SUPREME COURT NO. _____

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

SAN DIEGANS FOR OPEN GOVERNMENT,
Petitioner and Plaintiff,

v.

PUBLIC FACILITIES FINANCING AUTHORITY OF THE CITY OF SAN DIEGO, ET AL.
Respondent and Defendant.

After Decision of the Court of Appeal,
Fourth Appellate District, Division One, Case No. D069751

San Diego County Superior Court
The Honorable Joan M. Lewis
Case No. 37-2015-00016536-CU-MC-CTL

PETITION FOR REVIEW

MARA W. ELLIOTT, City Attorney, City of San Diego
GEORGE SCHAEFER, Assistant City Attorney
MEGHAN ASHLEY WHARTON, Chief Deputy City Attorney
California State Bar No. 250498

OFFICE OF THE SAN DIEGO CITY ATTORNEY
Civil Division
1200 Third Avenue, Suite 1100
San Diego, California 92101
Telephone: (619) 533-5800
Facsimile: (619) 533-5856
Email: mwharton@sandiego.gov

Attorneys for Respondents City of San Diego

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

INTRODUCTION

Petitioners City of San Diego and its affiliated entities ("City" and collectively "Petitioners") respectfully petition the Supreme Court of California for review of the Fourth District Court of Appeal's published Opinion in *San Diegans for Open Government v. Public Facilities Financing Authority of the City of San Diego,* 16 Cal.App.5th 1273 (2017) filed November 9, 2017[1] (the "Opinion") reversing the trial court ruling that Appellant/Plaintiff San Diegans for Open Government ("SDOG") lacks standing under Government Code section 1090 ("Section 1090") and Government Code section 1092 ("Section 1092") to bring a claim to invalidate a public entity transaction.

ISSUE PRESENTED FOR REVIEW

Does a taxpayer group have direct standing[2] under Section 1090 and Section 1092 to bring an action to challenge the validity of a public entity transaction for an alleged violation of Section 1090?

SUMMARY OF THE PETITION

The Supreme Court should grant review in this case to secure uniformity of decision and to settle an important question of law of statewide importance. Cal. R. Ct. 8.500(b)(1). To summarize, the published Opinion conflicts with a prior decision of the Court of Appeal, fundamentally confounds basic principles of statutory construction and

---

[1] Pursuant to California Rule of Court 8.504(b)(4) and (e)(1)(A), a true and correct copy of the Opinion bearing the date it was entered is attached hereto as Exhibit 1. The page numbers used herein refer to the version of the Opinion attached as Exhibit 1.

[2] Direct standing refers to independent standing in one's own name. In contract, representational standing is standing to sue in the name of the public entity involved in the transaction, including standing under Code of Civil Procedure section 526a.

opens the floodgates for those citizens rebuffed by the political process to abuse the State's court system to halt or delay local government transactions they disagree with. Further, the action is particularly appropriate for Supreme Court review because the Supreme Court can resolve the legal dispute in question based on a set of uncomplicated and undisputed facts.

First, the Opinion directly conflicts with the Fourth District Court of Appeal's Decision in *San Bernardino County v. Superior Court*, 239 Cal.App.4th 679 (2015), *review denied* (Nov. 24, 2015), *request to depublish denied* (Nov. 24, 2015) ("*San Bernardino*"). In *San Bernardino*, the Court of Appeal found that a taxpayer does not have standing under Section 1092 to sue to invalidate a contract alleged to violate Section 1090. The subject Opinion finds the exact opposite. There is no way the two decisions can be reconciled. Therefore, the Supreme Court's review is necessary to secure uniformity of decision in the State.

Second, this Court should grant review because the Opinion is clearly inconsistent with the plain language of Section 1090 and Section 1092. Without analysis, the Opinion adopts an erroneous construction of Section 1092 that (a) has been squarely rejected by Division Three of the Fourth District Court of Appeal; and (b) is unsupported by the California canons of statutory construction.

Third, the Supreme Court should grant review of this case because the case involves an important question of law that is of great interest to local government entities and persons that do business with them throughout the State. Importantly, the Opinion does not just open the door for disgruntled taxpayers to halt a public entity's actions on a challenged transaction or otherwise interfere with the business of the local government

entity. The Opinion and the issues presented by this case also impact the thousands of non-government parties who have in the past or will in the future enter into contracts with local government entities throughout the State. Under the published Opinion, those contracts, no matter how distant in the past, may now be subject to challenge and effectively frozen in time on even the most specious grounds alleged by disgruntled taxpayers given a private right of action under Section 1090 and Section 1092.

STATEMENT OF UNDISPUTED FACTS

On March 17, 2015, the City of San Diego adopted San Diego Ordinance No. O-20469 and PFFA Resolution No. FA-2015-2 authorizing the issuance of the 2015 Refunding Bonds to refund and refinance the remaining amount owed by the City on the 2007 bond issuance relating to the remaining debt for the construction of Petco Park ("2015 Refunding Bond Approvals" and "2015 Refunding Bond Issuance"). 1 AA 16/186:2-5. Pursuant to the 2015 Refunding Bond approvals, the following entities would serve in the following described roles for purposes of the 2015 Refunding Bond Issuance:

a. Outside Financial Advisor to the City – Public Resources Advisory Group

b. Bond and Disclosure Counsel – Nixon Peabody LLP

c. Bond Trustee – Wells Fargo Bank, National Association

d. Lead Underwriter – RBC Capital Markets

e. Other members of the Underwriter Syndicate – BofA Merrill Lynch, William Blair, Stern Brothers & Co.

f. Underwriter's Counsel – Sidley Austin LLP

1 AA 12/131:1-13.

Neither SDOG nor any of its members are or will be a party to any of the various transactions that will make up the 2015 Refunding Bond Issuance. 1 AA 12/131:14-16.

PROCEDURAL HISTORY

Just prior to the start of trial, the trial court took up the initial question of whether SDOG has direct standing to assert a claim to invalidate or void the 2015 Refunding Bond Approvals under Section 1090 Section 1092. 1 AA 106/Ex. 1 at 188. After expedited briefing, the trial court ruled that SDOG did not have standing to bring a claim to challenge the validity of the 2015 Refunding Bond Approvals under Section 1090. 1 AA 16/Ex. 1 at 187:15-17. The trial court's decision rejecting SDOG's claim to direct standing to bring the Section 1090 Claim was soundly grounded in the Court of Appeal's interpretation of sections 1090 and 1092 in *San Bernardino*. 1 AA 16/Ex. 1 at 188-89. In the Opinion, the Court of Appeal overturned the trial court's decision on standing.

DISCUSSION

I. REVIEW IS APPROPRIATE TO SECURE UNIFORMITY OF DECISION BECAUSE THE OPINION IS IN CONFLICT WITH THE DECISION AND ANALYSIS IN *SAN BERNARDINO*

The Supreme Court should grant review of the Opinion to ensure clarity and uniformity on the fundamental issue of who has direct standing to bring a claim to void a public entity transaction under Section 1090 and Section 1092. Can a taxpayer or taxpayer group bring a direct action in its own name to challenge a contract under Section 1090 if the taxpayer is not a "party" to the transaction as Section 1092 seems to require? The Court of Appeal in *San Bernardino* answered this question in the negative; in the Opinion, the Court of Appeal answers the question in the affirmative.

The Opinion conflicts with *San Bernardino* in its final holding and on several points of analysis. In fact, in the Opinion, the Court of Appeal expressly casts aside the decision in *San Bernardino* when it states that "we do not agree with the limited interpretation of section 1092 adopted in *San Bernardino*." Op. at 14. For this reason, this Court should grant review to secure uniformity of decision in the State.

A. The Opinion and *San Bernardino* reach Conflicting Conclusions on the Question of Direct Standing under Section 1090 and Section 1092 after Conflicting Analyses

The S*an Bernardino* case involved a decision of the County of San Bernardino to enter into a settlement agreement in an inverse condemnation matter. *San Bernardino*, 239 Cal.App.4th at 682. The county then brought a validation action and obtained a judgment declaring the settlement agreement and the bonds issued to satisfy the judgment valid. *Id.* at 682-83. Five years later, a taxpayer organization sought to void the settlement agreement in an action brought under Section 1090 based on allegations that a county supervisor received bribes from the landowner in exchange for his vote to approve the settlement agreement. *Id.* at 683. The plaintiff taxpayer organization in *San Bernardino* alleged three grounds for standing: (a) direct standing under Section 1090 and Section 1092; (b) indirect standing under Code of Civil Procedure Section 526a ("Section 526a"); and (c) indirect standing under the common law. *Id.* at 683. As to direct standing under Section 1090 and Section 1092, the *San Bernardino* Court found that only a party to a challenged contract has direct standing to challenge a transaction for an alleged violation of Section 1090. *Id.* at 684.

1. In the Opinion, the Court of Appeal Construes Section 1092 to Mean the Opposite of the Meaning Given by the Court of Appeal in *San Bernardino*

Section 1090 mandates that public officials "shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members." Section 1090 does not by itself authorize a cause of action to sue for a violation. Instead, Section 1092 contains the language that authorizes a cause of action: "Every contract made in violation of any of the provisions of Section 1090 may be avoided at the instance of any party except the officer interested therein."

In reaching its decision on direct standing, the Court of Appeal in *San Bernardino* engaged in a thorough exercise of statutory construction to determine the Legislature's intent in adopting Section 1090 and Section 1092. *Id.* Of all the cases discussed by the Court of Appeal in the Opinion, *San Bernardino* is the only decision where the Court of Appeal performed the exercise of statutory construction to determine the meaning of the term "any party" as used in Section 1092. *San Bernardino*, 239 Cal.App.4th at 684.

Construing Section 1092, the Court of Appeal in *San Bernardino* found that only a party to a challenged contract has direct standing to bring a cause of action challenging a public entity contract for an alleged violation of Section 1090. *Id.* at 684. In reaching its decision on direct standing, the Court of Appeal first sought to determine the Legislature's intent in crafting Section 1090 and Section 1092. *Id.* at 684-85. The Court of Appeal found that nothing in the plain language of either section 1090 or section 1092 suggests that the Legislature intended to grant nonparties to a contract, such as taxpayers, the right to sue to challenge a transaction for an

alleged violation of section 1090. *Id.* at 684. The Court of Appeal in *San Bernardino* supported its conclusion on this point by noting that "the Legislature's choice to use the word 'party' in Section 1092 – as opposed to, say, 'person' – suggests the Legislature intended only parties to the contract at issue" to have standing to challenge contracts allegedly made in violation of section 1090. *Id* at 684.

In contrast, in the Opinion, the Court of Appeal reaches the exact opposite conclusion as to the meaning of Section 1092 without any attempt at statutory construction to determine the meaning of the term "any party" as used in Section 1092. Further, in the Opinion, the Court of Appeal completely disregards the statutory construction of Section 1092 given by the Court of Appeal in *San Bernardino*, and simply states, without explanation: "In any event, we do not agree with the limited interpretation of section 1092 adopted by the court in *San Bernardino*." Op. at p. 14. On the other hand, the Opinion focuses extensively on the policy behind Section 1090 which is not in dispute in this case. Op. at pp. 3-7.

Then, without analysis of the words of the provision or discussion of the California canons of statutory interpretation, the Court of Appeal declares that "we interpret section 1092's reference to 'any party' to include any litigant with an interest in the subject contract sufficient to support standing." Op. at pp. 14-15. The Court of Appeal goes on to hold that standing under Section 1092 is broadly conferred on taxpayers within the local government jurisdiction who would otherwise have standing to bring a reverse validation action under Code of Civil Procedure section 863 or a representative action in the name of the public entity under Section 526a. Op. at p. 15.

In declaring the meaning of the term "any party" in Section 1092, the Court of Appeal simply casts aside the decision and reasoning of the Court of Appeal in *San Bernardino*, 239 Cal.App.4th at 684. Instead of relying on the sound reasoning of the Court of Appeal in *San Bernardino*, the Court of Appeal Opinion declared the meaning of the term "any party" without first performing the analysis required by California's canons of statutory construction to determine the Legislature's intent in adopting the statute. Op. at pp. 14-15. Proper application of the California canons of statutory construction yields a statutory construction consistent with the decision of Court of Appeal in *San Bernardino* that the "Legislature intended only parties to the contract at issue. . . to have the right to sue to avoid contracts made in violation of section 1090." *San Bernardino*, 239 Cal.App.4th at 684.

Importantly, other than *San Bernardino*, not one of the other decisions referenced in the Opinion includes an exercise of statutory construction to determine the Legislature's intent in using the term "any party" in Section 1092. In fact, in the Opinion, the Court of Appeal acknowledges that a number of the cases cited as the "weight of authority [that] plainly finds that standing to assert section 1090 claims goes beyond the parties to a public contract" actually only mention the issue of standing in passing and/or without analysis. Op. at p. 14. For example, the Court of Appeal in the Opinion recognizes that *Thomson v. Call*, 38 Cal.3d 633, 646 (1985), "assumed, without discussion, that the taxpayers had standing to bring a section 1090 challenge to the transaction." Op. at p. 7. Similarly, the Court of Appeal acknowledges that the decision as to standing in *Davis v.*

Fresno Unified Sch. Dist., 237 Cal.App.4th 261, 297 n.20 (2015), "is plainly dicta." Op. at p. 8.

Further, in the Opinion, the Court of Appeal acknowledges that the four other decisions the Court of Appeal cites in support of its interpretation of the term "any party" in Section 1092 contain only "unspoken assumptions" on the question of the meaning of Section 1092. Op. at p. 8 (citing *Stigall v. City of Taft*, 58 Cal.2d 565, 570-71 (1962), *Gilbane Bldg. Co. v. Super. Ct.*, 223 Cal.App.4th 1527, 1531 (2014), *Finnegan v. Schrader*, 91 Cal.App.4th 572, 579 (2001), and *Terry v. Bender*, 143 Cal.App.2d 198, 204 (1956).

Finally, the Court of Appeal acknowledges in the Opinion that two of the recent decisions that purportedly "*directly* considered the issue of standing to bring an action under section 1090" [Op. at p. 9] made such a finding only in reliance on the outcomes in *Thomson* and *Davis*, neither of which analyzed the Legislature's intent in using the term "any party" in any way. Op. at pp. 11-12 (noting that the Court in *McGee v. Balfour Beatty Constr., LLC*, 247 Cal.App.4th 235, 247-48 (2016), relied on *Davis* and *Thomson* to allow taxpayer standing to sue under Section 1092), p. 12-13 (noting that the Court in *California Taxpayers Action Network v. Taber Constr., Inc.*, 12 Cal.App.5th 115, 144-45 (2017) ("*CTAN*"), relied on *Davis* and *McGee* to allow taxpayer standing to sue under Section 1092).

2. In the Opinion, the Court of Appeal Gives Considerable Weight to Authorities Distinguished by the Court of Appeal in *San Bernardino*

In addition to statutory interpretation, the Courts of Appeal in the *San Bernardino* decision and the present Opinion both examine several of the same cases cited by the parties in the briefing. *San Bernardino*, 239

Cal.App.4th at 684-85, Op. at pp. 7-8, 13-14. As to each of these authorities, the *San Bernardino* decision distinguished the authority while the Opinion relied on the authority to support its final ruling.

For example, the Court of Appeal in *San Bernardino* rejected *Terry v. Bender* as authority for direct standing because the case concerns representational standing – an action in the name of the public entity – and not direct standing. *San Bernardino*, 239 Cal.App.4th at 684 (discussing *Terry v. Bender*, 143 Cal.App.2d 198, 207 (1956)). The Court of Appeal in *San Bernardino* noted that "[n]othing in the *Terry* opinion is reasonably interpreted to contemplate Government Code section 1090 as an independent source of plaintiffs' standing." *Id.* at 207.

In contrast, in the Opinion, the Court of Appeal gives considerable weight to *Terry* as authority to find in favor of taxpayer standing "to challenge government contracts on the grounds they violated section 1090." Op. at p. 8 (citing *Terry*, 143 Cal.App.2d at 204). Unlike the Court of Appeal in *San Bernardino*, the Court of Appeal in the Opinion gives weight to *Terry* despite the fact that the case did not concern a claim to direct standing under Section 1092. Op. at pp. 8, 13. Unlike *San Bernardino*, the Opinion simply ignored the fact that *Terry* was brought by plaintiffs in the name of the public entity pursuant to Code of Civil procedure section 526a.[3] *San Bernardino*, 239 Cal.App.4th at 684.

---

[3] Under Section 526a, a taxpayer lawsuit to challenge a local government transaction is authorized only if the local government entity has a duty to act to challenge the transaction and refuses to do so. *San Bernardino*, 239 Cal.App.4th at 686 (citations omitted). If the local government has discretion to act and chooses not to, the courts are not permitted to interfere with the decision, and no taxpayer action will lie to invalidate or void the transaction. *Id.* at 686.

Likewise, the Court of Appeal in *San Bernardino* rejected *Gilbane Building Company v. Superior Court*, as authority for direct standing because the "plaintiff organization had associational standing under Code of Civil Procedure section 526a." *San Bernardino*, 239 Cal.App.4th at 684-85 (discussing *Gilbane Bldg. Co. v. Super. Ct.*, 223 Cal.App.4th 1527, 1531 (2014)). In *Gilbane*, a taxpayer group brought an action alleging that certain construction firms including defendant Gilbane provided gifts to officials of a high school district in exchange for construction contracts. *Gilbane*, 223 Cal.App.4th at 1529. The action was brought as one for declaratory relief and constructive trust under Section 526a. *Id.* at 1530. The Court of Appeal in *Gilbane* allowed for taxpayer standing under Section 526a and then allowed the plaintiff to assert a Section 1090 legal theory in the action. The Court of Appeal in *Gilbane* effectively converted the plaintiff's action into solely an action brought in the name of the public entity. *Id.* at 1532. *San Bernardino* rightfully distinguished the *Gilbane* decision because the decision did not concern the question of direct taxpayer standing to sue under Section 1090 and Section 1092. *San Bernardino*, 239 Cal.App.4th at 684-85.

The Opinion acknowledges the limitations of the *Gilbane* decision then inexplicably goes on to consider *Gilbane* as authority supporting the proposition that direct standing exists for taxpayers under Section 1090. Op. at pp. 9, 13. Once again, the Opinion relied on authority that was distinguished by the Court of Appeal in *San Bernardino*. This is further evidence of the conflict between the two decisions.

The Court of Appeal in *San Bernardino* rejected *Thomson v. Call* and *Finnegan v. Schrader* as authority for taxpayer standing under Section 1090 and Section 1092. *San Bernardino*, 239 Cal.App.4th at 684-85

(discussing *Thomson v. Call,* 38 Cal.3d 633, 638-39 (1985) ("*Thomson*") and *Finnegan v. Schrader,* 91 Cal.App.4th 572, 579 (2001)). In *San Bernardino*, the Court of Appeal rejected these decisions as authority on the legal issue in question because "[n]either case . . . contains any discussion of standing." *Id.*684-86.

In contrast, in the Opinion, the Court of Appeal gives substantial weight to *Thomson* and *Finnegan*. Op. at 7-8, 13. (citing *Thomson*, 38 Cal. 3d at 652 and *Finnegan*, 91 Cal.App.4th at 579). For example, the Court of Appeal in the Opinion acknowledges that "*Thomson* assumed, without discussion, that the taxpayers had standing to bring a section 1090 challenge to the transaction." Op. at p. 7 (citing *Thomson*, 38 Cal. 3d at 646). Unfortunately, the Court of Appeal then goes on to adopt this statement from *Thomson* as law without any further analysis of the statutory language of Section 1090 and Section 1092. Op. at p. 7. Similarly, in the Opinion, the Court of Appeal relies on *Finnegan* despite the fact that the issue of standing was not once discussed in the decision. *Finnegan*, 91 Cal.App.4th 572. Op. at pp. 8, 13.

Finally, after the plaintiffs in *San Bernardino* brought to the Court's attention the decision in *Davis v. Fresno Unified School District* at oral argument, the Court of Appeal rejected *Davis* as authority because "the issue of standing was not before the Court, as it was not raised by the parties." *San Bernardino*, 239 Cal.App.4th at 685 n.5 (discussing *Davis v. Fresno Unified Sch. Dist.*, 237 Cal.App.4th 261, 297 n.20 (2015)). The *Davis* opinion itself notes that Defendant's demurrer was not brought on the basis of standing, and it was the ruling on demurrer that was before the Court of Appeal. *San Bernardino*, 239 Cal.App.4th at 685 n.5. In *Davis*, the sum total of the discussion of standing in the decision is contained in a

single brief footnote. *Davis*, 237 Cal.App.4th at 297 n.20. The Court of Appeal's perfunctory statement on standing in *Davis* in the footnote is merely an assumption – without analysis – that the term "any party" as used in Section 1092 confers broad taxpayer standing to sue to void a transaction for a violation of Section 1090. *Id.* In *Davis*, the Court of Appeal made this assumption and then cited to *Thomson* as the authority for the proposition. *Id.* The Court of Appeal in *San Bernardino* rightfully rejected *Davis* as authority on the issue of standing under Section 1090 and Section 1092 on this ground. *San Bernardino*, 239 Cal.App.4th at 685 n.5 ("To the extent this dictum may be read as treating Government Code section 1090 as an independent source of standing . . . it relies on the same reading of *Thomson* that we reject in this opinion. We do not find that interpretation persuasive and decline to adopt it.").

In contrast, in the Opinion, the Court of Appeal incorrectly gives considerable weight to the dicta in the *Davis* decision. Op. pp. 8, 13-15. While the Opinion notes that *Davis* touched on this issue only in dicta, the Court of Appeal goes on to reference *Davis* as part of the "weight of authority" that allows the Court of Appeal in the Opinion to extend standing under Section 1092 beyond the parties to the transaction. Opinion at pp. 8, 14.

Finally, the Opinion fails to distinguish *San Bernardino* from the case at hand. The only distinction between the two cases drawn by the Court of Appeal in the Opinion is that *San Bernardino* involved a challenge to a contract that had previously been validated and this case did not. Op. at pp. 13-14. However, the Opinion fails to explain how this single difference is grounds for the Court of Appeal to cast aside the reasoned analysis of the

meaning of Section 1092 and relevant case law set forth by the Court of Appeal in *San Bernardino*. *Id.*

B. The Opinion and *San Bernardino* are the only Decisions that Address Direct Standing to Sue under Section 1090 and Section 1092

In this case, the Court of Appeal bases the Opinion, in part, on the claim that "the weight of authority plainly finds that standing to assert section 1090 claims goes beyond the parties to a public contract." Op. at 14. However, of all the decisions discussed in the Opinion, *San Bernardino* is the only decision that addressed the question of direct standing to sue under Section 1090 and Section 1092 in a meaningful way. All of the other cases referenced in the Opinion in support of standing dealt with claims of representational standing to bring an action in the name of the public entity or rely on such cases. In fact, several of the cases relied upon by Court of Appeal in the Opinion were correctly distinguished by the Court in *San Bernardino* precisely because they involve questions of representational standing to bring an action under section 526a and not an individual right - direct standing - to bring an action under section 1090 and 1092.

Under California law, there are two types of standing for taxpayer actions. Direct standing refers to a situation where the party in question has a legal right to pursue the cause of action in his or her own right. Either an individual or an entity can have direct standing to sue a public entity if authorized by law. *See Hatchwell v. Blue Shield of Cal.*, 198 Cal.App.3d 1027, 1034 (1988). In this action, SDOG claims to have direct standing to sue the Petitioners. On the other hand, representational standing or indirect standing is standing by a taxpayer or taxpayer organization to bring an action that purports to be *in the name of the public entity*. A party with

representational standing may or may not also have standing to sue on an individual basis.[4] In this case, SDOG does not claim to have representational standing in part because representational standing under Section 526a is unavailable to challenge the issuance of municipal bonds. Cal. Code Civ. Proc § 526a.

Of all the cases discussed in the Opinion, *San Bernardino* is the only decision that addresses and analyzes the question of direct standing to sue under Section 1090 and Section 1092 – the same question presented in this case. *San Bernardino*, 239 Cal.App.4th at 684-85. The Court of Appeal in *San Bernardino* clearly establishes the law for direct standing and does not contemplate an avenue for direct standing under Section 1090 and Section 1092 in any circumstances. *Id.*

In the Opinion, the Court of Appeal attempts to support its decision to cast aside *San Bernardino* by citing to decisions published after the *San Bernardino* decision. Op. pp. 11-13 (discussing *McGee v. Balfour Beatty Construction*, 247 Cal.App.4th 235, 247-48 (2016) and *CTAN*, 12 Cal.App.5th at 144-45. However, the Opinion's points on *McGee* and *CTAN* are unpersuasive because *McGee* and *CTAN* suffer from the same

---

[4] Representative standing should not be confused with the concept of associational standing. Associational standing is standing for an organization that is derived from the individual standing of one or more of its members. Associational standing can be either direct standing or representational standing. Associational standing that is also direct standing exists where an association sues a public entity based on the right of an individual member to sue the public entity directly for a violation of a right. This is the type of associational standing that SDOG claims to have in this case – the right to bring an action in the association's own name by claiming that one of its taxpayer members has individual standing. On the other hand, associational standing that is also representational standing exists where a taxpayer organization sues a public entity *in the name of the public entity* based on the right of its individual member to bring the same action *in the name of the public entity*. This would be associational standing to bring a lawsuit under Section 526a.

infirmities as the cases distinguished by the Court of Appeal in San Bernardino (*Thomson, Finnegan, Terry, Gilbane* and *Davis*) because those cases serve as the foundation for the decisions in *McGee* and *CTAN.*

The Courts of Appeal decisions in *McGee* and *CTAN* rely almost solely on the decisions in *Thomson* and *Gilbane*– decisions correctly distinguished by the Court of Appeal in the *San Bernardino* decision because they involve representational standing. *McGee*, 247 Cal.App.4th at 247-248 (discussing *Thomson*, 38 Cal.3d 633), *CTAN*, 12 Cal.App.5th at 141-145 (discussing *Gilbane*, 223 Cal.App.4th at 1530-33, *Thomson*, 38 Cal.3d 633 and *McGee*, 247 Cal.App.4th at 247-48). The decisions of the Courts of Appeal in *Thomson* and *Gilbane* are clearly distinguishable from *San Bernardino* because each of these cases was brought under the theory of representational standing in the names of the public entities involved under Section 526a. *Thomson v. Call*, 198 Cal.Rptr. 320, 324-25 (Ct. App. 1983)[5], *Gilbane*, 223 Cal.App.4th at 1531-32. Section 526a is an independent source of standing for taxpayers to bring actions in the name of the public entity. In each of these cases, it was only after the plaintiff demonstrated standing under Section 526a that the plaintiff was permitted to assert a legal theory grounded in Section 1090. Section 1090 and Section 1092 did not serve as an independent basis for standing in *Thomson* or *Gilbane.*

[5] Pursuant to California Rule of Court 8.1115(e)(2), it is permissible for this Court to consider certain aspects of the Court of Appeal decision reviewed by the Supreme Court

II. THE SUPREME COURT SHOULD GRANT REVIEW TO ASSIGN THE CORRECT STATUTORY CONSTRUCTION TO SECTION 1092 BECAUSE THE COURTS OF APPEAL FAILED TO DO SO

Excepting *San Bernardino*, not a single Court of Appeal that ruled on the issue of standing under Section 1090 and Section 1092 engaged in the necessary exercise of statutory construction of Section 1092. *See generally*, *CTAN*, 12 Cal.App.5th at 141-145, *McGee*, 247 Cal.App.4th at 247-48, *Davis*, 237 Cal.App.4th at 297 n.20, *Gilbane*, 223 Cal.App.4th at 1532-33. Yet, the Opinion rejects the statutory construction of Section 1092 given by the Court of Appeal in *San Bernardino* in favor of the outcomes in these cases. Op. at pp. 10, 14. Further, in decisions issued after *San Bernardino*, the Courts of Appeal in *CTAN* and *McGee* completely ignored the statutory construction of Section 1092 given by the Court of Appeal in *San Bernardino*. *CTAN*, 12 Cal.App.5th at 141-145, *McGee*, 247 Cal.App.4th at 247-48. Therefore, the Supreme Court should grant review to settle the issue of the correct statutory construction of Section 1092.

Each of the Courts of Appeal that considered the question of standing under Section 1090 and Section 1092 should have applied California canons of statutory construction to determine the meaning of the term "any party" as used in Section 1092. *McCarther v. Pac. Telesis Grp.*, 48 Cal.4th 104, 110 (2010). Statutory construction begins with looking at the words used in the statute in order to determine the Legislature's intent in crafting a statute. *Hassan v. Mercy Am. River Hosp.*, 31 Cal.4th 709, 715 (2003). The words of the provision are given their ordinary and usual meaning and are construed in their statutory context. *Id.* at 715. If the

language of the statute is clear, it is applied without further inquiry. *Id.* at 715-16. If the statutory language in question is susceptible to more than one construction, the court examining the issue is required to look to additional canons of statutory construction to determine the Legislature's purpose. *Olson v. Auto. Club of S. Cal.*, 42 Cal.4th 1142, 1147 (2008). "Both the legislative history of the statute and the wider historical circumstances of its enactment may be considered in ascertaining the legislative intent." *Dyna–Med, Inc. v. Fair Emp't & Hous. Comm'n*, 43 Cal.3d 1379, 1387 (1987).

In the first step of statutory construction, the Courts of Appeal should have given the term "any party" as used in the Section 1092 its ordinary and usual meaning. *Hassan*, 31 Cal.4th at 715. Black's Law Dictionary defines a "party" as "a person concerned or having or taking part in any affair, matter, transaction, or proceeding, considered individually." *Black's Law Dictionary* at 1122 (6th Ed. 1990). In the context of Section 1090, the term "any party" is used in relation to a specific transaction. Therefore, applying the ordinary meaning of the term, "party" in Section 1092 necessarily refers to a person or entity that is a party to the subject transaction. This is the exact statutory construction give to the provision by the Court of Appeal in *San Bernardino*. *San Bernardino*, 239 Cal.App.4th at 684. As such, Section 1092 confers standing to sue for a violation of Section 1090 upon any party to the transaction. As the Court in *San Bernardino* ruled, Section 1092 does not confer broad standing to any citizen or taxpayer to bring an action to void a public entity transaction. *Id.*

The legislative history of Section 1092 further supports the Court of Appeal's conclusion in *San Bernardino* that the Legislature intended a more narrow interpretation of the term "any party" as used in Section 1092. Section 1092 was last amended by the Legislature by Assembly Bill 1678 in 2007 which added subsection (b) regarding the statute of limitations. The legislative history for A.B. 1678 strongly indicates that the Legislature views Section 1092 as conferring standing only on parties to the public entity transaction. For example, the Senate Bill Analysis noted as follows:

- "According to the author, the absence of a statute of limitations applicable specifically to Government Code Section 1092 actions has resulted in ambiguities that disadvantage *public entities trying to void contracts made by public officials* in violation of conflicts of interest rules." Sen. Rules Comm., Analysis of Assem. Bill 1678 (2007-2008 Reg. Sess., June 19, 2009)[6] (emphasis added).

- "Thus, a minimum of a four-year statute of limitations from the date of discovery by the public entity of the illegality of the contract would *protect a public entity's right to recovery under section 1090*." *Id.* (emphasis added).

- "They often hide their relationships to one another at the time of approval of the illegal contracts, and it is not until later wherein *the public entities discover the illegal activities and seek justice under Section 1090*." *Id.* (emphasis added).

- "It would therefore give *public entities* more time to gather information and *develop their cases for voiding contracts* that are grounded on violations of the public trust." *Id.*

- There is not a single sentence or phrase in the legislative history that indicates that it was the Legislature's intent that Section 1092 be given the broad interpretation given by the Court of Appeal in the Opinion. *Id.*

[6] Pursuant to California Rule of Court 8.504(e)(1)(C), a true and correct copy of the cited legislative history is attached hereto as Exhibit 2.

As further evidence that the term "any party" in Section 1092 refers to a party to the transaction, the Courts of Appeal should have considered other statutory provisions that confer standing upon persons to maintain an action. For example, Section 526a confers standing on a "citizen resident. . . who is assessed for and is liable to pay" a tax. Clearly, when the Legislature intends to confer broad taxpayer standing to maintain an action, the Legislature specifically words the statute to do so. Similarly, Code of Civil Procedure Section 1060 ("Section 1060") states that "any person interested under a written instrument" may bring an action. In the instance of Section 1060, the Legislature clearly used the term "person" to confer standing on non-parties to the written instrument who otherwise have an interest in the instrument. Clearly, the Legislature knows how to use the term "person" to extend standing to non-parties to an agreement when it wants to.

The Court of Appeal in *San Bernardino* properly performed a sufficient level of statutory construction in determining that the Plaintiff lacked standing to sue under Section 1090 and Section 1092. *San Bernardino,* 239 Cal.App.4th at 684-85. In doing so, the Court of Appeal in *San Bernardino* held that "[n]othing in the plain language of either section 1090 or section 1092 grants nonparties to the contract, such as plaintiffs, the right to sue on behalf of a public entity that may bring a claim as provided in section 1092, but has not done so." *Id.* at 684. Yet that statutory construction was cast aside and ignored by Courts of Appeal in subsequent cases. Op. at pp. 10, 14; *CTAN,* 12 Cal.App.5th at 141-145, *McGee,* 247 Cal.App.4th at 247-48. For this reason, Supreme Court review is required

to determine the proper statutory construction of the term "any party" as used in Section 1092.

III. THE SUPREME COURT SHOULD GRANT REVIEW BECAUSE THIS CASE INVOLVES ISSUES OF CONTINUING INTEREST TO A LARGE NUMBER OF PERSONS/ENTITIES THROUGHOUT THE STATE

Petitioners request that the Supreme Court exercise its inherent power to decide the issue raised in this Petition because the issue is "important and of continuing interest" in the State. *Burch v. George*, 7 Cal.4th 246, 253 n.4 (1994). The parties' differing interpretations of Section 1090 and Section 1092, along with the conflicting case law interpreting the provisions, make it clear that there is confusion in the Courts of Appeal as to the law which can only be resolved by Supreme Court review.

The Opinion concerns a question of law that is of paramount importance to the State's local government entities and the persons that transact business with them. Local government entities, the persons that do business with them and taxpayers need to fully understand the question of direct taxpayer standing to sue to challenge a local government entity contract under Section 1090 and Section 1092. Local government entities authorize business transactions on a near daily basis. It is these transactions that keep our local governments running and ensure that taxpayers in California receive the core local government services that residents and visitors depend on and which are necessary for our society to function.

Local government entities across California frequently face opposition to such transactions from taxpayers, including losing bidders, which is frequently resolved through the democratic process. Unfortunately,

vocal taxpayer opponents to certain transactions often fail to block or alter the transactions to their liking through participation in the democratic process. When that happens, the disgruntled taxpayers often seek to use the judicial system to block or delay the democratically-approved transactions. In the past, a taxpayer's ability to use litigation to delay or block local government transactions has been limited to waste actions under the restrictions of Section 526a and validation and other special proceedings with short statutes of limitations and expedited proceedings so as to prevent the litigation from unduly delaying or interfering with local government activities and to prevent ongoing uncertainty regarding the validity of local government contracts. Otherwise, California law has long held that there exists no broad direct taxpayer standing to bring an action to invalidate a local government transaction when a taxpayer disagrees with the outcome of the democratic process. This is especially true for litigation challenging democratically-approved transactions where the obligations have long been performed by the parties.

The subject Opinion, along with *McGee* and *CTAN*, abruptly change the course of the law to suddenly allow taxpayers direct standing to challenge all local government transactions for years after the parties have performed their obligations under the transaction – even when the taxpayer does not or cannot bring the action under Section 526a or in a validation proceeding. As such, the Opinion, *McGee* and *CTAN* open the door to a flood of litigation challenging local government transactions by taxpayers unhappy with the democratic process who do not want to or cannot comply with the restrictions of Section 526a or the validation statutes.

Under notice pleading, taxpayer litigation challenging local government transactions can be brought on even the flimsiest of grounds and work to automatically halt the transaction. To halt a local government transaction, the challenger need only be a taxpayer in the jurisdiction and allege that the transaction may be infected by the *appearance* of a conflict of interest.[7] While the allegation may lack even a kernel of truth, once the taxpayer litigation is initiated, all activity on the transaction ceases and the local government and the contracting private party can be left in limbo for the several years that it takes the litigation to work its way through the courts. That the Opinion, *McGee* and *CTAN* authorize direct taxpayer standing in such cases greatly affects local governments and those persons that do business with local governments because it makes litigation challenging government transactions more likely and more burdensome for all involved in the transactions. Frequently, the private party that contracts with the local government entity will incur significant expense when it is forced to retain counsel and appear in the litigation as a real party in interest. Such voluminous and expensive litigation will certainly interfere with the day to day business of local government entities and those persons that do business with them.

In fact, the present action is exactly type of frivolous action that can be expected if the Opinion, *McGee* and *CTAN* are allowed to stand and this

---

[7] As this case proves, the taxpayer challenger need not identify an actual government official or employee with a conflict of interest under Section 1090 in the complaint initiating the litigation. Instead, the taxpayer need only allege that a person involved in the transaction has some sort of prior or existing relationship with the local government and therefore qualifies as a government official under Section 1090. In this case, the alleged local government officials with an alleged conflict of interest are the financial institutions that process the City's banking and investment transactions.

Court allows *San Bernardino* to be cast aside. SDOG's challenge to the 2015 Bond Approvals under Section 1090 challenges a bond purchase agreement for the 2015 Bond Issuance between the underwriting syndicate, the City and the City's financing authority. However, SDOG does not allege that a single city official or employee is financially interested in the bond purchase agreement. Instead, SDOG alleges that three of the five large international banks that are part of the underwriting syndicate also have either a transactional broker or banking relationship with the City's Treasurer's Department in that the banks process the City's investment or financial transactions. Despite the routine and generic nature of the City's relationships with completely different divisions of these large banking institutions, SDOG argues that these ongoing broker and banking relationships render each and every one of these large international banks "public officials" of the City for purposes of Section 1090. Therefore, SDOG reasons that the limitations of Section 1090 apply to the banks and bars the banks from participating in the underwriting syndicate for the transaction or any other transaction with the City from which they would profit. Under SDOG's theory of the case, any bank that ever processed a financial transaction for the city would be barred from underwriting a City bond issuance or otherwise transacting business with the City for profit.

As this case demonstrates, there is no end to the possible constructs of taxpayer actions if direct standing is granted under Section 1090, and a taxpayer will be able to plausibly portray just about any party to any transaction as a public official subject to the restrictions of Section 1090. Along those lines, the result of this Opinion, *McGee* and *CTAN* is that every local government transaction will be clouded by the threat of a taxpayer challenge for an indefinite period of time simply by taxpayers

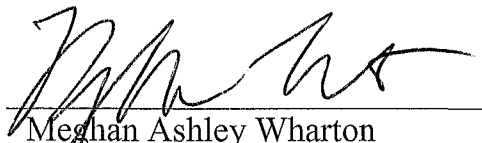
seeking to abuse the court system to halt government transactions that they do not agree with and could not defeat in the democratic process.

CONCLUSION

For the reasons stated herein, the Supreme Court should grant review of the issue described herein.

Dated: December 18, 2017

MARA W. ELLIOTT, City Attorney

By 

Meghan Ashley Wharton
Chief Deputy City Attorney
Attorneys for Respondents

CERTIFICATE OF WORD COUNT

I, Meghan Ashley Wharton, hereby certify that pursuant to CRC 8.204(c)(1), this foregoing Respondents' Petition for Review is set in 13-point Times New Roman font and contains less than 7,125 words, including footnotes, as counted by the MSWord word processing program used to generate the document.

Dated: December 18, 2017

By 

Meghan Ashley Wharton
Chief Deputy City Attorney
City of San Diego

EXHIBIT 1

Decision from the Court of Appeal, Fourth District – D069751

Filed 11/9/17

CERTIFIED FOR PUBLICATION

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

SAN DIEGANS FOR OPEN GOVERNMENT, Plaintiff and Appellant, v. PUBLIC FACILITIES FINANCING AUTHORITY OF THE CITY OF SAN DIEGO et al., Defendants and Respondents.	D069751 (Super. Ct. No. 37-2015-00016536-CU-MC-CTL)

APPEAL from a judgment of the Superior Court of San Diego County, Joan M. Lewis, Judge. Reversed.

Briggs Law Corporation and Cory J. Briggs; Higgs Fletcher & Mack and Rachel E. Moffitt, for Plaintiff and Appellant.

Mara W. Elliott, San Diego City Attorney, David J. Karlin, Assistant City Attorney and Meghan Ashley Wharton, Deputy City Attorney, for Defendants and Respondents.

At issue here is a municipal ordinance, which authorized the issuance of bonds to be used to refinance the defendants' obligations with respect to construction of a baseball

park. We find plaintiff taxpayers have standing under Government Code[1] section 1092 to challenge the ordinance on the grounds participants in the proposed transaction violated the conflict of interest provisions of section 1090. Accordingly, we must reverse the trial court's judgment dismissing plaintiff's complaint, which judgment was entered on the grounds plaintiffs do not have standing to challenge the ordinance.

FACTUAL AND PROCEDURAL BACKGROUND

On March 17, 2015, respondents City of San Diego (the city) and Public Facilities Financing Authority (PFFA)[2] adopted San Diego Ordinance No. 0-20469 and PFFA Resolution No. FA-2015-2, which authorized issuance of 2015 Refunding Bonds (2015 Bonds). The 2015 Bonds, if issued, will refund and refinance the remaining amount owed by the city on bonds issued in 2007 with respect to construction of the baseball stadium at Petco Park.

On May 18, 2015, San Diegans For Open Government (SDFOG) filed a complaint that challenged the validity of the 2015 Bonds. SDFOG alleged that it is a nonprofit taxpayer organization and that at least one of its members is a resident of the city. SDFOG alleged, among other claims, that one or more members of the financing team that participated in preparation of the 2015 Bonds had a financial interest in the sale of

---

1 All further statutory references are to the Government Code, unless otherwise specified.

2 All further references to the city include the PFFA.

the bonds and the existence of that interest in turn gave rise to a violation of section 1090. SDFOG sought, among other remedies, declaratory relief.

Prior to trial on the merits, SDFOG dismissed all of its substantive claims, other than its allegation the city had violated section 1090. Before commencing trial on the merits of SDFOG's section 1090 claim, the trial court asked for and received briefing from the parties with respect to SDFOG's standing. After considering the parties' briefing and the argument of counsel, the trial court determined, as a matter of law, that because SDFOG was not a party to the bond transaction, it lacked standing to pursue a section 1090 challenge. The trial court dismissed SDFOG's complaint, and judgment was entered in the city's favor. SDFOG filed a timely notice of appeal.

I

Where, as here, there is no dispute as to the material facts and the appellant only challenges a trial court's interpretation of law, we review the trial court's ruling de novo. (See *Ghirardo v. Antonio* (1994) 8 Cal.4th 791, 799.)

II

A. Section 1090

Section 1090, subdivision (a) states: "Members of the Legislature, state, county, district, judicial district, and city officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members. Nor shall state, county, district, judicial district, and city officers or employees be purchasers at any sale or vendors at any purchase made by them in their official capacity."

The important policy embodied in section 1090 requires that its prohibitions be vigorously enforced so that in addition to punishing actual fraud and public malfeasance, public officials are not even tempted to engage in prohibited activity. The court fully set out the policy and the need for vigorous enforcement in *Thomson v. Call* (1985) 38 Cal.3d 633, 647–649 (*Thomson*): "In *San Diego v. S.D. & L.A. R.R. Co.* [(1872)] 44 Cal. 106, we recognized the conflict-of-interest statutes' origins in the general principle that 'no man can faithfully serve two masters whose interests are or may be in conflict': 'The law, therefore, will not permit one who acts in a fiduciary capacity to deal with himself in his individual capacity . . . . For even if the honesty of the agency is unquestioned . . . yet the principal has in fact bargained for the exercise of all the skill, ability and industry of the agent, and he is entitled to demand the exertion of all this in his own favor.' (44 Cal. at p. 113.) We reiterated this rationale more recently in *Stigall v. City of Taft* [(1962)] 58 Cal.2d 565[, 570–571 (*Stigall*)]: 'The instant statutes [§ 1090 et seq.] are concerned with any interest, other than perhaps a remote or minimal interest, which would prevent the officials from exercising absolute loyalty and undivided allegiance to the best interests of the city.' [Citations.]

"In *Stigall* we relied in part on the reasoning of the United States Supreme Court on a federal penal statute under which a contract was declared to be unenforceable because of a conflict of interest: ' "The statute is thus directed not only at dishonor, but also at *conduct that tempts dishonor.* This broad proscription embodies a recognition of the fact that an impairment of impartial judgment can occur in even the most well-meaning men when their personal economic interests are affected by the business they

transact on behalf of the Government. To this extent, therefore, the statute is more concerned with what might have happened in a given situation than with what actually happened. It attempts to prevent honest government agents from succumbing to temptation by making it illegal for them to enter into relationships which are fraught with temptation." ' (*Stigall, supra*, 58 Cal.2d at p. 570, quoting *United States v. Mississippi Valley Generating Co.* (1961) 364 U.S. 520.) Implicit in this reasoning is the assumption that the purpose of such statutes is 'not only to strike at actual impropriety, but also to strike at the appearance of impropriety.' [Citation.]

"It follows from *the goals of eliminating temptation, avoiding the appearance of impropriety, and assuring the city of the officer's undivided and uncompromised allegiance* that the violation of section 1090 cannot turn on the question of whether actual fraud or dishonesty was involved. Nor is an actual loss to the city or public agency necessary for a section 1090 violation. In *Stigall*, for example, a city councilman had a financial interest in a plumbing company which submitted the lowest bids for a municipal contract. Taxpayers sued to have the contracts declared void. They did not allege 'actual improprieties,' nor did they contend that the contract was unfair, unjust, or not beneficial to the city. [Citation.] On these facts, we nonetheless concluded that the contract violated section 1090, reasoning that the 'object of these enactments is to remove or limit the possibility of any personal influence, either directly or indirectly which might bear on an official's decision, as well as to void contracts which are actually obtained through fraud or dishonest conduct.' [Citations.] [We have] observed that 'it matters not how fair

upon the face of it the contract may be, the law will not suffer [the official] to occupy a position so equivocal and so fraught with temptation.' [Citation.]

"In short, if the interest of a public officer is shown, the contract cannot be sustained by showing that it is fair, just and equitable as to the public entity. Nor does the fact that the forbidden contract would be more advantageous to the public entity than others might be have any bearing upon the question of its validity. [Citation]

"Moreover, California courts have consistently held that the public officer cannot escape liability for a section 1090 violation merely by abstaining from voting or participating in discussions or negotiations. [Citations.] Mere membership on the board or council establishes the presumption that the officer participated in the forbidden transaction or influenced other members of the council. [Citations.] Similarly, the full disclosure of an interest by an officer is also immaterial, as disclosure does not guarantee an absence of influence. To the contrary, it has been suggested that knowledge of a fellow officer's interest may lead other officers to favor an award which would benefit him." (*Thomson, supra*, 38 Cal.3d at pp. 647–650, some italics added, some italics omitted; fns. omitted.)

In *Thomson*, taxpayers sued the participants in a transaction in which a member of a city council sold property to a third party and the third party then transferred the property to the city as parkland as a means of fulfilling conditions of a development permit granted by the city. The relative innocence of the city council member, Call, did not prevent enforcement of section 1090. "Mitigating factors—such as Call's disclosure of his interest in the transaction, and the absence of fraud—cannot shield Call from

liability. Moreover, the trial court's remedy—allowing the city to keep the land and imposing a money judgment against the Calls—is consistent with California law and with the primary policy concern that every public officer be guided solely by the public interest, rather than by personal interest, when dealing with contracts in an official capacity. Resulting in a substantial forfeiture, this remedy provides public officials with a strong incentive to avoid conflict-of-interest situations scrupulously." (*Thomson, supra*, 38 Cal.3d at p. 650, fn. omitted.)

B. Standing Jurisprudence

Although section 1090 was enacted in 1943 (see Stats. 1943, ch. 134, p. 956), only quite recently has the issue of standing been directly litigated.

The court in *Thomson* assumed, without discussion, that the taxpayers had standing to bring a section 1090 challenge to the transaction and found the transaction in fact violated section 1090. (*Thomson, supra*, 38 Cal.3d at p. 646.) Significantly, the court found the important public policy manifested in the statute justified a fairly harsh remedy: even though the councilman had acted in good faith and was required to return the $258,000 he had received in the transaction, the city was permitted to retain the land which had been transferred to it. (*Id.* at pp. 646–649.) Although the court did not speak directly to the question of standing or the applicability of Code of Civil Procedure, the court emphasized that "*civil liability* under section 1090 is not affected by the presence or absence of fraud, by the official's good faith or disclosure of interest, or by his nonparticipation in voting; nor should these considerations determine the civil remedy." (*Thomson,* at p. 652.)

In *Davis*, taxpayers also challenged a lease-leaseback construction contract on the grounds the construction company that received the contract was, by virtue of consulting services it provided to the city, subject to section 1090. The court in *Davis* noted that, under section 1092, any contract made in violation of section 1090 may be avoided by " 'any party.' " (*Davis v. Fresno Unified School Dist.* (2015) 237 Cal.App.4th 261, 297.) In what is plainly dicta, the court then stated: "The term 'any party' is not restricted to parties to the contract. Defendants did not base their demurrer on the ground Davis lacked standing to bring the conflict of interest claim under Government Code section 1090 since it is recognized that either the public agency or a taxpayer may seek relief for a violation of section 1090. (E.g., [*Thomson, supra*,] 38 Cal.3d 633 [taxpayer suit successfully challenged validity of land transfer from city council member through intermediaries to city]; see Kaufmann & Widiss, *The California Conflict of Interest Laws* (1963) 36 So.Cal. L.Rev. 186, 200.)" (*Id.* at p. 297, fn. 20.)

The assumption in *Thomson* and the dicta in *Davis* are consistent with the unspoken assumptions in at least four other cases that have come to our attention: *Stigall, supra*, 58 Cal.2d at pp. 570–571, *Gilbane Building Co. v. Superior Court* (2014) 223 Cal.App.4th 1527, 1531 (*Gilbane*), *Finnegan v. Shrader* (2001) 91 Cal.App.4th 572, 579 (*Finnegan*), and *Terry v. Bender* (1956) 143 Cal.App.2d 198, 204 (*Terry*). In each of those cases, taxpayers were permitted to challenge government contracts on the grounds they violated section 1090. In *Stigall*, in addition to assuming taxpayers have standing, the court held the policy underlying section 1090 was so fundamental that it applied even when the party who received the challenged contract was the lowest bidder and even

when that party was not a member of the city council when the bid was accepted, but had only participated in preliminary approvals of the subject project. (*Stigall*, at pp. 570–571.)

In *Gilbane*, which was decided by this court, in addition to assuming that Code of Civil Procedure section 526a provided standing to bring a section 1090 claim, we found that the fact SDFOG alleged that one of its members resided within and paid taxes to the school district which was the subject of SDFOG's claim was sufficient to give SDFOG standing under section Code of Civil Procedure section 526a. In doing so we relied on an earlier case we decided, *Taxpayers for Accountable School Bond Spending v. San Diego Unified School District* (2013) 215 Cal.App.4th 1013, 1032.

More recently courts have *directly* considered the issue of standing to bring an action under section 1090. These case have reached somewhat conflicting conclusions. In *San Bernardino County v. Superior Court* (2015) 239 Cal.App.4th 679 (*San Bernardino*), a group of taxpayers challenged a settlement agreement a county and flood control district had reached with a property owner with respect to property the county had taken as part of a regional flood control project. Under the terms of the settlement the county and district agreed to pay the property owner $102 million; significantly, the county obtained a judgment validating the agreement. Five years later, the taxpayers brought their action under section 1090, in which they alleged that campaign contributions the property owner had made to a former county supervisor were in fact bribes and invalidated the settlement.

In a writ proceeding, the Court of Appeal found the plaintiff taxpayers did not have standing to challenge the settlement. The *San Bernardino* court found that although section 1092 provides that "[e]very contract made in violation of any of the provisions of Section 1090 may be avoided at the instance of *any party* except the officer interested therein," the taxpayers were not parties to the contract and thus section 1092 did not provide the taxpayers with standing. The court stated: "Nothing in the plain language of either section 1090 or section 1092 grants nonparties to the contract, such as plaintiffs, the right to sue on behalf of a public entity that may bring a claim as provided in section 1092, but has not done so. Indeed, the Legislature's choice of the word 'party' in section 1092—as opposed to, say 'person'—suggests the Legislature intended only parties to the contract at issue normally have the right to sue to avoid contracts made in violation of section 1090." (*San Bernardino*, *supra*, 239 Cal.App.4th at p. 684.)

The court in *San Bernardino* also rejected the plaintiffs' contention they had standing under Code of Civil Procedure section 526a. By its terms Code of Civil Procedure section 526a permits "[a]n action to obtain a judgment, *restraining and preventing any illegal expenditure of, waste of, or injury to, the estate, funds,* or other property of a county, town, city or city and county of the state, . . . against any officer thereof, or any agent, or other person, acting in its behalf." (Italics added.) The court in *San Bernardino* noted that " '[t]axpayer suits are authorized only if the government body has a duty to act and has refused to do so. If it has discretion and chooses not to act, the courts may not interfere with that decision.' [Citation.]" (*San Bernardino, supra*, 239 Cal.App.4th at p. 686.) The court further noted that a public agency's decision to bring or

not bring legal action is generally an exercise of discretion and hence Code of Civil Procedure section 526a did not provide the taxpayers with standing to challenge the county's apparent decision *not to* challenge validity of the settlement. (*San Bernardino,* at pp. 686–687.) Importantly in rejecting the plaintiffs' contention that the county had no discretion with respect to its obligations under section 1090, the court drew a distinction between prospective action by a governmental agency and fully executed contracts, such as the settlement. The court found that the plaintiffs' contention with respect to the county's duties: "would be more to the point if plaintiffs were seeking to enjoin the County from entering into such a settlement agreement. But that ship has long since sailed. The issue now is the County's decision (or lack thereof) with respect to bringing suit on the basis of the alleged violation of . . . section 1090, and whether this decision is an exercise of discretion or a mandatory duty that County—so far, at least—has failed to perform." (*San Bernardino,* at p. 687.)

In *McGee v. Balfour Beatty Construction, LLC* (2016) 247 Cal.App.4th 235, 247–248 (*McGee*), the court disagreed with the reasoning in *San Bernardino* and found that taxpayers had standing to bring an action alleging violation of section 1090. In *McGee*, like *Davis* the plaintiffs challenged the validity of a lease-leaseback transaction between a school district and a construction company on the grounds, among others, that in providing consulting and other services to the district, the construction company filled the roles of officers, employees and agents of the district and, therefore, the construction company was subject to section 1090. The court in *McGee* determined that the taxpayer plaintiffs had standing to raise a section 1090 challenge to the validity of the lease-

leaseback transaction and that their allegation the construction company was, by virtue of the services it provided, subject to section 1090, was sufficient to survive a demurrer. (*McGee,* at pp. 248–249.) With respect to the issue of standing, the court in *McGee* relied on the opinions in *Thomson* and *Davis* and distinguished *San Bernardino* on the grounds the court in *San Bernardino* itself suggested, i.e., that unlike the proceedings in *San Bernardino*, the plaintiffs in *McGee* initiated their complaint as a validation action before the disputed contract had been performed. "As in *Davis*, this case involved a validation action . . . In contrast, in *San Bernardino*, plaintiffs' challenge to the agreement was barred by a prior validation judgment." (*McGee,* at p. 248.) The court further determined: "[I]n contrast to the *San Bernardino* court, we find *Thomson . . . , supra*, 38 Cal.3d 633 apposite as our high court could not have concluded a contract was invalid in violation of section 1090 without implicitly concluding that the taxpayers challenging it had standing to challenge it." (*Ibid.*)

More recently the court in *California Taxpayers Action Network v. Taber Construction, Inc.* (2017) 12 Cal.App.5th 115, 144–145 (*California Taxpayers*), considered another section 1090 challenge to a school district's lease-leaseback transaction. The court agreed with the reasoning of the courts in *Davis* and *McGee* and found standing. In disagreeing with, as well as distinguishing, *San Bernardino*, the court in *California Taxpayers* stated: "We conclude that *Davis* and *McGee* are more like this case than *San Bernardino*, and the weight of authority supports permitting a taxpayer to bring a claim under . . . section 1090 under the circumstances here. If the lease-leaseback agreement in this case violates section 1090, then it is void, not merely voidable. Whether

the lease-leaseback agreement is void is not a matter within the School District's discretion. [Citation.] And, even assuming *San Bernardino* was correctly decided under its facts, the case is distinguishable (as it was in *McGee*). . . . [I]n *San Bernardino*, a prior, validation action had concluded long before the plaintiffs sued; here, plaintiff's action is itself a reverse validation action." (*California Taxpayers,* at pp. 144–145.)

C. Analysis

The strict and important policy embodied in section 1090, which in *Thomson* required imposition of a substantial forfeiture on an official who had acted in good faith, will not be vindicated if public officials believe section 1090's substantive provisions may only be enforced by the very public officials or public entities who have violated the statute's provisions. Plainly, a public official's duty to avoid *even temptation* cannot be advanced by adopting a rule which limits civil enforcement to that public official or public entities controlled by the official. The self-evident nature of this proposition—that civil enforcement of section 1090 was never intended to be left in all cases to the parties to a government contract—arguably explains the silence of the courts *Stigall*, *Thomson*, *Gilbane*, *Finnegan* and *Terry,* as well as the brief footnoted dicta in *Davis.*

The conflict between these cases, as well as the recent opinions in *McGee* and *California Taxpayers* on one hand, and *San Bernardino* on the other hand, is, in the end narrower than appears at first blush. Notwithstanding the important public policies embodied in section 1090, a validation judgment, such as the one the defendants obtained in *San Bernardino* long before the complaint attacking the settlement was filed, plainly barred any attack on the validity of the settlement agreement and thus, in that sense at

least, deprived the plaintiffs of standing to attack the judgment. (See Code of Civ. Proc., § 870, subd. (a); *Friedland v. City of Long Beach* (1998) 62 Cal.App.4th 835, 844.) Code of Civil Procedure section 870, subdivision (a) states: "The judgment, if no appeal is taken, or if taken and the judgment is affirmed, shall, notwithstanding any other provision of law including, without limitation, Sections 473 and 473.5, thereupon become and thereafter be forever binding and conclusive, as to all matters therein adjudicated or which at that time could have been adjudicated, against the agency and against all other persons, and the judgment shall permanently enjoin the institution by any person of any action or proceeding raising any issue as to which the judgment is binding and conclusive." In light of the broad and conclusive impact of the validation judgment, the limitations on application of section 1092 and Code of Civil Procedure section 526a the court in *San Bernardino* discussed were not necessary to reach its holding that the plaintiffs' claims were barred.[3]

In any event, we do not agree with the limited interpretation of section 1092 adopted by the court in *San Bernardino*. As we have indicated, the weight of authority plainly finds that standing to assert section 1090 claims goes beyond the parties to a public contract. Because of that authority and the important and strict policy embodied in section 1090, we interpret section 1092's reference to "any party" to include any litigant

---

3 In contrast to *San Bernardino* of course, *Davis*, *McGee* and *California Taxpayers* were each themselves timely reverse validation actions brought under Code of Civil Procedure section 863 and hence not subject to the bar of a validation judgment as set forth in Code of Civil Procedure section 870.

with an interest in the subject contract sufficient to support standing. (See *Davis, supra*, 237 Cal.App.4th at p. 273, fn. 4.) In this regard, we believe the cases which have discussed the interests which support standing under Code of Civil Procedure sections 526a and 863 provide some guidance with respect to interests sufficient to support standing under section 1092. With respect to Code of Civil Procedure section 526a, our Supreme Court has recently found that it requires that a plaintiff "allege she or he has paid, or is liable to pay, to the defendant locality a tax assessed on the plaintiff by the defendant locality." (*Weatherford v. San Rafael* (2017) 2 Cal.5th 1241, 1252 (*Weatherford*).) Similarly, cases have consistently held that taxpayers of a municipality have standing as interested parties to bring a reverse validation action under Code of Civil Procedure section 863. (See *Regus v. City of Baldwin Park* (1977) 70 Cal.App.3d 968, 971–973.) SDFOG has alleged the taxpayer interests required by both Code of Procedure sections 526a and 863; indeed, the city has conceded SDFOG has alleged an interest sufficient to maintain a reverse validation action under Code of Civil Procedure section 863. Thus, SDFOG has alleged an interest which is sufficient to provide it with standing under the narrower provisions of section 1092.[4] Accordingly, the trial court erred in dismissing plaintiff's complaint and its judgment must be reversed.

---

4 Because SDFOG has alleged its interest on behalf of a taxpayer who is a resident of the city, we do not consider what other circumstances might also support standing under section 1092. Nonetheless we note that the requirement imposed on mandate applicants by Code of Civil Procedure section 1086, that they have a beneficial interest in the relief requested, has been repeatedly waived where " ' " 'the question is one of public right and the object of the mandamus is to procure the enforcement of a public duty.' " ' [Citations.]. . . . [[A] party's interest ' "in having the laws executed and the duty in

DISPOSITION

The judgment is reversed. SDFOG to recover its costs on appeal.

BENKE, Acting P. J.

WE CONCUR:

HUFFMAN, J.

HALLER, J.

---

question enforced" ' is sufficient even absent a "'legal or special interest" '].) This exception to the beneficial interest requirement protects citizens' opportunity to 'ensure that no governmental body impairs or defeats the purpose of legislation establishing a public right.' [Citation.]" (*Weatherford, supra*, 2 Cal.5th at p. 1248.)

Although the cases which have discussed standing under Code of Civil Procedure sections 526a and 863 have informed our application of section 1092, we need not and do not determine whether, on this record standing is also available under those Code of Civil Procedure provisions.

EXHIBIT 2

California Bill Analysis AB 1678

CA B. An., A.B. 1678 Sen., 6/19/2007

California Bill Analysis, Senate Committee, 2007-2008 Regular Session, Assembly Bill 1678

June 19, 2007
California Senate
2007-2008 Regular Session

SENATE JUDICIARY COMMITTEE

Senator Ellen M. Corbett, Chair

2007-2008 Regular Session

AB 1678

Assemblymember De La Torre

As Amended May 14, 2007

Hearing Date: June 19, 2007

Government Code

GMO:rm

SUBJECT

Public Officials: Conflicts of Interest

Action to Void Public Contract: Statute of Limitations

DESCRIPTION

This bill would enact a four-year statute of limitations to commence an action to avoid a contract in violation of existing law that prohibits specified public officials from having a financial interest in a contract entered into by the public official in his or her official capacity or by any board or body of which he or she is a member. The four years would run from the time the plaintiff discovered, or in the exercise of reasonable care should have discovered, the violation.

BACKGROUND

Government Code 1090 prohibits Members of the Legislature, and state, county, district, judicial district, and city officers or employees from having any financial interest in any contract made by them in their official capacity, or by any board or body of which they are members. They are also prohibited from being purchasers at any sale or vendors at any purchase made by them in their official capacity. Government Code 1092 provides that a contract made in violation of 1090 may be avoided at

the instance of any party other than the officer with interest in the contract, and requires that the contract must have been made in the official capacity of the officer or by a board or body of which the official was a member. Both 1090 and 1092 have spawned hundreds of cases, each court affirming the principle that government officials owe paramount loyalty to the public and that private or personal financial considerations of a public official should not be allowed to enter the decision making-process.

Two years ago, Albert Robles, former Treasurer of the City of Southgate in the author's district, was convicted of fraud, money laundering, and public corruption in the conduct of the city's business. During his tenure, various contracts were let by the city that resulted in kickbacks of more than $1.2 million to Robles and his associates; law firms friendly to Robles ran up huge legal fees, charging hourly rates far above what other municipalities allow; some city employees received huge raises and extravagant severance packages; yet some employees, such as two police captains, a lieutenant and the chief of police, were so mistreated they sued the city and the city has had to spend large sums to defend itself. There were alleged payoffs in the award of a $48-million trash-hauling contract, a $24-million housing project for senior citizens, and a $4-million contract to oversee sewer improvements. The city's redevelopment agency had entered into $30 million worth of contracts during Robles' term, but only had $24 million in available redevelopment funds. A developer, for example, was given $12 million by the city to create moderate-income housing after selling him a seven-acre parcel for $1. Robles' actions left the city with even more legal fees from lawsuits stemming from the corrupt practices, and a reserve fund that dwindled from $8 million to $3 million in a few years. One law firm has been ordered by the federal court to return over $500,000 in legal fees charged to the city for representing Robles before grand juries. In short, this small city has had to lay off workers, raise taxes, freeze hiring, and sell off property to meet its obligations.

Additionally, Southgate has attempted to block some of the contracts Robles and his cohorts issued, with limited success. While the city is struggling with its financial condition, it has had to spend several million dollars in legal fees trying to undo bad deals from Robles' term of office. Because of the complexity of the cases, the city is running into statute of limitations problems in bringing lawsuits to avoid some of these contracts.

Presently the state courts are split as to the statute of limitations applicable to lawsuits brought pursuant to violations of Gov. Code 1090. The leading case of Marin Healthcare Dist. v. Sutter Health (2002) 103 Cal.App.4th 861 found that actions brought under Gov. C. Sec. 1090 are subject to the statutes of limitations in the Code of Civil Procedure for actions other than for recovery of real property (C.C.P. 335 et seq.) and fall in the "catch-all" provision of Code of Civil Procedure Sec. 343: "an action for relief not hereinbefore provided for must be commenced within four years after the cause of action shall have accrued."

This bill would establish a four-year statute of limitations for commencing actions to avoid contracts where a violation of 1090 has occurred.

CHANGES TO EXISTING LAW

Existing law prohibits Members of the Legislature, and state, county, district, judicial district, and county officers or employees from having any financial interest in any contract made by them in their official capacity, or by any board or body of which they are members. (Government Code 1090. All references are to the Government Code unless otherwise indicated.)

Existing law provides that a contract made in violation of Gov. Code 1090 may be avoided at the instance of any party except the officer who is interested in the contract, and may not be avoided because of the interest of the officer unless the contract is made in the official capacity of the officer or the body or board of which he or she is a member. (1092.)

Existing law establishes statutes of limitations for the commencement of actions but does not specify which statute of limitations applies to claims under 1090 or 1092.

Existing law provides that other than for actions to recover real property, the time for commencement of actions given to an individual or to an individual and the state is within one year upon a statute for a penalty or forfeiture unless another statute prescribes a different limitation, or within one year for an action upon a statute for a forfeiture or penalty given to the people of this state. (Code of Civil Procedure 340.)

Existing law provides that an action for relief not specifically identified in statute must be commenced within four years after the cause of action has accrued. (Code of Civil Procedure 343.)

Existing case law , Marin Healthcare Dist. v. Sutter Health (2002) 103 Cal.App.4th 861, held that claims brought pursuant to 1090 or 1092 are based on the public's right to be free of a government contract made under the influence of a financial conflict of interest and therefore the applicable statute of limitations is not one based on the remedy sought. Marin, thus, held that these claims are subject to the "catch-all" statute of limitations provided in the Code of Civil Procedure.

This bill would provide that claims brought under 1092 shall be commenced within four years after the plaintiff has discovered, or in the exercise of reasonable care should have discovered, a violation of 1090 in the making of a contract.

COMMENT

1. Need for the bill

According to the author, the absence of a statute of limitations applicable specifically to 1092 actions has resulted in ambiguities that disadvantage public entities trying to void contracts made by public officials in violation of conflicts of interest rules. The author argues that 1090 claims "often involve coordinated action between members of approving boards and private parties. They often hide their relationships to one another at the time of approval of the illegal contracts, and it is not until later wherein the public entities discover the illegal activities and seek justice under section 1090. Thus, a minimum of a four-year statute of limitations from the date of discovery by the public entity of the illegality of the contract would protect a public entity's right to recovery under section 1090."

Apparently, defendants in the 1090 actions brought by the city of Southgate and by other public entities in similar situations have been asserting that the one-year statute of limitation for forfeitures apply to the public entities' claims. This bill would establish a four-year statute of limitations for 1092 actions that are based on violations of the conflict of interest prohibitions of 1090. It would therefore give public entities more time to gather information and develop their cases for voiding contracts that are grounded on violations of the public trust.

2. Marin Healthcare District v. Sutter Health and the Attorney General's Conflict of Interest Handbook

The Attorney General's Handbook on Conflict of Interest states that 1090 "basically prohibits the public official from being financially interested in a contract or sale in both his or her public and private capacities.

In Thomson v. Call (1985) 38 Cal.3d 633, 649, the California Supreme Court reiterated the long-standing purpose and framework of Section 1090. The purpose of Section 1090 is to make certain that 'every public officer be guided solely by the public interest, rather than by personal interest, when dealing with contracts in an official capacity. Resulting in a substantial forfeiture, this remedy provides public officials with a strong incentive to avoid conflict-of-interest situations scrupulously.' (Id. at p. 650.)." The handbook further states that courts have held that a contract made in violation of 1090 is void; that any payments made to a third party must be returned and no future payments may be made; and that the public entity is entitled to retain any benefits it receives under the contract. (Citations omitted.)

The Attorney General's handbook also states that despite the language in 1092 that a contract "may be avoided," case law "has historically interpreted contracts made in violation of section 1090 to be void, not merely voidable." On this basis, the applicable statute of limitations would relate to the nature of the remedy sought by a lawsuit to avoid the contract, which in most cases would be a forfeiture and thus a one-year statute of limitations would apply.

In Marin , supra, the Marin Healthcare District, a political subdivision of the state, brought suit to recover possession of a publicly owned hospital and related assets that it had leased and transferred in 1985 to defendant Marin General (owned by Sutter Health). The District claimed the 1985 agreements were void because its chief executive and legal counsel had a financial interest in the agreements at the time of their execution, in violation of 1090. The trial court held the suit was time-barred because it was filed 12 years later.

The appellate court in Marin was the first to squarely address the applicable statute of limitations for suits to void a contract in violation of Government Code 1090 or its predecessor statute. The court clearly stated that claims made under 1090 or 1092 are subject to applicable statutes of limitations. However, the appellate court's decision in Marin articulated a different basis for 1090 and 1092 claims than the nature of the remedy sought, which is what the various statutes of limitations in the Code of Civil Procedure is based upon. The court stated that claims brought pursuant to 1090 or 1092 are based on the public's right to be free of a government contract made under the influence of a financial conflict of interest and therefore the applicable statute of limitations is not one based solely on the remedy sought. While it appears the court agreed that the one-year statute of limitations for forfeitures could apply to the facts of that case (as argued by the defendants), the court also said that even the four-year catch-all statute of limitations in C.C.P. 343 would bar the District's case because its claim

was filed 12 years after it entered the contract in question.
More importantly, the Marin court held that applying C.C.P. 343 to the subject contracts "on the ground of illegality would certainly be consistent with existing case authority. (E.g., Moss v. Moss (1942) 29 Cal.2d 640, 644-645 [holding that cause of action for cancellation of an agreement is governed by 343, in part because there is "no section of the code that expressly limits the time within which an action must be brought for cancellation of an instrument because of its illegality"]; Zakaessian v. Zakaessian (1945) 70 Cal.App.2d 721, 725 [161 P.2d 677] ["[o]rdinarily a suit to set aside and cancel a void instrument is governed by section 343 of the Code of Civil Procedure" unless, for example "the gravamen of the cause of action stated involves fraud or a mistake"];? (other citations omitted)." Thus, even though the Marin decision did not expressly hold that for all 1092 claims the applicable statute of limitations is four years under C.C.P. 343, it provides sufficient rationale for AB 1678 to articulate a four-year statute of limitations specifically for 1092 actions.
This bill would provide that a 1092 claim must be brought within four years of a plaintiff's discovery, or in the plaintiff's exercise of reasonable care should have discovered, of a conflict-of-interest violation under 1090. The relation back to the date of discovery of the violation for purposes of the statute of limitations is consistent with existing law.

Support: None Known

Opposition: None Known

HISTORY

Source: Author

Related Pending Legislation: None Known

Prior Legislation: None Known

Prior Vote: Asm. Cmte. on Local Gov. (Ayes 7, Noes 0)
Asm. Flr. (Ayes 75, Noes 0)

CA B. An., A.B. 1678 Sen., 6/19/2007

End of Document

IN THE SUPREME COURT

OF STATE OF CALIFORNIA

PROOF OF SERVICE

SAN DIEGANS FOR OPEN GOVERNMENT,
Petitioner and Plaintiff,
v.

PUBLIC FACILITIES FINANCING AUTHORITY OF THE CITY OF SAN DIEGO, ET AL.,
Respondent and Defendant.

After Decision of the Court of Appeal,
Fourth Appellate District, Division One, Case No. 069751

San Diego County Superior Court
The Honorable Joan M. Lewis
Case No. 37-2015-00016536-CU-MC-CTL

I, the undersigned, declare that:

I was at least 18 years of age and not a party to the case; I am employed in the County of San Diego, California. My business address is 1200 Third Avenue, Suite 1100, San Diego, California, 92101.

On December 18, 2017, I served true copies of the following document(s) described as:

- **RESPONDENTS' PETITION FOR REVIEW**

on the interested parties in this action as follows:

Clerk of Court of Appeal
Fourth District, Division One
750 B Street, Suite 300
San Diego, CA 92101

Via TrueFiling

Cory J. Briggs, Esq.
Anthony N. Kim, Esq.
Briggs Law Corporation
4891 Pacific Hwy #104
San Diego, CA 92110
Tel: (619) 497-0021
cory@briggslawcorp.com
anthony@briggslawcorp.com

Attorneys for Plaintiff and Appellant

Rachel E. Moffitt, Esq.
Higgs Fletcher & Mack LLP
401 West A Street, Ste 2600
San Diego, CA 92101
Tel: (619) 236-1551
moffittr@higgslaw.com

Attorneys for San Diegans for Open Government

Via TrueFiling

Honorable Joan M. Lewis
c/o Appeals Division
San Diego Superior Court
220 Broadway, Room 3005
San Diego, CA 92101

Superior Court Trial Judge

Via Personal Service

[xx] **(BY ELECTRONIC SERVICE)** By transmitting via TrueFiling to the above parties at the email addresses listed above.

[xx] **(BY PERSONAL SERVICE)** I provided copies to Nationwide Legal for personal service on this date to be delivered to the office of the addressee(s) listed above.

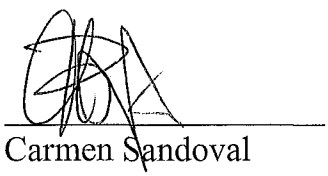
[ ] **(BY OVERNIGHT DELIVERY)** I enclosed said document(s) in a sealed envelope or package provided by Golden State Overnight (GSO) and addressed to the person(s) at the address(es) listed above. I placed the envelope or package for collection and overnight

delivery at an office or a regularly utilized drop box of GSO.

[ ] **(BY UNITED STATES MAIL)** I enclosed the document(s) in a sealed envelope or package addressed to the person(s) at the address(es) listed above and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing with the United States Postal Service and that the correspondence shall be deposited with the United States Postal Service with postage fully prepaid this same day in the ordinary course of business.

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

Executed on this 18th day of December 2017, at San Diego, California.



Carmen Sandoval