City of Hermosa Beach

Civic Center, 1315 Valley Drive, Hermosa Beach, CA 90254-3885

Hany S. Fangary, Councilmember *hfangary@hermosabch.org* *310-340-4773*

October 6, 2020

Suja Lowenthal
City of Hermosa Beach
1315 Valley Drive
Hermosa Beach, CA 90254
Email: suja@hermosabch.org

Michael Jenkins
Best Best & Krieger
1230 Rosecrans Avenue, Suite 110
Manhattan Beach, CA 90266
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Re: **Press Release | Hermosa Beach's Statement on Ruling in Lawsuit Crossfit Horsepower Filed Against the City Dated September 28, 2020**

Dear Ms. Lowenthal and Mr. Jenkins:

I was very surprised to receive the press release referenced above ("Press Release") and to see that it is titled "Hermosa Beach's Statement on Ruling in Lawsuit Crossfit Horsepower Filed against the City" for various reasons. The Press Release is attached as Exhibit A.

The Press Release Is Not Hermosa Beach's Statement Regarding the Court's Ruling

First, as a councilmember of the City, that press release clearly does not convey my statement on the Court's ruling regarding the CrossFit litigation. The Court's ruling is attached as Exhibit B. How did the City formulate that "statement" and represent it to the community as "Hermosa Beach's Statement" regarding the Court's ruling? As you know, Councilmembers Campbell and Massey have recused themselves from this litigation, pursuant to Mr. Jenkins' recommendation, in 2018, and have since not been involved in any closed session or public meetings regarding this matter. As such, they cannot have a "Statement" regarding this litigation, when they have recused themselves from it, and have not had any meaningful participation in the matter since at least 2018.

With councilmembers Campbell and Massey recusing themselves, that leaves three councilmembers – Armato, Fangary and Detoy – that can participate in this matter, and can participate in formulating "Hermosa Beach's Statement" regarding the Court's ruling. However, no one from the City consulted with me about this prior to issuing the Press Release. And, based on discussion with Councilmember Detoy, no one consulted with him either. The City could have scheduled a closed session meeting to discuss the Court's ruling and formulate a press release or other actions in response to the Court's ruling, but no closed session meeting was scheduled.

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As such, the Press Release is merely Councilmember Armato's statement, not Hermosa Beach's statement. It is unconscionable that a sole councilmember somehow is allowed to be the sole voice of the entire City of Hermosa Beach regarding a Court ruling that held that "'concrete facts' in the record establish an unacceptable probability that Armato was biased against [CrossFit Gym] . . . Armato should have recused herself. Because she did not, [CrossFit Gym] did not receive a fair hearing and the Council's decision must be set aside."

The Court ruling held that Armato's "statement that her communications with residents were "part of the record" was misleading." (emphasis added). The Court further held that "Armato appeared adamant at the July 10, 2018, meeting that the Council find the Gym to be a public nuisance at that time, prior to presentation from [CrossFit Gym's] attorney."

The Court further held that "Armato communicated directly with code enforcement officials . . . contravening [Hermosa Beach Municipal Code] section 2.12.080. Section 2.12.080 states that Councilmembers 'shall deal with the administrative service of the city only through the city manager, except for the purpose of inquiry, and neither the city council nor any member thereof shall give orders to any subordinates of the city manager.' . . . Despite this rule, the record shows various direct communications between Armato and City code enforcement officials that exceeded the scope of mere "inquiry." . . . Armato admittedly gave instructions to code enforcement official Justin Edson to investigate resident complaints about the Gym. . . . Emails from Edson show that he reported directly back to Armato after investigating noise and vibration complaints about the Gym. . . ." (Emphasis added).

Thus, the Court held that: 1. Armato made misleading statements during the July 10, 2018 hearing; 2. that "concrete facts" in the record establish an unacceptable probability that Armato was biased against CrossFit Gym; and 3. that Armato communicated directly with code enforcement officials . . . contravening Hermosa Beach Municipal Code ("HBMC") section 2.12.080. Yet, despite the Court's ruling that Armato made misleading statements, was probably biased against CrossFit Gym, and violated HBMC, the City elected to have Councilmember Armato be the sole voice of the City to provide "Hermosa Beach's Statement" regarding the Court's ruling? How was that decision made? Why? What protocols were followed in reaching that decision?

Second, issuing the Press Release is inconsistent with the Mayor and City Council Protocols: Operating Guidelines for City Council and City Manager of Hermosa Beach's Leader's Guide. Protocol No. 8 provides:

> Protocol 8: Spokesperson on City Matters
> • Official communication (including press release) through the Public Information Officer; Tested Mayor/Pro Tem.
> • Mayor and City Manager reflect the City Policy
> • Circulate to Councilmembers

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The Press Release was not tested by the Mayor and Mayor Pro Tem as required by Protocol No. 8 of the Leader's Guide because both the Mayor and Mayor Pro Tem have recused themselves from this litigation matter. As such, neither of them has the requisite knowledge of the issues raised in the Court's ruling to review and edit the City's official communication. Further, although Protocol No. 8 provides that the Mayor and City Manager reflect the City Policy, the Press Release does not include any statements from the Mayor or the City Manager. Finally, the Press Release was not circulated to the Councilmembers as Protocol No. 8 requires. Instead, Councilmember Armato's statements were the only statements from any member of the City Council included in the Press Release, contravening Protocol No. 8 of Hermosa Beach's Leader's Guide.

Third, Councilmember Armato's statements in the Press Release are unprofessional, and expose the City to further liabilities related to this matter. Rather than acknowledging the issues raised in the Court's ruling and committing to abide by the Court's ruling in the future, and the HBMC, Armato's statements appear to merely dismiss the Court's ruling as incorrect and irrelevant. Armato states in the Press Release "I'm disappointed in the court's ruling. . . . I have read the court's opinion carefully but believe that I did right by my constituents, and I was fair to CrossFit Horsepower." In other words, Armato's statement implies that she did nothing wrong, and that she will continue to do the same thing going forward, potentially exposing the City to further litigation and liabilities. Armato neither expresses remorse for her actions nor a commitment to follow the HBMC requirements going forward. For an elected official that expects her constituents to abide by the City's rules and requirements, including the HBMC, her utter indifference to the fact that Court held that she contravened the HBMC is, simply, appalling and unacceptable.

Armato's Actions Expose The City to Further Liabilities

As you are aware, now that the Los Angeles County Superior Court granted CrossFit's writ of mandate, the litigation is now expected to proceed in Federal Court. With Armato's blatant disregard for the Court's ruling, and her dismissive statements included in the Press Release, I assume the Federal Court will not be sympathetic to the City's defenses to CrossFit's claims. As such, I anticipate this litigation to proceed in Federal Court for an extended period of time, exposing the City to significant litigation related expenses.

The City Council Should Evaluate Armato's Conduct at a Future Public Meeting

Defending CrossFit's writ of mandate has cost the City more than $120,000 to date. With the litigation proceeding in Federal Court, with anticipated discovery and motion practice, this could cost the City hundreds of thousands of dollars more. Yet, Armato has not included in the Press Release any remorse for her actions and/or any commitment that she will no longer engage in the same conduct that led to the Court's findings.

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At the October 13, 2020 City Council meeting, I plan to bring as an Other Matters agenda item, a request that the City Council hold a public hearing to evaluate possible censure of Armato based on the "concrete facts" referred to in the Court's ruling. Further, I plan to request that Council hold a public hearing to evaluate if the City is required to continue to pay for Armato's defense costs in light of the Court's ruling. I assume neither of you will interfere with my intent to place this item as an Other Matters item, but if you plan to do so, please let me know immediately so that I can evaluate my options.

Referrals to Los Angeles County Public Integrity Unit and California Attorney General's Office

I have been serving as a councilmember in the City for almost seven years, and this is the first time I have encountered a situation where the City lost in litigation solely due to the actions of one councilmember. Further, due to Armato's complete lack of remorse, and refusal to commit to abide by the HBMC and other requirements included in the Court's ruling, I intend to further refer this matter to the Los Angeles County Public Integrity Unit and the California Attorney General's Office for further consideration.

I would appreciate a response to the issues raised in this letter no later than October 9, 2020.

Sincerely,

Hany S. Fangary

Hany Fangary,
Councilmember

EXHIBIT A

City News & Press Releases

Press Release | Hermosa Beach's Statement on Ruling in Lawsuit Crossfit Horsepower Filed Against the City

Post Date: 09/28/2020 6:00 PM

HERMOSA BEACH, CA – Los Angeles Superior Court Judge Mary H. Strobel issued a ruling last week in the lawsuit CrossFit Horsepower filed against the City of Hermosa Beach in 2018 over Hermosa Beach City Council's vote to declare the gym a public nuisance arising from noise and vibrations impacts on neighboring residents.

The Council's August 2018 vote came after the City had received more than 175 complaints from 2014-2018 from nearby residents about amplified music and the noise and vibrations of weights being dropped on the floor of the gym. In approving the public nuisance resolution, the Council gave the business 90 days to implement vibration- and sound-proofing measures that would meet the City's Code requirements and achieve compatibility of the business operations with its neighbors. Rather than comply, CrossFit Horsepower sued the City. Its owners then chose to close the gym in 2019.

The judge set aside the City's resolution declaring CrossFit Horsepower to be a nuisance, citing City Councilmember Stacey Armato's communications with neighbors afflicted by the gym's noise and vibrations. Following is a statement from Hermosa Beach City Attorney Michael Jenkins regarding the judge's ruling in the case:

"Though the City is gratified that the court rejected CrossFit Horsepower's allegations regarding the manner in which the City conducted the nuisance abatement proceeding, we are disappointed that the court found Councilmember Stacey Armato was not an impartial decisionmaker. The evidence presented to the City Council demonstrated that CrossFit Horsepower's operation was adversely affecting the quality of its neighbors' lives. The court's ruling does not suggest otherwise. The City Council ordered remedial measures for CrossFit Horsepower to undertake to meet City Codes and fulfill the promises it made when the Council approved the zone text amendment for CrossFit Horsepower to open a gym in the Cypress District. These remedial measures were balanced and fair and provided CrossFit Horsepower an opportunity to coexist harmoniously with its neighbors. Regrettably, CrossFit Horsepower decided to go in a different direction. The City Council will meet soon to determine its next steps."

Following is a statement from Councilmember Stacey Armato:

"I take great pride in being accessible and responsive to my constituents. I see that as among the most important parts of my job as a city councilmember. Residents know that they can reach out to me and that I will follow-up on their behalf to get their problems resolved. I did that with the neighbors who were afflicted for years by unrelenting noise and vibrations from CrossFit Horsepower, and I have done it in hundreds of other instances. That's what I signed up for when I ran for City Council.

"Accordingly, I'm disappointed in the court's ruling. Sure, I was empathetic to the plight of the neighbors, but empathy is not bias. I went into that hearing with an open mind, and I did my job fairly and with restraint. I listened to all the evidence and all the arguments and, in the end, the Council unanimously imposed a thoughtful remedy. I have read the court's opinion carefully but believe that I did right by my constituents, and I was fair to CrossFit Horsepower."

About Hermosa Beach

Founded in 1907, Hermosa Beach is a thriving community of some 20,000 residents. Located on the southern end of the Santa Monica Bay in Los Angeles County, with beaches ranked among the best in the world, Hermosa Beach has been recognized for its work to highlight Southern California beach culture, foster a vibrant local economy and protect coastal and environmental resources.

To learn more about Hermosa Beach, please visit the City website: www.hermosabeach.gov/
Or keep up with Hermosa Beach news and events through social media channels:

HermosaBeachCity @hermosabeachcity @HermosaBchCity

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News

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Environmental Programs	Legal Notices & Public Hearings	Parking & Traffic
Planning Projects	Public Notices / General Announcements	Public Safety
Public Works Project Updates	Recreation Classes and Activities	School Board
Summary of New Ordinances	Utilities, Trash and Recycling	Volunteers Wanted

EXHIBIT B

RING BENDER LLP
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Hermosa Fitness, LLC d/b/a CrossFit Horsepower Hermosa Beach

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

HERMOSA FITNESS, LLC a California Limited Liability Company, d/b/a CROSSFIT HORSEPOWER HERMOSA BEACH, Plaintiff and Petitioner, vs. CITY OF HERMOSA BEACH, a California Municipal Corporation, and STACEY ARMATO, in Her Official Capacity as a CITY COUNCILPERSON OF THE CITY OF HERMOSA BEACH, and DOES 1 through 100, Defendant and Respondents.	Case No. 18STCP02840 Assigned for All Purposes To: Hon. Mary H. Strobel Dept: 82 **NOTICE OF ORDER GRANTING HERMOSA FITNESS, LLC'S PETITION FOR WRIT OF MANDATE** Trial Date: September 24, 2020 Time: 1:30 p.m. Petition Filed: November 7, 2018 Amended Petition Filed: February 19, 2019

RING BENDER LLP
3150 Bristol Street, Suite 220
Costa Mesa, California 92626

TO RESPONDENTS AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on September 24, 2020 at 1:30 p.m. in Department 82 of the above-captioned court, Petitioner Hermosa Fitness, LLC's Petition for Writ of Mandate came on for hearing pursuant to notice. Petitioner Hermosa Fitness appeared through its attorneys of record Ring Bender, LLP by Patrick K. Bobko. Respondents City of Hermosa Beach and Councilmember Stacey Armato appeared through their attorneys of record, Best Best & Krieger by Patrick Donegan.

Following the Court's consideration of the moving papers, the memoranda in support and in opposition thereto, and the arguments of counsel, the Court GRANTED the petition for writ of mandate. A true and correct copy of the Court's tentative order that it adopted as its final order is attached hereto as **Exhibit A**.

Dated: September 24, 2020

Respectfully submitted,

RING BENDER LLP
PATRICK K. BOBKO
NORMAN A. DUPONT

By: _____
Patrick K. Bobko
Attorneys for Plaintiff and Petitioner, Hermosa Fitness, LLC d/b/a CrossFit Horsepower Hermosa Beach

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EXHIBIT A

DEPARTMENT 82 LAW AND MOTION RULINGS

Hon. Mary H. Strobel

The clerk for Department 82 may be reached at (213) 893-0530.

Case Number: 18STCP02840 **Hearing Date:** September 24, 2020 **Dept:** 82

Hermosa Fitness, LLC, et al.,

v.

City of Hermosa Beach, et al.

Judge Mary Strobel

Hearing: September 24, 2020

18STCP02840

Tentative Decision on Petition for Writ of Mandate

Petitioner Hermosa Fitness, LLC dba CrossFit Horsepower Hermosa Beach ("Petitioner") petitions for a writ of administrative mandate directing Respondent City of Hermosa Beach ("City") to set aside the decision of its City Council ("Council") to adopt Resolution No. 18-7141, which declared the existence of and ordered the abatement of a public nuisance with respect to the operation of Petitioner's gym. City and Respondent Stacey Armato, in her capacity as City Councilperson ("Respondents"), oppose the petition.

Judicial Notice

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Petitioner's RJN Exhibits 1-4 – Granted.

Petitioner's Supplemental RJN Exhibits 5-7 – Granted.

Respondents' RJN Exhibits A-C – Granted.

Respondents' RJN Exhibit D – Denied. Respondents do not show how this federal complaint is relevant to the instant writ petition. (See RJN 3-4.) Moreover, Respondents rely on Exhibit D as extra-record evidence without addressing the requirements of CCP section 1094.5(e) to augment the record. (Oppo. 11:13-16.)

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Background

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City Approves Zone Text Amendment Requested by Petitioner

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In March 2014, the City approved a zone text amendment requested by Petitioner to allow for gym use in the M-1 (light manufacturing) zone. (AR 59.) Petitioner began operating a CrossFit gym (hereafter "Gym") at 725 Cypress Avenue, Hermosa Beach, CA, in or about September 2014. (AR 1246, 1996.)

City Investigates Noise and Vibration Complaints Against the Gym

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The Gym neighbors a residential zone on Loma Drive, which is directly west of the Gym. (AR 1246.) Starting in November 2014, City began to receive numerous complaints from City residents about the Gym. Specifically, City residents complained about loud music, weight noise, weight dropping, vibrations, and organized outdoor class activity. (AR 1246, 1865, 1997-2000.)

In 2015, City code enforcement officers and a city prosecutor, Melanie Chavira, investigated the complaints about the Gym, including for possible misdemeanor criminal charges. (AR 92-94, 1246, 1997-2000.) Although criminal charges were not filed, City investigations of the Gym continued in 2016 and 2017, and included sound tests and community meetings with residents. (AR 1246-48.) In or about 2018, City retained an attorney, Joy Abaquin, with experience in nuisance issues to assist in resolving the alleged nuisance at the Gym and to serve as "Quality of Life" prosecutor. (AR 996, 1768.9.)

Initiation of Nuisance Abatement Proceedings

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On May 22, 2018, the Council adopted a resolution of intent to conduct a hearing on July 10, 2018, to determine if the Gym constitutes a public nuisance. (AR 1019.) Two Councilmembers recused themselves, leaving a quorum of three Councilmembers – Respondent Stacey Armato, Mayor Jeff Duclos, and Hany Fangary. (AR 1023.2-3; see Opening Brief (OB) 5-6.) Both owners of the Gym were present for the May 22, 2018, Council meeting and addressed the Council prior to passage of the Resolution. (AR 1023.14-41.)

The City mailed notice of the nuisance abatement hearing on June 21, 2018, and posted notice on the gym on June 25, 2018. (AR 1121; see OB 6.) On June 22, 2018, Petitioner's lawyer, Albro Lundy, of the law firm Baker Burton Lundy, submitted a letter requesting a 60-day continuance of the hearing because of his own scheduling conflict and also for "additional time to address the concerns of the City and prepare for the hearing." (AR 1068.) On or about July 5, 2018, five days before the Council's July 10, 2018, meeting, City received a public records act from Lundy asking for documents relating to the Gym. (AR 1113-14.)

At the July 10, 2018, Council meeting, the Council first considered and ultimately denied Petitioner's request for a continuance so that its attorney could attend the hearing. Armato and Mayor Dulcos voted against the continuance on the grounds that Petitioner had adequate notice of the July 10 hearing and witnesses had appeared to testify on July 10. (AR 1768.16-25.) Councilmember Fangary abstained based on his objections to the Council's refusal to grant the continuance. (AR 1768.11-16, 1768.146.)

The Council heard presentations of evidence related to the alleged nuisance on July 10, 2018. Specifically, Abaquin made her presentation of evidence and argument as to how Petitioner's conduct constituted a public nuisance; public comment in favor of nuisance abatement was received; the Gym owners, Jed Sanford and Dan Wells, made presentations on behalf of Petitioner; and public comment supporting Petitioner was received. Petitioner did not have an attorney present. (AR 1768.1-1768.150; see Oppo. 8:12-17.)

After deliberations on July 10, 2018, Armato made a motion "that we declare a nuisance and have staff come back, [at] the meeting in August, after working with the owners of [Petitioner] on some abatement measures/mitigation measures to address the nuisance." (AR 1768.145-146.) Mayor Duclos indicated that he could support the motion, while Fangary abstained based on his belief a continuance should have been granted. (Ibid.) Before a formal vote on the motion, City Attorney Jenkins stated "this isn't the final action" and that the City Council was open to hearing further presentation from Petitioner, including from its attorney, at the August 2018 meeting. (AR 1768.146-147.) Mayor Duclos and the Council agreed with that procedure.

On or about August 28, 2018, Petitioner's attorney submitted a 12-page letter discussing alleged procedural errors and also responding on the merits to the nuisance allegations. (AR 1933-44.)

At the August 28, 2018, meeting, the Council heard additional presentation related to the abatement proceedings against Petitioner, including from Petitioner's attorney. (See AR 1995.1-128.) After deliberation, the Council voted unanimously (3-0) to adopt Resolution No. 18-7141 and found that the Gym did constitute a public nuisance. (AR 1996-2010.) City ordered Petitioner to abate the nuisance by undertaking various actions, including to conduct a noise study to determine what sound and vibration measures would satisfy the requirements of City's Municipal Cod sections 8.24.040(I) and 8.24.030 and implement those measures within 90 days. (AR 2008.)

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Writ Proceedings

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On November 7, 2018, Petitioner filed a verified petition for writ of administrative mandate pursuant to CCP section 1094.5 and traditional mandate pursuant to CCP Section 1085[1], and a complaint for violation of civil rights and inverse condemnation.

On February 19, 2019, at a trial setting conference, the court stayed all non-writ causes of action (i.e. third, fourth, and fifth causes of action in original petition and complaint.)

On February 27, 2019, Petitioner filed a verified, first amended petition and complaint ("FAP"), which added a sixth cause of action for violation of equal protection.

On May 2, 2019, the City certified the administrative record.

On May 15, 2019, Respondents filed an answer.

On September 24, 2019, Petitioner dismissed its claims for "Violation of Civil Rights, Equal Protection, and Inverse Condemnation only."

On December 10, 2019, Petitioner filed its opening brief in support of the writ petition.

On March 5, 2020, the court granted Petitioner's motion to augment the administrative record. The court granted Respondents' oral request to file an amended opposition to the writ petition.

On May 8, 2020, Respondents filed their substitute opposition brief to the writ petition. On September 9, 2020, Petitioner filed a reply. The court has received the administrative record and joint appendix.

Standard of Review

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Under CCP section 1094.5(b), the pertinent issues are whether the respondent has proceeded without jurisdiction, whether there was a fair trial, and whether there was a prejudicial

abuse of discretion. An abuse of discretion is established if the agency has not proceeded in the manner required by law, the decision is not supported by the findings, or the findings are not supported by the evidence. (CCP § 1094.5(b).)

"'On questions of law arising in mandate proceedings, [the court] exercise[s] independent judgment.' .... Interpretation of a statute or regulation is a question of law subject to independent review." (*Christensen v. Lightbourne* (2017) 15 Cal.App.5th 1239, 1251.)

"A challenge to the procedural fairness of the administrative hearing is reviewed de novo on appeal because the ultimate determination of procedural fairness amounts to a question of law." (*Nasha L.L.C. v. City of Los Angeles* (2004) 125 Cal.App.4th 470, 482.)

The petitioner seeking administrative mandamus has the burden of proof and must cite to the administrative record to support its contentions. (See *Bixby v. Pierno* (1971) 4 Cal. 3d 130, 143; *Steele v. Los Angeles County Civil Service Commission*, (1958) 166 Cal. App. 2d 129, 137.)

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Analysis

Respondents' Affirmative Defenses – Exhaustion of Administrative Remedies; Mootness

Respondents contend that Petitioner failed to exhaust administrative remedies because (1) Petitioner filed its writ petition before complying with all abatement measures ordered by Resolution No. 18-7141 (the "Resolution"); and (2) Petitioner did not request an extension of time to comply or pursue "further appeal rights." (Oppo. 11-12.)

"When remedies are available before an administrative body, a party must in general exhaust those remedies before seeking judicial relief." (*Singletary v. Int'l Bhd. of Elec. Workers, Local 18* (2012) 212 Cal.App.4th 34, 45.) There are exceptions to the exhaustion requirement, including when "the petitioner can positively state that the administrative agency has declared what its ruling will be in a particular case." (*Bollengier v. Doctors Medical Center* (1990) 222 Cal.App.3d 1115, 1126.)

In the Resolution, City ordered Petitioner to conduct a noise study to determine what sound and vibration measures would satisfy the requirements of City's Municipal Code sections 8.24.040(I) and 8.24.030 and implement those measures within 90 days. (AR 2008.) Respondents contend that this abatement order was an administrative remedy that Petitioner needed to fulfill before filing a writ petition. Respondents cite no authority that supports that argument, which the court finds unpersuasive. (Oppo. 11-12.) The abatement order was part of a final administrative decision which Petitioner could challenge immediately under CCP section 1094.5.

Respondents cite to language in Hermosa Beach Municipal Code ("HBMC") section 8.28.070(E) and (F) suggesting that the property owner can request an extension of time to comply with an abatement order or may make "further appeal" to the Council. (Oppo. 11-12; RJN Exh. C.) Respondents contend that Petitioner was required to take these steps to exhaust its administrative remedies. Since Petitioner is challenging the entire abatement order, and not the time for compliance, an extension of time does not appear to be an adequate remedy. Nor do Respondents explain what "further appeal rights" were available. In any event, City Council had already found that the Gym constitutes a public nuisance. Because Council made its ruling clear, any further appeal rights would be futile. Thus, Petitioner fully exhausted its administrative remedies or was excused from exhausting the purported remedies cited by Respondents.

Respondents suggest that the writ petition is moot because Petitioner allegedly "decided to shutter its business before the City's process was final." (Oppo. 12.) Respondents do not cite to evidence in the record to support this argument, and they do not comply with the requirements of CCP section 1094.5(e) to augment the record. In any event, even if Petitioner closed its Gym in response to the Resolution, that would not make the writ petition moot. In the Resolution, Council declared Petitioner's business to be a public nuisance. Petitioner has a remedy in section 1094.5 to challenge that administrative decision and finding, which could be harmful to Petitioner as a business entity.

Respondents' affirmative defenses for exhaustion of administrative remedies and mootness are denied.

City's Nuisance Abatement Procedures are Not Limited to Criminal Prosecution

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Petitioner contends that "the City concocted a hearing process to obtain a result it couldn't get by following its own Municipal Code." (OB 1, 8-10.) According to Petitioner, "[t]here is no authority for the City to use enforcement methods other than prosecution via misdemeanor complaint" to abate the alleged nuisance at the Gym. (Reply 11.) Respondents contend that City has discretion under the HBMC to pursue administrative, as opposed to criminal, abatement proceedings. Respondents also point out, correctly, that a decision to pursue criminal prosecution against Petitioner is discretionary with City. (Oppo. 13-15; see *Gananian v. Wagstaffe* (2011) 199 Cal.App.4th 1532, 1543-46 [prosecutorial discretion not subject to judicial control].)

City conducted the abatement proceedings and adopted the Resolution pursuant to Chapters 8.24 and 8.28 of the HBMC, as well as HBMC section 1.040.050(C). (AR 1996, 2000-09.)

HBMC section 1.040.050(C) provides that "any condition caused or permitted to exist in violation of any of the provisions of the Code shall be deemed a public nuisance and may be

summarily abated as such by the city, and every day such condition continues shall be regarded as a new and separate offense." (RJN Exh. A.)

Chapter 8.24, titled "Noise Control," prohibits any person within City from making or causing "to suffer any noises, sounds or vibrations that in view of the totality of the circumstances are so loud, prolonged and harsh as to be physically annoying to reasonable persons of ordinary sensitivity and to cause or contribute to the unreasonable discomfort of any persons within the vicinity." (HBMC § 8.24.030.) Section 8.24.030 sets forth several factors to consider in determining whether a noise, sound, or vibration is prohibited, including the volume and intensity of the noise, the proximity to residential uses, and the time of day. (Ibid.) Chapter 8.24 describes certain noise-making activities that are specifically prohibited in the City. (§ 8.24.040.) It provides that "[v]iolations of the provisions of this chapter shall be a misdemeanor enforceable as provided in Chapter 1.04." (§ 8.24.100.)

Chapter 8.25, titled "Nuisances," is intended "to protect the inhabitants of the city against all forms of nuisances, public or private, not specifically prohibited by state law, growing out of any action, activity, condition, circumstances or situation permitted to exist within the city and caused or produced by any person … or by any mechanical or other contrivance, and which is injurious to health, … or offensive to the senses or an obstruction to the free use of property to such an extent as to interfere with the comfortable enjoyment or life or property by the entire community or neighborhood, or by any considerable number of persons." (§ 8.28.010.)

As relevant here, section 8.28.070 sets forth a detailed abatement procedure "[w]henever the director of community development finds that a nuisance exists on any property within the city." Section 8.28.070 describes the notice requirements; the type of evidence to be considered by the Council at the abatement hearing; and the requirement for Resolution of Abatement by the Council.

In its writ briefs, Petitioner does not argue or show that City failed to follow, in all material respects, the abatement procedure set forth in section 8.28.070. Rather, Petitioner contends that Chapter 8.24, which deals with noise, sound, and vibrations, governs the complaints against the Gym and only gave City authority to prosecute such complaints criminally. (OB 8-10.) Petitioner's argument is unpersuasive. Chapter 8.28 defines "nuisances" broadly to include, *inter alia*, "permitting individuals or groups using or visiting such premises in a manner which adversely affects the use or enjoyment of surrounding properties or uses thereof" and "conditions which reasonably constitute a nuisance within the intent expressed in Section 8.28.010." (§ 8.28.020(b)(3); § 8.28.030.) City could reasonably determine that the complaints against Petitioner, which led to the abatement hearing, fell within these broad provisions and could be addressed pursuant to the abatement procedure in section 8.28.070. (See AR 1996-2000.)[2]

Petitioner points out that City "recently amended Chapter 8.24 to remove noise violations from the administrative penalty program." (OB 9.) Petitioner's legislative history suggests that this change was made to give City *more* enforcement options in the form of criminal prosecution. The cited ordinance reclassified violations of Chapter 8.24 as a misdemeanor. (See Suppl. RJN Exh. 5-7.) The legislative history does not show intent to exclude noise complaints from City's abatement procedures in section 8.28.070.

In reply, Petitioner contends for the first time that City's "prosecution" violated the "Williamson Rule." (Reply 11-12, citing *People v. McCall* (2013) 214 Cal.App.4th 1006, 1011-12.) "The salutary rule is that points raised in a reply brief for the first time will not be considered unless good cause is shown for the failure to present them before." (*Balboa Ins. Co. v. Aguirre* (1983) 149 Cal.App.3d 1002, 1010.) Petitioner does not show good cause to raise this legal argument for the first time in reply. In any event, the argument is not persuasive. City did not "prosecute" the alleged nuisance criminally, and Petitioner does not show that the Williamson Rule applies in this context. The "general" ordinance here (section 8.28.070) does not set forth criminal penalties. Chapter 8.24 cannot be viewed as an exception to section 8.28.070.

Petitioner does not show a prejudicial abuse of discretion in City's decision to use the abatement procedure set forth in HBMC section 8.28.070 to adjudicate the nuisance complaints made against the Gym.

Did Councilmember Armato Exhibit an Unacceptable Probability of Actual Bias Against Petitioner?

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Petitioner contends that Councilmember Armato's pre-hearing communications with City residents who made complaints against the Gym, as well as her conduct at the abatement hearings, exhibited an unacceptable probability of bias against Petitioner. (OB 10-13; Reply 5-8.)

Summary of Applicable Law

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"City council members wear multiple hats. It is commonly understood that they function as local legislators. But sometimes they act in a quasi-adjudicatory capacity similar to judges." (*Petrovich Development Company, LLC v. City of Sacramento* (April 2020) 48 Cal.App.5th 963, 973.) ""[W]hen functioning in such an adjudicatory capacity, the city council must be 'neutral and unbiased.'" (Ibid.) "[A]llowing a biased decision maker to participate in the decision is enough to invalidate the decision." (Ibid.)

"Bias and prejudice are never implied and must be established by clear averments." (*Burrell v. City of Los Angeles* (1989) 209 Cal.App.3d 568, 581-582.) Petitioner must show "'an unacceptable probability of actual bias on the part of those who have actual decisionmaking power over their claims.'" (*Nasha LLC v. City of Los Angeles* (2004) 125 Cal.App.4th 470, 483.)

"[I]f the decision maker 'has become personally 'embroiled' in the controversy to be decided,' then the decision maker must be disqualified from further participation in the matter." (*Sabey v. City of Pomona* (2013) 215 Cal.App.4th 489, 498.) Prehearing statements or opinions concerning the subject matter of an administrative hearing do not necessarily disqualify a public official from voting on that matter, although they may be relevant to a bias claim. (See *City of Fairfield v. Sup.Ct.* (1975) 14 Cal.3d 768, 780-781 ["A councilman has not only a right but an obligation to discuss

issues of vital concern with his constituents and to state his views on matters of public importance."]; but see *Nasha L.L.C. v. City of Los Angeles* (2004) 125 Cal.App.4th 470, 483 ["The newsletter article by Lucente, attacking the project as a 'threat to wildlife corridor,' gives rise to an unacceptable probability of actual bias."].)

Additional Factual Background

On May 9, 2016, shortly after Armato was elected to City Council, resident Larry Nakamura emailed Armato to meet to discuss certain community business. (AR 514.) Armato and Nakamura met for coffee on May 16, 2016, and discussed Nakamura's complaints about the Gym. (AR 513.) Based on feedback from the city manager, Armato advised Nakamura that residents needed to call code enforcement with their complaints, and that "the [nuisance] case is basically paused right now because no complaints have been coming in." (AR 513.)

In late May 2016, Armato helped arrange a meeting between City code enforcement officials and residents affected by the noise and vibrations coming from the Gym. (AR 580, 1116.)

On June 28, 2016, after a phone call the day before, Nakamura wrote Armato an email and asked her to "keep this email between us." (AR 567.) Nakamura wrote that he and other residents were concerned that "code enforcement communications with the gym often hurts our cause (unintentional as they may be)" by alerting Petitioner to upcoming noise tests. (AR 597.) Armato responded that she did not know how information was getting back to the Gym. (AR 604-605.)

On July 11, 2016, Armato wrote to Nakamura: "Any update on the vibrations? Still quiet?" (AR 612.) Nakamura responded: "overall it has been very quiet with the exception of a day or so. Reasonable enough to me." (AR 611.)

City residents made a video of Gym members using City streets for workouts. (AR 611.) On July 12, 2016, Armato asked Nakamura if she could share the video with code enforcement officer Bob Rollins ("Rollins"). (AR 611, 640, 647.) Amato indicated "[Rollins] seemed very willing previously to issue a citation on that." (AR 611.) On July 13, 2016, Armato shared the video with Rollins. (AR 647.)

Nakamura and Armato continued to exchange e-mails and texts about the Gym and the alleged nuisance. (AR 640-685.) On August 31, 2016, Armato wrote: "I cannot express enough how sorry I am that this continues to be a problem." (AR 671.) On October 12, 2016, she wrote: "I'm sorry that they continue to be such a nuisance but at least they turned it down." (AR 677.)

On January 15, 2017, in an email to code enforcement officer Justin Edson ("Edson") and others, Armato wrote: "Copying our city manager so he is aware of the continued, unacceptable

nuisance [at the Gym] as we work on next steps." (AR 1415; see also AR 691, 1410-27 [Edson communications with Armato and others about the noise complaints re: the Gym].)

On February 16, 2018, Armato received a noise and vibration complaint about the Gym from Becky Nakamura, a City resident. In response, Armato wrote: "Thank you, Becky. We are building the record and this information is helpful. I'm sorry they continue to be terrible neighbors." (AR 806.) On March 2, 2018, Armato wrote Beck Nakamura: "I know it's a pain but have you already spoken to code enforcement or the police tonight? It sounds like the activity is much worse than normal and if they can document that would be helpful. Regardless, I've forwarded this to our city attorney to help establish a plan to resolve this nuisance." (AR 811.)

On March 2, 2018, in response to a vibration complaint from resident Bruce Burger, Armato wrote: "Lots of complaints tonight about the gym. I've looped in the city attorney and he's helping devise a plan that truly addresses the nuisance.... Meanwhile, please continue to call code enforcement or police ... so we can keep that documented as well." (AR 815.)

A community meeting was held regarding the Gym and the alleged nuisance on April 23, 2018. (AR 1116.) Armato did not attend the meeting, having been instructed by the City Attorney not to attend. (Suppl. AR ("SAR") 1.) On April 23, 2018, at 7:05 pm, Armato texted Nakamura: "I'm sorry I wasn't allowed to be at the meeting tonight. City Atty wouldn't allow it. Please ask your questions in the meeting tonight – I know it's important for the prosecutor to know the whole picture. I'll call you tomorrow." (SAR 1.) On April 24, 2018, Armato wrote Nakamura that she "was able to talk to Binder [another resident] right after the meeting." (SAR 1.)

Petitioner contends that "[t]here are no e-mails in the record between Armato and the gym." (OB 12.) In opposition, Respondents cite no evidence of communications between Armato and Petitioner's representatives.

On May 17, 2018, a few days before the first hearing on May 22, 2018, at which Council voted to initiate the abatement proceedings against Gym, Armato texted Nakamura: "It's finally on our agenda to set a date for a public nuisance hearing.... Mary and Justin have to recuse themselves. So it's just me, Hany and Jeff. I'm hopeful it will move forward!" (SAR 2.)

On May 22, 2018 the Council, with Armato making the motion, determined sufficient evidence existed to proceed to a "nuisance abatement" hearing against Petitioner. (AR 1061-65, 1023.37.)

Prior to the July 10, 2018, hearing, City posted a staff report that included numerous heavily redacted emails and various reports concerning the Gym. (See OB 6; AR 1246-1690.) Some of Armato's communications with residents and code enforcement officials are included, although resident names are redacted. (See e.g. AR 1400-04, 1411-12, 1415-21, 1428.) It appears Armato's text messages with Nakamura were not disclosed prior to the abatement hearings. Respondents cite no evidence to the contrary.

At the start of the July 10, 2018, abatement hearing, the Councilmembers were asked to disclose their ex parte communications. In response, Armato stated the following:

> Thank you, Mr. Mayor. My ex parte communications aren't unlike Councilmember Fanagry's. I'd say for a better part of a year people have been forwarding me various complaints. I sent those along to staff and also responded. They, from what I could tell, were part of the record. And I've also had phone calls with some of the affected residents, and their testimony seems to be reflected in this report as well, but I haven't formed an opinion one way or another, and I haven't substantiated the complaints from the past year or so either. (AR 1768.7.)

At the July 10, 2018, Council meeting, the Council first considered and ultimately denied Petitioner's request for a continuance so that its attorney could attend the hearing. Armato and Mayor Dulcos voted against the continuance. (AR 1768.16-25.) After the Council heard evidence on the merits, Armato made a motion "that we declare a nuisance and have staff come back, [at] the meeting in August, after working with the owners of [Petitioner] on some abatement measures/mitigation measures to address the nuisance." (AR 1768.145-146.) Mayor Duclos agreed, and the hearing was continued to August 2018 meeting for further presentation. (AR 1768.146-147.)

At the August 28, 2018, meeting, after the Council heard additional evidence, Armato moved to adopt the resolution declaring the gym a nuisance and imposing abatement conditions. (AR 1995.127.) The motion passed unanimously. (AR 1996-2010.)

Analysis of Petitioner's Bias Claim

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The record shows that newly elected Councilmember Armato received numerous complaints from residents about the Gym, and that, in particular, she communicated extensively with Larry Nakamura about his complaints. Armato was responsive to the complaints, some of which she forwarded to the city manager. Armato encouraged residents to document their complaints and contact City code enforcement officials. She also helped arrange a meeting between City code enforcement officials and residents affected by the noise and vibrations coming from the Gym. These communications and actions with constituents, standing alone, do not show an unacceptable probability that Armato was biased against Petitioner with respect to the residents' nuisance allegations. (See *City of Fairfield v. Superior Court* (1975) 14 Cal.3d 768, 780-81 [local officials are expected to discuss matters with constituents].)

In several communications with residents or City staff, Armato described the Gym's activities as "a nuisance" or a "continued, unacceptable nuisance." (AR 677, 1415, 811, 815.) She also consoled a resident that Petitioner and its Gym users "continued to be terrible neighbors." (AR 806.) While ill-advised given her potential role as decisionmaker in an abatement proceeding, these pre-hearing statements do not, in themselves, disqualify Armato from voting on the abatement case. The alleged nuisance at the Gym was a matter of concern for members of the local

community, who were Armato's constituents. (See *City of Fairfield, supra* at 780; see also *Petrovich Development Company, LLC v. City of Sacramento* (April 2020) 48 Cal.App.5th 963, 974.)

However, these communications, in conjunction with other concrete facts, show an unacceptable probability that, during the more than two years of City investigation prior to the abatement hearing, Armato became biased in favor of the complaining residents and against the Gym.

As argued in the opening brief, Armato communicated directly with code enforcement officials about the residents' complaints, contravening HBMC section 2.12.080. (See OB 4; RJN Exh. 4.) Respondents do not address this argument in opposition. Section 2.12.080 states that Councilmembers "shall deal with the administrative service of the city only through the city manager, except for the purpose of inquiry, and neither the city council nor any member thereof shall give orders to any subordinates of the city manager." (RJN Exh. 4.) Despite this rule, the record shows various direct communications between Armato and City code enforcement officials that exceeded the scope of mere "inquiry." Armato shared with code enforcement official Rollins a video prepared by residents of alleged code violations by Gym users, and added her opinion that "this nuisance persists." (AR 647; see also AR 611, 640, 653.) Armato admittedly gave instructions to code enforcement official Justin Edson to investigate resident complaints about the Gym. (AR 680.) Emails from Edson show that he reported directly back to Armato after investigating noise and vibration complaints about the Gym. (AR 1412, 1420.)

Especially when considered alongside her direct communications with code enforcement officials, Armato's communications with complaining residents show that she became an active participant in building a nuisance case against the Gym. For instance, following a complaint from Becky Nakamura in February 2018, Armato wrote: "Thank you, Becky. ***We are building the record*** and this information is ***helpful***." (AR 806 [emphasis added].) Although Armato was instructed by the City Attorney not to attend the community meeting on April 23, 2018, she nonetheless communicated directly with complaining residents both before and after the meeting. (AR 1116, SAR 1.) Armato encouraged Nakamura to "ask your questions in the meeting tonight – I know it's important for the prosecutor to know the whole picture." (SAR 1.) Armato was not simply responsive to constituents, as Respondents contend. She helped the residents "build a record" that would support an abatement claim against Petitioner, and that she and the other Councilmembers would decide. There is no evidence Armato gave similar assistance to Petitioner in addressing the nuisance allegations, or that Armato even discussed the case with Petitioner.

Although not as blatant as the facts in *Petrovich, supra*, the record also contains evidence that Armato counted votes prior to the abatement hearings. (See *Petrovich, supra* at 974-975.) On May 17, 2018, a few days before the first hearing on May 22, 2018, at which Council voted to initiate the abatement proceedings against Gym, Armato texted Nakamura: "It's finally on our agenda to set a date for a public nuisance hearing.... Mary and Justin have to recuse themselves. So it's just me, Hany and Jeff. I'm hopeful it will move forward!" (SAR 2.) Although this statement does not expressly commit Armato to vote in favor of finding the Gym a nuisance, the text message must be interpreted in context of the years of communications between Armato and Nakamura about his complaints against the Gym. In that context, Armato strongly suggests to Nakamura that she believed, before the proceedings even began, that the abatement case had a good chance of prevailing given the makeup of the Council, after two recusals. The exclamation point used by

Armato at the end of the text message is also revealing of her expectation that the abatement proceedings would lead to a favorable result for Nakamura and other complaining residents.

Respondents contend that Armato disclosed her ex parte communications at the July 10, 2018, hearing, negating any bias claim based on those communications. (Oppo. 16, citing AR 1768.7.) The contents of Armato's text messages with Nakamura were not disclosed prior to the abatement hearings in the staff report. (AR 1246-1690.) Respondents cite no evidence to the contrary. Respondents assert that no California statute restricts ex parte communications with City decisionmakers. (Oppo. 16, fn. 13.) This argument is irrelevant. Petitioner's bias claim is not based on the fact Armato engaged in ex parte communications. Rather, Petitioner asserts that the contents of the communications show an unacceptable risk of bias.

If the text messages with Nakamura had been disclosed prior to the abatement proceedings, Petitioner would have had grounds to demand Armato's recusal. Armato had access to the staff report prior to the July 10, 2018, abatement hearing. Thus, her statement that her communications with residents were "part of the record" was misleading. Moreover, in her disclosure, Armato downplays her communications with residents. As discussed above, residents did not simply "forward" complaints to Armato. She was actively involved in helping the residents "build a record" against the Gym. Because her disclosure of ex parte communications was not complete, and because of the other evidence of bias summarized above, Armato's assertion at the July 10, 2018, meeting that she had not formed an opinion about the case is not persuasive evidence of impartiality.

Armato's statements and actions during the abatement hearings also support a finding of unacceptable probability of bias. Petitioner's attorney could not attend the July 10, 2018, meeting, and the Council eventually decided to continue the hearing for further presentation from Petitioner's attorney. Nonetheless, Armato appeared adamant at the July 10, 2018, meeting that the Council find the Gym to be a public nuisance at that time, prior to presentation from Petitioner's attorney. (AR 1768.130.) Additionally, as in other cases in which a City decisionmaker was found to be biased, Armato made the dispositive motions against Petitioner. (See AR 1768.145-146, 1995.127; see *Petrovich, supra* at 974-975; *Nasha L.L.C. v. City of Los Angeles* (2004) 125 Cal.App.4th 470, 477; *Woody's Group, Inc. v. City of Newport Beach* (2015) 233 Cal.App.4th 1012, 1023 ["like the biased member in *Nasha,* Henn was the one to propose the motion that the lower decision be overturned."].)

Respondents contend that Armato was not biased because she participated in deliberations to revise the restrictions imposed on the Gym. (OB 15-16; see AR 1995.72-127.) The Council imposed substantial restrictions on the Gym, *after* the Gym had been declared a nuisance. Respondents' record citations suggest Armato advocated for substantial restrictions, including on the Gym's use of free weights (free weights are important to a CrossFit gym.) Armato also advocated for a shorter, 60-day compliance period for the Gym. (See AR 1995.81-90, 110-120.) Moreover, even if the unacceptable risk of bias extended primarily to Armato's decisionmaking with respect to the question of whether the Gym was a nuisance, that risk of bias invalidates the decision.

Respondents contend that, unlike in *Nasha* and other cases, Armato "did not predetermine or write out any statement prior to the meeting." (Oppo. 18.) However, as discussed above, the record shows that Armato became an active participant in building a nuisance case against Petitioner, and that she did not give similar assistance to Petitioner. While she may not have written an advocacy statement prior to the meeting, she performed functions of an advocate (e.g. investigation, evidence gathering) only for the complaining residents.

Based on the foregoing, "concrete facts" in the record establish an unacceptable probability that Armato was biased against Petitioner, and in favor of complaining residents, on the question of whether the Gym was a public nuisance. Armato should have recused herself. Because she did not, Petitioner did not receive a fair hearing and the Council's decision must be set aside.

Petitioner's Other Fair Hearing Arguments

Petitioner makes several other fair hearing arguments, specifically that the City Attorney acted as both prosecutor and neutral advisor (OB 12); City did not disclose all relevant evidence prior to the abatement hearing, and omitted some relevant evidence from the Staff reports (OB 13-14; Reply 8-9); City did not allow cross-examination of witnesses (Reply 10); and Mayor Duclos impermissibly discussed evidence from outside the abatement hearing (OB 14-15.)

Petitioner does not show that the City Attorney acted as a prosecutor or played a part in preparing the case for trial. (See Oppo. 17; cf. *Nightlife Partners v. City of Beverly Hills* (2003) 108 Cal.App.4th 81, 93 ["it is improper for the same attorney who prosecutes the case to also serve as an adviser to the decision maker"].) Petitioner relies upon Armato's March 2018 email, which stated that she "looped in the city attorney and he's helping devise a plan" to address the alleged nuisance. (OB 12, citing AR 815.) This email does not show that the City Attorney participated with the Quality Life Prosecutor in the preparation of the case for the abatement hearing. City hired Abaquin to perform that role. (AR 996, 1768.9.) Nor do Petitioner's record citations from the July 10, 2018, hearing support a fair hearing claim. (OB 12:11-13.) The City Attorney advised the Council to continue the July 10, 2018, hearing for further presentation, and made other statements consistent with a neutral adviser. (See AR 1768.141-142.)

A fair procedure did not necessarily require City to allow Petitioner to examine or question City's witnesses. City's abatement procedure, section 8.28.070, does not require cross-examination. When an administrative proceeding may result in a severe penalty, and when the credibility of witnesses is central to the adjudication of the allegation, a fair procedure may require that the agency allow some form of cross-examination of the witnesses at the hearing. (*Doe v. Allee* (2019) 30 Cal.App.5th 1036, 1069; *Doe v. Regents of University of California* (2018) 28 Cal.App.5th 44, 60.) However, in a writ proceeding, the burden is on Petitioner to show that these circumstances are present such that cross-examination was required. In its writ briefs, Petitioner does not show, with citation to the record, that credibility of any witnesses was central to City's adjudication of the abatement claims. (See OB 13-14.) Petitioner does not discuss any credibility findings made by the Council or explain which witnesses Petitioner wished to cross-examine or the types of questions Petitioner would ask. On this record, and based on the briefing provided, the court cannot conclude that cross-examination of witnesses was required in this case. However, in

any new hearing, City would need to consider the guidance provided in *Doe v. Regents* and similar cases with regard to cross-examination.

Petitioner's remaining fair hearing arguments also require a showing of prejudice. A court will not issue a writ of administrative mandate unless the petitioner shows that the agency's error "prejudicially affect[ed] the petitioner's substantial rights." (*Thornbrough v. Western Placer Unified School Dist.* (2013) 223 Cal.App.4th 169, 200.) Procedural errors, "even if proved, are subject to a harmless error analysis." (*Hinrichs v. County of Orange* (2004) 125 Cal.App.4th 921, 928.)

Petitioner cites to Mayor Duclos' reference to extra-record evidence. The extra-record evidence was not a stated basis for the Council's abatement decision. (OB 14-15, citing AR 1768.125-126, 1995.44-46; AR 1996-2000.) While Duclos should not have considered matters outside the record, Petitioner has shown insufficient prejudice from this fact alone to overturn the decision on fairness grounds.

Petitioner contends that City did not disclose some relevant evidence prior to the abatement hearing, pointing to Abaquin's presentation of a technical vibration propagation theory and City's redaction of residents' names from emails. While City should have given notice to Petitioner of the material evidence upon which it intended to make the nuisance determination, Petitioner has not shown sufficient prejudice from introduction of the vibration theory. While redaction of residents' names from e-mails could have prejudiced Petitioner, Petitioner has not sufficiently shown prejudice, especially in light of the fact numerous residents testified at the nuisance hearing.

City omitted the "disposition" of certain noise complaints from a table produced in the abatement proceedings. It also appears City did not produce certain police reports. (See Reply 8-9; SAR 5-30; cf. AR 1393.) Although Petitioner does not cite a procedural rule or case on point, it was improper for City to submit only favorable parts of the table of complaints. Nonetheless, as argued in opposition, Petitioner does not show that the omission of this evidence was prejudicial. (Oppo. 19.) Noise and vibration complaints are "temporal," and thus the "disposition" of the complaints does not necessarily support Petitioner's position that no nuisance occurred. There was other evidence to substantiate the noise and vibration complaints, to which Petitioner responded. (See AR 1768.72-82, 1933-44, 1995.4-16.) For similar reasons, Petitioner has not shown prejudice from City's failure to produce the police reports.

In summary, Petitioner does not show that the City Attorney acted as prosecutor in the case. Petitioner does not show that cross-examination was required, and Petitioner does not make a sufficient showing of prejudice for its other fair hearing arguments. However, the administrative decision must be set aside as a result of the unacceptable probability that Armato was biased against Petitioner. Any further hearing should also be conducted in light of the fairness arguments discussed above.

Conclusion

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The petition for writ of mandate is GRANTED. The court will issue a writ directing City to set aside Resolution No. 18-7141.

Should City conduct any further abatement proceedings against Petitioner related to the allegations at issue in Resolution No. 18-7141, City shall conduct the hearing before impartial decisionmakers, and in accordance with this ruling.

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[1] Although the petition also cites CCP section 1085, Petitioner makes no argument in its writ briefs for a writ of ordinary mandate. Because an abatement hearing was required by law and discretion in the determination of facts is vested in the City Council, the action is governed by CCP section 1094.5. (See *Bunnett v. Regents of University of California* (1995) 35 Cal.App.4th 843, 848.)

[2] The court states no opinion on the merits of the nuisance allegations against Petitioner.

PROOF OF SERVICE

Hermosa Fitness, LLC v. City of Hermosa Beach, et al.

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is: 3150 Bristol Street, Suite 220, Costa Mesa, CA 92626. My email address is: ljuarez@ringbenderlaw.com

On September 24, 2020, I served the foregoing document(s) described as:

NOTICE OF ORDER GRANTING PETITION FOR WRIT OF MANDATE

on all interested parties in this action by placing ☒ a true copy ☐ the original thereof enclosed in sealed envelopes addressed as follows:

☐ BY MAIL - As follows: I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. Postal Service on that same day with postage thereon fully prepaid at Irvine, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

☐ BY OVERNIGHT DELIVER - By placing the document(s) listed above in a sealed envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a FedEx agent for delivery, or deposited in a FedEx box or other facility regularly maintained by FedEx, in an envelope or package designated by the express service carrier, with delivery fees paid or provided for, addressed to the person(s) at the address(es) set forth above.

☒ BY PERSONAL DELIVERY - I caused such envelope to be hand delivered to the offices of the addressee.

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

Executed on September 24, 2020, at Foothill Ranch, California.

Laura T. Juarez
(Type or print name)

Laura Juarez
(Signature)

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