

Docket no. D077591

**IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION ONE**

SAVE CIVITA BECAUSE SUDBERRY WON'T,
Plaintiff and Appellant,

v.

CITY OF SAN DIEGO,
Defendant and Respondent.

San Diego County Superior Court case no.
37-2017-00045044-CU-TT-CTL
(Judge Joel R. Wohlfeil – Department C-73)
From Judgment after Court Trial

APPELLANT'S OPENING BRIEF

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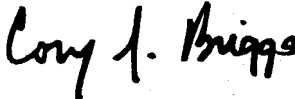
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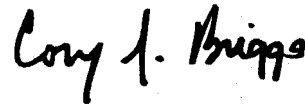


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Dated: December 18, 2020.



Cory J. Briggs

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I. INTRODUCTION

Appellant Save Civita Because Sudberry Won't ("Save Civita") appeals the trial court's denial of a petition for writ of mandate and other relief. Save Civita challenged the project and its environmental impact report ("EIR") as violating the California Environmental Quality Act ("CEQA"), the Planning and Zoning Law ("PZL"), and the public's due-process and fair-hearing rights. The trial court held that Respondent City of San Diego ("City") sufficiently complied with the law. For the reasons discussed herein, the trial court erred and its ruling should be reversed.

II. STATEMENT OF THE CASE

A. Factual Background¹

1. Civita/Quarry Falls²

Civita/Quarry Falls is a large, mixed-use community located in the Mission Valley Community Plan ("MVCP") area just south of the Serra Mesa Community Plan ("SMCP") area. AR 58:5925, 5948-49 (maps). It consists of residential units, retail and office space,

¹ All citations to the Administrative Record are denoted as "AR" followed by the tab number and then the consecutive page number such that "AR 58:5925" refers to tab 58, page 5925. Line numbers, if available, follow the page number.

² Prior to being named "Civita," the development project was known as "Quarry Falls."

and approximately 17.5 acres of public parks, civic uses, open space, and trails. AR 58:5924. Approved back in 2008, Civita/Quarry Falls was touted in this way:

Transit, walkability, and healthy living are thoughtfully integrated into Quarry Falls – making it a model, sustainable community that will provide a high quality of life for its residents and surrounding community members in Mission Valley. Quarry Falls will help meet Mission Valley’s planning needs for attainable homes, a new public park, a public charter school, and urgently needed traffic improvements, while reducing commuter traffic by offering jobs and recreation close to homes on the site of an aging quarry.

AR 59:6238 (bold in original; underline added). Civita/Quarry Falls was sold to the public as being consistent with – even *exemplifying* – the “City of Villages” concept outlined in the City’s General Plan. AR 59:6246, 6299. “In 2002, San Diego city planners created the City of Villages strategy as the guiding land use principle for updating the city’s general plan. A village was defined as an integrated mix of commercial, residential, employment, and civic uses, with parks and open space, and a place that . . . is *pedestrian friendly* and transit accessible.” AR 59:6299 (emphasis added).

2. The Project

This lawsuit concerns the Serra Mesa Community Plan Amendment Roadway Connection (“Project”),³ which would amend the plan to add a four-lane major street connection between Phyllis Place and Via Alta and Franklin Ridge Road to the south. *See* AR 2:2; AR 74:6652 (map). Phyllis Place is located in the SMCP area. AR 51:3907, 3933. Via Alta and Franklin Ridge are located in the MVCP area within Civita/Quarry Falls. *Id.* The Project was designed to divert vehicle traffic from the I-805 and Serra Mesa down through and into Mission Valley. *See* AR 51:4223 (“Implementation of the project would redistribute vehicle trips by diverting traffic to the new road connection”); AR 2353:36750 (“with a connection a driver could simply proceed through the middle of the Civita project using Franklin Ridge Road”).

The latest iteration⁴ of the Project came about in connection with the Civita/Quarry Falls project, consistent with the MVCP. *See*

³ The Project was also previously known as the Franklin Ridge Road Extension Project. *See* AR 47:2245, 2255.

⁴ This is not the first time this particular road connection has been proposed (and rejected). It was proposed twice in 2004; the City’s Planning Commission denied it both times. AR 2338:34567, 2339:34575. It was appealed to the City Council in 2005; the appeal was denied. AR 2340:34608.

AR 54:5652; 59:6247. However, the SMCP did not include the street connection. AR 59:6247. Although the respective community planning groups *both* voted to recommend approval of Civita/Quarry Falls, they did so with divergent aims consistent with their respective community plans. The Mission Valley Community Planning Group (“MVCPG”) recommended approval “based upon the inclusion of a road connection to Phyllis Place,” whereas the Serra Mesa Community Planning Group (“SMCPG”) recommended approval “based upon prohibiting the road connection to Phyllis Place . . . and preserving the neighborhood character by maintaining Murray Ridge Road with one travel lane in each direction.” AR 54:5652; 31:318.

Concurrently with the approval of Civita/Quarry Falls, the City adopted a resolution “initiating an amendment” to the City’s General Plan and the SMCP to include a road connection between Phyllis Place and Friars Road; the purpose was to reconcile the conflict between the two community plans. AR 31:318-19.⁵ In the resolution, the City Council specifically directed staff to analyze four

⁵ Importantly, the “initiation process” is only the first step in the amendment process that allows staff to proceed with analysis and preparation of the amendment; it in no way confers adoption of the amendment nor does it commit the City to adopt or deny the amendment in the future. AR 31:318.

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. AR 31:319-20. In other words, in considering approval of a potential road connection down the line, the City was primarily concerned with limiting the use of such a road for emergencies while maintaining the area's pedestrian and bicycle access.

3. The Appellant⁶

Save Civita is non-profit organization organized and operating under the laws of the State of California. I AA 11; 81:6-8. At least one of Save Civita's members has a geographical nexus and environmental connection to the Project. *See id.* at 81:4-5, 16-18. Save Civita is concerned about the environmental impacts that will be caused by the Project including impacts related to traffic, air quality, and safety, among others. *See id.* Save Civita also strives to ensure that local government and public officials adhere to CEQA

⁶ All citations to the Appellant's Appendix are denoted as "AA" preceded by the volume and followed by the page number. Line numbers, if available, follow the page number such that "I AA 11:21-24" refers to page 11, lines 21 through 24, in volume I.

and other land-use laws when approving projects with negative environmental consequences. I AA 81:9-15. In order to address these concerns, Save Civita and its members repeatedly participated in the administrative process and ultimately commenced this lawsuit challenging the City's approval of the Project on the grounds that it violated CEQA, the PZL, and the public's due-process and fair-hearing rights. *See generally, e.g.*, AR 51:2916-25, 3233-39, 3521-28; 2350:36294:8-96:23; *see also* I AA 11-15.

4. The Administrative Process⁷

In 2016, the DEIR for the Project was circulated for public review. AR 67:6535; 2346:35450. The DEIR stated that “[t]he proposed project is ***a community plan amendment*** (CPA) to the [SMCP] to include a street connection from Phyllis Place, located in Serra Mesa, southward to the boundary of Serra Mesa and Mission Valley.” AR 51:5855 (emphasis added). After the public-comment period, “the City updated the project description to include construction of the roadway connection at a project level and

⁷ This Project has three different EIRs. *See generally* AR 51; 2346; 2349. The original draft program EIR was completed in April 2016 and is referred to in this brief as “DEIR.” The recirculated draft EIR was completed in March 2017 and is referred to in this brief as “RE-DEIR.” The final EIR was completed in August 2017 and subsequently certified; it is referred to in this brief as “FEIR.”

recirculated the DEIR for public review” in 2017. AR 67:6535; 2349:35785 (comments due by May 15, 2017).

The RE-DEIR updated the Project description to read that “[t]he proposed project consists of **construction and operation of a four-lane major street**, complete with bicycle lanes and pedestrian pathways, extending from Phyllis Place in Serra Mesa southward to Via Alta and Franklin Ridge Road in Mission Valley. The proposed project would also require an amendment to the [SMCP].” AR 2349:35815 (emphasis added).

The Project struggled to gain the support of those most affected by it. On June 1, 2016, the MVCPG – the same group that supported Civita’s inclusion of a road connection to Phyllis Place back in 2008 – voted to **withhold** support for the Project. AR 2347:35769-70. On May 3, 2017, the MVCPG held a hearing on the Project and took no action on it. AR 69:6544. On May 18, 2017, the SMCPG voted 11-0 to recommend denial of the Project. *Id.* Indeed, the latest iteration of the Project drew the ire of the community, with literally hundreds of the City’s residents submitting written opposition to it. *See, e.g.*, AR 51:3040-3784.

Nevertheless, in August 2017, the Planning Commission recommended approval of the Project. AR 67:6536. The Project then

went before the Smart Growth and Land Use Council Committee (“SGLU”) in September 2017; the committee voted 4-0 to recommend approval of the Project. AR 2351:36393. Finally, the Project came before the City Council, which approved the Project and certified the FEIR on October 30, 2017. AR 86:6859. The City filed a notice of determination on November 13, 2017. AR 3:3.

B. Procedural Background

On November 27, 2017, Save Civita filed its Verified Complaint and Petition for Writ of Mandate (“petition”) under CEQA and other laws. *See generally* I AA 11-16. The petition contained one cause of action alleging that the approval of the Project was illegal. *Id.* at 13-15. Save Civita sought a judgment or other appropriate order determining or declaring that the City failed to fully comply with CEQA (and other applicable laws) and for injunctive relief. *Id.* at 15:23-16:16. The City answered the petition by denying the allegations and asserting 30 affirmative defenses. *Id.* at 22-30.

The parties submitted lengthy briefs on the merits in advance of the hearing on the petition. In its opening brief, Save Civita identified four areas where the City’s CEQA analysis was irredeemably deficient: (1) the City failed to summarize the

revisions made in the RE-DEIR, (2) the FEIR failed to adequately analyze a reasonable range of alternatives, (3) the FEIR failed to adequately analyze the Project's impact on and inconsistency with relevant land-use plans, and (4) the FEIR failed to adequately analyze the Project's traffic impacts. *See generally id.* at 58:23-77:10. Save Civita separately argued that the City violated the PZL in approving the Project and that the City violated the public's due-process and fair-hearing rights – a violation that was evident only upon review of the administrative record. *See id.* at 77:11-79:24. The City filed its brief in opposition and argued that it properly exercised its discretion in approving the Project and that there was substantial evidence to support the findings and conclusions in the FEIR. *See generally id.* at 84-122 (opposition brief), 125-67 (errata with corrected opposition brief). Save Civita filed its reply. IV AA 1341-71.

After receiving all of the briefing, the trial court issued its tentative ruling concluding that the FEIR was sufficient and complied with CEQA (except in one instance where the violation was not prejudicial); that because the FEIR did not conflict with existing land-use plans under CEQA, it did not violate the PZL; and that Councilmember Sherman's actions did not violate the public's

right to due process and a fair hearing. *Id.* at 1377-85. In its conclusion, the trial court stated the City balanced the various competing factors in a lawful and transparent way. *Id.* at 1385. After hearing oral argument, the trial court confirmed its tentative ruling and denied the petition. *Id.* at 1386.

C. Statement of Appealability

On January 28, 2020, the clerk of the trial court mailed the minute order confirming the tentative ruling as the order of the court. *See* IV AA 1386-87 (minute order), 1377-85 (tentative ruling). Judgment was entered on February 18, 2020, and a Notice of Entry of Judgment was filed and served on March 2, 2020. *Id.* at 1388-406. Save Civita filed and served its notice of appeal on May 26, 2020. IV AA 1407-09. This appeal is timely.⁸

⁸ Pursuant to the emergency orders of the State and the Chief Justice of the California Supreme Court, the Chief Justice of the San Diego County Superior Court issued three orders extending the time within which litigants have to file papers; March 17 through May 22, 2020, are deemed holidays. *See* Gen. Order Nos. 031820-34, 040320-39, 043020-47. May 23 and 24 were weekends, and May 25 was a court holiday.

III. STANDARD OF APPELLATE REVIEW

Because this appeal involves three different bodies of law, the standards of review are discussed in each of the three discussion sections below pertaining to the particular laws in question.

IV. DISCUSSION

Save Civita challenged the Project on three separate grounds. First, the City certified an EIR that did not comply with CEQA in four particular areas: (1) the RE-DEIR failed to summarize the revisions made as required by CEQA's Guidelines⁹; (2) the FEIR failed to adequately analyze a reasonable range of alternatives, specifically the Amend MVCP alternative; (3) the FEIR failed to adequately analyze the Project's traffic impacts; and (4) the FEIR failed to adequately analyze the Project's impacts on and inconsistency with applicable land-use plans.¹⁰

⁹ The CEQA Guidelines implement the provisions of CEQA and are codified in the California Code of Regulations, title 14, section 15000 *et seq.* (the "Guidelines").

¹⁰ CEQA requires a challenger to exhaust its administrative remedies prior to filing suit. *See* Pub. Res. Code § 21177(a)-(c); *but see also Galante Vineyards v. Monterey Peninsula Water Mgmt. Dist.*, 60 Cal. App. 4th 1109, 1118-19 (1997) ("a petitioner who has taken part in the administrative process may assert any issues raised by other parties during the administrative proceedings"). The alleged grounds for non-compliance were asserted during the administrative proceedings and will be cited as they become relevant to the discussion.

Second, the City approved the Project in violation of the PZL. The Project's traffic impacts on Civita/Quarry Falls and its residents directly undermine the City of Villages strategy outlined in the General Plan, making the Project inconsistent with the General Plan.

Finally, at least one of the City's decision-makers was biased in violation of the public's due-process and fair-hearing rights. Specifically, Councilmember and SGLU Chairperson Scott Sherman was boosting, advocating, and organizing support for the Project prior to hearing all of the evidence and casting his vote.

A. The City Certified an EIR that Did Not Comply with CEQA

1. Standard of Review for CEQA Claims

The appellate court reviews the legality of the agency's actions under CEQA de novo. "On appeal, the appellate court's 'task [in reviewing a CEQA challenge] . . . is the same as that of the trial court: that is, to review the agency's actions to determine whether the agency complied with procedures required by law.' [Citation.] The appellate court reviews the administrative record independently; the trial court's conclusions are not binding on it." *Gentry v. City of Murrieta*, 36 Cal. App. 4th 1359, 1375-76 (1995); *see also Ass'n of Irrigated Residents v. Cty. of Madera*, 107 Cal. App.

4th 1383, 1390 (2003) (“AIR”); *McCorkle Eastside Neighborhood Grp. v. City of St. Helena*, 31 Cal. App. 5th 80, 88 (2018), *as modified* (Jan. 25, 2019), *review denied* (Apr. 17, 2019).

Challenges brought pursuant to CEQA are adjudicated in accordance with Section 1094.5 of the Code of Civil Procedure. Courts must then determine whether the public agency “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); Pub. Res. Code § 21168. Failing to proceed in the manner required by law, making an order or decision that is not supported by the findings, and/or making findings that are not supported by the evidence are all abuses of discretion. Civ. Proc. Code § 1094.5(b).

The EIR is the “heart of CEQA.” *Citizens of Goleta Valley v. Bd. of Supervisors*, 52 Cal. 3d 553, 564 (1990) (citations omitted). “Its purpose is to inform the public and its officials of the environmental consequences of their decisions *before* they are made. Thus, the EIR ‘protects not only the environment but also informed self-government.’” *Id.* (italics in original); *Sierra Club v. Cty. of Fresno*, 6 Cal. 5th 502, 512 (2018) (“Because the EIR must be

certified or rejected by public officials, it is a document of accountability.”).

In reviewing the sufficiency of an EIR challenged under CEQA, “the reviewing court focuses on adequacy, completeness and a good faith effort at full disclosure. The EIR must contain facts and analysis, not just the bare conclusions of the agency . . . [and] must include detail sufficient to enable those who did not participate in its preparation to understand and to consider meaningfully the issues raised by the proposed project.” *AIR*, 107 Cal. App. 4th at 1390 (citations and quotations omitted). Courts do not pass on the correctness of the conclusions in the EIR. *Id.* at 1391. Rather, they must ascertain whether the report’s conclusions are supported by substantial evidence¹¹ and whether the report itself is sufficient as an informational document, regardless of whether the project at issue is ultimately approved. *Bakersfield Citizens for Local Control v. City of Bakersfield*, 124 Cal. App. 4th 1184, 1197 (2004)

¹¹ The “substantial evidence” standard is codified in CEQA. *See* Pub. Res. Code § 21168. Substantial evidence includes “facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts;” it excludes “[a]rgument, speculation, unsubstantiated opinion or narrative, evidence which is clearly inaccurate or erroneous, or evidence of social or economic impacts which do not contribute to, or are not caused by, physical impacts on the environment.” Pub. Res. Code § 21082.2(c).

(invalidating EIR) (citations and quotations omitted); *Friends of the Eel River v. Sonoma Cty. Water Agency*, 108 Cal. App. 4th 859, 872 (2003) (ruling that approval of project is “nullity” if based on EIR that does not provide required information to decision-makers and public).

“The substantial evidence standard is applied to conclusions, findings and determinations. It also applies to challenges to the scope of an EIR’s analysis of a topic, the methodology used for studying an impact and the reliability or accuracy of the data upon which the EIR relied because these types of challenges involve factual questions. [Citation.] Substantial evidence is defined as ‘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.’” *Bakersfield Citizens for Local Control*, 124 Cal. App. 4th at 1198 (citations and quotations omitted).

“Noncompliance with substantive requirements of CEQA or noncompliance with information disclosure provisions ‘which precludes relevant information from being presented to the public agency . . . may constitute prejudicial abuse of discretion within the meaning of [Public Resources Code] Section[] 21168 . . . regardless

of whether a different outcome would have resulted if the public agency had complied with those provisions.’ (§ 21005, subd. (a).) *** [W]hen an agency fails to proceed [as CEQA requires], harmless error analysis is inapplicable. The failure to comply with the law subverts the purposes of CEQA if it omits material necessary to informed decisionmaking and informed public participation. Case law is clear that, in such cases, the error is prejudicial.” *Sierra Club*, 6 Cal. 5th at 515 (citations omitted).

2. City Failed to Summarize the Revisions Made to the RE-DEIR

An agency is ***required*** to include a summary of the changes made to a recirculated EIR, whether recirculated in whole or in part. *See* Guidelines, § 15088.5(g) (“the lead agency ***shall*** . . . summarize the revisions made to a previously circulated draft EIR” (emphasis added)). The purpose of this requirement is to call readers’ attention to those parts of the report that have changed.

“An EIR will be found legally inadequate – and subject to independent review for procedural error – where it omits information that is both required by CEQA and necessary to informed discussion.” *Cal. Native Plant Soc’y v. City of Santa Cruz*, 177 Cal. App. 4th 957, 986 (2009). “Failure 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 requirement.” *City of Long Beach v. Los Angeles Unified Sch. Dist.*, 176 Cal. App. 4th 889, 898 (2009). Moreover, “[t]he organization of an EIR should not require readers ‘to sift through obscure minutiae or appendices’ to find important components of the analysis.” *Id.* at 902.

Here, the City’s failure to summarize the RE-DEIR’s changes had two detrimental consequences: first, it forced readers to leaf through thousands of pages to figure out what had been changed; and second, it caused readers to have the mistaken belief that the RE-DEIR related to the same project as the original DEIR.

The Guidelines suggest that an EIR’s text should normally be less than 150 pages (300 pages if unusual or complex). However, with the inclusion of appendices and comment letters, it is not uncommon (as here) for an EIR’s page count to number in the thousands. *See* Guidelines, § 15141; *see generally* AR 51 & 2353 (FEIR and appendices totaling almost 2,000 pages). The DEIR contained over 300 pages and the RE-DEIR had over 400 pages. *See*

generally AR 51:3845-4274 (RE-DEIR); 2346:35450-766 (DEIR). Neither the RE-DEIR nor any attachment to it summarized the revisions made.¹² *See generally* AR 2349:35783-6214. The City defended itself by citing to generalized statements about ***the decision to re-circulate***, but that failed to achieve CEQA’s informational purpose.¹³ *See* I AA 160:17-61:15.

As noted in response to comments, the City substantially revised the entire DEIR. AR 51:3111. The City’s position was that because the revision was substantial, it did not have to provide a summary and it was up to the concerned public to start from scratch. *See* AR 51:3111-12 (stating that public-review period was more than enough time to review RE-DEIR ***in its entirety***). In one response the City stated that the RE-DEIR’s new font, numbering, and figures were sufficient to indicate “that the entirety of the [RE-DEIR] had been revised.” AR 51:2988. This is not at all what is

¹² This issue was raised at the administrative level. AR 51:2934, 3101-02.

¹³ The trial court, agreeing with Save Civita, found that “[t]he City was required to reference, discuss or list in some logical, meaningful way the changes made between the draft PEIR [*i.e.*, DEIR] and the recirculated draft EIR [*i.e.*, RE-DEIR]. Arguably, the City did not do this. The references cited by the City do not alert the reader as to the specific changes.” IV AA 1396. However, the trial court concluded that the omission was not prejudicial. *Id.* For the reasons discussed herein, that conclusion is in error.

contemplated by CEQA's disclosure requirements. *See City of Long Beach*, 176 Cal. App. 4th 902 ("The organization of an EIR should not require readers "to sift through obscure minutiae or appendices" to find important components of the analysis."); *accord San Joaquin Raptor Rescue Ctr. v. Cty. of Merced*, 149 Cal. App. 4th 645, 659 (2007).

Failing to provide any kind of summary was an obstacle to informed discussion about the Project. Commenters, including Save Civita, were able to pick up that a four-lane road was contemplated in both the DEIR and RE-DEIR. *See, e.g.*, AR 51:2916 ("DO NOT APPROVE THIS NEW ROADWAY"); AR 51:3040-3065 (change.org petition opposing the road connection including individual comments). However, without knowing what to look for in the RE-DEIR, commenters were left to object on grounds that the City later determined were unrelated to CEQA and did not warrant a response. *See, e.g.*, AR 51:2916-25 (comment letter), 2926 (City's response to Save Civita's comment letter stating the letter does not provide explanation or specific examples of alleged inadequacies of the RE-DEIR), 2927 (stating that community character is not environmental impact under CEQA). 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 RE-DEIR. *See* AR 51:3102 (asking whether voluminous appendices have changes and, if so, which ones).

Moreover, under CEQA the City was not required (and declined) to address comments received during the prior review period. *See* Guidelines, § 15088.5(f)(1); *see also* AR 2349:35785. Commenters were left either to re-submit previous letters and risk the City disregarding them because they addressed details that had changed or to start over (the latter being the non-obvious option since the report was styled as a “*recirculated* draft”).

The trial court also recognized that the RE-DEIR “underwent a structural change” but concluded it “maintained the same discussion regarding impacts and mitigation, and relied on the same data. . . . Re-circulation was not used as an opportunity to insert new conclusions as to significant impacts on the community.” IV AA 1396. This conclusion is erroneous and not supported by the record. For example, the RE-DEIR shifts the proposed road from a *four-lane collector road* to a *four-lane major road*. Although textually subtle, the difference between the road proposed in the DEIR and the road described in the RE-DEIR is dramatic. *Compare* AR 88:6957-58 (four-lane collector road; ADT: 6,500 at LOS D;

Design Speed: 30 mph) to AR 88:6969-70 (four-lane major road; ADT: 35,000 at LOS D; Design Speed: 55 mph).¹⁴ A proper summary would have alerted interested persons to this dramatic shift. Instead, the City permitted this information to be buried in the RE-DEIR, effectively obscuring it from view. *See City of Long Beach*, 176 Cal. App. 4th 902; *accord San Joaquin Raptor Rescue Ctr.*, 149 Cal. App. 4th at 659.

The failure to summarize the material changes to the Project was prejudicial and deprived the public of a meaningful opportunity to discuss and critique the Project. As the California Supreme Court noted, prejudice is inherent in CEQA violations that suppress key information. *Sierra Club*, 6 Cal. 5th at 515. Accordingly, the City violated the informational requirement of CEQA.

¹⁴ “ADT” stands for Average Daily Traffic which is the number of vehicles to pass a given point on a roadway during a 24-hour period on an average day. AR 88:7073. “LOS” stands for Level of Service and is a quantitative measure that represents quality of service for the driver. AR 2353:36635. LOS A represents the best operating conditions and LOS F represents the worst. *Id.* at 36635-36636. LOS C is the appropriate level per the City’s General Plan. AR 88:6932. LOS D is an acceptable level under CEQA. *Id.*

Design Speed is the maximum safe speed for the roadway. AR 88:7073.

3. The FEIR Failed to Adequately Analyze a Reasonable Range of Alternatives

“The core of an EIR is the mitigation and alternatives sections.” *Citizens of Goleta Valley*, 52 Cal. 3d at 564. Indeed, one of the main purposes of an EIR is “*to identify alternatives to the project.*” *Id.* at 565 (italics in original); Pub. Res. Code §§ 21001(g), 21061. The Guidelines direct:

An EIR shall describe a range of reasonable alternatives to the project, or to the location of 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.

Guidelines, § 15126.6(a). This robust discussion is required because “[i]t is the policy of the state that public agencies ***should not approve projects*** as proposed if there are ***feasible alternatives*** or feasible mitigation measures available which would substantially lessen the significant environmental effects of such projects....” *Citizens of Goleta Valley*, 52 Cal. 3d at 565 (emphasis added).

Feasibility is defined by the Legislature as “capable of being accomplished in a successful manner within a reasonable period of time, taking into account economic, environmental, social, and technological factors.” Pub. Res. Code § 21061.1. While “[a]n EIR

need not consider every conceivable alternative to a project,” an alternative need only be *potentially feasible* to warrant examination. Guidelines, § 15126.6(a).

The discussion of alternatives must “focus on alternatives capable of eliminating any significant adverse environmental effects or reducing them to a level of insignificance, even if these alternatives would impede to some degree the attainment of the project objectives, or would be more costly.” *Planning & Conservation League v. Dep’t of Water Res.*, 83 Cal. App. 4th 892, 917 (2000). The discussion of alternatives must be judged against a rule of reason. *Id.* (citing *Citizens of Goleta Valley*, 52 Cal. 3d at 565); Guidelines, § 15126.6(f). Importantly, a project may still be approved despite the existence of significant environmental impacts. *Habitat and Watershed Caretakers v. City of Santa Cruz*, 213 Cal. App. 4th 1277, 1302 (2013) (citing *Citizens of Goleta Valley*, 52 Cal. 3d at 564-65). However, it is the responsibility of the agency “to provide an adequate discussion of alternatives” and “[a]n EIR should not exclude an alternative from detailed consideration merely because it would impede to some degree the attainment of the project objectives.” *Id.* at 1303 (citations and quotations omitted).

In reviewing the sufficiency of the lead agency’s alternatives analysis, “a court may look at the administrative record as a whole to see whether an alternative deserved greater attention in the [EIR].” *Preservation Action Council v. City of San Jose*, 141 Cal. App. 4th 1336, 1351 (2006).

Here, the FEIR fails to adequately analyze the No Build/Remove Road Connection from MVCP alternative (the “Amend MVCP alternative”).¹⁵ Recall that the impetus to this Project was the *inconsistency* between the MVCP and the SMCP with respect to this potential roadway connection. *See* AR 31:318. The City Council concluded that amending the SMCP *to include* the connection would reconcile the conflict between the two plans. *Id.* at 319. If the primary purpose of considering an amendment to the SMCP was to reconcile its conflict with the MVCP, then a logical, feasible alternative would have been amending the MVCP *to remove* the road connection; this would have easily made the plans consistent with each other. That did not happen.

The Amend MVCP alternative was listed in the FEIR but summarily rejected for further analysis. *See* AR 51:4249-50; *see also* AR 2346:35731 (DEIR similarly rejecting the alternative in

¹⁵ This issue was raise at the administrative level. AR 51:3103-04.

summary fashion). The FEIR concluded that it would not meet four of the five listed objectives and would be inconsistent with other land-use plans but provided no data or analysis to support that conclusion. *See id.*¹⁶ Considering that the Project was rejected twice by the Planning Commission in 2004, rejected by the City Council in 2005, resoundingly rejected by the area residents, and failed to gain support from either the MVCPG or the SMCPG – not to mention all of the significant traffic impacts¹⁷ – it was an abuse of discretion to have dismissed the Amend MVCP alternative with ***no analysis.***

Importantly, the main objectives of the Project experienced a significant shift between the DEIR and the RE-DEIR/FEIR.¹⁸ Compare AR 2346:35730 to AR 51:4247-48 & 2349:36187-88.¹⁹ For instance, the DEIR's first objective was to resolve the inconsistency

¹⁶ The trial court, siding with City, concluded that the City's summary dismissal of the Amend MVCP alternative was appropriate because it did not meet the Project's objectives. IV AA 1381; *see also* I AA 142:1-49:20. However, as demonstrated below, that finding was not supported by substantial evidence in the record.

¹⁷ *See* sections IV.A.3.i and IV.A.4, *infra*.

¹⁸ This irregularity was raised at the administrative level. AR 916:15674.

¹⁹ The objectives listed in the RE-DEIR and FEIR were the same. *See* AR 51:4247-48; 2349:36187-88.

between the SMCP and MVCP “as it pertains to a connection from Mission Valley to Phyllis Place in Serra Mesa.” AR 2346:35465. In contrast, the FEIR’s first objective was to resolve the inconsistency between the MVCP and the SMCP “by providing a multi-modal linkage from Friars Road in Mission Valley to Phyllis Place in Serra Mesa.” AR 51:3866. The road connection went from a mere possibility to a concrete Project element. This prominent, multi-modal feature is important because under the DEIR amending the MVCP would have achieved ***all but one*** of the Project’s objectives. See AR 2346:35731 (noting that alternative was rejected only “because it would not promote inter-community connectivity as envisioned in General Plan”). Under the Project as described in the DEIR, there is substantial evidence in the record showing that the Amend MVCP alternative was not only feasible but would have met most of the Project’s objectives and it would have avoided the severe and unavoidable traffic impacts²⁰; thus, the Amend MVCP alternative should have been fully analyzed. See *Habitat and Watershed Caretakers*, 213 Cal. App. 4th at 1303 (“The EIR ‘is required to make an in-depth discussion of those alternative identified as at least potentially feasible.’” (italics in original)).

²⁰ See note 17, *supra*.

i. **Substantial Evidence Supports the Feasibility of the Amend MVCP Alternative**

The City argued that it properly exercised its discretion in dismissing the Amend MVCP alternative. *See* I AA 142:11-12. The trial court agreed. IV AA 1381. However, the standard is not whether an alternative is a perfect match to the Project, but whether the alternative is *potentially feasible*. *See* Pub. Res. Code § 21061.1; Guidelines, § 15126.6(a). Because the Amend MVCP alternative would require scant more than the Project – adding language to one plan is no more onerous than removing language from another – it was capable of being successfully accomplished in a reasonable period and accounting for economic, environmental, social, and technological factors; it was therefore feasible.

Rather than be faced with a *feasible* alternative to the Project, the City changed the Project description and the Project objectives such that the Amend MVCP alternative would appear infeasible. *Compare* AR 2346:35464 (amending community plan) & 35465 (resolving plan inconsistency pertaining to road connection) *to* AR 51:3865 (construction and operation of four-lane major street) & 3866 (resolving plan inconsistency by providing multi-modal linkage); *Cty. of Inyo v. City of Los Angeles*, 71 Cal. App. 3d 185, 199

(1977) (“an accurate, stable and finite project description is the Sine qua non of an informative and legally sufficient EIR. The defined project and not some different project must be the EIR’s bona fide subject.”).

Even under the revised Project description and objectives (and looking past the failure to summarize the revisions), there is substantial evidence in the record that the Amend MVCP alternative achieved most of the Project’s alternatives and would have lessened or avoided the significant environmental impacts of the Project. Guidelines, § 15126.6(a); *Preservation Action Council*, 141 Cal. App. 4th at 1351 (“the administrative record may be studied ‘to assess the degree of discussion any particular alternative deserves, based on the alternative’s feasibility and the stage in the decisionmaking process it is brought to the attention of the agency’”).

Project Objective no. 1. “Resolve the inconsistency between the [MVCP] and the [SMCP] by providing a multi-modal linkage from Friars Road in Mission Valley to Phyllis Place in Serra Mesa.” AR 51:4247. The City determined that the Amend MVCP alternative would not meet this objective because it would not provide a new multi-modal linkage – that is, a new road. AR

2349:36189; I AA 143:9-25. However, this conclusion – in addition to being reached with zero analysis – ignored evidence of all of the multi-modal linkages that already exist in the area to connect the two communities. *See* AR 916:15701 (SMCPG comment letter listing three existing multi-modal linkages). These linkages were acknowledged, either directly or indirectly, in the FEIR. *See, e.g.*, AR 51:4010. The City dismissed the existing pedestrian, bike, and emergency access between Aperture Circle and Kaplan Drive, stating that it did not provide passenger vehicle access. AR 51:3032. The City dismissed the planned pedestrian and ***bike trail*** from Phyllis Place to Friars Road by curiously stating that it would ***not*** allow bike access. *Id.*; *but see* AR 45:1701 (plan for Quarry Falls showing a planned bike path from Phyllis Place down to Friars Road with or without a road connection); *see also* AR 916:15701. Finally, the City dismissed the existing linkage via Mission Center Road, stating that it does not provide direct access from Phyllis Place down to Friars Road. AR 51:3032. As discussed above, an alternative need not be perfect to warrant analysis. *See Planning & Conservation League*, 83 Cal. App. 4th at 917.

“A lead agency may not give a project’s purpose an artificially narrow definition.” *N. Coast Rivers All. v. Kawamura*, 243 Cal. App.

4th 647, 668 (2015) (quoting *In re Bay-Delta etc.*, 43 Cal. 4th 1143 (2008)) (“*Kawamura*”). In *Kawamura*, the court held that the EIR’s alternatives analysis was deficient and in violation of CEQA because it summarily dismissed any alternative to the subject pest-control program that did not achieve ***complete eradication*** and only proposed to ***control*** the pests. *Id.* at 668-70. There, the court held that this failure to address non-eradication alternatives was prejudicial because it precluded informed decision-making and informed public participation. *Id.* at 670-71.

Similarly, here, the RE-DEIR/FEIR summarily dismissed any alternative that did not construct a road.²¹ The decision to forego a full analysis of the Amend MVCP alternative prevented the decision-makers from fully examining this viable alternative that would avoid all the significant traffic impacts, garner support from the local residents, and reconcile the inconsistency between the two community plans. Instead, the FEIR informed decision-makers that there was no other way to achieve the Project’s objectives except to transform two steep and curvy residential roads in one of San

²¹ As discussed in section IV.A.3.ii, *infra*, the No Project alternative and the Amend MVCP alternative were distinct and should not have been equated by the City (in their analysis) or the trial court (in its ruling).

Diego's premier walkable neighborhoods into busy throughways with freeway access. AR 51:4249-50.

Thus, the conclusion that the Amend MVCP alternative did not meet Objective no. 1 is not supported by the record.

Project Objective no. 2. "Improve local mobility in the Serra Mesa and Mission Valley planning areas." AR 51:4247. The City determined that the Amend MVCP alternative would not meet this objective because "no roadway would be constructed, thereby limiting routes between these planning areas." *Id.* at 4250; I AA 143:26-44:16. Again, this conclusion was reached with zero analysis. *See* AR 51:4250.

As discussed above, there are already routes and linkages between the communities. In addition, there are plans to improve these existing linkages. For instance, the Civita/Quarry Falls project already requires improvements to Mission Center Road between I-805 and Murray Ridge Road if the Project is not approved. *See* AR 915:15635 & 45:2002. The City dismisses this existing mitigation measure as being irrelevant because widening of Mission Center Road "would not occur [with the Project]" and because there is "sensitive biological resources protected as Multi-Habitat Planning Area (MHPA) on both sides of the roadway." AR 51:3012-13; AR

2349:36194 (Section 9.5.1 of DEIR). But there is no evidence in the record that removal of this mitigation measure (widening Mission Center Road) was ever studied or approved. Further, that an environmental impact may need to be mitigated in order for widening to move forward is not evidence that the widening is unlikely to occur. In fact, when this Project was proposed as a part of Civita/Quarry Falls, it was recognized that the road connection would “result in greater impacts to biological resources, due to construction of the road through sensitive habitat.” AR 44:895. Rather than canceling the Project, the City mitigated the impacts. *See* 51:4119-20 (MM BIO-1 & BIO-2 mitigating biological impacts caused by the Project). Thus, it is clear that the need for mitigation does not make an alternative infeasible. *See* Guidelines, § 15126.6(a).

In sum, the conclusion that the Amend MVCP alternative did not meet Objective no. 2 is not supported by the record. There is substantial evidence showing that amending the MVCP to remove the road connection and move forward with existing mobility improvement plans that have already been studied and approved – *e.g.*, widening Mission Center Road – would achieve Objective no. 2.

Project Objective no. 3. “Alleviate traffic congestion and improve navigational efficiency to and from local freeway on- and off-ramps for the surrounding areas.” AR 51:4248; *see also* 2346:35465. The City determined that the Amend MVCP alternative would not meet this objective because not building a roadway would “limit[] access *options* for those in the areas within the vicinity of the project site.” AR 51:4250 (emphasis added). Again, this conclusion was reached with zero analysis. *See id.* In opposition to the petition, the City relied on its view that the Project was superior to the Amend MVCP alternative. *See* I AA 144:17-46:16. But again, the standard for determining whether an alternative warrants further study is feasibility, not superiority or perfection.²²

First, the Amend MVCP alternative does not include the removal of any existing access options. *See* AR 51:4249 (“The [Amend MVCP alternative] would not include the construction and operation of the roadway . . . and would remove language regarding the potential connection from the [MVCP].”)

²² For instance, that the Amend MVCP alternative might not “improve navigational efficiency” (half of the objective) does not categorically preclude it from further study. *See Planning & Conservation League*, 83 Cal. App. 4th at 917.

Second, when the Amend MVCP alternative was dismissed under the DEIR, it was rejected only because it did not “promote intercommunity connectivity,” a separately listed objective. AR 2346:35730, 35731. The clear implication is that this alternative did meet the other objectives, including “alleviate traffic congestion.” *Id.* This is consistent with the observation that the Project itself will divert traffic rather than minimize it. *See* AR 51:4223.

Third, there is substantial evidence in the record demonstrating that the Amend MVCP alternative – *i.e.*, not building the roadway – would be better for traffic congestion than the Project. With the Project, Serra Mesa’s morning traffic would improve for 14 percent of intersections, not change for 43 percent of intersections, and **worsen for 43 percent** of intersections. AR 51:4030-33 & 915:15662. Mission Valley’s morning traffic would improve for 0 percent of intersections, not change for 94 percent of intersections, and **worsen for 6 percent** of intersections. *Id.* The afternoon numbers are not much better with the Project: Serra Mesa would improve for 14 percent of intersections, not change for 29 percent of intersections, and **worsen for 57 percent** of intersections; Mission Valley would improve for 18 percent of intersections, not change for 70 percent of intersections, and **worsen**

for 12 percent of intersections. AR 51:4030-33 & 915:15663. Finally, as to Serra Mesa, the Project will improve 0 percent of roadway segments, not change 67 percent of roadway segments, and *worsen 33 percent of roadway segments*; for Mission Valley, it will improve 25 percent of roadway segments, not change 55 percent of roadway segments, and *worsen 20 percent of roadway segments*. AR 51:4028-29 & 915:15664-65. Additionally, even under the VMT model, the Project would result in barely perceptible decreases to freeway mainline segments of 1.8 percent within the study area and 0.32 percent region-wide.²³ AR 51:4022.

What these numbers really show is that traffic is not being *alleviated* under the Project so much as being *redistributed* to the Serra Mesa community. See AR 51:4021 (The proposed project would not add trips . . . rather, vehicle trips would be redistributed to other regional circulation network infrastructure.) Meanwhile, substantial evidence in the FEIR shows that traffic congestion would be the same *or better* under the Amend MVCP alternative than with the Project at most intersections and in most roadway segments. Therefore, to say that the Amend MVCP alternative was

²³ Additional issues with the VMT model used is discussed in section IV.A.4.i, *infra*.

eliminated from further analysis because it did not alleviate traffic congestion is to say that the Project, too, should have been eliminated from contention. If, under this data, the Project meets this objective, so too does the Amend MVCP alternative because it would not redistribute freeway congestion onto residential roads. Thus, the conclusion that the Amend MVCP alternative did not meet this objective is unsupported – even belied – by the record.

Project Objective no. 4. “Improve emergency access and evacuation route options between the Serra Mesa and Mission Valley Planning Areas.” AR 51:4248. The City determined that the Amend MVCP alternative would not meet this objective because “it would not provide additional ingress/egress for emergency responders, nor would an additional emergency evacuation route be created.” *Id.* at 4250. Again, this conclusion was reached with zero analysis. *Id.* Rather, the City supports its conclusion by pointing to discussion *of the Project*. See I AA 147:22-28. Unfortunately, none of that speaks to whether the Amend MVCP alternative was itself feasible, warranting its own study.

The FEIR discloses that emergency access from Serra Mesa to Mission Valley *already exists* between Aperture Circle and

Kaplan Drive.²⁴ AR 51:4048. The FEIR states that this existing access “is only intended for emergency access” but then confusingly states it is “not as easily accessible for emergency responders” despite it being only for their use. *Id.* Nonetheless, the FEIR failed to study whether this existing access would meet this objective under the Amend MVCP alternative. Moreover, the Amend MVCP alternative does not propose eliminating or impeding any existing emergency access routes.

Thus, the conclusion that the Amend MVCP alternative could not meet this objective is not supported by the record as no analysis was completed.

Project Objective no. 5. “Provide a safe and efficient street design for motorists, cyclists, and pedestrians that minimizes environmental and neighborhood impacts.” AR 51:4248. The City determined that the Amend MVCP alternative did not meet this objective because “no roadway would be constructed.” *Id.* at 4250. Again, this determination is not supported by any analysis. *See id.*

First, as criticized in *Kawamura*, creating objectives so narrow that they could not be met by anything other than the

²⁴ This disclosure did not appear in the RE-DEIR and was later added to the FEIR. *See* AR 51:2867 (underline markings mean inserted text); 4248 (text).

proposed project does not meet the requirements of CEQA, in letter or in spirit. *See Kawamura*, 243 Cal. App. 4th at 667-68. There, the agency declined to study any pest-**control** alternatives not because it would not lessen the environmental effects, but because it would not achieve the stated goal of total pest **eradication**. *Id.* at 667. The court held “this position confuses the CEQA project, objectives, and purposes” and resulted in an “improper ‘artificially narrow’ definition” in violation of CEQA. *Id.* at 667-69. Here, the City (summarily) concluded that the Amend MVCP alternative would not meet Objective no. 5 because “no road would be constructed.” AR 51:4250. However, just like in *Kawamura*, the construction of the road is the **purpose**, not the objective. *See* AR 51:3865. The objective here is to “provide a safe and efficient street design.” *Id.* at 3866, 4248. To conclude that this objective is not met because it does not construct a road is to confuse the purpose and objective. *See Kawamura*, 243 Cal. App. 4th at 667-69. Had the City fully studied the Amend MVCP alternative, it could have analyzed whether the existing street design was safe and efficient, both standing alone and in comparison to the Project.

Second, there is substantial evidence in the record to demonstrate that Via Alta and Franklin Ridge already provide a

safe and efficient design and that the safety and efficiency of the these roads will be completely destroyed by the Project because it would divert thousands of daily vehicle trips to these residential roads. AR 51:2916 (public comment); 4021 (redistributing vehicle trips). Both Via Alta and Franklin Ridge are classified as “two-lane collector roads” and have bike lanes, medians, and wide sidewalks. *See* AR 45:1557 (Quarry Falls EIR), 2349:35862 (RE-DEIR); *see also* AR 88:6958-59 (Street Design Manual).²⁵ Indeed, Civita/Quarry Falls was always meant to create a pedestrian-friendly, walkable community and was designed to achieve that vision. AR 59:6238, 6276, 6297.

In contrast, the Project seeks to up-end this vision by turning Via Alta and Franklin Ridge into throughways. *See* AR 51:4028-29.²⁶ Re-designating these two roads from “two-lane collector roads” to “two-lane major roads” significantly changes the character of their use, including speed. *Compare* AR 88:6957-58 (four-lane collector road; ADT: 6,500 at LOS D; Speed: 30 mph) *to* AR 88:6969-70 (four-

²⁵ Curiously, the FEIR does not describe these roads as “collector roads” but as “two-lane Major Arterials.” *See* AR 51:3997.

²⁶ The City argued that “Via Alta and Franklin Ridge were designed to accommodate the amount of vehicle traffic contemplated [by the Project].” I AA 148:22-25. As discussed below, the evidence in the record does not support that claim.

lane major road; ADT: 35,000 at LOS D; Speed: 55 mph). Increasing the potential maximum speed of these roads from 30 mph to 55 mph will negatively affect the safety and pedestrian-friendly nature of these roads. *See* AR 51:2917 (“This community cannot successfully serve two diametrically opposed purposes. It cannot be a safe walkable dense urban village and a conduit for freeway traffic at the same time.”).

The Project will result in an increase of average daily trips from 2,420 to **34,540, a more than 14-fold increase in new vehicle trips**. *See* AR 51:4028 (on Phyllis Place; Franklin Ridge Rd to I-805 SB ramp). Residents and pedestrians on Franklin Ridge will suffer **20,919 trips (2-fold increase)**; on Via Alta, they will suffer **11,686 trips (3-fold increase)**. *Id.* at 4028 (on Franklin Ridge Road; Via Alta to Civita Blvd), 4029 (on Via Alta; Franklin Ridge Rd to Civita Blvd). These increases dramatically reduce the levels of service of these roads to unacceptable levels. *See id.* The Amend MVCP alternative would avoid these increases and maintain Via Alta and Franklin Ridge as the quiet, slow residential roads they were designed to be. There is no evidence that these roads are unsafe or inefficient in their current configuration; nor is there any

evidence that amending the MVCP would make these roads less safe.

Thus, the conclusion that the Amend MVCP alternative did not (or could not) meet this objective is not supported by the record.

Other Plan Inconsistencies. Finally, the EIR states (again, without analysis):

[A]lthough [the Amend MVCP] alternative would remove the language associated with the roadway connection [from the MVCP], it would not resolve the inconsistency with other land use plans that have already been adopted. For example the City's Climate Action Plan ["CAP"] and the Bicycle Master Plan Update ["BMP"] include the proposed roadway in its assumptions. Therefore, this inconsistency would require additional environmental analysis prior to removal from the [MVCP], and the plans that indicate the connection would potentially need to be amended.

AR 51:4250.

The Amend MVCP alternative need not have met all of the Project's objectives in order to warrant full consideration and study. See Guidelines, § 15126.6(a) (alternatives need only *feasibly* attain *most* of the basic objectives); *Planning & Conservation League*, 83 Cal. App. 4th at 917 (even alternatives that impede to some degree the attainment of the project objectives should be considered). "If an alternative is identified as at least potentially feasible, an in-depth

discussion is required.” *See Ctr. for Biological Diversity v. Cty. of San Bernardino*, 185 Cal. App. 4th 866, 883 (2010).

The Amend MVCP alternative has been proposed since the Project’s inception. *See, e.g.*, AR 2340:34606 (staff directed to study Quarry Falls without road connection), 34607 (noting community plan’s inconsistencies “could be resolved in either direction, with or without the street connection”); 2353:36574 (suggesting amending the MVCP). At no point does the FEIR state that the Amend MVCP alternative is infeasible. *See* AR 51:4249-50. Similar to *Center for Biological Diversity*, the traffic (and safety) impacts associated with diverting a large number of daily vehicle trips through the Civita neighborhood are substantial and the most detrimental aspect of the Project, thus warranting more than a passing dismissal in the FEIR. *Accord Ctr. for Biological Diversity*, 185 Cal. App. 4th at 884-85 (finding that FEIR’s conclusory discussion of infeasibility of enclosed facility alternative to proposed open-air facility was insufficient where impacts on air quality were substantial and most detrimental aspect of project; holding that claims of infeasibility must be supported by substantial evidence). Furthermore, as discussed above, there is substantial evidence that the alternative meets most of the Project’s objectives.

Also, the conclusion that the Amend MVCP alternative is inconsistent with other land-use plans such as the City's CAP and the BMP is not supported by the record. AR 51:4250. That the Project is consistent with these plans says nothing about the Amend MVCP alternative. *See* I AA 148:26-49:8. There is no evidence of these alleged inconsistencies; the FEIR does not cite a single section of either the CAP or the BMP that the Amend MVCP alternative would frustrate. *See* AR 51:4250. The fact is: neither the BMP, the CAP, the CAP EIR, nor the CAP appendices discuss the road connection that is the subject of this Project.²⁷ *See generally* AR 2337:34468-34563 (CAP appendices); 2342:34688-872 (Bicycle Master Plan), 2344:34924-35375 (CAP EIR), 2345:35376-449 (CAP). The City even admits that “[the Amend MVCP alternative would need to be fully analyzed for potential conflicts with the CAP and other land use and transportation plans.” I AA 149:9-10.

Thus, there is no evidence that the Amend MVCP alternative would be inconsistent with any of these land-use documents.

²⁷ The BMP does contain maps that appear to include this road connection as a *proposed* bike path. *See, e.g.*, AR 2342:34791. However, the Project is not mentioned by name anywhere in the BMP and the route is not considered “high priority.” *See id.* at 34788, 34798-99. Moreover, the Project site is slated to have a public park and bike paths are already planned even if the road connection is not built. *See, e.g.*, AR 45:1701.

ii. **The Amend MVCP Alternative and the No Project Alternative Are Different and Distinct**

The trial court found that the FEIR's anemic and conclusory comments dismissing the Amend MVCP alternative sufficient under CEQA.²⁸ IV AA 1381; *see also* I AA 149:21-50:22 (arguing that evidence to support "no project alternative" analysis supports the Amend MVCP alternative). The trial court reasoned that the analyses of the No Project alternative and the Amend MVCP alternative were complimentary and together were sufficient under CEQA. *Id.* at 1381.

As described in *Planning & Conservation League*:

A no project description is *nonevaluative*. It provides the decision makers and the public with specific information about the environment if the project is not approved. It is a factually-based forecast of the environmental impacts of preserving the status quo. It thus provides the decision makers with a base line against which they can measure the environmental advantages and disadvantages of the project and alternatives to the project.

By contrast, the discussion of alternatives is *evaluative*. Measured by the rule of reason, the feasibility of various alternatives is considered. But the

²⁸ For the reasons stated above, the FEIR's discussion was far from sufficient given the alternative's feasibility.

essential ingredient in determining feasibility is the assessment of the alternative in relation to the objectives of the project.

Planning & Conservation League, 83 Cal. App. 4th at 917-18 (emphasis added). Here, the No Project alternative and the Amend MVCP alternative serve two separate purposes. The No Project alternative would have maintained the status quo: namely, no road connection and inconsistent community plans. AR 51:4250. In contrast, the Amend MVCP alternative would have done more than maintained the status quo; it would have reconciled the inconsistency between the plans. *Id.* at 4249. Indeed, it would have met four of the five original objectives.²⁹ See AR 2346:35731. Furthermore, had the Amend MVCP alternative been fully analyzed, other solutions related to inter-connectivity between the communities and emergency access could have been identified and examined (and possibly added to the alternative). Therefore, the trial court erred in equating the No Project alternative with the Amend MVCP alternative.

* * *

²⁹ Again, the City restructured the Project's objectives between the DEIR and the RE-DEIR/FEIR. AR 2346:35465; 51:3866.

Amending the MVCP to remove the proposed roadway connection was a feasible alternative that should have been fully analyzed in the FEIR. Not doing so was an abuse of discretion, resulting in the FEIR's failure as an information document and hampering informed public participation and informed decision-making.

4. **The FEIR Failed to Adequately Analyze the Project's Traffic Impacts**

The FEIR concluded that the traffic impacts on freeway mainline segments from the Project would be less than significant. AR 51:4022. However, there is substantial evidence in the record that the FEIR misrepresented the traffic data in order to reach the "less than significant" conclusion.³⁰ Additionally, the traffic hazards on Via Alta and Franklin Ridge were completely ignored.

i. **The FEIR Misrepresented Traffic Data**

An EIR's presentation and discussion of technical data "must not only be sufficient in quantity, it must be presented in a manner calculated to adequately inform the public and decision makers, who may not be previously familiar with the details of the project. Information 'scattered here and there in EIR appendices' or a report

³⁰ This was raised at the administrative level. AR 2203:32440-42.

‘buried in an appendix,’ is not a substitute for ‘a good faith reasoned analysis.’” *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova*, 40 Cal. 4th 412, 442 (2007) (citations omitted) (certifying an EIR that relied on information not actually incorporated or described and referenced in the EIR was a failure to proceed in a manner provided by CEQA).

Here, a traffic impact is considered significant if, among other things, the project results in “[t]he addition of a substantial amount of traffic to a congested freeway interchange or ramp, or in a substantial increase in [Vehicle Miles Traveled (‘VMT’)] for freeway mainline segments.” AR 51:4013. In making its determination, the FEIR claimed to “refocus the attention of analysis to reducing VMT on the regional circulation network.” *Id.* at 4021. As such, “a significant impact would occur if the project would result in a substantial increase in VMT when compared to the baseline condition.” *Id.* at 4014. The FEIR then directed the reader 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 0.32 percent” on a region-wide basis, for the near-term year 2017. AR 51:4022; 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 0.28 percent decrease on a region-wide basis for that same year. AR 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.* Michael Calandra, one of the two principal authors of the white paper, was an engineer at SANDAG. AR 2341:34623. When he was asked about the potential margin of error in the model, he replied that this particular model had a margin of error of “+/- 10% of observed conditions for the region as a whole” and “+/- 7% from day-to-day” for freeways and highways. AR 2203:32459-60. He went on to state 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.*³¹

In other words, the FEIR’s conclusion that in 2017 the Project will **decrease** VMT within the study area by 1.8 percent, and in the region by 0.32 percent, was subject to a **7 to 10 percent margin of**

³¹ This information was shared with the City prior to the certification of the FEIR. *See* AR 86.1:6874:25-75:22; 2203:32435; 2350:36281:4-82:16.

error. Furthermore, the predicted 1.8 percent decrease in the study area, and the 0.28 percent decrease in the region for the year 2035 was subject to an even *greater margin of error*. The FEIR does not disclose this margin of error, let alone analyze or discuss it. Given the possibility of a 10-point swing, the Project could actually increase VMT by 10 percent now and by an even higher percent in the future. Not only are the benefits (decreased VMTs) negligible at best, but the potential 10-point swing could put the traffic impacts as significant – requiring feasible mitigation.

The trial court found that “[a]lthough the accuracy of the VMT modeling is subject to reasonable debate, it is not clearly inadequate or unsupported.” IV AA 1383. The court further supported its ultimate finding of adequacy with the fact that a member of Save Civita raised the issue in written correspondence and at meetings. *Id.* However, it is not the responsibility of concerned citizens to provide proper disclosures under CEQA; in this case, that was the City’s job. *See* Guidelines, § 15144. Had the FEIR properly considered this margin of error, it could have mitigated accordingly.

All this potential variation should have been disclosed, analyzed, and mitigated; but it was not. Thus, the FEIR’s conclusion

that there will be no increase in VMT is not supported by substantial evidence.

ii. **The FEIR Ignored Obvious Traffic Hazards to Via Alta and Franklin Ridge**

The FEIR's analysis of the Project's traffic impacts includes a discussion of traffic hazards; it asks, "[w]ould the proposed project result in an 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)?" AR 51:4046. The FEIR concludes that the Project could "result in possibly unsafe conditions for motorists entering or exiting the City View Church parking lot, as the driveway would be approximately 150 feet east of the signalized intersection [at Phyllis Place]. Therefore, impacts would be potentially significant and mitigation is required." *Id.* at 4046-47. As this was the only impact identified, it was the only impact mitigated. *See id.* at 4047.

Evidence in the record confirms that Via Alta and Franklin Ridge are ***steep and curvy***, meaning they allow for high vehicle speeds and have poor sight distance. *See, e.g.*, AR 69:6546-47 (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 Deborah 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); *see also* AR 2350:36322:18-23:3 (noting potential for road to become “speedway”).

The City’s own graphics confirm that 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.*, AR 69:6545. If the curve on Phyllis Place was significant enough to warrant mitigation for the church, then the steep and curvy nature of Via Alta and Franklin Ridge should have likewise been considered significant enough to warrant study and mitigation for the residents of Civita.

Nowhere in the FEIR are the potential traffic hazards to Via Alta and Franklin Ridge discussed despite the issue being raised by City officials and staff and during public comment. *See, e.g.*, AR 2350:36334 (City staffer acknowledging that Project would cause “localized impacts” that would not occur but for road connection), 36340-41 (Commissioner Granowitz discussing need for pedestrian crossings along Via Alta and noting need to include protections for residents); *see also* AR 86.1:93-94. Those localized impacts include

“grades [that] will *encourage people to drive faster than the speed limit*. It’s unfortunate but it’s human behavior.” AR 2350:36360.

City staff rationalized not examining potential traffic hazards along Via Alta and Franklin Ridge by myopically insisting that only the road connection – Phyllis Place – was under consideration and that the roads into Civita were “separate and not before the [planning commission] today.” *Id.* at 36341. Not accepting this compartmentalization, Commission Granowitz pressed staff on the impacts to Civita’s roads, to which staff indicated that impacts related to pedestrian and bike access in Civita were addressed in the traffic analysis. *See id.* at 36342. This false statement was quickly corrected by another staff member who indicated there was not enough information to determine the impacts because Civita was (is) not yet fully built out. *See id.* at 36342, 36344 (testimony of Mr. Hajjiri); *but see* AR 2090:31648-31669 (public presentation about lack of mid-block pedestrian crossings that cut-off residents from safe, easy access to parks and school, tediously showing how Project met all City criteria for such measures); *Citizens Ass’n for Sensible Dev. of Bishop Area v. Cty. of Inyo*, 172 Cal. App. 3d 151, 173 (1985) (relevant personal observations of residents are

substantial evidence). In truth, nowhere in the FEIR or Traffic Impact Report are the potential traffic hazards to Via Alta or Franklin Ridge discussed despite CEQA's imperative to look at regional impacts. *See Citizens of Goleta Valley*, 52 Cal. 3d at 575 (“EIR may not ignore regional impacts . . . including those that occur outside [the project's] borders; . . . a regional perspective is required”).

The trial court, in finding the discussion of these traffic hazards adequate, reasoned that these roads (with and without a connector road) were extensively analyzed in the Civita/Quarry Falls EIR and that Save Civita had not cited any authority for the proposition that the impacts should be re-evaluated. IV AA 1384. The trial court also held that there was no evidence of a non-standard design feature affecting these roads and, thus, no significant impact. *Id.* As discussed above, there are non-standard design features the impacts of which will be significant given the amount of traffic slated to be redirected to these roads. Furthermore, the requirement that the CEQA analysis take a regional approach (*i.e.*, no be limited to just the road connection) and the residents' personal observations (which are evidence) support the conclusion that the City failed to adequately analyze the

potential traffic hazards identified by Save Civita and others. Thus, it was an abuse of discretion to fail to examine those potential hazards particularly given that one of the intended consequences of the Project was to redistribute a significant amount of traffic from the freeway onto these roads. *See* AR 51:4223.

5. **The EIR Failed to Adequately Analyze the Project’s Impacts on and Inconsistency with Relevant Land-Use Plans**

An EIR must discuss “*any inconsistencies* between the proposed project and applicable general plans, specific plans and regional plans.” Guidelines, § 15125(d) (emphasis added). “[T]here is no requirement that an EIR itself be consistent with the relevant general plan, [however,] it must identify and discuss any *inconsistencies* between a proposed project and the governing general plan. Because EIRs are required only to evaluate ‘any *inconsistencies*’ with plans, no analysis should be required if the project is *consistent* with the relevant plans.” *N. Coast Rivers All. v. Marin Mun. Water Dist. Bd. of Directors*, 216 Cal. App. 4th 614, 632 (2013) (citations and quotations omitted; italics in original). The City’s CEQA Significance Determination Thresholds explain further that a plan inconsistency must relate to an environmental issue to be considered significant. *See* AR 51:3968. Potentially significant

impacts include conflicts or inconsistencies with the environmental goals, objectives, or guidelines of a community or general plan and substantial incompatibility with an adopted plan. *Id.*

The City's General Plan is completely built around the City of Villages concept and strategy. AR 2355:37162, 37166-67. Thus, the Land Use and Community Planning Element ***begins***: “[This Land Use Element] provides policies to guide the City of San Diego’s growth and implement the City of Villages strategy within the Context of San Diego’s community plan program.” AR 2355:37198. “The City of Villages strategy is to focus growth into mixed-use activity centers that are ***pedestrian-friendly***, centers of community, and linked to the regional transit system.” *Id.* at 37201 (emphasis added). “All villages will be ***pedestrian-friendly*** and characterized by inviting, accessible, and attractive streets and public spaces.” *Id.* (emphasis added). The strategy aims to guide development in an environmentally conscious way. *See id.* at 37201-02 (focusing on natural environment, density, and reducing greenhouse-gas emissions).

Civita/Quarry Falls was specifically designed to meet the City of Villages vision. *See* AR 59:6299 (“The Quarry Falls plan embodies this village concept and exemplified San Diego’s desired future

development strategy”), 6300 (“Quarry Falls implements the City of San Diego’s ‘City of Villages’ strategy”); *see also id.* at 6274-6278 (detailing Civita/Quarry Falls’ “Walkable Community” vision). Indeed, this was a selling point for many Civita residents. *See, e.g.*, AR 842:15221, 15222; 844:15232; 867:15282.

The FEIR admits that projects are “required to demonstrate consistency with the guiding vision of the general plan, which sets forth a ‘city of villages’ strategy,” but then defines that strategy as one “that aims to concentrate density in parts of the city that are considered appropriate, such as community areas like those within Mission Valley that are adjacent to existing transit and jobs.” AR 51:4198.

Against this backdrop, the FEIR fails miserably. First, the General Plan’s goal and promotion of walkability and pedestrian-friendly development is almost completely ignored in the FEIR.³² Moreover, the FEIR lacks substantial evidence to support the conclusion that “the proposed project would implement and uphold the goals, policies, guidelines, and recommendations contained

³² The “City of Villages” is mentioned only twice in Section 5.1 (Environmental Analysis: Land Use) of the FEIR, under Regulatory Framework. *See* AR 51:3961. The fact that Civita/Quarry Falls is supposed to be a “walkable community” is mentioned only once under Surrounding Land Uses. *See* AR 51:3956.

within the existing City of San Diego General Plan and the [SMCP].”³³ AR 51:3973.

The FEIR should have discussed the Project’s inconsistencies with the environmental goals, objectives, and guidelines contained in the City’s General Plan and embodied in the City of Villages strategy: namely, developing walkable urban villages that are pedestrian-friendly and designed to get people out of their cars. AR 2355:37167; *see San Bernardino Valley Audubon Soc’y Inc. v. Cty of San Bernardino*, 155 Cal. App. 3d 738, 753 (1984) (upholding inconsistency determination based on inconsistency with single measure).

Second, the FEIR omits relevant policies from its analysis. For instance, Policy ME-C.6 states:

Locate and design new streets . . . to:
respect the natural environment, scenic character, and ***community character*** of the area traversed; and meet safety standards.

...
b. Design roadways and road improvements ***to maintain and enhance neighborhood character.***

³³ This issue was raised at the administrative level. *See* AR 2203:32437-38.

AR 2355:37274 (emphasis added). Despite this Project consisting of a new street connection, Policy ME-C.6 is not listed or discussed. *See* AR 51:3974-86. Furthermore, there is substantial evidence in the record that tends to demonstrate that community character is not being respected, maintained, or enhanced. *See, e.g.*, AR 2350:36334, 36341 (City staffers acknowledging that Project will result in localized impacts but insisting on narrow focus to FEIR's study area).

This is inexplicable given that the Project will result in a **14-fold increase** of average daily vehicle trips on Phyllis Place. AR 51:4028 (last line on page showing increase from 2,420 to 34,540). Franklin Ridge and Via Alta – brand new roads in the new Civita/Quarry Falls – will experience two- and three-fold increases in average daily vehicle trips, respectively. *Id.* at 4028 (20,919 ADT), 4029 (11,686 ADT). Civita/Quarry Falls was touted as one of San Diego's premier walkable communities. *See, e.g.*, AR 59:6274-78. Sending thousands of more vehicle trips through this walkable community (and past a future school site³⁴) on a daily basis would undoubtedly have a detrimental impact on, and thus would be

³⁴ *See* AR 51:3925 (map showing school site option), 4050 (roadway will be adjacent to potential school).

inconsistent with, its walkability. This concern was raised multiple times during public comment. *See, e.g.*, AR 51:2916-19, 3040-56. Nowhere in the FEIR is this inconsistency discussed.

Third, where the FEIR does discuss the Walkable Community goals, it concludes that the Project is consistent. *See* AR 51:3976-77. In fact, the FEIR does not list a single instance of nonconformance with the applicable goals, policies, guidelines, and recommendations contained within the existing General Plan, SMCP, or MVCP. *See* AR 51:3974-86 (left-most column). Again, even if the landscape buffer, ADA compliance, and sidewalks are sufficient to meet the Walkable Community goals, the discussion still omits the exponential increase in vehicle traffic through the community. *See id.*

The FEIR goes to great lengths to cherry-pick those elements of the General Plan with which it is consistent. *See generally* AR 51:3974-86. It is not just that Save Civita disagrees with the FEIR's conclusions; it is that consequential information – information that could have affected the adequacy of the disclosures and analysis for this Project – was left out. *See* IV AA 1382. In order to foster informed discussion and decision-making, an EIR must discuss the Project's ***inconsistencies*** with applicable land-use documents.

Guidelines, § 15125(d). There is substantial evidence in the record that the FEIR's analysis of the Land Use inconsistency was insufficient and failed to foster informed participation and decision-making because it made the Project appear 100 percent consistent. Avoiding those elements that are inconsistent with the Project is a violation of CEQA. *See N. Coast Rivers All.*, 216 Cal. App. 4th at 632.

In sum, Save Civita does not argue that the Project could never be approved. The argument, rather, is that the FEIR was so deficient in the above-discussed ways that the process by which the Project was approved subverted the goals of CEQA and informed decision-making.

B. City Violated the Planning and Zoning Law

The PZL requires every county and city to adopt a “comprehensive, long-term general plan for the physical development of the county or city. . . .” Gov't Code §§ 65000, 65300. The general plan has been described as the “constitution for all future developments” within a city or county. *See Citizens of Goleta Valley*, 52 Cal. 3d at 553. It sits “at the top of the hierarchy of local government law regulating land use.” *DeVita v. Cty. of Napa*, 9 Cal. 4th 763, 773 (1995). Accordingly, “the propriety of virtually any local

decision affecting land use and development depends on consistency with the applicable general plan and its elements.” *Citizens of Goleta Valley*, 52 Cal. 3d at 553; *see also, e.g.*, Gov’t Code §§ 65454 (requiring specific plans to be consistent with general plan), 65460.8 (requiring transit village plans to be consistent with general plan).

The requirements of the PZL differ from the requirements of CEQA in that CEQA requires analysis and discussion of the project’s ***inconsistencies*** with applicable land-use plans, whereas the PZL requires analysis and discussion of the project’s ***consistency*** with applicable land-use plans. *Compare* Guidelines, § 15125(d); *N. Coast Rivers All.*, 216 Cal. App. 4th at 632 (under CEQA, a project need not be consistent with applicable land-use plans but may not be inconsistent with them).³⁵

“[Courts] review decisions regarding consistency with a general plan under the arbitrary and capricious standard. . . . [T]he inquiry is whether the decision is arbitrary, capricious, entirely lacking in evidentiary support, unlawful, or procedurally unfair. [Citations.] Under this standard, [the court] defer[s] to an agency’s

³⁵ The trial court relied on its determination that the Project’s land-use discussion satisfied CEQA to hold that the City had not violated the PZL but these are separate statutes requiring separate treatment. *See* IV AA 1384. Satisfying CEQA does not answer the question of whether a Project violates the PZL.

factual findings of consistency unless no reasonable person could have reached the same conclusion on the evidence before it.” *Spring Valley Lake Ass’n v. City of Victorville*, 248 Cal. App. 4th 91, 99 (2016) (citing *Cal. Native Plant Soc’y v. City of Rancho Cordova*, 172 Cal. App. 4th 603, 637 (2009)). “A project is consistent with the general plan if, considering all its aspects, it will further the objectives and policies of the general plan and not obstruct their attainment. A given project need not be in perfect conformity with each and every general plan policy. To be consistent, a subdivision development must be ‘compatible with’ the objectives, policies, general land uses and programs specified in the general plan.” *Id.* (citations and quotations omitted); *but see San Bernardino Valley Audubon Soc’y, Inc.*, 155 Cal. App. 3d at 753.

As discussed above, the Project would result in a substantial increase in vehicle thru-traffic on three residential roads: Phyllis Place, Via Alta, and Franklin Ridge. *See* AR 51:4028-29. Also as discussed above, this increase in vehicle traffic was not analyzed against the City of Villages concept which emphasizes walkable communities and pedestrian-friendly features. *See* AR 2355:37201. Sending thousands of vehicles through what is designated by law as a walkable urban village – their drivers’ destinations *not* being

inside Civita/Quarry Falls – is not consistent with the City of Villages concept and would obstruct the attainment of its goals. *See* AR 2353:36679 (prioritizing freeway access); *see also* AR 51:3941 (proposed roadway would be “[a] street that primarily provides a network connecting vehicles and transit to other major streets and primary arterials, and to the freeway system”). This is not an instance of the FEIR’s discussion being deficient or falling short under CEQA; the discussion demonstrating consistency is not there at all as required by the PZL. *See also Spring Valley Lake Ass’n*, 248 Cal. App. 4th at 100 (editorializing in response to comments falls short of bridging analytical gap between raw evidence and ultimate decision), 101 (where evidence is wholly lacking, it cannot be said there is substantial evidence to support consistency finding).

City of Villages is the overarching concept and objective of the General Plan. *See* AR 2355:37198. Civita/Quarry Falls was designed and approved to be one of these “villages.” *See* AR 59:6246 (“*Quarry Falls - a ‘City of Villages’ as outlined in the city’s General Plan*”), 6299 (“The Quarry Falls plan embodies this village concept”). Failing to address the Project’s consistency (or lack thereof) with the City of Villages strategy was a violation of the PZL.

C. City Violated the Public's Right to Due Process and a Fair Hearing

The certification of an EIR and attendant approval of a project are reviewed under the administrative-mandamus procedures under Code of Civil Procedure Section 1094.5. *See* Pub. Res. Code § 21168. “[W]hether the agency’s decision was . . . unlawful or procedurally unfair, are essentially questions of law” that are reviewed de novo. *Petrovich Dev. Co., LLC v. City of Sacramento*, 48 Cal. App. 5th 963, 972-73 (2020), *review denied* (Aug. 12, 2020) (“*Petrovich*”) (citations and quotations omitted).

Cases brought under Section 1094.5(b) ask (with Save Civita’s emphasis) “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.” Due process and the principles of fairness require that the City’s administrative decision-makers remain unbiased in their decision-making on the Project. *Haas v. Cty. of San Bernardino*, 27 Cal. 4th 1017, 1024 (2002) (“due process requires fair adjudicators in courts and administrative tribunals alike”). As the High Court recognized: “of course, an impartial decision maker is essential.” *Id.* at 1025.

“[W]hen functioning in such an adjudicatory capacity, the city council must be “neutral and unbiased.”” *Petrovich*, 48 Cal. App. 5th

at 973 (citations omitted); *accord* Michael Asimow et al., Cal. Practice Guide: Admin. Law (Rutter Group 2019) Ch. 3-H, ¶ 3:426 (“A decisionmaker must be unbiased (meaning that the decisionmaker has no conflict of interest, has not prejudged the specific facts of the case, and is free of prejudice against or in favor of any party.)). “[A]llowing a biased decision maker to participate in the decision is enough to invalidate the decision.” *Petrovich*, 48 Cal. App. 5th at 973 (citations omitted).

The law does not require proof of actual bias. Rather, “there must not be an ***unacceptable probability*** of actual bias on the part of a municipal decision maker.” *Id.* (citations and quotations omitted; emphasis added). Bias cannot be implied and “must be established by clear averments.” *Id.*

In *Petrovich*,³⁶ a councilmember was against a gas-station project. *Id.* at 965. There was evidence that the councilmember was securing votes and communicating with other councilmembers in such a way that showed “his prehearing commitment to achieving [a specific] outcome.” *Id.* at 974-75. The councilmember prepared a compilation of facts, referred to as “Talking points,” in advance of

³⁶ *Petrovich*, which discussed facts nearly identical to this case, was published after the briefing and final ruling in this case.

the meeting for the mayor's use. *Id.* at 975. Weeks before the hearings, there were communications between the councilmember and member of the public that also opposed the project; elements of the councilmember's Talking points turned up in the substance of that person's opposition letter to the council. *Id.* Finally, the councilmember himself was the one that made the motion to reverse the decision of the planning commission. *Id.* at 975-76. According to the court, these affirmative acts established "concrete facts" that the councilmember was biased. *Id.* at 976. Moreover, that the councilmember's vote was not outcome determinative (*i.e.*, harmless) was both forfeited on appeal and disregarded because the councilmember's advocacy "was not a mere technical error that can be deemed harmless or nonprejudicial, but rather a fundamental flaw in the process." *Id.* at 976 n.9 (citations omitted).

Here, Save Civita and other members of the public were denied fair hearings because Councilmember Sherman was a cheerleader for the Project and decided he was going to approve the Project long before any evidence was presented to the SGLU³⁷ or City Council. After the RE-DEIR was released for public review, but long before the Project was scheduled for any public hearings,

³⁷ At the time, Sherman was the Chair of the SGLU.

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, Sherman's Director of Outreach sent 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 the subject. ***We are hoping we can get a letter of support as well from Escala for the Planning Commission and City Council.***

AR 958:16722 (emphasis added). Many similar letters were sent out by Sherman's staff. See, e.g., AR 948:16536; 965:16739-41. On at least one occasion, Sherman's staff was offering to write the support letter for a potential supporter. See AR 837:15212. Notably, all of this boosting for the Project was occurring ***months before*** the Planning Commission hearing (held on August 24, 2017), the SGLU hearing (held on September 21, 2017), and the City Council hearing (held on October 30, 2017) but after the relevant community planning groups expressed reluctance or opposition to the Project. See AR 69:6541, 6544.

Even worse, the day after the Planning Commission recommended approval of the Project, Sherman's staff sent out an email stating: "Thank 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." AR 1939:30580-81 (emphasis added). Sherman's staff then urged supporters to attend future public hearings and sign an online petition in support of the Project. *See id.*

This is precisely the kind of biased behavior the court in *Petrovich* concluded was impermissible. *See Petrovich*, 48 Cal. App. 5th at 974-76. Sherman, both the Chair of the SGLU and a Councilmember, had aligned himself with the applicant in favor of the Project. *See* AR 1939:30580 ("*we* had over 40 speakers . . . and turned in over 50 letters" and "*We* have heard that after this latest vote, *the opposition* will be working to activate their coalition for an even bigger crowd on September 21 [at the SGLU hearing]") (emphasis added)). It was Sherman who, at both the SGLU and City Council meetings, made the motion to approve the Project. *See* AR 86:6859; 2351:36393. While a councilmember 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,” decision-makers have crossed the line when they start ***advocating*** for or against a project. *Petrovich*, 48 Cal. App. 5th at 974. Sherman’s actions are concrete facts showing that he was not neutral, unbiased, or even open-minded about the Project and had cross the line into advocacy. Thus, the public did not receive a fair hearing in violation of due process.

V. CONCLUSION

Therefore, Save Civita respectfully requests that this Court reverse the trial court’s ruling; find that the Project and its approval violated CEQA, the PZL, and the public’s right to due process and a fair hearing; and direct the trial court to issue the writ of mandate ordering the City to comply with all applicable laws.

Docket no. D077591

**IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION ONE**

SAVE CIVITA BECAUSE SADBERRY WON'T,
Plaintiff and Appellant,

v.

CITY OF SAN DIEGO,
Defendant and Respondent.

San Diego County Superior Court case no.
37-2017-00045044-CU-TT-CTL
(Judge Joel R. Wohlfeil – Department C-73)
From Judgment after Court Trial

PROOF OF SERVICE

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I, **Keri Taylor**, am employed by Briggs Law Corporation in Upland, California, am more than eighteen years of age, and am not a party to this action. My business address is **99 East “C” Street, Suite 111, Upland, California 91786.**

On **December 18, 2020**, I served the following documents on the parties listed below as indicated.

Documents Served

1. Appellant’s Opening Brief
2. Application for Leave to File an Oversized Brief; Declaration of Cory J. Briggs
3. Appellant’s Appendix, Volume I
4. Appellant’s Appendix, Volume II
5. Appellant’s Appendix, Volume III
6. Appellant’s Appendix, Volume IV

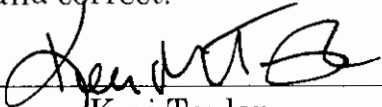
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Honorable Joel R. Wohlfeil San Diego County Superior Court 330 West Broadway, Dept. C-73 San Diego, CA 92101	Trial Court Judge <i>By mail only (brief only)</i>
Xavier Becerra, Attorney General Department of Justice P.O. Box 944255 Sacramento, CA 94244-2550	Attorney General <i>By mail only (brief only)</i>

California Supreme Court 350 McAllister Street, Rm 1295 San Francisco, CA 94102	<i>By e-submission only via TrueFiling</i>
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: December 18, 2020


Keri Taylor