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[Fee exempt Pursuant to
Govt. Code § 6103]

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DISTRICT, POWAY DISTRICT BOARD OF EDUCATION; and
8 MARIAN KIM PHELPS, in her capacity as Superintendent

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 COUNTY OF SAN DIEGO - CENTRAL

11
12 PROTECT OUR COMMUNITY NOW, a
California nonprofit public benefit
13 corporation,

14 Petitioner and Plaintiff,

15 v.

16 POWAY UNIFIED SCHOOL DISTRICT, a
California public school district; POWAY
17 DISTRICT BOARD OF EDUCATION; and
MARIAN KIM PHELPS, in her capacity as
18 Superintendent,

19 Respondents and
20 Defendants.

21 COSTCO WHOLESALE CORPORATION, a
Washington profit corporation,

22 Real Party-in-Interest.
23

Case No. 37-2020-00037296-CU-WM-CTL
Civil-Unlimited Jurisdiction

**RESPONDENT’S OPPOSITION TO
VERIFIED PETITION FOR WRIT OF
MANDATE AND COMPLAINT**

(RELATED TO ROA#1)

Judge: Hon. Eddie C. Sturgeon
Dept. C-67
Complaint Filed: October 15, 2020
Trial Date: NONE

24 POWAY UNIFIED SCHOOL DISTRICT, a California public school district; POWAY
25 DISTRICT BOARD OF EDUCATION; and MARIAN KIM PHELPS, in her capacity as
26 Superintendent, (hereinafter collectively, the “District”) hereby opposes the Petition for Writ of
27 Mandate and Complaint (“Writ”) filed by PROTECT OUR COMMUNITY NOW, a California
28 nonprofit public benefit corporation (“POCN”).

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I.**

3 **INTRODUCTION**

4 The Education Code authorizes school districts to pursue the sale or lease of property they
5 no longer need to obtain much-needed funds to support educational programs. Although the
6 Education Code’s process requires school districts to consider community input, it does not
7 obligate school districts to decipher the collective will of the community or acquiesce to the
8 desires of a vocal group of community members. Instead, school districts must consider the needs
9 of its students and its educational programs, along with community input, and make the best
10 decision possible based on these multiple, and sometimes conflicting, needs and desires.

11 POCN constitutes a group of some community members who want to stop the potential
12 development of property owned by the District. To do this, POCN misstates the law by expanding
13 the “community input” requirement to suggest the District must bend to its will. POCN also
14 misrepresents the facts by ignoring the District’s multiple efforts to obtain community input and
15 alleging, in clear contradiction to the facts, that the District already entered into an agreement with
16 Costco Wholesale (“Costco”), when it has not. Simply stated, POCN along with the rest of the
17 community, has had, and will continue to have, the opportunity to provide input regarding the
18 District’s potential agreement with Costco and Costco’s potential development. However, the
19 District ultimately retains the right to take whatever action it deems best of its students and the
20 community as a whole as authorized by the Education Code.

21 **II.**

22 **STANDARD OF REVIEW**

23 POCN seeks a Writ of Mandamus pursuant to Code of Civil Procedure sections 1085 and
24 1094.5. (Writ, page 11, line 27.) When reviewing an action under Code of Civil Procedure
25 (“CCP”) section 1094.5, the independent judgment standard is employed. (*Excelsior College v.*
26 *California Bd. of Registered Nursing* (2006) 136 Cal.App.4th 1218, 1237-38.) “In reviewing an
27 administrative agency decision, [the] trial court is required to exercise its independent judgment on
28 the evidence presented in the administrative hearing, and determine whether the weight of the

1 evidence supports the agency’s decision...” (*Mason v. Office of Administrative Hearings* (2001)
2 89 Cal.App.4th 1119, 1130.) In doing so, a trial court must afford a strong presumption of
3 correctness to the administrative findings, and the party challenging the administrative decision
4 bears the burden of convincing the court that the administrative findings are contrary to the weight
5 of the evidence. (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 816-17.) The independent
6 judgment test is highly deferential. In weighing the evidence, this Court can and should give
7 considerable weight to the public agency’s actions. (*Drummey v. State Bd. of Funeral Directors*
8 (1939) 13 Cal.2d 75, 86.)

9 With respect to reviewing administrative actions pursuant to CCP section 1085, the court’s
10 review is also deferential, requiring that the agency's findings be upheld unless arbitrary,
11 capricious, or entirely lacking evidentiary support. (*State Bd. of Chiropractic Examiners v.*
12 *Superior Court* (2009) 45 Cal.4th 963.) In determining whether a public agency has abused its
13 discretion, a court may not substitute its judgment for that of the administrative board, and if
14 reasonable minds may disagree as to the wisdom of the board's action, its determination must be
15 upheld. (*California Oak Foundation v. Regents of University of California* (2010) 188
16 Cal.App.4th 227, as modified, review denied.) Abuse of discretion refers to situations where an
17 administrative agency either failed to exercise its discretion or where the agency failed to perform
18 an act clearly required by the statute. (*California Water Impact Network v. Newhall County Water*
19 *Dist.* (2008) 161 Cal.App.4th 1464.)

20 **III.**

21 **FACTUAL OVERVIEW**

22 California school districts are authorized to pursue the sale or lease of their real property
23 assets through the “surplus property procedure” set forth in Education Code sections 17455
24 through 17484 (the “Surplus Property Procedure”). As admitted in the Writ, the District received
25 a waiver from the State Board of Education (“SBE”) that waived portions of the Surplus Property
26 Procedure and instead authorized the District to pursue disposing of the Property through a
27 “Request for Proposal” (“RFP”) process. (Writ, page 8, lines 22-23.) The District has complied
28 with the process required by the SBE Waiver and the Education Code as follows.

1 **A. The District Formed an Advisory Committee Which Sought and Obtained**
2 **Community Input**

3 As admitted by the Writ, the District formed a Real Property Advisory Committee (RPAC)
4 to review the District’s properties. (Writ, page 6, lines 26-27.) The stated purpose of this RPAC
5 requirement is to “provide for hearings of community input.” (Education Code section 17390.)
6 Accordingly, the RPAC conducted seven (7) publically noticed meetings during which the
7 community was given the opportunity to comment on the Property. (Declaration of Stephen
8 McLoughlin (“McLoughlin Declaration” ¶5.) RPAC then prepared a Report to the District’s
9 Board of Education which included summarizes of the community input along with the RPAC
10 recommendation to declare the Property surplus and pursue its disposition. (McLoughlin
11 Declaration, ¶4.) This RPAC Report was presented and accepted by the Board during an open
12 session board meeting. (McLoughlin Declaration, ¶6.)

13 **B. The District Conducted Public Presentations to Discuss the Property and Received a**
14 **SBE Waiver**

15 After receiving and considering the RPAC report, the District Board held two (2) public
16 presentations during its open session meetings in which the District staff discussed the options
17 available to the District with respect to the Property and the potential to seek a waiver from SBE.
18 (McLoughlin Declaration, ¶7, 9, and 11.)

19 After these meetings, as admitted in the Writ, the District posted public notices announcing
20 it would hold a public hearing to consider seeking a SBE Waiver for the potential disposal of the
21 Property. (Writ, page 8, lines 14-17) On June 27, 2019, after conducting the public hearing, the
22 Board authorized the District to seek a waiver by adopting a resolution.

23 **C. Pursuant to the SBE Waiver, the District Issued a RFP, Considered Proposers in**
24 **Open Session and Identified Costco as the Most Desirable Proposal**

25 On August 8, 2019, the District held a public presentation during its open session Board
26 meeting regarding the District’s requested SBE Waiver and the proposed RFP process.
27 (McLoughlin Declaration, ¶7.) As admitted in the Writ, SBE granted the District a waiver on
28 November 6, 2019. (Writ, page 8, lines 22-23.) After receiving SBE Waiver, the District Board

1 held another public meeting on November 14, 2019 to discuss the received SBE Waiver and the
2 RFP process. (McLoughlin Declaration, ¶9.) On November 19, 2019, as authorized by the SBE
3 Waiver, the District circulated a RFP instructing all parties interested in acquiring the Property to
4 submit a written proposal on or before February 3, 2020 (McLoughlin Declaration, ¶10.) After
5 releasing the RFP, the District also conducted a “Santaluz Town Hall Meeting” on January 22,
6 2020 during which District staff discussed the Property and the District’s RFP process.
7 (McLoughlin Declaration, ¶11.) The District received three proposals in response to the RFP by
8 the deadline, including a letter of intent from Costco Wholesale (“Costco”). (McLoughlin
9 Declaration, ¶13.)

10 After submitting its proposal, Costco submitted a revised letter of intent (“Costco Revised
11 LOI”). (Declaration of Jenifer Murillo “Murillo Declaration” ¶2 and 3.) Thus, on August 13,
12 2020, the District Board reviewed and discussed the Costco Revised LOI in closed session and
13 approved it as the final terms proposed by Costco. (McLoughlin Declaration, ¶12.) As admitted in
14 the Writ, the District Board also took action in open session by announcing the Revised Costco
15 LOI and noting that “[a]t a future date Board Meeting open session, the Board will be presented a
16 summary of each received final Request for Proposal response, and action may be taken to
17 formally approve the proposal which is most beneficial to the District.” (Writ, page 9, lines 25-
18 27.) The Writ acknowledges the District’s actions, but claims they are “nothing short of
19 remarkable” because they demonstrate the District violated Section 17472. (Writ page 9, lines 25 –
20 page 10, Line 2.) However, as noted below, the SBE Waiver waived Section 17472 from applying
21 to the District. The Costco Revised LOI does not constitute a binding agreement, but instead
22 identifies the key terms Costco proposed to potentially lease the Property for the District’s
23 consideration and negotiation.

24 On September 10, 2020, the District Board held an open session meeting in which District
25 legal counsel presented all three the received proposals’ terms, including Costco’s proposal (the
26 “September Meeting”). (McLoughlin Declaration, ¶13.) The District Board then deemed
27 Costco’s proposal the “most desirable” as required by the SBE Waiver. (McLoughlin Declaration,
28 ¶13.) Thus, the Board delegated authority to the District Superintendent to “negotiate an Option

1 Agreement and Ground Lease between the District and the most desirable proposer, and present
2 such documents to the Board at a later date.” (McLoughlin Declaration, ¶13.)

3 **D. The District Held Another Public Meeting to Discuss the Property, Costco’s Proposal,**
4 **and Further Consider Community Input**

5 On November 4, 2020, the District held an approximately two (2) hour, publically
6 announced community meeting in which District staff discussed the Property, the RFP process,
7 Costco’s proposal, and allowed for, and addressed, public comments and questions. (McLoughlin
8 Declaration, ¶14.) To date, the Board has not approved any binding agreement with Costco.
9 (Murillo Declaration, ¶8.)

10 **IV.**

11 **ARGUMENT**

12 POCN claims that the District “unlawfully identified Costco as the most desirable
13 proposal” for the Property and “approved entering into an Option Agreement and Ground Lease
14 with Costco” “without following the procedures mandated by law.” (Writ, page 12, lines 2-6.) To
15 substantiate this allegation, POCN makes several claims that are simple misstatements of facts and
16 misrepresentations of the law.

17 **A. The District Considered Community Input Throughout the Process as Required by**
18 **the Education Code and the SBE Waiver**

19 POCN first claims that the District “failed, inter alia, to obtain community input and make
20 a decision based on the best interests of the community.” (Writ, page 12, lines 7-8). POCN both
21 misrepresents the community involvement requirement and misstates the District’s actions.
22 Simply stated, the District has obtained, and will obtain, community input regarding the potential
23 development of the Property. As summarized above, the District formed the RPAC which
24 conducted several public meetings in which public input was solicited, considered, and reported to
25 the Board. The Board itself conducted several public meetings and presentations to discuss the
26 Property generally, its options, the SBE Waiver, the RFP, and the proposals, including Costco’s
27 final proposal before it deemed Costco’s proposal the most desirable. Thus, the claim that the
28 District failed to “obtain community input” is demonstrably false.

1 Further, POCN’s suggestion that the District is somehow required to make decisions
2 “based on the best interests of the community” misrepresents the legal requirements. There is
3 nothing in the law or the SBE Waiver that requires the District demonstrate its actions are in the
4 “best interests” of the community. Instead, the District is required to solicit and consider
5 community input and then make a decision considering the various opinions of the community as
6 well as the needs of the District to identify the most desirable proposal, as required by the SBE
7 Waiver.

8 POCN cites to Education Code section 17387 and the SBE Waiver as the basis for its
9 claim that the District must bend to its will as the “best interests of the community,” neither of
10 which require the District to ignore other community interests or the needs of the District.

11 **B. The District Complied With the Community Involvement Requirement of Section**
12 **17387**

13 As stated in the Writ, Education Code section 17387 provides:

14 “it is the intent of Legislature into pursuant to this chapter **provide for community**
15 **involvement** by attendance area at the district level. This community involvement
16 should facilitate making the best possible judgments about using the use of excess
17 school facilities in each individual situation. It is the intent of the Legislature to
18 have the community involved before decisions are made about school closure or
19 the use of surplus space, thus avoiding community conflict and assuring building
20 use that is **compatible** with the community’s needs and desires.” [Emphasis
21 added.]

22 Section 17387 is the introductory section to Article 1.5, Chapter 4 of Division 1 of the
23 Education Code titled “Advisory Committees.” Thus, Section 17387 establishes the intent of the
24 Legislature when it enacted the Advisory Committee chapter of the Education Code. This chapter
25 requires school districts to form Advisory Committees, made up of members of the community, to
26 review the District properties and hold public hearings to involve the community in the District’s
27 decisions. Education Code section 17390 states the purpose of the Advisory Committee is to
28 “provide for hearings of community input.” (Education Code section 17390.)

The District complied with the intent and requirements of the Advisory Committee
regulations. As noted above and admitted in the Writ, the District formed the RPAC which
conducted seven (7) public hearings to receive and consider public input. (McLoughlin

1 Declaration, ¶5.) The RPAC Report, which was presented to the Board and includes the meeting
2 minutes of each meeting, does not conclude or indicate that the community uniformly rejected the
3 development of the Property. (McLoughlin Declaration, ¶4.) Even if the District was somehow
4 able to conclude that the majority of the community does not want the Property developed (which
5 is impossible), the law does not require the District to comply with the will of the majority of the
6 community. Instead, Section 17387 only requires the District to solicit and consider community
7 input to determine if a potential use is “compatible” with its needs and desires.

8 POCN misrepresents Section 17387 by suggesting it requires the District to somehow
9 make decisions “based on the best interests of the community.” The plan language of this Section
10 states that the Legislature implemented the RPAC requirement to “have the community
11 involved...assuring that is compatible with the community’s needs and desires.” The community
12 “interests” are inherently varied, and the District is required to consider the needs of the District
13 and its students; however, the District has simultaneously considered the needs of the
14 “community” which includes all of the District’s constituents, not just the select few community
15 members neighboring the Property. Thus, the Legislature indicated its intent in requiring the
16 RPAC was to “provide community input” so the District can assure the potential property use was
17 “compatible” with the “community’s needs and desires.” The District met this requirement by
18 forming the RPAC which was made up of community members, held several public hearings
19 soliciting public input, and provided reports and updates to the District Board with the community
20 input incorporated and considered.

21 **C. The District Considered the City’s Subarea Plan and Required the Proposers to**
22 **Address It, or Any Other Requirements, With the City**

23 POCN claims that the City’s Subarea Plan is evidence that the District did not consider
24 community input:

25 Given that the Black Mountain Ranch Subarea Plan makes clear that any alternative
26 use to a school at the PUSD Middle School Site required a low density residential
27 use, which a Costco is patently not, it is evident that PUSD could not make the
28 required findings set forth in its SBE waiver and Education Code section 17387.”
(Writ, page 10, liens 25-28.)

1 The Writ notes that the “Subarea Plan” “is a part of the City of San Diego’s General Plan
2 and has the same force and effect as a Municipal Code.” (Writ, page 4, lines 11-12.) The District
3 considered the Subarea Plan, and all other possible Municipal Code and City requirements,
4 throughout the process.

5 The District’s RFP notifies all proposers that the Property may be subject to various City
6 requirements and explicitly states that the proposers will be responsible for complying with all
7 applicable requirements. (McLoughlin Declaration, ¶10.) Further, the Costco Revised LOI states
8 that “Costco will pursue all zoning entitlements, governmental approval and permits, and the like,
9 and the costs for such shall be incurred by Costco.” (Murillo Declaration, ¶5.). Thus, the District
10 made sure Costco is fully aware of the City requirements and committed to seeking the necessary
11 entitlements and approvals from the City for its proposed development of the Property. The City,
12 not the District or POCN, is charged with assessing developments based on the applicable
13 regulations. If Costco is unable to get the necessary approvals (including a vote of the people
14 pursuant to Proposition A which is applicable in the City of San Diego for the rezoning of any
15 such property), the City will not allow it to develop the Property.

16 POCN suggests that the District should/can circumvent the City as arbiter of
17 developments. The District’s designation of Costco’s proposal as “most desirable” does not
18 constitute approval of its development process. Instead, if the District and Costco enter into one
19 or more binding agreements, Costco will have the opportunity to present its proposed development
20 to the City for approval. As with any other zoning requirement, Costco may be able to change the
21 Subarea Plan requirements or get an exemption from the City. The District is not responsible for
22 determining if the City will ultimately approve Costco’s proposed development of the Property.
23 Throughout the City’s property development and rezoning application processes, POCN, and any
24 other interested party, may discuss the proposed development and its application to the Subarea
25 Plan with the City.

26 **D. The District Complied with the SBE Waiver Conditions**

27 POCN also claims the SBE Waiver “made clear that the District was required to maximize
28 the return on the sale or lease of the PUSD Middle School Site (and other PUSD surplus

1 properties) ‘in a manner that best serves its schools *and community* through the RFP process.’”
2 [Emphasis from Writ] (Writ, page 8, lines 23-26.) However, the SBE made no such requirement.
3 Instead, the language quoted in the Writ is from the District’s waiver application itself, which
4 states that the RFP process “will allow the district to maximize the return on the sale or lease of
5 one piece of property in a manner that best serves its schools and community.” (McLoughlin
6 Declaration, ¶8.) The District language reflects its ultimate goal and duty, which is to balance the
7 needs of its schools and the various community needs, which are not uniformly represented by
8 POCN.

9 The SBE Waiver did not create any additional community involvement requirement
10 beyond Education Code section 17387. Instead, the SBE Waiver only includes the following
11 requirements:

12 the proposal the districts’ governing boards determine to be the most desirable shall
13 be selected within 60 days of the public meeting where the proposals were
14 received, and that the reasons for those determinations be discussed in public
session and included in the minutes of the meeting. (McLoughlin Declaration, ¶8.)

15 As noted above, the District held a public meeting on September 10, 2020 in which it presented
16 the received proposals and determined that Costco’s proposal was the “most desirable” proposal.
17 (McLoughlin Declaration, ¶13.). The meeting minutes from the September Meeting discuss the
18 reasons why the District deemed Costco’s proposal the “most desirable” as required by the SBE
19 Waiver. (McLoughlin Declaration, ¶13.) POCN admits that the District held this meeting but
20 claims it was a “sham” because the District “failed to explain how the Costco deal was in the best
21 interests of the community or how the Costco use was compatible with the community needs and
22 desires.” (Writ, page 10, lines 23-24.)

23 However, again, there is nothing in the law or the SBE Waiver that requires the District to
24 determine the collective will of the community or pick the proposal that is “in the best interest of
25 the community.” Instead, the SBE Waiver requires the District to identify the “most desirable”
26 proposal based on a number of factors including the District’s needs and community input, which
27 it did. POCN tacitly acknowledges this analysis but attempts to dismiss it by alleging, without
28 evidence, that the District “presented demonstrably bogus apples-to-orange financial benefit

1 information, grossly and misleadingly overstated the economic benefit of the Costco proposal.”
2 (Writ page 11, lines 1-2.) POCN concludes that the District “could not have meaningfully
3 evaluated the benefit of the Costco proposal against the other proposals without first performing
4 basic value normalizing functions, such as addressing present value of the various proposals.
5 PUSD failed to do any of that.” (Writ, page 11, lines 2-5.) POCN provides no evidence to support
6 its naked assertions. POCN obviously does not like the District’s determination and is attempting
7 to circumvent the District’s right to decide how to use its Property by claiming its decision is
8 “bogus” based on nothing more than the fact that POCN does not like it.

9 **E. The District’s Closed Session Meetings Did Not Violate the Education Code or the**
10 **SBE Waiver**

11 POCN also alleges that the District “engaged in real property negotiations with an
12 interested party or persons without adhering to the competitive bidding process in the absence of a
13 SBE waiver in violation of Ed. Code § 17466 *et seq.*” (Writ, page 12, lines 11-14.) POCN basis
14 this allegation on closed session meetings held before the District obtained the SBE Waiver.
15 (Writ, page 7, lines 32-28.) Specifically, POCN cites to three closed session items on the District
16 Board’s agenda on December 3, 2013, January 17, 2017, and March 14, 2019.

17 POCN claims that these closed session items are evidence that the District “had entered
18 into negotiations with an interested party or parties in closed session in violation of not only the
19 Brown Act but also Education Code section 17466 *et seq.* since the District had not procured a
20 waiver from” SBE. (Writ, page 7, lines 25-28.)

21 This is simply not true. First, POCN again misstates the laws applicable to the District.
22 POCN claims these meetings violate “Education Code section 17466.” However, the SBE Waiver
23 explicitly waived Section 17466 and therefore, it is inapplicable to the District. (McLoughlin
24 Declaration, ¶8.)

25 Further, Government Code section 54956.8 authorizes the District to hold closed session
26 meetings with its negotiators “prior to the purchase, sale, exchange, or lease of real property by or
27 for the local agency to grant authority to its negotiator regarding the price and terms of payment
28 for the purchase, sale, exchange, or lease.” [Emphasis added.] Thus, Section 54956.8 authorizes

1 the District to discuss the potential sale or lease of real property in closed session so the District’s
2 negotiators can confidentially discuss and decide the terms it is willing to consider and accept
3 prior to direct negotiations with any interested parties. (94 Cal. Op. Att’y Gen. 82 (2011)).¹

4 POCN admits that the closed session items did not identify the negotiating parties. (Writ,
5 page 7, lines 20-21.) This is because there were no parties. Instead, these meetings allowed the
6 District to determine the terms it will seek for the potential sale or lease of the Property, as
7 permitted by Section 54956.8, prior to issuing the RFP or engaging in any negotiations. Costco
8 did not attend these closed session meetings and did not negotiate any lease or other agreement
9 related to the Property prior to submitting its original proposal in response to the RFP. (Murillo
10 Declaration ¶6 and 7.) Further, there is nothing in the law, or the SBE Waiver, that prohibits the
11 District Board from holding closed session meetings. The closed session authorization of the
12 Section 54956.8 and the “community involvement” requirement of Education Code section 17387
13 are not mutually exclusive: School districts can plan their negotiation strategy in closed session
14 and then solicit community input publicly.

15 POCN suggests that the District violated the Brown Act with respect to the closed session
16 meetings because the agenda items for these meetings “critically omit the negotiating parties and
17 ‘whether instruction to the negotiator would concern, price, terms of payment or both’” in
18 violation of Government Code section 54954(b). (Writ, page 7, lines 19-22.) POCN’s claims
19 regarding non-compliance with the Brown Act are incorrect and irrelevant to this issue.
20 Government Code section 54954(b) requires “substantial compliance” with the information
21 included in the Board agenda items. If POCN wanted to make a claim with respect to the Brown
22 Act, it was required to comply with the process set forth in Government Code section 54960.2
23 which first requires any interested party to submit a letter to the District within nine months of the
24

25
26 ¹ “we conclude that the real-estate-negotiations exception to the open meeting requirements of the Brown Act permits
27 the closed-session discussion of: (1) the amount of consideration that the local agency is willing to pay or accept in
28 exchange for the real property rights to be acquired or transferred in the particular transaction; (2) the form, manner,
and timing of how that consideration will be paid; and (3) items that are essential to arriving at the authorized price
and payment terms, such that their public disclosure would be tantamount to revealing the information that the
exception permits to be kept confidential.” (94 Cal. Op. Att’y Gen. 82 (2011))

1 alleged violation before filing a claim. (Government code section 54960.2.)² Thus, any Brown
2 Act allegations are irrelevant, improper, untimely, and false.

3 **F. The District Assessed the Property Proposals Publically and in Compliance with the**
4 **Education Code and the SBE Waiver**

5 The Writ also claims that the District “failed to complete with Education Code section
6 17472 (as amended by the SBE waiver) which required PUSD to make public each proposal
7 response to the RFP and to examine them in a public session.” (Writ, page 12, lines 15-16.)

8 Once again, this allegation constitutes a blatant misrepresentation of the District’s Waiver
9 and the law. The SBE Waiver waived specific sections of the Education Code, including Section
10 17472. (McLoughlin Declaration, ¶8.) Thus, POCN’s claim that the District’s actions violated
11 Section 17472 is patently false.

12 Further, the SBE Waiver does not require the District “to make public each proposal
13 response to the RFP and to examine them in public session.” As admitted in the Writ and noted
14 above, the SBE Waiver required the District to identify the “most desirable” and “the reasons for
15 those determinations be discussed in public session and included in the minutes of the meeting.”
16 The District met this requirement. As admitted in the Writ, and stated above, District legal
17 counsel presented a summary of the proposals received in response to the RFP, including Costco’s
18 proposal, in public session, during the District Board’s September 10, 2020 meeting. (Writ, page
19 10, lines 20-22.) POCN admits the District “presented the three response to the RFP” during this
20 meeting, but attempt to dismiss this as a “sham public hearing” without any evidence. Again, just
21 because POCN does not like the conclusion of the Board does not mean the District’s decision is
22 “bogus” or a “sham public hearing.”

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27 ² “The cease and desist letter required under paragraph (1) is submitted to the legislative body within nine months of
28 the alleged violation.” (Cal. Gov’t Code § 54960.2)

1 **G. The “First Offer” Requirement of Education Code Section 17464 Does Not Apply to**
2 **the District’s Potential Lease to Costco**

3 Finally, POCN claims the District “Respondent failed to first offer the property to a group
4 of designated entities for park and recreational purposes depriving them of an opportunity to
5 negotiate for the purchase of the site in violation of Ed. Code § 17464.” (Writ, page 12, lines 21-
6 24.) Section 17464 requires the District to give prior written notice to certain entities before
7 entering into an agreement for “the sale or lease with an option to purchase of real property.”
8 POCN claims the District violated this section because the District “authorized entry into an
9 option agreement with Costco” which includes “a qualified right of first refusal which would
10 allow Costco to ultimately purchase the property.” (Writ, page 11, lines 14-18.)

11 Again, the District has not entered into any agreement with Costco. The “option
12 agreement” mentioned by Costco references a potential agreement that will grant Costco a time
13 period to assess the Property, and work with the City, to determine if its proposed development is
14 feasible and decide whether it wants to proceed with a lease. In other words the “option
15 agreement” will grant Costco an option to lease (not purchase) the Property. The Costco Revised
16 LOI includes a request from Costco for a right of first refusal as follows:

17 Right of First Refusal: Costco would receive a right of first refusal if the Poway
18 Unified School District decides to sell the Property, **after the District follows any**
19 **applicable statutory authority for such sale**, and otherwise complies with any
20 third party existing rights of first refusal. [Emphasis Added.]

21 Again, the Costco Revised LOI does not constitute a binding agreement and therefore, does not
22 obligate the District to enter into a lease with an option to purchase. Even if the District agrees to
23 Costco’s request, the right of first refusal requested by Costco explicitly states that the District will
24 follow any legal requirements (including Section 17464) prior to selling the Property to Costco, if
25 then applicable, prior to selling the Property. Thus, POCN’s claim that the District violated
26 Section 17464 is simply false.
27
28


V.

CONCLUSION

The Education Code, as well as the SBE Waiver, each recognize that community members do not have uniform “needs and desires” and that school districts must consider several factors, including the needs of their students and educational programs, when assessing their properties. Thus, the surplus property procedure allows school districts to solicit and consider the various opinions of the community and then decide the most desirable use of their properties based on various factors. POCN represents a group of community members who obviously do not want Costco to develop the Property. The District is sympathetic to their concerns and considered their input; however, the District is not required to substitute the needs and desires of a few vocal community members for the needs of the District, its students and its education programs, as well as the desires of other community members. As noted above, POCN, and all other community members, will have an opportunity to express their concerns if the District enters into one or more agreements with Costco through the City’s property development and rezoning processes (which will afford POCN and any interested parties years of opportunity to address specific project development concerns). POCN simply has no legal authority to dictate the District’s decision as it is attempting to do here.

Dated: November 12, 2020

ATKINSON, ANDELSON, LOYA, RUUD & ROMO

By: 
Stephen M. McLoughlin
Attorneys for Defendants, POWAY UNIFIED
SCHOOL DISTRICT, POWAY DISTRICT
BOARD OF EDUCATION; and MARIAN KIM
PHELPS, in her capacity as Superintendent

PROOF OF SERVICE

[CCP § 1013; CRC Rule 2.304 - Revised 01/01/07]

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES:

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 12800 Center Court Drive South, Suite 300, Cerritos, California 90703-9364;

On **November 12, 2020**, I served the foregoing document described as:

RESPONDENT’S OPPOSITION TO VERIFIED PETITION FOR WRIT OF MANDATE AND COMPLAINT

on the interested parties in this action by the method indicated below:

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**Attorneys for
Petitioner and
Plaintiff Protect
Our Community
Now**

- BY ELECTRONIC SERVICE VIA ONE LEGAL:** Complying with Local Rule of Court 352, California *Rule of Court 2.253(a)(1)(2)* and *Code of Civil Procedure* § 1010.6, I caused a true and correct copy of the document(s) to be served through One Legal at www.onelegal.com addressed to the parties shown herein appearing on the above-entitled case. The service transmission was reported as complete and a copy of One Legal’s Receipt/Confirmation Page will be maintained with the original document in this office.

Executed on **November 12, 2020**, at Cerritos, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct and, that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Stephanie L. Thomas

