Civil Case No. S214061

IN THE SUPREME COURT OF CALIFORNIA

FRIENDS OF THE COLLEGE OF SAN MATEO GARDENS,

Plaintiff and Respondent,

v.

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

Defendants and Appellants.

After an Unpublished Decision by the Court of Appeal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 Case No.: CIV 508656

OPENING BRIEF

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QUESTION PRESENTED FOR REVIEW

When a lead agency performs a subsequent environmental review and prepares a subsequent environmental impact report, a subsequent negative declaration, or an addendum, is the agency's decision reviewed under a substantial evidence standard of review (*Mani Brothers Real Estate Group v. City of Los Angeles* (2007) 153 Cal.App.4th 1385), or is the agency's decision subject to a threshold determination whether the modification of the project constitutes a "new project altogether," as a matter of law (*Save Our Neighborhood v. Lishman* (2006) 140 Cal.App.4th 1288)?

INTRODUCTION

The answer to the question presented is that the appropriate standard of review in any subsequent review situation is the substantial evidence standard of review. The application of this standard affords the appropriate amount of deference due to agencies in administrative matters, which principle has been long recognized by this Court (*Laurel Heights Improvement Association v. Regents of University of California* (1988) 47 Cal.3d 376, 393), most of the courts of appeal in subsequent review circumstances,[1] and the California Environmental Quality Act (CEQA) and its implementing Guidelines pertaining to subsequent review (Pub. Resources Code, § 21166 [discouraging further review unless substantial

[1] *See, e.g., Bowman v. City of Petaluma* (1986) 185 Cal.App.3d 1065, 1074; *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, 1473-1474, 1480-1481; *River Valley Preservation Project v. Metropolitan Transit Development Bd.* (1995) 37 Cal.App.4th 154, 166-168; *Santa Teresa Citizen Action Group v. Santa Clara Valley Water District* (2003) 114 Cal.App.4th 689, 703; *Mani Brothers Real Estate Group v. City of Los Angeles* (2007) 153 Cal.App.4th 1385; *Abatti v. Imperial Irrigation Dist.* (2012) 205 Cal.App.4th 650, 651; *Latinos Unidos de Napa v. City of Napa* (2013) 221 Cal.App.4th 192 (decided just weeks after the case presented to this Court).

changes occur]; Cal. Code Regs., tit. 14, div. 6., ch. 3 ["CEQA Guidelines"], § 15064, subd. (f)(7) ["The fair argument standard does not apply to determinations of significance pursuant to sections 15162, 15163, and 15164"].)

The "new project" standard, as first articulated in *Save Our Neighborhood v. Lishman*, is nowhere sanctioned or supported in the CEQA statute or CEQA Guidelines, nor does it respect the traditional discretion afforded to agencies to implement policy through their legislative and administrative decision-making functions. Therefore, the Court should address this "split" in authority by declining to adopt the novel "new project" standard.

The controversy in this case arises from the San Mateo County Community College District's decision to demolish, rather than to renovate, an obsolete building, ancillary storage facilities, and part of the surrounding landscaped area during the course of a campus-wide renovation project. In January 2007, after completing project-level environmental review under CEQA (Pub. Resources Code, § 21000 et seq.), the District and its Board of Trustees approved a set of detailed facility improvements at the College of San Mateo ("the CSM project"). Friends of the College of San Mateo Gardens ("Friends") did not participate in that public process. However, Friends sued the District over modest actions it took more than four years later in August 2011 to implement portions of the CSM Project.

The original CSM Project planned for the demolition of up to 16 buildings and renovation of numerous other buildings, parking lots, and pathways across the CSM campus. The District originally expected that Building 20, its associated structures and parking lots, and its surrounding landscaped area (the "Building 20 complex") would be renovated. But the District did not acquire state funding for this specific portion of the CSM Project, so it revaluated the need for the building and its usefulness to the

CSM campus. In light of its age, deteriorated state, and lack of use as a horticultural building due to drastically reduced enrollment in those programs, the District determined that the most efficient action would be to demolish the complex and expand the existing three small parking lots into a single, renovated parking lot.

The District carefully analyzed the potential environmental impacts associated with this change to the CSM Project. Since no new significant or substantially more severe significant impacts not previously studied in the IS/MND were identified, the District determined no supplemental or subsequent Environmental Impact Report ("EIR") was required. Thus, as authorized by Public Resources Code section 21166 and section 15164, subdivision (b), of the CEQA Guidelines, the District relied on an addendum to the IS/MND to approve the changes to the CSM Project resulting in the demolition of the Building 20 complex and construction of a new parking lot. Friends filed a lawsuit, arguing the District was required to prepare a new EIR to analyze potential aesthetic, biological, and cultural impacts from demolishing the Building 20 complex. The trial court agreed with Friends, and granted the petition for writ of mandate.

Division One of the First Appellate District, in an unpublished opinion, also ordered the District's actions be set aside. Surprisingly, the court treated the change to the previously approved CSM Project (to demolish rather than renovate Building 20) as constituting an entirely "new" project for the purposes of CEQA. The appellate court disagreed with the District's characterization of the action as a modification to the previously approved CSM Project. The distinction is very important because changes to approved projects (as opposed to new projects) are subject to the policies embodied in Public Resources Code section 21166, the CEQA provision governing the preparation of subsequent Environmental Impact Reports ("SEIRs") and supplements to EIRs, and the

corresponding CEQA Guidelines (sections 15162-15164). In contrast, new projects are subject to the low threshold "fair argument" standard for preparing EIRs as set forth in Public Resources Code section 21080, subdivision (d). (See CEQA Guidelines, § 15064, subd. (f)(1).)

The propriety of the District's consideration under section 21166 is also supported by the language of section 21166 itself. Section 21166 establishes a presumption against requiring subsequent EIRs to protect the finality of agency decisions. The section states: "When an environmental impact report has been prepared for a project pursuant to [CEQA], *no* subsequent or supplemental environmental impact report shall be required...*unless*" certain specified events occur. (Pub. Resources Code, § 21166, italics added.) These events include circumstances where substantial changes are proposed to the project or where substantial changes occur with respect to the circumstances under which the project is being undertaken, or new information becomes available which was not or could not have been known at the time the EIR was certified. (Pub. Resources Code, § 21166, subds. (a)-(c).) When discussing the statute in dealing with analogous but distinct issues arising under section 21092.1, which governs the recirculation of EIRs, this Court had the following to say about section 21166:

> In the case of a certified EIR, which is a prerequisite for application of section 21166, section 21167.2 mandates that the EIR be conclusively presumed valid unless a lawsuit has been timely brought to contest the validity of the EIR. *This presumption acts to preclude reopening of the CEQA process* even if the initial EIR is discovered to have been fundamentally inaccurate and misleading in the description of a significant effect or the severity of its consequences. After certification, the interests of finality are favored over the policy of encouraging public comment.

(*Laurel Heights Improvement Assn. v. Regents of Univ. of Cal.* (1993) 6 Cal.4th 1112, 1130, ("*Laurel Heights II*") italics added.)

Instead of following this clear presumption against further environmental review, and without giving any deference to the District's reasonable interpretation of its own actions as a change to a previously approved project, rather than a "new" project, the Court of Appeal relied on a heavily criticized 2006 decision of the Third District Court of Appeal, *Save Our Neighborhood v. Lishman* (2006) 140 Cal.App.4th 1288 (*Save Our Neighborhood*). The "new project" test employed by the court in *Save Our Neighborhood* finds no support in the CEQA statute or Guidelines. The test conflicts with the substantial evidence standard of review the courts have applied in numerous prior published cases. Published court decisions after *Save Our Neighborhood* have also declined to apply the non-deferential new project test to agency decisions made pursuant to section 21166. In fact, the new project test subverts the very purpose of section 21166 which, Division Four of the First District emphasized, "is intended to provide a balance against the burdens created by the environmental review process and to accord a reasonable measure of finality and certainty to the results achieved. This purpose appears not only from its prohibitory language ('*no* subsequent or supplemental environmental impact report . . . *unless* . . .') but also from legislative context and history." (*Bowman v. City of Petaluma* (1986) 185 Cal.App.3d 1065, 1074 (*Bowman*).) Both *Save Our Neighborhood* and the First District's unpublished opinion in this case are judicial outliers that are squarely inconsistent with the notion, stated in *Bowman*, that the Legislature, in enacting section 21166, meant to set a high bar for the preparation of SEIRs.

The answer presented by Friends to the District's petition for review is inconsistent with the language of section 21166, the Guidelines, and the legislative policy of raising the bar for subsequent rounds of environmental

review. Friends asserts the project is a "new idea," "requires more than minor, technical changes to the negative declaration," and that it "is not within the scope of the 2007 CSM Project." This answer ignores and bears no relationship to the direct language of section 21166 and its implementing Guidelines. Even where a previously approved project undergoes changes, a subsequent EIR is only required where the changes are substantial and new or substantially more severe impacts than previously studied are implicated.

Substantial evidence supports both the District's determination that its proposed actions were a change to a previously approved project and its decision to rely on an addendum to assess the potential effects of those changes. The substantial evidence supporting the District's analysis demonstrates that the changes to the CSM Project will not result in any new or substantially more severe impacts than previously studied. Therefore, the Court of Appeal's opinion should be reversed in light of its disregard for the substantial evidence in the record and its reliance on the unfounded and unworkable "new project" test concocted out of whole cloth in *Save Our Neighborhood.*

FACTUAL SUMMARY

The District owns and operates three community colleges in San Mateo County, including the College of San Mateo ("CSM"). (Administrative Record ["AR"] 1:235.) In August 2006, the District adopted the 2006 *Facilities Master Plan* to provide guidance for specific facility improvements at its three community colleges over the next five to seven years. (AR 1:235-236; 3:1672-1687 [Recommended 2006 Facilities Master Plan for CSM].) The Facilities Master Plan included recommendations to renovate or replace the oldest facilities on campus, improve accessibility to student support services, and improve campus access overall. (AR 3:1671.) The District published an Initial Study and

Mitigated Negative Declaration ("IS/MND") (AR 1:214-392) analyzing the potential physical environmental effects of implementing these recommendations for the Facility Improvements at College of San Mateo Project ("CSM Project") in December 2006. (AR 1:3.)

A. The Facility Improvements at College of San Mateo Project entailed extensive physical work across the entire campus.

The CSM Project consists of numerous facility improvements throughout the CSM campus. These various improvements include enhancement of the campus entrance, pedestrian corridors, and plazas; internal traffic circulation improvements; renovation of existing buildings; demolition of obsolete buildings; construction of new and/or replacement buildings; and renovation and construction of new parking lots. (AR 1:3, 245-247; 3:1679-1687.) In total, the CSM Project initially envisioned demolition of up to 16 buildings. (AR 1:245-246 [renovate or replace Building 1; demolish and replace Buildings 5, 6, 10, 11, 15 and 17; demolish Buildings 21-29].) In addition, it identified multiple buildings and parking lots for renovation. (*Ibid.* [renovate Buildings 2, 3, 4, 8, 12, 14, 16, 19, and 20; renovate Parking Lots 1 and 2; Renovate Plazas and Pedestrian Corridors].)

The IS/MND concluded that, with the implementation of mitigation measures, the CSM Project would not have a significant effect on the environment. (AR 1:341.) The District's Board of Trustees adopted the IS/MND for the CSM Project on January 24, 2007, after it had been circulated for the required 20-day public comment period. (AR 1:64, 393-394.) The District received no comments from the public during the review period. (AR 1:394.)

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B. The District adopted an addendum to the CSM Project IS/MND analyzing proposed changes to the disposition of the Building 20 complex.

After adoption of the IS/MND for the CSM Project, the District failed to acquire state funding for the Building 20 complex remodel, as originally proposed in the CSM Project. (AR 1:64.) Therefore, the District considered alternative plans for the Building 20 complex in light of changed funding status and District program needs.

The Building 20 complex consists of Building 20, a greenhouse, a lath house, gardens and landscaping, and three small parking lots. Building 20 itself is a small, cast-in-place concrete building containing a classroom and lab facilities. The garden areas consist of approximately 19,185 square feet of plants and grass on the north side of Building 20 ("North Garden") and 32,020 square feet of planted area (mostly lawn) south of Building 20 ("South Garden"). The South Garden also includes some landscaped area and an educational demonstration garden. (AR 1:65, 80.) The area is framed by a landscaped slope leading up to the main part of the CSM Campus. (AR 1:93.)

Three parking lots are associated with the Building 20 complex. (See AR 1:76, 79.) These lots (Lots 20, 20A, and 20M) currently provide about 40 total parking spaces. (AR 1:79.)

Since state funding for remodeling the Building 20 complex was rejected, the Districted re-evaluated the structure's usefulness to the San Mateo campus. (AR 1:64.) The District's evaluation considered numerous factors.

First, when the Board adopted the 2006 master plan, the Building 20 complex housed the CSM floristry and horticulture programs and several student services offices. (AR 1:396; 2:658.) But due to budget cuts, the horticulture program had not been offered in the previous two years, and

the floristry program was serving only 4.3 full time equivalent students, mostly non-majors. (AR 1:65, 396.) Second, the single classroom located in Building 20 was no longer used, and the student services previously housed there had been relocated to a new building. (AR 1:64-65, 12.) Third, the building is not compliant with the access requirements of the Americans with Disabilities Act, is in great disrepair due to its age, contains hazardous building materials such as asbestos (AR 1:65), and the landscaping surrounding the building is unkempt. (AR 2:625 [area not well maintained for several years despite arrangement that called for faculty and students to maintain area].) Fourth, the District's facilities condition database indicates that all of the structures in the complex are well beyond their service life. (See AR 4:2113-2115.)[2]

After considering these issues in light of the lack of state funding, the District changed its intentions for the Building 20 complex from those previously stated for the CSM Project. Instead of renovating the Complex, the District decided the most efficient course of action would be to demolish it and renovate the existing parking lots to create an expanded, single parking lot. The revised project would also include accessibility and landscaping improvements. (AR 1:9.) The District concluded that further environmental review of this change to the CSM Project was required.

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[2] Building 20 itself received a score of 68.36% on the Facilities Condition Index (FCI), where a higher number indicates worse condition. Any score over 10% is considered "poor." (AR 1:71.) The FCI is an economic measurement: the score represents the ratio of the cost to correct a facility's deficiencies to the current replacement value of the facility. (*Ibid.*, fn. 2.) So, a score of 68.36% indicates that the current value of the Building 20 complex is very low, while its replacement cost will be very high.

(1) The District revised the Building 20 complex plans to incorporate public input while conducting additional environmental review and before adopting an addendum.

The District determined that an addendum to the IS/MND was the proper document to use for analyzing the proposed changes to the CSM Project. The District reached this conclusion pursuant to CEQA Guidelines section 15164 because the proposed changes "would not result in a new or more severe impact relative to the prior 2006 IS/MND." (AR 1:9; *see also, generally*, AR 1:4-57 [addendum].) The District approved an addendum at a public hearing on May 16, 2011, and posted a notice of determination for this action in the County's Clerk's office on May 17, 2011. (AR 1:1.)

The proposed changes to the CSM Project and the Building 20 complex generated some public controversy, and the original addendum was discussed at several Board hearings prior to May 16, 2011. At the Board hearing on March 23, 2011, a critic of the addendum offered alternative proposals for the Building 20 complex and noted the current plan did not include a replacement garden or a place for the horticulture program. (AR 2:611.) Other individuals expressed similar concerns during the hearing, and at its close, Board President Holober thanked the presenters and indicated that "the Board listened attentively and [would] take the comments into consideration." (AR 2:609-611.) At the April 13, 2011, hearing, the Board outlined an updated plan for the Building 20 complex in response to public comments. (AR 2:625.) The District indicated it would rehabilitate 16,000 square feet of a hillside/berm area and create a teaching garden within it because faculty had "made a good case" that this was an important teaching area. (*Ibid.*) In addition, 21,000 square feet of the garden space north of Building 20 would be rehabilitated, and $75,000 would be assigned to transplant certain species of plants to these areas. (*Ibid.*)

Staff testimony at the May 16, 2011, hearing provided additional details regarding the Building 20 complex demolition plan and compromises made by the District, noting that, in addition to preserving the North Garden and enhancing and replanting the slope areas, a landscaped area of approximately 7,000 square feet adjacent to the Building 20 complex and Building 36 would be set aside for plantings. (AR 2:719.) While numerous individuals again expressed concern regarding the proposal (AR 2:719-721), vocal project critic Student Trustee Jointer admitted that Building 20 should be demolished. (AR 2:723.) Jointer stated that, when he first came to the CSM and walked around campus, "the first thing he noticed was that Building 20 was run-down and out of place...it would have to be flattened and rebuilt." (*Ibid.*) Vice President Mendelkern responded that, by preserving and enhancing the North Garden area, the berm/slopes, and the south landscape slope/garden, the District had tried to accommodate the needs and perspectives that had been expressed through the planning process. (*Ibid.*) The revised proposal before the Board on May 16, 2011, reflected many of the students' and project opponents' recommendations, and the District no longer proposed to eliminate the entire garden area. (AR 2:724.) President Holober noted that the revised proposal would result in only a minor net loss of open green or garden space on campus. In total, less than one-third of one acre of the 86 available acres of landscaped and open space would be lost. (*Ibid.;* see also AR 1:80 [comparing total landscaping under existing and proposed conditions].)

Following this discussion, the Board voted to approve the demolition of the Building 20 complex, based on the addendum to the IS/MND for the CSM Project. (*Ibid.*) This addendum was later rescinded by the District after the unincorporated association "The Friends of the College of San Mateo Gardens" sued the District regarding the changes to the CSM Project and the District's compliance with CEQA. (*Friends of the College of San*

Mateo Gardens v. San Mateo County Community College District (Super. Ct. San Mateo County, 2011, No. CIV506455) [voluntarily dismissed Nov. 2, 2011].)

The District rescinded and revised the first addendum to include additional analysis and to better explain the potential scope of physical changes to the CSM Project in response to the claims asserted in Friends' first lawsuit and public testimony. (AR 1:65-66.) The revised addendum also provided additional detail about the changes the Building 20 complex plans had undergone in response to comments received from the project opponents. (AR 3:1399-1400, 1562, 1566.)

The revised addendum discussed the loss of landscaped and open areas in significant depth. Because the changes to the District's plans for the Building 20 complex include substantial retention and rehabilitation of landscaped areas surrounding the complex, the net loss of landscaped and open areas will be minimal. (AR 1:65-66; 3:1563.) In 2011, the Building 20 complex contained approximately 55,995 square feet of lawn and landscaped area. (AR 1:80.) Under the District's proposed plans, the lawn and landscaped area will be reduced to approximately 45,565 square feet. (*Ibid.*) More than 80% of the North Garden will be retained and rehabilitated. (AR 1:93.) A semi-mature dawn redwood tree and some of the lawn surrounding it in the South Garden will also be retained. The slopes in this area will be re-landscaped and will incorporate native plants with the development of "mini-ecosystems" planned by science faculty for teaching purposes. (AR 1:85-91.) The existing demonstration garden will be removed, but the District proposed to relocate the existing plants to an area adjacent to the Building 20 complex. (AR 1:93-94.) The total loss of landscaped area represents about 0.24 acres or less than 0.33% (one third of one percent) of the total landscaped/open space area available on campus. (AR 1:72.) Put another way, under current conditions, impervious

surfaces—buildings, asphalt parking, and sidewalks—cover approximately 48,840 square feet of the Building 20 complex site. (AR 1:80.) Under the proposed changes to the site, asphalt parking and sidewalks will cover approximately 59,270 square feet. This means only about 10,000 square feet out of 55,995 square feet of existing lawn and landscaped area will be displaced. (*Ibid.*)

The revised addendum also compared the impacts of demolition against those previously analyzed for the CSM Project. The IS/MND adopted for the CSM Project originally assumed the renovation of 10 buildings and demolition of up to 16 buildings on campus. (AR 1:65, 245-246; 3:1563.) Removing the Building 20 complex will require demolition of a combined total of 13,000 square feet of structures. (AR 1:72.) During the course of the CSM Project, however, the District had decided to rehabilitate rather than demolish Buildings 15 and 17. (AR 2:1034, 3:1563.) As a result, these buildings, representing 30,000 to 40,000 square feet of space, will be remodeled instead of demolished as originally assumed and analyzed in the IS/MND for the CSM Project. (*Ibid.*) Taken together, the changed disposition of Buildings 15 and 17 (now to be renovated) and the Building 20 complex (to be demolished) would result in the demolition of fewer buildings and less square footage of structures than was studied in the IS/MND. (AR 1:92; 3:1584-1585.) Based on these and other factors, the revised addendum concluded that the District's modified plans for the disposition of the Building 20 complex would not result in any new or substantially more severe significant environmental impacts than were previously disclosed in the adopted IS/MND for the CSM Project. (AR 1:109.)

The District made the addendum, along with the Board's standard public meeting materials, available to the public prior to the August 24,

2011, Board meeting.[3] (AR 4:2208 [email notifying public of availability of Board packet, including addendum]; 3:1397, 1398-1400, 1401-1555 [August 24, 2011 Board packet].) The Board voted to adopt the revised addendum and approve demolition of the Building 20 complex following public discussion at its August 24, 2011, meeting. (AR 3:1566.)

PROCEDURAL HISTORY

After the District approved the revised addendum to the IS/MND for the CSM Project in August 2011, Friends filed a new petition for writ of mandate, initiating this action and asserting claims under CEQA. (Appellant's Appendix [AA]: 001-012.) Friends claimed the District must prepare an environmental impact report (EIR) for demolition of the Building 20 complex because a "fair argument" suggests the project could have significant aesthetic, biological, or cultural impacts. (AA: 80-88.) Following a hearing on the merits, the trial court granted the petition. (AA: 198-206.) The trial judge concluded that the demolition project was "inconsistent" with the CSM Project, and that "the impacts of demolishing the Building 20 complex and North and South Gardens were not addressed in the 2006 MND." (AA: 199.) The trial court's order simply stated that "[t]he August 2011 Addendum to the 2006 IS/MND provides inadequate analysis of the change in the project in violation of CEQA, where the Building 20 complex is now planned to be demolished rather than renovated." (AA: 208-216.)

The District appealed from the trial court's order. After briefing and oral arguments on the matter, Division One of the First Appellate District upheld the trial court's judgment. In its decision, the Court of Appeal acknowledged that "the typical standard of review" in such cases is controlled by the substantial evidence standard. (Opinion, p. 8.) But the

[3] CEQA Guidelines section 15164, subdivision (c), provides that "[a]n addendum need not be circulated for public review. . . ."

court then determined that "in the narrow circumstances of the present case," the "new project" test established in *Save Our Neighborhood* is both "sound and workable." (Opn. pp. 8-9.) Without citing specific facts from the record, the court concluded "that the nature of the project has fundamentally and qualitatively changed to the point where the new proposal is actually a new project altogether." (Opn., p. 8.) To reach this conclusion, the court characterized the IS/MND as "a large-scale environmental document" that only "addresse[s] the environmental effects of a complex long-term management plan...". (Opn., pp. 9-10.) The court concluded that the District had erred in determining that CEQA's subsequent review provision (Public Resources Code section 21166) applied, and instead, the District should have treated its decision to demolish Building 20 as a new project under CEQA.

The Court of Appeal did not reach the merits of Friends' remaining contentions regarding the adequacy of the actual environmental impacts analysis in the addendum. Therefore, the court did not identify any portion of the detailed analysis in the addendum as inadequate.

The District sought review from this Court to resolve the sharpening conflict in the law regarding the proper judicial standard of review to be applied to agencies' decisions in subsequent environmental review situations. The question posed to and accepted for review by this Court is whether the appropriate standard is the threshold "new project" test first articulated in *Save Our Neighborhood, supra,* 140 Cal.App.4th 1288, in which no deference is afforded to an agency's determination that its proposed action is a change to a previously reviewed and approved project, or the substantial evidence standard of review followed by *Mani Brothers Real Estate Group v. City of Los Angeles* (2007) 153 Cal.App.4th 1385 ("*Mani Brothers*"), and the majority of the other appellate decisions dealing with subsequent review under CEQA. The District submits that the CEQA

statute, its implementing Guidelines, and a long line of persuasive appellate court opinions on the issue indicate that the deferential substantial evidence standard of review is required in subsequent review circumstances.

ARGUMENT

A. The substantial evidence standard of review should apply to agency determinations made under Public Resources Code section 21166.

The parties' dispute in this case has consistently centered on the standard of review courts should apply to an agency's determination made pursuant to Public Resources Code section 21166. Throughout this litigation, the District has maintained its position, consistent with the Legislature's intent as expressed in the CEQA statute, as well as the persuasive majority of the published appellate case law, that the substantial evidence standard of review properly applies to its decision to analyze, in an addendum, the potential impacts of demolishing the Building 20 complex. The contrary position taken by Friends, that courts have unfettered discretion to decide for themselves as a threshold matter whether proposed agency actions are "new" or changes to previously reviewed projects, introduces an uncertain, arbitrary test that is nowhere supported in CEQA or administrative mandamus law generally, and therefore must be rejected by this Court.

(1) The starting point for judicial review of an agency's action under CEQA is the administrative record, not a court's subjective opinion of the nature of a project.

The Legislature, in articulating the scope of the courts' review of actions under CEQA, limited courts' inquiries to (1) whether there is any substantial evidence in light of the whole record to support the decision, and (2) whether the agency making the decision abused its discretion by failing to proceed in the manner required by law. (Pub. Resources Code, §§ 21168, 21168.5; *see also Bowman, supra,* 185 Cal.App.3d at pp. 1071-

1072.) Thus, depending on the nature of a petitioner's claims, a reviewing court's two options in a CEQA case are to consider the evidence in the administrative record of the agency's decision or to determine whether the agency has violated a mandatory duty under the law. As articulated in *Bowman,* the courts "exercis[e] the appellate function of determining whether *the record* is free from legal error." (185 Cal.App.3d at p. 1076, italics added.) CEQA nowhere indicates that a court may or should decide, as a matter of law, how to characterize an agency's proposed action – here, whether as a change to a previously approved project, or a "new" project. The Third District Court of Appeal in *Save Our Neighborhood* never explained any legal basis for concluding that it had the authority under CEQA or any other law to decide, as a matter of law and with no deference to the agency, "whether we are dealing with a change to a particular project or a new project altogether." (140 Cal.App.4th at p. 1300.) The "new project" test articulated in *Save Our Neighborhood* finds no support in CEQA. Such a non-deferential, subjective standard completely undermines the Legislature's intended purpose of providing agencies certainty and finality in their administrative and environmental decisionmaking.

The *Save Our Neighborhood* decision appears to conflate the question of whether an activity is a "project" subject to CEQA with the novel "threshold" question the court created in its opinion of whether the project is "new." The issue whether an activity is even a "project" for CEQA purposes *is* a question of law to which no deference to the agency is required. (See *Fullerton J. Union High School Dist. v. State Bd. of Education* (1982) 32 Cal.3d 779, 794-795; *Kaufman & Broad-South Bay, Inc. v. Morgan Hill Unified School Dist.* (1992) 9 Cal.App.4th 464, 473.)

In this case, however, the District did not take the position that its approval of the Building 20 complex proposal was not a CEQA "project." Had the District taken that tack, it would have proceeded without

performing *any* CEQA review. In fact, the District recognized the Building 20 complex proposal was a CEQA "project." Thus, the issue for the District was not *whether,* but *how* to comply with CEQA.

Except for *Save Our Neighborhood v. Lishman*, nearly all of the published appellate cases dealing with subsequent environmental review have applied the deferential "substantial evidence" test. (*Latinos Unidos de Napa v. City of Napa* (2013) ("*Latinos Unidos*") 221 Cal.App.4th 192; *Abatti v. Imperial Irrigation Dist.* (2012) 205 Cal.App.4th 650 ("*Abatti*"); *Mani Brothers Real Estate Group, supra,* 153 Cal. App. 4th 1385; *Santa Teresa Citizen Action Group v. City of San Jose* (2003) 114 Cal.App.4th 689, 703 ("*Santa Teresa*"); *Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307 ("*Sierra Club*"), 1318; *Fund for Environmental Defense v. County of Orange* (1988) 204 Cal.App.3d 1538, 1543-1545 ("*Fund for Environmental Defense*"); *River Valley Preservation Project v. Metropolitan Transit Development Bd.* (1995) 37 Cal.App.4th 154, 166-168 ("*River Valley*"); *Snarled Traffic Obstructs Progress v. City and County of San Francisco* (1999) 74 Cal.App.4th 793, 797 ("*STOP*"); *Benton v. Bd. of Supervisors* (1991) 226 Cal.App.3d 1467, 1480 ("*Benton*"); *Bowman, supra,* 185 Cal.App.3d at p. 1074; see also CEQA Guidelines, §§ 15164, subd. (e), 15064, subd. (f)(7).) [4] The Court should determine that this standard properly applies here.

The only instances when a less deferential standard is appropriate is, as noted above, in reviewing an agency's determination whether an action is even a "project" subject to CEQA, or when reviewing an agency's

[4] The court in *Moss v. County of Humboldt* (2008) 162 Cal.App.4th 1041, 1053 reviewed the subsequent review issue before it as a question of law, but only after finding that "[t]he legal effect that expiration of a project's tentative map has on CEQA review of the project is not a factual question, nor is it a matter that would typically be within a local agency's realm of expertise."

adoption of a negative declaration for a new project under the "fair argument" standard. (*No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 84.)

(2) Public Resources Code section 21166 provides no criteria by which a court could fashion or apply a "new project" test.

In drafting the provision of the CEQA statute that governs subsequent agency decisionmaking after some initial review has been conducted and adopted, the Legislature gave no hint that it intended for agencies to be provided as little, or even less, deference as they would receive for initial project review under CEQA. Specifically, Public Resources Code section 21166 provides:

> When an environmental impact report has been prepared for a project pursuant to this division, no subsequent or supplemental environmental impact report shall be required by the lead agency or by any responsible agency, unless one or more of the following events occurs:
>
> (a) Substantial changes are proposed in the project which will require major revisions of the environmental impact report.
>
> (b) Substantial changes occur with respect to the circumstances under which the project is being undertaken which will require major revisions in the environmental impact report.
>
> (c) New information, which was not known and could not have been known at the time the environmental impact report was certified as complete, becomes available.

There is no suggestion in this provision that an agency must somehow justify its decision to treat a proposed action as a change to a previously reviewed and approved project. But abundant and uniform case law supports the proposition that the agency's actions and findings under section 21166 should be upheld if they are supported by substantial

evidence in the record – that is, if credible evidence supports what the agency did or found, even if the record contains evidence to the contrary. (See cases cited above under Section A.1, citation sentence beginning with *Latinos Unidos de Napa,* etc.) Here, as explained in the Factual Summary, *supra,* the District had reasonable grounds for concluding that its proposed changes to the disposition of the Building 20 complex were properly considered as changes to the previously reviewed and approved CSM Project, rather than a "new" project. Because that determination is supported by substantial evidence in the record, the District's decision should be afforded considerable judicial deference, as that approach is consistent with both the CEQA statute (Pub. Resources Code, §§ 21168, 21168.5) and long standing interpretations by the appellate courts.

In contrast, the *Save Our Neighborhood v. Lishman* decision and the opinion reviewed here provided no factors grounded in the CEQA statute or Guidelines to guide agencies in making future determinations as to whether courts would uphold their proposed actions as changes to previously reviewed and approved projects or reject them for subsequent review as "new" projects.

(3) The higher threshold for further environmental review under section 21166 balances the relatively low threshold that CEQA establishes for preparing an EIR for a project in the first instance.

CEQA sets a relatively low threshold for requiring the preparation of an EIR for a project of first impression. Under this low threshold, if a fair argument based on substantial evidence can be made that a proposed project may have potentially significant and adverse environmental impacts, the lead agency must prepare an EIR. (CEQA Guidelines, § 15064, subd (a); see also *No Oil, Inc., supra,* 13 Cal.3d at p. 75.)

But where a lead agency has already completed environmental review and approved a project, CEQA disfavors further environmental

review. Under this later, higher threshold, a subsequent EIR is generally not required absent the occurrence of new significant impacts or significant impacts that are substantially more severe than previously indicated, requiring major revisions of the previous EIR or negative declaration. (Pub. Resources Code, § 21166; CEQA Guidelines, § 15162, subd. (a).) In *Bowman, supra,* 185 Cal.App.3d 1065, the court interpreted Public Resources Code section 21166 to require courts to uphold agencies' decisions *not* to prepare subsequent EIRs if any "substantial evidence" supports such decisions. The court stated that, although the Legislature intended agencies to resolve doubts in favor of preparing an *initial* EIR, such a "low threshold requirement" was not proper for the decision whether to prepare a *subsequent or supplemental EIR.* (185 Cal.App.3d at pp. 1073–1074.)

The Guidelines expand upon section 21166 to provide further guidance for the subsequent review process. Guidelines section 15162 mirrors the language of section 21166 while offering additional detail, laying out three circumstances under which a subsequent EIR must be prepared for a project:

> (1) Substantial changes are proposed in the project which will require major revisions of the previous EIR or negative declaration due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects;
>
> (2) Substantial changes occur with respect to the circumstances under which the project is undertaken which will require major revisions of the previous EIR or negative declaration due to the involvement of new significant, environmental effects or a substantial increase in the severity of previously identified significant effects; or
>
> (3) New information of substantial importance, which was not known and could not have been known with

> the exercise of reasonable diligence at the time the previous EIR was certified as complete or the negative declaration was adopted, shows any of the following:
>
> > (A) The project will have one or more significant effects not discussed in the previous EIR or negative declaration;
> >
> > (B) Significant effects previously examined will be substantially more severe than shown in the previous EIR;
> >
> > (C) Mitigation measures or alternatives previously found not to be feasible would in fact be feasible and would substantially reduce one or more significant effects of the project, but the project proponents decline to adopt the mitigation measure or alternative; or
> >
> > (D) Mitigation measures or alternatives which are considerably different from those analyzed in the previous EIR would substantially reduce one or more significant effects on the environment, but the project proponents decline to adopt the mitigation measure or alternative.

(CEQA Guidelines, § 15162, subd. (a); see also *Federation of Hillside and Canyon Assns. v. City of Los Angeles* (2004) 126 Cal.App.4th 1180, 1199-1200; *Com. for a Progressive Gilroy v. State Water Resources Control Bd.* (1987) 192 Cal.App.3d 847, 863.) In summary, if major revisions to the previous document are required due to the occurrence of new or substantially more severe environmental impacts, the lead agency must prepare a subsequent EIR.

If no new or substantially more severe environmental impacts are identified, the lead agency may decide whether to prepare a subsequent negative declaration, an addendum, or no further documentation. (CEQA Guidelines, § 15162, subd. (b).)

An addendum to an adopted negative declaration is the appropriate document where a project undergoes some modifications or changes but

"none of the conditions . . . calling for the preparation of a subsequent EIR or negative declaration have occurred." (CEQA Guidelines, § 15164, subd. (b); see also *Napa Citizens for Honest Government v. Napa County Bd. of Supervisors* (2001) 91 Cal.App.4th 342, 390, fn. 10.) According to the CEQA Guidelines, an agency's decision not to require a subsequent EIR is subject to the substantial evidence standard of review. (CEQA Guidelines, § 15064, subd. (f)(7) ["[T]he fair argument standard does not apply to determinations of significance pursuant to sections 15162, 15163, and 15164"].) Therefore, if the agency's decision to rely on an addendum (or to prepare no further documentation) is supported by substantial evidence in the record, courts must defer to the agency's decision even if a contrary conclusion could be reached. (Pub. Resources Code, §§ 21168, 21168.5.)

(4) The majority of courts that have considered agency decisions made pursuant to section 21166 have correctly applied the substantial evidence standard of review.

A long line of cases correctly holds that the substantial evidence standard applies to an agency decision made under section 21166. One of the earliest and most influential of these cases, *Bowman, supra,* 185 Cal.App.3d 1065, grappled extensively with the actual statutory language and legislative intent of Public Resources Code section 21166. The reasoning in that decision is worthy of this Court's careful consideration.

In *Bowman, supra,* the respondent city certified an EIR for a residential project and subsequently proposed modifications to the project's traffic design. The city updated its environmental package, including a traffic report, and reapproved the original EIR as amended. Although the trial court held that subsequent environmental review was required, the Court of Appeal determined that nothing in the record indicated modifications to the project were responsible for any significant increase in adverse impacts. (*Id.* at pp. 1079-1080.) The appellate court upheld the

city's conclusions under section 21166 because they were supported by substantial evidence in the record. (185 Cal.App.3d at pp. 1081-1082, 1085.)

The *Bowman* court concluded that the trial court had erred by conflating the standard of review to be applied when the question arises whether to prepare an original EIR with the test to be used after completion of such document. (185 Cal.App.3d at pp. 1071-1072.) The court further concluded the trial court exceeded the scope of its review authority stated in Public Resources Code sections 21168 and 21168.5 by exercising its independent "judgment to determine whether the requisites for a subsequent or supplemental EIR were present", rather than applying the substantial evidence standard of review. (*Id.* at pp. 1072-1073.)

The court noted the "prohibitory language ('*no* subsequent or supplemental environmental impact report . . . *unless* . . .')" of section 21166, and concluded that the legislative context and history of that section evinces the legislative purposes of "balancing environmental considerations against the social and economic burdens of compliance," "reduc[ing] the delays in the environmental review process," and on the whole of "'eliminat[ing] much of the uncertainty in the application process and to expedite development project approval.'" (*Bowman, supra,* 185 Cal.App.3d at p. 1074, italics original.)[5]

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[5] Although this Court, in *Laurel Heights II, supra,* 6 Cal.4th 1112, was not presented with the question whether the "fair argument" standard or even some less deferential standard applies under section 21166, the Court cited *Bowman* approvingly, and held that the substantial evidence test, and not the fair argument test, applies to the agency's decision under section 21092.1 whether to recirculate an EIR. (*Id.* at pp. 1132–1135.) The Court emphasized that the fair argument test has only been applied to the decision whether initially to prepare an EIR or a negative declaration, and noted that this standard is drawn from statutory language specifically governing that initial decision. (*Ibid.*) The Court acknowledged the "analogous" statutory language for subsequent or supplemental environmental review under

In contrast to this well-grounded reasoning in *Bowman*, the judicial application of the arbitrarily applied, non-deferential "new project" test espoused in *Save Our Neighborhood* to agencies' determinations that they have "changed" project proposals rather than "new" projects would ill-serve those legislative purposes.

Following the decision issued in *Bowman,* several courts of appeal applied the substantial evidence standard of review to a wide range of changed projects, even where the changes proposed were extensive. These many cases demonstrate an understanding that a deferential judicial posture is warranted by section 21166. These cases illustrate that even where projects were made significantly larger, changed locations, or agencies added new mitigation measures, the courts applied the deferential, higher bar imposed by the statute in determining whether comprehensive further review was triggered.

In *Fund for Environmental Defense v. County of Orange* (1988) 204 Cal.App.3d 1538, the applicant proposed substantial design changes to a project originally approved by the respondent county. The original project was a 308,000-square-foot complex comprised of 22 one-story buildings, served by 825 mostly underground parking spaces. The applicant revised the project substantially by expanding it to 331,000 square feet, increasing the number of two-story buildings, eliminating underground parking, and adding 75 parking spaces. (*Id.* at pp. 1545-1546.) The revised project required increased grading, resulting in greater storm water runoff. But the revised project included mitigation measures similar to those adopted for the original project, which would adequately address those impacts. Since

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section 21166, but noted that unlike the circumstances triggering recirculation of an EIR before certification, "[a]fter certification, the interests of finality are favored over the policy of encouraging public comment." (*Id.* at p. 1130.)

no new or substantially more severe impacts were identified, the court upheld the county's decision not to prepare a supplemental EIR. (*Id.* at p. 1552.)

In *Save San Francisco Bay Association v. San Francisco Bay Conservation and Development Commission* (1992) 10 Cal.App.4th 908, 935, the court upheld the agency's decision to prepare an addendum to an existing EIR when adding a new mitigation measure. The addendum analyzed the removal of a deteriorating pier to create public open space as an off-site mitigation measure for the impacts caused by an aquarium project. (*Id.* at 934.) The addendum indicated that the project would not result in new significant environmental impacts not considered in the EIR. In fact, substantial evidence indicated that the long-term impacts of the modification studied in the addendum would be generally positive. (*Id.* at 934-935.)

In *Santa Teresa Citizen Action Group v. Santa Clara Valley Water District* (2003) 114 Cal.App.4th 689, a water district revised a recycled water pipeline project to follow a route entirely different from the one previously assumed and studied. The agency evaluated the new route and concluded that previously adopted mitigation measures would avoid groundwater impacts and there were neither any new significant environmental effects nor any substantial increases in the severity of previously identified effects. Based on these conclusions, the agency adopted an addendum to the prior EIR for the recycled water system. (*Id.* at pp. 698-699.) The petitioners argued that the previous EIR did not consider the geologic differences between the old and new pipeline routes or the presence of certain toxic substances in the recycled water. The Court of Appeal held that the deferential substantial evidence standard applied to the petitioners' claims. (*Id.* at p. 703.) The court then compared the old and new pipeline routes and concluded that neither the petitioners nor the record

demonstrated that the changed route or circumstances surrounding the project were so significantly different that new or more severe impacts would result. (*Id.* at pp. 704-705.)

The project changes in *River Valley Preservation Project v. Metropolitan Transit Development Board* (1995) 37 Cal.App.4th 154, were also substantial. There, the revisions to two light-rail line alignments in the 100-year flood plain of the San Diego River involved doubling the height and increasing the slope of the segment of the berm upon which the lines would run. This change increased the fill in the flood plain and decreased the area available for spreading flood flows. The lead agency approved an addendum to its certified EIR, concluding that the revisions would not involve new environmental impacts. The court noted the key issue was whether the changes "created *substantial environmental ramifications* that will require major revisions of the EIR." (*Id.* at p. 175, italics added.) The changes did not require preparation of a supplemental EIR because the original EIR discussed the same or similar impacts caused by the changes, and mitigation measures applied to the project were equally applicable to the revised project. (*Id.* at pp. 177-178.)

Similarly, substantial changes were proposed to the original project approved in *Mani Brothers Real Estate Group v. City of Los Angeles* (2007) 153 Cal.App.4th 1385. The EIR for the original project considered the impacts caused by five buildings with approximately 2.7 million square feet of development. Later, the project increased to 3.2 million square feet, an 18.5 percent increase in size, and it was significantly reconfigured to accommodate mixed-use development. (*Id.* at pp. 1392-1393.) Despite these substantial changes, the court upheld the use of an addendum for all but one distinguishable issue. (*Id.* at p. 1403.)

In *Melom v. City of Madera* (2010) 183 Cal.App.4th 41, the Fifth Appellate District determined the city properly relied on an addendum

rather than a subsequent or supplemental EIR. The original EIR had studied the potential impacts of a proposed retail center with approximately 795,000 square feet of floor area located on a 100-acre site. (*Id.* at p. 44.) Subsequently, the developer proposed a refined site plan, in which the largest retail space would be "considerably larger" than originally described in the EIR. The city prepared an addendum, which concluded the changes would not result in new or substantially more severe environmental impacts. (*Id* at pp. 44-45.) The court determined the city properly applied Guidelines section 15164 and upheld the addendum. (*Id.* at pp. 55-58.)

Most recently, the City of Napa withstood a challenge to its decision not to prepare subsequent environmental review for a revised long-range plan in *Latinos Unidos de Napa v. City of Napa* (2013) 221 Cal.App.4th 192. The city previously adopted a program EIR in 1998 for its 2020 general plan update. (*Id.* at p. 197.) Ten years later, the city began the process of updating the housing element portion of its general plan for the third time since the EIR had been certified. The update would involve adding new policies to encourage increased housing densities. An initial study prepared for the project considered whether the proposed policy changes could result in any new or different environmental impacts not already analyzed in the EIR prepared for the 2020 general plan update. The study determined that the project would not result in new or more severe impacts. Therefore, the project fell within the scope of the 1998 program EIR, so the city concluded no further environmental review was required. (*Id.* at p. 198.) The First Appellate District, the same court that reviewed this case, determined substantial evidence supported the City's decision to proceed under section 21166 and to refrain from preparing a new EIR for its housing plan update. (*Id.* at pp. 200-207.)

While the foregoing decisions of the courts of appeal are certainly not binding on this Court, taken as a whole they are nonetheless instructive

and persuasive authority for the long-held and widespread understanding that the substantial evidence standard of review is necessarily triggered by the presumption against further review contained in section 21166. Moreover, such a deferential standard is appropriately applied in light of the legislative policies favoring certainty and finality after the completion of an original environmental document.

(5) Numerous courts have also properly applied the substantial evidence standard of review to subsequent review cases where the original document was a negative declaration instead of an EIR.

Many petitioners have tried to argue over the years that the less deferential "fair argument" standard of review should apply to environmental reviews that rely upon or supplement original negative declarations. With the exception of the *Save Our Neighborhood v. Lishman* decision, which created the entirely new and even less deferential "new project" test, the courts of appeal have rejected all such attempts to require that the lower threshold of the fair argument test be applied to reviews following adopted negative declarations. The circumstances at issue and reasoning applied in those cases should be helpful to the Court's decision in this case. The Court should embrace the reasoning of these cases because they are consistent with the statutory language of section 21166.

Guidelines section 15164, subdivision (b), describes the circumstances in which an agency may prepare an addendum to an adopted negative declaration. It sets forth two scenarios in which an addendum to a negative declaration is appropriate: (1) "if only minor technical changes or additions [to the prior analysis] are necessary," *or* (2) a subsequent EIR or negative declaration is not required under Guideline section 15162. (CEQA Guidelines, § 15164, subd. (b).)

Guidelines section 15162 mirrors and expands on the language of Public Resources Code section 21166, providing that after the certification

of an EIR or adoption of a negative declaration for a project, "no subsequent EIR shall be prepared for that project unless the lead agency determines, on the basis of substantial evidence in light of the whole record," that substantial changes in the project or circumstances under which the project is undertaken which will require major revisions of the previous EIR or negative declaration because of new or more severe significant environmental effects or new information indicating such effects will occur. (CEQA Guidelines, § 15162, subd. (a).) Thus, if the conditions under section 15162 triggering a subsequent EIR or negative declaration are not met, section 15164 allows that an addendum is appropriate even where the initial environmental review document was a negative declaration.

The First Appellate District affirmed this interpretation of the Guidelines in *Benton v. Board of Supervisors* (1991) 226 Cal.App.3d 1467. In that case, Napa County approved a use permit for a winery based on a negative declaration. The applicant subsequently acquired an adjoining parcel and applied to amend its use permit to move the winery a mile, to a larger site closer to existing residences. The neighbors sued. (*Id.* at pp. 1473-1474.) The court held the rules governing supplemental environmental review controlled, even though the first analysis was a negative declaration. (*Id.* at pp. 1480-1481.) The court upheld Guidelines section 15162 as a validly promulgated regulation against the neighbors' claim that it could not be applied in negative declaration cases. The court explained that section 15162 and section 21166 do not create any different standard for review of subsequent review documents following EIRs versus negative declarations. (*Id.* at pp. 1481-1482.) In fact, the court emphasized that a holding to the contrary would be illogical:

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> 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 a project that initially raised so few environmental questions 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.

(*Id.* at p. 1480, italics original and underlining added.) The court then considered the only environmental issue potentially implicated by moving the winery: noise. Although the modified winery might cause greater noise impacts on residents than would have occurred at the original location, this impact could be adequately mitigated. (*Id.* at p. 1483.) Thus, a supplemental EIR was not required.

Snarled Traffic Obstructs Progress v. City and County of San Francisco (1999) 74 Cal.App.4th 793, 797-800 also involved review of an agency's changed project originally approved on a negative declaration. The project at issue involved demolition of an existing two-story parking garage and its proposed replacement with a larger, seven-story structure with 10,000-to-13,000 square feet of retail space on the ground floor. Nine years later, city officials proposed to lower the garage and to eliminate the ground-floor retail. The city approved a new conditional use permit and zoning variance for the revised project. A neighborhood group alleged the changed project would have adverse effects on light, air and views for residents of adjacent residential hotels. (*Id.* at pp. 795-796.) The court concluded the city had not erred in determining changes in the setting had not altered the negative declaration's conclusion. (*Id.* at p. 802.) The court

reached this conclusion after applying the substantial evidence standard of review to the city's decision. (*Id.* at pp. 799-800.)

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." (*Id.* at p. 1083.) 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.*)

The Fourth Appellate District recently upheld this application of section 21166 to projects originally approved on a negative declaration in *Abatti v. Imperial Irrigation Dist.* (2012) 205 Cal.App.4th 650. There, the petitioners challenged an irrigation district's adoption of revised water distribution regulations due to the district's failure to prepare subsequent environmental review. The irrigation district's originally adopted regulations had been analyzed in a negative declaration. (*Id.* at pp. 653-655.) The later plan adopted by the irrigation district was intended to control the distribution of water in the event of water shortages. (*Id.* at p. 653.) The petitioners argued Guidelines section 15162 inappropriately applied Public Resources Code section 21166 to negative declarations and that as a result, the *Benton* court's validation of Guidelines section 15162 had been wrongly decided. (*Id.* at pp. 668-674.) The *Abatti* court rejected this argument. It agreed with *Benton*'s reasoning that the principles of 21166 "apply with even greater force in a case...in which the initial

environmental review resulted in the issuance of a negative declaration rather than an EIR." (*Id.* at p. 670.) *Abatti* notes 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." (*Id.* at p. 673, original italics.) The court reviewed the irrigation district's revisions to the water distribution regulations under the substantial evidence standard. The court determined substantial evidence supported the irrigation district's conclusions that the revisions would not result in "'new significant environmental effects or a substantial increase in the severity of previously identified significant effects.'" (*Id.* at p. 682.)

Again, while this Court is in no way bound by the lower appellate courts' consistent interpretations of section 21166 and its implementing Guidelines as requiring the deferential substantial evidence standard of review, the District urges the Court to give considerable weight to the persuasive reasoning and respect for the legislative goals of promoting finality and certainty in the CEQA process applied by those courts. The contrary standard articulated in *Save Our Neighborhood* and urged by Friends in its briefing below and its answer to the District's petition for review evinces no respect for these goals or the significant costs, delays, and inefficiencies that endless loops of new review create.

B. The "new project" test created in *Save Our Neighborhood v. Lishman* is not grounded in any provision of CEQA, and therefore the Court should reject it.

The Third District's decision in *Save Our Neighborhood* was startling to many CEQA practitioners. It created a new, undefined procedural hurdle agencies must overcome when considering a determination pursuant to section 21166. The decision deviated from the deferential standard of review historically applied to an agency's

conclusions under section 21166 but failed to articulate any statutory or regulatory basis for doing so.

Additionally, the seemingly arbitrary and case-specific factors the court cited in holding that the project at issue was, as a matter of law, a "new project," created substantial uncertainty for agencies trying to navigate their way under section 21166.

In *Save Our Neighborhood, supra*, the respondent city prepared a mitigated negative declaration for the "North Point" project. This project included a 106-unit motel, restaurants, lounge, gas station, convenience store, and car wash. But the project was never constructed. (140 Cal.App.4th at pp. 1291-1292.) Later, a substantially similar hotel/gas station/convenience store project was proposed by a different applicant for the same property. The city initially circulated a new MND for this similar "Gateway" project. It later recast the project as a modification to the previously reviewed and approved North Point project and prepared an addendum to the original MND. (*Ibid.*) The city approved the project after determining there would be no new or substantially more severe significant environmental impacts than were identified in the MND prepared for the North Point project. (*Id.* at 1293.) The appellate court rejected the city's approach.

The Third Appellate District identified two factors critical to its analysis. First, the court found it compelling that the two projects had different proponents. Second, the court asserted that the latter project did not use any of the drawings or other materials connected with the earlier project as a basis for the new configuration of uses. (*Save Our Neighborhood, supra,* 140 Cal.App.4th at p. 1300.) The court imposed a "new project" test, prior to considering the agency's section 21166 conclusions, under which the court could decide for itself as a threshold matter of law whether the project was a change to a particular project or a

new project altogether. (*Id.* at p. 1301.) The court reached this decision without citing or explaining any basis for it in the CEQA statute or Guidelines. Petitions for rehearing and review were denied, and agencies waited to see if the Third District's novel "new project" test would be followed by other appellate districts.

Rather than follow *Save Our Neighborhood*, the next year, in *Mani Brothers, supra,* 153 Cal.App.4th 1385, the Second Appellate District sharply criticized the new project test. In reaching its decision, the court declared:

> Even if *Save Our Neighborhood* was not distinguishable on its facts, its fundamental analysis is flawed. The court in *Save Our Neighborhood* tackled what it perceived to be the "threshold question [of] whether we are dealing with a change to a particular project or a new project altogether," and declared that "section 21166 and Guidelines section 15162 apply to the former but not the latter." (*Save Our Neighborhood, supra*, 140 Cal.App.4th at p. 1301. . . .) This novel "new project" test does not provide an objective or useful framework. Drastic changes to a project might be viewed by some as transforming the project to a *new* project, while others may characterize the same drastic changes in a project as resulting in a dramatically *modified* project. Such labeling entails no specific guidelines and simply is not helpful to our analysis.
>
> The "new project" test in *Save Our Neighborhood*, also inappropriately bypassed otherwise applicable statutory and regulatory provisions (i.e., § 21166; Guidelines, § 15162) when it considered it "a question of law for the court" whether the changed project was to be reviewed under section 21166 at all. (*Save Our Neighborhood*, *supra*, at p. 1297. . . .) We disagree with that approach and view the issue of whether an agency proceeded properly in treating a project as subject to section 21166 *not* as a question of law, but rather as a question of the adequacy of evidence in the

> record to support the agency's determination.
>
> The question of law approach employed in *Save Our Neighborhood* conflicts with the customary substantial evidence test discussed above and long used in all other cases. . . .
>
> Treating the issue as a question of law, as the court did in *Save Our Neighborhood*, inappropriately undermines the deference due the agency in administrative matters. That principle of deference is otherwise honored by the substantial evidence test's resolution of any "'reasonable doubts in favor of the administrative finding and decision.'" (*Laurel Heights Improvement Assn. v. Regents of University of California, supra*, 47 Cal.3d at p. 393. . . .)

(*Id.* at pp. 1400-1401.)

In subsequent cases, most courts have also declined to follow the "new project" test from *Save Our Neighborhood*. The First Appellate District, in *Moss v. County of Humboldt* (2008) 162 Cal.App.4th 1041, only applied the question of law standard after noting that the challenge to the addendum at issue "[did] not raise or depend upon any *factual* assertions about the nature of the project." (*Id.* at p. 1052, italics added.) In fact, the *Moss* court emphasized the project at issue "*had not changed in any way.*" (*Id.* at p. 1053, original italics.) The project was challenged only because the previously approved tentative map for the project had expired. (*Ibid.*) Therefore, the *Moss* court found "[t]he legal effect that expiration of a project's tentative map has on CEQA review of that project is not a factual question, nor is it a matter that would typically be within a local agency's realm of expertise." (*Id.* at p. 1053.) "*Mani Brothers* was particularly concerned about courts drawing their own conclusions about what is essentially a factual question—i.e., whether the effect of changes to a project render it so drastically changed as to constitute a 'new' project." (*Id.* at p. 1052.) The holding in the *Moss* court suggested deference to the

agency is appropriate where factual questions are at issue, impliedly rejecting the non-deferential posture taken in *Save Our Neighborhood.*

The First Appellate District recently acknowledged the confusion caused by the courts' conflicting approaches in *Save Our Neighborhood*, *Mani Brothers*, and *Moss*. (*Latinos Unidos*, *supra*, 221 Cal.App.4th at p. 201-202.) But in *Latinos Unidos* the court rejected the notion that any threshold question of law applied to the city's decision to proceed under section 21166. The court then considered the substantial evidence in the record and determined this evidence supported the city's section 21166 determination. (*Id.* at pp. 202-204.)

The great weight of cases addressing section 21166 decided prior to *Save Our Neighborhood* applied the substantial evidence standard of review. (See sections A (1)-(2), *supra.*) Cases decided subsequent to the holding in *Save Our Neighborhood*, like *Mani Brothers*, *Moss,* and *Latinos Unidos* have declined to apply the new project test to factual determinations, such as those made by the District in this case.

The *Mani Brothers* court precisely identified the flaws and conflicts of law in the new project test announced in *Save Our Neighborhood.* In contrast to the reasoning applied in *Save Our Neighborhood,* the *Mani Brothers* court connected the judicial inquiry in subsequent review situations to the CEQA statute itself and its fundamental reliance on the judiciary's deferential consideration of evidence in the administrative record to resolve CEQA disputes, rather than encouraging judges to substitute their independent judgments or subjective assessments of project merits. For these very sound reasons, the District urges the Court to adopt the appropriately deferential substantial evidence standard of review articulated in the *Mani Brothers* decision.

C. Substantial evidence supports the District's decision to rely on an addendum to its negative declaration adopted for the CSM Project.

The Building 20 complex demolition is not a new, stand-alone project, and the District's preparation of an addendum was appropriate because the changes the Building 20 complex plans effect in the CSM Project will not result in new or significantly increased environmental impacts. Substantial evidence in the record supports this conclusion. However, even under the non-deferential "new project" test applied in *Save Our Neighborhood* and the First District decision from which this appeal is taken, it is difficult to understand how the plans for the Building 20 complex reasonably could be cast as anything other than changes to the previously reviewed CSM project.

The Building 20 complex changes to the CSM Project involve demolition activities within the scope of those considered in the IS/MND. The IS/MND contained project-specific analysis of the disposition of every building on the campus and various other related campus-wide improvements. (AR 1:245-246.) The original CSM Project included the demolition of up to 16 buildings and the renovation of various parking lots. (AR 1:245-246). The District later decided to renovate rather than demolish Buildings 15 and 17. (AR 3:1584-1585.) Therefore, the change in the CSM Project to include Building 20 in the demolition list rather than renovating it will still result in the demolition of one less building than originally contemplated. (*Ibid.*) Further, the demolition of Building 20 will result in a loss of only about 6,000 square feet of building space, as compared to the approximately 32,000 square feet of space in Buildings 15 and 17 that were originally going to be demolished. (AR 1: 92; 3:1584-1585.) Thus, any impacts resulting from the demolition of the Building 20 complex fall within the scope of those the IS/MND determined would be less than

significant as mitigated. (AR 1:339-341.) Further, the addendum's analysis indicated this demolition would not result in any new or substantially more severe impacts in any resource area. (See e.g., AR 1:95-97 [Air Quality], 97-100 [Biological Resources], 101-102 [Cultural Resources], 103 [Hazards and Hazardous Materials], 103-104 [Hydrology and Water Quality].)

The Building 20 complex changes to the CSM Project include parking lot and landscaping renovation activities also within the scope of those considered in the IS/MND. While the CSM Project originally did not consider alterations to the Building 20 complex gardens, the IS/MND did assume the demolition of nine existing buildings for parking lot space. (AR 1:246 [demolition of Buildings 21-29 for expansion of Parking Lot 11].) Further, the IS/MND indicated the CSM Project would require landscaping and the addition of trees and walkways where parking lot renovation and reconfiguration occurred. (AR 1:249.) The IS/MND also noted that tree removal could occur as a result of construction or demolition, and any such removal would be compensated with the planting of replacement trees and vegetation around new or renovated buildings and parking lots. (AR 1:250.) So the types of physical environmental changes implicated by the Building 20 complex plans, such as parking lot reconfiguration and landscaping alterations or improvements, were previously considered in the IS/MND that the addendum updates and revises.

Substantial evidence in the record further indicates measurable aesthetic changes resulting from the Building 20 complex demolition will be minor in the context of the campus-wide renovation activities the CSM Project envisioned. (AR 1:92-95.) Changes to the garden areas will result in about 10,430-square-feet less landscaped area on campus. This loss represents about 0.24 acres, or less than 0.33% (one third of one percent), of the total landscaped/open space area available on campus. (AR 1:72.) Of

the existing garden areas in the Building 20 complex itself, 80% of the North and 45% of the South Gardens will remain after demolition and parking lot construction. (AR 1:65-66, 105; 3:1566.) The existing significant tree of note on the project site will also be preserved, and the District's plans provide the opportunity for additional teaching gardens. (See AR 1:182-210 [dawn redwood tree assessment finding tree suitable for preservation and recommending steps for protection during construction]; 1:85-91 [math/science division teaching garden plans with description of ecosystem zones and conceptual plan].) The record supports the conclusion reached in the addendum: the changes to the CSM Project resulting in the demolition of the Building 20 complex will not significantly and adversely affect the aesthetics of the campus environment. (AR 1:92-95.) Nor will the changes result in significant impacts in other important resource areas, as evidence in the addendum explains. (See AR 1:95-109.) Throughout this litigation, Friends has failed to prove otherwise. (*Citizens for Responsible Equitable Environmental Development v. City of San Diego* (2011) 196 Cal.App.4th 515, 526-27 [plaintiff's burden to prove agency's use of an addendum improper].)

D. Rules regarding tiering do not apply here, where the environmental review was project-specific rather than programmatic.

The District did not rely on tiering or prior program-level review, but the opinion from which the District appeals incorrectly treats the IS/MND prepared for the CSM Project as a program-level review document, rather than a project-specific review document, so the District takes this opportunity to clear up any misconception. (Opn., pp. 9-10.) As an example of programmatic review, the First District's opinion cites the long-term mining plan at issue in *Sierra Club, supra,* 6 Cal.App.4th at p. 1316, presumably because Friends also argued below that it was relevant

and applicable here. The opinion then compares the District's IS/MND to a "large-scale environmental document" covering a "complex long-term management plan," such as the mining plan at issue in *Sierra Club*. (Opn., pp. 9-10.) The court therefore concluded that, with respect to the District's changed approach to the Building 20 complex, it could "find a material alteration in that plan regarding a particular site or activity to be a *new project* triggering new environmental review." (Opn., p. 10, citing *Sierra Club, supra,* 6 Cal.App.4th at pp. 1313-1314, 1320-1321, italics added.) But the District's previously adopted MND for the CSM Project was a *project-specific* review document that considered the disposition of *every building on the campus*. (AR 1:245-246; *see generally* 3:1672-1687 [Recommended 2006 Facilities Master Plan for CSM].) Therefore, the provisions regarding programmatic review or tiering are not applicable in this case, as they were in *Sierra Club*. (See *Friends of Mammoth v. Town of Mammoth Lakes Redevelopment Agency* (2000) 82 Cal.App.4th 511, 527-531 ("*Friends of Mammoth II*"), citing *Sierra Club, supra,* 6 Cal.App.4th at pp. 1319-1321.)

As the court explained in *Friends of Mammoth II, supra*, "[t]he standard for determining whether to engage in additional CEQA review for subsequent projects under a tiered EIR is more relaxed than the prohibition against additional review imposed by Public Resources Code section 21166 for project EIRs." (82 Cal.App.4th at p. 528.) The *Friends of Mammoth II* court explained that the reference to a "new project" in *Sierra Club* comes from this statement regarding program-level review. If a subsequent project is not within the scope of a *program or first-tier* EIR, it is treated as a new project. (*Id.* at pp. 528-529 [citing Pub Resources Code § 21094, subd. (b)].) No similar test is found in the statute or Guidelines for subsequent review situations for project-level review documents. (*Ibid.;* Pub. Resources Code, § 21166; CEQA Guidelines, §§ 15162-15164; see also

Latinos Unidos, supra, 221 Cal.App.4th at pp. 200-201 [acknowledging this distinction].) Moreover, the record demonstrates that the types of changes proposed for the Building 20 complex *were* within the scope of the IS/MND, and even if it was a programmatic document, which it is not, the modification to the plans for Building 20 was covered by the IS/MND.

CONCLUSION

The District urges this Court to conclude that the substantial evidence standard of review is the appropriate judicial posture to apply to agencies' determinations under CEQA that their proposed actions are changes to previously reviewed and approved projects, rather than new projects. This position is consistent with both the language of the CEQA statute and implementing Guidelines themselves, as well as the persuasive authority of a long line of appellate case law interpreting agency's obligations under Public Resources Code section 21166.

As early as 1986, the First Appellate District acknowledged that the Legislature adopted section 21166 in the interest of protecting the finality of environmental review. (*Bowman, supra,* 185 Cal.App.3d at p. 1074.) The First District recognized the intention of the Legislature to create a balance against the burdens created by the environmental review process set forth in CEQA. This intention has been affirmed by the courts in numerous subsequent opinions addressing section 21166.

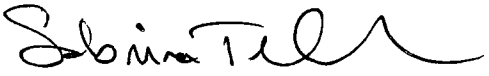
Until 2006, the courts typically applied the substantial evidence standard when reviewing any particular agency decision made pursuant to section 21166. But in 2006, the Third District Court of Appeal imposed a threshold "new project" test in *Save Our Neighborhood.* This novel test allows courts to disregard substantial evidence cited by agencies in support of their section 21166 determinations and instead encourages reviewing courts to step into the agency decision-makers' shoes and decide for themselves whether a contemplated change to a project should actually be

treated as a "new" project under CEQA. The new project test exacerbates uncertainty for agencies because it fails to identify any objective factors, grounded in the statute, for agencies to consider when deciding if a proposal is a change or a new project. In contrast, section 21166 provides a clear metric for agencies to follow: no supplemental or subsequent EIR is required unless any new or substantially more severe impacts are identified.

Here, the District exercised its discretion in determining that the best course of action to meet the evolving needs of its campus in a cost-effective manner was to demolish, rather than renovate, the Building 20 complex. The District weighed the substantial evidence in its record and found no new or more severe adverse impacts associated with this modification to the CSM Project. The District prepared and adopted a revised addendum supporting this conclusion. But despite preparing an addendum amply supported by substantial evidence, the District was arbitrarily ordered to treat its decision to demolish Building 20 as a new project. Neither the trial nor the appellate courts below found specific fault with the analysis and impact conclusions in the addendum, rather, merely with the District's characterization of the project and the type of document it prepared. As a result of this outcome, the District could bear the cost of hundreds of thousands of dollars in attorney's fees and EIR preparation costs for new analysis that is unlikely to reach different conclusions than the addendum. It is precisely to avoid this kind of wasteful scenario in the future that the District seeks this Court's disapproval of the new project test invented in *Save Our Neighborhood*.

Date: February 14, 2014

Respectfully submitted,
REMY MOOSE MANLEY, LLP

By: 

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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, Rule 8.520(c)(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 one of the attorneys for Respondents in this action.

2. California Rules of Court, rule 8.520(c)(1), states that an a Brief produced on a computer must not exceed 14,000 words, including footnotes.

3. This Brief was produced on a computer using a word processing program. This Brief consists of 12,961 words, including footnotes but excluding the caption page, tables and this certificate, as counted by the word processing program.

Respectfully submitted,

Date: February 14, 2014

REMY MOOSE MANLEY, LLP

By: _____

Sabrina V. Teller

Attorneys for Petitioner San Mateo County Community College District

Friends of the College of San Mateo Gardens v.
San Mateo County Community College District
Supreme Court Case No.: S214061
(Court of Appeal, First Appellate District, Div. 1, Case No.: A135892,
San Mateo County Superior Court Case No.: CIV508656)

PROOF OF SERVICE

I, Matthew Tabarangao, 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 February 14, 2014, I served the following:

OPENING BRIEF

☑ 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:

SEE ATTACHED SERVICE LIST

I declare under penalty of perjury that the foregoing is true and correct and that this Proof of Service was executed this 14th day of February, 2014, at Sacramento, California.

_____
Matthew Tabarangao

Friends of the College of San Mateo Gardens v.
San Mateo County Community College District
Supreme Court Case No.: S214061
(Court of Appeal, First Appellate District, Div. 1, Case No.: A135892,
San Mateo County Superior Court Case No.: CIV508656)

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