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SUPERIOR COURT OF CALIFORNIA

COUNTY OF VENTURA

DOS VIENTOS COMMUNITY PRESERVATION ASSOCIATION, A California unincorporated association, and DONALD ARMSTRONG, Petitioners, vs. CITY OF THOUSAND OAKS, a municipal corporation and DOES 1-25, inclusive, Respondents	Case No. 56-2018-00510555-CU-MC-VTA RESPONSE BRIEF IN OPPOSITION TO PETITIONERS' OPENING BRIEF, FILED BY REAL PARTIES IN INTEREST/ DEFENDANTS DAN H. WILKS and STACI WILKS, TRUSTEES OF THE HEAVENLY FATHER'S FOUNDATION TRUST
DAN H. WILKS AND STACI WILKS, TRUSTEES OF THE HEAVENLY FATHER'S FOUNDATION TRUST dated December 27, 2010, a 501(c)3 Charitable Organization; CALVARY CHAPEL OF THOUSAND OAKS, a California nonprofit religious corporation and DOES 26-50, inclusive, Real Parties in Interest	**Date Action Filed: April 18, 2018** **Writ Hearing Date: TBD** **Time: TBD** **Assigned to Hon. Matthew P. Guasco** **Dept. 20**

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I. INTRODUCTION

Real Parties in Interest Dan H. Wilks and Staci Wilks, Trustees of the Heavenly Father's Foundation Trust (HFFT), oppose Petitioners' thinly veiled attempt to force the City of Thousand Oaks ("CTO") to discriminate against religious facilities. The Second Amended Petition and Complaint ("SAP") should be dismissed with prejudice for Petitioners' failure to show that Respondent CTO had any duty to deny Real Parties the right to use the Subject Property ("Property") for religious purposes without a new or amended development permit. Neither CTO's Zoning Code nor Resolution 2002-040 ("Resolution" or "Res.") require such a development permit, and the Religious Land Use and Institutionalized Persons Act (RLUIPA) forbids it.[1]

II. STATEMENT OF FACTS

A. Facts in Dispute

CTO, in its Answer to Petitioners' SAP (8/20/19), disputed several facts. (*See, e.g.,* CTO Ans. SAP at ¶¶18, 19, 23, 33, 34, 39.) The Resolution, (AR-862-78), describes the Property as part of a commercial shopping center located in Specific Plan No. 8, in Site E, Planning Unit 22, to which development permit ("DP") 2001-775 applies. (AR-873, -880 (Res. Ex. B); -760 (Ex. L).) The entitlement, "Tentative Tract 5096 Modification 2," includes, *inter alia*, the commercial shopping center, which was divided into Lots 1, 2, and 3. (AR-872; -948 (Ex. I ¶ 2).) The Property is on Lot 1. (AR-1463.) Thus, the "'YMCA Development Permit'" moniker repeatedly employed by Petitioners is misleading because DP2001-775 covers far more property than Lot 1.

Likewise, CTO disputed Petitioners' characterization of the Property as providing a "public benefit." (CTO Ans. SAP at ¶¶ 23, 34.) The Resolution demonstrates Petitioners' error, because it does not contain the phrase, "public benefit." (AR-862 to -1082.); -752 to -770 (Res. Ex. L); -947 to -968 (Res. Ex. I).) Petitioners glaringly fail to cite any page in the Amended Record where this phrase – upon which they stake their claim – is found. (*See* Pet. Brf. at 4:12, 15; 9:11; 16:9.) Instead, the Resolution describes the "provision of land for a community service facility (YMCA)" as one of **several** benefits, (AR-862),

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[1] HFFT hereby adopts as its own, and incorporates by reference as if fully set herein, the arguments in response to Petitioners' opening brief presented in the separate response briefs of CTO and Real Party in Interest Calvary Chapel of Thousand Oaks, filed on the same date herewith.

and one of **thirteen** "project benefits," the first-listed being "the **permanent** preservation of substantial open space without cost to the public," (AR-869 (emphasis added)). In two places, the Resolution lists first the preservation of open space in the Western Plateau as a benefit. (AR-862, -869.) The Resolution specifically finds that the "'Western Plateau Preservation Plan' [("WPPP")] . . . is an inter-related group of proposed land use actions . . . **for the purpose of achieving the public acquisition and preservation as open space** of that land commonly known as the 'Western Plateau,'" (AR-862 (emphasis added)), referencing 191 acres within Specific Plan No. 7 (AR-862, -869). Contrary to Petitioners' use of the term "public benefit" to imply public ownership or operation of the Property, the Resolution's plain text recognizes the Property's **private** ownership. It required Miller Brothers to **convey** Lot 1, Tract 5096 to the Conejo Valley YMCA. (AR-876, ¶ 17.) In stark contrast, the Resolution elsewhere explicitly states which land is public, and uses durational language: "The Western Plateau, consisting of approximately 191 acres, will be **permanently** preserved as **publicly owned** open space . . .." (AR-869 (emphasis added).) No such durational language, expressing intended permanence is used for the Property, at all.

Additionally, although Petitioners noted that the Final Supplemental Impact Report No. 317 ("EIR") found a significant impact posed by the Preservation Plan (Pet. Brf. at 6:20-21), Petitioners glaringly failed to mention that none of the impacts requiring mitigation were caused by Site E, containing the Property. (AR-178-91 (EIR Summary).)

B. Petitioners Tellingly Failed to Mention Zoning Code Article 18 and the CC&Rs, Both of Which Permit Use Changes Without New Development Permits.

Initially, the Property is zoned C-1 (AR-638 (Res. Ex. F)), **which permits Places of Worship**. CTO Zoning Code § 9-4.2105.[2] Notably, § 9-4.2105 requires a development permit but does not require any Special Use Permit ("SUP" or "SUPA," *see* §§ 9-4.2103) for Places of Worship in C-1 Zones. Such **use** permits, though, **are required** for Places of Worship in other zones, *e.g.*, C-O and M-1 Zones. *Id.*

[2] Unless otherwise specified, all statutory references herein refer to the CTO Zoning Code. All references to CTO's "Zoning Code" refer to Chapter 4 ("Zoning") of Title 9 "Planning and Zoning" of the CTO Municipal Code. *See* Zoning Code § 9-4.101.

Once a development permit has been granted, contrary to Petitioners' unsupported argument, Zoning Code Article 18, "Design Review: Requirements and Procedure,"[3] governs minor building permit applications.

Directly applicable here, § 9-4.1804(g), provides, in relevant part,

> Notwithstanding any of the provisions of this Code, the Community Development Director or designee **may** approve the following modifications to existing multi-family residential and non-residential projects through a Design Review application or zone clearance **without hearing or notice and without the need for modification to any underlying permit**:
>
> . . .
>
> (g) Any other **minor exterior building** and **site improvements** consistent with the overall building and site design and the provisions of the City's Architectural Design Guidelines Resolution.

Id. (emphasis added). Additionally, § 9-4.1800 provides, in pertinent part that CTO seeks to "encourage[e] quality and creative architectural and landscaping designs[, . . .] without depriving a property owner of any authorized uses of property . . .." *Id*. Petitioners curiously fail to mention this important provision.

Also relevant, yet not mentioned by Petitioners, Resolution Exhibit I, titled "Findings and Conditions of Approval for Tract 5096 Modification 2," (AR-947), governs, *inter alia*, "Restrictions, CC&R, Etc.," and specifically references Lots 1, 2, and 3 of the "commercial center." (AR-951-52, ¶¶ 23-25.) Notably, Exhibit I requires, *inter alia,* establishment of a "property owners maintenance association or other suitable entity," for the "commercial center (Lots 1 [the Subject Property], 2, and 3)" and further requires the City Attorney and Community Development Department ("CDD") to "review and approv[e]" the "specific vehicle" establishing the foregoing maintenance association. (*Id*. ¶ 23 (emphasis added).) That vehicle, titled "**Declaration of Covenants, Conditions and Restrictions and Reciprocal Easement Agreement**," ("**CC&Rs**"),[4] contains numerous provisions that demonstrate that the City Council did **not** intend to require any new or modified development permit should the Subject Property merely change ownership and use, (*see* AR-1433-65), as explained *infra* (§ III(B)(5)).

For comparison purposes, Resolution Exhibit Q, titled "Findings and Conditions of Approval for DP 2001-776," demonstrates what CTO would have included as a condition had it intended to require new

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[3] *See* HFFT's Request for Judicial Notice ("RJN"), **Exhibit 1**, filed contemporaneously herewith.

[4] *See* HFFT's Request for Judicial Notice ("RJN"), **Exhibit 4**, filed contemporaneously herewith.

owners to obtain a new or amended development permit upon change of use. Exhibit Q contains a very specific land use restriction that applies to a neighborhood park within Dos Vientos Specific Plans 8/9. (AR-880 (Res. Ex. B) (containing property description of DP 2001-776).) A condition for that underlying development permit, DP 2001-776, explicitly **prohibits** any "organized sports facilities" from being "constructed on the park site." (AR-1054 (Ex. Q, ¶ 7).) Emphatically, the Resolution applies no similar condition to any use of the Property.

The CC&Rs, reviewed and approved by both the City Attorney and the CDD, explicitly contemplate that the Property could change hands **without** requiring the YMCA or other entity to maintain any particular use. The parties to the CC&Rs (Miller Brothers and the YMCA) **expressly disclaimed** that "the Shopping Center is, **or will be**, committed to, **or developed for**, **a particular (or any) use**, or that if the Shopping Center **or any portion thereof** is **once used** for a particular use, **such use will continue in effect**." (AR-1456, ¶ 36 (emphasis added).) Moreover, they disclaimed representing or warrantying "that the use of the Shopping Center or **any portion thereof will not be changed in the future**." (*Id.*)

The only "use restrictions" contained in the CC&Rs do not affect Real Parties' use of the Property. These "Use Restrictions" (paragraph 10) prohibit numerous uses, yet **none** prohibit use as a Place of Worship (religious facilities). (AR-1448.) Likewise, paragraph 9 restricts only those future uses that would increase the allocated number of parking spaces. (AR-1447, ¶ 8.) These restrictions are explicitly enforceable by CTO. (AR-1438, ¶ 3(b) (subjects use and improvements of shopping center to property to Resolution conditions); AR-1452, ¶ 17(h) (City has authority to enforce, *inter alia*, ¶ 3(b)).)

III. ARGUMENT

A. <u>Standard of Review</u>.

Under Code of Civ. Proc. § 1085, Petitioners "**must** demonstrate that the public official or entity **had a ministerial duty** to perform, and that [Petitioners] had a **clear** and beneficial **right to performance**." *AIDS Healthcare Found. v. Los Angeles Cty. Dep't of Public Health* ("*AIDS Healthcare*"), 197 Cal. App. 4th 693, 700 (2011) (emphasis added). "Generally, mandamus may be used **only** to compel the performance of a duty that is purely ministerial in character." *Ridgecrest Charter Sch. v. Sierra Sands Unified Sch. Dist.*, 130 Cal. App. 4th 986, 1002 (2005) (citation omitted). "Mandamus will not lie to

control an exercise of discretion, i.e., to compel an official to exercise discretion **in a particular manner**." *Common Cause Bd. of Supervisors of Los Angeles Cty.* ("*Common Cause*"), 49 Cal. 3d 432, 442 (1989) (emphasis added).

> A ministerial act is an act that a public officer is required to perform in a prescribed manner in obedience to the mandate of legal authority and without regard to his [or her] own judgment or opinion concerning such act's propriety or impropriety, when a given state of facts exists. Discretion is the power conferred on public functionaries to act officially according to the dictates of their own judgment. Mandamus does not lie to compel a public agency to exercise discretionary powers in a particular manner, only to compel it to exercise its discretion in some manner.

AIDS Healthcare, 197 Cal. App. 4th at 700-01 (citations omitted). In *Common Cause*, the Court explained the "well-settled principle of statutory construction that the word '**may'** is ordinarily construed as **permissive**, whereas '**shall'** is ordinarily construed as **mandatory**, particularly when both terms are used in the same statute." 49 Cal. 3d at 443 (emphasis added).

Determining whether a duty is ministerial or discretionary "is a question of statutory interpretation." *AIDS Healthcare,* 197 Cal. App. 4th 701. As explained in *Terminal Plaza Corp. v. City and Cty. of San Francisco* ("*Terminal Plaza"*), 186 Cal. App. 3d 814, 826 (1986), "'the rules applying to the construction of statutes apply equally to ordinances.'" *Id.* (citation omitted). First, courts must "'examine the language, function and apparent purpose' of the statute." *AIDS Healthcare,* 197 Cal. App. 4th at 701 (citation and internal quotation marks omitted). Further, "'[e]ven if mandatory language appears in [a] statute creating a duty, the duty is discretionary if the [public entity] must exercise significant discretion to perform the duty.'" *Id.* (alterations in original except the first) (citation omitted). Courts must also "**examine the entire statutory scheme** to determine whether the [government entity] has discretion to perform a mandatory duty." *Id.* (emphasis added). "[S]tatutes [must be read] as a whole, giving effect to all their provisions, neither reading one section to contradict others or its overall purpose," and further "'avoiding an interpretation which renders any of its language surplusage.'" *Jurcoane v. Superior Court* ("*Jurcoane*"), 93 Cal. App. 4th 886, 893 (2001) (citations omitted).

Absent ambiguity, the statutory language controls and legislative history is not referenced. *Jurcoane*, 93 Cal. App. at 893-94. Courts presume express statutory distinctions are deliberate, and "**should not read statutes to omit expressed language or include omitted language**." *Jurcoane*, 93 Cal.

App. 4th at 894. Here, this Court need not delve into legislative history because Petitioners admit the Resolution and the Zoning Code provisions are "plain." (Pet. Brf. at 9:11-12, 16-18.)

Finally, "'[i]n order to construe a statute as imposing a mandatory duty, the mandatory nature of the duty **must be phrased in explicit, forceful language**.'" *The H.N. & Frances C. Berger Found. v. Perez* ("*Berger Found.*"), 218 Cal. App. 4th 37, 48 (2013) (quoting *Quackenbush v. Superior Court*, 57 Cal. App. 4th 660, 663 (1997)) (emphasis added). Otherwise, there is no mandatory duty. *Id.*

B. Petitioners Have Failed to Demonstrate That CTO Had Any Ministerial Duty to Require a New Development Permit.

Noticeably absent from both the Resolution and **relevant** Zoning Code is any forceful, mandatory terminology that would prohibit a change to any permissible use in a C-1 Zone. In stark contrast, § 9-4.1804(g) contains a procedure allowing CTO to do exactly what Petitioners argue against. Not surprisingly, Petitioners completely failed to mention this dispositive provision. Instead, Petitioners errantly and exclusively rely on an obviously irrelevant Zoning Code, § 9-4.107, which by its express terms applies only to "public buildings, real property, or facilities **to be built or owned by the City of Thousand Oaks** (Pet. Br. 10:6-9 (quoting § 9-4.107) (emphasis added), **and is therefore of zero relevance to the privately-built and privately-owned Property**. Yet Petitioners persist in asking this Court to (impermissibly) re-write the Code and Resolution in favor of a construction that leads to an irrational conclusion that discriminates against religious organizations. Petitioners' arbitrary, and consequently discriminatory, distinctions drawn between community clubs and Churches must fail.

1. Petitioners Errantly Ignore Zoning Code Article 18, Which Governs This Case.

As already noted, Zoning Code 9-4.1804(g) provides that the "Community Development Director or designee **may** approve the following modifications to . . . non-residential projects . . . **without** hearing or notice and **without** the need for **modification** to any **underlying permit,"** and subsection (g) describes the Real Parties' activities precisely: minor exterior building and site improvements. *Id.* CTO had full authority and correctly granted tenant improvement (building) permit applications for HFFT's tenant, Calvary Chapel, under § 9-4.1804(g).

Petitioners' construction is patently unreasonable, particularly considering its conflict with CTO's policy established in Article 18 of the Zoning Code. *See* § 9-4.1800 (Purpose). This policy provides that CTO seeks to "encourage[e] quality and creative architectural and landscaping designs[, . . .] without depriving a property owner of any **authorized uses** of property . . .." *Id.* (emphasis added). This policy suggests a more liberal, rather than restrictive approach, which accounts for unique aspects of different properties and property owners' goals. Petitioners' construction turns this policy on its head.

Emphatically, Petitioners **do not argue** that the physical improvements made by Real Parties to the building's interior or exterior improvements fell outside the scope of § 9-4.1804(g). Petitioners' sole contention focuses on the Zoning Code's and the Resolution's textual requirements. To support their theory, Petitioners feebly attempt to draw an arbitrary and discriminatory distinction between the YMCA and churches,[5] notably without citation to any caselaw for that distinction. (Pet. Brf. at 12). For that failure alone, this Court should dismiss that argument as waived. *See Cal West Nurseries v. Superior Court*, 129 Cal. App. 4th 1170, 1174 (2005) ("We treat a point not supported by reasoned argument and citations to authority as waived.")). That churches and houses of worship provide "public benefits" and serve the public interest cannot be seriously questioned without evidencing hostility and animus toward religion.[6]

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[5] Petitioners would impose onerous processes based solely on disparate line-drawing offensive to the First Amendment and RLUIPA. (Pet. Brf. at 4, 11-15). Petitioners' terse comparison between religious organizations and other community organizations necessarily assumes that churches provide **less (or no) value** to the community. Petitioners' narrow definition for "church" severely limits church activities **solely** to "prayer and worship," which renders worthless the wide and varied community services that houses of worship provide across the nation, and that Calvary Chapel provides to its community in particular. Tellingly, Petitioner's "comparison" concerning daycare services fails to mention that **Calvary Chapel has continued daycare services**. (CTO Ans. SAP, ¶76.) Petitioners' misguided and short-sighted assumptions are offensive and run afoul of RLUIPA. (***See* Calvary Chapel's Opposition Brief, which HFFT adopts and incorporates in full by reference herein**.)

[6] *See e.g., On Fire Christian Center, Inc. v. Fischer*, No. 3:20-CV-264-JRW, 2020 WL 1820249, *9 (W.D. Ky., April 11, 2020) ("**[T]he public has a profound interest in men and women of faith worshipping together [in church] in a manner consistent with their conscience**." (emphasis added)); *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 389 F.3d 973, 1010 n.6 (10th Cir. 2004) (Seymour, J., concurring) (recognizing the "vital **public interest** in protecting [the] free exercise of religion" (emphasis added)), *aff'd Gonzales v. O Centro Espirita Beneficiente Uniao de Vegetal*, 546 U.S. 418 (2006); *Cottonwood Christian Ctr. v. Cypress Redev. Agency,* 218 F. Supp. 2d 1203, 1230-31 (C.D. Cal. 2002) ("By passing RLUIPA, Congress conclusively determined the national public policy that religious land uses are to be guarded from interference by local governments to the maximum extent permitted by the Constitution.").

In any event, Petitioners' argument ignores that CTO has already decided that within non-residential, C-1 Zones, Places of Worship are included in the group, "Institutional and Civic Uses," and CTO treats them **identically** to private clubs and lodges. § 9-4.2105. Importantly, Petitioners cannot ignore § 9-4.1804(g), and as such, they are left with their arbitrary distinction drawn between Places of Worship and all other similarly situated "Institutional and Civic Uses." Beyond that steep hurdle, Petitioners must demonstrate that CTO had a ministerial duty to act. *AIDS Healthcare*, 197 Cal. App. 4th at 700. They have not come close. Real Parties have met the basic requirements under § 9-4.1804(g), and CTO would be impermissibly discriminating for failing to grant their permit applications based solely upon the religious nature of the use, under § 9-4.2105 (an RLUIPA violation). Thus, with the terms of § 9-4.1804(g) met, CTO had a ministerial duty **to grant** Calvary Chapel's permit applications. *See City of Poway v. City of San Diego*, 155 Cal. App. 3d 1037, 1047 (1984) (building permit approval for specific projects is a ministerial act). CTO did so.

Further, under Code of Civ. Proc. § 1085, this Court's review of CTO's application approval (pursuant to § 9-4.1804(g)) must defer to agency expertise. *See Stone v. Regents of University of California*, 77 Cal. App. 4th 736, 745 (Ct. App. 1999) ("The court **may not reweigh the evidence** or substitute its judgment for that of the agency. ... A court will **uphold the agency action unless the action is arbitrary, capricious, or lacking in evidentiary support**. (quotes and citations omitted) (emphasis added)) *rejected on other grounds*, *Ellis v. Ellis*, 235 Cal. App. 4th 837, 843 (Ct. App. 2015). Petitioners have not come close to meeting this extraordinarily high burden.

2. Petitioners' Exclusive Reliance on Zoning Code § 9-4.107 Is Utterly Irrelevant.

Curiously, Petitioners rely on a portion of the Zoning Code that, by its clear terms, only applies to CTO-built or CTO-owned buildings. Titled "**City project** review," Zoning Code § 9-4.107 governs "**public** buildings, real property, or facilities **to be built or owned by the City of Thousand Oaks**." *Id.* (emphasis added). Indisputably, the Property is **privately** built and **privately** owned, taking it wholly outside § 9-4.107. Petitioners' exclusive reliance on this provision is bizarre, and fatal to their claim.

3. The Zoning Code Contains No Forceful Command Imposing Any Duty to Require a New or Amended Development Permit.

Absent "express, **forceful** language" imposing a mandatory duty to require a new or amended development permit, no such duty exists. *Berger Found.*, 218 Cal. App. 4th at 48. Petitioners have cited no such command. Instead, Petitioners have merely assumed that, because Places of Worship require an initial development permit in a C-1 zone, that a new or amended development permit should be required with **every** change in use (or worse, **only** for religious uses), whether statutorily permitted or not in C-1 zones under § 9-4.2105. Petitioners are wrong. The plain text of the Zoning Code § 9-4.2803 expressly distinguishes between the requirements of a development permit and a use permit. *See id.*[7] Petitioners noticeably fail to mention that § 9-4.2803(a) states that other provisions in chapter 4 ("Zoning") may **override** a public hearing requirement, and subsection (c) distinguishes between the specific findings needed for development permits and special use permits. While both permit types share the first four requirements, **only special use permits** require a fifth finding – compatibility of "**proposed use[s]**." Zoning Code § 9-4.2803(c)(5). Yet Petitioners, without citation to any statute or caselaw, would have this Court rewrite the Zoning Code to add a "use" permit requirement on top of the existing DP 2001-775, and **only** for churches in the subject Property's C-1 Zone. That rewrite is impermissible in light of the express statutory distinctions created by CTO. *Jurcoane*, 93 Cal. App. 4th at 894.

Petitioners' point, that Places of Worship are permitted in other zones, (Pet. Brf. at 13:1-6), works against them. CTO decidedly excluded any "use" permit requirement for Places of Worship in C-1 Zones.

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[7] Zoning Code § 9-4.2803 provides in relevant part,

> (a) **Except as specifically provided in this chapter**, all applications for permits . . . made pursuant to the requirements of this chapter . . . and all modifications to said permits . . . , shall be considered by the Commission at a public hearing, . . . as follows:
>
> . . .
>
> (c) **Unless otherwise specified in this chapter**, the decision-making body may approve a development permit, as conditioned, based on the following findings (1) through (4), and may approve a special use permit, as conditioned, based on findings (1) through (5):
>
> (1) The project is consistent with the Thousand Oaks General Plan and any applicable specific plan or redevelopment plan; (2) The project complies with all applicable laws, regulations and policies, including the Thousand Oaks Municipal Code; (3) The project will not be detrimental to the public health, safety or general welfare; (4) The project has been reviewed in conformance with the provisions of the California Environmental Quality Act; (5) The **proposed use** at the proposed location will be compatible with land uses in the vicinity.

Id. (emphasis added).

Instead, only a Development Permit is required, which was obtained long ago. Where CTO has imposed a Special Use Permit ("SUP" or "SUPA") requirement for Places of Worship in **other** zones, *e.g.,* C-O and M-1 zones, §§ 9-4.2103, 9-4.2105, this distinction demonstrates that, had CTO intended to treat religious uses differently in C-1 zones, it certainly knew how to do so, **but decided otherwise**. "Where the Legislature makes express statutory distinctions, [courts] **must presume it did so deliberately** . . .." *Jurcoane*, 93 Cal. App. 4th at 894 (emphasis added).

4. The Resolution Also Does Not Require A New or Amended Development Permit.

The Resolution's text cannot be construed to support Petitioners' position. Four times Petitioners insist that the Resolution refers to the YMCA as a "public benefit," (Pet. Brf. at 4:12, 15; 9:11; 16:9), even insisting that, to change such a "public benefit" "over the counter," is "beyond reason." (*Id.* at 9:10-15). Yet the phrase, "public benefit" curiously appears **nowhere** in the Resolution. Petitioners' manufacture and repetition of the phrase does not magically transform the Property. Even land regulated for the **public benefit** does not thereby become "public" or come under "public" control. *See Friedman v. City of Fairfax*, 81 Cal. App. 3d 667, 677 (1978).

Any "public benefit" that may have been obtained by CTO in the WPPP did not bestow any special "public" status on the privately-built and privately-owned Property, such that § 9-4.107 should apply. In fact, the Southeast Ventura County YMCA ("YMCA"), that operated the former Miller Family YMCA,[8] is a private, 501(c)(3) organization.[9] The YMCA charges a monthly admission fee.[10] And, while Petitioners bemoan the loss of YMCA in their community, the community apparently failed to sufficiently support the YMCA, causing it to close after "incurring an average operating loss of $100,000 annually for 10 years."[11]

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[8] *See* Dawn Megli-Thuna, *Texas billionaire buying Miller Family Y building,* Thousand Oaks Acorn (Nov. 22, 2017), https://www.toacorn.com/articles/texas-billionaire-buying-miller-family-y-building/.

[9] *See* HFFT's **RJN, Exhibit 2**, filed concurrently herewith (*Tax Exempt Organization Search*, IRS.gov, https://apps.irs.gov/app/eos/ (last verified May 12, 2020) (Search: Young Mens Christian Association of Southeast Ventura County, Westlake Village, Ca)).

[10] *See* HFFT's **RJN, Exhibit 3**, filed concurrently herewith *YMCA Membership*, Southeast Ventura County YMCA, https://www.sevymca.org/html/membership.html (last visited May 12, 2020)).

[11] *See Miller Family YMCA Building in Newbury Park Sold; Will Become New Home to Local Church*, Conejo Valley Guide (Nov. 22, 2017), https://www.conejovalleyguide.com/local-buzz/miller-family-ymca-building-in-newbury-park-sold-will-become-new-home-to-local-church.

Neither the Resolution nor its Exhibits (Ex. I (AR-947, *et seq.*) and Ex. L (AR-752, *et seq.*)) contain any condition requiring either a "public benefit" or a "YMCA" "use" to be maintained, let alone for any particular duration. (*Compare* AR-869 ("The Western Plateau, consisting of approximately 191 acres, will be **permanently** preserved as **publicly owned** open space," *id*. (emphasis added)) *with* AR-753, ¶¶ 2-3.)

Petitioners severely misplace their reliance on the Resolution's mere reference to the YMCA by name in Exhibit L, Paragraphs 2 and 3. (Pet. Brf. at 13-14.) Petitioners take that reference wildly out of their context. Where the Resolution refers to a "community service" use of the property with the YMCA listed parenthetically, that reference at best could signal an intent to require a **civic use,** as opposed to another commercial or residential use. Yet, as explained above, CTO has already determined (correctly, appropriately and constitutionally) that Places of Worship fall into that category. § 9-4.2105.

Moreover, Exhibit L, paragraph 2, to which Petitioner misleadingly refers as "Condition 2," (Pet. Brf. at 13:7-9), speaks only to construction plan compliance, and does not place any restriction on later use by an owner after the building is completed. (AR-753.) Paragraph 2 provides, in pertinent part:

> **Scope of Permit Approval** – The Development Permit is granted to allow the construction of a commercial retail center and community service (YMCA) facility, **which shall be constructed substantially as shown** on the site, phasing, elevation, building section, floor and roof plans labeled Exhibits [list of exhibit numbers], except as indicated otherwise herein.

(*Id*. (second emphasis added).) The plain terminology of Paragraph 2 makes clear that its initial reference to "community service (YMCA) facility" was descriptive only, without any other terminology imposing a "condition" for later use after the building is complete. Paragraph 2 has apparently been fulfilled sufficiently because it only required that the applicant of DP 2001-775 construct **both the commercial center <u>and</u> the "community service (YMCA) facility"** in substantial compliance with the building plans. Petitioners' construction would require every new tenant of the commercial shopping center to obtain a new development permit every time a use changed, even to another permitted use in the C-1 zone. That is an overburdensome and absurd result, lacking foundation in either the Code or logic. In the commercial shopping center (Paraiso), CTO has approved "approximately 27 tenant improvements for uses allowed in the underlying zone," **none of which were required to obtain a new or modified development permit**. (CTO Ans. SAP, ¶ 69.)

Similarly, contrary to Petitioner's misleading assertion concerning Exhibit L, paragraph 3, (Pet. Brf. at 13:7-9 (citing AR-753)), this paragraph contains no express "use" restriction affecting Real Parties. Paragraph 3 provides in pertinent part:

> **Approval Period/Use Inauguration** – The Development Permit is granted for a three (3) year period of time ending **February 26, 2005**, at which time said permit shall expire unless the use authorized herein has been inaugurated in accordance with **Section 9-4.2812[(c)]** of the Thousand Oaks Municipal Code. The applicant may request time extensions of this period . . .

(AR-753 (emphasis added).) The plain terms in this provision clearly show it is not relevant. This so-called "condition" merely provides a deadline by which initial construction had to begin. The applicant would have no issue so long as "use" was inaugurated prior to the expiration date, pursuant to § 9-4.2812[(c)]. Importantly, "Use Inauguration," as used in § 9-4.2812(c), simply refers to the time when **permanent construction** has begun. *Id.* Initial construction began and ended long ago. The term "use" here does **not** refer to any later change in use by a building owner.

Finally, Petitioners' terse recitation (and incomplete discussion) of two Development Permit Minor Modifications (Pet. Brf. at 15) not only fails to address the 27 tenant improvement permits granted in the Paraiso shopping center, but DPMN2016-70157 and DPMN 2018-70165 can hardly describe a representative sample of applications sufficient to characterize them as "the City's general treatment of proposed projects." (Pet. Brf. at 15:6.) The first, DPMN 2016-70157, (AR-1736-39), is not comparable. As noted in the DPMN Findings, at ¶ 6, although medical uses were permitted in the relevant C-O Zone, the medical use "ha[d] been restricted to specific building locations to satisfy the Municipal Code **parking demand minimums, as well as strategically disperse higher parking demands** throughout the complex, whenever possible." (AR-1737 (emphasis added)). Further, the documents provided indicated that other relevant development permits and modifications existed that contained conditions not stated in this DPMN, but which likely controlled whether another DPMN would be required. (AR-1739, ¶5.) This DPMN is factually nothing like the tenant improvement permits at issue here.

Petitioners' comparison of DPMN 2018-70165 suffers the same severe flaws. As the Conditions of Approval explain, at ¶ 7, "All previously imposed conditions of **DP 78-397**, and any modifications thereto, shall apply to this permit . . .." (AR-2167.) Without viewing DP 78-397 and its conditions, it is

impossible to determine whether this application was even remotely similar to the issues at bar. Real Parties have not sought to expand or modify parking, and thus neither of the above DPMN applications are comparable.

5. The CC&Rs Demonstrate Legislative Intent to Liberally Allow Change In Use.

CTO was well aware of the provisions of the CC&Rs because, as explained *supra* § II(B), CTO's City Attorney and CDD were required to review and approve the CC&Rs to ensure compliance with the Resolution. (AR-951 (Ex. I, ¶ 23).) Absent evidence in the administrative record negating the presumption that the City Attorney and CDD have performed their duties required in Exhibit I, paragraph 23, this Court must presume that they have done so. Cal. Evid. Code § 664 (presumed that "official duty has been regularly performed"); *City of Poway v. City of San Diego*, 155 Cal. App. at 1042 (citing Civ. Code §§ 3529 ("Presumption of Performance"), 3548 ("Law Obeyed"); Evid. Code § 664). Thus, CTO may be deemed aware of the CC&R provisions providing, *e.g.*, that the parties disclaimed that "the Shopping Center [was], **or [would] be**, committed to, **or developed for**, **a particular (or any) use**," or that any particular use would continue, (AR-1456, ¶ 36 (emphasis added)), or that "**any portion"** would not ever be changed. (*Id.* (emphasis added).) That the CTO reviewed and approved the CC&Rs (executed in 2007 (AR-1457-60), long after the Resolution's enactment in 2002 (AR-877), further demonstrates that the Resolution was not intended to continue a YMCA in perpetuity or that any change in use would require special approval. *See, e.g., Terminal Plaza*, 186 Cal. App. 3d at 829-30 (absence of clarification in prior amendment indicative that no change to remove 12-foot requirement was intended). These provisions stand in stark contrast to the intent attributed by Petitioners to the Resolution. Petitioners have not pointed to any evidence that CTO was unaware of or shirked any duty with respect to the CC&R provisions.

C. Petitioners Alleged No Facts Showing Any Zoning Code or Resolution Violation, or Any Beneficial Interest.

Petitioners errantly rely on *Terminal Plaza* and *Harbach v. El Pueblo De Los Angeles State Historical Comm'n*, 14 Cal. App. 3 828 (1971), in comparing Calvary Chapel's approved permits to those disapproved by those courts. (Pet. Brf. at 13-14). Both cases are factually inapposite because, as discussed above, Petitioners 1) failed to contemplate the provisions §§ 9-4.2803 and 9-4.1804; and 2) failed to point

to any mandatory duty in either the CTO's Zoning Code or the Resolution. Petitioners further fail to allege any fact that would show Calvary Chapel's building improvements made any change that exceeded the bounds of Section 1804(g). Petitioners' complaint solely and improperly rests upon the religious nature of Real Parties' use of the subject Property.

Unlike Resolution 2002-040, *Terminal Plaza* involved a dispute over the terms of a specific condition in the resolution at issue there, as to whether Five Freemont was required by "Condition 5," 186 Cal. App. 3d at 822, to build a 12-foot pedestrian way, *id*. at 825-26. After deciding the legislative history **should not be considered** under the plain meaning rule of statutory construction, *id*. at 826-28, the court simply determined the condition was enforceable, *id*. at 830. There is not any factual parallel where, as explained *supra* § III(B)(4), "Conditions 2 and 3" (Pet. Brf. at 13-14), are irrelevant by their plain terms.

Terminal Plaza does, however, provide a relevant **deferential** standard that this court should apply to CTO's approval of Calvary Chapel's permits: "[T]he interpretation of the resolution by the administrative agency charged with enforcing it **is entitled to great weight and should be followed unless clearly wrong**." 186 Cal. App. 3d at 826. Here, CTO acted properly under § 9-4.1804(g), and this Court should reject Petitioners' capricious claim that any new or amended development permit should be required. Their argument is tethered to no explicit Zoning Code provision, and conflates the purposes of development permits and special use permits.

Finally, Petitioners' glaring lack of any alleged harm due to any physical change to the Property demonstrates their critical failure to show any beneficial interest, whether direct or public. *SJJC Aviation Svcs., LLC v. City of San Jose*, 12 Cal. App. 5th 1043, 1053, 1057-58 (2017) (**direct and substantial** beneficial interest required under Civ. Proc. Code § 1086). With the CC&Rs executed, had Calvary Chapel made no physical change to the Property at all (for instance, had it kept the pool for use in conjunction with its religious purpose), it would have had no need to obtain any building permit at all. No variance or zone clearance would have been necessary with the Property already zoned C-1, permitting religious facilities. Neither did the YMCA, a private organization, need CTO's permission to sell the Property under the CC&Rs (already CTO approved). Thus, Petitioners obtain nothing but a speculative opportunity to

attend a hearing in hopes another club will come along with an offer. Importantly, the YMCA is not a CTO entity, and the Resolution contains no durational language requiring CTO to find a new club.

Neither have Petitioners alleged any direct ability to replace the YMCA with a new club. Thus, any proposed benefit from gaining a new hearing would be far too speculative. *SJJC Aviation Svcs. LLC*., 12 Cal. App. 5th at 1054 (no beneficial interest where new bidding process would not resolve deficiencies in petitioner's non-responsive bid). Neither can Petitioners show the "**sharp**" duty and **"weighty**" public need required to claim public interest standing. *Id*. at 1057-58. Generalized allegations are insufficient. *Id*. at 1058-59 (emphasis added). Petitioners' burden is insurmountable where religious uses are already permitted in the zone on equal terms with private clubs. Even Petitioners' resort to CEQA concerns (despite dismissal of their CEQA claim) cannot provide standing because their sole complaint lies in their hostile claim against religious uses, rather than any issue that turns on a finding in the EIR. As already explained, **none** of the impacts requiring mitigation were caused by Site E. (AR-178-91.)

D. <u>Petitioners Have Waived Any Right to Declaratory or Injunctive Relief</u>.

Petitioners mentioned neither any legal standard nor any argument in support of either declaratory or injunctive relief. *See SJJC Aviation Services, LLC v. City of San Jose*, 12 Cal. App. 5th at 1060-62 (2017) (in combined writ petition and complaint, factors supporting injunctive and declaratory relief, distinct from writ relief, not met); *McDowell v. Watson*, 59 Cal.App.4th 1155, 1162 (1997) (procedural differences between writ of mandate and injunctive relief not erased). Likewise, Petitioners failed to allege they have suffered or will suffer any actual damages. As such, Petitioners have waived any right to such relief for failing to include any "reasoned argument, and citations to authority." *Cal West Nurseries v. Superior Court*, 129 Cal. App. 4th at 1174. Furthermore, "points raised in a reply brief for the first time will not be considered." *Neighbours v. Buzz Oates Enters.* 217 Cal. App. 3d 325, 335, fn. 8, (1990)).

IV. CONCLUSION

For the foregoing reasons, this Court should dismiss Petitioners' SAP with prejudice, enter judgment in favor of HFFT and against Petitioners, and award HFFT its costs and attorney fees pursuant to any applicable authorities, including without limitations, California Code of Civil Procedure Section 1021.5, and for such other and further relief as this Court deems proper.

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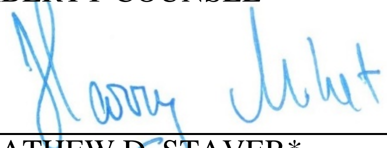
June 22, 2020

LIBERTY COUNSEL



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PROOF OF SERVICE

I am employed in the County of Orange, State of Florida. I am over the age of eighteen years and not a party to the within entitled action; my business address is P.O. Box 540774, Orlando, Florida 32854.

On June 22, 2020, Pursuant to Cal. Code Civ. P. 1013(a), I served the foregoing ***Response Brief in Opposition to Petitioners' Opening Brief, Filed by Real Parties in Interest/ Defendants Dan H. Wilks and Staci Wilks, Trustees of The Heavenly Father's Foundation Trust*** on the following interested parties:

(SEE ATTACHED SERVICE LIST)

[ ] By placing the original and/or a true copy thereof enclosed in a sealed envelope addressed as follows:

[ ] (**BY FIRST CLASS, U.S. MAIL**) I deposited such envelope in the mail at Encino, California. The envelope was mailed with postage thereon fully prepaid. I am readily familiar with the firm's practice of collection and processing correspondence for mailing. It is deposited with the U.S. Postal Service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

[ ] (**BY OVERNIGHT DELIVERY**) I delivered to an authorized driver authorized by Federal Express / U.S. Postal Service to receive documents, in an envelope or package designated by the applicable carrier with delivery fees paid or provided for, addressed to the person on who it is to be served, at the office address as last given by that person on any document filed in the cause and served on the party making service; or at that party's place of residence.

[ ] (**BY PERSONAL SERVICE**) I caused such envelope to be personally delivered by an employee of Nationwide Legal, LLC, by hand, to the offices of the addressee. [An additional Proof of Service will be executed by the messenger who personally delivered the documents and subsequently filed with the Court.]

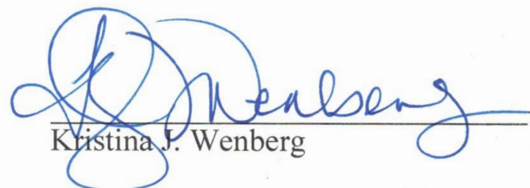
[ ] (**FACSIMILE**) I faxed such document from Orlando, Florida, to the facsimile number(s) shown on the attached service list. The sending facsimile machine number is **(407) 875-0770**. The transmission was reported as complete and without error and the transmission report was properly issued by the transmitting facsimile machine.

[**X**] (**EMAIL**) I served said document by e-mail or electronic transmission, to the persons at the e-mail addresses listed on the attached service list. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

[**X**] (**STATE**) I declare under penalty of perjury under the laws of the State of California, that the foregoing is true and correct.

[ ] (**FEDERAL**) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on June 22, 2020, at Orlando, Florida.



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