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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

MOUNTAINGATE OPEN SPACE MAINTENANCE ASSOCIATION; CREST/PROMONTORY COMMON AREA ASSOCIATION,

Plaintiffs,

v.

MONTEVERDI, LLC, a California limited liability company; BERGGRUEN INSTITUTE, a California nonprofit organization; and CASTLE & COOKE CALIFORNIA, INC., a California corporation; and DOES 1-10,

Defendants.

CASE NO. 19STCV33839

DEFENDANTS BERGGRUEN INSTITUTE'S AND MONTEVERDI, LLC'S REPLY IN SUPPORT OF THEIR MOTION TO STRIKE PLAINTIFFS' FIRST AMENDED COMPLAINT

[Supplemental Declaration of Katarzyna Ryzewska; Declaration of Amy Forbes; Request for Judicial Notice; Evidentiary Objection; and Responses to Evidentiary Objections filed concurrently herewith]

Hearing

Date: October 13, 2020
Time: 10:00 A.M.
Location: Courtroom 7D
Judge: Hon. Rupert A. Byrdsong
Reservation: 427522902268

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I. INTRODUCTION

Plaintiffs' Opposition confirms that Defendants Monteverdi, LLC's and Berggruen Institute's (collectively "Berggruen") Anti-SLAPP Motion should be granted. The First Amended Complaint ("FAC") is expressly predicated on protected petitioning activity, and the MOU at issue is not binding on Berggruen, notwithstanding Plaintiffs' revisionist mischaracterization of events and facts. *First*, the ***only*** activity supporting the supposed breach of the MOU by Berggruen is Berggruen's filing of an Environmental Assessment Form ("EAF") with the City of Los Angeles ("City"), which is the first step in the California Environmental Quality Act ("CEQA") process for the proposed Berggruen project. This is a quintessential protected activity. The FAC does not allege ***any other*** misconduct by Berggruen. Belatedly realizing that the petitioning activity is protected, Plaintiffs now assert that the filing is only "incidental" to its claims. Nonetheless, the crux of Petitioners FAC is that Berggruen should not be allowed to process any approvals with the City that are inconsistent with the MOU.

Second, Plaintiffs have failed to establish likelihood of success. Berggruen is not bound by the MOU because they are not parties to the MOU, the MOU was never recorded, and there is no evidence that Berggruen had notice of the MOU prior to purchasing the Property. While Plaintiffs now claim that they told Berggruen about the MOU at a meeting in August 2014, the meeting is not alleged in the FAC, has never been mentioned in correspondence between MOSMA and Berggruen or the City, and would constitute inadmissible hearsay in any event. (See FAC; Saltsman Decl., Ex. A; Lonner Decl., Exs. G, H, I.) Plaintiffs do not allege that they or anyone else provided a copy of the MOU to Berggruen before the purchase of the Property. Indeed, Berggruen still does not have notice of the MOU because Plaintiffs have submitted two different versions of the MOU, neither of which appears to be complete. Plaintiffs' submission of inconsistent and incomplete versions of the MOU dooms their claims.

Plaintiffs also cannot establish that the MOU imposes a permanent restriction on the Property because they admittedly ***<u>never recorded it</u>***. This fact alone is inconsistent with an intent to impose a permanent restriction. (Civ. Code., § 1213 [recording provides constructive notice]; *First Bank v. E. W. Bank* (2011) 199 Cal.App.4th 1309, 1314 [constructive notice "imparted by the recording and proper indexing of an instrument in the public records"].) Indeed, because the MOU expressly allows for the parties to sign by facsimile, by its own terms it could never have been publicly recorded. (Gov't Code,

§ 27201, subd. (b)(1)).

Nor can Plaintiffs establish that Berggruen assumed the MOU's obligations. The MOU is not mentioned in the Purchase Agreement. Nor is there any evidence that Castle & Cooke ("C&C") disclosed it. Berggruen could not have assumed the obligations of an agreement that had never been recorded, that they never saw, and that they never agreed to assume. Relying on a partial excerpt from the Purchase Agreement, Plaintiffs argue that Berggruen "agreed to 'assume and comply with' all obligations relating to the Property." (Opp. at 7.) However, Berggruen's obligation under Paragraph 8(b) to "assume and comply with all obligations for or relating to the ownership and use of the Property" was ***expressly subject*** to Paragraph 6(g), which obligated C&C to terminate "any and all agreements and/or contracts relating to the Property, which Purchaser has not ***affirmatively elected to assume***." (Brody Decl., Ex. A ¶ 6(g), emphasis added.) Plaintiffs have offered no evidence (because there is none) that Berggruen affirmatively elected to assume the MOU's obligations.

Finally, Plaintiffs cannot succeed because they breached the MOU. Plaintiffs' chief obligation under the MOU was to "endorse and agree with the development of the Property in accordance with the Reduced Density Plan," but they breached this obligation by opposing the Reduced Density Plan development. (Ryzewska Decl., Ex. A ¶ 3.) Not only have Plaintiffs sent letters to the City opposing the Final Map for the Reduced Density Plan, but even after Berggruen filed the Motion, MOSMA blatantly breached the MOU by filing a petition in Writs and Receivers challenging the approval of the Final Map. The Court should grant the anti-SLAPP Motion.

II. ARGUMENT

A. Plaintiffs' Claims Are Based On Protected Petitioning Activity

The anti-SLAPP statute must be "construed broadly." (Code Civ. Proc., § 425.16, subd. (a).) By its terms, the statute applies to "*any* action against a person arising from *any* act of that person in furtherance of the person's right of petition or free speech. . . ." (*Ibid.*, italics added; see also *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 734 ["the plain language of the 'arising from' prong encompasses any action based on protected speech or petitioning activity as defined in the statute"].)

Plaintiffs do not (and cannot) dispute that the filing of an EAF constitutes protected petitioning activity as defined by the statute. Plainly, an EAF is (1) a "written . . . statement or writing made before

a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law," (2) a "written . . . statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law," and (3) a "written . . . statement or writing made in a place open to the public or a public forum in connection with an issue of public interest." (Code Civ. Proc., § 425.16, subd. (e)(1), (2), (3); see also *Dixon v. Superior Court* (1994) 30 Cal.App.4th 733, 742 [statements made in connection with CEQA proceedings fall under the anti-SLAPP statute]; *Ludwig v. Superior Court* (1995) 37 Cal.App.4th 8, 15 [statements made in connection with CEQA proceedings were "clearly a matter of public interest"].)

Plaintiffs belatedly assert that the filing of the EAF is "merely incidental" to their claims. (Opp. at 9-10.) But there is literally no basis for Plaintiffs' claims in the FAC other than the filing of the EAF. The FAC does not even allege that construction has *begun*. Nor does the FAC allege anything about a July 2019 meeting at which Berggruen supposedly repudiated the MOU. Rather, the FAC alleges, as the ***sole*** basis for Plaintiffs' claims, that Berggruen "***filed*** an Environmental Assessment Form ('EAF') and related documents *with the City of Los Angeles* ***requesting*** that it approve the development of an entirely different, non-residential development," which the FAC defines as the "Berggruen Project." (FAC ¶ 39, italics added.) All references to the "Berggruen Project" are references to the plans described in the EAF. (See FAC ¶¶ 62, 69, 74, 76, 77, 83, 84, 93, 94.) Indeed, the FAC expressly alleges that Berggruen has breached the MOU merely by "***seeking*** to develop" the Property "contrary to the terms of the MOU," and requests declaratory and injunctive relief that would, if granted, prevent Berggruen from further participating in the CEQA process. (FAC ¶ 67 & p. 20, italics added.)[1]

Plaintiffs' reliance on *Wang v. Wal-Mart Real Estate Bus. Tr.* (2007) 153 Cal.App.4th 790 is also misplaced. In *Wang*, the claims involved a breach of a contract for the sale of two parcels of land to the defendants, where the defendant failed to construct a street leading to their properties, and a "locked gate" prevented access to their properties, in violation of the agreement. The fact that the defendants had filed plans with the city truly was incidental to the claim that defendants had breached the agreement. Plaintiffs ***did not try to block*** the City's processing of the approvals, and the project was already built when the

[1] See also FAC ¶¶ 45 [alleging that "Monteverdi's ***applications***" breach the MOU], 46 [alleging that "the ***Proposed Berggruen Development***" would damage Plaintiffs], 47 [alleging that "Monteverdi's ***applications***" are false], italics added.

claim was filed. Here, the FAC alleges no wrongful acts other than the filing of the EAF with the City, so the petitioning activity constitutes the alleged breach.

Plaintiffs' own statements confirm that Plaintiffs are basing their claims on the filing of the EAF. On August 8, 2019, MOSMA sent a letter to counsel for Berggruen stating that "MOSMA is informed that on July 31, 2019, Monteverdi ***filed applications*** to develop the Property with a project other than the Reduced Density Plan, ***which action constitutes a breach of the Agreement***." (Saltsman Decl., Ex. A at 1, emphases added.) And on August 12, 2019, MOSMA sent a letter to ***the City*** stating that the City could not process the EAF as filed, because MOSMA had not "granted access over Stoney Hill Road" pursuant to their alleged rights under the MOU. (Lonner Decl., Ex. G, at 187 [The City "must cause the Initial Study Project Description to be revised before proceeding further to delete Monteverdi's assertions of access over the Stoney Hill Road private street . . . "].) Plaintiffs now seek identical relief from this Court. Petitioners are not just objecting to the Berggruen Project, they are asserting that the City has no right to process approvals for the project. Plaintiffs' claims are strictly based on protected petitioning activity.

B. Plaintiffs Have Failed To Establish A Probability Of Success On The Merits

1. Berggruen Is Not Bound By The MOU

Plaintiffs do not dispute that Berggruen is not a party to the MOU, that the MOU was never recorded, and have abandoned any claim that the MOU runs with the land. (Opp. at pp. 12-14.)[2] Instead, they now argue that Berggruen is "equitably" bound by the MOU because it expressly assumed its obligations, are successors in interest to C&C, and because the MOU is an equitable servitude. (*Ibid.*) All of Plaintiffs' arguments fail.

First, Berggruen did not assume the MOU's obligations. Plaintiffs misquote and mischaracterize the Purchase Agreement. Paragraph 13 required C&C to deliver "[o]riginals (or copies thereof) of any and all documents in Seller's possession relating to the Property not already provided to Seller." (Brody Decl., Ex. A, ¶ 13(c).) There is no evidence that C&C ever delivered a copy of the MOU; the evidence is to the contrary. Further, Berggruen's obligation under Paragraph 8(b) to "assume and comply with all

[2] The plain terms of the MOU refute any suggestion that it runs with the land. Paragraph 13 provides that the MOU "may be signed . . . by facsimile." (Ryzewska Decl., Ex. A, ¶ 13.) This is inconsistent with an intent that the MOU run with the land. A covenant running with the land must be publicly recorded (Civ. Code, § 1468), and only documents containing "an original signature or signatures" may be publicly recorded (Gov't Code, § 27201, subd. (b)(1)).

obligations for or relating to the ownership and use of the Property" was expressly subject to Paragraph 6(g), which obligated Castle & Cook to terminate "any and all agreements and/or contracts relating to the Property, which Purchaser has not ***affirmatively*** elected to assume." (*Id.* ¶ 6(g), emphasis added.) There is no evidence that Berggruen affirmatively elected to assume the MOU.

Plaintiffs now claim that they once alluded to an MOU at a meeting in 2014. (Drimmer Decl., ¶¶ 7-8.) This is inadmissible hearsay (Evid. Code., § 1200), and not even alleged in the FAC. Nor do they claim to have provided a copy of the MOU at the alleged meeting or thereafter, making this improper and inadmissible allegation irrelevant. In any event, the Purchase Agreement makes clear Berggruen would not have been bound by it because they did not affirmatively assume it. It was *Plaintiffs'* burden to show an express assumption, and they have failed to do so.

Second, Berggruen is not a successor in interest. "At common law an assignment transfers the benefits of an executory contract but not its burdens, ***unless the assignee expressly assumes the latter***." (*Citizens Suburban v. Rosemont* (1966) 244 Cal.App.2d 666, 675, emphasis added.) Thus, "[w]hile an assumption of obligations may be implied from the acceptance of benefits under a contract, that is so only '***so far as the facts are known, or ought to be known, to the person accepting***.'" (*Unterberger v. Red Bull* (2008) 162 Cal.App.4th 414, 421, quoting Civ. Code, § 1589, emphasis added.)

Here, Berggruen ***still does not have a complete copy of the MOU***. The 1999 MOU refers to the Reduced Density Plan "as depicted in Exhibit A." (Ryzewska Decl., Ex. A ¶ 1.) But Exhibit A is not attached to the Complaint, the FAC, or to Robert Rieth's Declaration. Instead, a tentative tract map signed in 2003 is attached to the Complaint and the FAC, (Compl. Ex. B; FAC, Ex. B), and a map signed in 2004 is attached to the Rieth Declaration (Rieth Decl., Ex. A, at p. 10). Plainly, neither the 2003 map nor the 2004 map was attached to the 1999 MOU when it was executed. Yet, Plaintiffs have consistently represented to the Court that these maps, dated years after the MOU, were originally attached to the MOU. (FAC ¶ 24; Rieth Decl., ¶ 7.) Berggruen could not have been on notice of an agreement when Plaintiffs and their counsel apparently do not even have a complete copy and have attempted to pass off two different documents as Exhibit A to the MOU.

Citizens does not support Plaintiffs' position. The court there 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." (*Citizens*, *supra*, 244 Cal.App.2d at p. 677.) In so holding, the court relied on the fact that Price acted as principal for both the promoter and the developers. (*Ibid.*) But C&C was a seller, not Berggruen's promoter. There is no overlap in the ownership or management between C&C and Berggruen. Nor did Berggruen knowingly accept any benefits of the MOU. Indeed, there were no such benefits. MOSMA was obligated not to challenge the Final Map for the Reduced Density Plan. (See Ryzewska Decl., Ex. A, ¶ 3(a).) Yet MOSMA filed suit challenging the Final Map. (Lonner Decl., Ex. G; Ex. I; Ryzewska Supp. Decl., Ex. A.)

Finally, Plaintiffs' argument that the MOU is binding as an equitable servitude fails for the same reasons.[3] "Restrictions that do not meet the requirements of covenants running with the land may be enforceable as equitable servitudes provided the person bound by the restrictions had notice of their existence." (*Nahrstedt v. Lakeside* (1994) 8 Cal.4th 361, 375; see also *id.* at p. 379 ["under general rules governing equitable servitudes a subsequent purchaser of land subject to restrictions must have actual notice of the restrictions"]; *Ross v. Harootunian* (1967) 257 Cal.App.2d 292, 294 ["[A restrictive covenant] may be enforced as an equitable servitude against a transferee who takes with knowledge of its terms and under circumstances which would make avoidance of the restriction inequitable"].)[4]

Here, Berggruen did not have notice of the MOU prior to purchasing the Property. (Nakagawa Decl., ¶ 4.) The MOU was never recorded, and there is no evidence that Berggruen ever saw the MOU. Even if it were admissible (it is not), Drimmer's hearsay testimony does not establish that Berggruen had "knowledge of [the MOU's] terms." Drimmer does not state that he showed the MOU to Berggruen, that he explained its terms, or that he sent a copy for Berggruen's review. (*See* Drimmer Decl., ¶¶ 7-8.) Moreover, it would be grossly inequitable to bind Berggruen to the MOU given that, even now, Plaintiffs have failed to come forward with a complete version and have clearly breached it.

2. The MOU Does Not Create A Permanent Restriction On Development

Plaintiffs have also failed to establish that the MOU created a permanent restriction on the

[3] Further, "the instrument containing the covenant must describe both the dominant estate and the servient estate," but the MOU does not. (*In re Snow* (Bank. C.D.Cal. 1996) 201 B.R. 968, 1972.)

[4] *Mullin v. Bank of America* (1988) 245 Cal.Rptr. 66 was depublished and is not citable. And the restrictions at issue in *MacDonald Properties, Inc. v. Bel-Air Country Club* (1977) 72 Cal.App.3d 693 were set forth in a recorded deed. (*MacDonald*, *supra*, 72 Cal.App.3d at p. 700.) Here, it is undisputed that the MOU was never recorded.

development of the Property. As such, their claims for declaratory relief regarding the MOU, declaratory relief regarding equitable servitude, breach of the MOU, breach of the duty of good faith and fair dealing, intentional interference with contract, and unjust enrichment fail.

First, the MOU imposed only three obligations on C&C—to "withdraw from further consideration or processing its Vesting Tentative Tract Map," to "file a new vesting tentative tract map," and to "dismiss with prejudice its lawsuit against the City of Los Angeles"—and C&C fully performed them years ago. (Mot. at 11.) Plaintiffs' reliance on generic language in the preamble is unavailing. (See *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"]; *Wing v. Forest Lawn Cemetery Ass'n* (1940) 15 Cal.2d 472, 479 ["[A]ny provisions of an instrument creating or claimed to create such a servitude will be strictly construed, any doubt being resolved in favor of the free use of the land"].)[5]

Second, Plaintiffs mischaracterize Paragraph 6, which does not impose a permanent restriction on the Property, but rather allows either party to oppose a development project proposed in violation of the MOU. Indeed, the MOU expressly contemplates that there could be "other development plan[s] . . . for the Property." (Ryzewska Decl., Ex. A ¶ 6.) Specifically, 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 the project. (*Ibid.*) However, while Plaintiffs are free to oppose the Berggruen Project, they may not petition the City to stop processing the new approvals. (*Id.* at ¶ 3(a), 4, 6.) In any event, even if MOSMA were entitled to specific performance, that would only apply to C&C's three obligations under the MOU. If C&C had refused to dismiss the 1999 lawsuit, for example, MOSMA would have been able to enforce that obligation. Beyond the three obligations placed on C&C, however, there are no other provisions

[5] See also *Glenn-Colusa Irrigation Dist. v. U.S. Army Corps of Engineers* (E.D.Cal. July 18, 2019) 2019 WL 3231748, at *4 ["Recitals are generally given limited effect and do not form any part of the real agreement."]; *Westlands Water Dist. v. U.S. Dep't of Interior* (E.D.Cal. 1994) 850 F.Supp. 1388, 1406 ["As a general rule, although a preamble may be useful in interpreting an ambiguous operative clause in a contract, it cannot create any right beyond those arising from the operative terms of the document"] [internal quotations omitted]; Civ. Code, § 1068 ["recourse may be had to [a contract's] recitals only where "the operative words of a grant are doubtful"].

1 MOSMA can seek to enforce by means of specific performance.

2 Paragraph 6 does not state that C&C can *only* recommence processing other plans if MOSMA 3 breaches (the word "only" does not appear), but rather that, in the event of a breach by MOSMA, C&C 4 can seek specific performance, the reprocessing of any development plan, or any other available 5 remedies. (Ryzewska Decl., Ex. A, ¶ 6.) The language is not surplusage, and protected C&C from 6 MOSMA's future opposition by clarifying that C&C could file other plans.

7 *Third*, Paragraph 7 of the MOU expressly provides that C&C may terminate the MOU if, *inter* 8 *alia*, it "determines in good faith costs or conditions . . . make the Reduced Density Plan economically 9 or otherwise infeasible." (Mot. at 11-12.) The fact that C&C could have unilaterally terminated the MOU 10 is further proof that the MOU does not create a permanent restriction on the land. *Finally*, the MOU is 11 not ambiguous, and even if it were, any ambiguity would have to be "resolved in favor of the free use of 12 the land." (*Wing*, *supra*, 15 Cal.2d at p. 479.) Moreover, the MOU is, by its terms, "the entire agreement 13 of the Parties concerning its subject matter." (MOU ¶ 12.) Extrinsic evidence is not admissible to vary 14 its terms. (*Wind Dancer v. Walt Disney* (2017) 10 Cal.App.5th 56, 69.) In any event, Plaintiffs have 15 offered no contemporaneous, written evidence of the *parties'* intentions—as opposed to *Plaintiffs'* after-16 the-fact subjective, undisclosed intentions, which are irrelevant and inadmissible. (See, e.g., *Iqbal v.* 17 *Ziadeh* (2017) 10 Cal.App.5th 1, 8 ["The parties' undisclosed intent or understanding is irrelevant to 18 contract interpretation"]; *Cedars-Sinai v. Shewry* (2006) 137 Cal.App.4th 964, 980 ["[i]t is the objective 19 intent, as evidenced by the words of the contract, rather than the subjective intent of one of the parties, 20 that controls interpretation"] [quotations omitted].) Simply put, Plaintiffs have failed to show, with 21 "competent, admissible evidence," that the parties intended to create a permanent restriction on 22 the Property. (*Roberts v. L.A. Cty. Bar Assn.* (2003) 105 Cal.App.4th 604, 613-614.)

23 **3. MOSMA Breached The MOU**

24 MOSMA was obligated to "endorse and agree with the development of the Property in accordance 25 with the Reduced Density Plan." (Ryzewska Decl., Ex. A, ¶ 3.) There can be no question that Plaintiffs 26 have breached this provision. On December 19, 2019, only days after Berggruen filed the anti-SLAPP 27 motion, MOSMA filed a Petition for Writ of Mandate against the City and Berggruen, challenging the 28 City's approval of the Final Map for the Reduced Density Plan. (Ryzewska Supp. Decl., Ex. A (Petition),

¶¶ 28, 30, 33, 34.) This was a clear breach of the MOU.

Plaintiffs also do not dispute that they sent a letter to the City on December 5, 2019, challenging the City's approval of the Final Map for the Reduced Density plan and the issuance of related grading permits. (Lonner Decl., Ex. I.) This was yet another breach of paragraph 3 of the MOU. Paragraph 4 of the MOU does not provide otherwise. While it allows certain challenges, it specifically forbids "those set forth in paragraph 3." (*Id.* at ¶ 4.)

Finally, Plaintiffs' excuse argument fails. Plaintiffs did not plead excuse in the FAC. To the contrary, they pleaded that "MOSMA has fully performed all, or substantially all, of its obligations under the MOU." (FAC ¶ 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].) Nor can Plaintiffs seek to enforce an agreement they refuse to perform.

4. Berggruen Has Received No Benefit, And MOSMA Has Suffered No Damages

As set forth above, Berggruen has received no benefit from the MOU. Nor have Plaintiffs been damaged by the filing of the EAF. Attorneys' fees and "paper" losses caused by the COVID-19 pandemic are not damages. Moreover, even if specific performance were available to MOSMA, it is limited to enforcing the three obligations placed on C&C under the MOU. (Ryzewska Decl., Ex. A, ¶¶ 1-2.)

5. Plaintiffs Claim For Declaratory Relief Regarding Stoney Hill Road Fails

For the same reasons discussed above and more, Plaintiffs' claim for declaratory relief regarding Stoney Hill Road also fails. *First*, Plaintiffs do not dispute that, separate and apart from the access granted by the 2009 Covenant, the City also reserved utility and emergency access easements. (Lonner Decl., Ex. K.) Plaintiffs cannot challenge the City's express reservation of access. *Second*, when the City approved the Final Map in 2019, it also expressly recognized that the Property had access to Stoney Hill Road pursuant to a 2009 Covenant, stating that: "Ingress and egress via Stoney Hill Road is provided by the Covenant and Agreement dated as of May 1, 2009 . . . ." (Lonner Decl., Ex. E, at pp. 35, 40.) *Third*, the City's approval was clearly correct because the 2009 Covenant expressly provides that a "private ingress and egress easement over the private street area will be granted to owners ***of all properties currently using*** the public street portion of Stoney Hill Road . . . for access." (Lonner Decl., Ex. M, at p. 284, emphasis added.) This language is not limited to properties that are adjacent to Stoney Hill Road, but

includes all properties that relied upon the road for access. C&C was the owner of the Property at the time, and an interested party related to the street vacation. (Lonner Decl., Ex. K, at pp. 262, 268.) It was notified of all recommendations related to Stoney Hill Road, and the City Engineer's Report described the parcels utilizing Stoney Hill Road and expressly acknowledged that while the 2050 Stoney Hill Road Property was vacant, it had been "proposed for development under Tract No. 53072." (*Ibid.*) The Property was clearly one of the properties for which access was contemplated when the Covenant was recorded. Moreover, while the Covenant itself does not name C&C as a beneficiary, it does not name ***any*** adjacent property owner, but instead uses the broad language of "owners of all properties currently using" the road. (Lonner Decl., Ex. M, at p. 284.)

Fourth, Berggruen is entitled to an abutter's easement. Plaintiffs' reliance on *Bacich v. Board of Control* (1943) 23 Cal.2d 343 is misplaced. *Bacich* makes clear that the purpose of an abutter's easement is to give consideration to the purpose of the property, and that an abutter's easement goes beyond accessing the street "immediately in front of the property." (*Id.* at pp. 352-353.) Plaintiffs' reliance on *People v. Russell* (1957) 48 Cal.2d 189, 195 is likewise unavailing. Indeed, the court expressly held that an abutter's easement is "more extensive than a mere opportunity to go into the street immediately in front of one's property." (*Ibid.*)

Finally, Plaintiffs offer no support for their claim of abandonment. "Extinguishment by abandonment is effected by the concurrence of three elements: (1) nonuser, (2) intention to abandon (as to which it has been said the evidence must be clear and unequivocal) and (3) damage to the owner of the servient tenement." (*Nevada Irr. Dist. v. Keystone Copper Corp.* (1964) 224 Cal.App.2d 523, 532.) Plaintiffs offer no evidence as to any of these elements. Indeed, Berggruen has expressly made claims for access to the road. (Forbes Decl., ¶ 3, Ex. A; Abshez Decl. ¶ 4.)

III. CONCLUSION

The Court should grant Berggruen's Motion to Strike Plaintiffs' Complaint with prejudice, and award attorneys' fees and costs to Berggruen.

Dated: October 5, 2020

GIBSON, DUNN & CRUTCHER LLP

By: */s/ James P. Fogelman*
James P. Fogelman

Attorney for Monteverdi, LLC and Berggruen Institute

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PROOF OF SERVICE

I, Katarzyna Ryzewska, declare as follows:

I am employed in the County of Los Angeles, State of California, I am over the age of eighteen years and am not a party to this action; my business address is 2029 Century Park East, Los Angeles, CA 90067, in said County and State. On October 5, 2020, I served the following document(s):

DEFENDANTS BERGGRUEN INSTITUTE'S AND MONTEVERDI, LLC'S REPLY IN SUPPORT OF THEIR MOTION TO STRIKE PLAINTIFFS' FIRST AMENDED COMPLAINT

SUPPLEMENTAL DECLARATION OF KATARZYNA RYZEWSKA IN SUPPORT OF DEFENDANTS' REPLY IN SUPPORT OF MOTION TO STRIKE PLAINTIFFS' FIRST AMENDED COMPLAINT

DECLARATION OF AMY R. FORBES IN SUPPORT OF DEFENDANTS BERGGRUEN INSTITUTE AND MONTEVERDI, LLC'S REPLY IN SUPPORT OF THEIR MOTION TO STRIKE PLAINTIFF'S FIRST AMENDED COMPLAINT

on counsel stated below, by the following means of service:

William M. Brody Arthur Fels Loeb & Loeb LLP 10100 Santa Monica Boulevard, Suite 2200 Los Angeles, CA 90067 Tel: (310) 282-2000 Fax: (310) 282-2200 wbrody@loeb.com afels@loeb.com	Attorneys for Plaintiffs Mountaingate Open Space Maintenance Association and Crest/Promontory Common Area Association
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☑ BY ELECTRONIC SERVICE: On the above-mentioned date, I caused the documents to be sent to the persons at the electronic notification addresses as shown above.

☑ I am a member of the bar of this court.

☑ (STATE) I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on October 5, 2020.

Katarzyna Ryzewska