STATE OF CALIFORNIA, COURT OF APPEAL

FOURTH APPELLATE DISTRICT, DIVISION ONE

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

APPELLANT'S REPLY BRIEF

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

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I.
SUMMARY OF ARGUMENTS ON REBUTTAL

Despite material omissions of baseline and community conditions, lack of committed and enforceable "mitigation," failure to study certain off-site impacts, and substantial evidence demonstrating potentially significant impacts both directly and indirectly caused by installing 100 foot stadium lights, the District seeks to convince this Court that it has shown sufficient "good faith" to pass legal muster under CEQA. It is as if the District considers CEQA merely a guidance or policy document simply suggesting what should be disclosed, reviewed and mitigated.

The Legislature has not exempted school districts or schools from the requirements of CEQA. If the District can *suggest* and not *adopt* mitigation in support of an MND, why limit such allowance to schools? Many other public agencies also need to "balance" widely varying needs and provide similar essential public services. If subjective "good faith" is all that is required, agencies and courts might as well eliminate section 21081.6(b) of CEQA and eliminate the fair argument standard for requiring the preparation of an EIR.

CEQA compliance cannot be so casually read or implemented. The MND contains too many irregularities to be dismissed as harmless

omissions. These errors impaired the entire CEQA analysis beginning with the ambiguous project description of "approximately 15 evening events" to the omissions of the historical nature of the surrounding community, to the refusal to study off-site impacts such as parking, to the unintentional (or intentional) error claiming the Project was already exempt from local land use ordinances.

The District is absolutely correct on one point. The District must balance many competing interests in the community. (R.B. at 1) CEQA provides for such balancing through the preparation of an EIR, the making of findings, and ultimately, if necessary, the adoption of a statement of overriding considerations. This lawsuit is not about re-opening debate; this lawsuit is about having an informed and honest debate about the true scope of the project and its impacts.

Ironically, as will be further discussed below, the subsequent Exemption Action, exempting Hoover High and 11 other schools from compliance with zoning codes, is specifically designed to avoid the honest review and debate required by CEQA. It does not matter whether the Court considers the Exemption Action a project unto itself, or an initial step (and improper segmentation) of 12 different projects, it is still an action that may ultimately result in potentially significant impacts, and therefore must undergo CEQA review prior to approval. The

District's subsequent Exemption Action must also be rescinded based on insufficient notice and arbitrary action taken without sufficient description, nexus and disclosure.

With regard to the challenge to the Proposition S measure, the simple fact that "field lighting" was contained on the second to last page of the bond measure in a section describing project costs "incidental and necessary for completion of the listed projects" does not mean that the bond measure was intended to fund new stadium lights at any school throughout the District. Converting a bond measure entitled "San Diego School Repair and Safety Measure" into a discretionary general fund not only violates the express Constitutional limits imposed by Proposition 39, but will make an already leery electorate even more reticent to approve bond measure for even the most worthy of school causes. Thus, it is important to ensure that bond money is spent in strict compliance with actual intent and listed projects contained in the Prop S bond measure.

II.

THE MITIGATED NEGATIVE DECLARATION FAILS TO COMPLY WITH CEQA

A. An Ambiguous "Design Element" of "Approximately 15 Evening Events" Cannot Substitute as Mitigation Because It is Not Legally Enforceable as Required by CEQA

The District claims that the estimate of "approximately 15 evening events" is a "design element" of the project. (R.B. at 10) However, the District admits that "due to routine practices and the potential for unforeseen events, such as playoff games, a few more events may occur." (1 AR T-8, 71.) The problem with such a flexible "project description" is that it fails to inform the community and the decisionmaker about the full scope of the potential project.

Most notably, the District categorically refused to limit the project to 15 evening events. (1 AR T-5, 60.) Such refusal brings into serious question whether the "design element" accurately reflects the project. A similar issue was addressed in Communities for a Better Environment v. City of Richmond, (2010) 184 Cal.App.4th 70. In Communities, the court struck down an EIR because it was unclear whether equipment might be altered to process "heavier crudes", thereby causing increased pollution. (Id. at 84.) The EIR and the applicant denied the upgrades

would include the equipment for processing of heavier crude. (Id. at 81.) However, when it was suggested that a CUP condition prohibit the processing of heavier crude, the applicant vehemently objected. (Id. at 84.) The court noted that a legitimate interpretation of such opposition was that the applicant "sought to preserve its operational flexibility to process heavier crude." (Id.) "By giving such conflicting signals to decisionmakers and the public about the nature and scope of the activity being proposed, the project description was fundamentally inadequate and misleading." (Id. at 84, quoting San Joaquin Raptor Rescue Center v. County of Merced (2007) 149 Cal.App.4th 645, 655–656.) The District is giving similar conflicting signals concerning the actual scope of this project.

The District argues that "The limitations on the number and hours of operation of field events…are aspects of the project that avoid significant impacts from occurring." (R.B. at 10-11) Thus, but for a limitation of 15 evening events, the project will have significant impacts.[1] Nevertheless, the District claims that such "design element" is not mitigation. (R.B. at 11) Mitigation may very well include "minimizing impacts by limiting the degree or magnitude of the action and its implementation." (Guidelines § 15370.) To comply with CEQA

[1] A limitation of 15 evening events may *reduce* some impacts, but not to a level of insignificance.

such mitigation must be "fully enforceable through permit conditions, agreements, or other measures." (Pub.Res.Code § 21081.6(b).) Without enforceable permit limitations, there is a fair argument that the Project may cause a significant impact on the environment.

The District does not claim an aggrieved person could seek injunctive relief to prevent nighttime events in excess of fifteen. Instead, the District claims that excessive nighttime events "would not comport with this MND Project Description, and would have to be the subject of its own CEQA review." (R.B. at 11) Enforcing subsequent CEQA review involves overcoming a high threshold of discretion afforded to agencies under Public Resources Code section 21166. (Fund for Environmental Defense v. County of Orange, (1988) 204 Cal.App.3d 1538, 1544.) A subsequent EIR would only be required if the changes required "major revisions of the previous…Negative Declaration due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects." (Guidelines § 15162.) In addition, CEQA review could only be triggered if there was a discretionary decision, and it is unlikely that permitting additional practices, games or even renting out the stadium to third parties would be considered anything but ministerial. (Guidelines § 15268.) Coupled with the fact that "approximately 15 evening events" is

ambiguous on its face, it would be practically impossible to compel subsequent environmental review for additional events.

The District's reliance on Environmental Council of Sacramento v. City of Sacramento (2006) 142 Cal.App.4th 1018, 1035, 1036 ("Environmental Council") demonstrates just how far the District must reach to justify its position. (R.B. at 11) Such case concerned the enforceability of baseline assumptions in an EIR prepared for a region-wide habitat conservation plan in the Natomas Basin near Sacramento, such as the maintenance of 15,000 acres of agricultural land. The assumption was supported with substantial evidence "including historic land use patterns, adopted general plans and policies concerning this land, state and federal regulations, and limitations on the provision of water and sewer services." (Id. at 1036.)

The distinguishing characteristics of the Environmental Council case are almost too numerous to list. Most prominently, the agency prepared an EIR, not MND as here, and therefore the deferential substantial evidence test applied, not the fair argument test. (Id. at 1029.) Further, the Environmental Council court properly noted that projects changing the agricultural designation would have to undergo CEQA review as independent projects. This greatly contrasts with the case at

bar, where additional nighttime events would be unlikely to undergo any further CEQA review.

Lastly, the District claims that "debate by the Board … of possible expanded use of the facility in the future has no bearing on the CEQA evaluation this project." (R.B. 11) However, field rentals to third parties are not "a gleam in a planner's eye" when rentals have already occurred. (2 AR T-105Z, 933-34; 2 AR T-105AA, 965.) Further, the District interprets the Civic Center Act and San Diego School Policy K-4000 as requiring rental of the field to third parties. (1 AR T-8, 112; 1 AR T-16, 352-360; Ed. Code § 38130 et. seq.) The District cannot rely on a "design element" of "approximately 15 evening events" when it cannot or will not preclude third parties from renting the field during the nighttime.

Even assuming the project was 15 evening events a year, the impacts would be significant. Fifteen evening events would mean that 40% of Friday nights or weekends throughout the school year could have an evening event, and therefore may cause a significant impact.[2] (1 AR T-10, 160 ["nearly half of our weekends would be affected"].) The District's refusal to place any limits on evening use, *a fortiori*, constitutes substantial evidence to support a fair argument that stadium

[2] 9 months x 4 weeks = 36 weekends. 15 events ÷ 36 weekend = .41.

lights may have significant direct and indirect impacts to the neighborhood.

B. Describing the Actual Baseline, including Recent Attendance Figures, is a Mandatory Requirement and Cannot Be Dispensed with at the District's Discretion.

The District does not claim that past attendance figures from Hoover High Athletic Events were unavailable. Instead, it argues that reference to attendance at unlighted daytime events is of "limited value." (R.B. at 13.) In other words, the District made a discretionary decision to not provide information about past events despite such information being required under CEQA. (Guidelines § 15125.)

Far from being of limited value, historical and recent attendance figures would provide a yardstick to measure the project and impacts. CEQA is intended to evaluate and measure the change in the environment. (Pub.Res.Code § 21068.) Omitting perhaps the most relevant baseline renders the entire MND analysis faulty thwarting reasoned analysis of potentially significant impacts.

A strong line of case law, unrebutted by the District, has held that omission of relevant information that precludes informed decisionmaking constitutes a prejudicial abuse of discretion under

CEQA. (Environmental Protection Information Center v. California Dept. of Forestry & Fire Protection (2008) 44 Cal.4th 459, 487 ("EPIC"); Sunnyvale West Neighborhood Assn. v. City of Sunnyvale City Council, (2010) 190 Cal.App.4th 1351, 1388; Rural Landowners Ass'n v. City Council, (1983) 143 Cal.App.3d 1013, 1021.) This is even more egregious in the context of MND, where decisionmakers must determine whether substantial evidence exists to support fair argument of significant impacts.

The Supreme Court has noted that "Courts are generally not in a position to assess the importance of the omitted information to determine whether it would have altered the agency decision, nor may they accept the post hoc declarations of the agencies themselves." (EPIC, *supra*, 44 Cal.4th at 487.) Nevertheless, the prejudice to public and decision on the MND can easily be seen in this case. For example, the District claims it is entirely unforeseeable, and would be pure speculation, that an event would ever approach maximum seating capacity. (R.B. at 13) Yet, in the same breath, the District admits that the public identified "one homecoming event"[3] and one "third party event" which had significant attendance in the recent past. Knowing the attendance of these events

[3] Contrary to the District's contention, "Homecoming" was an evening event under temporary stadium lights. (2 AR T-105HH, 994.)

would provide some understanding of what the potential impacts to the community may be and would provide further support that maximum attendance is foreseeable and likely.

Finally, the District's argument that it analyzed the Project as if *all impacts were new* is simply inaccurate. (R.B. at 13) It prominently announced that the Project was reducing the number of the seats and increasing the amount of onsite parking, which it claimed would reduce off-site parking impacts. The further argument that daytime attendance was irrelevant is also not true. If daytime events are having an impact, and evening events are intended to increase attendance, then such impacts must be considered along with accompanying nighttime uses and effects.

C. By Failing to Analyze the Potential Impacts for Reasonably Foreseeable Maximum Capacity Crowds, the District Failed to Consider Whether Substantial Evidence Supported a Fair Argument That Evening Events May Have a Significant Impact on the Environment

The District's insistence on using an estimate of 1,444 attendees (36% stadium capacity) to evaluate the impacts displays a fundamental misunderstanding of CEQA. The only way to ensure that significant impacts are mitigated is to evaluate the maximum potential capacity of

the Project and impose mitigation measures to reduce such impacts to the extent feasible. Such policy is reflected in the fundamental policies of CEQA. "'Significant effect on the environment' means a substantial, or potentially substantial, adverse change in the environment." (Pub.Res.Code § 21068 (emphasis added).) A MND is only appropriate when changes to the project or mitigation measures have been imposed that mitigate the significant impacts "to a point where clearly no significant impact on the environment would occur." (Pub.Res.Code §§ 21064.5, 21080(c)(2)(A) (emphasis added).)

In this case, the facts supporting a fair argument there *may* be a significant impact are relatively straightforward. First, the project will have 3,970 seats. (1 AR T-8, 70.) There have been events in the years prior that have drawn capacity or near capacity crowds. (2 AR T-105AA, 965; 2 AR T-105HH, 991 [2/3 – 3/4 full], 2 AR T-105NN, 1016.) The purpose of installing stadium lights is to hold events in the evening when people are off work. (1 AR T-3, 19 [coach urging approval so families can attend]; 1 AR T-3, 29 [night games will allow stands to be "packed"]; 1 AR T-3, 36:19-23 [dayworkers need night games].) And the Initial Study admits that there will be an increase in attendance. (1 AR T-8, 87.)

Comments from Lincoln High's athletic director provide even greater support for the possibility the stands will be filled near capacity. "We have drawn real well for our home games that have been all at night. The first year our ticket line was about a 45 minute wait and our home section was almost filled all the time." (1 AR T-14, 280.) Lincoln High, which only has 300 more students than Hoover High, averages approximately 3,000 attendees per game and 5,000 attendees at the homecoming game. (1 AR T-14, 280.) Thus, it is reasonably foreseeable that a maximum capacity crowd will occur in the future with the installation of stadium lights.

Numerous cases have either struck down or upheld EIRs based on whether there was a sufficient analysis of maximum capacity conditions. For example, the Supreme Court, in striking down an EIR for a subdivision, noted "[an] EIR evaluating a planned land use project must assume that all phases of the project will eventually be built and will need water, and must analyze, to the extent reasonably possible, the impacts of providing water to the entire proposed project." (Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova (2007) 40 Cal.4th 412, 431.) In contrast, in Las Virgenes Homeowners Fed'n v. County of L.A. (1986) 177 Cal.App.3d 300, 307, the court upheld a tiered EIR because the worst case scenario for traffic and

parking had previously been analyzed. Even the one case cited by the District for avoiding a "worse-case scenario" analysis, did in fact, analyze the maximum build-out of the project. (R.B. at 12, citing Towards Responsibility in Planning v. City Council (1988) 200 Cal.App.3d 671.) The Court noted that "[the EIR analyzed] the first phase of the proposed projects, full development of the projects and cumulative impacts of all campus/industrial development in the North Coyote Valley." (Id. at 680.) Nothing in those cases support solely analyzing a proposed project at one-third of operational capacity.

The public policy behind requiring the agency to evaluate a reasonably foreseeable maximum capacity project is clear. Allowing analysis based on a reduced capacity project would permit the agency to avoid preparing an EIR by cynically asserting that average operations were significantly less than maximum capacity. The public would have no recourse if the project and impacts turned out to be significantly greater than predicted.

For example, in this case, the noise study found no significant impact from crowd noise based on an assumption that attendance would be 1,444 people. Yet, the noise study admits, "It can be easily seen that for a full sporting event (such as a full capacity football event) source levels can exceed 90 dba due to human vocalization alone." (1 AR T-13,

216 fn. 9.) This is consistent with public comments which have described not being able to even watch movies because of the cheering crowd. (1 AR T-105AA, 943, 963.) If the crowd noise from a full capacity event was considered, there would be no question that an EIR must be prepared.

To base the entire MND on the assumption that stadium attendance will not exceed 36% capacity fails to properly inform the public and decisionmakers of the potential impacts from the project. In addition, based on the fact that capacity crowds or near capacity crowds have occurred in the recent past, there is a fair argument that the project may have a significant impacts on traffic, parking, noise and a host of related impacts on the community.

D. Attracting Cars is a Physical Impact on the Environment that Must Be Studied Under CEQA

The District insists that CEQA simply does not require the consideration of parking impacts because it is merely a "social inconvenience." (R.B. at 21.) Thus, according to the District, no matter how egregiously underparked a project, because the social inconvenience of hunting for a parking is not a "physical change to the environment" it does not need to be studied nor considered by the decisionmakers under CEQA. Contrary to the District's contention, in cases where a project

will attract a large amount of people, parking must be evaluated to determine whether the project may have a significant impact. (*See*, City of Hayward v. Trustees of the California State Univ. (Cal. App. 1st Dist. May 30, 2012) 2012 Cal. App. LEXIS 761, at *44 [EIR finding parking impacts significant and unavoidable].)

First, obviously a car is a physical object that actually takes up space. A project slated to increase the number of cars in a particular location must consider where such cars will be stored, just like any other physical material, whether such material is lumber, waste sludge or freshwater. If there is insufficient space to store the cars onsite, the agency must consider whether there is space in the immediate vicinity and what other projects are competing for the same resource (space for parking). Failing to properly supply parking onsite means that the project will have a direct impact on the availability on parking in the surrounding community.

The District argues the mental frustration and anger people feel when illegally parked cars block their driveways, nearby parking is unavailable for friends and family, when hordes of drivers searching for parking make it difficult to even get home, is a "mere social inconvenience" that need not be studied by CEQA. However, even social inconveniences must be considered and studied if they cause or

are caused by physical impacts. (Guidelines § 15382; See also Guidelines §15384(a).)

The Guidelines provides extensive guidance on determining whether a social change may be used to determine whether a physical change is significant. Guidelines section 15064 states, in relevant part:

> Where a physical change is caused by economic or social effects of a project, the physical change may be regarded as a significant effect in the same manner as any other physical change resulting from the project. Alternatively, economic and social effects of a physical change may be used to determine that the physical change is a significant effect on the environment. If the physical change causes adverse economic or social effects on people, those adverse effects may be used as a factor in determining whether the physical change is significant. For example, if a project would cause overcrowding of a public facility and the overcrowding causes an adverse effect on people, the overcrowding would be regarded as a significant effect.

(Guidelines § 15064(e); See also, Guidelines § 15131(b) (social effect of dividing a community).)

In this case, the substantial increase in people seeking available parking during the evening, when available parking in front of houses is at a premium, is a physical change directly caused by the installation of the stadium lights and the change in use from daytime to nighttime. The social impact is the disruption to the community and outrage people feel when their driveways are blocked by illegally parked vehicles and parking is otherwise unavailable. The District cannot summarily dismiss this impact as a mere social inconvenience. (*See*, Bakersfield, *supra*, 124

Cal.App.4th at 1207 [EIR struck down for failing to analyze urban decay as economic impacts].)

Finally, the Guidelines include its own "threshold of significance," in a manner speaking, pertaining to parking. If a project complies with a locally adopted parking ordinance it may not even need to discuss or analyze parking as a significant impact. (Guidelines § 15183(f).) "Parking ordinances" is an example of a development policy adopted to substantially mitigate an environmental effect. (Guidelines § 15183(g)(1).) In other words, barring unusual circumstances, if a project complies with a parking ordinance, parking is not considered a significant impact. The inverse is also true – if a project does not comply with the parking ordinance, there may be a significant impact.

In this case, the project with 223 parking spaces is under-parked under San Diego City Parking Ordinances by 40% even using the District's estimated attendance figures, and would require at least 174 parking spaces in the surrounding neighborhood. (1 AR T-14, 249-250.) If Project parking was calculated as required by the Municipal Code - one parking space per 3 seats - the Project would be underparked a whopping 1,100 spaces or over 300%.[4] There was no study to determine

[4] 3,970 seats ÷ 3 = 1,323.33 - 223 onsite parking = 1,100 parking spaces needed for maximum capacity crowd. (J.A.96; SDMC Table 142-05F.)

whether 174 parking spaces were available for the 36% capacity crowd, not to mention the 1,100 off-site spaces required for a maximum capacity crowd. In this context, the claimed benefit of adding 56 onsite spaces over existing conditions appears to be ridiculously ineffective mitigation.

Petitioner has already extensively analyzed and distinguished San Franciscans Upholding the Downtown Plan v. City and County of San Francisco (2002) 102 Cal.App.4th 656. (O.B. at 32-35.) Talmadge is not remotely similar to downtown San Francisco. Petitioners urge the Court to limit *San Franciscans* to the unique facts of such case, and recognize the statement concerning parking as the dicta that it is. However, even if parking was a social effect, "[t]he lead agency cannot divest itself of its analytical and informational obligations by summarily dismissing the possibility of urban decay or deterioration as a 'social or economic effect' of the project." (Bakersfield, *supra*, 124 Cal.App.4th at 1207.)

E. The District Failed to Study or Consider any of the Secondary Impacts Caused by Insufficient Parking

It is undisputed that the secondary impacts of scarce parking, such as the impacts on traffic and air quality, must be considered. (San Franciscans, *supra*, 102 Cal.App.4th at 697.) The District utterly lacks

evidence that the traffic study considered the effects of the scarcity of parking on traffic and air quality. (R.B. at 22) It claims that "based on the evaluation that the 174 street-parked cars will disperse along the streets surrounding the school, there is substantial evidence in the record that there is no potential for a significant traffic impact." (R.B. 22-23)

Contrary to the District's contention, the traffic study admits, "the number of on-street parking spaces currently used by the high school patrons is unknown." (1 AR T-14, 248.) Instead of analyzing the potential impact, the MND claims that CEQA does not require an analysis of parking. (1 AR T-10, 111.) Further, District staff admits that there is a parking problem in the adjacent neighborhood. (1 AR T-3, 34:22-25.) The existence of 174 parking spaces directly adjacent to the school is speculative. The traffic study, as well, only analyzed intersections on El Cajon Boulevard, clearly not analyzing the impacts that an absence of parking would have on traffic, air quality, or other neighborhood impacts.

The District argues that "no competing study provides any support of a contrary analysis." (R.B. at 22.) Its blatant omissions do not warrant a shift of its CEQA obligations or burden of proof. Laypersons' testimony about existing traffic conditions and parking can constitute substantial evidence to support a fair argument. (Oro Fino Gold Mining

Corp. v. County of El Dorado, (1990) 225 Cal.App.3d 872, 882-883.) In addition, photographs of the parking conditions were submitted demonstrating a distinct lack of parking availability during game events. (3 AR T-105VVV, 1121-1132.) The fact the District has not done a study to evaluate the availability of parking strengthens the argument that cars will be circling the neighborhood at night looking for parking in vain during evening events. "The agency should not be allowed to hide behind its own failure to gather relevant data." (Sundstrom v. County of Mendocino, (1988) 202 Cal.App.3d 296, 311.)

Finally, the District repeatedly claims there will be no impact due to the Project's "infrequent lighted events." (R.B. at 22) As discussed above, the District expressly rejected placing a 15-event limit on nighttime events. (1 AR T-5, 60.) A parade once a year may not cause a significant impact. But there is a fair argument that a "parade" of cars twice a month, or more frequently during football season, may be a significant impact on parking, and the secondary impacts on traffic, air quality and noise.

F. The District Fails to Comprehend or Comply with Its Duty Under CEQA to Evaluate the Impacts to Historical Resources

"A resource included in a local register of historical resources, as defined in section 5020.1(k) of the Public Resources Code . . . shall be presumed to be historically or culturally significant." (Guidelines § 15064.5(a)(2).) If a resource is listed on a local register, the public agency must treat it as a "historically significant" unless preponderance of evidence shows that it is not significant. (Id.) The District's inquiry must go well beyond simply looking at the SHPO website.

In this case, the City of San Diego officially designated the Talmadge Gates Historic District in its local register of historical resources. (3 AR T-105TTT, 1097.) This historic district is directly adjacent to the football field. (3 AR T-105TTT, 1097.) Contrary to the District's characterization, this is not a "free" or careless use of the words "historic" and "eligible." (R.B. at 1.) The Talmadge Gates Historic District went through the City's process for being officially recognized as a historic resource. The District completely omitted reference to the Talmadge Historic District in the initial study - - yet another example of the omission of relevant information precluding informed decisionmaking. (1 AR T-8, 84.) The District's post hoc belittling of the local historical designation does not constitute a

preponderance of evidence that the historical resources are not significant.

The District argues that only a physical impact or alteration of the historical resource may be a significant impact. (R.B. at 19.) For support, the District cites Eureka Citizens for Responsible Government v. City of Eureka (2007) 147 Cal.App.4th 357. (R.B. at 20) Ironically, in Eureka Citizens, the city prepared an EIR because it found that noise from a playground may significantly impact the neighborhood. (Id. at 365.) Said case also does not stand for the proposition that only a direct physical change to the actual historic resource could constitute a significant impact. Contrary to District's contention, alteration of a historical resource's "immediate surroundings" resulting in the significance of the resource being materially impaired may also be a significant impact. (Guidelines § 15064.5(b)(1).)

The District argues that the "Talmadge Gates Historic District…cannot be in any reasonable sense be considered at secondary risk from the Project." (R.B. at 19.) Considering that the Project proposes to install 90 and 100 foot stadium lights directly adjacent to a locally designated historic district, the better question is "how could it not be considered at risk?" The District cannot claim that modern stadium lights will not materially impair the significance of the Historic

District without analyzing what made the Talmadge Gates Historic District eligible for local designation. The District refused to consider that off-site impacts must be considered. (See, 1 AR T-10, 125 "Response F-14".) Such failure to study a potentially significant impact lowers the already low threshold for requiring the preparation of an EIR. (Sundstrom v. County of Mendocino (1988) 202 Cal.App.3d 296, 311.)

In this case, there is a fair argument based on substantial evidence that modern 90-100 foot stadium lights will be visually incompatible with a designated historical district populated by well-maintained 1920s houses, historic-style lamp posts, and historic entrance gates. The District's CEQA decision and MND is defective by not considering the potentially significant impact on historical resources.

G. The Administrative Record Contains Substantial Evidence that the Stadium Lights May Have a Significant Impact on Aesthetics, Regardless of Whether Such Evidence Comes from the Lighting Study or From the Comments of the Community

The District appears to misunderstand its role when considering comments on a MND. It may, as a District-wide policy, contend that the stadium lights are an asset to the schools or to the community, and are even beautiful additions to the skyline. (R.B. at 16) However, "[i]n determining whether an effect will be adverse or beneficial, the Lead

Agency shall consider the views held by members of the public in all areas affected as expressed in the whole record…" (Guidelines § 15064(c).) Not a single person from the surrounding community agreed that 90 to 100 foot lighting standards was an aesthetic asset to the community. The public's comments could not be characterized as a few "individualized complaints regarding the aesthetic merit" of the stadium lights. (R.B. at 14) To the contrary, there was near universal condemnation of the installation of the stadium lights from the surrounding community.

In addition, while the District may dispute as to whether the stadium lights are a positive or negative aesthetic impact, the standard of review is whether there is substantial evidence to support a fair argument that the installation of the lights may be a significant impact. The facts used to support the fair argument include that the stadium lights will tower over the community, may be seen for a number of blocks, and when lighted, will be seen from significant distances. Coupled with the fact the project is located in residential neighborhood where the community has made a specific effort to maintain and emphasize the historic ambiance of the neighborhood, there is a fair argument that the project may degrade the visual resources. The fair argument is furthered by the fact that the District refuses to place any limits on the number of

times the field will be lighted on a weekly, monthly or yearly basis, and the record reflects it will be substantially more than 15. (See Section II.A, *ante*.)

The District argues that the lighting impact study demonstrates that there was a less-than-significant impact. (R.B. at 14) However, while glare may or may not be mitigated, glare is not the only visual impact that must be considered. (*See*, Berkeley Keep Jets Over the Bay Com. v. Board of Port Cmrs. (2001) 91 Cal.App.4th 1344, 1381 (threshold of significance for noise is not the only standard to consider).) If only glare could cause a deterioration of the visual character, a neon sign suspended 100 feet above the community stating "Hoover High Cardinals" would not be a significant impact as long as the sign did not create .8 foot candle of light intrusion into neighboring residences. (See, 1 AR T-12, 199.) Like a neon sign, which some people may believe is an appropriate display of school spirit, 90-100 foot stadium lights will significantly degrade the visual quality of the quaint Talmadge neighborhood.

This brings up another problem with the District's MND. Evidence in the lighting study demonstrates that, in the near term (before proposed landscaping reaches maturity), the stadium lights would exceed the threshold of significance for light intrusion on a number of

residences during pre-curfew. (1 AR T-12, 190, 191, 193, 196, 199.) Because the glare will exceed the threshold of significance, there is a fair argument that glare from the lights will have a significant impact on the residences at least in the near term.

The District claims such argument misreads the lighting study which explains that due to location, ambient light conditions and limited frequency and duration, the lighting would not create a significant impact. (R.B. at 14) These explanations may support a statement of overriding considerations on why visual resources and short-term glare impacts may be acceptable. But, such explanation does diminish the fact that, in the near term, until the landscaping has sufficiently matured to block the light, glare from the field lights will cause a significant impact on the adjacent neighbors. Petitioner has found no cases, and the District cites none, where exceeding the threshold of significance does not constitute substantial evidence that a project may have a significant impact. In this case, there is substantial evidence in the record to support a fair argument that the Project may have a significant impact on the environment.

H. CEQA Protects Not Only the Quality of California's Pristine Forests, Rivers, and Oceans, but it also Protects the Quality of the Community

The District claims that "cumulative impacts" does not refer to the cumulative effects of impacts within a project. (R.B. at 25.) However, "cumulative" is defined in CEQA as, "two or more individual effects, when considered together, are considerable or which compound or increase other environmental impacts." (Guidelines § 15355.) The Guidelines further specify, "the individual effects may be changes resulting from a single project or a number of separate projects." (Guidelines § 15355(a).) The District makes no effort to dispute the validity of such CEQA Guideline. (Bakersfield, *supra*, 124 Cal.App.4th at 1197.) Obviously, cumulative impacts can be considered two or more effects within a project that combine to increase an impact.

What is particularly disturbing is the District's attitude towards cumulative impacts, is the District's claim that the quality of the neighborhood is not something relevant to the analysis of the Project under CEQA. As expressly noted in the Legislative intent regarding CEQA, "It is necessary to provide a high-quality environment that at all times is healthful and pleasing to the senses and intellect of man." (Pub.Res.Code § 21000(b).) "Pleasing to the senses and intellect of

man" clearly includes mental evaluation of a safe, beautiful and welcoming environment. "At all times" indicates a desire to protect the home environment as well. As eloquently explained by the Fifth District Court of Appeal:

> An EIR's role "as an environmental 'alarm bell' … is equally vital whether one is protecting our coastline and forests or preserving our inland neighborhoods as viable communities. For many of us, adverse environmental impacts such as reduction of endangered species habitat are regrettable but largely abstract harms. In contrast, deterioration of our local communities is a very real problem that directly impacts the quality of our daily life.

(Bakersfield, *supra,* 124 Cal.App.4th at 1220.)

The District's contention that impacts to the quality of the community are not CEQA impacts is simply incorrect. Admittedly, CEQA attempts to segregate impacts into various distinct categories for the purpose of analysis. However, the fact that one or more categories are not included in the "Appendix G" Guideline does not mean they are not subject to evaluation. The fact that multiple impacts will combine to create a truly shocking adverse impact to the surrounding community does not somehow shield a cumulative impact from the fair argument standard. In fact, if one considers the glaring lights, the noise from cheering fans, the hundreds of cars circling the narrow and winding neighborhood streets, the lack of adopted mitigation for crowd control and policing of the neighborhood (including the trash, blaring radios and

history of minor crime), and the fact that all these impacts will be worse because they will occur at night when it is dark and residents are home from work, there is a fair argument based on substantial evidence that the stadium lighting project will have a significant direct, indirect, and cumulative impact on community quality.

I. The District Fatally Confused and Misdirected Decisionmakers and the Public by Incorrectly Stating It was Exempt from Local Plans and Zoning Laws, Instead of Stating it Would Later Consider an Exemption Vote on the Subject

The District disavows the very distinct difference between telling the public and the decisionmaker – *the District is exempt from the City of San Diego's Municipal Code*, as opposed to – *the District will consider and vote to exempt itself in the future*. (R.B. at 23-24, 42) Informing the public that an action *may occur* in the future invites comments on the impact of such future action, whereas informing the public that some discretionary exemption action *has already occurred* and relevant local laws and plans do not apply, serves to mislead and suppress comment on the subject.

Furthermore, when an agency is exempt from certain laws and plans, it certainly will not take a hard critical look at alternatives and other considerations. Statements misleading the public and

decisionmaker about the applicability of land use plans and zoning constitutes a prejudicial abuse of discretion because it serves to thwart informed CEQA review and decisionmaking.

It was only after Taxpayers filed suit with a cause of action specifically challenging the improper claim of exemption that the District admitted it was not exempt by taking steps for Board consideration and vote for a *possible* exemption. Had the Initial Study stated that it *intended* to exempt itself, Taxpayers would have addressed the matter differently by encouraging and lobbying decisionmakers to prevent a two-thirds vote exempting local zoning laws.

The District claims that, as a result of appellant "comment[ing] on all of these issues," there is no substantial evidence to support a fair argument that "CEQA goals were 'thwarted by the preclusion of informed decision making and public participation.'" (R.B. at 24, quoting San Lorenzo Valley Community Advocates for Responsible Education v. San Lorenzo Valley Unified School District (2006) 139 Cal.App.4th, 1356, 1375.) There is no merit to this argument for a number of reasons.

First, the omission of relevant information or providing misinformation is not reviewed under a substantial evidence test or the fair argument test. Failing to provide proper information constitutes a

failure to proceed in accordance with law. (Sunnyvale, *supra*, 190 Cal.App.4th at 388.) The harmless error standard is inapplicable. (Id.) Further, even if the harmless error was applicable, the burden is on the agency to demonstrate lack of prejudice. Incorrect information is even more prejudicial than omitting information. The error cannot be considered immaterial.

The District essentially argues the MND evaluated what it termed as "advisory" land use plans and policies regarding "aesthetics, traffic, parking, land use designation, footprint, noise and other environmental issues, and concluded that the Project will not result in any inconsistencies." (R.B. at 23) Unfortunately, such statement is demonstrably incorrect. The stadium lights are completely inconsistent with City zoning laws which limits the height of all structures to 30 feet. Exceeding height limitations by 60 to 70 feet is not a minor deviation of zoning and land use law. In addition, the Project is nowhere close to being consistent with the City's parking requirements. (Discussed in Section II.D, *ante*.) The Initial Study is required to identify inconsistencies and explain why the District believed that such inconsistencies did not constitute a significant impact. (Guidelines § 15063(d)(3).)

Additionally, such an errant disclosure does not comply with CEQA, which requires a discussion and analysis of a project's environmental setting at the time the application was filed. (Guidelines § 15125.)

III.
THE DISTRICT SELECTIVELY MISREADS THE PLAIN LANGUAGE IN THE BOND MEASURE TO EFFECTIVELY CREATE AN UNRESTRICTED SPORTS FACILITIES SPENDING PROJECT; THE PROPER PARTIES ARE NAMED AND BEFORE THE COURT TO HAVE THIS MATTED ADJUDICATED

The arguments of the District ignore and circumvent three important factors about the Prop S bond measure. First, the District omits any discussion of the express "incidental to and necessary for completion of the listed projects" language preceding the bulleted list of "cost" items on page 96 of the bond measure. Despite its own recognition that *all words in a statute shall be given meaning, force and effect so as to not render them meaningless* (R.B. at 31), the District does not address the important point that "field lighting" is not incidental to, nor necessary for, the completion of any of the projects listed for Hoover High.

Second, the District briefly mentions how the bond contains "eight general categories of school facilities work" (R.B. at 28, emphasis added), but nowhere does the District explain how athletic facilities projects would fit within any of the eight categories, including Hoover's "Projects to Improve Accessibility, Code Compliance Upgrades."

The District also fails to respond to the fact that its expansive interpretation would give it unlimited discretion to build any of the "costs" or "furtherance" items contained on pages 96 and 97 as a "listed project" at any school throughout the District. The interpretation promoted by the District serves to turn the strict requirements under Proposition 39 on its head, making Proposition S a general fund bond for virtually any infrastructure development later chosen. Proposition 39 does not allow such an unlimited and expansive reading.

A. Full Athletic Facilities, Stadium Lighting, and Other Sports Equipment Measures Were Not Contained in the Specific Schools' Projects Lists and the List of "Necessary and Incidental" Project Features Cannot Be Read as an Additional Project List.

As pointed out above, the District conveniently overlooks ignores express language in Prop S that demonstrates that items listed on page 96 must be "**incidental to and necessary for completion of the listed**

projects." (4 AR, T-135, 2255.) Unambiguously, the bullet points on page 96 relate solely to incidental and necessary "costs" for the projects listed for each school. The bullet points that follow on page 96 are not a new list of possible or discretionary "projects" to be constructed at any school.

The District demands this Court apply a rote interpretation of the bond that if an incidental project feature is listed, no further inquiry should be conducted. (See, R.B. at 26, 29-30 ["'Field lighting' is plainly stated in the final bullet point in this section, together with other features associated with athletic facilities."].) However, the District's argument regarding *plain meaning* and *mere presence* requires this Court to also consider how the words *incidental and necessary* "costs" in the preceding paragraph impact the proper interpretation of the bulleted items. (In re Tobacco Cases I, (2010) 186 Cal.App.4th 42, 49 ["must give significance to every word of a contract, when possible to avoid an interpretation that renders a word surplusage."].)

Contrary to suggestion of the District, neither Foothill nor Hermosa Beach is applicable to the particular facts and challenge brought here by Taxpayers.[5] Taxpayers does not request or demand

[5] Foothill-De Anza Community College Dist. v. Emerich, (2007)158 Cal.App.4th 11, 24 and Committee for Responsible School Expansion v. Hermosa Beach City School Dist., (2006)142

compliance with "minute details" (Foothill at 24) in the sense that a "three-compartment sink" or "accessible compliant wrestling room" might be listed. (*See,* e.g. 4 AR T-135, 2239 [Hoover project list].) Rather, Taxpayers contend that the boilerplate and "incidental and necessary" and "further specifications" minutiae on the last two pages of the bond measure (4 AR, T-135, 2255-2256) not be read to become one or more of the Constitutionally required "listed projects" now applicable district-wide at any school, irrespective of whether they are "incidental or necessary for completion of a listed project." It is the project lists for each school that control. As explained by the court in Foothill:

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

In this case, the voters were advised of the specific school projects lists (4 AR, T-135, 2169-2254), but even a hyper-vigilant voter

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Cal.App.4th 1178. With Hermosa Beach being sufficiently addressed in the Opening Brief (at pp. 47-48), only Foothill is addressed herein.

would not have surmised that the bond money would be spent on stadium lighting projects throughout the school district.

In Foothill, the court noted:

> The list of projects set forth in Measure C clearly identifies the types of projects to be funded. For example, it is clear that among the projects to be funded are: repair or replacement of leaky roofs, wiring classrooms for computers and other technology, and installation of fire safety doors and sprinklers. This is sufficiently specific for meaningful approval and oversight.

(Foothill, *supra*, 158 Cal.App.4th at 24.) Such were the identified and described projects appearing as the "project list" for the two colleges in the Foothill-De Anza district. (Id. at 31 [full ballot measure in the Appendix to decision].)

The District argues that placement of pages 96 and 97 of the bond measure under each school heading would create a "ridiculously unwieldy" document. (R.B. at 30.) The District knows full well how to properly disclose a stadium renovation or upgrade project. Just as it listed the "three compartment sink and hand sink in the kitchen" and "[r]enovate/replace stadium bleachers, including press box," the District could have stated a project regarding "new or replacement stadium lights" for any intended and named schools without creating a cumbersome or unreadable bond measure. The District chose not to list and present such a project to the voters.

This begs the question as to what kind of projects the bulleted list on Page 96 may apply? Such incidental project features and equipment expenditures would certainly apply for related construction of an entire school facility or campus – as exemplified by Wilson Middle School (4 AR T-135, 2236) and two of the three new school "additional projects" listed at the top of page 96. (4 AR T-135, 2255) It is unreasonable to apply the language concerning sports, fields, and athletic facility projects to *every* school throughout the district. Such a reading of the last bullet point on page 96 of the bond measure would allow Prop S funds for just about anything *outside a classroom or building* throughout the district (e.g. "repair, upgrade, modify, expand, refinish, replace and construct site improvements, including off-street parking areas…").

While the District states the obvious that "[n]ot every item can be first on the list" (R.B. at 26), it is just as obvious that in enacting the special and restricted provisions under Proposition 39 the Legislature did not contemplate how a bond measure would be worded to fund essentially any school facility possible.

Significantly, the District cannot meet or prove its most basic argument that:

> "Because field lighting was called out specifically as an element of the high school field upgrades, including those at Hoover High School, the District satisfied the accountability requirements." (R.B. at 26-27)

Nowhere within the description of projects for Hoover is there any suggestion that *new* (not *upgraded*, *modified*, *expanded*, or *replaced*) athletic field or stadium lighting was intended to be a part of any listed project. Because such field lighting was not described as an element of the field upgrades for Hoover, the District's reading of the bond measure is not supported and must be rejected.

B. The District's Reading of the Proposition S Violates the Constitutional Requirements to Disclose Specific School Facilities Projects to Be Funded

The District repeatedly argues that Taxpayers "goes too far" in trying to promote its sole cause and angst – the use of Prop S funds for new stadium lighting at Hoover High. Such fact does not diminish the merits of the argument. The Constitution and enactments of the Legislature have endorsed strict judicial enforcement to prevent any misuse of the specially restricted Prop S bond funds.

The accountability set forth in the California Constitution mandates, in pertinent part:

> (3) ...shall apply only if the proposition...includes all of the following accountability requirements:

(A) ... proceeds from the sale of the bonds be used only for the purposes specified in Article XIII A, Section 1(b)(3), and not for any other purpose…

(B) A list of the specific school facilities projects to be funded and certification that the school district… has evaluated safety, class size reduction, and information technology needs in developing that list.

(Const. Art. XIIIA, § 1(b)(3), emphasis added.)

Confirmed via additional Legislative enactments, the stated intent reiterated:

(a) Vigorous efforts are undertaken to ensure that the expenditure of bond measures, including those authorized pursuant to paragraph (3) of subdivision (b) of Section 1 of Article XIIIA of the California Constitution, are in strict conformity with the law.

(d) That unauthorized expenditures of school construction bond revenues are vigorously investigated, prosecuted, and that the courts act swiftly to restrain any improper expenditures.

(Education Code § 15264, subds. (a) & (d).)

The few paragraphs containing a project's possible incidental cost features at the end of Prop S should not be read in a manner to subvert the Legislative intent of Prop 39, turning the strict nature of required "project lists" into a general expenditure bond.

If the District's expansive reading of Proposition S is to be endorsed, then it is clear that neither the whole of the Prop S measure, nor the "incidental" cost features at the end of Prop S, satisfy the intent

and requirements of Proposition 39. Proposition S was not specific enough to "clearly apprise" the voters that their new property taxes for Prop S would be used for a full-blown athletic development program, including stadium lighting and completely rebuilt stadiums, and sports equipment to outfit the same. Local citizens and local parents have not been given the ability to "decide what is best for its children." (Prop. 39, § 2(f)) Nor have voters been given "a list of specific projects [that] their bond money will be used for." (Prop. 39, § 3(c).)

As demonstrated in this case, the District's actions seek to violate the intent and restrictions of the strict Constitutional bond measure to create an impermissibly broad and unlimited range of school facility projects.

C. Taxpayers Satisfies Both Taxpayer and Public Interest Standing Requirements for its Claims and Relief Sought

Representative organizations such as Taxpayers are allowed to maintain suits on behalf of its members under the doctrine of "public interest standing." As ruled by the California Supreme Court in Common Cause v. Board of Supervisors, (1989) 49 Cal.3d. 432, 439, a lawsuit brought by an organization (whose members included qualifying taxpayers) had standing because Code of Civil Procedure section 526a

provides an independent basis for plaintiff citizens to proceed and procure the enforcement of a public duty. "The relator need not show that he has any legal or special interest in the result, since it is sufficient that he is interested as a citizen in having the laws executed and the duty in question enforced..." (Id.)

Here, Taxpayers represents a class of interested persons "collectively formed and are currently united for the purpose to monitor and ensure that laws are faithfully and fully complied with during the planning, implementation and spending of school bond money…" The members of Taxpayers "stand to benefit through proper implementation and be harmed by the improper interpretation and implementation of Prop S." (J.A. at 2 [FAC ¶ 5].)

The District seeks to restrict this action as solely being one as a taxpayer action under Education Code § 15284(a). (R.B. 35) While representative members of Taxpayers could have chosen to *only* bring this action as a taxpayers lawsuit under Code of Civil Procedure § 526a and Education Code § 15284, it was not required to do so. Tellingly, the Legislature expressly endorsed the ability to pursue alternative causes of actions and remedies. (Ed.Code § 15284(c).)

As explained by the Supreme Court's in Common Cause:

> The purpose of a standing requirement is to ensure that the courts will decide only actual controversies between parties

> with a sufficient interest in the subject matter of the dispute to press their case with vigor. [] This purpose is met when, as here, plaintiffs possess standing to have the underlying controversy adjudicated and the desired relief granted after a trial on the merits." (Id. at pp. 439-440 [citations omitted])
>
> . . . We find it unnecessary to reach the question whether plaintiffs have standing to seek an injunction under Code of Civil Procedure section 526a , because there is an independent basis for permitting them to proceed. The ultimate relief sought in this action includes a writ of mandate … [W]here the question is one of public right and the object of the mandamus is to procure the enforcement of a public duty, the relator need not show that he has any legal or special interest in the result, since it is sufficient that he is interested as a citizen in having the laws executed and the duty in question enforced."

Common Cause v. Board of Supervisors, (1989) 49 Cal.3d 432, 436-437 [internal quotes and citations omitted]).

Here, Taxpayers seek declaratory relief, mandamus, injunction and/or other available relief to compel the respondent District to comply with the laws and legal principles that govern the interpretation, application, spending and implementation of Proposition S and the related project approvals. (J.A. 10-11, 16 [FAC ¶¶ 26, 27, 28, 29; prayer at ¶¶ 1-3]; *see also*, Venice Town Council, Inc. v. City of Los Angeles, (1996) 47 Cal.App.4th 1547, 1563-1567.)[6]

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[6] As specifically alleged in Paragraph 27 of the FAC, "Without the grant of declaratory relief, the granting of an injunction, and/or the issuance of a writ of mandate, the District will continue to proceed in a manner not allowed by law …"

Additionally, Taxpayers qualifies for "taxpayer standing" based on criteria that: "(a) its members would otherwise have standing to sue in their own purpose; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires participation of the individual members in the lawsuit." (Driving School Assn. of California v. San Mateo Union High School Dist., (1992) 11 Cal.App.4th 1513, 1517, citing Brotherhood of Teamsters & Auto Truck Drivers v. Unemployment Insur. Appeals Bd., (1987) 190 Cal.App.3d 1515, 1522.) Whether labeled as a taxpayer lawsuit or a citizens' suit, Taxpayers has standing to obtain a ruling on the merits:

> Taxpayer suits and citizen suits are closely related concepts of standing. [] The chief difference is a taxpayer suit seeks preventative relief, to restrain an illegal expenditure, while a citizen suit seeks affirmative relief, to compel the performance of a public duty. [ ] Where standing appears under either rule, the action may proceed regardless of the label applied by the plaintiff.

(Connerly v. State Personnel Bd., (2001) 92 Cal.App.4th 16, 29 citing Common Cause, *supra*, 49 Cal.3d at 439, citations omitted.)

The District has not refuted that Taxpayers is composed of qualified taxpayer persons and members with sufficient standing to bring this action. (J.A. 309-322) Instead, the District solely focuses on the fact the organization itself does not own property or pay taxes. (R.B. at 35-26) However, in this case, there is no individual or differential

ratepayer accounting or tax refund involved such that individual participation is necessary or warranted. Thus, the third factor for organizational standing is satisfied. (Driving School Assn., *supra*, 11 Cal.App.4th at 1517; *See also*, Citizens for Uniform Laws v. County of Contra Costa, (1991) 233 Cal.App.3d 1468, 1472-1473 [organization would have standing through avowed member, if qualified, but court found him to be an independent contractor, not an "employer"].) The District does not attempt to argue or refute that Taxpayers is constituted with members who reside within the school district and have paid ad valorem taxes within the last year.

Of note, the named Taxpayers plaintiff here is no different from the community organization in Committee for Responsible School Expansion v. Hermosa Beach City School Dist., (2006) 142 Cal.App.4th 1178 (Hermosa Beach), whereby a group of individuals joined to file a lawsuit to challenge an unlawful expenditure similar to the action here.[7]

D. The District is a Properly Named Defendant

Respondent claims Taxpayers cannot name the School District as a defendant because the statute says a plaintiff *may* name its officers, agents, and employees, and therefore only particular persons "may" be

[7] The District contends the history of named parties in Section 53094 challenges supports its position that only local agencies may sue. (*See* R.B. at 39, fn. 8.)

named and enjoined. (R.B. at 36-37) The District misconstrues the plain language of the statute.

"It is a well-settled principle of statutory construction that the word 'may' is ordinarily construed as permissive, whereas 'shall' is ordinarily construed as mandatory, particularly when both terms are used in the same statute." (Doe v. Lincoln Unified School Dist., 188 Cal.App.4th 758, 770, quoting Common Cause v. Board of Supervisors, (1989) 49 Cal.3d. 432, 443.) Thus, a plaintiff *may* also elect to name the agency and school district itself as a defendant, in lieu of one or more of its officers or agents.

In this case it was the District itself which held a hearing and rendered a decision or order authorizing the Project, not some officer, superintendent, treasurer, or clerk. Relief and remedy via an order and judgment made against the District is sufficient in this case to redress the alleged wrong. Furthermore, Taxpayers pleaded "the "District" includes all of its departments, officers, superintendent, and appointed and elected representatives charged with the duties and obligations as alleged herein." (J.A. at 3 [FAC ¶ 6].)

Respondent erroneously interprets and provides no support to contravene the express and permissive plain language of Education Code § 15284 as to who may be sued.

IV.

THE EXEMPTION ACTION SHOULD BE OVERTURNED BASED ON IMPROPER NOTICE, ARBITRARY AND CAPRICIOUSACTION AND FAILURE TO COMPLY WITH CEQA

A. It is Arbitrary and Capricious to Exempt Multiple Projects Without Considering the Appropriateness or Necessity of the Zoning and Plan Exemptions

1. The Arbitrary and Capricious Standard of Review for a School District Section 53094 Exemption Action

While this Court exercises limited review in ordinary mandamus proceedings, it cannot uphold the District's Exemption Action with respect to 11 schools where its decision is utterly lacking in evidentiary support and made without disclosing the context and necessity of the claimed exemptions. (McGill v. Regents of University of California, (1996) 44 Cal.App.4th 1776, 1786.) Courts must ensure that an agency has adequately considered all relevant factors, and has demonstrated a rational connection between those factors, the choice made, and the purposes of the enabling statute. (Id.)

The District argues the Exemption Action is legislative in nature, while Taxpayers contends the action should be considered quasi-

adjudicatory, much like a variance action. Whether an exemption action is quasi-legislative or quasi-adjudicative the District is still bound to comply with certain prerequisite consultation and environmental review, and has substantive (nonclassroom) statutory limitations – all controlling and limiting when and how an exemption may be applied. [8]

The difference between a "legislative decision" and an "adjudicatory decision" was explained in Strumsky v. San Diego County Employees Retirement Assn., (1974) 11 Cal.3d 28, 34, fn. 2, as follows: "Generally speaking, a legislative action is the formulation of a rule to be applied to all future cases, while an adjudicatory act involves the actual application of such a rule to a specific set of existing facts."

Even for actions wholly legislative actions "in which policy decisions be made" (Schabarum v. California Legislature, (1998) 60 Cal.App.4th 1205, 1219), "[t] he performance of the policymaking role of the Legislature necessitates that the Legislature engage in certain fact-finding processes. These are not the type of case-specific factual determinations that are intrinsic to the judicial function, but are instead 'an indispensable incident and auxiliary to the proper exercise of

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[8] Section 53094(b), referencing Public Resources Code § 21151.2, Government Code § 65352.2, and that exemptions may not be used for features that could be characterized as "nonclassroom facilities," such as warehouses, administrative buildings, automotive storage (e.g., parking) and repair buildings, that are devoted to ancillary noninstructional functions.

legislative power.'" (Id.) "Although courts must give legislative findings great weight and should uphold them unless unreasonable or arbitrary," courts also have an obligation to ensure that the legislative body "has drawn reasonable inferences based on substantial evidence." (Professional Engineers v. Department of Transportation, (1997) 15 Cal.4th 543, 569, internal quotes omitted.)

Because the ultimate question, whether the agency's action was arbitrary and capricious, is one of law, the trial court's statement of decision has no conclusive effect on the court. (Loyola Marymount University v. City of Los Angeles, (1996) 45 Cal.App4th 1256, 1260, citing Shapell Industries, Inc. v. Governing Board, (1991) 1 Cal.App4th 218, 233.)

The inquiry into arbitrary and capriciousness is similar to the substantial evidence review in that both require a reasonable basis for the decision. (Western/California Ltd. v. Dry Creek Joint Elementary School Dist, (1996) 50 Cal.App4th 1461, 1492, citing Garrick Development Co. v. Hayward Unified School Dist., (1992) 3 Cal.App.4th 320, 328.)

2. The District Proceeded with the Exemption Action in a Deficient, Arbitrary and Wholly Unsupported Manner.

With the exception of responses to comment in the Hoover High MND that 90 and 100 foot lighting structures need not comply with local laws, the record and evidence in this case is completely devoid of identification of the projects and zoning code(s) sought to be exempted, for any of the other 11 school projects. The Resolution exempting all local zoning codes and planning ordinances for yet unstated facilities or project features demonstrates an arbitrary, capricious and unsupported action.

Section 53094 contains language indicating an apparent purpose that an exemption would only be made where (1) a particular development project is in need of being exempted, and (2) a discernible project has progressed to a point where zoning and land use applicability can be substantially ascertained and meaningfully (and possibly) measured against the "proposed use of property" as set forth in Section 53094(c).

An action taken by a school district, and any judicial review of it by a court, would be meaningless with respect to a "proposed use of property by the school district" if it is not disclosed at the time of the action. Also, an attempted exemption for a project that has not been

substantially defined and disclosed will not allow a school district to be in a position to give itself, the public, or the local agency information to determine the legality of the school district's action.

For this instant case, in addition to the above, the District's Exemption Action contains no explanation of the details of any project's characteristics, does not explain the necessity of the exemption. For example, in its opposition the District circularly remarks that a *whole high school project, in and of itself, is used for or directly related to student instruction*, thereby suggesting its action must only be interpreted as avoiding any nonclassrooms from the exemptions. (R.B. 42)[9]

Such complete absence of information or explanation makes the Exemption Action entirely lacking in evidentiary support for purposes of public and local agency disclosure, future applicability, and judicial review. There is no support that the District "has adequately considered all the relevant factors and has demonstrated a rational connection between those factors, the choice made, and the purposes of the enabling statute." (*See* Ridgecrest Charter School v. Sierra Sands Unified School

[9] The District states this notwithstanding tremendous overbreadth of its exemption which it enacted to cover and apply to all "educational facilities" and every possible zoning code and land use plan of the City of San Diego, no matter what they are. (*See* O.B. at 53-55)

District, (2005) 130 Cal.App.4th 986, 1006-1007, citing Sequoia Union High School Dist. v. Aurora Charter High School, (2003) 112 Cal.App.4th 185, 195, citing McGill v. Regents of University of California, (1996) 44 Cal.App.4th 1776, 1786.)

B. It is Mandatory and Not Premature for CEQA to Apply to an Exemption Action

1. CEQA has Long Recognized that Zoning Changes May Ultimately Cause a Significant Impact, therefore an EIR Must Be Prepared Before the District Exempts Itself from Local Zoning and Adopted Plans

The District claims that a zoning exemption cannot be a project because it neither causes nor leads inevitably to any physical changes to the environment. (R.B. at 45.) Such argument was rejected by California courts more than 25 years ago. (Bozung v. Local Agency Formation Com., (1973) 13 Cal.3d 263, 277, superseded by statute on other grounds; Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo, (1985) 172 Cal.App.3d 151, 165-167.) If general plan amendments and rezoning of property for specific projects are considered subject to CEQA, then certainly a discretionary action to exempt specific projects from land use plans designed to protect the

environment and communities would be considered subject to CEQA. (Guideline § 15378(a)(1).)

The District argues that "Appellant has cited no statute or case authority holding that a section 53094 action is such project." (R.B. at 45.) Such contention was oddly adopted by the trial court, which denied the cause of action because no previous cases had held that such action was a project. Such a rote approach – regarding the absence of case involving a particular statute – is not the appropriate test under CEQA. The District's action to exempt 12 projects from zoning is far from unique under CEQA's long history.

For example, a very similar issue and identical arguments were addressed in City of Carmel-by-the-Sea v. Board of Supervisors (1986) 183 Cal.App.3d 229. In City of Carmel the issue was whether a zoning amendment to establish the demarcation of wetlands constituted a project. (Id. at 239.) The real party in interest argued that the zoning amendment simply made the property consistent with the Land Use Plan and made no commitment for future development. (Id. at 243.) The court rejected such argument, noting that it was clear that the zoning amendment was the "first step" towards development. (Id. at 243-44.) Therefore, the zoning amendment was part of a whole project that must undergo CEQA. (Id.)

Likewise here, the District argues that the exemption action is specifically designed to facilitate the District's projects, and further argues "nothing in the environment must change as a result of the Exemption." (R.B. at 46) The fact that the exemption action was an "initial step" specifically designed to facilitate development that will conflict with San Diego's Municipal Code means the exemption action is part of a whole project that must undergo CEQA.

2. CEQA Review Is Not Premature at this Time Because the District Purports to Know its Projects, the Desire or Need for Exemptions, and the Location of Each School

The District argues that CEQA review for each of the projects can occur later when more details have been settled. (R.B. at 47) The District explains, "The potential CEQA impacts of [Stadium Lights], including glare, spill light, and aesthetics, cannot be evaluated accurately until there are specific plans in place showing their placement in their surroundings and their proposed usage." (R.B at 48) The District claims that attempting to analyze those concerns in the abstract does nothing to advance CEQA's goals.

The argument that "CEQA will occur later when plans have been finalized" has been proffered and rejected in numerous cases. (*See* e.g.,

Save Tara v. City of West Hollywood (2008) 45 Cal.4th 116, 135; City of Carmel, *supra*, 183 Cal.App.3d at 239.)

The projects must be considered at the earliest time possible, before the project or project elements gain irreversible momentum. (Bozung v. Local Agency Formation Com. (1975) 13 Cal.3d 263, 283-284 & fn. 28.) Environmental review must occur early when true flexibility exists. (Sundstrom v. County of Mendocino (1988) 202 Cal.App.3d 296, 307.) The relevant question is not whether environmental review could be done in the future, but whether there is sufficient information available at this time that the environmental review would contain meaningful information. (Fullerton Joint Union High School Dist. v. State Bd. of Education (1982) 32 Cal.3d 779, 797, citing No Oil, Inc. v. Los Angeles (1974) 13 Cal.3d 68, 78.) Further, by breaking a project up into separate governmental approvals, the District seeks to violate the prohibition on segmentation of the project. (Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo (1985) 172 Cal.App.3d 151, 167.)

Obviously, there is plenty of information that could provide the basis for meaningful environmental review. The location of each school is known, and the location of each intended school facility is known. The District does not need to know the exact or final building designs or

plans to conduct environmental review. (Fullerton, *supra*, 32 Cal.3d at 797 [Court rejected that specific plans had not yet been formulated for construction of a new high school before CEQA review was required].) More importantly, environmental review may actually help determine alternatives for use and placement of facilities, or whether they should be installed at all.

3. The District's Exemption Action Frustrates CEQA's Informational and Accountability Review Process

Most disturbing with the Exemption Action is the reason and manner the District seeks to wipe-out all discussion of incompatibility certain classroom facilities and stadium lights that stand to violate local zoning. By exempting projects from municipal land use and zoning codes, the District presumes it will eliminate discussion in an initial study, MND or EIR. (City of Long Beach v. Los Angeles Unified School Dist. (2009) 176 Cal.App.4th 889, 918.) The District's action is specifically designed to deprive community opposition by eliminating discussion whether such projects may have a significant impact.

At issue in the case, the MND for Hoover High provides a prime example of how future CEQA review will address inconsistencies if the District's exemption action is upheld:

> According to California Government Code, Section 53094, the District is exempt from the City of San Diego's Municipal Code. Therefore, the City of San Diego adopted land use plans and policies function as advisory documents only. Implementation of the proposed project would not result in any inconsistencies with the advisory land use plans and policies; and, therefore, no significant land use and planning impact has been identified.

(1 AR T-8, 91.)

One of the purposes of CEQA is to "demonstrate to an apprehensive citizenry that the agency has in fact analyzed and considered the ecological implications of its action." (No Oil, *supra*, 13 Cal.3d at 86.) Obviously, exempting the projects from local land use plans prior to CEQA demonstrates an intent to avoid analyzing and considering impacts with the land-use plans, and therefore community compatibility.

"The requirement of a detailed statement [in an EIR] helps insure the integrity of the process of decision by precluding stubborn problems or serious criticism from being swept under the rug." (People v. County of Kern, (1974) 39 Cal.App.3d 830, 841 Only through the scrupulous enforcement of CEQA is the "public … able to determine the environmental and economic values of their elected and appointed officials, thus allowing for appropriate action come election day should a majority of the voters disagree." (Id. at 842.) A pre-emptive exemption action, enacted as a consent item with no public debate or CEQA review

serves to prevent a thorough analysis and disclosure of land use inconsistencies and cannot be considered in compliance with CEQA (under good faith or otherwise).

C. Whether or Not the Zoning Exceptions are Considered Adjudicatory or Legislative, More Individualized Notice is Required; Harmless Error Cannot be Presumed Under the Facts of this Case

The District argues its zoning Exemption Action is legislative in nature and therefore no notice to landowners or a public hearing was required. (R.B. at 43-46) The District argues its Section 53094 zoning exemption matters are properly heard on a non-public hearing consent (or "business") agenda with simple posting at its headquarters and webpage applicable to local agencies under Section 54954.2. (R.B. at 42-42.) The District also argues CEQA reviews and determinations need not be considered in conjunction with its zoning exemption decisions.

1. The District's Qualified Right to Zoning Exemptions are Adjudicative in Nature Requiring Adjacent and Nearby Landowner Notice

The legislative grant of authority under Section 53094 provides a limited and "qualified" exception for school districts from adopted local zoning and assuming certain standards or conditions are met. (Gov. Code

§ 53094 (b).) The District is considering and applying one or more of its proposed projects to set of laws. It is not re-legislating or changing the zoning. As explained in the Opening Brief, the exemption action is more similar to qualified variances, exception or conditional uses rather than legislating its own land use codes and general plans – which the District does not do.

It is well settled that adoptions and amendments to zoning ordinances are legislative acts, but conditional uses, variances, exceptions and subdivisions remain adjudicatory. (Arnel Development Co. v. City of Costa Mesa (1980) 28 Cal.3d 511, 518.) The fact the District seeks to involve multiple city-wide high schools as part of its zoning action does not depart from the qualified limitation allowed for classroom exemptions only, notwithstanding the fact each exemption is for a different school, different project, in a different zone and planning area, and will involve different geographical concern and limitations.

The case cited by the District, Oceanside Marina Towers Assn. v. Oceanside Community Development Corp., (1986) 187 Cal.App.3d 735, is an example of a citywide policy issue involving amendment of a land use plan, not a site-specific code variance ("facts peculiar to the individual case") proposed here by the District. The redevelopment agency's plan amendment to move a railroad switchyard to a different

location involved a broad spectrum of community costs and benefits, which this Court involved not only the nearby owners, but also business and residents and users of the downtown that stood to benefit by the relocation. (Id. at 746-747, citing San Diego Bldg. Contractors Assn. v. City Council, (1974) 13 Cal.3d 205, at p. 212.) As part of its Section 53094 exemption, the District has to be considering one or more specific projects, or project features, as applied to particular sites, along with the zoning codes and land use plans adopted there.

2. California Law Requires More Individualized Notice for Zoning and Planning Legislative Actions

In the alternative, even should this Court accept the District's offered "legislative" action defense (that its particular school projects Section 53094 exemptions are not adjudicatory), the District would still not be able to dispense with the type of individualized public notice and hearing required for zoning and land use decisions as alleged by Taxpayers. As argued before the trial court (J.A.at 419-20), Government Code § 65854 similarly requires local agencies such as school districts provide individualized notice and hearing under Section 65091 when a zoning action affects the permitted uses of real property. The same is

required for amendment of general plans as well as specific plans. (§§ 65091(a) and 65453 (a), respectively.)

No matter how the District frames and argues its 12-school zoning and land use exemption actions – whether as single site-specific, multiple grouped projects, or on a citywide basis – the District's 72-hour notice and consent item passage for its zoning and land use action is legally insufficient.

3. Incorrect and Ambivalent Responses to CEQA Comments Made Three Months Prior Do Not Impart Actual or Constructive Notice of Later Unidentified and Undetermined Agency Action

For the first time, on appeal, the District argues without any support, that the lack of notice to all stakeholders was nonprejudicial because there can be no harm ("deprivation of a significant property right"). (R.B. at 42-45.) The District argues further, that despite the February 10, 2011 lawsuit filing, the December 2010 public comments on the MND "not only [provided] adequate, actual notice and opportunity to challenge the District's right to the Exemption, they exercised their rights." (R.B. at 43) This defies basic administrative decision-making process. The public could have approached, argued, and lobbied the District Board not to exempt Hoover had the District properly stated it would have to later *consider* a special action with a

two-thirds vote for a *possible* exemption. Even assuming the District's argument has merit, it would only apply to the Hoover project, not notice and due process related to 11 other school development projects.

For the purpose of the Hoover project, the District argues Taxpayers (and others) had an opportunity to object. (R.B. 42-43.) However, the facts indicate that the public objections and decision-makers instructions were responded that (1) the District was already exempt, and (2) the District's compliance with local zoning and plans was merely advisory. (1 AR T-8, 91; 1 AR T-10, 115, respectively.) Tellingly, no further objection was made at the January 11, 2011 hearing. With limited and no effective notice given for the May 10, 2011 hearing, it is not surprising landowners would not appear. (J.A. 265 [Superintendent's Consent Agenda, Item No. 23].)

The District extrapolates how its incorrect and defective CEQA responses given for Hoover (1 AR T-10, 115) act as full adjudication and right for objection for every possible property issues related to 11 other school sites throughout the city. (R.B. at 42 ["the issue is resolved also with respect to the other nine similar projects...[and] the Whole Site Modernization projects, by definition, present less of an issue because there can be no question that a high school itself is used for or directly related to student instruction"].) This conclusory and circular

explanation defies both logic and evidence because (1) one or more of the projects facially involve nonclassroom facilities such as parking lots, city sidewalk projects, field storage buildings, administrative buildings and the like (e.g., J.A. 275-276 [Hoover], 281-282 [Madison]), (2) it is wholly unknown and undisclosed what may be the other project elements necessary and intended for the exemption, and (3) nonetheless whole school projects would, at a minimum, contain parking lots, administrative buildings, and the like. (*See* above additionally related argument in Sections II.I and III.A, and in Opening Brief at 56-58.)

D. The City's Non-Filing of Suit is Legally Irrelevant to Taxpayers' Claims; There is No Legislated Prohibition Against Mandamus Review for Compliance

The District provides no legal authority to support its contention that the provisions requiring notice to a city under Section 53094(b) mean that only a city or local agency can file a lawsuit to enforce a public duty. (R.B. at 39-40)[10] "On the contrary, when the Legislature creates a public duty but wishes to limit the use of a writ of mandate to enforce it, it has done so affirmatively." (Santa Clara County Counsel

[10] As contradicted by the District itself, "a school board decision to exempt itself from local regulation is subject to public and judicial scrutiny and reversal if found to be arbitrary and capricious." (R.B. at 39 citing City of Santa Cruz v. Santa Cruz City School Board of Education, (1989) 210 Cal.App.3d 1, 6)

Attys. Assn. v. Woodside, (1994) 7 Cal.4th 525, 540-541.) "It appears elementary that courts may not frustrate the creation of a statutory duty by refusing to enforce it through the normal judicial means." (Id. at 540)

Furthermore, the District incorrectly misapplies the fact and evidence that the City of San Diego has not brought suit. As the District is well aware, the City did not sue because, similar to the objections raised by Taxpayers, (1) it did not know what the projects were, (2) it could not discern what zoning codes or land use plans were intended to be exempted, and (3) noted it has 6 years to challenge the District's action pursuant to Code of Civil Procedure § 343. (R.T. 64:23 - 65:14)

Taxpayers proffered such information, on multiple grounds, at the trial and hearing on the Exemption Action, as such rebuttal information was contained in the August 9, 2011 City Attorney's memorandum. (R.T. 64:27 -67:10) The trial judge denied hearing such information on the grounds it was not contained in the administrative record (R.T. 65:24-26) and would not even allow it for rebuttal purposes (in response to an issue raised in the court's tentative ruling) based on lack of foundation and hearsay. (R.T. 66:20-67:10.) It is incongruous and improper that the trial court should accept an opposing party's evidence of a *post hoc* May 12, 2011 notice given to the City of San Diego, along with argument about *nonoccurrence* of an event (R.B. at 39, citing J.A.

252), but refuse contemporaneous explanation of the city attorney's response why such filing was necessarily deferred.

Regardless, there is no such jurisdiction or standing limitation to prevent Taxpayers or other aggrieved parties from seeking legal redress of the agency's statutory duty of proper application of a Section 53094 exemption.

V.

CONCLUSION

For the above reasons, and those contained in its Opening Brief, Taxpayers seeks reversal and remand.

Respectfully Submitted,

Dated: July 20, 2012

LAW OFFICE OF CRAIG A. SHERMAN

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VI.

CERTIFICATION OF WORD COUNT COMPLIANCE

Counsel of record for appellant, Craig A. Sherman, hereby certifies that pursuant to California Rules of Court, Rule 8.204, subd. (c), that the above *APPELLANT'S REPLY BRIEF* has been produced using 13-point Roman type, and contains 13,708 words (including footnotes, headings, and citations), which is less than the 14,000 words permitted by this rule, as counted by the word counter of the computer program used to prepare the brief.

Dated: July 20, 2012

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VII.

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):

APPELLANT'S REPLY BRIEF

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

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

in the following manner:

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

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

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

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

Executed on July 20, 2012 at San Diego, California.

Paul Best

SERVICE LIST

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