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8 Attorneys for Petitioner and Plaintiff
PROTECT OUR COMMUNITY NOW

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA
10 COUNTY OF SAN DIEGO

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

14 v.

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

19
20 COSTCO WHOLESALE CORPORATION, a
Washington profit corporation,
21
22 Real Party-in-Interest.

Case No. 37-2020-00037298-CU-WMM-CTL

**VERIFIED PETITION FOR WRIT OF
MANDATE AND COMPLAINT**

**[CODE CIV. PROC., §§ 1085, 1094.5,
AND 526A]**

1 abuts Black Mountain Ranch.

2 11. Black Mountain Ranch is comprised by Santaluz, a 3,690 acre development that was
3 approved by the City of San Diego for low residential density of one dwelling unit per four acres of
4 land – and Del Sur which encompasses 1,410 acres. The number of residential units for the entire
5 Black Mountain Ranch subarea was limited to no more than 5,400 dwelling units.

6 12. In 1979, the City of San Diego adopted a tiered growth management system of its
7 lands and classified the entire City as Urbanized, Planned Urbanizing or Future Urbanizing. The
8 latter designation includes a 12,000 acre area stretching from Interstate 5 on the west to the Rancho
9 Penasquitos Community on the east. The Black Mountain Ranch subarea is part of this
10 designation, and its Subarea Plan (or Community Plan) sets forth land use patterns and policies
11 which are intended to guide the long term use and development of the area. The Subarea Plan is a
12 part of the City of San Diego’s General Plan and has the same force and effect as Municipal Code.

13 13. The Black Mountain Ranch Subarea Plan describes Black Mountain Ranch in terms
14 of its “regionally significant open space system” and community design which is a “traditional
15 community with distinct, yet complementary, neighborhoods emphasizing mixed uses and
16 pedestrian friendliness,” which would promote a “rural character” and limit impacts to wildlife.
17 Indeed, the vast majority of the community was designated for parks and open space (67%) as
18 opposed to 29 percent for residential development, 2 percent for schools and 2 percent for
19 commercial and employment uses.

20 14. The Subarea Plan further explains that the land use for Black Mountain Ranch is
21 focused on two villages surrounded by significant open space, recreational amenities, and low
22 density development. “Overall, it is a plan designed to work with the natural environment, to create
23 pleasing neighborhoods and exceptional recreational facilities.”

24 15. A unique and important characteristic of Black Mountain Ranch is its vast open
25 spaces which the City designated for preservation in order to promote regional resource protection.
26 The Subarea Plan explains that the goals of the open space elements in this area are to “maintain
27 natural resources . . . , provide a critical corridor for the regional MSCP open space system that
28 serves as a wildlife linkage between regional parks and preserves, as well as a multi-resource

1 habitat preservation area,” and to “link open space areas with interconnected trails to provide
2 opportunities for recreation, education and visual relief.”

3 16. In furtherance of the community character outlined in the Subarea Plan, the Plan
4 restricts exterior lighting for both private and public facilities. The intensity of exterior lighting is
5 required to be “kept to a minimum to promote a rural character and limit impacts to wildlife which
6 occupy the extensive open space at Black Mountain Ranch” and exterior lights are required to be
7 directed downward.

8 **B. The Poway Unified School District Middle School Site**

9 17. The Black Mountain Ranch (Subarea Plan I) is located entirely within the Poway
10 Unified School District.

11 18. As of the time the Subarea Plan was adopted, and under the terms of the already-
12 approved development within the Black Mountain Ranch Vested Tentative Map and Development
13 Agreement, an agreement was entered into with the District to provide additional funding to it to
14 accommodate the increase in students in the Black Mountain Ranch area. The agreement also
15 provided for new school sites within the Black Mountain Ranch Vested Tentative Map and fair
16 share participation in the future development of new schools.

17 19. The new school sites are designated in the Subarea Plan and include five school
18 sites for future schools, including a portion of a middle school site along the south boundary of the
19 Subarea (the “BMR PUSD Middle School Site”).

20 20. Given that the BMR PUSD Middle School Site is sited near a regional wildlife
21 corridor, the Subarea Plan explains that “fencing/barrier plantings would be required along the site
22 in the south” which would also redirect public access and restrict pet access. “Informational
23 signage and environmental education programs (including monitoring and restoration projects) are
24 required to heighten the awareness of the City’s Multiple Species Conservation Program (MSCP)
25 goals, purpose and needs of Subarea I.”

26 21. The Plan provides that “in the event any of the designated school sites in Subarea I
27 are not ultimately utilized for school purposes, they may be converted to other uses compatible
28 with adjacent areas.” **“In the case of the . . . south middle school sites, uses consistent with the**

1 **Low Density residential designation are appropriate.”** (Emphasis added.) **In other words, if**
2 **the BMR PUSD Middle School Site is not ultimately developed for a middle school, its**
3 **alternative use must be limited to a use akin to low density residential.**

4 22. The BMR PUSD Middle School Site adjoins additional acreage that lies in the
5 Torrey Highlands Subarea Plan to the south of Black Mountain Ranch, which is also a designated
6 middle school site in the Torrey Highlands Subarea Plan (“TH PUSD Middle School Site”).
7 Together with the BMR PUSD Middle School Site and the TH PUSD Middle School Site, PUSD
8 owns 27.22 acres of area designated for a middle school (the “PUSD Middle School Site”).

9 23. 26.71 acres of the PUSD Middle School site is zoned for Agricultural use and .51
10 acres, residential.

11 24. Similar to Black Mountain Ranch, open space in Torrey Highlands is deemed by
12 the City to be integral to the North City Future Urbanizing Area open space network. The Torrey
13 Highlands Subarea Plan Preserve incorporates MSCP lands which provide a large contiguous area
14 of natural open space to support native plants, animals and linkages between large areas of off-site
15 natural open space.

16 25. Torrey Highlands was designed around a functional open space and the
17 implementing principles of the area include, inter alia, providing a critical corridor for the regional
18 MSCP open space system and creating a neighborhood focus through the use of pedestrian oriented
19 design principles and emphasizing bicycle, equestrian and pedestrian trails as the focal point of the
20 community.

21 26. Black Mountain Ranch (Santaluz and Del Sur) property owners are assessed a 1%
22 Proposition 13 Mello-Roos tax based on the purchase price of property in Black Mountain Ranch.
23 The homes in Torrey Highlands are also subject to Mello-Roos. These taxes are used to fund, in
24 part, PUSD schools.

25 **C. PUSD Declares the PUSD Middle School Site “Surplus Property”**

26 27. In 2012, PUSD formed a Real Property Advisory Committee or 7/11 Committee
27 (“RPAC”) to advise the PUSD Board on the use or disposition of PUSD real property not needed
28 for school purposes. The Committee was formed under the requirements set forth in Education

1 Code Sections 17387-17391.

2 28. On May 21, 2012, PUSD declared the PUSD Middle School Site as “surplus
3 property” not needed by the District for school classroom buildings, thus authorizing it to sell the
4 Site or to lease it for a term not exceeding 99 years.

5 **D. PUSD Board of Education Unlawfully Conducts “Real Property Negotiations” in Non-**
6 **Public Closed Sessions Without a Waiver from the Statutory Competitive Bid Process.**

7 29. By declaring the PUSD Middle School Site as “surplus property”, any offer to sell
8 or lease the property was required to be done through an open and public competitive bidding
9 process absent a waiver from the State Board of Education (“SBE”). (See Ed. Code, § 17466 *et*
10 *seq.*) As PUSD admits, the “[b]id process does not allow negotiations with interested parties, but
11 instead Districts must establish the terms of lease or sale and assess bids based on total price.”

12 30. As of today’s date, PUSD maintains a website listing activities of the RPAC,
13 including its meetings in connection with the surplus property. PUSD documents reflect that
14 following the declaration of surplus property on May 21, 2012, the RPAC engaged in a number of
15 closed sessions with “Real Property Negotiators” on December 3, 2013, January 17, 2017 and
16 March 14, 2019, respectively.

17 31. The agendas for the closed sessions specifically refer to Assessor’s Parcel Numbers
18 306-020-32, 306-250-27 and 312-293-11, collectively the PUSD Middle School Site, and
19 designated as the agenda items “options for disposal” of these properties. The agendas also
20 identify PUSD’s “agent negotiator,” but critically omit the negotiating parties and “whether
21 instruction to the negotiator would concern price, terms of payment or both” in violation of the
22 Brown Act, Gov. Code § 54954.5(b). By omitting this material information and referring to the
23 PUSD Middle School Site by APNs, the agendas not only violated the Brown Act open meeting
24 law, but undoubtedly suppressed public interest or inquiry.

25 32. Upon information and belief, PUSD had entered into negotiations with an interested
26 party or parties in closed session in violation of not only the Brown Act, but also Education Code
27 section 17466 *et seq.* since PUSD had not procured a waiver from the competitive bidding process
28 from the State Board of Education as of the dates of the confidential closed sessions.

1 33. A mere two months after the final closed session with “Real Property Negotiators,”
2 the RPAC called a meeting wherein it discussed for the first time a SBE waiver from the
3 competitive bidding process.

4 34. The SBE has special authority by statute to grant conditional waivers of state law to
5 school districts under specified circumstances, upon application by a school district. This authority
6 is intended to ensure that if a school district cannot technically comply with certain requirements
7 such as number of teaching minutes in a day, or provide a specific program certification, the waiver
8 would allow uninterrupted continuity of the public schools, and avoid what might be an impossible
9 compliance situation (e.g., meeting a deadline that has now passed.) Waivers are not meant to skirt
10 public process or transparency.

11 35. If the SBE grants a waiver of state law, the applicant is bound to comply with all
12 conditions or limitations to that waiver. If the conditions are not complied with, the waiver is
13 invalid as are any actions taken under authority of such waiver.

14 36. On June 20 and June 27, 2020, respectively, PUSD posted a notice of public hearing
15 in the San Diego Tribune solely with respect to its proposed SBE waiver of the Education Code
16 establishing a competitive bid process related to the potential sale or lease of surplus property at the
17 PUSD Middle School Site.

18 37. On June 27, 2020, the PUSD Board approved Resolution No. 112-2019 "Approving
19 Poway Unified School District's Request for State Board of Education Waiver" to provisions of the
20 Education Code establishing a competitive bid process related to the potential sale or lease of the
21 PUSD Middle School Site. PUSD noted that the “state process” would be a “public process.”

22 38. On November 6, 2019, the SBE approved PUSD’s waiver from the competitive
23 bidding process with conditions. The SBE conditional approval made clear that the District was
24 required to maximize the return on the sale or lease of the PUSD Middle School Site (and other
25 PUSD surplus properties) “in a manner that best serves its schools *and community* through the
26 RFP process...”, which the District requested SBE find in connection with its waiver. (Emphasis
27 added.) This “community interest” condition built into the SBE waiver is the law applicable to
28 PUSD’s actions with respect to the PUSD Middle School Site (and other surplus properties).

1 39. This requirement is also memorialized at Educ. Code § 17387 which states:

2 It is the intent of the Legislature that leases entered into pursuant to this chapter
3 provide for community involvement by attendance area at the district level. This
4 community involvement should facilitate making the best possible judgments about
5 using the use of excess school facilities in each individual situation. It is the intent
6 of the Legislature to have the community involved before decisions are made about
7 school closure or the use of surplus space, thus avoiding community conflict and
8 assuring building use that is *compatible with the community's needs and desires*.
9 [Emphasis added.]

7 40. The foregoing statute, section 17387, was not waived by SBE. The Black Mountain
8 Ranch and Torrey Highlands community needs and desires are fundamentally reflected in the
9 community plans (or Subarea Plans) referred to herein.

10 41. As a consequence of PUSD's waiver from the otherwise statutory competitive
11 bidding process, PUSD was subsequently (but not before) entitled to pursue requests for proposal
12 for the sale or lease of the PUSD Middle School Site or the exchange of property.

13 42. Following receipt of the SBE Waiver, PUSD wasted no time. The following week,
14 on November 14, 2019, the PUSD Board approved the issuance of a Request for Proposal for the
15 lease, sale or exchange of the PUSD Middle School Site ("RFP"), and on November 19, 2019, the
16 RFP issued with a response deadline of February 3, 2020.

17 **E. PUSD Approves the Costco Deal in Secret without Considering the Other Responses**
18 **to the RFP in Violation of the Education Code and SBE Waiver.**

19 43. Following expiry of the RFP deadline, on August 13, 2020, *in closed session*, the
20 PUSD Board approved a Letter of Intent with Costco Wholesale Companies which outlined the
21 terms of a lease with a right of first refusal. The minutes from the closed session state in pertinent
22 part:

23 In connection with the District's previously issued Request for Proposal for the
24 Property, **the Board took action, by unanimous vote to approve an updated**
25 **Letter of Intent from Costco Wholesale for the proposed Ground Lease of the**
26 **Property, and has directed the negotiation of an appropriate Option**
27 **Agreement and Ground Lease for such transaction. At a future date Board**
28 **Meeting open session, the Board will be presented a summary of each received**
final Request for Proposal response, and action may be taken to formally
approve the proposal which is most beneficial to the District. [Emphasis added.]

44. The foregoing minutes are nothing short of remarkable. Education Code section

1 17472 (as amended by the SBE waiver) required PUSD to make public each proposal in response
2 to the RFP and to examine them in a public session. Moreover, the waiver and Education Code
3 section 17387 required PUSD to consider the community’s best interests in connection with the
4 Costco deal, and separately, to assure that the proposed use of the site was compatible with the
5 community’s needs and desires as set forth in the Black Mountain Ranch Subarea Plan.

6 45. Contrary to PUSD’s foregoing obligations, it not only concealed from the public
7 Costco’s response to the RFP and its examination of it, but went further to approve the LOI and
8 negotiations regarding the option agreement and ground lease with Costco without any public
9 participation. Adding insult to injury, the minutes reflect that PUSD elected to move forward with
10 the Costco deal without even considering the other responses to the RFP. Lastly, the minutes make
11 no mention of the community or its interests, much less how the Costco deal was in the
12 community’s best interests and how the Costco use of the site was compatible with the
13 community’s needs and desires. Moreover, PUSD made no effort whatsoever to ascertain what
14 those interests might be, and made no mention of the Black Mountain Ranch Subarea Plan—the
15 baseline community “interest” document.

16 46. On September 10, 2020, the PUSD Board held yet another closed session, the
17 minutes of which unlawfully state “conference with real property negotiator” without more. The
18 agenda for the closed session states the same in violation of the express requirements of the Brown
19 Act.

20 47. On the same date, the PUSD Board held a sham public hearing where it presented
21 the three responses to the RFP (despite its earlier secret approval of the Costco LOI on August 13,
22 2020). Unsurprisingly, the PUSD Board concluded the meeting with its approval to enter into an
23 option agreement and ground lease with Costco. Here too, PUSD failed to explain how the Costco
24 deal was in the best interests of the community or how the Costco use was compatible with the
25 community’s needs and desires. Given that the Black Mountain Ranch Subarea Plan makes clear
26 that any alternative use to a school at the PUSD Middle School Site required a low density
27 residential use, which a Costco is patently not, it is evident that PUSD could not make the required
28 findings set forth in its SBE waiver and Education Code section 17387. In addition, the PUSD

1 presented demonstrably bogus apples-to-oranges financial benefit information, grossly and
2 misleadingly overstating the economic benefit of the Costco proposal. PUSD could not have
3 meaningfully evaluated the benefit of the Costco proposal against the other proposals without first
4 performing basic value normalizing functions, such as addressing present value of the various
5 proposals. PUSD failed to do any of that.

6 48. Following the September 10, 2020 meeting, PUSD failed to make any of the
7 responses to the RFP public until Plaintiff’s Counsel sent a public records act request to the PUSD
8 after which it finally posted the responses to its website. However, notably, PUSD failed to
9 provide all information upon which it relied in making its decision to approve the Costco deal
10 which was the singular request of the public records act request.

11 **F. PUSD Violated Ed. Code § 17464 and Gov. Code § 54220 by Entering into a Lease**
12 **with an Option to Purchase Without First Offering the PUSD Middle School Site to**
13 **Designated Entities for Park and Recreational Purposes.**

14 49. To this date, PUSD has failed to disclose the terms of its “option agreement” and
15 “ground lease” with Costco to the public. However, it admits on multiple occasions that it
16 authorized entry into an option agreement with Costco. In other documents, PUSD couches the
17 option as a “qualified right of first refusal” which would allow Costco to ultimately purchase the
18 property.

19 50. Education Code section 17464 makes clear that where a school district intends to
20 lease surplus property with an option to purchase, it must first offer the property to a group of
21 designated entities for park and recreational purposes. The entities must be allowed sixty days
22 after receiving notice to respond and are entitled to a negotiation period of ninety days after notice.

23 51. PUSD did not comply with the foregoing statutory requirement, instead committing
24 to a LOI and “option agreement” and ground lease vis-à-vis its foregoing approvals without
25 noticing the designated agencies.

26 **FIRST CAUSE OF ACTION**

27 **(Writ of Mandamus [Code Civ. Proc., §§ 1085 and 1094.5])**

28 52. Petitioner incorporates by reference each and every allegation contained above and

1 below as though the same were set forth in full herein.

2 53. Respondent unlawfully identified Costco as the most beneficial proposal for the
3 disposition of the Surplus Real Property known as the Black Mountain Ranch Southern Site in
4 response to its Request for Proposals, and approved entering into an Option Agreement and
5 Ground Lease with Costco for the lease of the Black Mountain Ranch Southern Site without
6 following the procedures mandated by law as follows:

- 7 • Respondent failed, *inter alia*, to obtain community input and make a decision based on
8 the best interests of the community and assure that the proposed use of the property was
9 compatible with the community's needs and desires as required by state law and the
10 explicit approval condition to do so in the SBE waiver upon which Respondent relies.
- 11 • Upon information and belief, on multiple occasions Respondent engaged in real
12 property negotiations with an interested party or persons without adhering to the
13 competitive bidding process in the absence of a SBE waiver in violation of Ed. Code §
14 17466 *et seq.*
- 15 • Further, Respondent failed to comply with Ed. Code § 17472 (as amended by the SBE
16 waiver) which required PUSD to make public each proposal in response to the RFP and
17 to examine them in a public session. Instead, Respondent secretly conducted its review
18 of the Costco proposal and entered into a LOI with it, approving the negotiations of a
19 ground lease and option agreement and without first considering the other responses to
20 the RFP.
- 21 • Further, Respondent failed to first offer the property to a group of designated entities for
22 park and recreational purposes depriving them of an opportunity to negotiate for the
23 purchase of the site in violation of Ed. Code § 17464.

24 54. For each of the foregoing reasons, Respondent failed to proceed in the manner
25 required by law and committed a prejudicial abuse of discretion in that its decisions are not
26 supported by the findings and the findings are not supported by the law. As a consequence, each of
27 the foregoing reasons independently compels setting aside the District's August 13, 2020 and
28 September 10, 2020 approvals set forth above.

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SECOND CAUSE OF ACTION

(Taxpayer Waste [Code Civ. Proc., § 526a])

55. Petitioner incorporates by reference each and every allegation contained above and below as though the same were set forth in full herein.

56. Respondent is prohibited from engaging in any “illegal expenditure of, waste of, or injury to, the estate, funds, or other property of” Respondent pursuant to Code of Civil Procedure section 526a.

57. Respondent engaged in taxpayer waste by, *inter alia*, agreeing to enter into an Option Agreement and Ground Lease with Costco for the disposition of the Black Mountain Ranch Southern Site without complying with the statutorily mandated requirements and without fulfilling the obligations set forth by the California Department of Education.

58. Respondent’s actions as described herein constitute waste and are in violation of Code of Civil Procedure section 526a thereby entitling Petitioner to an injunction preventing Respondent from entering into the Ground Lease with Costco until all Respondent’s full compliance with all applicable laws and regulations.

THIRD CAUSE OF ACTION

(Declaratory Relief)

59. Petitioner incorporates by reference each and every allegation contained above and below as though the same were set forth in full herein.

60. An actual and substantial controversy has arisen between Plaintiff and Respondent with respect to the validity of the actions taken by PUSD.

61. Plaintiff desires a judicial determination with respect to the legal force and effect of the actions taken by PUSD. Such declaration is necessary at this time so that Plaintiff and PUSD can ascertain the legal force and effect of the actions taken by PUSD, and is appropriate because it will obviate the need for future legal action between the parties regarding the same subject matter.

PRAYER FOR RELIEF

WHEREFORE, Petitioner prays for relief as follows:

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1. Alternative and peremptory writs of mandate commanding Respondent to:
 - (a) Vacate its determination and approval of the Most Beneficial Proposal and Specific Proposal Terms for the Black Mountain Ranch Southern Site;
 - (b) Vacate its approval to enter into an Option Agreement and Ground Lease with Costco for the Black Mountain Ranch Southern Site;
 - (c) Vacate the Option Agreement and Ground Lease with Costco for the Black Mountain Ranch Southern Site.


2. An injunction prohibiting Respondent from entering into the Ground Lease with Costco until Respondent has fully complied with all applicable laws and regulations;

3. A judicial declaration that PUSD’s approval of the Most Beneficial Proposal and Specific Proposal Terms for the Black Mountain Ranch Southern Site, and its approval to enter into an Option Agreement and Ground Lease for the Black Mountain Ranch Southern Site are invalid;

4. Petitioner also seeks the following relief:
 - (a) For costs of suit incurred herein;
 - (b) For an award of attorneys’ fees pursuant to Code of Civil Procedure section 1021.5; and,
 - (c) For such other and further relief as the Court deems just and proper.

DATED: October 15, 2020

PROCOPIO, CORY, HARGREAVES &
SAVITCH LLP

By: 

John C. Lemmo
Rebecca L. Reed
Justin M. Fontaine
Attorneys for Petitioner and Plaintiff
PROTECT OUR COMMUNITY NOW

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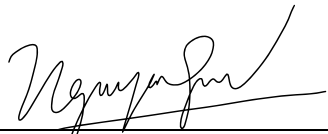
VERIFICATION

I have read the foregoing Verified Petition for Writ of Mandate and Complaint for Taxpayer Waste and know the contents thereof.

I am a Board Member and authorized representative of Protect Our Community Now, a California nonprofit public benefit corporation, Petitioner in this action, and I am authorized to make this verification for and on its behalf. The matters stated in the foregoing documents are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

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

Executed this 15th day of October, 2020, at San Diego, California.



Gianni Nguyen