CARSTENS, BLACK & MINTEER LLP
Amy Minteer, SBN 223832; acm@cbcearthlaw.com
Michelle N. Black, SBN 261962; mnb@cbcearthlaw.com
Sunjana Supekar, SBN 328663; sss@cbcearthlaw.com
2200 Pacific Coast Highway, Suite 318
Hermosa Beach, CA 90254
Tel: 310.798.2400; Fax 310.798.2402

Attorneys for Petitioners
Studio City Residents Association
and Save LA River Open Space

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

STUDIO CITY RESIDENTS ASSOCIATION and SAVE LA RIVER OPEN SPACE, Petitioners, v. CITY OF LOS ANGELES Respondent; _____ HARVARD-WESTLAKE SCHOOL; COUNTY OF LOS ANGELES and DOES 1-10 Real Parties in Interest. _____	CASE NO.: 23STCP04483 **PETITIONERS' EVIDENTIARY OBJECTIONS TO DECLARATION OF JAMES DEMATTE** Petition Filed: December 13, 2024 Assigned for All Purposes To: Honorable Maurice A. Leiter Department 54 Stanley Mosk Courthouse Trial Hearing Date: December 10, 2024 Time: 9:30 a.m.

I. INTRODUCTION.

Petitioners, Studio City Residents Association, Save LA River Open Space, and Save Weddington, hereby make the following objections to the Declaration of James DeMatte in Support of Opposition to Petitioners' Joint Opening ("Declaration") on the basis that the Declaration and its Exhibit 1 constitute irrelevant, extra-record evidence in a case that must be decided based upon an administrative record. Petitioners also object to the Declaration of as an inadmissible and irrelevant assertion of opinion by a nonparty, rather than any properly presented evidentiary facts.

II. The Declaration Contains Irrelevant, Extra-Record Documents.

Attached to the Declaration as Exhibit 1 are photographs of the Project site, allegedly taken in September and October of 2024. Real Parties' submission attempts to skirt well-established law precluding the consideration of extra-record evidence in a writ case, such as this. (*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 573 ("*WSPA*"); *RiverWatch v. Olivenhain Municipal Water Dist.* (2009) 170 Cal.App.4th 1186, 1218.) In a California Environmental Quality Act (CEQA) case such as this one, the Court's review is limited to a review of the administrative record and documents or propositions of which the Court has granted judicial notice. (Pub. Resources Code, §21167.6, subd. (e).) The Petitions challenge the City's compliance with CEQA at the time it approved the Project in November 2023.

Exhibit 1 is neither part of the administrative record, nor appropriate for judicial notice. (See Evid. Code, §§451, 452.) Exhibit 1 was created nearly one year after Project approval and is thus irrelevant to demonstrate that the environmental impact report or the City's approval process, at the time of approval, complied with CEQA. (*Smith v. Selma Community Hospital* (2008) 164 Cal.App.4th 1478, 1520 [evidence that an element of collateral estoppel was met in January 2008 is not relevant as to whether the doctrine was applied correctly before an administrative governing board in July 2005].) "[E]xtrarecord evidence which comes into existence after an agency's final CEQA determination on a project may not be considered by the courts." (*Protect Tustin Ranch v. City of Tustin* (2021) 70 Cal.App.5th 951, 963, fn. 4.)

Real Parties have made no showing of "reasonable diligence" for Exhibit 1, and even if they had, the evidence must still have "existed before the agency made its decision" to be relevant to the court's

consideration. (*WSPA*, *supra*, 9 Cal.4th 559, 578.) This post-decisional document showing site conditions 11 months after Project approval was not before the City at the time of project approval. Longstanding case law precludes the consideration of such extra-record evidence. (*WSPA*, *supra*, 9 Cal.4th 559, 573; *Defend the Bay v. City of Irvine* (2004) 119 Cal.App.4th 1261, 1275, fn. 5 [court declines judicial notice of report demonstrating compliance with mitigation measure that was not part of the administrative record at the time of EIR approval].)

III. The Declaration of James DeMatte is Irrelevant and Inadmissible.

The Declaration states that Real Parties have completed tree removal on the Project site, removing 213 of the 215 trees slated for removal and all demolition. (Declaration ¶¶3-4.) As the Petitions challenge the City's compliance with CEQA at the time of Project approval in November 2023, the completion of tree removal is irrelevant. This statement does not concern the City's approval process, or the adequacy or content of the EIR or CEQA findings and is irrelevant extra-record evidence.

Real Parties appear to include this statement in an attempt to moot Petitioners' claims about the Project's potentially significant environmental impacts related to the removal of trees, including the harm to sensitive bird and bat species, the loss of carbon sequestration and urban heat island reduction, and their aesthetic and screening value. However, in *California Oak Foundation v. Regents of University of California* (2010) 188 Cal.App.4th 227, the court opined that the removal of trees did not moot CEQA claims concerning those trees. Specifically, the court found:

> Under Guidelines section 15233, when an injunction is not granted after commencement of a CEQA action, the agency may assume the challenged EIR complies with CEQA. However, "[a]n approval granted by a responsible agency in this situation provides only permission to proceed with the project at the applicant's risk prior to a final decision in the lawsuit." (Guidelines, § 15233, subd. (b); see also *Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1203, 22 Cal.Rptr.3d 203.) "Failure to obtain an injunction should not operate as a de facto waiver of the right to pursue a CEQA action." (*Ibid.*) "As conditions of reapproval [of a project], the [lead agency] may compel additional mitigation measures or require the projects to be modified, reconfigured or reduced. The [agency] can require completed portions of the projects to be modified or removed and it can compel restoration of the project sites to their original condition." (*Id.* at p. 1204, 22 Cal.Rptr.3d 203.)

(*California Oak Foundation, supra,* 188 Cal.App.4th 227, 280, fn. 31, emphasis added.)

The court continued, stating, "we are confident appellants' challenge to the EIR with respect to biological impacts remains a live issue," citing *Woodward Park Homeowners Assn. v. Garreks,*

Inc. (2000) 77 Cal.App.4th 880, 889–890 in which a different court refused to find moot the issue of whether an EIR was CEQA-compliant after construction had begun because "the project can be modified, torn down, or eliminated to restore the property to its original condition," and because defendants "chose to continue with the project despite the risk that pending litigation could result in rescission of the City's action approving it." (*California Oak Foundation, supra,* 188 Cal.App.4th 227, 280 fn. 31.) Moreover, removal of the trees does not limit the court's ability to halt construction of new buildings, excavation and ground disturbance, or the installation of the Project's light poles.

The Declaration further states that ground-disturbance, soil export, and site grading has commenced and is nearing completion. (Declaration ¶7.) Again, this information post-dates Project approval and is irrelevant to the Court's consideration of the City's compliance with CEQA in November 2023. Real Parties again appear to be attempting to moot Petitioners' claims about impacts related to grading – namely, noise and air quality. However, it is clear that excavation and ground disturbance are not yet complete. The court retains authority to enjoin continued construction activities.

Next, the Declaration states, "construction crews have followed and implemented the Project's soil management plan" and all protocols for transporting and disposing of soil, wetting soil, and preventing the spread of airborne dust particles. (Declaration ¶8.) But it is unlikely that the Declarant personally witnessed every movement of soil or every movement of every employee. There is no evidence that no soil left the Project site or that spores did not migrate into the neighborhood. It also fails to address whether complaints regarding the ongoing air quality, noise, traffic and other impacts associated with construction were submitted to the City, County or South Coast Air Quality Management District. The Declaration's statement is thus a conclusion that contains no evidentiary facts. "All affidavits relied upon as probative must state evidentiary facts; they must show facts and circumstances from which the ultimate fact sought to be proved may be deduced by the court. [Citation.] Affidavits or declarations setting forth only conclusions, opinions or ultimate facts are to be held insufficient." (*Greshko v. County of Los Angeles* (1987) 194 Cal.App.3d 822, 834, emphasis added.) This out-of-court statement offered to prove the truth of the matter stated is also inadmissible hearsay. (Evid. Code § 1200.)

Real Parties offer up this statement in an effort to moot Petitioners' claims about the spread of Valley Fever, stating, "There has not been any indication of airborne particles that are related to Valley

Fever." However, the Declarant's statement lacks an evidentiary basis. Valley Fever spores are invisible to the naked eye. The Declarant does not claim to be a public health expert, nor does he provide evidence for the incubation period for Valley Fever infections and symptoms after soil disturbance. Thus, the Declaration is without evidentiary support to conclude that Valley Fever spread has not occurred.

More importantly, these statements are irrelevant to whether the EIR adequately disclosed, analyzed, and mitigated the Project construction's potential to send Valley Fever spores airborne during hundreds of thousands of cubic meters of grading and soil export at the relevant time – November 2023.

In paragraph 9, the Declarant claims that no tribal cultural resources or artifacts of potential tribal cultural significance have been encountered. Again, this post-approval, self-serving statement is irrelevant to the adequacy of the EIR's disclosure, analysis, and mitigation in November 2023 when the City approved the Project. Further, it is unlikely the Declarant witnessed or has personal knowledge of every soil disturbance or excavation that occurred and is even less likely that the Declarant, alone, would recognize tribal cultural resources or artifacts if encountered or destroyed by construction workers on site. Moreover, the conditions of approval did not require a Native American monitor to oversee the excavation and determine whether there are any tribal cultural resources. (AR 234-35.) Given the court's ability to order site restoration, issues concerning tribal cultural resources raised in the Petitions are not moot.

Mr. DeMatte next opines that the construction team never observed traffic conflicts with Los Angeles Fire Station 78 operations. Again, this post-approval statement is irrelevant to the resolution of Petitioners' concerns about the impermissibly deferred Construction Management Plan. Even if relevant, which the statement is not, Mr. DeMatte cannot testify as to the personal observations of other members of the construction team. Finally, this statement has no impact whatsoever on Petitioners' concerns about the Project's operational impacts on emergency access and response.

In paragraphs 11 through 13, Mr. DeMatte states that the School entered into a contract to purchase Musco Lighting. However, this alleged contract is dated April 9, 2024, and post-dates Project approval by five months. It was not before the City at the time of Project approval and is irrelevant and inadmissible. Nor is it attached to the Declaration. Paragraphs 12 and 13 detail features that the lighting system allegedly contains, but no evidentiary support is provided for these features. Thus, none can be

assumed by the court. What is relevant is the adequacy of the EIR's disclosure, analysis, and mitigation of the potential impacts of the Project's lights, which will reach 80 feet in height. Real Parties cannot backfill inadequate CEQA analysis with post-decision declarations lacking any evidentiary basis.

IV. CONCLUSION.

As the Declaration and its attached Exhibit 1 post-date the City's approval of the Project, they are irrelevant to the claims raised in the Petitions for Writ of Mandate challenging the compliance of the City's approval process with CEQA. Furthermore, writ cases are limited to the consideration of the administrative record and to documents for which judicial notice is granted. Neither the Declaration nor Exhibit 1 are contained within the administrative record, owing to their creation after Project approval. Moreover, Real Parties did not, and cannot, seek judicial notice for the site photographs or accompanying hearsay or conclusory, out-of-court statements. Petitioners respectfully request that this Court sustain their objection to the Declaration.

Dated: October 28, 2024

CARSTENS, BLACK & MINTEER LLP

By: _____
Amy Minteer
Attorneys for Petitioners
Studio City Residents Association and Save LA River Open Space

CHANNEL LAW GROUP, LLP

By: /s/ Jamie T. Hall
Jamie T. Hall
Attorneys for Petitioner
Save Weddington

PROOF OF SERVICE

I am employed by Carstens, Black & Minteer LLP in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action. My business address is 2200 Pacific Coast Highway, Ste. 318, Hermosa Beach, CA. On October 28, 2024, I served the within documents:

PETITIONERS' EVIDENTIARY OBJECTIONS TO DECLARATION OF JAMES DEMATTE

☐ **VIA UNITED STATES MAIL.** I am readily familiar with this business' practice for collection and processing of correspondence for mailing with the United States Postal Service. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service in a sealed envelope with postage fully prepaid. I enclosed the above-referenced document(s) in a sealed envelope or package addressed to the person(s) at the address(es) as set forth below, and following ordinary business practices I placed the package for collection and mailing on the date and at the place of business set forth above.

☐ **VIA OVERNIGHT DELIVERY.** I enclosed the above-referenced document(s) in an envelope or package designated by an overnight delivery carrier with delivery fees paid or provided for and addressed to the person(s) at the address(es) listed below. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

☒ **VIA ONE LEGAL E-SERVICE.** By submitting an electronic version of the document(s) to One Legal, LLC, through the user interface at www.onelegal.com.

☐ **VIA EMAIL OR ELECTRONIC SERVICE.** Based on a court order or an agreement of the parties to accept service by electronic transmission, I caused the above-referenced document(s) to be sent to the person(s) at the electronic address(es) listed below.

I declare that I am employed in the office of a member of the bar of this court whose direction the service was made. I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on October 28, 2024, at Hermosa Beach, California.

/s/ Sarah Bloss

Sarah Bloss

SERVICE LIST

Attorneys for Respondent City of Los Angeles
Hydee Feldstein Soto
Denise C. Mills
K. Lucy Atwood
Kathryn C. Phelan
Kimberly A. Huangfu
OFFICE OF LOS ANGELES CITY ATTORNEY
200 North Main Street, 701 City Hall East
Los Angeles, California 90012
lucy.atwood@lacity.org
kathryn.phelan@lacity.org
kimberly.huangfu@lacity.org

Co-Counsel for Respondent
Sabrina Teller
Nathan George
REMY MOOSE MANLEY
555 Capitol Mall, Ste. 800
Sacramento, CA 95814
steller@rmmenvirolaw.com
ngeorge@rmmenvirolaw.com

Attorneys for Real Parties in Interest Harvard-Westlake School
Edgar Khalatian
Nedda Mahrou
Daniel Queen
MAYER BROWN LLP
333 South Grand Avenue, 47th Floor
Los Angeles, CA 90071-1575
EKhalatian@mayerbrown.com
NMahrou@mayerbrown.com
DQueen@mayerbrown.com

Attorneys for County of Los Angeles
Laurie E. Dods, Principal Deputy County Counsel
OFFICE OF THE LOS ANGELES COUNTY COUNSEL
648 Kenneth Hahn Hall of Administration
500 West Temple Street
Los Angeles, CA 90012-2713
ldods@counsel.lacounty.gov

Alisha M. Winterswyk
BEST, BEST & KRIEGER
18101 Von Karman Ave., Suite 1000
Irvine, CA 92612
Alisha.winterswyk@bbklaw.com

Attorney For Save Weddington, Inc.
Jamie T. Hall
CHANNEL LAW GROUP, LLP
8383 Wilshire Blvd., Suite 750
Beverly Hills, CA 90211
Jamie.Hall@ChannelLawGroup.com