SUPERIOR COURT OF CALIFORNIA

COUNTY OF VENTURA

TRUOJAI, LLC, Petitioner, v. COUNTY OF VENTURA, Respondent.	CASE NO.: 56-2018-00515555-CU-WM-VTA RULING ON PETITION FOR WRIT OF MANDATE

The court hereby rules on the submitted matter regarding Petitioner Truojai's Petition for Writ of Mandate.

Evidentiary Matters:

The County's request for judicial notice is granted.

Petitioner's request for judicial notice is granted.

Summary of Court's Ruling:

The court denies Petitioner's writ of mandate based on alleged CEQA violations. The County has established that its Class 8 exemption and common sense exemption are supported by substantial evidence. The County has established that its use of a historic baseline was proper and that it proceeded in the manner required by law in making CEQA determinations.

The court denies Petitioner's writ of mandate based on alleged violations of the State Planning and Zoning Law. Although Petitioner has shown that the Planning Commission's recommendation was technically deficient for failure to include all elements required by Gov.

Code section 65855, Petitioner has failed to show prejudice, that it suffered substantial injury as a result, or that a different result would have been probable if the error had not occurred. (See Gov. Code, § 65010(b).)

The court denies Petitioner's writ of mandate based on alleged Brown Act violations. This court finds that the 6/19/18 hearing was merely a continuation of the 6/12/18 hearing, and therefore no additional public comment period was necessary at the 6/19/18 hearing. Based on the express language of the statute and case law describing it as the "committee exception," the exception does not apply to the Board's hearing on the TRU Ordinance on 6/19/18 because the Board—not a committee of the Board—heard the same item on 6/12/18. Moreover, the item was not substantially changed, as determined by the legislative body, pursuant to Gov. Code section 54954.3(a). Thus, Petitioner has failed to show a violation of the Brown Act, and Petitioner has failed to show that any purported violation was prejudicial.

Petitioner's remaining issues, including the cause of action for declaratory relief, have been waived/forfeited due to Petitioner's failure to address them in the opening brief, reply brief, or oral argument.

Background:

This is a petition for writ of mandate based on alleged violations of CEQA, the State Planning and Zoning Law, the Brown Act, due process, the Equal Protection Clause, vested property rights, and regulatory taking laws. The project at issue is the "County-Initiated Proposal to Amend Articles 2, 3, 4, 5, 7, 9, 14, and 18 of the Non-Coastal Zoning Ordinance ("NCZO") (PL 17-0138) to Regulate Temporary Rental Units" ("TRU Ordinance" or "the Ordinance"). Respondent County of Ventura ("County" or "Respondent") found that the TRU Ordinance was exempt from CEQA under the common sense exemption and the Class 8 categorical exemption. County's Board of Supervisors ("Board") adopted the TRU Ordinance on 6/19/18. County subsequently issued a Notice of Exemption ("NOE"), listing the common sense exemption.

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Causes of Action:

(1) Petition for Writ of Mandate Under Public Resources Code § 21168.5 and California Code of Civil Procedure § 1085 – Violation of CEQA

(2) Petition for Writ of Mandate Under California Code of Civil Procedure § 1085 – Violation of Government Code § 65855

(3) Declaratory Relief Under Code of Civil Procedure § 1060 – Violation of Due Process, Equal Protection, Vested Property Rights, and Regulatory Taking, Under the California and U.S. Constitutions

(4) Petition for Writ of Mandate Under California Code of Civil Procedure § 1085 – Violation of Government Code § 54950 et seq.

Prayer:

(1) "For a peremptory writ of mandate directing Respondent to set aside the Notice of Exemption and to hold further required public hearings after giving public notice in the manner required by law, in order to come into full compliance with CEQA";

(2) "For a temporary stay, temporary restraining order, and preliminary and permanent injunction restraining Respondent and their respective agents, servants and employees from taking any action to implement the TRU Ordinance pending full compliance with CEQA and other state and local laws"; and

(3) "For a declaration that the County's actions, specifically in enacting the TRU Ordinance, 1) violate CEQA, 2) violate Government Code §65855, 3) violate County residents'".[1]

General Allegations of the Petition:

The TRU Ordinance creates strict compliance regulations (e.g., permit requirements, inspections, occupancy limits, etc.) for Temporary Rental Units ("TRUs")—a term that includes both short-term rentals ("STR") and homeshares—throughout unincorporated areas of the County, and bans STRs in the Ojai Valley through an overlay zone. (FAP, ¶¶ 2-3.) Petitioner alleges that the TRU Ordinance will result in environmental impacts, including: (1) increased traffic/vehicle miles, (2) increased greenhouse gas emissions due to additional trips, (3) adverse impacts to air

[1] The prayer for relief abruptly ends mid-sentence. (See FAP, p. 29:27-28.) In the original petition, Petitioner's declaratory relief paragraph stated: "For a declaration that the County's actions, specifically in enacting the TRU Ordinance, 1) violate CEQA, 2) violate Government Code §65855, 3) violate County residents' right to due process under the California and U.S. Constitutions, 4) violate equal protection under the California and U.S. Constitutions, 5) violate vested property rights under the California and U.S. Constitutions, and 6) constitute a regulatory taking under *Penn Central*." In the original petition, Petitioner prayed for costs and attorney's fees.

quality, and (4) urban decay caused by potentially devastating economic impacts. (FAP, ¶ 4.) Petitioner alleges this is the case because, with the lack of alternative short-term lodging in the area, banning STRs in the Ojai Valley will force Ojai and Ojai Valley visitors to lodge in Ventura or other far away locations and drive to/from Ojai and the Ojai Valley, which in turn will result in more vehicle miles and more greenhouse gas and criteria contaminant emissions. (FAP, ¶ 4.) According to Petitioner, the record demonstrates that the loss in business revenue from tourists who cannot secure alternative lodging and make the long trek from areas with lodging will cause distressing effects in the business community, which could lead to closures of businesses and urban decay. (FAP, ¶ 4.)

According to Petitioner, a writ of mandate and declaratory and injunctive relief should be issued to stop the enforcement and effectiveness of the TRU Ordinance, at least until the County fulfills its CEQA duty of analyzing and mitigating the extensive significant environmental impacts identified in the record by countless members of the public, through comment letters and at public hearings. (FAP, ¶ 10.) Petitioner argues that before enacting the TRU Ordinance, the County was required to comply with CEQA by studying and mitigating the environmental impacts and evaluating a range of feasible project alternatives that would avoid these impacts. (FAP, ¶ 5.) Petitioner argues that there is an abundance of comments in the record regarding citizens' concerns for the environmental impacts of the TRU Ordinance, including a traffic study from the Associated Transportation Engineers ("ATE Study") that reviewed traffic effects of providing STRs in Ventura County, focusing on the Ojai Valley. (FAP, ¶¶ 74-75.) The ATE Study concludes that STRs generate less traffic than a traditional single family unit, and significantly less peak hour traffic, and the majority of trips generated by STRs are local. (FAP, ¶ 76.) The ATE Study and dozens of public comments raised the possibility that there would be significant traffic impacts, which in turn form the basis for other significant environmental impacts such as greenhouse gas emissions and air quality. (FAP, ¶ 77.) Petitioner alleges that the economic impacts of the project are potentially devastating to local businesses, which in turn could cause urban decay. (FAP, ¶ 78.)

Petitioner also alleges that the County failed to comply with State Planning and Zoning

Law in adopting the TRU Ordinance. (FAP, ¶ 8.) When the Planning Commission on 3/1/18 directed the Density Analysis be conducted by planning staff, Petitioner argues that it did not make a recommendation that complies with Gov. Code section 65855; rather, it directed staff to undertake the Density Analysis. (FAP, ¶ 88.) Government Code section 65855 requires the Planning Commission's recommendation to "include the reasons for the recommendation, the relationship of the proposed ordinance or amendment to applicable general and specific plans, and shall be transmitted to the legislative body in such and manner as may be specified by the legislative body." (FAP, ¶ 89.) The Planning Commission's recommendation after the 3/1/18 hearing allegedly did not contain these required elements 1) an actual recommendation regarding the TRU Ordinance, 2) reasons for the recommendation, and 3) relationship of the proposed ordinance or amendment to applicable general and specific plans. (FAP, ¶¶ 90 & 159.) Therefore, according to Petitioner, the matter was required to go back to the Planning Commission for a formal recommendation compliant with Government Code section 65855. (FAP, ¶ 90.) At the 5/1/18 Board meeting, the Board chose to bypass the required formal recommendation from the Planning Commission, and proceed directly to a Board hearing to approve the matter, which Petitioner alleges was in violation of section 65855. (FAP, ¶¶ 91 & 160.)

Petitioner alleges that the County violated the Brown Act (Gov. Code, § 54950, et seq.), since it did not provide public notice of key documents and actions that were presented to and acted upon by the members of the Board. (FAP, ¶ 9.) The draft amendments that Supervisor Bennett proposed the day before are a public record because it was "distributed to all, or a majority of all, of the members of a legislative body" per Gov. Code section 54957.5(a). (FAP, ¶ 98.) The record was "distributed less than 72 hours prior to that meeting" and per Petitioner should have been made available to the public at the same time per Gov. Code section 54957.5(b). (FAP, ¶¶ 99 & 169.) Alternatively, the record was "distributed during a public meeting" and per Petitioner should have been "made available for public inspection at the meeting" because it was "prepared by a member of [the Board's] legislative body" per Gov. Code section 54957.5(c). (FAP, ¶¶ 100 & 170.) Regardless of whether or not the document was distributed to other board members the

day before, or at the meeting itself, Petitioner argues that there is a violation of either Gov. Code section 54957.5(b) or 54957.5(c). (FAP, ¶¶ 101 & 171.) The failure to distribute the proposed amendments allegedly constituted a failure to conduct an open meeting of the legislative body under Gov. Code section 54953(a). (FAP, ¶¶ 102 & 172.) In addition, Petitioner maintains that the County failed to agendize the discussion of the proposed amendments under Gov. Code section 54954.2, and ignored County Counsel's admonition to reopen the public comment period under Gov. Code section 54954.3 when a substantial change was made to the TRU Ordinance by removing the "sites of merit" exemption. (FAP, ¶¶ 103 & 173.) Petitioner sent a cure and correct letter to the County as required by Gov. Code section 54960.1; since the County did not respond within 30 days, it has failed to cure and correct the violations per section 54960.1. (FAP, ¶¶ 104-107.) Therefore, Petitioner argues that Supervisor Bennett's distribution of documents to the other Board members without making those same documents available to the public is a clear violation of the Brown Act, and the action taken on 6/19/18 (approval of the TRU Ordinance) should be invalidated and declared null and void. (FAP, ¶¶ 108 & 174.)

The Court's Legal Analysis and Discussion:

Requests for Judicial Notice:

A. County's Request With the Opposition

Pursuant to Evid. Code section 452(b), the County requests judicial notice of: (1) the County's land use hearing rules set forth in the County's Administrative Policy Manual at Policy No. Chapter II-11, Rule 42; and (2) Chapter 26 of the County's Initial Study Assessment Guidelines. Each item is a regulation/legislative enactment issued by or under the authority of a public entity that is subject to permissive judicial notice. (See Evid. Code, § 452(b).) Thus, the County's request for judicial notice is granted.

B. Petitioner's Request With the Reply

Pursuant to Evid. Code sections 451(a), 452(b), and 453, Petitioner requests judicial notice

of the County's Administrative Supplement to the State CEQA Guidelines (Pet. RJN, Ex. 1.) This is a regulation/legislative enactment issued by or under the authority of a public entity that is subject to permissive judicial notice. (See Evid. Code, § 452(b).) Thus, Petitioner's request for judicial notice is granted.

Waived/Forfeited Issues:

Petitioner's briefs fail to address the following issues asserted in the FAP:

- Third cause of action for declaratory relief based on alleged violations of Due Process, Equal Protection, and Vested Property Rights, and Regulatory Taking. (See FAP, ¶¶ 8, 94-95, 111-144, & 163-167.)
- Alleged violation of Gov. Code section 54952.2 (part of the Brown Act) for failure to agendize the deletion of "sites of merit" from the TRU Ordinance. (See FAP, ¶ 173.)
- Alleged violation of Gov. Code sections 54953 and 54957.5 (parts of the Brown Act) re: submission of a document at the 6/12/18 hearing. (See FAP, ¶ 171-172.)

The County argues that these issues should be deemed waived/forfeited, citing *Holden v. City of San Diego* (2019) 43 Cal.App.5th 404. This argument is well-taken. In *Holden*, the appellant failed to raise certain issues in the trial court, and attempted to raise them on appeal. Further, those issues raised on appeal were merely mentioned in a footnote, without substantive argument. The Court of Appeal deemed the issues waived/forfeited for the appellant's failure to fully and properly address them. Likewise, here, Petitioner has failed to substantively raise these issues in the opening brief. Moreover, Petitioner has not even mentioned these issues in either the opening or reply briefs. At the hearing on this matter, in response to the court's questions about these issues, the court understood Petitioner as indicating that these issues were no longer being alleged. In sum, the following issues have been waived/forfeited due to Petitioner's failure to address them:

- Third cause of action for declaratory relief based on alleged violations of Due Process, Equal Protection, and Vested Property Rights, and Regulatory Taking. (See FAP, ¶¶ 8, 94-95, 111-144, & 163-167.)
- Alleged violation of Gov. Code section 54952.2 (part of the Brown Act) for failure to agendize the deletion of "sites of merit" from the TRU Ordinance. (See FAP, ¶ 173.)
- Alleged violation of Gov. Code sections 54953 and 54957.5 (parts of the Brown Act)

re: submission of a document at the 6/12/18 hearing. (See FAP, ¶ 171-172.)

Basic CEQA Principles:

CEQA and the CEQA Guidelines establish a three-tiered review structure. (*No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 74.) First, a lead agency must conduct a preliminary review to determine whether an activity is subject to CEQA—or not subject to CEQA because it (1) "does not involve the exercise of discretionary powers"; (2) "will not result in a direct or reasonably foreseeable indirect physical change in the environment"; or (3) is not a project—and whether the project is exempt. (CEQA Guidelines, §§ 15060, subd. (c) & 15061.) If a project falls within an exemption or "it can be seen with certainty that the activity in question will not have a significant effect on the environment ([CEQA Guidelines], § 15060), no further agency evaluation is required." (*No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 74.)

Second, if the project is non-exempt, subject to CEQA, and "there is a possibility that the project may have a significant effect," then CEQA compliance is required and the analysis proceeds to the second tier, i.e. the requirement that the lead agency conduct an initial study. (See *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 74; see also CEQA Guidelines, §§ 15060 & 15063, subd. (a).)

Third, depending on the results of the initial study, the lead agency issues an EIR, a negative declaration, or another environmental review document authorized by the CEQA Guidelines. (CEQA Guidelines, § 15063, subd. (b); see also *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 74.)

Definitions of "Project" and "Approval":

As a preliminary matter, the court must define the project and approval for purposes of CEQA, since the analysis of whether the County complied with CEQA depends on those definitions.

> The somewhat abstract nature of the project decision is appropriate to its preliminary role in CEQA's three-tiered decision tree. Determination of an activity's status as a project occurs at the inception of agency action, presumably

> before any formal inquiry has been made into the actual environmental impact of the activity. The question posed at that point in the CEQA analysis is not whether the activity will affect the environment, or what those effects might be, but whether the activity's potential for causing environmental change is sufficient to justify the further inquiry into its actual effects that will follow from the application of CEQA. If the proposed activity is the sort that is capable of causing direct or reasonably foreseeable indirect effects on the environment, some type of environmental review is justified, and the activity must be deemed a project. CEQA analysis is then undertaken to evaluate the likelihood and nature of the project's environmental impacts, in order to determine the extent of environmental review required.

(*Union of Med. Marijuana Patients, Inc. v. City of San Diego* (2019) 7 Cal.5th 1171, 1197–98.) "Whether an activity constitutes a project subject to CEQA is a categorical question respecting whether the activity is of a general kind with which CEQA is concerned, without regard to whether the activity will actually have environmental impact." (*Rominger v. County of Colusa* (2014) 229 Cal.App.4th 690, 701.) The question is whether the activity qualifies as a CEQA project is an issue of law. (*Ibid.*) It is undisputed that the "project"[2] is the TRU Ordinance and "approval"[3] occurred on 6/19/18.

Preliminary Review & Determinations as to Whether TRU Ordinance Is Subject to CEQA and Subject to an Exemption:

The first tier is the only CEQA tier at issue in this case. A lead agency must conduct a preliminary review to determine whether an activity is subject to CEQA, and whether any exemption applies. If a project is not subject to CEQA or if an exemption applies, then no further agency action is required. (*No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 74.) The agency's quasi-legislative determinations during preliminary review are subject to the abuse of discretion standard of review in Public Resources Code section 21185.5, and an abuse of discretion is established if the agency has not proceeded in the manner required by law or if the determination is not supported by substantial evidence. (See Pub. Res. Code, §§ 21168, 21168.5; see also

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[2] "'Project' means an activity"—i.e. "the whole of an action"—"which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment." (Pub. Res. Code, § 21065, subd. (b); CEQA Guidelines § 15378, subd. (a).)

[3] "'Approval' means the decision by a public agency which commits the agency to a definite course of action in regard to a project intended to be carried out by any person." (CEQA Guidelines, § 15352, subd. (a).)

Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova (2007) 40 Cal.4th 412, 426-27; see also *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 392, fn. 5, as modified on denial of reh'g (Jan. 26, 1989) ("*Laurel Heights I*") [noting that the distinction between the standards of review in Pub. Res. Code section 21168 (administrative mandamus) and section 21168.5 (traditional mandamus) is mostly academic, since the standards of review are effectively the same, i.e. whether substantial evidence supports the agency's determination].)

> (a) "Substantial evidence" as used in these guidelines means enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached. Whether a fair argument can be made that the project may have a significant effect on the environment is to be determined by examining the whole record before the lead agency. Argument, speculation, unsubstantiated opinion or narrative, evidence which is clearly erroneous or inaccurate, or evidence of social or economic impacts which do not contribute to or are not caused by physical impacts on the environment does not constitute substantial evidence.
>
> (b) Substantial evidence shall include facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts.
>
> (CEQA Guidelines, § 15384.)

First, the analysis will address Petitioner's repeated assertion that the Board failed to proceed in the manner required by law by failing to make the CEQA determinations. Next, the analysis will address the Class 8 exemption raised by the County during administrative proceedings (see, e.g., AR 1:0252-0253) and in the opposition. Lastly, the discussion will address Petitioner's arguments regarding the common sense exemption, which is the only exemption set forth in the County's NOE. (See AR 1:0002-0003.)

Failure of the County to Expressly Adopt the Class 8 Exemption:

Petitioner argues that the County is barred from raising the Class 8 exemption because the County did not expressly adopt/approve the Class 8 exemption. In essence, Petitioner asserts that since the item's minutes (AR 1:218) did not specifically state that the Board's motion adopting the TRU Ordinance included approval of the staff's other recommended actions set forth in the subject

Board letter, including the CEQA determinations, the County did not make the CEQA exemption determinations in adopting the TRU Ordinance.

The first question is whether there is any such requirement, that is, a requirement that the Board expressly, in the minutes, adopt the TRU Ordinance and include an approval of staff's recommended CEQA actions. This court does not believe that there is such a requirement. (See, *Del Cerro Mobile Estates v. City of Placentia* (2011) 197 Cal.App.4th 173, 181 where the court rejected the argument that a City's failure to make an express exemption finding precluded reliance on the exemption.) In the opening brief, Petitioner cites *Vedanta Soc. of Southern California v. California Quartet, Ltd.* (2000) 84 Cal.App.4th 517, 534–535 for the proposition that "CEQA requires the elected decision-making body—here the Board—to make an affirmative decision on a CEQA determination properly before it." (Opening Brief, p. 16:3-5.) *Vedanta* contains no such holding. *Vedanta* merely addresses the requirement of board action in certifying an EIR. Here, in contrast, there is no EIR, and certification of an EIR is not at issue. Thus, Petitioner's reliance on *Vedanta* is misplaced.

Petitioner's opening brief acknowledges that *Vedanta* only involves the certification of an EIR, but insists that this reasoning also applies to a decision to use a categorical exemption because, according to Petitioner, after the *Vedanta* decision, Pub. Resources Code section 21151(c) was amended to include negative declarations and determinations that a project is subject to a categorical exemption. (Opening Brief, p. 16:20-26.) Petitioner's argument lacks merit. The discussion of Pub. Resources Code section 21151(c) in *Vedanta* (which cites to *Kleist*, discussed below) pertains to a separate issue of the appeals process; *Vedanta* stands for the proposition that *an appeal* from the certification of an EIR must be decided by the elected body. (*Vedanta Soc. of Southern California v. California Quartet, Ltd.* (2000) 84 Cal.App.4th 517, 525-530.) The relevant text of Pub. Resources Code section 21151(c) only relates to the appeals process. It states that "[i]f a nonelected decisionmaking body of a local lead agency certifies an environmental impact report, approves a negative declaration or mitigated negative declaration, or determines that a project is not subject to this division, that certification, approval, or determination may be appealed to the

agency's elected decisionmaking body, if any." (Pub. Resources Code, § 21151(c).) In other words, while the statute requires the elected body to decide the *appeal*, the statute impliedly recognizes that "a nonelected decisionmaking body" may decide whether an exemption applies.

Petitioner cites *Kleist v. City of Glendale* (1976) 56 Cal.App.3d 770, 779 for the proposition that: "Neither CEQA nor the state guidelines authorize the [elected decisionmaking body] to delegate its review and consideration function to another body. Delegation is inconsistent with the purpose of the review and consideration function since it insulates the members of the council from public awareness and possible reaction to the individual members' environmental and economic values." Petitioner takes this quote out of context. *Kleist*, like *Vedanta*, is discussing the non-delegation principle in the context of approving and certifying an EIR. The facts are distinguishable because, here, there is no EIR certification issue.

Petitioner also relies on *Citizens for the Restoration of L Street v. City of Fresno* (2014) 229 Cal.App.4th 340, 361-62. Again, however, Petitioner's reliance on this case is misguided because it involved the decision on an administrative appeal. As explained above in connection with *Vedenta*, the administrative appeal issue is governed by Pub. Resources Code section 21151(c), which only relates to the appeals process. While that statute requires the appeal to be decided by the elected body, the statute impliedly recognizes that the underlying decision of whether an exemption applies may be determined by "a nonelected decisionmaking body." It follows that Petitioner's reliance on *Citizens for Restoration of L Street* is misguided.

In sum, Petitioner fails to cite any law that would require the Board to include an approval of the staff's recommended actions, regarding this preliminary determination that an exemption applies, in the minutes. Moreover, the County persuasively argues that no such requirements exist. Unlike the formal requirements for a negative declaration or EIR, "determinations made as part of a preliminary, first-tier CEQA review are not formalized until after the project has been approved"; there is no requirement that an agency put its exemption decision in writing; CEQA does not provide for a public comment period before an agency decides a project is exempt; and "CEQA

does not apply to exemption decisions." (*San Lorenzo Valley Community Advocates for Responsible Education v. San Lorenzo Valley Unified School Dist.* (2006) 139 Cal.App.4th 1356, 1385-86.) Since CEQA does not apply to exemption decisions, it would be illogical to try to apply the standards applicable to higher-level CEQA review matters—such as the decision to issue a negative declaration or certify an EIR—to this preliminary question of whether an exemption applies.

Petitioner cites to the County's Administrative Supplement to the State CEQA Guidelines. (See Reply RJN, Ex. 1.) The supplement begins by stating that "[u]nder provisions of CEQA and the State CEQA Guidelines, written findings, certifications and specifications related to an environmental exemption or document must be made by the decision-making body before it can approve or carry out a project." (Reply RJN, Ex. 1, ¶ 8.) Contrary to Petitioner's assertion, this paragraph does not impose any additional requirement on the County; rather, it is merely summarizing existing laws in the Public Resources Code and CEQA Guidelines. As explained above, nothing in the Public Resources Code or CEQA Guidelines requires the County's decision-making body to expressly make CEQA findings/determinations without simply adopting staff findings and recommendations. The supplement further states that CEQA Guidelines section 1500.2 provides exceptions to the categorical exemptions, and "[t]he decision-making body must find that, in light of the whole record, none of the exceptions as set forth in §15300.2 of the State CEQA Guidelines apply." (Reply RJN, Ex. 1, ¶ 8.1.) However, Petitioner ignores the fact that the staff recommendations on 6/19/18 include a recommended finding that the "no substantial evidence exists precluding the use of these exemptions based on the presence of an unusual circumstances or any other exception set forth in CEQA Guidelines section 15300.2." (AR 253.) Furthermore, the County persuasively argues that the evidence in the record, as well as the Administrative Policy Manual subject to judicial notice, establish that the Board did in fact approve and adopt the CEQA determinations recommended by staff. (See AR 1:224 [minute order, listing documents that had been submitted (including exhibits and proposed amendments) approving recommendations to adopt the TRU Ordinance], 1:252-53 [staff's recommended actions, including

the Board's findings that the TRU Ordinance is exempt, and certification of all exhibits and staff reports]; see also RJN, Ex. 1, pp. 6-7 [stating that "[a] motion to adopt or approve staff recommendations or simply to approve the action under consideration shall, unless otherwise particularly specified, be deemed to include adoption of all proposed findings and execution of all actions recommended in the staff report on file in the matter"].) Pursuant to the County's Administrative Policy Manual, the Board's approval necessarily included the adoption of all actions recommended in the staff report on file, including the recommendations and findings to adopt the CEQA exemption determinations, and the finding that no exception in CEQA Guidelines section 15300.2 applied. Accordingly, the County proceeded in a manner required by law and the Board made CEQA determinations.

Whether the Court may consider an exemption not listed in the NOE:

The County relies upon *California Farm Bureau Federation v. California Wildlife Conservation Bd.* (2006) 143 Cal.App.4th 173, 190-191 for the proposition that "[t]he fact that the County only cited the common sense exemption in its notice of exemption (AR 1:2-1:3) does not preclude the County from invoking the Class 8 exemption as well. (*California Farm Bureau Federation v. California Wildlife Conservation Bd.* (2006) 143 Cal.App.4th 173, 190-191 [agency not limited to invoking CEQA exemption cited in notice of exemption and may rely on any exemption during litigation; sole purpose of notice of exemption is to start 35-day statute of limitations].)" This argument is well-taken.

> In briefing the merits of the CEQA issues before the trial court, and now again on appeal, the State Agencies assert that the improvements required by the management plan for the conservation easement on the property were exempt under the Guidelines' Class 4 categorical exemption. (Guidelines, § 15304.) Farm Bureau complains this exemption was not identified in the notice of exemption filed by the WCB after approval of the project. ***However, it is clear a notice of exemption is not mandatory and its only effect when filed is to start the statute of limitations running.*** (Guidelines, §§ 15002, subd. (k)(1), 15062; see *Apartment Assn. of Greater Los Angeles v. City of Los Angeles, supra*, 90 Cal.App.4th at p. 1171, 109 Cal.Rptr.2d 504; Remy, CEQA Guide, pp. 84–87.) ***Therefore, the fact the WCB listed the project as exempt only under Class 13 and not Class 4 would not necessarily preclude the WCB from defending its exemption determination by asserting other categorical exemptions, at least where there is no claim or***

showing of prejudice. (Compare *McQueen v. Bd. of Directors of the Mid–Peninsula Regional Open Space District* (1988) 202 Cal.App.3d 1136, 1143–1147, 249 Cal.Rptr. 439, [notice of exemption improperly used, incomplete and misleading] (*McQueen*), disapproved on other grounds in *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 570, 38 Cal.Rptr.2d 139, 888 P.2d 1268, with *Centinela Hosp. Assoc. v. City of Inglewood* (1990) 225 Cal.App.3d 1586, 1600–1601, 275 Cal.Rptr. 901 [notice of exemption with inaccurate project description upheld].)

(*California Farm Bureau Federation v. California Wildlife Conservation Bd.* (2006) 143 Cal.App.4th 173, 190–191, emphasis added.)

The court also notes that a NOE is not required. CEQA Guidelines § 15002(k)(1) merely state that: "If the project is exempt, the process does not need to proceed any farther. The agency ***may*** prepare a notice of exemption. . . ." (CEQA Guidelines § 15002(k)(1), emphasis added.) In accordance with *California Farm Bureau Federation v. California Wildlife Conservation Bd., supra,* Petitioner has not demonstrated prejudice and the court does not believe prejudice could be shown because the record establishes that Petitioner had clear notice that the County asserted the Class 8 exemption in approving the TRU Ordinance on 6/19/18 (see AR 1:0252-0253), and addressed this exemption in the reply brief. Therefore, the absence of the Class 8 exemption from the NOE does not prevent the County from relying on said exemption. Stated differently, the County may rely on the Class 8 exemption despite its omission from the NOE.

Petitioner's failure to object to the Class 8 Exemption during the hearings:

The County asserts that Petitioner's CEQA challenge is barred, and fails as matter of law, because Petitioner has not objected to the Class 8 exemption during the legislative process, and thus, has not exhausted administrative remedies. No action or proceeding may be brought to challenge a decision under CEQA unless the grounds for the alleged noncompliance were presented to the public agency orally or in writing during the public comment period or before the close of the public hearing. (Pub. Resources Code, § 21177, subd. (a).) The petitioner has the burden of proving exhaustion, which is a "jurisdictional prerequisite." (*California Native Plant Society v. City of Rancho Cordova* (2009) 172 Cal.App.4th 603, 615.) In *Tomlinson v. County of Alameda* (2012) 54 Cal.4th 281, 291, the California Supreme Court held that this exhaustion

requirement applies to an agency's categorical exemption determination as long as the agency provided public notice and the public could comment on the exemption determination at a public hearing. According to the County, "both of which occurred here. (See AR 1:253, 1:530, 1:538, 4:2145, 4:2152-4:2153, 4:2177-4:2178, 4:2180, 7:3959, 14:7374, 14:7380.)"

The County is correct that the AR shows that Petitioner had notice and the opportunity to object. Specifically, a summary of comments from the advisory meeting on 12/18/17 shows that Petitioner had notice and an opportunity to comment on the Class 8 exemption, which was expressly raised at that time. (See AR 1:530, 1:538.) The Planning Commission Staff Report, pre-meeting notice, and transcript from the public meeting on 3/1/18 also included the Class 8 exemption (see AR 4:2177-2178, 4:2180, 7:3959, 14:7380), and therefore, Petitioner could have subsequently objected during the 6/12/18 public comments period. The pre-hearing public notice and recommended actions from the public hearing on 6/12/18 also refers to the Class 8 exemption, thereby giving Petitioner another opportunity to object to the Class 8 exemption. (See AR 4:2145, 4:2152-2153, 14:7374.)

Petitioner persuasively argues that it did in fact exhaust administrative remedies on the Class 8 exemption by objecting to it during the 3/1/18 meeting. (AR 3991-92.) Petitioner's objection consists of a citation to the Class 8 exemption statute, an objection to what it perceives as late timing for a new exemption assertion by the County, and the argument that neither the common sense nor the Class 8 exemption applies because there is the potential for significant effect on the environment due to traffic. (*Ibid.*) Thus, contrary to the County's assertion, Petitioner did exhaust administrative remedies as to the Class 8 exemption. Simply put, Petitioner had notice and an opportunity to object to the Class 8 exemption, and did in fact object during the 3/1/18 meeting. It follows that Petitioner may challenge the Class 8 exemption due to its failure to exhaust administrative remedies.

Merits of the Class 8 Exemption:

The Class 8 exemption is a categorical exemption codified in CEQA Guidelines § 15308.

"If an agency has established that a project comes within a categorical exemption, the burden shifts to the party challenging the exemption to show that it falls into one of the exceptions. ([Citation].)" (*North Coast Rivers Alliance v. Westlands Water Dist.* (2014) 227 Cal.App.4th 832, 851–852.)

> When a project comes within a categorical exemption, no environmental review is required unless the project falls within an exception to the categorical exemption. Although categorical exemptions are construed narrowly, our review of an agency's decision that a project falls within a categorical exemption is deferential, and we determine only whether that decision is supported by substantial evidence. (*Save Our Carmel River v. Monterey Peninsula Water Management Dist.* (2006) 141 Cal.App.4th 677, 697, 46 Cal.Rptr.3d 387.) Under CEQA, "substantial evidence includes fact, a reasonable assumption predicated upon fact, or expert opinion supported by fact" and "is not argument, speculation, unsubstantiated opinion or narrative, evidence that is clearly inaccurate or erroneous, or evidence of social or economic impacts that do not contribute to, or are not caused by, physical impacts on the environment." (Pub. Resources Code, § 21080, subd. (e).)
>
> (*Aptos Residents Assn. v. County of Santa Cruz* (2018) 20 Cal.App.5th 1039, 1046–1047.)

It is the County's initial burden to establish that the TRU Ordinance comes within the Class 8 exemption. (See *North Coast Rivers Alliance v. Westlands Water Dist.* (2014) 227 Cal.App.4th 832, 851–852.) The Class 8 exemption states:

> Class 8 consists of **actions taken by regulatory agencies, as authorized by state or local ordinance, to assure the maintenance, restoration, enhancement, or protection of the environment where the regulatory process involves procedures for protection of the environment**. Construction activities and relaxation of standards allowing environmental degradation are not included in this exemption.
>
> (CEQA Guidelines, § 15308, emphasis added.)

The County argues that the TRU Ordinance comes within the Class 8 exemption because it is a local ordinance to assure the maintenance or protection of the environment, where regulatory process involves procedures for the protection of the environment. "'Environment' means the physical conditions which exist within the area which will be affected by a proposed project, including land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance." (§ 21060.5.) The County argues that, in this context, the environment includes long-term housing stock, such that any ordinance (i.e. the TRU Ordinance) that maintains and protects

long-term housing stock is protected by the Class 8 exemption.

The County's contention that maintenance and protection of long-term housing stock qualifies as maintenance and protection of the environment for purposes of the Class 8 exemption is well-taken. The TRU ordinance would in fact "assure the maintenance, restoration, enhancement, or protection of the environment … ." (*Cal. Code Regs.*, tit. 14, § 15308.) County correctly asserts that CEQA Guidelines Appendix G recognizes the loss of long-term housing stock as an environmental impact. Section XIV Population and Housing asks whether the project would induce substantial unplanned population growth in the area, either directly or indirectly, or displace numbers of existing people or housing, necessitating the construction of replacement housing elsewhere. Likewise, *Hollywoodians Encouraging Rental Opportunities v. City of Los Angeles* (2019) 37 Cal.App.5th 768 generally recognizes the loss of "rent-stabilized" housing stock as an environmental impact under CEQA. Furthermore, County's Initial Study Assessment Guidelines (adopted in 2010) deem the loss of existing "housing stock" an environmental impact. (Opp. RJN; Barnes Decl., Exh. 2, p. 2, § 26.A ["Definition of Issue"] and § 26.D.1 ["Threshold of Significance Criteria," "Existing Housing Stock"].) This supports the County's conclusion that the TRU Ordinance is subject to the Class 8 exemption because it will likely preserve long-term housing stock.

The County also correctly states that substantial evidence in the AR supports the County's finding that the TRU Ordinance would maintain and protect long-term housing stock:

- The Planning Commission Staff Report from the 3/1/18 meeting recognizes the disproportionately negative impact that STRs and TRUs have had in the Ojai Valley, where a disproportionately high percentage of residents are "overpaying" for home ownership and long term rentals (i.e. paying more than 30% of their income), and where there is a disproportionately high rate of STRs and TRUs. (AR 1:262-263.) Staff retained services of Applied Development Economics ("ADE") to prepare an economic impact study in the Ojai Valley. (AR 1:263 & 1:476-1:498 [ADE Report].) ADE found that the number of STRs is growing at a faster rate than the total number of housing units; housing supply growth in the study area will likely continue to be slow and increasing numbers of STRs would represent a significant share of the housing stock; there is evidence to indicate that STRs have had an impact on the rental housing market, particularly for multi-family housing, by reducing the supply of available housing, rents have continued to increase above the level of demand that would have been generated

by increases in population and incomes in the study area; jobs located in the Ojai Valley provide an average wage of $44,071 compared to $53,573 in the county as a whole due to a relatively fewer jobs in manufacturing, wholesale, finance, and government and relatively more jobs in education, arts/entertainment/recreation, and accommodation/food services; unlike the data for rental rates, the data do not suggest there has been a significant increase in home purpose costs within the Ojai Valley over the rest of the county; and the proportion of households paying more than 50% of income for rent within the Ojai Valley increased dramatically from 21% in 2010 to 33% in 2015, which was higher than the rates in the county overall. (AR 1:263-264 & 1:476-1:498.) The ADE report concludes that this is a consequence of the relatively lower wages paid by the types of jobs located in the Ojai Valley and the lower household incomes of residents of the area combined with the rapid increases in rents. (AR: 1:264 & 1:476-1:498.) Based on this information, the Staff Report concludes: "As noted above, the appeal of the Ojai area as a tourism destination and the associated demand for temporary accommodations, combined with the city's [Ojai's] TRU prohibition, has likely resulted in a greater demand for TRUs in the surrounding unincorporated area that other unincorporated areas of the county. Coupled with evidence in the ADE report demonstrating that the number of STRs have contributed to increased rents in the rental housing market, the growth rate of STRs is outpacing the number of total housing units being built, and average wages in the Ojai Valley are lower than the county as a whole, it is reasonable to conclude that the use of dwellings for STRs is contributing to the displacement of lower-wage-earning, long-term renters from the Ojai Valley as the rental housing affordability gap continues to widen. Due to the geographic remoteness of the Ojai Valley, displaced workers who cannot afford to live in the Ojai Valley face lengthy commute distances from the next-closest cities of Ventura or Santa Paula or beyond which, in turn, contributes to the existing traffic issues and adverse impact on regional air quality [¶] Prohibiting STRs within the Ojai Valley MAC boundary (other than for STRs located at sites of merit and designated land marks) would eliminate the legal market for entire-dwelling short-term rental housing there. This would help protect the supply of long-term rental housing and ease the upward pressure on rental prices, particularly for those residents who work lower paying jobs in the Ojai Valley's prevalent service sector. As summarized above, ADE found that only 37 out of 200 existing TRUs within the Ojai Valley MAC boundary are homeshares. Therefore, a decision to allow permits to operate homeshares should not significantly impact rental housing availability or housing prices due to the fact that homeshares comprise a relative minor portion of the total TRUs in the Ojai Valley." (AR 1:264.)

- At the meeting on 5/1/18, Johnny Johnston, Mayor of the City of Ojai, testified to the link between the recent displacement of housing stock by STRs and the need to build new housing in the Ojai Valley, which would cause environmental impacts: "people are coming to the city [of Ojai] and saying because of the lack of housing in the surrounding county territory, you know, you've got to do something to create more housing in the city to house the people who are displaced in the county." (AR 6:3424.) According to Mayor Johnston, "we have lost much more of our housing stock in the [Ojai] valley to the STRs than we did to the [Thomas] fire." (AR 6:3424-6:3425.)

- The Planning Commission and Board received numerous complaints from local residents about how STRs and TRUs are destroying the environment in local neighborhoods by, for example, causing excessive noise, littering, increased traffic (including tour buses), increased vehicles parked on residential streets, increased home rental and purchase prices for long-term housing stock, displacing residents (including families) who can no longer afford to live in the Ojai Valley due to the decreased long-term housing stock caused by the STRs, and an increase in homeless persons who lost their housing because landlords turned their units into STRs. (AR: 3:1308-1310, 3:1314, 3:1317, 3:1530, 3:1534-1535, 3:1560, 3:1568-1569, 3:1575, 3:1579-1580, 3:1582, 3:1616-1617, 7:3626, 7:3785, 9:5071, 10:5751-5752, 10:5811-5812, 14:7689.)

- Likewise, the Board heard complaints from residents about those same problems at the meetings on 12/13/16, 5/1/18, and 6/12/18. (AR: 4:2022-2023, 6:3435, 9:4782-4784.)

In sum, as the County persuasively argues, the determination that the TRU Ordinance would help protect housing stock (and prevent noise, parking, refuse, and other environmental impacts typically associated with STRs) is supported by substantial evidence. Accordingly, the County has met its burden to establish that the TRU Ordinance comes within the Class 8 exemption.

Since the County met its initial burden, the burden shifts to Petitioner to show that it falls into one of the exceptions. (See *North Coast Rivers Alliance v. Westlands Water Dist.* (2014) 227 Cal.App.4th 832, 851–852.) Petitioner does not attempt to address the exceptions in the opening or reply briefs. Instead, Petitioner's sole argument, raised for the first time in the reply, was that the County failed to meet its initial burden to show that the exemption applies in the first instance. As explained above, the County has met its burden, and it necessarily follows that Petitioner's only argument fails.

Despite this court's conclusion that Petitioner failed to establish that any of the above noted exceptions apply, the court will address the merits of the exceptions. CEQA Guidelines § 15300.2 sets forth the following exceptions that apply to the Class 8 exemption:

> (b) Cumulative Impact. All exemptions for these classes are inapplicable when the cumulative impact of successive projects of the same type in the same place, over time is significant.
>
> (c) Significant Effect. 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.

(d) Scenic Highways. A categorical exemption shall not be used for a project which may result in damage to scenic resources, including but not limited to, trees, historic buildings, rock outcroppings, or similar resources, within a highway officially designated as a state scenic highway. This does not apply to improvements which are required as mitigation by an adopted negative declaration or certified EIR.

(e) Hazardous Waste Sites. A categorical exemption shall not be used for a project located on a site which is included on any list compiled pursuant to Section 65962.5 of the Government Code.

(f) Historical Resources. A categorical exemption shall not be used for a project which may cause a substantial adverse change in the significance of a historical resource.

(CEQA Guidelines, § 15300.2(b)-(f).)

It is readily apparent that the exceptions for cumulative impact, scenic highways, hazardous waste, and historical resources do not apply in this case. Thus, those exceptions require no further discussion. Therefore, the court's analysis will focus on the exception for "significant effect."

"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***." (CEQA Guidelines, § 15300.2(c), emphasis added.) Although not addressed by the parties, a two-prong analysis determines whether the exception applies: First, the determination as to whether there are any "unusual circumstances" is reviewed under the substantial evidence prong of Pub. Resources Code section 21168.5; second, if unusual circumstances have been shown, then an agency's finding as to whether unusual circumstances give rise to "a reasonable possibility that the activity will have a significant effect on the environment" is reviewed to determine whether the agency, in applying the fair argument standard, proceeded in the manner required by law. (*Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1114.) "This bifurcated approach to the questions of unusual circumstances and potentially significant effects comports with our construction of the unusual circumstances exception to require findings of *both* unusual circumstances *and* a potentially significant effect." (*Id.*, at p. 1115, italics in original.)

Petitioner has failed to address whether there are unusual circumstances. Moreover, given

that evidence in the record shows that the TRU Ordinance would simply create the same STR ban in the Ojai Valley that already exists in other parts of the County, including the City of Ojai, substantial evidence would support the County's finding that no unusual circumstances exist. This alone is sufficient to defeat the "significant effect" exception.

Even if Petitioner had shown that there is substantial evidence to support unusual circumstances, Petitioner would also have to show that there is a reasonable possibility that the activity will have a significant effect on the environment under the fair argument standard. "As to this question, the reviewing court's function 'is to determine whether substantial evidence support[s] the agency's conclusion as to whether the prescribed "fair argument" could be made.' ([Citation].)" (*Berkeley Hillside Preservation v. City of Berkeley* (2015) 60 Cal.4th 1086, 1115.) Here, substantial evidence supports the County's conclusion that no fair argument could be made. There is no reasonable possibility that the activity—banning STRs and regulating homeshares in the Ojai Valley—will have a significant effect on the environment due to unusual circumstances; the evidence in the record establishes that the activity will have the opposite effect, i.e. the TRU Ordinance will result in preserving long-term housing stock, decreasing the negative traffic and parking effects caused by STRs, decreasing the littering and noise pollution caused by STRs, etc. (See AR 1:262-1:264, 1:476-1:498, 3:1308, 3:1314, 3:1317, 3:1530, 3:1534, 3:1560, 3:1568-3:1569, 3:1575, 3:1579-3:1580, 3:1582, 3:1616-3:1617, 4:2022-4:2023, 6:3424-6:3427, 6:3435, 7:3626, 7:3785, 9:4782-9:4784, 9:5071, 10:5751-10:5752, 10:5811-10:5812, 14:7689.)

Petitioner's traffic argument lacks merit. As the County correctly notes, Petitioner speculates that the Ordinance could indirectly cause traffic and related air quality impacts. This argument is based on a paper (AR 2:769 [ATE Study]) submitted by Petitioner's traffic consultant comparing average traffic rates for three different land uses that are listed in the ITE trip generation manual: "single-family detached housing units," "motels" and "recreational homes." The paper states that on average, "single-family detached housing units" generate more traffic than "motels," and "motels" generate more traffic than "recreational homes." (AR 2:769-2:772.) Petitioner cites this information to argue that regulations allowing residential dwellings to be used as STRs could

reduce overall traffic and related air quality impacts because STRs are more akin to "motels" which generate less average traffic than "single-family detached housing units." Therefore, as a threshold issue, Petitioner's alleged evidence of traffic impacts is mere speculation, based on the assumption that STRs create traffic akin to motels and recreational homes. In addition, Petitioner inflates the amount of traffic that may be generated by residential dwellings that are not used as STRs by implying that if a dwelling is not used as an STR, it must instead be used as a "single-family detached housing unit" that will generate more traffic than a "recreational home." In fact, under the NCZO, the "dwelling" land use encompasses dwellings that are used as "single-family detached housing units" and "recreational homes." So both before and after adoption of the Ordinance, dwellings that are not used as STRs could be used as "recreational homes" which, according to petitioner's traffic paper, generate the least amount of traffic. Petitioner's reliance on average traffic rates for motels is thus inaccurate.

In determining whether to adopt the TRU Ordinance, the County considered and rejected Petitioner's arguments regarding traffic. (AR 4:2152-4:2153.) The County indicated that Petitioner's traffic paper is "not evidence that the County's proposed TRU ordinances may have a significant traffic impact." (AR 4:2153.) Petitioner insists that this is an improper dismissal of their evidence; however, as explained above, Petitioner's traffic paper does not equate to reliable fact based study. Rather, the traffic paper is mere speculation based on assumptions and extrapolations of data applicable to motels. Petitioner also speculates that the Ordinance could, by limiting availability of STRs, require Ojai Valley tourists to stay elsewhere and drive longer distances to the Ojai Valley for day trips, thereby increasing vehicle miles traveled and air pollution. This argument ignores the possibility that allowing STRs would increase vehicle miles traveled by displacing housing stock in the geographically isolated Ojai Valley, thereby requiring employees with jobs in the Ojai Valley to reside in Ventura or other communities and commute longer distances to Ojai on a daily basis. In sum, Petitioner has failed to meet its burden to show that the significant effect exception applies. Petitioner has failed to meet its burden to show that any exception to the Class 8 exemption applies.

Common-Sense Exemption:

A project is exempt from CEQA if:

The activity is covered by the common sense exemption that CEQA applies only to projects which have the potential for causing a significant effect on the environment. Where it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment, the activity is not subject to CEQA

(CEQA Guidelines, § 15061(b)(3).)

The "common sense" exemption arises when a project does not qualify for a statutory or categorical exemption, and "[w]here it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment." (*Muzzy Ranch Co. v. Solano County Airport Land Use Com'n* (2007) 41 Cal.4th 372, 380.) In evaluating a common sense exemption, the agency must provide the support for its decision before the burden shifts to the challenger. (*Davidon Homes v. City of San Jose* (1997) 54 Cal.App.4th 106, 116.) An agency's obligation to produce substantial evidence supporting its exemption decision is all the more important where the record shows that opponents of the project have raised arguments regarding possible significant environmental impacts. (*Id.*, at p. 117.) "[T]he showing required of a party challenging an exemption under Guidelines section 15061, subdivision (b)(3) is slight, since that exemption requires the agency to be *certain* that there is *no possibility* the project may cause significant environmental impacts. If legitimate questions can be raised about whether the project might have a significant impact and there is any dispute about the possibility of such an impact, the agency cannot find with certainty that a project is exempt." (*Ibid.*, italics in original.)

The County argues that substantial evidence supports the common sense exemption. According to the County, it determined the Ordinance has no possibility of causing a significant impact because, by prohibiting STRs in most dwellings (while allowing homeshares), the TRU Ordinance merely requires that dwellings be principally used for long-term residential occupancy consistent with their historic purpose and existing County land use law.

A project is exempt from CEQA if the activity is covered by the common sense exemption that CEQA applies only to projects which have the potential for causing a significant effect on the environment. (CEQA Guidelines, § 15061(b)(3).) "Where it can be seen with certainty that there is no possibility that the activity in question may have a significant effect on the environment, the activity is not subject to CEQA." (*Ibid.*) In order to determine whether an activity may have a significant effect on the environment, the Court must first determine the baseline, i.e. the existing environmental conditions against which the project's effects will be measured.

Petitioner argues that the County cannot use a historic baseline. According to Petitioner, the County cannot properly "presume" that actual traffic generated as if the use of the property was always as "full-time residential dwellings," and doing so improperly ignores evidence and "assum[es] away impacts." Petitioner cites no law to support this assertion in the opening brief. In reply, Petitioner describes the County's use of a historic baseline as "hypothetical," and cites *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 952, 955, *POET, LLC v. State Air Resources Bd.* (2017) 12 Cal.App.5th 52, 80, and *Woodward Park Homeowners Assn., Inc. v. City of Fresno* (2007) 150 Cal.App.4th 683, 707, as modified on denial of reh'g (May 11, 2007) in support of its assertion. As explained below, Petitioner's argument lacks merit.

> To decide "whether a given project's environmental effects are likely to be significant, the agency must use some measure of the environment's state absent the project, a measure sometimes referred to as the 'baseline' for environmental analysis. According to an administrative guideline for CEQA's application, *the baseline 'normally' consists of 'the physical environmental conditions in the vicinity of the project, as they exist at the time ... environmental analysis is commenced ....'* (Cal. Code Regs., tit. 14, § 15125, subd. (a).)" (*Communities, supra*, 48 Cal.4th at p. 315, 106 Cal.Rptr.3d 502, 226 P.3d 985, italics added.)[Fns. omitted.]
>
> The baseline determination is an important component of the CEQA process, as it sets the criterion by which the agency determines whether the proposed project has a substantial adverse effect on the environment. (*John R. Lawson Rock & Oil, Inc. v. State Air Resources Bd.* (2018) 20 Cal.App.5th 77, 103–104, 230 Cal.Rptr.3d 1.) However, neither "CEQA nor the CEQA Guidelines mandates a uniform, inflexible rule for determination of the existing conditions baseline. Rather, **an agency enjoys the discretion to decide, in the first instance, exactly how the existing physical**

conditions without the project can most realistically be measured, subject to review, as with all CEQA factual determinations, for support by substantial evidence. [Citation.]" (*Communities*, *supra*, 48 Cal.4th at p. 328, 106 Cal.Rptr.3d 502, 226 P.3d 985.)

(*Hollywoodians Encouraging Rental Opportunities v. City of Los Angeles* (2019) 37 Cal.App.5th 768, 778–779, italics in original, bold added.)

(1) Generally, the lead agency should describe physical environmental conditions as they exist at the time the notice of preparation is published, or if no notice of preparation is published, at the time environmental analysis is commenced, from both a local and regional perspective. **Where existing conditions change or fluctuate over time, and where necessary to provide the most accurate picture practically possible of the project's impacts, a lead agency may define existing conditions by referencing historic conditions, or conditions expected when the project becomes operational, or both, that are supported with substantial evidence**. In addition, a lead agency may also use baselines consisting of both existing conditions and projected future conditions that are supported by reliable projections based on substantial evidence in the record.

(2) . . . .

(3) **An existing conditions baseline shall not include hypothetical conditions, such as those that might be allowed, but have never actually occurred, under existing permits or plans, as the baseline**.

(CEQA Guidelines, § 15125(a)(1)-(3), emphasis added.)

Based on the above, the agency may properly use a historical baseline. For example, an appellate court upheld a city's use of a shopping mall's historic traffic levels as a CEQA baseline instead of recent, much lower traffic levels, caused by mall vacancies atypical of historic use. (*North County Advocates v. City of Carlsbad* (2015) 241 Cal.App.4th 94, 105-06.) As another example, an appellate court upheld a city's use of project site's historic water demand as the CEQA baseline (1,484 acre-feet/year) instead of using recent, much lower water demand (50 acre-feet/year). (*Cherry Valley Pass Acres & Neighbors v. City of Beaumont* (2010) 190 Cal.App.4th 316, 337-338.) Since the agency may properly use a historic baseline, even if recent conditions have changed, it was proper for the County to consider the Ojai Valley's historic use as long-term housing stock and a residential community, rather than considering Ojai Valley's more recent transformation into a community with a disproportionately high rate of STRs.

Petitioner's reliance on *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931 in the reply is misplaced. In that case, the trial court determined that the Water Agency's baseline description was inadequate for failure to disclose impacts upon the fishery resources and lake levels; because the analysis of so-called "historical operations" was meaningless because it did not establish how PG&E would operate the project in a particular year; because it did not specify a specific water release schedule and operations plan for wet, dry, and normal years; and because it used a hypothetical minimum stream flow instead of actual stream flow figures. (*County of Amador*, *supra*, at pp. 952, 955.) None of these concerns exist in this case, where there is no need to address specific year-to-year concerns because, unlike water levels, there is no annual fluctuation that needs to be addressed in considering potential environmental impacts. More importantly, the County's use of a historic baseline relies on actual existing figures about the long-term housing stock in the Ojai Valley area, not some hypothetical situation of long-term housing stock.

In the reply, Petitioner next cites to *Woodward Park Homeowners Assn., Inc. v. City of Fresno* (2007) 150 Cal.App.4th 683, 707. In that case, the EIR acknowledged that the project site was presently a vacant lot, but then went on to evaluate environmental impacts by comparing the project's impacts with those of the maximum buildable development under existing zoning and plan designations. (*Woodward Park Homeowners Assn., Inc. v. City of Fresno* (2007) 150 Cal.App.4th 683, 707.) The court rejected this analysis as hypothetical. (*Ibid.*) Here, in contrast, the historic baseline is not hypothetical; rather, the historic baseline relies on actual figures about the long-term housing stock in the Ojai Valley in the recent past, immediately before the sudden increase in STRs (and reduction in long-term housing stock) caused by certain websites, and immediately before the County first began to research the STR problem in 2015. (See AR 2393 [ADE Report showing dramatic increase in STRs from 2011 to 2017]; see also AR 2387-2407 [entire ADE Report, showing that long-term housing stock is being depleted due to the recent proliferation of STRs].) Therefore, the facts in this case are easily distinguished from *Woodward Park* because the historic baseline used by the County is not hypothetical; rather, it is based on

actual figures pertaining to the historic long-term housing stock available in the Ojai Valley that has recently been converted into STRs.

Lastly, Petitioner cites to *POET, LLC v. State Air Resources Bd.* (2017) 12 Cal.App.5th 52, 80 for the proposition that an agency that elects not to provide an analysis based on existing conditions must provide justification for doing so. It is true that an agency that deviates from the norm must provide "an adequate justification" for doing so. (*POET, LLC v. State Air Resources Bd.* (2017) 12 Cal.App.5th 52, 80.) Even so, in this case, the County has provided an adequate justification for relying on a historic baseline; that is, the County has shown that, in recent years, the number of STRs in the Ojai Valley increased dramatically, causing a significant depletion of long-term housing stock that had historically been in the area. (See AR 2387-2407 [ADE Report].) This is an adequate justification that supports the County's use of a historic baseline. This court finds that it was proper for the County to have used the historical use of the Ojai Valley as long-term residential housing as the baseline for the analysis of the common sense exemption.

Substantial Evidence to Support the Common-Sense Exemption:

As a threshold issue, in the reply, Petitioner asserts that the substantial evidence standard does not apply, and suggests that instead that CEQA Guidelines section 15061(b)(3), *Davidon*, and *Muzzy Ranch* impose on the respondent the burden to establish to a certainty that there is no possibility that the activity in question may have a significant effect on the environment in response to a CEQA challenge. Petitioner misconstrues the CEQA Guidelines, *Davidon*, and *Muzzy Ranch*. CEQA Guidelines section 15061(b)(3) merely sets forth the common sense exemption, without indicating what standard of review applies to a challenge to an agency's decision that the common sense exemption applies. Petitioner ignores the fact that the Public Resources Code states that CEQA challenges are reviewed under an abuse of discretion standard, asking whether the decision is not supported by substantial evidence or whether the agency has not proceeded in a manner required by law. (See Pub. Res. Code, §§ 21168 & 21168.5.) *Muzzy Ranch* does not state what standard of review applies to the common sense exemption. That being said, Petitioner ignores

language in *Muzzy Ranch* describing the evidence needed to support the common sense exemption. "Determining whether a project qualifies for the common sense exemption need not necessarily be preceded by detailed or extensive factfinding. Evidence appropriate to the CEQA stage in issue is all that is required." (*Muzzy Ranch Co. v. Solano County Airport Land Use Com.* (2007) 41 Cal.4th 372, 388, as modified (Sept. 12, 2007).) Most importantly, *Davidon* holds that, in reviewing a common sense exemption determination, an agency bears the burden to produce "substantial evidence supporting its exemption decision." (*Davidon Homes v. City of San Jose* (1997) 54 Cal.App.4th 106, 117, 119.) Simply put, Petitioner's argument lacks merit because no legal authority cited by Petitioner supports the proposition that the substantial evidence standard is inapplicable, and *Davidon* demonstrates that the substantial evidence standard applies.

Petitioner argues that there is no substantial evidence to support the common sense exemption, relying heavily on *Davidon, supra.* In *Davidon*, the court found that the agency had not met its burden to show that substantial evidence supported the common sense exemption because the agency's action:

> [W]as supported only by a conclusory recital in the preamble of the ordinance that the project was exempt under [the common sense exemption]. There is no indication that any preliminary environmental review was conducted before the exemption decision was made. The agency produced no evidence to support its decision and we find no mention of CEQA in the various staff reports. A determination which has the effect of dispensing with further environmental review at the earliest possible stage requires something more. We conclude the agency's exemption determination must be supported by evidence in the record demonstrating that the agency considered possible environmental impacts in reaching its decision.
>
> (*Davidon Homes v. City of San Jose* (1997) 54 Cal.App.4th 106, 117.)

Here, unlike in *Davidon*, the record is rife with evidence to support the County's decision that the common sense exemption applied, and it is apparent that the County considered possible environmental impacts in reaching its decision. The record contains substantial evidence to show that the County considered the environmental impact that STRs were having on long-term housing stock—which is part of the environment—as well as noise, traffic, parking, litter, etc. in the Ojai

Valley. (See AR 1:262-1:264, 1:476-1:498, 3:1308, 3:1314, 3:1317, 3:1530, 3:1534, 3:1560, 3:1568-3:1569, 3:1575, 3:1579-3:1580, 3:1582, 3:1616-3:1617, 4:2022-4:2023, 6:3424-6:3427, 6:3435, 7:3626, 7:3785, 9:4782-9:4784, 9:5071, 10:5751-10:5752, 10:5811-10:5812, 14:7689.) The record contains numerous references to CEQA in staff reports, and particularly to the common sense exemption. (See, e.g., AR 1:253, 1:269, 1:271, 2:1088-1089, 2:1095.) Therefore, Petitioner's reliance on *Davidon* is misplaced.

This court finds that substantial evidence supports the County's determination that the TRU Ordinance did not and would not alter baseline conditions and thus will have no environmental impact under CEQA. For example, the 6/12/18 Board letter contains the following environmental review, which includes a discussion of the common sense exemption:

> The proposed project consists of the County's adoption and implementation of the above described ordinances regulating TRUs in unincorporated Ventura County. Under the status quo, the use of existing dwellings as TRUs is not specifically regulated in unincorporated Ventura County. These ordinances will establish standards and requirements for the use of existing dwellings as TRUs to ensure that such uses meet health and safety requirements and are compatible with, and do not adversely impact, surrounding residential and agricultural uses or affordable housing stock. **The project is exempt from CEQA pursuant to CEQA Guidelines section 15061 (b)(3) because it can be seen with certainty that there is no possibility the project may cause a significant effect on the environment. To the extent the project affects the environment at all, the effect is expected to be beneficial since the proposed ordinances will protect public health and safety, ensure compatibility between TRUs and surrounding residential and agricultural uses, and help protect affordable housing stock.** In this regard, because the project consists of regulations intended to benefit the environment, it is also exempt from CEQA pursuant to CEQA Guidelines section 15308. No substantial evidence exists precluding the use of these exemptions based on the presence of unusual circumstances or any other exception set forth in CEQA Guidelines section 15300.2.
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> (AR 4:2152.)

When compared to the baseline historic use of the Ojai Valley as long-term residential housing stock, the County has shown that there is substantial evidence in the record to support its finding that it was/is *certain* that there is *no possibility* the project may cause significant environmental impacts. Using this baseline, no legitimate questions can be raised about whether

the TRU Ordinance might have a significant impact, since the TRU Ordinance would merely restore the historic baseline.

Petitioner's Traffic & Urban Decay Arguments:

Petitioner argues that the County cannot show that the common sense exemption applies because Petitioner raised arguments about possible traffic and urban decay impacts. In the reply, Petitioner cites *Myers v. Board of Supervisors* (1976) 58 Cal.App.3d 413 for the propositions that "[i]f legitimate questions can be raised about the possibility of such an impact, the agency cannot find with certainty that a project is exempt," and "a dispute means that 'the agency cannot find with certainty that a project is exempt.' (*Myers*, *supra*, 58 Cal.App.3d, at p. 425.)" Although artfully quoted, this court reads *Myers* as holding that the common sense exemption applies where it is with certainty that there is no possibility of a significant environmental impact. (See *Myers*, *supra*, at p. 425.)

In evaluating a common sense exemption, the agency must provide the support for its decision before the burden shifts to the challenger. (*Davidon Homes v. City of San Jose* (1997) 54 Cal.App.4th 106, 116.) An agency's obligation to produce substantial evidence supporting its exemption decision is all the more important where the record shows that opponents of the project have raised arguments regarding possible significant environmental impacts. (*Id.*, at p. 117.) "[T]he showing required of a party challenging an exemption under Guidelines section 15061, subdivision (b)(3) is slight, since that exemption requires the agency to be *certain* that there is *no possibility* the project may cause significant environmental impacts. If legitimate questions can be raised about whether the project might have a significant impact and there is any dispute about the possibility of such an impact, the agency cannot find with certainty that a project is exempt." (*Ibid.*, italics in original, bold added.) In other words, the mere fact that Petitioner raised the arguments alone is insufficient. Rather, the evidence in the record must show that there were *legitimate questions* that could be raised and a *dispute* about the possibility of such an impact. With that in mind, the only two issues raised by Petitioner—traffic and urban decay—are discussed below.

Petitioner raises traffic as a potential environmental impact. This argument was addressed by the County on 6/12/18:

> Commentators have submitted data suggesting that TRUs generate less peak hour vehicular traffic than full-time residential dwellings. (December 13, 2016 submittal by Richard Poole, attached as Exhibit 20.) Commentators have cited this data to suggest that regulations allowing TRUs would have a beneficial impact on traffic conditions and, conversely, that regulations prohibiting or limiting TRUs would have a detrimental impact on traffic conditions. These comments and data are not evidence that the County's proposed TRU ordinances may have a significant traffic impact. As stated above, under the County's proposed TRU ordinances, the operation of a TRU, if permitted, would merely be an allowable accessory use of an existing dwelling. The owner of a permitted TRU would not be obligated to operate the dwelling as a TRU at all, let alone for any set amount of time. **Every permitted TRU's principal use would continue to be a full-time residential dwelling under the County's zoning ordinance. Consequently, for purposes of zoning and CEQA review, the County assumes that every existing dwelling will generate an amount of traffic typically associated with the dwelling's principal use as full-time residential dwelling.** Based on the commentator's data suggesting that TRUs generate less peak hour traffic than full-time residential dwellings, **the County's proposed TRU regulations would not negatively affect existing traffic conditions because, at most, the use of some dwellings as TRUs would decrease the amount of peak hour traffic as compared to that generated by the assumed, principal use of the structures as full-time residential dwellings**.
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> (AR 4:2153, emphasis added.)

Under the applicable baseline (discussed above), it was proper for the County to reject Petitioner's traffic argument and traffic paper.[4] It was soundly within the County's discretion to establish baseline conditions based on the historic, principal use of residential dwellings for long-term occupancy, and to reject petitioner's argument that this baseline must somehow be adjusted

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[4] In any event, Petitioner's traffic arguments lack merit, as discussed above in connection with the Class 8 exemption. Petitioner's so-called evidence of traffic impacts is mere speculation, based on the assumption that STRs create traffic akin to hotels (without any data to support that assumption). Such speculation is insufficient to show that an exception applies. Petitioner also speculates that the Ordinance could, by limiting availability of STR accommodations, require Ojai Valley tourists to stay elsewhere and drive longer distances to the Ojai Valley for day trips, thereby increasing vehicle miles traveled and air pollution. This argument, however, ignores the possibility that allowing STRs would increase vehicle miles traveled by displacing housing stock in the geographically isolated Ojai Valley, thereby requiring employees with jobs in the Ojai Valley to reside in Ventura or other communities and commute longer distances to Ojai on a daily basis.

to account for an alleged decrease in environmental impacts associated with the recent proliferation of dwellings being used for transient occupancy. (See *North County Advocates v. City of Carlsbad*, *supra*, 241 Cal.App.4th, at pp. 105-06; *Cherry Valley Pass Acres & Neighbors v. City of Beaumont*, *supra*, 190 Cal.App.4th, at pp. 337-338.) Thus, Petitioner's traffic argument lacks merit. Even when considering potential traffic considerations, when compared to the baseline historic use of the Ojai Valley as long-term residential housing stock, the County has shown that there is substantial evidence in the record to support its finding that it was/is *certain* that there is *no possibility* the project may cause significant environmental impacts.

Petitioner raises urban decay as a potential environmental impact, arguing that local businesses will experience negative economic consequences from the loss of local visitor lodging. "As defined by CEQA, urban decay is a relatively extreme economic condition." (*Placerville Historic Preservation League v. Judicial Council of California* (2017) 16 Cal.App.5th 187, 197.) "[U]rban decay requires a significant effect on the physical environment." (*Joshua Tree Downtown Business Alliance v. County of San Bernardino* (2016) 1 Cal.App.5th 677, 685.) Petitioner's urban decay argument is predicated on comments received primarily from Petitioner, STR operators (including members of Petitioner), and local tourist-related business owners that the TRU Ordinance will harm local businesses catering to tourists. (See Opening Brief, at pp. 9:25-10:2 & 11:15-26:, citing AR 3960, 2958, 3077-79, 3214, 3248, 3314, 3657-58, 3735, 3739, 3749, 3775, 4005-06, 4609-10, 4627-29, 4638, 1255-56, 1273-75, 1284, 5014-15, 5033-34, 1403, 5089, 1540-42, 1574, 1639-40, 3077-79, 3214-16, 1920-22, 5684-85, 5808-09, 6575, 2799-2807, 7805-06, 7807-08, 7831-32, 2929-30, 2947-49, 2958-59.) Such evidence of anecdotal comments is insufficient to show the type of physical deterioration necessary to constitute urban decay. (See *Placerville Historic Preservation League v. Judicial Council of California* (2017) 16 Cal.App.5th 187, 199.) Petitioner also relies on a memo from the Director of Ventura County Resources Management Agency to the Board of Supervisors that warns generally of the negative economic impact that a complete STR ban could cause. (See Opening Brief, at p. 11:15-26, citing AR 445-46.) These general complaints about reduced business revenue are insufficient to show the physical

deterioration necessary to constitute urban decay. Thus, Petitioner's urban decay argument lacks merit.

Even if the TRU Ordinance indirectly reduces tourist-related income to some extent, this would not evidence urban decay. Nothing in the administrative record establishes, or even suggests, that the TRU Ordinance would reduce tourism in the Ojai Valley, let alone decimate the local economy. Rather, the AR shows that many residents, business owners and school officials commented that STRs are harming local schools, businesses, charities and other organizations that have historically served the residents being displaced by rapidly proliferating STRs. (AR 3:1314, 3:1616, 6:3283-6:3284, 7:3625, 7:3626, 9:5043, 9:5071, 9:5095-9:5097, 9:5264-9:5265, 10:5710, 11:6006-11:6009.) Such evidence suggests that the TRU Ordinance will help prevent urban decay. There is substantial evidence in the record to support the County's determination that the common sense exemption applies to the TRU Ordinance.

State Planning & Zoning Law Claim (Gov. Code, §§ 65855, 65856):

Petitioner seeks a writ of mandate under the State Planning and Zoning Law, codified in Gov. Code section 65000 et seq. (See Gov. Code, § 650000 ["This title may be cited as the Planning and Zoning Law."].) Although not addressed in Petitioner's opening brief, the County's opposition correctly cites to Gov. Code section 65010 as setting forth the legal standard to determine whether to invalidate or set aside a zoning law or amendment on the ground that it violates a provision of the State Planning and Zoning Law. Gov. Code section 65010 states, in relevant part:

> No action, inaction, or recommendation by any public agency or its legislative body or any of its administrative agencies or officials on any matter subject to this title shall be held invalid or set aside by any court on the ground of the improper admission or rejection of evidence or by reason of any error, irregularity, informality, neglect, or omission (hereafter, error) as to any matter pertaining to petitions, applications, notices, findings, records, hearings, reports, recommendations, appeals, or any matters of procedure subject to this title, **unless the court finds that the error was prejudicial and that the party complaining or appealing suffered substantial injury from that error and that a different result would have been probable if the error had not occurred.** There shall be

no presumption that error is prejudicial or that injury was done if the error is shown.

(Gov. Code, § 65010(b), emphasis added.)

The essential elements for a claim for violation of the State Planning and Zoning Law are: (1) improper admission or rejection of evidence or an error, irregularity, informality, neglect, or omission as to any matter pertaining to petitions, applications, notices, findings, records, hearings, reports, recommendations, appeals, or any matters of procedure subject to this title; (2) that the error was prejudicial; (3) that the party complaining or appealing suffered substantial injury from that error; and (4) that a different result would have been probable if the error had not occurred. (See Gov. Code, § 65010(b); see also *Rialto Citizens for Responsible Growth v. City of Rialto* (2012) 208 Cal.App.4th 899, 917 [noting that the petitioner made no attempt to show that the defective notice was prejudicial, caused substantial injury to anyone, or that a different result was probable absent the defect].)

Although the FAP alleges two violations of the State Planning and Zoning Law—Gov. Code sections 65855 and 65856—the opening brief only addresses section 65855, which is analyzed below.[5] "The planning commission shall hold a public hearing on the proposed zoning ordinance or amendment to a zoning ordinance," and notice must be given. (Gov. Code, § 65854.)

> After the hearing, the planning commission shall render its decision in the form of a written recommendation to the legislative body. Such recommendation shall include the reasons for the recommendation, the relationship of the proposed ordinance or amendment to applicable general and specific plans, and shall be transmitted to the legislative body in such form and manner as may be specified by the legislative body.
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> (Gov. Code, § 65855.)

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[5] In the reply, Petitioner for the first time attempts to raise a violation of Gov. Code section 65857, with no explanation for the failure to raise this issue earlier. Courts generally disregard new arguments raised in the reply brief, without a showing of good cause for the failure to raise the arguments earlier, since considering such arguments would deprive the other party of the opportunity to counter the argument. (See *Kahn v. Wilson* (1898) 120 Cal. 643, 644; see also *Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764.) Thus, Petitioner's new Gov. Code section 65857 argument is disregarded.

Petitioner first asserts that "when the Planning Commission on 3/1/18 directed that a Density Analysis be conducted by staff, it did not undertake the exercise of making a recommendation that complies with Gov. Code section 65855, given its directive." (Opening Brief, at pp. 21:28-22:2, citing AR 2148-49.) Later, according to Petitioner, County Counsel informed the Planning Commission that its direction to staff to undertake the Density Analysis and develop alternative regulations that include density limitations was inconsistent with the Commission's advisory role with respect to proposed land use legislation initiated by the Board; County Counsel advised the Planning Commission that it could only recommend that ***the Board direct*** staff to develop alternative regulations but that the Planning Commission itself could not direct staff to do so. (Opening Brief, at p. 22:3-9, citing AR 3561-64, 3888-89.) Petitioner states that the Planning Commission failed to take County Counsel's advice at its next 4/12/18 meeting, "so the [3/1/18] direction to undertake the Density Analysis was the only 'recommendation' from the Planning Commission." (Opening Brief, at p. 22:9-12, citing AR 3561-64.)

According to Petitioner, when the matter went before the Board again on 5/1/18, the staff report "incorrectly stated" that if the Board does not approve the budget for the Density Analysis, then it could either (1) send the matter back to the Planning Commission for a formal updated recommendation regarding the existing draft TRU Ordinance; or (2) skip that step and just direct the staff to schedule a public hearing for the Board's consideration of the existing draft TRU Ordinance. (Opening Brief, at p. 22:13-18, citing AR 2148-49.) Petitioner argues that the first option—sending the matter back to the Planning Commission for a formal recommendation—was the only "legal option available to the Board pursuant to Govt. Code §65855." (Opening Brief, at p. 22:19-21.) Petitioner insists that the second option (which was ultimately taken by the Board) is contrary to law because the Board would have been acting without the formal recommendation from the Planning Commission in violation of Gov. Code section 65855, since the Planning Commission's recommendation lacked (a) an actual recommendation regarding the TRU Ordinance itself (i.e. whether the Board should adopt the TRU Ordinance); (b) stated reasons for the recommendation; and (c) a discussion regarding the relationship of the proposed ordinance or

amendment to applicable general and specific plans.

Petitioner misconstrues Gov. Code section 65855 as prohibiting the Board from taking action without a recommendation from the Planning Commission that fully complies with that statute. Nothing in Gov. Code section 65855 would prohibit a board of supervisors from acting without a formal recommendation from a planning commission that complies with the statute. Gov. Code section 65855 merely requires the Planning Commission to issue a recommendation that contains certain required information, but it does not prohibit the Board from acting without a code-compliant recommendation.

The only relevant question is whether the Planning Commission issued a recommendation that complied with Gov. Code section 65855. The Planning Commission Minutes from 3/1/18 are included in the AR. (AR 3928-32.) Contrary to Petitioner's assertion, the minutes expressly state that the Planning Commission recommended actions and directed staff to do more analysis and return with revised ordinances that include numeric and/or density limits, and that motion was approved. (AR 3931.) That being said, Petitioner is correct that the Planning Commission's recommendation is deficient for lack of stated reasons for the recommendation, and the lack of a discussion regarding the relationship of the proposed ordinance to the applicable general and specific plans. The original recommendation from the staff to the Planning Commission, summarized at the beginning of the minutes, includes a recommended finding that the TRU Ordinance is consistent with the general and specific plans; however, there is no similar analysis or discussion with respect to the Planning Commission's recommendation that the draft TRU Ordinance be amended, and that a Density Analysis be performed. (AR 3929-30.) Likewise, the minutes include stated reasons for the staff's recommendations to the Planning Commission, but there is no statement of reasons or the Planning Commission's contrary recommendation. (AR 3929-30.) Thus, Petitioner is correct that the Planning Commission's recommendation fails to comply with Gov. Code section 65855 in two respects: (1) it lacks stated reasons for the recommendation; and (2) it lacks a discussion regarding the relationship of the proposed ordinance or amendment to applicable general and specific plans.

No defect or irregularity governed by the State Planning and Zoning Law shall be held invalid "unless the court finds that the error was prejudicial and that the party complaining or appealing suffered substantial injury from that error and that a different result would have been probable if the error had not occurred. There shall be no presumption that error is prejudicial or that injury was done if the error is shown." (Gov. Code, § 65010(b); see also *Rialto Citizens for Responsible Growth v. City of Rialto* (2012) 208 Cal.App.4th 899, 917.) Therefore, Petitioner bears the burden to show that the error was prejudicial, that Petitioner suffered substantial injury from that error, that a different result would have been probable if the error had not occurred.

The County persuasively argues that Petitioner has not attempted to show—let alone met its burden to demonstrate—that any purported violation of Gov. Code section 65855 (or any other provision in the State Planning and Zoning Law) was prejudicial, that it suffered substantial injury as a result, or that a different result would have been probable if the error had not occurred. In reply, Petitioner generally asserts that "Petitioner is a group of individuals and entities who own and operate real property in the County and who are impacted by how the County regulates the use of their property. Obviously, the loss of an allowed use of property constitutes prejudice." This argument lacks merit because Petitioner fails to show that compliance with Gov. Code section 65855 would have resulted in a different outcome, i.e. Petitioner fails to show that the non-compliance with that statute is what *caused* the claimed prejudice. Furthermore, Petitioner's reliance on *Environmental Defense Project of Sierra County v. County of Sierra* (2008) 158 Cal.App.4th 877 is misplaced because that case is readily distinguishable from the facts presented here. In *Environmental Defense Project of Sierra County*, the alleged violation of the State Planning and Zoning Law at issue was the failure to provide a 10-day notice of the legislative body's hearing after the planning commission's recommendation has been received that included the planning commission's recommendation as part of the general explanation of the matter to be considered. (*Environmental Defense Project of Sierra County v. County of Sierra* (2008) 158 Cal.App.4th 877, 893.) Such a violation results in a total lack of notice to the public and an opportunity to be heard. As explained in *Sounhein v. City of San Dimas* (1992) 11 Cal.App.4th

1255, discussed above, such a violation is not a mere technical violation; rather, such a violation results in a total lack of notice. Here, in contrast, Petitioner does not claim that there was a lack of notice. Instead, Petitioner solely relies on a mere technical violation, that is, the failure to include all required elements in the Planning Commission's recommendation. No legal authority supports Petitioner's contention that such a simple, technical violation can justify setting aside a legislative action when there is no showing of prejudice, substantial injury, and that a different result would have been probable. Therefore, Petitioner's argument lacks merit.

In sum, Petitioner has shown that the Planning Commission's recommendation fails to comply with Gov. Code section 65855 in two respects: (1) it lacks stated reasons for the recommendation; and (2) it lacks a discussion regarding the relationship of the proposed ordinance or amendment to applicable general and specific plans. However, this alone is insufficient to show that a writ of mandate should issue. Petitioner must also show that the violation of Gov. Code section 65855 was prejudicial, that it suffered substantial injury as a result, or that a different result would have been probable if the error had not occurred. (See Gov. Code, § 65010(b).) Petitioner has failed to show that any violation of Gov. Code section 65855 was prejudicial, that it suffered substantial injury as a result, or that a different result would have been probable if the error had not occurred. It follows that Petitioner's writ of mandate for violation of the State Planning and Zoning Law fails.

Brown Act Claim:

Petitioner seeks a writ of mandate under the Brown Act. Although not addressed in the opening brief, the County's opposition correctly cites to *Olson v. Hornbrook Community Services Dist.* (2019) 33 Cal.App.5th 502 as setting forth the legal standard to determine whether to invalidate or set aside a law on the ground that it violates the Brown Act:

> Section 54960.1, subdivision (a) provides that an interested person may sue the legislative body of a local agency by mandamus or injunction to determine whether an action taken by that body violated certain provisions of the Act, and as a consequence is null and void. Section 54960.1 limits its remedy to actions that violated the Act's mandate for open and public meetings (§§ 54953, 54956,

54956.5) and its agenda posting requirements (§§ 54954.2, 54954.5, 54954.6). "'To state a cause of action, a complaint based on [section] 54960.1 must allege: (1) that a legislative body of a local agency violated one or more enumerated Brown Act statutes; (2) that there was "action taken" by the local legislative body in connection with the violation; and (3) that before commencing the action, plaintiff made a timely demand of the legislative body to cure or correct the action alleged to have been taken in violation of the enumerated statutes, and the legislative body did not cure or correct the challenged action.' " (*Bell v. Vista Unified School Dist.* (2000) 82 Cal.App.4th 672, 684, 98 Cal.Rptr.2d 263.)

Subdivision (d)(1) of section 54960.1 provides that any action alleged to have violated these specified sections shall not be determined to be null and void if the action was taken in substantial compliance with that section. Further, "[e]ven where a plaintiff has satisfied the threshold procedural requirements to set aside an agency's action, Brown Act violations will not necessarily 'invalidate a decision. [Citation.] [Plaintiffs] must show prejudice.' " (*San Lorenzo Valley Community Advocates for Responsible Education v. San Lorenzo Valley Unified School Dist.* (2006) 139 Cal.App.4th 1356, 1378, 44 Cal.Rptr.3d 128.)

(*Olson v. Hornbrook Community Services Dist.* (2019) 33 Cal.App.5th 502, 517.)

The essential elements for a claim for violation of the Brown Act are: (1) a violation of a statute in the Brown Act, without "substantial compliance" with that statute; (2) action taken by the legislative body in connection with the violation; (3) pre-litigation demand by the petitioner to cure the defect; and (4) prejudice shown by the petitioner. (See *ibid.*; see also *San Lorenzo Valley Community Advocates for Responsible Education v. San Lorenzo Valley Unified School Dist.* (2006) 139 Cal.App.4th 1356, 1410 [stating that a showing of prejudice is required for a Brown Act claim].)

Petitioner asserts that the County violated the Brown Act by failing to re-open the matter for public comment during the 6/19/18 hearing, after "substantial changes" were purportedly made to the proposed draft TRU Ordinance—i.e. the decision to strike "sites of merit" from proposed exemptions to the prohibition, and to only allow an exemption for "historic properties"—after the hearing that allowed public comment on 6/12/19. Petitioner argues that this failure to reopen the matter for public comment on 6/19/18 after a "substantial change" to the proposed ordinance violates Gov. Code sections 54954.2 and 54954.3 of the Brown Act. In opposition, the County argues that it did not violate the Brown Act because the hearing on 6/19/19 was merely a

continuation of the hearing on 6/12/19, and the Brown Act expressly allows for hearings to be continued per Gov. Code section 59455.1. The County further asserts that, contrary to Petitioner's assertion, the item was not "substantially changed," and therefore no additional comment period was required. The County also argues that that the "substantial change" exception in the statute only applies when an item is heard by the legislative body after the item's initial hearing by a committee composed of members of the same legislative body. The County asserts that the "committee exception" does not apply to the Board's hearing of the ordinance on 6/19/18 because the Board—not a committee of the Board—heard the same item on 6/12/18. Therefore, the County concludes that it was not required to provide for public comment on 6/19/18 because the opportunity for public comment for the same item had already been provided, and extensively occurred, on 6/12/18.

This Court must first determine whether the hearing on 6/19/18 was merely a continuation of the hearing on 6/12/18. Next, the Court must determine whether the substantial change exception applies at all. Lastly, the Court must decide whether there was a "substantial change" to the draft TRU Ordinance at the 6/19/18 meeting, or whether—as the County asserts—there was not substantial change based on the "committee exception." Each issue is discussed separately below.

"Any hearing being held, or noticed or ordered to be held, by a legislative body of a local agency at any meeting may by order or notice of continuance be continued or recontinued to any subsequent meeting of the legislative body in the same manner and to the same extent set forth in Section 54955 for the adjournment of meetings . . . ." (Gov. Code, § 54955.1.) "At least 72 hours before a regular meeting, the legislative body of the local agency, or its designee, shall post an agenda containing a brief general description of each item of business to be transacted or discussed at the meeting, including items to be discussed in closed session." (Gov. Code, § 54954.2(a)(1).) "Notwithstanding subdivision (a), the legislative body may take action on items of business not appearing on the posted agenda" under certain conditions. (*Id.*, subd. (b).) "Prior to discussing any item pursuant to this subdivision, the legislative body shall publicly identify the item." (*Ibid.*)

> Every agenda for regular meetings shall provide an opportunity for members of the public to directly address the legislative body on any item of interest to the public, before or during the legislative body's consideration of the item, that is within the subject matter jurisdiction of the legislative body, provided that no action shall be taken on any item not appearing on the agenda unless the action is otherwise authorized by subdivision (b) of Section 54954.2. However, the agenda need not provide an opportunity for members of the public to address the legislative body on any item that has already been considered by a committee, composed exclusively of members of the legislative body, at a public meeting wherein all interested members of the public were afforded the opportunity to address the committee on the item, before or during the committee's consideration of the item, unless the item has been substantially changed since the committee heard the item, as determined by the legislative body. Every notice for a special meeting shall provide an opportunity for members of the public to directly address the legislative body concerning any item that has been described in the notice for the meeting before or during consideration of that item.
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> (Gov. Code, § 54954.3(a).)
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> When the Brown Act and the Sunshine Ordinance are read in their entirety, we conclude that the lawmaking bodies clearly contemplated circumstances in which continuances and multiple sessions of meetings to consider a published agenda would be required, and thus they mandated that a single general public comment period be provided *per agenda*, in addition to public comment on each agenda item as it is taken up by the body. For example, section 54955.1 allows for any hearing by a legislative body of a local agency to be continued in the manner set forth in section 54955. Section 54955 provides that less than a quorum may adjourn from time to time and a copy of the order or notice of adjournment shall be conspicuously posted on or near the door of the place where the meeting was held within 24 hours after the time of the adjournment. In addition, section 54954.2, subdivision (b)(3) mandates that action on continued agenda items must occur within five calendar days of the meeting at which the continuance is called.
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> (*Chaffee v. San Francisco Library Com.* (2004) 115 Cal.App.4th 461, 469.)

When a hearing is continued to a later date and the same item is considered at both the original and the continued hearing, the Brown Act only mandates "a single general comment period be provided *per agenda*, in addition to public comment on each agenda item that is taken up by the body." (See *ibid.*) So long as the same agenda is used at both meetings, and so long as there is a single public comment period for that agenda and each agendized item, the legislative body will be in compliance with the Brown Act.

It is undisputed that the draft TRU Ordinance was an agenda item for the meeting on 6/12/18. Furthermore, the County's argument that the meeting on 6/19/18 was merely a continuance of the 6/12/18 meeting is persuasive. The transcript from the meeting on 6/12/18 expressly states that the agendized item on the draft TRU Ordinance was continued to 6/19/18 for decision-making. (AR 2076.) The transcript from the meeting on 6/19/18 also states that the discussion on the agendized item on the draft TRU Ordinance was a continuation from the 6/12/18 meeting. (AR 228.) Moreover, as the County correctly points out, the transcript for the 6/12/19 portion of the hearing included several hours of public comment on the subject item, i.e. the draft TRU Ordinance. (AR 1885-2078.) Therefore, the record shows that only one public comment period was required for both the 6/12/19 and 6/19/18 meetings, and that public comment period was provided on 6/12/19.

As stated above, "the agenda **need not** provide an opportunity for members of the public to address the legislative body **on any item that has already been considered by a committee, composed exclusively of members of the legislative body, at a public meeting** wherein all interested members of the public were afforded the opportunity **to address the committee on the item**, before or during the committee's consideration of the item, **unless the item has been substantially changed since the committee heard the item**, as determined by the legislative body." (Gov. Code, § 54954.3(a), emphasis added.) Petitioner's opening brief does not address the language of the statute; instead, it relies on the fact that County Counsel, Leroy Smith, stated at the start of the 6/19/18 meeting that public comment did not need to be reopened unless, per Gov. Code section 54954.3(a), there the item was substantially changed. It is true that Mr. Smith made such a comment at the beginning of the meeting. (See AR 228-29.)

The County correctly asserts that the substantial change exception in Government Code section 54954.3(a) only applies to an item considered by a committee, but not by the entire legislative body. The express language of the statute establishes that the substantial change exception of Gov. Code section 54954.3(a) only applies if the item was first considered by a committee at a public meeting, and is subsequently considered by the legislative body. In *Preven*,

a case cited by the County, the court stated that "[t]he parties refer to this [meaning the exception in Gov. Code section 54954.3(a)] as the 'committee exception,' and we likewise use that terminology for ease of reference." (*Preven v. City of Los Angeles* (2019) 32 Cal.App.5th 925, 931.) The court recognized that this "committee exception" applies to regular meetings, but not special meetings. (*Id.*, at pp. 931-33) Notably, the court in *Preven* did not actually address the question of whether this so-called "committee exception" applies when the prior opportunity for public comment occurred before the entire legislative body, not merely a committee composed of members of that legislative body. Even so, the court's use of the phrase "committee exception" supports the County's assertion that this exception does not apply to the Board's hearing on the TRU Ordinance on 6/19/18 because the Board—not a committee of the Board—heard the same item on 6/12/18.

Petitioner fails to cite any legal authority to support the proposition that the subject exception in Gov. Code section 54954.3(a) could apply to the continued hearing on 6/19/18. In sum, based on the express language of the statute and case law describing it as the "committee exception," the Court finds that this exception does not apply to the Board's hearing on the TRU Ordinance on 6/19/18 because the Board—not a committee of the Board—heard the same item on 6/12/18.

Assuming *arguendo* that the exception applies, the remaining issue is whether the draft TRU Ordinance was "substantially changed" since the 6/12/18 hearing, "as determined by the legislative body," i.e. the Board. (See Gov. Code, § 54954.3(a).) Petitioner insists that Supervisor Bennett's proposal to strike "sites of merit" from the draft TRU Ordinance was a substantial change that required further public comment because dozens of STRs qualified as "sites of merit" and would therefore be affected by and included in the STR ban. Petitioner cites to portions of the administrative record referring to the number of sites of merit that would be affected, as well as Supervisor Bennett's explanation that removing "sites of merit" was proper because "sites of merit" go through less rigorous designation standards than historic landmarks, and including the dozens of "sites of merit" in the exception would negatively impact housing stock. (See AR 229-

233.) Petitioner further asserts that this "is a significant number" given that there are only 160-239 STRs in all of the Ojai Valley.

Petitioner's argument lacks merit for two reasons. First, Petitioner cites no case law holding that a change to an item that affects a "significant number" of properties constitutes a "substantial change" to the item, and proffers no further analysis to support this bare assertion. Second, Petitioner's argument ignores the language in Gov. Code section 54954.3(a) stating that this exception applies when "the item has been substantially changed since the committee heard the item, **as determined by the legislative body**." (Gov. Code, § 54954.3(a), emphasis added.) Petitioner cites no portion of the administrative record that could be construed as the Board's determination that the decision to strike "sites of merit" constitutes a substantial change to the draft TRU Ordinance. As such, the Court finds that the item was not substantially changed, as determined by the legislative body, pursuant to Gov. Code section 54954.3(a).

Petitioner has failed to show a violation of the Brown Act. The 6/19/18 hearing was merely a continuation of the 6/12/18 meeting, and therefore no additional public comment period was necessary at the 6/19/18 hearing. Based on the express language of the statute and case law describing it as the "committee exception," the exception does not apply to the Board's hearing on the TRU Ordinance on 6/19/18 because the Board—not a committee of the Board—heard the same item on 6/12/18. In any event, the item was not substantially changed, as determined by the legislative body, pursuant to Gov. Code section 54954.3(a).

Lastly, Petitioner must show prejudice in order to prevail on this petition for writ of mandate seeking to invalidate the TRU Ordinance based on an alleged violation of the Brown Act. (See *Olson v. Hornbrook Community Services Dist.* (2019) 33 Cal.App.5th 502, 517; see also *San Lorenzo Valley Community Advocates for Responsible Education v. San Lorenzo Valley Unified School Dist.* (2006) 139 Cal.App.4th 1356, 1410.) The County persuasively argues that Petitioner has not attempted to show—let alone met its burden to demonstrate—that any purported violation of the Brown Act was prejudicial. In reply, Petitioner generally asserts that "Petitioner is a group

of individuals and entities who own and operate real property in the County and who are impacted by how the County regulates the use of their property. Obviously, the loss of an allowed use of property constitutes prejudice." This argument lacks merit because Petitioner fails to show that compliance with the Brown Act would have resulted in a different outcome, i.e. Petitioner fails to show that the non-compliance with the Brown Act is what *caused* the claimed prejudice. Thus, regardless of whether Petitioner has shown a violation of the Brown Act, Petitioner's claim fails as a matter of law.

Dated: June 23, 2020

KEVIN G. DeNOCE
Judge of the Superior Court