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Via Email
Followed by Hand Delivery

Board of Education
SAN DIEGO UNIFIED SCHOOL DISTRICT
4100 Normal Street
San Diego, CA 92103

Re: Comments and Objections – Agenda Item H.3 (January 14, 2014)
Certification of FEIR for Hoover High School Athletic Facilities Upgrades and Modernization Project

Requested and Legally Mandated Action(s): **CONTINUANCE and/or DENIAL**

1. continuance of FEIR certification allowing additional time for review prior to decision;

2. further review, evaluation and consideration of CEQA alternatives and impacts;

3. adoption of mitigation measures, redeterminations of significant impacts, and/or revised overriding considerations for unmitigated impacts.

Board Members Barnett, Barrera, Beiser, Evans and Foster:

This office represents Taxpayers for Accountable School Bond Spending, including its representative taxpaying members, and also makes these comments on behalf of other similarly situated taxpayers and member groups who have an interest in this matter.

Objections

For the below enumerated reasons, it is requested that the Board **disapprove** the above action and agenda item with directions made to staff and the environmental consultant (BRG) to correct material inaccuracies and legally defective standards of CEQA analysis and review.

1. Notice Regarding Availability and Action on the FEIR has Been Violated

Pursuant to Public Resources Code § 21092.5, lead agencies must provide a written response to comments made on the draft EIR by each public agency at least ***10 days*** prior to the certification of the final EIR. One of the public entities submitting comments on the project DEIR was the Ken-Tal Planning Group, an official division and related public serving entity of the City of San Diego and State of California. The FEIR recognizes and admits the "public agency status of the Ken-Tal Planning Group. (FEIR, p. RTC-ii)

The Ken-Tal Planning Group (KTPG) submitted comments on the project DEIR on December 2, 2013. The availability and release of the FEIR was first noticed on January 7, 2014 by environmental consultant BRG with select email notification to some persons who commented on the DEIR. No official notification is known to have been made to the Ken-Tal Planning Group. SDUSD set certification of the FEIR for immediate Board of Education (BOE) action on the next available date, and did so with faulty e-mail posting such that the agenda was not available within 72 hours as required under the Brown Act.

Notwithstanding whether it may be determined that SDUSD, through its staff, consultants, and legal counsel continues to "play games" with public notice and process so as to give itself an undue advantage and thwart public involvement, the practical and legal time was not allowed for the public and local planning groups to review the FEIR and SDUSD's responses to comments, therefore violating the spirit and express intent of CEQA.

A continuance and re-noticing of availability of the FEIR and final action to possibly certify the FEIR is both legally and practically mandated.

2. The FEIR Fails as an Essential Informational Document Under CEQA

The numbered sections that follow here demonstrate the underlying purposes and intent of CEQA – that a public agency (SDUSD) should not approve a project or certify an EIR if there are potential significant adverse environmental effects that have not been disclosed mitigated, or avoided to the most legal and practical extent available.

In the case of the subject FEIR, there exist substantial and material defects which have impaired informed decision-making. These defects have been pointed out by both members of the public as well as one or more experts. However, SDUSD and its consultants just do not want to be accurate or honest. While an EIR need not be *perfect* and the purpose of an EIR is not to generate endless reams of paper, there are simply no supportable legal or practical bases for refusing to correct the errors and findings of which SDUSD has already been made aware - and is again being made aware of to give SDUSD one last chance to correct its errors.

Courts have repeatedly stated that informed decision-making is a fundamental purpose of CEQA. (Citizens of Goleta Valley v. Board of Sups., (1990) 52 Cal.3d 553; Laurel Heights Improvement Ass'n v. U.C. Regents, (1988) 47 Cal.3d 376.) A court's duty is to review the sufficiency of the EIR as an informative document and determine if the substantial evidence supports the agency's conclusions. The purpose of the EIR is not only to protect the environment, but is also to demonstrate to the public that the environment is being protected. (County of Inyo v. Yorty, (1973) 32 Cal.App.3d 795, 810.)

CEQA has both procedural and substantive mandates. (Pub. Res. Code § 21002; Friends of Mammoth v. Board of Supervisors, (1972) 8 Cal.3d 247, 254-265.) The Legislature, in enacting CEQA intended to provide certain substantive measures for protection of the environment and requires agencies "to deny approval of a project with significant adverse effect when feasible alternatives or feasible mitigation measures can substantially lessen such effects." (Id,; Sierra Club v. Gilroy City Council, (1990) 220 Cal.App.3d 30, 41.)

Under CEQA, the omission of significant environmental information is a prejudicial abuse of discretion, whether or not a different outcome may have resulted, because such omissions almost always thwart the purpose and ability to conduct informed decision-making. (Sierra Club v. State Board of Forestry, (1994) 7 Cal.4th 1215; *see also*, Kostka, et al., Practice Under the California Environmental Quality Act, Cont. Ed. Bar, 2003 update, § 23.37, pp. 954-955.)

Where an administrative agency improperly fails to include pertinent information that would affect its decision making, consideration of alternatives, and/or mitigation options, courts have no choice but to assume that lack of compliance infected the decision-making and disclosure requirements of CEQA. (*See* Friends of Eel River v. Sonoma County Water Agency, (2002) 108 Cal.App.4th 859, 868-875 [omitted consideration of reduced water source was not speculative and spoiled the enter scope compliance with CEQA].)

3. Material Factual and Legal Infirmities in the FEIR Affecting and Prejudicially Impairing the Lighting Impact Analysis

In addition to the observations of other commenters, there are multiple factual and legal errors in the FEIR such that it cannot and should not be legally certified as a compliant CEQA document.

In relation to information and mitigation requirements of CEQA, the FEIR fails because the record in this case indicates that SDUSD and its consultant (1) knowingly used an outdated and inapplicable legal threshold and standard for determining significance of lighting impacts, and (2) further relied on intended or expected "as built conditions" to shield and mitigate impacts to homes and neighborhoods which clearly are not built or planned as a mitigation measure.

While it is expected that SDUSD will argue that there can be no possible lighting impacts because the Court of Appeal already said so, and/or there *technically* can be no CEQA impact arising from ruining only *a few* home environments – such arguments are not legally or factually supported upon the full record of review and consideration of the EIR.

Rather than honestly study and disclose the fact that lighted stadiums immediately adjacent to homes and close-knit residential neighborhoods are extremely disturbing, SDUSD appears determined to misapply objective measurements and standards so it can artificially minimize the results.

SDUSD has specifically failed to measure, record and disclose adverse lighting impacts by using an improper threshold for determining "adverse significance." Commenter and expert James Benya timely pointed out in his comments dated November 8, 2013 that both (1) an update in the lighting zone characterization was adopted as an industry standard, and (2) the residential neighborhood surrounding the project site should have been given a lower threshold of significance. (FIER, p. RTC-10)

The material legal failings of SDUSD in this case are that (1) it neither utilized nor applied a proper standard for determining adverse and baseline impacts *based on the conditions, information, and standards* available at the time of the Notice of Preparation of the project EIR (April 19, 2013)[1], (2) nor was SDUSD entitled to vary or apply an outdated or different industry threshold of significance when it had no different *adopted* standard to utilize and its stated purpose of *convenience* in comparing the outdated initial "LIS" violates CEQA law regarding baseline.

SDUSD incorrectly analyzed the level of existing "baseline" conditions against which the impacts of the project should be measured. According to CEQA Guidelines § 15125, subdivision (a), a project's impacts must be measured against the physical and legal environmental conditions existing at the time of the NOP. The baseline measurements of significant impacts should have been considered based on standards in the *IES Lighting Handbook*, Tenth Edition. Not having adopted any different threshold of significance, SDUSD is not legally or factually entitled to ignore refined industry

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[1] The NOP was for a different "focused" EIR type of study intending to only analyze traffic, parking and attendance, and SDUSD expressed no intention at the time to prepare a full EIR and/or revisit the lighting impacts arising from the project. It is unknown whether SDUSD ever prepared or gave required statutory notice about its intent to conduct a full EIR and cover more subjects. This is an independent ground for denying certification of the FEIR until the project and its CEQA review can be re-noticed and circulated based upon the proper and actual type of CEQA document, with the expanded scope of subjects, which SDUSD ultimately proceeded with and prepared.

standards.[2] Further, there is no support use of an outdated threshold for the purpose of "direct comparison" with an *anticipated* or *theoretical* lighting system when an actual lighting system had been installed and actual existing measurements were readily available.

The failure to discuss and quantify important aspects of existing conditions (environmental setting) is a prejudicial error under CEQA. (County of Amador v. El Dorado County Water Agency, (1999) 76 Cal.App.4th 931, 955 [description of setting must include analysis sufficient to allow informed comparison of pre-project and post-project conditions]; Cadiz Land Co. v. Rail Cycle, (2000) 83 Cal.App.4th 74, 94 [failure to set forth conditions of possibly impaired groundwater would make impact assessment impossible and faulty].)

As above, determining and disclosing the "significance" of an environmental effect is one of the most important purposes of CEQA. Artificially minimizing or ignoring standards of adverse environmental effects violates the intent and purpose of CEQA. After application of the principles set forth in Section 15064(f), and in marginal cases where it is not clear whether there is substantial evidence that a project may have a significant effect on the environment, the lead agency shall be guided by the following principal: If there is a disagreement among experts opinion supported by facts over the significant effect on the environment, the Lead Agency shall treat the effect as significant and prepare an EIR. (CEQA Guidelines § 15064, subdivision (g).) This standard, applicable to an outdated Initial Study referenced and relied upon by SDUSD in this case, is equally relevant here.

The failure to utilize a correct baseline for measurement of potential lighting impacts is a material and prejudicial error under CEQA for which correction is mandated and certification of a FEIR should be withheld.

4. Failure to Consider Reasonable Range of Alternatives

The failure to utilize a correct baseline for measuring and determining the adversity and significance of lighting impacts is the "poisonous fruit" than infects the entirety of the remaining CEQA analysis and findings (including but not limited to the Alternatives analysis and Statement of Overriding Considerations).

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2 *See* CEQA Guidelines § 15064.7, subd. (b) ["Thresholds of significance to be adopted for general use as part of the lead agency's environmental review process must be adopted by ordinance, resolution, rule, or regulation, and developed through a public review process and be supported by substantial evidence."]

The alternatives where chosen and rejected based on the lack of a need to mitigate ANYTHING BUT NOISE. Had lighting or other impacts been identified, the findings and considerations of other alternatives or mitigation measures would have legally been required to be brought into the mix.

SDUSD and its EIR consultant was given at least one feasible alternative – the Modified version of Alternative 1. Despite this, SDUSD never analyzed or considered the possible impact reducing solutions presented in this alternative due to the above faulty determinations that there were no other adverse impacts to mitigate. SDUSD also discounted and refused to consider the modified Alternative 1 on the conclusionary and unsupported bases that the Alternative would not meet the project objectives. (See Taxpayers' separately submitted written comment letter on the FEIR dated Jan. 14, 2014, 3 pages, with attachments.) The refusal to consider this "facially valid" impact reducing alternative or mitigation in the EIR is both a procedural and substantive violation of CEQA. (Los Angeles Unified School Dist. v. City of Los Angeles, (1997) 58 Cal.App.4th 1019, 1028-1031.) There are at least two reasons why SDUSD should reject certification of the FEIR. The requirement to present and analyze a reasonable range of alternatives which minimize and avoid significant impacts is a mandatory and substantive requirement of CEQA, not merely a procedural one. (Kings County Farm Bureau v. City of Hanford, (1990) 222 Cal.App.3d 692, 711, 730-731; Public Resources Code §§ 21002, 21081; CEQA Guidelines §§ 15002(a)(3), 15021(a)(2), and 15091(a).) The "rule of reason" to be applied in the selection of project alternatives requires that a reasonable range of alternatives be considered *so far as the environmental aspects of a project site are concerned.* The reasonableness of the selected range of alternatives will be judicially reviewed based upon the facts of the case and statutory purpose under CEQA which is "to afford the fullest possible protection to the environment within the reasonable scope of the statutory language." (Friends of Mammoth v. Board of Supervisors, (1972) 8 Cal. 3d 247, 259; Citizens of Goleta Valley v. Board of Supervisors, (1990) 52 Cal. 3d 553, 563.) In reviewing the range of alternatives, the court serves a vital function in that "[e]ach case must be evaluated on its facts, which in turn must be reviewed in light of the statutory purpose." (Citizens of Goleta Valley, *supra* at p. 566.) This is especially true because the rule of reason establishes no categorical legal imperative as to the scope of alternatives to be analyzed in an EIR. (*Id.*)

It is a prejudicial abuse of discretion under CEQA for SDUSD to adopt and certify findings, mitigation, a monitoring reporting program and a statement of overriding considerations for the Project and its FEIR. The goal of the EIR process is to provide viable alternatives that can be studied to reduce significant impacts to a less than

significant impact. Instead, the lead agency created outrageous and infeasible strawman alternatives which it could readily dismiss based on lunacy or impracticability – such as a dug-out pit stadium or reducing ticket sales so that event would not be attended.[3]

SDUSD failed to present and reasonably consider a reasonable range of project alternatives because it did not correctly include or conclude analyses of one or more identified adverse effects or mitigating alternatives. (Los Angeles Unified, *supra* at 1028-1031) As such, certification of the FIER should be rejected and the project and DERI should be redrafted, reconsidered and recirculated for further review and public comment consistent with the above.

5. Failure to Properly Mitigate Potential Adverse Impacts Based on the Lack of Committed and Enforceable Mitigation Measures

SDUSD cannot support and rely on findings that mitigation measures avoid or reduce significant impacts because CEQA requires that it find, based on the substantial evidence, that the mitigation measures have been "required in, or incorporated into, the project which mitigate or avoid the significant effects on the environment." (Cal. Pub. Res. Code § 21081, subd. (a)(a); Guidelines § 15091, subds. (a)(1) &(b).)

SDUSD has failed to "provide that measures to mitigate or avoid significant effects on the environment are fully enforceable through permit conditions, agreements, or other measures." (Cal. Pub. Res. Code § 21081.6, subd. (b)), and must adopt a mitigation program to ensure that all the mitigation measures are implemented. (Cal. Pub. Res. Code § 21081.6, subd. (a).)

The purpose of these requirements is to ensure that feasible mitigation measures will actually be implemented as a condition of the development, and not merely adopted and ignored. (*See* Cal. Pub. Res. Code § 21002.1, subd. (b).)

Asserted project "features" and/or security plans or event plans are not legally valid mitigation measures under CEQA. Deferral of specific mitigation is only permissible where the local entity commits itself to mitigation and lists the alternatives to be considered, analyzed, and possibly incorporated in the mitigation plan. On the other hand, an agency such as SDUSD does not legally comply with CEQA's legal requirements when it simply *suggests* or *mentions* it will do things for a limited or

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[3] It should be noted that SDUSD contradictorily argues that measured and reduced actual attendance figures support that parking and traffic impacts will not be an adverse impact (arguing actual 2013 nighttime attendance is lower than what was realized at pre-project day games), whereas SDUSD also argues higher nighttime attendance numbers MUST BE ACHIEVED to meet the project purpose. Reliance on such a false and non-existent purpose – which SDUSD argues in its favor is NOT BEING ACHIEVED – cannot form the basis for rejecting consideration of an otherwise impact reducing alternative such as the Modified version of Alternative 1.

ineffective time (such as buying blinds for impacted properties). (Defend the Bay v. City of Irvine, (2004) 119 Cal.App.4th 1261, 1275.) Similar to this case, Endangered Habitats League, Inc. v. County of Orange, (2005) 131 Cal.App.4th 777, 794-795, required effective and enforceable mitigation measures to address interference from noise, lighting impacts, parking, traffic and circulation.

6. The CEQA Project, FEIR and its Findings are Dependent on 15 Events

A substantially controversy in this case is whether SDUSD intended to increase night lighted occurrences beyond 15 events. This was deemed critical by the public and EIR process because the studies and the resulting impacts themselves are so dependent upon the number of nighttime lighted events that may take place. Based on the comments, responses and conclusions of the FEIR, this matter has now been resolved and the public and decision-makers have relied on the definitions and project description continuously stated throughout the CEQA process and final conclusions of the FEIR:

> Events conducted within the athletic stadium that previously were possible only during the daylight hours or with temporary lights would be able to occur in the evening with field lighting. These events include football, boys and girls soccer, and track and field. The District anticipates that approximately 15 evening events would occur with implementation of the proposed project. The District notes that due to routine practices and the potential for unforeseen events, such as playoff games, a few more events may occur. No lights are proposed on the upgraded baseball field; therefore, only daytime baseball or softball games would occur. . . .
>
> The expected highest capacity lighted use of the stadium would be from an evening football game. It is anticipated that of the approximately 15 evening events, six (6) of those events are expected to be home evening football games.

(FEIR, Project Description Section 1.3.2, Athletic Facilities Operations.)

> As discussed in Section 3.1.2 of the FEIR, the project description contemplates approximately 15 school-related evening events that would occur with implementation of the proposed Project. Non-lighted events at the facility are not changes in use that require CEQA evaluation and are not part of the project description. Civic Center Act uses may not exceed what is permitted in the project description. All events at the stadium are required to comply with the school's existing Stadium Event Plan, as provided as Appendix D3 of the EIR.

(FEIR, Response to Comment D-45, FEIR, p. RTC-52.)

7. Lighted Athletic Stadiums Versus Established Residential Communities

A final comment on the subject of residential and community impacts arising from the project is appropriate here. While some would like to debate and decide the preference of high school football versus protection of neighborhoods and homes, with regards to CEQA disclosures, honesty, and full mitigation compliance there is no debate.

In enacting CEQA, the State Legislature has indicated that the provision of lighting for football games does not take precedence over protecting the environment. (Pub. Res. Code § 21001; Friends of Mammoth *supra* at p. 259.) While it is undoubted that high school football games may be good and desirable for participants, their families, and the school spirit, fun and camaraderie sought to be invoked, protecting the quality of the environment and "quality of life" so that people can enjoy their homes *in a satisfactory living environment* is the primary purpose of CEQA. Public Resources Code § 21001, subdivision (d) states that the purpose of CEQA is to:

> Ensure the long-term protection of the environment consistent with the provision of a decent home and suitable living environment for every Californian, shall be the guiding criterion in public decisions.

It is not coincidental that CEQA Guidelines § 15021, subdivision (d) provides the same.

What members of the public and State law requires is that decision-makers go on the record and be honest and accurate with their decisions which stand to impact the environment. CEQA is a process for such honest disclosures. What this case has proven is that SDUSD continues to take short-cuts (as it did via an initial MND process), and refuses to properly analyze impacts and go on the record – that stadium lighting and nighttime events are disturbing and disruptive to established residential communities that do not have such baseline or preexisting conditions. Further, imperative but shockingly ignored by SDUSD and its decision-makers is the refusal and unwillingness to identify, incorporate and implement any official or statutorily required mitigation measures addressing the same.

Today is the day for the Board of Education to come clean and correct an EIR process and decision which impermissibly remains in denial as to the environmental impacts arising from lighted athletic stadiums in and adjacent to established residential settings.

The agenda item before the Board (Item H.3) is respectfully requested to be denied.

Sincerely,

Craig A. Sherman