NO. D079480

COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION ONE

SAVE THE FIELD, a California nonprofit public benefit corporation,

Appellant,

vs.

DEL MAR UNION SCHOOL DISTRICT,

Respondent.

On Appeal from a Judgment in
Superior Court for the County of San Diego
Case No. 37-2020-00020207-CU-TT-CTL

APPELLANT'S OPENING BRIEF

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CERTIFICATE OF INTERESTED PARTIES

(Cal. Rules of Court, Rule 8.208)

The following entities or persons have either (1) an ownership interest of 10 percent or more in the party or parties filing this certificate or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves:

None.

DATED: January 19, 2022 PROCOPIO, CORY, HARGREAVES & SAVITCH LLP

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I.

INTRODUCTION

Appellant Save the Field filed a petition for writ of mandate asking the trial court to set aside Respondent Del Mar Union School District's Negative Mitigated Declaration (MND) and to require the District to prepare an Environmental Impact Report (EIR) for the Del Mar Heights Elementary School Rebuild Project as a result of the District's failure to comply with the California Environmental Quality Act, Public Resources Code section 21168.9. The trial court granted Save the Field's petition, in part, and ordered that the District's MND be vacated for failing to address potentially significant adverse impacts on the environment in at least three areas. The District did not challenge the findings in the trial court and has not appealed.

Prior to entering judgment, the trial court requested briefing from the parties regarding the appropriate CEQA remedy given the court's order vacating the MND. The District requested that the trial court permit it to keep its deficient MND alive and merely "fix" the three issues found by the trial court to be in derogation of CEQA. The trial court rejected the District's request. Save the Field argued that because the trial court found that the Rebuild

Project may have significant adverse impacts on the environment that an EIR is required. While the trial court ruled that an EIR was an option for the Rebuild Project to proceed, it also ruled that the District could proceed with a "limited" or "focused" EIR as the Rebuild Project's only operative environmental document. Thereafter, the trial court discharged the writ based on the District's representation it had vacated its deficient MND and was proceeding by way of a focused EIR.

The trial court's judgment permitting the District to proceed by way of a focused EIR was in error. Once evidence is presented that a project might have a substantial impact on the environment in any area, CEQA requires that the lead agency must prepare an EIR for the *proposed project*—a limited EIR to supplement a deficient MND does not achieve compliance. Accordingly, the judgment should be partially reversed and the District required to prepare an EIR for the Rebuild Project.

II.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Rebuild Project and the District's Failure to Comply with CEQA

The Del Mar Heights School is a K-6 public elementary school located on a 10.85 acre site at 13555 Boquita Drive in San Diego, California. [1 AR Tab 5, p. 23.] On the northerly side of the school campus is a number of detached buildings, a parking lot, and other incidental improvements. [*Ibid.*] A grassy field and two baseball fields sit on the remaining portion of the site. [1 AR Tab 5, p. 29.]

The lion's share of the school is directly adjacent to the Torrey Pines State Reserve Extension, which is a protected State Natural Reserve and is located within the City of San Diego's Multiple Habitat Preservation Area and is subject to the protections under the City's Multiple Species Conservation Plan. [1 AR Tab 5, pp. 29, 38; 6 AR Tab 1, p. 3658.] As the California Department of Parks and Recreation has recognized, the reserve "is environmentally very sensitive and important regionally." [6 AR Tab 1, p. 3658.] In addition to its location next to the protected reserve, the school sits in a highly sensitive Coastal Overlay Zone.

(See San Diego Municipal Code § 132.0402.) The school is also situated in a "Very High Fire Hazard Severity Zone." Here, California has designated the location of the school as an area with the very highest risk of wildfire.[1]

In 2018, the District endeavored to rehabilitate the school campus and placed a Proposition 39 (Cal. Const. art. 13A §1(b)(3)(A) & (B)) bond measure – Measure MM – on the ballot asking voters to approve $186,000,000 in funding payable from the voters by exceeding the statutory 1% cap on ad valorem taxes. [9 AR Tab 1, p. 4825.] Measure MM passed by at least 55% of the vote and the Rebuild Project for the school, which has a student enrollment of 459 students, is being funded with $56,000,000 of the Measure MM bond funds. [1 AR Tab 5, p. 37; 9 AR Tab 4, p. 4849.]

While the Rebuild Project was pitched to the voters as a rehabilitation project, it proposed to demolish the existing 52,406 foot school and to replace it with 66,823 feet of new construction, expanding the school's footprint over the entire width of the school

[1] https://gis.data.ca.gov/datasets/789d5286736248f69c4515c04f58f414.

site. [1 AR Tab 5, p. 39.] The Rebuild Project also sought to redesign the existing campus and significantly increase the size of the school's paved parking lot which will stretch the entire width of the campus. [1 AR Tab 5, p. 43.]

The 14,400 ft expansion of the school and significant extension of the parking lot comes at the cost of the current school's grassy fields, which are currently used by the community after school hours. The school's grassy fields will be reduced by 41,643 feet (nearly one acre). [1 AR Tab 5, p. 115.] In other words, the school is swapping grassy playfields for a paved parking lot.

From the early planning stages of the Rebuild Project, it was the District's intent to begin demolition and construction of the existing campus in the summer of 2020. [1 AR Tab 5, p. 39.] In a strained effort to meet its ambitious project schedule, the District short-circuited the normal CEQA review process. Instead of preparing an EIR, the District prepared an Initial Study/Mitigated Negative Declaration ("IS/MND") which summarily concluded that the Rebuild Project would have no significant impacts on the environment. [1 AR Tab 1, p. 1.]

The District—acting as its own lead agency—also gave significant impetus to the Rebuild Project which foreclosed

alternatives and mitigation measures. The District spent nearly $1.1 million in Measure MM funds prior to the certification of its MND. [9 AR Tab 4, p. 4849.] Notably, the District spent $956,645 in architect fees (representing 34% of the $2,800,000 budget), in connection with preparing the current design. [*Ibid.*] The District first submitted pre-check documents (thereby incurring significant architectural costs) to the Division of the State Architect on February 11, 2020, before the MND was first circulated for public review on February 20, 2020. [4 AR Tab 1, p. 3880; 1 AR Tab 3, p. 10.][2]

Unfortunately, the District expended significant costs in connection with the current design, and foreclosed the consideration of any project alternatives or mitigation measures that have been raised during the CEQA process. Indeed, the District's preparation of these detailed (and expensive) construction plans are the very type of bureaucratic and financial momentum the California Supreme Court has warned of—the

[2] The Administrative Record only contains the District's Increment 1 submission to the DSA. [See 6 AR Tab 1, pp. 3880-3906.] The Administrative Record does show, however, that the Increment 2 plan sheets had been received by, and were under review by the DSA as of February 24, 2020. [*Id.* at p. 3876.]

District knew that it was going to approve its own environmental document and therefore moved forward with preparing detailed construction documents and solidifying the current design regardless of the environmental consequences.[3]

The IS/MND not surprisingly contained many factual and legal deficiencies, prompting a significant number of comment letters raising concerns related to the Rebuild Project's potentially significant impacts to the environment. For example, in response to the District's IS/MND, the California Department of Parks and Recreation wrote that given the school's location adjacent to the Reserve, and "[b]ecause this land is environmentally very sensitive

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[3] The California Supreme Court has stated,

> "[T]he later the environmental review process begins, the more bureaucratic and financial momentum there is behind a proposed project, thus providing a strong incentive to ignore environmental concerns that could be dealt with more easily at an early stage of the project. This problem may be exacerbated where, as here, the public agency prepares and approves the EIR for its own project. For that reason, 'EIRs should be prepared as early in the planning process as possible to enable environmental considerations to influence project, program or design.' "

(*Laurel Heights Improvement Assn. v. Regents of the Univ. of Cal.* (1988) 47 Cal.3d 376, 395, quoting *Bozung v. Local Agency Formation Com. of Ventura County* (1975) 13 Cal.3d 263, 282.)

and important regionally [State Parks has] several concerns regarding the proposed Project that need to be better addressed or redesigned before the Draft MND is completed." [6 AR Tab 1, p. 3658.] Additionally, the Sierra Club North County Coastal Group expressed its disappointment that its "concerns about protection of the adjacent reserve have not received adequate consideration to date." [6 AR Tab 1, p. 3504.] Save the Field also heavily commented on the District's IS/MND and submitted comments from technical experts at RK Engineering Group, Inc. regarding a number of deficiencies set forth in the District's IS/MND. [6 AR Tab 1, p. 3727.]

Instead of meaningfully addressing the foregoing concerns, the District prepared a Response to Comments in an attempt to defend its inadequate IS/MND. [See 6 AR Tab 1, pp. 3420-3953.] Determined to proceed with the Rebuild Project as quickly as possible, on May 12, 2020, the District approved the Rebuild Project and adopted the MND. [1 AR Tab 1, p. 1;1 CT 12, ¶22.]

Save the Field thereafter filed its Petition for Writ of Mandate in order to ensure that the District completes adequate environmental review of the Rebuild Project. [1 CT 1, 11, ¶18.]

B. Procedural History

1. Order Granting the Petition for Writ of Mandate

Following trial, the court found that the District's MND failed to state, or substantially understated the severity and scope of the Rebuild Project's environmental impacts. On December 22, 2020, the trial court entered its ruling in favor of Save the Field on several issues and directed that a writ of mandate issue vacating the MND for the Rebuild Project, vacating the District's approval of the Rebuild Project, and suspending any and all activity pursuant to the District's approval of the Rebuild Project until the District fully complied with all requirements of CEQA, Pub. Resources Code 21168.9. [2 CT 506-523.] The trial court specifically found as follows:

> [S]ubstantial evidence exists within the administrative record supporting a fair argument that a significant environmental effect may result from construction noise levels, because noise levels may exceed the threshold of significance when construction activities take place closer to nearby residences.

[2 CT 511.] Further, the court found that,

> [S]ubstantial evidence exists within the administrative record supporting a fair argument that the combination of increased vehicle access with construction of a new campus entry point will increase

> vehicle traffic on Mira Montana Drive. This could result in a significant impact that has not been addressed or mitigated.

[2 CT 518.] Finally, the Court has found that,

> In the absence of this data, the existing substantial evidence within the administrative record establishes a fair argument that the Rebuild Project will result in a significant impact to biological resources through the disturbance of sensitive habitat, potentially including an endangered plant species.

[2 CT 523.] In short, the District's MND violated CEQA and was vacated because in at least three areas the Rebuild Project may have significant effect on the environment.

2. Additional Briefing Regarding the Appropriate CEQA Remedy

At the time the trial court issued its December 22, 2020 order, Save the Field objected to the District's argument that the MND, vacated by the trial court, could be kept alive permitting the District to merely "fix" those issues that the Court found were in derogation of CEQA. Save the Field also objected to the District's assertion that it could proceed by preparing a limited or focused EIR. [RT dated 12/22/20, pp. 10-15.] Save the Field informed the trial court that it was important to address the District's contention that it be allowed to be prepare a focused EIR as the

replacement document for its defective and vacated MND because a partial EIR would not satisfy the City of San Diego's requirements for a Coastal Development Permit. [*Id.*, pp. 10:25-11:8 ("I would think that the District would want that (an EIR) particularly as it goes through its C.D.P and S.E.P. (sic)[4] process with the City of San Diego. They will certainly require a full environmental document be certified as part of that process…").] Thereafter, the trial court ordered each side to submit a proposed judgment and briefing regarding the appropriate CEQA remedy for the court's consideration. [2 CT 523.]

Save the Field submitted briefing explaining that the law does not permit the District to resurrect its vacated MND and "fix" its defective parts. [2 CT 422-445.] Save the Field also provided authority regarding why a focused EIR cannot serve as a replacement document for a vacated MND. [*Ibid.*][5] The trial court's findings that the Rebuild Project may have significant effect on the

[4] SDP (Site Development Permit) mistakenly reported as a S.E.P.

[5] Without waiting for the trial court to address the issue, the District engaged its environmental consultant to proceed with this strategy. [2 CT 430.]

environment in at least three areas required that the District prepare an EIR. [*Ibid.*]

The District likewise submitted briefing and a proposed judgment. [2 CT 446-457.] The District argued that because Save the Field had only prevailed on three of its eleven challenges to the MND that the trial court should allow the District to keep its MND alive and merely "fix" those issues that the Court found were in derogation of CEQA. [2 CT 447-448.] The specific remedies requested by the District were for the trial court to "(1) vacate the resolution adopting the MND and approving the Project; (2) vacate certain findings made in the MND; (3) order that the remainder of the MND is in compliance with CEQA; (4) order the District to re-study the temporary construction noise impacts and biological resources impacts; and (5) order the District to recirculate its findings as to these two specific parts of the MND only." [2 CT 448.] The trial court denied the District's requested relief. [2 CT 471; 2 CT 483-484.]

Instead, after considering the parties' respective briefs, the trial court ruled that it would execute Save the Field's judgment with modifications and writ of mandate (vacating the MND) and that the District had the following three options:

> Given the Court's prior ruling granting the writ of mandate (ROA # 47), **Respondent is left with three choices if the Rebuild Project is to go forward: it may prepare and circulate a complete EIR, a "focused" EIR or a second MND.** The briefing provides cogent argument why any of these scenarios could satisfy the requirements of CEQA. However, Respondent must be afforded the discretion to choose the path forward. The court lacks the authority to mandate any particular procedure, any finding in that regard would constitute an impermissible advisory ruling.

[2 CT 479-480, emphasis added.]

3. The Judgment

The trial court thereafter entered judgment granting Save the Field's petition for writ of mandate on the ground that the abbreviated process employed by the District did not, in part, comply with CEQA. [2 CT 503-505.] The judgment provides:

> A peremptory writ of mandate directed to Respondent Del Mar Union School District shall issue under seal of this Court, ordering Respondent to:
>
> (1) Set aside and vacate Resolution No. 2020-13 approving the Del Mar Heights Rebuild Project;
>
> (2) Set aside and vacate Resolution No. 2020-13 certifying the Mitigated Negative Declaration for the Del Mar Heights Rebuild Project;
>
> (3) Suspend all project activities in connection with the Del Mar Heights Rebuild Project that could result in any change or alteration to the physical environment until Respondent has reconsidered its resolution and brought it into compliance with the requirements of the California Environmental Quality Act ("CEQA");

> (4) Comply with the provisions of CEQA prior to the issuance of any such permit or approval.

[2 CT 482.] The trial court also awarded Save the Field its attorneys' fees and costs. [3 CT 553.]

4. Discharge of the Writ

On March 10. 2021, the District filed its initial return representing that the Board vacated its Resolution No. 2020-13 approving the MND and vacated the approval of the project. [2 CT 524-527.] The District further advised "it had decided to pursue a 'focused' Environmental Impact Report ("EIR") per the Court's Minute Order dated February 8, 2021." [2 CT 525.]

The draft focused EIR addressed: l) the potential impact to Southern Maritime Chaparral habitat and any endangered plant species caused by proposed modification to stormwater outfall pipes; 2) the potential impact of construction noise on adjacent residential sensitive receptors; 3) potential traffic impacts caused by the proposed construction of new stairs and ADA ramp at the southern tip of the campus. [2 CT 524-527.] According to the District, the third issue, potential traffic impacts caused by the proposed construction of new stairs and ADA ramp, was resolved

by the Board's removal of these components from the project at its meeting on January 19, 2021. [2 CT 459-461.]

On April 12, 2021 and May 24, 2021, the District filed its second and third returns making the same representations regarding having vacated its MND and detailing its "Focused EIR Schedule." [3 CT 551-553; 3 CT 579-580.] On July 7, 2021, the District filed its final return requesting the trial court to discharge the writ issued in this case on the basis that it complied with the trial court's judgment and writ of mandate again expressly representing: (1) it vacated the MND and (2) "The District (also) decided to pursue a 'focused' Environmental Impact Report ('EIR') per the Court's Minute Order dated February 8, 2021." [3 CT 584.] In its Proposed Order, the District summarized the attached Resolution and Board Action therein as follows: "Resolution No. 2021-11 makes all appropriate findings under CEQA, approves and certifies the Final Focused EIR, CEQA Findings of Fact for the FEIR, the Mitigation Monitoring and Reporting Program, and approves the Project." [3 CT 590:6-8.]

Save the Field did not object *again* to the discharge of the writ because the trial court had already overruled Save the Field's objection that a focused EIR could serve as the operative

environmental document for the Rebuild Project. [2 CT 479-480.] On July 19, 2021, the trial court discharged the peremptory writ. [3 CT 597-609.]

5. Save the Field's Appeal and the District's Motion to Dismiss

Save the Field timely filed its Notice of Appeal of the judgment. [3 CT 628.] It later filed an Amended Notice of Appeal out of an abundance of caution to include the trial court's July 19, 2021, order discharging the writ. [See Docket dated 09/21/21.] The District did not file a cross-appeal and therefore the trial court's finding that the District's MND must be vacated for failing to address potentially significant adverse impacts on the environment in at least three areas has not been and cannot be challenged.

On November 5, 2021, the District filed a motion to dismiss Save the Field's appeal arguing that because Save the Field did not object to the discharge of the writ that the appeal was moot and that Save the Field should otherwise be found to have forfeited challenge of the trial court's judgment.[6] On November 23, 2021,

[6] The District ironically argued in its reply that Save the Field "misrepresents the facts of the underlying case" despite that the

the Court ordered that the District's motion would be considered concurrently with Save the Park's appeal.

III.

STATEMENT OF APPEALABILITY

This appeal is taken from a final judgment and an order discharging a writ that followed pursuant to Code of Civil Procedure section 904.1(a) (1), (2). The judgment was filed on February 8, 2021. [2 CT 503-505.][7] Save the Park filed its Notice of Appeal on August 6, 2021. [3 CT 628.] The order discharging the writ was filed on July 19, 2021 and Save the Appeal filed its Notice of Appeal on September 15, 2021. [3 CT 597-609; see Docket dated 9/21/21.]

The District's reply in support of its motion to dismiss misunderstands basic appellate procedure in arguing Save the Field's notice of appeal was required to list interim orders

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District filed a motion to dismiss based on purported waiver yet completely failed to advise the Court of the significant briefing that occurred in the trial court regarding the range of permissible CEQA remedies that could follow the trial court's order vacating the MND.

[7] A second judgment was filed March 26, 2021, incorporating the trial court's hand mark-up of the original judgment. [3 CT 551-553.]

preceding the judgment to preserve challenge thereof and that such orders "would need to be challenged via extraordinary writ." [Reply, p. 3.] Code of Civil Procedure section 906, provides in pertinent part:

> Upon an appeal pursuant to Section 904.1 or 904.2, the reviewing court may review the verdict or decision and **any intermediate ruling, proceeding, order or decision which involves the merits or necessarily affects the judgment or order appealed from or which substantially affects the rights of a party, including, on any appeal from the judgment**, any order on motion for a new trial, and may affirm, reverse or modify any judgment or order appealed from and may direct the proper judgment or order to be entered, and may, if necessary or proper, direct a new trial or further proceedings to be had.

(Code Civ. Proc. § 906, emphasis added.)

IV.

APPLICABLE LEGAL STANDARDS

A. The Purpose and Policy of CEQA

The purpose of the California Environmental Quality Act "is to inform the public and its responsible officials of the environmental consequences of their decisions *before* they are made." (*Protect Niles v. City of Fremont* (2018) 25 Cal.App.5th 1129, 1138 [emphasis in original].) "To this end, public

participation is an 'essential part of the CEQA process.' " (*Ibid.* quoting Guidelines, § 15201.)[8]

CEQA's purposes are designed to (1) inform governmental decision makers and the public about the potential, significant environmental effects of a proposed project, (2) identify ways to avoid or significantly reduce environmental damage, (3) prevent significant, avoidable damage to the environment by requiring changes to a project that use alternatives or mitigation measures, and (4) to disclose to the public the reasons why a governmental agency approved a project in the manner it chose if significant environmental effects are present. (Guidelines § 15002; *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus* (1996) 42 Cal.App.4th 608, 614.) The provisions of CEQA are interpreted "to afford the most thorough possible protection to the

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[8] The term "CEQA Guidelines" refers to the regulations for the implementation of CEQA authorized by the Legislature (Pub. Resources Code § 21083), codified in title 14, section 15000 et seq. of the California Code of Regulations, and "prescribed by the Secretary of Resources to be followed by all state and local agencies in California in the implementation of [CEQA]." (CEQA Guidelines, § 15000.) In interpreting CEQA, the court accords the CEQA Guidelines great weight except where they are clearly unauthorized or erroneous. (*Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564, fn. 3.)

environment that fits reasonable within the scope of its text." (*California Bldg. Industry Assn.t v. Bay Area Quality Management Dist.* (2015) 62 Cal.4th 369, 381.)

CEQA requires a lead agency to prepare an environmental impact report any time a project "may have a significant effect on the environment." (Pub. Resources Code § 21151, subd. (a).) "[I]f a lead agency is presented with a fair argument that a project may have a significant effect on the environment, the lead agency shall prepare an EIR even though it may also be presented with other substantial evidence that the project will not have a significant effect." (Guidelines, § 15064, subd. (f)(1).) A significant effect is any "substantial, or potentially substantial, adverse changes in the physical conditions which exist within the area." (Pub. Resources Code § 21151, subd. (b); Guidelines § 15382.)

The California Supreme Court has stated that "[t]he EIR has been aptly described as the 'heart of CEQA'." (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 390 [quoting Guidelines, § 15003, subd. (a)].) The EIR "protects not only the environment but also informed self-government." (*Id.* at p. 392.) The California Supreme Court has recognized that "the later the environmental review process

begins, the more bureaucratic and financial momentum there is behind a proposed project, thus providing a strong incentive to ignore environmental concerns that could be dealt with more easily at an early stage of the project. This problem may be exacerbated where . . . the public agency prepares and approves the EIR for its own project." (*Id.* at p. 395.)

CEQA requires that negative declarations be "prepared as early as feasible in the planning process to enable environmental considerations to influence project program and design and yet late enough to provide meaningful information for environmental assessment." (Guidelines, § 15004, subd. (b).) A public agency is prohibited from "tak[ing] any action which gives impetus to a planned or foreseeable project in a manner that forecloses alternatives or mitigation measures that would ordinarily be part of CEQA review of that public project." (*Ibid.*) Indeed, the guidelines expressly state that a public agency "shall not undertake actions concerning proposed projects that would . . . limit the choice of alternatives or mitigation measures, before completion of CEQA compliance." (*Ibid.*)

Furthermore, a mitigated negative declaration may be adopted only if the record shows that there is no substantial

evidence that the project may have a significant effect on the environment. (See Guidelines § 15070, subd. (b)(2); *Keep Our Mountains Quiet v. County of Santa Clara* (2015) 236 Cal.App.4th 714, 730.) "In reviewing an agency's decision to adopt an MND, a court . . . must determine whether there is substantial evidence in the record to support a 'fair argument' that a proposed project may have a significant effect on the environment." (*Preserve Poway v. City of Poway* (2016) 245 Cal.App.4th 560, 575-576.) "The fair argument standard creates a 'low threshold' for requiring an EIR, reflecting a legislative preference for resolving doubts in favor of environmental review." (*Ibid.*; *Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307, 1316-1317.) Notably, "courts owe no deference to the lead agency's determination" and "[r]eview is de novo." (*Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 928.)

B. Standard of Review

Judicial review under CEQA is generally limited to whether the agency has abused its discretion by not proceeding as required by law or by making a determination not supported by substantial evidence. (Pub. Resources Code §§ 21168, 21168.5; *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564;

Laurel Heights, 47 Cal.3d at p. 392 & fn. 5.) A court reviewing an agency's decision not to prepare an EIR in the first instance must set aside the decision if the administrative record contains substantial evidence that a proposed project might have a significant environmental impact; in such a case, the agency has not proceeded as required by law. (*Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307, 1317–1318.) Stated another way, the question is one of law, i.e., "the sufficiency of the evidence to support a fair argument." (*Id.*, quoting *Bowman v. City of Petaluma* (1986) 185 Cal.App.3d 1065, 1073.) Under this standard, deference to the agency's determination is not appropriate and its decision not to require an EIR can be upheld only when there is no credible evidence to the contrary. (*Id.*)

Here, the trial court determined that the Rebuild Project might have significant environmental impact in three areas. Those findings have not been challenged and therefore it is undisputed the District's decision not to prepare an EIR must be set aside.

V.

THE TRIAL COURT ERRED IN NOT REQUIRING THE DISTRICT TO PREPARE AN EIR AFTER THE DISTRICT'S MND WAS VACATED

Once an MND is vacated, CEQA mandates that the District prepare an EIR which analyzes the entirety of the Rebuild Project. The statutory language is clear—a lead agency is required to prepare an EIR any time a project "may have a significant effect on the environment." (Pub. Resources Code § 21151, subd. (a).) The CEQA Guidelines further show the mandatory nature of this requirement: "if a lead agency is presented with a fair argument that a project may have a significant effect on the environment, the lead agency shall prepare an EIR . . . ." (Guidelines § 15064, subd. (f)(1) [emphasis added].) The California Supreme Court has recognized that "[i]f no EIR has been prepared for a nonexempt project, but substantial evidence in the record supports a fair argument that the project may result in significant adverse impacts, the proper remedy is to order preparation of an EIR." (*Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 319-320; see also *Brentwood Assn. for No Drilling, Inc. v. City of Los Angeles* (1982)

134 Cal.App.3d 491, 505 [affirming "the judgment of the trial court granting the petition for writ of mandate and directing the City to take no further action . . . until an environmental impact report is prepared"]; *California Native Plant Society v. County of El Dorado* (2009) 170 Cal.App.4th 1026, 1061 [directing trial court "to issue a writ of mandate commanding the County to cancel the MND and prepare an EIR consistent with the views stated herein"].) When setting aside an inadequate negative declaration, the California Supreme Court stated, "The appropriate remedy is therefore to order the District to set aside its Negative Declaration and project approval and to prepare an EIR that will evaluate, along with other potentially significant impacts, these increased emissions." (*Communities for a Better Environment*, 48 Cal.4th at p. 320, citing Guidelines § 21168.9.)

Notably, the law mandates the preparation of a full EIR even if a court finds a mitigated negative declaration inappropriate on limited grounds. (See, e.g., *Protect Niles v. City of Fremont* (2018) 25 Cal.App.5th 1129.) In *Protect Niles*, the "trial court found substantial evidence supported a fair argument of significant impacts on aesthetics and traffic only." (*Id.* at p. 1137.) "The court ordered the City to vacate its Project approvals and refrain from

approving the Project 'absent compliance with CEQA in the preparation of an EIR.'" (*Ibid.*) The Court of Appeal affirmed the trial court's mandate to the City to prepare an EIR. (*Id.* at 1153-1154.)

The recent decision of *Farmland Protection Alliance v. County of Yolo* (2021) 71 Cal.App.5th 300 (*Farmland*), is directly on point. The case involved the proposed operation of "a bed and breakfast and commercial event facility supported by onsite crop production intended to provide visitors with an education in agricultural operations," on an 80-acre agriculturally-zoned site near the city of Winters. The County of Yolo approved a MND under CEQA, and Farmland Protection Alliance sued challenging the MND's adequacy. (*Id.* at p. 304.) The trial court found that substantial evidence supported a fair argument that the project may have a significant effect on three species of concern identified in the complaint. However, while the court then ordered the county to prepare an EIR, it allowed the EIR to be limited to addressing only the project's impacts on those species, while allowing the project approval and MND (and its mitigation measures) to remain in effect and also allowing project operations to continue pending compliance with its order. (*Id.* at p. 305.) While the county

prepared and certified an EIR regarding impacts to the three species, Farmland appealed.

In the published portion of its decision[9], the court of appeal articulated Farmland's argument as "once evidence is presented that a project might have a substantial impact on the environment—in any area—the lead agency *must* proceed to prepare an environmental impact report '*for the proposed project*.' " (*Id.* at p. 309, citing *Muzzy Ranch Co. v. Solano County Airport Land Use Com.* (2007) 41 Cal.4th 372, 381.) The county and real parties, by contrast, argued (as the District did here) that Public Resources Code section 21168.9 gave the trial court the discretion to craft the remedy it did. (*Id.*)

The court of appeal agreed with Farmland, holding that "[t]he remedies under section 21168.9 do not trump the mandatory provisions of the Act. Section 21168.9 is intended to facilitate *compliance* with the Act; it does not provide a means to circumvent the heart of the Act—the preparation of an

[9] The unpublished remainder of the opinion evaluated evidence of significant impact to the three species at issue. (*Id.* at p. 305.)

environmental impact report for the project." (*Ibid.*, emphasis orig.)

The court reviewed CEQA's three-tier process, which requires an agency to first decide if CEQA applies to a proposed project, and then, if it does, to conduct an initial study to determine whether there is substantial evidence "that the project or any of its aspects may cause a significant effect on the environment." (*Id.*, citation omitted.) If there is no such evidence, the agency may prepare a negative declaration. (*Id.*; see *Save Our Big Trees v. City of Santa Cruz* (2015) 241 Cal.App.4th 694, 704-705.) If the study identifies potential significant effects on the environment, the agency must determine whether such effects can be mitigated or whether "substantial evidence supports a fair argument that a proposed project may have a significant effect on the environment." (See *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1399-1400.)

Importantly, the Court in *Farmland* found nothing in CEQA or the case law interpreting it "suggesting a project's impact analysis may be divided across the second and third tiers of environmental review such that some impacts are analyzed in a mitigated negative declaration and others are analyzed in an

environmental impact report." (*Farmland,* 71 Cal.App.5th at p. 310.) Rather, "if *any* aspect of the project triggers preparation of an environmental impact report, a full environmental impact report must be prepared in accordance with the definition of [an EIR in Public Resources Code] section 21061." (*Id.* at p. 310, citing *San Bernardino Valley Audubon Soc. v. Metropolitan Water Dist.* (1999) 71 Cal.App.4th 382, 402 & fn. 11.) Thus, an agency may adopt a negative declaration or prepare an EIR, not both: "the second and third tiers of environmental review under the Act are mutually exclusive[.]" (*Id.*)

While the statute authorizes "flexibility in fashioning remedies," involving consideration of equitable principles to bring agency actions into compliance with CEQA, ordering a "limited" EIR to supplement a deficient MND when CEQA requires a full EIR does not achieve compliance. (*Id.* at p. 305.) Even where substantial evidence is found to support only a fair argument that a single aspect of the project may have a significant effect, an EIR for the project is still required in accordance with the CEQA statute and Guidelines. Accordingly, the court of appeal held that the trial court did not have the power to circumvent this

fundamental CEQA requirement, and it reversed the judgment. (*Id.* at p. 310.)[10]

Here, there is no authority that permits the District to resurrect its vacated MND and "fix" its defective parts. Similarly, a focused EIR could not be used to cure the deficiencies in the vacated MND or otherwise serve as the operative CEQA document for the Rebuild Project; instead it is a tiered document that may only be used when a project already has an EIR that is found to be deficient and needs to be cured. The District was found to have prepared an invalid MND and thus, CEQA explicitly mandates that the District prepare a full EIR. (See Pub. Resources Code §

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[10] The court concluded:

> " 'The issue of whether an [environmental impact report] must be prepared is resolved by applying the fair argument test. ' " [Citation.] "Under this test, the agency must prepare an [environmental impact report] whenever substantial evidence in the record supports a fair argument that a proposed project may have a significant effect on the environment." [Citation] **If a court finds the fair argument test has been met but the agency failed to prepare an environmental impact report, "the court must set aside the agency's decision to adopt a negative declaration [or a mitigated negative declaration] as an abuse of discretion in failing to proceed in a manner as required by law.**" [Citation.]

(*Id.*, emphasis added)

21151, subd. (a); Guideline, § 15064, subd. (f)(1).) Every EIR must describe a reasonable range of alternatives to the proposed project and its location that would feasibly attain the project's basic objectives while avoiding or substantially lessening the project's environmental impacts. (Pub. Resources Code § 21100, subd. (b)(4); Guidelines, § 15126.6.) "Without meaningful analysis of alternatives in an EIR, neither the courts nor the public can fulfill their proper roles in the CEQA process . . . ." (*Laurel Heights*, 47 Cal.3d at p. 404.) The District cannot engage in a meaningful discussion of project alternatives and other CEQA mandates if its analysis is limited to just portions of the Rebuild Project and not the Rebuild Project as a whole.

VI.

CONCLUSION

Based on the foregoing, the judgment of the trial court should be partially reversed and the District ordered to prepare an EIR with regard to the entire Rebuild Project.

DATED: January 19, 2022 PROCOPIO, CORY, HARGREAVES & SAVITCH LLP

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, Rule 8.204(c), I certify that this APPELLANT'S OPENING BRIEF is proportionately spaced, has a typeface of 13 points or more, and contains 6,208 words.

DATED: January 19, 2022 PROCOPIO, CORY, HARGREAVES & SAVITCH LLP

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PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is PROCOPIO, CORY, HARGREAVES & SAVITCH LLP, 525 "B" Street, Suite 2200, San Diego, California 92101. On January 19, 2022, I served the within documents:

APPELLANT'S OPENING BRIEF

☑ **BY U.S. MAIL** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Diego, California addressed as set forth below. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on the same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing an affidavit.

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☑ I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on January 19, 2022, at San Diego, California.

/s/ *Maria Vizcaino*
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