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 REPLY BRIEF

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CERTIFICATION OF WORD COUNT
(Cal. R. of Court 8.204(c)(1).)

I, Cory J. Briggs, hereby certify, pursuant to California Rule of Court 8.204(c)(1), that this foregoing Appellant's Opening Brief is set in 13-point Century Schoolbook font and contains fewer than 5,150 words, as counted by the WordPerfect X8 word processing program used to generate the brief.

Dated: July 12, 2021.

Cory J. Briggs

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I. INTRODUCTION

Once you get beyond the noise and misdirection, it is clear that the Final Environmental Impact Report ("FEIR") for the Project[1] did not comply with the California Environmental Quality Act ("CEQA").[2] Respondent City of San Diego ("City") touts those parts of the FEIR that it may have gotten right, urging the Court not to look at those parts it clearly got wrong. But adequacy in one area of the environmental-review process does not cure inadequacy in another.

There is no dispute that the Project has very real adverse environmental impacts on the Civita and Serra Mesa communities in the areas of traffic and safety, but critical aspects of those impacts were not studied (or not adequately studied) in the FEIR. *See generally* AOB 33-71. Nothing in the City's Respondent's Brief ("RB") refutes the existence of those impacts or the deficiencies in

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[1] The "Project" is the Serra Mesa Community Plan Amendment ["SMCP"] Roadway Connection. *See* Appellant's Opng. Br. ("AOB") 14 & n.3.

[2] As noted in the AOB, the Project had three different environmental impact reports ("EIR"): the original draft program EIR ("DEIR"), the recirculated draft EIR ("RE-DEIR"), and the final EIR ("FEIR"). AOB 17 n.7.

the FEIR; rather, the City pleads non-responsibility and misdirection – the proverbial "look over there, not here."

The purpose of CEQA is not to present the rosiest possible picture of a project; it is to disclose, inform, and mitigate the adverse environmental impacts of a project whenever feasibly possible. *See* Guidelines, § 15002(a).[3] By shortcutting its analyses of alternatives, traffic hazards, and land-use inconsistencies, the FEIR was not able to fulfill its purpose of informing the City's decision-makers of the environmental issues and consequences of the Project (so that they could be mitigated).

Appellant Save Civita Because Sudberry Won't ("Save Civita") does not want to "disconnect this mobility project." RB 10. Save Civita wants a mobility project that considers and fits their community. *See* AR 51:2916-19; 59:6238, 6276, 6297. What Save Civita seeks is for the Project to go back to the City for further analysis – to fairly discuss the adverse environmental impacts caused by this Project and to mitigate those impacts to the fullest extent possible. The Project's violation of the Planning and Zoning Law ("PZL") and Councilmember Scott Sherman's prehearing

[3] Citations to "Guidelines" refer to CEQA's implementing guidelines codified at California Code of Regulations, title 14, section 15000 *et seq*.

advocacy of the Project also justify sending it back to the City for further review.

II. DISCUSSION

A. CEQA Claims

1. The FEIR's Alternative Analysis Does Not Comply with CEQA

The City claims it "was not required to include a detailed analysis of [the Amend MVCP Alternative[4]] because it was inconsistent with the underlying fundamental purpose of the Project and it failed to meet most of the basic Project objectives that were reasonably prepared by the agency [*i.e.*, the City] acting within its discretion." RB 16.

"Courts will defer to an agency's selection of alternatives unless the petitioners (1) demonstrate that the chosen alternatives are manifestly unreasonable and . . . do not contribute to a reasonable range of alternatives, and (2) submit evidence showing the rejected alternative was both feasible and adequate, because it was capable of attaining most of the basic objectives of the project, taking into account site suitability, economic viability, availability of infrastructure, general plan consistency, and other relevant

[4] It is known as the "No Build/Remove Road Connection from Mission Valley Community Plan ['MVCP'] Alternative" in the FEIR.

factors." *South of Mkt. Cmty. Action Network v. City & Cty. of San Francisco*, 33 Cal. App. 5th 321, 345 (2019) (internal citations and quotation marks omitted).

The City deserves no such deference. First, the City significantly altered its "underlying fundamental purpose" and its "basic Project objectives" between the DEIR and the RE-DEIR/FEIR. *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); *see also* AR 51:3101-02. These modifications were not "slight." *Contra* RB 21. Resolving a plan inconsistency ***pertaining to*** a road and resolving a plan inconsistency ***by providing*** a road is a significant change in the Project's purpose.

The City writes off this significant change as a non-issue that was otherwise within its discretion. However, this drastic restructuring of the Project created a moving target. As discussed in *County of Inyo v. City of Los Angeles*, 71 Cal. App. 3d 185, 192-193 (1977) (with Save Civita's emphasis), the courts have held that such a moving target cannot satisfy CEQA:

> A curtailed or distorted project description may stultify the objectives of the reporting process. ***Only through an accurate view of the project may affected outsiders and public decision-makers balance the proposal's benefit against its environmental cost, consider mitigation measures, assess the advantage of terminating the proposal (i.e., the 'no project' alternative) and weigh other alternatives in the balance. An accurate, stable and finite project description is the sine qua non of an informative and legally sufficient EIR***.

Accord Stopthemillenniumhollywood.com v. City of Los Angeles, 39 Cal. App. 5th 1, 17 (2019), *review denied* (Nov. 26, 2019) (and cases cited therein). Moreover, "'[a] lead agency may not give a project's purpose an artificially narrow definition.'" *North Coast Rivers All. v. Kawamura*, 243 Cal. App. 4th 647, 668 (2015) (citation omitted) ("*Kawamura*"). The City violated both of these principles by restructuring the Project in the middle of the public process and giving the revised Project an artificially narrow purpose that could only be served by a road connection. A review of the City's alternatives analysis reveals that this change was ultimately the basis for rejecting any alternative that did not build a road for vehicle traffic. *See* AR 51:4249-50, 4258, 4261. This is the kind of

narrow analysis that was rejected as being deficient under CEQA in *Kawamura* and it should be similarly rejected here.

Second, the standard for whether an alternative receives full consideration is ***feasibility***, not perfection. *See* Guidelines, § 15126.6(a) & (c); Pub. Res. Code § 21061.1; *Habitat & Watershed Caretakers v. City of Santa Cruz*, 213 Cal. App. 4th 1277, 1303 (2013). Even an alternative that would "impede to some degree the attainment of the project objectives" is ***required*** to be analyzed and considered if it is "capable of eliminating any significant adverse environmental effects or reducing them to a level of significance." *Planning & Conservation League v. Dep't of Water Res.*, 83 Cal. App. 4th 892, 917 (2000). Therefore, not only is an alternative not required to meet all of the Project's objectives, but an alternative that ***impedes*** the Project's objectives is still required to be analyzed if it can be feasibly implemented and would provide a better environmental outcome.

With respect to the level of analysis required for alternatives, "'[a]n EIR 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***.'" *Habitat & Watershed Caretakers*, 213 Cal. App. 4th at 1303 (quoting

Laurel Heights Improvement Assn. v. Regents of Univ. of California, 47 Cal. 3d 376, 404-405 (1988)) (emphasis added).

The impetus for the original Project was the inconsistency between the MVCP and the SMCP on the subject of a road connection. *See* AR 31:318-320. The Project sought to amend the SMCP to add the subject road; therefore, a natural alternative would be to amend the MVCP to remove the subject road. With such an obvious alternative (particularly one favored by the affected nearby residents), to summarily dismiss the Amend MVCP alternative from further analysis was patently unreasonable and did not contribute to a reasonable range of alternatives. *See*, *e.g.*, AR 51:2985, 3040-65, 3103-04.

Save Civita and others repeatedly put forth evidence that the Amend MVCP alternative was a feasible alternative to the original Project. *See* AR 51:2916-25, 3041, 3103-04; *see also* AOB 38-55. Under the original purpose and objectives, the Amend MVCP alternative was absolutely feasible – even ***environmentally preferable*** to the Project itself – and should have been fully analyzed and considered. *See* AOB 36-37. Even under the revised objectives, the Amend MVCP alternative was still a feasible alternative to the revised Project to warrant full analysis. *See* AOB

39-54 (discussing how the Amend MVCP alternative met the revised Project objectives). Additionally, the Amend MVCP alternative was environmentally superior to the Project because it would have solved the community-plan inconsistency ***and*** avoided the adverse environmental impacts (traffic and safety) on the affected communities. *See id*; *see also* AR 2347:35769-70 (MVCPG voting to withhold support); 69:6544 (SMCPG voting to recommend denial); 51:3040-3784 (public comments in opposition).

The City's claim that the Amend MVCP alternative would "increase" or "cause" environmental impacts defies logic. *See* RB 38. Not constructing a road would maintain the physical and environmental status quo. *See* AR 51:4249 (the Amend MVCP alternative would not build a road but would update the language in the MVCP). Both the City and the trial court equated the Amend MVCP alternative with the No Project Alternative, which was found to be the environmentally superior option. *See* RB 37; IV AA 1381; AR 51:4261-62. There is no evidentiary support for the City's claim that the Amend MVCP alternative would harm the environment.

Even though both would be better environmentally, the Amend MVCP alternative advocated by Save Civita and others is distinct from the "No-Project Alternative." *See* AOB 41 n.21, 55-56;

contra RB 16; *see also Planning & Conservation League*, 83 Cal. App. 4th at 917-918. The former thus has one benefit that the latter lacks: The Amend MVCP alternative would have addressed the plan inconsistency, which was the genesis of the Project, whereas the No-Project Alternative would not have. *See* AR 51:4252; *see also* AR 51:4258, 4259, 4261 (noting the Bicycle, Pedestrian, and Emergency Access Only Alternative would not have addressed the plan inconsistency).

The City concluded that the No-Project Alternative would not meet any of the Project objectives but such a conclusion is obvious given the non-evaluative nature of the No-Project Alternative. *See* AR 51:4258; *see also* AR 51:4250 ("The purpose of describing and analyzing a no project alternative is to allow a lead agency to compare the impacts of approving the project to the impacts of not approving it."). Relying on a non-evaluative forecast to satisfy the evaluative alternatives discussion was a violation of CEQA because it did not provide the public and the decision-makers with the a complete analysis of a reasonable range of alternatives.

Next, the City argues that substantial evidence in the record supports the City's conclusion that the Amend MVCP alternative did not meet most of the basic Project objectives. *See* RB 27. The

FEIR effectively assessed only ***one*** alternative: the Bicycle, Pedestrian, and Emergency Access Only Alternative. All projects must include a no-project alternative and, as discussed above, the no-project alternative is non-evaluative and is intended to describe the effects of non-action. *See* Guidelines, § 15126.6(e); *Planning & Conservation League*, 83 Cal. App. 4th at 917-918. For all the reasons described above and in the AOB, the Amend MVCP alternative was a feasible alternative that would have met most of the Project's objectives (or could have with mitigation). Save Civita does not argue that the City was required ***to select*** the Amend MVCP alternative, only that it should have been fully studied and that a fair analysis of the alternative should have been presented to the public and the City's decision-makers for consideration.

The City's refusal to fully explore the Amend MVCP alternative was an abuse of discretion and, as a result of that refusal, the FEIR did not contain a reasonable range of alternatives. Therefore, it was an abuse of discretion for the City to summarily dismiss the Amend MVCP alternative from further review and consideration.

2. The FEIR Did Not Adequately Analyze the Project's Traffic Impacts

The City erroneously argues that it adequately analyzed traffic impacts. *See* RB 41.

First, the City claims that there was substantial evidence in the record to support the conclusion that traffic impacts on the freeway mainline segments will be less than significant, specifically referring to Save Civita's criticism that the VMT (vehicle miles traveled) modeling used in the FEIR had a significant margin of error that was not adequately disclosed or accounted for in the City's analysis. RB 41; AOB 57-61.

The FEIR's traffic study concluded that the Project would decrease freeway VMT by 1.8 percent in the study area and by 0.32 percent region-wide. AR 51:4022; 2348:35778. Based on those percentages, the FEIR concluded that the traffic impacts to the freeway would be less than significant, necessitating no mitigation. AR 51:4022. But the FEIR did not discuss or account for the 7.0 to 10.0 percent margins of error in the VMT model – margins of error that mean the Project could easily contribute to significantly ***increase*** freeway VMT. It was Save Civita's members who uncovered this margin of error and brought it to the City's attention, where it was dismissed. AR 86.1:6874:25–75:22; 2203:32440-41;

2350:36281:4–82:16. These numbers do not demonstrate that the City was exercising discretion on a "close call." It was an abuse of discretion not to disclose or account for the significant margin or error in its freeway traffic analysis, especially given the practically negligible decreases in freeway VMT which formed the basis for the "less than significant" finding (and the lack of mitigation therefor). *See* AR 51:4022.

The City points to a non-specific reference to a margin of error in the ITE White Paper. *See* RB 48. It is not clear from the cited material to what exactly that margin of error refers. *See* AR 2341:34679. It is also not clear that the ITE White Paper was provided to the City's decision-makers; neither the margin of error uncovered by Save Civita or referenced in the City's RB was included in the FEIR or any other document provided to City decision-makers. In contrast, the 7.0-10.0 percent margin of error cited by Save Civita was received from the author of the ITE White Paper in response to a specific question about margins of error for his model. *See* AR 2203:32459-60.

It is true that the State has mandated the use of VMT as the metric for transportation impacts caused by projects. However, that shift in metric does not justify the City's omission and obfuscation

of the VMT model and/or numbers. The City's decision-makers are empowered to rely on the information and analysis provided to them by staff – even over concerns of the public or non-staff experts – which is why full-disclosure and analysis in the FEIR are necessary for informed decision-making.

Next, the City argues that there is substantial evidence in the record to support the City's conclusion on the traffic hazards caused by the Project. *See* RB 28. At its core, the City's argument is that it did not need to look at impacts of the road connection on Via Alta and Franklin Ridge. *See* RB 49 ("these roads are not 'proposed' in this Project" and "[w]hile there may be instances where a regional perspective is warranted, this is not one of them"). A main goal of the Project was to connect Phillis Road (and the I-805 freeway) ***to*** Via Alta and Franklin Ridge. AR 51:3865, 3927. When presented with concerns and evidence tending to demonstrate that the traffic hazards would affect pedestrian safety, the City deflected and said that Via Alta and Franklin Ridge are outside of the Project area. *See* AR 2350:36334 (lns. 3-10), 36341 (lns. 4-23); *see also* RB 49 ("these roads are not 'proposed' in this Project").

Diverting thousands of new cars through the Civita/Quarry Falls' "walkable and pedestrian-friendly" neighborhoods, down

admittedly steep and curvy roads, put Via Alta and Franklin Ridge squarely within the Project's "region." The inevitable traffic hazards caused by diverting so many cars into a residential community should have been studied and it was an abuse of discretion and a violation of CEQA to ignore those impacts. The claim that Via Alta and Franklin Ridge are ***outside*** of the "region" of the Project and therefore the impacts of the Project on those streets do not need to be studied is completely indefensible. This approach artificially narrowed the scope of the environmental analysis for the Project, obscured potential impacts and hazards, and was therefore inadequate under CEQA.

Despite the City's bald assertion to the contrary, the intent of the Project ***was*** to redistribute a significant amount of traffic to Via Alta and Franklin Ridge. RB 50; *but see*, *e.g.*, AR 51:4007, 4021, 4036, 4068, 4071, 4191, 4202, 4223 (all discussing the redistribution of traffic as an intended effect of the Project); *see also*, *e.g.*, AR 51:2928, 2997, 3002, 3010, 3119, 3169 (references to the redistribution of traffic in response to comments). For all the reasons discussed in the AOB, it is precisely this significant redistribution of traffic through a residential, walkable, pedestrian-friendly community that needed to be studied. *See*, *e.g.*, AR 51:4028

(showing increase in ADT[5] on Phyllis Place from 2,420 to 34,540 and on Franklin Ridge from 10,457 to 20,919), 4029 (showing increase in ADT on Via Alta from 3,647 to 11,686).

The City's reliance on the 2008 Quarry Falls EIR (which admittedly did not include a road connection) does not satisfy CEQA's informational purpose ***for this Project*** because that EIR cannot and does not account for any changes in circumstances over the 10 years that followed. While the Quarry Falls EIR likely did its best to make accurate assumptions about the future, Civita has since been built-out; it has residents who bought into the City of Villages vision for their community and who now stand to be detrimentally affected by the Project.

3. The FEIR Did Not Adequately Analyze the Project's Inconsistencies with Relevant Land-Use Plans

The City argues that there is substantial evidence in the record supporting the conclusion that the Project is ***consistent*** with the General Plan. *See* RB 54. However, this is not what CEQA requires. Under CEQA, a project must be reviewed for consistency with the relevant land-use plans and must discuss any

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[5] "ADT" stands for Average Daily Traffic. *See also* AOB 32 n.32 (describing ADT).

inconsistencies. Guidelines, § 15125(d); *North Coast Rivers All. v. Marin Mun. Water Dist. Bd. of Directors*, 216 Cal. App. 4th 614, 632 (2013). For all the reasons discussed in the AOB, the FEIR was required to discuss the Project's inconsistencies with relevant land-use documents. Instead, the FEIR glosses over those inconsistencies (if it discusses them at all) and instead discusses the Project's purported consistencies.

Had the Project's inconsistencies with the General Plan's and the Civita/Quarry Falls' City of Villages vision been adequately discussed, the major impacts to traffic and pedestrian safety could have been more thoroughly discussed and (more importantly) mitigated.[6]

Moreover, it is fairly plain to see that diverting ***thousands of new cars*** through a residential community – particularly one touted as the shining example of the City of Villages strategy – is likely inconsistent with the City of Villages and the Civita/Quarry Falls walkable nature. The City did nothing to analyze this significant inconsistency. CEQA requires inconsistencies with

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[6] The Project inconsistency with the City's General Plan, particularly the City of Villages strategy/vision upon which the Civita/Quarry Falls community is built, was repeatedly raised during public comment. *See*, *e.g.*, AR 51:2916-19, 3040-56; 59:6238, 6276, 6297; 842:15221-22; 844:15232; 867:15282.

relevant land-use plans to be studied. Guidelines, § 15125(d). While a Project is not required to be consistent with every element of the relevant land-use plans, any inconsistencies are required to be studied under CEQA. *See North Coast Rivers All. v. Marin Mun. Water Dist. Bd. of Directors*, 216 Cal. App. 4th at 632. The City points to elements of the General Plan to which the Project is consistent, but that does not satisfy the informational purpose underlying CEQA to discuss the inconsistencies.

4. The City's Failure to Summarize the Changes Made in the RE-DEIR Precluded Informed Discussion and Public Participation

The City argues that its failure to satisfy the mandatory requirement to summarize the changes made to the RE-DEIR did not preclude informed discussion or public participation. *See* RB 59. For the reasons set forth in the AOB, the City's failure did detrimentally affect informed discussion and public participation. *See* AOB 27-32. The changes made to the RE-DEIR were not "[i]nsubstantial or merely technical omissions." *Contra* RB 60. The RE-DEIR "underwent a structural change." *See* IV AA 1380. It is true that no case has decided the level of specificity required under section 15088.5(g) of the CEQA Guidelines; however, a complete failure to provide any summary certainly would not satisfy this

requirement. For the reasons discussed in the AOB, this omission was prejudicial and not harmless. *See* AOB 27-32.

That the changed information was mixed throughout the RE-DEIR does not satisfy the requirement that the information be presented in a way that is accessible to the public and the decision-makers. *See City of Long Beach v. Los Angeles Unified Sch. Dist.*, 176 Cal. App. 4th 889, 902 (2009) ("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. County of Merced*, 149 Cal. App. 4th 645, 659 (2007). The City's attempt to now provide that mandatory summary to this Court does not cure the confusion caused by its failure to do so during the administrative process. *See* AR 51:3102; *see also* IV AA 1396.

Save Civita and other members of the public attempted to raise all of the issues related to the Project and in many cases were dismissed due to lack of specificity. *See*, *e.g.*, AR 51:5916-25, 2926, 2927. By the same measure, it is clear that the City's failure to provide the necessary summary was a prejudicial violation of CEQA. *Cf. California Native Plant Soc'y v. City of Santa Cruz*, 177 Cal. App. 4th 957, 986 (2009).

B. The Violations of the Planning and Zoning Law Were Adequately Raised at the Administrative Stage

While CEQA requires analysis of the Project's ***inconsistencies*** with relevant land-use plans, the PZL asks whether the Project is ***consistent*** with relevant land-use plans. *Spring Valley Lake Assn. v. City of Victorville*, 248 Cal. App. 4th 91, 97 (2016); *accord Citizens of Goleta Valley v. Bd. of Supervisors*, 52 Cal. 3d 553, 570 (1990)).

The City argues that the violation of the PZL was not raised at the administrative level, but it was. *See* RB 58; *see*, *e.g.*, AR 2203:32436, 32437-39.

A potential plaintiff is not required to have referenced any specific statute during the administrative process to have adequately raised an issue under the PZL. *See Building Indus. Assn. of Cent. California v. County of Stanislaus*, 190 Cal. App. 4th 582, 597 (2010); *accord McPherson v. City of Manhattan Beach*, 78 Cal. App. 4th 1252, 1264 (2000) ("It is not necessary to identify the precise statute at issue, so long as the agency is apprised of the relevant facts and issues."). "The purpose of the exhaustion doctrine is to give the agency an opportunity to respond to specific objections before those objections are subjected to judicial review." *Woodward*

Park Homeowners Assn., Inc. v. City of Fresno, 150 Cal. App. 4th 683, 712 (2007). Here, that purpose was served.

Save Civita as well as others raised issues of consistency with the City's General Plan and City of Villages strategy and related policies. *See*, *e.g.*, AR 2203:32436, 32437-39 (Save Civita comment); 52:4391 (SMPG comment); 52:4471 (Reichert comment); 52:4472 (Noar comment); *see also* AR 2203:32436 ("we are not lawyers"). This was noted in Save Civita's trial brief in the court below. *See* I AA 69-73, 77-78. Furthermore, both the City and the trial court recognized the interconnected and overlapping nature of CEQA and the PZL with respect to analyzing a project against the relevant land-use plans. *See* I AA 113-114 n.11; IV AA 1400; *see also* RB 58 (section title claiming Save Civita's PZL claim ". . . FAILS FOR THE SAME REASONS DISCUSSED IN SECTION C [discussing land-use claim under CEQA]").

As such, the City was fully forewarned that Save Civita and others believed that the Project violated the City's General Plan – specifically, that the Project was inconsistent and conflicted with the City of Villages strategy, which promotes *inter alia* walkable, pedestrian-safe communities. *See generally* AOB 65-74. And for all the reasons stated in the AOB, the Project's approval violated the

PZL because the Project is inconsistent with and would frustrate the City of Villages strategy, which underlies the City's General Plan and was specifically the basis for the Civita community. *See id.*; AR 59:6246; 2355:37198.

C. Councilmember Sherman's Prehearing Advocacy of the Project Violated the Public's Right to Due Process and a Fair Hearing

Finally, the City argues that Save Civita was not denied due process or a fair hearing by Councilmember Sherman's prehearing advocacy for the Project. *See* RB 67. Specifically, the City argues that Save Civita "cannot demonstrate any actual bias" and was not the Project's applicant. *See* RB 67, 70.

"'[T]he broad applicability of administrative hearings to the various rights and responsibilities of citizens and businesses, and ***the undeniable public interest in fair hearings*** in the administrative adjudication arena, militate in favor of assuring that such hearings are fair.'" *Nasha v. City of Los Angeles*, 125 Cal. App. 4th 470, 483 (2004) (emphasis added; citations omitted).

As detailed in Save Civita's AOB, the evidence in the administrative record demonstrated an unacceptable probability of actual bias on the part of Councilmember Sherman. *See* AOB 77-80; *see also Nasha*, 125 Cal. App. 4th at 485 (courts may consider

evidence not presented at the administrative level related to procedural fairness). From rallying and mobilizing supporters of the Project to offering to pen letters of support for various groups months before the public hearings on the Project, Councilmember Sherman was actively advocating for the Project. *See* AOB 77-80; *see also* AR 69:6541 & 6544; 837:15212; 948:16536; 958:16722; 965:16739-41; 1939:30580-81. These acts do not "merely suggest" bias but are concrete facts showing Councilmember Sherman's commitment to a particular result – approval of the Project – long before the public hearings were held in violation of the fair hearing requirement under Code of Civil Procedure section 1094.5. *See Breakzone Billiards v. City of Torrance*, 81 Cal. App. 4th 1205, 1236 (2000); *accord Petrovich Dev. Co., LLC v. City of Sacramento*, 48 Cal. App. 5th 963, 973-976 (2020), *review denied* (Aug. 12, 2020) ("*Petrovich*").

The City's attempt to distinguish *Petrovich* on the grounds that the councilmember there was advocating ***against***, rather than ***for***, a particular project should be wholly rejected. *See* RB 69. It is the commitment to a particular result that violates the fair-hearing requirement, not the position held. *Cf. Breakzone Billiards*, 81 Cal. App. 4th at 1236.

Likewise, the City's attempt to deflect by asserting that it was Councilmember Sherman's ***district staff*** who sent the emails and not Sherman himself should also be disregarded. *See* RB 69. It is clear that Sherman's staff was working at Sherman's direction or with his blessing as the communications were sent from City email addresses with the individuals identifying themselves as Sherman's staff. *See*, *e.g.*, AR 837:15213; 948:16536; 958:16722; 965:16741; 1939:30581 (emails from Councilmember Sherman's Director of Outreach).

Sherman's concerted efforts to advocate and mobilize support for the Project before it was officially presented to the City's decision-makers, taken together with Sherman's making the motion to approve in both the Smart Growth and Land Use ("SGLU") Committee and the City Council (AR 86:6859; 2351:36393), add up to an unacceptable probability of actual bias. *See Petrovich*, 48 Cal. App. 5th at 974-76.

The cases cited by the City to support its contention are inapposite. *Breneric Associates v. City of Del Mar*, 69 Cal. App. 4th 166, 185-86 (1998), involved a pleading challenge under 42 U.S.C. section 1983 ("section 1983"). There, the court concluded that the complaint sufficiently alleged a claim for administrative mandamus

but not a claim under section 1983. *Id*. at 186. The instant case does not question Councilmember Sherman's motives or involve a section 1983 claim and ***is*** an administrative-mandamus case. Furthermore, the improper advocacy here was not discovered until after the commencement of this lawsuit when the documents consisting of the administrative record were provided to Save Civita. *See Nasha*, 125 Cal. App. 4th at 485.

Stubblefield Construction Company v. City of San Bernardino, 32 Cal. App. 4th 687, 694 (1995) ("*Stubblefield*"), is likewise distinguishable. That case involved an equal-protection claim alleging that municipal officials had "deliberately inflicted harm" by "irrationally and arbitrarily manipulating City processes and procedures for no legitimate reason." *Id*. at 694. No such claim is made in the instant case. Moreover, the facts in *Stubblefield* tend to demonstrate that the councilmember was merely sharing his opinion on the subject project and otherwise acted at public meetings. *Id*. At 697-698. In contrast, the evidence in the instant case tends to show that Councilmember Sherman was not just sharing his opinion or furthering public debate but advocating for the Project and mobilizing supporters for the Project ***months before*** the public hearings but after opposition surfaced. *See* AOB 78-79

(detailing timeline). It is this prehearing advocacy for a project that goes too far. *See Petrovich*, 48 Cal. App. 5th at 974-975. Councilmember Sherman's actions demonstrate he was a biased decision-maker when this Project was finally brought before the SGLU Committee and the City Council.

That Save Civita was not the Project applicant does nothing to cure the lack of a fair trial here. *See* RB 69. Section 1094.5(b) asks "whether there was a fair trial" and does not specify from whose perspective "fairness" is measured because it does not matter. Indeed, as noted in *Petrovich*, a councilmember's advocacy was "a fundamental flaw in the process." *Petrovich*, 48 Cal. App. 5th at 976 n.9.

Lastly, that Councilmember Sherman's vote was not outcome determinative cannot and does not cure the "fundamental flaw in the process" caused by Sherman's advocacy. *Petrovich*, 48 Cal. App. 5th at 976 n.9.

III. CONCLUSION

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 rescind the Project approvals and send it back to the City for further review and reconsideration.

This lawsuit is not about killing a road. Although Save Civita would prefer no road because it is the environmentally superior option, all Save Civita wants (and the public deserves) is a Project that has been fully and fairly studied and the impacts of which have been adequately mitigated to preserve the City of Villages. If Civita must become a throughway between the I-805 and Mission Valley, the safety of its residents should be paramount and not "outside the scope."

PROOF OF SERVICE

1. My name is **Ruth Flores**. I am over the age of eighteen. I am employed in the State of California, County of **San Bernardino**.

2. My ✓ business ___ residence address is **Briggs Law Corporation, 99 East "C" Street, Suite 111 Upland, CA 91786**.

3. On **July 12, 2021**, I served ___ an original copy ✓ a true and correct copy of the following documents: **APPELLANT'S REPLY BRIEF**

4. I served the documents on the person(s) identified on the attached mailing/service list as follows:

___ ***by personal service.*** I personally delivered the documents to the person(s) at the address(es) indicated on the list.

___ ***by U.S. mail.*** I sealed the documents in an envelope or package addressed to the person(s) at the address(es) indicated on the list, with first-class postage fully prepaid, and then I

___ deposited the envelope/package with the U.S. Postal Service

___ placed the envelope/package in a box for outgoing mail in accordance with my office's ordinary practices for collecting and processing outgoing mail, with which I am readily familiar. On the same day that mail is placed in the box for outgoing mail, it is deposited in the ordinary course of business with the U.S. Postal Service.

I am a resident of or employed in the county where the mailing occurred. The mailing occurred in the city of _____, California.

___ ***by overnight delivery.*** I sealed the documents in an envelope/package provided by an overnight-delivery service and addressed to the person(s) at the address(es) indicated on the list, and then I placed the envelope/package for collection and overnight delivery in the service's box regularly utilized for receiving items for overnight delivery or at the service's office where such items are accepted for overnight delivery.

___ ***by facsimile transmission.*** Based on an agreement of the parties or a court order, I sent the documents to the person(s) at the fax number(s) shown on the list. Afterward, the fax machine from which the documents were sent reported that they were sent successfully.

✓ ***by e-mail delivery.*** Based on the parties' agreement or a court order or rule, I sent the documents to the person(s) at the e-mail address(es) shown on the list. I did not receive, within a reasonable period of time afterward, any electronic message or other indication that the transmission was unsuccessful.

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

Date: **July 12, 2021**

Signature: Ruth Flores

SERVICE LIST

Court of Appeal Fourth Appellate District Division One Case No. D077591

Save Civita Because Sudberry Won't v. City of San Diego

San Diego County Superior Court Case No. 37-2017-00045044-CU-WM-CTL

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