

1 Babak Naficy (State Bar No. 177709)
2 Jamie Garretson (State Bar No. 306947)
3 LAW OFFICE OF BABAK NAFICY
4 1504 Marsh Street
5 San Luis Obispo, CA 93401
6 Telephone: (805) 593-0926
7 Facsimile: (805) 593-0946
8 babaknaficy@sbcglobal.net

9 Attorneys for Petitioner:
10 JT 105 ALLIANCE

11 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
12 **FOR THE COUNTY OF SAN BERNARDINO**

<p>13 JT 105 ALLIANCE, a community group 14 15 Plaintiff/Petitioner, 16 vs. 17 COUNTY OF SAN BERNARDINO, 18 and SAN BERNARDINO COUNTY 19 BOARD OF SUPERVISORS, and 20 DOES 1-25, inclusive 21 22 Defendants/Respondents 23 24 YV 105 LLP, a limited liability 25 partnership, and RON SCHWARTZ, an 26 individual, and ROES 26-50 inclusive, 27 28 Real Parties in Interest.</p>	<p>Case No: PETITION FOR PEREMPTORY WRIT OF MANDATE AND COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF C.C.P. §§1085, 1094.5 & §1021.5; Pub. Res. Code §§ 21000 et seq. ; Gov. Code §65000, et seq.</p>
---	--

Petitioner, JT 105 ALLIANCE alleges as follows:

I. INTRODUCTION

1. JT 105 ALLIANCE (“Petitioner”) petitions this Court for a writ of mandate and order under Code of Civil Procedure §1094.5, directed to Respondents, COUNTY OF SAN BERNARDINO and SAN BERNARDINO COUNTY BOARD OF SUPERVISORS, (“Respondents” or collectively “County”), setting aside Respondents’ approval of a private gated residential community known as the Altamira Project (“Project”). Project approvals include

1 Tentative Tract Map 18255 and a Conditional Use Permit (“CUP”) to construct a wastewater
2 package treatment plant to serve the Project.

3 2. Petitioner contends the County’s approval must be set aside because the County
4 violated the California Environmental Quality Act (“CEQA”) by failing to prepare an
5 Environmental Impact Report and otherwise to perform adequate environmental review and that
6 the County’s approval of the Project was inconsistent with the County’s General Plan and the
7 Joshua Tree Community Plan, in violation of the County Development Code and without the
8 proper findings required for approval of a Tentative Tract Map and Conditional Use Permit.

9 **II. THE PARTIES**

10 3. Petitioner and Complainant, JT 105 Alliance, is a community group dedicated to
11 responsible planning and development in the Joshua Tree area of San Bernardino County. Some of
12 JT 105 Alliance members work, own businesses, recreate and/or reside in Joshua Tree and/or the
13 Morongo Basin, in the vicinity of the Project. JT 105 Alliance brings this action on its own behalf,
14 for its members, and in the public interest.

15 4. Respondent and Defendant County of San Bernardino (“the County”) is a local
16 governmental agency and subdivision of the State of California with the authority to regulate and
17 administer land use and development within its territory, but only in compliance with the duly
18 adopted provisions of its zoning ordinances, General Plan, Community Plans, Development Code
19 and all applicable provisions of state law, including CEQA, the Planning and Zoning law, and the
20 Subdivision Map Act.

21 5. Respondent and Defendant, San Bernardino County Board of Supervisors (“BOS”) is
22 the legislative body and highest administrative body in the County. The BOS has the authority to
23 approve or disapprove of Conditional Use Permits and other land use entitlements. The County
24 Planning Commission is the lead agency within the meaning of CEQA, but the BOS bears the
25 ultimate responsibility for the County’s compliance with CEQA.

26 6. Petitioner is informed and on that basis alleges that YV 105 LLP and Ron Schwartz
27 (“Real Parties in Interest”) are the real parties in interest by virtue of YV 105 LLP and Ron
28 Schwartz being the Project applicant/representative and recipient of project approval(s).

7. Petitioner does not know the identity of ROES 26-50, but will amend the Petition as
required to specifically identify each such person or entity as a real party in interest if the identity,
interest and capacity of such party, if any, becomes known.

///
///

1 **III. PROCEDURAL ALLEGATIONS**

2 8. Petitioner has performed any and all conditions precedent to filing the instant action
3 and has exhausted any and all administrative remedies to the extent required by law, by *inter alia*,
4 because individual members of JT 105 Alliance submitted written and oral comments on the
5 Project and the County’s environmental review during the applicable administrative review
6 process.

7 9. Through its members, Petitioner requested that the County not approve the Project
8 before complying with CEQA and alerted the County to the fact that the Project is inconsistent
9 with the County’s zoning regulations. Petitioner appealed approval of the Project to the Board of
10 Supervisors, where it was consequently denied. Therefore any further attempts to pursue
11 administrative remedies would be futile.

12 10. Petitioner has complied with the requirements of the Public Resources Code (“Pub.
13 Res. Code”) §21167.5 by mailing written notice of the commencement of this action to
14 Respondents prior to filing this petition and complaint. A true and correct copy of this notice is
15 attached hereto.

16 11. Petitioner has complied with the requirements of Pub. Res. Code §21167.7 and
17 Code of Civil Procedure §388 by mailing a copy of the Petition/Complaint to the State Attorney
18 General.

19 12. Petitioner has no plain, speedy, or adequate remedy in the ordinary course of law
20 unless this Court grants the requested writ of mandate to require Respondents to undertake
21 adequate environmental review as required by CEQA, and not to approve the Project unless it is
22 revised to comply with the County’s own regulations. In the absence of such remedies,
23 Respondent’s approvals will remain in effect in violation of CEQA and the County’s General Plan,
24 Development Code, the Joshua Tree Community Plan, and CA Government Code §66474.

25 13. If Respondents are not enjoined from approving the Project, and from undertaking
26 acts in furtherance thereof, Petitioner will suffer irreparable harm from which there is no adequate
27 remedy at law in that the Project area and surrounding area would be irrevocably altered and
28 significant adverse impacts on the environment would result. Petitioner and the general public will
also be harmed by Respondents’ failure to comply with the County’s own regulations.

 14. In pursuing the action, which involves enforcement of important rights affecting the
public interest, Petitioner will confer a substantial benefit on the general public, citizens of Joshua

1 Tree and the County of San Bernardino and the State of California, and therefore will be entitled to
2 attorneys' fees and costs pursuant to, *inter alia*, Code of Civil Procedure §1021.5.

3 15. Petitioner brings this action in part pursuant to Pub. Res. Code §21168.5 and Code
4 of Civil Procedure §1085 and §1094.5, which require that an agency's approval of a Project be set
5 aside if the agency has prejudicially abused its discretion. Prejudicial abuse of discretion occurs
6 either where an agency has failed to proceed in a manner required by law or where its
7 determination or decision is not supported by substantial evidence. Respondents have prejudicially
8 abused their discretion because Respondents have failed to proceed according to law, and their
9 decision is not supported by substantial evidence.

10 **IV. JURISDICTION AND VENUE**

11 16. The court has jurisdiction over this action pursuant to Code of Civil Procedure §§
12 1085 and 1094.5 and Pub. Res. Code §§ 21168, 21168.5 and 21168.9.

13 17. Venue is proper in this Court because the Project site is located in San Bernardino
14 County and Respondents' approval of the Project also occurred in San Bernardino County.

15 **V. STATEMENT OF FACTS**

16 18. The Project (APN: 0601-211-09 and 13; Project No. P200700997) site is located in
17 the unincorporated community of Joshua Tree, approximately one half mile south of State
18 Highway 62 in the Morongo Basin area of San Bernardino County. The Project site is 105 acres of
19 native Joshua tree woodland wrapping around and adjacent to an existing elementary school and
20 partially built-out, open to the desert, residential neighborhoods comprised of single-family homes
21 on lots averaging 18,000 sq. feet to over an acre. The Project site is currently vacant.

22 19. The Project is comprised of 248 single family lots with the majority of the lots
23 10,000 sq. feet, 12,000 sq. ft. and cul-de-sac parcels, due to their geometry, up to 20,320 sq. feet.
24 The Project will include public and private streets, 1 acre of recreation area and a community
25 center, and open space in the area required for drainage channels and retention basins. The Project
26 will be gated and surrounded by an accompanying wall and/or fence. As proposed, the Project will
27 include the construction and operation of a wastewater treatment plant to treat all wastewater
28 generated on-site to tertiary levels and partially returns the effluent to the aquifer via injection
wells. This facility will be managed by the Joshua Basin Water District.

20. The Project site is designated Single Residential (RS-10M) land use/overlay with a
minimum 10,000 sq. foot lot size.

1 21. Project site is located within the Mojave Desert Air Quality Management District,
2 which is in a state of sever non-attainment for ozone and PM10.

3 22. The Project, as proposed, is inconsistent with a number of land use policies and
4 regulations, as discussed in more detail below. Further, neither the Initial Study/MND nor any of
5 the Staff Reports ever explicitly analyzed the Project for compliance with the applicable Joshua
6 Tree Community Plan adopted as a component document of the San Bernardino County General
7 Plan in 2007, nor with a number of its goals and policies intended to protect the areas' unique
8 natural features and biological resources. The County Development Code requires the proposed
9 map and use to be consistent with all elements of the General Plan, including the open space and
10 safety elements, as well as any applicable community plans, such as the Joshua Tree Community
11 Plan. The evidence in the record shows that the Project is inconsistent with important provisions,
12 goals and policies of the General Plan.

13 **Procedural history and the County's administrative review process**

14 23. The proponents met with three members of the Joshua Tree Municipal Advisory
15 Council Chair Mickey Luckman and former City Planner Bonnie Kopp in late 2006, with their
16 idea of the 'Gated Community'. They told the proponents YV105, LLC (now LLP) that the Joshua
17 Tree Community would not welcome that project and believed it would be opposed by the JT
18 Community.

19 24. The Project was first presented on February 19, 2009 in a public meeting to the
20 Municipal Advisory Council. Over one hundred residents attended, and all were opposed to the
21 project's design.

22 25. An Initial Study/Mitigated Negative Declaration ("MND") for the Project was
23 circulated for public review and comment on August 13, 2014.

24 26. On October 16, 2014 the Morongo Basin Conservation Association informed the
25 Planning Commission that based on their review, the approval under a MND was illegal and that
26 CEQA requires the preparation of an EIR.

27 27. On March 14th, 2016 the Morongo Basin Municipal Advisory Council unanimously
28 approved Resolution No. MB-MAC015 urging the Planning Commission to prepare an
Environmental Impact Report ("EIR") in accordance with CEQA requirements. The Resolution
found that in light of issues of vegetation removal (e.g. Joshua trees), the flood zone aspect of the
Project parcel, the project as a gated community, the presence of desert tortoises, air quality

1 concerns, and the lack of consideration of community input, the Planning Commission should
2 prepare an EIR in accordance with CEQA.

3 28. On April 7, 2016 the Planning Commission approved the Project. The Planning
4 Commission's approval comprised of Tentative Tract map 18255 and a Conditional Use Permit for
5 the Project's wastewater treatment plant.

6 29. In accordance with Development Code §86.08.010 Planning Commission approval
7 was timely appealed to the Board of Supervisors by JT 105 Alliance on April 18, 2016.

8 30. On September 27, 2016 the Board of Supervisors denied the appeal in a 3-2 vote
9 and upheld the Planning Commission's approval of the Project.

10 **The Project's environmental impacts and the County's preparation of a Mitigated Negative**
11 **Declaration**

12 31. The County's environmental review consisted of the preparation of an Initial
13 Study/Mitigated Negative Declaration ("MND") which was circulated in August 2014. The MND
14 concluded all of the Project's potential environmental impacts were either insignificant or could be
15 reduced to a less than significant level with mitigation. However, the MND's analysis of proposed
16 impacts is inadequate and contrary to the mandates of CEQA.

17 32. The evidence in the record supports a fair argument that the Project may cause
18 significant environmental impacts. These negative impacts include views and aesthetics, air quality
19 and related health risks, biological resources, water supply, population growth and traffic.

20 33. As Petitioner explained in its comments, the Project will cause significant view and
21 aesthetic impacts by materially altering the view from Highway 62, which is a designated scenic
22 highway. The Project will cause an adverse aesthetic impact by eliminating approximately
23 hundreds of Joshua Trees and well over a thousand Mojave Yuccas of notable size and replacing
24 them with a large scale, dense, walled-in residential development project. The loss of Joshua
25 Trees, Mojave Yuccas, and other indigenous native plants and protected cacti species will be
26 particularly significant because as Staff admits in its supplemental response to the appeal, Joshua
27 Tree woodlands throughout the area are stressed from the ongoing drought and in decline.
28 Eliminating the aesthetic value of an undeveloped tract of land visible from designated scenic
highway violates the County's General Plan policies intended to protect vistas and visual
resources, and puts Highway 62 at risk of having its official State designation as a scenic highway
revoked. Further, as land visible from the scenic highway, as per the General Plan, review of the
Project by Caltrans was required to ensure the protection of the scenic corridors to the maximum

1 extent feasible. See, Circulation Element, “Scenic Routs” at p. III-6. There is no evidence that the
2 County has consulted with Caltrans, or that Caltrans has approved the Project. The County has
3 failed to make a finding that the Project protects visual resources to the maximum extent feasible.

4 34. The MND’s analysis of lighting is inadequate as it fails to require specific,
5 meaningful and enforceable mitigation measures. The lighting mitigation measures simply state
6 that street lighting will be limited to the “greatest extent possible” without any concrete
7 performance standards. The mitigation measures are further devoid of any meaningful or
8 objectively enforceable provisions as it merely requires a “very reasonable effort shall be made to
9 protect night skies” without providing any analysis of the levels of night lighting or their effects.

10 35. The Project may have significant direct and cumulative air quality impacts because
11 the Project site is within Mojave Desert Air Quality Management District’s (MDAQMD) which is
12 in severe non-attainment for ozone and PM10. The Air Quality Impact Analysis found that criteria
13 pollutants, PM10 and PM2.5 are the most prevalent in the Project area. The MND’s conclusion
14 that the Project will not result in a cumulatively significant air quality impact is not supported by
15 substantial evidence, as this is based solely on the County’s contention that the Project does not
16 exceed the Mojave Desert Air Quality Management District’s (MDAQMD) thresholds of
17 significance for direct impacts. These thresholds, however, relate only to a Project’s direct
18 emissions, and cannot be relied upon to draw conclusions about the significance of the Project’s
19 cumulative impacts. Pursuant to CEQA and the MDAQMD guidelines, the County was required to
20 analyze the Project’s potential cumulative air quality impacts by considering the Project’s impact
21 in addition to any other similar projects in the Project’s vicinity or other appropriate geographic
22 area. Finally, the MND’s conclusion that the Project’s PM10 emissions would be below the
23 MDAQMD threshold of significance was based on the unfounded assumption that only 17 acres of
24 the Project site would be disturbed at any given time. There is no evidence that this assumption is
25 reasonable, or that it was made a condition of approval.

26 36. The MND claims the Project is not expected to generate objectionable odors, but
27 utterly fails to analyze the potential environmental impacts of the proposed onsite WWTF.

28 37. The MND likewise fails to adequately analyze the Project’s potential impact on
biological resources. The MND admits the Project site has the potential to inhabit 11 sensitive
species, some of which with a moderate to high occurrence and foraging probability. The MND
misrepresents the biological baseline and the adequacy of the biological studies. For example, the
MND fails to mention that in 2009, a desert tortoise was observed about a mile north of the

1 project. See March, 12, 2010 Update to 20017 Biological Report. The subsequent “surveys” were
2 utterly inadequate as these were merely “field visits” during which winter months (when many
3 species including the desert tortoise are inactive) and were only limited to “representative areas of
4 the site were assessed to document current site conditions” These supplemental visits did not amount
5 to surveys for species and did not amount to substantial evidence. Moreover, the record shows that the
6 2007 desert tortoise field survey expired in 2008.

6 38. Moreover, the biological mitigation measures are wholly inadequate as none of the
7 proffered mitigation measures directly address the identified sensitive species that are present on
8 the Project site.

8 39. The 2007 Baseline Biological and Focused Desert Tortoise Survey relied upon in
9 the MND to determine the absence of the desert tortoise (*Gopherus agassizii*), a federally-listed
10 endangered species, was invalid also because (1) it was based on United States Fish and Wildlife
11 (“USFW”) protocols published in 1992, rather than the updated protocols published in 2010; (2)
12 surveys were performed outside of the active period for desert tortoises and USFW protocol
13 requires tortoise surveys be performed in April, May, September or October; (3) focused surveys
14 for desert tortoises are only considered valid by the USFW for one year; and (4) extensive field
15 surveys for desert tortoises performed by Circle Mountain Biological Consultants Inc. over the
16 past two decades indicate the presence of desert tortoises on parcels biologically proximate to the
17 Project site. An additional biologist has confirmed these findings.

17 40. The MND and the County’s environmental review of the Project’s biological
18 impacts are violation of CEQA also because the County’s analysis was not based on any valid
19 surveys of onsite Joshua Trees or other sensitive plants. Instead, the MND requires post-approval
20 “full Joshua Tree surveys” for each phase of the Project (See Bio Mitigation Measure IV(e)),
21 which would include the location of trees and make recommendations for maximum preservation
22 of Joshua trees and Mojave yuccas. Post-approval surveys are not useful in informing the public
23 and the decision-makers before approving the Project. Moreover, this approach amounts to an
24 impermissible deferral of mitigation measures because the County has not identified any
25 performance criteria for directing the implementation of this mitigation measure.

25 41. The MND likewise fails to adequately analyze the Project’s impact on available
26 water supplies. The MND claims the Project “is not expected to generate a significant need for
27 additional water resources, and the Joshua Basin Water District (“JBWD”) has indicated that it is
28 able and willing to serve the proposed project,” therefore no mitigation measures are required. See

1 Hydrology and Water MND IX(b). However, JBWD’s conditional will-serve letter expired on July
2 15, 2016. Further this claim, however, is directly contradicted by the Joshua Basin Water District’s
3 statements in its July 15, 2015 “Conditional Will Serve Letter,” in which the District reserved the
4 right to decide whether to supply water to the Project. It also specifically warned that its
5 conclusion that absent a state of emergency, adequate supplies exist to supply the Project may need
6 to be re-assessed after the preparation of the 2015 Urban Water Management Plan. Planning Staff
7 in their Supplemental Responses to issues raised on appeal state the JBWD confirmed “actual
8 water service to the Project shall not be provided during the term of any Declared Drought State of
9 Emergency. This means that the Project could not obtain grading permits, building permits, or
10 record a Final Map until the declared state of emergency is lifted and/or the District issues an
11 unconditional water will-serve letter for the Project.” Given the Project’s significant water demand
12 (see below, Project’s impact on community), the current historical drought, and the uncertainty
13 surrounding the District’s ability and/or willingness to serve the Project, it was critical for the
14 County to further analyze the Project’s impact on water supplies.

15 42. Contrary to the MND’s conclusions, the Project will likely generate a substantial
16 growth in population within the Joshua Tree community. The MND estimates a population
17 increase of 665 persons and asserts this is insignificant to the overall County population of over 2
18 million. However, it completely overlooks and fails to consider the population data as applied to
19 the community of Joshua Tree, the area the Project is located in. The projected Project population
20 increase is approximately 10% of the current residential population of Joshua Tree. As such, the
21 MND was incorrect in its finding that less than significant impact would occur to population
22 growth in the area and therefore no mitigation measures were required. As a small community, a
23 population increase of such magnitude would stress school services, fire and police protection,
24 parks, roadways and other public services and therefore requires more substantial environmental
25 review.

26 43. The MND fails to adequately address the traffic issues arising from the Project’s
27 inevitable large increase in vehicle miles traveled. The MND admits the Project exceeds the
28 arterial link threshold volume of 50 two-way trips during peak hours. The Traffic Impact Analysis
relied upon in the MND is fatally flawed because it does not include the elementary school
adjacent to the Project site. With the Project bringing in hundreds of more people to the area, there
is a fair argument the Project will negatively impact traffic in the area, particularly at the school.
The Project creates a confusing and potentially dangerous four-way stop on Sunny Vista and Alta

1 Loma, which could result in dangerous school crossing as there are no plans to include a cross
2 walk at the east end. Petitioners explained in their letters that the main crossing at the school is
3 frequently run-through by locals and tourists. Further, the Traffic Impact Analysis relies on peak
4 hour times that do not accurately reflect the area and incorrectly references the Project size. The
5 study considers 5:00 p.m. as the beginning of evening peak hours. However, the adjacent
6 elementary school lets out at 3:30 p.m., causing substantial traffic in the area at that time, a fact not
adequately considered in the traffic analysis.

7 44. The traffic study also identifies impacts at the Torres Avenue/HWY 62 and Sunny
8 Vista Road/HWY 62 intersections resulting in the intersections operating at some of the worst
9 conditions possible by rating Level of Service (“LOS”) at LOS D and LOS F. The LOS
10 measurements range from A-F, with F being the worst possible conditions. Santa Bernardino
11 County has established the LOS rating for above mention roadways must operate at LOS C or
12 above. The MND claims these impacts will be mitigated through “road improvements” but fails to
13 define what these improvements would entail and how they would be enforced. The conditions of
14 approval do not include reference to any such improvements that would alleviate the traffic
15 conditions at these intersections. The traffic study further fails to adequately address the increased
16 traffic along Alta Loma due to the increased popularity of Joshua Tree National Park.

17 45. The County decided the Project was not required to quantify the Project’s overall
18 Greenhouse Gas (“GHG”) emissions because the Project purportedly achieved a score of 102 on
19 the County’s GHG Plan Screening Table. The County, however never provided the public with a
20 copy of the completed Table for the Project, making it impossible to verify the County’s
21 assessment of the Project’s GHG mitigations. Moreover, as explained in public comments, the
22 evidence in the record does not support the County’s contentions regarding the Project’s structural
23 climate change mitigation measures. For example, the evidence contradicts the County’s claim
24 that the Project would provide pedestrian and bicycle linkage to nearby commercial districts, as the
25 nearest commercial area, which is approximately 1.5 miles away, is not connected to the Project
26 site via existing sidewalks. Moreover, the County’s climate change mitigation measures (eg.
27 pedestrian linkage to nearby commercial areas) violated CEQA mandates as these were not made
28 enforceable through conditions of approval.

The County Violated CEQA by Failing to Prepare an Environmental Impact Report

46. There is a fair argument the Project will have significant impacts on aesthetics, air
quality, biological resources, water supplies, and significant growth inducing impacts.

1 47. Moreover, the evidence shows that many of the proposed mitigation measures are
2 inadequate and therefore cannot support a conclusion that the Project’s potentially significant
3 impacts will be reduced to a less than significant level. For example, with regard to lighting, the
4 mitigation measures violate CEQA because it impermissibly defers the formulation of the specific
mitigation measures without specifying any concrete performance standards.

5 48. There is a fair argument that substantial evidence in the record supports all the
6 above discussed potential negative impacts. As such, the County cannot avoid preparing an EIR
7 because it can still be fairly argued that the Project may have a significant environmental impact.

8 CEQA Mandates

9 49. CEQA was enacted to require public agencies and decision-makers to document
10 and consider the environmental implications of their actions before formal decisions are made.
11 Pub. Res. Code § 21000, and to “[e]nsure that the long-term protection of the environment shall be
12 the guiding criterion in public decisions.” Pub. Res. Code § 21001(d). “CEQA was intended to be
13 interpreted in such a manner as to afford the fullest possible protection to the environment within
14 the reasonable scope of the statutory authority.” 14 California Code of Regulations, (hereinafter
15 cited as “CEQA Guidelines”) § 15003(f), citing Friends of Mammoth v. Board of Supervisors,
16 (1972) 8 Cal. 3d 247. “[T]he overriding purpose of CEQA is to ensure that agencies regulating
17 activities that may affect the quality of the environment give primary consideration to preventing
18 environmental damage. CEQA is the Legislature's declaration of policy that all necessary action
19 be taken ‘to protect, rehabilitate and enhance the environmental quality of the state.’” Save our
20 Peninsula v. Monterey County Board of Supervisors (2001) 87 Cal.App.4th 99, 117, citing Laurel
21 Heights Improvement Assn. v. Regents of University of California, (1988) 47 Cal.3d 373, 392; and
22 Pub. Res. C § 21000.

23 50. The lead agency must identify all potentially significant impacts of the Project, and
24 must therefore consider all the evidence in the administrative record, not just its initial study. Pub.
25 Res. C. §21080 (c), (d), §21082.2. CEQA Guidelines direct lead agencies to conduct an Initial
26 Study to “determine if the Project may have a significant impact on the environment.” §15063(a).
27 “All phases of the Project planning, implementation, and operation must be considered in the
28 Initial Study”. CEQA Guidelines §15063(a)(1). Besides the direct impacts, the lead agency must
also consider reasonably foreseeable indirect physical changes in the environment in the area in
which significant effects would occur, directly or indirectly. See CEQA Guidelines §15064(d) &
§15360, see, also, Laurel Heights Improvement Assn, supra, 47 Cal.3d at 392.

1 51. Where the CEQA environmental process was procedurally or substantively
2 defective, reviewing courts may find prejudicial abuse of discretion even if proper adherence to
3 CEQA mandates may not have resulted in a different outcome. Pub. Res. Code §21005(a). For
4 example, the Court in Citizens to Preserve Ojai v. County of Ventura (1985) 176 Cal.App.3d 421,
5 428 held that the certification of an EIR that had not adequately discussed the environmental
6 impacts of the Project constituted a prejudicial abuse of discretion even if strict compliance with
7 the mandates of CEQA would not have altered the outcome. Resource Defense Fund v. LAFCO
8 (1987) 191 Cal.App.3d 886, 897-8, went so far as to declare that failure to comply with CEQA
9 procedural requirements was *per se* prejudicial. Kings County Farm Bureau v. City of Hanford
10 (1990) 221 Cal.App.3d 692 explained that an agency commits prejudicial error if “the failure to
11 include relevant information precludes informed decision making and informed public
12 participation, thereby thwarting the statutory goals of the EIR process.” *Id.*, at 712.

13 52. The environmental review process under CEQA is intended assure the public that
14 “the agency has, in fact, analyzed and considered the ecological implications of its actions.”
15 Laurel Heights Improvement Ass. v. Regents of the University of California (1988) 47 Cal.3rd
16 376, 392. The function of the environmental review is not merely to result in informed decision
17 making on the part of the agencies, it is also to inform the public so they can respond to an action
18 with which they disagree. *Id.*

19 53. After an EIR has been certified for a project, a subsequent or supplemental EIR
20 must be prepared if “ [s]ubstantial changes are proposed in the project which will require major
21 revisions of the previous EIR or negative declaration due to the involvement of new significant
22 environmental effects or a substantial increase in the severity of previously identified significant
23 effects.” CEQA Guideline §15162(a)(1). Where new information or circumstances are incapable
24 of causing new significant effects or substantially increase the severity of previously identified
25 effects, the agency may proceed with a negative declaration or addendum. CEQA Guideline
26 §15162(b).

27 **The “Fair Argument” Standard of Review of Agency Decisions not to Prepare an EIR**

28 54. CEQA requires lead agencies to prepare an Environmental Impact Report (“EIR”) whenever the approval of a proposed project may cause significant adverse effects on the environment. Pub. Res. C. §21100. CEQA contains a strong presumption in favor of requiring preparation of an EIR: even if the lead agency finds that a project *may* cause an impact, an EIR must be prepared. Pub. Res. C. §21100, 21151; CEQA Guidelines §15064(a)(1), (f)(1). Thus, if

1 substantial evidence in the record supports a “fair argument” that the project may cause a
2 significant impact on the environment, the agency must prepare an EIR even if other significant
3 evidence in the record support the conclusion that the project will not cause a significant impact.
4 No Oil v. City of Los Angeles (1974) 13 C3d 68; see also Quail Botanical Gardens Foundation v.
5 City of Encinitas, (1994) 29 Cal.App.4th 1597, Practice under CEQA, §6.29, Kostka and Zischke
6 (2000). “The lead agency’s decision is thus largely legal rather than factual; it does not resolve
7 conflicts in the evidence but determines only whether substantial evidence exists in the record to
8 support the prescribed fair argument.” Friends of “B” St. v. City of Hayward (1980) 106 Cal App.
9 3d 988.

10 55. If, after preparing an Initial Study, the lead agency determines that the project will
11 not have a potentially significant impact on the environment, it may prepare a Negative
12 Declaration (or Mitigated Negative Declaration, or an “MND”), which must describe the reasons
13 why in the agency’s opinion, the project will not cause any significant impacts. CEQA Guidelines
14 §15371. As more fully explained below, however, there is a **strong presumption** in favor of
15 requiring the preparation of an EIR because under the “Fair Argument Standard,” the lead agency
16 must prepare an EIR whenever there is any substantial evidence in the record supporting a fair
17 argument that a project may cause significant environmental impacts. Laurel Heights
18 Improvement, supra, 47 Cal. App.3d at 392.

19 56. The EIR has been described as the "heart of CEQA." CEQA Guidelines,
20 §15003(a). Its purpose "is to identify the significant effects on the environment of a project, to
21 identify alternatives to the project, and to indicate the manner in which those significant effects can
22 be mitigated or avoided." (Public Resources Code section 21002.1(a).) By carrying out this
23 purpose, the EIR informs "the public and its responsible officials of the environmental
24 consequences before they are made. Thus, the EIR "protects not only the environment but also
25 informed self-government." Citizens of Goleta Valley v. Board of Supervisors (1990) 52 Cal.3d
26 553, 564.

27 57. The “fair argument” standard is very different from the other standards public
28 agencies are normally held to in making their administrative decisions. In virtually every other
context, the agencies weigh the evidence before them and reach a decision based on the
preponderance of the evidence. See, California Administrative Hearing Practice §7.51 (2d ed Cal.
CEB 1997). Under the fair argument standard, however, the agencies may not compare or weigh
the evidence in order to decide which side has the better argument. Rather, the agency’s task is

1 limited to the determination of whether “substantial evidence” exists to support a “fair argument”
2 that environmental impacts may occur. Friends of “B” St. v. City of Hayward, supra, 106 Cal.
3 App. 3d at 1002.

4 58. Pursuant to the “fair argument” standard, a court must independently review the
5 record to determine whether there is any substantial evidence in the record to support a fair
6 argument that a significant impact may occur. Quail Botanical Gardens, Inc. v. City of Encinitas,
7 supra, 29 Cal. App. 4th at 1602. If the court determines that there is substantial evidence in the
8 record to support a “fair argument” that significant impacts may occur, the existence of contrary
9 evidence (in support of the agency’s determination) is insufficient to avoid an EIR because it can
10 still be fairly argued that the project might have a significant environmental impact. Friends of
11 “B” Street v. City of Hayward supra, 106 Cal. App. 3d at 1002. CEQA allows a public agency to
12 dispense with an EIR and prepare a “negative declaration” only when there appears to be **no**
13 **possibility** that the project will actually cause significant environmental impacts. Pub. Res. Code
14 § 21080(c)); CEQA Guidelines §§ 15070-15075, §15083 (emphasis added). A negative
15 declaration is essentially a certification that the project will have no significant environmental
16 effects. Citizens of Lake Murray Association v. San Diego City Council (1982) 129 Cal.App.3d
17 436, 440.

18 59. In reviewing the agency’s decision not to prepare an EIR, the court must answer a
19 question of law, which means that “*deference to the agency's determination is not appropriate and*
20 *its decision not to require an EIR can be upheld only when there is no credible evidence to the*
21 *contrary.* [Citation.]” Quail Botanical Gardens, supra, 29 Cal. App. 4th at 1602 (emphasis in the
22 original); (citing Sierra Club v. County of Sonoma (1992) 6 Cal. App. 4th 1307, 1317-1318.)

23 Planning and Zoning Laws

24 60. The general plan is “a charter” for further development of the municipality it
25 governs. Leshar Communications, Inc. v. City of Walnut Creek, (1990) 52 Cal.3d 531, 541.
26 Because the general plan functions as the “constitution for all future developments,” all land use
27 decisions must be consistent with the general plan. Citizens of Goleta Valley v. Board of
28 Supervisors, (1990) 52 Cal.3d 553, 570. According to the “consistency doctrine”, the regulatory
controls and development approvals of all cities and counties, including zoning and subdivision
approvals, must be consistent with the agency’s adopted general plan. Longtin’s California Land
Use, 2nd Ed., at §2.40. “The requirement of consistency is the linchpin of California’s land use and

1 development laws. It is the principle which infused the concept of planned growth with the force of
2 law.” Battori v. City of Norco, (1985) 171 Cal.App.3d 1204.

3 ///

4 **FIRST CAUSE OF ACTION**

5 (Violation of CEQA)

6 61. Petitioner incorporates all previous paragraphs as if fully set forth.

7 62. CEQA requires the County to conduct adequate environmental review *prior* to
8 making any formal decision regarding projects subject to the Act. (CEQA Guidelines, 14 Cal.
9 Code Regs. § 15004). Because the County’s approval of the Project violates CEQA, the approval
10 must be set aside.

11 63. CEQA requires public agencies first to analyze all of a project’s reasonably
12 foreseeable environmental effects in the initial study and to prepare an EIR when substantial
13 evidence exists that the Project may have a significant effect on the environment so as to fully
14 study the potential effects and to analyze mitigation measures and alternatives to the Project.

15 64. CEQA imposes upon the County a clear, present and mandatory duty to include all
16 feasible mitigation measures or adopt alternatives which would substantially lessen the significant
17 environmental effects of the project.

18 65. The following is a list of some, but not all of MND’s violations of CEQA and
19 inadequate impact analysis.

20 **View and Aesthetics**

- 21 • The MND fails to distinguish the Project as within the view-shed of a scenic
22 route listed in the General Plan
- 23 • The Project fails to adequately mitigate the adverse aesthetic impact of
24 eliminating approximately hundreds Joshua Trees and well over a thousand
25 Mojave Yuccas of notable size
- 26 • The MND did not adequately analyze the Potential impact of Project lighting
27 on aesthetics

28 **Air Quality and Related Health Risks**

- The MND fails to adequately assess the Project’s potentially significant
direct and cumulative air quality impacts, particularly of PM10
- The MND fails to propose adequate mitigation measures to address Project
impacts on air quality

1 **Biological Resources**

- 2 • The MND fails to adequately describe Project setting and baseline
3 environmental conditions because the sensitive species biological surveys
4 were inadequate, invalid, stale, and not conducted at the appropriate sites and
5 were not properly timed to identify and detect all potential plant and animal
6 species that could be present on the site. The MND’s conclusions regarding
7 the Project’s potential impact on sensitive biological resources is not
8 supported by substantial evidence. The evidence shows the Project site is
9 suitable for and likely supports sensitive species and the loss of habitat and
10 movement corridor alone will result in a significant impact.
- 11 • The County’s conclusion that the loss of Joshua Trees and Mojave yuccas
12 that would result from the implementation of the Project would not result in
13 a significant impact is not supported by substantial evidence, as the County
14 has deferred Joshua tree surveys to after Project approval, See, Condition of
15 Approval 47.
- 16 • The MND fails to proposed adequate mitigation measures for the Project’s
17 potential impact on the present sensitive species and plants.
- 18 • The MND fails to adequately analyze the impacts of construction within
19 wildlife habitat and movement corridor, as well as construction of individual
20 houses and fencing of the existing blue-line stream(s) on site would affect
21 wildlife, including sensitive and/or rare species.

22 **Hydrology and Water Quality**

- 23 • The IS/MND fails to adequate analyze Project’s potential impacts on
24 water supply or the adequacy of those supplies to meet project demand
- 25 • The MND failed to adequately analyze or require adequate mitigation
26 measures for Project impacts, such as erosion and alteration of drainage
27 patterns that can result from the construction activities within streambeds,
28 including 37,820 cubic Yards of cut and fill.
- The MND fails to consider the extreme flood potential on site (sheetflow,
 and water surges) as illustrated in the flood of September 16, 2014.

Population and Housing

- 1 • The MND fails to contemplate the population growth on the community of
2 Joshua Tree as a result of the Project, and the subsequent strain that would be
3 placed on public services

4 **Traffic**

- 5 • The MND fails to adequately analyze Project impacts on traffic and
6 circulation, including local highway segments and intersections, or increase
7 traffic hazards
8 • The MND fails to include adequate mitigation measures to reduce the
9 Project’s traffic impacts to a less than significant level

10 **Climate Change**

- 11 • MND fails to adequately analyze the Project’s impact on climate change or
12 to include feasible and effective mitigation measures to reduce those impacts
13 to a less than significant level

14 **Piece-mealing and Failure to Analyze the “whole” of the Project**

- 15 • The MND inappropriately fails to analyze the whole of the Project. The
16 MND fails to describe and analyze the impacts that could result from the
17 construction and operation of an onsite waste water treatment facility,
18 including potential water quality impacts and odor. Likewise, the MND fails
19 to analyze the impacts that could result from construction activities within
20 the streambed because such activity is subject to the jurisdiction of the
21 California Fish and Wildlife Agency.

22 **Inadequate Mitigation Measures**

- 23 • As set forth above, the County’s and MND’s analysis of Project impacts are
24 woefully inadequate. The County’s failure to adequately analyze a wide
25 range of the Project’s impacts has resulted in the unlawful approval of the
26 Project despite potentially significant impacts. The County has failed to
27 require adequate mitigation measures to reduce Project impacts to a less than
28 significant level.

Failure to Prepare an EIR

- As substantial evidence in the record supports a conclusion that the Project
 may result in one or more significant environmental impacts, the County was
 required but failed to prepare an EIR.

1 ///

2 **SECOND CAUSE OF ACTION**

3 (Violation of Planning Laws)

4 66. Petitioner refers to and incorporates herein by this reference paragraphs 1-##, inclusive, of this Petition as though fully set forth herein.

5 67. The MND does not adequately analyze the Project's inconsistencies with County
6 General Plan policies or the Joshua Tree Community Plan.

7 68. Community Plan policies include Land Use 1.2, which directs the County to
8 maintain and conserve sensitive plant communities, particularly Joshua Trees, Mojave Yuccas and
9 creosote rings. This Project will result in the destruction of an unknown number of Joshua trees and
10 other sensitive native plants. As the County has not required a detailed report on the number and
11 location of these plants or how many plants would be salvaged, there is no evidence in the record
12 from which to conclude the sensitive plant communities on site would be adequately protected and
13 conserved as required by County Policy.

14 69. The Project is likewise inconsistent with General Plan Policies designed to protect
15 scenic highways. The evidence in the record does not support a conclusion that the County
16 complied with the provisions of the Circulation Element, "Scenic Resources" (Page III-6) by
17 consulting with Caltrans or other agencies to "ensure the protection of scenic corridors to the
18 maximum extent feasible."

19 70. The County's conclusion that the Project is consistent with the character of the
20 neighboring areas is not supported by substantial evidence. The evidence shows the Project is
21 inconsistent with most of the surrounding neighborhood owing to many factors, including its
22 relatively high density and the fact that it is a gated and walled community, excluding the free travel
23 of wildlife and neighbors, a feature that is at odds with the character of the Joshua Tree
24 Community.

25 71. The County's approval based on the density allowed under the applicable zoning
26 was unlawful because the Project's zoning designation (RS-10M) is inconsistent with the General
27 Plan and Joshua Tree Community Plan's goals and policies. In light of this inconsistency, the
28 County was required but failed to change the site's zoning designation consistent with the goals and
policies of the Joshua Tree Community Plan and the General Plan.

72. The County's approval of the Project, including conditions of approval and
mitigation measures, is inconsistent with County Code §88.01.050((f)(1), which directs the County

1 to permit removal of Joshua Trees only if the County is able to make one of several enumerated
2 findings, demonstrating the need for the removal of individual trees. The Conditions of Approval
3 do not condition the issuance of a tree removal permit on a demonstration of need as required by
§88.01.050.

4 WHEREFORE, Petitioner prays for relief as follows:

- 5 1. For an alternative and peremptory writ of mandate, commanding Respondents:
 - 6 A. To set aside and vacate its adoption of the Initial Study/Mitigated Negative
7 Declaration and Findings supporting the Project;
 - 8 B. To set aside and vacate any approvals for the Project based upon the Initial
9 Study/MND supporting the Project, including, but not limited to, the Tentative Tract Map 18255,
10 Conditional Use Permit; and
 - 11 C. Not to reconsider the project unless it has prepared and certified a legally
12 adequate EIR for the Project so that Respondents will have a complete disclosure document before
13 it, identify for the decision-makers and public the potential significant impacts of the Project, and
14 enable it to formulate realistic and feasible alternatives and mitigation measures to avoid those
15 impacts;
- 16 2. For declaratory judgment, stating that the actions of COUNTY OF SAN
17 BERNARDINO and SAN BERNARDINO COUNTY BOARD OF SUPERVISORS in certifying
18 the MND and approving the Project were unlawful;
- 19 3. For a temporary restraining order, preliminary injunction, and permanent injunction
20 prohibiting any actions by Respondent or Real Parties based on the MND or any of the Project
21 approvals to construct any portion of the Project or to develop or alter the Project site in any way
22 that could result in a significant adverse impact on the environment unless and until a lawful
23 approval is obtained from Respondent after the preparation and consideration of an adequate EIR;
- 24 4. For cost of the suit;
- 25 5. For reasonable attorneys' fees; and
- 26 6. For such other and further relief as the Court deems just and proper.

24 Dated: October 28, 2016

LAW OFFICES OF BABAK NAFICY

26 By: _____
27 Babak Naficy
28 Counsel for Petitioner,
JT 105 ALLIANCE