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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 Petitioner and Plaintiff,

13 v.

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

17 Respondent and Defendant.
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22 COSTCO WHOLESALE CORPORATION, a
Washington profit corporation,

23 Real Party-in-Interest.
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Superior Court of California,
County of San Diego

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Case No. 37-2020-00037296-CU-WM-
CTL

**PETITIONER PROTECT OUR
COMMUNITY NOW'S REPLY BRIEF
IN SUPPORT OF EX PARTE
APPLICATION FOR TEMPORARY
RESTRAINING ORDER AND ORDER
TO SHOW CAUSE RE:
PRELIMINARY INJUNCTION**

IMAGED FILE

Date: November 20, 2020
Time: 9:00 A.M.
Dept: C-67
Judge: Hon. Eddie C. Sturgeon

Complaint Filed: October 15, 2020
Trial Date: Not Set

1 Petitioner PROTECT OUR COMMUNITY NOW (“POCN”), respectfully submits the
2 following Reply Brief In Support of Its Ex Parte Application For Temporary Restraining Order
3 And Order To Show Cause Re: Preliminary Injunction, for which Respondents POWAY UNIFIED
4 SCHOOL DISTRICT (“PUSD”) erroneously entitled their opposition brief “Brief in Opposition to
5 Verified Petition for Writ of Mandate and Complaint relating to ROA #1”.

6 **I. INTRODUCTION**

7 Preliminarily, PUSD’s brief entitled “Opposition to Verified Petition for Writ of Mandate
8 and Complaint” fails to address the elements of the matter at hand—a temporary restraining
9 order/preliminary injunction. POCN anticipates that the Court will nonetheless accept it as an
10 opposition to its motion; however, PUSD makes no argument as to why it is not reasonably
11 probable that POCN will prevail on the merits (it does not even mention POCN’s Taxpayer Waste
12 Claim), nor does it address the balancing of the harms.

13 As is demonstrated herein and POCN’s moving papers on indisputable evidence (official
14 records of the District itself), it is more than reasonably probable that POCN will prevail on the
15 merits of both its Writ and Taxpayer Waste claims. Further, given that this matter concerns the
16 disposition of valuable real property which is held in trust for the public, POCN will suffer the
17 greater injury if an injunction does not issue. It is well settled that school districts like PUSD hold
18 public school property in trust for the State. As articulated by our Supreme Court: “The beneficial
19 ownership of property of the public schools is in the state.” (*Hall v. City of Taft* (1956) 47 Cal.2d
20 177.) Thus, it follows that school districts are deliberately constrained by law to dispose of
21 “surplus” property—land truly not and never needed for public school use—only in an open and
22 public manner such that community interests are fulfilled. PUSD has acted deliberately to avoid
23 public knowledge and scrutiny of its secret effort to convey by long term lease and option
24 agreement, property dedicated to public middle school use, to a specific private business interest:
25 Costco.

26 For purposes of this Motion, POCN will not address PUSD’s defenses to its Brown Act
27 violations and other issues set forth in POCN’s Petition for Writ of Mandate and Complaint which
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1 were neither raised in POCN’s moving papers and/or are irrelevant to the injunction analysis,
2 reserving its right to do so in connection with a hearing on the merits of its claims.

3 **A. IT IS REASONABLY PROBABLE THAT POCN WILL PREVAIL ON THE**
4 **MERITS OF ITS WRIT AND TAXPAYER WASTE CLAIMS SINCE PUSD**
5 **PLAINLY FAILED TO COMPLY WITH ITS STATUTORY RFP**
6 **REQUIREMENTS.**

7 It must be first said that PUSD is a public agency – not a private property owner or private
8 developer; and the property at the heart of this lawsuit is held by PUSD for the benefit of the
9 public. (See, *Hall v. City of Taft*, supra.) Therefore, unlike a private property owner, PUSD cannot
10 dispose of its property without strictly adhering to Education and Government Code requirements
11 and procedures. In this case, the property at issue is 27.22 acres of sensitive open space, mostly
12 agricultural zoned land adjacent to a wildlife corridor that the City of San Diego has earmarked as
13 regionally important, and in its Community Plan (which is municipal code), made clear that in the
14 event the land is not developed for a middle school site, the property must be used solely for a use
15 akin to no more than low density residential. Pl. NOL Exs. 7 p. 2 and 8 pp. 31, 37 and 21.

16 Contrary to PUSD’s bombast, POCN has not contended that PUSD must “decipher the
17 collective will of the community” or to “bend to its will” despite PUSD’s many assertions in its
18 opposition briefing. Instead, POCN is merely asking that PUSD follow the law – the statutory
19 process for disposing of school property that is held in public trust; and, as it must, assure that
20 Costco is compatible with the Black Mountain Ranch community’s needs and desires.

21 As outlined in POCN’s opening brief, PUSD was required to do, inter alia, the following in
22 connection with the disposal of the Black Mountain Ranch site—but it has ignored all of them:

- 23 • maximize the return on the sale or lease of the property “in a manner that best serves
24 its schools and the community through the RFP process”; (SBE Waiver Pl. NOL
25 Ex. 11);
- 26 • make good on PUSD’s promise that it would “work closely with legal counsel *to*
27 *assure that the process is fair and open*” (SBE Waiver Pl. NOL Ex. 11, p. 4);
- 28 • assure a building use that is compatible *with the community’s needs and desires*
(Ed. Code § 17387); and
- make each response to the RFP public and *to examine each response in a public*
session (Ed. Code § 17472 (as amended by the SBE waiver).

1 The reason for the instant motion is simple. On August 13, 2020 PUSD took the following
2 actions in closed session (without any public input), as indisputably demonstrated by the official,
3 Board-adopted minutes of its actions:

4 (i)n connection with the District’s ... Request for Proposal... ***the Board took***
5 ***action by unanimous vote to approve*** an updated Letter of Intent form Costco
6 Wholesale for the proposed Ground Lease of the Property, ***and has directed the***
7 ***negotiation of an appropriate Option Agreement and Ground Lease for the***
8 ***transaction.*** At a future Board 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 the most beneficial to
the District. Pl. NOL Ex. , p. 3 ¶ 2.7a [Emphasis added].

9 Germane to the motion before the Court, the foregoing minutes are the ***very first time*** that
10 “Costco” is mentioned in ***any*** PUSD public document – and that mention pertains to a closed
11 session (i.e., non-public) discussion without any public notice or participation.

12 Following the August 13, 2020 closed session meeting, on September 10, 2020 in public
13 session (without revealing the actions it took in closed session), PUSD notified the public that it
14 had selected and acted upon the Costco deal over the two other proposals for the land. Pl. NOL Ex.
15 20, p. 7 ¶ 7.3.

16 The next thing PUSD did was hold a “FAQ Town Hall” on November 4, 2020 (which was
17 scheduled and conducted after this lawsuit was filed) and which was not a hearing noticed under
18 the Brown Act. See Pl. NOL Ex. 26.¹ PUSD does not contend (nor could it) that the “FAQ Town
19 Hall” was intended to consider the community’s needs and interests in connection with the disposal
20 of the property to Costco.

21 The foregoing is the entire PUSD public record as it relates to the selection of Costco for
22 the disposal of the Black Mountain Ranch site. On its face, it is readily evident that PUSD utterly
23 failed to comply with its statutory obligations when it acted to enter into a letter of intent with
24 Costco and directed the negotiation of a ground lease and option agreement for what it called “the
25 transaction”. Pl. NOL Ex. , p. 3 ¶ 2.7a.

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27
28 ¹ See <https://youtu.be/WcvWip8nGZo>.

1 **1. The August 13, 2020 Closed Session Selection of Costco Violated the Law.**

2 First, in the August 13th closed session, PUSD evaluated Costco’s response to the RFP
3 without making the response public, and without examining the response in a public session in
4 violation of Ed. Code § 17472 (as amended by the SBE waiver). Indeed, PUSD first made the
5 responses to the RFP available to the public *only after* POCN’s attorney issued a public records act
6 request on the eve of filing this lawsuit. (See Declaration of Rebecca L. Reed in Support of Ex
7 Parte Application for Temporary Restraining Order; Pl. NOL Exs. 21-24).

8 Making matters worse, PUSD accepted a “revised LOI,” which logically presupposes at
9 least one prior or initial (still not public) LOI which is not referenced in any PUSD public record.
10 As such, it is axiomatic that PUSD considered Costco’s response to the RFP before the closed
11 session on August 13 without any public notice or public participation. PUSD went further to
12 direct the negotiation of a lease and purchase agreement with Costco – and Costco alone. These
13 acts were carried out without providing the community any notice that PUSD was considering
14 Costco or that Costco had even responded to the RFP. As such, they not only violate Ed. Code §
15 17472 and the District’s promise to carry out a fair and open RFP process, they also belie the
16 District’s summary contentions in this litigation that it considered public input when it selected
17 Costco.

18 Moreover, the August 13, 2020 minutes make no mention of the community, much less
19 how a Costco use would be compatible with the community’s “needs and desires” in violation of
20 the District’s SBE waiver and separately Ed. Code § 17387.

21 These facts alone justify the issuance of an injunction. Indeed, they are egregious and
22 indefensible such that PUSD ostensibly believed it necessary to half-cite and mischaracterize the
23 actions take on August 13, 2020; and falsely claim that the State Board of Education waived its Ed.
24 Code § 17472 requirements to make the responses to the RFP public and to examine them in
25 public.

26 It is instructive to examine what PUSD has stated to the Court, as compared to what the
27 Board-approved minutes convey, in the context of the law. PUSD speciously explains to the Court
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1 that "...on August 13, 2020, the District Board reviewed and discussed the Costco Revised LOI in
2 closed session and approved it as the final terms proposed by Costco...As admitted in the Writ, the
3 District Board also took action in session by announcing the Revised Costco LOI and noting '(a)t a
4 future date Board Meeting open session, the Board will be presented a summary of each received
5 final Request for Proposal response, and action may be taken to formally approve the proposal
6 which is the most beneficial to the District." Opp. P. 8:11-17. Similarly, in PUSD's attorney's
7 declaration — notably the only declaration filed on behalf of PUSD in opposition to the motion —
8 he conclusively declares "(o)n August 13, 2020, the District approved the revised letter of intent
9 submitted by Costco (the "Costco Revised LOI") and announced its approval in open session."
10 Declaration of Stephen McLoughlin ¶ 12.

11 In other words, PUSD claims that it merely "announced" or approved a "Revised Costco
12 LOI" on August 13, 2020. Simply put, that contention is absurd. PUSD did not merely approve a
13 revised LOI as it contends in its briefing, it "directed the negotiation of an appropriate Option
14 Agreement and Ground Lease for the transaction." This was a Board-level action directing the
15 Superintendent, staff and consultants to make this "transaction" happen. Stating the obvious, a
16 property owner does not negotiate an option agreement and ground lease "for (a) transaction"
17 unless it has selected the lessee and buyer.

18 Lastly, PUSD is flatly wrong that it was waived out of its public process requirements set
19 forth in Ed. Code § 17472. The State Board of Education modified the statutory requirements by
20 removing the strikethrough language below, *but fully maintained the balance of the statute here*
21 *at issue*, in bold.

22
23 **At the time and place fixed in the resolution for the meeting of the governing**
24 **body, all [sealed] proposals which have been received shall, in public session,**
25 **[be opened], examined, and declared by the board. [~~Of the proposals submitted~~**
26 **~~which conform to all terms and conditions specified in the resolution of~~**
27 **~~intention to sell or to lease and which are made by responsible bidders, the~~**
28 **~~proposal is the highest, after deducting therefrom the commission, if any, to~~**
~~be paid a licensed real estate broker in connection therewith, shall be finally~~
~~accepted, unless a higher oral bid is accepted or the board rejects all bids].~~

1 PUSD indisputably failed to follow Education Code § 17472, and offers no excuse except
2 the false assertion that the State Board waived the public process requirements. Considering that
3 there is no such waiver and obvious violations of the law on August 13, 2020, it is reasonably
4 likely that POCN will succeed on its Writ claim to set aside the August 13, 2020 approvals, and
5 separately, its taxpayer waste claim given that the disposal of the Black Mountain Ranch site in
6 derogation of the foregoing statutory requirements constitutes waste. See e.g. *Blair v. Pitchess*
7 (1971) 5 Cal. 3d 257, 285; *Wirin v. Horrall* (1948) 85 Cal. App. 2d 497, 504-505.

8 **2. The September 10, 2020 Public Hearing Was a Sham and Violated the Law.**

9 The September 10, 2020 can only be described as a sham. This is true since PUSD
10 failed to disclose to the public its actions taken on August 13, 2020 and instead, purported to
11 review all of the responses to the RFP in that public meeting and at the end, unsurprisingly selected
12 Costco as the most beneficial. As was the case with the August 13 closed session meeting, PUSD
13 made no mention of the community, its needs or interests or the Black Mountain Ranch
14 Community Plan – the very document that defines the City’s intent for the community and the
15 Black Mountain Ranch site specifically.

16 In this litigation, PUSD claims that it considered the Black Mountain Ranch Community
17 Plan (Subarea Plan), but only in connection with *Costco’s* zoning requirements. Opp. P. 12:2-15.
18 As mentioned above, PUSD is not a private property owner – it is a public agency with statutory
19 requirements in connection with its disposal of property held in trust for the benefit of the public—
20 a statewide concern. These requirements include independently assuring that the “building use” –
21 here Costco - is “compatible with the community’s needs and desires.” See Ed. Code § 17472. The
22 Community Plan that governs Black Mountain Ranch dictates that any use other than a middle
23 school must be akin to a low density residential use, which is not refuted by PUSD. A Costco big
24 box retail store and gas station with high density housing are not likely to meet this requirement.
25 Significantly here, PUSD did nothing to ascertain any compatibility with community needs and
26 desires. To the contrary, PUSD appears to have deliberately concealed its efforts until questioned
27 after it took action.

1 For the above reasons, the action taken on September 10, 2020 violated the District’s SBE
2 waiver and separately Ed. Code § 17387. For these additional reasons, it is reasonably likely that
3 POCN will succeed on its Writ and taxpayer waste claims.

4 **3. PUSD has Not Produced Any Evidence that It Complied with Its Statutory**
5 **Obligations.**

6 The only “evidence” proffered by PUSD to show that it satisfied its statutory obligations is
7 a self-serving conclusion that “the District ...considered the needs of the ‘community’ which
8 includes all of the District’s constituents...” (Opp. P. 11: 11-15); and its contention that PUSD
9 conducted “seven (7) public hearings to receive and consider public input” Opp. p. 10:27-28.

10 As mentioned, not one PUSD Board member or employee filed a declaration in support of
11 PUSD’s opposition. Instead, its attorney filed a declaration purporting to declare what PUSD did
12 relative to the disposition of the Black Mountain Ranch site. Not only is that declaration
13 objectionable for the obvious reasons, the declaration fails to provide any actual facts that support
14 the conclusion that PUSD “considered the needs of the community,” which begs the question,
15 where is the actual evidence – the who, what, when, where, why? What did PUSD do to consider
16 the needs of the community? In the same vein, PUSD omits any explanation of what it did to
17 assure that the Costco building use is compatible with the community’s needs and desires as
18 required by Ed. Code § 17387.

19 Further, the contention that PUSD held seven public meetings in connection with the
20 disposition of the Black Mountain Ranch site is outright specious. As PUSD’s brief makes clear,
21 all of the public hearings it conducted but one – some of which were 8 years prior to PUSD’s
22 selection of Costco - related to declaring the Black Mountain Ranch surplus property and its
23 decision to pursue a waiver from the competitive bidding process. The *only* public hearing after
24 the RFP issued which concerned the disposition of the Black Mountain Ranch site was on
25 September 10, 2020 – after PUSD had already reviewed Costco’s RFP response in closed session,
26 accepted an original LOI and an amended LOI with Costco and decided to negotiate a ground lease
27 and option agreement with Costco exclusively.

1 Given PUSD’s derogation of its statutory obligations in approving the Costco deal, there is
2 more than a reasonable probability that Plaintiff will prevail on the merits of its claims in which
3 case, Plaintiff is entitled to an order setting aside PUSD’s approvals of the Costco deal under CCP
4 § 1094.5. In that event, PUSD is without authority to dispose of the Black Mountain Ranch
5 property until it complies with its statutory obligations. Separately, the disposal of rare and
6 environmentally significant property in Black Mountain Ranch in violation of PUSD’s statutory
7 obligations constitutes taxpayer waste pursuant to CCP § 526(a), entitling Plaintiff to an injunction.

8 **B. THE BALANCING OF THE HARMS WEIGHS HEAVILY IN POCN’S FAVOR.**

9 POCN respectfully requests an injunction restraining PUSD from entering into any
10 agreements with Costco in connection with its RFP for the Black Mountain Ranch, including the
11 actions PUSD took on August 13, 2020 and separately, September 10, 2020 until the merits of this
12 case are decided. The forthcoming disposal of the Black Mountain Ranch property, which PUSD’s
13 counsel represented at the originally scheduled temporary restraining order hearing would occur on
14 December 4, 2020, is the textbook irreparable injury that warrants an injunction until the Court can
15 decide the merits of this case. See Civ. Code § 3387.

16 Notably, PUSD did not discuss the balancing of the harms element of the injunction
17 analysis, including how it would be harmed if an injunction issued. Indeed, since both PUSD and
18 Costco have declared that the LOI is not binding, there is no harm to PUSD in the event the Court
19 issues an injunction until Petitioner’s claims can be heard on the merits. In contrast, the disposal of
20 PUSD’s present possessory interest (and ultimately ownership) in 27.22 acres of land in the heart
21 of the Black Mountain Ranch community—beneficially owned by the state for the benefit of the
22 public school system—would cause POCN – a community based group representing hundreds of
23 Black Mountain Ranch residents - to suffer substantial harm. For these reasons, the harm to POCN
24 greatly outweighs any harm to PUSD should an injunction not issue.

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II. CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests the Court enter an injunction restraining PUSD from entering into any agreements with Costco in connection with its RFP for the Black Mountain Ranch site, including the actions PSUD took on August 13, 2020 and separately, September 10, 2020.

DATED: November 16, 2020

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