No. S210950

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

TAXPAYERS FOR ACCOUNTABLE SCHOOL BOND SPENDING Plaintiff and Appellant, v. SAN DIEGO UNIFIED SCHOOL DISTRICT Defendant and Respondent.	No. S210950 Fourth Appellate Dist, Div. 1 No. D060999 San Diego Co. Superior Court Case No. 37-2011-85714

ANSWERING BRIEF TO PETITION FOR REVIEW

After a Decision by the Court of Appeal
Fourth Appellate District, Division One, Case No. D060999

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I.

INTRODUCTION

Review of the Proposition 39 issue should be denied for two reasons. First, the Court of Appeal correctly found, after reviewing the entire bond measure and decisional record, that petitioner proceeded with a project different from what was disclosed to and approved by the voters. Second, the Court of Appeal's manner and standard of review of the bond measure is consistent with all relevant authorities on the issue, comports with the basic strict contractual review standard required of bond measures, and does not otherwise present any issue worthy of Supreme Court review.

Petitioner incorrectly claims there is a conflict in the lower courts over the manner that Proposition 39 bond measures should be reviewed. There is no conflict between this instant case and the other two reported court decisions on Proposition 39.[1] All courts have required "projects" to be succinctly listed and disclosed to meet the threshold of "specific school facilities projects" allowed to be funded under California Constitution, article XIIIA, section 1, subdivision (b)(3)(B).

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[1] (Foothill-De Anza Community College Dist. v. Emerich, (2007) 158 Cal.App.4th 11; Committee for Responsible School Expansion v. Hermosa Beach City School Dist., (2006)142 Cal.App.4th 1178.)

The ruling on the subject Proposition 39 bond measure (Measure S) involves a localized issue on a particular bond measure covering one of the largest school districts in the state. After a thorough review of the entire bond measure, and administrative records including the requisite pre-adoption assessments and resolution adopting Measure S, the Court of Appeal found that athletic field or sport facilities stadium lighting projects were not listed or disclosed to the voters anywhere in bond measure or decisional record.

The Legislature intended a strict application of taxpayer bond-funded school construction projects under Proposition 39 according its corollary enactment of the "Strict Accountability in Local School Construction Bond Act of 2000." [2] Notwithstanding the Constitutional and Legislative enactments, petitioner incorrectly requests this Court both (1) apply a different liberal standard of review allowing an expansive reading and *post hoc* discretion for bond measure expenditures, and (2) make a different factual determination of the Measure S expenditure than determined by the Court of Appeal after its *de novo* review of the bond measure and administrative record.

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[2] *See*, e.g. Cal. Ed. 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."].)

Petitioner fully knows how to disclose a Proposition 39 project for stadium renovation and upgrades projects - just as it listed the "three compartment sink and hand sink in the kitchen" and "[r]enovate/replace stadium bleachers, including press box." If intended, petitioner would simply have listed "stadium lighting" in the school specific project list.

As determined by the Court of Appeal, nowhere in the bond measure does the School district list or suggest a project regarding *new or replacement stadium lights*. Since adoption of Measure S, the school district has decided to create an additional stadium improvement not disclosed to or approved by the voters. The undisputed intent and purposes of Proposition 39 does not allow petitioner to create undisclosed and additional projects *post hoc* under a claim of "legislative prerogative" or *right* to determine the actual projects *later*.

Since the initial opinion of the Court of Appeal, petitioner seeks to recast the stadium lighting project as a general "accessibility" project. This eleventh-hour change in argument not only fails factually, but procedurally it should be precluded from being raised for the first time in its Petition for Rehearing and Petition for Review here.

As a second basis for review, petitioner argues that CEQA is inapplicable to parking availability and the secondary/indirect impacts arising from project-created cars driving around, parking, and disrupting

persons from using and enjoying their environments. To the contrary, CEQA was enacted for such purposes – to protect the physical and aesthetic values of environments. (Cal. Pub. Res. Code § 21001, subd. (b).)

Petitioner's claimed conflict is based entirely **its own** misreading and misapplication of the court's decision in San Franciscans Upholding the Downtown Plan v. City and County of San Francisco, (2002) 102 Cal.App.4th 656. The Court of Appeal correctly explains and distinguishes petitioner's perceived conflict in the Opinion by pointing out the specific facts and limitations of the San Franciscans case. Even the paragraph latched onto in the Opinion by the petitioner reaffirms the CEQA rule that *secondary effects arising from physical impacts may also be considered to determine if the physical impact is significant*. (CEQA Guidelines, Cal. Code Regs, title 14, §§ 15382, 15064, subd.(e).)

There is nothing review-worthy about the Opinion criticizing San Franciscans and limiting that ruling to its own terms. Unlike San Franciscans, this instant case involves a **Negative Declaration** and one in which the Court of Appeal made a *de novo* record review and factual determination that the school district's CEQA studies and environmental review ignored existing conditions, artificially lowered expected attendance, and considered none of the potential offsite physical impacts to the adjacent residential area. No substantive similarities can

reasonably be made between the defective **Negative Declaration** in this case as opposed to the fully studied and substantially mitigated **Environmental Impact Report** in San Franciscans. Petitioner ignores the heightened "fair argument" standard of review employed by the Court of Appeal in this case and factually must admit that its study for the Negative Declaration omitted concerns regarding offsite impacts arising from its project. There is no conflict in the lower courts on any of these issues and thus review should be denied.

II.

THERE IS NO CONFLICT IN ANY DECISIONS OF THE LOWER COURTS REGARDING PROPOSITION 39 SCHOOL BOND MEASURES

Petitioner argues that there is an impermissible conflict in the lower courts regarding the purpose and application of Proposition 39 school bond measures. As indicated in the Opinion and the two decided cases on the subject of Proposition 39, there is no such conflict. Rather, petitioner seeks to create a conflict based on a narrow and fact-driven question regarding the contents of the San Diego school district bond measure.

A. The Opinion Does Not Conflict with Other Reported Case Law Regarding Proposition 39 Bond Measures

There are few reported cases on project accountability challenges under Proposition 39. In the first decided case, the court ruled that project lists need not necessarily be placed in the actual ballot measure so 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. ("Hermosa Beach"), (2006) 142 Cal.App.4th 1178, 1182, 1190-92.)

The Hermosa Beach court factually 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.) However, the court accepted and ultimately ruled that the gymnasium project was sufficiently covered under Cal. Constitution, article XIIIA, § 1, subdivision (b)(3)(B) because both the attached exhibit to the school board resolution had the gym project listed when approved (id. at 1182, 1189), and the arguments contained in the ballot for and against Measure J included discussion that bond funds would be used to build a gym. (Id. at 1182.) The sole and substantive holding of the Hermosa Beach court is that the "project list" need not be contained in the ballot measure itself

as long as the list existed, was referenced, and had been previously disclosed and available to the voters. (Id. at 1190-1191.)

In this instant case, based upon the specific factual contents of the bond measure and decisional record, the Court of Appeal could not similarly find that new or replacement stadium lighting projects were included in any pre-bond assessment, resolution, or arguments for or against the bond measure submitted to the voters. The record in this case is devoid of such factual support and thus there is no conflict of application of law or fact with the Hermosa Beach decision.

Similarly, there is no conflict with the Opinion and the only other reported decision substantively considering Proposition 39 as rendered in Foothill-De Anza Community College Dist. v. Emerich, (2007) 158 Cal.App.4th 11.

In Foothill, the court rejected a facial challenge to the entirety of the bond measure based on plaintiffs' demand for more specificity of the project lists such as identifying which doors would be repaired, which roofs would be repaired or replaced, or what accessibility standards would be implemented:

> it is unnecessary to inform the voters *which buildings* will receive new fire safety doors or *which roofs* will be replaced and which will be repaired. That is minutiae that the voter has no expertise or need to consider. Furthermore, requiring such minute detail as defendants propose would be impractical. By the time the District is assured of the bond

> proceeds, the roof that might have been repaired may now need to be replaced; or safety and accessibility renovations may need to be revised to comply with changing regulations.

(Foothill, 158 Cal.App.4th at 24.)

In this case, the Court of Appeal ruled that the project list did not contain or disclose *any* new or retrofit athletic stadium lighting projects as a part of the bond measure list, or any other particular listed facilities projects could reasonably be connected with athletic stadium lighting projects. The Court of Appeal correctly rejected the school district's attempt to shoehorn athletic stadium lighting projects under a generic category and label of an "accessibility" project.

Contrary to the facts in Foothill, this instant lawsuit does not involve a type or category of *projects* in which final locations had just not yet been determined. (Foothill, at 24.) Rather, here the Court of Appeal determined that stadium and field lighting projects were not listed or disclosed under either a Part One **general** athletic stadium accessibility, code compliance or upgrade "type" of project, or **specifically** as a Part Two listed project for particular identified schools, or Hoover. The Opinion does not in any way conflict with Foothill. With Measure S not identifying new or replacement stadium lighting for any listed project, the facts and holding of Foothill related to which schools may be the beneficiary of specific listed projects is just not

present in this case.[3] Whether stadium lighting is included and intended for new or upgraded athletic stadiums is not "minutiae" for the purposes of Measure S or within the meaning in Foothill.

As additionally pronounced in Foothill, the Opinion of the Court of Appeal's here is on par and consistent with the rule of law and interpretation to be given to Proposition 39 measures.

Both courts similarly concluded that a sufficient *specific project* list must be presented to apprise the voters what they agreed to be funded with their tax dollars.

> The voters approved the bond proposition that was printed in the voter information pamphlet. Any future changes would have to be consistent with the projects specified in the proposition the voters approved. In the event the District exceeds the authority granted by the voters' approval, the Legislature has provided a separate remedy. (Ed. Code, § 15284.)

(Foothill, 158 Cal.App.4th at 24.)

As further explained in Foothill and adopted by the Court of Appeal here, it is the **project lists** for each school that control:

> "the initiative was intended to make it easier to pass school bonds, the proceeds of which would be used to upgrade school

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[3] The Court of Appeal correctly rejected, and petitioner has since abandoned, the primary and original argument that "field lighting" was a stand-alone independent project as set forth in a section allowing "…other costs incidental to and necessary for completion of the listed projects…" despite a vague mention in this section, athletic stadium lighting projects were not "tethered to" any of the listed projects.

> facilities, reduce class size, and improve safety, and to ensure that district boards actually spent the bond proceeds on the projects the voters approved. That means that the list of projects submitted to the voters must be specific enough that the voters know what it is they are voting for and the auditors know how to evaluate the district's performance."

(Foothill, 158 Cal.App.4th at 23-24, emphasis added.)

In sum, there is no conflict of law, or the application of the law, in any reported decisions that needs correction or is worthy of review by this Court.

B. There is No Incorrect or Conflicting Application or Interpretation of Law (Regarding Proposition 39 or Other Bond Measures Interpretation) Warranting Supreme Court Review: The Court of Appeal Correctly Considered the Entirety of the Proposition S Bond Measure

As admitted by petitioner, the "Opinion stated correctly the laws of initiative language interpretation." (Petition at 24.) Notwithstanding the absence of any need for this Supreme Court to correct any lower court conflict of law, petitioner seeks review on the basis the Court of Appeal *misapplied* the law to the facts of this case. As the record and Opinion reflects, petitioner's argument has no merit and review is not warranted.

Legally, the Court of Appeal correctly conducted its independent duty to read the bond measure to see if stadium lighting projects were

sufficiently contained in the school district's Proposition S safety, accessibility and code compliance bond measure. Nowhere in the Petition does petitioner contend that the Court of Appeal applied a manner or standard of review different from the Hermosa and Foothill cases. Petitioner's perceived conflict and problem with the Opinion is that it simply does not approve of the fact-finding conclusion and decision reached.

As more fully presented above in Section II.D *post*, until the Court of Appeal's decision was rendered, petitioner had always argued the incidental project elements containing field lighting were "additional projects" applicable to all schools. (*See*, e.g. Respondent's Brief at 32-34 citing AR 2255.)[4]

The Court of Appeal directly and factually answered petitioner's assertion:

> Contrary to District's assertion, new "field lighting" for Hoover's football stadium is *not* an independent, specifically listed project of its own in Proposition S. Rather, "field lighting" must be tethered to, and based on, a listed project expressly authorized elsewhere in Proposition S. Absent that tether, the use of Proposition S bond proceeds to pay for "field lighting" is not authorized for Hoover's football stadium.

(Opinion at 15.)

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[4] This "incidental costs" section of the bond measure even contains a possible listed project feature amounting to "etc." at the end of the subject paragraph. (AR 2255.)

However, the Court of Appeal did not end its inquiry there. Instead, it extended its inquiry and looked to other parts of the safety, accessibility, and code compliance measure to see if the stadium lighting project was reasonably contained in any of the listed projects in either Part One, Part Two, or any other part of the Proposition S bond measure.

> Because the projects specifically listed in and authorized by Part Two for Hoover's football stadium, as well as the projects specifically listed and authorized by Part One for all school sites, as we concluded above, do not include stadium field lighting, we look to other language in Proposition S that arguably could authorize that lighting.

(Opinion at 14.)

Giving petitioner the widest latitude possible, the Court of Appeal was also willing, and did, correctly apply the standard that it "may resort to extrinsic sources, including the analyses and arguments contained in the official ballot pamphlet, and the ostensible objects to be achieved." (Opinion at 8.)

However, on the record before it, there was nothing in the ballot measure, arguments for or against its adoption, or any of the required pre-bond assessments which included a stadium lighting project for Hoover.[5]

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[5] The constitutionally required pre-bond needs "assessment" (Art. 13A, § 1, subd. (b)(3)(B)) did not include stadium or field lighting. The only Proposition S projects from the pre-bond

C. There is No Incorrect or Conflicting Application of Fact: The "Conflict" Argued by Petitioner Arises from Isolated and Misconstrued Statements of the Court of Appeal, Not a Conflict in Lower Court Decisions.

Despite the above-described correct application of law, petitioner argues the existence of an internal contradiction in the Opinion based on the court's refusal to read Part One of the bond measure in an expanded and open-ended manner newly argued by petitioner. Notwithstanding the multiple permutations of its arguments, the conflict urged by petitioner is just not present.

Focusing on two sentences of the Opinion, petitioner now argues the Opinion should have concluded that new field lighting was authorized for projects listed under Part One, and there is no justification for requiring that field lighting be singled out for a named school in Part Two. (Petition at 24-25.)

Notwithstanding petitioner's incorrect reading of the Opinion and its demand for a more expansive reading of the bond measure, as framed

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assessment were "Critical Projects Required for Code and Safety" which ultimately made it on to the Measure as "Accessibility, Code Compliance Upgrades." (*See* AOB at 3-5, 49-50 and citations to A.R. 1432-1438 explaining the history of the Long Range Facilities Master Plan its incorporation into Facilities Management Report for Proposition S.

by petitioner, this Petition most directly involves factual inquiry into a localized spending issue and is hardly an issue meriting review.

Petitioner seeks to obtain a different ruling by this Court based on its new argument that stadium and field lighting is an "accessibility" issue and project under Part One of the bond measure.[6] To enable Part One to contain an athletic stadium lighting project petitioner requests the definition of the word "accessibility" be construed broadly to mean "uses" – thereby suggesting the voters intended to expand nighttime lighted stadium "uses." The Court of Appeal rejected this argument presented which was newly presented for the first time in the Petition for Rehearing. (Petition for Rehearing at 8.) Contradicting this repackaged and eleventh-hour argument, all uses of the term "accessibility" in the bond measure and Hoover High School relate to ADA and code compliance upgrades.

Petitioner's new use of the term "accessibility" also differs from how that term is used consistently throughout other sections the bond measure and defies the decisional record in this case regarding how *accessibility* was analyzed and discussed during the required pre-bond

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[6] The Court of Appeal explained in detail how other sections of the bond measure, including Part One, Part Two, and the "incidental costs" section did not contain or authorize an independent stadium lighting project or a project that stadium lighting could be reasonably read to be tethered to.

assessment and resolutions selecting the Proposition S projects. Accessibility and code compliance language in Part One mirrors the specific selected accessibility and code compliance projects chosen for Hoover. (AR 2168 ["Projects to Improve School Accessibility; Code Compliance Upgrades"].) Except for a semicolon in Part One, the accessibility and code compliance language is substantially the same as found for the specific projects listed for Hoover in Part Two. (Compare AR 2168, with AR 2255.)

In every sentence of the Hoover project list where the terms "accessible" and "accessibility" are used, they unambiguously pertain to ADA and code compliance upgrades. Tellingly, "accessibility" as it appears in the context of upgrading fields, tracks or courts for Hoover, refers to "accessibility compliance." (AR 2239, emphasis added.)

The projects contained in the bond measure, as indicated generally in Part One and specifically for Hoover in Part Two, mirrors what was assessed, described, and selected by the school board when it studied and created the specific project list for Hoover and other schools. Petitioner's attempt to expand and redefine "accessibility" to include stadium lighting projects is linguistically without merit and factually not supported by the record in this case.

The Court of Appeal correctly gave the Proposition S bond measure a full and fair reading, including Part One, and correctly found there was nothing that expressly or implicitly indicated field or stadium lighting was contemplated in any of the specific listed projects. (Opinion at 12.)

D. Argument Presented for the First Time in Petitions for Rehearing and Supreme Court Review Should Not be Considered by this Court

For the first time in this litigation and on appeal, petitioner now presents two new arguments that (1) the listed project for athletic stadium field lighting derives from Part One of the bond measure for projects allowed any school, and (2) a different and broader definition of "accessibility and safety" applies so that "uses of any project" should allow for "educational facilities, playgrounds and fields for accessibility and safety." (Petition at 20, underscoring added.)

The Petition should be denied because it principally relies on new arguments created and presented for the first time in its petitions for rehearing and Supreme Court review. (Conservatorship of Susan T., (1994) 8 Cal.4th 1005, 1012-1013 [fundamental rule of appellate practice; besides, the record did not support the new arguments and points being raised]; Reynolds v. Bemet, (2005) 36 Cal.4th 1075, 1092, citing Gentis v.

Safeguard, (1998) 60 Cal.App.4th 1294, 1308 ["It is well settled that arguments, including sufficiency of the evidence, cannot be raised for the first time in a petition for rehearing."])

Petitioner's request to reargue the case on new grounds does not arise from any new issue of law or fact arising from the Opinion and there is no doubt that the parties had sufficient opportunity to brief the issue themselves. (Plumas County Dept. of Child Support Services v. Rodriguez, (2008) 161 Cal.App.4th 1021, 1029, fn. 1, applying Gov. Code § 68081.) On these grounds alone the Petition should be denied.

Petitioner now seeks to abandon its primary (and only) argument presented in the merit proceedings of the trial and appellate courts, that stadium and field lighting are *additional independent projects* as contained on page 96 of the bond measure." (*See* Appellant's Opening Brf. at 48-50; Appellant's Reply Brf. at 34-38.) Petitioner never argued the bulleted "incidental" project elements were tied to any of the "listed projects." Instead respondent argued they were "additional projects" applicable to all schools.[7] This Court should reject petitioner's request to *factually* reconsider its appeal on the basis that it can *now* identify the

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[7] Petitioner argued and contended that athletic stadium field lighting features are listed projects for *every* school as an "additional project," and it would have just been too "ridiculously unwieldy" to list it in any other manner. (Respondent's Brief at 30.)

generic desirability and goal of "accessibility" for which athletic stadium lighting might be connected.[8]

This Court should decline to address petitioner's new argument raised only after the Court of Appeal rejected the legal and factual arguments originally posited to legitimize its action. While review should be denied on this procedural basis alone, even if the issue was worthy of review, the Court of Appeal correctly resolved all such issues in this case.

E. The Purpose and Goals of Proposition 39 Bond Measures are Furthered and Not Frustrated by the Opinion

As a last attempt to have this Court grant review and re-decide the case, petitioner argues the Court of Appeal incorrectly applies the purpose and goal of Proposition 39 bond measures in a manner infringes on its "legislative prerogative."

Petitioner muddles the issue about the *purpose* and *goals* of Proposition 39 bond measures by arguing there should be less concern about the *projects* as opposed to *accountability*. (Petition at 18.) Petitioner's argument ignores the principal embodiment of Proposition

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[8] Respondent's new Part One *general and physical education "use"* argument is so open-ended that would lead to infinite range of projects and there would be no way to evaluate them and monitor spending for compliance or accountability.

39 that it requires a *specific project list*. (Cal. Const. art. XIIIA § 1, subd. (b)(3)(B).)

The accountability issue to which petitioner refers pertains to whether the school district is complying with the *specific projects* limits imposed on it. These two interrelated matters must be viewed independently as there can be no accountability but for a specific facilities project list. If an open-ended or overly broad discretionary interpretation or "legislative prerogative" was employed for the required Proposition 39 project list, what meaningful, certain, or "strict accountability" could there be?

It should be no surprise to the petitioning school district, or this Court, that a community and neighborhood group of taxpayers came forward to challenge a stadium lighting project which was never disclosed to be implemented at Hoover. After all, it was the express purpose of the Proposition 39 enactment to "give local citizens and local parents" the right "so each community can decide what is best for its children." Proposition 39 put the approval of selected projects in the power of the taxpaying public who would be taxing their real properties to pay for them.

The control and significance of voter-reviewed and -approved enumerated projects was made abundantly clear in the Proposition 39

ballot measure: "We need to give local citizens and local parents the ability to build those classrooms by a 55 percent vote in local elections so each community can decide what is best for its children"; "We need to ensure accountability so that funds are spent prudently and only as directed by the citizens of the community"; and "To ensure that before they vote, voters will be given a list of specific projects their bond money will be used for." (Cal. Const., art. XIIIA, § 1, Ballot Measure, Proposition 39, §§ 2(f), 2(g) & 3(c), as set forth in West's annotated code.)

Notwithstanding current widespread use of Proposition 39 school bond measures, there is no conflict in any lower court decision regarding either the purpose or the standard of review for interpreting these special school bond tax measures. The request for review on the basis of statewide significance should be declined because the Opinion states the law and correctly decided the factually narrow interpretation of the subject local Proposition S measure.

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III.

THERE IS NO MATERIAL CONFLICT WITH THE OPINION AND THE SAN FRANCISCANS CASE; THE COURT OF APPEAL CORRECTLY APPLIED THE LAW AND DISTINGUISHED DIFFERENCES

Petitioner also seeks review of the CEQA determinations of the Court of Appeal based on the claim of an impermissible conflict in the lower courts between the Opinion and the decision in San Franciscans Upholding the Downtown Plan v. City and County of San Francisco, (2002) 102 Cal.App.4th 656.

After examining the major factual and legal differences between the two cases, it is clear there is no material conflict worthy of review. The Court of Appeal correctly limited the holding of San Franciscans to its own terms based on the full mitigation program and Environmental Impact Report (EIR) conducted in San Franciscans.

Petitioner provides little or no background of the actual factual or legal context of the San Franciscans case instead focusing on an outlier issue and argument made by appellants there. As correctly explained in the Opinion, the parking aggravation issue was neither relevant nor necessary to decide the San Franciscans case. (Opinion at 48.) The "mere inconvenience" argument extracted from San

Franciscans is also distinguishable to this CEQA **Negative Declaration** case.

The issue about "social inconveniences of scarce parking" arose from a third-tier argument addressed by the court after it had already upheld the lead agency's **Environmental Impact Report** on other grounds. (Id. at p. 696.) In support of the EIR, the court found the lead agency sufficiently addressed the *secondary adverse environmental effects of parking deficits* because (1) multiple mass transit and monetary mitigation measures were imposed (id. at 697), and (2) the applicable city rules and ordinances expressly *discouraged* any additional parking for the project. (Id. at 698, fn. 24). Notwithstanding the mitigation efforts, the lead agency admitted, disclosed, and accepted all remaining unavoidable and unmitigated adverse impacts via adoption of a *Statement of Overriding Considerations* for specific policy, social, and economic reasons. (Id. at 672-673, 609; citing Cal. Pub. Res. Code §§ 21002.1, subds. (b), (c), 21081.)

Contrary to the assertions of petitioner, a complete reading of the Opinion indicates that it does not hold "parking itself" *is always* an adverse physical environmental impact. Rather, in most situations it needs to be considered because *parking and cars do cause physical*

impacts.[9] The isolated quote petitioner extracts from the Opinion (pages 51-52) is taken out of context. The prior paragraphs on page 50 first states the general rule that – regardless of whether parking is considered as a primary or secondary project impact, it should be studied for any potential impact on the environment. The Opinion then correctly explains the rule on page 51 that – social or economic change *by itself* shall not be considered a significant effect. In the process of determining the *degree of any impact*, a lead agency may employ the CEQA regulation that a "social or economic change related to a physical change may be considered in determining whether the physical change is significant." (Opinion at 51, emphasis added.)

The fact that people are driving around looking for parking, blocking access, creating additional traffic, noise and pollution, and the ambiance of community character with streets, choked with cars, people, and the garbage they leave behind are physical changes to the environment caused by a project's deficient parking. The secondary and social effects of enjoying and being able to use neighborhoods

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[9] Petitioner misconstrues the Opinion by arguing it creates a new CEQA rule. The Opinion neither creates a new rule or application of CEQA. Nor does it hold that parking, in and of itself, must always be considered a significant adverse effect on the environment. Like most every other CEQA project attribute or effect, parking and traffic caused by lack of parking just needs to be considered.

affected by these conditions are CEQA considerations used for deciding whether impacts are significant or not.

Petitioner overstates its argument by claiming the Opinion creates a "conundrum" in the CEQA analysis. (Petition at 31.) No such conundrum exists. CEQA simply demands an evaluation of whether sufficient parking exists and if not how to mitigate the effects from the lack of such parking. In this case petitioner sought to omit consideration of all offsite parking impacts through an expanded reading of San Franciscans as holding that community parking impacts (including aesthetics, lack of access, lines of cars, cars on curbs, and nighttime crowding in a residential neighborhood) should not be considered as part of its CEQA review.

The Court of Appeal ruled the omission of considering offsite impacts arising from the admitted 174 parking space deficit[10] resulted in an improper and unsupported determination under CEQA. (Opinion at 46-47.) Notwithstanding its failure to assess availability of offsite parking, petitioner concluded that community streets would accommodate the project's cars. In addition to the defective review and unsupported finding, the Negative Declaration adopted no mitigation measures and ignored the city's off-street parking

[10] Also determined to be a defective and understated number which considered attendees from only a 1/3 stadium capacity event.

regulations that schools and similar support facilities must "provide adequate off-street parking" to protect residential neighborhoods.

The two opinions really stand for the unremarkable proposition that CEQA requires a site specific analysis. The impacts to shoppers driving to a commercial district in downtown San Francisco is materially different from residents being able to drive, park, and enjoy the aesthetics and quality of life in a residential community. As reported in numerous reported decisions – time and place matters. (*See* CEQA Guidelines, Cal. Code Regs. title 14, § 15064, subd. (b).)

The reviewability of this case and alleged conflict with San Franciscans is considerably minimized by petitioner's admission that it omitted offsite parking issues and impact analysis from its environmental review and negative declaration determination. Tellingly, petitioner admits it "takes no issue with the Opinion's direction to conduct further CEQA analysis of expected attendance and traffic." (Petition at 28.)

The Opinion correctly holds that both onsite and offsite parking impact analyses and mitigation measures have been and continue to remain important environmental considerations under CEQA. It cannot be said that San Franciscans holds that impacts arising from deficient parking should not be considered as part of a CEQA review. (*See*,

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.) [full EIR discussion and adoption of parking mitigation measures required and upheld by the respective courts as being adequately discussed].) [11]

The CEQA parking issue is not worthy of review based on any misstatement or conflict of CEQA rules. The Opinion comports with the relevant case law on the subject and properly limits San Franciscans from being expanded into a general rule that parking availability need not be studied or considered. Overall, the criticism of San Franciscans does not create any reviewable conflict in lower court decisions and this Court should not expend its valuable time and resources to address the same.

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[11] The cases cited by petitioner on page 30 of its Petition do not result in a different conclusion. Santa Monica Chamber of Commerce v. City of Santa Monica, (2002) 101 Cal.App.4th 786, at page 793, involved discussion of CEQA categorical exemptions where factually there must be "negligible or no expansion of use beyond that previously existing." Mira Mar Mobile Community v. City of Oceanside, (2004) 119 Cal.App.4th 477, 492 was a case involving the challenge of a supplemental EIR brought by a single owner of a mobilehome park. The court recognized the ability of a lead agency in an EIR case to "determine whether to classify an impact described in an EIR as 'significant,' depending on the nature of the area affected," citing CEQA Guidelines, § 15064, subd. (b) and National Parks & Conservation Assn. v. County of Riverside (1999) 71 Cal.App.4th 1341, 1357 [holding that "varying thresholds of significance may apply depending on nature of area affected."].

As an alternative, should this Court believe there is confusion created by the Opinion in its discussion of San Franciscans, then it could simply decertify the publication of the CEQA portion of the Opinion thereby resulting in a *partial publication* for only the Proposition 39 portion as originally requested by appellant in its publication request dated April 15, 2013.

IV.

CONCLUSION

For the above reasons, the Petition for Review should be denied.

Respectfully submitted,

Dated: June 24, 2013

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V.

CERTIFICATION OF WORD COUNT COMPLIANCE

Counsel of record for appellant, Craig A. Sherman, hereby certifies that pursuant to California Rules of Court, Rule 8.504(d)(1), the above *Answering Brief to Petition for Review* has been produced using 13-point Roman type, and contains 5,723 words (including footnotes, headings, and citations) as counted by the word counter of the computer program used to prepare the brief, thereby not exceeding the 8,400 words permitted by the above Rules of Court,

Dated: June 24, 2013

LAW OFFICE OF CRAIG A. SHERMAN

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

VI.

DECLARATION OF SERVICE

California Supreme Court, No. S210950
Court of Appeal, Fourth Dist., Div. One, No. D 0060999
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):

Answering Brief to Petition for Review

On June 24, 2013 on the following person(s) in a sealed envelope or package, addressed as follows:

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1) ☒ By sending via overnight mail for next day delivery by the courier Norco Delivery Services. AS INDICATED

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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. AS INDICATED

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 June 24, 2013 at San Diego, California.

Paul Best

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