**BEFORE THE BOARD OF SUPERVISORS**

**OF NAPA COUNTY**

In the Matter of:

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| Consideration and possible direction regarding an appeal filed by Robert Barbarick on behalf of Balloons Above the Valley to a decision by the Napa County Planning Commission to deny Use Permit No. P19-00303 requesting daily launching of up to eight hot air balloons year round and related activities between the hours of 6:00 a.m. and 9:30 a.m., on a 2.03-acre parcel within the Agricultural Preserve (AP) zoning district, with a General Plan land use designation of Agricultural Resource (AR) located at 5360 Washington Street, Napa, California, APN: 036-130-029. | **RESOLUTION NO. 2021-07**  **FINDINGS OF FACT AND DECISION ON APPEAL** |

WHEREAS, on June 28, 2019, Robert Barbarick on behalf of Balloons Above the Valley (the Applicant or BATV) submitted an application for Use Permit No. P19-00303-UP requesting daily launching of up to eight hot air balloons year round and related activities between the hours of 6:00 a.m. and 9:30 a.m. (the Project); and

WHEREAS, the Project site is located on a 2.03-acre parcel within the Agricultural Preserve (AP) zoning district, with a General Plan land use designation of Agricultural Resource (AR) located at 5360 Washington Street, Napa, California, APN: 036-130-029; and

WHEREAS, resubmittal applications with additional information about the hot air balloon operation were provided on September 4, 2019; November 11, 2019; and January 1, 2020. The application was determined to be complete on February 7, 2020; and

WHEREAS, on October 23, 2019, a New Project Submittal Courtesy Notice was mailed to all property owners within 1,000 feet of the subject property and emailed to those persons on the general CEQA document notification list; and

WHEREAS, after a preliminary review of the Project, the Planning, Building and Environmental Services (PBES) Department determined that the Project might result in a significant environmental effect and therefore required preparation of an Initial Study consistent with the requirements of the California Environmental Quality Act (CEQA) to determine if the Project may have a significant effect on the environment; and

WHEREAS, on August 12, 2020, the Public Notice for the Planning Commission hearing and Notice of Intent to Adopt a Negative Declaration was mailed to all property owners within 1,000 feet of the subject property as well as any other persons who had requested notice. It should be noted that the County’s requirements to notice all property owners within 1,000 feet far exceeds the State mandate of noticing all owners within 300 feet. Notice was also provided to those persons on the general CEQA document notification list. The Notice was published in the Napa Valley Register on August 12, 2020; and

WHEREAS, on September 2, 2020, the Planning Commission held a properly noticed public hearing on the Project and the Negative Declaration. After considering all written and verbal public testimony and all evidence submitted, the Planning Commission closed the public hearing, deliberated, and voted (3:2 – AYES: Whitmer, Gallagher and Cottrell; NOES: Mazotti and Dameron) to deny Use Permit No. P19-00303; and

WHEREAS, on November 6, 2020, after the Commission’s decision and within the prescribed period, Robert Barbarick on behalf of Balloons Above the Valley (Appellant or BATV) submitted a timely Notice of Intent to Appeal the Planning Commission’s decision to deny the Project and then filed a timely Appeal Packet on November 6, 2020 (collectively the Appeal). The Appeal Packet specified the grounds on which the Appellant’s Appeal is based, and are set forth with more particularity therein[[1]](#footnote-1); and

WHEREAS, in accordance with Napa County Code (NCC or County Code) Section 2.88.080(A), a hearing on the Appeal was scheduled before the Board of Supervisors (the Board) for December 15, 2020, a date at least 15 but no more than 90 days from the date of submittal of the Appeal; and

WHEREAS, due to an error in the public noticing, on December 15, 2020, the Board continued the public hearing (without public comment) on the Appeal to January 12, 2021; and

WHEREAS, on December 22, 2020, public notice of the January 12, 2021, appeal hearing was mailed and provided to all parties who received notice of the Planning Commission hearing on September 2, 2020. The notice ran in the Napa Valley Register on December 22, 2020; and

WHEREAS, on January 12, 2021, at a duly noticed continued public hearing on the Appeal, the Board heard and considered all evidence and testimony regarding the Appeal. The Board closed the public hearing and adopted a motion of intent to: (1) uphold the Appeal; (2) reverse the Planning Commission’s decision; and (3) approve the Project and Use Permit No. P19-00303 subject to Revised Conditions of Approval. The Board further directed County Counsel to prepare a resolution containing Findings of Fact and Decision on Appeal in support of its proposed decision to present those findings to the Board for consideration at its meeting on January 26, 2021; and

WHEREAS, on January 26, 2021, this proposed resolution containing the Findings of Fact and Decision on Appeal was presented to the Board for possible adoption; and

WHEREAS, this proposed resolution containing the Findings of Fact and Decision on Appeal having been presented to the Board for possible adoption at a regular meeting of the Board on January 26, 2021, and interested persons having been given an opportunity to address the Board regarding the proposed resolution;

**NOW, THEREFORE, BE IT RESOLVED,** that the Board of Supervisors finds, determines, concludes and decides as follows:

**Section 1. Recitals.**

The Board finds and determines that the foregoing recitals are true and correct.

**Section 2. Conduct of Appeal.**

A. NCC Section 2.88.090(B) provides that if the hearing before the approving authority was recorded electronically or by a certified court reporter then upon request by the appellant or any interested party and upon a showing of good cause, the Board may permit additional evidence to be presented which could have been presented at the time of the decision appealed from was made but was not presented. Here, the Planning Commission proceeding was recorded electronically and a transcript of the proceeding was provided to the Board.

B. The Appellant did not request augmentation of the Planning Commission record of proceedings with new evidence or that the Board hear the Project de novo. As such, no new evidence was allowed or considered by the Board in connection with the Appeal.

**Section 3. Findings of Fact and Conclusions of Law on Appeal.**

The Board makes the following findings of fact and conclusions of law in regard to each of the grounds for appeal as stated by Appellant in the Appeal[[2]](#footnote-2):

**A. First Ground of Appeal.**

**Appellant’s Position:** Appellant asserts that the Planning Commission abused its discretion by deciding that the zoning ordinance is inconsistent with the County's General Plan, and that balloon launchings should not be permitted, as a rule, in the Agricultural Preserve. Appellant claims that the Board of Supervisors determined in 2006 that Ordinance No. 1276 was consistent with the General Plan and remained consistent with the General Plan update in 2008. Appellant further asserts that the Board made a decision that balloon launching would be permitted in the Agricultural Preserve under very exacting standards.

**Findings and Decision:** The Board finds and determines as follows:

The Planning Commission did not abuse its discretion. The Planning Commission’s finding of General Plan inconsistency applied to the specific Project before it rather than the underlying zoning ordinance. As described in Planning Commission Resolution No. 2020-01, the Planning Commission interpreted General Plan Goal AG/LU-1[[3]](#footnote-3) and Policies AG/LU- 4[[4]](#footnote-4) and AG/LU-12[[5]](#footnote-5) in a manner that resulted in a finding of inconsistency based on the unique features of the Project site and what the Commission viewed as significant increases in intensity and level of commercial activity. Nothing in the Resolution broadly finds or concludes that the zoning ordinance is inconsistent with the General Plan or that hot air balloon launching is an inappropriate use on all agricultural lands.

The Napa County Board of Supervisors is the local government body charged by law with interpreting the County’s land use policies and rendering the final determination on a project’s consistency or lack thereof with those land use policies.[[6]](#footnote-6) Further, the Board has significant discretion in interpreting the County’s land use policies. The courts’ review of a county’s interpretation of its general plan policies is highly deferential because “policies in a general plan reflect a range of competing interests” and the agency’s decision-making body “must be allowed to weigh and balance the plan’s policies when applying them, and it has broad discretion to construe its policies in light of the plan’s purpose.”[[7]](#footnote-7)

The rule of general plan consistency is that the project must at least be *compatible with* the objectives and policies of the general plan.[[8]](#footnote-8) “[S]tate law does not require perfect conformity between a proposed project and the applicable general plan” for a site, or an exact match between the project and the applicable general plan. [Citations.] Instead, a finding of consistency requires only that the proposed project be ‘*compatible* with the objectives, policies, general land uses, and programs specified in’ the applicable plan. [Citation.] “The courts have interpreted this provision as requiring that a project be ‘in agreement or harmony with’ the terms of the applicable plan, not in rigid conformity with every detail thereof.”[[9]](#footnote-9) To reiterate, the essential question is “whether the project is compatible with, and does not frustrate, the general plan’s goals and policies.”[[10]](#footnote-10)

Judicial review of consistency findings is highly deferential to the local agency.[[11]](#footnote-11) “[C]ourts accord great deference to a local governmental agency’s determination of consistency with its own general plan, recognizing that ‘the body which adopted the general plan policies in its legislative capacity has unique competence to interpret those policies when applying them in its adjudicatory capacity. [Citations.] Because policies in a general plan reflect a range of competing interests, the governmental agency must be allowed to weigh and balance the plan’s policies when applying them, and it has broad discretion to construe its policies in light of the plan’s purposes. [Citations.] A reviewing court’s role “is simply to decide whether the city officials considered the applicable policies and the extent to which the proposed project conforms to those policies.” [Citation.]’”[[12]](#footnote-12)

The Board is not bound by the Commission’s determination that the Project is inconsistent with the General Plan and would adversely affect the public welfare. A majority of the Board reasonably interpreted the applicable General Plan agricultural policies in a manner similar to what Staff had recommended in the General Plan Consistency Analysis provided to the Planning Commission. The record reflects that l**ess than half of the 2.03-acre parcel would be used for balloon launching for up to three hours a day, no permanent structures or facilities would be constructed, and the Project would not remove crops or permanently convert the site (predominantly a fallow field) from agricultural use.** Furthermore, the additional launch days per year is not detrimental to agriculture in general or agricultural uses adjacent to the area as evidenced by neighboring vineyard owners (Rodgers Land and Development Company) written support of the Project. **Therefore, the Project is consistent with Policies AG/LU-1 and AG/LU-4.** The Board further recognizes that while hot air balloon launchings are not directly related to agriculture, they provide a means for showcasing the County’s agricultural preserve and agricultural landscape and allow people to experience and enjoy the County's agricultural lands that are otherwise inaccessible.

In the use permit application, Appellant requested up to 365 launch or attempted launch days a year, which is the maximum allowed by the ordinance code, yet Appellant estimated that launching would likely occur approximately 229 days per year. A majority of the Board considers launching up to 365 days a year excessive, unlikely given the weather and seasonal variations and per the Appellant unnecessary for Appellant’s business and economic needs. Therefore, the Board reduced the number of Appellant’s launch days per year from a maximum of 365 to 225.(See Revised COA Project Scope No. 1.1 (a) and COA No. 4.12 (a).)The Board finds that the additional launch days resulting from grant of the use permit is an expansion of the existing use that is already occurring and is not a new use or of such magnitude as to render the primary use of the parcel as commercial rather than agriculture. Therefore, the Project is not inconsistent with Policy AG/LU-12.

**Conclusions:**

For the foregoing reasons, **the Board finds the Project consistent with the General Plan and with applicable General Plan policies supporting agriculture. The** Board further finds that substantial evidence exists in the record to uphold the Appeal in its entirety, reverse the Planning Commission’s decision to deny the Project and approve the Project and Use Permit No. P19-00303 subject to the Revised Conditions of Approval attached as Exhibit “A.”

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**B. Second Ground of Appeal.**

**Appellant’s Position:** Appellant asserts that the area used for balloon launching is actually about an acre that has not been in agricultural use for at least 40 years. Balloon launchings already occur on the property, so granting the requested use permit would not create a new use.

**Findings and Decision:** The Board finds and determines as follows:

Appellant holds Administrative Permit No. P19-00235 that allows a maximum of 50 launch days per year or attempted launches. The Board concurs with Appellant that granting Use Permit No. P19-00303 would increase the number of launch days already occurring on the property but is not a new use and therefore the Project is not inconsistent with Policy AG/LU-12. See also Findings and Determination to the First Ground of Appeal incorporated here by reference.

**Conclusion:**

For the foregoing reasons, **the Board finds the Project consistent with the General Plan and with applicable General Plan policies supporting agriculture. The** Board further finds that substantial evidence exists in the record to uphold the Appeal in its entirety, reverse the Planning Commission’s decision to deny the Project and approve the Project and Use Permit No. P19-00303 subject to the Revised Conditions of Approval attached as Exhibit “A.”

**C. Third Ground of Appeal.**

**Appellant’s Position:** Appellant asserts that the Project and the zoning ordinance that permits the Project both further the objectives and policies of the General Plan, including Agricultural Policies AG/LU-1, AG/LU-4 and AG/LU-12, which require the preservation and reservation of agricultural lands for agricultural uses, because hot air balloon flights allow people to experience and enjoy the County's agricultural lands that are otherwise inaccessible. This visual experience draws tourists to partake in other aspects of the County's agricultural identity, including wine tasting and tours. The Project's small footprint and lack of permanent physical changes to the property mean that future agricultural use of the property is neither inhibited nor obstructed.

**Findings and Decision:** The Board finds and determines as follows:

A majority of the Board concurs with Appellant and with the Staff-recommended General Plan Consistency Analysis regarding the Project’s consistency with the General Plan including Community Character Element, Recreation and Open Space Element, Economic Element and applicable General Plan policies supporting agriculture. See also Findings and Determination to the First and Second Grounds of Appeal incorporated here by reference.

**/ /**

**Conclusion:**

For the foregoing reasons, **the Board finds the Project consistent with the General Plan and with applicable General Plan policies supporting agriculture. The** Board further finds that substantial evidence exists in the record to uphold the Appeal in its entirety, reverse the Planning Commission’s decision to deny the Project and approve the Project and Use Permit No. P19-00303 subject to the Revised Conditions of Approval attached as Exhibit “A.”

**D. Fourth Ground of Appeal.**

**Appellant’s Position:** Appellant asserts that the Commission erred in substituting its own judgment for that of the Board of Supervisors who adopted Ordinance No. 1276 and the General Plan and for the Staff members who carefully prepared the General Plan Consistency Analysis.

**Findings and Decision:** The Board finds and determines as follows:

The Planning Commission did not substitute its judgment for that of the Board of Supervisors. The Commission used its judgment and discretion and interpreted the General Plan policies in a reasonable manner. The fact that the interpretation does not comport with Appellant’s interpretation does not make it erroneous.

The Board is not bound, however, by the Planning Commission’s interpretation and may make its own reasonable interpretation of the policies at issue. Furthermore, as the body that adopted the General Plan, the Board is the body empowered to decide matters of consistency. See also Findings and Determination to the First Ground of Appeal incorporated here by reference.

**Conclusion:**

For the foregoing reasons, **the Board finds the Project consistent with the General Plan and with applicable General Plan policies supporting agriculture. The** Board further finds that substantial evidence exists in the record to uphold the Appeal in its entirety, reverse the Planning Commission’s decision to deny the Project and approve the Project and Use Permit No. P19-00303 subject to the Revised Conditions of Approval attached as Exhibit “A.”

**E. Fifth Ground of Appeal.**

**Appellant’s Position:** Appellant asserts that it has safely operated a balloon launching business from the property since June 2019. Any suggestion by the Commission that its application is adversely affects the health, safety and welfare of the County is overreaching and belies the fact that the application was not given fair consideration. Appellant asserts that the Planning Commission does not have any reasonable facts at its disposal that show that Appellant is not operating safely or poses any meaningful risk to public health, safety or welfare.

**Findings and Decision:** The Board finds and determines as follows:

While the record contains verbal and written testimony, complaints, and photographs from residents regarding noise and disruption to their quality of life resulting from balloon operations in general and then also from residents living in close proximity to the launch site, the property owners residing within 500 feet of the Project site all support the Project (a prerequisite required by the County Code).

The Federal Aviation Administration (FAA) requires that each hot air balloon have a serial number on the balloon as a form of identification. However, some people have stated that the serial numbers are illegible from a distance once the balloons are airborne, so it is difficult for them to ascertain which operator’s balloons are responsible for the public complaints and alleged violations. To ensure that Appellant’s balloons are readily identifiable and operating in compliance with FAA regulations including minimum altitude requirements, Appellant voluntarily agreed at the Appeal hearing to a new Condition of Approval requiring self-identification. Appellant agreed that all of its balloons would be clearly marked and identifiable. The Board finds that Appellant’s voluntary agreement will ensure that County Staff and the community can readily ascertain BATV balloons from other balloon operators that may be adversely affecting the community’s privacy, health, safety and welfare. (See Revised COA No. 4.12 (k).)

The FAA also requires that manned balloon launching facilities must notify the FAA Administrator by submitting FAA Form 7480-1 and consulting with the FAA prior to commencing operations. At the Appeal hearing, Appellant voluntarily offered a new Condition of Approval to submit Form 7480-1 and consult with the FAA before it begins operations under Use Permit No. P19-00303. The Board finds that Appellant’s voluntary agreement addresses any concerns regarding FAA compliance. (See Revised COA No. 4.12 (m).)

Ordinance No. 1276, adopted by the Board in 2006, authorized hot air balloon launching sites in any zoning district and created two separate permit processes depending on the number of launch days requested (County Code Sections 18.120.010(B)(16) and (D)(5)). The Ordinance authorized administrative permits for launching sites involving 50 or few days of launches or attempted launches per year (County Code Section 18.126.030(G)) and permitted launchings for more than 50 launches or attempted launches per year upon grant of a Use Permit (Section 18.120.010(B)(16)) if the required findings can be made (Section 18.104.400).

The County has issued seven administrative balloon launch permits since 2012, including Administrative Permit No. P19-00235 issued to the Appellant in 2019 for the Project site. However, the County has not received a use permit application since adoption of the Ordinance in 2006 until now. Appellant’s application is the first use permit request for a hot air balloon launch site for more than 50 launch days per year. The Board acknowledges the concerns expressed by the public and finds that since this is the first use permit for balloon launching, there should be an administrative review of BATV’s compliance with the conditions of approval one year after approval. The Board directed Staff to include an administrative review of Appellant’s Use Permit within one year of project approval in the Revised COA. (See Revised COA No. 4.12 (l).)

At the Planning Commission hearing, Appellant testified that Appellant may allow other companies to launch from the Project site, which is not prohibited by the County Code, but the Board acknowledges the concerns from neighbors that the launch site could be used by other balloon companies and that those other companies’ operations and qualifications have not been reviewed by the County. To ensure that the launch site is used only by BATV and its successors and assigns, the Revised Conditions of Approval prohibit Appellant from subletting the launch site to other hot air balloon companies. (See Revised COA No. 4.12 (i).)

The Revised COA will address many of the public’s concerns and ensure that the Project will not adversely affect the public health, safety and welfare.

**Conclusion:**

For the foregoing reasons, the Board finds that substantial evidence exists in the record to uphold the Appeal in its entirety, reverse the Planning Commission’s decision to deny the Project and approve the Project and Use Permit No. P19-00303 subject to the Revised Conditions of Approval attached as Exhibit “A.”

**Section 4. CEQA Determination.**

The Board has received and reviewed the Negative Declaration pursuant to the provisions of CEQA and Napa County’s Local Procedures for Implementation of CEQA, and finds that:

* 1. Prior to taking action on the Negative Declaration and Project, the Board read and considered the Negative Declaration.
  2. The Negative Declaration is based on independent judgment exercised by the Board.
  3. The Negative Declaration was prepared and considered in accordance with the requirements of CEQA.
  4. There is no substantial evidence in the record as a whole that the proposed Project will have a significant effect on the environment.
  5. There is no evidence in the record as a whole that the Project will have a potential adverse effect on wildlife resources or habitat upon which the wildlife depends.
  6. The site of the proposed Project is not on any of the lists of hazardous waste sites enumerated under Government Code Section 65962.5 and is not within the boundaries of any airport land use plan.
  7. The Clerk of the Board of Supervisors is the custodian of records of the proceedings on which this decision is based. The records are located at the Napa County Planning, Building and Environmental Services Department, 1195 Third Avenue, Second Floor, Napa, California.

**Section 5. Substantial Evidence.**

Substantial evidence supporting every finding made herein is contained in the record of proceedings. All of the files and records that comprise the administrative record for the Project are incorporated herein by reference.

**Section 6. Summary of Decision.**

Based on the foregoing facts, findings, and determinations, the Board of Supervisors hereby:

A. Upholds the Appeal in its entirety;

B. Reverses the Planning Commission’s decision to deny the Project;

C. Adopts the Negative Declaration for the Project; and

D. Approves the Project and Use Permit No. P19-00303 subject to the Revised Conditions of Approval attached as Exhibit “A.”

**Section 7. Effective Date.**

This resolution shall take effect in accordance with the provisions of NCC Section 2.88.090.

**Section 8. Judicial Challenge.**

Unless a shorter period applies, any judicial challenge to this decision is governed by California Code of Civil Procedure Section 1094.6.

**THE FOREGOING RESOLUTION WAS DULY AND REGULARLY ADOPTED** by the Board of Supervisors of the County of Napa, State of California, at a regular meeting of said Board held on the 26th day of January, 2021, by the following vote:

AYES: SUPERVISORS GREGORY, RAMOS and PEDROZA

NOES: SUPERVISORS WAGENKNECHT and DILLON

ABSTAIN: SUPERVISORS NONE

ABSENT: SUPERVISORS NONE

NAPA COUNTY, a political subdivision of

the State of California

By: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

ALFREDO PEDROZA, Chair of the

Board of Supervisors

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| APPROVED AS TO FORM  Office of County Counsel  By: *Laura J. Anderson (e-sign)*  Deputy County Counsel  Date: January 20, 2021 | APPROVED BY THE NAPA COUNTY  BOARD OF SUPERVISORS  Date: January 26, 2021  Processed By:    Deputy Clerk of the Board | ATTEST: JOSE LUIS VALDEZ  Clerk of the Board of Supervisors  By: \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_ |

Attachment:

* Exhibit “A” – Revised COA (clean and redlined)

BOS/APPEALS-PC/BATV/BATV FF Final Revised.doc

1. The complete Appeal Packet is on file with the Clerk of the Board of Supervisors. [↑](#footnote-ref-1)
2. This Resolution summarizes the grounds of appeal. For the complete text of the Appeal, please see the actual Appeal dated November 6, 2020. [↑](#footnote-ref-2)
3. Agricultural Preservation and Land Use Element Goal AG/LU-1. Preserve existing agricultural land uses and plan for agriculture and related activities as the primary land uses in Napa County. [↑](#footnote-ref-3)
4. Agricultural Preservation and Land Use Element Policy AG/LU-4. The County will reserve agricultural lands for agricultural use including lands used for grazing and watershed/open space, except for those lands shown on the Land Use Map as planned for urban development. [↑](#footnote-ref-4)
5. Agricultural Preservation and Land Use Element Policy AG/LU-12. No new non-agricultural use or development of a parcel located in an agricultural area shall be permitted unless it is needed for the agricultural use of the parcel, except as provided in AG/LU-2, AG/LU-5, AG/LU-26, AG/LU-44, AG/LU-45 and ROS-1. [↑](#footnote-ref-5)
6. *San Franciscans Upholding the Downtown Plan v. City & County of San Francisco* (2002) 102 Cal.App.4th 656, 668 (*San Franciscans*). [↑](#footnote-ref-6)
7. *Friends of Lagoon Valley v. City of Vacaville* (2007) 154 Cal.App.4th 807, 816. [↑](#footnote-ref-7)
8. *Sequoyah Hills Homeowners Assn. v. City of Oakland* (1993) 23 Cal.App.4th 704, 717-718 (*Sequoyah Hills*); *Friends of Lagoon Valley, supra*, 154 Cal.App.4th at p. 817. [↑](#footnote-ref-8)
9. *San Franciscans*, *supra*,102 Cal.App.4th at p. 678. [↑](#footnote-ref-9)
10. *Napa Citizens for Honest Government v. Napa County Bd. of Supervisors* (2001) 91 Cal.App.4th 342, 378. [↑](#footnote-ref-10)
11. *Friends of Lagoon Valley*, *supra*, 154 Cal.App.4th at p. 816. [↑](#footnote-ref-11)
12. *San Franciscans, supra*, 102 Cal.App.4th at pp. 677-678, quoting *Save Our Peninsula* *v. Monterey County Bd. of Supervisors* (2001)87 Cal.App.4th 99, 142; *Naraghi Lakes Neighborhood Preservation Assn. v. City of Modesto* (2016) 1 Cal.App.5th 9, 17-19. [↑](#footnote-ref-12)