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CONCERNED RESIDENTS OF HANCOCK PARK,
7 SUSANA FUNSTEN, LARRY FAIGIN, and MICHAEL
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8

9 **SUPERIOR COURT, STATE OF CALIFORNIA**
10 **COUNTY OF LOS ANGELES**

11
12 CONCERNED RESIDENTS OF HANCOCK
PARK, an unincorporated California association;
13 SUSANA FUNSTEN, an individual; LARRY
FAIGIN, an individual; and MICHAEL
14 O'CONNELL, an individual,

15 Petitioners,

16 v.

17 CITY OF LOS ANGELES; LOS ANGELES
CITY COUNCIL; LOS ANGELES CENTRAL
18 AREA PLANNING COMMISSION; LOS
ANGELES CITY PLANNING COMMISSION;
19 ANIK CHARRON IN HER OFFICIAL
CAPACITY AS A LOS ANGELES
20 ASSOCIATE ZONING ADMINISTRATOR;
and DOES 1 through 10, inclusive,

21 Respondents,
22

23 YAVNEH HEBREW ACADEMY, a California
corporation,
24

25 Real Party in Interest.
26
27
28

CASE NO. BS 106960

(Assigned to the Honorable Daniel S. Pratt)

**REPLY BRIEF IN SUPPORT OF WRIT OF
MANDATE AND TRIAL**

**[APPENDIX OF NON-CALIFORNIA
AUTHORITIES AND SUPPLEMENT TO
ADMINISTRATIVE RECORD FILED
CONCURRENTLY HEREWITH]**

DATE OF FILING
OF PETITION:

January 19, 2007

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I. INTRODUCTION

In asserting that the Hancock Park neighborhood is generally supportive of Yavneh’s school use, City and Yavneh (collectively “Respondents”) answer issues not raised by Petitioners. It is undisputed that Petitioners have no objection to Yavneh’s school uses in accordance with its CUP. But Respondents never address how (1) Yavneh’s activities can exceed “secular education programs for enrolled students and related religious education programs **for the same students**” AR06805 (Condition No. 6 of Yavneh’s CUP, emphasis added); and (2) the City can ignore Yavneh’s admitted and repeated non-compliance with its Condition 6 and the Los Angeles Municipal Code (“LAMC”).

There is no dispute that the City, at Yavneh’s urging, amended Yavneh’s CUP to allow it to expand its hours on Fridays and Saturdays to accommodate religious services for groups well beyond students, including faculty, grandparents, family members, guests of the school, visiting rabbis, alumni, donors and others Yavneh euphemistically referred to as “School support members.” See Joint Opposition (“Opp.”) at 8; see also AR04181. There is no dispute that Yavneh has never applied for or received a CUP for a house of worship or for any other non-school uses as required by the LAMC. Respondents’ Opposition focuses on archaic definitions of “synagogue,” and in doing so misses the central point that, whatever term one uses to characterize the activities at Yavneh, they are undisputedly beyond “secular education programs for enrolled students and related religious education programs **for the same students.**” While the City is entitled to some deference, it is not entitled to unfettered discretion, and here the City has abdicated its duty to enforce its own code.

Similarly, Respondents have only inadequate responses to the various procedural violations committed by the City. Respondents misunderstand LAMC Section 12.24.M (concerning the expansion of “deemed-approved” uses) in wrongly arguing that this provision vests broad jurisdiction in the Associate Zoning Administrator (“AZA”) and the Central Area Planning Commission (“CAPC”) to expand permitted uses for schools. Respondents never address how a school CUP can be used to authorize a “house of worship,” or indeed any thing other than a school. Respondents make the unsupported argument that language in the Notice of Appeal can trump the express language of the LAMC. With respect to the City’s failure to make adequate findings in support of its decision, Respondents rely principally on de-published authority and, in any event, never address

1 Petitioners' specific showing that the City's purported findings were inconsistent with the City's
2 extensive discussion of Yavneh's non-compliance with its CUP and overwhelming evidence in the
3 record. Respondents' claim that the amendments to the CUP was not a "project" under CEQA is
4 contradicted by the plain language of the statute.

5 Lastly, Respondents seem surprised that Petitioners raise the Religious Land Use and
6 Institutionalized Persons Act ("RLUIPA") as the reason for the City's total abdication of its duty to
7 enforce the conditions in Yavneh's CUP. But the Administrative Record is replete with examples of
8 Yavneh and the City using RLUIPA as the reason why Yavneh has a "right to pray" at its facility,
9 regardless of applicable land use regulation.¹ Respondents now incredibly contend that RLUIPA had
10 nothing to do with the City's decision-making." Opp. at 17-18.

11 One can only speculate why Respondents now downplay RLUIPA's role. One possibility is
12 the Ninth Circuit's recent decision that held that RLUIPA does not provide religious uses a blanket
13 exemption from land use regulations. See *The League of Residential Neighborhood Advocates v. City*
14 *of Los Angeles (Etz Chaim)*, Case No. 06-56211, 2007 U.S. App. LEXIS 19824 at *9 (9th Cir. Aug.
15 21, 2007). Because Yavneh never even tried to obtain a CUP for a house of worship, the City could
16 not rely on RLUIPA to allow Yavneh to conduct such activity on its premises. In any event, the
17 Administrative Record is clear that RLUIPA was the basis for the City's decision to delete the hours
18 limitations imposed by the AZA as a means of ensuring compliance, and to expand the hours to
19 accommodate Friday and Saturday prayer services for the broader community. Since the justification
20 for the City's action has been determined to be wrong, this fact alone establishes an abuse of
21 discretion.

22 II. RESPONSE TO RESPONDENTS' SUMMARY OF KEY FACTS

23 Respondents' recitation of the history of Yavneh's CUP is largely irrelevant because it
24 focuses primarily on school use, which is not in dispute here, and it comprises a lengthy compendium
25

26 ¹ For example, in urging the City to amend Yavneh's CUP, Yavneh argued: "[T]he action revoking
27 Yavneh's right to pray on Friday evening and during the day on Sabbath is unconstitutional and
28 violates Yavneh's constitutional right to hold such prayer services and a federal Religious Land
Use Institutionalized Persons Act, known as RLUIPA, and various federal cases with respect to
RLUIPA and the Constitution." AR06571-72.

1 of previous compliance reviews, which are not at issue here. *See* Opp. at 2-7. With respect to the
2 CUP modification at issue, certain of Respondents' key admissions and misleading statements are
3 worth highlighting.

4 First, Respondents admit that "grandparents, family members, donors, guests of the school,
5 visiting rabbis, etc." were attending religious services at Yavneh. *See* Opp. at 8 (citing AR06573-74,
6 which also lists current and former school board members, cantors, and Holocaust survivors as
7 additional groups who attend prayer services at Yavneh). In addition, Respondents admit that the
8 CAPC expanded Friday and Saturday hours so that "School support members such as faculty, alumni,
9 and donors" can "attend Shabbat services on Friday and Saturday." *Id.* Thus, by their own
10 admissions, Yavneh is operating in a manner that goes well beyond "secular education programs for
11 enrolled students and related education programs for the same students." AR06805 (Condition No. 6
12 of Yavneh's CUP).

13 Next, Respondents occasionally refer to the CUPs of other institutions to suggest that Yavneh
14 was somehow treated differently. *See, e.g.,* Opp. at 4, 7. First, virtually all of the examples
15 Respondents give are not in the record.² Second, none of the facilities Yavneh identifies in its
16 Opposition was considered by the City in the plan review at issue here.³ Third, the circumstances of
17 each facility are unique and the individualized nature of granting a CUP necessarily will result in
18

19 ² Ironically, Respondents ask the Court to take judicial notice of a CUP for a synagogue in North
20 Hollywood. *See* Opp. at 7. Perhaps forgetting that Yavneh is pretending not to be a synagogue,
21 Respondents complain that Yavneh's conditions feature more restrictions than those for Temple
22 Adat Ari El, which is a synagogue. Opp. at 7. Moreover, the temple in question is in an R-3 zone,
23 adjacent to multi-family and commercial uses at the corner of Burbank Boulevard and Laurel
24 Canyon. It first received a CUP for "church" purposes in 1946 and is designated in the applicable
25 general plan as "religious institution." The record shows Yavneh's circumstances to be quite
26 different. *See, e.g.,* AR03875, showing that Yavneh is in an RD-1.5 single-family zone.
27 Respondents cite allowed uses at the adjacent Third Street school, but the cite is actually a page
28 from Yavneh's own CUP. *See* Opp. at 3 (citing AR01457). Finally, the bald assertion that
unspecific "Christian schools" have onsite prayer services is also unsupported by any record
evidence.

³ For example, Respondents' references to alleged prayer service that took place at Whittier Law
School (*see* Opp. at 4 n.2) have nothing to do with Yavneh's current CUP or the recent
modifications to it. Respondents seem to be suggesting that prior unlawful behavior justifies
Yavneh's current violations of the LAMC.

1 different conditions (conditions are specifically tailored depending on what the property is zoned for,
2 its proximity to residences, the nature of neighboring uses, etc.). For example, Petitioners would
3 have no issue with the expanded Yavneh uses if they took place a few blocks away on the
4 commercially zoned La Brea Boulevard. Thus, notwithstanding Yavneh's apparent belief that other
5 facilities have received more favorable conditions, these other permits and cases have absolutely
6 nothing to do with Yavneh's failure to comply with its own CUP.

7 Respondents also assert that Petitioners did not present any evidence of impacts in the
8 underlying proceedings. Opp. at 19-20. Not only did Petitioners establish that the Administrative
9 Record is replete with evidence of the impacts (*see* fn.13 *infra*), the City's recent supplement to the
10 Administrative Record, composed entirely of material from March 18, 2007 forward, also shows
11 impacts and a consistent disregard for the CUP conditions. For example, this supplement includes an
12 internet advertisement for a Sunday night lecture for adults (which violates multiple aspects of
13 Yavneh's CUP) and other materials showing Yavneh advertised itself as a synagogue, complete with
14 a map, to the general public. *See* AR06863-68.

15 III. ARGUMENT

16 Petitioners do not take issue with Respondents' general articulation of the standard of review.
17 As Respondents themselves acknowledge, any deference accorded to the City's decision does not
18 extend to cases where the City's enforcement and interpretation of its regulations "is clearly
19 erroneous or unauthorized." Opp. at 14; *see also Etz Chaim*, 2007 U.S. App. LEXIS 19824 at *9
20 ("Municipalities may not waive or consent to a violation of their zoning laws, which are enacted for
21 the benefit of the public.").

22 A. Petitioners Exhausted All Of The Issues Raised In Their Petition.

23 California law does not require specific exhaustion in the context of administrative
24 proceedings. "[L]ess specificity is required to preserve an issue for appeal in an administrative
25 proceeding than in a judicial proceeding, since citizens are not expected to bring legal expertise to the
26 administrative proceeding." *Woodward Park Homeowners Ass'n, Inc. v. City of Fresno*, 150 Cal.
27 App. 4th 683, 712 (2007) (internal quotes and citations omitted). Further, specific exhaustion of all
28 issues is not required in situations where, as here, the agency provides little or no advance notice of

1 its decision. In *Woodward Park*, a “statement of overriding considerations,” which was being
2 challenged in the lawsuit, was not made available to the public before the city council meeting at
3 which approval was granted. *Id.* at 701 “As far as we can tell from the record, the public had only
4 the day of the meeting to review and analyze the statement.” *Id.* at 720. The Court of Appeal held
5 that in such cases, “it is uncertain whether the exhaustion requirement even applies to objections.” *Id.*

6 Given that Petitioners were in the dark as to the City’s proposed action until they arrived at
7 the hearing room, *Woodward Park* certainly suggests exhaustion was not required. In any event,
8 Petitioners exhausted each and every defect raised in this lawsuit. First, Respondents argue that
9 “Petitioners never challenged the AZA/CAPC’s Jurisdiction.” *Opp.* at 12. This is demonstrably
10 untrue. In a letter to the City Council, before its November 7, 2006 hearing on the matter, Petitioners
11 plainly objected that:

12 [I]t appears that jurisdiction for “educational institutions” or “schools” such as this
13 one, should have been vested in the City Planning Commission, with appeals to the
14 City Council. Here an appeal was taken to the Central Area Planning Commission.
15 Consequently, as an initial matter, we believe to conform with City procedures it is
appropriate for this issue to be heard by the City Council on appeal.

16 AR06522. Furthermore, at the City Council hearing, Petitioner Susana Funsten stated that Yavneh’s
17 application should have gone to the City Planning Commission first. AR06779. Indeed,
18 Respondents themselves recognized that the City had proceeded incorrectly, writing in their appeal of
19 the AZA’s August 14, 2006 written determination that, according to the LAMC, “jurisdiction for
20 ‘educational institutions’ and schools is vested in the City Planning Commission. Appeals of plan
21 approvals of the City Planning Commission are vested in the City Council[.]” AR04174.

22 Next, Respondents argue that “Petitioners never challenged the School’s Friday Hours.”
23 *Opp.* at 13. Petitioners never had the opportunity to challenge the CAPC’s extension of Yavneh’s
24 Friday hours from 6 p.m. to 8 p.m. because Petitioners had no notice that the CAPC would consider,
25 let alone extend, Yavneh’s Friday hours.⁴ *See* Petitioners’ Opening Brief (“Pet. Br.”) at 11-12. In

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28 ⁴ Ironically, Respondents themselves concede that Petitioner Susana Funsten submitted a petition
from the neighbors generally opposing “extended hours.” *Opp.* at 13. AR04265.

1 fact, it was not until after the public hearing at the CAPC ended and just prior to the final vote, that
2 the CAPC unilaterally decided to extend Yavneh's Friday hours at the request of Yavneh's counsel.
3 *See* AR06705-06.

4 In addition, with the last minute confusion as to the CAPC's action, even after the hearing,
5 Petitioners did not know the City had extended Yavneh's Friday hours. Indeed the March 8, 2007
6 determination (issued well after this lawsuit was filed), showed that Yavneh's Friday hours were not
7 extended but remained at 6 p.m. *See* AR04050. It was not until April 24, 2007, after Petitioners
8 objected to activities past 6 p.m., that the City issued yet another document, claiming it was the true
9 memorialization of the City's October 24, 2006 decision, and indicating that Friday hours had been
10 extended to 8 p.m. *See* AR06805. Thus, Petitioners had no opportunity to object until well after the
11 deadline to initiate this lawsuit had passed.

12 Respondents also contend that "Petitioners never challenged the AZA's determination that the
13 school was in compliance with the conditions of its CUP." *Opp.* at 13. Petitioners did not challenge
14 the AZA's initial August 14, 2006 written determination regarding compliance because, until they
15 entered the hearing room, they thought the AZA fully agreed with Petitioners, stating, *inter alia*, that
16 "the applicant chose only to show disregard ... for the City regulations [and] the surrounding
17 community and neighbors" (AR03896); that there was a "history of abuse of the condition by"
18 Yavneh (*id.*); and that Yavneh's claim that "'services' were always permitted on the site, is quite
19 disingenuous." AR03895. But once the AZA made her stunning about-face at the beginning of the
20 CAPC hearing, the Administrative Record makes absolutely clear that Petitioners emphatically
21 argued that Yavneh is not in compliance with its CUP⁵ along with the request that the City enforce
22 Yavneh's compliance with its CUP and further that it require Yavneh to obtain a separate CUP for
23 any new uses besides a K-8 school.⁶

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26 ⁵ *See, e.g.*, AR06695, where Petitioners' representative told the CAPC that there was no school use
at Yavneh on Saturdays and that religious services were nevertheless taking place there.

27
28 ⁶ Respondents also make a related (and bizarre) claim that Petitioners did not exhaust the argument
that Yavneh's CUP should be revoked. *See Opp.* at 13-14. But Petitioners are not seeking now
[Footnote continued on next page]

1 Finally, Respondents argue that Petitioners did not exhaust the CEQA violation. Opp. at 24.
2 The record reveals, however, that CEQA arguments were integral to Petitioners' grievances and that
3 they raised it before the CAPC and the City Council. *See, e.g.*, AR06524, AR06587-88, AR06778.

4 **B. Under The LAMC, The AZA And CAPC Lacked Jurisdiction To Make Substantive**
5 **Modifications To A CUP For A School.**

6 Respondents fail to rebut Petitioners' argument that the AZA and the CAPC lack jurisdiction
7 to amend a CUP for an educational institution. First, Respondents resort to Section 12.24.M of the
8 LAMC as authorizing the CAPC's jurisdiction to make the challenged "modifications" to Yavneh's
9 CUP. *See* Opp. 18-19. But Section 12.24.M states that only existing conditional uses "deemed-
10 approved" by other provisions in Section 12.24 may be extended. *See id.* at 18. Yavneh's CUP is for
11 a specific use (a K-8 school) and not for "deemed-approved" uses. Indeed, as set forth in Petitioners'
12 Opening Brief, the City historically has denied Yavneh's efforts to convert its CUP for a K-8 school
13 into something that allows wider prayer services at the school. *See* Pet. Br. at 18-19.

14 Second, Respondents' reliance on Section 12.24.M is misguided for the independent reason
15 that this provision explicitly states that any applicant proceeding under it must go through "whichever
16 [local agency] has jurisdiction" to consider the application. *See* Opp. at 18. In other words, this
17 provision does not change which agency has jurisdiction over the type of CUP at issue. As
18 Petitioners explained in their Opening Brief (*see* Pet. Br. at 7) and as Yavneh conceded (*see*
19 AR04174), it is the City Planning Commission – not the AZA – that has original jurisdiction and it is
20 the City Council – not the CAPC – that has appellate jurisdiction over amendments to CUPs for
21 schools like Yavneh. *See also* LAMC § 12.24.U(6), (24) and § 12.24.P.⁷

22 Third, Respondents' claim that Condition No. 33 of Yavneh's CUP, which states that the
23 AZA "may modify, add or delete conditions as deemed necessary," also gave the AZA and CAPC

24 [Footnote continued from previous page]

25 (nor have they ever sought) the revocation of Yavneh's CUP for a religious K-8 school. As noted
in the Introduction, Petitioners do not object Yavneh's having a CUP for a school.

26 ⁷ Respondents' invocation of Section 12.03 of the Municipal Code fails for this same reason. *See*
27 Opp. at 19. Section 12.03 simply indicates that the CAPC has jurisdiction to hear matters "in
28 accordance with procedures prescribed by ordinance." LAMC § 12.03(c). As set forth above, the
LAMC does not grant the CAPC jurisdiction over CUPs for schools.

1 jurisdiction to amend Yavneh's CUP is unsupportable. *See* Opp. at 19. A fuller context of Condition
2 No. 33 shows that the purpose of the plan approval process is "to review [Yavneh's] compliance with
3 and the effectiveness of [the] conditions" in its CUP to ensure that it functions only as a K-8 religious
4 school. AR03886 (emphasis added). As such, efforts to expand the school's hours and the scope of
5 attendees permitted at religious events have nothing to do with compliance and, therefore, are not
6 authorized by this process. To interpret Condition No. 33 as permitting the addition of entirely new
7 uses in the context of a compliance review of Yavneh's existing CUP is inconsistent with the
8 LAMC's provisions that separately and specifically govern these new uses. Respondents'
9 interpretation would allow the City to use the compliance review process to circumvent the
10 requirements of the City's own zoning regulations, which is not permitted. *See Hansen Bros. Enter.,*
11 *Inc. v. Bd. of Supervisors*, 12 Cal. 4th 533, 564 (1996).

12 Finally, Respondents ignored *Tustin Heights Ass'n v. Bd. of Supervisors of Orange County*,
13 170 Cal. App. 2d 619, 630 (1959) and *Robison v. City of Oakland*, 268 Cal. App. 2d 269, 274 (1968),
14 both cited in Petitioners' Opening Brief, that hold that the City's jurisdictional error, on its own,
15 mandates the vacating of its decision. *See* Pet. Br. at 7.

16 **C. The City Ignored Its Own Regulations That Are Meant To Safeguard Petitioners' Due**
17 **Process Rights.**

18 In response to Petitioners' argument that the City deprived Petitioners of their due process
19 rights, Respondents' primary argument is that the Notice of the October 24, 2006 CAPC hearing
20 includes language that the "Commission can consider the entire action even if only a portion has been
21 appealed." Opp. at 20. This argument fails for two reasons. First, the issue of extending the hours
22 was never part of the "entire action." Yavneh never even applied to expand its Friday hours. It did
23 not make such a request at the AZA's public hearing; nor did its notice of appeal to the CAPC, which
24 lays out the substance of its appeal, include a request to extend its hours.⁸ *See* Pet. Br. at 11.

25
26 ⁸ Respondents argue that "the restrictions on Saturday prayer sessions [and] the prohibition of
27 'religious services' as a permitted use" being on the Notice of Hearing was sufficient notice. *See*
28 Opp. at 20. But that language refers only to Yavneh's attempt to open up existing Saturday hours
to the broader community and is neither an explicit nor implied reference to extending Friday or
Saturday hours.

1 Second, Respondents cite no authority that allows the City to ignore the procedural due
2 process requirements set forth in its own regulations and, instead, to insulate itself from claims of due
3 process violations by simply inserting a “disclaimer” to the effect of “all bets are off and anything
4 goes.” *See* Opp. at 20. By contrast, Petitioners cited to binding authority that requires the City to
5 ensure procedural safeguards that are mandated by the Constitution, including “reasonable notice and
6 an opportunity to be heard.” Pet. Br. at 8. In *Cohan v. City of Thousand Oaks*, 30 Cal. App. 4th 547
7 (1994), for example, the city argued that a “disclaimer” similar to the one in this case meant that the
8 petitioner should have been aware that any aspect of the underlying ruling – not just the issues in the
9 notice of appeal – could come up. *Id.* at 557. The *Cohan* court rejected this argument, noting that,
10 “we presume that the City’s ordinance requiring that the notice of appeal contain a statement of
11 grounds was enacted for a purpose.” *Id.* In this case, the LAMC includes a number of specific
12 provisions that are meant to safeguard Petitioners’ due process rights. *See* Pet. Br. at 8-10. Just as
13 the City ignored these ordinances in the underlying proceedings, Respondents ignored them again in
14 their Opposition.

15 Instead, Respondents’ superficially argue that there was no prejudice to Petitioners because
16 they “knew the appeal related to the fence, hours, and who could attend services.” Opp. at 22. But
17 *Cohan* specifically rejected this line of argument, stating that, “[s]imply because [petitioner] was
18 familiar with the objections to the project does not satisfy due process. The Council ignored the very
19 laws and regulations meant to ensure fair process[.]” 30 Cal. App. 4th at 560 (emphasis added);⁹
20 *Robison*, 268 Cal. App. 2d at 274 (no showing of prejudice required where the agency failed to act
21 pursuant to “the provisions of its own ordinance.”).

22 Indeed, Respondents repeatedly argue that the City is entitled to deference. In this case, in
23 the context of one of Yavneh’s prior compliance reviews, the City Attorney’s Office stated that an
24 _____

25 ⁹ Respondents’ attempts to distinguish *Cohan* are meritless. They argue that it is a Brown Act case
26 and that it requires a showing of prejudice. *See* Opp. at 22. While *Cohan* features a single section
27 on the Brown Act, Petitioners citations to *Cohan* are from other sections discussing due process
28 violations generally. Further, the language requiring prejudice is limited to violations of the Brown
Act – not for general due process violations. Finally, *Cohan* makes clear that violations of due
process are sufficient to warrant vacating the City’s action. *See* 30 Cal. App. 4th at 561.

1 “anything goes” approach is not the policy of the City and for the CAPC to consider issues that were
2 not appealed is a violation of due process. *See* Pet. Br. at 12 (“If the original request did not specify
3 changing the hours for Saturday morning and was not noticed, it is not before the Commission,” and
4 that it is a “due process” violation to consider issues when the “appeal misstates what was originally
5 applied for”). Thus the established policy, entitled to deference, is one that would require re-noticing
6 of the hearing.

7 Finally, Respondents have a tortured conception of the AZA’s role in the CAPC’s
8 October 24, 2006. *See* Opp. at 21-22. According to Respondents, the City could circumvent due
9 process rights by having the AZA issue a decision and then completely disavow it – in the guise of
10 advisor to the CAPC – at the CAPC’s appellate hearing without giving notice to the parties of this
11 about-face or allowing them to meaningfully prepare for this hearing. Under this paradigm, the
12 AZA’s decision is effectively a nullity since there is no knowing what the AZA, in the role of
13 advisor, will say at the beginning of the CAPC hearing, which will then serve as the basis for the
14 CAPC’s appeal.¹⁰ Respondents offer no code section or case in support of their conception of this
15 process. To the contrary, a City Councilman’s representative stated that, “in all my years I do not
16 remember where I went to an appeal hearing and did not get notice or a copy of the changes being
17 proposed by the AZA[.]” *See* Pet. Br. at 11.

18 **D. The CAPC Did Not Make Adequate Findings To Support Its Decision**

19 Petitioners set forth, in detail, the CAPC’s failure to make the required findings and to
20 identify the evidence in support of their decision to amend Yavneh’s CUP to extend Friday and
21 Saturday hours when there was no school and to allow non-students to attend these services. *See* Pet.
22 Br. at 12-15. Petitioners noted that the large portions of the CAPC hearing devoted to Yavneh’s non-
23 compliance flatly contradicted the CAPC’s decision. Further, the March and April 2007 belated
24 additions to the Administrative Record, which Respondents claim are the true memorializations of
25

26
27 ¹⁰ Respondents’ bizarre theory is also contradicted by the reality that the agenda for the CAPC’s
28 hearing plainly stated that the staff, which includes the AZA, recommended that Yavneh’s appeal
be denied – not that the AZA had a new recommendation. *See* AR06553; Pet. Br. at 4.

1 the CAPC's final decision, starkly differ from the official transcript of the CAPC's October 24, 2006
2 in that the many references to non-compliance were deleted.¹¹ *Id.* at 13-14.

3 Respondents do not explain this significant discrepancy at all. Instead, they make the
4 damning admission that the CAPC's ultimate memorialization of its findings (the April 24, 2007
5 document) is "substantially similar" to the AZA's August 14, 2006 written determination, which did
6 include the many references to Yavneh's non-compliance. *See Opp.* at 24. It is indefensible for these
7 two documents to be similar to each other because the AZA's written determination recommended a
8 total denial of Yavneh's requested changes whereas the CAPC's decision was to grant Yavneh's
9 modifications in full. Thus, the notion that the CAPC's findings could be "substantially similar" to
10 the AZA's initial decision is not only absurd, it establishes that the CAPC's purported written
11 findings fail to "reveal the route [the CAPC] took from evidence to action," as required under Code
12 of Civil Procedure Section 1094.5. *See Topanga Ass'n for a Scenic Comm. v. Cty. of Los Angeles*, 11
13 Cal. 3d 506, 515 (1974).

14 Respondents rely on the de-published opinion in *Sierra Club v. California Coastal*
15 *Commission*, 107 Cal. App. 4th 1030 (2003) to defend the City's findings.¹² *See Opp.* at 23-24.
16 Because that decision may not be cited to or relied upon by the Court, and because discussion of that
17 decision permeates Respondents' argument on this subject, that argument cannot be considered at all.
18 *See Cal. R. of Court 8.1105(e)(1), 8.1115(a)*. The Court should, instead, rely upon wholesome cases
19 cited in Petitioners' Opening Brief, which control this issue.

20 **E. The CAPC's Approval Of Yavneh's CUP Was Not Exempt From CEQA**

21 Respondents argue that the CAPC's amending of Yavneh's CUP was not a "project" subject
22 to CEQA, citing to Public Resources Code § 21065. *Opp.* at 24. However, 21080(a) of the Public
23 Resources Code, provides that CEQA "shall apply to discretionary projects proposed to be carried out
24

25
26 ¹¹ Petitioners renew their objection to the admission of these two documents into the Administrative
Record.

27
28 ¹² The California Supreme Court ordered this opinion de-published, 2 Cal. Rptr. 3d 553 (Cal. 2003),
and later superseded it with its own opinion, 35 Cal. 4th 839 (2005).

1 or approved by public agencies, including ... the issuance of conditional use permits ... unless the
2 project is exempt from this division.” Pub. Res. Code § 21080(a); *see also Starbird v. County of San*
3 *Benito*, 122 Cal. App. 3d 657, 660 (1981). The statute plainly mandates that an agency making a
4 CUP determination can either conduct an environmental review or make an exemption finding. But
5 it cannot do what Respondents propose –fail to conduct any CEQA review.

6 Respondents claim that Yavneh’s “minor CUP modifications would clearly be exempt” from
7 CEQA (Opp. at 24-25), is the quintessential *post hoc* rationalization. Even as a *post hoc*
8 rationalization, however, the City’s claim fails. It is impossible to understand the full impacts of
9 expanding the uses and hours, because the fiction is maintained that only school activities take place
10 at the site. Moreover, it is not up to the applicant to decide whether impacts are significant, but the
11 lead agency (here the City) after undertaking independent review and study.¹³ The failure to follow
12 CEQA’s mandatory procedures is a presumptively prejudicial abuse of discretion. *Sierra Club v.*
13 *State Bd. of Forestry*, 7 Cal.4th 1215, 1236 (1994). Accordingly, the City’s decision to amend
14 Yavneh’s CUP should be set aside on this basis alone. *Id.*

15 **F. The City Has a Duty to Impose Conditions that Ensure Compliance with the CUP.**

16 Respondents make the claim that the City’s expansion of hours, and deletion of what it terms
17 “religion-specific restraints” did not turn its facility into a synagogue or house of worship open the
18 general public. *See* Opp. at 16-18. This argument misunderstands the relevant questions and is
19 contradicted by the record evidence. First, the question is not whether Yavneh fits some dictionary or
20 Arkansas State Court definition of a “synagogue” but whether the City abused its discretion by
21 allowing Yavneh to operate in a manner that is beyond “secular education programs for enrolled
22 students and related religious education programs for the same students[.]” AR06805 (CUP
23

24
25 ¹³ Respondents’ claim that “[t]here is no evidence of any potentially significant physical
26 environmental change that will result from these CUP modification” is simply not true. *See* Opp.
27 at 25. Petitioners’ Opening Brief highlighted record evidence of actual and potential impacts as
28 noted by neighbors (Pet. Br. at 1 n.1, 18 n.10, 24 n.17), AZAs considering Yavneh’s most recent
and prior compliance review applications (*id.* at 24 n.16), and even a representative from the local
councilman’s office (*id.* at 24). Even members of the CAPC recognized that the CAPC’s decision
threatened potential impacts on the environment. *See* AR06699-700.

1 Condition No. 6; emphasis added). If it did – whether one calls it a synagogue, a community center
2 or an adult education center¹⁴ – Yavneh is doing so without a CUP for such use. Yet, in the face of
3 blatant non-compliance, the City failed to uphold the AZA’s action to restrict hours to when the
4 school is actually in session, and deleted “religion-specific restraints” so as to permit activities well
5 beyond “religious education programs for the same students.” The City abused its discretion.

6 The record evidence that Yavneh was using its facility as a house of worship not restricted to
7 students is overwhelming. Indeed, Respondents do not deny the examples cited by Petitioners in
8 their Opening Brief of community members, who are not students at Yavneh, admitting to attending
9 prayer services there. Rather, Respondents attempt to make a distinction between those “affiliated
10 with the School” and “everyone in the community,” arguing only the former group attends prayer
11 services at Yavneh. *See Opp.* at 15-16. But Yavneh’s CUP does not allow those “affiliated with the
12 School” to attend religious services at Yavneh, nor could it without a CUP for a house of worship.
13 Moreover, Respondents’ argument ignores the mountain of evidence in the Administrative Record,
14 including evidence dating from earlier this year, that the school advertises itself as a temple and holds
15 events, minyans, adult programs and services well beyond the limits of its CUP. *See Pet. Br.* at 1-2;
16 *see also* AR06863-68.

17 **G. The City’s Misapplication Of RLUIPA In Amending Yavneh’s CUP, By Itself,**
18 **Establishes An Abuse Of Discretion.**

19 In their Opposition, Respondents incredibly assert “[t]here is no evidence to support” the
20 position that “the City is using [RLUIPA] to relieve the School of permit rules.” *Opp.* at 17-18.
21 Respondents’ surprising assertion is utterly contradicted by the Administrative Record. The record
22 makes absolutely clear that RLUIPA was the reason relied upon by the City in allowing Yavneh to
23 expand its Friday and Saturday hours so it could hold religious services and to open up attendance at
24

26 ¹⁴ The AZA who rebuffed a previous effort by Yavneh to open its religious services noted that,
27 “regardless of whether the proposed use would constitute a synagogue, it would function as one.”
28 AR02883. He went on to note that, “no case was recalled where outside religious participation on
a regular basis occurs at any such school.” AR02884. *See also Pet. Br.* at 19, n.11.

1 these services to its congregation. Yavneh asserted that RLUIPA somehow granted Yavneh the
2 unlimited “right to pray.”

3 Respondents’ current about-face likely results from a realization that new federal caselaw
4 dealing with a similar issue just blocks away, clarifies that RLUIPA may be relied upon only after a
5 permit has been applied for and denied, and a violation definitively established. In *Etz Chaim*, the
6 Ninth Circuit rejected the City of Los Angeles’ decision to allow another synagogue to operate in
7 Hancock Park without requiring it to obtain a specific permit for such use. In that case, the City
8 improperly granted synagogue-like uses through a settlement agreement that resolved an alleged
9 RLUIPA violation. The *Etz Chaim* Court held that the City could not “disregard its local ordinances
10 in the name of RLUIPA.” 2007 U.S. App. LEXIS 19824 at *15-16.

11 Faced with the realization that the only justification relied upon by the City to amend
12 Yavneh’s CUP and overturn the AZA’s hours limitations was a misapplication of RLUIPA,
13 Respondents simply ignore a mountain of record evidence and deny that RLUIPA motivated the
14 City’s decision. Yet, as part of its appeal of the AZA’s original August 14, 2006 written
15 determination, Yavneh wrote, in a section entitled “RLUIPA Applies to Yavneh’s CUP Request,”
16 that RLUIPA dictates that the entire “Yavneh community” should be allowed to attend Saturday
17 morning prayer services at Yavneh. AR04181; *see also* AR04181-82 (arguing that “denial of
18 Saturday morning hours for religious services” is improper); AR06571-72 (Yavneh argued to the
19 CAPC that “the action revoking Yavneh’s right to pray on Friday evening and during the day on
20 Sabbath is unconstitutional and violates . . . RLUIPA”). After successfully convincing the CAPC to
21 apply RLUIPA, Yavneh sent a letter to each City Councilperson, in advance of the November 7, 2006
22 City Council hearing, asserting that, “Federal law [referring to RLUIPA] is clear. . . . The City
23 cannot prohibit Yavneh from using their school for prayer on Sabbath. If the City denies the right to
24 prayer, the City will be subject to a federal lawsuit and liability for substantial attorneys’ fees and
25 monetary damages.” AR06508-21; *see also* AR06771-72.

26 City officials picked up where Yavneh left off, making it clear that RLUIPA was the basis for
27 their decision to amend Yavneh’s CUP. For example, the AZA stated that the reason for her
28 eleventh-hour about-face was that “[a]fter consulting with the city attorney,” RLUIPA caused the

1 change of heart. AR06567-68. The spectre of RLUIPA also caused the CAPC to absolutely refuse to
2 make a distinction between school uses and prayer services. *See, e.g.*, AR06696 (“I do not believe
3 that we are the proper body to make a determination whether activities of the school fall within the
4 purview of the school activities versus fall within the purview of a synagogue.”).¹⁵ At the November
5 7, 2007 City Council hearing, Councilpersons confirmed with the City Attorney’s Office and the
6 AZA that RLUIPA inevitably would control this dispute and prevent the result from changing even if
7 the City Council decided to hear the appeal. *See, e.g.*, AR06796-97, AR06802.1-3.

8 Given this history, it is simply impossible to deny that RLUIPA was the reason the City
9 amended Yavneh’s CUP in a manner that improperly allowed it to operate beyond its permitted uses.

10 **IV. CONCLUSION**

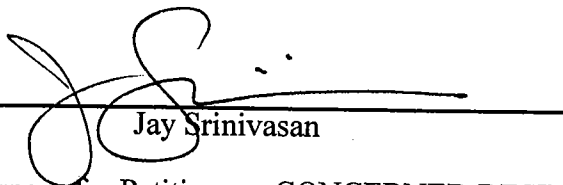
11 The City cannot grant Yavneh permission to engage in any use beyond “religious education
12 programs” for Yavneh’s K-8 students. The City has an obligation to uphold its own zoning laws.
13 Having failed to do so, and for the reasons stated above, this Court should grant Petitioners their
14 requested relief in full.

15 DATED: October 15, 2007

Respectfully submitted,

GIBSON, DUNN & CRUTCHER LLP

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20
21 By: 
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25 _____
26 ¹⁵ But the CAPC has jurisdiction of CUPs for only particular types of uses and not others. *See*
27 *generally* LAMC § 12.24.W. Using these code definitions, the City draws distinctions among uses
28 all of the time. RLUIPA does not prevent the drawing of such distinctions.

1 **PROOF OF SERVICE**

2 I, Jodi Arneson, hereby certify as follows:

3 I am employed in the County of Los Angeles, State of California; I am over the age of
4 eighteen years and am not a party to this action; my business address is 333 South Grand Avenue,
5 Los Angeles, California 90071, in said County and State; I am employed in the office of Jay
6 Srinivasan, a member of the bar of this Court, and at his direction, on October 15, 2007, I served the
7 following:

8 **REPLY BRIEF IN SUPPORT OF WRIT OF MANDATE AND TRIAL**

9 on the interested parties in this action:

10 James L. Arnone
11 Courtney Vaudreuil
12 Latham & Watkins LLP
13 633 West Fifth Street, Suite 4000
14 Los Angeles, CA 90071-2007

Sharon Siedorf Cardenas
Siegmond Shyu
Office of the City Attorney
City Hall East
200 North Main Street
Los Angeles, CA 90012-4110

15 X **BY MAIL:** I placed a true copy in a sealed envelope addressed as indicated above, on the
16 above-mentioned date. I am "readily familiar" with the firm's practice of collection and
17 processing correspondence for mailing. It is deposited with the U.S. Postal Service on that
18 same day with postage thereon fully prepaid at Los Angeles, California in the ordinary
19 course of business. I am aware that on motion of party served, service is presumed invalid
20 if postal cancellation date or postage meter date is more than one day after date of deposit
21 for mailing an affidavit.

22 **BY PERSONAL SERVICE:** I placed a true copy in a sealed envelope addressed to each
23 person[s] named at the address[es] shown and giving same to a messenger for personal
24 delivery before 5:00 p.m. on the above-mentioned date.

25 I am "readily familiar" with the firm's practice of collection and processing correspondence
26 for mailing. Under that practice it would be deposited with the U.S. postal service on that same day
27 with postage thereon fully prepaid at Los Angeles, California in the ordinary course of business.

28 I certify under penalty of perjury that the foregoing is true and correct, that the foregoing
document(s), and all copies made from same, were printed on recycled paper, and that this Proof of
Service was executed by me on October 15, 2007, at Los Angeles, California.

Jodi Arneson