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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO – HALL OF JUSTICE

SAVE CIVITA BECAUSE SUDBERRY WON'T, Plaintiff and Petitioner, vs. CITY OF SAN DIEGO; and DOES 1 through 100, Defendants and Respondents; DOES 101 through 1,000, Defendants and Real Parties in Interest.	Case No. 37-2017-00045044-CU-WM-CTL **PLAINTIFF AND PETITIONER'S REPLY BRIEF IN SUPPORT OF COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND PETITION FOR WRIT OF MANDATE UNDER THE CALIFORNIA ENVIRONMENTAL QUALITY ACT AND OTHER LAWS** Action filed: November 27, 2017 Department: C73 (Hon. Joel R. Wohlfeil) Trial Date: December 12, 2019 Trial Time: 1:30 p.m.

Plaintiff and Petitioner Save Civita Because Sudberry Won't ("Plaintiff") respectfully submits this reply brief in support of its operative pleading.

Date: November 20, 2019.

Respectfully submitted,

BRIGGS LAW CORPORATION

By: _____
Cory J. Briggs

Attorneys for Plaintiff and Petitioner Save Civita Because Sudberry Won't

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I. INTRODUCTION

The public's participation throughout the life of this Project has been the model of civic engagement that adults try to teach future generations. Residents were well informed about the Project, they showed up to every public hearing, and they voiced their opposition at every turn when their political leadership's representation of the Project was completely out of touch with the reality on the ground. What the residents didn't know – and what's made clear by the City of San Diego's opposition brief – is that the process was rigged from the start and their voices never mattered. Stunningly, the City has chosen to characterize the community's concerns – those of the very residents it purports to serve – as mere "argument, speculation and unsubstantiated opinion. . . ." It then takes the egregious position that a council member is permitted to lobby the public to support approval of a project while voting for that same project months down the line. Fortunately for the sake of our democratic processes, courts have long held that advocating a particular position before a vote "[gives] rise to an unacceptable probability of actual bias and [is] sufficient to preclude [a decision-maker] from serving as a reasonably impartial, noninvolved reviewer." *Nasha v. City of Los Angeles*, 125 Cal. App. 4th 470, 484 (2004) (internal quotations omitted).

On substance, the City's opposition brief only confirms that approval of the Project was illegal. First, the City argues that it wasn't required to analyze amending the Mission Valley Community Plan ("MVCP") because the underlying purpose of the Project has always been to construct a roadway connector. However, as explained below, the purpose underlying the Project has always been to resolve the inconsistency between the Serra Mesa Community Plan ("SMCP") and the MVCP, not to build a road that allows freeway traffic to inundate a pedestrian community. Second, the City argues that it was not required to analyze the MVCP amendment because the alternative would not meet the Project's objectives. That's false for the numerous reasons explained below, but it bears noting here that the City has touted the Project as being one that reduces congestion and vehicle miles traveled ("VMT") within the study area by a meager .32 percent in the near term and 1.8 percent in the year 2035. What the City fails to squarely address in its opposition brief is that the traffic methodology used by the City is subject to a 10% margin of error.

Third, the EIR is clear that the Project will result in a 14-fold increase in traffic at Franklin Ridge and Via Alta. The City maintains that only the road connector needs to be studied and that

Franklin Ridge and Via Alta are separate from the Project. However, the Supreme Court made clear in *Muzzy Ranch Co. v. Solano County Airport Land Use Com.*, 41 Cal. 4th 372, 387 (2007), that "the project area does not define the relevant environment for purposes of CEQA ***when a project's environmental effects will be felt outside the project area***." (emphasis added). Finally, the EIR failed to address the Project's inconsistency with the General Plan's City of Villages concept, which prioritizes walkable, pedestrian-friendly communities that encourage people to drive less. Knowing that a 14-fold increase in dangerous vehicle traffic is inconsistent with that goal, the City argues that the Project is still consistent with the City of Villages concept because it also contemplates linking communities to the "regional transit system." But as explained below, the transit system as described in the General Plan refers to public transportation, not increased access to freeways.

For all these reasons, and those discussed below, Plaintiff respectfully asks the Court to grant the operative pleading's requested relief.

II. ARGUMENT AND ANALYSIS

A. Amending the MVCP to Remove the Roadway Connector Does Not Contravene the Project's Underlying Purpose

The City argues that it "was not required to include the No Build/Remove from MVCP Alternative because it cannot achieve the Project's underlying fundamental purpose." Opp'n Br., p. 8, lns. 5-6. In this regard, the City reasons that because "the 2008 Resolution initiated an amendment to the SMCP to include the Connector . . . , [t]he underlying fundamental purpose of the Project has always been to include a road connection to connect these two communities." *Id*., p. 8, lns. 12-14. This assertion is false and misleading. The initiating of a plan amendment does not mean that the fundamental purpose is to amend the community plan. That was made abundantly clear in the resolution initiating the amendment, which states that "initiation of a community plan amendment is the first step that allows staff to proceed with the ***analysis of proposals*** and preparation of any revisions to adopted documents. . . ." Admin. R. 31:319 (emphasis added). In other words, the only intention of such a resolution is for the City to conduct studies on whether or not such an amendment should move forward. Indeed, the resolution is clear that "the initiation of a community plan amendment ***in no way confers adoption of a plan amendment*** and ***City Council is in no way committed to adopt or deny the amendment***. . . ." *Id*. (emphasis added).

Specifically, the City Council directed staff to analyze the following issues: (1) whether ***police and fire response times*** would be improved with the road connection; (2) whether the road connection could serve as an ***emergency evacuation route***; (3) whether it is feasible to make the road available ***for emergency access only***; and (4) whether ***pedestrian and bicycle access*** would be improved by the street connection. *Id*., 31:319-320 (emphasis added). Thus, when the City initiated the plan amendment, the fundamental purpose was not to provide a road connection between the two communities to alleviate freeway traffic. Instead, the City was primarily concerned with providing emergency access while maintaining the area's pedestrian and bicycle access.

The City cites a number of inapposite cases to support its position. In *Jones v. Regents of the University of California*, 183 Cal. App. 4th 818 (2010) ("*UC Regents*"), the University of California sought to expand a laboratory operated by UC Berkeley. The expansion project was built around the "fundamental principle of bringing academic and research personnel ***together at the main hill site***." *Id*. at 829 (emphasis added). Unsurprisingly, the Court found that an off-site alternative need not be considered because a "complete off-site alternative . . . would result in the division of facilities and staff and would be contrary to the objective of creating a more cohesive Lab atmosphere." *Id*. at 828. In *Sierra Club v. County of Napa*, 121 Cal. App. 4th 1490 (2004), a developer of a wine facility proposed a project that had the specific objective of operating a winery that would be irrigated by wastewater, and which required the construction of 12 ponds for treating and storing winery wastewater. *Id*. at 1498-1499. The Court rejected the plaintiff's argument that the EIR was required to analyze an alternative that would require the developer to dispose of some or all of the wastewater through the sewer system instead of reclaiming it to irrigate the vineyard.[1] Unsurprisingly, the Court found that "the EIR was not required to analyze the effects of a project that [the developer] did not propose" – *i.e.*, a winery that was required to dispose of its wastewater instead of using it for irrigation. *Id*. at 1509.

The case at bar is factually distinguishable because the rejected alternatives in *UC Regents* and *Sierra Club* were uniformly at odds with the projects being proposed. In *UC Regents*, the University of California was understandably not required to consider an off-site laboratory when the fundamental purpose of the project was to bring academic and research personnel together ***at the main site***. In *Sierra*

[1] The plaintiff claimed that creation of the 12 ponds had a significant impact on wetlands around the project site.

Club, the county was understandably not required to consider a winery that disposed of its wastewater through the sewer system when the primary objective was to irrigate the vineyard with treated wastewater. The reasoning in those cases would apply in the case at bar if the Project's ultimate objective was to build a roadway connector between Mission Valley and Serra Mesa. But that's simply not the case.

Remember, the genesis of this Project arose from the City's desire to reconcile the conflict between the SMCP and the MVCP. The resolution initiating the plan amendment states:

> WHEREAS, the Serra Mesa Community Plan does not include a street connection between Phyllis Place and Friars Road; and
>
> WHEREAS, the Mission Valley Community Plan recommends the inclusion of a street connection between Phyllis Place and Friars Road; and
>
> WHEREAS, an amendment to the Serra Mesa Community Plan to include a street connection would ***reconcile the conflict between the Mission Valley Community Plan and the Serra Mesa Community Plan*** . . . .

Admin. R. 31:318-319 (emphasis added). The resolution is clear that the conflict between the community plans – not any need for a roadway connector – necessitated initiation of the plan amendment. Indeed, nothing in the resolution states that the roadway connector is needed for any purpose other than to reconcile this conflict. *Id*. Knowing this history, it makes sense that when this Project was first presented to the public, the principal objective was to "[r]esolve the inconsistency between the Serra Mesa Community Plan and Mission Valley Community Plan ***as it pertains to*** a connection from Mission Valley to Phyllis Place in Serra Mesa." Admin. R. 2346:35730 (emphasis added).[2] Unlike in *UC Regents* and *Sierra Club*, that objective is not uniformly at odds with an alternative that would simply amend the MVCP to remove the roadway connector and bring the two community plans in conformity with each other.

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[2] As pointed out in Plaintiff's opening brief, the City knew that simply amending the MVCP would easily resolve this inconsistency. Therefore, it created the Recirculated DEIR to change the Project objective to "[r]esolve the inconsistency between the Mission Valley Community Plan and the Serra Mesa Community Plan ***by providing a multi-modal linkage from Friars Road in Mission Valley to Phyllis Place in Serra Mesa***." Admin. R., 2349:35871 (emphasis added). The Recirculated DEIR then concluded that amending the MVCP would not meet this objective because it "would not provide a multi-modal linkage from Friars Road in Mission Valley to Phyllis Place in Serra Mesa, thereby limiting multi-modal options between the roadways." *Id*., 2349:36189.

The City argues that Plaintiff's "claims fail as a matter of law because lead agencies are entitled to exercise discretion to exclude consideration of alternatives that do not meet a project's fundamental purpose or are inconsistent with the basic nature of the project." Opp'n Br., p. 8, lns. 23-27. This argument fails for two reasons. First, it presumes that amending the MVCP is inconsistent with the Project's objectives. As explained above, and in Section II-C below, that's simply not the case. Second, lead agencies aren't given carte blanche to willy-nilly exclude reasonable project alternatives. Instead, "[d]ecisions as to the feasibility of alternatives . . . are subject to a rule of reason. ***No one factor establishes a categorical limit on the scope*** of reasonably feasible alternatives to be discussed in an EIR." *Banning Ranch Conservancy v. City of Newport Beach*, 2 Cal. 5th 918, 937 (2017) (emphasis added). Here, the City omitted any meaningful analysis of amending the MVCP to remove the roadway connector, which would bring that plan into conformity with the SMCP. The City's avoidance of such an inconvenient topic was illegal. As the Court will recall, the road connector was previously denied by the Planning Commission twice in 2004 and by the City Council in 2008, with literally hundreds of residents opposing the connector, and neither the Serra Mesa Community Planning Group nor the Mission Valley Community Planning Group supporting the Project as proposed. Applying the rule of reason, when we consider that the genesis of this Project was the conflict between the MVCP and the SMCP, in conjunction with the public's and the City's own opposition to the Project, it stands to reason that amending the MVCP to exclude the connector was a reasonable alternative that should have been analyzed.

B. <u>The EIR Was Required to Analyze the Alternative of Amending the MVCP</u>

The City argues that it "was not required to conduct a detailed analysis of the No Build/Remove from MVCP Alternative because it failed to meet most of the basic project objectives." Opp'n Br., p. 9, lns. 1-3. Relying on CEQA Guidelines Section 15126.6(c), the City argues that "[a]n alternative eliminated during the scoping process merits only a brief description in an EIR and explanation for the lack of an in-depth analysis is not required." Opp'n Br., p. 9, lns. 24-27. The argument fails for two reasons. First, the Guideline is clear that "an EIR ***shall*** describe a range of reasonable alternatives to the project . . . which would feasibly attain ***most of the basic objectives*** of the project but would avoid or substantially lessen any of the significant effects of the project, and ***evaluate the comparative merits of the alternatives***." CAL. CODE OF REGS., tit. 14, § 15126.6(a) (emphasis added). As explained in

Section II-C below, amending the MVCP would have met all of the Project's objectives and was thus a reasonable alternative that the EIR was required to analyze.

Second, even assuming the EIR properly wrote off the alternative, the City essentially reasons – in the loosest sense of that word – that none of the Project objectives could be met because "no roadway would be constructed." Admin. R. 52: 5608-5609. In the CEQA context, "there must be a disclosure of the 'analytic route the . . . agency traveled from evidence to action.' . . . . An EIR's discussion of alternatives must contain analysis sufficient to allow informed decision making." *Laurel Heights Improvement Assn. v. Regents of Univ. of Calif.*, 47 Cal. 3d 376, 404 (1988). To baldly conclude that the alternative was not considered because "no roadway would be constructed" is insufficient to support the EIR's finding that the MVCP amendment shouldn't be analyzed, especially on a record that supports a contrary conclusion, and because the Project deals with a road connector that has piqued the public's interest. As stated by the Supreme Court in discussing the fundamental importance of an EIR's alternatives analysis, "[w]ithout meaningful analysis of alternatives in the EIR, neither the courts nor the public can fulfill their proper roles in the CEQA process." *Laurel Heights*, *supra*, 47 Cal. 3d at 404. In light of that principal, courts cannot "countenance a result that would require blind trust by the public, especially in light of CEQA's fundamental goal that the public be fully informed as to the environmental consequences of action by their public officials. 'To facilitate CEQA's informational role, ***the EIR must contain facts and analysis, not just the agency's bare conclusions or opinions***.'" *Id*. at 404-405 (emphasis added; citations omitted).

Accordingly, the EIR's cursory treatment of the MVCP amendment violated CEQA.

C. <u>Substantial Evidence In the Record Does Not Support the City's Decision Not to Analyze Amendment of the MVCP</u>

The City argues that there is substantial evidence in the administrative record supporting the conclusion that amending the MVCP would not meet most of the Project's objectives. Opp'n Br., p. 10, lns. 5-6. The City is wrong for the following reasons.

<u>Project Objective no. 1</u>: It needs to be pointed out again that when this Project was initially presented to the public, the DEIR's first objective was to "resolve the inconsistency between the Serra Mesa Community Plan and Mission Valley Community Plan ***as it pertains to a connection from Mission Valley to Phyllis Place in Serra Mesa***." Admin. R. 2346:35730 (emphasis added). Knowing

that simply amending the MVCP would easily resolve this inconsistency – but ***with the City suddenly and inexplicably wanting a vehicle-serving road*** – the Recirculated DEIR was created to change the Project objective to "[r]esolve the inconsistency between the Mission Valley Community Plan and the Serra Mesa Community Plan ***by providing a multi-modal linkage from Friars Road in Mission Valley to Phyllis Place in Serra Mesa***." *Id.*, 2349:35871 (emphasis added). The City added the "multi-modal linkage" objective solely to facilitate the movement of vehicles through what was designed and marketed as a pedestrian-friendly community. Thanks to the City's subterfuge, the Recirculated DEIR then concluded that amending the MVCP would not meet this objective because it "would not provide a multi-modal linkage from Friars Road in Mission Valley to Phyllis Place in Serra Mesa, thereby limiting multi-modal options between the roadways." *Id.*, 2349:36189.

Nevertheless, Plaintiff pointed out that amending the MVCP would not prevent the Project from meeting its first objective since multi-modal options ***already existed*** because: (1) a pedestrian/bike trail between Civita and Phyllis Place was mandated by the Civita Project; (2) pedestrian, bike, and emergency access already existed from Civita to Mission Valley between Aperture Circle and Kaplan Drive; and (3) Mission Center Road already provided a multi-modal linkage from Murray Ridge in Serra Mesa to Friars Road in Mission Valley. Admin. R. 915:15649.[3] The City doesn't dispute that multi-modal options exist. Instead, it attempts to move the goalpost once more by stating that Plaintiff "misunderstands the term 'multi-modal' which means linkage that accommodates ***vehicles***, bicyclists, and pedestrians." Opp'n Br., p. 10, lns. 16-19 (emphasis added). It then cites to two pages in the administrative record, neither of which purports to define what the term "multi-modal" linkage means. *See* Admin. R. 51:3033, 3973. The term "multi-modal" literally means "having or involving several modes."[4] In this context, it simply means involving several modes of transportation and nothing in the term suggests – as advocated by the City – that it necessarily includes passenger vehicles.

As explained in Plaintiff's opening brief, the EIR rationalized its failure to include information about existing multi-modal linkages by stating that "[t]he trail to be constructed would not allow bike access." *Id.*, 52:4454. That rationalization was a lie because the Quarry Falls/Civita EIR clearly shows

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[3] This citation was inadvertently identified in the opening brief as Admin. R. 67:15649.

[4] "Multimodal." *See* https://www.merriam-webster.com/dictionary/multimodal (Nov. 12, 2019).

a bicycle path being built from Phyllis Place down to Friars Road.[5] *Id*., 45:1701. The EIR then indirectly admitted that pedestrian, bike, and emergency access from Civita to Mission Valley ***does*** exist, but that "[t]he access point at Kaplan Drive does not allow for passenger vehicles." *Id*., 52:4454. The EIR also admitted that Mission Center Road provides a multi-modal linkage from Serra Mesa to Mission Valley but stated that it doesn't provide direct access from Phyllis Place to Friars Road. *Id*. Clearly, the EIR omitted key information in order to justify the City's decision to reject the MVCP amendment as one of the selected alternatives to be analyzed.

The wealth of evidence demonstrates that multi-modal linkages ***do*** exist. Understanding this, the City has chosen not to address the evidence head on, but to ignore it completely while hoping the Court buys the City's bogus definition of the term "multi-modal" linkage.

Project Objective no. 2: The second Project objective is to "[i]mprove local mobility in the Serra Mesa and Mission Valley planning areas." Admin. R. 52:5315. In rejecting the MVCP amendment as a candidate for further analysis, the City doubles down on the scant "analysis" in the EIR by arguing that adding a roadway to improve mobility "just makes common sense." Opp'n Br., p. 11, lns. 1-3. In this regard, the City points out that the EIR contained an analysis that purports to show "that a more direct connection to the commercial area in MC [*sic*] would reduce Vehicle Miles Traveled and GHG's." *Id*., p. 11, lns. 9-13. But that conclusion isn't supported by the evidence. The "VMT analysis methodology is based on the San Diego Institute of Transportation Engineer/SANDAG white paper," which the Court knows the City misapplied (because of the tremendous margin of error discussed in the opening brief and below). Admin. R. 51:3009. In this regard, the EIR directs the reader to Appendix H, which allegedly demonstrates that the Project would result in "a 1.8 percent decrease of VMT within the study area" and "a decrease of .32 percent" on a region-wide basis, for the near-term year 2017. *Id*., 52:5397; 2348:35778. Further, Appendix H states that the Project would result in the same 1.8 percent decrease in the study area in the year 2035, with a .28 percent decrease on a region-wide basis for that same year. *Id.*, 2348:35778.

Per Appendix H, "[t]he VMT analysis was conducted consistent with methodologies discussed in the technical white paper, 'Vehicle Miles Traveled Calculations Using the SANDAG Regional

[5] Plaintiff pointed out this lie in its opening brief, which was not disputed by the City.

Travel Demand Model,' prepared by the San Diego Institute of Transportation Engineers. . . ." *Id*. One of the two principal authors of the white paper, Michael Calandra, was an engineer with SANDAG. *Id.*, 2341:34623. The evidence shared with the City showed that when asked what was the margin of error for VMT calculated by the SANDAG model, Mr. Calandra answered that the margin of error is "+/- 10% of observed conditions for the region as a whole" and that "observed data from Caltrans' freeway Performance Monitoring System confirms that travel on the freeways and highways can vary +/- 7% from day-to-day." *Id*., 2203:32459-32460. Further, Mr. Calandra concluded that "[e]ven a well calibrated and validated travel demand model will have a larger margin of error the further out into the future you go." *Id*. In other words, the EIR's conclusion in 2017 that the Project will decrease VMT within the study area by 1.8 percent, and in the region by .32 percent, was subject to a 10 percent margin of error. Furthermore, the predicted 1.8 percent decrease in the study area, and .28 percent decrease in the region, for the year 2035 was subject to an even greater margin of error. Nowhere in the EIR was this margin of error – acknowledged by the very expert who authored the model – mentioned or discussed. And given the possibility of a 10-point swing at minimum, the Project could actually ***increase*** VMT by 10 percent now and by an even higher percent years from now. Thus, the conclusion that it "just makes common sense" that adding the roadway connector would meet the Project's second objective to improve local mobility is not supported by the evidence.

Furthermore, as discussed above, the City ignores the numerous linkages already existing between Serra Mesa and Mission Valley. It also ignores the fact that if the Project is not approved, the Civita/Quarry Falls Project is ***already required to make an improvement*** to Mission Center Road from I-805 to Murray Ridge Road. *Id.*, 915:15635 & 45:2002. Instead of addressing the merits of the numerous linkages and the road widening's effect on traffic, the City tries to take this Court's attention away from them by giving them short shrift and baldly stating that Plaintiff "misses the point. The goal is to 'improve' local mobility. With or without the road widening, local mobility will improve with a connecting road." Opp'n Br., p. 11, lns. 4-8. As shown above, that's simply not true because of the undeniable 10-percent margin of error.

Finally, the City ignores the fact that the original DEIR listed a similar Project objective of "[i]mprov[ing] the overall circulation network in the Serra Mesa and Mission Valley Planning areas." Admin. R. 2346:35730. Remember, the only reason the DEIR rejected the MVCP amendment was

because it allegedly failed to promote the amorphous goal of inter-community connectivity. *See id*., 2346:35731. The DEIR never claimed that amending the MVCP would not help improve the overall circulation network in Serra Mesa and Mission Valley. The City conveniently fails to address this glaring inconsistency in its opposition brief, thus conceding the point.

Project Objective no. 3: The third Project objective is to "[a]lleviate traffic congestion and improve navigational efficiency to and from local freeway on- and off-ramps for the surrounding areas." Admin. R. 52:5315. The City suggests that because Plaintiff has shown that amending the MVCP "would alleviate traffic congestion" but not improve navigational efficiency to and from local freeways for the surrounding areas, the amendment only meets 50% of this particular objective and should be rejected "on that basis alone." Opp'n Br., p. 11, lns. 22-27. But that's not the law. Assuming for a moment that alleviating traffic congestion doesn't somehow improve navigational efficiency, an alternative does not need to meet every single project objective in order to warrant a full analysis. As stated by the Court of Appeal in *City of Long Beach v. Los Angeles Unified School District*, 176 Cal. App. 4th 889 (2009), "[t]he Guidelines require that the EIR 'describe ***a range*** of reasonable alternatives to the project . . . which would feasibly attain ***most*** of the basic objectives of the project . . . and evaluate the comparative merits of the alternatives." *Id.* at 920 (emphasis added). Thus, the City's assertion that it was permitted to reject further consideration of the MVCP amendment because it only achieved half of one objective – out of a total of five different objectives – is entirely without merit.

Next, the City suggests that it has already studied the alternative proposed by Plaintiff because the "No-Project Alternative traffic analysis was fully studied" and is similarly situated as an alternative amending the MVCP. Opp'n Br., p. 12, lns. 2-5. In this regard, "because the No-Project Alternative traffic analysis was fully studied, so was [Plaintiff's] Alternative." *Id*., p. 12, lns. 6-7. The argument fails for the simple reason that the no-project alternative doesn't contemplate amending the MVCP to bring it into conformity with the SMCP. The City admits as much in its response to comments on the EIR, stating that "[a]mending the Mission Valley Community Plan is not the same as the No Project Alternative." Admin. R. 52:5175.

For these reasons, and those explained in the section below discussing traffic, amending the MVCP is not at odds with the Project's objective of alleviating traffic and improving navigational efficiency to local freeways.

Project Objective No. 4: The fourth Project objective is to "[i]mprove emergency access and evacuation route options between the Serra Mesa and Mission Valley planning areas." In its opening brief, Plaintiff noted that the EIR failed to disclose that emergency access from Serra Mesa to Mission Valley already exists between Aperture Circle and Kaplan Drive, and equally failed to study whether the existing access met the goal. *See* Admin. R. 67:15649. The City argues that the route "does not qualify as official emergency access because it does not meet Fire Code standards and, therefore, it is not on their response or evacuation plan." Opp'n Br., p. 14, lns. 10-13. However, the access does not meet Fire Code at the moment because it is currently blocked by "bollards that can only be accessed by authorized emergency personnel." *Id*., p. 14, lns. 7-10.

The City's argument that the current route doesn't qualify as official emergency access fails for two reasons. First, the EIR already admits that "[e]mergency access exists from Aperture Circle in Quarry Falls to Serra Mesa via Kaplan Drive and that Kaplan Drive provides bicycle and pedestrian access." Admin. R. 51:3301. Second, the bollards that are preventing the access road from becoming compliant with the Fire Code could simply be removed or "replaced with retractable bollards that are designed for quick use and remote entry." *Id*., 2350:36272. At the public hearing on the Project, there was testimony from the Fire Marshal that the Fire Department has equipment to remove the bollards to provide access to emergency vehicles. *Id*., 2350:36327. Indeed, simply removing the bollards would ensure that the existing bicycle and pedestrian access continues, while also providing an additional emergency and evacuation road for emergency vehicles only. Remember, when the City first tasked staff with studying this amendment, one of its goals was to see whether a "road connection could serve as an ***emergency evacuation route*** . . . [and] whether it is feasible to make the road available ***for emergency access only***. *Id*., 31:319-320 (emphasis added). Improving the existing access would be consistent with the spirit of what was intended by the Project. By contrast, constructing a roadway connection at Phyllis Place – as opposed to leaving the Project site as is or using it for emergency access only – will result in an increase of average daily trips from 2,420 to 34,540; that's ***more than a 14-fold increase in new vehicle trips***. *See id*., 52:5403 (last line on page). That is clearly not consistent with what was intended when this amendment was initiated and will actually exacerbate the very problem – emergency-vehicle access – that the City in the beginning claimed to be the Project's motivation.

Project Objective No. 5: The fifth Project objective is to "[p]rovide a safe and efficient street design for motorists, cyclists, and pedestrians that minimizes environmental and neighborhood impacts." Admin. R. 52:5315. In its opening brief, Plaintiff pointed out that constructing the roadway connection at Phyllis Place – as opposed to leaving the Project site as is – will result in an increase of average daily trips from 2,420 to 34,540. *See id*., 52:5403 (last line on page). Residents and pedestrians on Franklin Ridge will suffer ***20,919 new trips***; on Via Alta, they will suffer ***11,686 new trips***. *Id*., 52:5403 ("Via Alta to Civita Blvd" line under "Franklin Ridge Rd" heading), 5404 ("Franklin Ridge Rd to Civita Blvd" line under "Via Alta" heading). Even worse, Phyllis Place will become a bottleneck in the event of a fire or other emergency evacuation because it will see a ***more than 14-fold increase in the number of vehicles***. *Id.*, 52:5403 (last line on page).

Instead of addressing these facts on their merit, the City chooses to baldly conclude that '[s]ince there is no street to be built in [Plaintiff's] alternative, there is nothing to design." Opp'n Br., p. 15, lns. 9-14. It then states that the above facts presented by Plaintiff were discussed in the EIR. While it's true they were discussed in the EIR, ***they were never discussed in the context of alternatives*** and specifically as they relate to Project objective no. 5. *See* Admin. R. 51:4248. Indeed, the EIR's discussion with respect to the MVCP amendment and objective number 5 reads, in full, as follows: "Finally, this alternative would not provide a safe and efficient street design for motorists, cyclists, and pedestrians, as no roadway would be constructed." *Id*., 51:4250. As pointed out above, the Project actually provides a less-safe, less-efficient street design.

Consistency with the Climate Action Plan and the Bicycle Master Plan

The City's final alleged reason for not further studying the MVCP amendment is that "although this alternative would remove the language associated with the roadway connection, it would not resolve the inconsistency with other land use plans that have already been adopted. For example, the City's Climate Action Plan and Bicycle Master Plan . . . include the proposed roadway in their assumptions." *Id*., 52:5609. As with the rest of its "analysis" of the MVCP amendment, the EIR failed to point out a single section of either the Climate Action Plan or the Bicycle Master Plan that the MVCP amendment would frustrate. The fact is: neither the Bicycle Master Plan, the Climate Action Plan, the Climate Action Plan EIR, nor the Climate Action Plan appendices discussed the connector that is the subject of this Project. *See generally id.*, 2337:34468-34563; 2342:34688-34872; 2344:34924-35375;

and 2345:35376-35449. Those documents simply have nothing to say about the Project in any detail if at all. Accordingly, there is no evidence that an MVCP amendment would be inconsistent with any of these land-use documents.

The City's opposition brief only confirms that no inconsistencies exist. Notably, while the EIR stated that the alterative is affirmatively inconsistent with the CAP, the City changes its tune in the opposition brief and merely states that "[t]he Project is . . . consistent with the Climate Action Plan." Opp'n Br., p. 16, ln. 3. That's because the EIR actually admits that "[t]he City's CAP does ***not*** specifically include ***any*** projects." Admin. R. 51:3034 (emphasis added). And even more importantly, the EIR admits that "the No Build/Remove from Mission Valley Community Plan Alternative would need to be fully analyzed for potential conflicts with the CAP and if it would affect the conclusions reached within the CAP." *Id*. In other words, the EIR's assertion that an MVCP amendment is inconsistent with the CAP is admittedly false. There is likewise no inconsistency with the Bicycle Master Plan. The evidence is clear that the Bicycle Master Plan viewed the Project as a "***proposed***" project, not one that has already been approved. *See* Admin. R. 2342:34794, Figure 6-3.

In the end there can be no question that the City violated CEQA by not analyzing the MVCP amendment. The case of *Center for Biological Diversity v. County of San Bernardino*, 185 Cal. App. 4th 866 (2010), is instructive and bears repeating here. There the developer was proposing to build an open-air facility that would compost biosolids derived from human waste and green material to produce agricultural grade compost. *Id*. at 874. The project's EIR rejected "the alternative of an enclosed facility as financially and technologically infeasible, and thus the alternative was not [– as in the case at bar –] 'evaluated in detail.'" *Id*. at 876. In support of that conclusion, the county's EIR cited to a memorandum from an environmental consultant, which found that "[c]apital costs for outdoor facilities are relatively modest, typically $2-3 million for a facility to accommodate a 400,000 ton per year facility. Capital costs for indoor facilities are significantly larger." *Id*. For example, the consultant pointed out, an indoor facility in Rancho Cucamonga had "an estimated capital cost of $62.5 million" while "the facility will have a capacity of 300,000 tons per year." *Id*. The memorandum went on at length about the different factors making an indoor facility economically infeasible. *Id*. at 876-877. The EIR then stated that an indoor facility was also technologically infeasible because the "Project site is not currently served by any electricity provider, and there are no electric lines within one mile of the

site. Nor is other infrastructure necessary for construction of a large building currently present." *Id*. at 878.

The appellate court affirmed the trial court's assessment that "the FEIR's discussion of the infeasibility of an enclosed facility [was] insufficient to allow informed decisionmaking." *Id*. at 884. It reasoned that the consultant's memorandum contained "no facts or information to support the statement or to indicate [the consultant] has any expertise in matters of composting facility financing." *Id*. at 884. "Under the CEQA Guidelines, 'substantial evidence shall include facts, reasonable assumptions predicated upon facts, and expert opinion *supported by facts*.'" *Id*. (italicized in original). The consultant's opinion, the Court concluded, was "at best an irrelevant generalization, too vague and nonspecified to amount to substantial evidence of anything." *Id*. Further, "the FEIR contains no information that an enclosed facility is technologically infeasible, other than the observation that there is no electricity at the proposed site and there were no electric lines within one mile of the site." *Id*. at 885. In sum, the appellate court agreed that "substantial evidence does not support the FEIR's position that an enclosed facility alternative is infeasible and unworthy of more in-depth consideration. 'The range of feasible alternatives shall be selected and discussed in a manner to foster meaningful public participation and informed decision making.'" *Id*.

Here, the City's decision to forego consideration of the MVCP amendment – and the anemic supporting "analysis" – is an even more egregious violation of CEQA than in *Center for Biological Diversity*. Whereas the agency in that case attempted to procure expert opinion to support its decision not to further analyze the indoor-facility alternative, here the City has merely recited the Project's objectives followed by a few sentences baldly concluding that the MVCP amendment would not meet those objectives. The City's "analysis" does not cite to any data, expert opinion, or facts supporting the conclusion that the MVCP amendment would not meet the Project's objectives. Similar to *Center for Biological Diversity*, the City's cursory analysis was "insufficient to allow informed decisionmaking." *Center for Biological Diversity, supra*, 185 Cal. App 4th at 884.

The City tries to distinguish *Center for Biological Diversity* by arguing that the consultant in that case "did not demonstrate he was an expert in composting facility financing and provided no foundation for his opinion." Opp'n Br., p. 16, lns. 11-15. By contrast, the City argues, the team that prepared the EIR "are all development professionals (traffic engineers, planners, etc.)." *Id*., p. 16, lns.

15-17. Not only does the City present no evidence in support of the assertion, but it misses the point of *Center for Biological Diversity*, which is that ***an agency cannot rely on bald conclusions to write off an alternative***. Remember, notwithstanding the Court's issues with the consultant's expertise, it reasoned that the consultant's memorandum contained "no facts or information to support the statement or to indicate [the consultant] has any expertise in matters of composting facility financing." *Center for Biological Diversity*, 185 Cal. App 4th at 884. The City did essentially the same here – in fact, it did worse – by baldly concluding that the MVCP amendment shouldn't be considered because it doesn't involve construction of the road connector.

Accordingly, substantial evidence does not support the EIR's conclusion that an MVCP amendment is unworthy of more in-depth consideration.

D. The Evidence Set Forth in the "No Project Alternative" Does *Not* Support the Conclusions Made about An MVCP Amendment

The City argues that the EIR's conclusions regarding the No Project Alternative are the same as if the MVCP were amended because the Project would not move forward under either alternative. That argument fails because the No Project Alternative would just maintain the status quo while Plaintiff's alternative includes amending the MVCP. Amending the MVCP requires its own environmental analysis. The EIR agrees, stating that "additional environmental analysis [is needed] prior to removal from the Mission Valley Community Plan. . . ." Admin. R. 52:4728. Further, the EIR recognizes that the MVCP is currently undergoing an update and may remove the roadway connector, necessitating further environmental review.[6] *Id*., 52:4727-42728. Accordingly, analyzing the mere maintenance of the status quo – *i.e.*, the No Project Alternative – is not the same as analyzing amendment of the MVCP.

E. The EIR Failed to Adequately Analyze the Project's Traffic Impacts

1. Regional Circulation Impacts Were Grossly Misrepresented and Subsequently Ignored in the City's Opposition Brief

In its opening brief, Plaintiff pointed out that the EIR grossly misrepresented the Project's impacts on regional circulation. *See* Op'g Br., Section IV-A-6-a. In brief, the EIR directed the reader

[6] For these same reasons, the City's argument that studying the MVCP amendment would not have added substantially to the alternatives analysis is entirely without merit. *See* Opp'n Br., pp. 17-18.

to Appendix H, which allegedly demonstrated that the Project would result in "a 1.8 percent decrease of VMT within the study area" and "a decrease of .32 percent" on a region-wide basis, for the near-term year 2017. Admin. R., 52:5397; 2348:35778. Further, Appendix H stated that the Project would result in the same 1.8 percent decrease in the study area in the year 2035, with a .28 percent decrease on a region-wide basis for that same year. *Id.*, 2348:35778. Per Appendix H, "[t]he VMT analysis was conducted consistent with methodologies discussed in the technical white paper, 'Vehicle Miles Traveled Calculations Using the SANDAG Regional Travel Demand Model,' prepared by the San Diego Institute of Transportation Engineers. . . ." *Id*. The evidence shows that the margin of error for the methodology is "+/- 10% of observed conditions for the region as a whole" and that "observed data from Caltrans' freeway Performance Monitoring System confirms that travel on the freeways and highways can vary +/- 7% from day-to-day." Admin. R. 2203:32459-32460.

Nowhere in the EIR was this margin of error mentioned or discussed. Knowing it made this critical omission, the City argues that "this very topic was the subject of a detailed memo presented to Council by Deborah Bossmeyer and addressed in the RTCs." Opp'n Br., p. 20, lns. 19-22. But Ms. Bossmeyer is a member of Plaintiff; she is not the one who carries the burden of environmental disclosure. "An EIR is an educational tool not just for the decisionmaker, but for the public as well. It is a document of accountability, an environmental 'alarm bell' whose purpose is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return." *Association of Irritated Residents v. County of Madera*, 107 Cal. App. 4th 1383, 1392 (2003). "If CEQA is scrupulously followed, the public will know the basis on which its responsible officials either approve or reject environmentally significant action, and the public, being duly informed, can respond accordingly to action with which it disagrees. The EIR process protects not only the environment but also informed self-government." *Id*.

In other words, it is ***the EIR*** that is the educational tool and the document of accountability. Even after the 10-percent margin of error undermining its traffic study was brought to the City's attention, it chose to sweep it under the rug first during the EIR process and now in its opposition brief. Here are the citations the City relies on to demonstrate that the flaw was allegedly not hidden from the public, contained on pages 20 and 21 of its brief:

- Admin. R. 2203:32435
- Admin. R. 51:3410-11
- Admin. R. 2350:36321-36324; 86.1:6937.1-8.1
- Admin. R. 2203:32459

Plaintiff urges the Court to review each of these citations as ***literally none of them*** contains an explanation from the City as to how it reconciled its conclusion on regional traffic impacts with the 10-percent margin of error pointed out by the methodology's author. Consequently, the EIR's conclusion that there will be no increase in VMT is not supported by substantial evidence.

2. <u>Traffic Hazards on Via Alta and Franklin Ridge Were Ignored</u>

In its opening brief, Plaintiff also pointed out that the EIR failed to discuss whether the Project would result in "[a]n increase in traffic hazards for motor vehicles, ***bicycles***, or ***pedestrians*** due to a proposed non-standard design feature (*e.g.*, ***poor sight distance*** or driveway onto an access-restricted roadway)." Admin. R. 52:5388 (emphasis added). In response to Plaintiff's charge that the "Impact Discussion" for traffic hazards looked only at the road connector itself and ***not*** at Via Alta or Franklin Ridge, the City stunningly suggests that it wasn't required to look at those impacts because they are not due to a "non-standard design feature." Opp'n Br., p. 22, lns. 1-10. In this regard, the City argues that the only non-standard design feature is that the location of a church driveway "potentially create[s] an unsafe condition for motorists entering or exiting the church parking lot." Opp'n Br., p. 22, lns. 8-10. It then goes on to ignore the wealth of evidence presented by Plaintiff demonstrating that traffic hazards on Via Alta and Franklin Ridge are assured.

Citation to that evidence bears repeating. At the Planning Commission hearing, the City's planning staff told Commissioners that there would be "localized impacts" caused by the connector road.

> So I think again it's important to understand that this project doesn't create any trips. It redistributes them. ***So with the proposed project*** [sic] ***would cause localized impacts*** but on the – on the, kind of, double – the dual community scale, it would – it would decrease the congestion. ***But localized to the road connection, there are more impacts than if the road wasn't there, if the connection wasn't there***.

Id., 2350:36334 (testimony from staff member Tanner French; emphasis added). Those localized impacts include "grades [that] will ***encourage people to drive faster than the speed limit***. It's unfortunate but it's human behavior." *Id.*, 2350:36360 (comments of chairperson; emphasis added).

Planning Commissioner Peerson was greatly concerned by what she heard, both from staff and from the public. Her prophecy should have worried everyone at the City:

> I live in Point Loma, between two major streets, Catalina and Chatsworth. There's a middle school on one end of my block, a long block, and there's an elementary school. ***What's been happening is what's going to happen in your community where your elementary school is when there's no crossing. There will be an accident***.

Id., 2350:36347 (emphasis added). She thus made this plea: "Can we, please, look at a condition that would put in some of these traffic calming measures, striping, signage?" *Id*., 2350:36348.

Indeed, the EIR pointed out that Civita will soon host a new public school. Admin. R. 59:6238; *see also id.*, 2090:31651 (showing proposed school at base of Via Alta). The EIR also confirmed that residents and pedestrians on Franklin Ridge will suffer ***20,919 new trips***; on Via Alta, they will suffer ***11,686 new trips***. *Id*., 52:5403 ("Via Alta to Civita Blvd" line under "Franklin Ridge Rd" heading), 5404 ("Franklin Ridge Rd to Civita Blvd" line under "Via Alta" heading). Other evidence in the record confirms that Via Alta and Franklin Ridge are ***steep and curvy***, meaning they have poor sight distance and allow for high vehicle speeds. *See, e.g., id.*, 69:6546-6547 (staff presentation showing curves and steep grades on two roads); 86.1:8 (staff noting "steep topography along the two roads"): 86.1:28-29 (testimony of Ms. Bossmeyer about steep grades and lack of mitigation); 86.1:93-94 (exchange between staff and Councilmember Bry admitting that both streets are steep and traffic-calming devices on them are not feasible).

As noted above, mitigation was required along the connector "in order ***to provide adequate sight distance due to the slight curve*** along Phyllis Place from the I-805 ramps." *Id.*, 52:5421 (emphasis added). If adequate sight distance due to a slight road curvature was important enough to mitigate for the church affected by the connector, then it should have been important enough to study and mitigate for residents, bicyclists, and pedestrians on Via Alta and Franklin Ridge. As the City's own graphics reveal, Franklin Ridge has the same overall curvature as Phyllis Place from the I-805 ramps while Via Alta has three curves that are all worse. *See, e.g., id.*, 69:6545.

The City's staff tried to rationalize not looking at traffic hazards along Via Alta and Franklin Ridge by insisting that only the road connector was up for consideration and the rest of Civita was "separate and not before the Commission today." *Id.*, 2350:36341 (Muto testimony). But that's not how CEQA works. Indeed, the Supreme Court made it clear that:

> [N]o statute (in CEQA or elsewhere) imposes any per se geographical limit on otherwise appropriate CEQA evaluation of a project's environmental impacts. To the contrary, ***CEQA broadly defines the relevant geographical environment as "the area which will be affected by a proposed project." Consequently, the "project area does not define the relevant environment for purposes of CEQA when a project's environmental effects will be felt outside the project area." Indeed, 'the purpose of CEQA would be undermined if the appropriate governmental agencies went forward without an awareness of the effects a project will have on areas outside the boundaries of a project area***."

Muzzy Ranch Co., supra, 41 Cal. 4th at 387 (emphasis added). Commissioner Granowitz understood this, stating that, "if we're going to approve something that's going to affect these people, there need to be some ***assurances*** that there's going to be ***some safe – ability for them to cross***. So while I get, in theory, that this is the only thing before us, in the real world – you know, what I mean – I need to have some assurance, if I'm going to consider voting for this, that there's protection for these guys." *Id*. (emphasis added). It was then that staff flat-out lied to the Commissioner: "So ***in our traffic analysis***, you know, you do analyze if there are impacts related to circulation, to ***any pedestrian and bike*** access. And ***that analysis was completed*** and no impacts related to bike or pedestrian access, active transportation were identified." Admin. R., 2350:36342 (emphasis added). In truth, there was no study of pedestrian access on Via Alta or Franklin Ridge; the only study was within the artificially narrow "Project" footprint. There were no bike- or pedestrian-safety issues identified because the City did not look at those impacts on either of the adjacent roadway segments.

Exacerbating the harm caused by staff's dishonest response is that there are no crosswalks for a half mile on Via Alta and Franklin Ridge, and crosswalks or other traffic-calming devices can never be installed because of the steepness of the grade and curves in the roads. The City dodges this important safety-engineering reality throughout its brief.

The City tries to excuse its failure to adequately analyze impacts to Via Alta and Franklin Ridge by stating that the impacts were already studied in the EIR for the Quarry Falls Project. Opp'n Br., p. 23, lns. 3-17. That argument fails because the EIR for that Project – specifically, the discussion on

transportation/traffic circulation – "focuse[d] on impacts associated with the proposed project ***without*** the connection." Admin. R. 45:1638 (emphasis added). To the extent that the City is relying on the ***alternatives*** section of the Quarry Falls EIR, which contemplated the construction of the roadway connector, that reliance is erroneous because the City is attempting to replace substantive analysis of impacts to Via Alta and Franklin Ridge with a short, brief discussion of the roadway connector from the alternatives section of the Quarry Falls EIR prepared over 10 years ago. *See* Admin. R. 45:1981-1993 (discussion of roadway connector in alternatives section of Quarry Falls EIR). Even if on point, by now its informoation has grown stale and cannot promote informed decision-making today.

Again, with more than a 14-fold increase in vehicles on Via Alta and Franklin Ridge – from 2,420 to 34,540 new vehicle trips – the City was obligated to look at the potential traffic hazards and public-safety impacts due to poor sight distance, high speeds, and narrow streets. Because it failed to do so, the City failed to consider all potential adverse impacts and equally failed to support its conclusion about the absence of such impacts with substantial evidence.

F. The EIR Failed to Adequately Analyze the Project's Impact on and Inconsistency with Relevant Land-Use Plans

In its opening brief, Plaintiff pointed out that the EIR failed to analyze the Project's inconsistency with the General Plan's City of Villages strategy, which is focused on building "mixed-use activity centers that are ***pedestrian-friendly***, centers of community, and linked to the regional transit system. *Id*., 2343:34878 (emphasis added). In defining a village, the General Plan goes on to state: "***All villages will be pedestrian-friendly*** and characterized by inviting, accessible, and attractive streets and public spaces." *Id*. (emphasis added). Hundreds of residents who live in the City spoke out about how their lives would be upended by this Project – one that goes against the very nature of the City of Villages concept.

Disgracefully, the City's official response to that concern is that the opinions of residents are nothing but argument, speculation, and unsubstantiated opinion. Opp'n Br., p. 27, lns. 8-10. In other words, the City's view is that the testimony of actual residents is worthless. Fortunately, the City is wrong not only as a matter of common sense and decency but as a legal matter; it has long been held that testimony from residents based on personal experience and observation about a project's impacts may constitute substantial evidence. *See Desmond v. County of Contra Costa*, 21 Cal. App. 4th 330,

337 (1993) ("It is appropriate and even necessary for the [public agency] to consider the interests of neighboring property owners in reaching a decision whether to grant or deny a land use entitlement, and the opinions of neighbors may constitute substantial evidence on that issue").

At the administrative level, there was a wealth of evidence presented as to why the Project is inconsistent with the City of Villages concept. *See* Op'g Br., Section IV-A-5. The City argues that there is no inconsistency because the concept also includes "linking communities to the 'regional transit system.'" Opp'n Br., p. 26, lns. 1-3. The disingenuous insinuation here is that increased access to a freeway interchange provides access to regional transit. But that's not how the term is used in the General Plan.[7] Specifically, the General Plan sets out its "Transit First" policy and its "Regional Transit Vision." The "Transit First" policy only has two goals: (1) an attractive and convenient transit system that is the first choice of travel for many of the trips made in the City; and (2) increased transit ridership. Admin. R. 2355:37265. Nothing about that policy suggests that a General Plan goal is to get more people onto the freeway. Further, when defining the City's "Regional Transit Vision," the General Plan does not once mention increasing freeway access or creating roadways that would cause a 14-fold increase in traffic on a particular street. *See id*., 2355:37265-37266. And critically, the General Plan states that "[t]he City of Villages strategy supports expansion of the transit system by calling for villages, employment centers, and other higher-intensity uses to be located in areas that can be served by high quality transit services. This will allow more people to live and work within ***walking distance of transit***." *Id*., 2355:37266 (emphasis added). The reference to walking distance to transit clearly indicates that linking communities to a regional transit system references public transit, not increased private-vehicle access to freeways.

The City tries to justify its failure to analyze the Project's inconsistency with the City of Villages concept by citing to stray portions of the General Plan referring to "vehicles" or "all modes of transportation." *See* Opp'n Br., p. 16, lns. 16-23. However, the City of Villages policy is quite clear in its goals. The General Plan describes its purpose as follows:

> Compact, transit-served growth is an efficient use of urban land that reduces the need to develop outlying areas and creates an urban form where walking, bicycling, and transit are ***more attractive alternatives to automobile travel. Reducing dependence on automobiles*** reduces

[7] Further, that term is generally used to refer to the transportation of people by ***public*** conveyance.

> vehicle miles traveled which, in turn, lowers greenhouse gas emissions. Additionally, it improves water quality by decreasing automobile-related oil and gas leaks that pollute water bodies throughout the City.

Admin. R. 2355:37187 (emphasis added). There can be no question that the Project's impact on the walkability of the neighborhood, attested to by the people who actually live near the Project, along with a 14-fold increase in vehicles traveling down Via Alta and Franklin Ridge – from 2,420 to 34,540 new vehicle trips – means that this is a Project that does the exact opposite of what the City of Villages concept calls for.

Accordingly, the City violated CEQA because there is no substantial evidence demonstrating that the Project is consistent with the General Plan or supporting the failure to analyze the serious environmental inconsistencies therewith.[8]

G. <u>The City Failed to Summarize the Revisions Made in the Recirculated Draft EIR</u>

CEQA Guidelines Section 15088.5(g) states (with Plaintiff's emphasis) that when a lead agency recirculates "a revised EIR, either in whole or in part, the lead agency ***shall***, in the revised EIR or by an attachment to the revised EIR, summarize the revisions made to the previously circulated draft EIR." The City circulated the DEIR for the Project from April 18 through July 5, 2016. Admin. R. 67:6535; 2346:35450. After the public-comment period, it revised and recirculated a new DEIR for public review from March 28, 2017, through May 30, 2017. *Id*., 67:6535; 2349:35785. However, neither the Recirculated DEIR nor any attachment to it summarizes the revisions made. *See generally id.*, 2349:35783-36214.

The City argues that it "summarized revisions made to the Programmatic DEIR in the Notice of Preparation for the Project level DEIR. . . ." Opp'n Br., p. 27, lns. 18-19. But the Notice of Preparation doesn't summarize any revisions or changes made, it merely informs the reader that the EIR has been revised. *See* Admin. R. 2349:35785-35686. Further, none of the additional citations provided by the City summarizes any of the revisions made to the EIR. *See* Opp'n Br., p. 27, lns. 24-27 (citing Admin. R. 2349:35849; 35871-35872; 35897).

Knowing that it failed to comply with Section 15088.5(g), the City argues that "noncompliance with CEQA's information disclosure requirements is not per se reversible; prejudice must be shown."

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[8] This inconsistency also violates the Planning and Zoning Law. *See* Op'g Br., Section IV-B.

Opp'n Br., p. 28, lns. 7-10. In support of the argument, the City relies on the 2004 case of *Bakersfield Citizens for Local Control v. City of Bakersfield*, 124 Cal. App. 4th 1184 (2004). However, two cases published years after that case demonstrate that the City's violation of CEQA's informational requirements is reversible.

A decade ago, the Court of Appeal held that the "'[f]ailure to comply with the information disclosure requirements constitutes a prejudicial abuse of discretion when the omission of relevant information has precluded informed decisionmaking and informed public participation, ***regardless of whether a different outcome would have resulted*** if the public agency had complied with the disclosure requirements.'" *City of Long Beach, supra*, 176 Cal. App. 4th at 898 (emphasis added). In *California Native Plant Soc'y v. City of Santa Cruz*, 177 Cal. App. 4th 957, 986 (2009), the Court stated that the test for prejudice was whether (1) the EIR omits information required by CEQA and (2) the information is necessary to an informed discussion.

Requiring members of the public to rifle through these two voluminous, technical documents to try and figure out the differences was an obstacle to informed discussion. For example, even the Serra Mesa Community Council and its highly experienced land-use attorney had a difficult time determining what specific changes were made in the revised, Recirculated DEIR. *See*, *e.g.*, Admin. R. 51:3102 (asking whether voluminous appendices have changed and, if so, which ones). Surely, community members with no land-use or legal experience would have just as much – if not more – trouble identifying the many differences between the documents. It's of no consequence that, according to the City, "public comment was vigorous"; the question is whether a summary of the revisions contained information "necessary to an informed decision." *California Native Plant Soc'y, supra*, 177 Cal. App. 4th at 986. The City's failure to provide the information required by Section 15088.5(g) constitutes the omission of information necessary to an informed decision. Since the public was not told about the nature of the changes, there's no evidence that they were aware of them in enough detail to comment on the revisions and meaningfully particulate in the process

Accordingly, the City violated the informational requirements of CEQA.

H. <u>The City Violated the Public's Right to Due Process and Fair Hearings</u>

Plaintiff argues in its opening brief that its members and other members of the public were denied fair hearings because at least one City Council member had decided he was going to approve

the Project long before any evidence was presented to the City Council. The City argues that Plaintiff failed to "raise this issue in any of the administrative proceedings ***or in the Petition*** and failed to exhaust the administrative remedies." Opp'n Br., p. 28, lns. 20-22 (emphasis added). As to the Petition, Plaintiff was clear that this action was brought under Code of Civil Procedure ***Section 1084 et seq***. Compl., ¶ 9. Accordingly, the inquiry in cases brought under Code of Civil Procedure Section 1094.5(b) is "whether the respondent has proceeded without, or in excess of, jurisdiction; ***whether there was a fair trial***; and whether there was any prejudicial abuse of discretion." CIV. PROC. CODE § 1094.5(b) (emphasis added). Because Plaintiff's charge that the City violated the public's right to due process and a fair hearing is encompassed by Section 1094.5(b), it was properly and sufficiently raised in the Petition.

As to exhaustion of Plaintiff's due-process claim, "the rule is that where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act." *Abelleira v. District Court of Appeal, Third Dist*., 17 Cal. 2d 280, 292 (1941). There is no statute to Plaintiff's knowledge – unlike with CEQA – requiring a member of the public to exhaust a due-process and fair-hearing claim.

More importantly, the secret cheerleading was not revealed in any of the materials available to Plaintiff or its members – or even shared with the other members of the City Council – until Plaintiff received the administrative record. The City certainly has not cited a single page in the record where the Councilmember's bias would have been evidence to any reasonable observer. The Councilmember was rallying his troops on the down-low. He certainly never publicly announced what he was doing.

Next, the City laughably argues that Plaintiff "has not identified any actions by Mr. Sherman that approach establishing an 'unacceptable probability of actual bias.'" Opp'n Br., p. 29, lns. 13-15. Remember, after the Recirculated DEIR was released for public review, and long before the Project was scheduled for any public hearings, Mr. Sherman tasked his staff with finding people who would submit favorable letters and speak in support of the Project when it finally came up for public hearing. For example, on May 23, 2017, Mr. Sherman's Director of Outreach wrote an email to the Escala Homeowners Association stating: "I wanted to reach out to you because the City has recirculated the [Project] and public hearings are scheduled to start in July. Would you like Barrett and I to come back to your HOA Board to brief you on this subject? ***We are hoping we can get a letter of support as well***

from Escala for the Planning Commission and City Council." Admin. R. 958:16722 (emphasis added). Numerous other similar letters were sent out by Mr. Sherman's staff. *See*, *e.g.*, *id*., 948:16536; 965:16739-16741. In fact, as far back as May 2017, on at least one occasion, ***Mr. Sherman's staff was offering to write the support letter for a group willing to support the Project***. *See id*., 837:15212-15213. Even worse, the day after the Planning Commission recommended approval of the Project on August 24, 2017, Mr. Sherman's staff sent out an e-mail stating "[t]hank you to everyone who came to the Planning Commission Hearing yesterday and sent in letters of support! With your support we had over 40 speakers in attendance and turned in over 50 letters in support of this Community Plan Amendment." *Id*., 1939:30580-30581. Mr. Sherman's staff then urged supporters to attend future public hearings and sign an online petition in support of the Project. *Id*. He didn't send those communications to the Project's opponents; he sent them only to his allies.

Due process requires that all hearing judges be impartial. *American Isuzu Motors, Inc. v. New Motor Vehicle Bd.*, 186 Cal. App. 3d 464, 472-473 (1990). As stated by the U.S. Supreme Court, the right to "a fair tribunal is a basic requirement of due process" and that principle "applies to administrative agencies which adjudicate as well as to courts." *Withrow v. Larkin*, 421 U.S. 35, 46-47 (1975). In this regard, "[n]ot only is a biased decisionmaker constitutionally unacceptable but 'our system of law has always endeavored to prevent ***even the probability of unfairness***.'" *Id*. at 47 (emphasis added). Imagine if this Court had done what Mr. Sherman had done: solicited letters from key members of the public to support the Project for months, then refuse to recuse itself after a lawsuit was filed and slated to be heard before this Court. Surely, the Court would recuse itself in this circumstance because it would be hard to maintain even the thinnest veneer of impartiality.

The City cites to two cases to supports its argument that "Mr. Sherman's motives for voting for the Project are irrelevant to assessing the validity of the Project approval." Opp'n Br., p. 29, lns. 20-22. The first case, *City of Fairfield v. Superior Court*, 14 Cal. 3d 768 (1975), states that 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. However, it's one thing to discuss issues of importance with constituents and a completely different thing to be actively lobbying members of the public in order to sway a decision on which the public official is voting. Councilmember Sherman's ***discussions*** aren't the problem; his ***one-sided advocacy*** is.

The second case, *Clark v. City of Hermosa Beach*, 48 Cal. App. 4th 1152 (1996), states that "a public official may express opinions on subjects of community concern . . . without tainting his vote on such matters should they come before him." *Id*. at 1173. This case is inapplicable for several reasons. First, the "community concern" at issue in that case was the council member's general concern regarding building heights throughout the city. That fact alone wasn't enough to give rise to any bias claims. However, the Court also recognized that because the council member had personal animosity toward a project applicant, that meant that "he was not a disinterested, unbiased decisionmaker." *Id*. Similarly, in the case at bar, it's not Mr. Sherman's general discussion about projects that's illegal, it's his apparent personal interest and active lobbying to push for a particular result on the Project that rendered him a biased decision-maker who should have never voted on the Project.

The case of *Nasha*, *supra*, 125 Cal. App. 4th 470, is particularly instructive here. In that case, the city's planning commission was set to vote on an administrative appeal regarding a project that – similar to the case here – threatened certain environmental impacts. *Id*. at 476. Prior to his vote on the project, one planning commissioner wrote a newsletter attacking the project. *Id*. at 483. The planning commissioner argued that the newsletter was merely informational. *Id*. at 484. The Court disagreed, reasoning that "[t]he article clearly advocated a position against the project. . . ." *Id*. The Court then found that the commissioner's "authorship of the newsletter article gave rise to an unacceptable probability of actual bias and was sufficient to preclude [him] from serving as a 'reasonably impartial, noninvolved reviewer.' [He] clearly should have recused himself from hearing this matter. ***His participation in the appeal to the Planning Commission requires the Commission's decision be vacated***." *Id*. (emphasis added). The Court then ordered the planning commission "to conduct a new hearing . . . before an impartial panel." *Id*. at 486. If a planning commissioner's authoring of a single newsletter in opposition to a project constitutes illegal bias, then surely a council member's use of staff to send out letters to garner support for the Project – especially when he was the one making the motions to approve the Project – constitutes the same.

Finally, the City argues that because the final vote on the Project was 8-1, it would have been approved even without Mr. Sherman's vote. Opp'n Br., p. 30, lns. 1-4. However, that same argument was rejected in *Nasha*, the Court reasoning that an unbiased commissioner's "participation in the appeal to the Planning Commission requires the Commission's decision be vacated," notwithstanding any

argument by the City that the commissioner "was not the sole decision maker" and that his "participation [was] harmless." *Nasha*, *supra*, 125 Cal. App. 4th at 484 & fn. 8.

In light of the foregoing, Plaintiff and members of the public were denied the fair hearing to which they were entitled under Code of Civil Procedure Section 1094.5(b).

III. CONCLUSION

For all these reasons, Plaintiff respectfully asks the Court to grant the relief requested in the operative pleading.