

1 KEVIN P. BUNDY (State Bar No. 231686)
GABRIEL M.B. ROSS (State Bar No. 224528)
2 ORRAN G. BALAGOPALAN (State Bar No. 341508)
SHUTE, MIHALY & WEINBERGER LLP
3 396 Hayes Street
San Francisco, California 94102
4 Telephone: (415) 552-7272
Facsimile: (415) 552-5816
5 bundy@smwlaw.com
ross@smwlaw.com
6 obalagopalan@smwlaw.com

7 Attorneys for Petitioner and Plaintiff
PASS ACTION GROUP

8 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
9 **COUNTY OF RIVERSIDE, RIVERSIDE HISTORIC COURTHOUSE**
10

11 PASS ACTION GROUP,

12 Petitioner and Plaintiff,

13 v.

14 CITY OF BANNING; CITY COUNCIL
15 OF THE CITY OF BANNING; and DOES
1-20,

16 Respondents and Defendants.
17

18 SUN LAKES HIGHLAND, LLC;
19 CREATION EQUITY, LLC; and DOES
21-40

20 Real Parties in Interest.
21

Case No. **CVRI2201482**

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

(California Environmental Quality Act,
Pub. Resources Code §§ 21168, 21168.5;
Code Civ. Proc. §§ 1085, 1094.5)

22 **INTRODUCTION**

23 1. This action challenges the February 17, 2022 approval of the Banning Point
24 Project (“Project” or “Banning Point Project”) by Respondents City of Banning and the City
25 Council of the City of Banning (collectively, the “City”). The City’s approval of the Project
26 violated the California Environmental Quality Act (“CEQA”), Public Resources Code section
27 21000 et seq., the CEQA Guidelines, title 14, California Code of Regulations, section 15000 et
28 seq., due process, the state Planning and Zoning Law, and the Banning Municipal Code.

1 2. The Project consists of a Tentative Parcel Map and Design Review authorizing
2 subdivision of the underlying parcel and construction of an approximately 600,000 square foot
3 warehouse building, with 150,000 square feet dedicated to highly polluting cold-storage use.
4 The City’s findings in support of the Project also assume the Project will include six retail
5 buildings. The Project site is adjacent to the Sun Lakes Country Club (“SLCC”), a 55-and-over
6 community occupied by thousands of seniors, all of them “sensitive receptors” to noise and air
7 pollution. The Project site is also adjacent to The Lakes, an assisted living and memory care
8 facility, and is less than a mile from the Four Seasons, another 55-and-over community. The
9 Project would send almost 300 diesel trucks through these communities each day, worsening the
10 disproportionate pollution burden already borne by Banning residents. The Project would also
11 exacerbate the severe traffic congestion in the area and inhibit the ability of first responders to
12 provide rapid, live-saving care to nearby community members in the event of an emergency,
13 including one occurring at the Project site.

14 3. Prior to Project approval, at least three members of the City Council demonstrated
15 clear bias in favor of the Project, thereby violating the Petitioner’s and the public’s right to a fair
16 hearing. These three members made statements expressing unequivocal support for the Project.
17 One councilmember even offered to help locate tenants for the Project *while it was pending*
18 *before the City Council.*

19 4. Approval of the Project follows the City’s 2020 approval of an amendment to the
20 Sun Lakes Village North Specific Plan (“Specific Plan Amendment”), which establishes general
21 land use standards and allowable uses in the Project area. The Specific Plan Amendment
22 allowed for business/warehouse, retail, and office uses on the Project site. Pursuant to CEQA,
23 the City certified a Program Environmental Impact Report (“PEIR”) for the Specific Plan
24 Amendment. The PEIR found the Specific Plan Amendment would result in numerous
25 significant and unavoidable environmental impacts.

26 5. CEQA allows a lead agency, such as the City, to rely on a previously-certified EIR
27 for a proposed project only when that EIR adequately analyzed all of the proposed project’s
28 significant environmental impacts. Where the proposed project has new, or more severe,

1 environmental impacts the previously certified EIR did not analyze, a subsequent or
2 supplemental EIR is required.

3 6. The Project authorizes uses, such as cold-storage warehousing, that are different
4 from those discussed in the Specific Plan Amendment and analyzed in the PEIR. Yet the City
5 refused to prepare a subsequent or supplemental EIR to address the specific impacts of the
6 Project. Instead, the City determined in an “Addendum” to the PEIR that the Project will not
7 have any new, or more severe, impacts.

8 7. CEQA requires lead agencies to consider the cumulative impacts of projects.
9 Cumulative impacts result from the incremental impact of the Project combined with the
10 impacts of past, present, and reasonably foreseeable future projects. One project’s cumulative
11 impacts may be individually minor, yet still considerable when added to the impacts of other
12 projects.

13 8. In the Addendum the City prepared for the Project, the City failed to account for
14 the Project’s contribution to significant cumulative impacts. Specifically, the City’s analysis
15 ignored the numerous closely related projects the City became aware of only after the PEIR was
16 certified, including a 5.5 million square foot warehouse project proposed approximately 3,000
17 feet east of the Project site. Together with the Project, these new projects will likely result in
18 millions of square feet of new warehouse use and thousands of daily truck trips along similar
19 routes, all of which will contribute significantly to cumulative impacts related to traffic, air
20 quality, greenhouse gases (“GHGs”), and noise. These new projects represent a substantial
21 change in the circumstances surrounding approval of the Project, and their cumulative impacts
22 represent new information that could not have been known at the time the PEIR for the Specific
23 Plan Amendment was certified.

24 9. Because the City relied entirely on the outdated cumulative impacts analysis in the
25 PEIR—which did not account for any of these new projects—the City unlawfully failed to
26 analyze the cumulative impacts caused by the Project in connection with these new projects.
27 Accordingly, the City’s determination that a subsequent EIR was not required is contrary to law
28

1 and unsupported by substantial evidence. The City must prepare a subsequent EIR to adequately
2 analyze the Project’s cumulative impacts.

3 10. The City also violated the Banning Municipal Code and the state Planning and
4 Zoning Law in approving the Project. The City made specific findings that assumed the six retail
5 buildings contemplated as part of the Project would act as a buffer between the warehouse
6 building and the adjacent residential community, as well as provide needed services to the
7 nearby community. However, the City failed to guarantee these buildings would ever be
8 constructed, and both the City and Real Parties in Interest stated that retail businesses may not
9 be economically viable. The City’s findings were therefore contrary to law and not supported by
10 substantial evidence.

11 11. By approving this Project, the City failed to proceed in the manner required by law
12 and failed to support its findings and conclusions with substantial evidence in the record. The
13 City prejudicially abused its discretion, and its approval of the Project must be set aside.

14 **PARTIES**

15 12. Petitioner and Plaintiff Pass Action Group (“PAG” or “Petitioner”) is an
16 association promoting the interests of local Banning residents alarmed over the increasing
17 intensity with which large-scale warehouse projects are being approved in their community, too
18 often without proper environmental review. PAG represents senior citizens who live in the 55-
19 and-over communities of SLCC, Four Seasons, and The Lakes, adjacent to and across the street
20 from the Project site, and are uniquely vulnerable to the air pollution, traffic, noise, and other
21 environmental impacts associated with warehouse construction and operation.

22 13. The interests that PAG seeks to further in this action are within the goals and
23 purposes of the organization. Petitioner and the local residents it represents have a direct and
24 beneficial interest in the City’s compliance with laws bearing on the Project. These interests will
25 be directly and adversely affected by the Project, which violates the law as set forth in this
26 Petition, and which would cause substantial harm to Petitioner, the natural environment, and the
27 quality of life in the surrounding community. The maintenance and prosecution of this action
28

1 will confer a substantial benefit on the public by protecting the public and the natural
2 environmental from the environmental and other harms alleged herein.

3 14. Respondent City of Banning (“City”) is, and at all times herein was, the
4 controlling land use authority within the City. The City’s responsibilities include but are not
5 limited to implementing and complying with due process requirements, the provisions of the
6 state Planning and Zoning Law, the City’s General Plan and ordinances, and CEQA. The City
7 has a present legal duty to comply with CEQA and state law.

8 15. Respondent City Council of the City of Banning (“City Council”) is, and at all
9 times herein mentioned was, the duly elected decision-making decision body of Respondent
10 City. As the decision-making body, the City Council was charged with responsibilities under
11 CEQA for conducting a proper review of the proposed action’s environmental impacts and
12 granting the various approvals necessary for the Project. The City Council also is and was
13 responsible for implementing and complying with due process requirements, the provisions of
14 the State Planning and Zoning Law, and the City’s General Plan and ordinances. The City
15 Council has a present legal duty to comply with CEQA, other state law, and the City code. The
16 City Council and its members are sued here in their official capacities.

17 16. Petitioner is unaware of the true names and capacities of Respondents fictitiously
18 named Does 1 through 20 and sue such respondents by fictitious names. Petitioner is informed
19 and believes, and on the basis of such information and belief, alleges the fictitiously named
20 respondents are also responsible for the actions described in this Petition. When the true
21 identities and capacities of these respondents have been determined, Petitioner will amend this
22 petition, with leave of the Court if necessary, to insert such identities and capacities.

23 17. Real Party in Interest Sun Lakes Highland, LLC (“Sun Lakes Highland”) is a
24 Delaware limited liability company doing business in California. Sun Lakes Highland is listed
25 as the “Project Applicant” on the City’s February 22, 2022 CEQA Notice of Determination
26 related to the Project. Sun Lakes Highland is named as a Real Party in Interest in this action
27 pursuant to Public Resources Code section 21167.6.5(a).

1 21. Pursuant to Code of Civil Procedure sections 526, 527, 1085, 1087, and 1094.5,
2 and Public Resources Code sections 21168, 21168.5, and 21168.9, the Riverside County
3 Superior Court has jurisdiction to issue a writ of mandate to set aside Respondents' decision to
4 approve the Project.

5 22. Venue for this action properly lies in the Superior Court for the State of California
6 in and for the County of Riverside pursuant to Code of Civil Procedure section 394.
7 Respondents' main offices are located in and the activities authorized by Respondents will occur
8 in Riverside County. Venue also properly lies in this Court pursuant to Code of Civil Procedure
9 section 393(b) because the effects of the City's actions will be felt in, and Petitioner's cause of
10 action therefore arose in, Riverside County.

11 23. This action is properly filed in the Riverside Historic Courthouse pursuant to
12 Local Rule 3115 and this Court's January 12, 2021 Administrative Order – Where to File Civil
13 Documents. This unlimited civil action is a petition for writ of mandate that includes CEQA
14 claims and arises in the City of Banning.

15 24. Petitioner has performed any and all conditions precedent to filing the instant
16 action and has exhausted any and all available administrative remedies to the extent possible and
17 required by law. Petitioner, its officers, and members of the public submitted numerous
18 objections to approval of the Project and the City's inadequate analysis of the Project's impacts
19 in the Addendum prepared for the Project.

20 25. Respondents have taken final agency actions with respect to adopting the
21 Addendum and approving the Project. Respondents have a duty to comply with applicable state
22 and local laws, including but not limited to CEQA, state Planning and Zoning Law, and the
23 Banning Municipal Code, prior to undertaking the discretionary approvals at issue in this
24 lawsuit. Petitioners possess no effective remedy to challenge the approvals at issue in this action
25 other than by means of this lawsuit.

26 26. On March 23, 2022 Petitioner entered into a Tolling Agreement with Creation
27 Equity, Sun Lakes Highland, the City of Banning, and the City Council. The Tolling Agreement
28 is attached hereto as **Exhibit A**. The parties agreed to toll and suspend all statutes of limitations

1 and defenses based upon the passage of time from March 22, 2022 through and including April
2 22, 2022. The Tolling Agreement provided that any party could terminate the agreement before
3 April 22, 2022 by providing written notice to all parties. If a party provided written notice of
4 early termination, the Tolling Agreement would then terminate 14 days following delivery of the
5 notice.

6 27. On April 4, 2022, Andrew Lee, counsel for Creation Equity and Sun Lakes
7 Highland, sent an e-mail to representatives of all parties to the Tolling Agreement stating that
8 Creation Equity and Sun Lakes Highland elected to terminate the agreement. Mr. Lee asserted
9 that his e-mail satisfied the written notice of early termination in the Tolling Agreement, and
10 thus the tolling would terminate on April 18, 2022.

11 28. Pursuant to Public Resources Code section 21167(b), where an agency files a
12 notice of determination after taking an action subject to CEQA, any CEQA-based challenge to
13 that action generally must be filed within 30 days after the notice is filed. However, California
14 law permits the tolling of CEQA's limitations period where, as here, "all parties directly
15 involved in a controversy concerning the adequacy of an EIR or compliance with other
16 provisions of CEQA" agree to toll the limitations period. *Salmon Protection and Watershed*
17 *Network v. County of Marin* (2012) 205 Cal.App.4th 195, 202.

18 29. Here, the City filed the notice of determination for the Project on February 22,
19 2022, requiring the Petitioners to file any CEQA-based causes of action by March 24, 2022. The
20 parties then tolled all limitations periods beginning March 22, 2022. Therefore, with the early
21 termination of the Tolling Agreement on April 18, 2022, Petitioners' last day to file a CEQA-
22 based challenge to the City's approval of the Project is April 20, 2022. As this Petition has been
23 filed before that date, Petitioner's challenge to the City's approval of the Project on CEQA
24 grounds is timely.

25 30. On March 22, 2022, Petitioner complied with Public Resources Code section
26 21167.5 by emailing and mailing to Respondents a letter stating that Petitioner planned to file a
27 Petition for Writ of Mandate seeking to invalidate Respondents' approval of the Project.
28 Attached hereto as **Exhibit B** is a true and correct copy of this letter.

1 31. On April 18, 2022, Petitioner will comply with Public Resources Code section
2 21167.7 and Code of Civil Procedure section 388 by furnishing the Attorney General of the
3 State of California with a copy of the Petition. Attached hereto as Exhibit C is a true and correct
4 copy of the letter transmitting the Petition to the Attorney General.

5 32. Pursuant to Public Resources Code section 21167.6(b)(2), Petitioner elects to
6 prepare the record of proceedings in this action. Concurrently with this Petition, Petitioner will
7 file a notice of election to prepare the administrative record.

8 33. Petitioner has no plain, speedy, or adequate remedy in the course of ordinary law
9 unless this Court grants the requested writ of mandate to require Respondents to set aside their
10 adoption of the Addendum and approval of the Project. In the absence of such remedies,
11 Respondents' approvals will remain in effect in violation of State law, and Petitioner and the
12 residents that it represents will be irreparably harmed. No money damages or legal remedy could
13 adequately compensate Petitioner for that harm.

14 **STATEMENT OF FACTS**

15 34. Petitioner realleges and incorporates by reference the preceding paragraphs in their
16 entirety.

17 **I. The Banning Point Project Site**

18 35. The Project site is a 47-acre undeveloped parcel in the City of Banning in
19 Riverside County. Land uses on the parcel are governed by the Sun Lakes Village North
20 Specific Plan.

21 36. To the south and east, the Project site is bordered by the Sun Lakes Country Club,
22 a 55-and-over community of mostly seniors. The Project site is also bordered on the east by The
23 Lakes Assisted Living and Memory Care Facility, a residential community for the elderly and
24 persons needing assistance with basic daily tasks such as bathing and dressing. To the north, the
25 Project site is bordered by the I-10 Freeway. On the western border of the Project site lies the
26 Sun Lakes Village Shopping Center. The Project site is less than a mile from the Four Seasons,
27 another 55-and-over community home to mostly seniors.

1 37. The Project site is approximately one-half mile east of the Highland Springs
2 Avenue exit off I-10. According to numerous Banning residents, this interchange experiences
3 significant traffic congestion most times of the day. There are no City police or fire stations
4 south of the I-10 freeway. First responders trying to access SLCC, The Lakes, and/or the Four
5 Seasons usually must travel southbound on Highland Springs Avenue, passing through this
6 interchange, to reach their destination.

7 **II. Certification of the 2020 Program EIR and Approval of the Specific Plan**
8 **Amendment**

9 38. On February 21, 2020, the City filed a Notice of Preparation of an EIR for the Sun
10 Lakes Village North Specific Amendment No. 5 (“Specific Plan Amendment”). The City
11 proposed to change the land use plan for the Sun Lakes Village North Specific Plan Area to
12 create three separate districts: (1) Business & Warehouse, (2) Office & Professional, and (3)
13 Retail & Service. The City also proposed Zone Change No. 20-3501 to incorporate the text of
14 the Specific Plan Amendment into the Banning Zoning Code. At the time, the specific plan
15 authorized solely “Retail/Commercial” uses.

16 39. The City identified five objectives of the Specific Plan Amendment:

- 17 a. Allow for a range of land uses that reflects current market conditions given
18 the trend away from brick-and-mortar retail.
- 19 b. Respond to an increase in e-commerce, especially driven by the coronavirus
20 pandemic.
- 21 c. Promote high quality development to safeguard the existing asset of the
22 Sun Lakes Country Club and other development in the vicinity.
- 23 d. Locate and design truck courts and semi-truck circulation to minimize
24 impacts on surrounding land uses and development.
- 25 e. Expand access to restaurants, shopping, and services for the nearby Sun
26 Lakes Country Club community.

27 40. On March 2, 2020, City staff and representatives of Real Parties in Interest hosted
28 a scoping meeting, presumably to inform members of the public about the Specific Plan

1 Amendment and listen to their concerns. However, City staff and Real Parties in Interest gave a
2 vague presentation and answered questions in an evasive manner. The City’s Community
3 Development Director described the Business & Warehouse District as “Business Park,”
4 suggesting it could include stores like Costco. The City and Real Parties in Interest emphasized
5 the retail and commercial center portion of the Project site fronting on Sun Lakes Boulevard that
6 is now designated as the Retail & Service District, presenting photographs of other upscale retail
7 stores and restaurants that Creation Equity represented it had developed in the past. Neither the
8 Community Development Director nor the Real Parties in Interest indicated that a large-scale,
9 high-cube cold-storage warehouse building would be constructed at the Project site. In fact,
10 when asked if the Specific Plan Amendment would result in an increase in semi-truck trips, the
11 Community Development Director responded, “not necessarily.” Similarly, the Community
12 Development Director failed to respond to a community member when asked about the “big
13 grey hole” on the project plans, referring to what is now designated as the Business &
14 Warehouse District.

15 41. The City elected to prepare a Program EIR (“PEIR”) for the Specific Plan
16 Amendment. As a self-described “zoning level document” lacking “sufficient detailed
17 information,” the Draft PEIR deferred several key analyses, including, but not limited to:

- 18 a. Conducting a Health Risk Assessment to analyze cancer risk from mobile
19 source diesel emissions.
- 20 b. Identifying the threshold of significance necessary to conduct a cumulative
21 air quality analysis to determine impacts to sensitive receptors.
- 22 c. Completing an Final Acoustical Report to address potential noise impacts
23 to nearby residences.

24 42. The Draft PEIR assumed the following uses:

- 25 a. 877,298 square feet of Industrial Park use,
- 26 b. 52,065 square feet of Medical Office use.
- 27 c. 37,189 square feet of Retail use.

1 43. The Draft PEIR was published in September 2020. The Draft PEIR reached the
2 following conclusions, among others:

3 a. The Specific Plan Amendment would result in significant and unavoidable
4 air quality impacts, because it would:

5 i. Conflict with the 2016 Air Quality Management Plan;

6 ii. Exceed Localized Significance Thresholds established by the South
7 Coast Air Quality Management District (“SCAQMD”) for nitrous oxide (“NOx”) during
8 operation and volatile organic compounds (“VOC”) during construction. Even with various
9 mitigation measures, emissions exceeded the applicable thresholds;

10 iii. Exceed Long-Term Regional Operation thresholds established by the
11 SCAQMD for NOx, even with mitigation.

12 iv. Expose sensitive receptors, such as senior citizens, to VOC
13 emissions during construction and operation that exceed thresholds established by the
14 SCAQMD, even with mitigation.

15 b. The Specific Plan Amendment would also result in significant and
16 unavoidable cumulative air quality impacts because it would conflict with the 2016 Air Quality
17 Management Plan and exceed numerical thresholds established by the SCAQMD for NOx
18 emissions during construction and operation.

19 c. The Specific Plan Amendment would result in significant and unavoidable
20 greenhouse gas (“GHG”) impacts, even with the implementation of mandatory Banning
21 Municipal Code requirements and various mitigation measures, because emissions would
22 exceed SCAQMD thresholds. Cumulative GHG impacts were also determined to exceed
23 SCAQMD thresholds, even with mitigation.

24 d. The Specific Plan Amendment would result in significant noise impacts
25 during construction and operation, but proposed mitigation measures would reduce these
26 impacts below the level of significance. The Draft PEIR provided the threshold at which a
27 cumulative noise impact would occur, but did not indicate whether the Specific Plan
28 Amendment would result in an exceedance of that threshold.

1 e. The Specific Plan Amendment would result in significant transportation
2 impacts due to projected vehicle miles travelled (“VMT”) exceeding the threshold of 15% below
3 the existing regional VMT per worker by 19%. Even with the implementation of mitigation
4 measures, these impacts would remain significant and unavoidable. Cumulative transportation
5 impacts would also be significant and unavoidable for the same reason.

6 44. CEQA requires lead agencies to consider the cumulative impacts of a project,
7 defined as those that result “from the incremental impact of the project when added to other
8 closely related, past, present, and reasonably foreseeable probable future projects.” CEQA
9 Guidelines § 15355(b). Even if an individual project’s effects are “individually limited,” they
10 may nonetheless be “cumulatively considerable” if they are significant when viewed in
11 connection with the impacts of other past, current, and probable future projects. (CEQA
12 Guidelines § 15064(h).) To ensure that an adequate range of other projects are considered in a
13 cumulative impacts analysis, CEQA Guidelines § 15130(b)(1) requires lead agencies to rely on
14 either:

15 a. A list of past, present, and probable future projects producing related or
16 cumulative impacts; or

17 b. A summary of projections contained in an adopted, local, regional, or
18 statewide plan, or related planning document, that describes or evaluates conditions contributing
19 to the cumulative effect.

20 45. The basis for the Draft PEIR’s cumulative impacts analysis is provided in its
21 “Environmental Analysis” section. The Draft PEIR provides: “The summary of projections
22 approach is used in this EIR, except for the evaluation of near-term traffic and vehicular-related
23 air quality, greenhouse gas, and noise impacts.” The Draft PEIR incorporated three outside
24 documents the City purportedly relied on for its cumulative impacts analysis:

25 a. Butterfield Ranch Specific Plan, Final Environmental Impact Report
26 (December 2011).

27 b. Rancho San Gorgonio Specific Plan, Environmental Impact Report (June
28 2016).

1 c. Banning Distribution Center, Environmental Impact Report (June 2018).

2 46. The Final PEIR was published on October 28, 2020. The Final PEIR responded to
3 public comments on the Draft PEIR and made several changes, which include but are not limited
4 to:

5 a. Whereas the Draft EIR concluded the Specific Plan Amendment’s
6 construction and operation emissions would not violate either the California Ambient Air
7 Quality Standards or National Ambient Air Quality Standards, the Final EIR noted that the NOx
8 emissions from operation and VOC emissions during construction would violate these
9 standards.

10 b. Accordingly, because the Draft EIR found that the purpose of the 2016 Air
11 Quality Management Plan was to avoid violation of the California Ambient Air Quality
12 Standards and the National Ambient Air Quality Standards, and the Specific Plan Amendment
13 would not violate these standards, the Draft EIR concluded that the Specific Plan Amendment
14 would not cause a significant environmental impact “due to a conflict with any land use plan ...
15 adopted for the purpose of avoiding or mitigating an environmental effect.” However, because
16 the Final EIR concluded the Specific Plan Amendment would violate these standards, the Final
17 EIR concluded the Specific Plan Amendment would cause a significant impact due to a conflict
18 with the 2016 Air Quality Management Plan.

19 47. Despite these changes, the City determined it was unnecessary to recirculate the
20 Draft EIR.

21 48. On November 4, 2020, the Planning Commission voted to recommend approval of
22 the Specific Plan Amendment, Zone Change No. 20-3501 to incorporate the text of the Specific
23 Plan Amendment into the Banning Zoning Code, and certification of the Final PEIR.

24 49. On December 8, 2020, the City Council voted to approve Zone Change No. 20-
25 3501, adopt the Specific Plan Amendment, adopt a statement of overriding considerations, and
26 certify the Final PEIR.

27 50. Despite multiple requests by members of the public and Petitioner, the City has
28 failed to produce evidence demonstrating it provided adequate notice to local community

1 members of both the November 4, 2020 Planning Commission hearing and the December 8,
2 2020 City Council hearing.

3 51. As originally proposed, the Specific Plan Amendment provided that the
4 “construction of development and improvements within the Retail & Service District shall be
5 completed prior to the occupancy of development within the Business & Warehouse District.”
6 This version of the Specific Plan Amendment remains the only version accessible on the City’s
7 website.

8 52. At the December 8, 2020 City Council hearing, City staff proposed changing the
9 Specific Plan Amendment to no longer require development of the Retail & Service District
10 prior to occupancy of the Business & Warehouse District. City staff indicated the change was
11 necessary because the Real Party in Interest claimed it would be difficult, if not impossible, to
12 obtain financing for the Retail & Service District buildings before construction of the warehouse
13 buildings. The City Council voted 5-0 to approve Resolution 2020-141, adopting the Specific
14 Plan Amendment as modified.

15 53. With respect to the phasing of the Retail & Service District and the Business &
16 Warehouse District, the final version of the Specific Plan Amendment provides:

17 a. “Site plan entitlement for the Retail & Service District shall be completed
18 prior to issuance of the first occupancy permit within the Business & Warehouse District.
19 Entitlement for the Retail & Service District shall be defined as approval of either a Design
20 Review or Conditional Use Permit application (or both) including adoption/approval of the
21 appropriate CEQA documentation”

22 **III. The Banning Point Project**

23 54. In 2021 Sun Lakes Highland submitted an application to the City for the Banning
24 Point Project. The Project consists of (a) Tentative Parcel Map No. 38164, to subdivide
25 approximately 47 acres of vacant land into three parcels, and (b) Design Review 21-7008, to
26 construct a 620,000 square-foot industrial building with 10,000 square feet of office space, and
27 six retail buildings totaling 34,000 square feet.

1 55. For the industrial building, the Project includes 450,000 square feet of high-cube
2 fulfillment center warehouse use and 150,000 square feet of high-cube cold storage warehouse
3 use. The industrial building would contain approximately 114 truck dock doors, with parking
4 spaces to accommodate trucks located in the vicinity of the truck dock doors.

5 56. According to the City, the Banning Point Project is intended to be constructed in
6 two phases. Phase 1 will consist of the industrial building, with construction projected to begin
7 in early 2022. Phase 2 will consist of the retail portion and is projected to begin construction
8 early 2023.

9 **IV. Related Projects Within the City Introduced after Certification of the 2020 PEIR**

10 57. Since the certification of the PEIR, the City has become aware of numerous
11 additional, reasonably foreseeable future projects proposed within the City, including without
12 limitation multiple warehouse and transportation projects. In fact, City staff have said they
13 believe as many as five warehouse projects will come before the Planning Commission in 2022
14 alone.

15 58. One of the most significant of these proposed projects is Sunset Crossroads, which
16 would consist of 5.5 million square feet of warehouse and associated uses approximately 3,000
17 feet east of the Banning Point Project.

18 59. The City issued a Notice of Preparation of an EIR for Sunset Crossroads in
19 February 2021. To facilitate this massive project, the City is proposing to amend its General
20 Plan, adopt a Sunset Crossroads Specific Plan, approve a parcel map and vesting tract map, and
21 adopt a pre-annexation and development agreement.

22 60. Both the SCAQMD and the California Air Resources Board (“CARB”) submitted
23 comments to the City in response to the Sunset Crossroads Notice of Preparation. SCAQMD
24 warned the City of the severe cancer risk associated with the Sunset Crossroads project,
25 explaining that “residents living in the communities surrounding the Proposed Project will
26 possibly face an even greater exposure to air pollution and bear a disproportionate burden of
27 increasing health risks.” CARB similarly warned that Sunset Crossroads “will expose nearby
28 disadvantaged communities to elevated levels of air pollution,” and expressed concern with the

1 “potential cumulative health impacts associated with the construction and operation of the
2 Project.”

3 **V. Councilmembers’ Statements in Support of the Project**

4 61. Before the City Council hearing on February 17, 2022, at least three
5 Councilmembers—Mary Hamlin, Colleen Wallace, and Alberto Sanchez—made comments
6 expressing support for the Project, including but not limited to those described in the paragraphs
7 below.

8 **A. Councilmember Mary Hamlin**

9 62. On November 19, 2021, Councilmember Hamlin posted a message in the
10 Facebook group for residents of the Sun Lakes Country Club. She wrote:

11 a. “Update on the Banning Pointe [*sic*] Project. I have spent the last few
12 weeks researching this project due to the numerous complaints mostly from misinformation,
13 speculation, and rumors. I have met with the developers and City staff several times. Here are
14 the facts. There is no reason to argue that the Highland Springs Avenue/I-10 Interchange does
15 not produce significant traffic. This problem has culminated from overbuilding in Beaumont
16 without required road improvements and the growth seen in the Pass area. The City is working
17 as fast as possible on both the Highland Spring/I-10 Interchange and the extension of Sun Lakes
18 Blvd – major improvements that will reduce wait times and congestion in and around this area
19 on both sides of the freeway. The developer has agreed to construct an extended left-hand
20 turning pocket on the E/B Sun Lakes Blvd. turning left into Sun Lakes Village Dr. They also
21 agreed to construct a dedicated truck lane on the east side of Sun Lakes village Drive for proper
22 ingress and egress. A recent Traffic Impact Analysis (TIA) done Oct 4, 2021, concluded that a
23 total of 26 truck trips would occur both in the AM and PM Peak Hours. This is a maximum of
24 13 trucks per day during normal business hours (M-F). The updated TIA concludes that no more
25 than 3 trucks per hour (per work day) will enter the project site. In addition this project alone
26 will generate approximately \$3,938,952.90 in development impact fees that will directly
27 contribute to the capital improvements of both Sun Lakes Blvd and the Highland Spring/I-10
28

1 Interchange Project. This proposal, along with other updates, will be presented at the next
2 Planning Commission Meeting on Wednesday, Dec. 1 at 6:30 in the Council Chamber.”

3 63. On November 20, 2021, Councilmember Hamlin sent an email to Randy Robbins,
4 President of PAG, arguing “this project appears to be good for the whole community and in the
5 long run will lift the entire community.” In addition, Councilmember Hamlin attached a
6 statement that she requested Mr. Robbins read at the next Sun Lakes community meeting. The
7 statement contained many of the same assertions as the November 19, 2021 Facebook posts.
8 Councilmember Hamlin added at least one additional point:

9 a. “The positive impact of new housing, new businesses and continued growth
10 will far outpace any adverse impact on property values ... Are we really going to repeat the
11 same mistake that was made with Walmart, Home Depot, and Best Buy? Sun Lakes opposition
12 killed development in Banning for almost 20 years and, if this happens again, we can expect
13 another 10 years of no development, which could likely bankrupt the City.”

14 64. On November 30, 2021, Councilmember Hamlin sent an email to City staff and
15 Josh Zemon, the Managing Principal of Real Party in Interest Creation Equity, asking questions
16 about the Project. In addition, she wrote:

17 a. “I am appalled at the misinformation, speculation, and rumors as well as the
18 outright nastiness of my so-called ‘neighbors’. I am being threatened with recall, being asked to
19 resign, sell my house and move, as well as threats of picketing my home and work. I hope this
20 project can be explained to the crowd that is expected to show up on Wednesday. Unfortunately,
21 I think their mouths are open and their ears are shut...”

22 65. On December 2, 2021, Councilmember Hamlin wrote an email to Mr. Zemon,
23 congratulating him on the Planning Commission’s approval of the Project and requesting that
24 she play a personal role in securing tenants for the Project. She wrote:

25 a. “Congratulations on passing the first hurdle with the Planning Commission.
26 As you saw, my constituents are extremely upset with me and don't understand that there was
27 nothing I could do. It was not presented to the Council for a vote - yet. I am sure the group will
28 appeal but probably have no legal grounds to stop the project. I need to do some damage control.

1 A building is just a building until someone occupies it. I would like to be seen as being involved
2 in finding suitable businesses to occupy the property. I know that I can't control who leases the
3 property, but if I can be perceived as being part of the selection process, it might go a long way
4 to repair the negativity. Can you arrange a meeting with me and the Cushman & Wakefield rep?
5 It can be a Zoom meeting if he is not in the area.”

6 66. Also on December 2, 2021, Mr. Zemon responded to Councilmember Hamlin and
7 said: “We would be happy to involve you in the leasing discussions.”

8 67. On December 7, 2021, Mr. Zemon sent an email to Councilmember Hamlin,
9 where he wrote:

10 a. “Mary - we must stop the dissemination of misinformation. The posts /
11 comments you’ve forwarded today has been factually inaccurate including the ones below. I’m
12 not sure what we can do to help - we want to be part of the solution here, but it seems like the
13 residents don’t want to engage in a rational, factual conversation and there is nothing we can do
14 to make them feel better. Please let your neighbors know that while we are going press forward
15 with our business plan, we are here, ready and available, for calls, meetings, etc. to answer
16 questions about the project and talk about ideas that residents have to improve our plan and
17 assuage concerns. We need to focus on things that we can do to make your neighbors feel good
18 about the project rather than them continuing to protest it outright.”

19 68. On December 8, 2021, Councilmember Hamlin responded to Mr. Zemon, writing:

20 a. “Unfortunately, I have lost all power to be believed. Maybe we should
21 contact the reporter from NBC Channel 4, Tony Shinn, and do an interview and set the record
22 straight. He was the reporter who did an interview with the action group. When I talk to an
23 individual who will still talk to me, I explain the project and they seem to get it. There are over
24 5,000 residents here so I can't talk to every one individually. We need some positive press
25 releases. Maybe David James Heiss with the Record Gazette can do an article. I have had to
26 hired a public relations firm to help repair my damaged image. I am open to suggestions.”

27 69. On December 13, 2021, Councilmember Hamlin sent another email to Mr. Zemon,
28 writing

1 a. “I guess your company needs an aggressive campaign to correct the
2 misinformation, speculations, rumors, and fears about the Banning Pointe project. Maybe some
3 sort of handout with the facts might be helpful.”

4 **B. Councilmember Colleen Wallace**

5 70. On October 14, 2021, Councilmember Wallace gave the annual “State of the City”
6 address to an audience in the Sun Lakes community ballroom. As part of her address,
7 Councilmember Wallace provided updates on projects the City approved in 2021, and a “sneak
8 peek” of projects to be approved in 2022. For almost all of these projects, Councilmember
9 Wallace provided only basic information, and did not express strong support or opposition.
10 However, after she introduced the Banning Point Project in the “sneak peek” section,
11 Councilmember Wallace stated:

12 a. “And can I just say something? People complain about why are you
13 building this here and there, but people have to understand, there are a lot of kids that are still
14 here, and kids that graduated college that want to come back and invest in our city. I’m just
15 keeping it real. I always keep it real. We’ll be dead and gone, our youngsters are our future ...
16 We have to think about the kids. I advocate for the youth and my thing is, you have to think
17 about, kids want to come back to Banning and they want to invest. They want to be
18 entrepreneurs here. You know, Banning, I tell people, Banning, we’re in between a mountain, so
19 we can’t have a lot, but the things we can have to start this City, to be where it was when I was a
20 little kid, we can do it. And, people are not going to like what you are going to do, but, oh well,
21 we have to do what we have to do.”

22 **C. Councilmember Alberto Sanchez**

23 71. On October 27, 2021, after the first Planning Commission meeting where the
24 Project was considered, Councilmember Sanchez wrote a comment on a Facebook post about
25 the Project. His post reads:

26 a. “Great project, will bring a lot of jobs and tax dollars to Banning. It will
27 also get rid of the homeless population nearby with the enclosure of these businesses. The retail
28 aspect looks great as well.”

1 72. On October 28, 2021, Councilmember Sanchez posted on the social media app
2 Nextdoor, in relevant part: “This is a great project because it does many things for the area, it
3 eliminates the homeless population due to the enclosed businesses. Great retail space facing Sun
4 lakes, and traffic is being mitigated by the time this development starts building. Banning
5 residents want growth, this is growth. More jobs, more tax dollars, other businesses will want to
6 do business in Banning as well.”

7 **VI. Planning Commission Approval of Design Review 21-7008 and Recommended**
8 **Approval of Tentative Parcel Map 38164**

9 73. The Planning Commission considered the Banning Point Project at two public
10 hearings, on October 19, 2021 and December 1, 2021.

11 74. At the October 19, 2021 hearing, the Planning Commission described the Project
12 to the public as including a large industrial warehouse building. Many members of the public
13 appeared at the hearing, including many residents of the Sun Lakes Community, and expressed
14 their concerns with and objections to the Project. Several members of the public discussed the
15 discrepancy between the Project as described at the March 2, 2020 scoping meeting—primarily
16 a business and commercial development, without clear mention of a warehouse—and the
17 warehouse-dominated Project as presented at the Planning Commission hearing. The Planning
18 Commission failed to reach a decision at the October 19, 2021 hearing, and continued the
19 hearing to December 1, 2021.

20 75. At the December 1 hearing, members of the public again appeared and objected to
21 the Project. Nonetheless, the Planning Commission voted 3-2 to approve Design Review 21-
22 7008 and recommend approval of Tentative Parcel Map 38164 to the City Council.

23 76. To support its decision that neither a Subsequent or Supplemental EIR is required,
24 the Planning Commission relied on a “Consistency Determination” that found the following:

25 a. The VMT impacts for the Project are “less intense than originally
26 envisioned in the Specific Plan Amendment No. 5 [PEIR].”

27 b. The project air quality “is less impactful” than envisioned in the PEIR.
28

1 c. The Project will provide significantly more landscaping than was analyzed
2 in the PEIR.

3 77. Even though the Planning Commission had no authority to issue a final decision
4 on Tentative Parcel Map 38164, the City filed a CEQA Notice of Determination (“NOD”) for
5 the Project on December 2, 2021.

6 78. Counsel for Petitioner sent a letter to the City Attorney on December 16, 2021,
7 explaining that the NOD was invalid and without legal effect because the Planning Commission
8 lacked authority to approve Tentative Parcel Map 38164 and because the Planning
9 Commission’s decisions were not final in light of Petitioner’s timely appeal to the City Council.
10 The letter requested that the City withdraw the NOD. The letter cited Banning Municipal Code
11 sections 16.14.030 and 17.04.060, which provide the Planning Commission has authority only to
12 *recommend* approval of tentative maps, not issue final approvals. The City Attorney responded
13 to Petitioner’s counsel on December 21, 2021, providing in a letter that the City “will agree not
14 to assert any statute of limitations defense based on the December 2, 2021 NOD.”

15 **VII. Appeal of Planning Commission Decision and Public Comments**

16 79. On December 8, 2021, Petitioner submitted an appeal of the Planning
17 Commission’s approval of Design Review 21-7008 and its purported approval of Tentative
18 Parcel Map 38164 on the following grounds:

19 a. The City’s failure to prepare a Subsequent EIR for the Banning Point
20 Project violated CEQA because the Project will have new, and more severe, environmental
21 impacts than analyzed in the PEIR.

22 b. The PEIR failed to adequately analyze the GHG, traffic, and air quality
23 impacts of the Project.

24 c. The Statement of Overriding Considerations adopted for the PEIR is invalid
25 because it refers to impacts and benefits of a project that are different from what was approved.

26 d. Zoning Change No. 20-3501 was not reflected in the Banning Municipal
27 Code, leaving authority for proposed uses unclear and unavailable to the public.
28

1 80. On January 24, 2022, Petitioner submitted a letter to the City in support of the
2 appeal. The letter outlined numerous ways in which the City’s approval of the Project would
3 violate CEQA, its own Municipal Code, and state law, including but not limited to the
4 following:

5 a. The PEIR lacked crucial detail about the actual cold-storage warehouse
6 Project proposed for the site. Cold-storage use was not analyzed in the 2020 PEIR, and such use
7 required preparation of a new EIR before it can be legally approved.

8 b. The “Project Updates” relied on by the Planning Commission at the
9 December 1, 2021 hearing were inadequate to support approval of the Project. Experts retained
10 by Petitioner concluded, among other things, that:

11 i. The cold-storage warehouse component of the Project constituted a
12 substantial change to the Project requiring preparation of a subsequent or supplemental EIR due
13 to “a substantial increase in the severity of previously identified significant effects.”

14 ii. The Urban Crossroads Report dated November 8, 2021, relied on by
15 the City, underestimated daily truck trips from the Project by as much as 400 percent. The Urban
16 Crossroads Report conducted no analysis of VMT. The Urban Crossroads Report also
17 significantly undercounted trip lengths for employees.

18 iii. A VMT analysis using realistic trip lengths revealed impacts related
19 to VMT would be even worse than shown in the PEIR, which determined VMT impacts would
20 be significant and unavoidable.

21 iv. The air quality analysis completed for the Project Updates
22 underestimated NOx emissions from the Project’s cold-storage warehouse operations by
23 undercounting vehicle trips and failing to include emissions from transport refrigeration units or
24 emergency diesel generators associated with cold-storage warehouse use. As a result, the Project
25 Updates incorrectly determined maximum daily NOx emissions would be slightly lower than the
26 SCAQMD threshold.

27 v. When considering realistic trip lengths and the unique operations of
28 cold-storage warehouses, Project maximum daily NOx emissions would appreciably exceed the

1 SCAQMD threshold. The addition of the cold-storage warehouse component thus required
2 preparation of a subsequent EIR.

3 vi. The failure to accurately calculate truck trips, in addition to the
4 failure to address the unique operation of cold-storage warehouse uses, also resulted in a severe
5 undercounting of GHG emissions. When accounting for the ignored emission sources, the
6 Project would result in a substantially more severe GHG impact than was analyzed in the PEIR.

7 c. The final acoustical report required as mitigation in the PEIR was never
8 conducted by the City. The City's conclusion that the Project would not have a significant noise
9 impact, even with the addition of the cold-storage warehouse use, therefore lacked evidentiary
10 support.

11 d. The City failed to analyze the Project's cumulative impacts together with
12 those of related, reasonably foreseeable projects. Specifically, the City failed to consider the
13 Sunset Crossroads project, in addition to the planned extension of Sun Lakes Boulevard that
14 would connect the I-10/Sunset Ave. exit to the Project.

15 e. The approval of the Specific Plan Amendment and the Project was plagued
16 by procedural errors, including but not limited to:

17 i. Zone Change No. 20-3501, which purported to incorporate the text
18 of the Specific Plan Amendment into the Banning Zoning Code, was not reflected in the Zoning
19 Code.

20 ii. The City failed to properly notify the public when approving the
21 Specific Plan Amendment.

22 iii. The City failed to notify SCAQMD and CARB of the Project.

23 f. For the Project to comply with the Specific Plan Amendment, the City must
24 ensure the Retail & Service District is constructed before the Business & Warehouse District is
25 occupied.

26 g. For the Project to comply with the conditions of approval as approved by
27 the Planning Commission, the City must ensure the Project has limited hours of operation.

28

1 81. On February 8, 2022, the City Council voted 4-1 to remove Planning
2 Commissioner Marco Santana from the Planning Commission on the grounds he was biased
3 against warehousing. Mr. Santana published an opinion article in the *Record Gazette* expressing
4 concern about the increasing number of warehouse projects in the City and broader Inland
5 Empire. In the article, Mr. Santana focused primarily on what he believed to be were the
6 negative health and economic impacts associated with warehouses. The article never made any
7 reference to any particular warehouse project.

8 82. In the staff report prepared for the hearing in which Mr. Santana was removed,
9 City staff argued Mr. Santana’s recusal was necessary because “there are currently as many as
10 five known warehouse projects that are likely to be considered by the Planning Commission in
11 2022.” A member of the public, Bobby Pitts, sent an e-mail to City Manager Doug Schulze
12 inquiring into the proposed removal of Mr. Santana. In response, Mr. Schulze wrote “If Mr.
13 Santana came out in support of warehousing, the same situation would be occurring and, I am
14 confident that the Pass Action Group attorney would be using the bias, unfair, and
15 predetermined opinion as the basis for the appeal and eventual lawsuit against the City.”

16 83. The City Council determined Mr. Santana was unacceptably biased against
17 warehousing, and removed him from the Planning Commission at the hearing on February 8,
18 2022.

19 84. In a Nextdoor post explaining his vote to remove Mr. Santana, Councilmember
20 Alberto Sanchez wrote: “Mr. Santana was removed because he is not able to be impartial
21 regarding an industry. There is nothing wrong with being an activist an having an opinion, that’s
22 why we have the first amendment, but unfortunately because he volunteered for the planning
23 commission position and was appointed by the city council it is required of him to conduct
24 himself in a manner where he needs to remain impartial regarding matters that come to the
25 planning commission.”

26 85. Petitioner submitted another letter to the City on February 11, 2022, requesting
27 that Councilmembers Colleen Wallace, Mary Hamlin, and Alberto Sanchez recuse themselves
28 from any decision on the Project. The letter identified numerous statements made by the

1 Councilmembers in support of the Project, and explained why both state and local law required
2 the recusal of the Councilmembers. Petitioner’s letter sought to hold the Councilmembers to the
3 same standard they applied to former Planning Commissioner Marco Santana. If Mr. Santana
4 was removed from the Planning Commission for expressing *general* concerns about
5 warehousing, the letter argued, the three councilmembers certainly should recuse themselves for
6 expressing active support for this *specific* Project.

7 86. Petitioner submitted its final letter to the City on February 16, 2022. The letter
8 further outlines ways in which the approval of the Project would violate CEQA, the Banning
9 Municipal Code, and various state laws, including but not limited to the following:

10 a. Project approval would conflict with several core provisions of the City’s
11 General Plan Noise Element.

12 b. The Specific Plan Amendment would allow trucks to access the Project
13 from the I-10/Sunset Avenue exit once the planned extension of Sun Lakes Boulevard is
14 completed. Trucks using this new route would travel through the entire SLCC community.
15 However, the City failed to analyze vehicle trips and traffic noise associated with this eastside
16 access route.

17 c. The City’s noise analysis did not support Project approval because the City
18 failed to consider single-event noise, relying solely on measurements of “equivalent sound
19 level” and “Community Noise Equivalent Level.”

20 d. The “Consistency Analysis” relied on by the City undercounted NOx
21 emissions, GHGs, and VMT.

22 87. Other members of the public also expressed great concern about the Project,
23 outlining numerous ways the Project would harm the Banning community and violate the law,
24 including but not limited to the following:

25 a. The Project would greatly exacerbate the significant traffic congestion at
26 the I-10/Highland Springs exit approximately one-half mile west of the Project site.

27 b. The Project would result in significant increases in air pollution due to the
28 hundreds of daily diesel-fueled truck trips.

1 c. The Project would result in unacceptable levels of noise.

2 d. Increased traffic congestion would inhibit the ability of police, fire, and
3 medical emergency vehicles to reach victims of an emergency or mass casualty event, with
4 potentially life-threatening consequences.

5 e. The Project plans were inconsistent with the publicly accessible version of
6 the Specific Plan Amendment because they failed to require the buildings comprising the Retail
7 & Service District to be constructed prior to occupancy of the Business & Warehouse District.

8 f. Sun Lakes Boulevard is not a designated commercial vehicle route pursuant
9 to City Council Resolution 2005-91, which designates certain streets in the city for use by large
10 commercial trucks.

11 **VIII. Addendum to the 2020 PEIR**

12 88. On February 14, 2022, a mere 3 days before the City Council hearing on
13 Petitioner’s appeal, the City announced it had prepared an Addendum/Consistency Checklist for
14 the Project. The Addendum itself is dated February 10, 2022.

15 89. The Addendum determined that the Project could have a significant effect on the
16 environment, but it concluded that all of the potentially significant effects had been adequately
17 analyzed in the PEIR, and that therefore no subsequent EIR was required.

18 90. Specifically, the Addendum reached the following conclusions, among others:

19 a. The Project would not result in significant air quality impacts because it is
20 consistent with the 2016 Air Quality Management Plan and daily pollutant emissions levels for
21 NOx and VOCs are below the SCAQMD’s thresholds of significance for both construction and
22 long-term operation. In addition, a Health Risk Assessment concluded cancer risk for nearby
23 residents would not exceed the SCAQMD significance threshold.

24 b. The Project would result in a significant GHG impact that is more severe
25 than the impact analyzed in the 2020 PEIR, but does not rise to the level of requiring a
26 Subsequent or Supplemental EIR.

27 c. Construction and operation noise, including traffic-related noise, would not
28 cause a significant impact.

1 d. The Project would not result in a significant VMT impac compared to VMT
2 impacts analyzed in the PEIR.

3 e. The Project would not result in any cumulative impact greater than that
4 identified in the PEIR, because the “type, scale, and location of the proposed Project is
5 consistent with and less intense than that evaluated in the PEIR.”

6 **IX. City Council Approval of the Project**

7 91. The City Council held a special meeting on February 17, 2022, to decide whether
8 to approve Tentative Parcel Map 38164, Design Review 21-7008, and adopt the Addendum to
9 the PEIR.

10 92. Counsel for Petitioner made the following arguments at the hearing:

11 a. The City’s environmental review was flawed because it ignored single-
12 event noise and did not consider traffic and noise from the eastside access route connecting the
13 Project site to the I-10/Sunset Avenue exit. The City’s environmental review also ignored the
14 multiple transportation projects under construction in the City, which were mentioned by Art
15 Vela, the City’s Director of Public Works, at the hearing.

16 b. The City’s findings in the resolution to support approval of Design Review
17 21-7008 and Tentative Parcel Map 38164 assumed that the buildings in the Retail & Service
18 District would act as a buffer and screen between the industrial warehouse building and the Sun
19 Lakes residential community. Thus, the City must include as a condition of approval a
20 requirement that the buildings comprising the Retail & Service District be constructed prior to
21 construction and occupancy of the warehouse.

22 c. The Specific Plan Amendment required the buildings in the Retail &
23 Service District to be constructed before occupation of the warehouse building, but the City fails
24 to guarantee these buildings will ever be built, let alone built before the warehouse building is
25 occupied. In response, the counsel for Creation Equity, Real Party in Interest, and City staff
26 noted that the final version of the Specific Plan Amendment no longer requires the retail
27 buildings to be constructed before occupation of the warehouse building.

1 d. Even if the final Specific Plan Amendment did not require the retail
2 buildings to be constructed prior to occupation of the warehouse, counsel for Petitioner noted
3 that the proposed Design Review and Tentative Map findings assume the retail buildings would
4 be in place to screen the Sun Lakes community from the warehouse. Since the Project failed to
5 require the construction of the retail buildings prior to construction of the warehouse, these
6 findings are not supported by substantial evidence.

7 93. Dozens of members of the public shared their concerns with the Project, which
8 included but were not limited to:

9 a. The Project would exacerbate the significant traffic congestion issues at the
10 I-10/Highland Springs Avenue Interchange.

11 b. The diesel emissions associated with increased truck trips would severely
12 impact the thousands of senior citizens living adjacent to the Project site.

13 c. The increased traffic congestion caused by the Project would inhibit the
14 ability of first responders to reach the Sun Lakes community, the Four Seasons, and the Lakes if
15 these communities face a medical emergency or mass casualty event.

16 d. The increased noise caused by the hundreds of daily truck trips would
17 negatively impact the thousands of senior citizens living in close proximity to the Project site.

18 e. The Specific Plan Amendment required that the retail and service buildings
19 be constructed before the warehouse building.

20 f. The findings in the staff report regarding the retail buildings screening the
21 warehouse building from the Sun Lakes community were not supported by substantial evidence.

22 g. Even assuming the retail buildings would eventually be constructed, the
23 six-foot open fence along Sun Lakes Boulevard could not effectively screen the residential
24 communities from the warehouse building in the interim period before such construction.

25 h. The Project plans show no buffer between the Project and The Lakes
26 Assisted Living and Memory Care Center.

27 94. The City Council voted 4-1 to approve Resolution 2022-14, approving Tentative
28 Parcel Map 38164, Design Review 21-7008, and adopting the Addendum to the PEIR.

1 Councilmember Hamlin, who was the last councilmember to cast her vote, was the sole “no”
2 vote.

3 95. In approving Resolution 2022-14, the City made the following findings, among
4 others:

5 a. The PEIR included a cumulative impacts analysis. Therefore, “no such
6 analysis is also required as a separate, standalone component of a determination that a
7 subsequent EIR is not required.”

8 b. The Project satisfied Banning Municipal Code § 17.56.050, requiring the
9 City to make the following four findings to approve any Design Review application:

10 i. The proposed project is consistent with the General Plan.

11 ii. The proposed project is consistent with the Zoning Ordinance,
12 including the development standards and guidelines for the district in which it is located.

13 iii. The design and layout of the proposed project will not unreasonably
14 interfere with the use and enjoyment of neighboring existing or future development, and will not
15 result in vehicular and/or pedestrian hazards.

16 iv. The design of the proposed project is compatible with the character
17 of the surrounding neighborhood.

18 c. Approval of Tentative Parcel Map 38164 is consistent with the City’s
19 General Plan and the Specific Plan Amendment.

20 96. On February 22, 2022, the City filed and posted a Notice of Determination with
21 the County Clerk-Recorder indicating the Project had been approved and an Addendum had
22 been adopted.

23 **FIRST CAUSE OF ACTION**

24 **Violation of CEQA**

25 **(Public Resources Code § 21000 et seq.; State CEQA Guidelines)**

26 97. Petitioner realleges and incorporates by reference the preceding paragraphs in their
27 entirety.

1 98. CEQA allows lead agencies to forgo preparing an EIR for a project where that
2 project’s environmental impacts have been adequately considered in a previously certified EIR.
3 However, under CEQA Guidelines section 15162, a lead agency is required to prepare a
4 subsequent or supplemental EIR in certain circumstances, including where:

5 a. Substantial changes occur with respect to the circumstances under which
6 the project is undertaken that require major revisions to the previous EIR due to new, or more
7 severe, impacts, including cumulative impacts, not analyzed the previous EIR.

8 b. New information, which could not have been known when the previous
9 EIR was certified, shows the project will have new, or more severe, impacts, including
10 cumulative impacts, not analyzed in the previous EIR.

11 99. Cumulative impacts are those that result “from the incremental impact of the
12 project when added to other closely related, past, present, and reasonably foreseeable probable
13 future projects.” CEQA Guidelines § 15355(b). Projects that are under review by an agency are
14 generally considered “reasonably foreseeable future projects.” *San Franciscans for Reasonable*
15 *Growth v. City and County of San Francisco* (1984) 151 Cal.App.3d 61, 75.

16 100. To ensure an adequate range of projects is considered in a cumulative impacts
17 analysis, CEQA Guidelines § 15130(b)(1) requires lead agencies to rely on either:

18 a. A list of past, present, and probable future projects producing related or
19 cumulative impacts; or

20 b. A summary of projections contained in an adopted local, regional, or
21 statewide plan, or related planning document, that describes or evaluates conditions contributing
22 to the cumulative effect.

23 101. In the PEIR, the “summary of projections approach is used ..., except for the
24 evaluation of near-term traffic and vehicular-related air quality, greenhouse gas, and noise
25 impacts.” Accordingly, the PEIR purported to use the “list of projects” approach for near-term
26 traffic and vehicular-related air quality, greenhouse gas, and noise impacts.

27 102. The City’s analysis of the Project’s cumulative air quality, greenhouse gas, traffic,
28 and noise impacts is flawed. This inadequate analysis stems from the City’s legally erroneous

1 interpretation of what cumulative impacts are and how they must be analyzed as well as from
2 the City’s failure to support its conclusions with substantial evidence. The “Cumulative
3 Impacts” section of the Addendum asserts that, because “the type, scale, and location of the
4 proposed Project is consistent with and less intense than that evaluated in the PEIR,” “no
5 cumulative impact greater than those identified in the PEIR would result” from the Project. In its
6 resolution approving the Project, the City found that, because the PEIR included a cumulative
7 impacts analysis, “no such analysis is required as a separate, standalone component of a
8 determination that a subsequent EIR is not required.”

9 103. The City’s interpretation of CEQA’s requirements concerning cumulative impacts
10 is erroneous for three reasons.

11 104. First, the assertion in Resolution 2022-14 that a project’s cumulative impacts
12 never require analysis as a component of a determination as to whether a subsequent EIR is
13 required is erroneous as a matter of law.

14 105. Second, cumulative impacts are those that result from the incremental impact of
15 the Project, *when added to other closely related projects*. Since certifying the PEIR, the City has
16 become aware of—and is even in the midst of preparing environmental documents for—several
17 closely related projects that the PEIR did not consider in its cumulative impacts analysis for the
18 Specific Plan Amendment. The Addendum’s conclusion that the Project’s “type, scale, and
19 location” are consistent with the PEIR cannot support a conclusion that the Project’s
20 contribution to cumulative impacts is insignificant in relation to the impacts of closely related
21 projects the City became aware of after the PEIR was certified.

22 106. Third, the City determined that it could proceed without a subsequent EIR, but this
23 determination lacks the required substantial evidence showing the Project will not result in new,
24 or more severe, environmental impacts, *including cumulative impacts*. The City has not, and
25 cannot, provide any legal basis for treating cumulative impacts differently than all other impacts
26 lead agencies are required to consider under CEQA. The City’s determination that a subsequent
27 EIR is not required is therefore also unsupported by substantial evidence.

1 107. The City’s erroneous interpretation of CEQA resulted in the City failing entirely to
2 consider the numerous related projects the City has become aware of since the 2020 PEIR was
3 certified, including but not limited to multiple warehouse and transportation projects. As City
4 staff noted in the agenda for the February 8, 2022 City Council hearing, the Planning
5 Commission is expected to decide on up to five warehouse projects in 2022 alone. The City is
6 currently undertaking the environmental review process for the Sunset Crossroads project,
7 which will consist of 5.5 million square feet of warehouse and associated uses, approximately
8 3,000 feet east of the Project site. Together with the Project, these new projects will likely result
9 in millions of square feet of new warehouse use and thousands of daily truck trips along similar
10 routes, all of which will contribute to significant impacts related to traffic, air quality, GHGs,
11 and noise.

12 108. The Addendum prepared by the City does not consider the cumulative impacts of
13 these new projects. Relying on SCAQMD methodology, the Addendum concluded that, because
14 emissions of NOx and VOCs from the Project itself do not exceed the thresholds of significance
15 for regional emissions, the Project will not have a cumulative air quality impact. However, there
16 is no indication in the Addendum or its appendices that air quality impacts from related projects,
17 such as Sunset Crossroads, were considered. In addition, the Addendum concluded the Project’s
18 GHG emissions would exceed the SCAQMD threshold for project-specific emissions. However,
19 the Addendum does not consider whether Project GHG emissions would exceed SCAQMD
20 thresholds for cumulative GHG emissions, as was determined in the PEIR. The GHG emissions
21 associated with other closely related projects were not analyzed. The Addendum also fails to
22 consider the impacts to VMT caused by the numerous related projects under review in the City.
23 Finally, the noise analysis in the Addendum and its appendices fails to analyze the closely
24 related projects.

25 109. None of these impacts could have been considered in the PEIR. The PEIR’s
26 cumulative impacts analysis for vehicular-related air quality, GHG, VMT, and noise impacts
27 purports to rely on a “list of projects.” Since the numerous new projects had not yet been
28

1 proposed, they were not, and could not have been, considered in the PEIR’s cumulative impacts
2 analysis.

3 110. These new projects constitute substantial changes to the circumstances under
4 which the Project is undertaken, and will require major revisions to the EIR due to the
5 involvement or new, and more severe, cumulative air quality, GHG, VMT, and noise impacts.

6 111. The existence of these projects also constitutes new information of substantial
7 importance, which could not have been known at the time the PEIR was certified, that show the
8 Project will have new, and more severe, cumulative air quality, GHG, VMT, and noise impacts.

9 112. Respondents failed to proceed in the manner required by law and violated CEQA
10 by approving the Project without preparation of a subsequent EIR. A subsequent EIR was
11 required here due to the Project’s new, and more severe, cumulative impacts. Respondents’
12 contrary conclusion rested on an incorrect interpretation of CEQA, is not supported by
13 substantial evidence, and thus fails as a matter of law.

14 113. Respondents failed to proceed in the manner required by law and violated CEQA
15 by approving the Project through adoption of an Addendum that determined a subsequent EIR
16 was not required, without supporting such determination with substantial evidence.

17 **SECOND CAUSE OF ACTION**

18 **Violation of Rights to Due Process**

19 **(Cal. Civ. Pro. § 1094.5; Procedural Due Process)**

20 114. Petitioner realleges and incorporates by reference the preceding paragraphs in their
21 entirety.

22 115. Respondents acted in a quasi-adjudicatory capacity when they denied Petitioner’s
23 appeal and approved the Project.

24 116. Where a city council acts in a quasi-adjudicatory capacity, the councilmembers are
25 required to ensure a fair hearing for the applicant and the public. *Woody’s Group, Inc. v. City of*
26 *Newport Beach* (2015) 233 Cal.App.4th 1012, 1021. A fair hearing is one in which the “decision
27 maker is free of bias for or against a party.” *Morongo Band of Mission Indians v. State Water*
28 *Resources Control Bd.* (2009) 45 Cal.4th 731, 737. Invalidation of a decision is required where a

1 decisionmaker “crosses the line into advocacy” for or against a project, yet still participates in
2 the decision. *Petrovich Development Company, LLC v. City of Sacramento* (2020) 48
3 Cal.App.5th 963, 974. The “prehearing bias of one [decision maker is] enough, by itself, to
4 invalidate” the decision. *Woody’s Group*, 233 Cal.App.4th at 1016.

5 117. Comments made by members of the City Council, including but not limited to
6 those described below, “cross[ed] the line into advocacy” and thus fit squarely within the type of
7 statements that require invalidation of the City Council’s decision under California law.

8 118. Councilmember Hamlin not only advocated in favor of the Project, but also saw
9 herself as integral to its approval and implementation. Before a final decision was made on
10 Project approval and adoption of the Addendum, she asked Mr. Zemon if she could *personally*
11 *participate* in finding tenants for the Project. Mr. Zemon granted her request that very same day.
12 Councilmember Hamlin and Mr. Zemon then worked together to present the Project to the
13 Banning community in the most positive light they could. Their emails demonstrate they
14 considered themselves a cohesive, singular team, whose mission was to see the Project approved
15 and implemented (“*we* must stop the dissemination of misinformation,” “*we* should contact the
16 reporter from NBC,” “*we* need some positive press releases”). In the email and attached
17 statement she sent to Randy Robbins, Councilmember Hamlin gave her opinion that the Project
18 would be “good for the community,” would have a “positive impact,” and that it would be a
19 “mistake” not to approve it. Councilmember Hamlin’s participation in the February 17, 2022
20 City Council meeting despite clear evidence of prehearing bias is therefore sufficient, on its
21 own, to invalidate the decision.

22 119. Councilmember Sanchez advocated in favor of the Project in his Facebook and
23 Nextdoor posts, where he said the Project was a “Great project” and proceeded to list what he
24 believed were positive aspects of the Project. Councilmember Sanchez’s participation in the
25 February 17, 2022 City Council hearing despite clear evidence of prehearing bias is sufficient,
26 on its own, to invalidate the decision.

27 120. At the 2021 “State of the City” address, Councilmember Wallace referenced the
28 Project in the “sneak peek” portion of the address dedicated to projects the City planned on

1 approving in 2022. This suggests she, and the City, had already determined they would approve
2 the Project. In addition, she spoke glowingly about the Project, providing her opinion that it is
3 crucial for the future development of the City, and indicating the City Council would “do what
4 [they] have to do” to approve it. Councilmember Wallace’s participation in the February 17,
5 2022 City Council hearing despite clear evidence of prehearing bias is sufficient, on its own, to
6 invalidate the decision.

7 121. Respondents violated the Petitioner’s and the public’s procedural due process
8 rights by allowing Councilmembers Hamlin, Sanchez, and Wallace to participate in the decision
9 despite their having demonstrated clear bias in favor of the Project.

10 **THIRD CAUSE OF ACTION**

11 **Violation of Banning Municipal Code**

12 **(Banning Municipal Code § 2.04.080)**

13 122. Petitioner realleges and incorporates by reference the preceding paragraphs in their
14 entirety.

15 123. The conduct of councilmembers in the City is governed by the “Manual of
16 Procedural Guidelines for the Conduct of City Council and Constituent Body/Commission
17 Meetings for the City of Banning” (“City Council Manual”). Banning Municipal Code §
18 2.04.080.

19 124. The City Council Manual provides: “For quasi adjudicative matters involving
20 public hearings, the members of the Legislative Body shall not prejudice the matter prior to the
21 public hearing, shall be fair and impartial, and shall decide the matter based upon the evidence
22 and the statutorily required findings ... For such matters, Legislative Body members should
23 avoid expressing an opinion or divulging their thought process until after the public hearing has
24 completed.” City Council Manual § 8.1(d), (e).

25 125. At the February 8, 2022 City Council hearing where Planning Commissioner
26 Marco Santana was removed from the Planning Commission, City Manager Doug Schulze
27 explicitly relied on these provisions in the City Council Manual in his staff presentation
28 recommending removal of Mr. Santana.

1 126. By making statements demonstrating clear bias in favor of the Project,
2 Councilmembers Hamlin, Sanchez, and Wallace violated their duties not to “prejudice the
3 matter,” to be “fair and impartial,” and to “avoid expressing an opinion or divulging their
4 thought process.” *Id.* If Mr. Santana’s opinion article, where he expressed only general concerns
5 about warehousing and never referenced a specific project as grounds for removal, then
6 certainly the Councilmembers’ numerous specific comments in favor of *this particular Project*
7 required their recusal.

8 127. Respondents’ participation in the February 17, 2022 hearing therefore violated the
9 Banning Municipal Code.

10 **FOURTH CAUSE OF ACTION**

11 **Violation of State Planning and Zoning Laws, Banning Municipal Code & Banning City**
12 **Council Resolution 2005-91**

13 **(Gov. Code §§ 65300 et seq; Banning Municipal Code §§ 17.56.050, 17.96.060, 17.040.030;**
14 **Banning City Council Resolution 2005-91; Banning City Council Resolution 2005-91,)**

15 128. Petitioners reallege and incorporate by reference the preceding paragraphs in their
16 entirety.

17 129. California law generally requires all land use decisions to be consistent with the
18 approving agency’s general plan. *Neighborhood Action Group v. County of Calaveras* (1984)
19 156 Cal.App.3d 1176, 1184; *Resource Defense Fund v. County of Santa Cruz* (1982) 133
20 Cal.App.3d 800, 806. Banning Municipal Code section 17.040.030 similarly requires all
21 development within the City to be consistent with the general plan. Banning Municipal Code
22 section 17.56.050 specifically prohibits the approval of a Design Review application unless the
23 City finds it is consistent with the general plan.

24 130. Government Code section 65455 provides that a tentative map within an area
25 covered by a specific plan may not be approved unless it is consistent with the adopted specific
26 plan. Banning Municipal Code section 17.96.060 provides that tentative maps and all land use
27 entitlements cannot be approved unless they are found to be consistent with the adopted specific
28 plan.

1 131. Thus, both state and local law require that the City properly find the Project
2 consistent with the Specific Plan Amendment and the City’s General Plan.

3 132. Additionally, the Banning Municipal Code section 17.56.050 requires the City
4 Council to make certain findings in order to lawfully approve a Design Review application,
5 including:

6 a. The design and layout of the proposed project will not unreasonably
7 interfere with the use and enjoyment of neighboring existing or future development, and will not
8 result in vehicular and/or pedestrian hazards (“Use and Enjoyment Finding”)

9 b. The design of the proposed project is compatible with the character of the
10 surrounding neighborhood (“Compatibility Finding”).

11 133. Where an administrative agency is required to make findings to support its
12 decision, the findings must “bridge the analytic gap between the raw evidence and ultimate
13 decision.” *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d
14 506, 515. A reviewing court “must scrutinize the record and determine whether substantial
15 evidence supports the administrative agency’s findings.” *Id.* at 514-15.

16 134. The City’s findings in support of its approval of the Project fail to meet applicable
17 legal and evidentiary requirements.

18 135. To support its findings that Tentative Parcel Map 38164 and Design Review 21-
19 7008 are consistent with Policy 6 in the Community Development Element of the General Plan,
20 the City relied on the assertion that “the warehouse use ... will be screened and buffered from
21 residential uses to the south and east by the retail and service buildings to be located in the
22 Retail and Services District.”

23 136. To support its finding that Tentative Parcel Map 38164 and Design Review 21-
24 7008 are consistent with the Guiding Objectives in the Specific Plan Amendment, the City relied
25 on the assertion that the “Project will provide up to six sites and buildings for restaurants,
26 shopping and services for the Sun lakes Country Club Community within the Retail and Service
27 District.”

1 137. To support its Design Review Use and Enjoyment Finding, the City found “the
2 warehouse ... will be screened and buffered from residential uses to the south and east by the
3 retail and service buildings to be located in the Retail and Services District.”

4 138. To support its Design Review Compatibility Finding, the City found the Retail &
5 Service District “will function as a visual and physical buffer from the Sun Lakes Country Club
6 residents [and] will provide needed retail, restaurant and services uses for the residents.”

7 139. There is no evidence to support any of the City’s findings that Retail & Service
8 buildings will be in place to act as a buffer and screen between the Sun Lakes community and
9 the industrial building. Nothing in the Project itself, the final Specific Plan Amendment, or the
10 City’s conditions of approval for the Project requires the Real Parties in Interest to construct any
11 retail or service buildings prior to the construction or occupation of the warehouse buildings. As
12 the City’s consultant asserted on February 15, 2022, in a letter responding to Petitioner’s
13 comments: “the Retail & Service District need only be entitled, not fully constructed, prior to
14 occupancy of the Business & Warehouse District.” An “entitlement” alone is not a “buffer”
15 between the warehouse and the Sun Lakes residential community. Nor does an “entitlement”
16 provide “needed retail, restaurant, and service uses” to the Sun Lakes residents.

17 140. The Specific Plan Amendment and the Project approval provide no guarantee that
18 the buildings comprising the Retail & Service District will ever be constructed. The City itself
19 found there has been a “trend away from brick-and-mortar retail.” In fact, City staff altered the
20 Specific Plan Amendment, which originally required the Retail & Service buildings be
21 constructed before occupation of the industrial building, because the Real Party in Interest
22 expressed doubt about the economic viability of retail and service businesses. Additionally,
23 Councilmember Happe indicated at the February 17, 2022 City Council hearing he had “a
24 concern that, if the retail component is not constructed concurrent to or prior to [the warehouse],
25 it will fall off the level of importance of this project.”

26 141. The City’s findings concerning the Retail & Service District are thus not supported
27 by substantial evidence, and the City has failed to bridge the analytic gap between the raw
28 evidence and ultimate decision in Resolution 2022-14.

1 142. The Project is also inconsistent with the General Plan itself. Program 4.A of the
2 Noise Element, located in the Environmental Hazards chapter of the General Plan, provides:
3 “The City shall review designated primary truck routes and ensure they are clearly marked
4 throughout the community. Except for traffic providing location-specific services and deliveries,
5 construction trucks and delivery trucks shall be limited to designated truck routes, including:
6 Ramsey Street, and those portions of Lincoln Street, Highland Spring Avenue, Hathaway Street,
7 Sunset Avenue, Eight Street, San Gorgonio Avenue and Hargrave Street so designated.”

8 143. The Project contemplates trucks accessing the Project site from the I-10/Highland
9 Springs exit via Sun Lakes Boulevard. The Specific Plan Amendment explicitly authorizes
10 trucks to access the Project site from the I-10/Sunset Ave exit via Sun Lakes Boulevard, once
11 the extension of Sun Lakes Boulevard is completed. Accessing the Project site from the I-
12 10/Highland Springs Ave. exit requires trucks to travel on Sun Lakes Boulevard for
13 approximately 1,000 ft. Accessing the Project site from the I-10/Sunset Ave. exit will require
14 trucks to travel on Sun Lakes Boulevard for approximately one mile. Resolution 2022-14 and
15 the Addendum further provide that commercial trucks weighing more than 10,000 pounds will
16 access the Project site via Sun Lakes Boulevard. The Project therefore violates the General
17 Plan’s requirement that “trucks shall be limited to designated truck routes.”

18 144. Respondents also violated Banning City Council Resolution 2005-91 by
19 authorizing the use of large commercial trucks on Sun Lakes Boulevard. Resolution 2005-91,
20 adopted on September 13, 2005, designates sixteen streets within the City “upon which
21 commercial vehicles in excess of ten thousand pounds may be operated.” The City did not
22 include Sun Lakes Boulevard in its list of sixteen streets in Resolution 2005-91.

23 145. As a result of the foregoing defects, Respondents prejudicially abused their
24 discretion and failed to proceed in the manner required by law by approving the Project, making
25 findings, and taking related actions that do not comply with the City’s General Plan, the Specific
26 Plan Amendment, the Banning Municipal Code, Banning City Council Resolution 2005-91, and
27 the state Planning and Zoning Law. As such, the Respondents’ approval of the Project must be
28 set aside.

1 **PRAYER FOR RELIEF**

2 WHEREFORE, Petitioner prays for judgment as follows:

3 1. Alternative and peremptory writs of mandate directing the City to vacate and set
4 aside its adoption of the Addendum, approval of Design Review 21-7008, approval of Tentative
5 Parcel Map 38164, and all other related Project findings and approvals;

6 2. Alternative and peremptory writs of mandate directing the City to comply with the
7 requirements of CEQA, State Planning and Zoning Law, due process, the City’s General Plan,
8 the Specific Plan Amendment, the Banning Municipal Code, and to take any other action as
9 required by Public Resources Code Section 21168.9 or other applicable law;

10 3. For a temporary stay, temporary restraining order, and preliminary and permanent
11 injunctions restraining the City and Real Party in Interest and their agents, servants, and
12 employees, and all other acting in concert with the City on their behalf from taking any action to
13 implement the Project, pending full compliance with the requirements of CEQA, the CEQA
14 Guidelines, due process, State law, and the Banning Municipal Code.

15 4. For costs of the suit;

16 5. For an order awarding Petitioner its attorneys’ fees under Code of Civil Procedure
17 section 1021.5 and other applicable authority; and

18 6. For such other and further relief as the Court deems just and proper.

19 DATED: April 18, 2022

SHUTE, MIHALY & WEINBERGER LLP

20
21 By: 

22 KEVIN P. BUNDY
23 GABRIEL M.B. ROSS
24 ORRAN BALAGOPALAN

25 Attorneys for Pass Action Group
26
27
28

1 **VERIFICATION**

2 I, Sheri Flynn, have read the foregoing Verified Petition for Writ of Mandate and
3 Complaint for Injunctive Relief and know its contents.

4 I am authorized to execute this verification on behalf of Pass Action Group. I have read
5 the foregoing Verified Petition for Writ of Mandate and Complaint for Injunctive Relief and am
6 familiar with its contents. All facts alleged in the above Petition, and not otherwise supported by
7 exhibits or other documents, are true of my own knowledge, except to matters stated on
8 information and belief, and as to those matters, I believe them to be true.

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

11 Executed on April 18, 2022, at Banning, California.

12
13 Sheri Flynn
14 _____

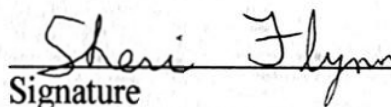
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Signature

Exhibit A

TOLLING AGREEMENT

This Tolling Agreement (“Agreement”) is entered into among (1) Creation Equity LLC and Sun Lakes Highland, LLC (collectively, “Developer”); (2) the City of Banning, California and City Council of the City of Banning (collectively, “City”); and (3) Pass Action Group (“PAG”). Developer, the City, and PAG will sometimes be collectively referred to herein as “Parties” and individually as “Party.” The purpose of this Agreement is to facilitate settlement negotiations between the Parties by extending the time period within which a suit may be brought by PAG based on the claims described herein.

WHEREAS, Developer applied for approval by the City of the Banning Point Project (“Project”), a warehouse project adjacent to the Sun Lakes Country Club neighborhood of the City.

WHEREAS, with respect to the Project, the City is the lead agency for purposes of compliance with the California Environmental Quality Act, Public Resources Code section 21000, *et seq.* (“CEQA”), and Developer is the project applicant and proponent for purposes of CEQA.

WHEREAS, on February 17, 2022, the Banning City Council voted to approve a tentative parcel map and design review for the Project and to make CEQA findings on the basis of an Addendum to an Environmental Impact Report that was certified on December 8, 2020.

WHEREAS, on February 22, 2022, the City filed a Notice of Determination (“NOD”) with the County of Riverside; the NOD was posted that same day.

WHEREAS, CEQA provides that an action or proceeding to attack, review, set aside, void, or annul the acts of the City in approving the Project must be commenced within 30 days of the posting of the NOD. *See* Pub. Res. Code § 21167(b), (c) & (e).

WHEREAS, PAG is considering the filing of a lawsuit against the City in which it challenges the City actions and approvals above (“Project Approvals”).

WHEREAS, the Parties believe that it would be productive for some or all of the Parties to engage in settlement discussions to try to resolve their differences without having to simultaneously incur the time, cost and expense of litigation relating to the Project Approvals.

WHEREAS, the Parties wish to enter into an agreement under which the 30-day filing period specified in Public Resources Code section 21167 and all other applicable statutes of limitation and other time-related rules, doctrines, claims or defenses, however defined or denominated, related to or arising out of the Project Approvals are extended and tolled during the term of this Agreement.

WHEREAS, in *Salmon Protection and Watershed Network v. County of Marin*, 205 Cal.App.4th 195 (2012), the First Appellate District Court of Appeal approved the use of a tolling agreement to extend the 30-day filing period specified in Public Resources Code section 21167, stating in part: “If all parties directly involved in a controversy concerning the adequacy of an EIR or compliance with other provisions of CEQA are disposed to seek a mutually acceptable means of resolving the controversy and agree to toll the period for commencing litigation, the interests of

both those parties and the public are promoted by permitting the settlement discussions to proceed without the distraction of litigation.” *Id.* at 202.

NOW, THEREFORE, to minimize the time, cost and expense of potentially avoidable litigation, and in consideration of the mutual promises, representations, terms and conditions contained herein, and of other good and valuable consideration, the reasonableness and sufficiency of which the Parties hereby acknowledge, the Parties agree as follows:

1. Any and all statutes of limitations and defenses based upon the passage of time, including but not limited to the 30-day statute of limitations provided in Public Resources Code section 21167, applicable to any and all claims, rights, demands, pursuits, causes of action and the like by PAG against the City or Developer, related to or arising out of the Project Approvals, are and shall be tolled and suspended from **March 22, 2022** through and including **April 22, 2022** (“Tolling Period”), provided, however, that nothing in this Agreement shall operate to revive the time for filing any claim or lawsuit, or for providing any notice, that was time barred before **March 22, 2022**. During the Tolling Period, all applicable statutes of limitations or statutes of repose and/or any other time requirements for the giving of any notice or the institution of legal proceedings by PAG against the City or Developer related to or arising out of the Project Approvals are hereby and shall be tolled. During the Tolling Period, absent prior termination of the Agreement, PAG is precluded from initiating against the other Parties any litigation related to or arising out of the Project Approvals.

2. With fourteen (14) days advance notice, any Party to this Agreement can terminate the Agreement before April 22, 2022 by providing written notice to all other Parties. The effective date of termination (the “Termination Date”) will be fourteen (14) days following delivery of written notice of termination to all other Parties. Upon the Termination Date, this Agreement and its Tolling Period will terminate and expire. The periods for calculating any applicable statutes of limitations, statutes of repose, and/or other timing requirements or deadlines tolled by the Agreement will resume running on the Termination Date. Absent termination prior to April 22, 2022, or absent a written agreement to extend the Agreement, or absent a settlement, the Termination Date of the Agreement shall be April 22, 2022.

3. The City and Developer are estopped from and shall not raise the running of time during the Tolling Period as a defense or bar to claims or causes of action asserted by PAG arising out of, or otherwise related to, the Project Approvals. Moreover, the City and Developer shall not support any motion or argument by a third party asserting that the running of time during the Tolling Period is a defense or bar to claims or causes of action asserted by PAG arising out of, or otherwise related to, the Project Approvals.

4. The Parties agree that the Tolling Period shall not be included in the calculation of the passage of time for the purposes of any statute of limitations, statute of repose, laches or any other defense based upon the lapse of time for any legal claim asserted by PAG related to or arising out of the Project Approvals.

5. Nothing in this Agreement shall constitute an admission of liability or fault on the part of the City or Developer, be construed or offered as evidence that PAG has any claim or right

against the City or Developer, or be construed or offered as evidence regarding the sufficiency or strength of any such claim or right.

6. This Agreement comprises the entire agreement of the Parties with respect to the tolling of the statute of limitations, the doctrine of laches and other time-based defenses that are or may be applicable to the Project Approvals, and this Agreement may be amended, modified or extended only by a written instrument signed by all Parties.

7. This Agreement is binding upon and shall inure to the benefit of each of the Parties and their respective successors, assigns, affiliates, subsidiaries, representatives, agents, and parents.

8. Each of the undersigned Parties represents and warrants that it has the requisite authority to bind, and in fact binds, the entities and/or persons on behalf of which it is executing this Agreement.

9. The City and Developer each agree and acknowledge that the Parties are the only signatories required to make this Agreement effective, and shall each be estopped to argue or claim that the Agreement is ineffective for lack of the participation or signature of any other party, and shall be estopped to support any other person or entity's claim or argument on such grounds.

10. This Agreement may be executed by the Parties on separate counterparts, each of which, when so executed, shall be deemed an original, but all such counterparts shall constitute one and the same instrument. Any executed copy of this Agreement delivered by confirmed facsimile or electronic mail shall be deemed to be binding to the same extent as an original executed copy of this Agreement.

11. This Agreement shall be governed in all respects by the laws of the State of California, without regard to conflict of law principles. The Parties further agree that any dispute regarding the interpretation or enforcement of this Agreement may be brought in Riverside County Superior Court.

IN WITNESS WHEREOF, each of the Parties, individually and/or through their respective attorneys or other duly authorized representatives, has executed this Agreement on the dates set forth below.

Dated: March __, 2022

SUN LAKES HIGHLAND, LLC

By:  4045B8FF5899449...

Name: _____

Title: _____

Dated: March ____, 2022

CREATION EQUITY LLC

By:  _____

Name: Josh Zemon _____

Title: Authorized Signatory _____

Dated: March ____, 2022

CITY OF BANNING, CALIFORNIA and
CITY COUNCIL OF THE CITY OF
BANNING, CALIFORNIA

By: _____

Name: _____

Title: _____

Dated: March ____, 2022

PASS ACTION GROUP

By: _____

Name: _____

Title: _____

//

//

Dated: March ___, 2022

CREATION EQUITY LLC

By: _____

Name: _____

Title: _____

Dated: March 23, 2022

CITY OF BANNING, CALIFORNIA and
CITY COUNCIL OF THE CITY OF
BANNING, CALIFORNIA

By:  _____

Name: Douglas Schulze

Title: City Manager

Dated: March ___, 2022

PASS ACTION GROUP

By: _____

Name: _____

Title: _____

//

//

Dated: March __, 2022

CREATION EQUITY LLC

By: 
Name: Josh Zemon
Title: Authorized Signatory


Dated: March __, 2022

CITY OF BANNING, CALIFORNIA and
CITY COUNCIL OF THE CITY OF
BANNING, CALIFORNIA

By: _____
Name: _____
Title: _____

Dated: March 23, 2022

PASS ACTION GROUP

By: 
Name: Sheri Flynn
Title: Pass Action Board Member

//
//

Exhibit B

SHUTE MIHALY
& WEINBERGER LLP

396 HAYES STREET, SAN FRANCISCO, CA 94102
T: (415) 552-7272 F: (415) 552-5816
www.smwlaw.com

KEVIN P. BUNDY
Attorney
bundy@smwlaw.com

March 22, 2022

Via By FedEx Overnight Delivery

Caroline Patton
Deputy City Clerk
City of Banning
99 E Ramsey Street
Banning, CA 92220

Re: Notice of Intent to Sue re Design Review 21-7008 and Tentative Parcel Map 38164 (Banning Point Project)

Dear Ms. Patton:

This letter is to notify you that Pass Action Group will file suit against the City of Banning and the Banning City Council for failure to observe the requirements of the California Environmental Quality ("CEQA"), Public Resources Code section 21000 et seq., in the administrative process that culminated in the City's decision to approve Design Review 21-7008 and Tentative Parcel Map 38164 on February 17, 2022. This notice is given pursuant to Public Resources Code section 21167.5.

Very truly yours,

SHUTE, MIHALY & WEINBERGER LLP



Kevin P. Bundy

1 **PROOF OF SERVICE**

2
3 At the time of service, I was over 18 years of age and **not a party to this action**. I am
4 employed in the County of San Francisco, State of California. My business address is 396
Hayes Street, San Francisco, CA 94102.

5 On March 22, 2022, I served true copies of the following document(s) described as:

6 **NOTICE OF INTENT TO SUE RE DESIGN REVIEW 21-7008 AND TENTATIVE**
7 **PARCEL MAP 38164 (Banning Point Project)**

8 on the parties in this action as follows:

9 Caroline Patton
10 Deputy City Clerk
11 City of Banning
12 99 E Ramsey Street
13 Banning, CA 92220

14 **BY OVERNIGHT DELIVERY:** I enclosed said document(s) in an envelope or
15 package provided by the overnight service carrier and addressed to the persons at the addresses
16 listed above. I placed the envelope or package for collection and overnight delivery at an office
or a regularly utilized drop box of the overnight service carrier or delivered such document(s) to
a courier or driver authorized by the overnight service carrier to receive documents.

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

19 Executed on March 22, 2022, at San Francisco, California.

20 

21 _____
Tuloa Sanchez

Exhibit C

SHUTE MIHALY
& WEINBERGER LLP

396 HAYES STREET, SAN FRANCISCO, CA 94102
T: (415) 552-7272 F: (415) 552-5816
www.smwlaw.com

KEVIN P. BUNDY
Attorney
bundy@smwlaw.com

April 18, 2022

Robert Bonta
Attorney General
California Department of Justice
1300 I Street
Sacramento, CA 95814-2919

Re: Notice of Filing CEQA Litigation (Pass Action Group et al. v. City of Banning et al.)

Dear Attorney General Bonta:

Enclosed please find a copy of the Verified Petition for Writ of Mandate in the above-titled action. The petition is provided to you in compliance with Public Resources Code section 21167.7 and Code of Civil Procedure section 388. Please acknowledge receipt in the enclosed prepaid, self-addressed envelope.

Thank you for your attention to this matter.

Very truly yours,

SHUTE, MIHALY & WEINBERGER LLP



Kevin P. Bundy

Encls.

1486588.1

1 **PROOF OF SERVICE**

2
3
4 At the time of service, I was over 18 years of age and **not a party to this action**. I am
5 employed in the County of San Francisco, State of California. My business address is 396
6 Hayes Street, San Francisco, CA 94102.

7 On April 18, 2022, I served true copies of the following document(s) described as:

8 **NOTICE OF FILING CEQA LITIGATION (Pass Action Group et al. v. City
9 of Banning et al.)**

10 on the parties in this action as follows:

11 Robert Bonta
12 Attorney General
13 California Department of Justice
14 1300 I Street
15 Sacramento, CA 95814-2919

16 **BY MAIL:** I enclosed the document(s) in a sealed envelope or package addressed to the
17 persons at the addresses listed above and placed the envelope for collection and mailing,
18 following our ordinary business practices. I am readily familiar with Shute, Mihaly &
19 Weinberger LLP's practice for collecting and processing correspondence for mailing. On the
20 same day that the correspondence is placed for collection and mailing, it is deposited in the
21 ordinary course of business with the United States Postal Service, in a sealed envelope with
22 postage fully prepaid.

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

25 Executed on April 18, 2022, at San Francisco, California.

26
27
28


Tuloa Sanchez