Civil Case No. S214061

IN THE SUPREME COURT OF CALIFORNIA

FRIENDS OF THE COLLEGE OF SAN MATEO GARDENS,

Plaintiff and Respondent,

v.

SAN MATEO COUNTY COMMUNITY COLLEGE DISTRICT and SAN MATEO COUNTY COMMUNITY COLLEGE DISTRICT BOARD OF TRUSTEES,

Defendants and Appellants.

After an Unpublished Decision by the Court of Appeal First Appellate District, Division One, Case No. A135892

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

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANTS

DOWNEY BRAND LLP
Christian L. Marsh, SBN 209442
Andrea P. Clark, SBN 226310
Amanda M. Pearson, SBN 268186
333 Bush Street, Suite 1400
San Francisco, CA 94104
Telephone: 415-848-4800
Facsimile: 415-848-4831
apearson@downeybrand.com

Attorneys for Amici Curiae LEAGUE OF CALIFORNIA CITIES, CALIFORNIA STATE ASSOCIATION OF COUNTIES, and ASSOCIATION OF CALIFORNIA WATER AGENCIES

Civil Case No. S214061

IN THE SUPREME COURT OF CALIFORNIA

FRIENDS OF THE COLLEGE OF SAN MATEO GARDENS,

Plaintiff and Respondent,

v.

SAN MATEO COUNTY COMMUNITY COLLEGE DISTRICT and SAN MATEO COUNTY COMMUNITY COLLEGE DISTRICT BOARD OF TRUSTEES,

Defendants and Appellants.

After an Unpublished Decision by the Court of Appeal First Appellate District, Division One, Case No. A135892

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

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANTS

DOWNEY BRAND LLP
Christian L. Marsh, SBN 209442
Andrea P. Clark, SBN 226310
Amanda M. Pearson, SBN 268186
333 Bush Street, Suite 1400
San Francisco, CA 94104
Telephone: 415-848-4800
Facsimile: 415-848-4831
apearson@downeybrand.com

Attorneys for Amici Curiae LEAGUE OF CALIFORNIA CITIES, CALIFORNIA STATE ASSOCIATION OF COUNTIES, and ASSOCIATION OF CALIFORNIA WATER AGENCIES

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

FEDERAL COURT CASES

STATE COURT CASES

TABLE OF AUTHORITIES
(continued)

Page

STATE STATUTORY AUTHORITIES

APPLICATION TO FILE AMICUS CURIAE BRIEF

INTRODUCTION

The League of California Cities ("League"), California State Association of Counties ("CSAC"), and Association of California Water Agencies ("ACWA") (collectively, "Amici Curiae") respectfully apply for leave to file the accompanying amicus curiae brief in support of defendants and appellants San Mateo County Community College District and San Mateo County Community College District Board of Trustees ("Appellants"). This application is timely, mailed within thirty (30) days after the last appellant's reply brief was or could have been filed. (Cal. Rule of Court 8.25(b)(3)(A); 8.520(f)(2).)

INTERESTS OF AMICI CURIAE

The Amici Curiae submit this brief as representatives of local public agencies and municipalities throughout the State of California, each of which has a vital interest in ensuring that the mandates of the California Environmental Quality Act ("CEQA") are fulfilled but that public agencies are not forced unnecessarily to repeat the entire CEQA process for projects that have already undergone review. Specifically, Amici Curiae are asking this Court to apply the more deferential substantial evidence standard of review to the question of whether modifications to a previously-approved project requires subsequent environmental review under Public Resources Code section 21166 and Section 15162 of the State CEQA Guidelines. As explained in the attached amicus brief, the Court of Appeal in this case gave no deference to the lead agency's determination and applied the de novo standard of review to the agency's decision to proceed pursuant to Section 21166 and Section 15162. In applying the de novo standard, the Court has injected uncertainty into the process by which public agencies

determine whether and to what extent proposed changes to an approved project require additional review under CEQA.

The League is an association of 470 California cities dedicated to protecting and restoring local control to provide for the public health, safety, and welfare of their residents, and to enhance the quality of life for all Californians. The League is advised by its Legal Advocacy Committee, which is comprised of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities, and identifies those cases that have statewide or nationwide significance. The Committee has identified this case as having such significance.

CSAC is a non-profit corporation with a membership consisting of the 58 California counties. CSAC sponsors a Litigation Coordination Program, which is administered by the County Counsels' Association of California and is overseen by the Association's Litigation Overview Committee, comprised of county counsels throughout the State. The Litigation Overview Committee monitors litigation of concern to counties statewide and has determined that this case is a significant matter affecting all counties in California and is worthy of amicus support.

ACWA is a voluntary, statewide non-profit corporation comprised of nearly 450 public water agencies, ranging from small irrigation districts to the largest urban water wholesalers in the United States. Collectively, ACWA's member agencies are responsible for delivering more than ninety-percent of the water used by the cities, rural communities, farms, businesses, and citizens of California. ACWA assists its members in promoting the supply, management and reasonable beneficial use of high quality water in an environmentally balanced manner. Through its Legal Affairs Committee, ACWA represents its members before the California Legislature, the United States Congress, and numerous regulatory bodies, and as amicus curiae in matters before California and federal courts. The

Legal Affairs Committee has determined that this case raises issues of significant concern to water agencies throughout California and thus warrants amicus support.

THE AMICUS CURIAE BRIEF WILL ASSIST THE COURT IN DECIDING THE MATTER

This case concerns the reliance of public agencies on Section 21166 of the Public Resources Code and Section 15162 of the CEQA Guidelines when addressing proposed changes to a project that has already been approved, and for which an environmental impact report ("EIR") or negative declaration has already been prepared. Section 21166 reflects the Legislature's interest in balancing the mandates of CEQA for in-depth review early in the project-approval process with the need for finality and certainty once a project is approved and has already been subjected to CEQA review and public scrutiny. At that point in the project development process, the Legislature in enacting Section 21166 intended that no subsequent environmental review will be required—even for "[s]ubstantial changes" to a previously approved project—unless those changes require "major revisions" to the EIR. (Pub. Resources Code § 21166(a); *Guidelines* § 15162(a)(1) (applying Section 21166 to negative declarations).)

The Court of Appeal in this case made two crucial errors. First, the Court transformed Section 21166 into a two-part inquiry, compelling agencies and lower courts to initially determine whether the changes in a previously-approved project are so significant as to render it an entirely "new project" unfit for Section 21166 review. In so doing, the Court abandoned the effects-based test currently embodied in Section 21166 even for "substantial changes" to previously approved projects. Second, the Court, without any deference to the administrative agency, applied the de

novo standard of review to lead agency findings under Section 21166 even though Guidelines section 15162 and the majority of case law unambiguously applies the more deferential "substantial evidence" standard. Deference to the lead administrative agency in these circumstances is particularly warranted due to the strong statutory presumption against subsequent CEQA review for previously approved projects.

Amici Curiae are uniquely situated to comment on the need for public agencies to consider project changes and to provide this Court with insight regarding the practical problems that would result if courts apply de novo review under Section 21166. Cities, Counties, and public water agencies are, first and foremost, responsible for implementing the laws of CEQA for projects that they approve or decide to carry out. They often serve as commenting agencies in the CEQA process of other agencies and, when necessary, file suit in state courts to enforce CEQA's mandates. Amici Curiae member agencies routinely face the difficult and fact-intensive task of evaluating whether "substantial changes" in a previously-approved project must undergo subsequent environmental review.

Adding a two-step inquiry and de novo review has already created considerable uncertainty among public agencies as to whether and to what extent they can rely on previously-adopted EIRs or negative declarations. As a consequence, member agencies often conduct extra rounds of environmental review even when unwarranted by the evidence. Such a low threshold for triggering subsequent environmental review directly contravenes the plain language of Section 21166 and Guidelines section 15162 as well as the policies that disfavor repeating a substantial portion of the CEQA process. (*Bowman v. City of Petaluma* (1986) 185 Cal.App.3d 1065, 1073.)

CONCLUSION

For the foregoing reasons, Amici Curiae respectfully request that the Court accept and consider the accompanying Amici Curiae brief in support of Appellants.

CERTIFICATION

No party or counsel for a party in this appeal authored this proposed amicus brief, in whole or in part, or made a monetary contribution intended to fund the preparation or submission of this brief. No other person or entity has made a monetary contribution intended to fund the preparation or submission of this brief.

DATED: May 30, 2014 DOWNEY BRAND LLP

By: Andrea P. Clark
FOR CHRISTIAN L. MARSH
Attorneys for Amici Curiae
CALIFORNIA LEAGUE OF CITIES, CALIFORNIA STATE ASSOCIATION OF COUNTIES, and ASSOCIATION OF CALIFORNIA WATER AGENCIES

AMICUS BRIEF IN SUPPORT OF APPELLANTS

ARGUMENT

A. Sections 21166 and 15162 provide finality – and a certain degree of flexibility – to balance the burdens CEQA imposes on public agencies.

When a previously-approved CEQA project is modified, additional CEQA review cannot be required unless one of three narrow circumstances is present: (1) substantial changes are proposed in the project which will require major revisions of the environmental impact report, (2) substantial changes occur with respect to the circumstances under which the project is being undertaken which will require major revisions in the environmental impact report, or (3) new information, which was not known and could not have been known at the time the environmental impact report was certified as complete, becomes available. (Pub. Resources Code § 21166.) An agency considering proposed changes to a project after adopting an environmental impact report ("EIR") or negative declaration for the project thus must first determine whether the changes are "substantial," such that "major revisions" to the CEQA document will be required "due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects." (Cal. Code Regs., tit. 14, § 15162(a).)[1] This analysis necessarily requires the agency to consider the scope, nature, and potential environmental effects of the project modifications in light of the analysis set forth in the existing EIR or negative declaration. (*See, e.g., Mani Brothers Real Estate Group v. City of Los Angeles* (2007) 153 Cal.App.4th 1385, 1402 ("*Mani Brothers*") [comparing impacts of the modified project and the original project]; *River Valley Preservation Project v. Metropolitan Transit Development Board*

[1] The CEQA Guidelines (hereinafter, "Guidelines") are found at Cal. Code Regs., tit. 14, div. 6, ch. 3.

(1995) 37 Cal.App.4th 154, 176-177 ("*River Valley*").)[2] If the agency determines that the elements of Sections 21166 and 15162(a) are met, it must prepare a subsequent EIR. (Guidelines §§ 15162(b).) The agency may also instead choose to prepare a supplemental EIR if "only minor additions or changes would be necessary to make the previous EIR adequately apply to the project in the changed situation." (Guidelines § 15163(a).)

If the elements of Sections 21166 and 15162(a) are not met, the agency cannot require preparation of another EIR for the project, notwithstanding any changes thereto. (Pub. Resources Code § 21166; Guidelines § 15162.) In that event, the agency may prepare a subsequent negative declaration, an addendum, or may forgo any further documentation. (Guidelines § 15162(b).) Thus, with respect to proposed changes to a project, an agency complies with CEQA by considering the changes and their potential environmental effects in light of the existing CEQA document, and then determining whether it is necessary to prepare another EIR or some other CEQA document to address the changes.

In its answer brief, Friends baldly claims that there is no statutory authority for the process of preparing and considering an addendum to a previously-adopted EIR or negative declaration. (Answer Brief, at 46-48 [citing Guidelines §§ 15164(a)-(d)].) This claim misconstrues the purposes served by an addendum. An addendum merely documents the changes incorporated in a previously-approved project and it may but is not required

---

[2] Because Section 21166 calls for a determination of whether the proposed changes would result in significant environmental effects that require "major revisions" to the existing CEQA document, the proposed changes and the potential effects thereof should not be considered in isolation. Instead, the agency considers the effects of the proposed modified project in relation to the effects of the original project. (See, e.g., *River Valley*, 37 Cal.App.4th at 176-177.)

to document the public agency's finding that no subsequent or supplemental environmental review is required. (*See, generally, Santa Teresa Citizens Action Group v. City of San Jose* (2003) 114 Cal.App.4th 689, 702-703 [agency decision to forgo subsequent review based on substantial evidence "in the record as a whole"]; Pub. Resources Code § 21166; Guidelines § 15164(e) ["A brief explanation of the decision not to prepare a subsequent EIR pursuant to Section 15162 should [not shall] be included in the addendum"].) Because there is no statutory provision mandating that agencies make express findings under Section 21166, it stands to reason that there is no statutory prohibition against documenting such findings in the form of an addendum when circumstances warrant. And certainly there is no statutory or regulatory mandate that such addenda are circulated for further rounds of public review. Thus, any suggestion that addenda are somehow unauthorized or improper is misleading and wrong.

There is a crucial difference between evaluating a project at the outset and evaluating proposed changes to an approved project: when a CEQA document has already been prepared for a project, the otherwise applicable low threshold requirement for preparation of an EIR no longer applies. (*Fund for Environmental Defense v. County of Orange* (1988) 204 Cal.App.3d 1538, 1544 [citation omitted].) Instead of a presumption in favor of additional review, the presumption is against further environmental review. (*Moss v. County of Humboldt* (2008) 162 Cal.App.4th 1041, 1049-1050 ("*Moss*").) Section 21166 thus represents an attempt by the Legislature to balance the burden CEQA initially imposes upon public agencies by providing them with certainty and finality as to their later project decisions. (*Friends of Davis v. City of Davis* (2000) 83 Cal.App.4th 1004, 1018 ("*Friends of Davis*") [citing *Bowman v. City of Petaluma* (1986) 185 Cal.App.3d 1065, 1074 ("*Bowman*")].) Accordingly, once

initial CEQA review is complete, agencies can rest assured that they will not be required to prepare another EIR for the project unless they find that subsequent "substantial" changes to the project or its circumstances would result in new or more severe environmental effects, or that new significant information has come to light that would require "major revisions" to the existing CEQA document. (Guidelines § 15162(a)(1)-(3).)

Section 21166 thus provides public agencies with the flexibility to allow for project modifications even after CEQA review has been completed, without necessarily having to prepare another EIR or negative declaration.[3] This flexibility is a crucial part of CEQA, because the needs of the agency or the public, or the circumstances under which a project is pursued, may change after a project is approved – thus warranting concomitant changes to the project itself. If agencies were always required to start the CEQA process anew for changes to an approved project, they would be severely discouraged from making any post-approval changes whatsoever, even if a change would best fit the agency's needs or better serve the public interest.

B. Agency decisions made pursuant to Section 21166 are reviewed under the substantial evidence standard.

It is well settled that courts review agency decisions made pursuant to Section 21166 under the substantial evidence test: Guidelines section 15162(a) requires the lead agency to determine, "on the basis of substantial evidence in light of the whole record," whether there are "substantial" changes to a project that will require "major revisions" to the existing

---

[3] This principle also finds support in Guidelines section 15378(c), which provides that the term "project" refers to the activity which is being approved, not each separate governmental approval – thus a change does not constitute a separate project just because an agency must approve the change.

CEQA document due to new or more severe environmental effects. Virtually every court addressing this particular issue has held that the substantial evidence test applies when a court reviews an agency's decisions under 21166. (*See, e.g., Moss, supra*, 162 Cal.App.4th at 1058 ["Our standard of review for an agency's decision under section 21166 is well settled... Our function is simply to determine whether the agency followed proper procedures and whether there is substantial evidence supporting the agency's determination... (citation)."]; *Latinos Unidos de Napa v. City of Napa* (2013) 221 Cal.App.4th 192, 204 ("*Latinos Unidos*"); *Abatti v. Imperial Irrigation District* (2012) 205 Cal.App.4th 650, 675 [citing *Citizens for a Megaplex-Free Alameda v. City of Alameda* (2007) 149 Cal.App.4th 91, 110]; *Mani Brothers, supra*, 153 Cal.App.4th at 1397; *American Canyon Community United For Responsible Growth v. City of American Canyon* (2006) 145 Cal.App.4th 1062, 1083; *Friends of Davis, supra*, 83 Cal.App.4th at 1018-1019; *River Valley, supra*, 37 Cal.App.4th 154, 166 [citing *Bowman, supra*, 185 Cal.App.3d at 1075; *Gentry v. City of Murrieta* (1995) 36 Cal.App.4th 1359, 1401 ("*Gentry*"); *Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307, 1318 ("*Sierra Club*")]; cf. *Laurel Heights Improvement Association v. Regents of the University of California* (1993) 6 Cal.4th 1112, 1135 ("*Laurel Heights II*") [applying the substantial evidence standard to an agency's decision that new information in a final EIR was not "significant" and so recirculation was not required].)[4]

---

[4] The issue of whether an agency must prepare additional, post-approval CEQA documentation is analogous to the issue of whether an agency must recirculate a final EIR. (*Laurel Heights II*, 6 Cal.4th at 1129.) In addition, the analogous "arbitrary and capricious" standard of review applies to an agency's decision not to prepare a supplemental environmental impact statement under the National Environmental Policy Act. (*Id.* at 1135, fn. 22 [citing *Marsh v. Oregon Natural Resources Council* (1989) 490 U.S. 360, 376-378].)

Application of the substantial evidence test comports with the intent of Section 21166 – to balance the burdens CEQA imposes upon public agencies by affording a reasonable measure of finality when a project changes – because it presumes that additional review is not required unless the changes result in new significant impacts. (*Moss*, *supra*, 162 Cal.App.4th at 1050 [citation omitted]; *Gentry*, *supra*, 36 Cal.App.4th at 1401 [citation omitted].) Application of the fair argument test to an agency's Section 21166 decisions would disrupt this balance and would effectively reverse the presumption against additional CEQA review of projects for which an EIR or negative declaration has already been prepared. Even *Save Our Neighborhood v. Lishman* (2006) 140 Cal.App.4th 1288, 1297-1300 ("*Save Our Neighborhood*") did not reject the application of the substantial evidence standard to an agency's decisions under Section 21166. Instead, the court found that, as a matter of law, the agency erred in proceeding under Section 21166 in the first place. But in doing so, the court created a new barrier to an agency's ability to invoke Section 21166. As shown below, the *Save Our Neighborhood* approach is not necessary to protect the environment, cannot be applied objectively, and imposes requirements over and above those set forth in CEQA.

C. Courts should review an agency's decision to proceed pursuant to Section 21166 under the substantial evidence test.

1. Courts have deferred, and should continue to defer, to an agency's decision to proceed pursuant to Section 21166; *Save Our Neighborhood* is an outlier and should be rejected.

While numerous cases have addressed the standard of review applicable to an agency's ultimate decision under Section 21166, fewer have addressed the standard applicable to an agency's decision to proceed under Section 21166 in the first place. That said, nearly all of the cases addressing this latter issue have applied the substantial evidence test, or

otherwise deferred to the agency's decision to invoke Section 21166. The notion that courts should determine whether an agency may rely on Section 21166 as a threshold matter of law is a novel one, raised for the first time in *Save Our Neighborhood*. *San Mateo Gardens* perpetuates this error, which has not been accepted in any published appellate decision.

Contrary to the suggestion in *Save Our Neighborhood*, the court in *Benton v. Board of Supervisors* (1991) 226 Cal.App.3d 1467 ("*Benton*") did not treat the question of whether a project is a "new project" or a modification of an existing project as a question of law. (*Save Our Neighborhood*, 140 Cal.App.4th at 1297 [citing *Benton*, 226 Cal.App.3d 1467, 1475, 1477].) The *Benton* court reviewed the record for the purposes of ascertaining how the public agency treated the project, and deferred to that treatment:

> [T]he administrative record demonstrates that the commission and board consistently treated the new application as if it were a request for modification of the already permitted project.
>
> *****
>
> On this record we are satisfied that the project before the board was a modification of the existing winery project, not an entirely new project.

(226 Cal.App.3d at 1476-1477.)

In *Gentry*, the court acknowledged the absence of a "clear-cut" test for determining when proposed changes should be treated as a modification of a previously approved project as opposed to a new project, but noted that case law provided pertinent guidance. (36 Cal.App.4th at 1401.) In two of the cases the *Gentry* court discussed – *Benton* and *Burbank-Glendale-Pasadena Airport Authority v. Hensler* (1991) 233 Cal.App.3d 577 – the courts deferred to how the lead agency had treated the project. (*Gentry*, 36 Cal.App.4th at 1401-1402.) In the third – *Sierra Club*, which dealt with a tiered EIR – the court viewed the question as being whether the original

project and the modified project were essentially the same, and without specifying the standard of review. (*Id.* at 1403.) The *Gentry* court cast some doubt upon *Sierra Club*, noting "a certain tension" between the language of Section 21166 and the suggestion in *Sierra Club* that differences between an original and modified project can render Section 21166 inapplicable. (*Ibid.* [Section 21166 "applies even where '*[s]ubstantial changes* are proposed in the project which will require *major revisions* of the environmental impacts report.'"] [emphasis the court's]; cf. *Concerned Citizens of Costa Mesa, Inc. v. 32nd District Agricultural Association* (1986) 42 Cal.3d 929, 934, 939 ("*Costa Mesa*") [addressing applicable statute of limitations when an agency makes "substantial changes" to a project – in that case, changing a 5,000 seat outdoor theater on 6 acres to 15,000 seats on 10 acres – but fails to comply with Section 21166].)

The *Gentry* court acknowledged that the respondent agency could have treated the project before it as a change to an existing project, rather than a new project. However, the agency had never purported to analyze the project under Section 21166, and had instead analyzed the project under Section 21151 (pertaining to initial EIRs). (36 Cal.App.4th at 1404-1405.) The court did not disagree with the agency's approach and did not suggest that it had to consider the question de novo, but simply found that the agency was bound by its decision to not proceed under Section 21166. (*Id.* at 1405.) In other words, like the *Benton* court, the *Gentry* court deferred to the agency's approach – but also took the additional step of holding the agency to that approach. (*Ibid.*; cf. *Temecula Band of Luiseño Mission Indians v. Rancho California Water District* (1996) 43 Cal.App.4th 425,

437-438 ("*Temecula*") [deferring to the critical decisionmakers' ultimate treatment of a "new" project as a modification of an earlier project].)[5]

The court in *Mani Brothers*, *supra*, soundly rejected the notion that agency determinations under Section 21166 should be subject to no deference. The court instead found that treating the question of whether to proceed pursuant to Section 21166 as a threshold question of law improperly undermined the deference due to agencies in administrative matters, whereas application of the substantial evidence test honored the principle of deference. (153 Cal.App.4th at 1401.) The *Mani Brothers* court went on to determine that the de novo standard of review would impose a new analytical factor upon the Section 21166 analysis that went beyond the framework of CEQA. (*Ibid.* [citing Pub. Resources Code § 21083.1].) The *Mani Brothers* court thus concluded that the question of whether an agency properly proceeded under Section 21166 should be treated as a question of whether evidence in the record adequately supported the agency's decision to so proceed. (*Id.* at 1400-1401.)

In *Latinos Unidos*, *supra*, the court refused to follow *Save Our Neighborhood* and properly evaluated the city's decision to proceed pursuant to section 21166 under the deferential substantial evidence test. (221 Cal.App.4th 192, 202.) As in *Mani Brothers*, the *Latinos Unidos* court based its decision, in part, on the fact that CEQA prohibits courts from interpreting CEQA or the Guidelines so as to impose requirements beyond those expressly stated therein. (*Id.* at 202, fn. 8 [citing section

---

[5] The *Temecula* court was specifically concerned with the scope of the analysis that must be included in a subsequent CEQA document, but the fact that the lead agency had viewed the "new project" as a modification of an earlier project guided the court's decision on that issue. (43 Cal.App.4th at 437-439.)

21083.1].)[6] The court also suggested that the *Save Our Neighborhood* approach was contrary to the principle that CEQA "must not be subverted into an instrument for the oppression and delay of social, economic, or recreational development or advancement." (*Ibid.*)

Citizens For A Megaplex-Free Alameda v. City of Alameda ("*Citizens*") is also instructive. In that case, the respondent city proposed to rehabilitate a historic theater and construct an adjacent multi-screen Cineplex and parking lot. (149 Cal.App.4th 91, 95.) It adopted a mitigated negative declaration for the project and filed a notice of determination. (*Id.* at 98-99.) It subsequently considered and approved revisions to the project design. (*Id.* at 99-100.) In doing so, the city found that there had been no change to the project that warranted subsequent environmental analysis. (*Id.* at 99.) The petitioners challenged the city's actions under CEQA, arguing, among other things, that the city had improperly relied on CEQA's supplemental review provisions (i.e., Section 21166 and its implementing regulations), and that even if the city had properly relied on those provisions, an EIR was required. (*Id.* at 100-102.)[7]

Regarding the application of Section 21166, the *Citizens* court held that because the statute of limitations had expired as to the original approval of the project, "any challenges under CEQA to later approvals or

---

[6] As recognized in *Latinos Unidos*, the court in *Moss* noted the conflict between *Mani Brothers* and *Save Our Neighborhood*, did not take a direct stand on the issue because the case before it did not raise the same type of factual assertions regarding the project that were present in those cases, but agreed with the suggestion in *Mani Brothers* that a court should "tread with extraordinary care before reversing a local agency's determination about the environmental impact of changes to a project." (*Latinos Unidos*, 221 Cal.App.4th at 201 [citing *Moss*, 162 Cal.App.4th at 1052-1053, fn. 6].)

[7] The exceptional similarity between these arguments and the arguments by the Plaintiff in this case can likely be attributed to the fact that the *Citizens* petitioners were represented by the same counsel as the Plaintiff here. (149 Cal.App.4th 91, 94.)

project it has already approved, rather than a "new" project that requires an entirely new CEQA process. Substantial evidence review allows courts to avoid substituting their own conclusions regarding whether proposed changes create a "new" project for those of the agency. Such deference effectuates the intent of Section 21166, balancing the burdens CEQA imposes upon public agencies by limiting the circumstances under which further environmental review is required. And as stated above, this does not mean that application of the substantial evidence test will undermine CEQA's purposes. Section 21166 does not mean that proposed changes will escape environmental review. Even under Section 21166, agencies are required to assess whether the revisions to the project cause new or more severe impacts necessitating a new EIR or negative declaration to address the proposed changes.

Application of the substantial evidence test is particularly proper when considering an agency's decision to proceed under Section 21166, because in such a case the agency has already performed detailed CEQA analysis, in the form of an EIR or negative declaration, for the project as initially approved. As numerous courts have stated, the question then becomes whether things have changed to such an extent that repeating a substantial part of the CEQA process is justified. (*See, e.g., Friends of Davis*, *supra*, 83 Cal.App.4th at 1018 ["Environmental review pursuant to CEQA has been performed, and the question is whether the City... is mandated to require additional review pursuant to [Section 21166]."]; *Citizens*, *supra*, 149 Cal.App.4th at 103; *Mani Brothers*, *supra*, 153 Cal.App.4th at 1398; *Bowman*, *supra*, 185 Cal.App.3d at 1073-1074 [Section 21166 comes into play precisely because, among other reasons, "the question is whether circumstances have *changed* enough to justify *repeating* a substantial portion of the process."] [italics original].) And as Section 21166 is intended to balance the burdens imposed by CEQA and

create a presumption against additional CEQA review, any reasonable doubts regarding the propriety of an agency's invocation of Section 21166 should be resolved in the agency's favor – which will occur only if courts apply the substantial evidence test.

3. Treating the propriety of an agency's decision to proceed under Section 21166 as a threshold question of law creates improper burdens, disrupts the balance Section 21166 provides, and contravenes the intent of the Legislature.

a. The "new project" test creates requirements not expressly found in CEQA or its Guidelines and improperly undermines Section 21166.

Nothing in CEQA expressly or impliedly imposes a threshold "new project" test – as a matter of law or otherwise – upon an agency's decision to proceed pursuant to Section 21166. It is thus wholly improper for courts to interpret CEQA so as to impose a requirement that proposed changes to a project pass such a test. (*Mani Brothers*, 153 Cal.App.4th at 1401 [citing Pub. Resources Code § 21083.1].) Worse, the "new project" test creates an additional barrier to an agency's ability to make their own decisions regarding the nature and scope of proposed modifications – one that affords no deference to such decisions. Any change to a project might be viewed as creating a "new" project if the modified project becomes "new" because it is different from the project that has already been studied. (See *Mani Brothers*, 153 Cal.App.4th at 1400 [noting that one person's "new project" could be another's "modified project"].) The entire point of Section 21166 is to look at changes to projects – even "substantial changes" – and evaluate whether major revisions to the environmental document are needed. If a court finds that a change creates a "new" project, then, under *Save Our Neighborhood*, the lead agency cannot proceed pursuant to Section 21166, even if there are no "new" or "more severe" impacts. (140 Cal.App.4th at

1301.) Thus, applying de novo review to the threshold question of whether a modification to an existing project constitutes a "new project" improperly cuts off the ability of agencies to make use of the very procedure the Legislature has provided for dealing with such modifications.[8]

b. A two-step inquiry and de novo review is not necessary to ensure that substantial post-approval changes are properly evaluated.

The prospect that proposed changes to a project might be substantial does not justify restricting the application of Section 21166 by creating a "new project" threshold test. Section 21166 clearly encompasses "substantial" changes that would require "major revisions" to the original CEQA document. (*Costa Mesa, supra*, 42 Cal.3d at 932; *Gentry*, 36 Cal.App.4th at 1403.) If changes are substantial, CEQA does not require the lead agency to conduct a new and independent CEQA process, but to instead determine whether a subsequent or supplemental EIR is necessary under Section 21166 because the changes would require major revisions to the existing CEQA document due to new or more severe impacts. (Pub. Resources Code § 21166; Guidelines § 15162(a); *Costa Mesa, supra*, 42 Cal.3d at 932.)

Moreover, changes to a project "are of no consequence in and of themselves. Such factors are meaningful *only* to the extent they affect the environmental impacts of a project." (*Mani Brothers*, 153 Cal.App.4th at 1401 [italics original]; *see also River Valley, supra*, 37 Cal.App.4th 154, 177 ["Although the increased height and dimension of the berm will

---

[8] In the analogous context of an agency's decision not to recirculate an EIR, this Court has held that a procedural violation – the type of violation that is properly subject to de novo review – cannot be found unless the agency's decision regarding the significance of new information in the EIR fails to pass muster under the applicable standard of review – the substantial evidence standard. (*Laurel Heights II, supra*, 6 Cal.4th at 1134-1135.)

increase the flood flow, the degree of that change has not been shown to reach the 'watermark' of substantial environmental ramifications..."].) For example, one of the changes the *Save Our Neighborhood* court identified was the fact that the modified project had a different proponent than the original project. (140 Cal.App.4th at 1300.) But such a change is entirely irrelevant under CEQA except to the extent the change may result in environmental effects. (*Friends of Davis, supra*, 83 Cal.App.4th at 1019 [identification of specific prospective retail tenant did not require additional review]; cf. *Maintain Our Desert Environment v. Town of Apple Valley* (2004) 124 Cal.App.4th 430, 443 [EIRs project description did not need to identify end user of project]). To decide whether any proposed change or combination of changes requires the preparation of an EIR requires a consideration of the effects of such changes, not the mere fact that changes are proposed. Determining that proposed changes create a new project without regard for the effects of such changes elevates form over substance.

c. The "new project" test is not a useful means of determining how to address proposed changes under CEQA and will lead to inconsistent results.

As noted by the *Mani Brothers* court, a two-step analysis or "new project" test does not provide an objective framework and could lead to inconsistent results. *Mani Brothers*, 153 Cal.App.4th at 1400. The analysis applied in *Save Our Neighborhood* provides no guidance, because although the court purported to decide the issue as a matter of law, it based its decision on the "totality of the circumstances" instead of identifying objective factors that agencies – and courts – can apply in the future. For example, the decision is unclear about how much weight decisionmakers must give to a change in a project proponent. Does such a change always create a new project as a matter of law or does it only create a new project if other changes are proposed? If the latter, what other changes, together

with a change in a project proponent, create a new project as a matter of law? (*See Save Our Neighborhood*, 140 Cal.App.4th at 1300.)

Because reasonable minds may differ as to whether any given change or combination of changes creates a "new project" or instead constitute a modification of an existing project, the "new project" test is unhelpful in determining how to address proposed changes under CEQA. (*Mani Brothers*, 153 Cal.App.4th at 1400.) Sections 21166 and 15162, in contrast, provide a useful means of evaluating whether and to what extent proposed changes require additional environmental review, because they provide for – and essentially require – a consideration of the actual effects of proposed changes.

d. De novo review contravenes Legislative intent and the CEQA Guidelines regarding how post-approval changes are to be treated.

At base, Section 21166(a) and Guidelines section 15162(a) presume that subsequent review should be the exception and not the norm and together call for substantial evidence review of agency decisions regarding how to address "substantial changes" to previously-approved projects. Section 21166, however, does not allow proposed changes to a project to go unstudied. It requires an agency to analyze proposed changes in order to determine whether they are substantial enough to necessitate major revisions to the existing CEQA document due to new or more severe significant environmental effects. If the triggers set forth in Sections 21166 and 15162 are met, the proposed changes will be studied in a new subsequent or supplemental EIR – they will not escape review. But if the triggers are not met, the Legislature has determined that a new EIR is not necessary. That decision should not be second-guessed by judicially imposing a two-step analysis for review of project changes under Section 21166.

In sum, Section 21166 calls for a determination of whether proposed changes must be analyzed in an EIR. Accordingly, there is no need to create a threshold "new project" test to ensure such a determination is made. To remove proposed project changes from the ambit of Section 21166 by labeling them "new projects" contravenes the intent of Section 21166 and creates requirements that go beyond those expressly set forth in CEQA and its Guidelines. (*Mani Brothers*, 153 Cal.App.4th at 1401-1402.) Section 21166 itself sets forth the framework by which public agencies determine how to deal with proposed project changes. Agencies must be allowed to rely on that framework. The only real purpose a "new project" test serves is to improperly bypass Section 21166 and the balance it provides. (*Mani Brothers*, 153 Cal.App.4th at 1400.)

CONCLUSION

In enacting Section 21166, the Legislature has strictly limited the circumstances under which subsequent environmental review may be required to address "substantial changes" to a project that has already been subject to CEQA review. Sections 21166 and 15162 provide public agencies with the tools to determine whether proposed changes to an approved project require further study in a new EIR – tools that are intended to balance the burdens CEQA normally imposes on public agencies. Agencies must be allowed to proceed pursuant to Section 21166 when considering proposed changes to an approved project. If such changes warrant an EIR, Section 21166 provides a mechanism for ensuring that an EIR will be prepared. And because the presumption is against additional environmental review, an agency's decisions under Section 21166 should be reviewed for substantial evidence.

A "new project" test does not provide an objective framework and elevates a court's subjective conclusions regarding the proper label to place

on proposed changes over an agency's factual determinations regarding the potential environmental effects of such changes. Imposition of a threshold new project test, decided as a matter of law, that prevents agencies from analyzing proposed changes pursuant to Section 21166 creates a new requirement not found in CEQA itself, thus eliminating the balance the Legislature has struck with respect to project changes. This Court should reject the new project test and reverse the decision below.

DATED: May 30, 2014 DOWNEY BRAND LLP

By: Andrea P. Clark
FOR CHRISTIAN L. MARSH
Attorneys for Amici Curiae
CALIFORNIA LEAGUE OF CITIES, CALIFORNIA STATE ASSOCIATION OF COUNTIES, and ASSOCIATION OF CALIFORNIA WATER AGENCIES

Friends of the College of San Mateo Gardens v. San Mateo County Community College District, et al.
Supreme Court of California, Case No. S214061
(First Appellate District Court of Appeal, Division One,
Case No. A135892) (2013))

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Downey Brand LLP, 621 Capitol Mall, 18th Floor, Sacramento, California, 95814-4731. On May 30, 2014, I served the within document(s):

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF IN SUPPORT OF APPELLANTS (Cal. Supreme Court Case No. S214061)

☐ **BY FAX:** by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.

☐ **BY E-MAIL:** by transmitting via e-mail or electronic transmission the document(s) listed above to the person(s) at the e-mail address(es) set forth below.

☐ **BY MAIL:** by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at Sacramento, California addressed as set forth below.

☒ **BY OVERNIGHT MAIL (Federal Express):** by causing document(s) to be picked up by an overnight delivery service company for delivery to the addressee(s) on the next business day.

☐ **BY PERSONAL DELIVERY:** by causing personal delivery by _____ of the document(s) listed above to the person(s) at the address(es) set forth below.

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal

cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

Service List

Sabrina M. Teller Remy Moose Manley, L.P. 455 Capitol Mall, Suite 210 Sacramento, CA 95814 Telephone: (916) 443-2745 Facsimile: (916) 443-9017	Attorney for Appellants **VIA FEDERAL EXPRESS**
San Mateo County Counsel Eugene Whitlock Deputy County Counsel 400 County Center, 6th Floor Redwood City, CA 94063 Telephone: 650-363-4989 Facsimile: 650-363-4034 Email: ewhitlock@co.sanmateo.ca.us	Attorney for Appellant **VIA FEDERAL EXPRESS**
Susan Brandt-Hawley Brandt-Hawley Law Group 13760 Arnold Drive Glen Ellen, CA 95442 Telephone: 707-938-3900 Facsimile: 707-938-3200 Email: susanbh@preservationlawyers.com	Attorney for Respondent **VIA FEDERAL EXPRESS**
First Appellate District of California Division One 350 McAllister Street San Francisco, CA 94102	**VIA REGULAR U.S. MAIL**

Friends of the College of San Mateo Gardens v. San Mateo County Community College District, et al.
Supreme Court of California, Case No. S214061
(First Appellate District Court of Appeal, Division One,
Case No. A135892) (2013))

San Mateo County Superior Court Honorable Clifford Cretan C/o Clerk of the Court 400 County Center Redwood City, CA 94063	**VIA REGULAR U.S. MAIL**

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

Executed on May 30, 2014, at Sacramento, California.

Linda Puzar