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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF RIVERSIDE, RIVERSIDE HISTORIC COURTHOUSE

| | |
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| PASS ACTION GROUP,<br><br>Petitioner and Plaintiff,<br><br>vs.<br><br>CITY OF BANNING; CITY COUNCIL OF THE CITY OF BANNING; and DOES 1 through 20,<br><br>Respondents and Defendants.<br><br>SUN LAKES HIGHLAND, LLC; CREATION EQUITY, LLC; and DOES 21-40,<br><br>Real Parties in Interest. | Case No. CVRI2201482<br><br>ASSIGNED FOR ALL PURPOSES TO Judge Craig Riemer, Dept. 1<br><br>**JOINT OPPOSITION BRIEF TO PETITIONER PASS ACTION GROUP'S OPENING BRIEF**<br><br>Complaint Filed: April 18, 2022<br>Trial Date: Not Set |

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23
24
25
26
27
28

## TABLE OF CONTENTS

Page


I. INTRODUCTION .......... 7
II. STATEMENT OF ISSUES .......... 10
III. STATEMENT OF FACTS .......... 11
A. The Specific Plan .......... 11
B. The PEIR and Environmental Review of the SPA .......... 12
1. SPA Cumulative Air Quality Impacts .......... 13
2. SPA Cumulative Noise Impacts .......... 14
C. The Project .......... 15
D. The Project Addendum .......... 15
1. The Addendum's Cumulative Air Quality Impacts Analysis .......... 16
2. The Addendum's Cumulative Noise Impact Analysis .......... 17
E. Planning Commission Hearing .......... 18
F. City Council Hearing .......... 19
IV. THE CITY CONDUCTED A FAIR HEARING AND NO COUNCILMEMBER RECUSALS WERE REQUIRED .......... 19
A. Summary of Relevant Legal Standard .......... 20
B. No Councilmembers Demonstrated Disqualifying Pre-decisional Bias .......... 21
1. Councilmember Wallace .......... 21
2. Councilmember Sanchez .......... 22
3. Councilmember Hamlin .......... 22
C. Petitioner's Cited Authority Is Readily Distinguishable and Unavailing .......... 25
D. The City Complied with Its Municipal Code .......... 27
V. THE CITY'S DECISION THAT NO SEIR WAS REQUIRED IS SUPPORTED BY SUBSTANTIAL EVIDENCE .......... 28
A. Summary of Relevant Legal Standards .......... 28
1. Legal Standard Governing Subsequent Review Under CEQA .......... 28

**Page**


2. Legal Standard Governing Analysis of Cumulative Impacts .................... 32

B. Petitioner Fails to Show that the Exacting Standard for an SEIR Was Met .................... 33

1. Substantial Evidence Supports the City's Determination that the Project's Air Quality Impacts are Not Cumulatively Considerable .................... 34

2. Substantial Evidence Supports the City's Determination that the Project's Noise Impacts are Not Cumulatively Considerable .................... 36

VI. THE CITY'S FINDINGS IN ITS APPROVAL OF THE TENTATIVE MAP AND DESIGN REVIEW ARE SUPPORTED BY SUBSTANTIAL EVIDENCE .................... 38

A. Standard of Review .................... 39

B. The Project is Consistent with the General Plan and SPA .................... 39

C. The City's Design Review Findings are Supported by Substantial Evidence .................... 42

VII. PETITIONER'S GENERAL PLAN INCONSISTENCY CLAIM IS BOTH PROCEDURALLY AND SUBSTANTIVELY DEFECTIVE .................... 43

VIII. CONCLUSION .................... 45

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**TABLE OF AUTHORITIES**

**Page(s)**

**Cases**

*A Local and Regional Monitor v. City of Los Angeles*
(1993) 12 Cal.App.4th 1773 .......... 32

*Abatti v. Imperial Irrigation District*
(2012) 205 Cal.App.4th 650 .......... 29

*Andrews v. Agricultural Labor Relations Bd.*
(1981) 28 Cal.3d 781 .......... 20

*Bowman v. City of Petaluma*
(2008) 185 Cal.App.3d 1065 .......... 29, 32

*Breakzone Billiards v. City of Torrance*
(2000) 81 Cal.App.4th 1205 .......... 20

*Browning-Ferris Industries v. City Council*
(1986) 181 Cal.App.3d 852 .......... 35

*California Native Plant Soc'y v. City of Rancho Cordova*
(2009) 172 Cal.App.4th 603 .......... 37

*Citizens Against Airport Pollution v. City of San Jose*
(2014) 227 Cal.App.4th 788 .......... 30, 31

*City of Fairfield v. Superior Court*
(1975) 14 Cal.3d 768 .......... 24, 25

*City of Irvine v. County of Orange*
(2015) 238 Cal.App.4th 526 .......... 31, 32

*Coalition for Student Action v. City of Fullerton*
(1984) 153 Cal.App.3d 1194 .......... 43

*Comm. for Green Foothills v. Santa Clara County Bd. of Supervisors*
(2010) 48 Cal.4th 32 .......... 30

*Corona-Norco Unified Sch. Dist. v. City of Corona*
(1993) 17 Cal.App.4th 985 .......... 43

*Dunn-Edwards Corp. v. South Coast Air Quality Management Dist.*
(1993) 19 Cal.App.4th 519 .......... 35

*Federation of Hillside and Canyon Associations v. City of Los Angeles*
(2004) 126 Cal.App.4th 1180 .......... 33

*Friends of College of San Mateo Gardens v. San Mateo County Community College Dist.*
(2016) 1 Cal.5th 937 .......... 8, 29

Page(s)

*Fund for Environmental Defense v. County of Orange*
(1988) 204 Cal.App.3d 1538 .... 29, 30, 31, 32

*Holden v. City of San Diego*
(2019) 43 Cal.App.5th 404 .... 9

*King & Gardiner Farms, LLC v. County of Kern*
(2020) 45 Cal.App.5th 814 .... 37

*Latinos Unidos de Napa v. City of Napa*
(2013) 221 Cal.App.4th 192 .... 37

*Laurel Heights Improvement Assn. v. Regents of University of California*
(1993) 6 Cal.4th 1112 .... 29

*League to Save Lake Tahoe Mountain etc. v. County of Placer*
(2022) 75 Cal.App.5th 63 .... 33

*Mani Brothers Real Estate Group v. City of Los Angeles*
(2007) 153 Cal.App.4th 1385 .... 31, 32

*Mount Shasta Bioregional Ecology Center v. County of Siskiyou*
(2012) 210 Cal.App.4th 184 .... 38

*Naraghi Lakes Neighborhood Preservation Assn. v. City of Modesto*
(2016) 1 Cal.App.5th 9 .... 39, 45

*Nasha v. City of Los Angeles*
(2004) 125 Cal.App.4th 470 .... 20, 25, 26

*Newtown Preservation Socy. v. Cnty. of El Dorado*
(2021) 65 Cal.App.5th 771 .... 8

*Pacifica Corp. v. City of Camarillo*
(1983) 149 Cal.App.3d 168 .... 42

*Petrovich Development Company, LLC v. City of Sacramento*
(2020) 48 Cal.App.5th 963 .... 25, 27

*Rialto Citizens for Responsible Growth v. City of Rialto*
(2012) 208 Cal.App.4th 899 .... 9, 34, 35, 36

*San Diego Navy Broadway Complex Coalition v. City of San Diego*
(2010) 185 Cal.App.4th 924 .... 30

*San Franciscans Upholding the Downtown Plan v. City & County of San Francisco*
(2002) 102 Cal.App.4th 656 .... 9, 39, 45

*Save Our Heritage Organization v. City of San Diego*
(2015) 237 Cal.App.4th 163 .... 43

*Sierra Club v. City of Orange*
(2008) 163 Cal.App.4th 523 .... 44

1 **Page(s)**


2 *The Committee for Re-Evaluation of the T-Line Loop v. San Francisco Municipal Transportation Agency*
3 (2016) 6 Cal.App.5th 1237 ... 30, 31, 32

4 *Todd v. City of Visalia*
(1967) 254 Cal.App.2d 679 ... 20
5
*Topanga Assn. for a Scenic Community v. County of Los Angeles*
6 (1974) 11 Cal.3d 506 ... 41

7 *William S. Hart Union High School Dist. v. Regional Planning Com.*
(1991) 226 Cal.App.3d 1612 ... 24
8
*Woody's Group, Inc. v. City of Newport Beach*
9 (2015) 233 Cal.App.4th 1012 ... 25, 26


10 **Statutes**


11 CEQA Guidelines, § 15064, subd. (h)(3) ... 34

12 CEQA Guidelines, § 15064, subd. (h)(4) ... 33

13 CEQA Guidelines, § 15088, subd. (c) ... 35

14 CEQA Guidelines, § 15130, subd. (a) ... 9, 32, 33, 34

15 CEQA Guidelines, § 15130, subd. (b), Appx. G, § III ... 9, 34, 35

16 CEQA Guidelines, § 15130, subd. (d) ... 33, 37

17 CEQA Guidelines, § 15162 ... 30, 33

18 CEQA Guidelines, § 15162, subds. (a)-(c) ... 29

19 CEQA Guidelines, § 15164, subd. (e) ... 32

20 CEQA Guidelines, § 15382 ... 30

21 CEQA Guidelines, § 15384, subd. (a) ... 30

22 Code Civ. Proc., § 389, subd. (a) ... 7

23 Pub. Resources Code, § 21080, subd. (e) ... 36

24 Pub. Resources Code, § 21082.2, subd. (c) ... 30

25 Pub. Resources Code, § 21166 ... 29

26 Pub. Resources Code, § 21166, subds. (a)-(c) ... 29

27 Pub. Resources Code. § 21167.2 ... 29, 37

28 Veh. Code, § 35703 ... 45

## I. INTRODUCTION.

Respondent City of Banning ("**City**") conducted a fair and unbiased hearing and complied with the California Environmental Quality Act (Pub. Resources Code, §§ 21000, et seq.) ("**CEQA**") in approving Real Party in Interest Sun Lakes Highland LLC's ("**Real Party**")[1] application to develop the Banning Point Project ("**Project**"). The Project is a mixed-use development consisting of an industrial warehouse, office, and retail on approximately 47 acres situated south of Interstate 10 off of Highland Avenue and Sun Lakes Boulevard in the City. The City previously approved an amendment to the Sun Lakes Village North Specific Plan ("**Specific Plan**") to allow these land uses, and analyzed their environmental impacts in a Program Environmental Impact Report ("**PEIR**") that was certified in December 2020. The PEIR is now final, beyond challenge, and is conclusive in all respects.

Petitioner Pass Action Group ("**Petitioner**") now brings a belated challenge to the City Council's policy decisions inherent in the Specific Plan amendment under the guise of a challenge to the Project. Petitioner fails to show the existence of any disqualifying bias by City Councilmembers, fails to contravene the extensive substantial evidence in the record supporting the validity of the City's actions in approving the Project entitlements and CEQA Addendum to the PEIR, and fails to demonstrate that the Project is inconsistent with the City's General Plan.

In lieu of providing actual substantial evidence, Petitioner presents only speculation, supposition and inaccuracies to support its assertions that the City's decisionmakers were biased in favor of the Project and that a subsequent or supplemental environmental impact report ("**SEIR**") rather than the Addendum should have been prepared for the Project. Petitioner ignores the import of the now-final PEIR (which neither Petitioner nor anyone else challenged) and misapprehends the Addendum in wrongly contending that the City was required to analyze the potential cumulative impacts of a nearby development project (Sunset Crossings) that is only now in the early stages of its own environmental review, has not been approved, and therefore is in no way

[1] Petitioner incorrectly asserts that Creation Equity, LLC, is a real party in interest in this action. Real Party Sun Lakes Highland, LLC, not Creation Equity, submitted the application to develop the Project and is the party whose entitlement interests are at stake in this litigation. Furthermore, there is no relief that Petitioner may obtain from Creation Equity. As such, Creation Equity is not a real party in interest. (See Code Civ. Proc., § 389, subd. (a).)

certain. Petitioner's contentions fail to undermine the substantial evidence supporting the Addendum and the City's findings. Petitioner cannot meet its burden of demonstrating that the Court should vacate the Project approvals and Addendum and require preparation of an SEIR. (*Newtown Preservation Socy. v. Cnty. of El Dorado* (2021) 65 Cal.App.5th 771, 781, 789 [complaints based on "dire predictions" and "[c]omplaints, fears, and suspicions" about the project's potential environmental effects insufficient to establish a valid CEQA claim].)

As outlined below, Petitioner's claims asserted in this action individually and collectively fail for lack of evidence and legal support.

***The City conducted a fair hearing***. The City Council conducted a public hearing in which all members of the public, including Petitioner's members, had an opportunity to and did participate. At the beginning of the hearing, Councilmembers dutifully disclosed contacts with the Project applicant, declared that they would listen with an open mind to all evidence presented at the hearing, and confirmed that they had not pre-committed to vote for or against the Project. The process worked as it should, culminating in the end with one Councilmember – who Petitioner goes to great lengths to paint in its Opening Brief as supporting the Project – voting against the Project based on information and testimony that she heard during the public hearing.

***The City's determination that the Project did not require an SEIR was supported by substantial evidence.*** Petitioner's contention that the City violated CEQA because it "failed to consider cumulative impacts [of air quality and noise] from the Project in combination with those of Sunset Crossroads" (OB, p. 29) is premised upon a fundamental misunderstanding of the law and the established protocols for conducting a cumulative impacts analysis under CEQA.

First, a deferential substantial evidence standard applies to claims (such as Petitioner's) that an SEIR is required due to changes in the project or circumstances or new information. CEQA limits a lead agency's authority to require additional CEQA review after an EIR has been certified. (*Friends of College of San Mateo Gardens v. San Mateo County Community College Dist.* (2016) 1 Cal.5th 937, 949.) Petitioner effectively ignores this standard, leaping to the conclusion that a full-blown SEIR was required for the Project.

Second, Petitioner is wrong on the facts. Utilizing the methodology approved by the South Coast Air Quality Management District ("**SCAQMD**"), the agency which oversees air quality within the South Coast Air Basin, including the City, the City found that the potential air quality impacts of the Project (which is thirty percent smaller and a less-intensive use than the development scenario analyzed in the underlying EIR) did <u>not</u> exceed SCAQMD's local and regional air quality thresholds for air quality and therefore were not cumulatively considerable. (CEQA Guidelines, § 15130, subd. (a).) The SCAQMD method, which evaluates cumulative impacts on a regional planning level rather than based upon specific nearby projects (such as Sunset Crossings), is supported by the CEQA Guidelines (CEQA Guidelines, § 15130, subd. (b), Appx. G, § III) and relevant case law. (*Rialto Citizens for Responsible Growth v. City of Rialto* (2012) 208 Cal.App.4th 899, 931-933.) The City similarly determined based upon substantial evidence that the potential noise impacts of the Project were de minimis in nature and therefore not cumulatively considerable. Thus, irrespective of the Sunset Crossings project, the City properly concluded, consistent with the requirements of CEQA, that the Project would not result in new or more severe cumulative air quality or noise impacts requiring preparation of an SEIR.

***The City's findings are supported by substantial evidence and entitled to deference.*** The City's General Plan consistency findings are extensive, presumed valid and entitled to great deference by a reviewing Court. (*Holden v. City of San Diego* (2019) 43 Cal.App.5th 404, 412.) As a result, Petitioner's contention that the City erred in finding that the Project is consistent with the General Plan and the Specific Plan is both factually in error and does not come close to showing that the City "acted arbitrarily, capriciously, or without evidentiary basis." (*San Franciscans Upholding the Downtown Plan v. City & County of San Francisco* (2002) 102 Cal.App.4th 656, 677 [citation omitted].) Petitioner alleges that the Project entitlements do not require that the retail services component of the Project fronting Sun Lakes Boulevard be constructed prior to or concurrent with development of the Project's proposed warehouse but the City's findings are unquestionably <u>not</u> predicated on the timing of construction of the retail component of the Project. The City's finding in support of the Design Review approval that the Project would not unreasonably interfere with the use and enjoyment of neighboring properties is

similarly based upon substantial evidence in the record and bolstered (contrary to Petitioner's unsubstantiated belief) by the City's adoption of a condition of approval requiring Real Party to install the landscaping for the retail component of the Project prior to occupancy of the warehouse building, thereby reducing potential visual or other impacts to the surrounding community.

***The Project is consistent with the General Plan.*** As a threshold matter, Petitioner's contention that the Project is inconsistent and conflicts with the Noise Element of the City's General Plan because it authorizes heavy-duty truck use on Sun Lakes Boulevard is barred because Petitioner failed to exhaust its administrative remedies by raising this issue before the Planning Commission or City Council prior to approval of the Project. Even if Petitioner had exhausted its administrative remedies, which contention Petitioner bears the burden to prove, the claim lacks merit. The City's General Plan (and State law) expressly contemplates and allows for commercial trucks to use non-designated truck routes to make pick-ups and deliveries.

Substantial evidence supports the City's fair and unbiased approval of the Project. Petitioner fails to carry its burden and demonstrate that there is no substantial evidence supporting the City's decision to proceed with an Addendum rather than an SEIR; fails to demonstrate that the City's findings are not supported by substantial evidence; and fails to show that the City's conclusion that the Project is consistent with the City's General Plan is either arbitrary or capricious. The City and Real Party respectfully request that the Court deny the Petition.

## II. STATEMENT OF ISSUES.

City and Real Party provide the following statement of issues pursuant to section F.3.b of this Court's CEQA Case Management Order dated June 17, 2022. Petitioner bears the burden of proof on all issues.

**Issue 1: Whether Petitioner Failed to Exhaust its Claim that the Project violates the City's General Plan.** Petitioner argues that the Project is inconsistent and conflicts with 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; however, Petitioner failed to exhaust its administrative remedies by not raising this issue before the Planning Commission or City Council.

## III. STATEMENT OF FACTS.

### A. The Specific Plan.

The Project site is located within the Sun Lakes Village North Specific Plan ("**Specific Plan**"), which was originally approved by the City on February 28, 1983. (AR 106, 5734.) "The Specific Plan authorizes 4,131 dwelling units, a 150-acre golf course, 12 acres of commercial use and 144 acres of office/industrial use on approximately 963 acres." (AR 5734.) While the majority of the Specific Plan area has already been developed, 47 acres of the Specific Plan area have "remained undeveloped for 30-years due to overly restrictive zoning, failed real estate transactions, and continued community opposition." (AR 902, 8579.)

Over the years, the undeveloped 47 acres became a burden on the City due to illegal dumping and transient activity. (AR 8579.) In 2006, the City amended the Specific Plan to specifically address the remaining undeveloped land within the Specific Plan by designating the 47 acres for auto dealership uses. (AR 8579.) However, the market did not support the auto sales use and the land remained undeveloped and vacant for over another decade with the illegal dumping and transient activity continuing to plague the City. (AR 8579.) In 2020, the City went back to the drawing board to "reimagine the Specific Plan area with a viable development concept that reflects today's market conditions." (AR 8579.) This fifth Specific Plan Amendment ("**SPA**") involved three different uses for the remaining 47 acres:

- **Business & Warehouse District.** The Business & Warehouse District use consists of approximately 30.22 acres and is located in the northwest portion of the Specific Plan area, adjacent to the Sun Lakes Village Shopping Center, the Southern Pacific Railroad, and the I-10 Freeway. (AR 8581.) "[U]ses permitted by right in this district include . . . e-commerce distribution centers, public storage, and general warehousing." (AR 8581.)
- **Office & Professional District.** The Office & Professional District use consists of approximately 10.06 acres and is located in the east part of the Specific Plan area adjacent to residential units on smaller lots that are part of the Sun Lakes Country Club community. (AR 8581.) This district allows a wide range of uses that will "serve as a buffer between

existing uses to the east and larger-scale development allowed within the Business & Warehouse District." (AR 8581.)

- **Retail & Service District.** The Retail & Service District use consists of approximately 6.83 acres and is located on the southern edge of the Specific Plan area, adjacent to Sun Lakes Boulevard. (AR 8582.) The Specific Plan allows for a wide range of uses varying from clothing stores, pet grooming, gyms, and restaurants. (AR 8582.)

Below is an image of the SPA area and its land use mix. (AR 8582.)

B. <u>The PEIR and Environmental Review of the SPA</u>.

The City prepared an Initial Study on February 18, 2020 to help identify the potentially significant environmental impacts associated with the SPA and focus the PEIR on those potentially significant environmental effects. (AR 5732.) The City distributed a Notice of Preparation on February 21, 2020, and shortly thereafter held a public scoping meeting at the Sun Lakes Village Community Center/Country Club to receive public input. (AR 5806, 5807.)

In preparing the PEIR, the City utilized the following assumptions for the vacant and undeveloped land "in order to provide a more robust analysis" of the potential environmental impacts of the SPA: (1) 877,298 sf. of industrial park; (2) 52,065 sf. of medical office; and (3) 37,189 sf. of retail use. (AR 5842.) With respect to cumulative impacts, the PEIR explained

that "[t]he summary of projections approach is used in this [P]EIR, except for the evaluation of near-term traffic and vehicular related air quality, greenhouse gas, and noise impacts. The prior environmental documents which [have] been adopted or certified, [] described or evaluated regional or area wide conditions contributing to the cumulative impact and are used in the cumulative impact analysis for this [P]EIR."[2] (AR 5844.) Once completed, the Draft PEIR was available for review and comment from September 11, 2020 through October 26, 2020. (AR 8587.) On November 4, 2020, the City adopted Resolution 2020-22, certifying the PEIR and adopting the corresponding mitigation monitoring and reporting program and statement of overriding considerations. (AR 3269, 3276.) In approving the SPA, the City Council made a policy decision to allow these land uses, including industrial uses expressly authorized in the business and warehouse district. The certified PEIR included a robust discussion of the SPA's potential environmental impacts based on the development assumptions described above, including a detailed air quality impacts analysis (AR 5852-5871, 6095-6724) and noise impact analysis (AR 5958-5971, 6911-6922). No one challenged the PEIR and it is now final.

**1. SPA Cumulative Air Quality Impacts**.

In the air quality section, the PEIR explained that the SPA is within the South Coast Air Quality Basin ("**Basin**"), which is currently in non-attainment status for several criteria pollutants under state and federal standards. (AR 5858, 5860.) The SCAQMD, as the agency charged with overseeing air quality within the Basin, is responsible for developing Air Quality Management Plans ("**AQMP**") to eventually achieve attainment status for all criteria pollutants. (AR 5858-5860.) In fulfilling its duties, "[t]he [SCAQMD] has developed regional and localized significance thresholds for regulated pollutants. Any project in the [Basin] with daily emissions that exceed any of the indicated regional or localized significance thresholds would be considered to *contribute* to a projected air quality violation." (AR 5860. [emphasis added].)[3]

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[2] The prior environmental documents incorporated into the PEIR include: (1) the Butterfield Ranch Specific Plan EIR ("**BR-EIR**"), which was certified in December 2011; (2) the Rancho San Gorgonia Specific Plan EIR ("**RSG-EIR**"), which was certified in June 2016; and (3) the Banning Distribution Center EIR ("**BDC-EIR**"), which was certified in June 2018. (AR 5844.)

[3] Notably, this same methodology was utilized and not challenged in the BR-EIR (AR 3771); the RSG-EIR (AR 5034-5035); and the BDC-EIR (AR 5599).

1 The PEIR analyzed the regional air quality impacts of the SPA's assumed development
2 using SCAQMD's methodology and determined that the "emission of NOx during operation and
3 VOC during construction [would] exceed [SCAQMD's] thresholds." (AR 5860-5864, 5866.) As
4 "emissions resulting from [SPA] operations would exceed the numerical thresholds established by
5 the SCAQMD," the PEIR concluded that the SPA "would result in a cumulatively considerable
6 net increase." (AR 5869.) Thus, the PEIR determined that both the SPA's project specific and
7 cumulative air quality impacts would be significant and unavoidable. (AR 5865, 5870.) For near-
8 term and localized impacts, the PEIR explained that SCAQMD guidance calls for the City to
9 conduct this analysis once an application has been submitted to develop the property. (AR 5865.)

10 **2. SPA Cumulative Noise Impacts.**

11 The PEIR explains that the "geographic context for the analysis of cumulative noise
12 impacts is the location of the roadway intersections listed in the [PEIR's] Traffic Impact
13 Analysis." (AR 5970.) The PEIR's Traffic Impact Analysis listed the following intersections
14 based on the route that the trucks will travel. (AR 6939.)

15 **TABLE 1-1: INTERSECTION ANALYSIS LOCATIONS**

16–22

| ID | Intersection Location | Jurisdiction | CMP? |
|---|---|---|---|
| 1 | Highland Springs Av. & I-10 WB Ramps | City of Banning, City of Beaumont, Caltrans | No |
| 2 | Highland Springs Av. & I-10 EB Ramps | City of Banning, City of Beaumont, Caltrans | No |
| 3 | Highland Springs Av. & 2nd St. | City of Banning, City of Beaumont | No |
| 4 | Highland Springs Av. & 1st St./Sun Lakes Bl. | City of Banning, City of Beaumont | No |
| 5 | Sun Lakes Village Dr. & Dwy. 1 – Future Intersection | City of Banning | No |
| 6 | Sun Lakes Village Dr. & Dwy. 2 – Future Intersection | City of Banning | No |
| 7 | Sun Lakes Village Dr. & Sun Lakes Bl. | City of Banning | No |
| 8 | Dwy. 3/Country Club Dr. & Sun Lakes Bl. | City of Banning | No |
| 9 | Dwy. 4 & Sun Lakes Bl. – Future Intersection | City of Banning | No |
| 10 | Twin Hills Dr./Country Club Dr. & Sun Lakes Bl. | City of Banning | No |

23 The PEIR's cumulative noise impact analysis explained that the SPA's "contribution to a
24 cumulative traffic noise increase would be considered significant" if the SPA "would increase the
25 noise level by 3 dBA." (AR 5970.) To achieve that effect, trips generated from the SPA area
26 "would need to result in a doubling of the traffic volumes on a road segment to result in an audible
27 increase in ambient noise levels." (AR 5971.) The PEIR determined that trips resulting from the
28

SPA will not double traffic volumes on a road segment; therefore, noise impacts will not be cumulatively considerable. (AR 5968, 5970-5971.)

**C. The Project.**

On May 27, 2021, Real Party submitted an application to the City "requesting approval of one (1) industrial warehouse building measuring 619,959 [sf.], which included 10,000 [sf.] of office, and six (6) retail/restaurant buildings totaling 34,000 [sf.]" (AR 11609.) "The Project is intended to be constructed in two phases. Phase 1 will consist of the industrial building with construction projected to begin early 2022. Phase 2 will consist of the retail portion and is projected to begin construction early 2023." (AR 1005.) Construction of the Project has not commenced as a result of the instant litigation.

The Project is nearly identical to the development scenario contemplated in the SPA and assumed in the PEIR in terms of land uses except that the Project is smaller in size and scope. More specifically, the Project's warehouse is over 250,000 sf. smaller than the industrial park anticipated in the PEIR, and the overall footprint of the entire Project is nearly 350,000 sf. smaller than was analyzed in the PEIR. (AR 1011.) As the Project is simply a smaller version of what was contemplated in the Specific Plan, the Project complies with all of the Specific Plan's development standards and the proposed uses are permitted by right. (AR 8581, 12537.) Thus, the only approvals the Project needed "include[] a Design Review Application, a Tentative Parcel Map, and an [e]nvironmental analysis." (AR 792.)

**D. The Project Addendum.**

Because the PEIR comprehensively analyzed impacts of the proposed land uses, including industrial uses, in November 2021 an Addendum was prepared for the Project and was later updated in February 2022[4]. The Addendum analyzed whether any major modifications were required to the PEIR. (AR 100.) Given the Project's smaller size as compared to the development concept analyzed in the SPA and PEIR, the City had initially determined that a Consistency Checklist pursuant to CEQA Guidelines section 15168, subdivision (c), would be prepared for the

[4] The February 2022 update contained minor revisions in response to public comments. (AR 2648.)

Project. However, to ensure a more robust environmental analysis, the Consistency Checklist was expanded into an Addendum to the certified PEIR. (AR 100, 2648.) The Addendum, including the extensive technical studies, consists of almost 700 pages of analysis. (AR 100-785.)

**1. The Addendum's Cumulative Air Quality Impacts Analysis**.

Consistent with the PEIR, the BR-EIR, the RSG-EIR, and the BDC-EIR, the Addendum measured the Project's air quality impacts – and whether the Project's air quality impacts are cumulatively considerable – based upon SCAQMD's thresholds of significance. (AR 134.) The Addendum determined that, because the Project is smaller than what was analyzed in the PEIR and will be constructed over two phases instead of one, the Project (i) will result in substantially fewer construction-related VOC emissions when compared to the SPA assumptions used in the PEIR; and (ii) no longer will exceed SCAQMD's daily significance threshold for VOC. (AR 134-135.) As a result, the Project's air quality impacts were determined to not be cumulatively considerable. (*Id.*)

The Addendum further noted that the Project's warehouse is 250,000 sf. smaller than what was analyzed in the PEIR and consists of seventy-five percent (75%) industrial use and twenty-five percent (25%) high-cube cold storage warehouse use whereas the PEIR's warehouse was conservatively classified as an "industrial park." (AR 586, 587.) The reduction in size and change in classification resulted in the Project's generating only 2,292 daily vehicle trips as opposed to the 3,844 daily vehicle trips assumed by the PEIR. (AR 588, 590.) The Addendum explains that this reduction of vehicle trips is sufficient to reduce NOx emissions below the SCAQMD's daily significance threshold, rendering them not cumulatively considerable under both the regional and localized impacts analysis. (AR 135, 138.) The Addendum also included a Health Risk Assessment ("**HRA**"), which was prepared following the "guidelines issued by the SCAQMD and the State Office of Environmental Health Hazards Assessment," and determined that impacts would fall below the established SCAQMD significance threshold and would therefore not "cause a significant human health or cancer risk."[5] ( (AR 138-139.)

[5] Petitioner is not challenging the adequacy of the HRA in this action.

In May 2021, after the PEIR was certified but before the Addendum was prepared, "the SCAQMD adopted the Warehouse Indirect Source Rule" ("**Rule 2035**") which will "reduce [NOx] and particulate matter emissions produced by light- and heavy-duty trucks and tractor-trailers (mainly diesel) traveling to and from warehouses" by requiring either certain "emissions-reducing activities or payment of mitigation fees to offset the number of truck trips to and from warehouses." (AR 135-136.). Although "compliance with Rule 2035 will decrease the Project's emissions," and the emissions of nearly every warehouse in the Basin, "in order to prepare a more conservative analysis, no reductions in emissions [were] assumed" in the Addendum. (AR 136.)

**2. The Addendum's Cumulative Noise Impact Analysis**.

As noted above, the Addendum and technical studies consist of almost 700 pages with over 100 of those pages dedicated to the Project's potential noise impacts. (AR 170-181, 577-686.) The noise study prepared for the Addendum explains that the Federal Interagency Committee on Noise ("**FICON**") developed guidance and recommendations that "are often used in environmental noise impact assessments involving the use of cumulative noise exposure metrics." (AR 701.) "The FICON guidance provides an established source of criteria to assess the impacts of substantial temporary or permanent increase in ambient noise levels" – in other words, cumulative impacts. (AR 701.) "Based on the FICON criteria, the amount to which a given noise level increase is considered acceptable is reduced when the without Project noise levels are already shown to exceed certain land-use specific exterior noise level criteria." (AR 701.) For off-site traffic, if ambient noise is 60 dBA CNEL or less, then a 5 dBA CNEL Project increase is cumulatively considerable; if ambient noise is 60-65 dBA CNEL, then a 3 dBA Project increase is cumulatively considerable; and if ambient noise is greater than 65 dBA CNEL, then a 1.5 dBA CNEL Project increase is considered cumulatively considerable. (AR 702.)

To determine off-site traffic noise, the environmental consultant used a computer program that replicates the Federal Highway Administration Traffic Noise Prediction Model ("**FHWA Model**"). (AR 708.) The FHWA Model "is commonly used to describe the off-site traffic noise levels throughout California and is consistent with the City of Banning General Plan Noise Element." (AR 708.) The consultant used the average daily vehicle trip findings from the traffic

assessment prepared for the Addendum and looked at eight different roadway segments across Highland Springs Avenue, 1st street, and Sun Lakes Boulevard. (AR 708-09.) To ensure that off-site traffic noise generated by the Project was accurately captured, "the Project related truck trips were added to the heavy truck category in the FHWA noise prediction model." (AR 709.)

The consultant then ran four scenarios in the FHWA Model to analyze off-site traffic noise levels in the Addendum: (1) Existing; (2) Existing + Project; (3) Horizon year (2040); and (4) Horizon Year (2040) + Project. (AR 708-709.) Across both the "Existing + Project and the Horizon Year (2040) + Project, the FHWA Model determined that ambient noise levels were greater than 65 dBA CNEL at each of the roadway segments. (AR 715.) However, the Project's noise impacts were not cumulatively considerable because the Project's contribution at each roadway segment was less than 1.5 dBA CNEL. (AR 715.) Thus, the Addendum concluded that the Project will not have any significant noise impacts. (AR 181.)

**E. <u>Planning Commission Hearing</u>.**

The Planning Commission held two hearings on the Project. The first hearing was held on October 19, 2021. (AR 786.) At that hearing, City staff and the Project's applicant provided detailed presentations on the Project and fielded questions from the Planning Commission. (AR 1951-2024.) Approximately 30 residents testified, after which the Planning Commission voted to continue the hearing to allow for additional discussions. (AR 2165-2166.)

The second Planning Commission hearing occurred on December 1, 2021. (AR 896.) This hearing also involved a detailed presentation about the Project with experts and consultants providing additional evidence regarding the Project's history; traffic, air quality, and noise issues; and even some market commentary. (AR 2408.) Approximately 33 members of the public spoke. (AR 2409.) At the conclusion of the hearing, the Planning Commission voted to: (1) approve Design Review 21-7008 and Tentative Parcel Map 38164; and (2) determine that the Project, and the circumstances under which the Project is undertaken, do not involve substantial changes that will result in new or more severe environmental effects, or involve new information showing that the Project will have significant environmental effects not analyzed or discussed in the PEIR, as would trigger the requirement to prepare an SEIR. (AR 2409.)

### F. City Council Hearing.

On January 11, 2022, the City Council received an appeal from Petitioner seeking to set aside the Planning Commission's approval of the Project. (AR 1006.) The City Council appeal hearing was scheduled for February 17, 2022. (AR 1006.) At the outset of the hearing, each Councilmember disclosed any contacts with the applicant or appellants, addressed any comments or statements previously made about the Project, and confirmed that they would listen with an open mind to all information presented at the hearing. (AR 2418-2421 [Wallace]; 2421-2423 [Hamlin]; 2423-2424 [Happe]; 2424-2426 [Sanchez]; 2426-2427 [Pingree].)

During the hearing, the City Council asked the environmental consultants several questions about both air quality and noise impacts. The noise consultant explained that "[t]he high existing ambient noise levels for the I-10 freeway will effectively overshadow potential noise levels from the project. And the noise analysis shows that the nearest noise sensitive receiver locations will experience a barely perceptible project related noise level." (AR 2497.) The consultant also noted that the Project itself will "act[] as a noise buffer to reduce noise levels from the I-10 freeway and railroad." (AR 2497.)

In response to the comments raised by Petitioner regarding the trucks traversing Sun Lakes Boulevard in order to access the I-10 freeway, the City's traffic consultant "point[ed] out that most industrial uses, such as the [P]roject, the truck drivers will want to access the state freeway system at the closest point possible using the allowable truck routes," which means that trucks will use the nearby interchange at Highland Springs instead of traversing several miles to access the same freeway. (AR 2513.) At the conclusion of the hearing, the City voted 4-1 to deny the appeal and approve the Project with the sole no vote coming from Councilmember Hamlin. (AR 2709.)

## IV. THE CITY CONDUCTED A FAIR HEARING AND NO COUNCILMEMBER RECUSALS WERE REQUIRED.

The City fully complied with its obligation to hold a hearing on the Project that comported with due process. All parties – Petitioner, Real Party, and other members of the public – were afforded notice and an opportunity to be heard before a City Council that affirmatively disclosed contacts with interested persons and declared the intention to listen with an open mind to all

testimony presented at the hearing prior to rendering a vote. As a result, there was no "unacceptable probability of bias" by any Councilmember and Petitioner has failed to carry its burden. Similarly, the City followed the procedures and requirements of its own Municipal Code. Petitioner's attempt to overturn the Project approval on these grounds fails.

### A. **Summary of Relevant Legal Standard**.

The law is clear: "Bias and prejudice are never implied and must be established by clear averments. […] a party's unilateral perception of an appearance of bias cannot be a ground for disqualification unless we are ready to tolerate a system in which disgruntled or dilatory litigants can wreak havoc with the orderly administration of dispute-resolving tribunals." (*Breakzone Billiards v. City of Torrance* (2000) 81 Cal.App.4th 1205, 1237.) To that end, "advance knowledge of adjudicative facts that are in dispute … do not disqualify the members of an adjudicatory body from adjudicating a dispute[.]" (*Id.* at 1236.)

"[A] party seeking to show bias or prejudice on the part of an administrative decision maker [is required] to prove the same with concrete facts[.]" (*Id.* at 1237.) Moreover, the "right to an impartial trier of fact is not synonymous with the claimed right to a trier completely indifferent to the general subject matter of the claim before him." (*Andrews v. Agricultural Labor Relations Bd*. (1981) 28 Cal.3d 781, 790.) California courts recognize that "administrative decision makers are drawn from the community at large. Especially in a small town setting they are likely to have knowledge of and contact or dealings with parties to the proceeding. Holding them to the same standard as judges, without a showing of actual bias or the probability of actual bias, may discourage persons willing to serve and may deprive the administrative process of capable decision makers." (*Nasha v. City of Los Angeles* (2004) 125 Cal.App.4th 470, 483.) Indeed, "it would be strange if the members of the council living and working in [the city] did not have considerable cognizance of what was going on in the city, of the efforts of some people to form the present assessment district and of the municipal needs in this respect, fanciful or actual." (*Todd v. City of Visalia* (1967) 254 Cal.App.2d 679, 691.) As a result, while the Banning City Councilmembers all admittedly were *aware* of the Project prior to it coming forward for hearing, and several had contacts with *both* members of the community opposed to the Project (including

members of Petitioner) and with the applicant, those actions are legal, permissible, and do not amount to a disqualifying bias. Petitioner's efforts to castigate the Councilmembers for being involved in their community and engaging with their constituents fails.

### B. No Councilmembers Demonstrated Disqualifying Pre-decisional Bias.

Petitioner cherry-picks comments from Councilmembers in an attempt to create issues where none exist, and then brushes aside actual evidence demonstrating that each Councilmember – including those Petitioner does not single out and who voted in favor of the Project – disclosed all contacts, affirmed that they had not pre-decided their votes, and declared that they did not know how other Councilmembers intended to vote.

#### 1. Councilmember Wallace.

During an October 2021 "State of the City" address (which was approximately four months before the Project came to the Council for hearing), Councilmember Wallace gave a presentation regarding various issues in the City including: information technology, public works grants, City programs and services, animal control, and the Sun Lakes Boulevard Extension, among others. (AR 13042; 19755.) The end of the presentation included a "Sneak Peek" regarding projects for 2022. (AR 13042; 19755.) Councilmember Wallace discussed various potential projects, including the Project, for approximately one minute. (AR 13042; 19755.) Petitioner cherry-picks quotations from this speech (OB at p. 17 ["she stated that the City Council would 'do what we have to do' to ensure development"]) and seeks to transform them into a pre-commitment to support the Project. But Petitioner takes Councilmember Wallace's comments out of context, as they were expressly made in response to community concerns. (AR 13042 ["People complain about 'why are you building this here and there?'[…]".)

Councilmember Wallace also addressed these comments at the beginning of the City Council hearing, declaring that her "statements during [her State of the City] address, which were made over four months ago, were related to all potential future development in the city, and how development in general can benefit the city's youth. I was not making a statement of support or opposition to this project in particular." (AR 2419.) She further stated that she did not have a predetermined bias, had not made up her mind on the Project, and "intend[ed] to listen objectively

to all parties and the public before making up [her] mind[.]" (AR 2419.) The Court should reject Petitioner's efforts to turn 15 seconds of comments, made four months earlier, during a speech discussing issues of general relevance in the City, into a disqualifying bias.

**2. <u>Councilmember Sanchez</u>.**

Petitioner similarly mischaracterizes words from Councilmember Sanchez in an October 28, 2021 comment made on the NextDoor app, wherein Councilmember Sanchez addressed community concerns. (OB, p. 17 ["This is a great project because it does many things for the area, it eliminates the homeless population due to the enclosed businesses"].) Petitioner again ignores the context surrounding this quote. In the same post, the Councilmember also stated in response to community comments: "No one in the City is trying to hide anything regarding this project. All the information about the developers, meetings, plans, etc is a public record[.]" (AR 19728.) Councilmember Sanchez further sought to ensure that misinformation was not being promulgated and to clarify information regarding the Project: "retail space facing Sun Lakes, and traffic is being mitigated by the time this development starts building." (AR 19728.)

Councilmember Sanchez further explained these comments at the beginning of the City Council hearing, stating: "I would like to clarify that my statements, which were made almost four months ago, were intended to indicate that projects like this one can have positive impacts on the community and not just negative impacts. At that time, I made those comments, I had not reviewed any of the materials, and this matter was not submitted to the Council for review." (AR 2425.) He further stated that he had not made up his mind yet and intended to listen objectively before making any determination. (AR 2426.) Petitioner has not provided any evidence that fleeting comments made months earlier on a social media post evidenced a pre-commitment by Councilmember Sanchez regarding the Project.

**3. <u>Councilmember Hamlin</u>.**

At the City Council hearing, Councilmember Hamlin forthrightly stated that she had met with Real Party's representatives "to learn information about the project and reactions to the project." (AR 2421.) She also candidly noted that she had posted on the Sun Lakes Community Facebook group chat and shared community concerns with the applicant, and then provided

context to those communications: "I would like to clarify that my statements, which were made three months ago, were intended to provide information to the community, and then to make sure city staff and the applicant heard what the community's questions and concerns about the project were." (AR 2422.) Later during the hearing, Councilmember Hamlin again stated that the purpose of her meeting with the applicant was to "convey to him all the emails that I have gotten from my constituents […] All of the complaints that I have [been] receiving, I have passed along to the developers and the city staff. In return, I was gathering facts from the city and from the developer to share with the constituents, it was misinterpreted as me supporting it." (AR 2610-2611.)

Evidence in the record confirms the lack of clarity in the community regarding the Project months prior to the hearing. For example, several months before the February 2022 City Council hearing, Councilmember Hamlin was accused of "approving" a warehouse, despite the fact that the City Council had not voted on a warehouse. (AR 19669 [following Hamlin's October 25, 2021 update: "I understand you were in approval of the warehouse"].) And, exactly as she said at the City Council hearing, she previously sought to relay information; on October 22, 2021, she posted for her constituents, seeking collaboration and asking for "suggestions of projects that would be appropriate and acceptable for the property across from Sun Lakes. Then I can take them to the City and the developers to be researched. We need to work together to come up with ideas." (AR 109657.)

Councilmember Hamlin then stated unequivocally at the beginning of the Council hearing that she "ha[d] not made up [her] mind on the project [and] intend[ed] to listen objectively to all parties and the public, before making up [her] mind and making any determination, and only after the close of the public hearing." (AR 2422-2423.)

While Petitioner makes much of the Councilmember's communications, Petitioner breezily casts aside the fact that Councilmember Hamlin ***voted against the Project***. (AR 2702.) (*See, e.g*., OB, p. 20 ["That Hamlin ultimately voted 'no' on the Project is therefore irrelevant"].) Indeed, a running theme through Petitioner's argument is that because Councilmembers Wallace, Sanchez, and Hamlin made various statements about the Project before the hearing, they were barred from having an open mind and being persuaded by arguments made at the hearing. But, this is belied

by the facts. According to Petitioner, Councilmember Hamlin had a "closed mind" regarding the Project and was biased in favor of it. Yet, Councilmember Hamlin listened to the testimony at the hearing with an open mind and ultimately determined that she could not support the Project.[6]

Councilmember Hamlin's subsequent comments reflect this. On February 21, 2022, she published a statement online for her constituents and explained that she voted 'No' because the Project that was presented was different from her original understanding of it. (AR 19698.) She further stated that she "had to keep an open mind and not express any opinions one way or the other. All that time I was conveying information to the developers and City staff, as well as gathering more information and details about the project. I had to be sure what I was going to be voting for or against. I had to see and hear the motion." (AR 19698.)

The comments and statements about which Petitioner complains are similar to the situation in *City of Fairfield v. Superior Court* (1975) 14 Cal.3d 768, where the court rejected claims of bias. There, two city councilmembers refused to recuse themselves from a vote to approve a shopping center. (*Id*. at 773.) Both of the councilmembers in question voted with the majority to deny the permit. (*Ibid*.) The developer complained that they had spoken out against the shopping center, and thus that their bias had denied the developer a fair hearing. (*Id.* at 774.) The developer sought to depose the councilmembers. (*Id*. at 774.) The court held that "even if Commercial could prove that Campos and Jenkins had stated their views before the hearing, that fact would not disqualify them from voting on the application" because the "few factual controversies were submerged in the overriding issue of whether construction of the shopping center would serve the public interest." (*Id*. at 779-780; see also, *William S. Hart Union High School Dist. v. Regional Planning Com*. (1991) 226 Cal.App.3d 1612, 1627 ["a litigant cannot inquire into what evidence a public official considered and what reasoning process he or she used when reaching a decision that is being challenged"].)

In arriving at its decision, the court in *Fairfield* took into heavy consideration the context

[6] Petitioner's attempts to make an issue out of the voting sequence are unavailing. All Councilmembers voted simultaneously on electronic devices. (AR 2702 ["Oh, we can vote online?"].) Councilmember Hamlin was not the last to vote and did not know how other Councilmembers were voting when she cast her ballot. Her comment about "locking in" her vote simply related to the mechanics of casting the vote, and was immediately preceded by the City Attorney reminding the Council that they "Need to lock it." (AR 2702.)

and size of the city:

> "In a city of Fairfield's size, the council's decision on the location and construction of a shopping center could significantly influence the nature and direction of future economic growth. The construction of that center will increase both the city's revenue and its expenditures; will affect the value not only of neighboring property, but of alternative shopping center sites and of existing businesses; will give employment but may also aggravate traffic and pollution problems. These topics are matters of concern to the civic-minded people of the community, who will naturally exchange views and opinions concerning the desirability of the shopping center with each other and with their elected representatives.
>
> A councilman has not only a right but an obligation to discuss issues of vital concern with his constituents and to state his views on matters of public importance." (*Id*. at 780.)

Similarly, Councilmember Hamlin's engagement and participation in her community, including providing information to the applicant about community concerns with the Project, reflected a desire to serve her constituents on an issue of significant concern. Rather than reflecting bias, this reflects a process that functioned properly, with a Councilmember who Petitioner expected to support the Project keeping an open mind and ultimately voting against it.

### C. Petitioner's Cited Authority Is Readily Distinguishable and Unavailing.

Tellingly, Petitioner relies entirely on case law wherein a disappointed project *applicant* claimed bias by the public agency against the *applicant*. (See, e.g., *Woody's Group, Inc. v. City of Newport Beach* (2015) 233 Cal.App.4th 1012; *Nasha*, *supra*, 125 Cal.App.4th 470; *Petrovich Development Company, LLC v. City of Sacramento* (2020) 48 Cal.App.5th 963.) Petitioner fails to provide even a single case where a non-applicant successfully prevailed on a claim of unfairness, bias, or lack of due process as a matter of right. The facts in these cases cited by Petitioner are also markedly dissimilar from this action.

In *Woody's*, the Newport Beach Planning Commission voted 5-2 to approve a conditional use permit and variance to allow Woody's to have a patio cover, remain open until 2:00 a.m. on weekends, and allow dancing inside the restaurant. (*Woody's*, *supra*, 233 Cal.App.4th at 1017.) Four days later, a city councilmember "made an 'official request to appeal' the planning commission's decision because he 'strongly believ[ed]' the 'operational characteristics requested in the application and the Planning Commission's decision are inconsistent with the existing and expected residential character of the area and the relevant policies of the voter approved 2006

General Plan.' " (*Id*. at 1017.) At the city council hearing, the council voted to reverse the planning commission's decision. (*Id*. at 1019.) In litigation that ensued, the court found that the councilmember was biased and "should not have been part of the body hearing the appeal." (*Id*. at 1023.) Petitioner ignores this entire prong of the court's reasoning. (OB, p. 15.) The court explained that the "problem of bias is amplified when it is combined with the related phenomenon of a city violating its own procedure by initiating an appeal to itself." (*Id*. at 1023.) Stated otherwise, the court was concerned by the councilmember initiating an appeal and then serving as one of the decisionmakers on the appeal. No such issue is present here, where the matter came to the Council without the involvement of any Councilmember. (AR 1006; 1027.)

Petitioner also relies heavily on *Nasha*. (OB, pp. 17-19.) There, the appellant owned land subject to a specific plan which the city required an application to determine if the project was compliant with the plan. (*Nasha*, *supra,* 125 Cal.App.4th at 473.) A city design review board recommended disapproval but the city's planning director unilaterally approved the project. (*Id.* at 475.) A neighbor and a conservancy organization each appealed to the planning commission. (*Id*. at 475.) Shortly before the hearing, a planning commissioner anonymously authored a piece in a residents' association newsletter criticizing the project and connected one of the appealing parties to the residents' association. (*Id*. at 476.) At the hearing, the commissioner did not disclose any of this. (*Id*. at 477.) He then moved to grant the appeal of the director's decision, which passed 3-1. (*Id*. at 477-478.) The court found this amounted to impermissible bias.

In contrast, all Councilmembers here disclosed on the record their contacts with the Project applicant and opponents, and publicly explained what information they reviewed and what was shared with the applicant and the community at large. There was no hidden agenda here.

Petitioner cites to a November 20, 2021 email, which Councilmember Hamlin sent a month before the Planning Commission hearing and several months before the City Council hearing. (AR 13051.) Petitioner extracts quotations of positive statements regarding the Project while neglecting the rest of the communication and the broader community context surrounding the City Council at this time. (OB, pp. 17-18.) Petitioner ignores Ms. Hamlin's statements that "I do have the best interests of Sun Lakes in mind as I research this project and any and all

alternatives. I have been meeting with the City staff and the developers to get the facts and a better understanding of the project." (AR 13051.) Councilmember Hamlin also provided a document entitled "Information on Banning Pointe" which was intended to provide accurate information regarding the Project. (AR 13052-13054 ["I think it's important to correct some misinformation about "100's of trucks per day"].) Petitioner's attempt to conflate the distribution of factual information to combat misinformation, which was sent long before the Planning Commission hearing had occurred and the matter had been appealed, with the situation in *Nasha*, is unavailing. There was no obfuscation here and no intent to stir debate or potentially persuade other decisionmakers; instead, Councilmember Hamlin was attempting to disseminate information and understand community concerns.

Finally, this case is distinguishable from *Petrovich Development Company, LLC v. City of Sacramento*, *supra*, 48 Cal.App.5th 963. In *Petrovich*, an allegedly biased city councilmember emailed a list of "Talking Points" to the City's Mayor and other councilmembers shortly before the hearing, which indicated his intended vote to his fellow voting councilmembers. (*Id*. at p. 970-972.) The councilmember communicated with other councilmembers before the vote and made statements indicating he knew which way councilmembers would vote. (*Id.*, at pp. 975-976.) Here, all Councilmembers expressly stated that they did not know how other Councilmembers intended to vote, and there is no evidence suggesting any communication among them regarding this Project. They all made their individual decisions based on information from the hearing.

In sum, all of the cases on which Petitioner relies are distinguishable on multiple bases.

**D. <u>The City Complied with Its Municipal Code</u>.**

The City followed the procedures of the City's Municipal Code through the cycle of this Project, which are largely found in Banning Municipal Code section 16.14.

Petitioner relies on the City's Manual of Policies and Procedures for the Conduct of Meetings by City Legislative Bodies, section 8.1(d), which states: "For quasi adjudicative matters involving public hearings, the members of the Legislative Body 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 the statutorily required findings." (Pet. RJN, B-24.) All Councilmembers followed

this policy, stating on the record that they would listen to the testimony at the hearing with an open mind and affirming that they had not pre-committed to a decision on the Project. Section 8.1(e) of the Manual further states: "For such matters, Legislative Body members should avoid expressing an opinion or divulging their thought process until after the public hearing has been completed." (Pet. RJN, B-24.) Again, at no point did any Councilmember share how they would weigh and balance competing interests regarding the Project or commit to voting for or against the Project.

Petitioner's argument is also grounded in a false parallel with the removal of Planning Commissioner Marco Santana ("**Santana**") for bias. (OB, p. 22.) The circumstances surrounding Santana's removal were similar to those found in *Nasha* and *Petrovich*, and for which reasons the City found it essential to remove Santana to preserve the fairness of the tribunal. (AR 13057-13060.) Santana published an opinion article in the local newspaper, which broadcast to the public and fellow commissioners his intended vote on all future warehouse projects, regardless of individual facts. (AR 13057-13060.) No statements by any Councilmember here asserted a predetermination, telegraphed their intended votes, or attempted to sway other Councilmembers. Petitioner's argument of procedural unfairness arises out of a false equivalency and is meritless.

## V. THE CITY'S DECISION THAT NO SEIR WAS REQUIRED IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

Petitioner's argument that the City was required to prepare an SEIR to analyze potential cumulative impacts related to other projects rests on flawed contentions regarding both the nature of subsequent environmental review and what the PEIR and Addendum actually studied. As shown below, the analysis in the Addendum was complete and supported the City's conclusion that the high bar for preparation of an SEIR was not met.

### A. Summary of Relevant Legal Standards.

#### 1. Legal Standard Governing Subsequent Review Under CEQA.

Pursuant to Public Resources Code section 21166, once "an environmental impact report has been prepared for a project…, **no subsequent or supplemental environmental impact report shall be required by the lead agency** or by any responsible agency, unless one or more of the following events occurs:

(a) Substantial changes are proposed in the project which will require major revisions of the environmental impact report.

(b) Substantial changes occur with respect to the circumstances under which the project is being undertaken which will require major revisions in the environmental impact report.

(c) New information, which was not known and could not have been known at the time the environmental impact report was certified as complete, becomes available.

(Pub. Resources Code, § 21166, subds. (a)-(c); CEQA Guidelines, § 15162, subds. (a)-(c); emphasis added.)

Unless the lead agency determines that one of these three circumstances exists, the agency is prohibited from requiring a subsequent or supplemental EIR. (Pub. Resources Code, § 21166; *Fund for Environmental Defense v. County of Orange* (1988) 204 Cal.App.3d 1538, 1554.)

"In reviewing an agency's decision not to require additional environmental review 'pursuant to [Public Resources Code] section 21166, courts are not reviewing the record to determine whether it demonstrates a possibility of environmental impact, but are viewing it in a light most favorable to the agency's decision in order to determine whether substantial evidence supports the decision not to require additional review.' [Citation.]" (*Abatti v. Imperial Irrigation District* (2012) 205 Cal.App.4th 650, 675.) Section 21166 thus limits the circumstances under which further EIRs must be prepared and balances information disclosure with finality and certainty in projects. (*Friends of College of San Mateo Gardens*, *supra*, 1 Cal.5th at 949; *Bowman v. City of Petaluma* (2008) 185 Cal.App.3d 1065, 1073-1074 ["[S]ection 21166 comes into play precisely because in-depth review has already occurred, the time for challenging the sufficiency of the original EIR has long since expired [], and the question is whether circumstances have changed enough to justify repeating a substantial portion of the process."].) After an EIR is certified and becomes final, a presumption of validity applies. (Pub. Resources Code. § 21167.2; *Laurel Heights Improvement Assn. v. Regents of University of California* (1993) 6 Cal.4th 1112, 1130 [presumption of validity "acts to preclude reopening of the CEQA process even if the initial EIR is discovered to have been fundamentally inaccurate and misleading in the description of a significant effect or the severity of its consequences"].) As a result, any issues

with the earlier EIR that were raised or could have been raised are barred from further consideration. (*Comm. for Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32, 50. In short, "[a]fter an initial EIR is certified, CEQA establishes a presumption against additional environmental review." (*San Diego Navy Broadway Complex Coalition v. City of San Diego* (2010) 185 Cal.App.4th 924, 928.)

"A party challenging an agency's decision under [Public Resources Code] section 21166 has the burden to demonstrate that the agency's decision is not supported by substantial evidence and is therefore improper." (*The Committee for Re-Evaluation of the T-Line Loop v. San Francisco Municipal Transportation Agency* (2016) 6 Cal.App.5th 1237, 1247.) An agency's decision not to prepare an SEIR is thus upheld if ***any*** substantial evidence supports its determination that changes in the project or surrounding circumstances or new information were not so substantial as to require major EIR modifications. (*Ibid*; see also *Citizens Against Airport Pollution v. City of San Jose* (2014) 227 Cal.App.4th 788, 797-798.)

Under CEQA, "substantial evidence" means "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached." (CEQA Guidelines, § 15384, subd. (a).) Of particular importance in the present case, mere argument, speculation, and unsubstantiated opinion or narrative is not substantial evidence. (Pub. Resources Code, § 21082.2, subd. (c); CEQA Guidelines, §15384, subd. (a).)

To require preparation of an SEIR, "there must be subsequent changes to the project or in the circumstances surrounding the project which "require important revisions of the previous EIR *... due to the involvement of new significant environmental impacts not considered in a previous EIR*." (*Fund for Environmental Defense v. County of Orange* (1988) 204 Cal.App.3d 1538, 1552 [citing CEQA Guidelines, § 15162, [emphasis added].) A "significant effect" is defined in the CEQA Guidelines as "a substantial, or potentially substantial, adverse change in any of the physical conditions within the area affected by the project." (CEQA Guidelines, § 15382.) The bar for demonstrating the existence of new information requiring subsequent environmental

review is extremely high and difficult to meet. (See, e.g., *Citizens Against Airport Pollution v. City of San Jose* (2014) 227 Cal.App.4th 788, 807-08.)

Petitioner cites *Mani Brothers Real Estate Group v. City of Los Angeles* (2007) 153 Cal.App.4th 1385, *Fund for Environmental Defense v. County of Orange* (1988) 204 Cal.App.3d 1538, *City of Irvine v. County of Orange* (2015) 238 Cal.App.4th 526, and *The Committee for Re-Evaluation of the T-Line Loop v. San Francisco Municipal Transportation Agency* (2016) 6 Cal.App.5th 1237, for the broad proposition that "changes in a neighborhood" may constitute a sufficient change in circumstances for purposes of CEQA Guidelines section 15162, subdivision (b). This premise is, in concept, true. However, in all of the above-referenced cases, the agencies' actions were upheld and the reviewing courts determined that the alleged neighborhood "changes" did not require subsequent environmental review because, **as is the case here**, the agencies' conclusions were based on substantial evidence and a thorough analysis consistent with CEQA. ***These cases only further emphasize the extremely high burden that Petitioner bears, and the dearth of California case law in which the Court of Appeal has overturned a local agency's decision to prepare an Addendum in lieu of requiring an SEIR.***[7]

Moreover, the Court of Appeal's conclusions in those cases that no subsequent review was required occurred with facts that are far more striking than those here. For example, in *Fund for Environmental Defense, supra,* 204 Cal.App.3d 1538, the Court of Appeal found, among other things, that a 30 percent increase in the size of the project's footprint and increased number of buildings (as compared to the 30 percent ***reduction*** in size and scope with the Project) did not constitute a sufficient change in circumstances that would require major revisions to the underlying EIR. (*Id.,* at pp. 1546-1547.) As here, the Court of Appeal also noted that the petitioner had failed to identify exactly how the alleged changes in the project would necessitate the major revisions to the EIR. (*Id.*, at p. 1547.) Similarly, in *Mani Brothers, supra*, 153 Cal.App.4th 1385, the Court of Appeal also dealt with modifications to the scope of a previously-analyzed project, including the substitution of residential uses in place of some office, retail, and

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[7] Not surprisingly, Petitioner's Opening Brief cites **no case** in which the Supreme Court or Court of Appeal invalidated an Addendum based upon the discovery of new information or a change in circumstances requiring supplemental environmental review.

cultural center uses, and found that the modifications did not require preparation of an SEIR, even with an overall increase in size and density of the project. (*Id.*, at pp. 1402-1403.) Here, the Project is a substantial ***reduction*** in scope from the project analyzed in the PEIR and contemplated in the SPA so it would logically follow that, as concluded in the Addendum, any Project-related impacts would be less than those analyzed and found to exist in the PEIR. The Court of Appeal decisions in *City of Irvine, supra,* 238 Cal.App.4th 526, 538 [challenge to county's decision to prepare supplemental EIR instead of a subsequent EIR], and *The Committee for Re-Evaluation of the T-Line Loop, supra,* 6 Cal.App.5th 1237, 1254-1256 [substantial evidence supported transportation agency's decision not to prepare SEIR for addition of 900 feet of rail to existing light rail line]), are thus unavailing to Petitioner.

There is no set procedure or format required for determining whether subsequent environmental review is or is not required for a project. (*See Bowman v. City of Petaluma* (1986) 185 Cal.App.3d 1065, 1081-82.) The lead agency need not make any formal findings nor is there any requirement for a public hearing or participation. (*Fund for Environmental Defense, supra,* 204 Cal.App.3d at p. 1553; *A Local and Regional Monitor v. City of Los Angeles* (1993) 12 Cal.App.4th 1773, 1804-1805.) Instead, all that is required is that the lead agency include "[a] brief explanation of [its] decision not to prepare a subsequent or supplemental EIR" somewhere in the record, and that its reasons for not preparing a subsequent or supplemental EIR be supported by "substantial evidence" in the record. (CEQA Guidelines, § 15164, subd. (e).) Here, far more than that was done – there was a detailed Addendum supported by technical studies.

**2. Legal Standard Governing Analysis of Cumulative Impacts.**

"An EIR shall discuss cumulative impacts of a project when the project's incremental effect is cumulatively considerable." (CEQA Guidelines, § 15130, subd. (a).) "Where a lead agency is examining a project with an incremental effect that is not 'cumulatively considerable,' a lead agency need not consider that effect significant, but shall briefly describe its basis for concluding that the incremental effect is not cumulatively considerable." (*Ibid.*) "In making those explanations, the EIR may, but is not required to use the Guidelines' technical requirements [commonly known as the list method and the projection method] for its cumulative impacts

1 analysis." (*League to Save Lake Tahoe Mountain etc. v. County of Placer* (2022) 75 Cal.App.5th
2 63, 149.) In the context of subsequent review, "[n]o further cumulative impacts analysis is
3 required when a project is consistent with a general, specific, master or comparable programmatic
4 plan where the lead agency determines that the regional or areawide cumulative impacts of the
5 proposed project have already been adequately addressed . . . in a certified EIR for that plan."
6 (CEQA Guidelines, § 15130, subd. (d).)

7 **B. <u>Petitioner Fails to Show that the Exacting Standard for an SEIR Was Met</u>.**

8 In order to meet its high burden under CEQA Guidelines section 15162 for requiring
9 subsequent environmental review for the Project, Petitioner must show "that the changed
10 circumstances compel the conclusion that the significant environmental effects will be different or
11 more severe" than those previously identified and studied and will require "major revisions" to the
12 PEIR. (*Federation of Hillside and Canyon Associations v. City of Los Angeles* (2004) 126
13 Cal.App.4th 1180, 1200.) Petitioner fails to meet this burden.

14 When considering whether a project has significant cumulative impacts, there are two
15 questions that must be considered. The first is whether a project with an incremental effect is
16 considered "cumulatively considerable." (CEQA Guidelines, § 15130, subd. (a).) "Where a Lead
17 Agency examining a project with an incremental effect that is not 'cumulatively considerable,' a
18 lead agency need not consider that effect significant…." (*Ibid.*) If the conclusion to the first
19 question is that the project effects will be considered cumulatively considerable, the second
20 question asks whether that cumulatively considerable contribution will result in a new or more
21 severe impact not previously anticipated in an underlying EIR. (CEQA Guidelines, § 15162.)
22 Contrary to Petitioner's assumptions, "[t]he mere existence of significant cumulative impacts
23 caused by other projects alone shall not constitute substantial evidence that the proposed project's
24 incremental effects are cumulatively considerable." (CEQA Guidelines, § 15064, subd. (h)(4).)

25 There is substantial evidence in the record to support the City's determination that the
26 Project's air quality and noise impacts are not cumulatively considerable. As such, Petitioner's
27 claims fail.
28

1. **Substantial Evidence Supports the City's Determination that the Project's Air Quality Impacts are Not Cumulatively Considerable.**

Under CEQA, a cumulative impacts analysis is only required to be prepared if the particular project's incremental effect is found to be "cumulatively considerable." (CEQA Guidelines, § 15130, subd. (a).) Per the methodology established by the SCAQMD, which is supported by the CEQA Guidelines and was affirmed by the Court of Appeal as a valid methodology, air quality impacts are cumulatively considerable only if the project-specific impacts exceed the SCAQMD's local and regional thresholds of significance. (CEQA Guidelines, § 15130, subd. (b), Appx. G, § III; *Rialto Citizens for Responsible Growth*, *supra*, 208 Cal.App.4th at p. 933.)

"A lead agency may determine that a project's incremental contribution to a cumulative effect is not cumulatively considerable if the project will comply with the requirements in a previously approved plan or mitigation program (including, but not limited to . . . [an] *air quality attainment or maintenance plan*…) that provides specific requirements that will avoid or substantially lessen the cumulative problem within the geographic area in which the project is located." (CEQA Guidelines, § 15064, subd. (h)(3) [emphasis added].) "Where a lead agency is examining a project with an incremental effect that is not 'cumulatively considerable,' a lead agency need not consider that effect significant, but shall briefly describe its basis for concluding that the incremental effect is not cumulatively considerable." (*Id*., at § 15130, subd. (a).)

Here, the City determined based upon substantial evidence and analysis that the Project would comply with the AQMP, the relevant air quality attainment plan, which is prepared and overseen by SCAQMD. (*Rialto Citizens for Responsible Growth*, *supra*, 208 Cal.App.4th at p. 933). The AQMP contains regional significance thresholds ("**RST**") and local significance thresholds ("**LST**") for each criteria pollutant measured. (AR 138, 5861.) If a project exceeds the RST or the LST for any criteria pollutant, the project not only has significant project specific air quality impacts, but its contribution to regional air quality impacts within the Basin is also cumulatively considerable. (AR 2760.) On the other hand, if a project does not exceed the RST or LST, the project does not have a significant project level impact and its contribution is not

1 cumulatively considerable. (AR 2760.) The Addendum and the corresponding technical studies
2 concluded that the Project does not exceed the RST or the LST for any criteria pollutant measured
3 under the AQMP. (AR 135-138, 224-226.) Petitioner does **not** dispute this conclusion.
4 Rather, Petitioner argues that the SCAQMD's methodology for analyzing cumulative air
5 quality impacts set forth in the *White Paper on Potential Pollution Control Strategies to Address*
6 *Cumulative Impacts from Air Pollution* is not an acceptable approach under CEQA. Petitioner
7 cites a "Best Practices" document prepared by the California Attorney General as the appropriate
8 methodology. (OB, pp. 29-30.) First, the Attorney General's "Best Practices" are not binding
9 CEQA authority for analyzing a project's cumulative air quality impacts and therefore do not
10 constitute substantial evidence of the City's alleged failure to comply with CEQA. Second, the
11 City had discretion to utilize the SCAQMD methodology in lieu of the Attorney General's "Best
12 Practices" (or any other competing approach) for assessing cumulative air quality impacts. Under
13 CEQA, a "public agency may choose between differing expert opinions. An agency may also rely
14 upon the opinion of its staff in reaching decisions, and the opinion of staff has been recognized as
15 constituting substantial evidence." (*Browning-Ferris Industries v. City Council* (1986) 181
16 Cal.App.3d 852, 866; CEQA Guidelines, § 15088, subd. (c); *Dunn-Edwards Corp. v. South Coast*
17 *Air Quality Management Dist.* (1993) 19 Cal.App.4th 519, 535.)
18 Furthermore, unlike the Attorney General's "Best Practices" that are designed to be
19 general in nature, SCAQMD is the local agency directly responsible for overseeing air quality
20 within the South Coast Air Basin and its methodology for evaluating cumulative air quality
21 impacts by requiring compliance with AQMP and designated RST and LST standards has been an
22 accepted, standard approach for nearly twenty years. The SCAQMD methodology is supported by
23 the CEQA Guidelines (CEQA Guidelines, § 15130, subd. (b), Appx. G, § III) and was expressly
24 upheld by the Court of Appeal as an appropriate standard for evaluating a project's cumulative air
25 quality impacts. (*Rialto Citizens for Responsible Growth*, *supra*, 208 Cal.App.4th at pp. 931-933.)
26 In *Rialto Citizens,* a petitioner challenged an EIR's cumulative air quality analysis on the grounds
27 that it was improperly under-inclusive because it did not take into consideration a nearby railyard
28 project. (208 Cal.App.4th at pp. 931.) The Court of Appeal disagreed, holding the city's use of

the SCAQMD methodology was valid and supported by substantial evidence. (*Id.*, at pp. 932-933.) In reaching its decision, the Court of Appeal took judicial notice of the fact that "the SCAQMD is the agency responsible for attaining state and federal clean air standards in the Basin, [including Riverside County]" and expressly affirmed that "a project's potential contribution to cumulative impacts should be assessed using the same significance criteria as those for project specific impacts," as recommended by SCAQMD. (*Id.* at p. 933.) **The Court of Appeal decision in *Rialto Citizens* is uncontroverted and the SCAQMD methodology utilized by the City is an acceptable approach for evaluating the Project's cumulative air quality impacts.**

In sum, the assessment of the Project's cumulative air quality impacts was based on the AQMP's regional development projections, which are based on anticipated general plan buildouts, rather than on an individual quantification of nearby projects. As such, on a standalone basis, the Sunset Crossings project is not relevant to determining whether the Project has a cumulatively considerable air quality impact. Stated differently, because the Project complies with the AQMP and is within the applicable SCAQMD significance thresholds, the Project's incremental effect is not cumulatively considerable pursuant to Guidelines section 15064. Because the Project's incremental effect is not cumulatively considerable, the City was well within its right to conclude that the Project does not have a significant cumulative air quality impact under CEQA Guidelines section 15130. (AR 135-138.)

**2. Substantial Evidence Supports the City's Determination that the Project's Noise Impacts are Not Cumulatively Considerable.**

Petitioner asserts that the Addendum failed to account for the Project's cumulative noise impacts associated with the speculative future development of the Sunset Crossings project. (OB, pp. 33-35.) Petitioner's arguments are full of sound and fury but do not constitute substantial evidence and, ultimately, signify nothing. Based upon the substantial evidence supporting the analysis in the Addendum, the Court should reject Petitioner's claim as mere "argument, speculation, [and] unsubstantiated opinion." (Pub. Resources Code, § 21080, subd. (e).)

First, the PEIR determined that the SPA's noise impacts were not cumulatively considerable. (AR 5970-5971.) The PEIR explained that given the "geographic context [used] for

the analysis of cumulative noise impacts," the SPA would need to "increase the noise level by 3 dBA" in order to be considered cumulatively considerable. (AR 5970.) As the PEIR found that the SPA would not increase noise levels by 3 dBA, it concluded that no cumulative noise impacts would result from the SPA. (AR 5968, 5970-5971.) The PEIR is final, presumed valid and cannot be challenged by Petitioner in this action. (Pub. Resources Code, § 21167.2 [EIR is conclusively presumed valid unless a lawsuit has been timely brought to contest its validity].) Here, the Project includes a thirty percent (30%) smaller footprint and less-intensive use than the development scenario proposed in the SPA and analyzed in the PEIR. As such, the City correctly determined that the PEIR's cumulative noise analysis adequately addressed the Project's cumulative noise impacts and that "[n]o further cumulative impacts analysis [was] required" under CEQA.[8] (CEQA Guidelines, § 15130, subd. (d).)

Nonetheless, and even though CEQA did not require any additional cumulative analysis, the Addendum and supporting noise study contain a lengthy, detailed analysis of the Project's noise and cumulative noise impacts. Indeed, over 100 pages of the roughly 700 pages that make up the Addendum are dedicated to noise impacts. (AR 170-181, 577-686.) As explained above, the Project's noise study used the FICON Guidance to determine whether the Project would result in cumulative impacts. (AR 701.) The FICON Guidance provides the following approach for measuring off-site traffic noise impacts: (1) if ambient noise is 60 dBA CNEL, the Project's noise impacts will be cumulatively considerable if it results in a 5 dBA CNEL; (2) if ambient noise is 60-65 dBA CNEL, the Project's noise impacts will be cumulatively considerable if it results in a 3 dBA CNEL; and (3) if ambient noise is greater than 65 dBA CNEL, the Project's noise impacts will be cumulatively considerable if it results in a 1.5 dBA CNEL. (AR 702.)

Utilizing the FICON Guidance's recommended metric, ambient noise was measured based on existing ambient noise and projected ambient noise in the year 2040 using the FHWA Model. (AR 708-709.) In both scenarios, the FHWA Model determined that ambient noise levels were

[8] It also bears noting that Petitioner's Opening Brief fails to describe the evidence favorable to the City and Real Party and show why it is lacking. A failure to do so is fatal to its challenge. (*King & Gardiner Farms, LLC v. County of Kern* (2020) 45 Cal.App.5th 814, 850; *Latinos Unidos de Napa v. City of Napa* (2013) 221 Cal.App.4th 192.). It is insufficient for the challenger to refer only to the evidence that supports its position. (*California Native Plant Soc'y v. City of Rancho Cordova* (2009) 172 Cal.App.4th 603, 626.)

greater than 65 dBA CNEL. (AR 715.) The study then measured the existing ambient noise levels plus the Project and 2040 projected noise levels plus the Project to determine whether the Project would result in a 1.5 dBA CNEL increase and result in a cumulatively considerable noise impact. (AR 708-709.) The data confirmed that the Project would – ***at most*** – result in a 0.9 dBA CNEL increase under existing conditions and a 0.6 dBA CNEL under the conditions anticipated in 2040. (AR 715.) The Addendum therefore concluded that the Project's noise impacts are not cumulatively considerable and will not result in any significant noise impacts. (AR 181.)

As with the air quality assessment, this approach is valid and has been upheld by the courts. (*Mount Shasta Bioregional Ecology Center v. County of Siskiyou* (2012) 210 Cal.App.4th 184, 211-12.) In *Mount Shasta*, "[a] significant cumulative noise impact [was] considered to exist in the project area because the [city's] noise ordinance standards . . . [were] already exceeded as a result of several existing sources in the area." (*Ibid*.) "However because the increase in noise associated with the implementation of the proposed project . . . is predicated to be small (1dBA or less)," the project's contribution to the existing cumulative noise impact is not considered to be cumulatively considerable." (*Ibid.*) The Court of Appeal thus held that the project at issue did not result in any significant cumulative noise impacts. (*Ibid.*)

In sum, the Project was not required to consider cumulative noise impacts because the cumulative noise analysis in the PEIR is still valid and the Project scope is substantially smaller than the project contemplated by the SPA and analyzed in the PEIR. Even so, the Addendum demonstrated a thorough analysis of the Project's specific and cumulative noise impacts and substantial evidence supports the conclusion that the Project's noise impacts are not cumulatively considerable and will not result in any significant noise impacts. (AR 181.)

## VI. THE CITY'S FINDINGS IN ITS APPROVAL OF THE TENTATIVE MAP AND DESIGN REVIEW ARE SUPPORTED BY SUBSTANTIAL EVIDENCE.

Petitioner wrongly claims that the City's findings in support of the Project approval are not supported by substantial evidence and therefore the approvals must be set aside. (OB, p. 37.) Petitioner bases this assertion on the erroneous assumption that the City's consistency and Design Review findings were predicated entirely on the City's belief "that the Retail & Service

[component of the Project] would be built before or concurrently with the warehouse" so as to provide screening and buffering of the warehouse from the residential community located to the south. (OB, p. 37.) Not so.

As outlined below, the isolated language cited by Petitioner in support of its argument is ancillary to (and ignores) the substantial evidence in the record supporting the City's findings that the Project is consistent with the General Plan and would not unreasonably interfere with the use and enjoyment of neighboring properties. (AR 61-74; 74-83.) Contrary to Petitioner's assertions, the City's findings are not predicated on the construction of the Retail and Services District component of the Project prior to or concurrent with construction of the warehouse building. The Court should, accordingly, reject Petitioner's claims.

**A. Standard of Review.**

Judicial review of a challenge to an agency's determination of consistency with its own planning and zoning documents is limited to "whether the local adopting agency has acted arbitrarily, capriciously, or without evidentiary basis." (*San Franciscans Upholding the Downtown Plan supra,* 102 Cal.App.4th 656, 677 [citation omitted].) "A city's findings that [a] project is consistent with its general plan can be reversed only if [they are] based on evidence from which no reasonable person could have reached the same conclusion." (*Id.*) Courts recognize that "the body which adopted the general plan policies in its legislative capacity has unique competence to interpret those policies when applying them in its adjudicatory capacity" and "the governmental agency must be allowed to weigh and balance the plan's policies when applying them." (*Naraghi Lakes Neighborhood Preservation Assn. v. City of Modesto* (2016) 1 Cal.App.5th 9, 18-19.)

**B. The Project is Consistent with the General Plan and SPA.**

The City Council resolution approving the Project includes extensive findings that the Project complies with the City's General Plan, including applicable policies of the Community Development Element (Policy Nos. 6, 8 and 10), Economic Development Element (Policy Nos. 2, 3, and 9) and Noise Element (Policy Nos. 1 and 4). (AR 61-68; 74-78.) Among other things, the City's findings note that with the incorporation of the required mitigation measures and

compliance with SCAQMD's rules, "the Project satisfies the non-polluting goal for industrial uses as provided in the General Plan" (AR 62, 75.) These findings are entitled to great deference and are presumed to be valid and supported by substantial evidence and can only be overturned upon a showing by Petitioner that the City abused its discretion in approving the Project. Petitioner has not met and cannot meet this burden.

At its core, Petitioner's argument of General Plan inconsistency is tied to a single sentence in the findings made regarding the Project's consistency with Policy 6 of the Community Development Element. The entire City finding states:

> "The Project is consistent with Policy 6 because the size of the portion of the site designated for business and warehouse uses is relatively large (30.22 acres) and is appropriately located immediately adjacent to the I-10 freeway and the Southern Pacific Railroad line to the north of the Project site. *In addition, the warehouse use is located on the portion of the site that 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 that exists between the residential uses in Sun Lakes to the south of Sun Lakes Boulevard* and the industrial building and by the Office and Professional District uses in the future that will exist between the warehouse uses and the residential and assisted living uses to the east of the Project site. The Project is consistent with Policy 8 because it will be immediately north, and the lot configuration and access points into and out of the site are designed to provide for the minimum amount of travel distance on Sun Lakes Boulevard to Highland Springs Avenue and then onto Interstate 10 and eventually from Sun Lakes Boulevard to the Sunset Avenue and onto Interstate 10 when the Sun Lakes Boulevard extension is completed. Finally, the Project, as more fully explained in connection the Project's consistency with the Specific Plan includes a variety of design elements, setbacks, landscaping features that will provide a high quality industrial project." (AR 62-63 [TPM]; 75-76 [Design Review] [emphasis added].)

The isolated statement relied upon by Petitioner in support of its argument (italicized above) is supplemental and ancillary to other language cited by the City Council in support of the finding of consistency with the General Plan's Community Design Element. Petitioner conveniently ignores these additional facts identified by the City to support the finding of General Plan consistency, including facts related to the: (i) size and location of the warehouse building on Site and vis-à-vis the I-10 freeway and Southern Pacific Railroad line; (ii) the lot configuration and access points designed to minimize truck travel from the Site to Highland Avenue; and (iii) the architectural, design and landscaping elements that will ensure the development of "a high quality industrial product." (AR 62-63, 75-76.)

In addition to the foregoing, the City made detailed findings supporting its determination that the Project was consistent with and complementary to the SPA, including the SPA's five "Guiding Objectives" for development. (AR 62-64, 76, 79-82.) The first and second objectives are to "[a]llow for a range of land uses that reflects current market conditions" and "[r]espond to an increase in e-commerce." (AR 64.) The City found that the Project met these objectives because the current market trend is "toward more e-commerce uses which necessarily includes warehouse uses as a key component of the supply chain." (AR 64.) The third objective calls for high quality development, and the fourth objective is to "[l]ocate and design truck courts and semi-truck circulation to minimize impacts on surrounding land uses and development." (AR 64.) The City found the Project consistent with these objectives, explaining that "[t]he lot configuration locates truck courts and semi-truck circulation towards the interior and northernly portion of the site next to the Southern Pacific Railroad line and Interstate 10 and away from the residential uses" and that the development and design standards will ensure a high quality development. (AR 64.) The fifth objective, which is to "[e]xpand access to restaurants, shopping, and services", was satisfied based upon the Project's inclusion of the Retail and Services District. (AR 64.)

In sum, the City's finding of the Project's consistency with General Plan would be valid regardless of whether the screening and buffering language selectively quoted and relied upon by Petitioner was included as part of the City's finding. Petitioner would have the Court disregard not only the additional facts cited in support of the Project's compliance with Community Development Policy No. 6, but also the City's additional findings related to its consistency with Policy Nos. 8 and 10 and the findings made in support of the Project's consistency with the Economic Development and Noise Elements of the General Plan. There is no evidence to support a claim that the City abused its discretion and extensive substantial evidence in the record to "bridge the analytical gap" and support the City's findings that the Project complies with the SPA and General Plan.[9] (*Topanga Assn. for a Scenic Community v. County of Los Angeles* (1974) 11 Cal.3d 506, 515.) As such, Petitioner's claims necessarily fail.

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[9] The administrative record contains substantial evidence supporting that construction of the warehouse building first will actually enhance and improve the marketability and subsequent development of the Retail and Services District. (AR 2620-2621 [construction of warehouse/office use first behind the retail/commercial part of a

### C. <u>The City's Design Review Findings are Supported by Substantial Evidence</u>.

Petitioner's challenge to the Design Review findings falls equally flat. Petitioner asserts that the City's findings are inadequate because the Project will "unreasonably interfere" with the use and enjoyment of neighboring properties due to the *potential* lack of screening and buffering to be provided by development of the Retail and Services component of the Project *if, hypothetically*, this portion of the Project is never developed. (OB, p. 38.)

Contrary to Petitioner's speculative assertions, the administrative record contains ample evidence to support the City's findings on the Design Review approval. Among other facts, the City notes that the Project will not unreasonably interfere with neighboring properties because: (i) the warehouse will be built up against the I-10 freeway and the Southern Pacific Railroad line and away from the nearby residential uses; (ii) the warehouse will back up "against the rear of the Sun Lakes Village Shopping Center buildings," again away from residential uses to the south and east; and (iii) the retail and office uses will provide screening and buffering from these residential uses "***in the future***." (AR 81 [emphasis added].) There is nothing in the City's findings suggesting that its approval of the Project was predicated on an assumption that the Retail and Services component of the Project would be built before or concurrently with the proposed warehouse. The City's finding that the Project will not interfere with the use and enjoyment of neighboring properties is independently supported by substantial evidence in the record.

Finally, Petitioner references the City Attorney's statements to the City Council that an "alternative condition" could be proposed to address any perceived concerns related to screening. (OB, pp. 39-40.) Petitioner argues that the condition evidences the City's acknowledgment that not requiring actual construction of the retail buildings prior to occupancy of the warehouse "undercut" the City's finding that the Project will not unreasonably interfere with the use and enjoyment of neighboring development. (OB, at p. 40.) The additional condition, which was

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project "catalyzes retail leasing, and then the retail [component] gets leased."].) This information does not amount to "Council debate" as claimed by Petitioner (OB, p. 39; citing *Pacifica Corp. v. City of Camarillo* (1983) 149 Cal.App.3d 168, 179 [mere verbal remarks of councilmembers, standing alone, "not the equivalent of *Topanga* findings."]), but is instead **<u>direct evidence</u>** reflecting Real Party's extensive development experience involving mixed industrial and commercial/retail projects akin to the Project.

adopted by the City Council as Condition of Approval 12A, requires installation of landscaping for the Retail and Services District prior to occupancy of the warehouse. (AR 89; 2695; 2702.)

Contrary to Petitioner's assertions, the City's adoption of Condition of Approval 12A actually *strengthens the City's Design Review finding* that the Project does not "unreasonably interfere" with the use and enjoyment of neighboring development because the installation of landscaping within the Retail and Services District will assist in *reducing visual and other impacts* from the warehouse component of the Project to the surrounding neighborhood. Logic dictates that measures which reduce visual and other impacts to the surrounding community would also effectively mitigate any "interference" with the use and enjoyment of neighboring properties. The Court should reject Petitioner's claim regarding the adequacy of the Design Review findings.

## VII. PETITIONER'S GENERAL PLAN INCONSISTENCY CLAIM IS BOTH PROCEDURALLY AND SUBSTANTIVELY DEFECTIVE.

Petitioner argues that the Project is inconsistent and conflicts with 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." (OB, pp. 40-41.) This argument is fatally flawed and should be rejected by the Court for several reasons.

First, as a threshold matter, Petitioner's General Plan inconsistency claim is barred because Petitioner failed to exhaust its administrative remedies by raising this issue before the Planning Commission and City Council prior to approval of the Project. "Exhaustion of administrative remedies is a jurisdictional prerequisite to judicial action to challenge a planning decision." (*Corona-Norco Unified Sch. Dist. v. City of Corona* (1993) 17 Cal.App.4th 985, 993.) Further, "[i]t was never contemplated that a party to an administrative hearing should . . . make only a perfunctory or skeleton showing in the hearing and thereafter obtain unlimited trial de novo, on expanded issues, in the reviewing court." (*Coalition for Student Action v. City of Fullerton* (1984) 153 Cal.App.3d 1194, 1197.) "The essence of the exhaustion doctrine is the public agency's opportunity to receive and respond to ***articulated factual issues*** and ***legal theories*** before its actions are subject to judicial review." (*Id.*, p. 1198 [emphasis added]; see also *Save Our Heritage Organization v. City of San Diego* (2015) 237 Cal.App.4th 163, 181.)

It is Petitioner's burden to demonstrate "that the issues raised in the judicial proceeding were first raised at the administrative level." (*Sierra Club v. City of Orange* (2008) 163 Cal.App.4th 523, 536.) To the extent that issues regarding the Project's consistency with the General Plan and use of Sun Lakes Boulevard by commercial vehicles were discussed during the administrative proceedings on the Project, the specific issue of a General Plan conflict due to the non-designation of Sun Lakes Boulevard as a truck route was never articulated with any degree of specificity that would have enabled City decisionmakers to consider and respond to such a claim. As such, because Petitioner failed to exhaust its administrative remedies, this argument cannot be litigated now by Petitioner as part of the instant challenge.

Although Petitioner raised concerns during administrative proceedings about the Project's alleged conflicts with certain policies of the Noise Element of the General Plan intended to protect residents from harmful noise impacts (AR 13073-13074), Petitioner ***never*** asserted that the potential use of Sun Lakes Boulevard by commercial vehicles traversing to and from the Project Site would conflict with the General Plan because Sun Lakes Boulevard is not a designated truck route within the City. This particular issue and claim, baseless as it may be (see below), was therefore never presented to or considered by the Planning Commission or City Council during their review and approval of the Project.

Even if Petitioner had exhausted its administrative remedies by adequately presenting this truck route General Plan inconsistency claim to the City, ***which Petitioner did not do***, the claim nonetheless lacks merit as General Plan Program 4(A) expressly allows for commercial trucks to utilize non-designated truck routes to make pick-ups and deliveries. (OB, pp. 40-41; Petitioner's RJN, Exh. C [C-15, C-17].) General Program 4(A) states: "*Except for traffic providing location-specific services and deliveries*, construction trucks and delivery trucks shall be limited to designated truck routes…" Clearly, the intent behind Program 4(A) was to allow delivery vehicles to access properties located on restricted roadways for purposes of making pick-ups and deliveries (e.g., "providing location-specific services and deliveries…"). It would be nonsensical to interpret General Plan Program 4(A) as Petitioner suggests, requiring all commercial businesses, which necessarily involve some degree of pick-ups and deliveries by trucks and commercial vehicles, to

be located directly abutting a designated truck route.[10] ***The City's ability to interpret its General Plan is the rule, not the exception, contrary to Petitioner's contention otherwise.*** (OB, p. 41; *Naraghi Lakes Neighborhood Pres. Assn, supra,* 1 Cal.App.5th at pp. 18-19 ["'the body which adopted the general plan policies in its legislative capacity has unique competence to interpret those policies when applying them in its adjudicatory capacity.'"] [quoting *San Franciscans Upholding the Downtown Plan, supra,* 102 Cal.App.4th at pp. 677-678].)

Thus, substantial evidence supports the City's interpretation that the General Plan, consistent with State law (see footnote 10, *supra*), allows for commercial vehicles and trucks to traverse over a non-designated truck route when necessary to make deliveries and pickups of goods and merchandise so long as they come from an unrestricted roadway. As relevant to the Project, this means that trucks coming from Highland Springs Avenue (a designated truck route within the City of Banning) may traverse over and along Sun Lakes Boulevard in order to access the Project Site without creating a conflict or inconsistency with the City's General Plan. Petitioner's jurisdictionally-barred claims to the contrary fail as both a matter of fact and law.

## VIII. CONCLUSION

The City approved the Project after a fair and unbiased hearing, properly analyzed the Project's environmental impacts in the Addendum, and made all of the appropriate findings necessary to sustain the Project approvals, including that the Project is consistent with the City's General Plan. Petitioner's claims to the contrary are based solely on argument and conjecture, and fail to rise to the level necessary to meet Petitioner's burden of proof. The Court should deny all of Petitioner's claims asserted in the Petition for Writ of Mandate.

[10] Consistent with intent underlying General Plan Program 4(A), Section 35703 of the California Vehicle Code specifically allows for commercial vehicles and trucks to access properties located on restricted roadways (e.g., non-designated truck routes) for purposes of making pick-ups and deliveries so long as the trucks came from an unrestricted roadway (e.g., approved truck route). (Veh. Code, § 35703 [city or county shall not "…prohibit any commercial vehicles coming from an unrestricted street having ingress and egress by direct route to and from a restricted street *when necessary for the purpose of making pickups or deliveries of goods, wares, and merchandise from or to any building or structure located on the restricted street…*"] [emphasis added].)

Dated: February _7_, 2023

RICHARDS, WATSON & GERSON
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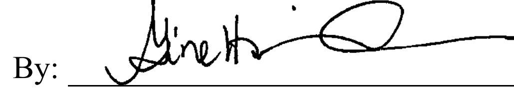
GINETTA L. GIOVINCO
SARAH E. GERST



By: ______________________________
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Dated: February 7, 2023

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By: ______________________________
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## PROOF OF SERVICE

I am employed in the County of Orange, State of California. I am over the age of eighteen (18) and am not a party to this action. My business address is 2010 Main Street, 8th Floor, Irvine, California 92614-7214.

On February 7, 2023, I served the within document(s) described as:

**JOINT OPPOSITION BRIEF TO PETITIONER PASS ACTION GROUP'S OPENING BRIEF**

on the interested parties in this action as stated below:

| | |
|---|---|
| Kevin P. Bundy, Esq.<br>Gabriel M.B. Ross, Esq.<br>Orran G. Balagopalan, Esq.<br>Shute, Mihaly & Weinberger LLP<br>396 Hayes Street<br>San Francisco, CA 94102-4421<br>E-Mail:<br>bundy@smwlaw.com<br>ross@smwlaw.com<br>obalagopalan@smwlaw.com | Attorneys for Petitioner and Plaintiff<br>PASS ACTION GROUP |
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☒ **BY MAIL:** I placed a true copy of the document in a sealed envelope or package addressed as indicated above on the above-mentioned date in Irvine, California for collection and mailing pursuant to the firm's ordinary business practice. I am familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☒ **BY E-MAIL OR ELECTRONIC TRANSMISSION:** Based on and in accordance with a court order or agreement of the parties to accept service by e-mail or electronic transmission, I caused a true copy of the document to be sent to the persons at the corresponding electronic address as indicated above on the above-mentioned date. My electronic notification address is mmason@allenmatkins.com. I am readily familiar with this firm's Microsoft Outlook electronic mail system and did not receive 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 February 7, 2023, at Irvine, California.

| | |
|---|---|
| Michael M. Mason | *Michael M. Mason* |
| (Type or print name) | (Signature of Declarant) |