United Walnut Taxpayers v. Mount San Antonio Community College District, et al., BC 576587

Tentative decision on (1) United Walnut's petition for writ of mandate: granted in large part; (2) City's petition for writ of mandate: granted in part; (3) District's petition for writ of mandate: granted in part

There are three separate mandamus petitions in this consolidated action. Plaintiff United Walnut Taxpayers ("United Walnut") petitions for a writ of mandate under CEQA against Defendant and Cross-Plaintiff Mt. San Antonio Community College District ("District" or "Mt. SAC"). The City petitions for a writ of mandate against the District. Defendant and Cross-Plaintiff District seeks declaratory relief against Cross-Defendant City of Walnut ("City").

The court has read and considered the moving papers, oppositions, and replies, and renders the following tentative decision.

A. Statement of the Case

1. United Walnut Petition

Plaintiff United Walnut commenced this proceeding on March 24, 2015, seeking declaratory and injunctive relief and a writ of mandate. The operative pleading is the Second Amended Complaint ("SAC") filed on August 29, 2016. The SAC alleges in pertinent part as follows.

On November 4, 2008 Measure RR, entitled and otherwise known as the "A Mount San Antonio Community College District bond proposition," appeared as a bond proposal on the ballot for voters within the District's boundaries (which include the City). The measure authorized a $353 million bond. A supermajority of 55% of those voting was required for Measure RR to pass and it did so with approval by 69.95% of District voters. The primary published and entitled language on the Measure RR ballot stated that its purpose was for classroom repair. The District is spending Measure RR money for the grading of sites for an Athletic Complex East ("ACE") and Retail/Solar Power Generating Plant ("Solar Project"), and has allocated future Measure RR money for the planning, design, study, construction or building, and implementation of those projects. The ACE and Solar Power Projects are not listed in the Measure RR Bond Project List.

On February 11, 2015, at regularly scheduled meeting, the District Board of Trustees ("Board") decided to approve a 2,300 space parking structure project (the "Parking Garage Project") by passing a resolution purporting to exempt the Parking Project from City zoning ordinances and entering into a lease/lease back agreement for construction of the Project (the "Parking Project Approvals"). The District is currently grading areas where it plans to build the Solar Project on land subject to and in violation of the City's zoning ordinances. Defendants are spending, and will continue to spend Measure RR bond revenues on the Parking Project, the ACE Project, and the Solar Project in violation of constitutional and statutory bond spending restrictions imposed by state voters via Proposition 39 and District voters via Measure RR.

The decisions for the Parking Garage Project and Solar Project are "projects" such that compliance with the California Environmental Quality Act ("CEQA") is required. The District

has prepared one or more programmatic environmental impact reports ("EIRs") in association with campus-wide master planning efforts for facilities, as well as plan updates, but has not prepared any project-specific CEQA documents for the Projects and made no CEQA decision or determination in the February 11, 2015 Parking Project Approvals.

In the first cause of action, the SAC seeks a declaratory judgment and the issuance of an injunction to enjoin and prevent the District from misuse or waste of public money in spending Measure RR bond sales revenue for the planning, design, study, construction or building, and implementation of the Parking Project, ACE Project, and Solar Project.

In the second cause of action for mandamus under CEQA, the SAC alleges that the District failed to proceed in a manner required by law by approving the Parking Garage and Solar Projects without making a determination that the projects are within the scope of the programmatic EIR. Plaintiff requests a peremptory writ of mandamus ordering the District to rescind and set aside its February 11, 2015 and September 16, 2015 final Solar Project and Parking Project Approvals, and remanding the matter for the District to reconsider the Parking Project and Solar Project consistent with the law.

The SAC's third cause of action for mandamus alleges the District's violation of City zoning ordinances for the Parking Garage Project and Solar Project, which are located within the City in an area zoned Residential Planned Development Zone ("RPDZ"). Structures built within the RPDZ cannot exceed a height of 35 feet. Walnut Municipal Code ("WMC") §25-89.1(b)(4)(g). Neither a parking garage structure nor a solar project is a permitted or authorized use in the RPDZ, unless a variance or conditional use permit ("CUP") is obtained and the Parking Project and the Solar Project can meet special conditions and special findings can be made and adopted for the same. The District has not applied for or obtained a CUP or variance from the City for either the Parking Project or the Solar Project.

The SAC's fourth cause of action for mandamus under CEQA and Government Code section 53094(b) alleges that the District failed to proceed in a manner required by law because it made no findings concerning land use and zoning conflicts in the February 11, 2015 Parking Garage Project Approvals. Plaintiff requests a peremptory writ of mandamus ordering the District to rescind and set aside its February 11, 2015 Parking Project Approvals, and remanding the matter to the District to reconsider the approvals consistent with the law.

The SAC's fifth cause of action alleges a pattern and practice violation of CEQA. The District continues to misinterpret the spirit, intent, and purpose of CEQA. Plaintiff requests a declaratory judgment and the issuance of an injunction to enjoin and prevent any District action proceeding with the quasi-legislative policy of implementing projects without performing required environmental review and making proper and adequate CEQA determinations for its master plan and programmatic EIR projects.

The SAC's sixth cause of action for declaratory and injunctive relief alleges violations of law in the lease-leaseback arrangement between the District and Real Party-in-Interest Tilden-Coil Constructors, Inc. ("Tilden"). Plaintiff alleges that there is no actual lease, and that the District is violating Public Contract Code section 17406 *et seq*. Plaintiff seeks a declaratory judgment and the issuance of an injunction to prevent any action by the District to proceed with payments to Tilden under the lease-leaseback agreement.[1]

[1] United Walnut's first and sixth causes of action have been bifurcated and stayed.

2. <u>The District's Cross-Complaint</u>

The District filed a Cross-Complaint against the City and its employee, Chris Vasquez ("Vasquez"), on November 18, 2016. The operative pleading is the Second Amended Cross-Complaint ("SACC") filed December 30, 2016. The SACC alleges in pertinent part as follows.

The Solar Project is an approximately 2.0 megawatt electrical output system with ground-mounted tracking solar photovoltaic panels and a small masonry structure to house equipment. It is located on the West Parcel of the Mt. SAC campus. The District has received all regulatory and permitted approvals required for the Solar Project.

The District did not apply for a CUP or entitlement related to the hauling, grading, or construction of the Solar Project because it is exempt from local zoning and building controls pursuant to Government Code section 53091(d) and (e). The WMC contains no applicable provisions for locating and constructing a solar photovoltaic project at the campus. The WMC grading ordinance does not regulate grading on public property such as the Solar Project. The City has always interpreted its authority as limited to reviewing final engineering plans for street improvements, which does not apply to the Solar Project.

In excess of its police powers and authority, on October 20, 2016 the City, by and through Vasquez, issued a Stop Work Order against the Solar Project. The Stop Work Order was issued by Vasquez in his capacity as Associate Planner at the City's Community Development Department.

The SACC's first cause of action is for a writ of mandate against the City. The District argues that the Stop Work Order incorrectly asserts police powers to stop the Solar Project based on the City's grading controls. The City lacks the authority to issue a Stop Work Order because the Solar Project is a solar generation project exempt from local zoning ordinances under Government Code section 53091(d) and (e). The District has not violated WMC Section 25-17, which pertains to building permits, or WMC Section 25-39(f), which pertains to public utilities, because the Solar Project is exempt from the City's building permit requirements and is not within the class of uses defined as "public utilities" or "utilities operated by mutual agencies."

The SACC's second cause of action seeks declaratory and injunctive relief against the City. District seeks a declaration that the Solar Project is exempt from the City's grading ordinances under Government Code section 53091. Alternatively, if the grading ordinance is applicable to the Solar Project under Government Code section 53097, the District seeks a declaration that the City's authority is limited to reviewing and approving grading plans related to the Solar Project, and the City lacks without authority to condition approval of those grading plans on the District's compliance with City's zoning and building laws. Finally, the District seeks an injunction to enjoin any action by the City to enforce the Stop Work Order.

3. <u>The City's Petition</u>

On March 26, 2015, the City filed a petition for writ of mandate in Case No. BS 154389. The operative pleading is the First Amended Petition ("City FAP"), filed March 24, 2016. The City FAP alleges in pertinent part as follows.

The Solar Project includes the mass grading of the West Parcel and the acquisition and installation of a ground-mounted solar photovoltaic system to provide approximately two megawatts of energy for the Mt. SAC campus. The West Parcel is zoned Residential Planned Development ("RPD") under the City's zoning ordinance. The RPD zone incorporates the permitted and conditionally permitted uses of the R-1 zone. Title VI C.25 Section 25-89.1

allows property in an RPD zone to be used for "any permitted use in an R-1 zone...."

The Solar Project is not a permitted or authorized use in the RPD zone without first obtaining a discretionary CUP from the City. The District has not applied for or obtained a CUP from the City for the Solar Project or any other permit or entitlement relating to the hauling, grading, and construction thereof.

The District generically discussed the Solar Project in a Program EIR, which the Board certified as final at its regular meeting of December 11, 2013. On May 15, 2015, the City, through email correspondence, informed the District that the Solar Project would be subject to the City's zoning regulations and CUP requirements. On July 8, 2015, the Board adopted Resolution No. 15-01 "Assessment, Design, Installation, and Operation and Maintenance of Photovoltaic Solar System — Request for Qualifications/Request for Proposal No. 3005," and in so doing entered into a design-build agreement for the purchase and installation of a ground mounted photovoltaic solar system.

At its November 18, 2015 meeting, the Board approved a design–build agreement for the Project pursuant to Resolution No. 15-06 "New Assessment, Design, Installation, Operation, and Maintenance of a Photovoltaic Solar System." The Board also approved Action Item No. 7, which was described as a "project" that "entails grading and site improvements required to prepare the West Parcel site… for the purchase and installation of a ground -mounted solar photovoltaic system, under a separate design -build agreement." The District never applied for a grading or hauling permit from the City.

On December 18, 2015, the City's counsel informed counsel for the District that the City would be assuming the "lead agency" role under CEQA for the Solar Project due to the District's failure to comply with CEQA. Four days later, on December 22, 2015, the District published the Addendum in an apparent attempt to cut the City out of its "responsible agency" role in the CEQA review process for the Project. The Board approved the Addendum at its January 13, 2016 meeting. The Addendum includes revisions to four mitigation measures (2c, 2k, 3a, and 3i) to allow for extended dump truck traffic, require parking supply studies, remove the requirement for obtaining a grading permit, and bring paint VOC standards to current industry and state requirements. The Addendum also adds six mitigation measures to "mitigate potentially significant traffic impacts from the construction truck hauling of soil import to the West Parcel."

The City FAP's first cause of action is for a writ of mandate under CEQA. The City alleges that the District has failed to carry out adequate CEQA analysis in approving the Solar Project. The Solar Project has changed in scope, and the District has improperly continued to rely on the Program EIR. Because the Project description was not accurately represented throughout the approval process, mitigation measures were never adequately formulated or evaluated. The District's failure to conduct adequate environmental review after significantly changing the Solar Project description and mitigation measures in the Addendum constitutes a prejudicial abuse of discretion that precludes informed decision-making and informed public participation.

In a claim for violation of State Planning and Zoning Law, the City alleges that the District is required to submit to the City any public works projects recommended for planning, initiation, or construction. The District has not submitted to the City any of its public works projects, including the Solar Project, for a finding of consistency with the City's General Plan.

In a claim for violation of the WMC, the City alleges that the Solar Project is subject to its WMC, zoning ordinance, General Plan, and other land use controls. The District previously

acknowledged the City's police power jurisdiction over the Solar Project, but has now taken the position that the Solar Project is exempt from the City's land use regulations. The District cannot exempt itself under Government Code sections 53091 and 53094. The District has neither submitted a grading plan nor other plans for City approval. In attempting to use the Addendum to usurp both the City's rights as a responsible agency under CEQA and its police powers to properly regulate and control grading activities, traffic, and weight limits on City streets, the District proposes to violate the law.

The City FAP's second cause of action is for declaratory relief. The City seeks a judicial determination and declaration whether the District's Addendum was proper. The City also seeks determination whether any laws of this State, including Government Code sections 53091 and 53094, exempt the Solar Project from the City's land use police powers and regulatory authority. Finally, the City seeks a determination whether CEQA and CEQA Guidelines require or permit it to take over the lead agency role for the Solar Project.

4. <u>Course of Proceedings</u>

On April 15, 2015, Plaintiff United Walnut applied *ex parte* for a temporary restraining order ("TRO") and order to show cause re: preliminary injunction ("OSC") with respect to the Parking Project. Department 82 granted the TRO and set an OSC hearing on the preliminary injunction.

After a May 13, 2015 OSC hearing, Department 82 granted the preliminary injunction. The court found that Plaintiff United Walnut was likely to prevail on its third and fourth causes of action alleging violation of the City's zoning ordinance. A parking structure is a non-classroom facility that cannot be exempted from the City's zoning laws. As a separate ground, the court found that Plaintiff was likely to succeed on its first cause of action alleging that the parking structure was not sufficiently identified in Measure RR when presented to voters. Defendants were enjoined from performing or conducting any further construction or dirt removal activity on the proposed parking structure site, or from spending any Measure RR funds on any aspect of the Parking Project. Plaintiff was ordered to post an undertaking in the amount of $127,076 and did so on May 28, 2015.

On July 27, 2015, this action was reassigned to Department 85. On January 21, 2016, Department 85 heard United Walnut's motions to file a First Amended Complaint ("FAC") and to consolidate this matter with another case (BS 154389). United Walnut additionally moved for a preliminary injunction against the District. In turn, the Districtmoved to dismiss the Complaint and dissolve the existing preliminary injunction in this action. The court granted United Walnut's motion to file an FAC and motion to consolidate. The District's motion to dismiss and motion to dissolve the preliminary injunction was denied. The court also denied United Walnut's application for preliminary injunction against construction of the Solar Project, ruling that the Complaint did not contain a cause of action alleging that the Solar Project was a violation of CEQA or the City's zoning laws; it only made those allegations for the Parking Project. Plaintiff additionally failed to demonstrate irreparable harm.

On December 6, 2016, Department 85 heard United Walnut's application for a preliminary injunction against the District. The District simultaneously moved for a preliminary injunction against the City. The court granted United Walnut's application, ruling that Plaintiff was likely to prevail on its amended third cause of action alleging that construction of the Solar Project violates WMC's grading and draining requirements, including review and approval by

the City. The court denied the District's application, ruling that the City had the authority to issue a stop work order. Section 53097 specifically requires school districts to comply with all city ordinances regulating drainage, road improvement, and grading plans and District's Solar Project was within the scope of the City's grading ordinances.

B. Standard of Review

A party may seek to set aside an agency decision for failure to comply with CEQA by petitioning for either a writ of administrative mandamus (CCP §1094.5) or of traditional mandamus. CCP §1085. A petition for administrative mandamus is appropriate when the party seeks review of 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 [CEQA]." Public Resources ("Pub. Res.") Code §21168. This is generally referred to as an "adjudicatory" or "quasi-judicial" decision. Western States Petroleum Assn. v. Superior Court, ("Western States") (1995) 9 Cal.4th 559, 566-67. A petition for traditional mandamus is appropriate in all other actions "to attack, review, set aside, void or annul a determination, finding, or decision of a public agency on the grounds of noncompliance with [CEQA]." Where an agency is exercising a quasi-legislative function, it is properly viewed as a petition for traditional mandamus. Id. at 567; Pub. Res. Code §21168.5.

Under CEQA, at issue is United Walnut's and the City's CEQA challenge to a quasi-adjudicative action taken by the District in approving the Solar Project, and United Walnut's additional challenge to the approval of the Parking Garage Project. This procedural setting, where an administrative hearing was required, is governed by administrative mandamus. In determining whether to grant a petition in a CEQA case, the court decides whether there was a prejudicial abuse of discretion. Public entities abuse their discretion if their actions or decisions do not substantially comply with the requirements of CEQA. Sierra Club v. West Side Irrigation District, (2005) 128 Cal.App.4th 690, 698. 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. Western States, *supra*, 9 Cal.4th at 568; Pub. Res. Code §21168.5.

A reviewing court must adjust its scrutiny to the nature of the alleged defect, depending on whether the claim is predominantly one of improper procedure or a dispute over the facts." (Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova, ("Vineyard") (2007) 40 Ca1.4th 412, 435. Challenges to an agency's failure to proceed in the manner required by CEQA, such as the failure to address a subject required to be covered in an EIR or to disclose information about a project's environmental effects, are subject to a less deferential standard than challenges to an agency's substantive factual conclusions. Id. at 435. In reviewing these claims, the court must "determine de novo whether the agency has employed the correct procedures, 'scrupulously enforc[ing] all legislatively mandated CEQA requirements'." Id.

The parties' land use claims that project approvals violated the WMC are governed generally by CCP section 1094.5, which does not in its face specify which cases are subject to independent review of evidentiary findings. Fukuda v. City of Angels, (1999) 20 Cal.4th 805, 811. Instead, that issue was left to the courts. In cases other than those requiring the court to exercise its independent judgment, the substantial evidence test applies. CCP §1094.5(c). Land use decisions do not typically involve vested rights requiring independent review. *See*PMI Mortgage Insurance Co. v. City of Pacific Grove, (1981) 128 Cal.App.3d 724, 729. A

requirement of a permit for a developer, public or private, under local city ordinances does not infringe on the fundamental vested rights of adjoining property owners. Bakman v. Dept. of Transportation, (1979) 99 Cal.App.3d 665, 689-90. The "substantial evidence" standard governs such review, and "substantial evidence" is relevant evidence that a reasonable mind might accept as adequate to support a conclusion (California Youth Authority v. State Personnel Board, (2002) 104 Cal.App.4th 575, 585) or evidence of ponderable legal significance, which is reasonable in nature, credible and of solid value. Mohilef v. Janovici, (1996) 51 Cal.App.4th 267, 305, n.28. The trial court considers all evidence in the administrative record, including evidence that detracts from evidence supporting the agency's decision. California Youth Authority, *supra*, 104 Cal.App.4th at 585.

Whether the agency abused its discretion must be answered with reference to the administrative record. This standard requires deference to the agency's factual and environmental conclusions based on conflicting evidence, but not to issues of law. Laurel Heights Improvement Assn. v. Regents of University of California, ("Laurel Heights") (1988) 47 Cal.3d 376, 393, 409. Argument, speculation, and unsubstantiated opinion or narrative will not suffice.[2] Guidelines §15384(a), (b).

Finally, the parties' traditional mandamus and declaratory relief claims are based on extra-record evidence and require no administrative record. A petition for traditional mandamus is appropriate in all actions "to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station...." CCP §1085. A traditional writ of mandate is the method of compelling the performance of a legal, ministerial duty required by statute. *See*Rodriguez v. Solis, (1991) 1 Cal.App.4th 495, 501-02. Generally, mandamus will lie when (1) there is no plain, speedy, and adequate alternative remedy, (2) the respondent has a duty to perform, and (3) the petitioner has a clear and beneficial right to performance." Pomona Police Officers' Assn. v. City of Pomona, (1997) 58 Cal.App.4th 578, 583-84 (internal citations omitted). Whether a statute imposes a ministerial duty for which mandamus is available, or a mere obligation to perform a discretionary function, is a question of statutory interpretation. AIDS Healthcare Foundation v. Los Angeles County Dept. of Public Health, (2011) 197 Cal.App.4th 693, 701.

Traditional mandamus relief is unavailable unless the petitioner can demonstrate an abuse of that discretion. Mandamus will not lie to compel the exercise of a public agency's discretion in a particular manner. American Federation of State, County and Municipal Employees v. Metropolitan Water District of Southern California, (2005) 126 Cal.App.4th 247, 261. It is available to compel an agency to exercise discretion where it has not done so (Los Angles County Employees Assn. v. County of Los Angeles, (1973) 33 Cal.App.3d 1, 8), and to correct an abuse of discretion actually exercised. Manjares v. Newton, (1966) 64 Cal.2d 365, 370-71. In making this determination, the court may not substitute its judgment for that of the agency, whose decision must be upheld if reasonable minds may disagree as to its wisdom. Id. at 371. A agency decision is an abuse of discretion only if it is "arbitrary, capricious, entirely lacking in evidentiary support, unlawful, or procedurally unfair." Kahn v. Los Angeles City Employees'

[2]As an aid to carrying out the statute, the State Resources Agency has issued regulations called "Guidelines for the California Environmental Quality Act" ("Guidelines") contained in Code of Regulations, Title 14, Division 6, Chapter 3, beginning at section 15000.

Retirement System, (2010) 187 Cal.App.4th 98, 106. In applying this very deferential test, a court "must ensure that an agency has adequately considered all relevant factors, and has demonstrated a rational connection between those factors, the choice made, and the purposes of the enabling statute." Western States, *supra*, 9 Cal.4th at 577. A writ will lie where the agency's discretion can be exercised only in one way. Hurtado v. Superior Court, (1974) 11 Cal.3d 574, 579.

C. CEQA

The purpose of CEQA, (Pub. Res. Code §21000 *et seq*.,) is to maintain a quality environment for the people of California both now and in the future. Pub. Res. Code §21000(a). "[T]he 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 Board of Supervisors, (2001) 87 Cal.App.4th 99, 117. CEQA must be interpreted "so as to afford the fullest, broadest protection to the environment within reasonable scope of the statutory language."Friends of Mammoth v. Board of Supervisors, (1972) 8 Cal.3d 247, 259.

The Legislature chose to accomplish its environmental goals through public environmental review processes designed to assist agencies in identifying and disclosing both environmental effects and feasible alternatives and mitigations. Pub. Res. Code §21002. Public agencies must regulate both public and private projects so that "major consideration is given to preventing environmental damage, while providing a decent home and satisfying living environment for every Californian." Pub. Res. Code §21000(g).

Under CEQA, a "project" is defined as any activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment (1) undertaken directly by any public agency, (2) supported through contracts, grants, subsidies, loans or other public assistance, or (3) involving the issuance of a lease, permit, license, certificate, or other entitlement for use by a public agency. Pub. Res. Code §21065. The word "may" in this context means a reasonable possibility. Citizen Action to Serve All Students v. Thornley, (1990) 222 Cal.App.3d 748, 753. "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. Guidelines §21060.5.

The "project" is the whole of the action, not simply its constituent parts, which has the potential for resulting in either direct or reasonably foreseeable indirect physical change in the environment. Guidelines §15378. An indirect physical change must be considered if that change is a reasonably foreseeable impact which may be caused by the project. On the other hand, a change that is "speculative or unlikely to occur is not reasonably foreseeable." Guidelines §15064(d)(3). The term "project" may include several discretionary approvals by government agencies; it does not mean each separate government approval. Guidelines §15378(c).

The EIR is the "heart" of CEQA, providing agencies with in-depth review of projects with potentially significant environmental effects. Laurel Heights, *supra*, 6 Cal.4th at 1123. An EIR describes the project and its environmental setting, identifies the potential environmental impacts of the project, and identifies and analyzes mitigation measures and alternatives that may reduce significant environmental impacts. Id. Using the EIR's objective analysis, agencies "shall mitigate or avoid the significant effects on the environment... whenever it is feasible to do

so. Pub. Res. Code §21002.1. The EIR serves to "demonstrate to an apprehensive citizenry that the agency has in fact analyzed and considered the ecological implications of its actions."No Oil, Inc. v. City of Los Angeles, (1974) 13 Cal.3d 68, 86. It is not required to be perfect, merely that it be a good faith effort at full disclosure. Kings County Farm Bureau v. City of Hanford, (1990) 221 Cal.App.3d 692, 711-12. A reviewing court passes only on its sufficiency as an informational document and not the correctness of its environmental conclusions. Laurel Heights, *supra*, 47 Cal.3d at 392.

All EIRs must cover the same general content. Guidelines §§ 15120-32. An EIR should be prepared with a sufficient degree of analysis to provide decision-makers with information which enables them to make a decision which intelligently takes account of environmental consequences. The environmental effects need not be exhaustively reviewed, but the EIR's sufficiency is viewed in the light of what is reasonably feasible. Guidelines §15151. The level of specificity of an EIR is determined by the nature of the project and the "rule of reason."Al Larson Boat Shop, Inc. v. Board of Harbor Commissioners, (1993) 18 Cal.App.4th 729, 741-42. The degree of specificity "will correspond to the degree of specificity involved in the underlying activity which is described in the EIR." Guidelines §15146. The ultimate decision whether to approve a project is a nullity if based upon an EIR that does not provide decision-makers, and the public, with the information about the project required by CEQA. Santiago County Water District v. County of Orange, (1981) 118 Cal.App.3d 818, 829.

D. Statement of Facts from the Administrative Record[3]

1. Environmental Impact Reports

a. 2002 Program EIR

On December 18, 2002, the District certified the Final Program EIR ("2002 Program EIR") for the District 2002 Campus Master Plan, also known as a Facility Master Plan. AR 4388, 4395-96. The Board adopted a Statement of Overriding Considerations for the Program EIR. AR 19, 4395. The Board found that there were significant historic resource and circulation impacts that were unavoidable after incorporation of all feasible mitigation measures. AR 19. These included demolition of campus buildings potential eligible for the California Register of Historical Resources and destruction of important habitat within the Wildlife Sanctuary. AR 19-20. The Board determined that the District's limited resources were better spent on new construction rather than restoration and retrofitting of the existing buildings, many of which were damaged. AR 20-21.

b. 2005 Supplemental EIR

In December 2005, the District issued a Draft Supplement to the Program EIR ("2005 Supplemental EIR") to address new environmental effects that may be caused by implementation of the 2005 Master Plan Update. AR 4778. The 2005 Supplemental EIR was prepared as part of the 2005 Master Plan Update. AR 4778. The 2005 Master Plan Update included changes in the location of planned buildings on campus, and additional parking availability. AR 4780. Specifically, the 2005 Master Plan Update proposed a 2,250-space parking structure. AR 4780.

[3] Where the Statement of Facts does not include a citation, the page cited by the party either was not included in the Joint Appendix or was mis-scited. As the facts are undisputed, the court has set forth the pertinent fact anyway.

The issues requiring resolution in the 2005 Supplemental EIR included determining what circulation improvements were required and when the parking structure would be built. AR 4781.

In May 2006, the District responded to public comments on the 2005 Supplemental EIR. AR 97. The City had commented that the proposed mitigation measures (2i and 2cc) for dedication of land to accommodate needed improvements to the intersection of Grand/Temple were too narrowly worded to address the needed right-of-way for that and other necessary intersection improvements. AR 131. The District responded that it was willing to dedicate any lands necessary for project-related improvements at the identified intersections and would replace the language in mitigation measure 2i. AR 97.

On March 16, 2006, the District issued a Statement of Facts and Findings to approve the final Master Plan Update 2005. AR 22-79. The Statement of Facts and Findings asserted that all significant environmental effects from the Master Plan Update that can feasibly be avoided have been eliminated or substantially lessened by virtue of the mitigation measures in the Final EIR. AR 23-37. The District again determined that unavoidable impacts to historic resources on campus were acceptable due to the need to modernize facilities on campus. AR 40-41.

c. 2008 Subsequent EIR

In May 2008, the District issued a Draft Subsequent EIR ("2008 Subsequent EIR") to address environmental effects that may be caused by implementation of the 2008 Master Plan Update. AR 6050-1, 6050-8, 6050-12. The purpose of the 2008 Subsequent EIR was for the review and consideration of the 2008 Master Plan Update. AR 6050-42. The 2008 Master Plan Update revised some land plans included in the 2005 Master Plan Update and included several new projects. AR 6050-11. Both the 2005 and 2008 Master Plan Updates proposed that a Parking Garage Project would be located south of Edinger Way east of Walnut Drive. AR 6050-11. The 2008 Master Plan Update included a new plan for the ACEProject. AR 6050-11 to 6050-12. This new project replaced the Gymnasium project in the 2005 Master Plan Update. AR 6050-36.

The District responded to public comments on the 2005 Subsequent EIR. AR 6052-54. On August 27, 2008, the Board certified the 2008 Final EIR, adopted a Statement of Overriding Considerations, and adopted the 2008 Master Plan Update. AR 6159-60.

d. 2012 Subsequent EIR

In September 2013, the District issued a Draft Subsequent EIR ("2012 Subsequent EIR") to address new environmental effects that may be caused by implementation of the 2012 Facility Master Plan. AR 140, 147. The District prepared the 2012 Facilities Master Plan to revise the land plans in the 2008 Master Plan Update, complete projects that had previously been un-funded, and include new projects. AR 151.

The 2012 Subsequent EIR stated that it "addresses the project at the level of detail characteristic of a conceptual master plan." AR 155. As a Subsequent Program EIR, the 2012 Subsequent EIR addressed the environmental concerns identified from public comments and from professional evaluation by the project team. AR 155. The initial potential area of controversy included the 383,000 cubic yards of earth export due to the Parking Garage Project and the ACEProject. AR 155.

The 2012 Draft EIR lists the Parking Garage Project, BCT Project, and ACE Project as

future projects that already had CEQA clearance from previous master plan updates. AR 181, 183. The Solar Project was new as it had not been included in the 2008 Subsequent EIR for the 2008 Master Plan Update. AR 183.

On December 11, 2013, the Board certified the 2012 Subsequent EIR, adopted a Statement of Overriding Considerations, and adopted the 2012 Master Plan Update. AR 14855, 14862-64. The Board again determined that the unavoidable impacts to historic resources and Wildlife Sanctuary were acceptable due to the need to modernize facilities on campus. AR 77-78. The Board stated its intention to restore and replace the riparian areas affected by the construction. AR 79.

e. 2015 Addendum

On December 22, 2015, the District issued a draft Addendum to the 2012 Subsequent EIR for the 2012 Facility Master PlanUpdate ("Addendum"). AR 1738.

f. 2015 Subsequent EIR

Sometime in 2015, the District issued a Subsequent Program/Project EIR ("2015 Subsequent EIR") to address the potential environmental impacts of the 2015 Facilities Master Plan Update. ER 2808.

2. The Parking Garage, ACE, and BCT Projects

a. The Parking Garage Project

The 2005 and 2008 Master Plan Updates identified the 2,250-space Parking Garage Project on the south side of Edinger Way and Walnut Drive. AR 4808, 6050-11. The 2012 Subsequent EIR identified the same 2,300-space Parking Garage Project on the south side of Edinger Way and the southeast side of Mountaineer Road. AR 151.

On February 11, 2015, the District awarded a Phase I Site Work Contract to Tilden-Coilto prepare the site for the Parking Garage Project. AR 2639. The Board also adopted Resolution No. 14-05, which found the Parking Garage Project exempt from compliance with the City's development and zoning ordinances. AR 12. No initial study was prepared for the February 11, 2015 Parking Garage Project approvals. AR 5-13.

United Walnut filed suit and on April 15, 2015 obtained a TRO prohibiting the District from proceeding with the Parking Garage construction on the basis that (a) the Parking Garage was not a project authorized for Measure RR expenditures and (b) was a non-classroom facility not exempt from the City's zoning and development ordinances. Thus, Resolution No 15-01's attempted exemption pursuant to Government Code section 53094(b) was impermissible.

On July 8, 2015, the District placed the Parking Project "on hold" and diverted the allocated Measure RR funds to other projects. The Board questioned that if "litigation goes in Mt. SAC's favor, would we be able to resume with plans to build a new Parking Structure?" Board President Scroggins answered "that the Parking Structure remains in the College's Facilities Master Plan and the Environmental Impact, and there are no plans to relocate the structure to any other location."

On July 22, 2015, the District took action to terminate the facilities lease contract (but not the site lease) with Tilden-Coil. On February 17, 2016, the District took action to abandon the Parking Garage Project as a Measure RR project. AR 14078. The Board specifically stated that it would not be taking any action to construct the Parking Garage Project under the

lease/leaseback contract award to Tilden-Coil. AR 14078. The abandonment of the Parking Garage Project was without prejudice to any future action authorizing a new parking structure in the same location. AR 14078.

The District has not rescinded Resolution No. 14-05. *See* AR 5-13. The District has also not rescinded the Parking Garage Project site lease to Tilden-Coil; it has rescinded only the facilities lease. ER 2-13. The District continues to plan to construct a parking structure at the same location in the future. AR 1948, 2248, 2842; ER 2817, 2864.

b. Athletics Complex Project

The 2008 Subsequent EIR identified the ACE Project east of Bonita Drive south of Temple Avenue. AR 5986, 6050-11.

As part of the 2012 Master Plan Update, the ACE Project was expanded, moved, and renamed with new building elements and practice field areas as the new "Athletic Education Building Project", also "Athletic Complex East" (ACE). AR 153. The 2012 Subsequent EIR identified the ACE Project on the same site as proposed in 2008 but expanded the project to 44,000 square feet and alters the building's footprint. AR 256.

This required the 2012 Subsequent EIR to address two additional construction-related issues for the Project: (i) potential impacts of earth export to the Fire Training Academy site and, (ii) potential additional impacts on California Walnut Woodlands north and west of Hilmer Lodge Stadium. AR 256. Preliminary grading plans for the ACE building were shown in the 2012 Subsequent EIR. AR 257.

On February 27, 2013, the Board approved an approximate $2 million contract with HMC Architects for final ACE Project design. AR 2442-8, 7199. The District did not prepare an initial study for the ACE Project. *See* AR 2442-8, 7199.

On April 2, 2014, the Board approved $5 million of Measure RR money for grading the ACE Project site to create temporary parking for a lease–leaseback construction contract with Tilden-Coil. *See* AR 2535-16 to 2535-17.

On June 24, 2015, the Board approved the final reconciliation and completion of a contract for the ACE Project site construction grading. AR 2535-16 to 2535-17. The Board explained why it did not conduct CEQA review:

> "Trustee Bader… wanted to make sure that it's clear that this isn't against policy. Gary Nellesen, Director, Facilities Planning and Management, said… that this item is for the moving of approximately 275,000 cubic yards of earth…for temporary parking…this work was covered in our Environmental Impact Report. He said that, when looking at environmental impacts, projects are not looked at individually, but how they affect other projects, and there are multiple projects in any given area." AR 2649-11.

On July 8, 2015, the Board approved submittal of the "Final Project Proposal for the New Physical Education Complex" to the State Chancellor's Office. AR 2652.

Based on a subsequent scoping review, The District prepared a project-specific Subsequent EIR for the ACE Project to address potential new environmental effects. ER 2808, 3130, 3132, 3162. To avoid confusion, the new project was titled "Physical Education Projects" ("PEP") to distinguish it from the abandoned ACE Project. Id. The budget for the PEP Project

is $87,795,000. AR 2472.

After an extensive comment period, a Notice of Determination for the PEP was filed on October 16, 2016. AR 14932-14934.

c. Business and Computer Technology Complex Project

The Business and Computer Technology Project ("BCT Project") was addressed as a long-term project in the 2008 Master Plan Update. AR 180. The 2012 Subsequent EIR includes the BCT Project. AR 1896.

The BCT Project construction contract award was on the agenda for the October 21, 2015 Board meeting. To support the CEQA evaluation, District consultant SidLindmark ("Lindmark") prepared Appendix G, Environmental Checklist Form, Revised 2009 ("Appendix G"), with a Notice of Determination signed by District staff Mikaela Klein that no further environmental review was required for the BCT Project. AR 1878-95. Lindmark also prepared a CEQA memorandum dated October 15, 2015 and directed to Gary Nellesen. AR 1896-1917. The memorandum contains an evaluation of the adequacy of existing CEQA documentation for the BCT Project (AR 1900-09) and concludes "[b]ased on the written evidence provided herein and the analysis of the Checklist, the existing CEQA documentation for the Project[] in the Final EIR is adequate and sufficient for the potential environmental impacts of the Project[]." AR 1910.

On October 21, 2015, the Board approved multiple bid packages for the BCT Project. AR 2692-11 to 2692-12. The October 21 Board minutes do not show an initial study or other CEQA review. AR 13595-96.

On February 27, 2013, the Board approved a $2.9 million contract to Hill Partnership, Inc. to design the proposed $40 million BCT Project. AR 7197-49.

3. The Solar Project

a. Background and Description

The Solar Project site is a 27.65-acre undeveloped hillside commonly known as the "West Parcel" of the Mt. SAC campus, 8.36 acres of which are Coastal Sage Scrub which is a California gnatcatcher habitat. AR 282. The West Parcel is a triangular lot with single-family residences along its southern and western boundaries and separated from Mt. SAC's main campus by Grand and Temple Avenues. AR 282-83.

The Solar Project is an approximately 2.0 megawatt electrical output system facility with ground-mounted tracking solar photovoltaic panels and a small masonry structure to house equipment, located on a pad of approximately 10.6 acres on the West Parcel. AR 1740-41. The District will realize savings of over $15,000,000 in electrical energy over the 25-year life cycle of the, Solar Project. AR 12423. The Solar Project qualifies under the California Solar Initiative Program for performance-based incentives totaling over $750,000 in the next five years based on the system's estimated electrical energy production. The Solar Project's funding source is (1) Proposition 39 Energy funds, (2) Energy Incentives, and (3) a zero-interest $3 million California Energy Commission loan. AR 12423.

b. 2008 Subsequent EIR

While the Solar Project had not yet been identified, the 2008 Subsequent EIR contained a biological technical report by Helix Environmental Planning Inc. conducting an initial evaluation

of the biological resources on the West Parcel. AR 14975-15022. Section 3.4 of the 2008 Subsequent EIR also evaluated the anticipated construction noise from projects listed in the 2008 Master Plan Update. AR 6050-101 to 6050-106. It found that construction noise generally would not be significant because the City had determined that construction noise during certain daytime hours is acceptable. Id.

c. 2012 Subsequent EIR

The 2012 Subsequent EIR identifies the Solar Project and analyzes its potential environmental impacts. AR 282-88. As evaluated in the 2012 Subsequent EIR, the amount of fill for the Solar Project to be hauled (or imported) to the West Parcel site is approximately 261,000 cubic yards for the 9.9-acre pad. AR 283. Mitigation Measure ("MM")-2c (adopted in the 2012 Mitigation Monitoring Program, limits the hauling of earth materials to outside of peak-hour traffic periods in order to avoid significant traffic impacts.

In Table 3.2.15, the 2012 Subsequent EIR analyzes the air quality impact of importing far more than the 261,000 cubic yards for the Solar Project, and analyzes importing 383,000 cubic yards for the construction of four projects simultaneously (Fire Training Academy, Athletic Education Building, Parking Structure, and West Parcel Solar). AR 219. The Solar Project as an individual project is separately analyzed in Table 3.2.12, for pollutant emissions in importing 261,000 cubic yards pursuant to the Preliminary Grading Plan in the 2012 Subsequent EIR. AR 214.

Section 3.9 of the 2012 Subsequent EIR provides impact analyses of the Solar Project's potential aesthetic, greenhouse gas, and biological impacts, and mitigation measures are included and adopted. In the 2012 Draft EIR, in Table 2.2.2, the Solar Project is identified as, "ID number… G, West Parcel Solar." AR 183. Section 3.9, entitled "WEST PARCEL SOLAR/RETAIL", contains an overview of the Project's biological impacts. AR 282.

The Draft 2012 Subsequent EIR stated that the preliminary grading plan would require 261,000 cubic yards of imported dirt. AR 283. In the 2012 Subsequent EIR, the District revised the grading plan to increase the acreage of the Solar Project from 6.6 to 10.6 acres, which will require additional grading. AR 327. Construction of the pad for the Solar Project in its final form requires 333,980 cubic yards of imported dirt. AR 327. It also requires the importation of 163,571 cubic yards of dirt through 160 large truck trips per day along a six-mile haul route. AR 1746, 1766.

The 2012 Subsequent EIR depicts the grading plan, showing the pad area, its resultant elevation, and the slope modifications, the access roads, and storm drain. AR 284. The 2012 Subsequent EIR clarifies that the Solar Project will be 2.0 MW on 10.6 acres. The 2012 Subsequent EIR notes that that: "Grading for the solar pad on the West Parcel will result in the removal of two drainages classified as non-wetland waters of the United States by the U. S. Corps of Engineers." AR 330. The District would apply to the Corps of Engineers for permits to remove the drainages. Ibid.

The 2012 Master Plan was approved and received CEQA lead agency clearance by the Board's certification of the 2012 Subsequent EIR on December 11, 2013. AR 2495-2500. The City never raised any grading issue with the Solar Project or any other project described in the 2012 Subsequent EIR during the comment period. *See* 323-24.

d. Project Approval

In April 2015, the District issued a Request for Statement of Qualifications and Request for Detailed Proposal ("RFP") for the Solar Project. AR 340-57. The RFP states that the Solar Project is an approximately two megawatt solar generation system. AR 343. The site description and utility information states that the Solar Project will be interconnected to the Southern California Edison utility grid. AR 359. The inverters for the Solar Project must be suitable for grid interconnection. AR 366.

On July 8, 2015, the Board first discussed Resolution No. 15-01 for an award of the construction and maintenance of the Solar Project to Borrego Solar Systems, Inc. ("Borrego"). AR 2122-24, 2652. Prior to the July 8, 2015 Board meeting, District consultant Lindmark prepared a CEQA memorandum addressed to the District's Director of Facilities Gary Nellesen ("Nellesen"). AR 1817-36. The CEQA memorandum stated that there was "no evidence that the [Solar] Project will cause a new significant environmental effect or increase the severity of previously identified significant effects identified in the Final EIR." AR 1829. In September 2015, Greve & Associates prepared air-quality and noise evaluations for the Solar Project based on the most recent grading plan and construction schedules. AR 12358-402, 12403-415.

United Walnut submitted written comments objecting that local zoning and development codes needed to be followed to build the Solar Project at the West Parcel site. AR 12218-21.

At the July 8 hearing, the Board adopted Resolution 15-01 and awarded a not-to-exceed amount of $5.3 million, including a $25,000 allowance, for a contract with Borrego as the Solar Project builder and operator. AR 2122-23. Resolution 15-01 contains a CEQA finding that the Solar Project is within the scope of the 2012 Subsequent EIR and that no substantial differences were present necessitating further environmental review. AR 2123.

In order to consider an increase to the award amount and allow an opportunity for a public hearing, the Board re-noticed the award of the Solar Project for the September 9, 2015 Board meeting. AR 12416, 12420. At the hearing, the Board found that no subsequent EIR was required for the Solar Project: "The project as currently designed could have significant effects on the environment, however, all potentially significant effects have been analyzed in the 2012 Final EIR pursuant to applicable standards and have been avoided or mitigated pursuant to the 2012 Final EIR, including mitigation measures that were adopted in the 2012 Mitigation Monitoring Program that are applicable to the project." AR 12420.

An updated CEQA memorandum dated September 9, 2015 was prepared by Lindmark and addressed to Nellesen for the re-noticed meeting. AR 1837-64. The updated memorandum contained an expanded discussion of the adequacy of the existing CEQA documentation for the Solar Project. AR 1856-57. Lindmark concluded that there were no new significant effects not analyzed in the 2012 Subsequent EIR, there were no substantial increases in the severity of the previously identified effects, and the District had not declined to adopt effective mitigation measures. AR 1856-57. To further support his analysis, Linkmark prepared an Appendix G form with a Notice of Determination signed by District staff.

At the September 16, 2015 meeting, members of the public spoke in opposition to the project presenting evidence about aesthetics, sight lines, and other impacts. AR 2689-1 to 2689-4, 2689-22 to 2689-79. Mt. SAC reviewed and approved a change to the Solar Project's location, footprint, and sight lines. AR 2689-3 ("Trustee Hidalgo said... that the relocation presented tonight by the College was a good compromise."); AR 2689-4 ("Mr. Gregoryk indicated that Trustee Chyr asked how much of this information is different than what was presented previously. Mr. Gregoryk said that the footprint is a little bit farther south than

previously presented, which affected the sight lines."); AR 2689-12 (change in location of Solar Project by 300 feet).

At a November 18, 2015 meeting, the Board passed Resolution 15-06 approving the Solar Project. AR 17-18. Resolution 15-06 excluded the Solar Project from Division of the State Architect ("DSA") review and approval because "the Board of Trustees assumes responsibility for adequate inspection of the materials and work of construction to ensure compliance with the provisions of Parts 2, 3, 4, 5, 6, 7, 11, and 12, Title 24, California Code of Regulations, as adopted by the California Building Standards Commission." ER 886-88. Resolution 15-01 stated that no EIR for the Solar Project was required because all potential significant effects were already analyzed in the 2012 Master Plan EIR. AR 15.

Also on November 18, 2015, the Board awarded five individual multi-prime bid packages required to prepare the West Parcel site for the Solar Project. AR 13689. The Board item for this award concluded no additional environmental analysis was required under CEQA as the environmental impacts of the site and grading components of the Solar Project had been addressed in the 2012 Subsequent EIR. AR 14908.

As required by MM-2c adopted in the 2012 Subsequent EIR, Mt. SAC's engineer, Iteris, Inc. ("Iteris") prepared a November 18, 2015 truck hauling plan that included an analysis of hauling the 163,571 cubic yards at 20 trucks (14 cubic yards each) per hour during non -peak - hour traffic periods and confirmed that there would not be any degradation of traffic Levels Of Service. AR 13621-77.

Board President Scroggins stated at the November 18 meeting that mitigation measures for dirt hauling for the Solar and ACE Projects had recently been modified. AR 2770. The District added that:

> …since the responsible agencies are conducting their own CEQA reviews and approvals of the West Parcel Solar Project, any project changes imposed by the responsible agencies as a condition of approval will not create a potentially new significant environmental impact or exacerbate any of the existing significant environmental impacts disclosed in the 2012 Master Plan Subsequent EIR…. For these reasons, no additional environmental analysis is required under CEQA. AR 2817.

At the same November 18 meeting, District approved design and consulting contracts to Helix Environmental Planning and to WW Design & Consulting, Inc. for a line of sight study. AR 2835.

e. <u>2015 Addendum</u>

On December 22, 2015, District issued a draft Addendum to the 2012 Subsequent EIR. AR 1738-1816. The District was considering extending construction traffic for an additional two hours per day during non-peak hours and the purpose of the Addendum was to change four existing mitigation measures adopted in the 2012 Subsequent EIR that apply to the Solar Project. AR 1741.

One of those mitigation measures was MM-2c, which provided that the District would consult with the City on a Truck Route Plan for truck hauling activities with more than fifty trucks per day. AR 1743. Hauling would occur only between 9a.m. and 2p.m. Monday through

Friday, and 8a.m. to 5p.m. on Saturdays. AR 1743. Light duty trucks with a weight of less than 8,500 pounds were exempted from this restriction. AR 1743.

The Addendum contended that MM-2c will intrude into the Saturday p.m. peak hour traffic and does not have the specificity needed for assessing truck hauling activities for the Solar Project or future projects hauling large amounts of dirt. AR 1743. Based on plans for the Solar Project, the haul route was defined. AR 1743. A congestion analysis of the haul route was completed in the November 18, 2015 Iteris report. AR 1745.

Based on this analysis, the District revised MM-2c as follows. AR 1750. For hauling operations of more than 15 trucks per hour and more than 100,000 cubic yards, a Truck Haul Plan shall be implemented as approved by the Director of Facilities Planning and Management. AR 1750. The Truck Haul Plan shall specify requirements to minimize traffic congestion both on and off campus. AR 1750. If necessary, haul trucks will be required to use radio communication to improve traffic flow. AR 1750. Light duty trucks with a weight of no more than 8,500 pounds are exempt from any Truck Haul Plan. AR 1750.

The Addendum concluded that a subsequent EIR need not be prepared because the changes proposed to MM-2c were not major revisions. AR 1752. The Addendum stated that the proposed changes were meant solely to address reduction of traffic congestion during the a.m. and p.m. hours. AR 1752.

The Board approved the Addendum on January 13, 2016. AR 2298, 14918-21. It concluded that the Addendum was for a minor technical change which would not create a new significant environmental impact or substantially increase the severity of a significant impact disclosed in a previous EIR under Guidelines section 15162. AR 2363-64.

The District has obtained the following required approvals for the Solar Project: (1) Section 401 Water Quality Certification from the Los Angeles Regional Water Quality Control Board ("RWQCB"), executed May 23, 2016 (AR 14080-95), (2) California Department of Fish and Wildlife Streambed Alteration Agreement, executed August 22, 2016 (AR 14096-19), and (3) a Section 404 Nationwide Permit from the Army Corps of Engineers, executed October 13, 2016, including a United States Fish and Wildlife Service ("USFWS") Biology Opinion (AR 14120-14). The District also complied with the National Pollution Discharge Elimination System ("NPDES") permit process (AR 14215-46) and submitted a Stormwater Pollution Prevention Plan to the State Water Resources Board (AR 14247-786).

f. <u>Stop Work Order</u>

On October 20, 2016, the City issued a Stop Work Order through its Community Development Department against the Solar Project. ER 5068. The Stop Work Order refers to District's "construction of the solar generation project located on undeveloped land south of Temple Avenue/Amar Road and West of Grand Avenue, in an area commonly known as the 'West Parcel' or otherwise known as the Solar Project. ER 5068. The Stop Work Order cites various alleged violations of the City's WMC, including section 25-39(f), which governs issuance of CUPs for property in the City zoned R-1, and section 6-5.6, which governs grading and certain provisions promulgated under Appendix J to the Los Angeles County Building Code ("LACBC") in the Los Angeles County Code, and WMC. ER 5048, 5068.

E. Statement of Extra-Record Facts[4]

1. Mt. SAC EIR Policy

Mt. SAC is the largest single campus community college district in the State of California with over 421 acres and is located in the City. Lindmark Decl. ¶3. Mt. SAC construction projects go through three phases of approvals. First is CEQA approval -- the project is identified and evaluated for CEQA compliance. Second, the project is designed and engineered by Board-approved architects and/or engineers. This stage of approval will sometimes show that the scope of the project has changed, necessitating a subsequent or supplemental EIR, or negative declaration (with or without mitigation or addendum). Nellesen Decl. ¶3. For example, the ACE Project was approved in the 2012 Subsequent EIR. Due to scope changes, a project-specific EIR was later prepared. Nellesen Decl. ¶3.The third and final phase of project approval occurs when the constructioncontracts are awarded by the Board. Nellesen Decl. ¶3.

Mt. SAC is an institution of "public higher education" and is required under Public Resources Code section 21080.09 to develop long range development plans ("LRDPs") that address physical development and land use planning to meet its academic and institutional objectives. Lindmark Decl. ¶3. The use of LRDPs and related EIRs is common to institutions of public higher education. For public agencies, Facility Master Plans serve a similar purpose as master plans, specific plans, and area plans for local agencies. Lindmark Decl. ¶3.

Mt. SAC prepared LRDPs in the form of Facility Master Plans in 2002, 2005, 2008 and 2012, which were evaluated in the Final Program EIR certified in December 2002 with Supplemental or Subsequent EIRs in 2005, 2008, and 2012. Lindmark Decl. ¶4. The use of program EIRs has several advantages for public higher education institutions like Mt. SAC that are required to evaluate and coordinate long range development projects. Lindmark Decl. ¶4. The program EIR can (a) provide a more exhaustive consideration of effects and alternatives than would be practical in a project-specific EIR, (b) provide consideration of cumulative impacts that might be ignored in a series of project-specific EIRs, (c) avoid duplicative consideration of long-range development policies, (d) allow consideration of multiple projects at a time when the lead agency has greater flexibility to address cumulative impacts, and (e) provide environmental review at the earliest stage possible. Lindmark Decl. ¶4. Mt. SAC policy is to use program EIRs addressing environmental impacts at a project -level so that CEQA review can start at the earliest meaningful time and cumulative district-wide impacts of the project may be considered. This is a common practice among large public education institution with numerous ongoing projects. Nellesen Decl. ¶3.

Mt. SAC does not have a policy of avoiding CEQA compliance by using tiered program EIRs to avoid evaluating project-level impacts and mitigation. Nellesen Decl. ¶3. Mt. SAC did not use “programmatic tiering” for the Solar, BCT, Parking Garage, and ACE projects was not "programmatic tiering". Lindmark Decl. ¶5. "Tiering" is defined in Guidelines section 15152 to mean "using the analysis of general matters contained in a broader EIR (such as one prepared for a general plan or policy statement) with later EIRs and negative declarations on narrower projects, incorporating by reference the general discussions from the broader EIR, and concentrating the later EIR or negative declaration solely on the issues specific to the later project." Lindmark Decl. ¶5. Mt. SAC prepares EIRs to support its Updated Master Plans with

[4] For convenience, the extra-record evidence is presented collectively for all three Petitions even though it differs slightly for each Petition.

sufficient project-level review to reduce the need for subsequent environmental review under CEQA Guidelines section 15162, which governs the preparation of subsequent EIRs and negative declarations, and not section 15152, which governs "tiering." Lindmark Decl. ¶5; Nellesen Decl. ¶4.

2. ACE

The Board never awarded a construction contract for the ACE Project. Nellesen Decl. ¶16. Based on a subsequent scoping review of the ACE Project, Lindmark recommended that the District prepare a project-specific EIR to address potential new environmental effects. Lindmark Decl. ¶26. To avoid confusion, the new project was titled PEP to distinguish the abandoned ACE Project. Lindmark Decl. ¶26.

Both the City and United Walnut have filed legal actions challenging the 2015 Subsequent EIR for the PEP. Lindmark Decl. ¶27.

3. Parking Garage Project

Since the award of the Phase I Site Work Contract with Tilden-Coil, the Board has taken official action to abandon the Parking Garage Project. Nellesen Decl. ¶15.

4. Solar Project

The Solar Project is a solar energy generation facility. Nellesen Decl. ¶21. Mt. SAC developed the Solar Project for the purposes of reducing its electrical energy consumption and passing those fiscal and ecological savings along to its students and surrounding community. The Solar Project will produce and generate approximately 21,671,525 Kwh of clean electrical energy over the next five years, and 103,124,789 Kwh of clean electrical energy over the 25 year life cycle of the Project.

The West Parcel had been shown in the 2002 draft EIR as a "Future Asset Management Area." Lindmark Decl. ¶6. The Solar Project began in 2008. While there was no Solar Project identified at that time, Mt. SAC had Helix Environmental Planning Inc. complete initial biological resources evaluations for the West Parcel as part of the 2008 Subsequent EIR Lindmark Decl. ¶6. The anticipated noise from the construction of the Solar Project was first analyzed in Section 3.4 of the 2008 Subsequent EIR. Lindmark Decl. ¶9. In 2012, Mt. SAC approved the "Facility Master Plan 2012" to, among other things, identify six campus zones of use to guide infrastructure development and future planning. Lindmark Decl. ¶7. The 2012 Subsequent EIR identified the Solar Project and also analyzed the potential environmental impacts of the Solar Project. Lindmark Decl. ¶7. Table 3.2.15 of the 2012 Subsequent EIR analyzed the air quality impact of importing far more than the 261,000 cubic yards for the Solar Project. Lindmark Decl. ¶8. Section 3.9 of the 2012 Subsequent EIR provided impact analyses of the Solar Project's aesthetic, greenhouse gas, and biological impacts, and appropriate mitigation measures were included and adopted. Lindmark Decl. ¶10. The 2012 Subsequent EIR also depicts the grading plan, pad area, elevation, slope modifications, access roads, and storm drain. Lindmark Decl. ¶11.

The contract award for the Solar Project occurred at the July 8, 2015 Board meeting. Lindmark Decl. ¶13. At the time, the Solar Project had not significantly changed from the Project approved in the 2012 Subsequent EIR. Lindmark Decl. ¶13. To support this finding, Lindmark prepared a CEQA memo addressed to Nellesen. Lindmark Decl. ¶13.

The Board re-noticed the award of the Solar Project for the September 9, 2015 meeting and Lindmark prepared another CEQA compliance memo for Nellesen. Lindmark Decl. ¶14 Nellesen Decl. ¶7. He also prepared an Appendix G checklist for Nellesen. Lindmark Decl. ¶14; Nellesen Decl. ¶7. The Solar Project was awarded by the Board at a September 16, 2015 special meeting. Lindmark Decl. ¶14.

The location of the Solar Project along Grand Avenue was an initial potential aesthetic concern because of the high traffic volume on the street, but the pad elevation and landscape plan assured no aesthetic impact. Lindmark Decl. ¶15. Subsequent analysis determined that only approximately 163,571 cubic yards of import would be needed for the Solar Project. Lindmark Decl. ¶16. Iteris prepared a truck hauling plan for this importation of dirt, and it concluded that the plan would not cause a significant traffic impact. Lindmark Decl. ¶16.

The Board did not approve contracts for the performance of post-approval environmental studies at its November 18, 2015 meeting. Nellesen Decl. ¶8. Instead, the Board approved consultant contracts necessary to comply with the requirements of resource agencies such as USFWS and the Corps of Engineers. Nellesen Decl. ¶8.

On November 18, Mt. SAC adopted Resolution 15-06 excluding the Solar Project from DSA review based on the conditions that Mt. SAC's plans be prepared by a California architect or engineer, that the Board assumes authority for inspection of materials and construction to comply with the California Building Code, and that the photovoltaic panels shall be ground-mounted, entirely fenced from student and public use, not associated with public viewing areas and other conditions. 2/10/17 Nellesen Decl. ¶9.

DSA requires, with few exceptions, a complete set of integrated architectural and engineered development plans and drawings before it will review an application. Hussain Decl. ¶3. The exceptions are for a ministerial "pre-check" and specially labeled and titled project increments. Hussain Decl. ¶3. The DSA web-tracker is a reliable source of project information. Hussain Decl. ¶5.

5. <u>The Addendum</u>

Beginning in December 2016, Mt. SAC considered extending construction truck traffic for an additional two hours per day during non-peak hours in addition to making minor edits to four existing mitigation measures adopted in the 2012 Master Plan to: (1) accommodate the extended construction truck traffic time (MM-2c); (2) require parking supply studies on regular intervals to more precisely determine when the parking supply mitigation is required to be implemented (MM-2k); (3) remove the requirement for grading permits, since the District does not require them (MM-3a); and (4) align the paint VOC requirements with current industry practices and California Emissions Estimator Model standards (MM- 3i). Additionally, four components of the Solar Project Truck Haul Plan were proposed to reduce potential traffic congestion if other drivers make unsafe vehicular movements near trucks along the haul route. Separation of haul trucks along the haul route minimizes traffic congestion and improves traffic flow. Lindmark Decl. ¶18.

An evaluation of the proposed changes was included in the Addendum. Lindmark Decl. ¶18. The Addendum was not a *post-hoc* rationale for Solar Project impacts. Nellesen Decl. ¶9. Its purpose was to address minor revisions to the Solar Project and mitigation measures resulting in similar or lesser effects than the original Project. Nellesen Decl. ¶9; 2/17/17 Lindmark Decl. ¶17. Lindmark concluded that an Addendum was the appropriate CEQA document because it

would not cause any new significant environmental impacts or substantially exacerbate existing impacts. Lindmark Decl. ¶19.

6. The City's Concerns

Based on the District's construction plans the Solar Project's West Parcel, accessible only by a driveway on the westerly side of heavilytraveled Grand Avenue, will be subject to a 40-foot truck either slowing to enter or leave theproject site approximately every 90 seconds, for eight hours a day, Monday through Saturday. Gilbertson Decl. ¶7. The truck deceleration/acceleration will take place within a left-merging rightlane (the "Number 3" lane) of Grand Avenue so that the truck driver will not merely need topull out onto a street with a 50 mile per hour speed limit but, within a matter of feet, mergeinto the second ("Number 2") traffic lane. Gilbertson Decl. ¶8.

The City Engineer's practice is to require the responsible party proposing a mass grading operation of the magnitude proposed for the Solar Project to submit a detailed "Haul Route Plan/Construction Traffic Control Plan." Gilbertson Decl. ¶9. As part of this established process , the City Traffic Engineer has several measures that can be implemented to ensure the safety of the City's streets. Gilbertson Decl. ¶11.

The Solar Project site proximity to the Grand Avenue and Amar Road intersection is an area of concern to the City. Gilbertson Decl. ¶11. The City Traffic Engineer could address the potential sight distance concerns by reducing speed limits on southbound Grand Avenue traffic, or by imposing a "no right turn on red" restriction at the intersection. Id. The left merge of the Number 3 lane is a particular concern that could be addressed be temporarily eliminating the Number 3 lane from Grand Avenue south of Amar Road, leaving the existing lane as a dedicated deceleration/acceleration ramp for trucks. Gilbertson Decl. ¶12. Finally, the City Traffic Engineer could address the left-hand turns needed for the proposed haul route by adjusting the traffic signal timing to extend the amount of time available for left turns. Gilbertson Decl. ¶13.

At no time has Mt. SAC consulted with the City Traffic Engineer regarding the proposed haul route, and the City Engineer is unaware of any concrete safety measures for the motoring public. Gilbertson Decl. ¶14. It is irresponsible for a public or private agency to use the right-of-way for hauling 163,571 yards of fill in an urban area without the review of the haul route and traffic plan by a registered traffic engineer. Gilbertson Decl. ¶15.

7. Addendum Approval

The Addendum was on the agenda for approval by the Board at January 13, 2016 meeting. 2/17/17 Lindmark Decl. ¶18. 19. The City attended the Board meeting to oppose the adoption of the Addendum and submitted a letter authored by the City Attorney dated January 13, 2016. 2/17/17 Lindmark Decl. ¶19.

All of the objections raised by the City Attorney are addressed in the Addendum. The basic parameters of the Solar Project has not changed -- the same site, an identical use, a reduction in grading import, and a reduction in height of the building pad are factors which reduce overall environmental impacts. 2/17/17 Lindmark Decl. ¶19. The City's criticism of the Iteris' truck haul congestion memorandum is unfounded. The distance from the borrow site to the Solar Project site is approximately one mile and the proposed truck hauling return trip is approximately five miles. No feasible alternative truck hauling routes are readily available that do not include residential areas or return trips on Grand Avenue. 2/17/17 Lindmark Decl. ¶21.

Mt. SAC has consulted with the City regarding the Truck Hauling Plan through the environmental review process. 2/17/17 Lindmark Decl. ¶21.

While the City claims the Addendum ignores health risks, a health risk assessment is not needed or appropriate for either the Truck Hauling Plan or hauling impacts at the Grand Avenue and Temple Avenue intersection. 2/17/17 Lindmark Decl. ¶27. There is no requirement from SCAQMD to prepare a health risk assessment for school-type operations or for construction projects of the type proposed. The Solar Project is a relatively small construction project as indicated by the fact that the air quality analysis shows emissions will be well below SCAQMD thresholds. 2/17/17 Lindmark Decl. ¶27.

8. <u>The Stop Work Order</u>

In recent history, Mt. SAC has never applied for a CUP from the City for any of its construction projects, notwithstanding its RPD zoning designation. Nellesen Decl. ¶19. Mt. SAC never applied for a grading permit for any of its construction projects. Nor has the City ever requested review and approval of any grading plans for Mt. SAC construction projects. Nellesen Decl. ¶19.

The Solar Project was approved as part of the 2012 Master Plan Update dated February 18, 2013, and received CEQA lead agency clearance by the Board's certification of the 2012 Subsequent EIR. No representative from the City or neighborhood group or resident raised any concerns about the Solar Project at December 11, 2015 Board meeting approving the 2012 Subsequent EIR and the Solar Project. Nellesen Decl. ¶19. Based on the longstanding history with the City and the lack of any comments, the Solar Project was commenced without a CUP, building permit, or grading permit from the City. Nellesen Decl. ¶19.

Mt. SAC has received regulatory approvals from the RWQCB, California Department of Fish and Wildlife ("CDFW"), and Army Corps of Engineers. 2/17/17 Nellesen Decl. ¶10. Mt SAC also has submitted a Stormwater Pollution Prevention Plan to the Water Resources Board and complied with the NPDES permitting process. 2/17/17 Nellesen Decl. ¶10.

The construction schedule for the Solar Project depends on several time-sensitive factors, including constructing around the breeding season of federally listed (threatened) coastal California gnatcatcher, which runs from February 15 to August 31. In addition, the Section 404 Nationwide Permit from the Corps of Engineers remains valid only through March 18, 2017, with a twelve month extension if the Project has commenced the permitted activity. Nellesen Decl. ¶7.

After obtaining these state and federal approvals, the District planned to start construction of the Solar Project on October 24, 2016 but was stopped when Vasquez of the City's Community Development Department issued the Stop Work Order on October 20, 2016. Nellesen Decl. ¶12.[5]

9. <u>The Revised Grading Plan</u>

After the December 6, 2016 hearing in which United Walnut's preliminary injunction application on its third cause of action was granted and the District's motion to enjoin

[5] The court has not set forth the evidence concerning the propriety of the signature on the Stop Work Order, as that issue was raised by the District in opposing a preliminary injunction, but not in any of its papers for trial.

enforcement of the Stop Work Order was denied, the District contacted the City for information about what it would need to do to obtain a grading permit for the Solar Project in an effort to avoid potential further delays. Nellesen Decl. ¶14. City Manager Robert Wisher ("Wisher") responded in a December 7, 2016 email as follows:

> "As a follow-up to our earlier conversation, there is a 19-page ruling from the Judge that is available. Also, for your information, in order to obtain a grading permit said project must be fully entitled. Which means that the project needs to go through the zoning process and receive approvals prior to issuance of any building/grading permits. Please refer to the zoning process documents that we forwarded to you and your staff on two (2) separate occasions." Nellesen Decl. ¶15; ER 5110.

The "zoning process documents" Wisher referred to in his December 7th email are: (i) CUP application; (ii) building permit application; and (iii) a development application. Nellesen Decl. ¶16. On December 13, 2016, the District responded by informing Wisher that the court's ruling determined the Solar Project is a solar energy generation facility and exempt from all City building and zoning ordinances other than a carve-out that the Solar Project must comply with the City's grading ordinance regulating "review and approval of grading plans related to the design and construction of onsite improvements which affect drainage, road conditions or grading." Nellesen Decl. ¶16; ER 5113. Mt. SAC's Vice-President, Michael Gregoryk ("Gregoryk") informed Wisher that the City cannot impose any other zoning controls for the Solar Project, including the requirement that the District obtain a CUP or any other permit unrelated to the narrow carve-out for grading plan review and approval as quoted above. Id.

Psomas is Mt. SAC's grading engineer for the Solar Project. Barker Decl. ¶5. The original grading plans for the Solar Project were prepared by Psomas based on the California Building Standards Code set forth in Title 24 of the California Code of Regulations. Nellesen Decl. ¶11; Barker Decl. ¶8. Psomas' grading plans were submitted for review to the Army Corps of Engineers and CDFW before those agencies took regulatory action to approve the Solar Project. Nellesen Decl. ¶11; Barker Decl. ¶19.

In December 2016, the District asked Psomas to review the relevant grading provisions in the WMC and the LACBC for the purpose of revising Psomas' grading plans as required under Government Code section 53097 for the design and construction of onsite improvements which affect drainage, road conditions or grading,. Nellesen Decl. ¶18; Barker Decl. ¶8.

Psomas prepared the revised grading plans for the Solar Project to comply with Appendix J of the LACBC. Barker Decl. ¶12-14. As long as a grading plan and application complies with the relevant technical portions of the criteria in Appendix J and any local agency approvals, the County building official will process the grading plan for approval. Barker Decl. ¶16. The revised grading plans are in full compliance with Appendix J and the WMC. Barker Decl. ¶17. WMC section 6-5.3 provides: "Development standards relative to grading within the City of Walnut are hereby established to complement the provisions set forth in Appendix Chapter J of the Los Angeles Building Code as currently adopted and as may be amended from time to time…." Barker Decl. ¶10. In Psomas's opinion, the "development standards" referred to in WMC section 6-5.3 apply only when a project is subject to City discretionary approval, such as when a CUP is required. Barker Decl. ¶11.

On January 23, 2017, the District transmitted Psomas' revised grading plans to the City. ER 5199; *see* Nellesen Decl. ¶19. In the transmittal letter, Nellesen explained that the revised grading plans had been prepared pursuant to Government Code section 53097 and asked that City's Building & Safety Division review and approve the revised grading plans. Nellesen Decl. ¶19; ER 5199. Nellesen did not include a grading permit application as he was unable to locate a City grading permit application on the City's website, and after diligence search of District's records, no such grading permit application can be located. Nellesen Decl. ¶19.

On January 24, 2017, Nellesen received an email from Vasquez acknowledging receipt of the revised grading plans and advising Nellesen that the City was quickly working to review the materials and would provide written correspondence immediately following completion of the review. Nellesen Decl. ¶20; ER 5199.

On February 23, 2017, the City responded, stating that Mt. SAC's grading plans are incomplete because Mt. SAC must submit a development application for City Planning Commission review. 2/24/17 Nellesen Decl. ¶5, Ex. A. The City relied on WMC section 6-5.6(b), which provides that when a grading plan proposing an elevation change of more than five feet, a development must be submitted to the Planning Commission for discretionary approval. Nellesen Decl. ¶5, Ex. A. The City stated that Mt. SAC's grading plans are subject to discretionary review because the elevation change is greater than five feet. Nellesen Decl. ¶5, Ex. A.

E. United Walnut Petition[6]

Petitioner United Walnut argues that the District has violated CEQA by failing to conduct and circulate initial studies for the Parking Garage and Solar Projects, violated the City's land use and zoning laws, and violated CEQA by implementing a policy and practice that avoids CEQA project-specific review.

1. The Failure to Conduct Initial Studies

Petitioner United Walnut's second cause of action concerns CEQA compliance for the Parking Garage and Solar Projects. United Walnut alleges that the District failed to perform required additional environmental review for the Parking Garage and Solar Projects. Pet. Op. Br. at 7, 9-10. Rather, the District relied entirely on its Program EIR, including the 2012 Subsequent EIR. According to Petitioner, this reliance is improper because it does not comply with CEQA's requirements for tiered programmatic review. Pet. Op. Br. at 9-10.[7]

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[6] In support of its Petition, United Walnut asks the court to judicially notice pages from the DSA website (Exs. 3-4). The request is granted. Evid. Code §452(c).

The court has ruled overruled United Walnut's objections to Mt. SAC's evidence. Walnut's objection to Mt. SAC's opposition brief also was overruled as improper; a party may not make an evidentiary objection to another party's argument. Nonetheless, the court has separated relevant Administrative Record from Extra Record evidence in considering the parties' claims.

[7] The District contends (Opp. at 10) that the substantial evidence standard applies to United Walnut's claims, but that standard applies only to the adequacy of the EIRs and the District's decision-making, not whether Mt. SAC proceeded in the manner required by law, which is reviewed *de novo*. *See post*.

A program EIR is used for purposes of (1) avoiding multiple EIRs, (2) simplifying later environmental review, and (3) consideration of broad programmatic issues. Cal. Practice under CEQA, Cont. Ed. Bar 2d ed. (2016) ("CEQA Practice Guide") §10.14B. The agency must examine each activity to determine whether additional environmental review is required. Id. at §10.16a. This determination requires a two-step process: "First the agency considers whether the activity is covered by the program EIR by determining whether the activity will result in environmental effects that were not examined in the program EIR." Id., (citing CEQA Guidelines §15168(c)(1). Second, "if the agency determines the activity is covered by the program EIR, [the agency] must evaluate the proposed activity to determine whether any new environmental effects could occur, or new mitigation measures would be required due to events occurring after the Program EIR was certified." Id. (citing CEQA Guidelines §15168(c)(2)).

When program EIRs are part of a tiered programmatic review, site-specific projects trigger new environmental review under CEQA's provision for tiered EIRs. Pub. Res. Code §§ 21068.5, 21094; Friends of Mammoth v. Town of Mammoth Lakes Redevelopment Agency, ("Friends of Mammoth") (2000) 82 Cal.App.4th 511, 528. Where a tiered EIR has been prepared, "CEQA requires a lead agency to prepare an initial study to determine if the later project may cause significant environmental effects not examined in the first EIR." Friends of Mammoth, *supra*, 82 Cal.App.4th at 528. "If the subsequent project is not consistent with the program or plan, it is treated as a new project and must be fully analyzed in a project EIR, or another tiered EIR if it may have a significant effect on the environment." Friends of College of San Mateo Gardens v. San Mateo City Community College Dist., ("San Mateo Gardens") (2016) 1 Cal.5th 937, 960. The default procedure is to prepare a tiered EIR for later projects. Only where the project was examined at a sufficient level of detail in the previous EIR is a tiered EIR or other environmental review not necessary. Pub. Res. Code §21094.

Petitioner United Walnut alleges that the District has conducted environmental review through tiered supplemental and subsequent Program EIRs, and never performed an initial study prior to approving the Parking Garage Project and Solar Project as required by Public Resources Code section 21094(c). The 2012 Subsequent EIR, which states: "[T]his document is a Subsequent EIR since new potential adverse project impacts not previously evaluated in prior CEQA documents (Certified Final EIRs) ... The prior 2002, 2005 and 2008 Campus Master Plans were evaluated in Final Program EIR ..." AR 147. According to United Walnut, the record shows that Mt. SAC intended and understood its 2012 Subsequent EIR to be part of its tiered programmatic EIRs beginning in 2002. In response to a Board member's concern about a particular project during deliberations on the 2012 Subsequent EIR, Mt. SAC President Scroggins stated: "Each project in the [2012] Master Plan will be presented to the Board individually and, if another Environmental Impact Report is required, one will be done." AR 2495-10 to 2495-11.

Petitioner United Walnut contends that additional environmental review did not happen. The Parking Garage and Solar Projects were approved in the 2012 Subsequent EIR. Pursuant to Pub. Res. Code section 21094(c), Mt. SAC must conduct an initial study for its campus projects as they come up for approval. *See*San Mateo Gardens, *supra,* 1 Ca1.5th at 960. Alternatively, Mt. SAC must make a determination whether its subsequent activity is within the scope of its Program EIR. Committee for Green Foothills v. Santa Clara County Board of Supervisors, (2010) 48 Cal.4th 32, 44-45. Mt. SAC never performed an initial study for the Parking Garage Project. Mt. SAC never circulated an initial study for the Solar Project on the occasions when it

approved the Project on July 8, 2015, re-approved it on September 9, 2015, or made substantial changes on September 16, 2015. Instead, the District merely contends that both Projects were fully studied in the 2012 Subsequent EIR. Pet. Op. Br. at 10.

A project EIR must evaluate the significant environmental impacts and mitigate them to less than substantial. Pub. Res. Code §21100. A program EIR is prepared for a series of actions that are related geographically or are part of a continuing program. Guidelines §15168. Project EIRs are often tiered from program EIRs when general matters are initially covered in the Program EIR and more specific environmental documents will follow. Guidelines §§ 15152, 15385; In re Bay Delta, (2008) 43 Cal.4th 1143. Tiering allows the broad overall impacts to be analyzed at the first-tier programmatic level, which need not be reassessed when each of the project's narrower phases is approved. San Mateo Gardens, *supra*, 1 Cal.5th at 959. Moreover, if the agency addressing a specific project finds that no new effects could occur or no new mitigation measures would be required, the agency can approve the activity as within the scope of the program EIR's project and no new environmental document will be required. Guidelines §15162(c)(2). This decision must be made after preparing an initial study in consultation with responsible agencies and is governed by the substantial evidence standard. Pub. Res. Code §21094(a), (c); Guidelines §15063(g); San Mateo Gardens, *supra*, 1 Cal.5th at 959.[8]

The District denies that its Program and Subsequent/Supplemental EIRs (collectively, "Program EIRs") are tiered documents, and argues that they fully evaluate all potential environmental impacts of the projects on campus, implement full mitigation measures, and make the required CEQA findings. Opp. at 10. The District contends that it does not defer any analysis of details of linked projects until those projects are ready for approval. *See* Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova, (2007) 40 Cal.4th 412, 429. As such, no further environmental review is required under Pub. Res. Code §2166 for any project referenced in the Program EIRs unless there are substantial changes to the project affecting the severity of environmental effects, substantial changes with respect to the project's undertaking affecting the severity of significant effects, or new information appears that was not known when the Program EIR was certified. Opp. at 11.

United Walnut notes that it is not challenging the contents or sufficiency of the Program EIR, and contends that Mt. SAC's procedure is a failure to proceed in the manner required by law under CEQA, and subject to *de novo* review. Reply at 1. United Walnut criticizes Mt. SAC's approach of attempting to address specific projects in the Program EIR. Such an approach locks in projects and prevents future public review and comment. The approach also permits Mt. SAC to avoid future CEQA study when project decisions actually are being made for specific design, size, and location, and resulting site-specific impacts can be more accurately disclosed, understood, and studied. Mt. SAC's Program EIR lacks an adequate informational basis because a reasonable person reading the collective Program EIRs simply cannot tell which projects have been finally and thoroughly analyzed, mitigated, and overridden. Reply at 5.

The court agrees with all of United Walnut's criticisms, which are aggravated by Mt.

[8] If the project is not within the scope of the program EIR project, review is not governed by section 2166's substantial evidence standard. Instead, the agency must determine whether the later project might cause significant environmental effects not considered in the program EIR, and a tiered EIR must be prepared if the project arguably may have such effects. Sierra Club v. County of Sonoma, (1992) 6 Cal.App.4th 1307, 1321.

SAC's piecemealing of its impacts analysis for projects between Subsequent EIRs. For example, the Solar Project began in 2008 with a biological resources evaluations for the West Parcel as part of the 2008 Subsequent EIR even though the Solar Project had not yet even been identified. Lindmark Decl. ¶6. The noise impacts from construction of the Solar Project were first analyzed in the 2008 Subsequent EIR. Lindmark Decl. ¶9. Then the 2012 Subsequent EIR identified the Solar Project and analyzed the remaining air quality, aesthetic, greenhouse gas, and biological impacts, imposed mitigations measures and a grading plan. Lindmark Decl. ¶¶ 10-11. It is extremely difficult for any reader to read and follow the impacts analysis for a project by having to refer to a series of Subsequent EIRs.

Nonetheless, St. SAC is entitled to use a program EIR to perform project-specific analysis. There are benefits to a program EIR. As Mt. SAC contends, Guidelines section 15168 provides that a program EIRs can (a) provide a more exhaustive consideration of effects and alternatives than a project-specific EIR, (b) consider cumulative impacts that might be ignored in a series of project-specific EIRs, (c) avoid duplicative consideration of long-range development policies, (d) allow consideration of multiple projects at a time when the lead agency has greater flexibility to address cumulative impacts, and (e) provides environmental review at the earliest stage possible. *See* Lindmark Decl. ¶4.

The question is has Mt. SAC used a true program EIR with tiering, or has it used a program EIR that also has project-specific evaluations of impacts and mitigations? The answer is the former. As United Walnut notes Mt. SAC's Subsequent EIRs define their "project" as the Facilities Master Plan. *See, e.g.,* AR 147. The Subsequent EIR's environmental analysis "addresses the project at the level of detail characteristic of a conceptual master plan." AR 155. The Subsequent EIRs then provide a project description – the bedrock of an informative and legally adequate EIR – in "typically uninformative EIR doublespeak" that mentions how the Facilities Master Plan is a collection of future planned facilities, some of which have been built and some of which have been changed, along with updated statistics on expected campus wide growth and needs. *See, e.g.,* AR 180-85.The project descriptions are opaque and the Project evaluations are buried in the EIRs, if present at all. Instead, the Subsequent EIRs merely lump the common types of impacts arising from the collective FMP projects and set forth mitigation measures to address those types of impacts. AR 2649-11. The EIRs do not address the details of the specific projects, they merely lists the projects that are part of the Facilities Master Plan. *See* AR 181-183. These are all characteristic of a programmatic EIR, not a project-specific EIR.[9]

Mt. SAC's Facilities Master Plans are the equivalent of the LRDPs required of public school districts. Pub. Res. Code §21080.09; Lindmark Decl. ¶3. The Legislature has expressly authorized school districts to tier from an LRDP's environmental review. Pub. Res. Code §21080.09(c). That is exactly what Mt. SAC's Program EIRs are: environmental documents from which Mt. SAC may tier.

[9] United Walnut provides as an example that the BCT Project is identified in the 2002 Program EIR and Supplemental/Subsequent 2005, 2008, and 2012 EIRs only by reference and without a project-specific identification, disclosure and analysis of project-specific impacts, and analysis of a particular mitigation related to it. Then the BCT project merely appears in the 2008 Subsequent EIR in a Table 3 list of projects. *Compare* AR 178 (2012 Subsequent EIR states that the BCT was reviewed in the 2008 Subsequent EIR) *and* AR 5374-85 (Notice of Preparation for the 2008 Subsequent EIR says nothing about the BCT). Reply at 5, n. 2.

Mt. SAC's Program EIRs are an environmental evaluation that can be used for use in tiering and not project-specific review. Mt. SAC's Program EIR actually is a campus-wide evaluations of common impacts that can be anticipated from projected growth (principally students, parking, greenhouse gases, and traffic), and future implementation of the collective proposed Facilities Master Plans.

As Nellesen accurately explained to the Board on June 24, 2015:

> "[W]hen looking at environmental impacts, projects are not looked at individually, but how they affect other projects, and there are multiple projects in any given area." AR 2649-11 (emphasis added).

Nellesen's description is that of a program EIR, not a project-specific EIR. *See* In re Bay-Delta et al. (2008) 43 Cal.4th 1143, 1170.

As a result of the fact that the Program EIR is a true tiering document, Mt. SAC must prepare and circulate initial studies to responsible agencies (at an appropriate time) as projects come up for an actual decision on design and implementation. Pub. Res. Code §21068.5, §21094(a), (c). The District was required to, at minimum, prepare and circulate an initial study for each of the Solar Project and the Parking Garage Project to determine whether the individual projects would cause significant environmental effects not examined in the Program EIR. Contrary to this requirement, the District did not properly prepare and circulate initial studies for those Projects. The initial studies for the Solar Project and BCT described by the District as CEQA memoranda, were prepared by Lindmark and provided only to Nellesen. Lindmark Decl. ¶¶ 13, 14, 20; Nellesen Decl. ¶¶ 7, 10. There is no evidence that the initial studies were presented to the Board or any responsible agencies.

The District failed to proceed in the manner required by law by failing to properly circulate initial studies for the Parking Garage and Solar Projects. However, the Parking Garage Project is now moot. *See post*.

2. Statute of Limitations

Pub. Res. Code section 21167 establishes statutes of limitations for all actions alleging violations of CEQA. When an agency approves a project without determining whether it will have a significant effect on the environment, the limitations period is 180 days from project approval. Pub. Res. Code §21167(a). The limitations period starts running on the date the project is approved, and is not re-triggered on each subsequent date that the public agency takes action toward implementing the project. Van de Kamps Coalition v. Board of Trustees of Los Angeles Community College District, (2012) 206 Cal.App.4th 1036, 1045.

On February 11, 2015, the District awarded a contract to Tilden-Coilto prepare the site for the Parking Garage Project. AR 2639. The Board also adopted Resolution No. 14-05, which found the Parking Garage project exempt from compliance with the City's development and zoning ordinances. AR 12. No initial study was prepared for the February 11, 2015 Parking Garage approvals. AR 5-13. United Walnut filed suit a little over two months later, on April 15, 2015, and obtained a TRO prohibiting the District from proceeding with the Parking Garage construction. The Parking Garage claim is timely. The District does not dispute that the second cause of action is timely for the Parking Garage Project.

The District argues that the Solar Project claim is time-barred. According to the District,

the Board approved the 2012 Subsequent EIR containing the Solar Project on December 11, 2013. United Walnut's First Amended Complaint alleging CEQA non-compliance for the Solar Project was not filed until January 2016. Opp. at 9.

United Walnut responds that the Solar Project claim is not time-barred because its CEQA cause of action for the Solar Project does not challenge the 2012 Subsequent EIR. Reply at 2. United Walnut also disputes that the District approved the Solar Project as part of the 2012 Subsequent EIR because the District expressly withheld approval as part of the 2012 Facility Master Plan. AR 2495-11 (President Scroggins: "there haven't been any changes except for the solar item, on which the Board reserves the right to approve in the future). Rather, United Walnut contends that its claim arises from the District's July 8, 2015 approval of the Solar Project. Although United Walnut did not file the First Amended Complaint until January 21, 2016, it sought permission from the court to do so much earlier on July 16, 2015. Reply at 2.

The timeliness of United Walnut's CEQA claim concerning the Solar Project is muddied by the fact that the Program EIR required tiered environmental evaluation. As the court discussed *ante*, the District was obligated to prepare an initial study for the Solar Project despite the 2012 Subsequent EIR. The operative dates triggering United Walnut's claim are the dates Mt. SAC failed to prepare an initial study. The Board initially approved an award of the Solar Project contract to Borrego on July 8, 2015, re-noticed the award to Borrego on September 9, 2015, passed Resolution 15-06 approving the Solar Project the November 18, 2015, and approved the Addendum on January 13, 2016.

United Walnut's July 16, 2015 *ex parte* application to amend its complaint to add the Solar Project claims occurred before or shortly after all of these dates. The *ex parte* application was deferred to a noticed motion, which was initially scheduled to be heard on September 10, 2015, and was delayed to January 21, 2016due to the transfer of the case to this Department.

United Walnut's second cause of action is not time-barred.

3. Mootness

The District argues that the Parking Garage Profect claim is moot. Opp. at 11. After Department 86 issued the May 13, 2015 preliminary injunction enjoining construction of the Parking Garage and use of Measure RR funds, the Board took action on July 8, 2015 to cease the expenditure of Measure RR funds for the Parking Garage Project and remove it from the Measure RR project list. AR 2653-55. Measure RR funds for the Parking Garage Project were diverted to the new Student Center. Id.

After United Walnut filed its First Amended Complaint, the Board again took official action to render the Parking Garage dispute moot. On February 17, 2016, the Board acted to "confirm the Parking Structure Project that is the subject of the Act has been abandoned by the Board of Trustees as a Measure RR project, and the Board of Trustees will not be taking any action to construct the parking Project under the lease/leaseback contract award to Tilden-Coil Constructors, Inc." AR 14078.

United Walnut argues that Mt. SAC has not formally rescinded Resolution 14-05 approving the Parking Garage Project. Pet. Op. Br. at 11-12. This is true. Prior to February 17, the District had not rescinded the Parking Garage Structure site lease to Tilden-Coil, only the facilities lease. ER 2-13. And the District continued to plan to construct a parking structure at the same location. AR 1948, 2248, 2842; ER 2817, 2864.

But now the Board has formally abandoned the Parking Garage Project. This

abandonment negates Resolution 14-05 approving the Project and the lease/leaseback with Tilden-Coil. "Although a case may originally present an existing controversy, if before decision it has, through the acts of the parties or other cause, occurring after commencement of the action, lost that essential character, it becomes a moot case or question which will not be considered by the court." Wilson v. Los Angeles County Civil Service Com., (1952) 112 Cal.App.2d 450, 453.

Because the claim is moot, United Walnut is not entitled to mandamus under CEQA ordering the District to rescind and set aside its Parking Approvals and requiring the District to consider the environmental consequences of the Parking Garage Project in the manner required by law. United Walnut also is not entitled to a declaration under the City's zoning and development ordinances. *See post*.

3. City Zoning and Development Ordinances

United Walnut's third and fourth causes of action concern compliance with the WMC. United Walnut alleges that the Parking Garage Project violates City Zoning, WMC, and General Plan height restrictions and cannot be exempted. Pet. Op. Br. at 10. Judge Lavin in Department 82 granted a preliminary injunction on the grounds that the Parking Garage Project (a) violates WMC section 25-89.1 (35 foot maximum height), (b) is not a permitted use in the residential planned zone (WMC §25-89.1(b)(4)(g)) and requires a CUP, and (c) is not exempt by Government Code section 53094 from the City's zoning laws because the Project is a non-classroom facility. Despite Judge Lavin's ruling, the District has failed to rescind and set aside Resolution 14-05. Pet. Op. Br. at 11. The District has also refused to rescind its approval of all contracts, and characterizes the Parking Garage Project as merely "on hold" and has included the Parking Garage Project in its latest Facility Management Plan. Pet. Op. Br. at 11-12.[10]

All claims related to the Parking Garage Project are moot because the District has abandoned the Parking Garage Project. *See ante*.

United Walnut argues that the Solar Project violates WMC grading requirements because the District is required by Government Code section 53097 to comply with the grading requirements of WMC sections 1-5.5 and 6-5.6. WMC unambiguously applies to all properties and owners. WMC §6-5.4. The WMC's adoption of the LACBC does not change the express terms of WMC 6-5.4. Pet. Op. Br. at 12-13.

The District contends that it is absolutely exempt from local zoning controls under Government Code section 53091. Opp. at 12. Government Code section 53091(d) and (e) provides that building ordinances and zoning ordinances shall not apply to the location or construction of facilities for the generation of electrical energy and the Solar Project falls squarely within this exception. Opp. at 12. The District acknowledges that it is a school district, but asserts that it is acting in its capacity as a local agency in building the Solar Project. Opp. at 12.

The District additionally argues that LACBC Appendix J explicitly applies only to private property and therefore does not govern the Solar Project. Opp. at 13. The City grading ordinances, which incorporate Appendix J, make no scope change to J101.1, which limits application of Appendix J to private property. WMC section 6-5.4's reference to "all grading work" does not modify the "private property" scope language in section J101.1. Opp. at 13.

[10] United Walnut cannot rely on Judge Lavin's preliminary injunction; a preliminary injunction does not bind a trial court's merits decision.

Allowing WMC section 6-5.4 to prevail over section J101.1 would violate settled rules of statutory interpretation.

As discussed in detail for the City's Petition *post*, section 53091's exemption permits location and construction of the Solar Project, but does not exempt the Project from grading because Government Code section 53097 specifically requires school districts to comply with all city ordinances regulating drainage, road improvement, and grading plans. To the extent there is any ambiguity as to scope, the WMC controls over Appendix J. *See* WMC §6-4. The scope of the WMC building code is broader than Appendix J. At a minimum, all projects, whether on public or private property, must comply with the additional provisions of WMC section 6-5.5 and 6-5.6.

United Walnut is correct that the District is required to comply with the City's grading ordinances in constructing the Solar Project.

4. Pattern and Practice

United Walnut's fifth cause of action is for declaratory relief and injunction. United Walnut argues that District has a pattern and practice of failing to prepare and circulate an initial study or perform required environmental review for its 2002 Program EIR projects at any time prior to approving the projects. By adding supplemental and subsequent program EIRS only for Facilities Master Plan Updates, the District avoids project specific and timely initial studies, environmental review, and final CEQA certifications. The tiered Program EIR issued in 2002, and the Subsequent/Supplemental EIRs issued in 2005, 2008, 2012, and 2015 broadly study general, campus-wide impacts for the Facilities Master Plan, but do not perform sufficient project-specific review. Pet. Op. Br. at 13.

CEQA requires that an agency determine whether a project may have significant environmental impacts before the project is approved. Laurel Heights Improvement Assn. v. Regents of Univ. of Cal., (1998) 57 Cal.3d 376, 394. A project is "approved" when a public agency "commits the agency to a definite course of action in regards to a project" or proposes to approve a project. Pub. Res. Code §21080(a). United Walnut contends that Mt. SAC's procedure is a *post hoc* rationalization to support actions already taken, arguing that the District's final design contracts, DSA submittals, and approval of site preparations and grading are "approvals" under CEQA that occurred before any environmental review was conducted. Pet. Op. Br. at 15.

The District responds that United Walnut has failed to show a District policy to deliberately violate CEQA. Opp. at 14-15. The District does not perform tiered programmatic review; the evidence shows that District prepares program EIRs that contain project-level CEQA review. Each program EIRs evaluates all of the environmental impacts, adopts mitigation measures as necessary, and the District issues findings when necessary. When there is new environmental impacts that meet the test of Guidelines section 15162, the District prepares additional environmental documentation. Opp. at 15.

As United Walnut correctly points out, there are two problems with the District's practice. *See* Reply at 4.

First, as discussed *ante*, Mt. SAC's program EIRs are programmatic CEQA documents that can be used for tiering, but they are not project-specific documents. Mt. SAC's program EIRs actually are campus-wide evaluations of common type of impacts that can be anticipated from projected growth (principally students and parking and greenhouse gases and traffic), and

future implementation of the collective proposed master plan facilities. As Nellesen accurately explained to the Board on June 24, 2015, the Program EIRs do not look at projects individually, but rather how they affect other projects in a given area. AR 2649-11. *See*In re Bay-Delta et al. (2008) 43 Cal.4th 1143, 1170. Mt. SAC's Facilities Master Plans are the equivalent of the LRDPs required of public school districts. Pub. Res. Code §21080.09; Lindmark Decl. ¶3. The Legislature has expressly authorized school districts to tier from an LRDP's environmental review. Pub. Res. Code §21080.09(c). That is exactly what Mt. SAC's Program EIRs are: environmental documents from which Mt. SAC may tier.

Second, as a consequence of the failure of its Program EIRs to perform a project-specific assessment, Mt. SAC's timing on project-specific evaluations is too late. Mt. SAC presents evidence that its projects go through three phases of approval: (a) the project is identified and evaluated for CEQA compliance, (b) the project is designed and engineered by Board-approved architects and/or engineers, and (c) the constructioncontracts are awarded by the Board. Nellesen Decl. ¶3. Yet, the District's practice is to submit DSA plans for approval and prepare final designs for its projects before assessing the projects as required by CEQA. *See* Reply at 9. The only environmental review that occurs before the completion of plans is the Program EIRs which are not project specific.

For example, the BCT Project was submitted for DSA approval on October 2, 2014 and received final approval on May 1, 2015. AR 7194-49. Lindmark prepared and circulated to Nellesen only a project-specific CEQA memo on October 21, 2015. AR 1896-1917. Similarly, the District issued an RFP for the Solar Project and decided to award the contract before Lindmark's CEQA memo to Nellesen of July 8, 2015. AR 343, 1817-1836. Only when Mt. SAC sees a change in project scope – such as with the ACE Project -- does it prepare a project-specific EIR. *See* Nellesen Decl. ¶3. But this is too late in the process.

In sum, the District has a practice of preparing Program EIRs which can be used for tiering, but are not project specific. As a result, any project specific analysis that does occur comes too late. Because it uses programmatic EIRs, Mt. SAC must prepare and circulate initial studies to responsible agencies (at an appropriate time) as projects come up for actual decisions for design and implementation. Pub. Res. Code §§ 21068.5, 21094(a), (c).

F. The City's Petition[11]

The City argues that the Solar Project is subject to WMC regulations regarding grading, hauling, and zoning. It further asserts that the District failed to comply with CEQA in approving the Solar Project by using *post-hoc* addendums. The City seeks to assume the lead agency role for the Solar Project due to District's failure to comply with CEQA.

1. Is the Solar Project Subject to Local Ordinances?

The City argues that the Solar Project is subject to the City's grading and haul route

[11] The City asks the court to judicially notice provisions of the WMC (Exs. A-B) and LACC sections J101-J112 (Ex. C). The requests are granted. Evid. Code §452(b).

In opposition to the City's Petition, Mt. Sac asks the court to judicially notice an excerpt from the Prop 39 California Energy Commission Guidelines (Ex. A). The request is granted. Evid. Code §452(c).

requirements because the District is a school district under Government Code[12] section 53097, and the Solar Project is a transmission facility under section 53091. Pet. Op. Br. at 4.

As a general matter, neither the State nor its agencies are subject to local building or zoning regulations unless the Constitution requires it or the Legislature consents to such regulation. City of Orange v. Valenti, (1974) 37 Ca1.App.3d 240, 245. In Article 5 of the Government Code (§§ 53090-53097.5), the Legislature consented to a limited form of such local regulation. The statutory scheme was enacted in response to opinions which broadly immunized all state agencies from local regulatory control. City of Lafayette v. East Bay Municipal Utility District, ("Lafayette") (1993) 16 Cal.App.4th 1005, 1013-14 (citations omitted).

Section 53097 requires that a school district comply with local ordinances (a) regulating drainage, (b) regulating road improvements and conditions, and (c) requiring the review and approval of grading plans as the ordinances relate to the design and construction of onsite improvements which affect drainage, road conditions or grading.[13]

Section 53091(a) requires each local agency to comply with city or county building and zoning ordinances. Section 53091(d) and (e)[14] contains an exception to this requirement, respectively providing that local building and zoning ordinances shall not apply to the location or construction of facilities for the generation of electrical energy. Specifically, section 53091(e) states that "[z]oning ordinances of a county or city shall not apply to the location or construction of facilities for… the production or generation of electrical energy." (Emphasis added.) However, zoning ordinances do apply to the location or construction of facilities for the storage or transmission of electrical energy if the zoning ordinances make provision for those facilities. §53091(e).

A "local agency" is defined as an agency of the state, not including the state, a city, a

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[12] All statutory references in this subsection are to the Government Code unless otherwise stated.

[13] Section 53097 provides: "Notwithstanding any other provisions of this article, the governing board of a school district shall comply with any city or county ordinance (1) regulating drainage improvements and conditions, (2) regulating road improvements and conditions, or (3) requiring the review and approval of grading plans as these ordinance provisions relate to the design and construction of onsite improvements which affect drainage, road conditions, or grading, and shall give consideration to the specific requirements and conditions of city or county ordinances relating to the design and construction of offsite improvements. If a school district elects not to comply with the requirements of city or county ordinances relating to the design and construction of offsite improvements, the city or county shall not be liable for any injuries or for any damage to property caused by the failure of the school district to comply with those ordinances."

[14] Section 53091(e) provides: "Zoning ordinances of a county or city shall not apply to the location or construction of facilities for the production, generation, storage, treatment, or transmission of water, or for the production or generation of electrical energy, facilities that are subject to Section 12808.5 of the Public Utilities Code, or electrical substations in an electrical transmission system that receives electricity at less than 100,000 volts. Zoning ordinances of a county or city shall apply to the location or construction of facilities for the storage or transmission of electrical energy by a local agency, if the zoning ordinances make provision for those facilities."

county, a rapid transit district, certain rail transit districts, or a bridge and highway district. §53090.

Section 53091 evinces a legislative intent to vest cities and counties with control over zoning and building restrictions. Lafayette, *supra*, 16 Cal.App.4th at 1014. The exceptions were intended to strike a balance between the value of local zoning control and the state interest in the production of water and electricity, and the exemptions are absolute. *See*Id. (section 53091 exemption does not apply to a support facility that does not generate, transmit, or store water).

The City admits that section 53091(e)exempts the location or construction of facilities for the generation of electrical energyand relies on section 53091(e)'s carve-out to that exception for zoning ordinances that provide for the construction of facilities for the storage or transmission of electrical energy if the zoning ordinances make provision for those facilities. The City argues that the Solar Project will transmit energy because it will be interconnected with Southern California Edison ("SCE") California Independent System Operator's Controlled Grid, and will transmit power to that grid. AR 371. This interconnection is provided for in the District's RFP for the Solar Project. Id. SCE's Rule 21 defines an "interconnection" as a physical connection of a Generating Facility… so that "Parallel Operation with [SCE's] Distribution or Transmission System can occur…." The City concludes that, because the Solar Project will be interconnected with SCE's grid so that parallel operation can occur, the Solar Project will transmit power to the grid and is within section 53091(e)'s exception to the exception. Pet. Op. Br. at 8. The Solar Project will also be interconnected to the main campus gear switch, requiring transmission lines from the West Parcel to the main campus. AR 340, 344, 366. A common sense meaning for the word "transmission" means the use of power lines for the transmission or distribution of electrical energy. Pet. Op. Br. at 9.

The City also concludes that the WMC "provides for" facilities that store or transmit energy as required by section 53091(e). The West Parcel is zoned for Residential Planned Development ("RPD") which incorporates the permitted and conditionally permitted uses of the R-1 zone. WMC section 25-89.1 allows property in an RPD zone to be used for "any permitted use in an R-1 zone...." City RJN, p. 3-15. This incorporation of the R-1 zone subjects the Solar Project to the applicable regulations of WMC section 25-39(e), which requires a CUP for premises in zone R-1 that will be used for "Public buildings and uses". City RJN, p. B-14. The Solar Project is a "public building" as defined by section 4217.11(k).[15] In light of WMC section 25-39(e)'s inclusion of the Solar Project as a public building, the City's zoning ordinances unquestionably "make[s] provision" it. The City concludes that, because the Solar Project is a facility that transmits electrical energy and because the City's zoning ordinance makes provision for such a facility, the Solar Project is subject to the carve-out in section 53091(e). Therefore, Mt. SAC must apply for a CUP before moving forward with the Solar Project. Pet. Op. Br. at 9-10.

There are two problems with the City's argument. First, as the District contends (Opp. at 6-7), section 53091(e)'s carve-out applies to facilities intended for the purpose of storing or

[15] Section 4217.11(k) provides: "Public building" includes any structure, building, facility, or work which a public agency is authonzed to construct or use, and automobile parking lots, landscaping, and other facilities, including furnishings and equipment, incidental to the use of any structure, building, facility, or work, and also includes the site thereof, and anyeasements, rights -of -way appurtenant thereto, or necessary for its full use."

transmitting electrical energy. The Solar Project is not a facility for the transmission or storage of electrical energy simply because it has the ability to transmit energy. Instead, the Solar Project's purpose is to produce and generate solar energy for Mt. SAC. Any transmission as described by City is incidental to the Solar Project and does not define its purpose. *See* AR 343.

This conclusion is supported by the purpose and legislative history of section 53091(e)'s carve-out. According to the legislative history, the carve-out permits a city to remove the zoning exemption of facilities for the storage or transmission of electrical energy where the zoning ordinance makes provision for the location of those types of facilities. Delta Wetlands Properties v. County of San Joaquin, (2004) 121 Cal.App.4th 128, 139 (quoting legislative history). There is no suggestion in the legislative history that the carve-out should apply to any facility that is merely capable of transmitting energy unless storage or transmission is its purpose.

Nor would it meet the statutory purpose to do so. The statutory scheme was enacted as a legislative consent to a limited form of local zoning regulation over state agencies, and the carve-out was intended to encourage state agencies to generate solar power without local zoning regulation. Lafayette, *supra*, 16 Cal.App.4th at 1013-14 (reaching same conclusion for water storage and transmitting facilities). It would make little sense for local zoning to control every solar energy facility that was hooked up to the electrical transmission grid.

Second, the City has not met the other prong of the carve-out. The zoning ordinance must make "provision" for the construction of facilities for the storage or transmission of electrical energy. It is not enough that the Solar Project would be included within the general provisions of WMC section 25-39(e) requiring a CUP for public buildings and uses in the R-1 zone. All property uses are included, generally or specifically, in a typical zoning code. The plain intent of section 53091(e) is to exempt the construction of facilities for the storage or transmission of electrical energy except where the zoning ordinance makes special provision for the location of those types of facilities. The City's WMC does not do so.

All of the evidence indicates that the Solar Project is an energy generation project that is exempt from the City's zoning ordinances under section 53091(e). The District is correct that the minor transmission capability identified by City is not sufficient to turn the Solar Project into a transmission facility. Nor does the WMC make special provision for the Solar Project facility. Therefore, the City's zoning ordinances do not apply to the location and construction of the Solar Project unless some California statute provides to the contrary.

The City contends that section 53097 is such a statute and the District must at least comply with the WMC grading ordinances. Pet. Op. Br. at 4.

In pertinent part, section 53097 provides: "Notwithstanding any other provisions of this article, the governing board of a school district shall comply with any city or county ordinance…(3) requiring the review and approval of grading plans as these ordinance provisions relate to the design and construction of onsite improvements which affect drainage, road conditions, or grading…"

The District admits that it is a school district, but asserts that it is constructing the Solar Project in its capacity as a local agency under 53090. The legislative history of section 53097 (SB 1681) shows that it was intended to rectify the fact that local agencies, but not school boards, must follow local ordinances for public works because a school district can override local control through a 2/3 board vote (§53094). SB 1681 was adopted as a result of storm runoff damage from a school site that wiped out part of a neighborhood. ER 5221. According to the District, SB 1681 was intended to modify section 53094 and not section 53097. Opp. at 8.

This argument flies in the face of the plain language of section 53097, and consequently there is no need to resort to the legislative history of SB 1681. *See* Brown v. Kelly Broadcasting Co., (1989) 48 Cal 3d 711, 724 (courts first look to the language of statute). The phrase "Notwithstanding any other provisions of this article" includes any other provision in Article 5. Sections 53091 is in Article 5. Section 53097 applies notwithstanding the exception to local zoning regulation in section 53091. Section 53097 was added to Article 5 to require school districts to comply with city ordinances regulating drainage, road improvement, and approval of grading plans relating to the design and construction of facilities. The Attorney General has opined that section 53097 was intended to address a particular undesirable situation and requires school district compliance with local ordinances for drainage, road improvement, and grading plans. 71 Ops.Cal.Atty.Gen. (1988) 332, 336, 341.

The District cannot elect to act as a public agency in some circumstances and as a school district in another. It is a school district, and is subject to section 53097. The Legislature has consented to municipal grading controls over school districts. The District's Solar Project is subject to the City's grading ordinances.

2. The WMC's Grading Ordinances

The City seeks to require District to comply with its grading and haul route requirements. The City argues that the District's planned haul route for the Solar Project will create a safety hazard because it requires trucks to turn in or out of the driveway every 90 seconds. Op. Br. at 5. The City can impose critical safety measures on the haul route if it is permitted to go through the normal process of analyzing the haul route, and has the authority to require the District to implement those safety measures. Pet. Op. Br. at 6.

WMC section 6-4, as amended by a 2016 Urgency Ordinance ("Urgency Ordinance"), adopts by reference the Los Angeles County Building Code ("LACBC") effective January 1, 2017, including Appendix J. City RJN, Ex. A, p. 4.

Appendix J addresses storm water concerns related to grading activities. Section J101.7 ("Storm water control measures"), requires a property owner to adopt precautionary measures to protect public or private property from damage by flooding during grading and construction activities. City RJN, Ex. C, p. 2.[16] Section J111 ("National Pollutant Discharge Elimination System (NPDES) Compliance") requires the property owner, and all grading plans and permits, to perform best management practices to prevent erosion and to control constructed-related pollutants from discharging from the project site. [17]

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[16] J101.7 provides: "Both the permittee and the owner of the property on which the grading is performed shall put into effect and maintain all precautionary measures necessary to protect adjacent water courses and public or private property from damage by erosion, flooding, and deposition of mud, debris, and construction -related pollutants originating from the site during grading and related construction activities." Ibid.

[17] Section J111 ("National Pollutant Discharge Elimination System (NPDES) Compliance") provides: "All grading plans and permits and the owner of any property on which such grading is performed shall comply with the provisions of this section for NPDES compliance. [¶] All best management practices shall be installed before grading begins. As grading progresses, all best management practices shall be updated as necessary to prevent

WMC 6-5.4(b), as amended and clarified in 2016, requires "[a]ll grading work [t]o conform to the Walnut Building Code, Municipal Code sections 6-5.3 through 6-5.9, Section 6-8 regarding the hauling of earth materials, and all city rules and regulations." City RJN, Ex. A, p.5.

WMC section 6-5.6, as amended in 2016, provides detailed regulation of grading activities, including requirements to mark boundaries to allow proper clearances, construction fencing, drainage protection devices, erosion control planting, soil analysis, and geologic and soils investigation, engineering. City RJN, Ex. A, p. 5, Ex. B, p. 4.

WMC section 6-8, as added in 2016 to codify existing practices, ("Hauling of Earth Materials") has been added to the Chapter 6 of Article II and provides in pertinent part:

> "(a) Any person, firm, association or corporation (hereinafter "permittee") moving or causing to be moved more than 5,000 cubic yards of earth material per project from or to the site of a grading operation on any public roadway within the City of Walnut shall be subject to the following requirements: (1) Haul Route…; (2) Access Roads…; (3) Signs…; (4) Inspection…; (5) Time of Hauling Operations…; (6) Notification…; (7) Dust Control…; (8) Debris on City Roadways…; (9) Load Limits…; (10) Financial Responsibility for Damage to Streets…; (11) Bonds for Grading to Include Street Repairs…; (12) Other Conditions…." City RJN, Ex. A, pp. 9-11.

Based on the above provisions, the City argues that its regulation of grading is extensive and consists of three components: storm water management, grading, and hauling. Section J101.7 regulates storm water during grading and construction, J111 regulates grading, and WMC section 6-8 regulates hauling. Pet. Op. Br. at 4-5.

The City contends that Mt. SAC's compliance with its grading and hauling requirements is critical to public safety. The Solar Project's site, the West Parcel, is accessed by a driveway off of busy Grand Avenue and will be subject to a 40 -foot truck either slowing to turn in or turning out of the drive way every 90 seconds, 8 hours a day, Monday through Saturday for three months. The truck de-acceleration/acceleration will take place within a merging right lane (Number 3) of Grand Avenue so that the truck driver must pull out onto a street with a 50 mile per hour speed limit and merge into the second (Number 2) traffic lane within a matter of feet. This is a huge safety hazard. Pet. Op. Br. at 4-5.

The City argues that, by analyzing the haul route, it can allow for the implementation of critical safety measures on its public streets. The City could address potential sight distance concerns by reducing speed limits on southbound Grand Avenue, impose a "no right turn on red" restriction from Amar Road onto southbound Grand Avenue in order to create more traffic "gaps" for trucks entering and leaving the West Parcel driveway, temporarily eliminate the Number 3 lane from Grand Avenue just south of Amar so that trucks would have exclusive use of the driveway for deacceleration/acceleration, or set the traffic signals to extend the amount of

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erosion and to control constructed related pollutants from discharging from the site. All best management practices shall be maintained in good working order to the satisfaction of the Building Official until final grading approval has been granted by the Building Official and all permanent drainage and erosion control systems, if required, are in place.

time for those vehicles and trucks making left turns. Gilbertson Dec., ¶¶ 12-13. The City traffic engineer also could adjust the hours of the truck traffic or reduce the number of truck trips during that time. Pet. Op. Br. at 6.

The District responds that the City's grading ordinances do not apply to the Solar Project because they fail to regulate public property. The 2013 California Building Code defined Appendix J's scope in J101.1 as "apply[ing] to grading, excavation, and earthwork construction, including fills and embankments. Where conflicts occur between the technical requirements of this chapter and the geotechnical report, the geotechnical report shall govern." ER 5227.

The County adopted the 2013 California Building Code Appendix J with modifications. One of the modifications was to amend J101.1 in part by setting forth its purpose:

> "The provisions of this Chapter [Appendix J] apply to grading, excavation, and earthwork construction, including fills and embankments and the control of runoff from graded sites, including erosion sediments and construction-related pollutants. The purpose of this Chapter is to safeguard life, limb, property, and the public welfare by regulating grading on private property." ER 5227, 5230.

According to the District, the County's LACBC Appendix J's scope was expressly limited to private property.[18] The City adopted this same limited private property scope when it adopted the County's 2013 LACBC in WMC section 6-4. City RJN, Ex. B, p. 1. The District acknowledges that the County recently amended Appendix J101.1 to state that it regulates all property, public and private. ER 5234. The City's Urgency Ordinance amends WMC section 6-4 to adopt by reference the 2017 version of the LACBC. City RJN, Ex. A, p. 4. Thus, it is clear that the City now regulates grading on both public and private property. But the District contends that the City cannot retroactively apply Appendix J to the Solar Project, relying on Melton v. City of San Pablo, ("Melton") (1967) 252 Cal.App.2d 797, 804 (citing Tevis v. City & County of San Francisco, ("Tevis") (1954) 43 Cal.2d 190, 195). Opp. at 9.

The City's reply does not address the issue of retroactivity. *See* Reply at 1. The ordinary rule is that legislative enactments become operative upon their passage, unless there is some express provision of law to the contrary. Midway Orchards v. County of Butte, (1990) 220 Cal.App.3d 765, 780. This legislative intent for retroactivity must be clearly apparent. Tevis, *supra*, 43 Cal.2d at 195; Melton, *supra*, 252 Cal.App.2d at 804. While the Urgency Ordinance provides that certain amendments merely clarify the law (*e.g.,* WMC §6-5.4(b)), it does not purport to apply any amendment retroactively.

The simple fact is that the City is not applying the Urgency Ordinance's grading and hauling provisions retroactively to the Solar Project, which has yet to begin. Mt. SAC has

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[18] As it existed before 2016, WMC section 6-4 provided: "There is hereby adopted by reference, except as hereinafter provided, that certain Building Code known and designated as Title 26 of the Los Angeles County Code…adopted November 26, 2013…as amended by Los Angeles County Ordinance No.l13-5076, effective January 1, 2014, and such code shall be and become the Building Code of the city…."

"In the event of any conflict or ambiguity between any provisions contained in the Building Code and any provisions of the Walnut Municipal Code, the Walnut Municipal Code shall control." City RJN WMC §6-4.

received regulatory approvals from various agencies, and planned to start construction on October 24, 2016 when construction was halted by the City's Stop Work Order. Nellesen Decl. ¶¶ 10, 12. There is no reason not to apply the City's grading ordinances to this unstarted Solar Project. In this regard, Mt. SAC makes no argument that it has a vested right to proceed with grading despite the City's Urgency Ordinance amending the WMC. The failure to raise an issue constitutes waiver. *See* Badie v. Bank of America (1998) 67 Cal.App.4th 779, 784, 85 (when a party fails to support issue with reasoned argument and citation, it is waived). More important, Mt. SAC has no vested right, which arises only after a property owner has performed substantial work and incurred substantial liabilities in good faith reliance on a properly obtained, valid permit. Avco Community Developers Inc. v. South Coast Regional Com., (1976) 17 Cal.3d 785, 791. Mt. SAC has no grading permit from the City on which it can rely.

Assuming *arguendo* that the City's pre-2017 adopted Appendix J applies, the City may make the WMC broader than Appendix J. The District argues that the WMC does not actually do so, and distinguishes WMC section 6-5.4's reference to "all grading work" as not modifying the limited scope of Appendix J to private property. According to the District, it would violate settled rules of statutory interpretation to allow WMC section 6-5.4 to trump the express purpose of Appendix J. Opp. at 10.

The previous WMC incorporated by reference Appendix J, but also supplemented Appendix J with the City's own development standards and grading permit procedures. WMC §§ 6-5.3, 6-5.5, 6-5.6 (City RJN Ex. B, pp. 2-5). The WMC further provided that all grading shall conform to the Municipal Building Code, sections 6-5.3-6-5.8, and all city rules and regulations. WMC §6-5.4 (Id.). To the extent there is any ambiguity as to scope, the WMC controls over Appendix J. WMC §6-4 (City RJN Ex. B, p.1). As a consequence, it does not fly in the face of statutory interpretation principles to conclude that the scope of the WMC's Municipal Building Code is broader than Appendix J. At a minimum, all projects, whether on public or private property, must comply with the additional grading provisions of WMC section 6-5.5 and 6-5.6.

The District argues that, whatever the WMC's application to grading, the scope of this lawsuit does not include the hauling requirements of WMC section 6-8 which were added in 2016. The hauling ordinance is not included in the City's First Amended Petition and is not cited in the Stop Work Order. Opp. at 10.[19]

Again, the City does not reply. WMC section 6-8 does provide that it was passed to codify existing practices, and the City Engineer's practice is to require a haul plan for mass grading operations for which a number of safety measures may be imposed. Gilbertson Decl. ¶9. The City Engineer's customary practice does not explain his authority for imposing a haul plan prior to WMC section 6-8. More important, the haul plan issue apparently is not included in either the City's First Amended Complaint or the Stop Work Order. As such, it is beyond the scope of this lawsuit.

In sum, the District must comply with the City's grading requirements. Whether it must also comply with the City's haul route requirements is not within the scope of this Petition (but is within the scope of the District's SACC). *See post.*

[19] The parties failed to include the Stop Work Order, cited as (ER 5068-70), in the Joint Appendix.

3. CEQA

The City argues that the District violated CEQA by approving the Solar Project on September 16, 2015 through Resolution 15-01, and subsequently publishing and approving an Addendum to the Program EIR on January 13, 2016. The City points out that it filed this action challenging Mt. SAC's approval of the Solar Project on December 21, 2015 and the next day Mt. SAC published the Addendum, adopting it three weeks later. Pet. Op. Br. at 12. The City describes the Addendum as a *post hoc* rationalization which is a classic failure to conduct environmental review before a project is approved in violation of CEQA. *See* Laurel Heights, *supra*, 47 Cal.3d at 394.

The District responds that the City wrongly proposes an incorrect standard of review. The substantial evidence standard applies to judicial review of whether a lead agency should have conducted additional environmental review for a changed project under Guidelines section 21166. San Mateo Gardens, *supra*, 1 Cal.5th at 960. "The court decides only whether the administrative record as a whole demonstrates substantial evidence to support the determination that the changes in the project or its circumstances were not so substantial as to require major modifications to the EIR." Sierra Club v. County of Sonoma, (1992) 6 Cal.App.4th 1307, 1318. Opp. at 10-11. The court must uphold the lead agency's decision if there is some evidentiary support, even in the face of equal or greater conflicting evidence to the contrary. San Mateo Gardens, *supra*, 1 Cal.5th at 953. The City's contention that the Addendum is a *post hoc* approval is dressed as a procedural violation, but is based on substantial evidence. Opp. at 11.

The District is wrong. The Supreme Court in San Mateo Gardens explained that whether a proposed activity is a CEQA project is a legal question because it depends on whether "undisputed data in the record" satisfy the detailed statutory definition of a project. 1 Cal.5th at 952. Whether an initial environmental document remains relevant despite changed plans or circumstances is predominantly a factual question for the agency to answer, drawing on its particular expertise. Id. at 953 (citation omitted). This case involves an issue similar to the question whether a proposed activity is a project – whether the District's 2002 Program EIR as modified by its Supplemental/Subsequent EIRs is program EIR with tiering or whether it has used a program EIR with project-specific evaluation of impacts and mitigations. This is an issue of law for the court to decide on undisputed facts. Only if the court were to determine that the documents contained project specific evaluations would the substantial evidence test apply to whether there had been changes plans or circumstances requiring additional environmental review under Pub. Res. Code section 21166 and Guidelines section 15162.

The court decided *ante* as a matter of law that Mt. SAC has prepared a programmatic EIR, not a project-specific EIR. Mt. SAC's Subsequent EIRs define the "project" as the Facilities Master Plan. *See, e.g.,* AR 147. Mt. SAC's Facilities Master Plans are the equivalent of the LRDPs required of public school districts. Pub. Res. Code §21080.09. The Legislature has expressly authorized school districts to tier from an LRDP's environmental review. Pub. Res. Code §21080.09(c). That is exactly what Mt. SAC's Program EIRs are: environmental documents from which Mt. SAC may tier.

The Subsequent EIR's environmental analysis "addresses the project at the level of detail characteristic of a conceptual master plan." AR 155. The Subsequent EIRs then provide a project description – the bedrock of an informative and legally adequate EIR – that mentions how the Facilities Master Plan is a collection of future planned facilities, some of which have been built and some of which have been changed, along with updated statistics on expected

campus wide growth and needs. *See, e.g.,* AR 180-85. The project descriptions are opaque and the project evaluations are buried in the EIRs, if present at all. Instead, the Subsequent EIRs merely lump the common types of impacts arising from the collective FMP projects and set forth mitigation measures to address those types of impacts. AR 2649-11. The EIRs do not address the details of the specific programs, they merely lists the projects that are part of the Facilities Master Plan. *See* AR 181-183. These are all characteristic of a programmatic EIR, not a project-specific EIR.

Mt. SAC's Program EIRs actually are campus-wide evaluations of common type of impacts that can be anticipated from projected growth (principally students, parking, greenhouse gases, and traffic), and future implementation of the collective proposed master plan facilities a fact which Nellesen accurately explained to the Board on June 24, 2015. AR 2649-11. Mt. SAC's Program EIRs are an environmental evaluation that can be used for use in tiering, but not project-specific review. *See*In re Bay-Delta et al. (2008) 43 Cal.4th 1143, 1170.

As a result, Mt. SAC must prepare and circulate initial studies to responsible agencies (at an appropriate time) as projects come up for actual decisions for design and implementation. Pub. Res. Code §21068.5, §21094(a), (c). The District is required to, at minimum, prepare and circulate an initial study for the Solar Project to determine whether it would cause significant environmental effects not examined in the Program EIR. Contrary to this requirement, the District did not prepare and circulate an initial study for the Solar Project. The District failed to proceed in the manner required by law by failing to prepare and circulate an initial study for the Solar Project.

The District's failure means that the court need not address in detail the defects in the Addendum. Nonetheless, it is defective. The Addendum attempted to delete the requirement in the 2012 Subsequent EIR's MM-2c that the District consult with the City on a Truck Haul Route for the Solar Project. AR 1743, 1750. However, the Addendum falls short because it fails to address MM AQ-03, which includes the identical consultation language:

> "AQ-03: Prior to issuance of a grading permit, Facilities Planning & Management shall consult with the City of Walnut on a Truck Route Plan for truck hauling activities with more than fifty (50) trucks per day. Hauling of earth materials shall only occur between 9:00 am and 2:00 pm Monday through Friday and between 8:00 am to 5:00 pm on Saturdays to void peak hour traffic. Light duty trucks with a weight of no more than 8,500 pounds are exempted from this restriction. Facilities Planning & Management shall ensure compliance." AR 221.

Under CEQA, mitigation measures must be fully enforced by the agency. Federation of Hillside & Canyon Associations v. City of Los Angeles, (2000) 83 Cal.App.4th 1252, 1260-61.

Mt. SAC's only response is to argue that AQ-03, the truck hauling mitigation, was "indexed" as MM-2c in the 2102 Subsequent EIR. Opp. at 11. Nothing in the 2012 Subsequent EIR or the Addendum explains any indexing. The District's opposition provides no explanation of this indexing either, which the City ridicules as completely unsupported. Reply at 8-9.[20] As

[20] Mt. SAC purports to rely on the Lindmark declaration, which is not part of the Administrative Record, but Lindmark only says that the two mitigation measures were indexed without further explanation and cites to AR970 which provides no pertinent information. *See*

the City argues, Mt. SAC must comply with AQ-03, which mandates consultation with the City for a Truck Haul Plan and imposes strictly limited hauling hours.

The City further argues that Mt. SAC improperly used an Addendum. An addendum to a previously certified EIR is allowed only if no conditions calling for the preparation of a subsequent EIR have occurred. Guidelines §15164(a). The Solar Project was only vaguely described in the 2012 Subsequent EIR. The Addendum contains substantial revisions to mitigation measures, including an acknowledgement that MM-2c was inadequate because it "will intrude into the Saturday pm peak hour" and lacked specificity for assessing truck hauling activities for both the Solar Project and future projects moving a large amount of earth. AR 1743. The City's opening brief concludes that use of the Addendum was improper. Pet. Op. Br. at 14-15.

The City adds considerable detail to this argument in its reply. The City contends that Mt. SAC rewrote MM-2c to materially increase its hauling operations and save money. Reply at 1. The original MM-2c (identical to AQ-03 above) required consultation with the City for truck hauling activities of more than 50 trucks a day, which works out to 10 trucks per hour based on the Monday-Friday, 9:00a.m.-2:00p.m. schedule. In contrast, revised MM-2c imposes no mitigation unless there are more than 15 trucks per hour and the project involves hauling more than 100,000 cubic yards.[21] Reply at 3. The City is a responsible agency for the Solar Project and has police power over its streets. Yet, the revised MM-2c does not require any consultation with the City and permits the Director of Facilities Planning (Nellesen) to make the haul plan decision. Reply at 4. The City further criticizes the revised MM-2c as imposing no mitigation at all because it does not require anything to be done when thresholds are met. Instead, the haul plan need only consider various factors. Thus, the revised MM-2c permits 120 trucks a day to "rumble down" City streets any time of day and any day of the week, overseen by an administrator with no heavy truck traffic experience. Reply at 7. The City concludes that the Addendum fails because it (a) authorizes a "massive expansion" of truck traffic that was undisclosed in the 2012 Subsequent EIR, and (b) eliminates the mitigation set out in the original MM-2c. Reply at 8.

The District responds by noting that Guidelines section 15164(b) authorizes a lead

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Lindmark Decl. ¶17.

[21] Revised MM-2c provides:

> "For hauling operations of more than 15 trucks per hour and more than 100,000 cubic yards, a Truck Haul Plan (THP) approved by the Director of Facilities Planning & Management, shall be implemented. The THP shall consider traffic counts, haul routes, hours/days of hauling, avoidance of peak hours, intersection geometrics, access/egress constraints, truck load capacity, and pieces of construction equipment on-site and shall specify requirements to minimize traffic and pedestrian congestion on-campus and off-campus. The THP shall be required in all applicable construction logistics plans. If necessary, all haul trucks shall utilize radio communication to improve traffic flow and minimize congestion. Light duty trucks with a weight of no more than 8,500 pounds are exempted from a THP. Facilities Planning & Management shall ensure compliance."
>
> (AR 1740; hereinafter, the "Revised MM 2c.")

agency to prepare an addendum to an EIR "if only minor technical changes or additions are necessary or none of the conditions described in Section 15162 calling for preparation of a subsequent EIR or negative declaration have occurred." Section 15162 does not require a subsequent EIR or negative declaration where the proposed changes will not create a new significant environmental impact or substantially increase the severity of a significant environmental impact disclosed in a previous EIR.

The District points out that the 2012 Subsequent EIR includes 104 mitigations, and the Addendum changes only four of them. Two of the revisions deal with minor air quality issues (3a, .3i) and one revision addressed future parking supply (2k).[22] These minor edits to four existing mitigation measures (1) accommodate an extended construction truck traffic time (MM-2c); (2) require parking supply studies on regular intervals to more precisely determine when the parking supply mitigation is required to be implemented (MM-2k); (3) remove the requirement for grading permits, since the District does not require them (MM-3a); and (4) align the paint VOC requirements with current industry practices and California Emissions Estimator Model standards (MM-3i). Additionally, four components of the Truck Haul Plan specific to the Solar Project were proposed to reduce potential traffic congestion if other drivers make unsafe vehicular movements near trucks along the haul route for soil import to the West Parcel. Separation of haul trucks along the haul route minimizes traffic congestion and improves traffic flow. Opp. at 13. The District notes that Guidelines section 15074.1 allows substitution of mitigation measures when the lead agency determines they are equivalent or more effective, and argues that the four revised mitigation measures meet that standard. Opp. at 11.

The District concludes that the changes in the Solar Project addressed in the Addendum did not result in any additional or more severe environmental impacts requiring an EIR under Pub. Res. Code section 21166 and Guidelines section 15162. Opp. at 14. The revised Solar Project and revised and mitigation measures will result in similar or lesser effects than the original project and will not cause any new significant environmental impacts or substantially exacerbate the significant and unavoidable impacts disclosed in the 2012 Subsequent EIR. Opp. at 14.

The City has the better argument. While not all of its criticisms are valid, the Addendum is defective because (a) the revised MM-2c does not require any consultation with the City even though it has police power over its streets, (b) the revised MM-2c imposes no actual mitigation, and (c) authorizes an expansion of truck traffic that was undisclosed in the 2012 Subsequent EIR. These are not minor changes supporting an addendum under Guidelines section 15164(b).

The City argues that it should be authorized to assume the lead agency role and prepare a subsequent EIR for the Solar Project under Guidelines section 15052. Pet. Op. Br. at 15. The District contends that a shift in lead agency designation occurs only where the normal CEQA process breaks down, and there has not been a breakdown in the process. Opp. at 15.

Again, the City does not address this issue in reply. A responsible agency may assume lead agency status, *inter alia*, where the statute of limitations for challenging the lead agency's approval have expired and (a) new circumstances require a supplemental or subsequent EIR or (b) the lead agency has prepared an inadequate document and failed to consult with the responsible agency. Guidelines §15052.

[22] Again, the District attempts to rely on the extra-record declarations of Lindmark and Klein without explaining why it is admissible. Opp. at 11.

These provisions generally apply where a project has been approved by the lead agency and the responsible agency is required to act but cannot do so until it has considered the project's environmental effects as shown in the EIR. Guidelines §15096(f). If the agency is time-barred from bringing a lawsuit to challenge the EIR, yet must prepare a subsequent EIR before granting its discretionary approval, it may take lead status. Similarly, if an EIR was prepared without the responsible agency's consultation and the statute of limitations prevents a legal challenge, the responsible agency can assume the role of lead agency. Remy, Thomas, Moose, and Manley, Guide to CEQA: California Environmental Quality Act , (11th ed. 2006) p. 409. As the statute of limitations to challenge the District's actions has not expired, the City may not act as lead agency.[23]

In sum, the City's Petition must be granted in part. The District failed to proceed in the manner required by law by preparing and circulating an initial study for the Solar Project. The Addendum also was improperly issued and relied upon. The District must set aside Solar Project approvals and prepare and circulate an initial study for the Solar Project before approving it. The City may not act as lead agency for the Solar Project. The City's challenge to the Parking Garage Project is moot.

G. The District'sSACC[24]

The District argues that the City's Stop Work Order cannot be enforced because the Solar Project is an electrical generating facility absolutely exempt from local building and zoning controls. Even assuming that local grading ordinances apply, the grading plans must be reviewed and approved consistent with Government Code[25] section 53097. Subjecting the grading plans to the City's development standards rather than to the County's Appendix J would swallow section 53097's limited exception for local grading controls.

The District notes that the Stop Work Notice states that the Solar Project is a generating facility. ER 5068. The District contends that the Solar Project is exempt from all zoning ordinances under section 53091(e)'s provision that zoning ordinances do not apply to the location or construction of facilities for the production or generation of electrical energy. Pet. Op. Br. at 7-9.

As discussed in City's Petition *ante*, the "location [and] construction" of electrical facilities exemption under section 53091 permits the location construction of the Solar Project, but does not exempt the Project from grading – which would otherwise be part of the exemption -- because section 53097 expressly requires school districts to comply with all city ordinances regulating drainage, road improvement, and grading plans. The District's argument that it is a local agency under 53090, not a school district under section 53097, is inconsistent with the plain language of section 53097. *See also* Opp. at 11-12.

The District further asserts that the Stop Work Notice cannot be enforced against it because the Solar Project is not subject to the grading requirements of Appendix J, which only

[23] The City's challenge to the Parking Garage Project is moot for the reasons stated *ante* with respect to United Walnut's Petition.

[24] In support of its Cross-Petition, District asks the court to judicially notice legislative history of SB 1681 (Exs. A-B). The request is granted. Evid. Code §452(b).

[25] All statutory references in this subsection are to the Government Code unless otherwise stated.

applies to private property. Pet. Op. Br. at 9-10. The District adds that the City has not imposed its grading ordinance on the District for the past 30 years. Nellesen Decl. ¶4. The City lacks any criteria for review and approval of grading plans submitted pursuant to section 53097 (ER 5111, 5115, 5116, 5118), and no public agency has submitted a grading plan to the city between January 1, 2013 to at least year-end 2016. Id. Pet. Op. Br. at 10-11.

The court also addressed this issue in the City's Petition *ante*. The court agrees with the District (Reply at 8-9) that the fact that the City has not imposed its grading ordinance on the District or any other public entity for 30 years shows a custom and practice that supports the District's interpretation of the WMC and the City has wrongly characterized the District's position as an estoppel argument. *See* Opp. at 6-7. Nonetheless, the grading ordinance applies to the District. The City explains why it is now enforcing its grading requirements against Mt. SAC: Mt. SAC initially agreed in MM-2c to consult with the City on a haul route for its trucks, and then revised that mitigation measure (but not the identical AQ-03) in an attempt to withdraw that requirement. Mt. SAC has, in fact, never consulted with the City on the haul route for the Solar Project. The City remains concerned about the safety issues of the Solar Project grading and hauling of dirt. Gilbertson Decl. ¶¶ 7, 12-15. Because of Mt. SAC's failures, the City for the first time has asserted its grading ordinance to Mt. SAC's public project. Opp. at 7-9.

The City's explanation why it is deviating from its previous practice is a strong argument for public safety, but less so for purposes of interpreting the grading ordinance. However, its failure to previously assert grading authority over Mt. SAC projects also is not compelling for purposes of statutory interpretation. A mere failure to assert authority is not an admission that such authority does not exist. The more important point is that the City's grading ordinances, interpreted collectively, permit their application to public projects. The County's recent amendment to Appendix J and the City's Urgency Ordinance also provide a seo\parate basis to apply the City's grading requirements to the Solar Project. *See ante*.

The District argues that, if the City's grading ordinances do apply, the City cannot force the District through the Stop Work Order to apply for a CUP or other entitlements in order to approve the grading plan for the Solar Project. Pet. Op. Br. at 11.

The District has created revised grading plans for the Solar Project that comply with the City's geotechnical and engineering design and construction criteria of Appendix J and referred to in WMC section 6-5.3. Barker Decl. ¶10; Nellesen Decl. ¶¶ 18-19. Specifically, the revised grading plans address and satisfy all relevant ordinances in Appendix J that relate to grading and drainage, taking into account the topography of the west parcel area, including all erosion issues. Barker Decl. ¶13. The revised grading plans meet the requirements of Appendix J sections J101.7, J108, J109, J110, and J111. Barker Decl. ¶17.[26] The revised grading plans also comply with the permitting requirements of responsible federal and state agencies. Pet. Op. Br. at 13.

WMC section 6-5.3 provides:

> "Development standards relative to grading within the City of Walnut are hereby established to complement the provisions set forth in Appendix Chapter J of the Los Angeles Building Code as currently adopted and as may be amended from time to time. In cases of conflict between the provisions of said Building Code and these development standards, the development standards shall prevail as to

[26] Appendix J sections J101.3, J101.4, J101.6, and J103.1 are not design-related. Id

> design concepts and nature and scope of permitted earthwork development. The Building Code shall prevail as to geotechnical and engineering design and construction and to administration of the permit process." *See* City RJN, Ex. A, p. 5.

The District argues that the "development standards" in WMC section 6-5.3 only apply where a project is subject to the City's discretionary land use approval. For example, such development standards would apply to a project that requires issuance of a CUP. Barker Decl., ¶11. Pet. Op. Br. at 15.As the revised grading plan complies with the relevant provisions of Appendix J, the District contends that the City should ministerially approve it. Pet. Op. Br. at 12-13. Subjecting the grading plans to the full development standards of the WMC would swallow the limited exception in for grading controls in section 53097.

The City opposes on the ground that it is still in the process of reviewing the grading plans submitted by District. Mt. SAC filed its SACC on December 30, 2016 and only transmitted its revised grading plans to the City on January 23, 2017. Opp. at 3, 4. Any discussion as to the adequacy of those plans seeks an advisory opinion on the adequacy of the revised grading plans and is not ripe because the City has not completed its review. *See* California Water & Telephone Co. v. County of Los Angeles, (1967) 253 Cal.App.2d 16, 22 (matter is ripe when facts are sufficiently congealed to permit useful decision). Opp. at 5, 14. The City also contends that Mt. SAC seeks relief that cannot be granted. It is entirely proper for the Stop Work Order to remain in place while the City reviews Mt. SAC's revised grading plans. According to the City, Mt. SAC improperly seeks to control the City's exercise of discretion through declaratory relief compelling it to issue grading approvals for the Solar Project. Opp. at 5-6.

The test for ripeness is (1) whether the dispute is sufficiently concrete so that declaratory relief is appropriate and (2) whether the parties will suffer hardship if judicial consideration is withheld. Farm Sanctuary, Inc. v. Department of Food & Agriculture, (1998) 63 Cal.App.4th 495, 502 (citation omitted).

While the City is correct that the adequacy of the revised grading plans is not ripe for review, there is a portion of the Stop Work Order that is ripe for declaratory relief. The Stop Work Order apparently states that no work may begin until ALL required land use entitlements, building permits, and approved truck haul routes, etc. have been issued by the City of Walnut."[27] Reply at 1. The District provides evidence that the City is refusing to issue any grading permit until the Solar Project is fully entitled. Nellesen Decl. ¶15; ER 5110. This would include applying for a CUP, a building permit, and a development application. Nellesen Decl. ¶16. The City also recently deemed District's submitted grading plans "incomplete" and stated that they need to be submitted to the Planning Commission for discretionary approval. Reply Nellesen Decl. ¶¶ 3-5. The issue of the City's right to require discretionary entitlements for the Solar Project is sufficient concrete, and Mt. SAC would suffer hardship from a delay in resolving that issue. *See* Reply at 3-4.

The District is entitled to a declaration regarding the scope of the Stop Work Order and the City's review of the revised grading plan, but not its adequacy. The District describes this scope as (1) whether it may proceed with construction without applying for zoning and building

[27] Again, the Stop Work Order was not included at ER 5068.

permits because it is exempt under section 53091 (decided *ante*), (2) whether the City may not enforce the Stop Work Order by requiring land entitlements and a CUP, and (3) alternatively, whether the City must review and process the grading plans for approval under its grading ordinances as defined and limited by section 53097 without a CUP, building permits, or zoning controls. Reply at 4.

The District challenges the City's attempts to impose truck haul route restrictions and any discretionary approvals by the Planning Commission. Waivers of sovereign immunity "must be express" and may not be "inferred by implication." Bame v. City of Del Mar, (2001) 86 Cal.App.4th 1346, 1358. An express waiver of sovereign immunity must be strictly construed in favor of the state. Coso Energy Developers v. County of Inyo, (2004) 122 Cal.App.4th 1512, 1533. Mt. SAC contends that the City's interpretation of Code section 53097 is too expansive, and violates these sovereign immunity principles. Reply at 5.

The District is correct that the City's attempts to force the District to obtain a CUP and comply with the City's development standards is beyond the scope of section 53097's exception. The Solar Project is generally exempt from local building ordinances under section 53091. The exception under 53097 permits the City to regulate the Solar Project only through ordinances that regulate drainage or road improvements and conditions, or that require the review and approval of grading plans as they relate to the design and construction of onsite improvements which affect drainage, road conditions, or grading. The District is not required to obtain a CUP or comply with any other discretionary land use standards outside this limited exception. Thus, the District need not comply with City ordinances regulating a usage of property that might impact drainage or road conditions. As applied to the Solar Project, section 53097 means what it says -- the City may regulate grading plans.

The District argues that the City's review and approval of the grading plan should not include the truck haul route, but does not really say why. Instead, the District only points out that section 53097 does not mention roadway activities as a harm. Reply at 5-6.

The District's position crops the photograph too closely. As a matter of practice as well as practicality, a haul route is part and parcel of grading. While some projects can be graded without importing or exporting dirt, any grading project of significant size cannot. Section 53097 also permits a city ordinance to regulate grading plans as they relate to the design and construction of onsite improvements which affect "road conditions." Heavy truck hauling for project grading could impact both a road's surface and its traffic conditions. The City explains that the Solar Project's haul route presents several safety issues. The District makes no showing that a haul route is not subsumed within the grading plan exception of section 53097.

The City can, therefore, review Mt. SAC's grading plan for compliance with its grading ordinances, including its haul route ordinance. The issue becomes whether this review is a discretionary or ministerial. The District argues that it is ministerial in nature because the technical and ministerial criteria in Appendix J apply, not the development standards in WMC section 6-5.3, which only apply to CUPs and other discretionary entitlements which must be reviewed by the City's Planning Commission. Pet. Op. Br. at 12-13; Reply at 6-7.

The City does not respond to this argument. While grading permits are generally ministerial, that is not always true. WMC section 6-5.3 provides that the City's development standards with respect to design and the nature and scope of permitted earthwork development control over Appendix J. City RJN Ex. B, p. 2. WMC section 6-5.4 requires all grading to conform to sections 6-5.3 through 6-5.8. WMC section 6-5.5 imposes specific grading

requirements for, *inter alia*, minimizing mass grading and the cutting and shaping of slopes. WMC section 6-5.6 provides that if a grading plan imposes a change in elevation of five feet or more it shall be submitted to the Planning Commission for approval. New WMC section 6-8 provides specific provisions for a haul route.

Based on these provisions, the court cannot say that the approval of the Solar Project's grading plans, including the haul route, is a ministerial task that need not be submitted to the Planning Commission. At least the haul route ordinance appears to be discretionary in nature. The District has presented the only evidence or argument on this issue, and it is not ripe for review. The court, therefore, will not provide an advisory opinion.

The District's petition is granted in part. The District is entitled to declaratory relief that (1) because it is exempt under section 53091, Mt. SAC may proceed with construction of the Solar Project without applying for zoning and building permits from the City, with the exception of grading and haul route approvals, (2) the City may not enforce the Stop Work Order by requiring land entitlements and a CUP,[28] but may enforce the requirement of grading and haul route approvals, and (3) the City must review and process the grading plans for approval under its grading ordinances, but without a CUP, building permits, or zoning controls other than grading and haul route approvals. The court offers no current opinion whether the City's grading plan and haul route approvals are ministerial or discretionary in nature.

H. Conclusion

United Walnut's Petition against the District is granted in large part. The Parking Garage Project is moot and United Walnut's claims concerning it are denied. For the Solar Project, the District failed to proceed in the manner required by law by failing to properly circulate initial study. The District also is required to comply with the City's grading ordinances in constructing the Solar Project. Finally, the District has a practice of preparing Program EIRs which can be used for tiering, but are not project-specific. Because it uses programmatic EIRs, United Walnut is entitled to declaratory and injunctive relief that Mt. SAC must prepare and circulate initial studies to responsible agencies (at an appropriate time) as projects come up for actual decisions for design and implementation.

United Walnut's first and sixth causes of action have been bifurcated and stayed and no judgment or writ can issue on its Petition, or on the District's SACC, until those claims are resolved. United Walnut's Petition is ordered transferred to Department 1 for reassignment to an I/C court.

The City FAP against the District is granted in part. The District's Solar Project must comply with the City's grading requirements, but the City's haul route requirements is not within the scope of the City's Petition (it is within the scope of the District's SACC). The District need not comply with the City's other zoning requirements. Additionally, the District failed to proceed in the manner required by CEQA in failing to prepare and circulate an initial study for the Solar Project. The District also improperly relied upon the Addendum. The District must set aside Solar Project approvals and Addendum, and prepare and circulate an initial study for the Solar Project before approving it. The City may not act as lead agency for the Solar Project. The

[28] The City does not dispute the District's contention that the Stop Work Order improperly relies on WMC sections 18-8 (business permits), and section 16-7.1 (regulating street parking). Pet. Op. Br. at 11.

City's challenge to the Parking Garage Project is denied as moot.

The District's SACC against the City is granted in part. The District is entitled to declaratory relief that (1) it is exempt under section 53091 and SAC may proceed with construction of the Solar Project without applying for zoning and building permits from the City, with the exception of grading and haul route approvals (2) the City may not enforce the Stop Work Order by requiring land use entitlements and a CUP, but may enforce the requirement of grading and haul route approvals, and (3) the City must review and process the grading plans for approval under its grading ordinances, but without a CUP, building permits, or zoning controls other than grading and haul route approvals. The court offers no current opinion whether the City's grading plan and haul route approvals are ministerial or discretionary in nature.

The City is entitled to a judgment and writ on its FAP and the District is entitled to declaratory relief against the City. The City's counsel is ordered to prepare a proposed judgment and writ of mandate, serve them on counsel for the District for approval as to form, wait ten days after service for any objections, meet and confer if there are objections, and then submit the proposed judgment and writ along with a declaration stating the existence/non-existence of any unresolved objections. An OSC re: judgment on the City/District matter is set for April 20, 2017 at 9:30 a.m.