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

ANSWER TO PETITION FOR REHEARING

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

TABLE OF CONTENTS

Page

I. INTRODUCTION AND SUMMARY OF ANSWERING ARGUMENTS TO THE PETITION FOR REHEARING. 1

II. POINTS AND AUTHORITIES SUPPORTING DENIAL OF PETITION FOR REHEARING 4

A. THIS COURT SHOULD REJECT RESPONDENT'S ARGUMENTS RAISED FOR THE FIRST TIME IN ITS PETITION FOR REHEARING. 5

B. THERE IS NO INTERNAL CONTRADICTION IN THE OPINION OR COURT'S REASONING 8

III. IT IS RESPONDENT'S INTERPRETATION OF THE "LISTED PROJECTS" WHICH RENDERS COMPLIANCE WITH PROPOSITION 39 DIFFICULT, RISKY AND UNENFORCEBLE 11

IV. CONCLUSION: THE OPINION IS WELL-GROUNDED AND THERE IS NO SUBSTANTIAL ERROR OF LAW OR FACT. . .14

V. CERTIFICATION OF WORD COUNT COMPLIANCE. 16

V. DECLARATION OF SERVICE 18

SERVICE LIST. 18

TABLE OF AUTHORITIES

California Case Law **Page**

Conservatorship of Susan T.,
(1994) 8 Cal.4th 1005, 1012-1013 5

Foothill-De Anza Community College Dist. v. Emerich,
(2007) 158 Cal.App.4th 11, 24 2

Gentis v. Safeguard,
(1998) 60 Cal.App.4th 1294, 1308 5

Plumas County Dept. of Child Support Services v. Rodriguez,
(2008) 161 Cal.App.4th 1021, 1029, fn. 1 5

Reynolds v. Bemet,
(2005) 36 Cal.4th 1075, 1092 5

California Statutes

Cal. Government Code § 68081 5

California Constitution

Art. 13 A, § 1 (Proposition 39) . . . . *passim*

I.

INTRODUCTION AND SUMMARY OF ANSWERING ARGUMENTS TO THE PETITION FOR REHEARING

In its Petition for Rehearing (Petition) respondent San Diego Unified School District (respondent or District) chooses select language in this Court's March 26, 2013 decision (Opinion) to argue irreconcilable factual and legal inconsistencies which makes language in the bond measure meaningless, and makes the bond measure too challenging to implement. Taking respondent's principal arguments in reverse order:

Respondent argues that this Court's ruling makes its Proposition S project list *intolerably uncertain*. (Petition at 12-15 [Sections III.C.3, III.C.4, and IV.].) To the contrary, that is the essence and reasoning why respondent's unsupported and overbroad reading of the bond measure was rejected by this Court. Without a sufficient connection of *incidental* project features, that are *necessary* to complete one of the listed projects, how can voters, administrators, oversight committees and the courts scrupulously review and hold school districts to specified bond projects.

(Opinion, at 12, 15 ["must be tethered to, and based on, a listed project expressly authorized elsewhere in the [bond measure]."].)[1]

For the first time in this litigation and on appeal, respondent 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 at any school, and (2) a different or broader definition of accessibility" should be accepted by the Court so that *anything* relating to the "use" of classrooms, playfields, or educational facilities must be allowed. (Petition at 8-11 [Sections III.B.4, III.B.5, III.C.1, III.C.2].)

Respondent contends field lighting must be contained in Part One of the bond measure because it contains authorized construction projects at all schools, with Part Two being an expanded "project list" of Part One which "each project is already assumed to include." Respondent is wrong for at least three principal reasons.

First, as correctly pointed out by the Court there is nothing on the face or fair reading of the projects lists in Part One of the bond measure (expressly or implicitly) that stadium lighting was contemplated. (Opinion at 12.)

---

[1] *See also* (Foothill-De Anza Community College Dist. v. Emerich, (2007) 158 Cal.App.4th 11, 24 [the projects to be funded must be "sufficiently specific for meaningful approval and oversight."].)

Second, 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)

Third, respondent's new definition of "accessibility" differs from how that term is consistently used throughout the bond and defies the decisional record in this case regarding how *accessibility* was analyzed and discussed during the required pre-bond assessment and ultimate selection of the Proposition S projects.

Notwithstanding impermissibly raising these new arguments for the first time in its rehearing petition, the record in this case and the plain language and use of the term "accessibility" proves there is no "distinction between improvements for general accessibility" as compared with "accessibility as it relates particularly to disabled persons," as argued by respondent.

Contrary to respondent's assertion, the Opinion does not render "field lighting" and Part One projects meaningless or nugatory. (Petition at 4-5, 10-11.) Instead all the ruling does is conclude field lighting is not contained or reasonably read to be a part of (incidental to and necessary for the completion of) "Projects to Improve School Accessibility, Code Compliance Upgrades." Constructing new schools

in the downtown and Miramar area would reasonably be expected to include “hard courts” and “athletic play fields, as well as possible “field lighting” as ancillary project features listed on page 96 of the bond measure. (AR 2255) Accessibility and code compliance projects at Hoover, or any other school, do not.

II.

POINTS AND AUTHORITIES

SUPPORTING DENIAL OF PETITION FOR REHEARING

This Court has properly considered and rejected respondent’s interpretation of Proposition S so as to allow expenditures for “field lighting” when it is untethered to any *specific listed project* as required by Art. 13 A, § 1, subd. (b)(3)(B). Contrary to respondent’s assertion, the role of this court is not simply to determine “whether Proposition S can be read to authorize field lighting.” (Petition at 2.) Rather, the question has been correctly addressed and answered by this Court that Proposition S does not authorize “field lighting” as an expenditure because it is not incidental to and necessary for the completion of “Projects to Improve School Accessibility, Code Compliance Upgrades” or any other listed project for Hoover, including the other general categories or projects. (AR 2168, 2239)

A. THIS COURT SHOULD REJECT RESPONDENT'S ARGUMENTS RAISED FOR THE FIRST TIME IN ITS PETITION FOR REHEARING

The Petition should be denied because it principally relies on new arguments created and presented by respondent for the first time in its petition for rehearing. (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."]) Other than criticizing and rearguing the case via the Opinion, respondent provides no explanation or basis why it changes course to interpret Proposition S via multiple arguments never previously presented.

Respondent'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.

In its Petition, for the first time in this litigation and on appeal, respondent *now* wants to acknowledge and reargue the case based on the words on page 96 of the bond measure relating to allowable costs "incidental to and necessary for completion of the listed projects." (*See* Open. Brf. at 48-50; Reply Brf. at 34-38)[2] Respondent has never before argued the bulleted incidental project elements were tied to any of the "listed projects." Instead respondent argued page 80 of the bond measure contained "additional projects" applicable to all schools. (R.B at 32-34 ["all projects should be assumed to include...," citing AR 2255].)[3] This Court should reject respondent's request to rehear this appeal on the basis that respondent believes *now* it can identify a "listed project" to connect field lighting with.

More dramatically, respondent shifts and creates a new argument in its Petition by asserting Part One of the Proposition S bond measure lists modernization and renovation of high school athletic facilities, and

---

[2] Contrary to respondent's assertion on page 9 of its Petition, it did argue and contend that field lighting was available as a project at any other school as an "additional project," it would just be "ridiculously unwieldy" to list it in every school project list. (R.B. at 30.) Respondent also argued any accountability or judicial inquiry ends because "field lighting is plainly stated in the final bulleted point. . . together with other features associated with athletic facilities." (R.B. at 30.)

[3] This begs the question, should all projects also be assumed to include the project listed as "etc." at the end of the subject paragraph on AR page 2255?

then equates the word “accessibility” to mean a beneficial “use” unrelated to code compliance or accessibility for ADA-like purposes. (Petition at 6-8, citing AR 2168.)[4]

This new argument has no merit and should be rejected because (1) it defies the *specific* project list it has chosen for Hoover, and (2) defeats the Constitutional mandate of having a “list of the specific school facilities projects.” (Const. Art 13 A § 1 (b)(3)(B), emphasis added.)[5] Most tellingly, in order to make its new argument work, respondent seeks to ascribe a new definition to the word “accessibility” in a manner which (1) is inconsistent with the use and meaning found throughout the bond measure, (2) is not supported by the record of measure’s pre-bond need assessment and creation of the project list, and (3) is not materially different from the Hoover specific project language. (*See* further and detailed arguments in Section B, *post*.)

---

4 Respondent now asserts it can use bond money for any “education facility,” “classroom,” or “physical education facilities” as contained in Part One of the measure citing AR 2168: “provide and modernize classrooms, labs and specialized facilities for high school students” [and] “modernize and renovate physical education facilities, playgrounds and fields for accessibility and safety”

5 Respondent’s new Part One (general and physical education “use”) argument is so open-ended that its interpretation results in an infinite range of *any* athletic project and would lead to absurd results because there would be no way to evaluate and monitor spending for compliance and accountability.

Notwithstanding the lack of merit, this Court should decline to rehear the case or address such new arguments presented for the first time in respondent's petition for rehearing.

B. THERE IS NO INTERNAL CONTRADICTION IN THE OPINION OR COURT'S REASONING

Respondent misconstrues and latches on a hypothetical statement of the Court to argue the Opinion has internal contradiction and cannot be reconciled. (Petition at 13, citing Opinion at 13.)

> "Part Two does not authorize a 'general' or nonspecific upgrading of the football field, *which arguably could include the addition of new field lighting*."

(Id., emphasis added by respondent)

Respondent's plea of contradiction only arises by its new definition of "accessibility" and constrained reading given to Part One of the bond measure. It achieves this by first arguing that Part One contains a separate list of projects which supports stadium lighting "authorized to be completed at each or any of the District's sites" (Petition at 6, citing AR 2168.) However, this was already analyzed and rejected by this Court based on both the plain language and reasoning that there is nothing expressly or implicitly included in the Part One suggesting a field or stadium lighting project. (Opinion at 12.)

Next, so as to enable Part One to contain a field lighting athletic stadium lighting project for hoover, respondent requests this Court to construe the definition of the word "accessibility" to now mean "uses" reflected by *expanded* nighttime lighted stadium *accessibility*. (Pet. at 8.)

Contradicting respondent's eleventh hour repackaged argument is that the term "accessibility" is used throughout the bond measure to mean and relate to ADA and/or code compliance upgrades. (*See* AR 2255)[6] 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. Respondent additionally fails to fully represent to this Court that use of the word "accessibility," as it appears in the context of upgrading fields, tracks and courts for Hoover, is actually stated and reads as "accessibility <u>compliance</u>." (AR 2239, emphasis added.)

Additionally defeating respondent's new accessibility definition is a fact wholly ignored by respondent -- that the required pre-bond

---

[6] The reasoning and factual support in the Opinion is buttressed by the fact the accessibility and code compliance language in Part One is the same and mirrors the specific selected accessibility and code compliance projects chosen for Hoover. (AR 2168 ["Projects to Improve School Accessibility; Code Compliance Upgrades"].)

measure needs assessment[7] did not include stadium or field lighting. This explains why it is not on the list for Hoover (or any other school). (*See* full explanation and history at A.O.B. at 3-5, 49-50.) It is no surprise that the projects selected from the pre-bond assessment only related to "Critical Projects Required for Code and Safety" became listed on the bond measure as "Accessibility, Code Compliance Upgrades."

Respondent incorrectly argues that the Court is placing too much reliance on the fact that Hoover stadium improvements relate only to disability-related accessibility. (Petition at 7.) To the contrary, this is what the bond measure described and listed for Hoover and that what was assessed, described, and selected by the school board when it studied and created the specific project list for Hoover and other schools.

Respondent's attempt to expand and redefine "accessibility" to include stadium lighting projects is linguistically without merit and is not supported by the record in this case.

---

[7] Which is the Constitutionally mandated pre-bond assessment study required by Art. 13 A, § 1, subd. (b)(3)(B) and which incorporated the Long Range Facilities Master Plan (LRFMP) into the Facilities Management report for Proposition S. (AR 1432-1438) (See A.O.B at 3-5, 49-50.)

III.

IT IS RESPONDENT'S INTERPRETATION OF THE "LISTED PROJECTS" WHICH RENDERS COMPLIANCE WITH PROPOSITION 39 DIFFICULT, RISKY AND UNENFORCEBLE

Respondent argues "intolerable uncertainty" because its bond measure is so general and nonspecific that appellant and this Court are creating a circumstance where it does not know how its school administrators can comfortably or correctly create projects and spend money.

- "the Opinion impermissibly shifts responsibility for education spending from the Board of Education to the voters in bond elections." (Petition at 2)
- "the Opinion exposes the district to intolerable uncertainty in relying on Proposition S' language, and to abuse through collateral attacks on funding by opponents." (Petition at 2, 17.)
- "The Opinion impermissibly intrudes into the District's domain of responsibility to determine what facilities as appropriate to fulfill its education mandate. (Petition at 13.)
- The District . . . charged with implementing the projects, is best positioned to determine the nature of its facilities. The courts, on

the other hand, are not well-positioned to make that determination, and the voters are likely even less so. (Petition at 13.)

Contrary to the assertions of respondent, the intent and restrictions of Proposition 39 bond measure were not developed to allow school district's an unlimited range of open-ended projects for school officials to create *post hoc* at its discretion. As approved by the voters to amend the Constitution, Proposition 39 reads:

- "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." (Ballot Measure, Proposition 39, § 2(f), notes following Const., Art. 13 A, § 1 in Wests annotated code.)
- "To ensure that before they vote, voters will be given a list of specific projects their bond money will be used for." (Id., Ballot Measure, Proposition 39, § 3(c).)
- "We need to ensure accountability so that funds are spent prudently and only as directed by the citizens of the community." (Id., Ballot Measure, Proposition 39, § 2(g).)

Respondent complains about court-created intolerable uncertainty rather than take responsibility and implement Proposition 39 as intended

– by following its needs assessment and clearly stated specific list of projects.

The *sky is not falling* and there are many worthy and clearly stated projects for each of the listed schools, e.g. related to technology and infrastructure improvements which were clearly determined to be needed by the requisite pre-bond assessment study. Uncertainty to respondent school district only results when it strays outside of the described school projects list and seeks to do something different from what is authorized by the bond. This is not a product or result of what voters or courts are doing to respondent. Rather, this is a result of respondent not following the studied and developed *specific* project list.

It should be no surprise to respondent or this Court that a large networked community group came forward to challenge what was not intended to be implemented at Hoover and other similarly situated Props S schools (e.g. Point Loma, Crawford.). After all, it was the express purpose of Proposition 39 to "give local citizens and local parents" the right "so each community can decide what is best for its children."

Respondent claims that the Opinion creates a logical absurdity, wherein those who support field lighting would have to vote no, and those who opposed to the lights would vote yes. (Petition at 13.) The voters were never given that opportunity. If the statement "install new or

replacement stadium lighting" had been included in the Hoover High project list (and the 8 or more other high schools now slated for new lights), then the voters could have made an informed decision. As currently worded and argued by respondent, the voters could not possibly know that they were voting to tax themselves for the installation of stadium lighting at Hoover High, or at other schools in the district.

This uncertainty and lack of clarity alone is the reason for rejecting respondent's arguments that stadium lighting is not a specific listed and authorized project. The reasonableness clarity standard might be stated something to the effect - *if you cannot clearly read and plainly understand it as delineated, then it should not be considered for bond expenditures and accountability purposes*. This sounds appropriate for a Constitutional provision which unambiguously requires a specific project list and strict accountability.

IV.

CONCLUSION: THE OPINION IS WELL-GROUNDED AND THERE IS NO SUBSTANTIAL ERROR OF LAW OR FACT

There is nothing in the Petition that warrants rehearing by this Court. Even considering the newly presented arguments regarding Part One and a broadened definition of "accessibility," which should be

procedurally precluded, the same result in the Opinion is reached. The incidental and possible project feature of "field lighting" is not tethered to any *specific listed project* for Hoover High School as required by Art. 13 A, § 1, subd. (b)(3)(B)

For the above reasons, the Petition should be denied.

Respectfully Submitted,

Dated: April 19, 2013 **LAW OFFICE OF CRAIG A. SHERMAN**

Craig A. Sherman, Esq.
Todd. T. Cardiff, Esq.
Attorneys for Appellant
TAXPAYERS FOR ACCOUNTABLE
SCHOOL BOND SPENDING

V.

CERTIFICATION OF WORD COUNT COMPLIANCE

Counsel of record for appellant, Craig A. Sherman, hereby certifies that pursuant to California Rules of Court, Rule 8.204, the above *Answer to Petition for Rehearing* has been produced using 13-point Roman type, and contains 2,946 words (including footnotes, headings, and citations), as counted by the word counter of the computer program used to prepare the brief.

Dated: April 19, 2013

LAW OFFICE OF CRAIG A. SHERMAN

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

V.

DECLARATION OF SERVICE

Appeal No. D 060999
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):

ANSWER TO PETITION FOR REHEARING

On April 19, 2013 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 19, 2013 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. (Via U.S. Mail)
Jonathan A. Pearl, 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

Lawrence M. Schoenke, Esq. (Via U.S. Mail)
Sandra T.M. Chong, Esq.
SAN DIEGO UNIFIED SCHOOL DISTRICT 4100 Normal Street, Room
2148 San Diego, CA 92103
Tel.: (619) 725-5630
Fax: (619) 725-5639

Counsel for Respondent
SAN DIEGO UNIFIED SCHOOL DISTRICT

Hon. Timothy B. Taylor (Via U.S. Mail)
c/o Civil Appeals Division
San Diego Superior Court
220 Broadway, Room 3005
San Diego, CA 92101

Clerk of the California Supreme Court (via Email)
Ronald Reagan Building http://www.courts.ca.gov/7423.html
300 So. Spring Street, 2nd Fl.
Los Angeles, CA 90013-1233