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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF RIVERSIDE, RIVERSIDE HISTORIC COURTHOUSE

PASS ACTION GROUP,

Petitioner and Plaintiff,

v.

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

Respondents and Defendants.

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

Real Parties in Interest.

Case No. CVRI2201482

PETITIONER'S OPENING BRIEF IN SUPPORT OF 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)

Assigned for All Purposes to:
Hon. Craig Riemer, Dept. 1

Action Filed: April 18, 2022
Trial Date: Not Set

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INTRODUCTION

The Banning Point Project (the "Project") proposed by Real Parties in Interest Creation Equity, LLC and Sun Lakes Highland, LLC ("Real Parties") would construct an industrial building with hundreds of thousands of square feet of warehouse and cold storage space adjacent to a residential neighborhood occupied primarily by seniors and a memory care facility. The Project would send nearly 300 trucks per day onto Sun Lakes Boulevard via Interstate 10, Highland Springs Boulevard and Sunset Avenue, bringing substantial noise, toxic diesel pollution, and traffic into the heart of the neighborhood.

Despite these impacts—and over the vehement objections of the community—Respondents City of Banning and the City Council of Banning (together the "City") approved the Project without first preparing a project-specific environmental impact report ("EIR") pursuant to the California Environmental Quality Act ("CEQA"), Public Resources Code section 21000 et seq.[1] Instead, the City relied on an "Addendum" to a prior program EIR (the "PEIR") adopted in 2020 for an amendment to the Sun Lakes Village North Specific Plan. The Addendum—which was not released to the public until days before the City Council's final approval of the Project—concluded that all of the Project's impacts already had been addressed in the PEIR. However, the City completely failed to consider the *cumulative* effect of the Project in conjunction with other nearby projects—including the 5.5 million square foot, 532-acre Sunset Crossroads warehouse development just one half-mile away—that the PEIR did not anticipate or address. The City concluded that CEQA requires no such consideration. The City was wrong.

Petitioner Pass Action Group objected to the Project throughout the administrative process and appealed the City Planning Commission's approvals to the full City Council. The Council, however, denied Petitioner a fair hearing. During the months before the Council hearing on Petitioner's appeal, no fewer than three City Council members repeatedly crossed the line into open advocacy for the Project in emails, written talking points, social media posts, and public speeches. One council member even involved herself directly in leasing discussions with the developers. Concrete facts in the record demonstrate an unacceptable probability of actual bias on the part of each of these council members. None of them could be fair and impartial, and none should have participated in the appeal hearing.

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[1] All undesignated statutory references are to the Public Resources Code. References to the "Guidelines" are to the CEQA Guidelines codified at title 14, California Code of Regulations, section 15000 et seq.

Yet participate they did—and they approved the Project based on findings of consistency with the City's General Plan, the Specific Plan, and the Banning Municipal Code that have no evidentiary support. The City found that a string of retail shops proposed as part of the Project would screen and buffer the warehouse from the surrounding neighborhood, even though nothing in the Project or the Specific Plan required those shops to be built at all, much less prior to or concurrently with the warehouse. The City's approval also contradicted its own General Plan's Noise Element by allowing truck traffic on Sun Lakes Boulevard, which is not a designated truck route.

For all of these reasons and as shown below, the City prejudicially abused its discretion in approving the Project. Petitioner respectfully requests that this Court set the City's approvals aside.

STATEMENT OF ISSUES

Petitioner provides the following statement of issues pursuant to section F.3.a of this Court's CEQA Case Management Order dated June 17, 2022. Petitioner exhausted administrative remedies pursuant to section 21151(c) and Guidelines section 15185 by appealing the Planning Commission's decisions regarding the Project to the City Council. Administrative Record ("AR") 1006, 1061-63. Petitioner bears the burden of proof on all issues.

Issue 1: Whether Respondents violated Petitioner's right to a fair hearing in light of extensive evidence of bias exhibited by members of the City Council. Petitioner contends the Project approval must be invalidated because three councilmembers demonstrated an unacceptable probability of actual bias in favor of the Project. Petitioner's claim is reviewed de novo. *Nasha v. City of Los Angeles* (2004) 125 Cal.App.4th 470, 482. Petitioner exhausted this claim in two letters to the City (AR 13041-69; AR 13070, 13072) and at the City Council's appeal hearing (AR 2501-02).

Issue 2: Whether Respondents' decision to forgo preparation of a subsequent or supplemental EIR violated CEQA due to the Respondents' failure to consider the cumulative impacts of the Project. Petitioner argues the Respondents' decision not to prepare a subsequent or supplemental EIR for the Project was based on erroneous legal conclusions and unsupported by substantial evidence. Respondents' interpretation of CEQA's requirements presents a question of law that this Court reviews de novo. *Protecting Our Water and Environmental Resources v. County of Stanislaus* (2020) 10 Cal.5th 479, 495. Respondents' factual determination that project changes or new information did not

require preparation of an EIR is reviewed in two steps. *Friends of College of San Mateo Gardens v. San Mateo County Community College Dist.* (2016) 1 Cal.5th 937, 953. First, the court decides whether the agency's decision to proceed under CEQA's subsequent review provisions is supported by substantial evidence. *Id*. Second, the Court must determine "whether the agency has properly determined *how* to comply with its obligations under those provisions." *Id*. "[W]here, as here, the agency has determined that project changes will not require 'major revisions' to its initial environmental document such that no subsequent or supplemental EIR is required, the reviewing court must then proceed to ask whether substantial evidence supports that determination." *Id*. Petitioner exhausted this claim in a letter to the City (AR 12624-25) and at the City Council hearing (AR 2602-03).

Issue 3: Whether Respondents' Project approval findings are unsupported by substantial evidence. Petitioner argues the City's findings of consistency with the General Plan, Specific Plan, and Municipal Code are unsupported by substantial evidence. Those findings conclude that development of the Retail & Service District will serve to screen the warehouse building from neighboring residential areas and provide retail opportunities for residents, despite the lack of substantial evidence that the retail development will occur. The City's findings are reviewed for substantial evidence. *Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 514-15. Petitioner raised this issue at the City Council hearing. AR 2600-01.

Issue 4: Whether the Project violates the City's General Plan. Petitioner argues the Project violates the Noise Element of the General Plan by authorizing heavy-duty trucks to use Sun Lakes Boulevard, which is not a designated primary truck route. The City's determination that the Project is consistent with the General Plan is reviewed for substantial evidence. *San Franciscans Upholding the Downtown Plan v. City and County of San Francisco* (2002) 102 Cal.App.4th 656, 675. Written and verbal public comments pointed out that Sun Lakes Boulevard is not designated for use by heavy trucks. AR 2739, 2741, 2592. Numerous members of the public also raised concerns about the use of large trucks on Sun Lakes Boulevard. AR 2560, 2567-68, 15254. The grounds for this claim were therefore presented to the City prior to the close of the public hearing on the Project in accordance with section 21177(a).

FACTUAL BACKGROUND

I. Project site.

The Project site is a 47-acre undeveloped parcel in the City of Banning in Riverside County. AR 1005. The site is adjacent to a majority-senior residential community burdened by severe air pollution and traffic congestion. *See* AR 15173, 15258, 18795. To the south and east of the site, across Sun Lakes Boulevard, is the Sun Lakes Country Club ("Sun Lakes"), a 55-and-over community of mostly seniors consisting of over 3,000 homes and 6,000 residents. AR 794, 17712. The site is bordered on the east by The Lakes Assisted Living and Memory Care Facility ("The Lakes"), a residential community for the elderly and persons needing assistance with basic daily tasks such as bathing and dressing. *See* AR 792, 794, 17712. The Project site is less than a mile from the Four Seasons, another 55-and-over community home mostly to seniors. AR 15267, 15339, 17214.

Numerous community members expressed concern that frequent diesel truck trips generated by the Project will exacerbate severe respiratory issues experienced by many nearby residents. AR 2545, 2555-57, 15841 16673, 16678-79, 16699, 17403, 17456, 18918, 19732. The American Lung Association ranks Riverside County as the nation's second "most polluted place[] to live" in terms of ozone and particulate pollution. AR 18800. According to the CalEnviroScreen tool developed by the Office of Environmental Health Hazard Assessment, the Project site's census tract is in the 98th percentile for ozone pollution. AR 17461-63. The California Air Resources Board ("CARB") explained that nearby residential communities are "disproportionately burdened by multiple air pollution sources." AR 13036.

To the north of the Project site lies the Interstate-10 Freeway ("I-10"). AR 794. The Project site is approximately one-half mile east of the Highland Springs Avenue exit from I-10. Trucks would access the site from the freeway using Highland Springs Boulevard and Sun Lakes Boulevard. *See* AR 229, 600. Dozens of Banning residents noted that these roadways experience significant traffic congestion throughout the day and expressed concern that truck trips generated by the Project will exacerbate that congestion. *See, e.g.,* AR 2525-26, 2531-36, 2543-44, 2561, 2563-64, 2572-74, 15174, 15255, 15263, 16255, 16614, 17465, 19732. The Project's census tract is in the 81st percentile for traffic congestion according to CalEnviroScreen. AR 17461. Numerous Banning residents also expressed concern with the

lack of emergency services south of the I-10 and delays in emergency response that may be caused by the additional truck traffic generated by the Project. AR 2531, 15173-74, 16614, 18565, 18634.

Warehouse development has dramatically increased in Banning and the greater Inland Empire region in recent years, as have the severe pollution and traffic issues associated with warehouses. 150 million square feet of warehouse space was built in the Inland Empire in the last decade alone. AR 12932. According to the California Attorney General, "imprudent warehouse development can harm local communities and the environment," primarily due to diesel particulate matter and nitrogen oxide emissions associated with "hundreds, and sometimes thousands, of daily truck and passenger car trips." AR 12933. These emissions are a "significant factor" in the development and exacerbation of respiratory problems like asthma, bronchitis, and lung irritation, as well as other health problems like heart disease and cancer. *Id*. The Attorney General also warns that truck trips associated with warehouses "contribute to traffic jams, deterioration of road surfaces, and traffic accidents." *Id.*

II. Certification of the 2020 Program Environmental Impact Report and approval of the Sun Lakes Village North Specific Plan Amendment.

On February 21, 2020, the City issued a Notice of Preparation of an EIR for an amendment to the Sun Lakes Village North Specific Plan ("Specific Plan Amendment"). AR 5724. At the time, the specific plan authorized only "Retail Commercial" uses. AR 793, 8579. The City proposed to change the land use plan for the Sun Lakes Village North Specific Plan Area to create three separate districts: (1) Business & Warehouse, (2) Office & Professional, and (3) Retail & Service. AR 8581-83. Residents noted that at a March 2020 community meeting on the "scope" of the EIR, City staff and developers were noncommittal as to what type of use would be associated with the "Business and Warehouse" district and suggested it could house a store like Trader Joe's or Costco. *See* AR 13072, 17215-17.

The City elected to prepare a Program EIR ("PEIR") for the Specific Plan Amendment. AR 8587. On November 4, 2020, the Planning Commission considered recommending approval of the Specific Plan Amendment, Zone Change No. 20-3501 to incorporate the text of the Specific Plan Amendment into the Banning Zoning Code, and certification of the Final PEIR. AR 793, 7091. On December 8, 2020, the City Council voted to approve Zone Change No. 20-3501, adopt the Specific Plan Amendment, and certify the Final PEIR while adopting a statement of overriding considerations. AR 1011, 8578.

III. Approval of the Banning Point Project and adoption of the Addendum.

In early 2021, Sun Lakes Highland, LLC submitted an application to the City for the Project. AR 1005. The Project consisted of Tentative Parcel Map No. 38164, to subdivide approximately 47 acres of vacant land into three parcels, and Design Review 21-7008, to construct a 620,000 square-foot industrial warehouse building with 10,000 square feet of office space, and six retail buildings totaling 34,000 square feet. *Id*. Community members were surprised to find a massive cold-storage warehouse at the heart of the proposal; many felt that City staff and developers deliberately misled the public during the Specific Plan approval process and obscured the fact that the project site would eventually house a large warehouse building. AR 2548-49, 17215-17, 15173; *see also* AR 5725, 5728, 5738 (Notice of Preparation designating portion of site as "Business Park").

The Project applicant listed on the City's Notice of Determination is Sun Lakes Highland, LLC. AR 2. However, throughout the review process, Real Party Creation Equity, LLC held itself out to the public as the Project applicant and developer. For example, at the City Council hearing where the Project was approved, Josh Zemon gave the applicant's presentation, introducing himself as the "managing principal" of Creation Equity, which he described as "the applicant for this project." AR 2489. Similarly, at the Planning Commission hearings where the Project was considered, Mr. Zemon introduced himself as the "managing principal of Creation Equity." AR 2004, 2189. In e-mails to each of the councilmembers, Mr. Zemon introduced himself as "the Managing Principal of Creation Equity, the developer/applicant of Banning Point." AR 15949, 15951, 15953, 15966, 15968.

Mr. Zemon repeatedly reached out to councilmembers and planning commissioners throughout the City's review process. *See, e.g.* AR 15949-75. Councilmember Mary Hamlin regularly communicated with Mr. Zemon, even going so far as to ask Mr. Zemon to personally involve her in leasing discussions for the Project *while it was pending before the City Council*. AR 19734-36. Multiple councilmembers also posted statements regarding the Project on various social media platforms, including Councilmember Alberto Sanchez, who repeatedly called the Project a "Great project." AR 13056, 19728.

The Planning Commission considered the Project at two public hearings, on October 19, 2021 and December 1, 2021. At the December 1 hearing, the Planning Commission voted 3-2 to approve Design Review 21-7008 and recommend approval of Tentative Parcel Map 38164 to the City Council. AR 1006.

On December 8, 2021, Petitioner appealed the Planning Commission's approval of Design Review 21-7008 and its recommended approval of Tentative Parcel Map 38164. AR 17701-11. Subsequently, Petitioner transmitted three letters outlining numerous ways in which the City's approval of the Project would violate CEQA, its own Municipal Code, and state law. AR 12613-13040, 13041-69, 13070-84.

On February 14, 2022, a mere three days before the City Council hearing on Petitioner's appeal, the City announced it had prepared an Addendum/Consistency Checklist ("Addendum") for the Project. *See* AR 2503. The Addendum itself is dated February 10, 2022. AR 100. The Addendum concluded that the Project "reflects minor changes to the project described in the certified PEIR" and "is equal to or less intense than what was planned [in the PEIR]." AR 108. The Addendum asserted that "no cumulative impact greater than those identified in the PEIR would result from" the Project because "[t]he type, scale, and location of the proposed Project is consistent with and less intense than that evaluated in the PEIR." AR 201. The City found that CEQA did not require analysis of the Project's cumulative impacts "as a separate, standalone component of a determination that a subsequent EIR is not required." AR 60.

The City Council held a special meeting on February 17, 2022, to decide whether to approve Tentative Parcel Map 38164 and Design Review 21-7008, and to adopt the Addendum to the PEIR. The City Council voted 4-1 to approve Resolution 2022-14, approving the tentative map and design review and adopting the Addendum to the PEIR. AR 2701-02. Councilmember Mary Hamlin, who was the last councilmember to lock in her vote, was the sole "no" vote. *Id*.

Pursuant to Public Resources Code section 21166 and the corresponding CEQA Guidelines section 15162, the City found that no subsequent or supplemental EIR was required to analyze the environmental effects of the Project. AR 56-60. Specifically, the City concluded no changes had occurred to the Project itself involving new significant environmental impacts or a substantial increase in the severity of significant impacts identified in the PEIR because "the Project proposes the same type of land uses analyzed in the [PEIR] ..., but it is smaller in scope." AR 58. The City also concluded no changes had occurred with respect to the circumstances under which the Project is undertaken involving new or more severe significant impacts because the Project "is smaller in scope than the development anticipated in" the PEIR and there "have been no changes to the [Specific Plan] area that would alter the ability of the Project to remain consistent with the" PEIR. *Id*. Lastly, the City concluded no information of substantial

importance was presented that shows the Project would have new or more severe effects because "[n]o information, let alone substantial evidence, had been presented to suggest that the current Project has environmental impacts beyond those" analyzed in the PEIR. *Id.*

The City also made numerous findings in connection with approval of the tentative map and design review. *See* AR 60-83. The City found the Project would be consistent with the City's General Plan, the Specific Plan Amendment, and the character of the surrounding neighborhood because the Retail & Service District would serve as a visual and physical "screen" and "buffer" between the warehouse and the adjacent Sun Lakes community. AR 62, 67, 75-76, 81, 83. However, the City did not provide any evidence the Retail & Service District would ever be built, let alone built concurrently with the warehouse.

Additional facts pertinent to Petitioner's individual claims are discussed below.

ARGUMENT

I. Respondents violated Petitioner's right to a fair hearing by approving the Project despite an unacceptable risk of bias on the part of multiple City Council members.

A. Overview of legal principles.

"[P]rocedural due process principles" are applicable to "quasi-judicial" decisions, defined as those that involve "the determination and application of facts peculiar to an individual case, rather than the adoption of rules of general application." *Nasha*, 125 Cal.App.4th at 482; *see also* Code Civ. Proc. § 1094.5(b) (challenge to a quasi-judicial decision "shall extend to ... whether there was a fair trial"). The approvals at issue here—design review and a tentative subdivision map—are quasi-judicial. *Nasha*, 125 Cal.App.4th at 481-82 (design review); *Youngblood v. Board of Supervisors* (1978) 22 Cal.3d 644, 651, fn. 2 (tentative subdivision map).

Quasi-judicial decisions must be preceded by a "fair tribunal," defined as "one in which the judge or other decision maker is free of bias for or against a party." *Morongo Band of Mission Indians v. State Water Resources Control Bd.* (2009) 45 Cal.4th 731, 737. It is unnecessary that Petitioner demonstrate "actual bias." *Woody's Group, Inc. v. City of Newport Beach* (2015) 233 Cal.App.4th 1012, 1021-22. Rather, there must not be an "unacceptable probability of actual bias" on the part of any decision maker. *Id.* (citations omitted). An unacceptable probability of bias may be shown where a decisionmaker "advocate[s] a position" for or against a project. *Nasha*, 125 Cal.App.4th at 484. An unacceptable

probability of bias also may be shown by "a commitment to a result (albeit, perhaps, even a tentative commitment)." *BreakZone Billiards v. City of Torrance* (2000) 81 Cal.App.4th 1205, 1236.

"[T]he prehearing bias of one [decision-maker is] enough, by itself, to invalidate [that agency's] decision." *Woody's Group,* 233 Cal.App.4th at 1016. Where a decision-maker demonstrates an unacceptable probability of bias, the court must set aside the agency's decision even if the ultimate outcome would have been the same without the biased decision-maker's participation. *See, e.g., Nasha*, 125 Cal.App.4th at 478, 484 (invalidating 3-1 planning commission decision denying project approval where only one commissioner was biased); *Woody's Group*, 233 Cal.App.4th at 1019, 1031-32 (invalidating 4-1 decision denying project approval where only one city council member was biased); *Petrovich Development Company, LLC v. City of Sacramento* (2020) 48 Cal.App.5th 963, 971, 976 (invalidating 7-2 decision denying project approval where only one city council member was biased).

A claim that an agency violated procedural due process principles "is reviewed de novo … because the ultimate determination of procedural fairness amounts to a question of law." *Nasha*, 125 Cal.App.4th at 482. Where a court finds that a decisionmaker has demonstrated an unacceptable probability of bias, the proper remedy is to invalidate the agency's decision and order a new hearing to be conducted without the participation of the biased decisionmaker. *Woody's Group*, 233 Cal.App.4th at 1031-32.

B. Councilmembers Mary Hamlin, Alberto Sanchez, and Colleen Wallace each made statements demonstrating their bias in favor of the Project.

1. Councilmember Hamlin.

On November 20, 2021, Hamlin transmitted an e-mail to Randy Robbins, President of Petitioner Pass Action Group. AR 13051-54. Attached to the e-mail was a statement from Hamlin that she requested Mr. Robbins read at a local community meeting. The e-mail and attached public statement included multiple pronouncements reflecting Hamlin's opinion in favor of the Project:

- "This project appears to be good for the whole community and in the long run will lift the entire community." AR 13051.
- "The positive impact of new housing, new businesses and continued growth will far outpace any adverse impact on property values." AR 13054.

- "Are we really going to repeat the same mistake that was made with Walmart, Home Depot, and Best Buy? Sun Lakes opposition killed development in Banning for almost 20 years and, if this happens again, we can expect another 10 years of no development, which could likely bankrupt the City." *Id*.

Using an unofficial email address, Hamlin also distributed an unsigned document entitled "The Truth about the Banning Pointe Project" to several recipients on December 1, 2021, the day of the second Planning Commission hearing on the Project. AR 17080-85. The document claimed that the Project was not a "distribution center" and that only three "large truck[s]" per hour would arrive during business hours. AR 17084. The document stated that "[i]f this project had been a distribution center with 100's of trucks, I would have opposed it." AR 17085. Contrary to the document's statements, the final traffic analysis concluded the Project would generate nine truck trips per hour during peak hours and 296 truck trips per day. AR 590.

Hamlin also personally involved herself in leasing discussions for the Project *while it was pending before the City Council*. On December 2, 2021, one day after the Planning Commission recommended approval of the Project, Hamlin transmitted an e-mail to Mr. Zemon congratulating him on "passing the first hurdle with the Planning Commission." AR 19736. In order to "do some damage control" and "repair the negativity" stemming from the Planning Commission's approval, she told Mr. Zemon she "would like to be seen and being involved [*sic*] in finding suitable businesses to occupy the property." *Id*. She requested that Mr. Zemon "arrange a meeting" between her and the developer's leasing representative. *Id*. Mr. Zemon responded saying the development team "would be happy to involve [her] in the leasing discussions." AR 19735-36. Mr. Zemon went on to arrange a meeting between Hamlin and the leasing representative. AR 19734-36.

Behind the scenes, Hamlin also advised the development team on community relations. On December 7, 2021, Mr. Zemon sent an e-mail to Councilmember Hamlin stating "we must stop the dissemination of misinformation" and "focus on things that we can do to make your neighbors feel good about the project." AR 17615. Hamlin responded by stating "we should contact the reporter from NBC Channel 4, Tony Shinn, and do an interview and set the record straight." *Id*. A few days later, Hamlin

again reached out to Mr. Zemon, suggesting the development team "needs an aggressive campaign to correct the misinformation, speculation, rumors, and fears about" the Project. AR 19742.

2. Councilmember Sanchez.

Sanchez authored two separate social media posts advocating a position in favor of the Project prior to the City Council hearing. On October 27, 2021, Sanchez posted the following on Facebook:

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

AR 13056. On October 28, 2021, Sanchez also posted the following on the NextDoor app:

> This is a great project because it does many things for the area, it eliminates the homeless population due to the enclosed businesses. Great retail space facing Sun Lakes, and traffic is being mitigated by the time this development starts building. Banning residents want growth, this is growth. More jobs, more tax dollars, other businesses will want to do business in Banning as well.

AR 13084, 19728.

3. Councilmember Wallace

Wallace gave a "State of the City" address on October 14, 2021—five days before the Planning Commission's first hearing on the Project—where she clearly advocated a position in favor of the Project and demonstrated the City's precommitment to approving the Project. AR 13042-43. Wallace's address included a "Sneak Peek" portion, where she discussed development projects—including this Project—that the City "expect[s] to begin construction" in 2022. AR 19755. For almost all of the projects Wallace mentioned during the "Sneak Peek" portion, she conveyed basic information and did not express any opinion. *Id.* at 19755, 19756-57. However, after she introduced this Project, Wallace interjected her opinion that the Project was crucial to her "advoca[cy] for the youth" and to the future development of the City, and she stated that the City Council would "do what we have to do" to ensure development despite community complaints. *Id.* at19755-56; *see also* AR 13042-43.

C. The biased Councilmembers' failure to recuse themselves violated Petitioner's right to a fair hearing.

1. Councilmember Hamlin's statements and actions go far beyond what appellate courts have found sufficient to invalidate agency decisions.

Hamlin's November 20, 2021 e-mail to Mr. Robbins and her attached public statement (AR 13051-54) are indistinguishable from the statements in *Nasha* that led the court to invalidate the city's decision.

In *Nasha*, a city councilmember authored a newsletter wherein he provided some factual information about a pending project, but also wrote the project was a "threat to [a] wildlife corridor," which he described as "absolutely crucial habitat." 125 Cal.App.4th at 476. The court found the article was not "merely informational," but rather "clearly advocated a position against the project." *Id*. at 483-84. The court held that authorship of the newsletter "gave rise to an unacceptable probability of actual bias and was sufficient to preclude" the councilmember from providing an impartial decision; this alone "require[d] the [agency's] decision be vacated." *Id*. at 484.

As in *Nasha*, Hamlin's e-mail to Mr. Robbins and the attached public statement were not merely informational, but rather "clearly advocated a position" in favor of the Project. *See id.* Indeed, Hamlin's comments go beyond the statements in *Nasha*. The councilmember in *Nasha* limited his opinion to a discrete environmental impact and refrained from commenting on the project generally. Hamlin, in contrast, stated that the Project as a whole "appears to be good for the whole community" and indicated it would be a "mistake" for the City not to approve it. AR 13051, 13054. Therefore, as in *Nasha*, Hamlin's e-mail "gave rise to an unacceptable probability of actual bias" and "requires the [Council's] decision be vacated." *Nasha*, 125 Cal.App.4th at 484.

Moreover, like the "talking points" in *Petrovich*, Hamlin's "Truth about the Banning Pointe Project" document (AR 17080-85) constitutes a "compilation of facts that amounted to a presentation [in favor of] the project," the "only conceivable purpose" of which was "to assist advocacy" in support of the project. *Petrovich*, 48 Cal.App.5th at 975. The document also understates the volume of truck traffic, contradicting the final traffic analysis. Compare AR 590 (final traffic study estimating nine trucks per hour and 296 trucks per day) with AR 17084 (Hamlin document stating traffic analysis showed only three large trucks per hour during peak business hours). Hamlin's document thus did not "dispel ... misinformation" (AR 17085), but rather contained inaccurate information.

Hamlin inserting herself into leasing discussions further demonstrates an unacceptable probability of bias in favor of the Project. A decisionmaker voluntarily becoming a de facto member of a project development team—*while the project is currently pending before that decisionmaker*—is highly irregular and goes far beyond what courts have found sufficient to demonstrate an unacceptable probability of bias. For example, in *Petrovich*, the court found that a councilmember demonstrated a "prehearing commitment

to" vote against a project where the councilmember was "counting—if not securing—votes" against it and stated he was "confident he had a majority" to deny the project. 48 Cal.App.5th at 974-75. Similarly, Hamlin's public advocacy for the Project and behind-the-scenes support for the development team—weeks before the Council ever decided to approve it—clearly demonstrated her "prehearing commitment" to ensuring the Project's approval. And when Hamlin decided to help secure tenants for the Project, Petitioner's chance at a fair hearing completely evaporated.

The coordination between Hamlin and Zemon also closely resembles the "coaching" of the project appellant by the biased councilmember in *Petrovich*. There, the councilmember texted the project appellant asking him "to put a few heads together to talk thru" the project; elements of the councilmember's "Talking points" related to the project also ended up in the appellant's presentation before the Council. 48 Cal.App.5th at 974-76. The appellate court endorsed the trial court's characterization of this evidence as showing the councilmember was "coaching [the project appellant] on how to prosecute the appeal." *Id*. at 975.

Similarly, the close coordination between Hamlin and Zemon—with Hamlin advising Zemon to seek "positive press releases" and engage in an "aggressive campaign" in support of the Project (AR 17615, 19742)—demonstrates Hamlin was "coaching" Zemon on how to present the Project to the City and the community. The numerous e-mail communications between Hamlin and Mr. Zemon demonstrate they considered themselves a singular, cohesive team whose mission was to blunt criticism and increase community support for the Project. Like the councilmember in *Petrovich*, Hamlin "took affirmative steps to assist [proponents] of the [Project]," acting as an "advocate, not a neutral and impartial decision maker, and should have recused [herself] from voting on the appeal." 48 Cal.App.5th at 976. Her failure to do so requires the Council's decision to be set aside.

Hamlin's "*prehearing* bias" is "enough, by itself, to invalidate" the City Council's decision. *Woody's Group,* 233 Cal.App.4th at 1016 (emphasis added). Hamlin's comments at the hearing that her pre-hearing statements were intended only to provide information (*see* AR 2421-23) not only contradict the record, but also cannot cure her prehearing bias. In *Woody's Group*, for example, the court disregarded a biased councilmember's "self-serving comment at the hearing" that he had no bias and concluded that he "should not have been part of the body hearing the appeal" at all. 233 Cal.App.4th at 1023. Here,

Hamlin similarly demonstrated an unacceptable probability of pre-hearing bias, yet refused to recuse herself from participating in the appeal hearing. Like the councilmember's statement in *Woody's Group*, whatever Hamlin said or did at the hearing cannot dispel the pre-hearing bias that legally prohibited her from appearing at the hearing in the first instance.

That Hamlin ultimately voted "no" on the Project is therefore irrelevant. Tellingly, Hamlin was the last councilmember to "lock in" her vote on the Project. *See* AR 2702. She therefore presumably cast her vote knowing it would have no impact whatsoever on the Council's decision. If anything, her "no" vote suggests an attempt to repair the perceived damage to her public image that followed her prehearing advocacy for the Project and the Planning Commission's preliminary approval. As discussed above, the day after the Planning Commission's decision, Hamlin transmitted an e-mail to Mr. Zemon requesting that she be personally involved in locating tenants for the Project because she believed it would help salvage her reputation. AR 19736. Indeed, she even went so far as to hire a public relations firm to "repair [her] damaged image." AR 17615. Thus, Hamlin's "no" vote neither retroactively justifies her participation in the hearing nor rebuts the evidence demonstrating an unacceptable probability of bias.

2. Councilmember Sanchez's social media posts are indistinguishable from the newsletter in *Nasha*.

Sanchez's October 27, 2021 and October 28, 2021 social media posts—authored a few days after the Planning Commission first considered the Project—impermissibly advocated a position in favor of the Project. Like the newsletter in *Nasha*, 125 Cal.App.4th at 484, Sanchez's posts provided some factual information regarding the Project, focusing on the tax revenue and jobs the Project would purportedly generate. AR 13056, 19728. However, also as in *Nasha*, Sanchez's posts were not merely informational. Sanchez gave his opinion that the Project was a "Great project." *Id*. He also gave his opinion on the Retail & Service District, referring to it as a "[g]reat retail space" in the Nextdoor post (AR 19728) and stating "[t]he retail aspect looks great" in the Facebook post (AR 13056).[2] By providing a favorable opinion on the Project, Sanchez "crossed the line into advocacy." *Petrovich*, 48 Cal.App.5th at 974. Sanchez also proposed the motion to approve the Project (AR 2702), an action courts have interpreted as another

[2] As discussed in Part III below, there is no substantial evidence demonstrating that the retail buildings will be built.

"concrete fact" indicating unacceptable bias. *See Petrovich*, 48 Cal.App.5th at 975-76; *Woody's Group*, 233 Cal.App.4th at 1023. Thus, Sanchez's participation in the Council's decision "requires the [Council's] decision be vacated." *Nasha*, 125 Cal.App.4th at 484.

3. Councilmember Wallace's "State of the City" address demonstrated the City's precommitment to approval of the Project.

Inclusion of the Project in the "Sneak Peek" portion of Wallace's address demonstrated at least a "tentative commitment" to approve the Project. *BreakZone Billiards*, 81 Cal.App.4th at 1236. Just five days before the Planning Commission's first hearing on the Project, Wallace stated in an official capacity that construction of the Project is anticipated to begin in early 2022. AR 19755. This statement indicates she considered approval of the Project to be a foregone conclusion. Moreover, after introducing the Project, she deviated from her prepared slides in order to underscore that as part of her advocacy for "the kids" of Banning, she would "do what we have to do" to push forward with development regardless of community complaints. AR 19755-56; *see also* AR 13042-43. And at the final City Council hearing, Wallace seconded Sanchez's motion to approve the Project. AR 2702. Instead of acting "neutral and unbiased," Wallace demonstrated "an unacceptable probability of actual bias" in favor of the Project. *Petrovich*, 48 Cal.App.5th at 973, 975-76.

D. The biased Councilmembers' participation in the hearing violated the Banning Municipal Code.

The Banning Municipal Code ("BMC") provides that the "Manual of Procedural Guidelines for the Conduct of the City Council and Constituent Body/Commission Meetings for the City of Banning" ("City Council Guidelines") governs the "conduct and procedures applicable to meetings of the city council." Petitioner's Request for Judicial Notice ("RJN"), Ex. A at A-1 (BMC § 2.04.080). For quasi-judicial matters involving a public hearing, councilmembers "shall not prejudice the matter prior to the public hearing, shall be fair and impartial, and shall decide the matter based upon the evidence and statutorily required findings." RJN, Ex. B at B-24 (City Council Guidelines, § 8.1(d)). Councilmembers are directed to "avoid expressing an opinion or divulging their thought process until after the public hearing has been completed." *Id*. (§ 8.1(e)). The statements and actions of Councilmembers Hamlin, Sanchez and Wallace discussed above plainly contravene these requirements.

The City Council failed to follow these standards itself, even while applying them strictly to others. For example, on February 8, 2022, the Council voted 4-1 to *remove* Commissioner Marco Santana from the Planning Commission for purported bias *against* warehouse projects. AR 19069-77. The Council removed Mr. Santana based on an opinion piece he published in the local *Record Gazette*, titled "Opinion: Warehousing Mortgages Banning's Future for a Quick and Unhealthy Buck." AR 13058-60. In the article, Mr. Santana raised general concerns about the significant increase in distribution centers in the Inland Empire and City of Banning. *Id*. However, Mr. Santana never even mentioned, much less took a position for or against, any specific warehouse project. *Id*. Nevertheless, the City Council determined his removal was justified. At the City Council hearing, City Manager Doug Schulze opined that "it would be necessary for Mr. Santana to recuse himself from discussion and voting" on "any future warehouse project." AR 19070. City Attorney Kevin Ennis referred to Mr. Santana as "a commissioner with high probable bias." AR 19072. Councilmember Hamlin stated that "Mr. Santana has revealed bias creating legal liabilities for the city." AR 19075.

Here, in stark contrast, the City Council failed to follow its own City Council Guidelines, despite far more egregious evidence that multiple councilmembers were biased in favor of this particular warehouse project. Unlike Mr. Santana, who expressed only general concerns about warehouse projects, three councilmembers here made specific, supportive prehearing comments about this Project. Thus, if Mr. Santana's comments were sufficient to require his permanent removal, then the councilmembers' comments and actions were sufficient to preclude them from rendering an impartial decision on the Project. The councilmembers' participation in the hearing violated both the City Council Guidelines and the Banning Municipal Code, in addition to generally applicable fair hearing requirements. The City's decision to approve the Project therefore must be set aside.

II. Respondents violated CEQA by failing to consider whether the Project's cumulative environmental impacts, in connection with the impacts of closely related projects not considered in the PEIR, necessitated further environmental review.

CEQA requires analysis of a Project's cumulative impacts in combination with those of other closely related past, present, and reasonably foreseeable probable future projects. Guidelines § 15355(b); *see Schoen v. Dept. of Forestry & Fire Protection* (1997) 58 Cal.App.4th 556, 571 ("[t]he significance of a comprehensive cumulative impacts evaluation is stressed in CEQA"). Here, however, the City refused

to analyze whether this Project's impacts would be cumulatively considerable in combination with other projects that were not considered in the Specific Plan Amendment PEIR. One such project is Sunset Crossroads, an enormous development consisting of 5.5 million square feet of warehouse space in close proximity to the Project. The City's decision to forgo consideration of the Project's cumulative impacts in determining whether additional environmental review was necessary rested on a fundamental legal error and was unsupported by substantial evidence. It must be set aside.

A. Overview of legal principles.

CEQA authorizes lead agencies to forgo preparing an EIR for a project that would otherwise require an EIR if the project's environmental impacts were adequately considered in a previously certified EIR. § 21166. However, CEQA requires lead agencies to engage in some form of subsequent review where the previously certified EIR requires revisions due to changes in a project, changed circumstances, or new information. *Id*. Subsequent review may take one of three forms: (1) a subsequent EIR (Guidelines § 15162); (2) a supplemental EIR (Guidelines § 15163); or (3) an addendum (Guidelines § 15164). As is relevant here, preparation of a subsequent or supplemental EIR is required where either (1) substantial changes occur with respect to the circumstances under which the project is undertaken which will require major revisions of the previous EIR due to the involvement of new, or more severe, significant environmental effects (Guidelines § 15162(a)(2)), or (2) new information of substantial importance, which could not have been known when the previous EIR was certified, shows the project will have new, or substantially more severe, significant impacts not analyzed in the previous EIR. Guidelines § 15162(a)(3).

In contrast, an addendum is authorized only where none of the conditions requiring a preparation of a subsequent EIR exist, and where only minor changes or additions are necessary to make the previous EIR adequately apply to the project. Guidelines § 15164(a). CEQA draws a significant distinction between an addendum and either a subsequent or supplemental EIR. Subsequent and supplemental EIRs are subject to public notice and public review requirements, whereas an addendum is not. Guidelines §§ 15162-64; *see also Save Our Heritage Organisation v. City of San Diego* (2018) 28 Cal.App.5th 656, 668 ("the absence of public review reflects the nature of an addendum as a document describing project revisions too insubstantial in their effect to require subsequent environmental review"). Here, for example, whereas

an EIR would have been publicly circulated for at least 30 days (§ 21091), the City released the Addendum just days before the City Council hearing where the Project was approved (*see* AR 2503).

Lead agencies' duty to inform the public about a proposed activity's environmental impacts—and to solicit public comment on those impacts—is at the heart of CEQA. *See, e.g. Protecting our Water and Environmental Resources v. County of Stanislaus* (2020) 10 Cal.5th 479, 488 (purpose of CEQA is to "inform the government and public about a proposed activity's potential environmental impacts … and [] disclose the government's rationale for approving a project"); *Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agricultural Assn.* (1986) 42 Cal.3d 929, 935 ("[p]ublic participation is an essential part of the CEQA process"). Therefore, an addendum should be prepared only where changes to a project are so minor that public notice and review is unwarranted.

B. The City failed to consider new information and changed circumstances related to Sunset Crossroads, an enormous warehouse project to be developed in the same neighborhood as the Project.

On February 1, 2021—three months after the City certified the PEIR—the City issued a Notice of Preparation for the Sunset Crossroads project. AR 12944-61. Sunset Crossroads will consist of approximately 5.5 million square feet of industrial/logistics use on a 532.7-acre site. AR 12944, 12950, 12956. The Sunset Crossroads project includes: (1) a General Plan amendment covering approximately 450 of the site's 532.7 acres; (2) a Specific Plan that would create 19 distinct planning areas; (3) a parcel map and vesting tract map; and (4) a pre-annexation and development agreement. AR 12944-45.

The western border of Sunset Crossroads is approximately one-half mile east of the Project. The Sun Lakes senior community would be sandwiched between the Project and Sunset Crossroads. A visual depiction of the proximity of the Project and Sunset Crossroads to one another, and the Sun Lakes community, can be found at AR 8580 and AR 12954. At AR 8580 is an aerial photograph of the Project site. The right side of the photograph depicts a vacant lot, south of the I-10 and east of the Sun Lakes community, which constitutes the northwest border of the Sunset Crossroads site. At AR 12954 is a depiction of the Sunset Crossroads site, which shows the Sun Lakes community immediately to the west.

In addition to their close proximity, the Project and Sunset Crossroads will soon share a direct roadway connection via Sun Lakes Boulevard. Sun Lakes Boulevard is currently a short east-west street connecting Highland Springs Avenue to Highland Home Road. *See* AR 8580. However, the City recently

approved an eastward extension of Sun Lakes Boulevard out to Sunset Avenue, just south of the I-10/Sunset Avenue exit. *See* AR 12954; *see also* AR 12963-13026. Once completed, Sun Lakes Boulevard will run directly south of the Project and cut through the middle of the Sunset Crossroads site. *Id*; *see also* AR 12951 ("[t]he [Sunset Crossroads] Project Site is bisected by the alignment of the future Sun Lakes Boulevard extension"), 12954 (showing "Future Sun Lakes Boulevard Extension" across site).

The City's Resolution approving the Project explicitly provides that, once the Sun Lakes Boulevard extension is completed, trucks may access the Project site from I-10 and Sunset Avenue to the east, crossing through the middle of the Sunset Crossroads site. AR 81-82 ("the access points into and out of the [Project] site are designed to provide for the minimum amount of travel distance … from Sun Lakes Boulevard to the Sunset Avenue and onto Interstate 10 when the Sun Lakes Boulevard extension is completed"); 78 ("[t]he future extension of Sun Lakes Boulevard to the east may also provide for future access to/from Interstate 10 via Sunset Avenue"). The Specific Plan governing the Project site also expressly authorizes trucks to access the Project from the I-10/Sunset Avenue exit. AR 8727.

Additionally, once the Sun Lakes Boulevard extension is completed, trucks may access Sunset Crossroads via the I-10/Highland Springs exit, using Sun Lakes Boulevard to cut through the neighborhood between the Project and the Sun Lakes community. The western border of Sunset Crossroads is essentially equidistant from the I-10/Sunset and I-10/Highland Springs exits. *See* AR 8580, 12954. The I-10 is a notoriously congested freeway; many portions of the I-10 in Southern California made the American Transportation Research Institute's "2022 Top 100 Truck Bottlenecks List." AR 19066-68. Therefore, it will likely often take less time for a Sunset Crossroads-bound vehicle travelling eastward on I-10 to use the I-10/Highland Springs exit and access the site via Sun Lakes Boulevard, instead of continuing in heavy traffic to the I-10/Sunset exit. Similarly, vehicles exiting Sunset Crossroads and travelling westward on I-10—or encountering congestion on I-10 while approaching the Banning Point Project from the east—may find it easier to use Sun Lakes Boulevard to access the Project and/or the I-10/Highland Springs exit. Therefore, the neighborhood impacted by the traffic-related noise and air pollution from the Project—a predominantly residential community consisting of thousands of seniors—will also be heavily impacted by Sunset Crossroads.

Despite the copious evidence demonstrating the Project and Sunset Crossroads will adversely impact the same area, the Addendum, technical documents, and staff reports prepared in connection with the City's approval of the Project completely fail to address Sunset Crossroads. Sunset Crossroads represents new information and changed circumstances that require revisions to the PEIR's cumulative impacts analysis due to new or more severe significant effects—and precludes the City's reliance on the Addendum alone in approving the Project.

C. The City's decision to forgo preparation of a subsequent or supplemental EIR rested on an erroneous interpretation of CEQA.

The City erred as a matter of law in concluding that cumulative impacts never require analysis in determining whether changed circumstances or new information require a subsequent or supplemental EIR. During the administrative process, Petitioner contended that the Project could not lawfully be approved without an analysis of the Project's cumulative impacts in conjunction with those of Sunset Crossroads and any other closely related projects the City became aware of after the PEIR certification. AR 12624-25. The City nonetheless found that "[t]he prior EIR included a cumulative impacts analysis; no such analysis is also required as a separate, standalone component of a determination that a subsequent EIR is not required." AR 60. The City misinterpreted CEQA and thus erred as a matter of law.

Tellingly, the City's finding cited no legal support. Nor could it. CEQA explicitly requires preparation of a subsequent EIR where substantial changes in the "circumstances under which the project is undertaken" require major revisions to the prior EIR due to "new significant environmental effects or a substantial increase in the severity of previously identified significant effects." Guidelines § 15162(a)(2). Section 15162 makes no distinction between cumulative and project-specific environmental effects. In *Committee for Re-Evaluation of T-Line Loop v. San Francisco Municipal Transportation Agency* (2016), the court expressly held that "changes in a neighborhood" can "constitute a change in circumstances" requiring a new EIR if the "changes require major revisions to an existing EIR." 6 Cal.App.5th at 1237, 1255. Consideration of "changes in a neighborhood" that may result in new or more severe cumulative impacts is therefore critical to determining whether major revisions to an existing EIR are necessary.

Indeed, courts have routinely considered whether the presence of new or more severe cumulative impacts require preparation of a subsequent or supplemental EIR. These courts have upheld an agency's

decision to forgo such preparation only where there was extensive analysis affirmatively demonstrating the absence of cumulative impacts, either in the initial EIR or a subsequent addendum. In *Mani Brothers Real Estate Group v. City of Los Angeles* (2007), a city adopted an addendum in connection with the approval of a real estate development project. 153 Cal.App.4th 1385, 1389-94. Years before the approval, the city had adopted an EIR in connection with the approval of a commercial development on the same site. *Id*. The petitioners argued a subsequent EIR was required, in part, because multiple projects in the vicinity of the approved project had been developed since the certification of the EIR. *Id*. at 1402. The court rejected the petitioners' claim because, unlike the Addendum prepared by the City here, "the 2005 Addendum specifically noted a list of cumulative related projects, took into consideration 'the current environmental setting … as the baseline' and analyzed the Original Project and the Modified Project 'under the same contemporary baseline conditions.'" *Id*. at 1403.

Mani Brothers is far from the only case where a court considered whether new or more severe cumulative impacts required preparation of a subsequent or supplemental EIR. *See, e.g., Fund for Environmental Defense v. County of Orange* (1988) 204 Cal.App.3d 1538, 1550-52 (claim that expansion of adjacent wilderness park after certification of EIR for medical resource and laboratory complex required subsequent EIR due to "cumulatively considerable" impacts is "at first blush compelling," but ultimately insufficient because "the record," including the addendum, "clearly demonstrates the change raises no new adverse effects that were not raised, analyzed, and discussed in the original EIR"); *City of Irvine v. County of Orange* (2015) 238 Cal.App.4th 526, 540-41 (rejecting claim that subsequent EIR was required instead of a supplemental EIR due to cumulative impacts caused by changes in the area surrounding the approved project because "no less than 89 pages of [the supplemental EIR]" were devoted to changes in the area occurring after the approval of the original EIR); *Committee for Re-Evaluation of T-Line Loop*, 6 Cal.App.5th at 1255 (rejecting claim that subsequent EIR was required for light rail project due to changes in the neighborhood surrounding the project because the original EIR "anticipated an increase in residential use and other development and … addressed the environmental effects of which the [petitioner] complain[ed]").

Even though in these cases the courts ultimately found against the petitioners, each court did so precisely because the agency—unlike the City—had conducted a thorough cumulative impact analysis

that supported its decision to forgo a subsequent or supplemental EIR. *See American Canyon Community United for Responsible Growth v. City of American Canyon* (2006) 145 Cal.App.4th 1062, 1078-81 (agency's failure to accurately identify and analyze project changes distinguishes case from cases where "the court was able to identify specific, solid evidence in the record supporting the agencies' determination that project changes would not have significant environmental effects requiring supplemental environmental review"). The applicable regulatory provisions and case law illustrate that, where an agency is presented with evidence of "changes in a neighborhood" or other potentially significant cumulative impacts not considered in the original EIR, the agency must determine whether those cumulative impacts will require major revisions to the PEIR. The City's assertion that such analysis is never required as a "component of a determination that a subsequent EIR is not required" is clear legal error.

The City's legal error is not limited to CEQA's subsequent review provisions. The City's analysis reflects a fundamental misunderstanding of cumulative impacts in general. The Addendum asserts that because the *individual* impacts of the Project itself are consistent with those analyzed in the PEIR, it is impossible for the Project to have new cumulative impacts, or cumulative impacts more severe than those analyzed in the PEIR. In the one-third of one page dedicated to cumulative impacts in the Addendum, the City asserted:

> The type, scale, and location of the proposed Project is consistent with and less intense than that evaluated in the PEIR, and the Project is consistent with the General Plan and the SLVNSP (zoning) for the Project site. Because of this consistency, the other potential cumulative environmental effects of the proposed Project would fall within those already identified in the PEIR. Therefore, no cumulative impact greater than those identified in the PEIR would result from either the construction or occupation of the proposed Project and implementation of the recommended Project mitigation.

AR 201. This dramatically misstates the law. A cumulative impact results from the incremental impact of a project "when added to other closely related past, present, and reasonably foreseeable probable future projects." Guidelines § 15355; *see also Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1214 (cumulative impacts analysis is intended to analyze impacts that may "appear insignificant when considered individually, but assume threatening dimensions when considered collectively with other sources with which they interact") (citations omitted). That the "type, scale, and location" of the Project *itself* may be consistent with the PEIR says

nothing of whether the Project may have new or more severe cumulative impacts due to the existence of *other* closely related projects the City became aware of only *after* certification of the PEIR.

The City's failure to conduct a cumulative impacts analysis is a prejudicial abuse of discretion requiring invalidation of Project approval. *See Bakersfield Citizens*, 124 Cal.App.4th at 1220-21 (certification of EIRs was "a prejudicial abuse of discretion" due to lack of adequate cumulative impacts analysis); *Pesticide Action Network North America v. Dept. of Pesticide Regulation* (2017) 16 Cal.App.5th 224, 248-51 (agency's approval of amended labels that expanded use of an insecticide was a prejudicial abuse of discretion due to the agency's failure to consider "the cumulative effects of its decision"). As discussed in Sections II.D. and E., had the City analyzed impacts from closely related projects it became aware of after certification of the PEIR, the City likely would have concluded a subsequent or supplemental EIR was required. The City's interpretation of CEQA as requiring no consideration of cumulative impacts in determining the necessity of subsequent environmental review was legal error.

D. The City's decision to forgo preparation of a subsequent or supplemental EIR lacked substantial evidentiary support.

The City found the Specific Plan Amendment would have significant and unavoidable impacts on air quality (AR 3341-44) and potentially significant noise impacts (AR 3336-37). With respect to this Project, the City found that no substantial changes had occurred with respect to the circumstances under which the Project is undertaken that would involve new or more severe significant environmental effects than were identified in the PEIR. AR 58. However, the City failed to consider cumulative impacts from the Project in combination with those of Sunset Crossroads, which was not included in the PEIR's cumulative impacts analysis. The City's findings therefore lack substantial evidentiary support.

1. The City failed to consider the cumulative air quality impacts of the Project in connection with Sunset Crossroads.

During the administrative process, Petitioner asserted the City was required to consider the cumulative air quality impacts associated with Sunset Crossroads. AR 12624-25. In response, the developer's consultant selectively quoted from the South Coast Air Quality Management District's ("SCAQMD") *White Paper on Potential Pollution Control Strategies to Address Cumulative Impacts from Air Pollution* ("SCAQMD White Paper"), claiming that SCAQMD treats the individual and cumulative significance thresholds for air quality impacts as identical. AR 13097. Thus, because the

Project itself was determined not to have any individually significant impacts, the consultant asserted its cumulative impacts also would be insignificant. AR 13098.

The City erred in concluding that the Project would have no significant cumulative impacts solely because air pollution from the Project alone did not exceed SCAQMD's significance thresholds. CEQA has long recognized that a project may create or contribute to significant cumulative impacts even if its individual impacts are less than significant. *See Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 720-21; *see also* Guidelines §§ 15064(h)(1) (requiring preparation of EIR if cumulative impact may be significant "and the project's incremental effect, though individually limited, is cumulatively considerable"), 15065(a)(3) (mandating finding of significance where a project "has possible environmental effects that are individually limited but cumulatively considerable"), 15355(b) ("Cumulative impacts can result from individually minor but collectively significant projects taking place over a period of time."). The City's approach misconstrues the purpose of cumulative impacts analysis.

The SCAQMD White Paper, moreover, directs lead agencies to discuss "unapproved projects currently under environmental review with related impacts or which result in significant cumulative impacts." RJN Ex. D at D-62 (SCAQMD White Paper, Appx. D at D-2). According to the California Attorney General's recently published *Warehouse Projects: Best Practices and Mitigation Measures to Comply with the California Environmental Quality Act*, "best practices when studying air quality and greenhouse gas impacts include … thoroughly considering the project's incremental impact in combination with past, present, and reasonable foreseeable future projects, *even if the project's individual impacts alone do not exceed the applicable significance thresholds*." AR 12937 (emphasis added). SCAQMD's and the Attorney General's guidance both reflect basic CEQA requirements for properly analyzing cumulative impacts. *See Bakersfield Citizens*, 124 Cal.App.4th at 1214 (impact analysis must include "the change in the environment which results from the incremental impact of the project when added to other closely related past, present, and reasonably foreseeable probable future projects") (citations omitted). The SCAQMD White Paper therefore does not support the City's decision not to analyze the Project's cumulative air quality impacts in connection with those of Sunset Crossroads.

Nor did the Specific Plan Amendment PEIR provide the missing analysis. The PEIR claimed that it relied on three previously certified EIRs for its cumulative impacts analysis. AR 5844. Yet *this* Project's

cumulative impacts from air pollution and noise were not, and could not have been, considered in these previous EIRs.

The CEQA Guidelines provide two acceptable methods for considering a project's cumulative impacts: (1) the "list of projects" approach, where the agency analyzes cumulative impacts based on a "list of past, present, and probable future projects producing related or cumulative impacts," and (2) the "summary of projections" approach, where the agency analyzes impacts based on a "summary of projections contained in an adopted local, regional or statewide plan, or related planning document." Guidelines § 15130(b). The PEIR stated that it relied on a summary of projections in three previously certified EIRs for its cumulative impacts analysis, "*except* for the evaluation of near-term traffic and *vehicular-related air quality*, greenhouse gas, *and noise* impacts." AR 5844 (emphasis added). Accordingly, by its own terms, the PEIR did not include Sunset Crossroads in any "summary of projections" related to air quality and noise impacts. Nor could any summary of projections in the prior EIRs have anticipated Sunset Crossroads in any event, because that project requires a substantial General Plan amendment. *See Bakersfield Citizens*, 124 Cal.App.4th at 1216-17 (rejecting summary of projections approach for analyzing impacts of two projects because the projects required general plan amendments and thus the projections were "inaccurate or outdated").

Likewise, none of the three prior EIRs included Sunset Crossroads on any specific list of projects. For example, the Butterfield Specific Plan DEIR's list of projects for cumulative impacts analysis did not include Sunset Crossroads or this Project. *See* AR 3677-84. Indeed, that EIR indicates that what is now Sunset Crossroads was still considered the "Five Bridges" development at the time. AR 3670-71. Similarly, the Rancho San Gorgonio Specific Plan DEIR relied, in part, on a list of projects approach but neither Sunset Crossroads or the Project were included on that list. AR 4952-56, 4960. The final EIR for the Banning Distribution Center indicates a list was used, but it does not contain the list. *See* AR 5536. Therefore, the three prior EIRs provide no support for the City's decision to forgo analyzing the Project's cumulative air quality impacts from mobile source diesel emissions.

A Health Risk Assessment analyzing operational toxic air contaminant emissions was conducted in connection with the Addendum.[3] The "Health Risk Assessment Output Files and Calculation" technical document attached to the Addendum, however, shows that only Project-related truck trips were considered. *See* AR 576-84. Truck trips related to Sunset Crossroads were not included. AR 578. Absent any analysis, it was impossible for the City to conclude that Sunset Crossroads did not constitute a change in circumstances that could give rise to new or more severe cumulative air quality impacts from diesel truck traffic. Thus, the City's decision to forgo preparation of either a subsequent or supplemental EIR lacks substantial evidentiary support.

Because the PEIR found air quality impacts significant (AR 3341-44), *any* cumulatively significant air quality impacts resulting from the Project in combination with Sunset Crossroads would be new or more severe impacts not previously identified in the PEIR. Comment letters submitted by CARB and SCAQMD in response to the Notice of Preparation of Sunset Crossroads confirm that cumulative air pollution impacts may be significant. AR 13031-40. CARB warned that Sunset Crossroads "will expose nearby disadvantaged communities to elevated levels of air pollution," specifically referencing the Sun Lakes community which would be sandwiched in between the Project and Sunset Crossroads. AR 13035. CARB indicates this community "is surrounded by existing toxic diesel particulate matter (diesel PM) emission sources." *Id*. Due to Sunset Crossroads' proximity to "residences already disproportionately burdened by multiple sources of air pollution," CARB expressed concern "with the potential cumulative health impacts associated with the construction and operation of" Sunset Crossroads *Id*. SCAQMD similarly expressed concern "about potential public health impacts of siting warehouses within close proximity of sensitive land uses, especially in communities that are already heavily affected by existing warehouse and truck activities," singling out "heavy-duty diesel-fueled trucks that emit [diesel particulate matter]" as a particular cause for concern. AR 13032.

[3] The PEIR deferred analysis of toxic air pollution emissions from project operation on the grounds that such analysis could not be done in connection with a plan-level approval. AR 5867. The PEIR thus provided that, if a specific project were ever proposed, the City must conduct a Health Risk Assessment to analyze toxic air contaminants caused by vehicle trips, "especially heavy-duty diesel-fueled vehicles," pursuant to SCAQMD's "Health Risk Assessment Guidance for Analyzing Cancer Risk from Mobile Source Diesel Idling Emissions for CEQA Air Quality Analysis." *Id*; *see also* AR 19310-22.

The sheer size of Sunset Crossroads and its proximity to the Project also provide strong evidence of cumulative air quality impacts from vehicular pollution. Sunset Crossroads will consist of 5.5 million square feet of industrial/logistic use, almost ten times the size of the warehouse use associated with the Project. Daily diesel truck trips generated by the project are likely to be enormous. Additionally, Sunset Crossroads is just one-half mile away from the Project and the two projects will soon share a direct roadway connection—one that cuts through the middle of a majority-senior community. It is likely thousands of people, in an area that already faces a disproportionate pollution burden, will be exposed simultaneously to the diesel emissions generated by each project.

The City's failure to consider cumulative air pollution impacts constitutes a prejudicial abuse of discretion and must be invalidated. *See Bakersfield Citizens*, 124 Cal.App.4th at 1220-21; *Pesticide Action Network*, 16 Cal.App.5th at 248-51; *see also Ventura Foothill Neighbors v. County of Ventura* (2014) 232 Cal.App.4th 429, 435-37 (agency's failure to identify and analyze "substantial changes" to a project was a prejudicial abuse of discretion); *American Canyon*, 145 Cal.App.4th at 1078 (agency's decision to approve project was unsupported by substantial evidence, and thus constituted a prejudicial abuse of discretion, where agency failed to accurately identify and analyze project changes).

2. The City failed to consider the cumulative noise impacts of the Project in connection with Sunset Crossroads.

Unlike with air quality, neither the City nor its consultants ever tried to justify its lack of a cumulative noise impacts analysis on the grounds that the individual and cumulative significance thresholds for noise are identical. Instead, the City simply omitted any such analysis.

The traffic noise analysis prepared for the Addendum did not consider truck trips, or any vehicle trips, generated by Sunset Crossroads. The traffic noise levels used in the analysis were calculated using a program that replicates the Federal Highway Administration Traffic Noise Prediction Model, which uses traffic volumes to estimate traffic noise levels. AR 708. The model "is significantly influenced by the number of heavy trucks in the vehicle mix." AR 709. To calculate the Project's traffic noise levels, "Project related truck trips were added to the heavy truck category in the FHWA noise prediction model." *Id*. Project noise levels were measured against "Existing" and "Horizon Year" noise levels. AR 709-15.

None of these measurements incorporated the large volume of vehicle trips, including heavy-duty truck trips, likely to be generated by Sunset Crossroads. Existing noise levels were measured "[b]y collecting individual hourly noise level measurements" at locations "as close to the nearest sensitive receiver locations as possible." AR 704. Because Sunset Crossroads has yet to be approved and developed, however, the existing noise measurement could not have included Sunset Crossroads-generated traffic noise. Nor did the Project increment noise levels encompass Sunset Crossroads-generated traffic noise, as only "Project related truck trips" were included within the prediction model. AR 709. Horizon Year Traffic Forecasts, as explained in the PEIR, are long-range planning tools that reflect "area-wide growth anticipated between Existing and Horizon Year traffic conditions," but do not provide any information specific to the area within the immediate vicinity of the Project. AR 6983. Similarly, there is no indication the City ever conducted any analysis of this Project's impacts in connection with the construction or operational noise impacts associated with Sunset Crossroads. *See* AR 718-27 (analysis of stationary-source operational noise impacts); 728-34 (analysis of construction noise impacts).

The PEIR similarly lacks substantive analysis of cumulative noise impacts. AR 5820-23, 5958-71, 6911-22. The Draft PEIR notes the threshold of significance for a cumulative noise impact, but fails to come to a conclusion as to whether that threshold has been exceeded. AR 5970-71. The Draft PEIR and its associated appendices also fail to analyze the noise impacts from any closely related projects. AR 5970-71, 6911-22. The Final PEIR is similarly void of any analysis of cumulative noise impacts. *See* AR 7085 (showing only one, unrelated change was made to the draft noise section).

In addition to the City's erroneous position that an agency does not need to conduct *any* cumulative impacts analysis when undergoing the subsequent review process, the City also appears to misinterpret CEQA's specific requirements for analyzing noise impacts. Relying on Appendix G to the CEQA Guidelines, the developer's consultant asserts a proper analysis of the Project's noise level increases must consider only "the magnitude of the increase, the existing ambient noise levels, and the location of noise-sensitive receivers to determine if a noise increase represents a significant adverse environmental impact." AR 700. Given the lack of cumulative impacts analysis, the consultant appears to interpret CEQA as not requiring an analysis of closely related reasonably foreseeable projects, such as Sunset Crossroads.

However, Guidelines Appendix G specifically directs lead agencies "to take account of the whole action involved, including off-site as well as on-site, *cumulative as well as project-level*, indirect as well as direct, and construction as well as operational impacts." Guidelines Appendix G, Evaluation of Environmental Impacts (emphasis added). Case law confirms the necessity of analyzing the cumulative impacts of reasonably foreseeable future projects when considering a project's noise impact. *See, e.g., Los Angeles Unified School Dist. v. City of Los Angeles* (1997) 58 Cal.App.4th 1019, 1024-28 (EIR inadequate due to lack of analysis of cumulative traffic noise impacts, including impacts of any "probable future projects") (citing Guidelines 21083(b)); *Mission Bay Alliance v. Office of Community Investment & Infrastructure* (2016) 6 Cal.App.5th 160, 194, fn. 25 (upholding adequacy of EIR, in part, because it included a cumulative noise impact analysis that considered the impacts of future development projects); *Gray v. County of Madera* (2008) 167 Cal.App.4th 1099, 1122-23 (EIR inadequate because noise impact analysis considered only the project's individual impacts and omitted cumulative impacts).

Sunset Crossroads will consist of 5.5 million square feet of warehouse use, is located about one-half mile away from the Project, and will soon share a direct roadway link to the Project—Sun Lakes Boulevard—which cuts through a majority-senior community. As explained in Section II.C, *supra*, it is likely vehicles traveling to and from Sunset Crossroads will frequently use the portion of Sun Lakes Boulevard south of the Project, which cuts directly through the Sun Lakes community. It is therefore likely that Sunset Crossroads will generate substantial off-site traffic noise in areas also affected by the Project. These impacts will further exacerbate the already severe traffic noise problem within the City. *See* RJN Ex. C at C-3 ("[T]he primary noise source in the City of Banning is motor vehicle traffic"), C-5 ("the noise levels along truck routes in the City are currently high"). Determining whether this Project's noise impacts, in the context of changed circumstances related to Sunset Crossroads, will require major revisions to the PEIR due to the presence of new or more severe cumulative noise impacts requires actual analysis of those impacts. The City never analyzed the two projects together. Accordingly, the City's decision to forgo preparation of an EIR lacks substantial evidence and must be set aside.

III. Respondents' findings in support of Project approval were contrary to law and unsupported by substantial evidence.

The City found the tentative map and design review consistent with the General Plan and the Specific Plan Amendment, as well as compatible with the existing neighborhood, based on assertions that development of the Retail & Service District component of the Project would serve to screen and buffer the warehouse from neighboring residences and otherwise benefit residents. However, there is no evidence in the record establishing that the Retail & Service District will ever be constructed, let alone that it must be built prior to or concurrently with the warehouse. In fact, there is ample evidence—including statements by the Real Parties themselves—that developing brick-and-mortar retail and service buildings is highly uncertain, especially given that the Retail & Service District is tucked away on a side street with no visibility from I-10 or frontage on any major City street. The screening and buffering that the City attributed to the Retail & Service District does not, and may never, exist. The City's findings are thus unsupported by substantial evidence and its decision must be set aside.

A. The City was required to find, based on substantial evidence and analysis, that the Project is consistent with the City's General Plan and the applicable Specific Plan.

Where an administrative agency is required to make findings to support a quasi-judicial decision, the findings must "bridge the analytic gap between the raw evidence and ultimate decision." *Topanga*, 11 Cal.3d at 515; *see also Healing v. California Coastal Com.* (1994) 22 Cal.App.4th 1158, 1167 ("the findings must support the decision and the evidence must support the findings"). A reviewing court "must scrutinize the record and determine whether substantial evidence supports the administrative agency's findings." *Topanga,*. 11 Cal.3d at 514-15. "When the administrative agency's findings are not adequate, an appropriate remedy is to remand the matter so that proper findings can be made." *Glendale Memorial Hospital & Health Center v. Department of Mental Health* (2001) 91 Cal.App.4th 129, 140.

California law generally requires all land use decisions to be consistent with the approving agency's general plan. *See, e.g. Neighborhood Action Group v. County of Calaveras* (1984) 156 Cal.App.3d 1176, 1184; *Resource Defense Fund v. County of Santa Cruz* (1982) 133 Cal.App.3d 800, 806. Specifically, California law prohibits local agencies from approving a tentative or parcel map unless it is found to be consistent with the general plan. Gov. Code § 66473.5. The Banning Municipal Code similarly requires all development within the City to be consistent with the General Plan. RJN, Ex. A at

A-1 (BMC § 17.04.030(A)). Accordingly, the City may not approve a Design Review application unless the City finds it consistent with the General Plan. *Id.* at A-1 to A-2 (BMC § 17.56.050(A)).

The City similarly cannot approve a tentative map in an area covered by a specific plan unless it is consistent with the adopted specific plan. Gov. Code § 65455; RJN, Ex. A at A-2 (BMC § 17.96.070). The Specific Plan's "Guiding Objectives" include the following (AR 1030):

- Promote high quality development to safeguard the existing asset of Sun Lakes Country Club and other development in the vicinity;
- Locate and design truck courts and semi-truck circulation to minimize impacts on surrounding land uses and development;
- Expand access to restaurants, shopping and services for the nearby Sun Lakes Country Club Community.

Additionally, the Municipal Code requires the City Council to make certain findings in order to lawfully approve a Design Review application, including:

- The design and layout of the proposed project will not unreasonably interfere with the use and enjoyment of neighboring existing or future development, and will not result in vehicular and/or pedestrian hazards ("Design Review Use and Enjoyment Finding"). RJN, Ex. A at A-1 (§ 17.56.050(C));
- The design of the proposed project is compatible with the character of the surrounding neighborhood. ("Design Review Compatibility Finding"). *Id.* at A-1 to A-2 (§ 17.56.050(D)).

B. Substantial evidence does not support the City's findings that depend on development of the buildings comprising the Retail & Service District.

The City found the Project consistent with the General Plan, the Specific Plan, and the municipal code's Design Review requirements based on the assumption that the Retail & Service District would be built before or concurrently with the warehouse. To support its finding that the Project is consistent with the Guiding Objectives in the Specific Plan, the City relied on the assertion that the "Project will provide up to six sites and buildings for restaurants, shopping and services for the Sun Lakes Country Club Community within the Retail and Service District." AR 64. To support the City's Design Review Use and Enjoyment Finding, in addition to its overall finding that the Project is consistent with the General Plan,

the City asserted that "the warehouse use … will be screened and buffered from residential uses to the south and east by the retail and service buildings to be located in the Retail and Services District." AR 62, 75, 81. To support its Design Review Compatibility finding, the City asserted the Retail & Service District "will function as a visual and physical buffer from the Sun Lakes Country Club residents [and] will provide needed retail, restaurant and services uses for the residents." AR 83. Accordingly, the City's findings of consistency with the General Plan, Specific Plan, and Design Review requirements all depend not only on the Retail & Service District being built out, but also on those buildings acting as a screen and buffer between the warehouse and adjacent residential uses. To provide such a screen and buffer, the Retail & Service District must be built out prior to or concurrently with development of the warehouse.

Yet there is no evidence the Retail & Service District will ever be developed at all, let alone built concurrently with the warehouse. Nothing in the Project itself, the Specific Plan, or the City's conditions of approval require the Real Parties to construct *any* retail or service buildings prior to, concurrently with, or even after, the warehouse building. The Specific Plan provides: "the Retail & Service District need only be entitled, not fully constructed, prior to occupancy of the Business & Warehouse District." AR 13099. An "entitlement" alone cannot provide a "screen" or "buffer" between the warehouse and the Sun Lakes residential community. Nor does an "entitlement provide "needed retail, restaurant, and service uses" to Sun Lakes residents.

The record shows the Retail & Service District may be developed only years after warehouse operations commence, if it is ever developed at all. Indeed, Real Parties themselves asked the City to remove any requirement for prior or concurrent retail development from the Specific Plan. The Specific Plan Amendment initially proposed by the City affirmatively *required* the construction of the buildings comprising the Retail & Service District to be completed "prior to occupancy of development within the Business & Warehouse District." AR 8746. However, the developer voiced concerns that developing the retail and service buildings before occupation of the warehouse would not be economically viable. *See* AR 2614-16. As a result, the City altered the Specific Plan Amendment to require only *entitlement* of the

retail and service buildings before occupation of the warehouse. *Id.*[4] The Guiding Objectives of the Specific Plan itself further undercut the City's findings by calling into question the future viability of brick-and-mortar retail and service businesses. *See* AR 1030 ("[a]llow for a range of land uses that reflects current market conditions *given the trend away from brick-and-mortar retail* … [r]espond to *an increase in e-commerce*, especially driven by the coronavirus pandemic") (italics added).

At the City Council hearing on Project approval, Councilmember David Happe expressed serious concern that if Real Parties were not required to construct the retail and service buildings, they would "fall off the level of importance" of the Project. AR 2613. Real Parties also expressed concern at the hearing with the economic viability of building and occupying brick-and-mortar retail and service businesses, stating that it is "virtually impossible" to build or finance retail "on spec" and that the retail component of the Project is "particularly challenging" due to a lack of frontage on Highland Springs Boulevard and visibility from the I-10 freeway. AR 2620.

Real Parties attempted to reassure the Council that the retail and service buildings would be constructed at some point, stating they had already retained a leasing agent and that their ideal Project would include retail. AR 2620-21. However, "Council debate … is not the equivalent of *Topanga* findings." *Pacifica Corp. v. City of Camarillo* (1983) 149 Cal.App.3d 168, 179. Even if the developers' intention is to ultimately develop the Retail & Service District, there is a significant possibility that development will not occur, if ever, until years after the warehouse is built—depriving neighbors of the "screen" and "buffer" the City's findings relied upon.

Indeed, the City Attorney cautioned the Council that

> one of the required findings for design review is about the design and layout of the project will not unreasonably interfere with the use and enjoyment of neighboring, existing, our future development [*sic*].·So, if the retail building isn't there, and there is some perceived impact of the warehouse building to the Sun Lakes community, then you may want to consider an alternative condition. If it isn't having the retail buildings actually constructed, having some alternative to address that interface. I think that would

[4] Throughout the entire review process leading up to the February 17, 2022 City Council hearing, the only publicly available version of the Specific Plan Amendment was a draft version that required construction of the buildings comprising the Retail & Service District to be completed before occupancy of the warehouse. However, at the hearing, City staff revealed that the publicly available version was not the final version, and that the final version required only that the Retail & Service District be entitled, not actually built. *See* AR 2513-14.

> go to the issue of whether design of the project will unreasonably interfere. I think it goes to some of the other required findings.

AR 2616. The City Attorney thus expressly acknowledged that eliminating the requirement in the draft Specific Plan for actual construction of the Retail & Service District, and replacing it with mere entitlement, undercut the legally required findings of compatibility with the neighborhood. The Council added an additional condition to its approval, but that condition required only installation of the *landscaping* for the Retail & Service District prior to occupancy of the warehouse. AR 89 (Condition 12.A). Yet the City's findings asserted the warehouse would be "screened" and "buffered" from residential uses by "retail and service *buildings*," not mere landscaping. AR 62, 75, 81 (italics added).

As the City Attorney implicitly acknowledged, retail buildings that have been entitled, but not constructed, cannot serve as a screen or buffer between the warehouse and residential communities. Thus, "the evidence [does not] support the findings" (*Healing*, 22 Cal.App.4th at 1167), and the City has failed the "bridge the analytic gap between the raw evidence and ultimate decision." *Topanga*, 11 Cal.3d at 515. The court must set the City's approval aside and direct it to reconsider whether the Project is consistent with the General Plan, Specific Plan, and Design Review requirements based on the actual evidence.

IV. The Project conflicts with the City's General Plan.

The Project is in plain violation of the Noise Element of the City's General Plan because it authorizes heavy-duty truck use on Sun Lakes Boulevard, which is not a designated truck route. The Noise Element lists numerous goals for development within the City, and associated policies and programs to achieve those goals. To achieve the goal of "[a] noise environment that complements the community's residential character and its land uses" (RJN, Ex. C at C-15), Program 4.A (*id.* at C-17) provides:

> The City shall review designated primary truck routes and ensure they are clearly marked throughout the community. Except for traffic providing location-specific services and deliveries, construction trucks and delivery trucks shall be limited to designated truck routes, including: Ramsey Street, and those portions of Lincoln Street, Highland Springs Avenue, Hathaway Street, Sunset Avenue, Eighth Street, San Gorgonio Avenue and Hargrave Street so designated.

By allowing heavy-duty truck use on Sun Lakes Boulevard, which is not a designated truck route, the Project facially conflicts with the City's General Plan. The City may not find the Project consistent with the General Plan notwithstanding this conflict because Program 4.A is phrased in clear and mandatory terms. *See, e.g.*, *Endangered Habitats League, Inc. v. County of Orange* (2005) 131 Cal.App.4th 777, 782-

83; *Families Unafraid to Uphold Rural El Dorado County v. Board of Supervisors* (1998) 62 Cal.App.4th 1332, 1341-42.

The truck traffic generated by the Project does not fall within the exception for "traffic providing location-specific services and deliveries." It is unreasonable to interpret this exception to apply to truck traffic from large warehouse Projects, as opposed to much more limited truck traffic generated by small retail, commercial, and residential uses. All trucks, ultimately, are "providing location-specific services and deliveries." Thus, this phrase cannot mean all trucks are permitted on any City street simply because they will eventually provide a location-specific service or delivery. The scope of the exception must be limited, particularly because Program 4.A is intended to prevent excessive traffic noise in residential areas.

If the exception was broad enough to include the enormous volume of truck traffic the Project will generate—adjacent to residential uses—the exception would "swallow the rule" and there would effectively be no restriction on truck use within the City. *See, e.g., Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 901-02 (rejecting proposed interpretation of exception because the "exception would swallow the rule"); *Apartment Assn. of Los Angeles County, Inc v. City of Los Angeles* (2009) 173 Cal.App.4th 13, 26 (same). Therefore, by authorizing the use of heavy-duty trucks on Sun Lakes Boulevard, the Project facially—and fatally—conflicts with the General Plan. The City's approval therefore must be set aside.

CONCLUSION

For the foregoing reasons, Petitioner requests that the Court grant the petition for writ of mandate, enter judgment in favor of Petitioner, and order the City to set aside its Project approvals.

DATED: December 9, 2022

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PROOF OF SERVICE
Pass Action Group v. City of Banning, et al.
Case No. CVRI2201482
Riverside County Superior Court

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

On December 9, 2022, I served true copies of the following document(s) described as:

PETITIONER'S OPENING BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDATE AND COMPLAINT FOR INJUNCTIVE RELIEF

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BY E-MAIL OR ELECTRONIC TRANSMISSION: I caused a copy of the document(s) to be sent from e-mail address tsanchez@hmnlaw.com to the persons at the e-mail addresses listed above. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

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

Executed on December 9, 2022, at San Francisco, California.

Tuloa Sanchez