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June 24, 2013

VIA HAND DELIVERY

The Honorable Tani Cantil-Sakauye, Chief Justice
Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, CA 94102

Re: *Taxpayers For Accountable School Bond Funding v. San Diego Unified School District*
Request for Depublication
San Diego Unified School District
Supreme Court Case No. S210950
Court of Appeal Case No. D060999
Our file 6745.10511

Dear Chief Justice Cantil-Sakauye and Honorable Associate Justices:

Pursuant to California Rules of Court, rule 8.1125, Defendant and Respondent San Diego Unified School District ("Respondent"), respectfully requests depublication of **1)** *Part I,* and **2)** *Part II, sections E and G,* of the attached decision filed on April 25, 2013, by the Court of Appeal, Fourth Appellate District entitled *Taxpayers For Accountable School Bond Funding v San Diego Unified School District* (2013) 215 Cal.App.4th 1013 (Fourth Appellate District, Case No. D060999) ("Opinion"). Respondent has separately Petitioned this Court for Review of the Opinion.

I. INTEREST OF SAN DIEGO UNIFIED SCHOOL DISTRICT

As the second-largest school district in California, responsible for the education of over 132,000 K-12 students at more than 200 school sites, Respondent will continue to need to raise and expend funds through Proposition 39 bond measures, and to perform California Environmental Quality Act ("CEQA") evaluations of its projects. The portions of the Opinion for which Respondent requests Depublication, if allowed to stand with precedential force, will affect Respondent directly in any future challenges to its use of bond proceeds and to its CEQA compliance.

II. REASONS FOR DEPUBLICATION

Plaintiff and Appellant ("Appellant"), led by neighbors of Herbert Hoover High School in San Diego, California, sued to block the installation of field lighting at the school's athletic facilities. Appellant challenged Respondent's CEQA compliance, its right to use Proposition S bond proceeds, and a zoning exemption Resolution. After Appellant failed to succeed on any of the issues in the Trial Court, the Opinion rejected all of Appellant's claims, except with respect to Proposition S funding and CEQA traffic and parking impacts. The Opinion held that the Respondent could not use bond proceeds for field lighting at any district school, and held that parking is an environmental impact under CEQA. Respondent contends that both rulings are in error as a matter of law, and is seeking Review.

Part I of the Opinion should be depublished because: 1) it conflicts with the decisions in *Committee for Responsible School Expansion v. Hermosa Beach City School Dist* (2006) 142 Cal.App.4th 1178 ("*Hermosa Beach*") and *Foothill-De Anza Community College Dist. v. Emerich* (2007) 158 Cal.App.4th 11 ("*Foothill*"), 2) it conflicts with the purpose and intent of California Constitution Article XIIIA, section 1, subd. (b), par. (3), commonly referred to as "Proposition 39," and 3) it conflicts with established laws of statutory interpretation. If allowed to have precedential effect, the Opinion will adversely affect the raising and administration of billions of public dollars by hundreds of school and community college districts.

Part II, sections E &G, of the Opinion should be depublished because the Opinion creates a direct conflict with longstanding First District Court of Appeal precedent in *San Franciscans Upholding the Downtown Plan v. City & County of San Francisco* (2002) 102 Cal.App.4th 656, and conflicts with established principles of CEQA law that social effects are not environmental impacts. If allowed to have precedential effect, the Opinion will re-open a settled question of law and will change the law to equate a project's social effects with environmental impacts under CEQA.

These two issues are severable from the remainder of the Opinion, which need not be depublished.

III. THE OPINION CONFLICTS WITH EXISTING PROPOSITION 39 LAW

A. Proposition 39 Ensures Accountability, Not Spending Constriction

Proposition 39 was enacted to promote school facilities financing by reducing the voter approval threshold from two-thirds to 55 percent, in return for enhanced notice and accountability to ensure funds are not used for purposes requiring two-thirds voter approval. California Constitution article XIIIA, section 1, subd. (b), par. (3)(*B*) requires bond propositions to contain *"a list of specific school facilities projects to be funded,"* but provides no detail or guidance for the degree of specificity required or for the structure of that list.

In 2008, Respondent's voters gave 68.49 percent approval to Proposition S, a $2.1 billion Proposition 39 bond initiative for improvements to 178 schools. Proposition S language

specifically identified *field lighting* as an element of spending "incidental to and necessary for" completion of the projects listed in the initiative. In reliance on that language, and after rejection of Appellant's claims by the Superior Court, Respondent used Proposition S proceeds to pay for the installation of field lighting at the Herbert Hoover High School Athletic Facilities in San Diego, and proposed to do so at other district high schools.

Proposition S is a comprehensive 97-page document, designed to comply with the constitutional accountability requirements of Proposition 39 when read and considered together as a whole. Prefatory language explains the overall purpose of the Proposition and its accountability requirements. The section entitled "Bond Project List" consists of a preamble, a Part One project list applicable to all schools, a Part Two listing of projects for 178 named schools, and a concluding section incorporating by reference numerous details applicable to all projects. Nothing in Proposition 39 requires or prohibits this particular format, or instructs that the language or projects must appear in any particular order or with any particular emphasis.

Consistent with the purpose of Proposition S to fund facilities improvements throughout the district, Part One describes high school athletic facility upgrades for general use as well as for ADA compliance. Part Two highlights certain aspects of the Part One projects. For additional specificity, Proposition S identifies many individual components of the listed projects, *which Proposition S declares to be "incidental to and necessary for"* those projects, including in particular, *"field lighting."*

B. The Opinion Conflicts With Existing Case Law

Since passage of Proposition 39 in 2000, two reported cases have considered its requirement of a list of specific school facilities projects to be funded, and both have held that the list need not be as specific as required by the Opinion. *Committee for Responsible School Expansion v. Hermosa Beach City School Dist* (2006) 142 Cal.App.4th 1178 ("*Hermosa Beach*") squarely decided that the project list need not be contained within the 75-word ballot summary, provided projects are referenced elsewhere. *Foothill-De Anza Community College Dist. v. Emerich* (2007) 158 Cal.App.4th 11 ("*Foothill*") decided that the ballot information listing projects by type rather than by site is sufficient. As the Opinion conflicts with the holdings and principles of both of these cases, the Opinion should be depublished.

Foothill, cited in the Opinion, affirms that the underlying purpose of Proposition 39 is the easing of school facilities funding through a lower threshold for voter approval, in exchange for increased accountability:

> Thus, if the list defines or identifies the projects in a manner that clearly apprises the voters, the auditors, and the public oversight committees of the **types** of projects for which the money is intended to be used, that is sufficient." (Foothill at 23-24.)[emphasis added]

In *Hermosa Beach*, the court approved funding for a gymnasium project not listed in the ballot itself. The *Hermosa Beach* court set no requirement for the relative prominence of particular items on the list of projects, holding that "the inclusion of the project list in the Resolution [authorizing the bond measure], coupled with a discussion of that list in the ballot pamphlet, more than satisfied the constitutional provisions." *Id.* at 1184. Proposition S exceeded this standard by incorporating the lengthy project list from the Resolution, disclosing athletic field upgrades, including specifically the element of field lighting. Nothing in Proposition 39 requires that any one or more aspects of construction be called out more prominently for attention than any others, yet that is what the Opinion demands in the case of field lighting.

C. The Opinion's Restrictive Reading Strips Proposition 39 Of Its Purpose

The Opinion acknowledged that "[c]ourts should interpret statutes or written instruments so as to give force and effect to every provision and not in a way which would render words or clauses nugatory, inoperative or meaningless." Bond measures should be interpreted within the context of Proposition 39's scheme of promoting school facilities financing through enhanced notice and accountability. Spending should be scrutinized to ensure proceeds are not used for non-facilities purposes "including teacher and administrator salaries and other school operating expenses." (Cal. Const., art. XIIIA, § 1, subd. (b), par. (3)(A.)

Nevertheless, rather than interpreting Proposition S in a manner consistent with Proposition 39's purpose of ensuring that specially-raised facilities funds are not used for non-facilities purposes, the Opinion authorizes courts to scrutinize individual project elements and usurp Respondent's legislative prerogative to decide what its projects require. The Opinion applied a narrow interpretation, inconsistent with *Hermosa Beach* and *Foothill*, in effect finding a way not to fund field lighting. The Opinion created the danger of judicial evaluation straying from questions of the legality of bond funding and into questions of spending choices reserved by law to duly-elected Boards of Education. Moreover, the Opinion creates intolerable uncertainty in the interpretation of Respondent's existing and future Proposition 39 bonds, and those of all school and community college districts in California.

D. The Opinion Hinders Reliance on Bond Language in the Administration of Proposition 39 Funds

A principal purpose of Proposition 39's accountability measures is to ensure that bond money is not spent on school operational or other non-capital needs. In the context of a $2.1 billion bond initiative to fund improvements over a period of years at more than 178 schools, it is not reasonable to conclude that Proposition 39 contemplated Proposition S voters weighing the relative merits of individual project components during an election. Proposition 39 contains no language requiring some project list items to be featured more prominently than others, nor any hint how such a determination could even be made. Both *Hermosa Beach* and *Foothil* ruled that Proposition 39 did not require that degree of specificity. The Opinion stands in direct conflict with the California Constitution and established authorities.

The Opinion now makes it perilous for Respondent in particular (the second largest in California), and any other school or community college district with existing Proposition 39 bonds, to have any confidence that their facility spending plans will survive a challenge, even when project elements are referenced specifically in a bond Proposition. The problem is compounded where, as with Hoover High School, the project is complete and operational, and the bond money is spent long before a court subsequently rules the project component is ineligible for funding.

Subsequent bond measures, to be consistent with the Opinion, must become either far briefer and less informative than Proposition S to avoid being interpreted restrictively, or far longer and more repetitive than Proposition S to avoid leaving anything exposed to attack. Neither outcome is likely to serve the purpose and intent of Proposition 39—to apprise the voters of the intended use of their tax money for school facilities and to ensure the money is used only for those purposes.

E. The Opinion Encourages Litigation Over Policy Choices

Whereas Code of Civil Procedure section 526a, under which Appellant sued, is designed to prevent misappropriation of public funds, the Opinion enables and encourages those such as Appellant to litigate against legitimate spending choices as a means to block projects they disfavor. The Opinion thereby denies voters and their school and community college districts the necessary assurance that reasonable decisions based on voter-approved language will not later be undermined.

The Opinion thus creates the irresolvable conflict of how a district is to prejudge what project elements will require a position of prominence in a Proposition and what level of prominence will suffice. As the Superior Court noted, not everything on a list can be first. This is especially troublesome where, as here, the controversy arises not directly from concern that money was spent for undisclosed or non-facilities purposes, but rather as a tool to block projects that some oppose.

Appellant challenged the spending as "waste" under Code of Civil Procedure section 526a. When considering allegations of waste:

> "... the courts should not take judicial cognizance of disputes which are primarily political in nature, nor should they attempt to enjoin every expenditure that does not meet with a taxpayer's approval." (*Daily Journal Corp. v. County of Los Angeles* (2009) 172 Cal.App.4th 1550, 1558.) [referencing Code Civ. Proc. § 526a.]

The Opinion invites litigation of what this case demonstrates are primarily political disputes. By requiring that field lighting be specified under the name of the school, rather than through incorporation by reference, the Opinion entered the political debate with a bias against the lighting. Such placement is not necessary for the voters to know that Respondent proposed to

spend bond proceeds on field lighting, or for the Independent Citizens' Oversight Committee to know if the money was spent elsewhere.

The Opinion opens the door to the abuse of attacks on bond funding to serve innumerable agendas unrelated to Proposition 39's purpose of ensuring accountability for the spending of specially-raised funds. Without Supreme Court guidance, districts cannot reasonably craft propositions that will anticipate every potential collateral attack, and nothing in Proposition 39's language or intent requires it to do so. The Opinion creates this intolerable uncertainty by construing Proposition S so narrowly that clear and plain language is rendered meaningless.

F. Hundreds of School and Community College Districts and Billions of Public Dollars Are Affected Adversely by the Opinion's Erroneous Statement of the Law

With the well-known decline in state funding for repair and upgrading of California's crumbling education infrastructure, Proposition 39 bonds have become a critical local funding resource. Beginning in 2008, voters in 307 school districts and 21 community college districts have authorized Proposition 39 bonds totaling $49.26 billion. From 1998 to 2012, all forms of school bonds provided approximately $66.17 billion of the $118 billion spent on California school facilities. Studies indicate that a further $117 billion will be required over the next decade, so there is every reason to believe that school and community college districts will continue to rely on Proposition 39 facilities funding.

All school and community college districts with currently-approved bonds are engaged on a daily basis making long- and short-term plans and decisions on the use of these bond funds, and in drafting new bond initiatives. Independent Citizens' Oversight Committees are charged with ensuring that funding complies with the terms of the initiatives. The Opinion introduced new substantial risk and uncertainty into those processes by allowing express language to be rendered meaningless.

IV. CALIFORNIA ENVIRONMENTAL QUALITY ACT

The Opinion specifically rejected the reasoning and holding of *San Franciscans Upholding the Downtown Plan v. City & County of San Francisco* (2002) 102 Cal.App.4th 656 ("*SFUDP*") from the 1st District Court of Appeal, which held in 2002 that parking is not a CEQA impact. The Opinion held that parked vehicles themselves are a physical impact to the environment, impliedly for the purpose of forcing consideration of the *social effects* on the neighbors of visitors occupying "their" street parking spaces. Social effects of projects have long been held not to be environmental effects. Depublication is required to eliminate the Opinion's error and conflict with the law articulated in *SFUDP*.

A. The Opinion Conflicts with 1st District Precedent

CEQA's Public Resources Code section 21068 defines a significant effect as "a substantial, or potentially substantial, adverse change in the environment." In *SFUDP*, the 1st District Court of Appeal said:

> [T]here is no statutory or case authority requiring an EIR to identify specific measures to provide additional parking spaces in order to meet an anticipated shortfall in parking availability. 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*. Under CEQA, a project's social impacts need not be treated as significant impacts on the environment. An EIR need only address the *secondary physical* impacts that could be triggered by a social impact. (Guidelines, § 15131, subd. (a.) *Id.* at 697.

The Opinion cited that passage from *SFUDP* and said, "We reject *SFUDP*'s language [] and are unpersuaded by its reasoning." (Opinion at 50.) The Opinion held:

> "Therefore, as a general rule, we believe CEQA considers a project's impact on parking of vehicles to be a physical impact that could constitute a significant effect on the environment." (Opinion at 49.)

The Opinion concluded that an EIR is required because "the Project may have a significant effect on parking ..." (Opinion at 54.) The Opinion stated:

> "Vehicles, whether driven or parked, in effect constitute man-made conditions and therefore may constitute physical conditions in an area that may be affected by a proposed project, thereby requiring a lead agency to study whether a project's impact on parking may cause a significant effect on parking and thus the environment. Furthermore, to the extent the lack of parking affects humans, that factor may be considered in determining whether the project's effect on parking is significant under CEQA. (Cf. Guidelines, § 15064, subd. (e) [overcrowding of a public facility that causes an adverse effect on people may be regarded as a significant effect].)" (Opinion at 51-52.)

In explaining its rationale, the Opinion stated, quoting from neighbors' letters:

> " '[s]treet parking []will impair the bedroom community in evening hours in ways of *preventing parking for people that live in the area coming home from work.*' Many other residents wrote letters expressing their concerns that the Project would adversely affect the availability of street parking in the area." (Opinion at 53.) (emphasis added.)

As *SFUDP* holds, it is not the scarcity of parking spaces itself or the social inconvenience of looking for scarce parking that are environmental impacts. Rather, the impacts are the traffic and air pollution resulting from people driving around looking for parking spaces. The Opinion, however, holds that parked cars themselves are an environmental impact, and that the social inconvenience of parked cars displacing resident parking during high school events may raise that impact to a level of significance. (Opinion at 48-49.) Whereas *SFUDP* clarified CEQA's critical distinction between environmental impacts and social impacts, the Opinion effectively erases that distinction.

B. Social Effects Cannot Be Evaluated Under CEQA

"Under CEQA, the question is whether a project will affect the environment of persons in general, not whether a project will affect particular persons." (*Mira Mar Mobile Community v. City of Oceanside* (2004) 119 Cal.App.4th 477, 492.)[1] The Opinion, however, necessarily requires Respondent to conduct CEQA review of the inability of *the residents in particular* to find parking, and of the above-described social effects on them associated with visitors parking in their neighborhood. Thus, the Opinion casts parking itself as a CEQA impact, to serve as a mechanism to force consideration of community rather than environmental concerns.

The CEQA Guidelines state repeatedly that social effects of a project shall not be treated as significant effects on the environment. (Cal. Code Regs, title 14, §§ 15064(e), 15131(a), and 15382.) *Goleta Union School Dist. v. Regents of University of California* (1995) 37 Cal.App.4th 1025 clarified that Guidelines, section 15064(e) "merely points out that in some cases socio-economic effects may cause physical changes that significantly affect the environment" [such as a large increase in student enrollment necessitating the construction of additional classrooms]. "[C]lassroom overcrowding, per se, does not constitute a significant effect on the environment under CEQA." (*Id.* at 1032.)

The conundrum posed by the Opinion for Respondent and all lead agencies is that there are no CEQA-recognized physical impacts of parking per se, direct or indirect, to be studied other than traffic and air quality. The obvious danger is that the Opinion's reasoning opens the door, closed by *SFUDP*, to the improper extension of CEQA's reach beyond the physical environment and into the social environment. If allowed to stand, the Opinion will conflict directly with *SFUDP* on the parking issue, and in principle, with cases such as *Goleta Union School Dist. v. Regents of University of California, supra,* 37 Cal.App.4th 1025, and *Mira Mar Mobile*

[1] Cited in Opinion at 34.

Community v. City of Oceanside, supra, 119 Cal.App.4th 477. Depublication will help resolve this conflict from arising in other cases.

C. Effect of Opinion if Not Depublished

Local agencies throughout California are affected immediately with the Opinion's requirement to addressing parking impacts, but without any basis in CEQA law to identify, measure or mitigate any such impacts. Moreover, freed from the strictures of *SFUDP*, lead agencies throughout California can expect renewed litigation claiming parking impacts, reopening legal issues long considered to have been resolved.

By depublishing Part II, sections E and G, of the Opinion, Supreme Court would reduce the conflict with in *SFUDP* and restore the precedent that parking does not itself constitute an impact to the environment within the meaning of CEQA. This rule focuses CEQA review where it belongs—on the measurable environmental consequences of traffic congestion and air pollution—insulating CEQA review from improper consideration of a project's social consequences.

V. REQUEST FOR DEPUBLICATION

Based on the foregoing, Respondent respectfully urges the Court to grant the Petition for Review submitted separately, and depublish Part I, and Part II, sections E and G, of the attached decision, *Taxpayers For Accountable School Bond Funding v San Diego Unified School District* (2013) 215 Cal.App.4th 1013.

Very truly yours,

DANNIS WOLIVER KELLEY

Cameron C. Ward

CCW:ab

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss.
COUNTY OF SAN FRANCISCO)

I am employed in the County of San Francisco, State of California. I am over the age of 18 and not a party to the within action; my business address is: 71 Stevenson Street, Suite 1900, San Francisco, CA 94105.

On the date set forth below I served the foregoing document described as **REQUEST FOR DEPUBLICATION** on interested parties in this action by placing true copies thereof enclosed in sealed envelopes addressed as follows:

1 Copy Craig Sherman, Esq Todd T. Cardiff, Esq. LAW OFFICES OF CRAIG A. SHERMAN 1901 First Avenue, Suite 219 San Diego, CA 92101 Attorneys for Appellants **Via U.S. Mail**	1 Copy 1st District Court of Appeal Fourth Appellate District Division One 750 B Street, Suite 300 San Diego, CA 92102 **Via U.S. Mail**
1 Copy The Honorable Timothy B. Taylor Judge of the Superior Court San Diego Superior Court 220 Broadway, Room 3005 San Diego, CA 92101 **Via U.S. Mail**	1 Copy Lawrence M. Schoenke Sandra T.M. Chong San Diego Unified School District 4100 Normal Street, Room 2148 San Diego, CA 92103 Attorneys for Defendant and Respondent **Via U.S. Mail**

☒ **(VIA U.S. MAIL)** I caused such document to be placed in the U.S. Mail at San Francisco, California with postage thereon fully prepaid.

I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day

after date of deposit for mailing in affidavit.

☐ **(VIA ELECTRONIC SERVICE)** [Code Civ. Proc. Sec. 1010.6; CRC 2.260] by electronic mailing a true and correct copy through DANNIS WOLIVER KELLEY'S electronic mail system from abarel@DWKesq.com to the email address(es) set forth above, or as stated on the attached service list per agreement in accordance with Code of Civil Procedure section 1010.6 and CRC Rule 2.260. The transmission was reported as complete and without error.

☐ **(BY PERSONAL SERVICE)** I caused such envelope to be delivered by hand to the offices of the addressee.

☒ **(STATE)** I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

AND:

I declare that on June 24, 2013, the original and 1 copy have been **hand delivered** for filing on this date to:

Clerk
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-4797

Executed on June 24, 2013, at San Francisco, California.

Anat Barel
Type or Print Name


Signature