**Case No. B308496**

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**SECOND APPELLATE DISTRICT**

**DIVISION 2**

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**MOUNTAINGATE OPEN SPACE MAINTENANCE ASSOCIATION ET AL.,**

*Plaintiffs and Appellees,*

*v.*

**MONTEVERDI, LLC, A CALIFORNIA LIMITED LIABILITY COMPANY, BERGGRUEN INSTITUTE ET AL.,**

*Defendants and Appellants.*

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Appeal from the Superior Court of the County of Los Angeles
Superior Court Case No. 19STCV33839
The Honorable Rupert Byrdsong, Judge Presiding

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# APPELLANTS' REPLY BRIEF

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**GIBSON, DUNN & CRUTCHER LLP**

JAMES P. FOGELMAN (SBN 161584)
jfogelman@gibsondunn.com
KAHN SCOLNICK (SBN 228686)
kscolnick@gibsondunn.com
SHANNON MADER (SBN 235271)
smader@gibsondunn.com
JONATHAN N. SOLEIMANI (SBN 295673)
jsoleimani@gibsondunn.com
KATARZYNA RYZEWSKA (SBN 300386)
kryzewska@gibsondunn.com
2029 Century Park East
Los Angeles, California 90067
Telephone: 310.552.8500
Facsimile: 310.551.8741
*Attorneys for Defendants and Appellants*
*Monteverdi, LLC and Berggruen Institute*

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## I. INTRODUCTION

Plaintiffs don't dispute that Berggruen's filing of an EAF with the City of Los Angeles to begin environmental review of the proposed Berggruen Project constitutes protected activity under the anti-SLAPP statute. Nor do they dispute that Berggruen's alleged lobbying activities likewise fall under the statute's purview. Plaintiffs also make little effort to defend the trial court's flawed analysis of step one in the anti-SLAPP inquiry, which hinged on the "gravamen" analysis the California Supreme Court later rejected in *Bonni v. St. Joseph Health System* (2021) 11 Cal.5th 995.

Instead, Plaintiffs insist Berggruen's protected conduct is merely "'incidental' or 'collateral'" backdrop, meant only to "provide evidence" for their overarching theory: that Berggruen allegedly breached the MOU and violated Plaintiffs' rights "by seeking to develop and developing the Monteverdi Property contrary to the [MOU's] terms." (1 CT 53, ¶ 67.) This is hopelessly circular. What Plaintiffs keep missing is that the *only affirmative acts* Berggruen allegedly undertook in its efforts to "seek[] to develop" the property and thereby breach the MOU were (1) its "fi[ling] [of] an [EAF] and related documents with the City" and (2) its "host[ing] [of] elected representatives," "ma[king] political contributions," and "lobby[ing] public officials to approve" the Berggruen Project. (1 CT 47–48, 50, ¶¶ 39, 49.) These activities do not merely "lurk in the background" of the complaint. (RB at 23.) Rather, they "form the basis for liability." (*Bonni, supra,* 11



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Cal.5th at p. 1009.)

Plaintiffs respond by trying to shift the focus away from the alleged *actual* breach of the MOU, and toward a purported "*anticipatory* breach." (RB 23, italics added.) Yet the alleged "conduct at issue" supporting any such "repudiation" is Berggruen's "*intent* not to comply with the MOU." (RB 27, italics added.) And the complaint makes clear that Berggruen expressed its supposed "intent not to comply with the MOU" by engaging in protected activities—that is, petitioning the government to seek possible approval of a new use for the subject property. Specifically, Plaintiffs allege it was Berggruen's "fil[ing] [of] an [EAF] and related documents" that "announced that *[Berggruen] do[es] not desire or intend to develop* the Reduced Density Plan," and instead plans to pursue a "more intensive" one. (1 CT 47–48, ¶ 39, italics added.) After all, if Plaintiffs weren't focusing their claims on Berggruen's petitioning activity—namely, the pursuit of environmental review and approval from the city—Plaintiffs would not be seeking an injunction to stop it. (1 CT 59, prayer for relief, ¶ 5.)

In sum, Berggruen has established that Plaintiffs' claims arise entirely (or at least in substantial part) from protected conduct, satisfying step one of the anti-SLAPP analysis. The Court should therefore reverse and remand with instructions to the trial court to proceed to step two. Alternatively, if this Court elects to proceed to step two in the first instance, Plaintiffs failed to meet their burden to show probable success.



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## II. ARGUMENT

### A. Berggruen satisfied step one of the anti-SLAPP analysis because Plaintiffs' claims arise from admittedly protected conduct.

Berggruen demonstrated that all of Plaintiffs' claims arise from Berggruen's initiation of the City's CEQA environmental review and its engagement in related lobbying activities in support of its project. (AOB 23–38.) "[B]ut for" these protected activities, "plaintiffs' present claims would have no basis." (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 92.) Critically, Plaintiffs *do not dispute* that these are protected activities. Instead, they attempt to recast the protected conduct as mere "collateral evidence" lurking in the background of their claims—not the basis for the claims themselves. But Plaintiffs cannot rewrite their complaint on the fly in this appeal. A close review of the complaint leaves no doubt that the claims all arise from the protected activity of Berggruen initiating the public process necessary for the City to consider alternative uses for the property.

#### 1. There's no dispute that Berggruen's filing of the EAF and related lobbying activities constitute protected conduct under the anti-SLAPP statute.

Plaintiffs do not dispute (or otherwise address) the foundational premise for Berggruen's anti-SLAPP argument: The U.S. and California Constitutions protect both the act of filing an EAF (and other supporting documents) to initiate the City's environmental review of the proposed Berggruen Project, and the act of lobbying public officials in support of this project. (AOB 31, citing

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3 CT 737.) Plaintiffs likewise do not (and cannot) dispute that this conduct is entitled to anti-SLAPP protection. (*Id*. at p. 33.) That's because the petitioning activities alleged in Plaintiffs' complaint fall squarely within the purpose of the anti-SLAPP statute: "to protect defendants from meritless lawsuits that might chill the exercise of their rights to speak and petition on matters of public concern." (*Wilson v. CNN, Inc.* (2019) 7 Cal.5th 871, 883–884.)

The only question, then, under the Supreme Court's recent opinion in *Bonni*, *supra*, is whether Plaintiffs' claims "are predicated on" or "arise from" these protected acts. (11 Cal.5th at p. 1009–10.) If so, Berggruen has satisfied the first step in the anti-SLAPP inquiry.

**2. Plaintiffs do not meaningfully defend the trial court's use of the "principal thrust" or "gravamen" standard that *Bonni* rejected.**

Tellingly, Plaintiffs devote roughly a page in total to defending the trial court's flawed reasoning in denying Berggruen's motion at step one—specifically, its (1) reliance on the "gravamen" framework the Supreme Court expressly repudiated in *Bonni*; and (2) its embrace of the very "logical flaw" the Court rejected in *Navellier*, *supra*, that there's a necessary distinction between "actions that target 'the formation or performance of contractual obligations' and those that target 'the exercise of free speech,'" since a given cause of action "may indeed target both" (29 Cal.4th at p. 92). (RB 9, 21, 33; see also AOB 34–37.)

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As for *Navellier*, Plaintiffs half-heartedly attempt to distinguish it by pointing out that in that case, "the only act alleged to support the claims was the filing of a lawsuit, which is clearly protected activity." (RB 21.) But seeking municipal environmental review and engaging in related lobbying are likewise "clearly protected activity." So that's not a meaningful distinction. And here, as in *Navellier*, the "conduct alleged to constitute [a] breach of contract may also come within constitutionally protected speech or petitioning." (29 Cal.4th at p. 92.)

And as for *Bonni*, *supra*, 11 Cal.5th at p. 995, and the now-rejected "gravamen" approach, Plaintiffs maintain "the gravamen of a claim is relevant to determine whether a particular act is the basis for a claim." (RB 33.) In making this argument, Plaintiffs purport to quote a portion of *Bonni*. Specifically, their brief states: "The Supreme Court recently ruled, '[a] court may consider the 'gravamen' of a claim to evaluate whether a particular act or series of acts applies an element or simply incidental context when the principal thrust concerns non-protected activity.'" (RB 33, purporting to quote *Bonni*, *supra*.) But no such quotation appears in *Bonni* (or elsewhere, to Berggruen's knowledge). (See also *id*. at p. 20 [similarly mischaracterizing *Bonni*].)

In reality, *Bonni* mentions identifying the "'principal thrust' of the cause of action" only in articulating the approach the *losing* plaintiff/appellant had "urge[d]" that Court to adopt. (*Bonni*, *supra*, 11 Cal.5th at pp. 1009–1010.) As the Court explained, "adopt[ing] Bonni's proposed gravamen approach [would]



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risk saddling courts with an obligation to settle intractable, almost metaphysical problems about the 'essence' of a cause of action that encompasses multiple claims." (*Id.* at p. 1011.) Needless to say, Plaintiffs' misquotation of *Bonni* in service of the now-abrogated "principal thrust" analysis cannot control here.

This now-abrogated approach is precisely what the Plaintiffs urged the trial court to apply. They emphasized that courts must "look at the principal thrust, the gravamen, and the core of the case . . . , which here is whether the MOU is binding." (1 RT 15:21–25, see also *id.* at 26:27–27:5 [same].) And the trial court applied this gravamen framework in adopting Plaintiffs' argument that "the case focuses on the MOU," not the filing of the EAF—and that "[t]he EAF is evidence of [Berggruen's] breach" and merely "collateral, incidental activity among thousands of other activities involved in developing the project." (1 RT 15:14–20.) It's irrelevant that the trial court "did not issue a *written* decision" or expressly "*state* that its decision was based on the gravamen of the complaint." (RB 9, 33, italics added.) The gravamen framework is obviously the basis for its ruling. And finding the anti-SLAPP statute not to apply here because the purported thrust of the complaint is "really asserting the rights under the MOU" (1 RT 2:22–23) is precisely the analysis that *Bonni* rejected. Plaintiffs do not credibly argue otherwise.

### 3. All of Plaintiffs' claims arise from Berggruen's protected conduct.

Plaintiffs insist that none of their claims "arise from" Berggruen's protected conduct—they argue the protected activities are



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merely incidental or collateral to each of their causes of action. (RB at pp. 16–34.) But the Court cannot just take Plaintiffs' word for it. The law requires careful "consider[ation] [of] the elements of the challenged claim[s]." (*Bonni*, *supra*, 11 Cal.5th at p. 1009.) Performing that analysis here leaves no doubt that Berggruen's protected conduct "form[s] the basis for liability" for each of Plaintiffs' causes of action, because the protected conduct "supplies" one or more "element[s]" of the claims. (*Id.* at pp. 1009, 1018.)

Berggruen will address each of Plaintiffs' claims separately in the subsections that follow. Berggruen devotes the most space to the contract-based claims in the first subsection—although most of the arguments in that subsection apply equally to the other claims as well.

**a. Plaintiffs' claims for breach of the MOU and the covenant of good faith and fair dealing arise from protected activity.**

Plaintiffs' third cause of action alleges that Berggruen already "*has* breached"—"and/or" "imminently soon *anticipates* to breach or further breach"—the "MOU by seeking to develop and developing the [Adjacent] Property contrary to the terms of the MOU." (1 CT 53, ¶ 67, italics added.)

The *only* affirmative acts Berggruen allegedly undertook to "seek[] to develop" the property in supposed breach of the MOU—or "anticipator[il]y" breach it (RB 27)—are protected conduct. (AOB 28–29.) Specifically, Plaintiffs point to (1) Berggruen's "filing [of] an [EAF] and related documents with the City" seeking



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approval of its proposed development (1 CT 47–48, ¶ 39); and (2) its "host[ing] [of] elected representatives at lavish parties, ma[king] political contributions, and engag[ing] public officials . . . to lobby [them] to approve" the project (1 CT 50, ¶ 49). These admittedly protected activities "supply the basis" for the contract-based causes of action. (*Bonni*, *supra*, 11 Cal.5th at p. 1010.)

Plaintiffs offer a number theories in an attempt to distance themselves from the core allegations in their own complaint, but none have merit.[1]

**(i) Courts look beyond the bare allegations in the "cause of action" section itself in analyzing step one.**

Plaintiffs begin by emphasizing that the specific paragraphs of their complaint setting forth the contract-based claims—paragraphs 64–70—"do[] not reference" or "mention the

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[1] Plaintiffs' claim for breach of the covenant of good faith and fair dealing seeks the same damages and rests on the same allegations of protected activity as their breach-of-contract claim. (1 CT 54, ¶ 69 [citing "attempts to develop the property" among grounds underlying this claim]; see also *id.* ¶ 68 [covenant requires Berggruen "not to do anything that would injure [MOSMA's] rights" to receive MOU's benefits or render its performance "impossible"].) This claim therefore arises from protected activity for the same reasons as the breach-of-contract claim. (See *Philipson & Simon v. Gulsvig* (2007) 154 Cal.App.4th 347, 361 [analyzing together plaintiff's claims for breaches of contract and the covenant of good faith and fair dealing where they were based on the same "petitioning activity," holding both claims were "subject to the anti-SLAPP law"].)



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EAF whatsoever." (RB 26, italics omitted.) So what?

First, the cause of action itself expressly "incorporates by reference each and every allegation of the other paragraphs in this complaint into this cause of action, as though set forth fully herein." (1 CT 53, ¶ 64.) So it's disingenuous for Plaintiffs to try to drive a wedge between the few boilerplate paragraphs of the cause of action and the rest of their complaint. In fact, Plaintiffs' own arguments regarding the first-step anti-SLAPP analysis repeatedly rely on portions of their complaint outside the "Cause of Action" subsections, but incorporated by reference therein. (See, e.g., RB at pp. 17–20, 22–24, 26–27, 30.)

Second, Plaintiffs cite *Kajima Engineering and Construction, Inc. v. City of Los Angeles* (2002) 95 Cal.App.4th 921, for the blanket proposition that "[t]he fact that a cause of action generally incorporates allegations by reference cannot be used to show it 'arises out of' protected activity." (RB 23, fn.4.) But that's not what that case says at all. In *Kajima*, the trial court had struck a cause of action that was obviously based on protected activity; the court allowed the other claims to go forward. (95 Cal.App.4th at p. 926.) When the Court of Appeal proceeded to analyze those *other* causes of action under step one of the anti-SLAPP test, it could not rely on the stricken cause of action because it had been "eliminated from the causes of action into which it had been incorporated." (*Id*. at p. 931; *see also ibid*. [rejecting argument that "the mere incorporation by reference of a cause of action struck under the anti-SLAPP statute taints the other causes of action



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that do not allege acts taken in furtherance of the right to petition or free speech"].)

Here, unlike *Kajima*, none of the key allegations have been stricken—they're all fair game and have been incorporated expressly into Plaintiffs' contract-based cause of action. And without these allegations of protected conduct, the complaint is devoid of any details as to how, precisely, Berggruen is "seeking to develop and developing" the property in alleged violation of the MOU. (1 CT 55, ¶ 74.)

Third, and in any event, Plaintiffs' own authorities demonstrate that courts can and should look beyond a complaint's "Cause of Action" subheadings in the first-step anti-SLAPP analysis. (See *Ratcliff v. The Roman Catholic Archbishop of Los Angeles* (2022) 79 Cal.App.5th 982, 999 fn.8, 1003–1004 [considering in first-step analysis the complaint's "Background Facts" section and rejecting defendant's argument this was "mere background"].)

**(ii) Berggruen's filing of the EAF and related activities are not merely "evidence of or collateral to" Plaintiffs' claims.**

Plaintiffs next contend that Berggruen's EAF filing is merely "'incidental' or 'collateral' protected activity" used to "provide evidence" for Plaintiffs' cause of action. (RB 9, 20). This too is wrong. And the decision in *Midland Pacific Building Corp. v. King* (2007) 157 Cal.App.4th 264 is instructive—if not dispositive.

In *Midland*, the plaintiff alleged the defendant developer



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"breached the contract [between them] by processing [a] high density tract map" with the city rather than a lower-density plan plaintiff previously approved. (157 Cal.App.4th at p. 269.) Years earlier, the parties had contracted for defendant to "obtain approval of a specific plan and vesting tentative tract map in substantial conformance" with plaintiff's preferred plans. (*Id.* at p. 267.) But when market conditions and cost estimates changed, defendant "threatened to withdraw [plaintiff's approved plans] and submit a new [higher-density] map to the City." (*Id.* at p. 268.) Over plaintiff's "insist[ence] that [defendant] perform as provided in the contract," defendant "presented a new tentative tract map at [a] hearing" before the city's planning commission. (*Id.* at p. 268.) Defendant also told the commission it planned to "return later and seek approval of a much higher density development." (*Id.* at pp. 268–69.) Based on these activities, plaintiff sued for breach of contract. (*Id.*)

The Court of Appeal held plaintiff's "breach of contract cause of action . . . *arose directly out of statements made and plans submitted to the planning commission and city council*," all of which was protected "petitioning activity." (*Midland*, *supra*, 157 Cal.App.4th at p. 274, italics added.) In doing so, the court rejected the very same argument that Plaintiffs are now pressing here: that "obtaining governmental approval" for the project was merely "collateral to the contract." (*Id.* at p. 273.)

As the court explained, "obtaining governmental approval" of the project was "not collateral to the contract, it was of the essence of the contract." (*Id.*) The contract called for the defendant



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to pursue and "*obtain approval* [from the city] of a specific plan and vesting tentative tract map." (*Id.* at p. 267, italics added.) The breach-of-contract cause of action was thus inextricably "*based on* the [defendant's] submission of [its] High Density Tract Map to the planning commission and city council," instead of the alternate map the plaintiff wanted defendant to submit. (*Id.* at p. 272, italics added.)

Here, likewise, the MOU allegedly called for Plaintiffs to offer "valuable consideration" (including "cooper[ation]" and "support") for C&C (and Berggruen as an alleged successor in interest) to "pursue the Reduced Density Plan," which "limited development" to a specific density. (CT 44, 53 ¶ 24, 65.) And as in *Midland*, an alleged condition of the MOU was that the proposed plans be "approved by the City" before the obligation to develop the land "in accordance with the Reduced Density Plan" kicked in. (*Ibid.*) Berggruen's alleged acts in seeking the City's approval—*i.e.*, "fil[ing] an [EAF] and related documents with the City of Los Angeles requesting that it approve" a "non-residential development" that is "entirely different" from Plaintiff MOSMA's preferred plan (CT 47–48, ¶ 39)—are the *only affirmative acts* alleged in the complaint that purportedly breached the MOU.

Any doubts about the basis for Plaintiffs' claims are resolved by examining the prayer for relief. In particular, if Berggruen's petitioning weren't the focus of Plaintiffs' complaint, Plaintiffs would not be seeking an injunction to stop Berggruen from "interfering with Plaintiffs' rights" under the MOU. (1 CT 59, prayer for relief, ¶ 5.) The *only* purported "interfer[ence]"



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with Plaintiffs' rights under the MOU is Berggruen initiating the City's environmental review of a project that, according to Plaintiffs, is different from the one Berggruen is contractually bound to pursue. (See also 1 CT 53, ¶ 62 [seeking declaratory relief on the ground that it would be unfair to Plaintiffs "to allow the development of the Berggruen Project . . . to proceed"].) "But for" Berggruen's protected activities, there would be nothing to enjoin. (*Navellier*, *supra*, 29 Cal.4th at p. 90; see also 3 CT 668, ¶ 16 [declaration of MOSMA president, asserting that MOSMA has been damaged because it "had to . . . respond to the new proposal that is not allowed under the" MOU, referring to filings in the CEQA process in response to Berggruen's petitioning].)

Berggruen's protected acts cannot be cast aside as mere "collateral evidence" of alleged breaches of the MOU. (RB 9.) Rather, they "form the basis" of the claims themselves. (*Bonni*, *supra*, 11 Cal.5th at p. 1009; see also *1-800 Contacts, Inc. v. Steinberg* (2003) 107 Cal.App.4th 568, 583–584 [claims against a lawyer for inducing breach of contract and fiduciary duty all arose from the defendant protected acts of facilitating meetings with an optometric agency and inviting legislation].) And because they "were clearly in furtherance of [Berggruen's] right of petition and free speech," Berggruen has "satisfie[d] the first prong of the anti-SLAPP test." (*Midland*, *supra*, 157 Cal.App.4th at pp. 272, 274.)

Plaintiffs accuse Berggruen of "deliberately misconstru[ing]" their complaint and "rearranging allegations" to "manufacture" a different version of their claims. (RB 8, 17.) That's a serious accusation, not remotely supported by the facts. In the



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trial court and in this appeal, Berggruen has fairly and accurately represented Plaintiffs' claims and the allegations supporting them. And Plaintiffs are wildly off base in making any comparisons to the Archdiocese's cherry-picking of allegations in *Ratcliff*, *supra.* (RB 16–17.)

In *Ratcliff*, the plaintiff brought a claim for child sexual abuse, arguing that the Archdiocese was liable under a theory of ratification. (79 Cal.App.5th at p. 1002.) In seeking to strike the ratification claim under the anti-SLAPP statute, the Archdiocese had entirely disregarded the acts alleged to give rise to ratification—including "any number of facts which, if true, would have put the Archdiocese on notice that Father Cunningham may have been, or actually was, molesting young boys at his assignments." (*Id.* at p. 1004.) Instead, the Archdiocese mischaracterized the claim as involving *solely* litigation conduct, "cherry-picking allegations" and then suggesting they were the only ones supporting the claim. (*Id.* at p. 1006.) In reality, the few references to litigation conduct in the complaint, when "[v]iewed as part of the full waterfront of the complaint's factual allegations," were but "a small jetty." (*Id.* at p. 1005.)

Again, Plaintiffs can point to nothing even remotely similar here. As described above and in Berggruen's opening brief, the EAF and related lobbying activity form the basis of each of Plaintiffs' claims. The Court can "take the amended complaint at its word." (*Ratcliff, supra,* 79 Cal.App.5th at p. 1005.)

Plaintiffs also rely heavily on *Wang v. Wal-Mart Real Es-*



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*tate Business Trust* (2007) 153 Cal.App.4th 790, as they did below. (See RB 20, 32.) But as they acknowledge, *Wang* didn't perform the correct first-step analysis. Rather, "*Wang* addressed the gravamen of the cause of action[,] which"—under *Bonni*—"is *not the proper way* to evaluate whether an entire cause of action arises from protected activity." (RB 32.)

Yet even if *Bonni* had not repudiated the principal thrust/gravamen approach, *Wang* would still be distinguishable on its facts. The land-sale contract in *Wang* afforded the defendant-purchaser "*sole discretion to approve certain conditions*," including "the obtaining of necessary discretionary and ministerial approvals and permits required for construction of a commercial retail center." (*Wang*, *supra*, 153 Cal.App.4th at p. 795, italics added.) "[P]ursuing governmental approvals" was thus mere "collateral activity," not the basis for a breach-of-contract claim arising "predominantly [from] private business-oriented activities" regarding a *completed* development. (*Id*. at 809.)

This contrasts sharply with *Midland*, where getting "approv[al] [from] the City" for a plan "in substantial conformance with" plaintiffs' desired one was a condition precedent of the contract. (*Midland*, *supra*, 157 Cal.App.4th at p. 267.) So too here, where the lone acts taken in alleged breach of the MOU involve petitioning the government for review of a "much more intensive development" than the one, according to Plaintiffs, the parties had agreed to submit for approval. (1 CT 47, ¶ 39.) In other words, seeking the City's approval of the project does not involve merely "ministerial" acts (*Wang*, 153 Cal.App.4th at p. 795), it *is*



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the alleged breach of the MOU here. *Wang* is thus irrelevant.

**(iii) Plaintiffs cannot insulate their contract-based cause of action from anti-SLAPP protection by repackaging it as one for "anticipatory breach."**

Plaintiffs also try to walk away from their allegations of an *actual* breach by asserting that their contract-based claim "is not necessarily based on a breach already occurring." (RB 27.) They now insist that Berggruen's alleged "*intent* not to comply with the MOU and *denial* that it binds [it] . . . *are the conduct at issue*." (RB 27, italics added.) At the very least, even if this were correct, it would still require the Court to strike the portions of the contract claims alleging that Berggruen already *has* breached the MOU by engaging in protected conduct.

But this argument is wrong in any event. Any "repudiation/anticipatory breach" (RB 27) would necessarily be premised on Berggruen's EAF filing and alleged lobbying activities. Plaintiffs highlight the boilerplate allegation in Paragraph 37 of their operative complaint: "'Plaintiff is informed and believes that [Berggruen] dispute[s] that [it is] bound by the MOU and the obligations thereunder.'" (RB 17–18, quoting 1 CT 47, ¶ 37.) That begs the question: What, exactly, has Berggruen (allegedly) done to give Plaintiffs the impression that Berggruen would not be complying with the MOU? The operative complaint answers that question as follows: "in August 2019, Berggruen [] announced that *they do not desire or intend to develop* the Reduced Density Plan" and would instead be pursuing a "more intensive one" by



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"*fil[ing] an [EAF] and related documents*." (1 CT 47, ¶ 39; see also *id.* at ¶ 40 [related "press releases and filings" revealed what Berggruen "intended" to do with the project].)

Plaintiffs also describe a meeting from July 23, 2019, a few weeks before the EAF was filed. (RB 13, 18.) They maintain that during this meeting, Berggruen said it would not comply with the MOU, was not bound by it, and would proceed with its own higher-density plans. (*Ibid.*) But these alleged statements, even if made, cannot insulate the breach-of-contract cause of action from anti-SLAPP protection because the statements are inextricably intertwined with the petitioning activity itself—the statements are nothing more than an expression of intent to move forward with the (protected) environmental-review process, which is the necessary first step for any alternate plan. Here, again, *Midland* is instructive.

The plaintiff in *Midland* similarly alleged that defendant engaged in pre-petitioning acts of repudiation. These included "threat[s]," directed at plaintiff's vice president, to "withdraw" plaintiff's preferred plan and instead "submit a new map to the City." (*Midland*, *supra,* 157 Cal.App.4th 264 at p. 268.) In addition, "[s]hortly before the [city's] planning commission meeting" (*i.e.*, before defendant engaged in the protected conduct), defendant conveyed to plaintiff's president its intent to "submit a high density map to the City" "unless [plaintiff] agreed" to defendant's alternative approach. (*Id.* at p. 270.) But these alleged repudiations did not shield the *Midland* breach-of-contract cause of action from the reach of the anti-SLAPP statute—just as Plaintiffs'



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claims of "repudiation (or anticipatory breach)" (RB 23) offer no such insulation here.

**(iv) Other contemporaneous evidence confirms that the contract-based claims arise from protected activity.**

While the Court need not go outside the pleadings to conclude that Berggruen's filing of the EAF forms the basis of Plaintiffs' claims, Plaintiffs' contemporaneous communications confirm it. (AOB 28–29.) On August 8, 2019—a month before filing this suit—MOSMA sent a letter to Berggruen's counsel unequivocally stating that the July 31, 2019 "fil[ing] [of] applications to develop the Property with a project other than the Reduced Density Plan . . . *constitutes a breach of the Agreement* [referring to the MOU]." (2 CT 559, italics added.)

Contrary to Plaintiff's suggestion, this sentence is not "vague." (RB 28 n.7.) It affirms what is already obvious from the complaint: Plaintiffs are claiming that Berggruen's protected petitioning activities breached the MOU.

Respondents ask the Court to ignore their letter, arguing—for the first time in this litigation, in a footnote—that the letter is subject to the mediation privilege because it included a "Request for Mediation" on the header. (RB 28 n.7.) Plaintiffs never objected to this evidence below and thus have waived any objection to it now. (See *Heiner v. Kmart Corp.* (2000) 84 Cal.App.4th 335, 346–347; see also *SEIU-USWW v. Preferred Building Services, Inc.* (2021) 70 Cal.App.5th 403, 408 fn.3 [substantive legal arguments buried in footnote are waived].)



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Regardless, the mediation privilege applies only to communications "by and between participants in the course of a mediation or a mediation consultation." (Evid. Code, § 1119, subd. (c).) Here, there was no such "mediation" in response to the letter, and the letter wasn't a "mediation consultation" because it was not sent to a mediator. (See Evid. Code., § 1115, subd. (c) [defining "Mediation consultation" as "a communication *between a person and a mediator* . . . ."], italics added.) Parties cannot slap a "Mediation" label on a letter and magically make it privileged.

And even if there had been a "mediation" or "mediation consultation," the privilege would have been waived in writing because Plaintiffs copied Los Angeles City Council member Mike Bonin on their communication. (2 CT 560; see Evid. Code, § 1122, subd. (2) [waiver of mediation privilege].) Moreover, communications that include Mr. Bonin cannot by definition be privileged because he was not a "participant" in any contemplated mediation. (Evid. Code, § 1119, subd. (c).) And because Mr. Bonin is a member of the City Council, the letter is a "public record," presumptively accessible to the public. (See Govt. Code, §§ 6252, subd. (e), (g); see also *id.*, § 6253, subd. (a).) Plaintiffs' decision to copy Mr. Bonin is inconsistent with their suggestion that they intended the letter to remain confidential or privileged. Rather, they knew and understood the issue was a matter of public concern and wanted to ensure it was brought to City Council's attention.



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**(v) Berggruen did not waive arguments concerning the alleged lobbying activity.**

There's no dispute that lobbying government officials is protected activity (Section A. 1, *supra*); nor is there a dispute that the complaint alleges Berggruen lobbied public officials in support of its project, in supposed breach of the MOU and violation of other common-law duties. (1 CT 50, ¶ 49 ["To avoid the City planning and zoning restrictions that would prohibit the development and operation of the Berggruen Project on the Adjacent Property, Berggruen has hosted elected representatives at lavish parties, made political contributions, and engaged public officials, including the former President of the City's Police Commission, *to lobby public officials to approve* the Berggruen Project."], italics added.) As Berggruen has explained, Plaintiffs' reliance on alleged lobbying as a basis for their claims further confirms why the trial court should have stricken their complaint under the anti-SLAPP statute. (AOB 27–30.)

Plaintiffs respond that Berggruen "waived" any arguments related to lobbying activity because they were "not a basis for" Berggruen's trial-court motion. (RB 26 n.6.) Not true. The alleged lobbying is not a separate ground for Berggruen's motion—it was simply one of the purported steps that Berggruen supposedly took to obtain the City's environmental approval, all of which Berggruen argued was "protected petitioning activity." (1 CT 101; see also 1 CT 100–101, citing paragraph 49 of the complaint [1 CT 50], which exclusively covers lobbying activities; 1 CT 102 [arguing that "statements made in connection with CEQA



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proceedings" are protected].)

In any event, this Court has discretion to consider alleged lobbying activity in assessing the first prong of the anti-SLAPP statute even if not explicitly raised below, because it presents a "purely legal" issue on "a matter of public interest." (*Bialo v. W. Mut. Ins. Co.* (2002) 95 Cal. App. 4th 68, 73.) Doing so is especially appropriate here, where a de-novo review standard applies and the Court must exercise its own "independent judgment" in applying the first prong. (*Park v. Bd. of Trustees of California State Univ.* (2017) 2 Cal.5th 1057, 1067.)

#### b. Plaintiffs' intentional-interference claim arises from protected activity.

Plaintiffs' intentional interference claim requires demonstrating that Berggruen engaged in "intentional acts designed to induce a breach" of the MOU. (*1-800 Contacts, supra,* 107 Cal.App.4th at p. 585.) As with Plaintiffs' "anticipatory breach" claim, this claim is premised on threadbare assertions of Berggruen's "'intent to develop the land contrary to the MOU.'" (RB 28–29, quoting 1 CT 56–57, ¶ 83–84.) This claim thus arises from protected activity to the same extent as the contract-based claims—namely, the only *substantive allegations* supporting Berggruen's "intent" to develop the land (or "cause" C&C to do so) in a way "contrary to the MOU" are its filing of the EAF and related documents with the City, and lobbying public officials in support of the Berggruen Project. (See *O&C Creditors Group, LLC v. Stephens & Stephens XII, LLC* (2019) 42 Cal.App.5th 546, 568 [where contract claim based on protected activity also formed



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basis of intentional interference with prospective economic advantage claim, court held the latter "[l]ikewise" fell under anti-SLAPP statute's purview].)

**c. Plaintiffs' claim for unjust enrichment arises from protected activity.**

Plaintiffs' claim for unjust enrichment requires them to demonstrate Berggruen's "'receipt of a benefit and unjust retention of the benefit at [Plaintiffs'] expense." (*Lyles v. Sangadeo-Patel* (2014) 225 Cal.App.4th 759, 769.) Plaintiffs themselves highlight the similarities between this claim and their anticipatory "breach" theory, arguing that this "cause of action alleges that Appellants *have rejected their obligations under the MOU*," making their retention of benefits from the MOU unjust. (RB 29–30, italics added.) And Plaintiffs expressly state—quoting their complaint—that Berggruen's "'rejection' of the obligations under the MOU *was their denial* that 'the MOU is binding on Monteverdi and Berggruen [Appellants] as successors and/or assigns of [C&C]' and repudiation of the MOU." (RB 30, quoting 1 CT 51–52, ¶ 57, italics added.)

Once again, the only *affirmative conduct* through which Berggruen is alleged to have "reject[ed] [its] obligations under the MOU" and thus "unjustly enriched" itself at Plaintiffs' "expense" (1 CT 57, ¶ 89)—was filing the environmental-review documents with the City and engaging in related lobbying activity in support of the Berggruen Project. (See *Ojjeh v. Brown* (2019) 43 Cal.App.5th 1027, 1038–1039 [affirming anti-SLAPP protection where the only "affirmative conduct . . . suppl[ying] the requisite



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element of . . . the wrongfulness of defendants' retention of [funds] for purposes of . . . [the] unjust enrichment cause of action" constituted protected activity].)

**d. Plaintiffs' claims for declaratory relief arise from protected activity.**

Plaintiffs contend their declaratory relief claims "concern a dispute over the applicability the MOU," and that this dispute would exist "even if [Berggruen] had not filed the EAF." (RB 25; see also *id.* at p. 30 [related dispute over Stoney Hill Road].) But Berggruen explained that its protected activity is only thing making this dispute "ripe"—that is, triggering the environmental review process is the only conduct that gives rise to a present dispute about the MOU, its terms, and whether it binds Berggruen. (AOB 29–30.)

Plaintiffs respond that declaratory relief claims are available even before a contract is breached. (RB 24.) That's true, but beside the point. A plaintiff must still point to something more than mere speculation about potential future breaches to assert a ripe declaratory relief claim. For instance, in *Wilson & Wilson v. City Council of Redwood City* (2011) 191 Cal.App.4th 1559, 1582–1584, the landowner's claim for declaratory relief to protect its property from future condemnation was not ripe—even though the city had stated it would "use its best efforts and legally available means to acquire" the parcels—because the "[c]ity has taken no steps to acquire [plaintiff's] property and . . . may never do so." (See also *Stonehouse Homes LLC v. City of Sierra Madre* (2008)



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167 Cal.App.4th 531, 541–42 [claim seeking declaration that moratorium resolution was legally invalid was not ripe because the resolution directed the commission to prepare final recommendations and thus "merely gave notice to the public of potential legislation that might be adopted in the future" which "implicated no rights of [plaintiff]"].)

Plaintiffs rely on *City of Cotati v. Cashman* (2002) 29 Cal.4th 69, and *City of Alhambra v. D'Ausilio* (2011) 193 Cal.App.4th 1301, for the proposition that declaratory relief claims can be related to protected speech without "arising from" it. (RB 31.) But both cases are easily distinguishable. As an initial matter, *Cashman* (and, by extension, *D'Ausilio*) relied explicitly on the now-rejected "gravamen" approach. (See *Cashman*, *supra*, 29 Cal.4th at p. 79 [purporting to discern the "gravamen" of the case].)

More importantly, in *Cashman*, the operative complaint "contain[ed] no reference to" the petitioning activity—namely, the defendant's prior filing of a federal lawsuit. (*Id*. at p. 77.) Instead, the parties' dispute was about the constitutionality of a mobile home ordinance; the fact that there had been a prior federal lawsuit seeking a declaration of unconstitutionality did not mean the claims arose from that lawsuit. (*Id*. at pp. 79–80.) Likewise, in *D'Ausilio*, both parties had filed claims and cross-claims against each other asking the court to resolve the same question: the enforceability of a contract. (193 Cal.App.4th at pp. 1304–1305.) The trial court and Court of Appeal put particular emphasis on the fact that the defendant (the party bringing



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the anti-SLAPP motion to strike) *himself* sought a declaration of rights under the contract. (*Id*. at pp. 1307–1308 ["Indeed, appellant's anti-SLAPP motion acknowledges that 'This lawsuit arises out of a Settlement Agreement . . . .'"].)

Here, by contrast, Plaintiffs are haling Berggruen into court *because of* Berggruen's petitioning activity; they are offering the purported "repudiation" theory as a mere fig leaf in an effort to avoid an anti-SLAPP motion. (See also *Burton Way Hotels, Ltd. v. Four Seasons Hotels Ltd.* (C.D. Cal. Feb. 23, 2012) 2012 WL 12883616, at *26 [distinguishing *D'Ausilio* on the basis that "D'Ausilio himself countersued, 'seeking a nearly identical judicial declaration'" concerning the parties' agreement].)

### B. Plaintiffs have not established a probability of success under step two of the anti-SLAPP analysis.

As shown above and established in Berggruen's opening brief, all of Plaintiffs' claims arise from protected activity. The Court should therefore reverse and remand with instructions to the trial court to consider step two of the anti-SLAPP framework in the first instance.

Alternatively, if this Court elects to address step two now, the burden shifts to Plaintiffs to show, by "competent, admissible evidence," a probability of prevailing on the merits. (*Roberts v. Los Angeles County Bar Assn.* (2003) 105 Cal.App.4th 604, 613–614.) Plaintiffs have not met their burden. (AOB 38–51.) Plaintiffs' various arguments on this score fall wide of the mark.

#### 1. The MOU is not binding on Berggruen.

Plaintiffs cannot show a probability of success unless they



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can demonstrate that the MOU binds Berggruen. They can't. (AOB 39–43.)

Plaintiffs concede Berggruen is not a party to the MOU; that the MOU was never recorded and, thus, does not run with the land; that there was no express assignment of the MOU to Berggruen; and that the Purchase Agreement does not reference the MOU. (RB 36–42.) So Plaintiffs instead argue that (1) Berggruen assumed the MOU when it entered the Purchase Agreement, since the Purchase Agreement contains an assumption provision, and (2) that Berggruen impliedly agreed to be bound by the MOU when it "accepted" the benefits of the MOU. (*Ibid.*) Both arguments fail.

**a. The Purchase Agreement did not require Berggruen to assume the MOU.**

Plaintiffs point to Section 8(b) of the Purchase Agreement, by which Berggruen agreed to "assume and comply with" all obligations relating to owning the property (3 CT 704, ¶ 8(b)); Plaintiffs contend "[s]uch obligations include the MOU." (RB 37.) But Plaintiffs are ignoring the critical flaw in their theory. (See AOB 40.) Namely, Section 8(b) was expressly made "subject to the provisions of Section 6(g) above." (3 CT 704, ¶ 8(b).) And Section 6(g) unambiguously required C&C, as part of the sale to Berggruen, to "terminate . . . any and all agreements and/or contracts relating to the Property, which [Berggruen] has not affirmatively elected to assume." (3 CT 702, ¶ 6(g).)

Under California law, "'[s]ubject to' means subordinate to, and is generally interpreted as a condition precedent." (*Matthews*



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*v. Starritt* (1967) 252 Cal.App.2d 884, 887 [citations omitted]; see also *Vons Companies, Inc. v. United States Fire Ins. Co.* (2000) 78 Cal.App.4th 52, 62 [same].) Put another way, "subject to" "means conditioned upon, limited by, or subordinate to." (*Swan Magnetics, Inc. v. Superior Ct.* (1997) 56 Cal.App.4th 1504, 1510; see also *Rubin v. W. Mut. Ins. Co.* (1999) 71 Cal.App.4th 1539, 1547 [same].)

Reading Section 6(g) and 8(b) together, then, Berggruen assumed only those contractual obligations that it had "affirmatively elected to assume." (See *Bravo v. RADC Enters., Inc.* (2019) 33 Cal.App.5th 920, 923 ["we read documents to effectuate and harmonize all contract provisions"].) The intent of the parties, as set forth in the plain language of their agreement, was that C&C would terminate all contracts relating to the property *other than* those Berggruen affirmatively elected to assume. (*Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264 ["The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties."].) In other words, Berggruen's assumption obligations in Section 8(b) were conditional—it agreed to assume only the obligations C&C had not terminated, understanding that C&C would terminate all contracts that Berggruen had not "affirmatively elected to assume."

Plaintiffs respond that Section 6(g) "merely contains a warranty by [C&C]." (RB 37.) But Plaintiffs are missing the point. Berggruen is not relying on Section 6(g) as a separate, standalone provision—it's not bringing a claim against C&C for a breach of Section 6(b) by not terminating the MOU. Rather,



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Berggruen's position is merely that the assumption obligation in Section 8(b) is "subject to" Section 6(g), so the two must be read together. Regardless of whether C&C complied with its obligation to terminate the MOU, Berggruen would not have assumed it absent an affirmative election.

In short, because Plaintiffs have never produced a shred of evidence that Berggruen "affirmatively elected to assume" the MOU, Plaintiffs' Section 8(b) argument goes nowhere.

**b. Berggruen did not assume the MOU by accepting its benefits.**

Plaintiffs next invoke Civil Code section 1589, arguing that Berggruen is bound by the MOU because it "accepted the benefits" of it. (RB 38.) But section 1589 does not sweep so broadly.

A party that accepts the benefits of a contract is not required to assume the contract's obligations unless "the facts are known, or ought to be known, to the person accepting." (*Unterberger v. Red Bull N. Am., Inc.* (2008) 162 Cal.App.4th 414, 421.) Plaintiffs have failed to establish, by admissible evidence, that Berggruen knew or ought to have known of C&C's obligations under the MOU.

As an initial matter, Plaintiffs seek to flip the burden to Berggruen to prove that it "did not have notice" (RB 42), even though Plaintiff bears the burden under step two of the anti-SLAPP analysis. (*Roberts, supra,* 105 Cal.App.4th at pp. 613–614.)

In any event, Berggruen submitted the declaration of Dawn Nakagawa, who made clear that Berggruen was *not* aware of the



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MOU. (2 CT 548–549, ¶ 4.)[2] Ms. Nakagawa is Berggruen's Executive Vice President; she is "responsible for implementing the strategic and operational direction of the Berggruen institute and in that capacity [is] generally familiar with" the subject property, and before making her declaration, she "reviewed files of the Berggruen Institute related to the purchase of the property at issue and [had] spoken to numerous of my colleagues related to that purchase." (2 CT 548.)

In response, Plaintiffs rely on the declaration of MOSMA's president (RB 40), Mr. Drimmer, who claims he told Mr. Berggruen that Plaintiffs have an MOU with C&C, and that it "limited his development of the Adjacent Property to only the twenty-nine homes which are reflected in the Reduced Density Plan." (3 CT 665.) These vague statements hardly constitute the key terms of the MOU, which contains numerous conditions, restrictions, and exceptions, as well as a tentative tract map. The court cannot reasonably imply from this vague statement Berggruen's acceptance of C&C's alleged obligations under the MOU—including, according to Plaintiffs, an obligation to develop the subject property in accordance with the detailed specifications set forth in the tentative tract map. (See *Unterberger, supra*, 162 Cal.App.4th at p. 421 [holding that brief and vague statements alluding to a contract, including asking defendant "to

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[2] Plaintiffs claim this statement is "sparse and unfounded" (RB 42), but Berggruen offered to make Ms. Nakagawa available to be deposed, and Plaintiffs never availed themselves of the opportunity. (3 CT 602–603.)



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reconfirm our terms," did not constitute "sufficient evidence" of an agreement to be bound by the alleged contract].)

And regardless, Mr. Drimmer's statements are inadmissible hearsay. While an out-of-court statement offered to show a "warning, admonition, or notice" may be admissible as non-hearsay "if the statement is significant irrespective of [its] truth or falsity [quotations omitted]" (*Evans v. Hood Corp.* (2016) 5 Cal.App.5th 1022, 1043–1044), here, the statement would have no significance if not true. Plaintiffs are alleging that Mr. Berggruen impliedly agreed to be bound by the MOU and accept C&C's purported obligations under it, simply by failing to object when informed that Plaintiffs had an "agreement" with C&C that "limited development of the Adjacent Property to only the twenty-nine homes which are reflected in the Reduced Density Plan." (3 CT 665.) This argument is irrelevant if Mr. Drimmer's statements are inaccurate or incomplete. In fact, Plaintiffs admit that they are offering Mr. Drimmer's statement for its truth. (See RB 42.)

Plaintiffs' cited cases do not support a different conclusion. In *Citizens Suburban Co. v. Rosemont Dev. Co.* (1966) 244 Cal.App.2d 666, 677 the court held that "[w]hen a corporation knowingly accepts the benefits of a contract entered into by its promoters before it comes into existence, it is liable as a party to the contract." In so holding, the court relied on the fact that the same person acted as a principal for both entities. (*Ibid.*) His "continued presence" established the corporation had knowledge of its predecessor's contract. (*Ibid.*) There is no such "continued



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presence" of the same individual or entity here. C&C was the seller, not a promoter. Nor is there any evidence of an overlap in the ownership or management of C&C and Berggruen.

Likewise, in *Edmonds v. County of Los Angeles* (1953) 40 Cal.2d 642, 645, plaintiffs operated a trailer court that violated local zoning laws. Plaintiffs were present, with counsel, when the local zoning board voted to approve an exception allowing additional trailers on the property, subject to a requirement that the nonconforming use be abandoned within three years. (*Id.* at pp. 645–646.) Thereafter, plaintiffs applied for and received permits that would not have been granted but for the exception. (*Id.* at p. 648.) Plaintiffs later filed suit, seeking a declaration that they had a right to continue their nonconforming use, even after the three years expired. (*Id.* at pp. 643–644.) In rejecting plaintiffs' argument that they never accepted the conditional exception because they did not execute a written agreement to that effect, the court held that their verbal acceptance of the exception sufficed, and that they were estopped to deny the existence of the oral promise because the city relied to its detriment on the promise. (*Id.* at p. 653.)

Those facts are not remotely similar to ours. There was no public meeting at which the MOU was voted on and approved. Berggruen was not present at the negotiations between MOSMA and C&C. Berggruen did not orally agree to be bound by the MOU, at a meeting at which its counsel was present and at which the terms of the MOU were debated. And unlike plaintiffs in *Edmonds*, C&C and Berggruen are not the same person and do not



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have overlapping management. Nor does promissory estoppel have any relevance here.

Accordingly, Plaintiffs have failed to meet their burden to establish that Berggruen agreed to assume the MOU when it entered into the Purchase Agreement or that Berggruen impliedly assumed C&C's obligations by accepting the benefits of the MOU.

**2. Plaintiffs concede that the MOU does not run with the land.**

Plaintiffs admit the MOU doesn't run with the land. (RB 36, fn. 9.) They concede that it was never recorded, and they do not even attempt to argue that it "touches and concerns the land." (*Ibid.*) As such, it fails to satisfy any of the essential elements of a covenant running with the land. (AOB 42–43.) Plaintiffs make no attempt to argue otherwise.

**3. The MOU is not an equitable servitude.**

Plaintiffs contend the MOU should be binding as an equitable servitude because Mr. Drimmer purportedly put Berggruen on notice of the MOU's existence. (RB 49–50.) Plaintiffs misstate the requirements of an equitable servitude, and Mr. Drimmer's alleged statements do not constitute either actual or constructive notice of the MOU's terms. (See AOB 43–44.)

For a covenant to be enforceable as an equitable servitude, the "transferee of the covenantor" must acquire the property "with knowledge of its terms" (*Marra v. Aetna Constr. Co.* (1940) 15 Cal.2d 375, 378) and "under circumstances which would make avoidance of the restriction inequitable." (*Ross v. Harootunian*



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(1967) 257 Cal.App.2d 292, 294.) Such knowledge can be "actual," like where the covenant is contained in the deed or purchase agreement, or "constructive," like a reference to the covenant in a recorded instrument, such as a declaration. (See e.g., *Nahrstedt v. Lakeside* (1994) 8 Cal.4th 361, 375, 378–379 [recorded declaration]; *Cebular v. Cooper Arms Homeowners Assn.* (2006) 142 Cal.App.4th 106, 124 [publicly recorded bylaws]; Civ. Code, § 1213 [every recorded "conveyance" of real property provides "constructive notice"].)[3]

The recording requirement is essential because, to be enforceable, the covenant must be "definite and clear, and should not be left to mere conjecture." (*Citizens for Covenant Compliance v. Anderson* (1995) 12 Cal.4th 345, 358, cleaned up.) In *Citizens*, the Supreme Court held that "requiring recordation" of a declaration containing the restrictions "before execution of the contract of sale . . . would [] be fair" because "[a]ll buyers could easily know exactly what they were purchasing." (*Id.* at pp. 364–365; accord *Gates Rubber Co. v. Ulman* (1989) 214 Cal.App.3d 356, 365 ["[A] subsequent bona fide purchaser or encumbrancer is not bound by off-record agreements not referenced in the recorded documents[.]"] quotations omitted.)

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[3] Plaintiffs cite *Mullin v. Bank of America* (1988) 245 Cal.Rptr. 66 and *MacDonald Properties, Inc. v. Bel-Air Country Club* (1977) 72 Cal.App.3d 693, for the proposition that constructive and inquiry suffice to create an equitable servitude. But *Mullin* was depublished and is not citable, and the restrictions in *MacDonald* were set forth in a recorded deed. (*MacDonald, supra*, 72 Cal.App.3d at p. 700.)



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None of these circumstances is present here. The MOU was never recorded,[4] nor was any instrument referring to the MOU (such as a declaration). The Tentative Tract Map does not mention the MOU or the existence of any restriction on the development of the Adjacent Land to a 29-home plan. (1 CT 133–139.) Nor was the MOU mentioned or referenced in the City Council approval of the Tentative Tract Map, or in the termination of the original tentative tract map. (1 CT 128–132, 141.) The Title Report for the Adjacent Land also does not list the MOU or any of the purported conditions found therein. (2 CT 556–583.)

Mr. Drimmer's vague statements do not establish the requisite knowledge. Even if they were admissible, these statements would not demonstrate that Berggruen had "knowledge of [the MOU's] terms." Mr. Drimmer doesn't claim he showed the MOU to Mr. Berggruen, that he explained its terms, or that he sent a copy for Berggruen's review. (3 CT 665–666.) As a matter of law, Mr. Drimmer's vague statements could not have put Berggruen on notice of the MOU's detailed terms.[5]

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[4] There was never any intent to record the MOU. Paragraph 13 provides that the MOU "may be signed . . . by facsimile." (1 CT 64, ¶ 13.) This language is inconsistent with an intent that the MOU be recorded. Only documents containing "an original signature or signatures" may be publicly recorded. (Gov't Code, § 27201, subd. (b)(1).)

[5] Even assuming oral statements alluding to the existence of a covenant could suffice to provide notice, that could be the case only where further inquiry would lead to the covenant. "A person generally has 'notice' of a particular fact if that person has knowledge of circumstances which, upon reasonable inquiry, would lead to that particular fact." (*First Fidelity Thrift &*



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Finally, it would be inequitable to bind Berggruen to the MOU when Mr. Drimmer had every opportunity to provide a copy of MOU to Berggruen, but failed to do so. In fact, it's unclear whether Plaintiffs even had a complete copy of the MOU at that time. In the proceedings below, Plaintiffs repeatedly filed incomplete or incorrect copies of it. The MOU refers to the Reduced Density Plan "as depicted in Exhibit A." (1 CT 62, ¶ 1.) But Exhibit A was not attached to the complaint, the FAC, or other filed documents. Instead, Plaintiffs attached to the Complaint and the FAC a tentative tract map signed in 2003 (1 CT 38, 67), and they attached to a declaration a map signed in 2004 (4 CT 900–01 [Reith Decl., Ex. A]). Plainly, neither the 2003 map nor the 2004 map could have been attached to the MOU when it was executed in 1999.[6] Berggruen could not have been on notice of the MOU when, even in the proceedings below, Plaintiffs and their counsel apparently did not have a complete copy of it.

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*Loan Assn. v. Alliance Bank* (1998) 60 Cal.App.4th 1433, 1443.) Here, because the MOU was never recorded or referenced in a publicly recorded instrument, no amount of inquiry could have uncovered it.

[6] Plaintiffs repeatedly represented to the trial court that these maps, dated years after the MOU was signed, had originally been attached to the MOU, see 1 CT 19, ¶¶ 23–24, 44, ¶¶ 23–24; 3 CT 738; 4 CT 900–01 [Reith Decl., Ex. A]. Plaintiffs did not file what they now claim is the correct Exhibit A until after Berggruen had filed its reply below. (4 CT 897–901.) Their failure to attach the correct Exhibit A to the initial complaint and the FAC should bar any recovery. In effect, Plaintiffs were asking the court to compel Berggruen to develop the property in accordance with the *wrong* plan.



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#### 4. The MOU does not restrict development on the Adjacent Land.

To establish a probability of success on their claims, Plaintiffs must establish that the MOU limits the development of the Adjacent Land to the Reduced Density Plan. (AOB 44–45.) They failed to do so. Plaintiffs make no meaningful attempt to rebut Berggruen's showing that the MOU imposed only three obligations on C&C, all of which C&C fulfilled: (1) withdraw an existing vesting tract map, (2) file a new vesting tract map, and (3) dismiss the lawsuit. (2 CT 404, ¶¶ 1–2.)

Instead, Plaintiffs ask the Court to disregard the plain language of the MOU in favor of recitals preceding the agreement. (RB 43.) But unless "the operative words of a grant are doubtful," "[r]ecitals are given limited effect even as between the parties." (*Sabetian v. Exxon Mobil Corp.* (2020) 57 Cal.App.5th 1054, 1069.)[7] Plaintiffs do not identify any ambiguous or "doubtful" language. And regardless, the recitals do not support Plaintiffs' interpretation. They state only that the MOU "relat[es] to the future development of the property." (1 CT 62.) This language cannot reasonably be read to create a permanent restriction on the development of the Adjacent Land.

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[7] (See also *Emeryville v. Harcros Pigments* (2002) 101 Cal.App.4th 1083, 1101 ["The law has long distinguished between a 'covenant' which creates legal rights and obligations, and a 'mere recital' which a party inserts for his or her own reasons into a contractual instrument. Recitals are given limited effect even as between the parties"]; *O'Sullivan v. Griffith* (1908) 153 Cal. 502, 506 ["A covenant or warranty is never implied from a mere recital."].)

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Plaintiffs' reliance on extrinsic evidence of intent (RB 45) is similarly unavailing. The MOU is not ambiguous, and even if it were, any ambiguity would have to be "resolved in favor of the free use of the land." (*Wing v. Forest Lawn Cemetery Ass'n* (1940) 15 Cal.2d 472, 479.) Moreover, the MOU is, by its terms, "the entire agreement of the Parties concerning its subject matter." (1 CT 64, ¶ 12.) "Under the parol evidence rule, when a contract is integrated [], extrinsic evidence cannot be used to vary or contradict the instrument's express terms." (*Hot Rods, LLC v. Northrop Grumman Sys. Corp.* (2015) 242 Cal.App.4th 1166, 1175; see also *Iqbal v. Ziadeh* (2017) 10 Cal.App.5th 1, 8 ["The parties' undisclosed intent or understanding is irrelevant to contract interpretation"].)

And in any event, Plaintiffs have offered no contemporaneous, written evidence of the *parties'* intentions—as opposed to *Plaintiffs'* after-the-fact, subjective, undisclosed intentions, which are irrelevant and inadmissible. (See, e.g., *Iqbal v. Ziadeh* (2017) 10 Cal.App.5th 1, 8 ["The parties' undisclosed intent or understanding is irrelevant to contract interpretation"]; *Cedars-Sinai v. Shewry* (2006) 137 Cal.App.4th 964, 980 ["[i]t is the objective intent, as evidenced by the words of the contract, rather than the subjective intent of one of the parties, that controls interpretation"], quotations omitted.)[8]

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[8] Plaintiffs purport to rely on a "written summary" of the MOU that Plaintiffs supposedly prepared and distributed to their members in 1999. (RB 45.) But Plaintiffs do not contend that C&C ever saw or approved that summary. It's inadmissible



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Plaintiffs also mischaracterize Paragraphs 6 and 7 of the MOU in an attempt to manufacture an obligation that appears nowhere on the face of the agreement. (RB 43–45.) Paragraph 6 does not impose a permanent restriction on the Property; rather, it allows MOSMA to oppose other plans for the Property. Notably, the MOU expressly contemplates there could be "other development plan[s] . . . for the Property." (1 CT 64, ¶ 6.) Paragraph 6 provides that if *MOSMA* violates the MOU, C&C can seek other remedies, specific performance, or elect to pursue another project. (*Ibid.*) If, however, *C&C* breaches the MOU or elects to pursue another project, MOSMA may oppose that project. (*Ibid.*) Yet while Plaintiffs are free to oppose the Berggruen Project, they may not petition the City to stop processing approvals or force C&C (or Berggruen) to build the Reduced Density Plan. (*Id.* at 62–64 ¶¶ 3(a), (d), 4, 6.)

Nor does Paragraph 6 state that C&C can recommence processing other plans *only* if MOSMA breaches. Instead, it states that in the event of a breach by MOSMA, C&C can seek specific performance, the reprocessing of any development plan, or any other available remedies. (1 CT 64, ¶ 6.) The language is not surplusage; it protected C&C from MOSMA's future opposition of the Reduced Density Plan by clarifying that C&C could file other plans.

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hearsay that reflects nothing more than Plaintiffs' "subjective intent."



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Lastly, Paragraph 7 expressly provides that C&C may terminate the MOU if, among other things, it "determines in good faith costs or conditions . . . make the Reduced Density Plan economically or otherwise infeasible." (1 CT 64, ¶ 7.) The fact that C&C could unilaterally have terminated the MOU is further proof that the MOU does not create a *permanent* restriction.

**5. MOSMA breached the MOU and was not excused from performance.**

To establish a probability of success on their claims, Plaintiffs also must demonstrate that MOSMA performed its obligations under the MOU, or was excused from nonperformance. (AOB 45–47.)

Among other things, the MOU required MOSMA to "endorse and agree with the development of the Property in accordance with the Reduced Density Plan," and to refrain from "support[ing], financ[ing], or participat[ing] in any" challenge to the City's decisions regarding certain matters, including emergency access. (2 CT 404–405, ¶ 3(a), (d).) But as Berggruen demonstrated, MOSMA breached its obligation by (1) sending a letter to the City on August 12, 2019, stating that no project would have access to Stoney Hill Road unless a separate access agreement were reached between MOSMA and Berggruen; (2) filing a mandamus proceeding challenging the City's approval of the Final Map; and (3) sending a letter to the City on December 5, 2019, challenging the City's approval of the Final Map and the issuance of grading permits for the Reduced Density Plan. (AOB 45–46.) Plaintiffs fail to rebut Berggruen's showing of breach, and fail to

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establish that MOSMA was excused from performance. (RB 45–47.)

Plaintiffs first contend their August 12, 2019 letter did not breach the MOU because (1) it did not address road access, (2) it stated only that two other associations—but not MOSMA—would refuse access via Stoney Hill Road, and (3) it stated that MOSMA would provide access if Berggruen proceeded with the Reduced Density Plan. (RB 45–46.) This is wrong on all counts. The MOU specifically addresses road access, stating that "questions, conditions and approvals" concerning "emergency access" "shall all be decided by the City." (2 CT 404–405, ¶ 3(b).) The only proposed use of Stoney Hill Road for the Berggruen Project is for emergency access. (2 CT 554–555.)

Additionally, the reference to a purportedly required annexation agreement with Crest/Promontory is a red herring. (RB 54–55.) Access via Stoney Hill Road was expressly reserved in a recorded covenant to all adjacent property owners (see Section B.7, *supra*), making any annexation unrelated to ingress and egress via Stoney Hill Road to the Reduced Density Plan or any other development. Plaintiffs also misrepresent MOSMA's involvement in the letter. The letter was written by *Plaintiffs'* counsel, who copied MOSMA's president. (2 CT 302–303; 3 CT 666, ¶ 13 [declaration of Mr. Drimmer, stating that the letter's author, Allen Abshez, is "MOSMA's attorney"], 668, ¶ 17 [stating that Mr. Drimmer is "also on the board of Crest/Promontory"].) And the letter expressly relies on the MOU, claiming that until *MOSMA* agrees to certain annexations, Crest/Promontory "and



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its associated Mountaingate Community Associations" will not agree to provide access to Stoney Hill Road. (2 CT 302.)

Next, Plaintiffs argue that neither the writ petition nor the December 5, 2019 letter breached the MOU because MOSMA was not challenging the Final Map, but seeking compliance with it. (RB 46–47.) This is sophistry. Both the letter and the petition expressly challenged approval of the Final Map. They challenged the City's issuance of grading permits, issued for grading specifically contemplated by the Reduced Density Plan, based on the 29-home plan's proximity to the landfill, and the existence of the landfill's methane collection system. (2 CT 334; 3 CT 798, ¶¶ 27, 28, 33, 34.)[9] This violated the MOU. Specifically, Section 3(b) provides that decisions related to "the proximity of the development to Canyon 8 landfill[,] and to methane" were left to the City, and MOSMA agreed not to "support, finance or participate in any effort" to challenge the City's final decisions on such matters. (1 CT 62–63, ¶ 3, subd. (b)(i)-(iv), (d).) Paragraph 4 reinforces this obligation by stating that MOSMA may not challenge or object to the City's decisions on these matters. (*Id.*, ¶ 4.) Recognizing that its petition violated the MOU, MOSMA quickly dismissed it shortly after Berggruen raised the issue. (3 CT 840.)

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[9] The grading contemplated for the Project is substantially different than for the Reduced Density Plan, and would require the issuance of new permits. (2 CT 555 ["Our project will significantly reduce grading compared to the [Reduced Density Plan], and achieve a far superior environmental result."].)



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Plaintiffs' "excuse[]" argument also fails. (RB 47.) Plaintiffs didn't plead in the FAC that they were excused from performing. To the contrary, they pleaded that "MOSMA has fully performed all, or substantially all, of its obligations under the MOU." (1 CT 53, ¶ 66.) Plaintiffs are bound by this allegation. (See *Simmons v. Allstate* (2001) 92 Cal.App.4th 1068, 1073 ["the anti-SLAPP statute makes no provision for amending the complaint" once an anti-SLAPP motion is filed].) And regardless, Plaintiffs' "excuse argument" fails on the merits. As discussed above, Berggruen could not have repudiated or anticipatorily breached the MOU because it was never bound it, and because C&C had fully performed. (See Section B.1, *supra.*)[10]

**6. MOSMA suffered no damages, and Berggruen received no benefit from MOSMA**

As Berggruen also demonstrated, Plaintiffs' contract and intentional-interference claims fail because MOSMA suffered no damages, and the claim for unjust enrichment fails because

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[10] Plaintiffs also misstate the applicable law. *Ferguson v. City of Cathedral* City (2011) 197 Cal.App.4th 1161, does not hold when a contract is repudiated, the non-repudiating party is excused from performance and can sue to enforce the contract. Quite the opposite. It holds that the non-repudiating party "faces an election of remedies: he can treat the repudiation as an anticipatory breach and immediately seek damages for breach of contract, thereby terminating the contractual relation between the parties, or he can treat the repudiation as an empty threat, wait until the time for performance arrives and exercise his remedies for actual breach if a breach does in fact occur at such time [citations omitted]." (*Id.* at p. 1168.) Here, Plaintiffs elected to file suit, but improperly seek to declaratory and injunctive relief enforcing the MOU.



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MOSMA cannot show that Berggruen was unjustly enriched at MOSMA's expense. (AOB 47–48.) In response, Plaintiffs argue they do not have to show they were damaged, but even if they did, they were damaged by a supposed "negative effect" on property values, the "significant time and costs of dealing with Appellants efforts to pursue the Project," and will be damaged in the future due to "aesthetic, safety, traffic and environmental harms." (RB 48.) Alternatively, they argue they can recover nominal damages and/or seek specific performance. (*Ibid.*) Plaintiffs also argue that Berggruen benefited because MOSMA did not oppose the Reduced Density Plan. (*Id.* at p. 51.) None of these arguments has merit.

*First*, damages are an essential element of Plaintiffs' causes of action for breach of the MOU, breach of the implied covenant of good faith and fair dealing, and intentional interference with contract. (AOB 47.) As such, Plaintiffs were required to "satisfy the second prong of the [anti-SLAPP] test and establish '*evidentiary* support for [their] claim[s].'" (*Navellier, supra,* 106 Cal.App.4th at p. 775, italics in original.) They failed to do so.

*Second*, Plaintiffs' alleged damages are entirely speculative. They have shown no "negative effect" on property values. Mr. Drimmer merely speculates that the Project, if built, "would likely result in lower home values," would "degrade our environment and way of life," and would "disrupt life" by causing "increased traffic and light pollution." (3 CT 667–668, ¶ 15.) This sort of guesswork does not remotely satisfy Plaintiffs' "burden of proving nonspeculative damages with reasonable certainty."



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(*Copenbarger v. Morris Cerullo World Evangelism, Inc.* (2018) 29 Cal.App.5th 1, 11; see also *Piscitelli v. Friedenberg* (2001) 87 Cal.App.4th 953, 989 ["damages which are speculative, remote, imaginary, contingent, or merely possible cannot serve as a legal basis for recovery [quotations omitted]"; Civ. Code, § 3301 ["No damages can be recovered for a breach of contract which are not clearly ascertainable in both their nature and origin."].)

*Third*, Plaintiffs identify no basis for the recovery of attorney's fees. "Attorney fees are not recoverable as costs unless a statute or contract expressly authorizes them." (*Sessions Payroll Mgmt., Inc. v. Noble Const. Co.* (2000) 84 Cal.App.4th 671, 677.) The MOU does not provide for the recovery of attorney's fees, and Plaintiffs cite no other avenue for recovering them.

*Fourth*, Plaintiffs did not plead nominal damages. (1 CT 59.) Nor is there any basis for awarding nominal damages, given Plaintiffs' failure to establish any actual harm. (See *Staples v. Hoefke* (1987) 189 Cal.App.3d 1397, 1406 ["[N]ominal damages need not be awarded where no actual loss has occurred."].)

*Finally*, Berggruen has received no benefit from MOSMA. Although MOSMA did not oppose the tentative tract map in 2004 (1 CT 57), Berggruen did not purchase the land until 2014. (2 CT 548.) Any alleged increase in the value of the land due to the approval of the tract map in 2004 would have been reflected in the price that Berggruen paid in 2014. Plaintiffs' speculation that the purchase price may not have reflected the "market value" of the property (RB 39, fn. 10) is unsupported and irrelevant.



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### 7. Plaintiffs' claim for declaratory relief regarding Stoney Hill Road fails.

Plaintiffs have also failed to show a likelihood of prevailing on their claim for declaratory relief regarding Stoney Hill Road. (AOB 48–51.)

Plaintiffs seek a declaration that Berggruen is not entitled to use Stoney Hill Road for ingress and egress for the Berggruen Project, as depicted in the EAF, which contemplates only emergency access via Stoney Hill Road. (1 CT 58, ¶¶ 91–95; 2 CT 554–555.) But the EAF is merely a request that the City initiate an environmental review, not a request that the City grant access to any specific road. (1 CT 162–298.) The City may never approve the Berggruen Project, let alone permit emergency access via Stoney Hill Road. As such, there is no live controversy because Plaintiffs' claim is based on a "purely hypothetical concern[]." (*Steinberg v. Chiang* (2014) 223 Cal.App.4th 338, 343; see also *Selby Realty Co. v. City of San Buenaventura* (1973) 10 Cal.3d 110, 118 [plaintiff failed to state a cause of action for declaratory relief based on the adoption of a development plan because "[w]hether eventually any part of plaintiff's land will be taken for a street depends upon unpredictable future events"].)

Regardless, the declaratory relief claim fails on the merits.

***The 2010 City Engineer's Report***. As Berggruen showed (AOB 48–49), the 2010 City Engineer's Report expressly acknowledged that although the Adjacent Land was vacant, it had been "proposed for development under Tract No. 53072." (2 CT 383.) Based in part on that Report, the City's Advisory Agency imposed



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multiple conditions that had to be satisfied before the street could be vacated, including that "private ingress and egress easements over the private street area will be granted to the owners of all properties currently using the public street portion of Stoney Hill Road being vacated . . . for access." (2 CT 389.)

Plaintiffs have no meaningful response. They argue only that the Adjacent Land was mentioned in the Engineer's Report because it abutted the *future street*. (RB 54.) But the report mentions the future street only because it was to be vacated along with Stoney Hill Road (2 CT 375), and when discussing the zoning and land use of the affected properties, the report lists the areas that have been developed with homes, as well as the undeveloped Adjacent Property, without any discussion as to what street it abuts (2 CT 383).

***The 2009 Covenant***. Plaintiffs also misread the 2009 covenant. (RB 53.) As Berggruen explained (AOB 48–49), the 2009 covenant expressly provides for ingress and egress rights to owners of the properties currently using the street. (2 CT 398–400.) Plaintiffs respond that "[t]he covenant pertained only to the homeowners who depended upon access to the nearest public street via Stoney Hill Road." (RB 53.) But it does not refer to homeowners—it refers to "*owners of all properties*." (2 CT 398–400.) Nor does it state that only homeowners who depend on access to the nearest public street are granted the easement—it says that any owner who uses the "street portion of Stoney Hill



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Road" is granted the easement. (2 CT 399, italics added.)[11]

This language plainly covers C&C because C&C owned the Adjacent Land at the time. That the Adjacent Land is not listed in the June 30, 2009 Advisory Agency decision as one of the *lots* in the private street map is irrelevant. The Adjacent Land was not a lot; nor did it contain any lots at this point in time. It was an adjacent, undivided parcel of land, meaning it would not be included in a list of lots with legal frontage.[12] Moreover, the Adjacent Property was specifically referenced in the City Engineer's

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[11] This interpretation is consistent with the Los Angeles Municipal Code regulations on private streets, which require that owners of adjacent property be provided access rights via private roads. (See L.A. Mun. C. § 18.01 ["'Private road easement' shall mean a parcel of land not dedicated as a public street, over which a private easement for road purposes is proposed to be or has been granted to the owners of property contiguous *or adjacent thereto* which intersects or connects with a public street, or a private street, in each instance the instrument creating such easement shall be or shall have been duly recorded or filed in the Office of the County Recorder of Los Angeles County," italics added]; § 18.05, subd. (G) ["'Effect on Adjoining Property' – Private street layout shall be designed to provide access to and not impose undue hardship upon *property adjoining* the proposed division of lands"], italics added.)

[12] (See L.A. Mun. C. § 18.01 [private street regulation, defining a lot as conforming to the definition in Section 12.03]; L.A. Mun. C. § 12.03 [A lot is defined as a "parcel of land occupied or to be occupied by a use, building or unit group of buildings and accessory buildings and uses, together with the yards, open spaces, lot width and lot area as are required by this chapter and fronting for a distance of at least 20 feet upon a street as defined here, or upon a private street."].)



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Report and is shown as an adjacent property to the street vacation in the private street map approved by the Advisory Agency. (2 CT 377, 383, 396.) In fact, apart from the 2009 covenant, the City expressly reserved from the public street vacation utility and emergency access easements (2 CT 383.) These are the only rights that Berggruen proposes to use if the Berggruen Project is built. (2 CT 554–555 ["Primary access [to the Berggruen Project] will be off Sepulveda Blvd. on an improved Serpentine Road. Stoney Hill Rd. will only be permitted for use by emergency vehicles" to "minimize impact on Mountaingate."].) And Plaintiffs concede that C&C and Berggruen have used the road, with "permission from the owners or their representatives." (3 CT 892.)[13]

***Abutter's Rights***. Finally, the Adjacent Land has access rights via Stoney Hill Road as an abutting property. (AOB 50–51.) Plaintiffs' responsive arguments are easily dispatched.

*First*, Plaintiffs are wrong that a street vacation extinguishes an abutter's easement permitting ingress and egress via the vacated street. (Sts. & High. Code, § 8353, subd. (a) ["[T]he vacation of a street or highway extinguishes all private ease-

[13] Additionally, Plaintiffs cannot challenge the City's determination that the Adjacent Land has an easement right over Stoney Hill Road under the 2009 covenant, as stated in the Final Map, because Plaintiffs never challenged the City's determination, and never objected to the Final Map, at the time. (3 CT 834, 890; see also Gov. Code, §§ 66499.37 [challenges to the approval of a final map must be commenced within 90 days after the date of the decision].)



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ments therein claimed by reason of the purchase of a lot by reference to a map or plat upon which the street or highway is shown, *other than a private easement of ingress and egress to the lot from or to the street or highway*"], italics added.)

*Second*, Plaintiffs distort the nature of the "future street," which they claim separated the Adjacent Land from Stoney Hill Road. (RB 52.) The "1-foot wide future street" is not an actual street, but a dedication from a previously filed tract map for the existing subdivision, in the form of a small strip of land, to a future street to be so designated at some future time, which in this case would be an extension of Stoney Hill Road. (See L.A. Mun. C. § 17.02 [defining a "future street" as a dedication that the City has rejected as a public street at the time of dedication]; § 17.05, subd. (D)(3); § 12.23, subd. (A)(5)(b)(iii), (6); Gov't Code, § 66475.) These are often referred to as "paper" streets, i.e. streets that only exist on paper. (*Clay v. City of Los Angeles* (1971) 21 Cal.App.3d 577, fn. 1 [describing a dedicated street, that has not yet been opened or developed, as a "paper street"].) The dedication is not a buffer that impedes Berggruen's abutter's right to Stoney Hill Road.

*Third*, Plaintiffs mischaracterize the holding in *People v. Russell* (1957) 48 Cal.2d 189, 195, arguing that abutter's rights include only customary uses, "which here would be for access to undeveloped land and *residential* uses." (RB 52, italics in original.) The court in *Russell* was referring to the "modes of conveyance and travel" on the road, not the nature or use of the property. (*Russell, supra*, 48 Cal.2d at p. 195, citing *Rose v. State*



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(1942) 19 Cal.2d 713, 728.) In other words, the street cannot be used like a highway or by a constant flow of heavy construction trucks, but can be accessed by a reasonable amount of vehicle traffic. And in the case of the Berggruen Project, the only proposed use would be for emergency access. (2 CT 554–555.)

*Fourth*, Plaintiffs' abandonment argument is conclusory and unsupported. Abandonment of the rights to an easement requires "unequivocal and decisive acts . . . clearly showing an intent to abandon," accompanied by nonuse of the easement. (*Gerhard v. Stephens* (1968) 68 Cal.2d 864, 889–91 [abandonment hinges on intent to forego all future use; evidence of abandonment must be clear, decisive and conclusive]; see also *Faus v. City of Los Angeles* (1967) 67 Cal.2d 350, 363 [finding that city had not abandoned easement where it removed tracks and indicated it would pave them when reasonably practicable]; *Cash v. S. Pac. R. Co.* (1981) 123 Cal.App.3d 974, 978 [finding that railroad had not abandoned a "right of way" simply because it had not made use of it].) Simply put, the evidence must demonstrate not only a present intention not to utilize the easement, but an intention to absolutely relinquish the right to ever use it in the future.

Plaintiffs offer no evidence of "unequivocal and decisive acts" of abandonment. The public history of the tract makes clear that not only did C&C and Berggruen *not* abandon their right of ingress and egress via Stoney Hill Road—they expressly asserted their right of access for future developments. The 1999 Reduced Density Plan tract map, 2000 Vesting Tentative Tract Map for



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the Reduced Density Plan, the 2004 Reduced Density Plan Tentative Tract Map, and the 2019 Final Map all stated that primary access would be via Stoney Hill Road. (1 CT 122, 128–132, 134–139, 144–160; 4 CT 900–901.) The vacation of Stoney Hill Road was done with the express consent from all owners of affected properties, including C&C, subject to the 2009 covenant with preserved ingress and egress rights to property owners, including C&C. (2 CT 382; 2 CT 399.)

*Finally*, Plaintiffs cite Mr. Drimmer's statement that "neither Berggruen nor [C&C] asserted to MOSMA or Crest/Promontory, or as far as I know to anyone else, that they had a right to use the road without permission." (3 CT 892.) This does not prove abandonment. Obviously, Mr. Drimmer can speak only to his personal knowledge; he cannot speculate as to every conversation that C&C and Berggruen had with "anyone else." (Evid. Code, §§ 400, 403, 702.) And even assuming the truth of Mr. Dimmer's statement, holders of an easement are not required to continuously communicate their right to others—the right exists until the easement holder decisively demonstrates their intent to abandon it. (*Gerhard, supra*, 68 Cal.2d at p. 893–94.) And as Plaintiffs and Mr. Drimmer know, C&C and Berggruen repeatedly asserted their right to use the road with their express approval. (1 CT 122, 128–132, 134–139, 144–160; see also 3 CT 889 ["At various times between 1999 and 2014, Castle & Cooke pursued the twenty-nine home plan. Per the terms of the MOU, MOSMA publicly supported and never objected to Castle & Cooke's efforts."]; 890 ["MOSMA did not oppose issuance of the



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[Final Map], which was approved by the Los Angeles City Council in June 2019 with no objections from MOSMA."].)

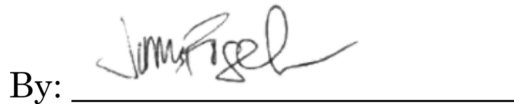
## III. CONCLUSION

For these reasons, the Court should reverse the trial court's order denying Berggruen's anti-SLAPP motion and remand with instructions to proceed to step two of the anti-SLAPP analysis in the first instance. To the Court proceeds on its own to step two, it should find that Plaintiffs failed to meet their burden to show probable success.

DATED: November 7, 2022

Respectfully submitted,

GIBSON, DUNN & CRUTCHER LLP



By: ____________________________

James P. Fogelman

*Attorneys for Defendants-Appellants Berggruen Institute and Monteverdi, LLC*

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## CERTIFICATION OF WORD COUNT

Pursuant to rule 8.204(c)(1) of the California Rules of Court, the undersigned hereby certifies that this opening brief contains 13,285 words, as counted by the Microsoft Word word-processing program, excluding the tables, this certificate, the verification, and the signature blocks.

DATED: November 7, 2022

/s/ *Kahn Scolnick*
Kahn Scolnick

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