IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION ONE

*****IMMEDIATE STAY REQUESTED (February 4, 2020)*****

APPEAL PENDING

CARDIFF SCHOOL DISTRICT, a California public school district,
Petitioner and Defendant.

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF SAN DIEGO,
Respondent.

SAVE THE PARK AND BUILD THE SCHOOL, a California unincorporated nonprofit association,
Real-Party-In-Interest

San Diego County Superior Court
Case No. 37-2019-00012880-CU-WM-NC
Trial Judge: Honorable Earl H. Maas, III (Department N-28)
Phone No. (760) 201-8028

CARDIFF SCHOOL DISTRICT'S PETITION FOR EXTRAORDINARY WRIT OF MANDATE, PROHIBITION, OR OTHER APPROPRIATE RELIEF; MEMORANDUM OF AUTHORITIES IN SUPPORT THEREOF; REQUEST FOR IMMEDIATE STAY

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS
(Cal. Rules of Court, Rule 8.208)

This is the initial certificate of interested entities or persons submitted on behalf of Appellant and Defendant Cardiff School District in the case number listed above.

The undersigned certifies that there are no interested entities or persons that must be listed in this certificate under California Rules of Court, rule 8.208.

Dated: February 3, 2020

/s/ Lindsay D. Puckett
Attorney for Appellant and Respondent
CARDIFF SCHOOL DISTRICT

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I. INTRODUCTION

Petitioner Cardiff School District (District) faces an emergency. The District is forced to bring this petition for extraordinary relief to prevent irreparable, immeasurable, and needless harm to the District and its young Kindergarten and first-grade students, ages five through seven.

A series of erroneous and unwarranted orders from the Superior Court have frozen all construction work—mid-construction—on the still occupied and operating Cardiff School. The Superior Court's orders relegate the young students that attend the Cardiff School to a permanent state of limbo—crammed in aging, portable classrooms on a torn-up campus lacking many basic necessities for the well-being of the students.

The young students are surrounded by open construction trenches, exposed footings, construction equipment, and temporary fencing. The campus has no warming kitchen, no food service building, no lunch court, no computer classroom, no reading classroom, no music classroom, no Kindergarten classroom restrooms, no indoor auditorium, and no outdoor assembly. In inclement weather, students are forced to eat cold lunches at their desks. The campus is also stuck with inadequate extended daycare facilities, inadequate grassy play areas, inadequate hardcourt play areas, a congested drop-off/pick-up area, and inadequate restrooms. Kindergarten students are forced to share a play area with first graders, a condition that is inconsistent with California Department of Education guidelines and not sustainable. Additionally, second-grade students, typically taught at the Cardiff School, are forced to continue attending and be taught in portable classrooms at a separate District school. The photograph below demonstrates current conditions at the Cardiff School:

(Exh. 71, p. 3605.)

Although these untenable, construction-site conditions were anticipated for a brief period—until permanent facilities could be expeditiously built—the Superior Court's unwarranted orders keep students and teachers frozen in these conditions *indefinitely*, with little hope that new facilities will be available next school year (as originally planned) or beyond. These young students, in the District's care, face imminent and irreparable injury to their education and well-being if construction of new school facilities cannot timely continue.

The construction work that has halted as a result of the Superior Court's orders is for a project intended to replace and modernize aging classrooms and facilities as well as reconfigure the Cardiff School's campus to facilitate a safer, more secure, and modern learning environment (Project). The Project includes changes to the school's playfield area, years ago named George Berkich Park by the District in honor of a previous principal. The playfield changes include transforming underutilized baseball fields into natural turf soccer fields, new picnic areas, improved parking areas, a new community garden, a new playground apparatus, and

an overall *increase* in recreational space. For purposes of this litigation, it is important to note that, although available for public recreation and named "George Berkich Park," the school's playfield is not a city, county, state, or federal park—rather, it is a school playfield owned and operated solely by the District and is intended first and foremost to serve the District's students.

Recognizing that the Project would garner significant interest from the community, the District engaged in a multi-year public design process, that included numerous public meetings and multiple Project re-designs in response to community feedback. Although the District considered the Project categorically exempt from CEQA on multiple grounds, the District *voluntarily* prepared a robust environmental impact report (EIR) to promote transparency, ensure community involvement, and in anticipation of litigation from a group of neighbors agitated over the Project's potential effect on ocean views from their homes.

In February 2019, at a duly-noticed public hearing, the District formally determined that the Project was exempt from CEQA, concurrently certified the EIR, and approved the Project. Before the approval, *nobody* objected to the District's CEQA exemption determination. Soon after approval, the small group of agitated neighbors, now organized under a single purpose entity named "Save the Park, Build the School" (STP), filed a petition for writ of mandate to stop the Project. STP asserted claims for waste of taxpayer funds, violation of California bond law, and violation of CEQA.

STP's CEQA claim focused on the EIR's disclosure and analysis of the Project's consistency with a 1993 grant agreement that the District entered with the State Department of Parks and Recreation Office of Grants and Local Services (DPR) on behalf of the National Parks Service (NPS). The grant financed outdoor recreational improvements on the District's

playfield in exchange for the District's commitment to maintain the improved area as outdoor recreational space, when not in use for school purpose, in perpetuity. In light of this, the District has worked closely with DPR and NPS to ensure all necessary permits and approvals are obtained before work in the grant boundary area occurs.

Because some of the Project construction could only be performed when school is out of session, the District began construction on portions of the Project in June 2019. Aside from some minor trenching to connect utilities, the work occurred entirely *outside* the grant boundary (i.e., the playfield area). This careful distinction as to where work occurred was consistent with direction from the Superior Court and requests from STP.

In late 2019, despite the District having done *more* CEQA analysis than was warranted, the Superior Court granted STP's petition for writ of mandate on the CEQA claims, refused to clarify its ruling on the petition, ordered *all* construction to cease—regardless of whether it was in the playfield area—and later refused to stay that order. The entire Project has now been enjoined by the Superior Court. The school's campus is frozen as a torn-up construction site.

The District seeks an immediate stay and a writ vacating the following orders related to STP's CEQA claim: (1) the November 18, 2019 order granting a petition for writ of mandate based on the District's alleged CEQA violation (Writ Order); (2) the December 2, 2019 order enjoining the District's on-going construction of the Project outside the grant boundary until the District complies with CEQA (Injunction Order); and (3) the December 18, 2019 order denying the District's request to stay the Injunction Order (Stay Denial Order) (collectively, Orders).

Writ review and an immediate stay of these Orders are necessary to prevent irreparable harm to the District and its students. The Orders have created a situation at the Cardiff School campus that is both dangerous and

untenable. If the Injunction Order is not stayed immediately, these conditions will persist *indefinitely*. Indeed, due to the tight construction schedule and the need to conduct certain work when students are not in school—even a slight delay will result in students being forced to bear these conditions for an additional school year. The harm to the well-being and education of these young students will be irreparable and immeasurable.

In contrast, the harm to STP is non-existent to negligible. The only changes to the playfield area needed for continued construction of essential school facilities is minor grading work to help contain stormwater—i.e., the creation of a few grassy swales or hills. This change would actually *benefit* the community and enhance the playfield's appeal for its primary users: students. Notably, none of the changes to the playfield would cause irreparable damage. In fact, the proposed landscaping changes could all be undone, if necessary.

Writ review is thus necessary to prevent irreparable harm to the District and its students. Writ review is also warranted because the Orders are erroneous and constitute an abuse of discretion.

The Orders are in part premised on the Superior Court's conclusion that the EIR is inadequate. As explained in Section II.D. below, this conclusion is meritless because substantial evidence in the administrative record supports the District's conclusion that the Project will not have any significant impacts on the environment. This Court, however, need not review the EIR to grant the District's requested relief because the Orders violate other fundamental legal precepts.

First, although the record demonstrates that the District fully complied with CEQA, when a court concludes that a lead agency has violated CEQA—as the Superior Court did here—the court must identify the agency's alleged errors. (See, e.g., Pub. Resources Code, § 21005,

subd. (c) ["any court, which finds. . . that a public agency has taken an action without compliance with [CEQA], *shall specifically address each of the alleged grounds for noncompliance*" (emphasis added)]; Pub. Resources Code section 21168.9, subd. (b) [court must "specify[] what action by the public agency is necessary to comply with" CEQA].) The Orders do not identify the alleged errors in the District's EIR and do not specify what action the District must take to comply with CEQA. This failure is significant because it precludes the District from attempting to fix the EIR's alleged deficiencies. Because the Orders preclude the District from continuing with the Project until it has complied with CEQA, this failure halts the Project indefinitely. CEQA's purpose is disclosure and informed decision-making; its purpose is not to block development. (14 Cal. Code Regs., § 15000 et seq. ("State CEQA Guidelines"), 15002(a).)

Second, the Orders are based on extra-record, post-approval evidence. (Exh. 1, p. 9; Exh. 3.) In denying the District's request to stay the Injunction Order, the Superior Court referenced the fact that DPR and NPS had not yet approved adjustment of the grant boundary. (Exh. 3, p. 14.) It is irrelevant whether additional approvals from other agencies are still pending after the lead agency certifies an environmental impact report. Indeed, CEQA specifically contemplates that a lead agency will complete its CEQA review before other agencies give their approvals. (See, e.g., State CEQA Guidelines, §§ 15381, 15096, subds. (a), (d)-(f).)

Third, the Writ Order erroneously concludes that STP was excused from exhausting its administrative remedies regarding the District's conclusion that the Project was exempt from CEQA. (Exh. 1, p. 7.) Conducting environmental review under CEQA does not restrict an agency from also relying on an exemption. (*Rominger v. County of Colusa* (2014) 229 Cal.App.4th 690, 700 (*Rominger*).) It is undisputed that the District gave notice of the grounds for exemption and held a public hearing.

(Exh. 29, p. 727; Exh. 51, pp. 2427-2428.) It is also undisputed that STP never objected to the proposed exemption findings during the administrative proceedings. Under *Tomlinson v. County of Alameda* (2012) 54 Cal.4th 281, 291 (*Tomlinson*), this failure is fatal to STP's CEQA claim.

Fourth, in issuing the Orders, the Court failed to tailor the remedy to the alleged CEQA violations. CEQA directs courts to exercise equitable discretion in fashioning a remedy. (See, e.g., Pub. Resources Code, § 21168.9, subd. (b); State CEQA Guidelines, § 15234.) The Orders disregard this by requiring the District to halt every facet of the Project.

Finally, assuming the Superior Court had not failed to comply with its statutory duty to consider the EIR for the Project, the Superior Court would have found that the EIR fully complied with CEQA.

Under these extreme circumstances, and to protect the safety, education, and well-being of the Cardiff School's young students, the District is left with no choice but to seek an immediate stay of the Orders and a writ commanding the Superior Court to vacate those Orders.

II. PETITION

Authenticity of Exhibits

1. The exhibits accompanying this petition are true and correct copies of original documents filed with the Superior Court, except for Exhibits 81-87, which are true and correct copies of the reporter's transcript of the hearings before The Honorable Judge Earl H. Maas, III. The exhibits are paginated consecutively from page 1 to page 3997. Page references in this petition are to the consecutive pagination.

The Parties

2. Petitioner District is the respondent and defendant in the underlying action titled *Save the Park and Build the School v. Cardiff School District*, San Diego Superior Court Case No. 37-2019-00012889-CU-WM-NC

3. Respondent Superior Court issued the Orders challenged in this Petition.

4. Real Party in Interest STP is the petitioner and plaintiff in the underlying action. STP's stated reason for challenging the Project approval is to "protect George Berkich Park while advocating common sense modernization and reconstruction of the Cardiff School without stealing land from George Berkich Park." (Exh. 5, p. 63.)

The District's Beneficial Interest

5. The District has a beneficial interest in this Petition because the challenged Orders require the District to stop all construction activities on the Project. The Project is intended to modernize the Cardiff School due to aging and inadequate facilities. The District has a strong interest in ensuring that the Project is implemented in order to serve its students attending the school.

Inadequate Remedy at Law

6. The District lacks an adequate remedy at law. Reversal of the Orders on appeal from final judgment would not remedy the lost construction time and increased construction cost that will result from the Orders, and would not remedy the irreparable harm that the District, and its students, teachers, administrators, parents, and volunteers will suffer from the Project being halted indefinitely.

Irreparable Harm to the District

7. As a result of the Orders, the Cardiff School's five- to seven-year-old students are left i*ndefinitely* attending classes in substandard, portable classrooms, amidst a torn-up, open construction zone campus that has no food service building, no lunch court, no warming kitchen, no computer or reading classroom, no music classroom, no Kindergarten classroom restrooms, no indoor auditorium, and no outdoor assembly areas. (Exh. 68, p. 3078; Exh. 69, p. 3089.)

8. Further, the campus will continue—*indefinitely*—to have inadequate extended daycare facilities, inadequate grassy play areas, inadequate hardcourt play areas, a congested drop-off/pick-up area, and inadequate restrooms. (Exh. 68, p. 3078; Exh. 69, p. 3089.) The Orders extend the period of time in which Kindergarteners would have to share a play area with first graders at the Cardiff School, a condition that is inconsistent with California Department of Education guidelines and not a sustainable operational model for an elementary school. (Exh. 68, p. 3078.) Additionally, second-grade students, typically taught at the Cardiff School, are forced to *indefinitely* continue attending and being taught in portable classrooms at a separate District school, Ada Harris Elementary. (Exh. 68, p. 3078; Exh. 69, p. 3089.) This severely effects and significantly strains the resources of Ada Harris Elementary. (Exh. 68, p. 3078; Exh. 69, p. 3089.)

9. The indefinite nature of this dire predicament results from the Superior Court's failure and refusal to identify the alleged defects in the EIR, which prevents the District from remedying the alleged defects. (Exh. 68, p. 3078; Exh. 69, pp. 3089-3090.)

10. The young students at the Cardiff School are at a very critical time developmentally for their education and will be irreparably harmed if school construction is not allowed to proceed and bring the classrooms and facilities up to proper standards. (Exh. 68, p. 3078; Exh. 69, p. 3089.) The harm to the students from continued delay and keeping them indefinitely in a substandard learning environment is immeasurable and cannot be undone, and is not something that can be made whole via reversal on appeal from final judgment. (Exh. 68, p. 3078; Exh. 69, pp. 3089-3090.)

11. Absent a stay of the Orders, the new classrooms and facilities have no chance of being ready by the end of August 2020 for the next school year (as originally scheduled). (Exh. 68, p. 3078; Exh. 69, pp. 3089-3090.)

Further delay of the Project could delay completion of the classroom buildings to the point that students would not be able to move into new classrooms for the 2020/2021 school year or beyond. (Exh. 68, p. 3078; Exh. 69, pp. 3089-3090.) Without immediate resumption of construction, some students will spend their first few, formative years of education in substandard conditions, never having experienced the educational environment that is intended and critical to their well-being. (Exh. 68, p. 3078; Exh. 69, pp. 3089-3090.)

12. Aside from the irreparable and immeasurable harm to the students, continued delay will result in increased construction and consulting costs. (Exh. 69, pp. 3086, 3089-3090.) When combined with construction escalation costs, which have been roughly four to five percent over the past three years and are anticipated to continue escalating, it is anticipated that the overall cost of the Project will increase by approximately $1,686,000 or more. (Exh. 69, p. 3090.)

13. In contrast, the harm to STP if construction outside the grant boundary is allowed to continue is non-existent to negligible. The playfield area will continue to exist as a recreational area after construction is complete. (Exh. 69, p. 3086.) Indeed, even if full Project construction were allowed to occur in the playfield area as planned, the area would continue to exist as a recreational area because the Project changes will maintain the playfield as a recreation area in perpetuity (and actually increase and enhance the outdoor recreational areas). (Exh. 51, pp. 2539-2541 [AR9:1727-1729]; Exh. 69, p. 3084.)

14. Regardless, the only change to the playfield area needed specifically for construction of essential school facilities outside the grant boundary is minor grading work in a portion of the playfield area to help contain stormwater—i.e., creation of grassy swales or hills. (Exh. 81, p. 3749, lines 15-20; Exh. 81, p. 3755, lines 16-23.) This change would actually *benefit*

the community by capturing stormwater onsite and enhancing the playfields for its primary users: young students. (*Ibid.*) None of these changes to a portion of the playfield area would cause irreparable damage; the proposed swales could even be removed, if necessary. (Exh. 81, p. 3755, lines 3-4.)

15. The District's students will suffer irreparable harm as a result of further delays to their new school. (Exh. 68, p. 3078; Exh. 69, pp. 3089-3090.) Whereas it is unclear how STP will suffer any harm if school construction occurs outside the playfield area within the grant boundary, and some grassy hills are created within portions of the playfield area.

The Petition is Timely

16. On November 18, 2019 the Superior Court issued the Writ Order. (Exh. 1.) On December 2, the Superior Court issued the Injunction Order. (Exh. 2; Exh. 86, pp. 3947-3949.). The District sought a stay of those orders through an ex parte application, which the Superior Court denied on December 18 in the Stay Denial Order. (Exhs. 3, 65-72.)

17. Given the Superior Court's reliance on extra-record evidence in the Writ Order, on December 2, 2019 the District filed a motion for reconsideration, to be heard on January 24, 2020, based on new, post-Project approval information regarding the status of the DPR/NPS approvals. (Exhs. 61-64.) The District withdrew the motion after the December 18 Stay Denial Order appeared to prematurely rule on the motion based on hearsay evidence submitted by STP's counsel regarding the status of the NPS approval. (Exh. 3; Exh. 74, p. 3683; Exh. 80, pp. 3738-3741.)

18. On January 21, 2020, the parties reached a tentative settlement; the trial on the remaining non-CEQA claim was taken off calendar; and the case was scheduled for dismissal. Unfortunately the parties have yet to finalize the settlement. The harm caused by the Orders is too great to delay the Stay Denial Order (December 23, 2019). (Exh. 88.)

Summary of Relevant Facts and Procedure

Cardiff School District

19. The District operates two schools: the Cardiff School, which offers classes for kindergarten and grades 1 through 2, and the Ada Harris School, which offers classes for grades 3 through 6. (Exh. 51, p. 2441 [AR7:164].)

20. Due to aging and inadequate facilities, the District has made concerted efforts to update its facilities. (Exh. 51, p. 2557 [AR20:2291].) In the early 2000s, the District was able to fully replace the Ada Harris School with all new construction. (*Ibid*.) The Cardiff School, however, which serves the youngest cohort of students, consists largely of aging and inadequate portable structures and buildings that do not meet standards for safety or security. (Exh. 51, pp. 2441, 2445 [AR7:163, 187]; Exh. 68, p. 3076; Exh. 69, p. 3082.)

21. In November 2016, District taxpayers overwhelmingly approved a $22 million bond for the replacement of aging classroom and multipurpose buildings at the Cardiff School. (Exh. 51, p. 2557 [AR20:2291]; Exh. 51, p. 2446 [AR7:188]; Exh. 68, p. 3076.) In response, the District prepared a plan to modernize and reconstruct the existing, inadequate buildings as well as reconfigure the campus layout to facilitate a safer and more secure campus. (Exh. 51, pp. 2445-2446 [AR7:187-188]; Exh. 68, p. 3076; Exh. 69, pp. 3082-3084.)

The Cardiff School

22. The Cardiff School sits on an approximately 7.4 acre site owned wholly by the District. (Exh. 51, pp. 2440-2441 [AR7:163-164]; Exh. 51, p. 2533 [AR9:1721]; Exh. 68, p. 3078; Exh. 69, p. 3089.) The entire site is designated as an operational school site. (Exh. 51, p. 2533 [AR9:1721]; Exh. 68, p. 3078; Exh. 69, p. 3089.) Although no part of the site is legally or otherwise designated as a park, years ago the District chose to name the

school's playfield area "George Berkich Park" to honor a previous principal. (*Ibid.*)

23. In 1993, the District and City of Encinitas entered into an agreement with and administered by the DPR's Office of Grants and Local Services (OGALS) to receive a $160,000 grant to finance outdoor recreational improvements on portions of the District's playfield area under Section 6(f)(3) of the Land and Water Conservation Fund (LWCF) Act (54 U.S.C. § 200301 et seq.) (Grant Agreement). (Exh. 51, pp. 2533-2534 [AR9:1721-1722]; Exh. 69, pp. 3087-3088.) Under the Grant Agreement, the District is required to maintain portions of the playfield area as outdoor recreational space, when not in use for school purposes, in perpetuity. (*Ibid.*) Accordingly, portions of the District's playfield area were designated and are referred to as the 6(f)(3) boundary (Grant Boundary). (Exh. 51, pp. 2533-2534 [AR9:1721-1722]; Exh. 69, pp. 3087-3088.)

24. In 2018, when the District began planning the Project, it became aware that over the years some improvements had been made within the Grant Boundary that unintentionally caused the District and City to fall out of compliance with the terms of the Grant Agreement. (Exh. 51, p. 2536 [AR9:1724].)

25. The District immediately contacted OGALS to make it aware of the Project and expressed its commitment to continue allowing public use of the school's outdoor recreational use areas when not needed for school purposes. (Exh. 69, p. 3087.) OGALS informed the District that a "conversion" process exists whereby the District and City could comply with the Grant Agreement by designating replacement land of equal utility and value, subject to approval by NPS. (Exh. 51, pp. 2468-2469 [AR7:364-365]; Exh. 51, p. 2537 [AR9:1725]; Exh. 69, p. 3087.)

26. To that end, the District continued to work closely with OGALS and NPS in the conversion process to modify the Grant Boundary (Grant

Boundary Adjustment) and comply with the Grant Agreement and the LWCF Act. (Exh. 51, p. 2537 [AR9:1725]; Exh. 69, pp. 3087-3088.) OGALS supported the District's proposal, and a preliminary review by NPS indicated that the replacement land being considered appeared eligible for the conversion process and would comply with the LWCF Act. (Exh. 51, pp. 2537, 2541 [AR9:1725, 1729]; Exh. 69, p. 3088.)

The Design Process for the Cardiff School Modernization and Reconstruction Project

27. The design for the Cardiff School rebuild was developed through an extensive community outreach process that brought teachers, students, parents, and local residents together to collaborate on a plan that would provide a safe and secure environment for the students, enhance their learning environment, and provide improvements to the Cardiff School playfield area. (Exh. 69, pp. 3083-3084.) The playfield area is entirely owned and maintained by the District without any deed restrictions. (*Ibid*.) The area is used first and foremost by the Cardiff School for educational programs for students and, although the District makes the area available to the public after hours and on weekends, the playfield area is not a City park, and public use is always secondary to educational uses. (*Ibid*.) The new design incorporates an improved parking/drop off/pick up area and a multi-purpose building and outdoor space adjacent to the designated parking, school office, and field area. (*Ibid*.) While the multi-purpose room will sit on a portion of the current playfield area, the playfield area is being reconfigured for increased student play space and safety as well as to respond to the increased demand for grass area for soccer as opposed to an underutilized skinned infield for baseball. (*Ibid*.) The recreational benefits of the playfields will be enhanced as part of the Project design. (*Ibid*.)

28. Over the course of nearly two years, the District repeatedly sought public input and responded to community concerns (e.g., impacts on

neighbors' views) by revising the site layout. (Exh. 51, pp. 2542-2543 [AR9:1730-1731], p. 2569 [AR180:15366], p. 2668-2669 [AR294:16862-16863]; Exh. 69, p. 3083.) In total, the District engaged in nine rounds of public review and revisions and presented 18 potential site layouts—often vastly different from previous versions—in an effort to address community input. (Exh. 51, pp. 2543, 2548-2556 [AR9:1731, 2145-2153]; Exh. 69, p. 3083.)

29. In fact, to accommodate community concerns, the District even incorporated design changes that compromised site functionality for educational programs and increased construction costs. (Exh. 51, p. 2543 (design revision at behest of community cut off direct access from kindergarten classrooms to field areas) [AR9:1731].)

30. Although no one design could possibly please everyone, after the multi-year community design process, and a pressing need to bring the school up to current safety and security standards, the District settled on a design in June 2018 that had the support of the greater Cardiff community. (Exh. 51, pp. 2543, 2556 [AR9:1731, 2153].) With the Project, the school would maintain its current operation and student population and would only increase the total net number of classrooms by one. (Exh. 51, p. 2557 [AR20:2291].) And via the Grant Boundary Adjustment, the outdoor recreation areas would be enhanced and expanded by approximately 2,047 square feet. (Exh. 51, pp. 2539-2541 [AR9:1727-1729]; Exh. 69, p. 3084.)

The CEQA Process

31. Although publicly recognizing early on that the Project was exempt from CEQA and no EIR was necessary, the District, in an abundance of caution, voluntarily chose to prepare an EIR. (Exh. 51, p. 2558 [AR20:2292].) As explained in verbal and written statements by the District's bond program manager at public meetings on October 11, 2018 and November 8, 2018, "no environmental assessment was required by law,

whether it be a Neg Dec, a Mitigated Neg Dec, or a full EIR," but because neighbor "concerns turned into threats of lawsuit the District chose to prepare a full Environmental Impact Report." (Exh. 51, pp. 2581, 2586 [AR223:16053, 229:16144].) As such, a draft EIR was circulated for public review in October 2018. (Exh. 51, p. 2432 [AR5:020].) Numerous community members participated in the CEQA process and submitted comments on the draft EIR. (Exh. 51, pp. 2531-2532 [AR9:1719-1720].) The District thoughtfully considered and responded to each one. (See generally Exh. 51, pp. 2533-2543 [AR9:1721-2139].)

32. Although not required, on February 1, 2019, the District sent a *courtesy* email to those who submitted comments on the draft EIR informing them when and where they could access the written agenda materials for the District's public meeting on the final EIR and Project. (Exh. 51, pp. 2618 (courtesy notice), 2620-2621 (email distribution list) [AR280:16404, 284:16409-16410].) The District posted the agenda and accompanying materials for the February 7, 2019 special meeting on the District's website and on the District's Bulletin Board at its offices located at the Cardiff School more than 72 hours before the meeting, even though applicable law (The Brown Act) only requires 24 hours' notice. (Gov. Code, § 54956; Ed. Code, § 35144; Exh. 51, pp. 2622-2623 [AR285:16411-16412].)

33. The agenda for the special meeting—scheduled solely to consider the Project—stated:

> A. Adopt Resolution No. 18-19-06 Making Findings Pursuant to the California Environmental Quality Act for the Cardiff School Modernization and Reconstruction Project; *Making CEQA Categorical Exemption Findings*; Adopting CEQA Findings of Fact; Certifying and Approving an Environmental Impact Report; Adopting a Mitigation

> Monitoring Program; and Approving the Project.
>
> B. Authorize District staff to *file a Notice of Exemption* and Notice of Determination for the Project with the San Diego County Clerk and the Office of Planning and Research.

(Exh. 51, p. 2623 [AR285:16412], emphasis added.)

34. Similarly, the District's Staff Report and draft Resolution were made available 72 hours in advance of the meeting at which the District was to consider the Project and had the following title:

> Adopt Resolution #18-19-06, A Resolution of the Cardiff School District Board of Trustees Making Findings Pursuant to the California Environmental Quality Act for the Cardiff School Modernization and Reconstruction Project; *Making CEQA Categorical Exemption Findings;* Adopting CEQA Findings of Fact; Certifying and Approving an Environmental Impact Report; Adopting a Mitigation Monitoring Program; and Approving the Project.

(Exh. 51, p. 2557 [AR20:2291], emphasis added.) The Staff Report also included a section discussing compliance with CEQA; staff's recommendation for the Board to find the Project categorically exempt from CEQA; an explanation of six applicable categorical exemptions; and an attached proposed Resolution with findings in support of the CEQA categorical exemptions. (Exh. 51, pp. 2435-2436 [AR5:023-024]; Exh. 51, pp. 2558-2559 [AR20:2292-2293].)

35. On February 7, 2019, the District held the special meeting and allowed public comments on the Project and the proposed CEQA action. (Exh. 51, pp. 2560-2561 [AR37:4479-4480].) No public comments were made or submitted during the public hearing. (Exh. 51, p. 2560 [AR37:4479].) After closing the public hearing, the Board voted to approve

the Resolution, deeming the Project categorically exempt from CEQA, certifying the Final EIR, and approving the Project. (Exh. 51, pp. 2435-2438 [AR5:023-026]; Exh. 51, p. 2561 [AR37:4480].) A Notice of Exemption and a Notice of Determination were filed with the County Clerk the next day. (Exh. 51, pp. 2426-2430, 2422-2425 [AR2:005-009, 1:001-004].)

STP's Petition for Writ of Mandate and Complaint

36. On March 8, 2019, STP filed a petition for writ of mandate and complaint (Petition) in San Diego County Superior Court. (Exh. 4.) The Petition was amended twice, with the second, operative Petition, filed on April 22, 2019. (Exh. 5.) The Petition included three causes of action: (i) that the District failed to comply with CEQA, (ii) that the Project violated California bond law, and (iii) that the Project constituted waste and misuse of public money. (Exh. 5, pp. 67-83.)

37. Project construction was tightly scheduled to ensure minimal disruption to students and the educational environment. On June 17, 2019 (immediately after the school year ended), the District's contractors began site utility construction work—which, for safety reasons, needed to be done during summer months when students and staff were not on campus. (Exh. 68, p. 3077; Exh. 69, pp. 3084-3086.)

38. On July 23, 2019, STP filed an ex parte application requesting a temporary restraining order and preliminary injunction enjoining the District from continuing Project construction under the third cause of action for waste of public money (not CEQA). (Exhs. 7-12.)

39. On July 24, 2019, at the hearing on STP's ex parte application, the Superior Court explained:

> So I'm going to grant the temporary restraining order with respect to the footprint of the park, with the exception being work that's necessary for putting in utilities to the school. So in other

> words, if there's a trench that has to be built to bring utilities from the street into the school, I'll allow that to proceed, but nothing that will destroy the footprint of the park.

(Exh. 81, p. 3756, lines 16-23.) The Superior Court issued an order granting the temporary restraining order and preliminary injunction consistent with this explanation on July 24, 2019. (Exh. 21, p. 627.)

40. Accordingly, the District tailored all ongoing Project construction to avoid the footprint of the school's playfield area subject to the Grant Agreement. (Exh. 68; p. 3077.) Construction work outside the restricted area included (i) disassembly of mismatched/uncoordinated utilities connecting the buildings, (ii) demolition of buildings scheduled to be replaced, (iii) trenching and installation of utilities necessary to restore power, and (iv) setting and pouring of footings and foundations for new buildings. . (Exh. 69, p. 3083.)

41. On October 4, 2019, at the noticed hearing on STP's motion for preliminary injunction based on its taxpayer waste claim, STP's counsel explained that STP sought to stop *only* the Project construction within the school's playfield area (i.e., the area subject to the Grant Agreement). (Exh. 84, p. 3832, lines 23-26; p. 3858, lines 5-6; p. 3862, lines 22-26.)

42. Consistent therewith, the District continued to tailor all ongoing Project construction to avoid the footprint of the school's playfield area subject to the Grant Agreement. (Exh. 68, p. 3077.)

43. On November 18, 2019, subsequent to a full briefing and hearing on STP's CEQA petition, the Superior Court issued the Writ Order granting (1) STP's request for a limited preliminary injunction as to the waste of public funds cause of action, and (2) STP's petition for writ of mandate as to the CEQA claims. (Exh. 1, pp. 6-9.)

44. As to the CEQA petition, the Writ Order acknowledged the law requiring exhaustion of administrative remedies and acknowledged that the

District provided notice and held a public hearing. (Exh. 1, p. 7.) According to the Superior Court, however, because STP received an email from the District regarding completion of the final EIR that "was unclear regarding the District's exemption determination," the notices were insufficient and administration exhaustion was apparently not required. (Exh. 1, p. 7.) The Writ Order did not include any legal basis for this exception from exhaustion requirements. (*Ibid*.)

45. Further, although the Writ Order explained why the Superior Court disagreed with the District's determination that the Project was categorically exempt from CEQA, the ruling failed to address *any* inadequacies in the EIR:

> Finally, Respondent, as of this ruling, has not resolved the issues over the federal Land and Water Conservation Fund Act issues. It has now been over one year and Respondent's inability to establish acceptable replacement property to the controlling authorities.

(Exh. 1, p. 9.) What *can* be gleaned from the Superior Court's two-sentence ruling—which was presumably intended to address the District's 2,000-page EIR—is that the Superior Court impermissibly considered the status of the DRP/NPS approvals, which is extra-record evidence that post-dates the February 7, 2019 certification of the EIR and approval of the Project. (Exh. 1, p. 9.)

46. The Writ Order also failed to address the District's defense that neither STP nor any other commenters on the Draft EIR, nor the petition for writ of mandate, specifically challenged the EIR's analysis of Recreation and Public Services (Parks). (Exh. 1, pp. 7-9; Exh. 41, pp. 2277.) Thus, STP also failed to exhaust its administrative remedies as a jurisdictional prerequisite to challenging the EIR.

47. After the Writ Order was issued, the District also filed a Motion for Reconsideration of the CEQA Ruling based on new, post-Project approval information regarding the status of the DPR/NPS approvals given the basis for the Court's Writ Order on the EIR. (Exhs. 61-64.) And both STP and the District sought clarification of the Writ Order via ex parte applications, which were heard on December 2, 2019. (Exhs. 54-59.)

48. The District, wanting to expeditiously resolve whatever errors the Superior Court found in the CEQA analysis, requested in its ex parte application for clarification as to which aspects of the EIR the Superior Court considered inadequate. (Exh. 55, p. 2836.)

49. STP's ex parte application, although couched as seeking clarification, requested that the Superior Court order the District "to cease all construction activities until it has complied with CEQA." (Exh. 58, p. 2916, lines 17-18.) STP argued that allowing construction to proceed outside the Grant Boundary would prejudice consideration of "alternatives" to the Project that would not require a Grant Boundary Adjustment. (Exh. 58, pp. 2912-2915.) And yet, STP's briefing on the adequacy of the EIR never even challenge the alternatives analysis. (Exh. 29, p. 723.)

50. STP's request to stop *all* construction came a full six months after construction had begun, despite the fact that STP was fully aware of and had not previously objected to the extensive construction work on the school buildings occurring outside the playfield area. (Exh. 21, p. 627; Exh. 84, pp. 3885, 3912, 3915.) Further, STP's motion for a preliminary injunction was only brought under the taxpayer waste claim, not CEQA. (Exh. 30, pp. 755-756.)

51. On December 2, 2019, at the hearing on the separate ex parte applications for clarification, the Superior Court refused to give *any* clarification or specify how the EIR was inadequate or what the District should do to comply with CEQA. The Superior Court only stated that it

would not "create an appellate issue for you by further, you know, following the path that you've asked me to go on. That just creates the appeal, you know." (Exh. 86, p. 3942, line 16 to p. 3943, line 23.)

52. Worse yet, despite not "specifying what action by the [District] is necessary to comply with [CEQA]" (Public Resources Code section 21168.9, subdivision (b)), the Superior Court granted STP's request to stop *all* construction work—regardless of whether it impacted the playfield area within the Grant Boundary—explaining that "CEQA does stop construction when the judge rules." (Exh. 86, p. 3948, lines 17-18.) "Once you've been found not to comply [with CEQA], you have to go back and comply…." (Exh. 86, p. 3949, lines 24-25.)

53. Further, contrary to CEQA's requirement in Public Resources Code section 21168.9, subdivision (a)(2), the Superior Court granted the Injunction Order without making any findings that "a specific project activity or activities will prejudice the consideration or implementation of particular mitigation measures or alternatives to the Project." (Exh 2, p. 10; Exh. 86, pp. 3940-3951.)

54. Due to the irreparable harm that would ensue as a result of the Superior Court's ruling and refusal to "specifically address each of the alleged grounds for noncompliance" (Public Resources Code section 21005, subdivision (c)), on December 16, 2019, the District filed an ex parte application seeking a temporary stay of the Injunction Order. (Exhs. 65-72).[1]

55. With its ex parte application seeking a temporary stay, the District submitted declarations from the District Superintendent and Bond Program Manager describing the irreparable harm that would occur if construction

[1] The District's Ex Parte Application was heard on December 18, 2019. The hearing was originally scheduled for December 11, but it was continued due to opposing counsel's schedule. (Exh. 67, p. 3072.)

outside the Grant Boundary playfield area were not allowed to proceed. (Exhs. 68-69.)

56. On December 18, 2019, after a hearing on the ex parte application seeking a temporary stay, the Superior Court denied the request. (Exh. 3.)

57. In full, the Superior Court's Stay Denial Order stated:

> Following oral argument and review of Petitioner's opposition brief, Respondent's request is denied. Should the parties agree to a resolution, the Court remains open to an interim modification. However, while it has been represented in argument that a resolution with the National Park Service is imminent, Plaintiff's documents suggest it is not. In any event, this was not the sole ground upon with the Court relied in its earlier ruling.

(Exh. 3, p. 14.)

58. This denial from the Superior Court contradicted the only aspect of the November 18, 2019 Writ Order that could even arguably be related to the alleged inadequacies in the EIR—i.e., the final two sentences, which relied on extra-record evidence. (Exh. 1, p. 9.) The Superior Court also effectively and prematurely ruled on the District's Motion for Reconsideration of the CEQA Ruling based on hearsay evidence submitted by STP's counsel regarding the status of the NPS approval. (Exh. 3, p. 14; Exh. 74, p. 3683.) As a result, on December 31, 2019, the District cancelled the hearing on the Motion for Reconsideration and, on January 13, 2020, withdrew its Motion for Reconsideration. (Exh. 80.)

59. The Superior Court's December 18, 2019 denial of the request for a temporary stay stated that the issues with NPS over the LWCF Act "was not the sole ground upon with the Court relied in its earlier ruling." (Exh. 3.) But, as previously noted, the Writ Order failed to address *any* inadequacies in the EIR. And the Writ Order's ruling on the CEQA

categorical exemptions has no bearing on the adequacy of the EIR. It is well-established that an agency can prepare a CEQA document while *also* relying on an exemption. (See e.g., *Santa Barbara County Flower & Nursery Growers Association v. County of Santa Barbara* (2004) 121 Cal.App.4th 864, 873-874 (*Santa Barbara*); *Del Cerro Mobile Estates v. City of Placentia* (2011) 197 Cal.App.4th 173, 179-180 (*Del Cerro*); *Rominger*, *supra*, 229 Cal.App.4th at p. 700; *San Lorenzo Valley Community Advocates for Responsible Education v. San Lorenzo Valley Unified School District* (2006) 139 Cal.App.4th 1356, 1385-1386 (*San Lorenzo*).) The standard of review, inquiry, and findings applicable to CEQA exemptions and an EIR are vastly different. Thus, the Superior Court's ruling in the Writ Order on the District's CEQA exemptions did not excuse the Superior Court from addressing the EIR.

Legal Basis for Relief

60. The Orders are clearly erroneous for the following reasons: (1) the Orders fail to identify the alleged errors in the EIR and do not specify what action the District must take to comply with CEQA (see, e.g., Pub. Resources Code, §§ 21005, 21168.9, subd. (b); (2) the Orders are based on extra-record, post-approval evidence (see, e.g., State CEQA Guidelines, §§ 15381, 15096, subds. (a), (d)-(f)); (3) the Superior Court failed to tailor the remedy to the alleged CEQA violations (see, e.g., Pub. Resources Code, § 21168.9, subd. (b); State CEQA Guidelines, § 15234); (4) the Writ Order erroneously concludes that STP was not required to exhaust its administrative remedies regarding the District's conclusion that the Project was exempt from CEQA (see, *Tomlinson, supra*, 291); and (5) substantial evidence supports the EIR's conclusion that the Project will not have any significant impacts on the environment.

III. PRAYER

WHEREFORE, Petitioner District prays that this Court:

1. Issue an immediate stay of the Orders; and

2. Issue a peremptory writ of mandate and/or prohibition in the first instance (Code of Civil Procedure, sections 1087-1088, 1104-1105) directing Respondent Superior Court to vacate its ruling enjoining all construction activities; or

3. Should it deem such action necessary and appropriate, issue an alternative writ directing respondent Superior Court either to grant the relief specified in paragraph 2 of this prayer or to show cause why it should not be ordered to do so, and upon the return of this alternative writ, issue a peremptory writ as set forth in paragraph 2 of this prayer; and

4. Award Petitioner its costs under Cal. Rules of Court, rules 8.485-8.493; and

5. Grant such other relief as may be just and proper.

Date: February 3, 2020

Respectfully submitted,

BEST BEST & KRIEGER LLP

By:/s/ Lindsay D. Puckett
Tyree K. Dorward
Matthew L. Green
Lindsay D. Puckett
Attorneys for Petitioner and Defendant CARDIFF SCHOOL DISTRICT, a California public school district

VERIFICATION

I, Lindsay D. Puckett, declare as follows:

I am the attorney for Petitioner, Cardiff School District, a public agency. I have read the foregoing Petition for Writ of Mandate and know its contents. The facts alleged in the Petition are within my own knowledge and I know the facts to be true or I am informed and believe that they are true. I verify this Petition based on my familiarity with the relevant facts pertaining the Orders.

I declare under penalty of perjury that the foregoing is true and correct and that this Verification was executed on February 3, 2020**,** at San Diego, California.

/s/ Lindsay D. Puckett
Lindsay D. Puckett

MEMORANDUM OF POINTS AND AUTHORITIES

I. AN IMMEDIATE STAY AND WRIT REVIEW ARE NECESSARY TO CONSIDER ERRONEOUS ORDERS AND PREVENT IRREPARABLE HARM TO THE DISTRICT AND ITS STUDENTS

This Court has authority to issue an immediate stay and grant writ review of the erroneous Orders. (See, e.g., *City of Goleta v. Superior Court* (2006) 40 Cal.4th 270, 275 [Court of Appeal issued immediate stay and granted writ petition reversing trial court's order granting petition for writ of mandate on land use claims].)

As is typical for school modernization and reconstruction projects, construction of the Project was planned to sync with the District's educational calendar. (Exh. 69, pp. 3089-3090.) Namely, as noted above, construction of classroom buildings was scheduled to be completed by the end of August 2020, allowing teachers to move into their classrooms during the Summer of 2020, and have all K-2 students attend the Cardiff School for the 2020-2021 school year. (Exh. 69, pp. 3089-3090.) Further delay of the Project will delay completion of the classroom buildings to the point that students will not be able to move into new classrooms for the 2020/2021 school year. (Exh. 69, p. 3090.) Given the 2020-2021 school year will have commenced by that time, teachers and students will be unable to occupy the new classrooms. (*Ibid*.) Instead, teachers will have to wait to move into their new classrooms until the Summer of 2021, which will result in the Cardiff School's students being forced to continue using aging portable classrooms for *at least* an entire extra school year. (*Ibid*.)

Moreover, only after removal of the portable classrooms can the District begin construction of Building H, another classroom building. (Exh. 69, p. 3090.) Building H, which is currently scheduled to be constructed from August 2020 to April 2021, would be delayed by *at least*

one year (i.e., until April 2022) if the portable classrooms are not removed from the Cardiff School site until the Summer of 2021.(Exh. 69, p. 3090.)

Thus, as a result of the Orders, Kindergarten and first-grade students—between the ages of five to seven years—will be stuck in aging portable classrooms on a campus lacking many basic necessities for the well-being of the students. (Exh. 68, p. 3078; Exh. 69, pp. 3088-3090.) The campus will continue to have no warming kitchen, no food service building, no lunch court, no computer classroom, no reading classroom, no music classroom, no kindergarten classroom restrooms, no indoor auditorium, and no outdoor assembly. (Exh. 68, p.3078; Exh. 69, p. 3089.) The campus will continue to have inadequate extended daycare facilities, inadequate grassy play areas, inadequate hardcourt play areas, a congested drop-off/pick-up area, and inadequate restrooms. (Exh. 68, p. 3078; Exh. 69, p. 3089.) Kindergarteners would have to continue sharing a play area with first graders at the Cardiff School, a condition that is inconsistent with California Department of Education guidelines and not a sustainable operational model for an elementary school. (Exh. 68, p. 3078.) Additionally, second-grade students, typically taught at the Cardiff School, will be forced to continue attending and being taught in portable classrooms at a separate District school. (Exh. 68, p.3078; Exh. 69, p. 3089.)

If the Orders are not stayed immediately, these conditions will persist indefinitely. Indeed, due to the tight construction schedule and the need to ensure student safety—even a slight delay will likely result in students being forced to bear these conditions for an additional year. (Exh. 68, p. 3078; Exh. 69, pp. 3089-3090.) The harm to the well-being and education of these young students will be irreparable and immeasurable.

Allowing the ban on all construction activities to continue indefinitely will also thwart the will of the voters who overwhelmingly approved the bond measure to rebuild and modernize the Cardiff School.

(Exh. 68, p. 3076; Exh. 69, p. 3082.) Instead, the will of a few neighbors and their concerns over private ocean views, masked under the guise of CEQA, will hold the education and well-being of the students hostage. Further, as Project construction costs increase due to delay, funds allocated to benefit the students in the way of new facilities will be lost forever and with nothing to show.(Exh. 69, p. 3090.)

II. THE ORDERS ARE WRONG AS A MATTER OF LAW

A. The Superior Court improperly granted the CEQA writ petition, despite failing to identify any errors in the EIR and improperly relying on extra-record evidence.

Public Resources Code section 21005, subdivision (c), states: "It is further the intent of the Legislature that any court, which finds … that a public agency has taken an action without compliance with [CEQA], *shall specifically address each of the alleged grounds for noncompliance*." (Pub. Resources Code, § 21005, subd. (c), emphasis added.) This mandate is also repeated in Public Resources Code section 21168.9, subdivision (b), explaining that court orders shall be made by "specifying what action by the public agency is necessary to comply with [CEQA]." (See also State CEQA Guidelines, § 15234 [addressing remedy].)

Contrary to CEQA, the Superior Court's ruling, after explaining the perceived errors with the District's CEQA exemption findings, states only:

> Finally, Respondent, as of this ruling, has not resolved the issues over the federal Land and Water Conservation Fund Act issues. It has now been over one year and Respondent's ability to establish acceptable replacement property acceptable to the controlling authorities.

(Exh. 1, p. 9.) There is no mention of the EIR. This failure alone is prejudicial error.

But even assuming these two sentences are intended to specify errors in the EIR, they do not specify what errors occurred or what action is necessary to comply with CEQA. The Superior Court's granting of STP's CEQA petition—despite failing to specify or even find a single error in the EIR—is an abuse of discretion.

What is more, when the District filed an ex parte application seeking clarification of the Superior Court's ruling, the Superior Court refused to provide clarity. (Exh. 2; Exh. 86, p. 3942, line 16 to p. 3943, line 23.) And when the District subsequently sought a temporary stay of the Superior Court's ruling that all construction halt, the Superior Court contradicted what was said in the Writ Order, stating that resolving the federal LWCF Act issues with NPS would not be sufficient to comply with CEQA. (Exh. 3, p. 14.)

In short, the Superior Court failed to specify anything wrong with the EIR. And the only language in the Writ Order that could even possibly be interpreted as applying to the EIR was undermined in the Stay Denial Order.

Further, the Superior Court's reference to the fact that the Grant Boundary Adjustment had not yet been approved in the Writ Order (Exh. 1, p. 9) constitutes an improper reliance on extra-record, post-approval evidence. The District certified the EIR on February 7, 2019. (Exh. 51, pp. 2423 [AR1:002], 2435-2438 [AR5:023-026], 2561 [AR137:4480].) Events that occur *after* the EIR is certified have no bearing on the validity of the EIR because a court reviewing a public agency's CEQA determination is limited to the record of the agency's proceedings up until the approval. (See *Western States Petroleum Ass'n v. Superior Court* (1995) 9 Cal.4th 559, 574.) It is irrelevant whether additional approvals from CEQA responsible agencies are still pending after a public agency certifies an EIR. Indeed, CEQA is specifically designed so that a lead agency completes CEQA

review before other agencies (known as responsible agencies) give approvals. (See State CEQA Guidelines, §§ 15381, 15096, subds. (a), (d)-(f); *Riverwatch v. County of San Diego* (1999) 76 Cal.App.4th 1428, 1450.)

These errors are significant. "When an EIR is challenged as being legally inadequate, a court presumes a public agency's decision to certify the EIR is correct, thereby imposing on a party challenging it the burden of establishing otherwise." (*Sierra Club v. County of Orange* (2008) 163 Cal.App.4th 523, 530.) Here, the Superior Court erred by turning the legal presumption of an EIR's validity on its head, issued a CEQA writ of mandate without finding any errors in the EIR, and improperly relied on extra-record, post-Project-approval evidence.

B. The Superior Court improperly excused STP's failure to exhaust administrative remedies.

Under CEQA, "the exhaustion-of-administrative-remedies requirement set forth in [Public Resources Code section 21177, subdivision (a)] applies to a public agency's decision that a proposed project is categorically exempt from CEQA compliance as long as the public agency gives notice of the ground for its exemption determination, and that determination is preceded by public hearings at which members of the public had the opportunity to raise any concerns or objections to the proposed project." (*Tomlinson, supra*, 54 Cal.4th at p. 291.) Here, the District met these notice and public hearing requirements. Before determining the Project was exempt, the District gave full notice of the grounds for its intended exemption determination and held a public hearing at which members of the public had the opportunity to raise any concerns or objections to the Project. These facts are undisputed.

Further, it is undisputed that neither STP nor anyone else raised a single objection or concern about the District's proposed findings that the Project was categorically exempt from CEQA. That is, the Superior Court

(and STP) failed to provide a single citation or piece of evidence demonstrating that STP or anyone else objected to the District's finding that the Project is categorically exempt from CEQA.

Under the Supreme Court's holding in *Tomlinson*, these facts demand dismissal of STP's CEQA writ petition. (*Tomlinson, supra*, 54 Cal.4th at p. 291; see also *Bridges v. Mt. San Jacinto Community College District* (2017) 14 Cal.App.5th 104, 117 [despite no mention of CEQA exemption in agenda, meeting noticed 72 hours in advance under Brown Act constituted "other opportunity" to raise CEQA objections].)

The Superior Court looked beyond these undisputed facts, however, and created a new exception to the administrative exhaustion requirements out of whole cloth. According to the Superior Court, because the District also prepared an EIR and *voluntarily* emailed all participants in the EIR process a notice that the EIR would be certified at an upcoming hearing (without also specifically referencing the CEQA exemption), STP was excused from exhausting its administrative remedies as to the CEQA categorical exemptions. (Exh. 1, p. 7.) That is, the Superior Court effectively punished the District for doing *more* than CEQA requires.

There is no legal basis for this conclusion—and the Superior Court cites none. To the contrary, the Public Resources Code expressly states that CEQA is not to be interpreted "in a manner which imposes procedural or substantive requirements beyond those explicitly stated in [the statute or regulations]." (Pub. Resources Code, § 21083.1.)

Further, courts uniformly refuse to punish public agencies for voluntarily undertaking more CEQA review than required. (See e.g., *Santa Barbara County, supra*, 121 Cal.App.4th at pp. 873-874 [county did not waive EIR exemption by submitting EIR to Coastal Commission]; *Del Cerro, supra*, 197 Cal.App.4th at pp. 179-180 [agreeing that "the City could defend itself against Del Cerro's claims the EIR was inadequate

under CEQA by asserting CEQA did not apply"]; *Rominger, supra*, 229 Cal.App.4th at p.700 [holding the county had the discretion pursuant to CEQA to both prepare a mitigated negative declaration and rely on a common sense exemption]; *San Lorenzo Valley, supra*, 139 Cal.App.4th at pp. 1385-1386 [upholding school district's categorical exemption determination despite failure to invoke exemption in advance of project approval].)

CEQA does not require *any* notice be given before a public agency finds a project exempt from CEQA. (*San Lorenzo Valley, supra*, 139 Cal.App.4th at pp. 1385-1386 ["CEQA does not provide for a public comment period before an agency decides a project is exempt."].) But, when notice *is* given and a public hearing *is* held—as was done here—the Supreme Court's holding in *Tomlinson* demands that un-exhausted arguments be dismissed.

If STP and the Superior Court think that CEQA's statutory notice requirements are unfair and should require more notice for CEQA exemption determinations, such a remedy lies "on the other side of Tenth Street, in the halls of the Legislature." (*Osborn v. Hertz Corp*. (1988) 205 Cal.App.3d 703, 711.) Because: (i) the District provided notice of the proposed CEQA categorical exemption determination and a public hearing at which the public could comment, and (ii) no one administratively objected to that determination, the Superior Court abused its discretion by not denying STP's CEQA writ of mandate for failure to administratively exhaust remedies.[2]

[2] Even assuming exhaustion was not required—it is—the District cited numerous categorical exemptions that *fully* covered every aspect of the Project. (Exh. 51, pp. 2435-2436 [AR5:023-024]; Exh. 41, pp. 2264-2269.)

C. The Superior Court improperly failed to tailor the remedy.

Although the District believes the Superior Court erred on the merits for multiple reasons, even assuming the Superior Court correctly granted the CEQA petition for writ of mandate, the Superior Court erred by failing to include only those mandates necessary to achieve compliance with CEQA (unfortunately, as explained previously, it is entirely unclear what actions the Superior Court thinks are necessary to achieve compliance with CEQA). The Superior Court should have limited its mandates to specific Project activities that are not in compliance with CEQA. (Pub. Resources Code, § 21168.9, subd. (b).)

Indeed, CEQA gives courts the authority to fashion remedies such that an agency may proceed with project activities during the remand period and states that additional environmental review should only be required as consistent with principles of res judicata. (State CEQA Guidelines, § 15234.) Courts are to exercise "equitable" discretion to allow certain project activities to proceed during the remand period. (*Ibid*.) But, here, the Superior Court's determination to stop every facet of the Project is *in*equitable and an abuse of discretion.

Given the District must act quickly to bring the facilities up to current safety and security standards and avoid escalating costs from delay, any remedy should have allowed the Project to move forward as quickly as possible. This is particularly true given that STP's purpose and CEQA briefing on the EIR has focused entirely on the Project as it relates to the Grant Boundary and the LWCF Act. (Exh. 5, p. 63; Exh. 29, pp. 743-751; Exh. 49, pp. 2404-2410.) As previously discussed, there is no prejudice to STP if work continues outside the Grant Boundary playfield area.

Further, courts routinely use their discretion to form equitable remedies that permit project activities to continue pending compliance with CEQA. (See e.g., *California for Alternatives to Toxics v. Department of*

Food and Agriculture (2005) 136 Cal.App.4th 1 [refusing to issue injunction and leaving to Superior Court determination whether injunction should issue, despite flaws in EIR, because project implementation would not moot consideration of alternatives or mitigation measures]; *City of Santee v. County of San Diego* (1989) 214 Cal.App.3d 1438 [county not barred from continuing to use site for temporary expansion of county jail while adequate EIR was being prepared]; *Laurel Heights Improvement Association v. Regents of University of California* (1988) 47 Cal.3d 376 (*Laurel Heights*).) In *Laurel Heights*, for example, the Supreme Court permitted a university to continue activities at a biomedical research facility, even though the EIR was found inadequate, concluding "there is no evidence the environment is being adversely affected by the present activities"; the defects in the EIR related only to future activity and feasible alternatives; and the university and "the general public might be unduly prejudiced if we were to enjoin the present activities." (*Id.* at pp. 422-424.) The Court reasoned that requiring existing laboratory operations to halt would cause unnecessary costs borne by the taxpayers and disrupt research that could result in lost faculty and funding. (*Id.* at p.424.)

Here, the Superior Court did not even find a defect in the EIR. Considering the irreparable and immeasurable harm that will occur to the District's students as a result of the ruling to stop all Project activities, versus the non-existent harm to STP by allowing work to continue outside the Grant Boundary playfield area, it was an abuse of discretion for the Superior Court to not limit its mandates to specific project activities that are not in compliance and fashion an equitable remedy.

D. The Final EIR complied with CEQA.

As noted above, this Court need not review the EIR to grant the District's requested relief. Nonetheless, should the Court elect to do so, the EIR complied with CEQA mandates and substantial evidence supports the

District's conclusion that the Project will not have any significant impacts on the environment.

STP argued the EIR did not adequately disclose and analyze the Project's impacts related to the Grant Boundary; the EIR should have found a significant impact related to the Grant Boundary requiring mitigation; and the EIR did not adequately analyze impacts related to Recreation and Public Services in light of the required Grant Boundary Adjustment. These arguments are meritless. (Exh. 29, pp. 743-751; Exh. 49, pp. 2404-2410.)

1. The deferential "substantial evidence" standard of review applies.

"CEQA challenges concerning the amount or type of information contained in the EIR, the scope of the analysis, or the choice of methodology are factual determinations reviewed for substantial evidence." (*Santa Monica Baykeeper v. City of Malibu* (2011) 193 Cal.App.4th 1538, 1546.) "[T]he burden is on the party challenging the EIR to show it is inadequate." (*California Native Plant Society v. City of Rancho Cordova* (2009) 172 Cal.App.4th 603, 626 (*California Native Plant*).)

2. The Final EIR adequately discloses and analyzes the Grant Boundary.

The Final EIR complies with CEQA because it adequately discloses and analyzes the Project's impacts related to the Grant Boundary. In May 2018, the District circulated a Notice of Preparation of Draft EIR and Initial Study to determine the scope of environmental issues to be analyzed in the Draft EIR. (State CEQA Guidelines, § 15063; Exh. 51, pp. 2480-2528 [AR8(a):509-594].) Once an agency is committed to preparing an EIR, an initial study is not even required. (State CEQA Guidelines, § 15063, subd. (a).) But an initial study may be used to focus the EIR on environmental effects determined to be significant; identify effects that are not significant;

explain why potentially significant effects were determined not to be significant; and identify the type of EIR that would be appropriate. (State CEQA Guidelines, § 15063, subd. (c)(3).) In contrast to an EIR, an Initial Study is only required to briefly identify the environmental setting. (State CEQA Guidelines, §§ 15063, subd. (d)(2), 15125, subd. (a).) An initial study is only a "preliminary analysis," and the requirements for its contents are not as demanding as those imposed upon an EIR. (State CEQA Guidelines, §§ 15063, 15120, 15365.)

An EIR should focus on potentially significant impacts and may limit discussion of other impacts to a brief explanation of why they are not potentially significant. (Pub. Resources Code, § 21002.1, subd. (e).) Environmental effects screened in an initial study as "clearly insignificant and unlikely to occur" do not need to be discussed in the EIR. (State CEQA Guidelines, § 15143.) An initial study may be attached to the EIR to explain the basis for screening the impact or included in the administrative record. (State CEQA Guidelines, § 15128; *Citizens of Goleta Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 569 [administrative record may provide further support for EIR conclusions].)

Here, the Initial Study and the Final EIR track the checklist questions in State CEQA Guidelines Appendix G. The questions are intended to serve as guidance for lead agencies when establishing thresholds of significance and are not presumptive. (*San Francisco Baykeeper, Inc. v. State Lands Commission* (2015) 242 Cal.App.4th 202, 227; *Save Cuyama Valley v. County of Santa Barbara* (2013) 213 Cal.App.4th 1059, 1068.) In other words, contrary STP's claims, the District was not required to use an Initial Study or any of the questions as standards of significance, nor explain a decision not to use the questions.

To comply with CEQA, the District need only demonstrate that the Final EIR, when looked at as a whole, provides a reasonable, good faith

disclosure and analysis of the Project's environmental impacts. (*California Oak Foundation v. Regents of University of California* (2010) 188 Cal.App.4th 227, 269.) The Initial Study (attached as Appendix 1-1 to the Draft EIR), acknowledges that the "westernmost portion of the site is recognized as outdoor recreational space by the Land and Water Conservation Fund Act." (Exh. 51, p. 2492 [AR8(a):521].) The Initial Study includes subsection (b) of the "Land Use and Planning" checklist question on the Project's consistency with "applicable land use plan, policy, or regulation of an agency with jurisdiction over the project [] adopted for the purpose of avoiding or mitigating an environmental effect." (Exh. 51, pp. 2524-2525 [AR8(a):572-573].) It concludes that the proposed Project improvements would be consistent with the existing land use and zoning but would require a coastal development permit from the City of Encinitas; therefore land use impacts were potentially significant. (*Ibid*.) In contrast, the Initial Study determined that impacts related to Recreation and Public Services would have no impact or a less than significant impact, and therefore would not be analyzed further in the Draft EIR. (Exh. 51, p. 2478 [AR7:481].)

As detailed in the Final EIR, current District staff did not become aware of the Grant until early 2018 and pursued the Boundary Adjustment later that year. (Exh. 51, pp. 2469 [AR7:365], 2536-2538 [AR9:1724-1726].) Thus, though the Land Use section of the Initial Study does not discuss the Project's consistency with the Grant Boundary, the Draft EIR's Section 3 (Environmental Setting), Section 4.2.8 (Project Description), and Section 5.8 (Land Use) devote nearly ten pages to the topic, while Section 2.1 of the Final EIR (Master Response for Proposed Recreational Area/6(F)(3) Land 'Conversion' Issues) devotes an additional ten pages in response to comments on the topic. (Exh. 51, pp. 2443, 2462-2463, 2468-

2477, 2566-2567 [AR7:166, 204-205, 356-357, 364-373]; Exh. 51, pp. 2533-2541 [AR9:1721-1729].)

Thus, STP's allegation that the Project Description in the Final EIR does not reveal the Project's "encroachment into the Park" and its characterization of the Boundary Adjustment as merely "exchanging parkland for a parking lot" is perplexing. (Exh. 29, p. 751.) Only four items are mandatory for a Project Description in an EIR: (1) a detailed map with the precise location and boundaries of the proposed project (see Exh. 51, p. 2444 [AR7:181 (Existing Grant Boundary map)], p. 2447 [189 (demolition plan)], p. 2449 [191 (site plan)], p. 2463 [205 (Proposed Boundary Adjustment Map)]); (2) a statement of project objectives (see Exh. 51, p. 2445 [AR7:187]); (3) a general description of the project's technical, economic, and environmental characteristics (see Exh. 51, pp. 2446-2462 [AR7:188-204]); and (4) a statement briefly describing the intended uses of the EIR and listing the agencies involved with and the approvals required for implementation (see Exh. 51, p. 2465 [AR7:207]). (State CEQA Guidelines, § 15124.) Aside from these four items, the project description "should not supply extensive detail beyond that needed for evaluation and review of the [project's] environmental impact." (*Ibid*.)

Consistent with this criteria, the Boundary Adjustment included within the Project would result in an increase to the Grant Boundary by 2,047 square feet (from 173,173 sf to 175,220 sf), keeping the open space of the park. (Exh. 51, pp. 2462, 2469 [AR7:204, 365].) The Final EIR expands on the Draft EIR's explanation of the "equal value" recreational area that would result with implementation of the Project, in compliance with the LWCF Act, and that would still be available for public use when not in use by the school. (Exh. 51, pp. 2468-2469 [AR7:364-365]; Exh. 51, pp. 2538-2541 [AR9:1726-1729].)

In July 2018, OGALS staff stated that the Project's increased parking and inclusion of parking within the Grant Boundary would be an enhancement; would be safer than the existing curbside parking; and more parking would result in greater community access to the recreational areas. (Exh. 51, p. 2537 [AR9:1725].) The parking increase and the length and width of the pick-up/drop-off areas are required by the City of Encinitas Planning and Fire Departments and the California Department of Education. (Exh. 51, p. 2540 [AR9:1728].)

Accordingly, in analyzing the Project's land use impacts, under Threshold LU-2 of Section 5.8, the Final EIR found that, because there would be some non-recreational improvements that would occur within the Grant Boundary, "the project would require an adjustment to the existing 6(f)(3) boundary called a 'conversion.'" (Exh. 51, pp. 2468-2469 [AR7:364-365].) Contrary to Petitioner's mischaracterization that the District "had not even applied [to OGALS] for a boundary conversion," in July 2018, the District "submitted a final letter describing the history of the site and the District's proposal," and in August 2018 "OGALS submitted the District's information to NPS for preliminary review." (Exh. 51, p. 2537 [AR9:1725]; Exh. 51, pp. 2572-2579 [AR214:15915-15922].) The Final EIR also explains that the District must submit a Proposal Description and Environmental Screening Form (ESF) to provide descriptive and environmental information for NPS review and decision as part of the Boundary Adjustment process. (Exh. 51, p. 2469 [AR7:365]; see also Exh. 51, pp. 2670-2672 [AR294:16921-16923 [email from OGALS requesting completion of form for National Environmental Policy Act (NEPA) process].) This form facilitates a determination as to what type of review is required for the Boundary Adjustment under NEPA and is submitted as part of a formal proposal to NPS by OGALS. (Exh. 51, p. 2469 [AR7:365].) The Final EIR includes Tables 5.8-3 and 5.8-4 comparing the Project

improvements to parts A and B of the ESF, which considers impacts to "[r]ecreation resources, land, parks, open space, conservation areas, recreational trails, facilities, services, opportunities, public access, etc." (Exh. 51, pp. 2470-2476 [AR7:366-372 (Part A, No. 15)].) The ESF states that it "should also be used to document any previously conducted yet still viable environmental analysis if used for this federal proposal." (Exh. 51, p. 2673 [AR294:16925].) OGALS opined the Final EIR could be used to complete the ESF, a draft of which is included in the record. (Exh. 51, p. 2538 [AR9:1726]; Exh. 51, pp. 2676-2716 [AR291:16479-16519].)

"[T]he sufficiency of an EIR is to be reviewed in the light of what is reasonably feasible." (State CEQA Guidelines, § 15151.) The Final EIR properly concluded, based on substantial evidence, the Project would be consistent with the LWCF Act and the requirements for the Boundary Adjustment; thus impacts would be less than significant and no mitigation was required. (Exh. 51, pp. 2476-2477 [AR7:372-373]; see *Schaeffer Land Trust v. San Jose City Council* (1989) 215 Cal.App.3d 612, 618-619 [upheld negative declaration for general plan amendment re-designating site from industrial park use to other mixed uses because it stated that a specific development project would not be approved unless it conformed to city's criteria for traffic level service].) The Final EIR is clear that the Project includes the Boundary Adjustment and land removed from outdoor recreation within the Grant Boundary would be replaced with land of equal utility and value based on objective federal criteria. (Exh. 51, pp. 2464, 2468-2469 [AR7:207, 364-365]; State CEQA Guidelines, § 15381.)

3. No mitigation measures related to the Boundary Adjustment are required.

Contrary to STP's claims, the Boundary Adjustment subject to OGALS and NPS approval is not a mitigation measure because it is inherent to the Project. The legal requirements for the Boundary

Adjustment are dictated by federal law, and unlike mitigation measures, were not created specifically for the Project. Moreover, CEQA allows an agency to adopt a CEQA document and approve a project that is subject to further approval by other agencies.

The term "project" refers to the activity that is being approved and which may be subject to several discretionary approvals by governmental agencies; it does not mean each separate governmental approval. (State CEQA Guidelines, § 15378.) In fact, a "responsible agency" with discretionary approval power over a project cannot take action on a CEQA document and project until the lead agency acts on it first. (State CEQA Guidelines, §§ 15381, 15096, subds. (a), (d)-(f).) Nothing in CEQA requires a lead agency to postpone approval of a project because it is subject to further approval by other agencies. (See *Riverwatch, supra***,** 76 Cal.App.4th at p. 1450 [court accepted deferred analysis for the widening of a highway based on a commitment that an underlying rock quarry project would not go forward until the realignment was approved by Caltrans and constructed].) Thus, there is no requirement for the District postpone action on the Project pending the OGALS/NPS approval, just like there is no requirement for the District to wait for the issuance of the City's coastal development permit (also listed as a necessary approval in the EIR) and no mitigation was required. (Exh. 51, pp. 2524-2525 [AR8(a):572-573].) The Project requires OGALS and NPS approval of the Boundary Adjustment, and the Final EIR goes even farther than that in *Riverwatch* because it analyzes the Boundary Adjustment's compliance with federal criteria for conversions. (Exh. 51, pp. 2470-2476 [AR7:366-372].)

Regulations of general applicability designed to prevent a significant impact from occurring are not considered mitigation measures. (See *Save the Plastic Bag Coalition v. City and County of San Francisco* (2013) 222 Cal.App.4th 863, 881–883 [10-cent fee for providing a compostable or

paper bag that was part of project design considered in determining whether check out bag ordinance was exempt], distinguishing *Salmon Protection & Watershed Network v. County of Marin* (2004) 125 Cal.App.4th 1098, 1104, 1108 [proposed action by project proponent to mitigate or offset environmental impacts was mitigation measure]; *San Francisco Beautiful v. City and County of San Francisco* (2014) 226 Cal.App.4th 1012, 1032 [standard permit review requirements]; *Berkeley Hillside Preservation v. City of Berkeley* (2015) 241 Cal.App.4th 943, 961 [construction traffic management plan required by city's standard conditions of approval].) But where project design features are incorporated, they must be clearly distinguishable from mitigation measures. (*Lotus v. Department of Transportation* (2014) 223 Cal.App.4th 645, 656-658, fn. 8 (*Lotus*) [incorporation of 'special construction techniques' to find no significant impact prevented an adequate analysis of whether mitigation was required].) Unlike *Lotus*, the Final EIR defines the Boundary Adjustment as a component of the Project, compares the Project to a clear threshold of significance (consistency with the LWCF Act and Grant Agreement) and concludes impacts would be less than significant (so no mitigation is required).

4. Inconsistency with Land Use Controls does not require a significance finding.

Despite the Final EIR's exhaustive analysis of the Project's requirement to obtain a Boundary Adjustment, the Project's consistency with the LWCF Act is a social and economic change associated with a contractual agreement outside the purview of CEQA. "[A]n inconsistency between a project and other land use controls does not in itself mandate a finding of significance." (*Lighthouse Field Beach Rescue v. City of Santa Cruz* (2005) 131 Cal.App.4th 1170, 1206-1207; see also *Joshua Tree Downtown Business Alliance v. County of San Bernardino* (2016) 1

Cal.App.5th 677, 695 [any inconsistency between approved retail store and economic goals and policies in community plan adopted to preserve small-town, rural atmosphere, and not to mitigate environmental impacts, did not "implicate CEQA"].) An inconsistency is merely a factor in determining whether a project may cause a significant environmental effect." (State CEQA Guidelines, § 15063, subd. (d)(5).) Effects analyzed under CEQA must be related to a physical change and not just a social or economic change. (State CEQA Guidelines, §§ 15064, subd. (f)(6), 15358, subd. (b), 15378, subd. (a), 15382.)

The proposed project in *Lighthouse*, *supra*, 131 Cal.App.4th at p. 1207, included an amendment to the city's general plan/local coastal program that was "in effect part of the project being considered." (*Ibid*.) The court found an initial study prepared to support a negative declaration failed, as a matter of law, to adequately consider the whole of the project with respect to the impact of unleashed dogs on the environment given that the updated general plan at issue eliminated the original plan's guideline restricting pet leashes (a policy shift). (*Ibid*.) Nonetheless, the administrative record did not contain evidence supporting a fair argument that the revised general plan may have a significant effect on the existing environment as measured against the existing environmental baseline because visitors with both leashed and unleashed dogs had already been using the State Beach extensively. (*Id*. at pp. 1207-1208.) The impact of dogs on the public's use of the beach was a social change outside the purview of CEQA that did not have the potential to degrade the physical environment. (*Id*. at p. 1206.)

Similarly, any impact of the Project on the Grant Agreement, the public's enjoyment of the Grant Boundary, or funding received under the LWCF Act is a social or economic change outside of CEQA. The Grant Agreement states, "the benefit to be derived by the State. . . is the

preservation, protection, and the net increase in the quality of public outdoor recreation facilities and resources [that] are available to the people of the State and of the United States." (Exh. 51, p. 2564 [AR162:14982 (Section II.C)].) Further, the Boundary Adjustment must "assure the substitution of other recreation properties of at leas[t] equal fair market value and of reasonable equivalent usefulness and location" in compliance with the LWCF Act. (Exh. 51, p. 2563 [AR162:14981 (Section II.B)].)

Accordingly, *City of Fremont v. San Francisco Bay Area Rapid Transit District* (1995) 34 Cal.App.4th 1780, 1789-1790 found an EIR for the extension of a transit line was not even required to discuss a transit district's obligation to comply with the LWCF Act, characterizing the omission as a "failure which has no effect on the information in an EIR." (*Id.* at p. 1790.) The court explained, "[t]he fact that moneys from the fund were used to improve Central Park was relevant only because it triggered an obligation from BART to replace any park land it should acquire with similar park land elsewhere." (*Ibid.*) The transit district had already identified the need for replacement parkland required under state law. (*Id.* at pp. 1788, 1790.) Here, the Final EIR specifically identifies the portion of the Project subject to the Grant Agreement administered under the LWCF Act and analyzes the physical impacts related to construction and operation of the uses within the Boundary Adjustment (i.e., replacement parkland) as part of the Project.

5. Substantial evidence demonstrated the Boundary Adjustment will be approved.

The Boundary Adjustment is not only a Project component, but substantial evidence in the record demonstrated the Boundary Adjustment would be accepted by OGALS and NPS. (Exh. 51, pp. 2534-2541 [AR9:1722-1729].) In October 2018, the District received a letter from OGALS stating that it had "submitted the District's preliminary

information to [NPS] regarding the proposal to change the Section 6(f)(3) boundary" and that "[b]ased on NPS review of the District's preliminary information. . . The land being considered as 'replacement land' appears to be eligible." (Exh. 51, pp. 2583-2585 [AR224:16055-16057]; Exh. 51, pp. 2537, 2540 [AR9:1725, 1728].) The Draft EIR released in October 2018 explains changes made to the Project in response to a request by OGALS, such as the inclusion of the entire parking lot and drop-off/pick-up area in the Boundary Adjustment, which OGALS and NPS consider supportive of outdoor recreation. (Exh. 51, p. 2541 [AR9:1729].)

6. The Final EIR adequately analyzes Recreation and Public Services impacts.

Finally, contrary to STP's claims, the Final EIR was not required to find a significant impact to Recreation or Public Services (Parks) in relation to the Boundary Adjustment. (Exh. 29, pp. 743-748.) As a preliminary matter, neither STP nor any other commenters on the Draft EIR, nor STP's Second Amended Verified Petition for Writ of Mandate, specifically challenged the EIR's analysis of Recreation or Public Services. A petition that fails to allege specific facts showing entitlement to relief is subject to general demurrer, or the court may deny the petition out of hand. (*Gong v. City of Fremont* (1967) 250 Cal.App.2d 568, 573; Code Civ. Proc., § 1094.5.)

Even if Petitioner did exhaust, the Boundary Adjustment itself would have no impact that was not already disclosed in the Final EIR's analysis of land use impacts. The "park land" is only treated as such because it is located in the existing Grant Boundary established by the terms of the Grant Agreement. Even with the Grant Boundary, it still remains school property that is, was, and will be used for educational programs within an existing school site. STP criticizes the location of such analysis in the Land Use section as opposed to the Recreation and Public

Services sections of the Final EIR. (Exh. 29, pp. 743-751.) But STP ignores the Final EIR's extensive analysis of the Boundary Adjustment under Land Use, focusing instead on the optional Initial Study and incorrectly concluding the District "eliminat[ed] from its EIR discussion of the project impacts to George Berkich Park." (Exh. 29, p. 748.) STP must describe evidence favorable to the District and explain why it is lacking; failure to do so is fatal to its challenge. (*Latinos Unidos de Napa v. City of Napa* (2013) 221 Cal.App.4th 192, 205; *California Native Plant, supra*, 172 Cal.App.4th at p. 626.)

Under CEQA, a project "may have a significant effect on the environment if it reduces available recreation activities." (*Clews Land & Livestock, LLC v. City of San Diego* (2017) 19 Cal.App.5th 161, 196.) The "Recreation" significance thresholds focus on physical effects that could occur from a project that increases the use of existing parks or includes the construction of recreational activities that could result in physical effects. (Exh. 51, p. 2528 (Initial Study) [AR8(a):579]; Exh. 51, pp. 2478, 2481 (Section 8.1 of Final EIR on Impacts Found Not be Significant) [7:481, 484].) Likewise, the threshold for Public Services asks whether the proposed project would result in substantial adverse physical impacts from additional government facilities, the construction of which could result in significant environmental impacts, in order to maintain performance objectives. This threshold also looks at whether service levels would be acceptable for park services. (Exh. 51, pp. 2526-2527 [AR8(a):577-578].)

The Final EIR analyzed all physical effects that would occur from improvements constructed within the Boundary Adjustment (such as air quality). (Exh. 51, pp. 2566-2467 [AR7:356-357], pp. 2468-2478 [AR7:364-373], p. 2528 [AR8(a):579].) The Recreation section of the Initial Study noted the Project would "improve the school's outdoor recreational spaces, which are recognized under the Land and Water

Conservation Fund Act and are used by the school and the community" and describes the improvements in detail (finding less than significant impact). (Exh. 51, p. 2528 [AR8(a):579].) Under Public Services, the Initial Study explains the Project would not generate a demand for park space (finding no impact). (Exh. 51, p. 2527 [AR8(a):578].) The Final EIR did not analyze these areas further. (Exh. 51, p. 2478 [AR7:481].)

As explained in the Final EIR, the Project would maintain the school's current operation and student population; would only increase the total net number of classrooms by one; and would not change school operating dates or hours. (Exh. 51, p. 2458 [AR7:200]; Exh. 51, p. 2557 [AR20:2291].) Thus, the Project would not require students to use existing neighborhood or regional parks and would enhance existing recreational facilities so that they can be better utilized. (Exh. 51, p. 2528 [AR8(a):579].) The Project's "improvements would not conflict with the integrity of the existing public recreation uses and are not intended to restrict or limit any current public uses." (Exh. 51, pp. 2539-2541 [AR9:1727-1728].) Even so, any allegation the Project would interfere with public enjoyment of the "park land" within the Grant Boundary is a social change outside of CEQA. (*Lighthouse, supra,* 131 CalApp.4th at p. 1207.)

III. CONCLUSION

The educational environment for young elementary-age students is at a critical juncture and, absent an immediate stay of the Orders, these students face irreparable harm. Having been told by the Superior Court that all school construction must stop immediately, with no guidance as to what is wrong with the EIR's analysis, the District is left with no option but to petition this Court for relief to allow essential school facility construction to continue.

For the forgoing reasons, the District requests this Court grant this Petition for Writ of Mandate, an immediate stay of enforcement of the

Orders, or other appropriate relief to allow construction of the Cardiff School to continue.

Date: February 3, 2020

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 8.204(c)(1))

The text of the brief consists of 13,813 words as counted by the Microsoft Word 2010 word-processing program used to generate the brief.

Dated: February 3, 2019

/s/ Lindsay D. Puckett
Lindsay D. Puckett

CERTIFICATE OF SERVICE

At the time of service, I was over 18 years of age and not a party to this action. My business address is 655 West Broadway, 15th Floor, San Diego, California 92101. I certify that on February 3, 2020, I caused the following documents to be served:

1. CARDIFF SCHOOL DISTRICT'S PETITION FOR EXTRAORDINARY WRIT OF MANDATE, PROHIBITION, OR OTHER APPROPRIATE RELIEF; MEMORANDUM OF AUTHORITIES IN SUPPORT THEREOF; and
2. EXHIBITS TO CARDIFF SCHOOL DISTRICT'S PETITION FOR EXTRAORDINARY WRIT OF MANDATE, PROHIBITION, OR OTHER APPROPRIATE RELIEF — VOLUMES 1 THROUGH 23

on the parties, or their counsel of record, by service through either the TrueFiling electronic system, by e-mail service or by personal service, as indicated in the service list below:

Rebecca L. Reed, Esq. Justin Fontaine, Esq. PROCOPIO, CORY, HARGREAVES & SAVITCH LLP 525 B Street, Suite 2200 San Diego, California 92101	***Via TrueFiling, E-mail and Personal Service*** Phone:(619) 238-1900 Email: Rebecca.Reed@procopio.com *Attorneys for Plaintiff and Real Party in Interest SAVE THE PARK AND BUILD THE SCHOOL*
The Honorable Earl H. Maas, III San Diego County Superior Court North County Regional Center Department N-28 325 South Melrose Drive Vista, California 92081	***Via Personal Service (Petition only)*** Phone:(760) 201-8600 *Respondent SUPERIOR COURT*
California Supreme Court 300 South Spring Street Los Angeles, California 90013	***Via TrueFiling***

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on February 3, 2020, at San Diego, California.

/s/ Wanda Roybal
WANDA ROYBAL