Case No. S214061

IN THE SUPREME COURT OF CALIFORNIA

FRIENDS OF THE COLLEGE OF SAN MATEO GARDENS

Petitioners and Respondents,

v.

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

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

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

ERRATA TO REPLY TO ANSWER TO PETITION FOR REVIEW

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The Community College District and its Board of Trustees, Respondents and Appellants in the above-captioned matter, filed a Reply to Answer to Petition for Review on December 5, 2013. Since filing the reply, the District's counsel discovered that an incorrect citation was provided for the recently published case *Latinos Unidos de Napa v. City of Napa* (2013) 221 Cal.App.4th 192. The District is providing a corrected table of authorities herein and three pages from the reply that reflect the correct citation for substitution in the Court's copies of the reply. We apologize for the error.

Respectfully submitted,

Dated: December 11, 2013

REMY MOOSE MANLEY, LLP1

By: _____
SABRINA V. TELLER

Attorneys for Defendant/Petitioner SAN MATEO COUNTY COMMUNITY COLLEGE DISTRICT

TABLE OF AUTHORITIES

California Cases

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

Remarkably, only two weeks later, the very same division of the First Appellate District *properly* applied the deferential substantial evidence standard of review to a lead agency's determination that section 21166 applied to its update of its Housing Element in the now-published case *Latinos Unidos de Napa v. City of Napa* (2013) ~~164 Cal.App.4th 274~~221 Cal.App.4th 192 ("*Latinos Unidos*"). (That decision had not yet been ordered published at the time the Community College District filed its Petition for Review in this case.) By applying these two contradictory approaches under section 21166 within a two-week period, Division One of the First Appellate District has indicated both a need to secure uniformity of decision and to settle an important question of CEQA law. (Rules of Court, Rule 8.500, subd. (b)(1).) Friends has failed to counter this showing in its answer to the petition.

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

District (2003) 114 Cal.App.4th 689; *Abatti v. Imperial Irrigation District* (2012) 205 Cal.App.4th 650 (*Abatti*), and now, Division One of the First Appellate District's decision in *Latinos Unidos, supra,* 221 Cal.App.4th 192~~164 Cal.App.4th 274~~. The most vocal judicial criticism of the *Save Our Neighborhood* reasoning was published in *Mani Brothers Real Estate Group v. City of Los Angeles* (2007) 153 Cal.App.4th 1385 ("*Mani Brothers*"), which also followed the substantial evidence standard of review for section 21166 circumstances and sharply noted that the "new project" analysis articulated by the Third Appellate District in *Save Our Neighborhood* was fundamentally flawed and "inappropriately bypassed otherwise applicable statutory and regulatory provisions (i.e., § 21166; Guidelines, § 15162).

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

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

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

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

In the instant litigation, Division One disregarded the substantial evidence in the addendum and elsewhere in the record explaining why the District reached its decision that the Building 20 demolition and parking lot project was a change to the previously reviewed and approved campus-wide CSM project, and instead applied *Save Our Neighborhood's* non-deferential "new project" test. It found the test appropriate under the "narrow circumstances" before it, but failed to state *any* reasoning or factors that would allow the District or other agencies to identify similar "narrow circumstances." (Opn. p. 8.) Then, in a complete reversal of direction, Division One applied the usual and appropriate deferential substantial evidence test in *Latinos Unidos* just two weeks after issuing the Opinion in this case. (*Latinos Unidos, supra*, 221 Cal.App.4th at pp. 200-202 ~~164 Cal.App.4th at pp.282-283~~.) These contrary results exacerbate the uncertainty faced by agencies in the CEQA process if they cannot expect consistent decisions out of the same division of the same Court of Appeal in the same month. As the law currently stands, preparing an addendum, though expressly authorized by CEQA Guidelines section 15064, is a complete gamble for agencies. They cannot be sure if a reviewing court will afford

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PROOF OF SERVICE

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

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

On December 11, 2013, I served the following:

ERRATA TO REPLY TO ANSWER TO PETITION FOR REVIEW

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

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

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

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

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First Appellate District of California Division One 350 McAllister Street San Francisco, California 94102	**VIA REGULAR MAIL**
San Mateo County Superior Court Honorable Clifford Cretan 400 County Center Redwood City, California 94063	**VIA REGULAR MAIL**

I declare under penalty of perjury that the foregoing is true and correct and that this Proof of Service was executed this 11th day of December, 2013, at Sacramento, California.

Rachel N. Jackson