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CLERK SUPREME COURT

Chief Justice Tani G. Cantil-Sakauye
and Associate Justices
The Supreme Court of California
350 McAllister Street
San Francisco, California 94102

Re: **Amicus Curiae Letter in Support of Petition for Review; *Friends of the College of San Mateo Gardens v. San Mateo County Community College District, et al.* (1st App. Dist. Case No. A135892 (2013)) (Cal. Supreme Court Case No. S214061)**

Dear Chief Justice Cantil-Sakauye and Associate Justices:

I am writing on behalf of the League of California Cities in support of the petition for review filed in the above-entitled case by the San Mateo County Community College District, *et al.* This amicus curiae letter has been prepared and is submitted in accordance with the California Rules of Court, Rule 8.500(g).

INTERESTS OF AMICUS CURIAE

The League of California Cities is an association of 467 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, 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.

GROUND SUPPORTING REVIEW

The San Mateo Community College District (District) had previously approved a plan to improve its campus at the College of San Mateo by renovating ten buildings and demolishing sixteen others. In compliance with the California Environmental Quality Act (CEQA), the District prepared and adopted a mitigated negative declaration to address the impacts of its improvement plans. Later, the District revised its plans for the College of San Mateo by deciding to demolish one building that had been set for renovation and to renovate two buildings that had been set for demolition. (*Friends of the College of San Mateo Gardens v. San Mateo Community College District* (Sept. 26, 2013, A135892) [nonpub. opn.], slip opn. at 4 [hereafter

“Friends” or “Decision”]; Defs.’ Pet. for Review at 7-9.)¹ The District evaluated the possible environmental consequences of altering its plans for the three buildings, and ultimately concluded that the changes were not so extensive as to require preparation of a subsequent environmental impact report (EIR), and instead prepared an Addendum to address the proposed revisions.

Petitioners challenged this decision under CEQA, seeking a writ of mandate ordering the District to prepare a full EIR. The trial court issued a writ of mandate, and the First District Court of Appeal affirmed. The First District Court of Appeal’s decision in this case made two fundamental errors. First, departing from a line of cases, the court’s decision declined to provide any deference to the District’s decision and reviewed the question of whether the revised plans constituted revisions to an existing project or a new project altogether as one of law for the court. Normally, such determinations are reviewed as factual questions under the more deferential “substantial evidence” standard. Second, the court issued the writ despite its failure to find that the District’s supposed error was indeed “prejudicial,” which is a prerequisite to finding a “prejudicial abuse of discretion” as the California Supreme Court affirmed this summer in *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal.4th 439 (hereafter “*Neighbors for Smart Rail*”).

This Court should grant the petition for review to secure uniformity of decisions regarding the standards of review that apply to a lead agency’s decision whether to require a subsequent EIR when considering changes to a previously-approved project. This case, if left to stand, will further an existing split in authority and cast significant uncertainty upon a lead agency’s ability to modify projects that have already undergone CEQA review.

A. The Decision Below Contributes To A Split Among The Courts of Appeal That Calls For Intervention By The California Supreme Court

A key question at issue in this case is this: How are courts to review a public agency’s decision, under CEQA, to deviate from a previously-approved project? It is well established that the deferential substantial evidence standard applies to a lead agency’s decision to not require a subsequent EIR under Public Resources Code section 21166 when changes are proposed to a previously-approved project. (See *Santa Teresa Citizens Action Group v. Santa Clara Valley Water District* (2003) 114 Cal.App.4th 689, 703; *Fund for Environmental Defense v. County of Orange* (1988) 204 Cal.App.3d 1538, 1544; *Bowman v. City of Petaluma* (1986) 185 Cal.App.3d 1065, 1075 (“*Bowman*”); compare *Mani Brothers Real Estate Group v. City of Los Angeles* (2007) 153 Cal.App.4th 1385, 1397-1401 (“*Mani Brothers*”) with *Save Our Neighborhood v. Lishman* (2006) 140 Cal.App.4th 1288, 1300-1301.) California’s CEQA Guidelines make clear that the same rule applies even when the prior CEQA document is a negative declaration and not an EIR. (Title 14, California Code of Regulations (hereafter, “CEQA Guidelines”) § 15162(a); *Abatti v. Imperial Irrigation District* (2012) 205 Cal.App.4th 650, 668-671, 675 (“*Abatti*”).) The

¹ Thus, under the proposed revisions to the plans, fifteen buildings would be demolished instead of sixteen, and eleven buildings would be renovated instead of ten.

substantial evidence standard is a crucial part of CEQA, as it recognizes the important role public agencies play in administrative matters. (*California Native Plant Society v. City of Santa Cruz* (2009) 177 Cal.App.4th 957, 985 (“*Native Plant*”) [the “highly deferential” substantial evidence standard of review “flows from the fact that the agency has the discretion to resolve factual issues and to make policy decisions.”].)

But under the instant decision, the court held that the question of whether a project is a “new” project (rather than merely a changed project under Section 21166 of CEQA) is a question of law to be reviewed *de novo*, without any deference to the lead agency’s review of the factual circumstances of the particular project. (*Friends*, slip opn. at 8-9.) This consequence of the Decision alone warrants review, as the determination of whether a proposed project revision requires preparation of a subsequent EIR is normally reviewed for substantial evidence, with deference to the lead agency’s decision. (CEQA Guidelines § 15162(a) (“[N]o subsequent EIR shall be prepared... unless the *lead agency determines...*”) (emphasis added); see also *Mani Brothers, supra*, 153 Cal.App.4th at 1401 [“Treating the issue as a question of law... inappropriately undermines the deference due the agency in administrative matters.”].) Further, it simply makes no sense to require agencies to begin the CEQA process anew when the project at issue has already undergone environmental review, and the lead agency is dealing with a change to that project, as the District was here. (See *Bowman, supra*, 185 Cal.App.3d at 1073 [rationale for limiting preparation of subsequent EIRs is because environmental review has already occurred, the original document cannot be challenged, and the “question is whether circumstances have *changed* enough to justify *repeating* a substantial portion of the process.”].) This is *especially* true when the initial environmental review resulted in a negative declaration. (*Abatti, supra*, 205 Cal.App.4th at 670 (quoting *Benton v. Board of Supervisors* (1991) 226 Cal.App.3d 1467, 1479-1480).)

Not only does the Decision split from nearly all cases that have ruled on this issue, but it also fails to provide meaningful benchmarks for an agency to use in determining when revisions to a previously approved project are substantial enough to become a “new project altogether.” (*Friends*, slip opn. at 8.) As a result, when addressing revisions to previously-approved plans, lead agencies will be torn between a reasonable expectation that a decision to not require a subsequent EIR will be upheld if supported by substantial evidence, and the possibility that a reviewing court may instead decide, as a matter of law, that a new project has been created. As to the latter possibility, given the lack of meaningful guidance in the Decision, lead agencies can only guess as to how a court might classify a proposal to revise a previously-approved project.

The Decision creates further confusion due to its inconsistency with another recent decision from the First District Court of Appeals, *Latinos Unidos de Napa v. City of Napa* (Oct. 10, 2013, A134959) ___ Cal.App.4th ___. *Latinos Unidos* addressed the split between *Save Our Neighborhood* and *Mani Brothers*, agreed with the latter, and applied the substantial evidence standard to the respondent City’s decision to refrain from preparing a new EIR for an update to its General Plan. (*Latinos Unidos*, slip opn. at 8-9.) Thus, even CEQA practitioners *within* the jurisdiction of the First District Court of Appeals can only guess as to what standard that court will apply in the future when addressing changes to previously-approved projects.

The fact that the Decision is unpublished does not solve the problems it creates, because the opinion is readily available to CEQA practitioners despite its unpublished status.² Despite the rules against citation of unpublished opinions, petitioner-side CEQA practitioners might, for example, attempt to use the Decision to argue that the question of the proper standard to apply when a lead agency revises previously-approved projects is not as well established as it actually is. This, of course, would only serve to perpetuate the split in authority regarding the proper standard in such cases. This Court should put the brakes on the increase in confusion the Decision has fueled by granting review and providing clarity on the standard of review that applies to a public agency's decision to deviate from a previously-approved plan.

B. The Decision Below Significantly Undermines the Ability of a Lead Agency To Make Discretionary Decisions Regarding Revisions to Approved CEQA Projects.

The Decision significantly undermines the ability of a lead agency to make its own determinations regarding whether changes in a project are sufficiently substantial to require preparation of a subsequent EIR, contrary to Guidelines section 15162. Section 15162 and the CEQA provision it implements, Public Resources Code section 21166, unequivocally limit the circumstances under which a subsequent EIR can be required when prior CEQA review has occurred. And, in accordance with the crucial role the lead agency plays throughout the entire CEQA process (see generally *Planning and Conservation League v. Department of Water Resources* (2000) 83 Cal.App.4th 892, 903-907), section 15162 firmly puts in the lead agency's hands the decision regarding whether circumstances requiring a subsequent EIR exist. (CEQA Guidelines § 15162(a) (“[N]o subsequent EIR shall be prepared... unless the *lead agency determines...*”) (emphasis added).) This reflects sensible administrative process: the lead agency will typically be the entity that is most intimately familiar with the scope, details, and potential effects of the original project, as well as the contents of the administrative record. Accordingly, the lead agency is in the best position to evaluate, based on “substantial evidence in light of the whole record,” whether a revision to the original project involves “substantial changes... which will require major revisions” of the original CEQA document, and courts should defer to a lead agency's decision in that regard. (Pub. Resources Code § 21166(a); CEQA Guidelines § 15162(a).) Application of a de novo standard of review to such questions risks encouraging litigation and needlessly overturning approvals for modest revisions in projects that have already undergone environmental review, upon the barest of evidence.

The First District appears to be concerned that empowering a lead agency to make these decisions would somehow undercut CEQA. (*Friends*, slip opn. at 10.) These fears are unfounded. The substantial evidence test, though deferential, is a key aspect of CEQA, and one that properly recognizes the important role public agencies play in resolving factual issues and making policy decisions. (*Native Plant*, *supra*, 177 Cal.App.4th at 985; *Mani Brothers*, *supra*, 153 Cal.App.4th at 1401.) It provides a meaningful way of evaluating an agency's CEQA decision: if substantial evidence in the record does not support the decision, the decision will not stand, the agency must go back to the drawing board, and CEQA's policy of environmental

² For example, the Decision is available from the Westlaw database at the citation 2013 WL 5377849.

protection will thus be served. But if substantial evidence in the record does support the agency's decision, nothing, from an environmental perspective, is gained by forcing the agency to rehash the analysis it has already completed.

Taking the decision of whether deviating from a previously-approved project requires a subsequent EIR out of the lead agency's hands poses serious practical problems for agencies that must formulate "accurate, stable, and finite" project descriptions, while also confronting the reality that sometimes they will need to modify a project to adapt to current circumstances. If a lead agency is not afforded some deference on the factual question of whether a subsequent change constitutes a "new" project or merely a modification to a previously-approved project, lead agencies will be forced to follow the safest course and, from a practical perspective, will prepare subsequent EIRs even though unwarranted. This runs counter to the Legislature's intent in enacting Section 21166, which created a presumption *against* the preparation of subsequent EIRs.

In sum, by affording no deference to the lead agency's decision on whether a change to a previously-approved CEQA project requires a subsequent EIR, the panel below has disrupted the CEQA process envisioned by the Legislature and cast significant doubt on a lead agency's discretion to make such determinations. This Court should grant review to protect the intent of sections 21166 and 15162 and to provide clarity regarding the discretion of a lead agency to make decisions regarding the need for subsequent EIRs.

C. The Decision Below Raises Serious Questions Regarding CEQA's "Prejudicial Abuse of Discretion" Standard

CEQA's judicial review provisions, sections 21168 and 21168.5 of the Public Resources Code, each call for an inquiry regarding whether there was a prejudicial abuse of discretion by the respondent agency.³ Section 21005(a) provides that a noncompliance with the provisions or requirements of CEQA *may* constitute a prejudicial abuse of discretion even if a different outcome would not have resulted in the absence of noncompliance. But section 21005(b) is equally clear that there *is no presumption* that an error under CEQA is prejudicial. In other words, even an agency's actual abuse of discretion will not justify reversal of the agency's decision unless the abuse of discretion resulted in prejudice.

This Court very recently affirmed these principles in *Neighbors for Smart Rail*, which found that although the respondent agency had abused its discretion with respect to its description of the environmental baseline, the error "did not deprive agency decision makers or the public of substantial information relevant to approving the project, and is therefore not a

³ Section 21168 itself does not expressly refer to this standard, but it does refer to Code of Civil Procedure section 1094.5, which incorporates this standard at subsection (b).

ground for setting that decision aside.” (*Neighbors for Smart Rail*, 57 Cal.4th at 463-465.) In other words, the error was not prejudicial.⁴

In this case, it appears that the public was well informed of the details of the revised plans, the District’s reasons for revising the plans, and the District’s reasons for concluding that the revisions would not result in new significant impacts. (*Friends*, slip opn. at 4-5.) The public was also afforded an opportunity to comment on the Addendum. (*Id.* at 5.) In other words, it appears that the District’s error, if error it was, did not deprive the District or the public of substantial information relevant to the District’s approval of the revised plans, and thus was not prejudicial. And the court below made no finding of prejudice, yet affirmed the trial court’s grant of a petition for writ of mandate against the District. The Decision thus raises serious questions regarding the efficacy and weight of the “prejudicial abuse of discretion” standard in CEQA cases.

Public agencies are not perfect beings. They may err despite their best intentions. But when an error does no harm to CEQA’s purposes of compelling such agencies to make decisions with environmental consequences in mind and enabling the public to understand the environmental values of their public officials, overturning the challenged decision and requiring the agency to conduct further CEQA analysis serves no purpose but to generate paper. This Court should grant review to correct the First District’s drift away from the prejudicial abuse of discretion standard, and to affirm that, in CEQA cases, substance takes precedence over form.

⁴ Justice Liu disagreed with the conclusion that the error was not prejudicial. (*Neighbors for Smart Rail*, 57 Cal.4th at 478.) Justice Baxter, along with Justice Chin and Chief Justice Cantil-Sakauye, concurred that the agency’s decision should be upheld, but disagreed with the finding that the agency had abused its discretion in the first place. (*Id.* at 468.)

CONCLUSION

The decision in *Friends*, though unpublished, casts doubt upon a lead agency's discretion to decide whether to require a subsequent EIR when dealing with changes to a previously-approved project, thus furthering a split amongst the California Courts of Appeal, and raises significant questions regarding the standard of review that applies in CEQA cases generally. This Court has the opportunity to resolve the split in authority and affirm that an error under CEQA must be prejudicial if it is to justify reversing an agency's CEQA decision. The League of California Cities therefore asks this Court to grant the petition for review.

Sincerely,

DOWNEY BRAND LLP



^{FOR}
Christian L. Marsh

*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 December 4, 2013, I served the within document(s):

**Amicus Curiae Letter in Support of Petition for Review; *Friends of the College of San Mateo Gardens v. San Mateo County Community College District, et al.* (1st App. Dist. Case No. A135892 (2013))
(Cal. Supreme Court Case No. S214061)**

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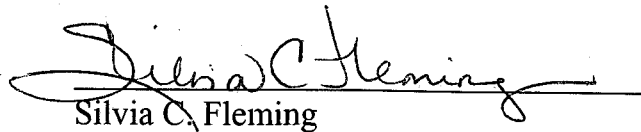
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I declare under penalty of perjury under the laws of the State of
California that the above is true and correct.

Executed on December 4, 2013, at Sacramento, California.


Silvia C. Fleming