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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO, HALL OF JUSTICE

FRIENDS OF THE SAN DIEGUITO RIVER VALLEY, a California Non-Profit Public Benefit Corporation, Petitioner, vs. CITY OF SAN DIEGO, a public entity; and DOES 1 through 5, inclusive, Respondent, SURF CUP SPORTS, LLC, a limited liability company; and OCEAN INDUSTRIES, INC., a corporation of unknown origin; and DOES 6 through 10, Real Parties in Interest.	GENERAL CIVIL (CEQA) CASE NO.: 37-2016-00030312-CU-TT-CTL **[Corrected and Amended] MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF SECOND AMENDED PETITION FOR WRIT OF MANDATE.** Judge: Hon. Gregory W. Pollack Dept.: C-71 Petition Filed: August 29, 2016 Hearing Date: January 4, 2019 Hearing Time: 9:30 a.m.

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Petitioner, Friends of the San Dieguito River Valley ("FSDRV"), hereby submits the following Memorandum of Points and Authorities in support of its Second Amended Petition for Writ of Mandate.

I. INTRODUCTION & BACKGROUND

On July 25, 2016, Respondent City of San Diego ("City") authorized a lease agreement with Real Party-in-Interest, Surf Cup Sports, LLC ("Surf Cup") to lease 114 acres of land in the San Dieguito River Valley for the operation of sports and other activities.[1] [Tab 1:AR 6-8.][2] This approval relied on a determination that authorization of the lease was categorically exempt from the requirements of the California Environmental Quality Act ("CEQA"). FSDRV has filed a Petition for Writ of Mandate challenging the City's authorization of the lease relying on categorical exemptions from CEQA.

The project site is located north of the San Dieguito River, on the west side of El Camino Real, south of Via de la Valle. The site extends from El Camino Real on the west to Via de la Valle adjacent to the community of Whispering Palms. [Tab 2:61.] The north side of the site abuts hillsides covered in high quality Diegan Coastal Sage Scrub that provides habitat for the threatened California gnatcatcher. [Tab 3:1385, Tab 4:3494.] A portion of the site is in the 100-foot buffer for the San Dieguito River. [Tab 5:609-612.] The San Dieguito River is known to provide habitat for the endangered least Bell's vireo and Ridgeway's rail. [Tab 6:580-603.] The project site is zoned AR1-1 (AR1-1), OF (Open Space/Floodplain) and FW (Floodway). [Tab 7:613.] Privately operated, outdoor recreations facilities over 40,000 square feet in size are prohibited in the OF zone and require a conditional use permit ("CUP") in the AR1-1 zones. (Petitioner's 04/16/2018 RJN Ex. B p. 29).

A. Background

The project site was acquired by the City through the development of Fairbanks Ranch in 1983. [Tab 8:2774.] The 1983 Grant Deed to the City included the following limitations on the use of the property:

[1] Approval of the lease to Surf Cup is also referred to as the "Project" in this brief.
[2] Tab numbers correspond to the excerpts to the administrative record that will be submitted with Petitioner's Reply Brief.

- All agricultural uses relating to the growing harvesting, processing or selling of field or grain crops, fruit and vegetables.
- Passive non-commercial recreational uses (e.g., picknicking, walking, hiking, and similar activities), and reasonable support facilities, including any restrooms and parking facilities as may be reasonably required, for such uses;
- Active non-commercial recreational uses not involving large assemblages of people or automobiles, nor involving the use of motor-driven machines or vehicles (e.g., equestrian activities, jogging, frisbee, and similar activities). [Tab 9:65]

In 1986, the City signed a 26-year lease with the Rancho Santa Fe Polo Club for the development of polo facilities including one 200 yard by 300 yard polo field, two portable trailers serving as office space and housing for a caretaker, portable corrals and pastures for 140-200 horses, a portable tack room, and two portable restrooms. [Tab 8:2774]

In 1992, the City allowed the Polo Club to sublease the site to Surf Cup for a youth soccer tournament spanning two weekends in the summer for a total of six days. By 2001, Surf Cup had expanded to three weekends for a total of nine days. In 2009, the use of the Polo Fields expanded to include one more soccer tournament for two days, a lacrosse tournament for three days, and Ultimate Frisbee for three days. By 2012, the use of the fields had been expanded to include 14 days of soccer tournaments and five days of lacrosse tournaments. [Tab 10:2436-2445.] In 2014, the City received permission from Ocean Industries, the successor in interest to the grantee to allow soccer tournaments with an unlimited number of days per year. By 2015 the use of the Polo Fields had increased to include 14 days of soccer tournaments, 6 days of lacrosse and 2 days of flag football. [*Ibid*].

The original lease with the Polo Club expired in 2012; in 2015 the City issued a Request for Proposals ("RFP") for qualified firms or individuals to lease the property. [Tab 11:1797-1819.] The City found that Surf Cup's proposal was the most responsive and recommended authorization of the lease to the Smart Growth and Land Use Committee of the City Council ("SGLU"). SGLU held a public hearing, with extensive testimony in favor and opposed to the lease. At the close of the public hearing the SGLU voted to recommend authorization of the lease to Surf Cup to the full City Council. [Tab 12:83-85.] The City Council held a public hearing and authorized the lease. The City Council also determined authorization of the lease was categorically exempt from the requirements of the California Environmental Quality Act ("CEQA"). [Tab 13:312-313.]

B. Baseline Conditions

CEQA sets the baseline for environmental review at the conditions as they exist early in the CEQA process. (14 Cal. Code Regs §15125(a).)[3] In this case, the appropriate baseline could be set at the existing conditions at the time the RFP was issued; August 2015.

In August 2015, cars for Surf Cup events were parked on the Hu Property to the north of the Polo Fields. [Tab 14:369.] The area currently used for parking on the southern edge of the property was occupied by barns and stables, the property supported numerous Eucalyptus trees, and the fields were more extensive. [*Ibid*] During the course of consideration of the RFP, Surf Cup removed the barns and stables, created parking where these facilities were formerly located, and graded new roads. Surf Cup graded the access road in violation of the San Diego Municipal Code, resulting in significant impacts to sensitive biological resources. [Tab 4:3491-3492; Tab 15:2713-2714.] Surf Cup created 2000 parking spaces in areas previously used for soccer fields and at the former location of the barns and stables. [Tab 16:179:15 – 180:16.] The baseline is also set prior to the illegal grading discussed during the City process. [Tab 4:3493-3494.]

II. ARGUMENT

The Legislature intended that the California Environmental Quality Act ("CEQA") be interpreted to afford the fullest protection possible to the environment within the scope of the statutory language. (*No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 83 ("*No Oil*"); *Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1111 ("*Berkeley Hillside*").) The City has proceeded in a manner that violates the basic tenet of CEQA to provide the fullest protection possible to the environment.

As an initial matter, The City improperly broke the Project into smaller, less impactive pieces in order to minimize the potential impacts of the Project as a whole. This "piecemealing" of the project allowed the City to move forward assuring the project complied with CEQA based on false assumptions. The City also approved the Project with a finding the Project was categorically exempt from the CEQA – however the Project falls within an exception to the categorical exemptions that

[3] Citations to 14 California Code of Regulations section 15000 et seq. will be referenced as the "CEQA Guidelines" hereafter.

denies reliance on an exemption if there is a reasonable possibility the activity will have a significant effect on the environment due to unusual circumstances. (CEQA Guidelines §15300.2(c).) Further, the Project does not meet the criteria for any of categorical exemptions relied upon by the City when authorizing the lease.

A. The City Failed to Consider the "Whole of the Project" as Required by CEQA.

Environmental review must commence at the earliest practicable time to allow the lead agency to make a fully informed decision at a project's formative stages, avoiding undue project momentum or post-hoc rationalizations. CEQA requires the lead agency consider the "whole of an action" at the earliest practicable time. (Pub. Resources Code §21065, CEQA Guidelines §15378(a).) The City's approval of the lease failed to consider the "whole of the project" and committed the City to a definite course of action regarding the use of the Polo Fields without full consideration of the impacts caused by the project.

Piecemealing occurs when a lead agency allows a project to be divided into two or more pieces, evaluating each piece in a separate environmental analysis rather than evaluating the whole project at once. A complete description of a project must address not only the immediate environmental consequences of going forward, but also all "reasonably foreseeable consequences of the initial project." (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 396 ("*Laurel Heights"*.) Piecemealing is forbidden by CEQA. (*Berkeley Keep Jets Over the Bay Com. v. Board of Port Cmrs.* (2001) 91 Cal.App.4th 1344, 1358.)

CEQA mandates "that environmental considerations do not become submerged by chopping a large project into many little ones – each with a minimal potential impact on the environment – which cumulatively may have disastrous consequences." (*Bozung v. Local Agency Formation Com.* (1975) 13 Cal.3d 263, 283-84.) If an activity or facility is necessary for the operation of a project, or necessary to achieve the project objectives, or a reasonably foreseeable consequence of approving the project, then it must be considered an integral project component and undergo environmental analysis. The 2nd District Court of Appeal recently further defined when a consequence is reasonably foreseeable in *Citizens Coalition Los Angeles v. City of Los Angeles.* (*Citizens Coalition Los Angeles v. City of Los*

Angeles (2018) 26 Cal.App.5th 561, 584-588 ("*Citizens Coalition"*).) Under *Citizens Coalition,* a consequence is reasonably foreseeable:

- When the agency has already committed itself to undertake the consequence of the decision.
- When the project under review presupposes the occurrence of that consequence – that is when the consequence is a "necessary" and essential component of the project itself. (*Banning Ranch Conservancy v. City of Newport Beach* (2012) 211 Cal.App.4th 1209 ("*Banning Ranch"*).)
- When it is itself under environmental review.
- When the agency subjectively "intends" or anticipates the consequence, and the project under review is meant to be the "first step" toward that consequence.
- If the project under review creates an incentive that is all but certain to result in the consequence.

(*Citizens Coalition, supra,* at pp. 585-586.)

There is sufficient evidence in the record to prove that an entire list of actions are reasonably foreseeable consequences of the City's action in approving the lease. In her Memo to the Mayor and members of the City Council Senior Planner Myra Hermann acknowledged the Lease Proposal included the following components:

- Improve existing irrigation system and equipment.
- Install replacement fencing and gates around property and way-finding signage.
- Replace existing turf with new turfgrass and make improvements to existing landscaping throughout the property.
- Improve all existing roads and parking areas.
- Remove unsafe and non-native trees or foliage.
- Disassemble and recycle existing barns, stables, temporary storage areas and other structures.
- Replace existing trailers to support existing staff.
- Remove and properly dispose of and/or/recycle all trash/ abandoned equipment and unused fixtures.
- Remove and replace dilapidated clubhouse and offices.
- Remove and relocate existing maintenance yard and associated structures.
- Miscellaneous improvements to ensure compliance with the City's Municipal Code.
- Remove the existing equestrian arena.
- Install caretaker housing to support polo uses on site.
- Remove polo scoreboard and billboards. [Tab 8; 2774-2777.]

The approval of the lease was the first step towards the future development of the site for Surf Cup purposes. (*Laurel Heights, supra, 47 Cal.3d* at p. 398; *Banning Ranch, supra,* 211 Cal.App.4th at

p. 1223.) The record provides evidence Surf Cup had already begun improvements to the existing roads and parking areas and disassembled and recycled existing barns and stables. [Tab 4:3493-3494; Tab 15:2713-2714; Tab 16:180:5-16.] During the SGLU hearing, Councilmember Todd Gloria specifically asked, "given some of the improvements that are being envisioned by Surf Cup, I'm thinking specifically, grading and demolition of existing structures, how is it that CEQA does not apply to – to those actions?" [Tab 16:185.] Mr. Gloria then clarified he was asking about the improvements going forward. [*Ibid*.] Tracy Irvin of the Real Estate Assets Department ("READ") responded "[t]hose improvements will go through the permitting process as they develop their plan and move forward with the –getting the prop – proper permits to conduct those activities." [*Ibid*.]

The City acknowledged and understood these improvements are a reasonable consequence of authorizing the lease and in fact some of the improvements had already occurred (grading the access road, removal of the horse barns and stall.) City staff had already informed the City Council that grading and the use of mechanized equipment during the nesting season caused a significant impact on sensitive biological resources. [Tab 4:3493-3494.] These activities occurred after the baseline conditions were set by the issuance of the RFP; and were a consequence of the pending lease with the City. At the time of its decision, the City presupposed these activities would occur as a consequence of the approval of the lease.

The City and Surf Cup have stated Surf Cup will obtain permits for the illegal grading in May 2016 and analyze the impact at that time. [Tab 16: 185, 253.] Surf Cup acknowledged it was no longer relying on parking vehicles offsite at the time the lease was being considered and was modifying the project site to allow parking for 2,000 cars on the project site. [Tab 14: 427, Tab: 16 179:15 – 180:16.] Separating all of the other proposed improvements is a classic example of the "piecemealing" proscribed by CEQA and the *Bozung* court. This is not allowed under CEQA. These are reasonably foreseeable consequences of the Project; CEQA requires analysis of the environmental impacts of these improvements before a project is approved. Because the City improperly piecemealed this Project in violation of CEQA, the City's authorization of the lease must be set aside until the City complies with the requirements of CEQA.

B. If Approval of the Lease Does Fit Within A Categorical Exemption as Defined in the CEQA Guidelines – the Exemption Must Be Denied Because there is a Reasonable Possibility of a Significant Effect Due to Unusual Circumstances.

The CEQA Guidelines provide a lengthy list of classes of projects that the California Secretary of Natural Resources has determined do not have a significant effect on the environment and are therefore exempt from CEQA. (Pub. Resources Code §21080(b)(9), *Berkeley Hillside, supra,* 60 Cal.4th at 1101.) The lead agency is not required to prepare an environmental impact report ("EIR") or a negative declaration for a project that qualifies for a categorical exemption. The City relied on four categorical exemptions to approve the lease without further environmental review. The Project does not fit within any of these categorical exemptions. In addition, the Project does not qualify for any of these categorical exemptions because there is a reasonable possibility the project will have a significant effect on the environment due to unusual circumstances.

Although a project might otherwise be categorically exempt from CEQA – the CEQA Guidelines require that an exemption must be denied if there is a reasonable possibility of a significant effect on the environment due to unusual circumstances. (CEQA Guidelines §15300.2(c).) This Court must apply a two-prong test to determine whether the City abused its discretion in finding the Project was categorically exempt from the requirements of CEQA. (*Berkeley Hillside, supra,* 60 Cal.4th at p. 1114.) "Abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination is not supported by substantial evidence." (*Id.* at p. 1110.) The Court must rely on the "substantial evidence" test to review whether there are unusual circumstances. If an agency is wrong about unusual circumstances; the agency's finding as to whether the project will have a significant effect is reviewed using the "fair argument" standard. (*Id.* at p. 1114.)

The City did not conduct a thorough review of the substantial evidence available to support the City's determination the project did not meet the exceptions that prohibit a categorical exemption. Rather, the City relied on one summary statement in the resolution of approval for the categorical exemptions based on a similar statement in a memo from Senior Planner Myra Hermann. [Tab 8: 2774 ("no exception to the exemption, as set forth in CEQA Guidelines section 15300.2 applies to the Project.").] The City's approval of categorical exemptions for the Project includes an implied finding

that the "unusual-circumstances" exception was inapplicable. (*Respect Life South San Francisco v. City of South San Francisco* (2017) 15 Cal.App.5th 449, 455 ("*Respect Life"*).) The Court's review of unusual circumstances is a factual inquiry, requiring deference to the agency's finding. But, a court cannot affirm an entity's implied determination that the unusual-circumstance exception is inapplicable by simply concluding that the record contains substantial evidence to support the agency's finding. Rather, the Court must assume that the entity found that the project involved unusual circumstances and then concluded the record contains no substantial evidence to support a fair argument the project will may have a significant effect. (*Id.* at 458.)

1. Unusual Circumstances.

The City wrongly relied on four different categorical exemptions in its approval of the ground lease between the City and Surf Cup. Aside from the categorical exemptions not applying, the City also should have considered – and ultimately applied- the unusual circumstances exception which would have prohibited use of categorical exemptions and required the City to prepare an environmental impact report before approving the project.

Under the CEQA Guidelines *Exceptions* to Article 19 Categorical Exemptions, "[a] categorical exemption shall not be used for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances." California court's have established standards for both evaluating an Agency's determination and for determining whether a project opponent has met their burden to show that the unusual circumstances exception should apply. The Supreme Court clarified the usage and application of the exception finding "there must be a reasonable possibility the project will have a significant environmental effect on the environment *due to unusual circumstances.*" (*Berkeley Hillside, supra,* 60 Cal. 4th at p. 1098.)

The 4th District Court of Appeal Court further outlined two alternative analysis that should be applied to determine whether the unusual circumstances exception applies. The first possible analysis requires the project opponent "prove both unusual circumstances and a significant environmental effect that is due to those circumstances." (*Don't Cell Our Parks v. City of San Diego*, (2018) 21 Cal. App. 5th 338 [Finding unusual circumstances exception doesn't apply to a faux cell tower tree in a

park].) To succeed under the first alternative "the unusual circumstances relate to some feature of the project that distinguishes the project from other features in the exempt class." (*Citizens for Environmental Responsibility v. State ex. rel. 14th Dist. Ag. Assn.* (2015) 242 Cal.App.4th 555, 574.) Under the second alternative, a project opponent "may establish an unusual circumstance with evidence that the project will have a significant environmental effect." (*Don't Cell Our Parks v. City of San Diego, supra*, 21 Cal.App.5th at p. 361 quoting *Berkeley Hillside*, at p. 1105.)

Under either analysis, FSDRV is able to meet the burden required to show the unusual circumstances exception should have been applied and the City incorrectly relied on categorical exemptions for the lease approval.

The project site is located on the north side of the San Dieguito River; high quality Diegan Sage Scrub supporting a threatened songbird (California gnatcatcher) is located on the north side of the site. [Tab 4:3493.] A significant portion of the southern edge of the project site is included within a 100' buffer that is "considered valuable as transitional habitat between the wetlands associated with the river and the upland habitats to the north." [Tab 6:580-603; Tab 4:3493.] Both habitats are considered to be sensitive biological resources in the City of San Diego. [Tab 4: 3493.] Surf Cup has moved forward with specific activities precluded from the wetland buffer – causing significant effects on the environment. [*Ibid.*]

The record includes evidence the San Dieguito River provides habitat for the endangered least Bell's vireo and Ridgeway's rail. [Tab 4: 3494.] The hillsides to the north of the site are also potential habitat for the threatened California gnatcatcher. [*Ibid*] In 2011, the US Fish and Wildlife Service and the California Department of Fish and Game opined that the CEQA findings for a proposed trail (required as part of the lease) and the operational uses of the site (at the time described as Polo Fields) were not supported by substantial evidence the project would not have a significant effect on the environment, namely the clapper rail (recently renamed "Ridgeway's rail") and the vireo. At the time, the agencies demanded the preparation of an EIR. [Tab 6: 585, 599.] In response to video of illegal grading shown at the SGLU hearing on June 29, 2016; the City's own biologist opined that the illegal grading performed had an effect on sensitive biological resources, it can be

inferred from this memo this was due to the unusual circumstance of the site being located between two different types of sensitive biological resources. [Tab 4: 3493.]

The US Fish and Wildlife Service, California Department of Fish and Game and the City's own biologist have provided substantial evidence of sensitive biological resources on the project site and adjacent to the project site. The existence of sensitive biological resources that support threatened and endangered species on and adjacent to the project site is an unusual circumstance. The City has cited to no substantial evidence to support any other conclusion. The administrative record provides evidence that a 100-foot wetland buffer extends onto the project site and must be protected to avoid significant impacts to sensitive biological resources. This evidence is further demonstration of the unusual circumstances associated with this project [Tab 6: 592-595, Tab 5: 619-612.]

2. The Record Contains Substantial Evidence to Support a Fair Argument The Proposed Project May Have a Significant effect on the Environment.

The agency's determination as to whether unusual circumstances give rise to a "reasonable possibility that the activity will have a significant effect on the environment" is reviewed under the fair argument standard set out in Public Resources Code ("PRC") §21151 and *Friends of "B" Street v. City of Hayward* (1980) 106 Cal.App.3d 988 at 1102 ("*Friends of "B" Street"*). (*Berkeley Hillside, supra,* 60 Cal.4th at 1112.) The fair argument standard is a low threshold; it is a question of law not fact; reviewing courts owe no deference to the lead agency's determination. (*Pocket Protectors v. City of Sacramento* (2004) 124 Cal.App.4th 903, 928 ("*Pocket Protectors*").) Review is de novo with a preference for resolving doubts in favor of environmental review. (*Ibid.*)

The fair argument standard set out in PRC 21151 and *Friends of "B" Street* requires the preparation of an EIR if there is substantial evidence to support a fair argument the project may have a significant environmental impact; "evidence to the contrary is not sufficient to support a decision to dispose with the preparation of an EIR and adopt a negative declaration. (*Friends of "B" Street, supra* at p. 1002.) Because there has been no environmental review under a categorical exemption, the fair argument standard is applied when reviewing the exceptions to the categorical exemptions. (*Berkeley Hillside, supra,* 60 Cal.4th at 1116, *citing to, No Oil, supra,* 13 Cal.3d 68)

The fair argument set out in *No Oil*, was based on PRC §21151 which requires the preparation of an EIR any time a project may have a significant effect on the environment. (Pub. Resources Code §21151.) *Friends of "B" Street* and CEQA Guidelines §15064(f)(1) memorialize the holding of *No Oil*. CEQA carries a strong presumption in favor or requiring the preparation of an EIR,

The lease approved by the City states Surf Cup will be performing the following work [Tab 18:3909-3966.]:

- Improve existing irrigation system and equipment.
- Install replacement fencing and gates around property and way-finding signage.
- Replace existing turf with new turfgrass and make improvements to existing landscaping throughout the property.
- Improve all existing roads and parking areas.
- Remove unsafe and non-native trees or foliage.
- Disassemble and recycle existing barns, stables, temporary storage areas and other structures.
- Replace existing trailers to support existing staff.
- Remove and properly dispose of and/or/recycle all trash/ abandoned equipment and unused fixtures.
- Remove and replace dilapidated clubhouse and offices.
- Remove and relocate existing maintenance yard and associated structures.
- Miscellaneous improvements to ensure compliance with the City's Municipal Code.
- Remove the existing equestrian arena.
- Install caretaker housing to support polo uses on site.
- Remove polo scoreboard and billboards.

CEQA requires the City consider the whole of the action that may result in the direct or reasonably foreseeable indirect physical change in the environment. (CEQA Guidelines §15378.) Under CEQA Guidelines §15378, the City should have considered all of the above listed items when it approved the Project with a categorical exemption. At the time of City Council approval Surf Cup had completed some grading of the access roads without a grading permit. Surf Cup had also removed the barns and stables that were located on the south side of the property. In addition, Surf Cup had converted areas previously used for barns, access roads and playing fields to parking. [Tab 15: 2713-2714]

Biology

There is substantial evidence in the record supporting a fair argument each of these activities may have a significant impact on the environment. If a fair argument could be made for only one of

these activities, an environmental impact report would be required. Although this may seem a very draconian result, this is the reality of proposing this level of activity on such an unusual site located amongst sensitive biological resources.

The letter of comment on the 2011 MND for the public trail is instructive as to the potential impacts from performing the work identified in the lease. In their comment letter the agencies addressed both the proposed project and the Polo Club as a nonconforming project in the area zoned Open Space and Flood Plain.[4] [Tab 6:582.] This letter identifies sensitive habitat on and adjacent to the project site. The letter also identifies significant impacts that will occur if work is proposed during the breeding season, identified by the City biologist as February 1 through September 15. The letter stated that the trail project and operational use of the project site could result in a take under the Endangered Species Act. [Tab 6:587.] The letter requires certain mitigation measures to avoid significant impacts to the sensitive species.

A primary consideration to avoid significant impacts was to provide a 100-foot buffer from the edge of the wetland. [Tab 19:552.] This buffer is identified and shown in the Staff Report for the Site Development Permit for the public trail and wetland restoration project.[5] [Tab 5:609-612.] To avoid significant impacts on biological resources, the wildlife agencies required that no active or passive uses occur within the 100-foot buffer. [Tab 6:580-603.] Surf Cup representatives agreed to be bound by the Site Development Permit and proceed with the trail permitted by the Site Development Permit during the approval process. [Tab 16:16.] The project proposes improvements to the roads and parking areas, much of which is within the 100-foot wetland buffer identified in the Site Development Permit. [Tab 4:3493-3493; Tab 5:609-612.] As the City biologist noted, Surf Cup performed grading of the roads within the buffer during the breeding season; resulting in significant impacts to biological resources. If this was the only evidence of potential significant impacts

[4] Contrary to the representations of the Real Estate Assets Department and representatives of Surf Cup during approval of the lease – the 2011 MND describes the existing uses on the project site as Polo Fields and makes no mention of using the site for soccer. [Tab 6:585.]

[5] The Site Development Permit is a covenant running with the land, as such Surf Cup is obligated to and has agreed to complete the work outlined in the Site Development Permit. [Tab 18:549.]

available, it would constitute substantial evidence to support a fair argument the Project may have a significant impact on the environment.

Similarly, the wildlife agencies identified increased noise levels as having a significant impact on the viability of the clapper rails that inhabit the river; the approved lease now allows use of the site including areas within the buffer for soccer tournaments. The record is rife with complaints related to the noise levels generated by soccer tournaments. [Tab 20: 4424, 4430, 4452, 4481-4484.] The lease now allows unlimited use of the project site for soccer tournaments, whereas prior to 2015 Surf Cup was limited to soccer tournaments 22 days per year. The history of use maintained by READ documents the historical uses of the fields for soccer tournaments and demonstrates the increase in use during the breeding season. [Tab 6: 595.] As the letter from the wildlife agencies documents, this increase in noise levels may have a significant impact on sensitive biological resources. [*Ibid.*]

Finally, the letter from the wildlife agencies also addresses impacts from non-equestrian uses that occur on the leasehold.[6] The Mitigation Monitoring and Reporting Program ("MMRP") adopted in conjunction with the Site Development Permit is required to offset potential impacts to biological resources as a result of that project. This Court can infer, failure to abide by those conditions would cause significant impacts. The conditions specifically forbid grading, construction, restoration and revegetation within the 100-foot wetland buffer between February 1 and September 15. [Tab 19:552-555.] The record demonstrates that Surf Cup graded the roads and removed the barns (shown in the buffer) during the breeding season. This failure to abide by a MMRP required to remove or reduce impacts to below a level of significance is substantial evidence to support a fair argument the project may have a significant impact on the environment.

Traffic

Many members of the public spoke about significant impacts on traffic in the vicinity of Surf Cup. [Tab 22:108, 132, 143.] Residents of the adjoining neighborhood also provided evidence of significant traffic impacts related to Surf Cup. [Tab 20:4420, 4430, 4452.] "[R]elevant personal

[6] The letter documents the advertised use of the site for Surf Cup in 2011 as two tournaments encompassing six days as opposed to the unlimited use allowed under the lease. [Tab 6: 601.]

observations are evidence. For example, an adjacent property owner may testify to traffic conditions based upon personal knowledge." (*Citizens Assn. for Sensible Development of Bishop Area v. County of Inyo* (1985) 172 Cal.App.3d 151.) The adjacent residents have provided substantial evidence to support a fair argument the increase in the intensity of use that is a reasonably foreseeable consequence new lease to Surf Cup may have a significant impact on traffic.

Land Use

There is substantial evidence to support a fair argument the Project may have a significant impact on Land Use. "[C]onflict with an applicable land use plan, policy or regulation…adopted for the purpose of avoiding or mitigating an environmental effect" qualified as an impact under CEQA. (*Friends of Riverside Hills v. City of Riverside* (2018) 26 Cal.App.5th 1137, 1151, quoting *Pocket Protectors* at p. 929.)

As discussed above, the use of the property by Surf Cup is not consistent with the San Diego Municipal Code. SDMC §131.0322 requires a conditional use permit for "privately operated, outdoor recreation facilities over 40,000 square feet," a category which applies to Surf Cup's activities on the project site. Despite the conditional use permit requirement, the City did not require Surf Cup obtain a conditional use permit. SDMC 131.0222 does not allow "privately operated, outdoor recreations facilities over 40,000 square feet" in the OF 1-1 zone. (Petitioner's 04/16/2018 RJN Ex. C p.51.)

The purpose of the Open Space Zones is to protect lands for outdoor recreation, education, and scenic and visual enjoyment; to control urban form and design; and to facilitate the preservation of environmentally sensitive lands. (Petitioner's 04/16/2018 RJN Ex. C p.48.) More precisely, the purpose of the OF zone is to control development within the floodplains to protect the public health, safety, and welfare and to minimize hazards due to flooding in areas identified by the FIRM on file with the City engineer…It is also the intent to…protect the functions and values of floodplains related to groundwater recharge, water quality, moderation of flood flows, wildlife movement and habitat. (*Id.* at 49) The Surf Cup use is not allowed in the portion of the site zoned OF. Under *Friends of Riverside Hills* and *Pocket Protectors*, any portion of the Surf Cup use in the OF zone represents a significant land use impact; thereby disqualifying the Project as a categorical exemption.

The approved lease states specific activities that are a reasonably foreseeable consequence of lease approval. There is substantial evidence in the record to support a fair argument these activities will cause a significant impact on the environment. Therefore, this Project does not qualify for the categorical exemptions relied upon by the City in approving the Project. The City's decision to approve the project relying on these categorical exemptions is an abuse of discretion; therefore, the City's lease approval should be set aside until the City certifies an EIR for the project in compliance with the requirements of CEQA.

C. The Project is not Categorically Exempt from CEQA.

The City filed a Notice of Exemption citing four categorical exemptions for the Project. However, in violation of CEQA, the City did not include a "brief statement of reasons to support the finding" – it simply cited to the CEQA Guidelines. (CEQA Guidelines §15062(a)(4).) For the reasons stated below, these categorical exemptions do not apply to this Project.

1. The Project is not Exempt Under § 15323 – Normal Operations of Facilities for Public Gatherings.

CEQA Guidelines § 15323 states "Class 23 consists of the normal operations of existing facilities for public gatherings for which the facilities were designed, where there is a past history of the facility being used for the same or similar kind of purpose. For the purposes of this section, "past history" shall mean that the same or similar kind of activity has been occurring for at least three years, and that there is a reasonable expectation that the future occurrence of the activity would not represent a change in the operation of the facility." (CEQA Guidelines § 15323.)

To apply this exemption, the Project must be (1) the use of an existing facility; (2) the use must be a use for which the facility was designed; and (3) there must be a history of three years of the same or similar use without a reasonable expectation that the future occurrence of the activity would represent a change in the operation of the facility. (CEQA Guidelines § 15323.) The purpose of this exemption is to avoid a duplication in evaluations – if there is no change in the use of the facility, and that use was evaluated at the time the permit for the facility was obtained, there can be no adverse environmental change which requires an evaluation. (*Lewis v. Seventeenth Dist. Agric. Ass'n.* (1985) 165 Cal.App.3d 823, 837.) "[Section 15323] exempts uses which have already been evaluated in the

review of the permit for the facility." (*Ibid.*) This lease is for existing land; however, Surf Cup's lease proposal includes the improvements detailed *supra*. The Project is not the use of an existing facility.

The Polo Fields were not designed to support 25 soccer/lacrosse tournaments per year with thousands of people and cars. There is not enough parking for all the attendees at these tournaments. The roads and intersections cannot support the traffic. If the Polo Fields were designed for these types of events, they would have been designed with enough parking, and paved roads, for thousands of cars. (The 1986 project included 50 off-street parking spaces.) [Tab 21:2949.]

In fact, the use proposed by Surf Cup is directly in conflict with the original 1983 grant deed, which restricted any commercial use and any events with large assemblages of people or cars. [Tab 22:657.] Surf Cup tournaments are commercial and involve large assemblages of people and cars. There is no evidence in the record that the Polo Fields were designed to be used to host huge soccer/lacrosse tournaments with thousands of attendees and cars.

There is not a three-year history of the Polo Fields being used in the same or similar way, and there is a reasonable expectation that the future use by Surf Cup would represent a change in the operation of the facility. [Tab 10:2436 – 2445.] Surf Cup has detailed its plans to intensify the use on the Polo Fields. Under the new lease, Surf Cup will hold more soccer/lacrosse tournaments at the Polo Fields. The planned improvements to the fields, roads, etc., are all "changes in the operation of the facility." There is a reasonable expectation the future use by Surf Cup will be a more intense use.

The clear purpose of the §15323 exemption is to allow normal, usual uses at places such as stadiums or convention centers without requiring environmental review for every event. There, potential environmental impacts would have been analyzed when the stadium or convention center was approved. Surf Cup's use of the property has not undergone any environmental review. This exemption cannot be applied to this project, and environmental review is required under CEQA.

2. The Project is not Exempt under § 15301 – Existing Facilities.

CEQA Guidelines §15301 states "Class 1 consists of the operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of existing public or private structures, facilities,

mechanical equipment, or topographical features, involving negligible or no expansion of use beyond that existing at the time of the lead agency's determination." When assessing whether this categorical exemption should apply "The key consideration is whether the project involves negligible or no expansion of an existing use." [*Id.*]

As a preliminary matter, Surf Cup's listed improvements in conjunction with the increase in usage of the Polo Fields do not fall under any of the listed exceptions for usage of the Existing Facilities exemption. While specifically stated that the list is not exhaustive, the categorical exemption does and should not apply to Surf Cup's usage of the polo fields.

Surf Cup does not intend to "maintain" or "repair" the structures and facilities on the project site. As detailed above, Surf Cup intends to replace the fields and tear down and replace all structures on the site. There is no evidence in the record the Project is a "negligible" expansion of use. It is clearly an intensification of use. The intent of § 15301 is to avoid duplicative environmental review for minor activities occurring on a site where the current uses have previously undergone environmental review. Again, there has been no environmental review of Surf Cup's use of this property. This exemption cannot be applied; environmental review is required under CEQA.

3. The Project is not Exempt Under § 15304 – Minor Alterations to Land.

CEQA Guidelines § 15304 states "Class 4 consists of minor public or private alterations in the condition of land, water, and/or vegetation which do not involve removal of healthy, mature, scenic trees except for forestry or agricultural purposes." Examples given in the Guidelines are minor grading (unless the grading is in a waterway or wetland), new landscaping, and minor temporary use of land having negligible or no permanent effects on the environment, including carnivals, sales of Christmas trees, etc. The Surf Cup tournaments are not minor or temporary.

These tournaments are not similar to carnivals (which arguably only occur for a few days in a year), or the sale of Christmas trees (which do not attract thousands of people at one time and do not have noise impacts). With 25 events per year, there will be a tournament at the Polo Fields almost half of the weekends in a year. The brackish marsh and riparian willow habitat of the San Dieguito River are wetlands; therefore, the Guidelines specifically prohibit the City from applying this

exemption to any past or future grading. Although the City represents the Project is simply the lease, the fact that the City has included this exemption for minor alterations to land shows the City is aware the Project is more extensive than simply the lease – the Project will include more grading and other site improvements that have not been analyzed. Replacing the fields will be a major alteration to the land, and the possible environmental impacts from that improvement must be analyzed and mitigated. This exemption cannot be applied to the project; environmental review is required under CEQA.

4. The Project is not Exempt Under § 15311 – Accessory Structures.

CEQA Guidelines §15311 states "Class 11 consists of construction, or placement of minor structures accessory to (appurtenant to) existing commercial, industrial, or institutional facilities, including but not limited to: (a) on premise signs; (b) small parking lots; (c) placement of seasonal or temporary use items such as lifeguard towers, mobile food units, portable restrooms, or similar items in generally the same locations from time to time in publicly owned parks, stadiums, or other facilities designed for public use." Surf Cup's intended use of the Polo Fields is not minor. Although the Guidelines do not define minor, minor must be something so small it does not cross the threshold level set by the Guidelines for an exception to the categorical exemptions. (See *Azusa Land Reclamation Co. v. Main San Gabriel Basin Watermaster* (1997) 52 Cal.App.4th 1165, 1194.) Thus, a minor structure cannot be anything that creates a reasonable possibility of a significant environmental effect. (See *Ibid.*)

As with the other categorical exemptions, the clear intent of this exemption is to allow <u>minor</u> accessory structures when the underlying use has already undergone environmental review in order to avoid duplicative review. Surf Cup's intense use has not undergone CEQA review. Surf Cup intends to remove and replace every structure currently on the site, but it is unknown what the new structures will look like. There is no information regarding how large they will be, where they will be located, etc. This type of development cannot be completed under a categorical exemption.

The Guidelines use the language "from time to time." Surf Cup's 25 events per year would not fit any reasonable definition of "from time to time." Almost half of all weekends in a year for 28 years is not "from time to time." Surf Cup does not allow the public to use the Polo Fields or the

facilities on the Polo Fields. These facilities are not being designed for public use. There is no evidence in the record to support the City's finding that this exemption applies to this Project. Further, this exemption can only be applied to commercial, industrial, or institutional facilities – commercial uses are specifically disallowed by the deed restrictions this lease is subject to. CEQA review is required.

III. CONCLUSION

The City of San Diego's authorization of the Percentage Ground Lease with Surf Cup Soccer LLC was an abuse of discretion because the City failed to comply with the requirements of the California Environmental Quality Act in determining the Project is categorically exempt from CEQA. The City's authorization of the lease should be set aside, and Surf Cup should be required to bring the site as physically close to the pre-RFP condition as reasonably feasible.

DATED: October 15, 2018

Respectfully Submitted,

LAW OFFICES OF JULIE M. HAMILTON

By: /s/
Julie M. Hamilton
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Friends of the San Dieguito River Valley v. City of San Diego
San Diego Superior Court Case No. 37-2016-00030312-CU-TT-CTL

PROOF OF SERVICE

STATE OF CALIFORNIA)

COUNTY OF SAN DIEGO)

I, the undersigned, say: I am over 18 years of age, employed in the County of San Diego, California, in which county the within mentioned delivery occurred, and not a party to the subject cause. My business address is 4112 Adams Ave, San Diego, CA 92116. My e-mail address is joseph@jmhamiltonlaw.com. On **October 15, 2018**, I served the document(s) listed below on the parties in this action.

- **[Corrected and Amended] MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF SECOND AMENDED PETITION FOR WRIT OF MANDATE**

SERVED UPON:

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_ (BY MAIL) I caused such envelopes with **first class** postage thereon fully prepaid to be deposited in the U.S. Mail mailbox at San Diego, California. I am readily familiar with the firm's

practice of collection and processing correspondence for mailing. It is deposited with U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation or postage meter date is more than one day after date of deposit for mailing in affidavit.

__ (BY HAND DELIVERY) I delivered to an authorized courier or driver authorized by Diversified Legal Services Inc. to receive documents to be delivered by the next business day.

__ (BY FEDERAL EXPRESS) I am readily familiar with the firm's practice for the collection and processing of correspondence for overnight delivery and know that the document(s) described herein will be deposited in a box or other facility regularly maintained by Federal Express for overnight delivery.

_X_ (BY E-SERVICE) I caused to be transmitted the document(s) described herein via the E-MAIL address(es) listed on the attached service list. In compliance with California Rules of Court 2.251, I filed and served the document(s) electronically through the Court's One Legal electronic filing system to those parties listed on the service list maintained on the One Legal website for the above-entitled case. The file transmission was reported as complete, and a copy of the file receipt page will be maintained with the original document(s) in our office.

Executed on **October 15, 2018** at San Diego, California. I declare under penalty of perjury under the laws of the State of California, that the above is true and correct.

/s/_____
Joseph Bruno
Associate Attorney
The Law Office of Julie M. Hamilton