

## BUSINESS & FACILITIES UPDATE

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### **State Law Requires Public Universities To Supplement Environment Impact Reports When Making Discretionary Decisions To Increase Enrollment.**

The Regents for the University of California adopted a development plan in 2005 to guide the University of California Berkeley campus through 2020 and certified a program Environmental Impact Report for the development plan, as required by the California Environmental Quality Act. The development plan and the EIR projected that, by the year 2020, the University's student enrollment would increase by 1,650 students the University would add 2,500 beds for students.

Save Berkeley, California nonprofit formed to improve Berkeley's quality of life and protect its environment, alleged that, beginning in 2007, the University made a series of discretionary decisions to increase enrollment well beyond the projection analyzed in the EIR. Save Berkeley alleged the University approved increases, without formal decisions, public notice, or further environmental review, in every two-semester period since 2007. By April 2018, the University's actual student enrollment had grown by a total of approximately 8,300 students—a five-fold increase over the 2005 projection.

In 2018, Save Berkeley filed a petition in a trial court to challenge the University's decisions to increase enrollment without further CEQA review. Save Berkeley argued the enrollment increases caused significant environmental impacts that were not analyzed in the EIR, including increased use of off-campus housing by University students, displacement of tenants and a consequent increase in homelessness, more traffic, and increased burdens on the City of Berkeley's public safety services. Save Berkeley argued CEQA required the University to prepare an EIR to analyze these impacts and to identify and adopt mitigation measures to reduce them. Save Berkeley also alleged it learned of the University's decisions in October 2017, and it could not have discovered the decisions earlier through the exercise of reasonable diligence. Save Berkeley asked the trial court for a declaration that the University's policy of increasing student enrollment without environmental review violated CEQA and for an order to compel the University to prepare and certify an EIR.

The University argued Save Berkeley did not state a cause of action for violation of CEQA because the enrollment increases are not a CEQA "project" or a project change requiring subsequent environmental review. The University also argued Save Berkeley's claims were barred by the applicable statute of limitations or moot.

The trial court agreed with the University and concluded Save Berkeley's petition was barred by the statute of limitations to the extent it challenged the adequacy of the EIR. Additionally, the

trial court held that informal, discretionary decisions to increase student enrollment beyond that anticipated in the development plan did not constitute project changes necessitating CEQA review. Accordingly, the trial court dismissed the case, and Save Berkeley appealed.

On appeal, Save Berkeley argued: (1) it stated a cause of action for violation of CEQA when it alleged the University substantially increased enrollment without analyzing the environmental impacts of those decisions and (2) the trial court's construction of CEQA requirements was inconsistent with the plain language of the statute, its legislative history, and long standing CEQA principles.

The Court of Appeal first examined the CEQA requirements. CEQA required a public agency that proposed to undertake an activity potentially within CEQA's scope to follow a three-step process. First, the agency must decide if the activity is a "project" i.e., an activity that may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment. Second, if it is a project, the agency must decide whether the project is exempt from CEQA review. Third, if no exemption applied and the project may have a significant environmental effect, the agency must prepare an EIR before approving the project.

The purpose of an EIR is to provide public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment, to list ways in which the significant effects of such a project might be minimized, and to indicate alternatives to such a project.

Here, the Parties did not dispute the 2005 EIR cannot be challenged because the statute of limitations expired. Instead, Save Berkeley alleged the University changed the original project and that the changes had significant environmental effects that were not examined in the EIR. Therefore, the question before the Court of Appeal was whether the alleged changes to the 2005 project—the decisions to increase enrollment beginning in 2007—required some form of environmental review under CEQA.

The Court of Appeal accepted as true that enrollment increases caused significant environmental impacts that were not analyzed in the EIR, and the University failed to analyze these impacts in a CEQA document and failed to adopt mitigation measures to reduce or avoid them. Based on this, Save Berkeley adequately pled that the University made substantial changes to the original project that trigger the need for a subsequent or supplemental EIR.

In response, the University argued that, based on California Public Resources Code section 21080.09, it was exempt from analyzing the changed increases in enrollment unless or until it approved a physical development project. The University argued that absent a development plan or a "physical development project," the statute exempted it from analyzing enrollment decisions in any kind of EIR.

The Court of Appeal disagreed with the University. The Court of Appeal held that the statute does not exclude enrollment increases from the broad definition of a "project," and the University must construe its project broadly to capture the whole of the action and its

environmental impacts. Furthermore, the Legislature recognized that both enrollment levels and physical development are related features of campus growth that must be mitigated under CEQA. The statute did not say that enrollment changes need only be analyzed in an EIR for a development plan or physical development.

Ultimately, the Court found the University undercut the fundamental premise of CEQA because it did not provide advance notice of its decisions, CEQA analysis, or mitigation of the environmental issues related to its decisions to expand student enrollment. While the Court of Appeal found Public Resources Code section 21080.09 was not ambiguous, it also found the statute's legislative history did not support the University's interpretation.

The Court of Appeal also rejected the University's argument that the Court's decision would require the University to provide annual CEQA review of enrollment levels and would create enrollment cap. The Court explained the University's options to avoid annual CEQA review and denied that requiring the University to comply with CEQA created an enrollment cap.

The Court of Appeal reversed the trial court's decision and remanded the case for further consideration.

*Save Berkeley's Neighborhoods v. Regents of Univ. of California* (2020) 51 Cal. App. 5th 226.

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