Case No. S214061

IN THE SUPREME COURT OF CALIFORNIA

FRIENDS OF THE COLLEGE OF SAN MATEO GARDENS

Petitioners and Respondents,

v.

SAN MATEO COUNTY COMMUNITY COLLEGE DISTRICT; SAN MATEO COUNTY COMMUNITY COLLEGE DISTRICT BOARD OF TRUSTEES; and DOES 1 THROUGH 5,

Respondents and Appellants

After a Decision by the Court of Appeal,
First Appellate District, Division One, Case No.: A135892

Appeal from the Superior Court of the State of California
for the County of San Mateo, The Honorable Clifford Cretan
San Mateo County Superior Court No.: CIV 508656

REPLY TO ANSWER TO PETITION FOR REVIEW

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I. Introduction

The San Mateo Community College District ("Community College District" or "District"), appellant in this case, has filed a Petition for Review with this Court identifying a conflict between the various appellate districts and also raising an important question of law in need of settling. The Community College District's petition meets this Court's criteria for publication. (Cal. Rules of Court, rule 8.500 (b)(1).) Further, the conflict and question of law at issue originate in the California Environmental Quality Act (Pub. Resources Code, § 21000 et seq.) (CEQA) and its Guidelines (Cal. Code Regs., tit. 14, §15000 et seq.). Therefore, not only does the petition meet the criteria for review, it implicates a body of law that is central to local land-use planning and will shape the future growth and progress of this state.

As the District explained in its petition, the specific CEQA issue posed to the Court deals with the appropriate role of courts in reviewing a lead agency's conclusions reached under Public Resources Code section 21166 and CEQA Guidelines section 15162, which identify the *limited circumstances* in which, after a lead agency has already prepared an environmental document for a project, the agency can be required to prepare yet another such document in response to project changes or changed circumstances. The petition provides this Court with the opportunity to clarify the increasingly complex body of CEQA law and answer this important question: should reviewing courts defer to the substantial evidence cited by a lead agency in support of its determination that sections 21166 and 15162 apply to the project at hand (i.e., that the project is a change to a previously reviewed and approved project)? Or may they ignore an agency's substantial evidence and apply an undefined "new project" test as a matter of law, even though this test is found nowhere in the CEQA statute or its implementing Guidelines?

In its answer to the petition, Friends of the College of San Mateo Gardens ("Friends") ignores the policy considerations embodied in section 21166 and suggests that this issue – a court's application of a non-deferential "new project" test in a section 21166 situation – does not present a conflict between the appellate districts requiring this Court's resolution. In fact, Friends suggests that the law is pretty well settled on this issue. But as explained by the District in the petition and further in this reply below, the First Appellate District's application of the "new project" test, even in an unpublished opinion, exacerbates the uncertainty created by the Third District Court of Appeal's earlier decision in *Save Our Neighborhood v. Lishman* (2006) 140 Cal.App.4th 1288 (*Save Our Neighborhood*), which was the first court to apply the "new project" test under section 21166 circumstances. Contrary to Friends' suggestion, the decision of the Third District Court of Appeal in *Save Our Neighborhood* has not generally been embraced by the other districts, but instead is an outlier that continues to create uncertainty and to undermine the will of the Legislature as embodied in section 21166.

II. Friends fails to counter the petition's showing that this Court should grant review; review is warranted to clarify whether courts may apply a "new project" test as a matter of law when reviewing a lead agency's determination under Public Resources Code section 21166.

As the petition explains, CEQA and the CEQA Guidelines describe the subsequent/ supplemental environmental review process that a lead agency engages in when environmental review for a project has already occurred and the agency is considering a changed project or new project approvals in light of changed circumstances. (Pub. Resources Code, § 21166; CEQA Guidelines, §§ 15162-15164.) But rather than defer to the statute or Guidelines, Division One of the First Appellate District adopted the "new project" test described in *Save Our Neighborhood.*

The reasoning in *Save Our Neighborhood* stands in stark contrast to numerous other published cases – including the First District's own 1986 decision in *Bowman v. City of*

Petaluma (1986) 185 Cal.App.3d 1065 (*Bowman*) – dealing with subsequent environmental review of changes to approved projects. By relying on *Save Our Neighborhood* to support its decision in this case, the First Appellate District ignored the substantial evidence cited by the District in support of its factual determination that the action at issue—a proposal to demolish, rather than remodel, an existing building and landscape complex on its San Mateo campus and to construct a new parking lot on part of the area—constituted a change to a previously reviewed project, a detailed set of facility improvements across the entire College of San Mateo campus (CSM project). Instead, the Court of Appeal paid no deference to the Community College District's determination and applied its own judgment as a matter of law, concluding that the building demolition and parking lot project was actually a new project, not a change to the previously reviewed and approved CSM project.

Remarkably, only two weeks later, the very same division of the First Appellate District *properly* applied the deferential substantial evidence standard of review to a lead agency's determination that section 21166 applied to its update of its Housing Element in the now-published case *Latinos Unidos de Napa v. City of Napa* (2013) 164 Cal.App.4th 274 ("*Latinos Unidos*"). (That decision had not yet been ordered published at the time the Community College District filed its Petition for Review in this case.) By applying these two contradictory approaches under section 21166 within a two-week period, Division One of the First Appellate District has indicated both a need to secure uniformity of decision and to settle an important question of CEQA law. (Rules of Court, Rule 8.500, subd. (b)(1).) Friends has failed to counter this showing in its answer to the petition.

The District, moreover, feels a keen sense of injustice in that it has "lost" in the Court of Appeal in an unpublished case on a legal theory that the very same division of the very same

court expressly repudiated in a published case just two weeks later. The law should be applied the same way in all cases. This Court has the power to rectify that injustice by granting review and (ultimately) disavowing the approach taken in *Save Our Neighborhood* once and for all.

A. The conflict between the appellate districts regarding the "new project" test under section 21166 is long-standing and existed prior to the First Appellate District's decision in this case.

Friends insists there is currently no conflict among the appellate districts in need of resolution. (Answer, p. 3; Cal. Rules of Court, rule 8.500(b)(1).) Friends is mistaken. As the petition explained, there was a conflict in the law regarding section 21166 and the "new project" test prior to the First Appellate District's decision in this case. But the trend in the law seemed clear. On one hand, a single case published seven years ago, *Save Our Neighborhood*, *supra*, 140 Cal.App.4th 1288, held that a court may apply a non-deferential "new project" test to invalidate a lead agency's determination under Public Resources Code section 21166 that a proposed action was a change to a previously reviewed project. The *Save Our Neighborhood* court relied on such factors as whether the identity of the developer was the same and whether the current applicant had relied on previous project plans in developing the instant proposal. But this test appears nowhere in the CEQA statute or Guidelines. On the other hand, numerous cases, going back to as early as 1986, have adopted the deferential substantial evidence test prescribed by section 21166 and further explained by Guidelines section 15162, 15163, and 15164. These cases include: *Bowman*, *supra*, 185 Cal.App.3d 1065; *Fund for Environmental Defense v. County of Orange* (1988) 204 Cal.App.3d 1538; *Benton* v. *Board of Supervisors* (1991) 226 Cal.App.3d 1467 (*Benton*), *River Valley Preservation Project v. Metropolitan Transit Development Board* (1995) 37 Cal.App.4th 154; *Snarled Traffic Obstructs Progress v. City and County of San Francisco* (1999) 74 Cal.App.4th 793; *Santa Teresa Citizens Action Group v. Santa Clara Valley Water*

District (2003) 114 Cal.App.4th 689; *Abatti v. Imperial Irrigation District* (2012) 205 Cal.App.4th 650 (*Abatti*), and now, Division One of the First Appellate District's decision in *Latinos Unidos, supra,* 164 Cal.App.4th 274. The most vocal judicial criticism of the *Save Our Neighborhood* reasoning was published in *Mani Brothers Real Estate Group v. City of Los Angeles* (2007) 153 Cal.App.4th 1385 ("*Mani Brothers*"), which also followed the substantial evidence standard of review for section 21166 circumstances and sharply noted that the "new project" analysis articulated by the Third Appellate District in *Save Our Neighborhood* was fundamentally flawed and "inappropriately bypassed otherwise applicable statutory and regulatory provisions (i.e., § 21166; Guidelines, § 15162).

Friends also suggests there is no conflict between *Mani Brothers* and *Save Our Neighborhood* requiring review because the conflict is dicta and the cases considered different prior environmental review documents (an EIR versus negative declaration). (Answer, p. 3.) This suggestion misinterprets the issue presented by the Community College District's petition. The issue is whether a court reviews addenda to any type of prior environmental document with *any* deference to the lead agency's factual determination that a proposed action is a change to a previously reviewed and approved project, or if a court may instead apply *Save our Neighborhood's* non-deferential analysis and determine for itself "as a matter of law" that the action is a "new project."

As explained in numerous published cases, Guidelines section 15164 does not create any different standard for the review of addenda to EIRs versus addenda to negative declarations. The First Appellate District itself emphasized this uniformity of the standard in *Benton v. Board of Supervisors* (1991) 226 Cal.App.3d 1467, stating:

> If a limited review of a modified project is proper when the intial document was an EIR, it stands to reason that no greater review should be required of the project that initially raised so few environmental concerns that an EIR was *not* required, but a negative declaration was found to satisfy the environmental review requirements of CEQA. To interpret CEQA as requiring a greater level of review for a modification of a project on which a negative declaration has been adopted and a lesser degree of review of a modified project on which an EIR was initially required would be absurd.

(226 Cal.App.3d at pp. 1479-1480, italics original and underline added.) The First Appellate District concluded in *Benton*, with rather strong language, that review of an addendum to a negative declaration should be afforded the same deference as review of an addendum to an EIR.

The conclusion reached by the First District in *Benton* was recently affirmed by the Fourth Appellate District in *Abatti*, *supra*, 205 Cal.App.4th 650. The Fourth Appellate District stated that "we agree with the central premise of *Benton* that it makes little sense to set a *lower* threshold for further environmental review of a project that is determined *not* to have a significant effect on the environment than section 21166 sets for a project that *may* have significant effects on the environment." (205 Cal.App.4th at p. 673, citing *Benton, supra*, 226 Cal.App.3d at p. 1480, emphasis original.)

Other published cases have reached the same conclusion regarding the standard of review to apply to addenda where the original document was a negative declaration. In *American Canyon Community United for Responsible Growth v. City of American Canyon* (2006) 145 Cal.App.4th 1062, 1073, 1083, the First District Court of Appeal determined that the respondent city violated CEQA with regard to changes to a mitigated negative declaration because the city's determinations under Public Resources Code section 21166 were not supported by substantial evidence. The court noted that the city "unsuccessfully attempted to piece together parts of the administrative record to justify its section 21166 determination." The court then *recommended*

that the city consider other section 21166 cases where "agencies have used the format of an addendum to the initial environmental review document to substantiate the determination that no subsequent environmental review was required." (*Ibid.*)

This Court should grant review to settle the conflict between the *Save Our Neighborhood* opinion and the numerous other published cases dealing with subsequent or supplemental review, including the cases specifically addressing addenda to negative declarations. Without this review, agencies within the First and Third Appellate Districts face significant uncertainty that their addenda will be reviewed without *any* deference, let alone the scant amount of deference afforded even to negative declarations. This uncertainty and the threat that courts may apply the new project test indiscriminately and seemingly on the basis of nothing more than a gut feeling about the actions proposed by the lead agency, as occurred here, defeats the very purpose of section 21166, which plainly is intended to limit the circumstances in which subsequent EIRs and similar documents need be prepared.

B. The First Appellate District's contradicting decisions in this case and *Latinos Unidos de Napa* exacerbates the existing conflict between the courts.

Friends also argues there is no conflict requiring this Court's review because "nothing has happened since" the publication of *Moss v. Humboldt.* (Answer, p. 3.) But as the Community College District has pointed out, section 21166 cases have been published since *Moss* (e.g., *Abatti)*, and Division One of the First Appellate District decided this case and *Latinos Unidos* in an utterly contradictory fashion within the span of just a couple of weeks. In its Petition for Review, the Community College District discussed the implications of the First Appellate District's then-unpublished *Latinos Unidos* opinion. (Petition, pp. 22-23.) Although the First District, after *Latinos Unidos*, may no longer stand by the reasoning it relied on in ruling against

the District in the instant case, the Third District still follows *Save Our Neighborhood*; and the inconsistency of the First District, Division One, calls into question the very notion that the Judiciary should apply the same law the same way in all cases, and should not render different results based on apparent subjective preferences or other extra-legal factors.

In other words, not only are decisions involving review of an agency's determination that section 21166 applies to a proposed action inconsistent between the various appellate districts, they are completely contradictory even within a single division of the First Appellate District. The Community College District respectfully submits that basic principles of fairness, as well as the need for uniformity amongst the appellate districts, warrant review in this case.

In the instant litigation, Division One disregarded the substantial evidence in the addendum and elsewhere in the record explaining why the District reached its decision that the Building 20 demolition and parking lot project was a change to the previously reviewed and approved campus-wide CSM project, and instead applied *Save Our Neighborhood's* non-deferential "new project" test. It found the test appropriate under the "narrow circumstances" before it, but failed to state *any* reasoning or factors that would allow the District or other agencies to identify similar "narrow circumstances." (Opn. p. 8.) Then, in a complete reversal of direction, Division One applied the usual and appropriate deferential substantial evidence test in *Latinos Unidos* just two weeks after issuing the Opinion in this case. (*Latinos Unidos, supra*, 164 Cal.App.4th at pp.282-283.) These contrary results exacerbate the uncertainty faced by agencies in the CEQA process if they cannot expect consistent decisions out of the same division of the same Court of Appeal in the same month. As the law currently stands, preparing an addendum, though expressly authorized by CEQA Guidelines section 15064, is a complete gamble for agencies. They cannot be sure if a reviewing court will afford the proper deference to their

factual determination that a proposed action is a change to a previously reviewed and approved project or, instead, apply the non-deferential "new project" test.

Based on the inconsistent reasoning applied within the same division of the First Appellate District, the Community College District's petition meets the criteria for the Court's review of the unpublished Opinion. The Court may grant review of unpublished opinions "to supervise and control the opinions of the several district courts of appeal,...and by such supervision to endeavor to secure harmony and uniformity in the decisions." (*People v. Davis* (1905) 147 Cal. 346, 348.) Opinions of the various appellate districts, whether published or unpublished, must be roughly consistent both among the districts and within the districts. Without this consistency, results-oriented opinions lacking articulated reasoning are allowed to spread unchecked. An appellate court should not be allowed to escape review of its decisions for consistency simply because it chose to apply one interpretation of the law to a set of parties privately in an unpublished opinion while applying a different interpretation of the law to another set of parties publically in a published opinion.

And even though the Opinion is unpublished, it did not go unnoticed among agencies and CEQA practitioners. Four separate requests were made to the appellate court to publish its decision in this case. The court denied those requests, but they demonstrate that the community of CEQA practitioners took notice of the First District's decision; and the petitioners' bar would like to see the "new project" test gain a greater foothold in the law governing subsequent environmental review. Again, this petition offers the Court an opportunity to address and settle this conflict within the appellate districts.

C. Review is warranted to settle an important question of law: how should Guidelines section 15164 be interpreted by reviewing courts when considering addenda to negative declarations.

The First Appellate District reasoned that an addendum was not appropriate to the negative declaration adopted by the Community College District because it required more than "minor technical changes or additions" to the CSM project originally approved by the Community College District. (Opn., p. 8.) This is also a primary contention of Friends in its answer to the petition. (Answer, p. 4.) The court ordered the college district to treat its decision to demolish the Building 20 Complex "as a separate, new project, rather than a minor or technical amendment *to the overall CSM project*." (Opn,. p. 10, emphasis added.) But whether the change to the original *project* is more than "minor or technical" is the wrong question to apply under CEQA and its Guidelines. Instead, the appropriate inquiry involves the necessary changes to the original environmental review document (e.g., the negative declaration or EIR) adopted or certified by the lead agency.

The intended focus of Guidelines section 15164 on the prior environmental review document, not the extent of changes to the previously reviewed project, is apparent based on the full text of the Guideline section. But to reach its erroneous interpretation of Guidelines section 15164, Division One referenced only the first half of the section. (Opn., p. 8.) Section 15164, subdivision (b) states, in full, that "[a]n addendum to an adopted negative declaration may be prepared if only minor technical changes or additions are necessary **or** none of the conditions described in Section 15162 calling for the preparation of a subsequent EIR or negative declaration have occurred" [emphasis added]. The court did not consider the language following the "or" that references Guidelines section 15162. And Friends does the same, simply ignoring the second kind of circumstance in which an addendum to a negative declaration is authorized.

Guidelines section 15162 mirrors (while expanding upon) the language of Public Resources Code section 21166, which controls whether a lead agency is required to prepare a subsequent or supplemental EIR. Under Public Resources Code section 21166, no subsequent or supplemental EIR is necessary unless "[s]ubstantial changes...will require major revisions of the *environmental impact report*[.]" (Pub. Resources Code, § 21166, subd. (a), (b), emphasis added.) As the Public Resources Code indicates, the proper focus of section 21166 (and by extension, Guidelines sections 15162 and 15164) is the extent of revisions required to the prior environmental review document to accommodate a project that has changed since originally being approved.

The Community College District previously explained the proper focus of Public Resources Code section 21166 and the CEQA Guidelines in its Petition for Review. (Petition, pp 18-19.) For example, the changes proposed to the original *project* in *Fund for Environmental Defense v. County of Orange* (1988) 204 Cal.App.3d 1538, which Division One of the First Appellate District cited as contrasting with the instant circumstances, were far more substantial than the changes to the CSM Project proposed by the Community College District. In *Fund for Environmental Defense*, the original project involved a 308,000 square-foot complex consisting of 22 one-story buildings served by underground parking. The respondent approved a revised project that substantially increased the number of two-story buildings to be constructed, eliminated underground parking, and added additional parking. Even though the revised project would result in greater impacts, no supplemental EIR was required because mitigation adopted for the originally approved project would adequately address those impacts generated by the revised project. (*Id.* at p. 1545-1546, 1552.) In contrast, the proposed changes to the CSM Project in this case touched only three buildings in a plan that considered the disposition of *every*

building on campus. [Administrative Record (AR) 1:245-246 (renovate or replace Building 1; demolish and replace Buildings 5, 6, 10, 11, 15 and 17; demolish Buildings 21-29).] The court's reference to *Fund for Environmental Defense* in its Opinion fails to account for the substantial extent of the changes to the *project* that were upheld in that case. (Opn., p. 9.) As a result, the Opinion provides no guidance to the Community College District or other public agencies to decide if section 21166 applies to their actions, or whether any proposed changes to a previously reviewed and approved project require the agency to treat it as a "new project."

If the Court does not address this issue by publishing the District's petition, the lower courts may continue to apply only the first half of Guideline section 15164 and improperly focus on the extent of changes to a project, rather than the required changes to the prior environmental review, and thereby invalidate addenda to negative declarations simply because a court decides to step into the shoes of the agency decisionmakers and conclude that the changes to the previously reviewed project have become more than "minor or technical."

III. Conclusion

The Community College District's Petition for Review demonstrates that the Opinion issued by Division One of the First Appellate District in this case meets the criteria for this Court's review. (Cal. Rules of Court, rule 8.500(b)(1).) As explained by the petition and emphasized in this reply, the Opinion applied an unsupported and sharply criticized "new project" test to invalidate the District's factual determination, based on substantial evidence, that section 21166 applied to its action under these circumstances. This "new project" test itself is the minority view in a seven-year standing conflict between the Third District and the rest of the appellate districts. Recently, the First Appellate District confusingly landed on both sides of this conflict by applying the new project test against the District in this case while reserving the

substantial evidence test for the lead agency's section 21166 conclusions in the published *Latinos Unidos* case just two weeks later. So not only does a clear conflict exist between the appellate districts, confusion as to the proper standard apparently exists within the very same division of the First Appellate District. Lead agencies within the jurisdiction of the First District are especially vulnerable to the uncertainty created by the intra-district conflict. Review of the issue presented by the District would resolve this conflict and provide the certainty agencies need to make confident determinations under section 21166.

By granting the petition, the Court could also definitively settle the appropriate interpretation of Guidelines section 15164. As the Community College District argued below on appeal, Guidelines section 15164, subdivision (b), focuses on the extent of changes or revision to the original environmental document. Although the language at issue is clear and unambiguous, the First Appellate District nevertheless ignored the full language in Guideline section 15164 to reach its contrary interpretation that the focus is on the court's subjective determination of the extent of changes to the original *project*.

Providing an answer to the questions raised by the petition is important for the State, its various public agencies (like the Community College District), and its taxpayers and citizenry. CEQA is a good law, though one that is much abused throughout the State. CEQA compliance is also very expensive and time-consuming, which explains why the Legislature, in enacting section 21166 in 1977, created a policy that *disfavors* and even *disallows* multiple CEQA documents for evolving projects except under specified circumstances. The Opinion in this case undermines that legislative policy. By granting the District's Petition for Review, the Court can provide much needed certainty to the increasingly complex CEQA process, reinvigorate the Legislature's purpose in enacting section 21166, and contribute to the ongoing need to put some

outer limits on the costs, in time and money, associated with CEQA review. The District is a public agency with limited resources with which to pursue its educational mission. Dollars spent on redundant, unnecessary environmental review are dollars that would otherwise help create an educated citizenry and work force in this State, which remains mired in an economic downturn that makes it hard for the District's graduates to find good jobs.

Respectfully submitted,

Dated: December 5, 2013

REMY MOOSE MANLEY, LLP

By: _____ For,
SABRINA V. TELLER

Attorneys for Defendant/Petitioner SAN MATEO COUNTY COMMUNITY COLLEGE DISTRICT

CERTIFICATE OF WORD COUNT
(Cal. Rules of Court, Rule 8.504(d)(1)

I, Sabrina V. Teller, declare as follows:

1. I am an attorney at law duly licensed to practice before the courts of the State of California, and am the attorney of record for the Appellants/Defendants in this action.

2. California Rules of Court, rule 8.504(d)(1), states that reply briefs produced on a computer must not exceed 4,200 words, including footnotes.

3. This Petition for Review was produced on a computer using a word processing program. This Reply to Answer to Petition for Review consists of 4,194 words, including footnotes but excluding the caption page, tables and this certificate, as counted by the word processing program.

Dated: December 5, 2013

REMY MOOSE MANLEY, LLP

By: _____
SABRINA V. TELLER
Attorneys for Defendants and Appellants SAN MATEO COUNTY COMMUNITY COLLEGE DISTRICT, et al.

Citizens for a Green San Mateo v.
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Supreme Court of California
Case No. S214061
(First Appellate District Court of Appeal, Division One
Case No. A135892)
(San Mateo County Superior Court No. CIV 508656)

PROOF OF SERVICE

I am a citizen of the United States, employed in the City and County of Sacramento. My business address is 455 Capitol Mall, Suite 210, Sacramento, California 95814. I am over the age of 18 years and not a party to the above-entitled action.

I am familiar with Remy Moose Manley, LLP's practice whereby the mail is sealed, given the appropriate postage and placed in a designated mail collection area. Each day's mail is collected and deposited in a U.S. mailbox after the close of each day's business.

On December 5, 2013, I served the following:

REPLY TO ANSWER TO PETITION FOR REVIEW

☒ On the parties in this action by causing a true copy thereof to be placed in a sealed envelope with postage thereon fully prepaid in the designated area for outgoing mail addressed as follows; or

☒ On the parties in this action by causing a true copy thereof to be delivered via Federal Express to the following person(s) or their representative at the address(es) listed below; or

☐ On the parties in this action by causing a true copy thereof to be delivered by facsimile machine number (916) 443-9017 to the following person(s) or their representative at the address(es) and facsimile number(s) listed below; or

☐ On the parties in this action by causing a true copy thereof to be electronically delivered via the internet to the following person(s) or representative at the address(es) listed below:

Citizens for a Green San Mateo v.
San Mateo County Community College District, et al.
Supreme Court of California
Case No. S214061
(First Appellate District Court of Appeal, Division One
Case No. A135892)
(San Mateo County Superior Court No. CIV 508656)

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San Mateo County Superior Court Honorable Clifford Cretan 400 County Center Redwood City, California 94063	**VIA REGULAR MAIL**

I declare under penalty of perjury that the foregoing is true and correct and that this Proof of Service was executed this 5th day of December, 2013, at Sacramento, California.

_____
Rachel N. Jackson