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9 THE SUPERIOR COURT OF CALIFORNIA
10 COUNTY OF SANTA CLARA
11 DOWNTOWN SUPERIOR COURT

12 ORGANIZACION COMUNIDAD DE
13 ALVISO, an unincorporated association,

14 Petitioner,

15 vs.

16 CITY OF SAN JOSÉ,

17 Respondent;

18 _____
19 JAGJEET S. KAPOOR; TERRA
20 HOSPITALITY, INC.; and DOES 1 through
21 25, inclusive,

22 Real Parties in Interest.

Case No.:

PETITION FOR WRIT OF MANDATE

ACTION BASED ON CALIFORNIA
ENVIRONMENTAL QUALITY ACT

(Code Civ. Proc. §1094.5; Pub. Res. Code §§
21168; 21168.5 et seq.)

1 **INTRODUCTION**

2 With this lawsuit, Petitioner ORGANIZACION COMUNIDAD DE ALVISO
3 (“OCDA”) challenges the December 13, 2016 action of Respondent CITY OF SAN JOSÉ
4 (“City”), taken by and through its City Council approving a Planned Development Re-Zoning
5 and General Plan Text Amendment for the “Topgolf @ Terra” Project located on North First
6 Street between Highway 237 and Gold Street in the Alviso area of San José (“Project”). In
7 approving the Project, the City adopted a mitigated negative declaration (“MND”) prepared
8 pursuant to the California Environmental Quality Act (“CEQA”), Pub. Resources Code § 21000
9 *et seq.*, concluding that the Project would have no significant unmitigated environmental impacts.

10 OCDA contends the City violated applicable provisions of the California Environmental
11 Quality Act (“CEQA”) by relying on the MND *in lieu* of preparing a full environmental impact
12 report (“EIR”) for the Project. Under CEQA, if there is substantial evidence in the
13 administrative record before a public agency that a proposed project may have a significant
14 impact on the environment, the agency may not lawfully rely on a negative declaration and
15 instead must prepare an EIR. In this case, there is abundant substantial evidence in the
16 administrative record before the City that the Project not only may but will have significant
17 environmental effects. The City therefore prejudicially abused its discretion by failing to prepare
18 and circulate an EIR before approving the Project. OCDA further contends the City violated
19 applicable provisions of the State Planning and Zoning Law, Gov’t Code § 65000 *et seq.* by
20 approving the Project notwithstanding its inconsistency and incompatibility with the City’s
21 General Plan and Alviso Master Plan.

22 OCDA accordingly seeks a peremptory writ of mandate under Code of Civil Procedure
23 section 1094.5, and Public Resources Code section 21168 and/or 21168.5, commanding the City
24 to set aside its certification of the MND and approval of the Project, and to reconsider its actions
25 only after preparing and circulating a draft EIR for public review and comment in accordance
26 with CEQA, and addressing the Project’s inconsistencies with the General Plan and Master Plan.
27 OCDA further seeks a stay of the effect of the City’s approvals during the pendency of these
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1 proceedings. Finally, OCDA seeks an award of costs and attorneys fees under Code of Civil
2 Procedure section 1021.5, together with any other relief the Court deems necessary and proper.

3 In support whereof, OCDA alleges:

4 **PARTIES**

5 **Organizacion Comunidad de Alviso**

6 1. Petitioner ORGANIZACION COMUNIDAD DE ALVISO is an unincorporated
7 association of residents, citizens, property owners, tax payers and electors residing in the Alviso
8 community of the City of San José. Its organizational purpose includes advocating for just,
9 equitable and responsible land use planning and policy, as well as diligent enforcement of
10 planning and environmental laws in and around Alviso and San José.

11 2. OCDA membership includes but is not limited to San José resident Mark
12 Espinoza, who objected to the City’s approvals of the Project orally and/or in writing prior to
13 the close of the final public hearing on the Project before the San José City Council.

14 3. OCDA’s members maintain a direct and regular geographic nexus with the City of
15 San José, and will suffer direct harm as a result of any adverse environmental and/or public
16 health impacts caused by the Project.

17 4. OCDA’s members have a clear and present right to, and beneficial interest in, the
18 City’s performance of its duties to comply with CEQA. As San José citizens, homeowners,
19 taxpayers, workers, and/or electors, OCDA’s members are within the class of persons to whom
20 the City owes such duties.

21 5. By this action, OCDA seeks to protect the interests of its members and to enforce
22 a public duty owed to them by the City. Because the claims asserted and the relief sought in this
23 petition are broad-based and of a public as opposed to a purely private or pecuniary nature,
24 direct participation in this litigation by Petitioner’s individual members is not necessary.

25 6. Individual members of OCDA presented oral and/or written comments in
26 opposition to the Project prior to and/or during the public hearings culminating in the City’s
27 December 13, 2016 approvals, and raised or supported all objections to the Project and alleged
28 grounds for noncompliance with CEQA and other applicable law presented herein.

1 **City of San José**

2 7. Respondent CITY OF SAN JOSÉ (“City”) is a California Charter City situated in
3 Santa Clara County. On December 13, 2016, the City, acting through its City Council, adopting a
4 mitigated negative declaration and approving a Planned Development Re-Zoning and General
5 Plan Text Amendment for the “Topgolf @ Terra” Project located on North First Street between
6 Highway 237 and Gold Street in the Alviso area. At all times relevant, the City served as the
7 “lead agency” under CEQA responsible for evaluating the environmental impacts of the Project.

8 **Jagjeet S. Kapoor**

9 8. OCDA is informed and believes that Real Party In Interest JAGJEET S.
10 KAPOOR (“Kapoor”) is an adult citizen domiciled in the State of California. OCDA is further
11 informed and believes that KAPOOR is a sponsor and developer of the Project, and was an
12 applicant for and recipient of the land use entitlements challenged herein.

13 **Terra Hospitality, Inc.**

14 9. OCDA is informed and believes that Real Party In Interest TERRA
15 HOSPITALITY, INC. is a California Corporation with a principal place of business in Milpitas,
16 Santa Clara County. OCDA is further informed and believes that TERRA HOSPITALITY,
17 INC. is a sponsor and developer of the Project, and was an applicant for and recipient of the
18 land use entitlements challenged herein.

19 **Does**

20 10. OCDA currently does not know the true names of Real Parties In Interest DOES
21 1 through 25 inclusive, and therefore names them by such fictitious names. OCDA will seek
22 leave from the court to amend this petition to reflect the true names and capacities of DOES 1
23 through 25 inclusive if and when ascertained.

24 **JURISDICTION & VENUE**

25 11. This action is brought pursuant to Public Resources Code sections 21167, 21168,
26 and 21168.5, and Code of Civil Procedure section 1094.5. Venue is proper in Santa Clara County
27 under Code of Civil Procedure section 395.

1 **FACTUAL BACKGROUND**

2 12. The Project consists of a Planned Development Rezoning from the CIC
3 Combined Industrial Commercial and R-M Multiple Residence Residential Zoning Districts to
4 the CIC(PD) Planned Development Zoning District to allow up approximately 110,000 square
5 feet of commercial/retail space, a 200 room hotel, approximately 72,000 square feet of
6 indoor/outdoor recreation use (Topgolf) and late night use, and a General Plan Text
7 Amendment to amend the Alviso Specific Plan to change the development standards for height
8 under the “Village Area Guidelines for Commercial Development” to include a maximum
9 allowable building height of 65 feet in certain areas and a maximum allowable non-building
10 structure height of 170 feet in certain areas.

11 13. The 36-acre Project site is located on the south side of North First Street, between
12 Highway 237 and Gold Street, in the Alviso area of San José, directly across North First Street
13 from the Alviso residential community and the George Mayne Elementary School.

14 14. On November 16, 2016, the City’s Planning Commission held a public hearing and
15 considered the Mitigated Negative Declaration, General Plan Amendment to the Text of the
16 Alviso Master Plan and Planned Development Rezoning. Various individuals and organizations,
17 including OCDA and/or its individual members appeared and testified in objection to the
18 Project. After closing the public hearing, a majority of the Planning Commission voted to
19 recommend that the City Council approve the Project.

20 15. On December 13, 2016, the City Council held a public hearing and likewise
21 considered the Mitigated Negative Declaration, General Plan Amendment to the Text of the
22 Alviso Master Plan and Planned Development Rezoning. Various individuals and organizations,
23 including OCDA and/or its individual members appeared and testified in objection to the
24 Project at this hearing as well. After closing the public hearing, a majority of the City Council
25 voted to adopt the Mitigated Negative Declaration approve the Project

26 16. On December 15, 2016, the City filed and posted a Notice of Determination in
27 accordance with Public Resources Code section 21152.
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1 **FIRST CLAIM FOR RELIEF**

2 **(Violation of CEQA – Failure to Prepare Environmental Impact Report)**

3 17. OCDA here incorporates by reference all preceding paragraphs in their entirety.

4 18. At all times relevant to this action the City was the “lead agency” responsible for
5 the review and approval of the Project under Public Resources Code section 21067.

6 19. Under Public Resources Code section 21080(d), if there is substantial evidence in
7 light of the whole record before a lead agency that a discretionary project it intends to carry out
8 may have a significant effect on the environment, the lead agency must prepare an EIR.

9 20. Under Public Resources Code section 21080(c)(1), a lead agency may adopt a
10 negative declaration for a project, only if an initial study shows there is no substantial evidence in
11 light of the whole record before the agency that the project may have a significant effect on the
12 environment. Under Public Resources Code section 21080(c)(2), if the initial study identifies
13 potentially significant impacts, but revisions to the project would avoid the effects or mitigate
14 them to a point where clearly no significant effects would occur, such that there is no substantial
15 evidence in light of the whole record before the lead agency that the project as revised may have
16 a significant effect on the environment, then the lead agency may adopt a mitigated negative
17 declaration. If, however, there is substantial evidence, in light of the whole record before the
18 agency, that a project as revised may have a significant effect on the environment, then the
19 agency still must prepare a full EIR for the project. In other words, if a lead agency is presented
20 with a “fair argument” that a project may have a significant effect on the environment, the lead
21 agency shall prepare an EIR even though it may also be presented with other substantial evidence
22 that the project will not have a significant effect (*No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.
23 3d 68). *See* 14 Cal.Code.Reg. § 15064(f)(1).

24 21. For purposes of CEQA, “substantial evidence” is defined as including: “facts,
25 reasonable assumptions predicated upon facts, and expert opinion supported by facts.” 14
26 Cal.Code.Reg. § 15064(f) (5). Thus under the CEQA statute and regulations, if there is
27 disagreement among expert opinion supported by facts over the significance of an effect on the
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1 environment, the lead agency “shall treat the effect as significant and shall prepare an EIR.” *Id.*
2 at subd. 15064(g).

3 22. Here, there is substantial evidence in light of the whole record before the City that
4 the Project not only may, but will, have significant unmitigated effects on the environment in
5 areas including but not limited to: (a) aesthetics, (b) air quality, (c) biological resources, (d)
6 hazards and hazardous materials; (e) human health; (f) land use planning, (g) noise; and (h) traffic
7 and circulation. There is substantial evidence in the form of facts, reasonable assumptions
8 predicated upon facts, and expert opinion supported by facts that the Project will have significant
9 adverse direct, indirect, and cumulative environmental effects in these areas. The City thus had
10 an affirmative duty under CEQA to prepare and circulate a full EIR for the Project before taking
11 any action to approve it.

12 23. Accordingly, the City prejudicially abused its discretion by adopting the MND for
13 the Project rather than preparing a full EIR, and by adopting erroneous factual findings that
14 there was no substantial evidence in the record before it that the Project may have a significant
15 environmental effect.

SECOND CLAIM FOR RELIEF

(Violation of State Planning and Zoning Law)

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17
18 24. OCDA here incorporates by reference all preceding paragraphs in their entirety.

19 25. Under the State Planning and Zoning law, Government Code §§ 65000 *et seq.*, a
20 local public agency may entitle a proposed land use only if the land use is consistent with the
21 goals, policies, and objectives contained in a valid, current, internally consistent General Plan,
22 including any applicable specific plans.

23 26. The Project is inconsistent and incompatible with governing goals, policies, and
24 programs of the City’s General Plan and the Alviso Master Plan.

25 27. The City therefore prejudicially abused its discretion by approving the Project
26 notwithstanding these Plan inconsistencies and incompatibilities, and by adopting findings of
27 Plan consistency that are not supported by substantial evidence.
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1 (b) to comply fully with CEQA and the State Planning and Zoning Law before taking
2 any subsequent action or actions taken to approve the Project.

3 2. For an order staying the effect of the City's actions pending the outcome of this
4 proceeding.

5 3. For a preliminary and permanent injunction directing the City and/or any Real
6 Parties In Interest to cease and refrain from engaging in any activities in reliance upon the
7 approvals challenged herein until the City takes any necessary action to bring its actions into
8 compliance with CEQA and the State Planning and Zoning Law.

9 4. For costs of suit.

10 5. For an award of attorneys' fees.

11 6. For other legal or equitable relief that the court deems just and proper.
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13 Dated: January 11, 2017.

Respectfully submitted,

M. R. WOLFE AND ASSOCIATES, P.C.



17 By: _____

18 Mark R. Wolfe
19 Attorney for Petitioner
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VERIFICATION

I, Mark Espinoza declare:

I am a principal member of ORGANIZACION COMUNIDAD DE ALVISO, the
Petitioner in the above-captioned action.

I have read the foregoing PETITION FOR WRIT OF MANDATE and know its
contents. The statements made therein are true of my own knowledge, except as to those
matters which are alleged on information and belief, and as to those matters I believe them to be
true.

I affirm, under penalty of perjury, that the foregoing is true and correct.

Dated: January ____, 2017

By: _____
Mark Espinoza