STATE OF CALIFORNIA, COURT OF APPEAL

FOURTH APPELLATE DISTRICT, DIVISION ONE

TAXPAYERS FOR ACCOUNTABLE SCHOOL BOND SPENDING Plaintiff and Appellant, v. SAN DIEGO UNIFIED SCHOOL DISTRICT Defendant and Respondent.	)	No. D 060999 San Diego Superior Court Case No. 37-2011-85714

APPELLANT'S OPENING BRIEF

An Appeal From the Judgment of the
Honorable Timothy B. Taylor

Craig A. Sherman, Esq. (SBN 171224)
Todd T. Cardiff, Esq. (SBN 221851)
LAW OFFICE OF CRAIG A. SHERMAN
1901 First Avenue, Suite 219
San Diego, CA 92101
Telephone: 619-702-7892
Facsimile: 619-702-9291

Counsel for Appellant
TAXPAYERS FOR ACCOUNTABLE
SCHOOL BOND SPENDING

TO BE FILED IN THE COURT OF APPEAL **APP-008**

COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE	Court of Appeal Case Number D060999
ATTORNEY OR PARTY WITHOUT ATTORNEY (Name, State Bar number, and address) Craig A. Sherman (SBN 171224) LAW OFFICE OF CRAIG A. SHERMAN 1901 First Avenue San Diego, CA 92101 TELEPHONE NO 619-702-789 FAX NO (Optional) 619-702-9291 E-MAIL ADDRESS (Optional) ATTORNEY FOR (Name) APPELLANT	Superior Court Case Number 37-2011-00085714-CU-WM-CTL FOR COURT USE ONLY
APPELLANT/PETITIONER: TAXPAYERS FOR ACCOUNTABLE SCHOOL BOND SPENDING, INC. RESPONDENT/REAL PARTY IN INTEREST: SAN DIEGO UNIFIED SCHOOL DISTRICT	
CERTIFICATE OF INTERESTED ENTITIES OR PERSONS (Check one): X INITIAL CERTIFICATE SUPPLEMENTAL CERTIFICATE	

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1. This form is being submitted on behalf of the following party (*name*): TAXPAYERS FOR ACCOUNTABLE SCHOOL BOND SPENDING, INC.

2. a. X There are no interested entities or persons that must be listed in this certificate under rule 8.208.
   b. Interested entities or persons required to be listed under rule 8.208 are as follows:

Full name of interested entity or person	Nature of interest (*Explain*):
(1)	
(2)	
(3)	
(4)	
(5)	

Continued on attachment 2.

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Date: April 20, 2012

CRAIG A. SHERMAN
(TYPE OR PRINT NAME)

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(SIGNATURE OF PARTY OR ATTORNEY)

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Local Ordinances

I.

INTRODUCTION

This case involves a legal challenge to the January 11, 2011 Herbert Hoover High School ("Hoover") athletic field construction project ("Project") and the later May 10, 2011 action of San Diego Unified School District ("District") to exempt Hoover and eleven (11) other high schools from complying with local zoning and land use laws ("Exemption Action").

The primary issues and laws implicated in this appeal are:

(1) the adequacy of the mitigated negative declaration (MND) and mitigation measures for the subject Project under the *California Environmental Quality Act* (Pub.Res.Code § 21000 et. seq.)("CEQA");

(2) the level of identification and disclosure necessary under the *Strict Accountability in Local School Construction Bond Act of 2000* (Ed. Code §§ 15264-15286 and Constitution, Article XIIIA, § 1(b)(3); and

(3) the degree of notice and environmental review required when a school district exempts "classroom facilities" from local zoning and plans under Government Code § 53094(b).[1]

[1] All references are to the *Government Code*, unless otherwise indicated.

II.
ISSUES PRESENTED FOR REVIEW

The issues presented on appeal are detailed as:

1. Whether the analysis of potential impacts, based on a limited number of nighttime events and limited attendance, was permissible under CEQA when (a) decision-makers expressly rejected limitations on the number of events, (b) the impacts analyzed in the MND were based on attendance at approximately 36% of stadium capacity, and (c) whether inaccurate or missing information precluded informed public participation and decision-making.

2. Whether the administrative record contains substantial evidence to support a fair argument that potential adverse impacts will occur.

3. Whether the Prop S bond measure sufficiently described and identified that stadium lighting was a project to be funded as part of bond.

4. Whether sufficient notice was given to project-adjacent residents and landowners for the District's action to exempt

school development projects from local zoning ordinances and land use plans under Government Code § 53094.

5. Whether the Exemption Action was impermissibly overbroad by failing to identify the "classroom facilities" or the zoning ordinances or plan elements exempted.

6. Whether it was impermissible to undertake the Exemption Action without any CEQA compliance.

7. Whether Taxpayers prevailed on their challenge under the third cause of action that the District was not exempt from local laws and plans.

III.
THE PROPOSITION S PROJECTS LIST AND THE HOOVER HIGH PROJECT

A. Creation of the Proposition S Project Lists for the Ballot

The Proposition S projects list came from the District's Long Range Facilities Master Plan (LRFMP). The LRFMP addressed the "unfilled need" for system improvements, ADA upgrades, ventilation/heating/ cooling, and for repair and replacement of deteriorating buildings. (3 AR T-111, 1297,

1300, 1311-14.)[2] The LRFMP included recommendations for athletic stadium improvements. (3 AR T-111, 1356 [timeline].) However, the subject bond funding priorities came from "Critical Projects Required for Code and Safety" which identified a few select "repair/upgrade high school athletic fields and physical education spaces to address accessibility and safety issues." (3 AR T-111, 1313, 1370.)

The District board met three times on July 8, July 21 and July 23rd, 2008 to consider the precise projects to be presented in the Proposition S measure. (3 AR T-111, 1224-1416; T-114, 1545-1558.) At the first two meetings, the board rejected the non-specific boilerplate nature of the lists, and directed staff to present additional information. (3 AR T-116, 1606-07; 4 AR T-133, 2154.) There was no mention of installing stadium lighting at any school during any hearing or meeting. Relevant to Hoover, its track/football stadium improvements were stated as "Accessibility, Code Compliance Upgrades" to "[r]enovate/replace stadium bleachers, including press box" and "[u]pgrade fields, tracks, and courts for accessibility compliance." (4 AR T-119, 1644.)

Despite such direction to staff, on July 23, 2008, the board approved the resolution and text of the ballot measure unchanged from the hearings on July 8 and July 21. (4 AR T-130, 1925-1939.)

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[2] The administrative record is referenced by volume, index tab "T-_", followed by page. ([vol] AR T_, [page]).

The Proposition S "San Diego School Repair and Safety Measure" appeared on the November 4, 2008 election ballot, complete with arguments for and against, and a detailed projects list for each school. (4 AR T-135, 2160-2256.) The project list for Hoover included:

Projects to Improve School Accessibility, Code Compliance Upgrades

- Renovate existing restrooms and locker rooms
- Renovate gymnasium building to meet accessibility regulations
- Provide accessible, compliant wrestling room
- Improve accessibility to all classrooms, labs, restrooms, and other school facilities to comply with accessibility regulations, including ADA Titles I & II
- Install three-compartment sink and hand sink in kitchen
- Renovate/replace stadium bleachers, including press box
- Upgrade fields, track, and courts for accessibility compliance
- Build new two-story classroom building to replace old portable classrooms
- Provide accessible restrooms with storage for athletic equipment

(4 AR T-135, 2239.)

The bond measure appeared aimed at improving "School Accessibility" and "Code Compliance." The lists were sufficiently detailed to include projects such as "[i]nstall three compartment sink." There was no mention of any stadium lighting project for Hoover or any school athletic or sports field project. (4 AR T-135, 2239.) Proposition S was approved by voters November 4, 2008.

B. The Hoover Athletic Facilities Project, CEQA Review, and the January 2011 Final Decision

1. The Project

On November 25, 2008, just three weeks after the election, the District presented Hoover's "Athletic Facilities ADA Upgrades." (1 AR T-15, 351; T-18, 365.) The proposed Project suddenly included new stadium lighting, an athletic administration building, and equipment storage facilities. (2 AR T-105N, 822 [¶ 1]; 2 AR T-100, 719-720, 726-728.) The neighbors expressed immediate outrage and bait-and-switch, objecting that the stadium lights were not included in Proposition S descriptions. (2 AR T-105N, 832.)

On October 15, 2010, after almost two years of claiming it was preparing an EIR, the District released the original project re-named "Herbert Hoover High School Athletic Facilities Upgrade Project."
(1 AR T-7, 63; 1 AR T-8, 70.)

The Initial Study described the project as being for "construction and operation of upgraded athletic facilities." (1 AR T-8, 69.) The stadium lights were to consist of two 100-foot and two 90-foot tall poles with 15 luminaries each. (1 AR T-8, 77.) Upgrades to the stadium seats results in a reduction from 5,635 to 3,970. (1 AR T-8, 70.) Despite the apparent reduction in number of rebuilt stadium seats and increased 56 parking spaces (1 AR T-8,

70), the traffic study found parking deficient under local parking standards by 174 spaces. (1 AR T-14, 250-251; *see also* J.A. 96 [SDMC Table 142.05F].)[3] No baseline study was conducted for alternative off-site parking.

The purpose of installing stadium lights intends to increase evening use and attendance when people are off-work. (1 AR T-3, 36:19-23.) The MND claimed "approximately 15 evening events would occur." (1 AR T-8, 71, emphasis added.) But, the Project is not limited to any number of events. As will be discussed below, what appears to be reduction in stadium size, and nominal increase in onsite parking, the Project will increase both attendance and impacts on the neighboring community. (*See*, e.g, 1 AR T-3, 29:11-15 [after a twenty year absence of stadium lights at Madison, "the stands were packed."])

2. The Project Site

The Project is located within and adjacent to Talmadge, a special neighborhood with unique homes and scenic canyons. (1 AR T-10, 125-126, 130; 5 AR T-138, 2298-99.) Iron gates with ornamental lights mark the gateways of Talmadge. (Id.) With its gateways, ornamental street lamps, curving streets, and historic homes, Talmadge is a strong candidate for designation as a historic resource and district. (J.A.66, 75; 5 AR T-138, 2322.)

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[3] Citation to the 2-volume Joint Appendix.

3. The CEQA Review, Analysis and Final Decision

Prior to final decision, the District promised to prepare an environmental impact report ("EIR"). (2 AR T-105E, 797, T-105F, 801.) In addition, to allay community concerns, the District promised the number of nighttime events would be limited. (2 AR T-105RR, 1033, 2 AR T-105WW, 1045-1046.) The District delayed circulation of any environmental documents for almost two years, all the while stating an EIR was being prepared to be released in July. (2 AR T-64, 578.)

On October 15, 2010, the District published the "Intent to Adopt an MND." (1 AR T-7, 63.) Public review lasted 30 days until November 15. A community meeting was held 10 days after MND release. (Id.) The District prepared and presented "Responses to Comments" to the District on January 11, 2011. (1 AR T-10, 106-166.) The District approved the Project and certified the MND the same date.

4. The May 10, 2011 Exemption Action for Twelve School Projects

Three months after Taxpayers filed its lawsuit (J.A.1), on May 10, 2011 the District adopted a Resolution to exempt twelve (12) listed high schools and projects from any applicable zoning ordinance or land use plan. (J.A.249-252.) On Friday afternoon, May 6, 2010, four days prior to the hearing, the Exemption Action matter appeared on the "Superintendent's

Consent Agenda." (J.A.264.) A copy of the agenda was posted at the District's headquarters and on its website. (J.A.264, 385, 401.) The item was identified as "Resolution Overruling Zoning Ordinances of the City of San Diego Applicable to the Use, Modernization, and Construction of Facilities at Various District High Schools." (J.A.265.) There were no details in the agenda or staff report as to aspects of listed projects or specific city ordinances or plan provisions sought to be exempted. (J.A.264-272.) At the hearing, the Board of Trustees approve d all consent items in a single motion. (J.A.271.) There was no staff presentation, no public hearing, or discussion by the board. (Id.) Unsurprisingly, not a single person from any neighborhood surrounding the 12 schools appeared to speak against the exemptions. However, after learning of the Exemption Action, a number of project-adjacent homeowners stepped forward to complain about lack of notice. (J.A.309-323.)

IV.
PROCEDURAL HISTORY

A *Tentative Ruling* for the second cause CEQA action was issued for the hearing held August 26, 2011. (J.A.324-329, 330; R.T 1-49 [transcript].) After a proposed *Decision* (J.A.345) and request to address additional issues (J.A.339), a final *decision* was issued September 27, 2011. (J.A.438-456.)

A *Tentative Ruling* on the first, third, and fourth causes was issued (J.A.457-462, 363; R.T 50-78), followed by a *Tentative Decision* (J.A.464-477). The District was ordered to prepare a statement of decision (J.A.478-483), after which the trial court issued a *final Decision* on October 25, 2011. (J.A.503-514.)

The trial court entered *Judgment* on October 26, 2011. (J.A.515-516.) A *Notice of Entry of Judgment* was served on October 31, 2011. (J.A.518-523.) On November 23, 2011, Taxpayers filed its *Notice of Appeal*. (J.A.524-525)

Because the trial court's rulings are not binding on this Court's de novo review, and because of limited space, Taxpayers will not describe the rulings point-by-point. It is sufficient to state that Taxpayers contest every ruling and sub-ruling of the trial court. Taxpayers take particular umbrage at the trial court's misapplication of "common sense" to both overcome the District's deficiencies and overrule substantial evidence submitted by the community. (*See*, e.g. J.A. 454.) In addition, much of the trial court's rulings could be considered part of the court's express invitation to appeal, such as statements concerning the District's exemption from zoning and land-use. (J.A.454-55; J.A.475; R.T. 70:26-71:8.)

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V.
APPEALABILITY

This appeal arises from final judgment made by the trial court, Judge Timothy B. Taylor presiding. (J.A.515-516.) This final judgment is appealable pursuant to Code of Civil Procedure § 904.1(a). This appeal serves to adjudicate all issues between the parties.

VI.
STANDARD OF REVIEW

The appellate standard of review for a CEQA case is the same as the trial court's – to review the administrative record for substantial evidence and determine whether the District abused its discretion. (Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova, (2007) 40 Cal.4th 412, 427.) An abuse of discretion is found if the agency failed to proceed in a manner required by law, fails to make findings required by law, or the findings are not supported by substantial evidence. (Code Civ. Proc. § 1094.5.) The trial court reviews the record de novo on appeal, and the trial court's conclusions are not binding. (Madera Oversight Coalition, Inc. v. County of Madera, (2011) 199 Cal.App.4th 48, 102 n.31.)

Court's must scrupulously enforce all the procedural requirements of CEQA. (Citizens of Goleta Valley v. Board of Supervisors, (1990) 52 Cal.3d

553, 564.) The omission of relevant information that precludes informed decision-making is a violation of the procedural requirements of CEQA and therefore constitutes an abuse of discretion. (County of Amador v. El Dorado County Water Agency, (1999) 76 Cal.App.4th 931, 946)

When challenging a MND, courts apply the "fair argument" test. Under the fair argument test, a court should uphold an agency's decision only if there is no substantial evidence that the project *may cause* a significant impact. (Guidelines § 15064; No Oil, Inc. v. City of Los Angeles, (1974) 13 Cal.3d 75.) "'May' means a reasonable possibility." (Pocket Protectors v. City of Sacramento (2004) 124 Cal.App.4th 903, 927.) Doubts as to whether there is a significant impact should be resolved in favor of preparing an EIR. (Id. at 928.)

Substantial evidence is defined as "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached." (Guidelines § 15384(a).) "Substantial evidence" includes "fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact." (Pub.Res.Code § 21080(e)(1); Guidelines § 15384(b), emphasis added.) Substantial evidence is not, "Argument, speculation, unsubstantiated opinion or narrative, evidence which is clearly erroneous or inaccurate, or evidence of social or economic impacts…" (Guidelines § 15384(a).)

"[E]vidence supporting a fair argument should not be equated with 'overwhelming or overpowering evidence.' Nor does it have to be uncontradicted." (Friends of the Old Trees v. Department of Forestry & Fire Protection, (1997) 52 Cal.App.4th 1383, 1402.) Substantial evidence is simply evidence which is of "ponderable legal significance . . . reasonable in nature, credible, and of solid value." (Stanislaus Audubon Society v. County of Stanislaus (1995) 33 Cal.App.4th 144, 152.)

Substantial evidence does not need to come from experts. For example, adjacent property owners may testify to traffic conditions based upon personal knowledge. (Citizens Association for Sensible Dev. of Bishop Area v. County of Inyo, (1985) 172 Cal.App.3d 151, 173) Personal observations about traffic and noise from similar projects can constitute substantial evidence. (Oro Fino Gold Mining Corp. v. County of El Dorado, (1990) 225 Cal.App.3d 872, 882,883.) In addition, substantial evidence can come from the lead agency's own testimony or studies. (Stanislaus Audubon Society, *supra,* at 153.)

While Courts must review the whole record to determine whether substantial evidence exists, this is not a weighing process. A court may not weigh one set of substantial evidence against another to determine who has the better argument. (Pocket Protectors , *supra*, 124 Cal.App.4th at 935.) "[A] decision not to require an EIR can be upheld only when there is no

credible evidence to the contrary." (Quail Botanical Gardens Foundation, Inc. v. City of Encinitas, (1994) 29 Cal.App.4th 1597, 1602 (citation omitted).)

Finally, in reference to the District's Exemption Action, whether an action is a "project" under CEQA is a question of law which courts review de novo. (Fullerton Joint Union High School Dist. v. State Bd. of Education, (1982) 32 Cal.3d 779, 795.) If not exempt, a discretionary action which has any possibility of an impact on the environment is subject to CEQA. Under the "common sense" exemption, if a project has no possibility of having a significant impact on the environment, then CEQA does not apply. (Guidelines § 15061.) It is the burden of the agency to prove it considered the possible environmental impacts in reaching its decision (California Farm Bureau Federation v. California Wildlife Conservation Bd., (2006) 143 Cal.App.4th 173, 186), whereby only a slight showing is necessary to overcome the common sense exemption. (Id. at 195.)

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VII.

ARGUMENT

A. THE DECISION TO ADOPT THE MITIGATED NEGATIVE DECLARATION FOR THE HOOVER ATHLETIC STADIUM PROJECT IGNORED IMPORTANT CEQA REQUIREMENTS AND SUBSTANTIAL EVIDENCE IN THE RECORD.

CEQA requires the District to make a good faith effort to disclose, consider, and mitigate direct, indirect and cumulative onsite and off-site impacts arising from construction and operation of the Project. In this case, the District failed to accurately describe the project, failed to properly evaluate the environmental setting, and failed to consider substantial evidence that the Project may have a significant impact. Crucial to the Court's consideration is evidence that the Project is not limited to *only* football games, nor limited to use by *only* the high school. Further, the District assumes project-related impacts to the adjacent neighborhood are reduced to a level of insignficance by "good neighbor" policies. While promising to act as a "good neighbor" may be appreciated, CEQA requires enforceable mitigation measures in the form of permit conditions or other enforceable agreements. (Pub.Res.Code § 21081.6(b).)

1. The Project Description Misled the Public and Decisionmakers Because the Analysis Improperly Relied on the Assumption that Approximately 15 Nighttime Events Would Occur.

The project description states, "The District anticipates that approximately 15 evening events would occur with implementation of the proposed project." (1 AR T-8, 71.) This assumption permeates every study, including studies that did not expressly rely on such fact for their conclusions. (See, e.g., 1 AR T-12, 182 [lighting]; T- 14, 247 [parking]; T-8, 82 [air quality]; T-8, 93[noise].) Although, the MND expressly claimed the District was exempt from zoning and summarily dismissed impacts to the historic neighborhood, the assumption that there will be 15 events also impacted the Board's evaluation of aesthetics, and community impacts. (1 AR T-8, 84, 91.)

"An accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient EIR." (County of Inyo v. City of Los Angeles, (1977) 71 Cal.App.3d 185, 192.) While CEQA is not designed to "freeze the ultimate proposal in the precise mold of the initial project," in order for the public and decision-makers to properly evaluate a project, they must have an accurate view of the project. (Id. at 199.) CEQA requires that all reasonably foreseeable anticipated uses be analyzed and included in a CEQA study. (Guidelines § 15144 [forecasting]; Laurel Heights Improvement Ass'n v. Regents of the Univ. of Cal., (1988) 47 Cal.3d 376, 396.)

Record evidence demonstrates it is both foreseeable and expected there will be more than 15 nighttime events. It is neither a reasonable assumption for a project description, nor a project limitation. In fact, the District Board expressly denied a motion to limit the Project to 15 events. (1 AR T-5, 60; *see also,* 1 AR T-3, 23:2-7 ["number of night games is open-ended"].) District Board members expressed a desire to maximize use beyond just football, but also to soccer, lacrosse and other sports. (1 AR T-3, 26:7-12, 27: 19-24, 47:17-23.) The District also intends the lighted stadium to be used for "routine practices" in addition to the stated 15 events. (1 AR T-12, 182; T-32, 443; T-34, 455; T-51, 502.) One Board member expressed it would be a waste if the lights were used only 15 times a year. (1 AR T-3, 36, 12-20.)

There is also no intent to prohibit rental to third parties. (1 AR T-3, 35, 18-23.) "[T]he athletic facilities would be subject to the Civic Center Act and Board of Education Policy K-4000, which permit organizations, clubs and associations…to use the school buildings and grounds." (1 AR T-10, 112; Ed. Code § 38130 et. seq.) Thus, in addition to football, soccer, lacrosse, track, and other school uses and practices, third parties may rent the field at night, any number of night events could occur.

Such revelation caused one community member to express, "We could conceivably have something going on there every single night." (1 AR T-3, 21:16-25.) While intended as an overstatement, frequent use of the stadium is

not speculative fear. As noted by District staff, "There's a tremendous shortage of athletic fields in the city, period." (1 AR T-3, 35:23-25.) One board member testified that some schools have lights on every single night. (1 AR T-3, 40:22 to 41:7.) The field lighting discussions for Hoover centered on multiple uses with no limitations. .

To minimize community impacts and concerns, the District wrote to Councilman Gloria promising a maximum limit of 15 nighttime events. (3 AR T-105, 1189-90.) District staff later decided to make its promise non-binding. (2 AR T-89, 686.) Nevertheless, instead of actually determining the "worst case" scenario, it decided to maintain the project description as "approximately 15 games" to "keep the flexibility." (Id.) Substantial evidence is necessary to support a limit and stabilize the project description and so it can be properly evaluated. The failure to identify the multiple uses and number of nights the lights could be used precluded informed decisionmaking and public participation.

2. The Project Description and Analysis was Misleading Because it Relied on an Assumption Attendance Would be Only 36% of Stadium Capacity.

The project description identifies that the maximum seating capacity for the stadium would be reduced from the existing 5,635 seats to 3,970 seats.

(1 AR T-8, 70.)[4] But, none of the MND's analysis is based on the maximum seating capacity.[5] Instead, the District relied on an estimated attendance of 1,444 people, which is approximately 36% of stadium capacity. (1 AR T-14, 249-250.) Using estimated attendance, instead of the Project's maximum capacity, skewed the analysis of parking and traffic, and misled the decision-makers about potential impacts of the project.

The estimated attendance of 1,444 was derived by assuming that Hoover would have attendance at 68% of the student body population. (1 AR T-14, 249.) This 68% figure was derived by averaging the attendance data from five other San Diego High Schools, including San Diego High School, which apparently has a football attendance rate of 13% of student body enrollment. Based on 68% of 2,123 enrolled students, average attendance of 1,444 was the level chosen for environmental analysis.

While Hoover's attendance percentage will likely be more than San Diego High's at 13%, nothing supports that Hoover will not achieve the same level of attendance as La Jolla and Madison High (80%) or Lincoln High school (125%). It is entirely foreseeable attendance will be well over 1,444 people, and at times be at or near capacity.

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[4] 2796 home seats + 1,174 visitor seats = 3970 seats (1 AR T-8, 70.)

[5] The basis for the noise analysis is not clear.

To determine whether a significant impact may occur, the actual physical baseline must be measured against the maximum capacity of the project. (San Joaquin Raptor Rescue Center v. County of Merced, (2007) 149 Cal.App.4th 645, 660; *see also*, Sacramento Old City Assn. v. City Council, (1991) 229 Cal.App.3d 1011, 1020 [analyzing parking and traffic impacts based on worst case scenario].) In San Joaquin Raptor, a mine expansion project specified a maximum operating capacity would be 550,000 tons per year. (San Joaquin Raptor, *supra*, at 660.) But, the analysis was based on an average of 260,000 tons per year. The court held the EIR's project description was inherently inaccurate and misleading because every year the mine operated at near capacity would require an offsetting year at near zero operational levels. (San Joaquin Raptor, *supra*, at 656 n. 4.) Further, the court also found problematic that there was no analysis of impacts at higher production levels. (Id. at 656.) The unstable project description "vitiated…intelligent public participation." (Id. quoting County of Inyo v. City of Los Angeles, (1977) 71 Cal.App.3d 185, 197-98.)

Similar to San Joaquin Raptor, the Project describes the maximum capacity of the stadium, but uses a hypothetical average attendance for analysis. Considering the unlimited project life, it is foreseeable that attendance may reach maximum capacity of 3,970 attendees. In fact, the record demonstrates large capacity crowds for some events in the past. (2 AR

T-105AA, 965; 2 AR T-105HH, 991 [2/3 – 3/4 full], 2 AR T-105NN, 1016.) It is unclear what actual attendance has been for large events, but the District must assume there will be a demand for close to 4,000 seats. Otherwise, why build and maintain a stadium with 3,970 seats. Failing to analyze and disclose the impacts of capacity crowds failed "to apprise all interested parties of the true scope and magnitude of the Project." (San Joaquin Raptor, *supra*, 149 Cal.App.4th at 657.)

3. The Failure to Describe the Existing Baseline for Attendance Prevented the Public and Decisionmakers from Evaluating the Magnitude of the Project.

The other problem basing analysis on an *average* attendance of 1,444 is there is nothing to compare it with. The Project's reduction in stadium seating leaves one with the impression that any event attendance increase will be negligible. Without providing actual attendance for past events, it is impossible for the decision-maker to accurately evaluate the impacts of the Project.

A long line of cases has discussed the necessity of accurately describing actual existing baselines. (Communities for a Better Environment v. South Coast Air Quality Management Dist., (2010) 48 Cal.4th 310, 321; *see also* Guideline § 15125.) "Before the impacts of a project can be assessed and mitigation measures considered, an EIR must describe the existing

environment. It is only against this baseline that any significant environmental effects can be determined." (County of Amador, *supra*, 76 Cal.App.4th at 952.)

In this case, the MND contains no discussion of the baseline attendance at either day events or nighttime events. Numerous community members argued that stadium lighting would increase crowds and associated impacts to traffic, parking, crime, trash and noise. This cannot be reasonably disputed because the actual purpose of installing lights is to increase attendance. (1 AR T-3, 19 [coach urging approval so families can attend]; 1 AR T-3, 29 [night games will allow stands to be "packed"]; 1 AR T-3, 36:19-23 [dayworkers need night games].) But, it was impossible to gauge how much attendance may increase.

The District will undoubtedly argue that the failure to identify the baseline event attendance was harmless error. However, as recently reiterated, "harmless error" is inapplicable when the agency omits relevant information. (Sunnyvale West Neighborhood Assn. v. City of Sunnyvale City Council, (2010) 190 Cal.App.4th 1351, 1388.) Failing to identify actual attendance at both daytime and nighttime games precluded informed public participation and decision-making. Courts are not in a position to determine how the omitted information would have affected the analysis or decision of the District Board. (Id.)

4. A Fair Argument Was Raised That the Installation of Stadium Lighting Would Have a Significant Impact to Aesthetics.

The greatest concern of the community was the installation of the stadium lights consisting of two 90-foot and two 100-foot tall galvanized steel poles, with a total of 60 luminaries. (1 AR T-12, 182.) The lights have been specifically designed to "minimize" off-site impacts, and "reduce light glare." (Id.) The lighting study assumed the lighting system would be used "approximately fifteen evening school events annually." (Id.) In addition, the lighting study assumed the lights would be dimmed at approximately 9:00 p.m. and extinguished by 10:00 p.m.. Finally, the lighting study repeatedly notes landscaping and trees will mature to help block light intrusion. (1 AR T-12, 188, 194, 195.) Based on such assumptions, the MND came to the conclusion that the stadium lights would not have a significant impact on aesthetics. (1 AR T-8, 77-79, 84, 91.)

Despite the lighting study, the neighbors raised a fair argument that the stadium lights would have a significant impact on aesthetics and community character. The court may not weigh substantial evidence against other substantial evidence and determine who has the better argument. (Pocket Protectors, *supra,* 124 Cal.App.4th at 935.) If substantial evidence supports a fair argument that there may be a significant impact despite the mitigation

measures, the fact that an expert disagrees would not overcome the necessity of preparing an EIR. Further, whether a project is "aesthetically pleasing is not the special purview of experts." (Ocean View Estates Homeowners Assn., Inc. v. Montecito Water Dist., (2004) 116 Cal.App.4th 396, 402.)

Government agencies must "[t]ake all action necessary [to protect] aesthetic, natural, scenic, and historic environmental qualities, and freedom from excessive noise." (Pub.Res.Code § 21001.) As discussed in CEQA Guidelines, the character of both the project and the surrounding site is important for determining whether a project may cause a significant impact. (Guidelines § 15064(b); *see also*, Bowman v. City of Berkeley (2004) 122 Cal.App.4th 572, 587 [replacing a dilapidated three story-building with a four story building in a flat urban neighborhood not a significant impact].) In this case, there are three main reasons that the stadium lights constitute a significant impact to aesthetics and community character: 1) The nature of the project; 2) the nature of the community, and; 3) the unlimited number of events.

First, while efforts have been made to minimize the amount of light intrusion, there is nothing in the record that would suggest that the neighborhood cannot see the lights, especially during night. (1 AR T-10, 164.) In response to comments, the District admits that the lights will be seen from the surrounding neighborhood. (1 AR T-10, 164 [comments W-6, W-7, W-8

& W-9].) It is also undisputed that the lights greatly exceed the 30 foot height limit proscribed by the zoning. (1 AR T-10, 115, 125.)

But, it is not just an adverse visual impact the lights represent, but the impact on the feel and quality of the neighborhood. Talmadge is identified as being special neighborhood of potentially historic significance. (J.A.66-67, 75.) As stated in the community plan, "The homes are all unique and all with a distinctive individuality acquired over generations of proud home ownership. Homes are located on narrow streets….This creates a wonderful pedestrian-oriented community where everyone walks and knows their neighbors." (J.A.67.) Instead of regular street lights, Talmadge has historic lamp posts. (1 AR T-10, 164; 3 AR T-105VVV, 1115; T-107, 1201 [lamp posts].) The direct visual impact of very tall modern stadium lights is completely out of character with historic nature of Talmadge.

To support a fair argument, the aesthetic impact does not have to be as dramatic as blocking views of the ocean and scenic vistas. (Pocket Protectors, *supra*, 124 Cal.App.4th at 938.) For example, it is significant that the project would result in a "tunneling" or "canyoning" effect from a long-double row of houses on a narrow street. (Id. at 937.) As suggested by Pocket Protectors, the aesthetic impact on a neighborhood is more than just a direct visual aversion, but a "quality of community" issue. There is a difference from

being unable to sleep because of light intrusion,[6] as compared to being aesthetically bothered by seeing the stadium lights while enjoying the backyard, working in the garden or walking the neighborhood at dusk. (1 AR T-10, 165; T-12, 184 [what may be acceptable to some, is objectionable to others].) Substantial glare is offensive in all environments, whereas the aesthetic impacts of stadium lights is particularly offensive in a neighborhood like Talmadge. CEQA is designed to assure "high-quality environment that at all times is healthful and pleasing to the senses and intellect of man." (Pub. Res. Code § 21000(b).) As appropriately noted by one community member, "We all work hard and long hours we want to come home to peace and calm, not bright lights and noise." (1 AR T-10, 146.) "Peace and calm" is an aesthetic value worth protecting.

Although still a significant impact, perhaps it might be a closer question <u>if</u> the stadium would only be lighted 15 times per year, but such project condition was expressly rejected. Lights will be used for practices, soccer, lacrosse, track, and whatever third party rental may be requested. (1 AR T-3, 33; T-32, 443.) The District categorically refused to put any limit on

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[6] The lighting study calculates light intrusion of .89 to 1.46 foot candles(fc) into neighboring residences, exceeding the level of significance of .8 fc during "pre-curfew," but predicts the installation of trees will reduce the luminance to less than significant levels. (1 AR T-12, 190.) Despite that trees take time to mature, the conclusion "near-term" impacts are not significant is admittedly not supported. (*See* 1 AR T-12, 199 [before landscape reaches maturity].)

the number of events. It is unknown exactly how many nights the stadium will be lighted. (1 AR T-5, 60.)[7] Obviously, the more often evening events allowed at the stadium, the more severe the impacts to community.

Finally, the lighting study specifically identifies dimming the stadium lights at 9 p.m. and turning them off at 10:00 p.m. to rely on a finding of no significant impact. (1 AR T-12, 198-199.) In other words, the lights must be turned off promptly to avoid a significant impact. Unfortunately, testimony from District leaders demonstrates known problems with schools leaving on stadium lights. (1 AR T-3. 30:16-25 ["hey it's midnight, and the lights are still on. And who's supposed to turn them off."]) The "policy" is not identified as a mitigation measure, and is therefore unenforceable. (1 AR T-9, 105.) On this record, residents can only "hope" stadium will not be lighted every night, and if they are on, the lights will be dimmed promptly at 9 p.m. CEQA does not require "hope," it requires enforceable mitigation. (Pub.Res.Code § 21081.6(b).)

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[7] One board member noted that some schools have the stadium lights on every night. (1 AR T-3, 40.)

5. The MND Failed to Accurately Describe the Environmental Setting by Omitting Information About Historical Resources.

As above, Talmadge is not a residential neighborhood consisting of 1970's tract homes. It is a special hidden neighborhood of historic significance established in the 1920's with entrances marked by historic iron gates. (J.A.66-67; 2 AR T-O 863, 875-76; 3 AR T-105TTT, 1097.) The MND failed to recognize such fact, simply describing the surrounding neighborhood as "a built-out urban area and [] surrounded by residential and commercial uses." (1 AR T-8, 71.) The discussion of historic resources added nothing, except - "The site is not listed on the State of California's Office of Historic Preservation (SHPO) list…" (1 AR T8, 84.) Such truncated analysis understates the true nature of the community and fails to assist the decisionmaker in appreciating possible impacts.

A lead agency must consider whether a project may have an adverse impact on historical or cultural resource. (Guidelines §15064.5; League for Protection of Oakland's etc. Historic Resources v. City of Oakland,(1997) 52 Cal.App.4th 896, 905.) This involves a two-step process. The first step is to determine whether a historic resource exists, and secondly, whether the project may have a direct or indirect impact on such resource. (Architectural Heritage Assn. v. County of Monterey, (2004) 122 Cal.App.4th 1095, 1112.)

In this case, the District failed to analyze whether historic resources were potentially at stake. The failure to analyze a potential significant impact enlarges the scope of the fair argument. (Sundstrom v. County of Mendocino, (1988) 202 Cal.App.3d 296, 311.)

The analysis of whether a resource is "historic" must go beyond SHPO listing. A resource may be considered historic if it is "eligible" to be listed on the SHPO, or if the resource has been listed in a local register of historical resources, or meets the criteria for listing with the California Registry of Historical Resources. (Guidelines § 15064.5(a)(1-3); League for Protection, *supra*, at 906.)

One of the goals of the Community Plan is to "preserve and enhance areas identified as historic districts." (5 AR T-138, 2322.) The city has mapped and included the neighborhood as a designated a historic corridor on both Highland Avenue and Monroe Avenue directly adjacent to the Project. (3 AR T-105RRR, 1094-1095; T-105TTT, 1097; 5 AR T-138, 2322.) The city additionally identified the Talmadge historic district as eligible for historic designation. (5 AR T-138, 2322.) As discussed above, tall stadium lights directly contradicts this goal. As noted by a member of the public, the excessively tall lighting structures (both lighted and unlighted) will be seen from afar adversely impacting aesthetics/community character in a recognized historic corridor. (1 AR T-10, 164.) The stadium lights may even affect the

neighborhood's potential for actual SHPO listing or other designation. This is a significant impact requiring CEQA consideration.

Secondly, the Project may cause significant impact on the historic ornamental Talmadge lampposts and gates adjacent to the stadium along Highland Avenue. (1 AR T-10, 148; 2 AR T-105O, 863; 875, 876 [photos].) As noted in the Mid-City Communities Plan, these ceremonial gates are recognized as important for reinforcing the neighborhood identity. (5 AR T-138, 2341.)

Past events at the school have resulted in persons climbing on the immediately adjacent Talmadge entry gates for viewing stadium events. (1 AR T-10, 148.) The District substantively responded to such evidence that "this matter does not concern CEQA," with no recognition that expanded nighttime crowds would enable such effects. (Id.) Another citizen complained how school project contractors had damaged the Talmadge gates with their vehicles, to which the District provided the irrelevant response "all construction for the proposed project will remain within the boundaries of the [school] campus and would not impact any structure or fencing…." (1 AR T-10, 125-126.)

The District's failure to accurately describe and evaluate existing and potential historical resources affected by the Project served to minimize and deny existence of possible impacts arising from the Project. Such omissions

precluded informed decisionmaking and constitute an abuse of discretion under CEQA. (Pub.Res.Code § 21005.)

6. The District Abused Its Discretion By Failing to Evaluate Impacts to Offsite Parking.

The traffic study identified that the nighttime events would generate 397 inbound trips. (1 AR T-8, 96.) This was based on expected attendance of 1,444 whereby 82% of attendees would drive, with each car carrying 3 people. (1 AR T-14, 250.) Even with nominal increased onsite parking and the questionable 36% attendance standard, the traffic study calculated an onsite deficit of 174 parking spaces. (Id.)[8] The traffic study admits the parking deficit exceeds the threshold of significance, but concluded it was not a significant impact because it would only occur 15 times per year and because parking was available in the surrounding residential neighborhood. (1 AR T-14, 251.)

Because the MND completely omits any discussion or analysis of offsite parking, a first question is whether parking impacts must be studied at all under CEQA. A second question is whether the traffic study's conclusions are supported when it failed to consider any available or baseline offsite

[8] The San Diego Municipal Code requires 1 parking space per three seats, not per estimated attendance, requiring 1,323 parking spaces. (SDMC Table 142-05F, J.A. 96.)

parking conditions. Lastly, the failure to determine baseline offsite parking conditions improperly skewed the traffic analysis.

a. A Project's Impact on Parking Availability is a Potential Direct Impact on the Environment That Must Be Analyzed Under CEQA.

The District's failure to discuss parking in the MND or to analyze offsite parking impacts in the parking study received such widespread objections that the District prepared a "master response" asserting that "[CEQA] does not require analysis of parking which would include offsite parking as an environmental issue." (1 AR T-8, 111; *see* e.g., 1 AR T-10, 123 [traffic safety/parking], 150, 155 [blocked driveways], 157 [narrow streets/parking]; 2 AR T-105HH, 155 [prior event parking impacts]; 3 AR T-105VVV, 1118-1132 [photos of event parking in neighborhood] .) The District clarified in briefing that it considered offsite parking a mere "social inconvenience" instead of a physical impact on the environment. (J.A.167, citing San Franciscans Upholding the Downtown Plan v. City & County of San Francisco, (2002) 102 Cal.App.4th 656, 697 (hereinafter "SFUDP") Such position was adopted by the trial court. (J.A.452; R.T 3:15:25-16:5.)

The relevant quote from SFUDP states, "The social inconvenience of having to hunt for scarce parking spaces is not an environmental impact; the secondary effect of scarce parking on traffic and air quality is." (SFUDP, at

697.) However, impacts to parking has long been viewed as potentially significant impacts that must be analyzed under CEQA. (Sacramento Old City Assn. v. City Council, (1991) 229 Cal.App.3d 1011, 1019-1023; Laurel Heights Improvement Assn. v. Regents of Univ. of California, (1998) 47 Cal.3d. 376, 417-418; *see also* Vineyard, *supra*, 40 Cal.4th at 431[tiering appropriate to formulate mitigation "site specific effects such as aesthetics or parking"].) The only published case citing SFUDP's quote on "social inconvenience" did not discuss whether it agreed with such statement, and instead upheld the EIR's parking analysis on substantial evidence. (City of Long Beach v. Los Angeles Unified School Dist., (2009) 176 Cal.App.4th 889, 917.) As discussed below, while perhaps searching for parking in a commercial zone in downtown San Francisco may be a social inconvenience, inadequate parking is a significant impact in other settings that must be analyzed under CEQA. (Guidelines § 15064(b) ["significance of an activity may vary with the setting"].) SFUDP's far reaching statement should be relegated to the specific facts of that case, and is not controlling here.

First, unlike here, where the MND omitted *any* discussion of offsite parking, the EIR in SFUDP treated parking as a significant impact, analyzing the existing conditions, cumulative impacts and interim impacts in detail. (SFUDP, *supra*, at p. 696.) Mitigation was also adopted, such as reducing the number of monthly rentals at neighboring city-owned parking garages, and

traffic related measures to decrease congestion. Importantly, the city required the developer to pay $1.5 million for "parking solutions," and $1.25 million more for improvements to a BART/MUNI station. (Id. at pp. 697 & 698, n.34.) San Francisco also adopted a statement of overriding considerations based partly on the contributions totaling $2.75 million to improve parking and transit. (Id. at 672-673.) Considering the extensive analysis of parking, the mitigation measures, and the statement of overriding consideration, SFUDP's opinion that parking could also be a "social inconvenience" was unnecessary to the resolution of the case, and should be considered non-binding dicta. (Redevelopment Agency of San Diego v. Attisha, (2005) 128 Cal.App.4th 357, 372 [opinions beyond the facts of case not controlling].)

To the extent it is precedent, the SFUDP case should be relegated to its unique facts. As discussed by the CEQA Guidelines, "An ironclad definition of significant effect is not always possible because the significance of an activity may vary with the setting. (Guideline § 15064(b).) Such policy is reflected in SFUDP: "[p]arking shortfalls …are not considered significant environmental impacts in the urban context of San Francisco." (SFUDP, *supra*, at p. 697 [quoting EIR],emphasis added.)

In this case, downtown San Francisco is vastly different than the Talmadge neighborhood impacted by this Project. Unlike SFUDP, Hoover High is not located on a transit hub "served by BART, 25 MUNI bus lines,

five MUNI metro lines, cable car lines, Golden Gate Transit, AC Transit, Caltrain and SamTrans." (Id. at 696-97.) Talmadge is a special historic neighborhood known for its unique houses and friendly atmosphere, not a downtown redevelopment area consisting of high-rise commercial, office and retail space. (J.A.66-67; Id., at 669, n.5.) Significantly, San Francisco city ordinances intentionally regulate new development in the downtown to *not* provide additional parking. (SFUDP, at 698, n.24.) San Diego's parking ordinance, in contrast, requires sufficient parking "to reasonably accommodate the peak parking needs of development…[and for] the preservation of community character." (SDMC § 42.0501, J.A. 84 (emphasis added); *see also,* SDMC § 141.0407(d) and Table 142-05F [parking ratios], J.A. 83, 95-98; 5 AR T-138, 2352 [schools and support facilities "Provide adequate off-street parking"].)[9] Importantly, San Diego holds that a 10% deficiency in parking exceeds the threshold for significance if it would adversely impact an adjacent residential neighborhood. (1 AR T-14, 251.) Thus, unlike San Francisco, San Diego considers adequate parking necessary for protecting the environment.

[9] District staff admits the surrounding area already has a parking problem. (1 AR T-3, 34:22-25.)

b. The Traffic Study Failed to Analyze the Offsite Parking Availability and Therefore Its Conclusion of No Significant Impact is Unsupported by the Evidence.

The traffic study admits that the Project's deficient parking exceeds the 10% threshold of significance identified by the City of San Diego. (1 AR T-14, 251, 271-72.) Nevertheless, the traffic study concludes that there will not be a significant impact because there will only be 15 nighttime events, and, ironically, because parking is available in the nearby residential area, the lack of parking will not impede accessibility to the stadium. (Id.) Without determining the baseline offsite parking, the traffic study's conclusions of no significant impact are unsupported by the evidence.

The study assumes that 174 cars would need to park in the residential neighborhood, but it did not analyze the baseline availability of parking in the neighborhood. (*See* 1 AR T-10, 122 [pointing out the lack of baseline].) Without identifying the baseline availability, there is no evidence that 174 parking spaces exist within a reasonable walking distance. The study cannot rely on off-site parking for its conclusion. Finally, the threshold for parking impact significance is a 10% deficiency. Even based on 1,444 attendees, the parking is deficient by more than 40%. If Project parking was calculated as required by the Municipal Code, one parking space per 3 seats the Project would be under-parked by over 300%. (J.A.96 [SDMC Table 142-05F].)

Based on the City's threshold of significance and the lack of baseline evaluation of available offsite parking, the Project may have a significant impact on the environment.

c. The Failure to Determine Baseline Offsite Parking Availability Renders the Traffic Evaluation Incomplete Preventing Informed Decisionmaking.

Although 174 cars must be parked off-site, the traffic analysis assumed that everyone would find parking immediately upon arrival. (1 AR T-14, 250, 256-260 [traffic study only measuring intersections along El Cajon Boulevard].) There was no analysis of the impacts of an unknown number of people circling the neighborhood looking for parking. Without an analysis of parking availability in the evenings, the traffic analysis is inadequate and faulty.

"A prejudicial abuse of discretion occurs if the failure to include relevant information precludes informed decisionmaking..." (Kings County Farm Bureau v. City of Hanford (1990) 221 Cal.App.3d 692, 712.) There is no analysis of congestion caused by drivers who cannot park onsite, and instead will be traveling on very narrow winding neighborhood roads. (*See* e.g., 3 AR T-105YY, 1051; T-105VVV, 1118.) The District could not properly evaluate whether traffic was significant if it only considered the 397 drivers turning once off El Cajon Boulevard. The failure to conduct baseline

analysis of offsite parking, for the purpose of determining significance of traffic impacts, constitutes an abuse of discretion. (Sunnyvale West, *supra,* 190 Cal.App.4th at 1388.)

7. The District Incorrectly Claimed It Was Exempt from Land Use Plans and Zoning Codes Thereby Thwarting Informed Public Participation and Decisionmaking.

The District refused to evaluate the Project's conflict with local land use plans and ordinances, claiming that the entire district was exempt under Government Code section 53094. (1 AR T-8, 91.) Such statements were incorrect at the time of approval on January 11, 2011 and Taxpayers challenged such determination. (J.A.15, ¶¶ 37, 38.) Obviously, considering the May 10th Exemption Action, there is no evidence in the record that the District was generally exempt from land use plans.

The District's analysis of land use consistency actively misdirected the public and the decisionmakers and therefore constitutes an abuse of discretion. (County of Amador, *supra*, 76 Cal.App.4th at 946.) Thus, even if there was no evidence in the record that the inconsistencies caused a significant impact on the environment, the District still thwarted the goals of CEQA because the public and decisionmakers were deprived the opportunity to comment on such land-use inconsistencies. (Sunnyvale West, *supra,* 190 Cal.App.4th at 1388.) For example, disclosing that the height of the lights

would conflict with the 30-foot height limitation specified in the zoning, would have emphasized that lights towering over adjacent homes by 60-70 feet supported concerns over aesthetics and community character. Disclosing that San Diego's parking ordinance requires 1 parking space for every 3 seats supports concerns about parking impacts and secondary impacts therefrom. An analysis of the Project's (in)consistency the Mid-Cities Community Plan would have informed the decisionmakers of the special historic nature of the community. Finally, had the District informed the public that it was "intending to exempt itself in the future," as suggested by the trial court, the public and decision-makers could have voiced and addressed Project concerns at an appropriate time.

Finally, the District also claimed that "implementation of the proposed project would not result in any inconsistency with the advisory land use plans and policies." (Id., emphasis added.) In other words, the District claimed the project was consistent with the land use plans despite being exempt. That is factually incorrect. The MND misled the public and decision-makers concerning the Project's inconsistency with land use and planning, and thereby thwarted informed public participation and decision-making. (Pub. Res. Code § 21005.)

8. The Stadium Lights, Coupled with the Attendant Increase in Traffic, Noise, Parking Impacts, Trash and Minor Crime Create a Cumulatively Significant Impact on a Historic Neighborhood.

As alluded to above, aesthetics is more than just a visual impact, but a sense of community well-being. Nighttime stadium events bring a whole host of new impacts that previously occurred on an infrequent basis, primarily during the day. The Project will make nighttime use regular and instill a combination of impacts including noise, parking, traffic, trash, and minor crime (graffiti, trespassing, illicit drugs and public urination). (1 AR T-10, 117-165; 2 AR T-105N, 835-36.) The community presented substantial evidence to support a fair argument that the Project and change in use from daytime to nighttime use would have a significant impact on the community.

First, the fact that general "community impacts" does not fall neatly into a category identified in the "form initial study" does not mean that impact does not exist. While "community character" falls most neatly into the general category of aesthetics (Guidelines Appx. G(I)(c) [quality of site and its surroundings]), it also falls into impacts to public services, historic resources, parking and noise. As stated in the note preceding the checklist, "Substantial evidence of potential impacts that are not listed on this form must also be considered." (Guideline Appx. G.) The checklist is intended to be tailored to the Project.

One way to consider the combination of impacts is how these impacts create a *cumulatively* considerable impact on the community. Cumulative impact is defined as "two or more individual effects, when considered together, are considerable or which compound or increase other environmental impacts." (Guidelines § 15355.) In this case, it is not just the direct visual impacts of the lights, it also the cheering, coupled with blaring radios, honking and other noise. (1 AR T-10, 124; 2 AR T-105AA, 943, 947, 956, 963; T-105HH, 994.) But, it is not just noise and lights, it is also the lack of parking, boisterous pedestrians, and illegally parked cars. (1 AR T-10, 155, 162; 2 AR T-105Z, 938; T-105VVV, 1118-32.) It is also the impacts of people driving around looking for parking on narrow streets, hemmed in by canyons. (1 AR T-10, 152, 157, 159; 2 AR T-105AA, 943, 950; T-105VVV 1118.) But it is not just the lights, increased noise, parking problems, and traffic, it is the trash, public urination, illicit drug use and graffiti that is left behind. (3 AR T-105Y, 932, T-105Z, 934, T-105AA, 943; T-105BB, 967, T-105HH, 997.) While Taxpayers contends that each of these impacts is individually significant, the combination will result in a tremendous impact on "a wonderful pedestrian-oriented community where everyone walks and knows their neighbors." (J.A.67.)

The District appeared to recognize how this change in use would have a significant impact on the community, repeatedly asserting that they must be

good neighbors. (*See* e.g., 1 AR T-3, 20, 36, 39, 40.) Nonetheless, the District imposed no conditions or measures to mitigate the impacts other than to address sound impacts from the PA system. (1 AR T-8, 105) Instead, the District promises multiple uncommitted measures it refers to as "design," "operational," or other unspecified "current measures." (1 AR T-32, 448; 1 AR T-10, 110; 1 AR T-10, 112.)

For instance, the District asserts it will employ traffic and crowd control, *as determined necessary by school officials*, to address parking, traffic, neighborhood interferences, and trash. (1 AR T-8, 71; T-14, 24.) The District asserts it will add additional evening flaggers/security personnel to direct traffic while buses are parked on Highland Avenue. (1 AR T-10, 112.) The District asserts it will continue to employ security and utilize traffic control and crowd control to encourage visitors to park within the existing campus. (1 AR T-10, 110.) All such "good neighbor" measures are voluntary, at best. (1 AR T-32, 443, 448.) So far, the school has demonstrated the inability to mitigate community impacts with such "good neighbor" efforts. (*See* 1 AR T-105Y to 105II [feedback from community on multiple events].)

To qualify for a MND, mitigation must be "required in, or incorporated into, the project which mitigate or avoid the significant effects on the environment." (Pub.Res.Code §§ 21081(a)(1), 21081.6(b); Guidelines § 15091 (a)(1)&(b).) The agency "shall provide that measures to mitigate or

avoid significant effects on the environment are fully enforceable through permit conditions, agreements, or other measures" and must adopt a mitigation program to ensure that all the mitigation measures are implemented. (Pub. Res. Code § 21081.6(a)(b).) The purpose of these requirements is to ensure that feasible mitigation measures will actually be implemented, and not merely adopted and ignored. (Lincoln Place Tenants Assn. v. City of Los Angeles, (2005) 130 Cal.App.4th 1491, 1508.)

If anything, the fact that the District makes all these unenforceable promises to act as a "good neighbor" serves to demonstrate that the Project will have a significant impact on the community. Comments from one of boardmember drives home this point:

> [A]re we going to be out there on Saturday morning picking up all the trash… [in] neighbors' front yards after a football game? I would hope so. I would hope that the football team, maybe, might want to take that on as a way to give back to the community.(1 AR T-40, 15-21.)

Such record comments and the failure to incorporate good neighbor "guidelines" as actual mitigation raise a fair argument that the Project will both directly and cumulatively have a significant impact on community character and aesthetics.

B. PROPOSITION 39 BOND MEASURES DO NOT ALLOW OPEN-ENDED OR "CATCH ALL" DEVELOPMENT PROJECTS. STADIUM LIGHTING PROJECTS WERE NOT IDENTIFIED AS PROJECTS TO BE FUNDED FOR HOOVER OR ANY OTHER SCHOOLS.

1. Introduction and Summary of Argument

Allowing school districts to include paragraphs of incidental construction features as catch-all *additional projects* under strict accountability Proposition 39 bond measures serves to stand the law on its head. If so, the special 55% voter-approval exception authorized by Prop 39 would swallow the general required (66.6%) approval requirement set forth in Constitution articles XIIIA, § 1(b)(2) and XXVI, § 18(b).

Proposition 39 was not intended, and Proposition S should not be read, to allow or provide any broad discretionary source of funding for school improvements. The "Smaller Classes, Safer Schools and Financial Accountability Act" bond measure was approved by the state electorate "To ensure that before they vote, voters will be given a list of specific projects their bond money will be used for." (Section 3(c), Proposition 39, effective November 8, 2000; *see* Const. Art XIIIA § 1(b)(3)(B).)

The Prop S bond measure does not include any reference of a project to construct new lighted athletic stadiums. Such inclusion would have been beyond controversial and the District did not propose or list projects that

could tip the balance of reticent and leery voters in these thin financial times. (*See*, 3 AR T-111, 1374-1375, 1390 [careful public polling to couch acceptable bond measure projects].) The omission of stadium lighting from project lists was likely intentional. Tellingly, the bond measure administrative record has no mention of it. The District cannot now "backdoor" controversial projects into expressly stated project lists where they were not disclosed or existing prior to voter approval.

2. The Purpose of the Proposition 39 Constitutional Amendment Unambiguously Intends the Strictest of Interpretation and Implementation

School district bonds intended to be repaid real property taxes must obtain two-thirds voter approval. (Const. Art. XIIIA, § 1(b)(2); Art. XXVI, § 18(b).) However, Proposition 39 reduced approval to fifty-five percent for bonds issued by school districts to pay for certain projects. The fifty-five percent approval applies *only* if the bond proposition submitted to the voters meets the accountability requirements of Proposition 39. (Prop. 39, § 4, as approved by voters, Gen. Elec. (Nov. 7, 2000); Const., Art. XIIIA, § 1(b)(3).) Among other things, such accountability requirements must include *a list of the specific schools projects* to be funded, and a statement that the bond funds may be used only for *those* projects. (Const., Art. XIII A, § 1(b)(3)(A)&(B).)

In conjunction with the passage of Proposition 39, the State Legislature enacted the "Strict Accountability in Local School Construction Bond Act of 2000." (Stats. 2000, ch. 44 (A.B. 1908), set forth at Education Code §§ 15264-15286.) The Act demonstrates the Legislature's intent for strict application of construction projects passed under Proposition 39. (Education Code § 15264(a) ["Vigorous efforts are undertaken to ensure . . . strict conformity with the law."]; § 15264(d) ["[U]nauthorized expenditures of school construction bond revenues are vigorously investigated, prosecuted, and that the courts act swiftly to restrain any improper expenditures."].)

3. Standard of Review and Case Law Precedence Involving Actions to Enforce Proposition 39 Strict Accountability Bond Measures

Judicial review here involves only a question of law. (Lazar v. Hertz Corp., (1999) 69 Cal.App.4th 1494, 1502; Foothill-De Anza Community College Dist. v. Emerich, (2007) 158 Cal.App.4th 11, 19.) The pertinent facts are not in dispute. There is no question about the contents of the administrative record leading up to adoption of the bond proposal (3 AR T-107, 1181 through 4 AR T-134, 2159) and the full text ballot measure submitted to the voters (4 AR T-135, 2160-2256).

In interpreting Proposition S or related statutory provisions, courts are guided by the following principles:

> In interpreting a voter initiative, we apply the same principles that govern our construction of a statute. We turn first to the statutory language, giving the words their ordinary meaning. If the statutory language is not ambiguous, then the plain meaning of the language governs. If, however, the statutory language lacks clarity, we may resort to extrinsic sources, including the analyses and arguments contained in the official ballot pamphlet, and the ostensible objects to be achieved.

(People v. Lopez, (2005) 34 Cal.4th 1002, 1006 (internal citations and quotes omitted); Foothill-De Anza Community College Dist. v. Emerich, (2007) 158 Cal.App.4th 11, 19-20.)

Any bond measure must be read in context with the limitations imposed to it by law:

> It is clear that proceeds of a bond issue may be expended only for the purpose authorized by the voters in approving issue of the bonds." …[ ] The statutes and ordinances under which the public body acts in submitting the bond issue proposal to the voters must be considered with the ballot proposition in determining the extent of this restriction."

(Sacks v. City of Oakland, (2010) 190 Cal.App.4th 1070, 1084.)

There are few reported cases on project accountability challenges under Proposition 39. One court has ruled *project lists* need not be placed in the **actual ballot measure** as long as the "list of projects was prepared and available to voters, coupled with the repeated references to a gymnasium in the ballot arguments." (Committee for Responsible School Expansion v.

Hermosa Beach City School Dist., (2006) 142 Cal.App.4th 1178, 1182, 1190-92 ("Hermosa Beach").)

The Hermosa Beach court determined "it is undisputed that Measure J did not include that list – and omitted construction of a gymnasium among the projects identified." (Id. at 1188.) Nonetheless, the trial and appellate courts ruled the gymnasium project was sufficiently covered under Art. XIII A, § 1(b)(3)(B) because Exhibit B attached to the school board resolution had the gym project listed when approved (id. at 1182, 1189), the ballot arguments for and against Measure J included discussion bond funds would be used to build a gym (id. at 1182), concluding the full project list was not required to be included in the ballot measure itself, as long as there exists such a previous disclosed list. (Id. at 1190-1191.)

In this case, new or replacement stadium lighting projects were not included for any school during pre-bond assessment, resolution consideration, or submittal of bond measure to the voters.

To support use of Proposition S funds for the construction of stadium (or "field") lighting projects throughout the city, the District argues for the mention of "field lighting," contained at the end of the bond measure, to be contained as an additional "list" of projects. Plain language in the bond measure shows those paragraphs contain construction features "incidental to and necessary for" completion of *listed* projects. (4 AR T-135, 2255.)

Taxpayers contends it is the school project lists that control. The District's attempt to create an entire new array of reserved projects from "incidental" construction is inappropriate implementation of the bond measure.

4. New or Replacement Athletic Stadium Lighting Projects Were Not Contained or Contemplated in the Proposition S Bond Measure Project Lists or the Administrative Record Leading up to Adoption.

Neither the list of specific school projects nor the record of the District's consideration and adoption of Proposition S mentions that taxpayer funds would be used for "whole school" athletic facilities reconstruction projects, including new or replacement stadium lighting projects. (3 AR T-107, 1181 thru 4 AR T-134, 2159.)

There was no pre-adoption Board discussion, ballot argument, or any other mention about athletic stadium lighting projects. (*See* discussion, Hermosa Beach, *supra*.) Stadium lighting does not appear on any individual school assessment report used to support the "facilities needs" for the bond measure. (*See*, e.g. "Facilities Management" report for Prop S containing full consideration of the LRFMP used to form the listed projects, 3 AR T-114, 1432-1438, and detailed project lists thereafter at 1458-1544.) "Stadium lighting" is not mentioned in any decisional document or record for any District high school project or school site, including relevant pre-bond and

actual bond measure documents. (E.g., 3 AR T-114,1524-1532; 4 AR T-119, 1641-1656; 4 AR T-131, 2082-2097.)

The sole mention of "field lighting" appears on the second-to-last page of the Proposition S bond measure below a heading entitled "Additional Projects." (4 AR T-135, 2255.) The "additional projects" heading pertains to three listed bullet-point projects, including (1) classrooms or schools for new housing developments in the **Miramar area**, (2) classrooms, labs and facilities for **specialized instruction**; and (3) the construction of **classrooms and schools in the downtown** area. (4 AR T-135, 2255, emphasis added.) This is consistent with the Prop S resolution adopted by the District whereby those 3 listed additional projects were similarly to be inserted. (3 AR T-114, 1553; 4 AR T-123, 1733; 4 AR T-130, 1933.)

The next paragraph on page 96 states in unambiguous plain language that the following bullet point items are intended as "other costs incidental to and necessary for completion **of the listed projects**. . . including:…" (4 AR T-135, 2255.) "Field lighting" is neither incidental to, nor necessary, for completion of Hoover or any other school stadium upgrade projects. Nor should the term "field lighting" be construed as a stand-alone optional District-wide project.[10]

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[10] The District now submits it could build *any* athletic ball field, playgrounds, or any other "field lighting" project at *any* school under Prop S. (J.A. 287-288 [*Admission No. 5*].)

It would be an impermissible expansion of Proposition S (including its project lists, administrative record, and ballot disclosures), under the restrictions of Proposition 39, to accept the District's argument that every school in the District is entitled to have a project including the additional facilities found on the last two pages of the ballot measure. (4 AR T-135, 2255-2256.)

Proposition S expenditures for *stadium lighting projects* was disclosed or not authorized as being one of (or any part of) the Prop 39 projects listed.

C. SOLEY POSTING THE AGENDA AT HEADQUARTERS AND ONLINE WAS LEGALLY INSUFFICENT NOTICE FOR THE SCHOOL PROJECTS' GENERAL PLAN AND ZONING EXEMPTIONS.

The District provided legally defective public notice for its land use and zoning decisions affecting the specific school sites and nearby properties. Reasonable notice and an opportunity to be heard is required for such quasi-adjudicatory actions involving specific locations and properties, which directly or indirectly affect property rights. (Horn v. County of Ventura, (1979) 24 Cal.3d 605, 614-615; Scott v. City of Indian Wells, (1972) 6 Cal.3d 541.)

The District simply provided 4 days' notice by posting the agenda on the window of the District's headquarters and on its webpage Friday

afternoon, May 6, 2011. (J.A.385, 401; *see* detailed discussion of notice given for the Exemption Action, Section III.B.4, *ante*.)

The Supreme Court has repeatedly held that specific projects impacting zoning and land use plans constitute actions which may deprive adjacent property owners significant property interest. For example, in the context of a conditional use permit, the Supreme Court explained: "Zoning does not deprive an adjacent landowner of his property, but it is clear that the individual's interest in his property is often affected by local land use controls and …[must be] given an opportunity for a hearing *before* he is deprived of any significant property interest." (Scott v. Indian Wells, (1972) 6 Cal.3d 541, 549; *see also* Topanga Assn. for a Scenic Community v. County of Los Angeles, (1974) 11 Cal.3d 506, 517 [adjacent owners have protected interest in zoning variances].) If the Supreme Court felt that zoning changes and variances could affect significant property rights, then surely an action to exempt one or more aspects of a school's "classroom facilities" from zoning ordinances cannot be so minor as to dispense with notice and due process to adjacent land owners.

Equally important to the reasonable notice doctrine, the two-line sentence generally describing the Exemption Action as a "Resolution Overruling Zoning Ordinances of the City of San Diego Applicable to the

Use, Modernization, and Construction of Facilities at Various District High Schools," is not specific enough to provide notice to affected owners. (Horn at p. 617 [notice must be "reasonably calculated to afford affected persons the realistic opportunity to protect their interests"].) At a minimum, the District should have published in a newspaper and mailed notice to people within 300 feet of the school projects, describing what portions of each individual project would be exempt from which general plan provision and local zoning ordinance.

D. THE DISTRICT'S SECTION 53094 EXEMPTION ACTION IS IMPERMISSIBLY OVERBROAD BY FAILING TO IDENTIFY WHAT FACILITIES WERE TO BE EXEMPT FROM WHICH ZONING LAWS AND GENERAL PLANS POLICIES.

Section 53094 requires clearly delineated projects as prerequisite to school districts exempting "classroom facilities" (or whole development projects) from local zoning and planning laws. The public, local agencies, and school decision-makers must be made aware of both the "facilities" and laws to be exempted for meaningfully consideration and decisions to be made.

Section 53094(b) may be invoked by a school district where:

> A school district, that has complied with the requirements of Section 65352.2 of this code and Section 21151.2 of the Public Resources Code, by a vote of two-thirds of its

> members, may render a city or county zoning ordinance inapplicable to a proposed use of property by the school district.

An additional but separate mandate of Section 53094(b) limits any such exemption:

> The governing board of the school district may not take this action when the proposed use of the property by the school district is for nonclassroom facilities, including, but not limited to, warehouses, administrative buildings, and automotive storage and repair buildings.

Nowhere in the decision or documents made part of the Exemption Action is any meaningful description of either (1) the "classroom facilities" or (2) the land use or zoning ordinances, sought to be exempted. (J.A.249-250; J.A. 263-271.)

The wholesale Exemption Action set forth in Section 2 states:

> That San Diego Unified School District hereby renders inapplicable <u>any</u> zoning ordinances of the City of San Diego including, <u>without limitation</u>, the City's Zoning Ordinances and General Plans, which would otherwise be applicable to the Projects or School Sites.

(J.A. 249, emphasis added.)

This overbroad "without limitation" Exemption Action potentially encompasses (1) every zoning ordinance of the City, (2) any applicable general and community plan, (2) any whole or part of "educational facilities"

contained in any of the "Projects," and (4) any educational facilities[11] that may be contained within any of the "School Sites."

At least three irregularities and legal defects arise from the description of the District's action. Firstly, exemption actions under Section 53094 are only allowed for statutory "classroom facilities" under Section 53094(b), not "educational facilities" as that term is defined in the Education code. (Ed. Code § 94110(e)(1).) [defined to include, e.g., dormitory, dining hall, student union, administration building, academic building, library…]; *see also*, Ed. Code § 17173 (f)(4),(f)(6)&(f)(7) [includes "administrative offices," "maintenance, storage, or utility facilities," and "parking, and supportive service facilities..."].) Thus, some education facilities clearly cannot be exempt under Section 53094.

Secondly, the "Projects" are not sufficiently defined to discern what they *currently* include. While one or two of the projects have been defined, environmentally reviewed, and approved (J.A.274-282 [Hoover and Madison]), at least seven of the other schools, do not match up with an identified project in the Prop S project list. (J.A.243-247 [¶¶ 3, 4, 7-10].) Even if they did, as demonstrated by this case, every school project may include any array of the catch-all "additional" facilities found in the

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11 The recitals of the Resolution suggests it applies only to "educational facilities as required by Government [sic] Section 53094." (J.A. 249 [recital ¶3].)

"incidental to and necessary for" provision located at the end of the bond measure. (*See* discussion, Section VII.B, *ante*.) The lack of any reference to Prop S in the Exemption Action further illustrates a faulty reliance that applicable "project features" for the Projects are sufficiently described in the Prop S project lists. (J.A.513.)

Reliance on the Prop S project lists are additionally legally defective because the Hoover project includes, e.g., maintenance equipment, storage building, city sidewalk project, athletic services building, and proposed parking lot developments (J.A.275-276) – facilities which are prohibited under Section 53094(b). The Madison High project also includes nonclassroom facilities such as field storage building, concession areas or snack bars, proposed parking lot, and bus shelter developments. (J.A.281-282.)

There is no way for District decision-makers, the public, or city officials to evaluate what "classroom" or "nonclassroom" facilities might be included, and the pros and cons of exempting such facilities. (J.A.243-247 [¶¶ 3, 4, 7-10 – lack of available information on seven or more schools and projects].)

Compounding the fact the exemption applies to undefined *future* projects, the District exempts whole school sites, such as the "La Jolla High School Whole Site Modernization" project. (J.A.246-248, 251.) Once again,

Section 53094 prohibits exemption of "nonclassroom facilities," some of which certainly will be contained in "whole school" sites.

The decision of the District – to exempt first and disclose and analyze impacts *later* – is a backwards approach with regards to CEQA and Section 53094 zoning exemptions which this Court should not endorse. If upheld, the District's preemptory exercise of the limited exception authorized by Section 53094(b) would swallow the general rule set forth in Section 53091.[12]

As an apparent case of first impression, Taxpayers has not located any case law authority addressing the legal sufficiency of the description of the *project*, *classroom facility*, and *zoning laws* for purposes of a school district exemption action under Section 53094. The trial judge similarly noted no judicial precedence and suggested this is a matter that should be decided on appeal. (R.T. 70-71.)

The reasoning and ruling in the condemnation case of City of Stockton v. Marina Towers, LLC, (2009) 171 Cal.App.4th 93, is instructive and applicable here. The court in City of Stockton described the issue and problem as a "condemn first, decide what to do with the property later" case. (Id. at p. 99.) In that case, the city had chosen parcels, adopted reasons of necessity, but never sufficiently described what it was going to do with the

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[12] Section 53091(a), states: "Each local agency shall comply with all applicable building ordinances and zoning ordinances of the county or city in which the territory of the local agency is situated."

property. Instead, the city simply listed a number of statutes and set forth various *possible purposes* for condemning the property. (Id. at p.110-111.)

Similarly here, for most of the exempted projects, the District has created a title and name for *future* proposed projects, but without identifying any specific facilities, or zoning or land use problems relating to the same. As a corollary, this Court could name the District's process, "exempt first, then identify the facilities and exempted ordinances later."

The Exemption Action is so overbroad and legally infirm that it is impossible for School decision-makers, the public, local agencies, and reviewing courts to determine is being appropriate applied to "classroom facilities." Because the decisionmakers have no idea what potential zoning and land use conflicts may arise, but are exempting the projects nonetheless, the action constitutes very definition of arbitrary and capricious.

E. THE EXEMPTION ACTION FAILED TO COMPLY WITH CEQA AND FACTUALLY SUPPORTS THAT TAXPAYERS PREVAILED ON ITS THIRD CAUSE OF ACTION.

1. The Exemption Action is a "Project" and Must Undergo CEQA Review Prior to Final Approval.

The District made no determination regarding CEQA compliance prior to approval of the Exemption Action. (J.A.268, 271) Because the

District did not prepare any type of CEQA document or mention any CEQA exemption in conjunction with adopting the subject Resolution, the only question for the Court is whether CEQA applies at all. If CEQA does apply, then the District abused its discretion by failing to proceed in a manner required by law, and the Exemption Action must be rescinded. (Code Civ. Proc. §§ 1085, 1094.5; Pub.Res.Code §§ 21168, 21168.5, 21168.9.)

First, there cannot be a dispute that the Exemption Action is both discretionary and an approval. (Guidelines §§ 15357 ["discretionary"]; 15369 ["ministerial"], 15352 ["approval"].) The District has not argued the Exemption Action itself is exempt under any categorical or statutory exemptions in CEQA. Thus, the only question is whether the Resolution constitutes a project.

Whether a particular activity is a "project" is a question of law which courts afford agencies no deference. (Fullerton Joint Union High School Dist. v. State Bd. of Education, (1982) 32 Cal.3d 779, 795.) The term "project" is given a broad interpretation in order to maximize protection of the environment. (McQueen v. Board of Directors, (1988) 202 Cal.App.3d 1136, 1143, disapproved on other grounds.) Project is defined in CEQA as any activity that may culminate in possible physical changes to the environment. (Guidelines § 15378; Pub. Res. Code § 21061; Friends of Mammoth v. Board of Supervisors, (1972), 8 Cal.3d 247, 265.) As

discussed by the Supreme Court, a "project" includes almost every conceivable action, including those that could be characterized and simply shuffling paper. (Bozung v. Local Agency Formation Com., (1973) 13 Cal.3d 263, 277, superseded by statute on other grounds.) If the underlying results of an agency's action could foreseeable result in either direct or indirect effects on the environment, then the action must be considered a project. (Id.)

In this case, the Exemption Action seeks to exempt 12 projects from the City laws and plans. Numerous provisions of San Diego's zoning codes and community plans were specifically adopted to protect the environment, and character of the community. (*See*, e.g., J.A.84 (purpose of parking regulations to "reduce traffic congestion and improve air quality…the preservation of community character.").) Zoning ordinances are instrumental in protecting the health, safety and welfare of residential communities. (Sechrist v. Municipal Court, (1976) 64 Cal.App.3d 737, 746.)

Just because a school district *can* exempt a project under Section 53094 from compliance with local zoning ordinances, does not mean that the impacts caused by such inconsistencies need not be addressed and possibly mitigated under CEQA. While the mere fact a project is inconsistent with land use controls does not automatically create a significant impact on the environment (Lighthouse Field Beach Rescue v.

City of Santa Cruz, (2005) 131 Cal.App.4th 1170, 1207), inconsistencies with land-use plans often demonstrate a fair argument that a project may have a significant impact on the environment. (Pocket Protectors, *supra,* 124 Cal.App.4th at 931-32.) Land use plans seek to protect important aspects of the physical environment (e.g., traffic, community character). CEQA requires a proper discussion of such inconsistencies with land use plans so that alternatives and/or mitigation measures can be considered. The failure to do so constitutes an abuse of discretion. (Napa Citizens for Honest Government v. Napa County Bd. of Supervisors (2001) 91 Cal.App.4th 342, 379.)

Exempting 12 projects, the majority of which are "stadium and sports facility improvements" from zoning ordinances may have a significant impact on neighborhoods which have relied on height limitations, use restrictions, setbacks, parking requirements, and other land use controls to maintain a quality physical environment. The simple fact the 12 projects require an exemption indicates that one or more aspects of the projects do not comply with adopted zoning and community plans. While the District may have the authority to exempt one or more "classroom facilities" from zoning ordinances pursuant to Section § 53094(b), such ability does not diminish the fact that such projects, by not conforming to the zoning ordinances, may have a significant impact on the environment. The District

was required to comply with and make a determination under CEQA prior to taking action on the Exemption Action.

2. It Is Not Premature to Conduct CEQA Review and Make Legally Appropriate CEQA Determinations on Matters or Underlying Projects Which are the Subjects of Zoning and Land Use Exemptions

The court should consider not only whether an action was a "project," but also whether CEQA review is premature. (Fullerton, *supra,* 32 Cal.3d at 797.) "Statements must be written late enough in the development process to contain meaningful information, but they must be written early enough so that whatever information is contained can practically serve as an input into the decisionmaking process." (Id., citing No Oil, Inc. v. City of Los Angeles, *supra*, 13 Cal.3d 68, 77, n.5.)

In this case, the District argues that CEQA should not be required because "there is no feasible way to conduct a CEQA review of the Exemption. Without actual project specifics before the lead agency, what would be studied?" (J.A.387.) The District argues it has no way of knowing whether there will be an environmental impact for any particular project. (Id.)

As discussed above, for an exemption to be valid under Section 53094, it requires the District to know exactly what it is exempting. There is

no way for District decision-makers to consider whether an exemption is necessary or appropriate without knowing what the exemptions are or what facilities they pertain to. Approving an exemption for unknown reasons on undefined projects elements meets the very definition of arbitrary and capricious. Considering that the Exemption Action was passed on a consent calendar, without discussion, staff presentation, or informative staff report, this may be the case.

However, it seems inherently improbable the District would list projects and undertake an Exemption Action without knowing sufficient information to conduct CEQA review. Thus, it is more likely the District is simply choosing not to disclose the exemption details of the 12 projects. (*See* e.g., 4 AR T-131, 2082-97 [high school project descriptions for bond].)

Finally, the time for conducting CEQA is *before* any approval of a project subject to CEQA. (Guidelines § 15004.) The Exemption Action is not only an "essential step," but impermissibly segments and divides project environmental review and decisions for each of the projects. (Fullerton, *supra*, 32 Cal.3d at p. 797; Bozung, *supra*, 13 Cal.3d at p. 283-84.) The District cannot "take any action that gives impetus to any 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." (Guidelines § 15004(b)(2)(B).)

3. Taxpayers is a Prevailing Party on its Third Cause. The District only Took Action to Exempt Itself Because Taxpayers Brought Suit.

During circulation of the MND and processing the Project approvals, the District asserted the *entire school district*, not just the Project, was exempt from city zoning laws and adopted plans under Section 53094.(1 AR T-8, 91.) However, neither the District nor the Hoover Project was exempt during the time of Project processing and final agency action. (Section 53091, footnote 12 *ante*.) Taxpayers specifically brought an action alleging the District was not exempt, and therefore failed to proceed in a manner required by law. (J.A.15.)

When the complaint was filed on February 9, 2011, Taxpayers was both factually and legally correct that the District was not exempt from compliance with city zoning ordinances and community plans. (*See*, J.A. 291 [Admission No. 14].) It was not until May 10, 2011, in response to Taxpayers' lawsuit, that the District took action to exempt the Hoover project along with 11 other high school projects. The District's attempt to make the lawsuit moot, after the filing of litigation, through a post-approval exemption renders Taxpayers the prevailing party in its claim. (*See*, e.g., Graham v. DaimlerChrysler Corp., (2004) 34 Cal.4th 553, 567.)

The trial court held that there was insufficient evidence that the May 10, 2011 exemption was the result of the litigation. The court essentially took words in the MND stating the District was *currently* exempt to mean that *future* board action would change the District's legal status. The trial court ruled the District "intended to proceed with the Project, and that it believed that the project would, when the formal Resolution was passed, qualify for the statutory exemption permitted by state law." (J.A.512.) Such is not a reasonable interpretation of the District's statement in the MND. (1 AR T-8, 91.) Further, it is impossible and improper for the court to know or presuppose the board would pass an exemption resolution by two-thirds majority. Regardless of whether the exemption action is legal or not, Taxpayers succeeded on this litigated claim.

In Belth v. Garamendi, (1991) 232 Cal.App.3d 896, 899, a public records case, the Department of Insurance denied access to certain files allegedly based on confidentiality. After litigation was filed, the Insurance Commissioner contacted the subject insurance company and obtained a voluntary waiver of confidentiality, and produced the documents to the plaintiff, effectively mooting out the PRA enforcement action. (Id., at 902.) Because the Insurance Commissioner allegedly obtained a waiver, and were not compelled to release the documents, the trial court denied plaintiff's motion for attorney's fees. (Id., at 900.) The appellate court disagreed,

holding, "A plaintiff is considered the prevailing party if his lawsuit motivated defendants to provide the primary relief sought or activated them to modify their behavior." (Id., at 902.)

Similarly here, the District indicated no intent prior to January 11, 2011 to take any future exemption action, acted in response to the lawsuit, mailed a copy of the exemption action to Taxpayers' counsel (J.A.245 [¶6]), and then argued its case that the third cause of action was moot, but had no causal connection and was unrelated to the Exemption Action. (J.A.381-382). It was necessary to file the action and Taxpayers prevailed on its third cause of action.

VIII.

CONCLUSION

Taxpayers submits that this matter should be remanded to the trial court with directions to enter a ruling and order granting a petition for writ of mandate and judgment in its favor directing the District to set aside its January 11 and May 10 decisions consistent with this Court's ruling.

Taxpayers requests its costs on appeal.

Respectfully Submitted,

Dated: April 20, 2012

LAW OFFICE OF CRAIG A. SHERMAN

Craig A. Sherman, Esq.
Attorney for TAXPAYERS FOR
ACCOUNTABLE SCHOOL BOND SPENDING

IX.

CERTIFICATION OF WORD COUNT COMPLIANCE

Counsel of record for appellant, Craig A. Sherman, hereby certifies that pursuant to California Rules of Court, Rule 8.204, subd. (c), that the above *APPELLANT'S OPENING BRIEF* has been produced using 13-point Roman type, and contains 13,953 words (including footnotes, headings, and citations), which is less than the 14,000 words permitted by this rule, as counted by the word counter of the computer program used to prepare the brief.

Dated: April 20, 2012

LAW OFFICE OF CRAIG A. SHERMAN

Craig A. Sherman, Esq.
Attorney for Appellant
TAXPAYERS FOR ACCOUNTABLE
SCHOOL BOND SPENDING

X.

DECLARATION OF SERVICE

Appeal No. D 0060999
Court of Appeal, Fourth District, Division One
San Diego Superior Court - Case No. 37-2011-00085714
Taxpayers for Accountable School Bond Spending v.
San Diego Unified School District

I, the undersigned, declare under the penalty of perjury that I am over the age of eighteen years, my place of business is in the County of San Diego, located at 1901 First Avenue, San Diego, CA, and I am currently the attorney to this action; that I served the below-named person(s) the following document(s):

APPELLANT'S OPENING BRIEF

On April 20, 2012 on the following person(s) in a sealed envelope or package, addressed as follows:

**** SEE ATTACHED SERVICE LIST ****

in the following manner:

1) ☐ By sending via overnight mail by the courier Fed Ex Express.

2) ☐ By hand delivering or having delivered by courier, during usual business hours, copies to the office(s) of the above-named addressee(s), and leaving said package or envelope with the person who was apparently in charge.

3) ☒ By placing a copy in a separate envelope, with postage fully pre-paid, for each person and address named above and depositing each in the U.S. Mails at San Diego, California.

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

Executed on April 20 2012 at San Diego, California.

Paul Best

SERVICE LIST

Appeal No. D 0060999
Court of Appeal, Fourth District, Division One
San Diego Superior Court - Case No. 37-2011-00085714
Taxpayers for Accountable School Bond Spending v.
San Diego Unified School District

Cameron Ward, Esq.
Mark K. Kelley, Esq.
DANNIS WOLIVER KELLEY
71 Stevenson Street, 19th Floor
San Francisco, CA 94105
Tel.: (415) 543-4111
Fax: (415)543-4384

Counsel for Respondent
SAN DIEGO UNIFIED SCHOOL DISTRICT

(Via U.S. Mail)

Hon. Timothy B. Taylor
c/o Civil Appeals Division
San Diego Superior Court
220 Broadway, Room 3005
San Diego, CA 92101

(Via U.S. Mail)

Clerk of the California Supreme Court
Ronald Reagan Building
300 So. Spring Street, 2nd Fl.
Los Angeles, CA 90013-1233

(via Email)
http://www.courts.ca.gov/7423.html

Ms. Kahala D. Harris, Attorney General
State of California
Office of the Attorney General
1300 I Street, Suite 1101
Sacramento, CA 95814

(Via U.S. Mail)