oil, Inc. v. City of Los Angeles
13 Cal.3d 68, 529 P.2d 66, 118 Cal.Rptr. 34, 7 ERC 1257, 5 Envtl. L. Rep. 20,166

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Commission on State Mandates

Original List Date:	10/3/2003
Last Updated:	9/15/2009
List Print Date:	10/23/2009
Claim Number:	03-TC-17
Issue:	California Environmental Quality Act (CEQA)

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