In the Court of Appeal of the State of California

Second Appellate District

Division 3

Friends of Griffith Park, et al, Petitioners, Plaintiffs, and Appellants, v. City of Los Angeles, Respondent, Defendant and Appellate Respondent.	Court of Appeal No. B290637 Superior Court No. BS170298

Appeal from a Superior Court, County of Los Angeles
Judgement and Statement of Decision
Hon. James C. Chalfant, Judge

City of Los Angeles' Respondent's Appeal Brief

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BRIEF FORMATTING

This brief is prepared in accordance with the Electronic Formatting Requirements and Guidelines of the Second District (Revised June 18, 2018.) Spacing is 1.8 lines, increasing the number of physical pages. Legal citations and internal brief references are hyperlinked. Brief headings are bookmarked.

Party References

"**FOG**" means Appellants and Petitioners below, Friends of Griffith Park, Griffith J. Griffith Charitable Trust, and Los Feliz Oaks Homeowners Association.

"**City**" means Respondent on appeal and Respondent below, City of Los Angeles.

Abbreviations and Citation Formats

Appellants' Appendix is cited accordingly: Volume 1, Page 1 of Appellants' Appendix is cited as, 1 AA 1.

"**AOB**" means Appellants' Opening Brief.

"**Sunset Ranch**" means Sunset Ranch Hollywood Stables, Inc.

INTRODUCTION

The trial court below correctly denied FOG's writ petition filed against the City. FOG's writ disputes a change authorized by the General Manager of the City's Department of Recreation and Park ("Department") to a gate that controls vehicular and pedestrian use of an access road which lead from Beachwood Canyon Drive to private property owned by Sunset Ranch Hollywood Stables ("Sunset Ranch") on land surrounded by the Park. ("Access Road.") The change was made to comply with a trial court order issued in another action.

The Sunset Ranch Lawsuit and Injunction

In 2001, the City created the first pedestrian connection between the Access Road and Griffith Park trails. (7 AA 1896.) Following this, in the 2015 lawsuit entitled, *Sunset Ranch Hollywood Stables v. City of Los Angeles,* Los Angeles County Superior Court, Case No. BC576506 ("*Sunset Ranch* Action"), Sunset Ranch sued the City alleging that the volume of pedestrians using the Access Road encouraged by the City's actions unreasonably interfered with Sunset Ranch's easement right to use the Access Road to get to and from its horse stable

business. (3 AA 714-715, ¶¶ 15-25.) After trial, the Hon. Judge Linda Feffer issued an injunction ordering the City to reduce that pedestrian interference. (3 AA 779-80.) ("*Sunset Ranch* Order.") To comply, the Department's General Manager authorized the Beachwood gate's lock to be reprogrammed to function solely as a pedestrian exit point for Park users. (7 AA 1905 ¶ 4; 10 AA 2749.) The City presented this decision to Judge Feffer in a proposed stipulated order, and Judge Feffer entered the order finding the action complied with her injunction. (3 AA 784-85; 10 AA 2744-45.) ("Proposed Order.")

Denial of FOG's writ challenging City compliance with the Sunset Ranch injunction

FOG's writ action below challenged the gate change on three grounds. They asserted the City closed the gate to all public uses leaving it solely for Sunset Ranch's use, making an illegal gift of public property and violating City Charter section 594(c)'s requirement that all parkland "forever remain for the use of the public inviolate." (1 AA 241:17-242:20 [FOG brief]; 5 AA 1384 [Charter.]) The trial court rejected these contentions, finding that the gate and Access Road are not closed and continue to be used by the public to exit Griffith Park and by the Department for

maintenance and emergency access. (7 AA 1897 ¶ 15 [declaration of use]; 10 AA 2751 [statement of decision].)

FOG next asserted that the Proposed Order in *Sunset Ranch* constituted a settlement of the *Sunset Ranch* Action by the City Attorney's Office in a manner not authorized by the Charter. (1 AA 238:13-240:20.) The trial court correctly rejected this contention, because Sunset Ranch's complaint was resolved by trial, not settled, and because the Department's General Manager made the decision about how to comply with the injunction, not the City Attorney's Office. (3 AA 772 [*Sunset Ranch* order]); 7 AA 1905 ¶ 4 [general manager]; 10 AA 2746 & 2748-49 [statement of decision].)

Finally, FOG asserted that the City had altered the use of the Access Road in violation of numerous City land use provisions. (1 AA 240:2-241:14.) The trial court correctly found that none of the land use provisions apply. (10 AA 2749-51.)

In denying FOG's writ entirely, the trial court found the gate and Access Road remain open to public use and found that the General Manager's decision about how to comply with the *Sunset Ranch* Order, was an operational determination. (10 AA

2742.) The trial court further found that the City Charter authorizes the General Manager to make such operational determinations without involving the Department's Board. As a result, the trial court denied FOG's writ petition. (10 AA 2746-49.) Pursuant to the well-settled substantial evidence standard of review, the trial court's factual findings after a trial are entitled to great deference. (*E.g, Valley Crest Landscape Development, Inc. v. Mission Pools of Escondido, Inc.* (2015) 238 Cal.App.4th 468, 482 (*Valley Crest*).)

And yet, FOG's appeal proceeds as if the writ trial below did not take place, ignoring the statement of decision and all of the trial court's rulings excluding evidence and improper argument. FOG abandons all of their trial court arguments, ignores the legal and factual findings of the trial court, and seeks the right to present two new arguments that are not new, are not properly made, and that both fail on their face. For at least three reasons, the trial court's order was correct and its judgment should be affirmed.

First, because FOG never challenges the trial court's factual findings and the findings are entitled to deferential

review, these facts are now undisputed. The undisputed fact that the gate is not closed to public use means that FOG's efforts to order it opened were correctly denied as meritless. Second, the trial court's legal reasoning was abundantly correct and should also be affirmed. Third, and finally, neither of FOG's arguments on appeal have merit and are improperly presented.

FOG's Two New Meritless Appellate Arguments

Rather than address the trial court's decision or any argument made below, FOG's appeal centers on two legal arguments not considered below. FOG characterizes these as new legal arguments, but they are not new. The Trial Court excluded them below. Moreover, a new legal argument may not be pursued on appeal where controverted factual issues exist. (See *Nellie Gail Ranch Owners Assn. v. McMullin* (2016) 4 Cal.App.5th 982, 997 (*Nellie Gail*).) The most significant controverted issue is FOG's unsupported contention that the Griffith Park gate has been altogether closed to the public, while the trial court and record establish that it remains open and used by the public for Park exit. FOG may not present their new legal arguments because they depend on resolution of contested factual

arguments.

The new arguments, as well, are without merit. FOG's first new argument is that subpart 4 of Charter section 594(c) requires the Board, not the General Manager, to approve any closure of a park entrance. Subpart 4 operates as an exception to the requirement of Section 594(c) that all park land, "shall forever remain for the use of the public inviolate," allowing the Department's Board to approve non-park uses of park lands to open, establish, and maintain "streets or other public ways." (5 AA 1384.) The trial court established that the gate and Access Road remain open to public use, thus whether the Charter regulates closure of park land or property is irrelevant. Nor would Section 594(c)(4) apply even if the Access Road is a street or public way as defined by Charter section 594(c)(4), because the record contains no evidence that the Access Road has been opened, established, or maintained. The only change has been to pedestrian use of the Access Road, which is now used solely for pedestrian exit instead of both entry and exit. This Charter section does not apply.

FOG's second new argument is that Los Angeles Municipal

Code section 63.45 (a) allows the Department General Manager to close a portion of a park only in the case of emergency. FOG's legal construction is entirely wrong because the Charter leaves all operational decisions to the General Manager, not the Department's Board. Moreover, because it is undisputed that the subject gate remains open, FOG's arguments about whether the General Manager is authorized to close it are irrelevant.

FOG's new appeal arguments must also be denied because FOG made them late below, after their opening brief and after the City's opposition brief was filed. The trial court properly excluded these arguments for this reason, a fact FOG fails to disclose or address. By presenting its arguments below late, FOG prevented the City from introducing trial evidence to support a proper statutory construction of these provisions of City law, thus the record on appeal does not contain such facts. The late arguments are irrelevant and FOG's conduct has prejudiced the City from fully responding on appeal, therefore the City requests this court strike those arguments from FOG's appeal brief.

City Request to Strike FOG's Flawed Appeal Brief

FOG's opening brief is flawed in other significant respects

and should be stricken. FOG's brief fails to support contentions with citation to the record. FOG cites to evidence the trial court excluded, never disclosing or challenging the trial court's rulings. FOG's brief should be stricken for failure to abide by appellate practice rules requiring citation to record evidence.

The trial court's findings of fact are correct and supported by substantial evidence. No ground exists to disturb the decision below that found the City acted in accordance with the law. Judgment denying FOG's writ should be affirmed.

STATEMENT OF QUESTION ON APPEAL

Does any basis exist to overturn the trial court's finding that the City's Charter authorized the Department's General Manager, without Department Board involvement, to alter the lock on a Griffith Park gate to change the gate's function to exit-only, where the change did not remove the gate or any Park property from public use?

STATEMENT OF FACTS

A. The Sunset Ranch Access Road Existed Before it Became Part of Griffith Park

In 1940, Eben Coe entered into a right of way agreement with the M.H. Sherman Company, conveying the land which is

now owned by the Sunset Ranch Hollywood Stables. ("Sunset Ranch Parcel") (3 AA 772.) The Sunset Ranch Parcel was part of a larger piece of land owned by the Sherman Company and because there was no means of entry or egress to the Sunset Ranch Parcel, the Sherman Company conveyed a right of way easement when it created and sold the Sunset Ranch Parcel. (3 AA 773-74.) In 1945, the Sherman Company transferred the land surrounding the Sunset Ranch Parcel to the City and that land is now part of Griffith Park. (3 AA 774.) The access easement extends from the Sunset Ranch Parcel to the public street at Beachwood Canyon Drive, which is the Access Road at issue in this action. (3 AA 773.) The Access Road, thus, existed before the land over which it runs became part of Griffith Park.

B. Prior to 2001, Beachwood Drive did not Provide Access into Griffith Park

Between the establishment of the Access Road easement in 1940 until 2001, the Access Road did not connect to any hiking trails or other Griffith Park land open for public use and led only to the Sunset Ranch Parcel, used now as horse stables. (10 AA 2743; 87 AA 1896 ¶ 13 [Department Superintendent Joe Salaices

("Salaices") declaration].)[1] Prior to 2001, access to Griffith Park trails near Beachwood Canyon Drive was possible from a location on another street, Hollyridge Drive. (*Id.*; also 3 AA 774 [*Sunset Ranch* Order].) The Hollyridge Drive access point connected to the Hollyridge Trail within the Park – which the Access Road did not. (10 AA 2743; 7 AA 1896 ¶¶ 13 & 14 [Salaices declaration].)

The Hollyridge Drive access point, however, was located on private property and, in 2001, the owner of that property blocked public access to the Hollyridge Trail and the Park. (*Id.*) In 2001, in order to re-establish emergency vehicle access to the Hollyridge Trail, Department staff created a dirt fire road that connected the Access Road to the Hollyridge Trail and the Park for the first time. (10 AA 2743; 7 AA 1896 ¶¶ 13 & 14 [Salaices declaration].)

Notably, Department staff did not consult the Department's Board for authorization to construct the connection road

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[1] Controverting this undisputed trial court finding, FOG asserts that "for generations" the public has accessed the Park via the Access Road. (AOB 2) At Argument parts II (B) (2) and III (B), the City asks this appellate court to strike FOG's untrue contention, supported solely by excluded evidence.

addressing the loss of the Hollyridge Drive access point. (10 AA 2743; 7 AA 1896 ¶ 14 [Salaices declaration].) After 2001, pedestrian and vehicular traffic use of the Access Road to reach the new fire road connection and Hollyridge Trail began to increase significantly, attributable in part to new internet tools such as Google Maps gaining in popularity. (*Id.*) Department staff proposed the Beachwood gate to limit the public's growing use of the Access Road. (*Id.)*

C. In 2014, Department Staff Designs a New Gate to Reduce Growing Public Use of the Access Road

In response to the increased public use of the Access Road, in 2014, Department staff caused a new pedestrian and vehicular gate to be designed to be located between Beachwood Drive and the Access Road and presented the design to the Department Board for funding. (10 AA 2743; 7 AA 1893 ¶ 4 [Salaices declaration].) The Department Board approved gate funding, but did not include instructions or rules about how the gate should be operated. (10 AA 2743 & 2744; 3 AA 706-709 [funding approval]; 7 AA 1893 ¶ 5 [Salaices declaration].) Gate operations, instead, have always been determined by Department staff without Board involvement. (*Id.*)

The new Beachwood gate opened in January 2015. (10 AA 2744; 7 AA 1893 ¶ 6.) From the day it was installed, Department staff, without Board involvement, operated the gate to limit use of the Access Road, programming the gate to bar pedestrian entry after Griffith Park hours, to allow pedestrian exit at all times, and to bar entry of all vehicles except those going to Sunset Ranch or being used by the Department for Park purposes. (10 AA 2744; 7 AA 1893-94 ¶¶ 5 & 6.)

D. In April 2017, Responding to a Court Order, the Department's General Manager Approved a Change Converting the Gate to Exit Only

On March 25, 2015, Sunset Ranch filed the *Sunset Ranch* Action against the City (identified above in the introduction), alleging that pedestrian use of the Access Road to reach the dirt connection to the Hollyridge Trail had grown to the point that it interfered with Sunset Ranch's easement rights. (10 AA 2744; 3 AA 711 [Sunset Ranch complaint].) On February 3, 2017, after trial of Sunset Ranch's claims, the Hon. Elizabeth R. Feffer issued a ruling finding that the City had unreasonably interfered with Sunset Ranch's easement rights by its 2001 action channeling pedestrian traffic to the fire road connection to the

Hollyridge Trail and Griffith Park. (10 AA 2744; 3 AA 778.) ("*Sunset Ranch* Order.") The *Sunset Ranch* Order enjoined the City from allowing continued interference with Sunset Ranch's easement rights and ordered the parties to update the Court concerning logistics of the City's compliance with injunction. (3 AA 779-80.)

The Department's General Manager reviewed the Sunset Ranch Order and injunction shortly after it issued and he determined the City would meet its court-mandated obligation to reduce pedestrian interference with Sunset Ranch's easement rights by reprogramming the Beachwood gate to provide pedestrian exit only. (10 AA 2749; 7 AA 1905 ¶ 4 [General Manager declaration].) On March 13, 2017, the City submitted a proposed order to Judge Feffer seeking approval of the General Manager's compliance plan. (10 AA 2744-5; 3 AA 784-89.) After a court hearing open to the public held that same date where the proposed order was discussed, Judge Feffer entered the order as proposed, accepting the General Manager's plan. (10 AA 2745; 3 AA 784-89 [executed proposed order]; 7 AA 1866-68 [minute order]; 7 AA 1867-68 [General Manager declaration].)

On April 18, 2017, the Department's General Manager authorized Department staff to re-program the pedestrian gate lock such that it prevented entry but preserved exit functions. (7 AA 1897 ¶ 15 [Salaices declaration]; 7 AA 1905 ¶ 4 [General Manager declaration].) The Beachwood gate remains available for use 24-hours a day as has been the case since the gate was constructed. (10 AA 2744; 7 AA 1893 ¶ 15 [Salaices declaration].)

E. The Beachwood Gate, Griffith Park, and the Hollyridge Trail Remain Open and Used by the Public

Although the public's access to the Hollyridge Trail from the Access Road, first created in 2001, is physically restricted, the Hollyridge Trail remains open and used by the public via access from inside Griffith Park, via the northern point of the Trail, as well as from other connective points. (10 AA 2744 & 2745; 7 AA 1893-94 ¶ 6; 7 AA 1895 ¶ 11.) The public continues to hike the entire length of the Hollyridge Trail and continues to use the Access Road and Beachwood gate to exit Griffith Park, as the Department's Superintendent explained,

> Even though entrance through the pedestrian Gate has been locked since April 2017, I have witnessed pedestrians exiting the access road, through the

> Gate, onto Beachwood Drive. I have also witnessed persons hiking in both north and south directions on the Hollyridge Trail subsequent to the date the pedestrian Gate was locked in April 2017.

(7 AA 1897 ¶ 15.) Given the current-day existence of ride sharing services such as Lyft and Uber, it should not be surprising that a member of the public would choose to exit Griffith Park at a location from where the person could not have entered the Park. No part of Griffith Park has been made inaccessible to the public due to the changes made to the Beachwood gate. (10 AA 2751.)

STATEMENT OF THE CASE

This appeal follows the trial court's entry of judgment denying FOG's First Amended Petition against the City styled alternatively as writs pursuant to Code of Civil Procedure sections 1085 and 1094.5. (1 AA 82:14-16.) Because FOG's writ action seeks to compel a hearing and does not dispute any administrative action, the trial court correctly found that the action proceeds as a traditional writ of mandate pursuant Section 1085 and not as a writ for administrative mandamus pursuant to Section 1094.5. (*See,* 10 AA 2832 & fn. 2; *Mileikowsky v. Tenet Healthsystem* (2005) 128 Cal.App.4th 531, 554, affd. on other grounds in *Mileikowsky v. West Hills Hospital & Medical Center*

(2009) 45 Cal.4th 1259 (*Mileikowsky*).) The First Amended Petition asserted eight causes of action. (1 AA 76-91.) The trial court denied all eight of the causes of action alleged in the First Amended Petition. (10 AA 2740-51; 10 AA 2781-84.) The trial court's judgment adopted its March 22, 2018 tentative decision as the final statement of decision. (10 AA 2740-51; 10 AA 2781-82.)

FOG's appeal brief appears to argue solely in favor of the first cause of action, which alleged that City Charter 594(c) required the Department's Board to approve changes to the Beachwood pedestrian gate, though not on the grounds FOG asserts on appeal. FOG has abandoned their remaining seven causes of action. Their appeal seeks to prosecute the first cause of action on grounds not alleged in the writ petition below, arguments the trial court excluded and did not consider. (See, Argument, part III (C).)

STANDARD OF REVIEW

FOG's appeal disputes a trial court judgment after trial denying a writ of mandate action brought pursuant to Code of Civil Procedure section 1085. (1 AA 82; See *Mileikowsky,* 128 Cal.App.4th at 554). Where an appellate court reviews a trial

court's judgment and statement of decision that contains findings of both disputed fact and a construction of disputed law, the factual findings are reviewed for substantial evidence and the conclusions of law are subject to independent review. (*Williamson v. Brooks* (2017) 7 Cal.App.5th 1294, 1299 and fn. 2 (*Williamson*); *Saathoff v. City of San Diego* (1995) 35 Cal.App.4th 697, 700-01 (appeal of writ action construing a city charter).) Interpretation of a statutory provision, such as a city charter, is a legal question subject to de novo review. (*Florio v. Lau* (1998) 68 Cal.App.4th 637, 641.)

The substantial evidence review standard which applies to determinations of fact is limited to a determination as to whether there is any substantial evidence, contradicted or uncontradicted, to support the findings of the trial court. (*Williamson, supra,* 7 Cal.App.5th at p. 1299.) In assessing whether any substantial evidence exists, the appellate court views the record in the light most favorable to the respondent, giving the respondent the benefit of every reasonable inference and resolving all conflicts in its favor. (*Id.* at pp. 1299-1300.) As the appellate court explained in *Morgan v. Imperial Irrigation Dist.* (2014) 223 Cal.App.4th

892, 912, "Even when we exercise our independent judgment in reviewing the record, we do not take new evidence or decide disputed issues of fact."

In an appeal following a bench trial where no party objects to factual findings stated in the trial court's statement of decision, as is the situation presented here, the appellate court infers that the trial court made findings favorable to the prevailing party on all issues necessary to support the judgment. (See*, Valley Crest, supra,* 238 Cal.App.4th at 482.)

FOG's opening brief argues an incorrect standard of appellate review, asserting that review is entirely de novo. (AOB 3.) FOG's argument is premised upon its assertion that the facts on appeal are undisputed. (*Id*.) As the City demonstrates throughout this brief, however, FOG's appeal asserts material facts directly at odds with the trial court's findings, which would require an improper appellate adjudication of contested facts. The standard of appellate review of a question of law where facts are undisputed does not apply.

ARGUMENT

On appeal, FOG abandons the case they presented at trial.

FOG's opening brief presents no legal argument about the meaning of any Charter provision or other City ordinance either party argued or which the trial court considered below. Nor has FOG challenged any trial court finding of fact.

Having abandoned their case below, FOG requests this appellate court adjudicate two new arguments FOG improperly attempted to assert on reply and at oral argument below. The trial court prohibited both tardy arguments – rulings FOG does not disclose. Notwithstanding FOG's inappropriate arguments, the judgment should be affirmed for the reasons set forth in the statement of decision.

First, the City's Charter authorizes the Department General Manager to make operational park determinations, including the determination to alter the functions on park gates. (10 AA 2747-48.) Second, the trial court has determined – *i.e.,* made a factual finding entitled to great deference here – that the General Manager's change to the Beachwood gate was an operational decision. (*Id.*) Third, the trial court's determination that the City Charter authorized the General Manager's action was proper and that FOG's writ must be denied. (See, *Id.*)

In addition to demonstrating FOG's appellate arguments are defective, the City requests the court strike FOG's brief and arguments due FOG's numerous significant violations of appellate rules. This includes failing to cite fact and law assertions with citation, citation to evidence and argument the trial court excluded, and presentation of new legal arguments that require the appellate court to construe disputed fact contentions.

I. The Trial Court Correctly Held the City Charter Authorized the Department's General Manager to Re-Program the Beachwood Gate

Although not addressed at all by FOG's appeal brief, a review of the trial court's statement of decision demonstrates it was properly decided and should be upheld. As the trial court held, the City's Charter authorizes the Department General Manager to make operational determinations and his decisions concerning the Beachwood gate was an operational determination. (10 AA 2747-48.) The City's conduct challenged by FOG's writ, therefore, was authorized by the Charter, as the trial court also determined.

A. Ordinary Rules of Statutory Construction Govern Interpretation of the City's Charter

Section 5 of Article XI of the California Constitution authorizes California cities to adopt charters. In *Michael Leslie Prods., Inc. v. City of Los Angeles* (2012) 207 Cal. App. 4th 1011, 1021, construing the City's Charter authority to reject a public contract bid, the 2nd District Court of Appeals held the following law governs interpretation of a charter:

> By adopting a charter and " 'accepting the privilege of autonomous rule[,] the city has all powers over municipal affairs, otherwise lawfully exercised, *subject only to the clear and explicit limitations and restrictions contained in the charter*.' "

([italics in original], [citing *Domar Electric, Inc. v. City of Los Angeles* (1994) 9 Cal.4th 161, 171.]) Ordinary rules of statutory construction apply to interpretation of charters and local regulations. (*E.g., Castaneda v. Holcomb* (1981) 114 Cal.App.3d 939, 942-43.) If the language of a statutory provision is unambiguous, it must be given its plain meaning, "rules of statutory construction are applied only where there is ambiguity or conflict in the provisions of the charter or statute, or a literal interpretation would lead to absurd consequences." (*Younger v.*

Superior Court (1978) 21 Cal.3d 102, 113 (*Younger*).)

Likewise, Code of Civil Procedure section 1858 states,

> In the construction of a statute or instrument, the office of the Judge is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all.

"It is axiomatic that every provision of the charter should be construed in the light of the whole instrument and of each and every other provision thereof, keeping in view at all times the intent underlying the same. . . ." (*City of San Jose v. Lynch* (1935) 4 Cal.2d 760, 766.)

A city's interpretation and application of its ordinances and resolutions is also entitled to judicial deference. The degree of deference provided to an agency's interpretation is not subject to precise formulation, but lies along a continuum. (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7-8 (*Yamaha*).) Greater deference is afforded to an agency's interpretation where, "the agency has expertise and technical knowledge, especially where the legal text to be interpreted is technical, obscure, complex, open-ended, or entwined with issues

of fact, policy, and discretion" (*Id*., at p. 12.) Greater deference is also given to the, "careful consideration by senior agency officials." (*Id*., at p. 13.)

B. The Charter Defines the Department of Recreation and Parks to Mean Both the Board and the General Manager

The City's Charter assigns operation of City parks to the Department of Recreation and Parks. (Section 590, "Powers and Duties of the Department" [5 AA 1382-83].)[2] The Department operates 444 parks, with more than 6,400 full and part-time employees. (10 AA 2747; 7 AA 1904 ¶ 2.) The Charter states that the *Department* consists of both a Board (Section 591 [5 AA 1383]) and a General Manager (Section 592 [5 AA 1383].)[3]

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[2] All citations in this brief to the City's Charter are found at pages 5 AA 1357-86 (exhibit 30 to the January 10, 2018 Declaration of Mitchell Tsai submitted at trial by FOG.) The trial court took judicial notice of exhibit 30, as requested by FOG. (10 AA 2742-43, fn 2.) The City has concurrently filed a request for appellate judicial notice of cited Charter provisions at Tsai, exhibit 30 (5 AA 1357-86).

[3] Charter § 592 uses the term, "chief administrative officer." Charter section 507 Charter states, "chief administrative officers may have different position titles including general manager and director." (5 AA 1362.) The chief administrative officer of the Department of Recreation and Parks, therefore, is known as the

The Charter assigns broad powers to the Department (comprised of both the Board and General Manager) such as the power and duty, "to establish, construct, maintain, operate and control, wherever located: all parks of the City of Los Angeles." (Section 590(a)(1) [5 AA 1383].)

The Department's Board is appointed by the Mayor, subject to approval of the City Council. (Sections 500(a) & 502(a) [5 AA 1358-60].) The Charter authorizes the Board to control all park sites, control the monies of the Department, organize the Department's work into divisions and appoint administrative officers, and acquire and dispose of park lands. (Sections 591 & 594 [5 AA 1383-85].) Charter section 506(b) extends to the Board the power to make and enforce all rules and regulations necessary for the exercise of the power conferred upon the Department by the Charter. (5 AA 1361-62.)

The Department's General Manager is also appointed by the Mayor and confirmed by the City Council, the Department's Board play no role in her appointment. (Sections 508(b) [5 AA 1362-63] and 592 [5 AA 1383].) The Charter authorizes the

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General Manager.

General Manager to, "administer the affairs of the department or bureau as its chief administrative officer." (Section 509(a) [5 AA 1363.]

C. The Trial Court's Undisputed Finding that the Beachwood Gate Change was an Operational Decision is Supported by Substantial Evidence

Because FOG's appeal does not challenge the trial court's determination, or any trial court factual finding, the following facts are undisputed and established:

> The decision to close the Beachwood Gate in compliance with the injunction is, by its nature, an operational decision. It affects how and where patrons can access Griffith Park. The General Manager is vested with the authority to make these sorts of decisions as a function of his job. Likewise, Petitioners' allegations of the consequences resulting from the closure of the Gate — parking issues, longer hikes — concern the operations of the Park. These operational concerns fall under the purview of the General Manager. (10 AA 2747.)

In addition to being undisputed, substantial evidence supports the trial court's finding. The gate change was, as the trial court found, made to comply with an injunction. (3 AA 779, p. 7 [*Sunset Ranch* Order] and (3 AA 784 [*Sunset Ranch* Proposed Order].) The gate change impacts where and how patrons access Griffith

Park, but does not alter park land available for public use or any uses of park land. (See 7 AA 1893-94 ¶ 6 [entry barred, exit allowed]; 7 AA 1897 ¶¶ 15 & 16 [public and Department uses].)

D. The Trial Court Correctly Determined the Charter Assigns Operational Decisions to the General Manager

Next, the trial court correctly found that the City's Charter authorizes the General Manager to make operational decisions for the Department. (10 AA 2746-48 [General Manager Authority].) This authority derives from Charter section 509(a), which empowers the General Manager to make all operational determinations necessary to "administer the affairs of the department." (7 AA 1363.) The trial court explained,

> Charter section 506(b) [7 AA 1361-62] clearly empowers the Board with the power to make and enforce all rules and regulations necessary for the exercise of the power conferred upon the department by the Charter. . . . The General Manager, in contrast, has the broad power to administer the affairs of the Department pursuant to section 509(a) [7 AA 1363].

(10 AA 2747). FOG's appeal brief makes no argument disputing this Charter interpretation, which is correct based on a plain reading of the text of the Charter and supported by all other

means of statutory construction.

The interpretation of administrative officials and the consistent past application of law may be considered by a court when construing a statutory provision. (*Yamaha, supra,* 19 Cal.4th at 7-8.) The trial court found that the Department's General Manager has consistently, independently undertaken park operational decisions and that all park operational decisions admitted as evidence were made by staff and not the Department's Board. (10 AA 2744 and 2747.) That finding is supported by substantial evidence. (7 AA 1893-94 ¶¶ 5 & 7 [gate and Access Road operations)] 7 AA 1905 ¶ 3 [General Manager's interpretation].) The Department's General Manager has explained,

> [I]t has been the practice of the Department, consistent with the authority granted by the City Charter to the General Manager, that Department staff make Park operational and management decisions independent of the Board. The Board and Board members have the ability to request review of such matters, but operations are dedicated to the Staff under my directions and authority granted to me by the City Charter.

(7 AA 1905 ¶ 3.)

When access to the Hollyridge Trail from Hollyridge Drive was lost in 2001, Department staff created the new path connecting the Access Road to the Hollyridge Trail to re-establish access from the Southern end of Hollyridge Trail. (10 AA 2743; 7 AA 1896 ¶¶ 13-14.) The Board was not involved. (*Id*.)

Similarly, in 2014, the General Manager recommended the Board approve funding for a new vehicular and pedestrian gate at the end of Beachwood Drive. (10 AA 2743-44; 3 AA 706-708 [General Manager's report].) The Board approved funding, which power derives from Charter section 591 (b), granting to the Department's Board the power to appropriate and expend Recreation and Parks Fund money. (5 AA 1383.) However, Department staff – not the Board – have always determined how to operate the gate. (10 AA 2744; 7 AA 1893-94 ¶¶ 5-7.)

The gate opened the first days of January 2015 and from that time until April 18, 2017, Department staff programmed the pedestrian gate to bar entry after Griffith Park hours, but to allow exit at all times. (10 AA 2744; 7 AA 1893-94 ¶ 6.) After April 18, 2017, Department staff programmed the pedestrian gate to bar entry at all times, but to allow exit at all times. (10

AA 2744; 7 AA 1897 ¶ 15.) From the day it opened, Department staff have operated the current Beachwood gate to limit access to Griffith Park. The trial court's factual findings of these operational determinations has been established on appeal. Those findings support the trial court's correct legal construction determining the Charter authorizes the Department's General Manager and staff he oversees to make park operational determinations such as the latest change to Beachwood gate functions.

E. The Trial Court Properly Rejected FOG's Contention that the Charter Required the Department's Board to Approve the Gate Change

FOG argued at trial that Charter section 506 required the Department's Board to approve the Beachwood Gate change (1 AA 236:6-11.) Charter section 506 authorizes City boards to make and enforce all rules and regulations of general application necessary for the exercise of powers and performance of board duties conferred by the Charter the Department's Board. (5 AA 1361-62.) The trial court correctly rejected this legal argument. The term, "rule of general application," is legally defined as

adoption of a rule applicable to all members of a class, kind or order. (*See, Volkswagen of Am. v. Superior Court* (2001) 94 Cal.App.4th 695, 703-04 (*Volkswagen*).) The trial court found that no such rule of general application was adopted. (10 AA 2747.)

On appeal, without addressing the trial court's finding, FOG makes the same contention it made at trial, that the change to the Beachwood gate is a rule of general application. (Compare AOB 6 with 1 AA 239:6-11 [trial brief].) FOG's appeal brief, however, offers no legal argument disputing the *Volkswagen* legal authority on the meaning of the term, rule of general application, or on that topic at all. Having failed to do so, the argument may deemed forfeited. (See *Centex Homes v. St. Paul Fire & Marine Ins. Co.* (2018) 19 Cal.App.5th 789, 796-797 ("*Centex Homes*") [appellate arguments forfeited for failure to support with legal authority or record citation].)

Further, the undisputed facts demonstrates that the change to the Beachwood gate lock is a physical change, not a regulatory change. The lock prevents people from physically walking through the gate to reach the Access Road. No evidence exists showing that a regulation or rule was adopted which is

violated if a person enters Griffith Park via the Access Road. For example, no new rule is violated if a person crosses onto the Access Road through the gate while it is held open by another person exiting the Access Road, or who walks in following a car travelling through the vehicular gate to the Sunset Ranch stables. (See 7 AA 1893-954 ¶ 6 [cars travel to the stables]; 7 AA 1897 ¶ 15 [pedestrian exit through the gate].)

As the trial court found, and FOG does not dispute, the Beachwood gate change impacts operations of Griffith Park, such as where and how the public can access the Park, parking, and the length of hikes. (10 AA 2747.) The trial court correctly concluded no rules of general application exist. (Id.)

The trial court, moreover, excluded all of the evidence FOG cites on appeal in support of their contention that the Charter generally requires the Department's Board to approve any allegedly important matter related to park access (AOB 7 [pattern and practice contentions].) This argument is not connected to any clear legal authority, the trial court excluded the evidence FOG cites, and the evidence is irrelevant to FOG's contentions. FOG's appeal brief cites the following three

documents in support of their "pattern and practice" contention: (1) a draft General Manager report (8 AA 1968-70 [Tsai Supp. Decl., Exh. B]), (2) a City Council motion (8 AA 1970-74 [Tsai Supp. Decl., Exh. C]), and (3) a Los Angeles Times Article. (8 AA 1999-2000 [Tsai Supp. Decl., Exh. L].) (hereinafter, the "Excluded Evidence.") FOG submitted the Excluded Evidence below for the first time in support of their reply brief and the City filed written objections.[4]

The trial court correctly sustained the City's objections to the Excluded Evidence as improperly filed in support of a reply brief pursuant to the legal standards explained below at Argument part III (C) of this brief.[5] In the statement of decision, the trial court also correctly found the Excluded Evidence inadmissible for failure to authenticate. (10 AA 2743 & fn. 2.) FOG's effort to authenticate the Excluded Evidence consisted

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[4] City objection nos. 24 and 25 (10 AA 2705-2710) concern the draft General Manager's report (8 AA 1969-70) and the Council Motion (8 AA 1971-74.) City objection Nos. 24 and 27 (10 AA 2705 & 2713-14) concern the LA Times Article (8 AA 1999-2000.)

[5] The trial court hand-wrote its rulings on the City's objection papers (10 AA 2705, 2710 & 2714), as explained in the judgment (10 AA 2782:4-8.)

solely of the repeated assertion by their attorney's declaration that, "[a] true and correct copy of [the document] is attached hereto." (8 AA 1960 ¶¶ 3 & 4 & 1962 ¶ 13.) This fails to meet Evidence Code section 1400's minimal requirement of "introduction of evidence sufficient to sustain a finding that it is the writing that the proponent of the evidence claims it is." The trial court's rulings excluding FOG's evidence were correct.

FOG does not acknowledge the trial court's rulings exist, let alone challenge them, thus has waived that right. The portions of FOG's brief improperly citing the Excluded Evidence (AOB 7 "pattern and practice") should not be considered. (See *Merrill v. Navegar, Inc.* (2001) 26 Cal.4th 465, 476 (*Merrill*) [appellate review does not include evidence properly excluded by the trial court]; *Citizens Opposing a Dangerous Environment v. County of Kern* (2014) 228 Cal.App.4th 360, 366, fn. 8 ["Factual matters that are not part of the appellate record will not be considered on appeal and such matters should not be referred to in the briefs."].) Additionally, a trial court's decision to exclude evidence may not be disturbed on appeal absent clear error of law or abuse of discretion. (*People v. Claxton* (1982) 129 Cal.App.3d

638, 658 (*Claxton*).) FOG has not argued or shown any abuse of discretion or error of law.

Additionally, none of the three pieces of Excluded Evidence is relevant, even if considered. FOG's appeal brief suggests these documents illustrate past Department Board actions consistent with FOG's general beliefs about what the Charter requires. (AOB 7.) None of the Excluded Evidence, however, illustrates past conduct of the Department Board.

The excluded General Manager's report (8 AA 1969-70) and the excluded newspaper article (8 AA 2000) illustrate only that City Council action is required to amend the City's Municipal Code. The excluded Council motion (8 AA 1972-73) also does not demonstrate Department Board action or responsibilities. The Council motion was addressed to the *Department*, which consists of both the General Manager and the Department Board (Charter § 591 [5 AA 1383]), asking them both to prepare a draft policy *the City Council* might adopt. (8 AA 1972-73.)

The Excluded Evidence is not relevant to FOG's arguments about what the Charter or any other City legal enactment may require of the Department's Board concerning park entrances or

management of park lands. FOG's citation to this excluded evidence is improper and the evidence is not relevant. FOG's Charter contentions are incorrect and without support.

F. FOG's Charter Contentions were Correctly Rejected Because they would Lead to an Absurd Result, Inconsistent with the Charter's Purposes

The trial court also correctly found that FOG's urged Charter reading would violate the principal of statutory construction prohibiting an interpretation of a provision of law inconsistent with the law's purpose or which would lead to an absurd result. (*See, Younger, supra,* 21 Cal.3d at 113.) The trial court found, "An interpretation of the Charter that limits to the Board, and not the General Manager, all decisions of general applicability to the parks would lead to an absurd result." (10 AA 2747.) The trial court explained further,

> If Petitioners' interpretation of the Charter were adopted, then the General Manager would be prohibited from making any decisions of general applicability and the Board would have to hold a public hearing on even the most minor operational decisions. The Board only meets twice a month (Shull Decl. ¶3) [7 AA 1905], a schedule which renders impossible the day-to-day operational decisions for the Park. As the City points out (Opp. at 15) [6 AA

> 1558], the City operates 444 parks with more than 6,400 full and part-time employees. Shull Decl. ¶2. [7 AA 1904] The General Manager must be permitted to make operational decisions concerning the day-to-day operations of the parks, even those of general application.

(*Id*.) The trial court's statement of decision and judgment below correctly construed the City's Charter and applied those undisputed findings of fact to that legal interpretation, denying FOG's writ. The decision was correct and should be upheld.

II. FOG's New Appellate Arguments Fail as a Matter of Fact and Law

Rather than address the trial court's findings or any of the arguments FOG presented at trial, their appeal is premised upon two City enactments, Charter section 594(c)(4) (at AOB 8) and Municipal Code section 63.45 (a) (at AOB 5), arguments the trial court rejected as made improperly late. (10 AA 2747; RT 11:11-12:22.) FOG's appeal brief attempting to assert these arguments on appeal for the first time is entirely defective, failing to disclosure or address the trial court's rulings excluding them, relying on factual and legal assertions without offering support, and citing to excluded evidence. Below, in Argument part III, the

City requests this court strike the brief and arguments for these many violations of appellate rules. Even if FOG's appellate arguments were properly presented, they are without merit and improperly presented for appellate consideration.

Charter section 594(c)(4)

Charter section 594 is entitled, "Control and Management of Recreation and Parks Lands." (5 AA 1384.) Subsection (c) of Section 594 is entitled, "Restrictions on Transfer of Dedicated Parks" and states,

> All lands heretofore or hereafter set apart or dedicated as a public park shall forever remain for the use of the public inviolate; but the board may authorize use of the lands for any park purpose, and for: [four subparts listed]. (*Id.)*

As an exception to the requirement that all park lands forever remain for the use of the public, Subpart (4) of Section 594(c) authorizes the Department's Board to approve use of park land for,

> Opening, establishment and maintenance of streets or other public ways in and through the park lands controlled by the board.

(*Id*.)

Municipal Code section 63.45

Municipal Code section 63.45 provides that the Department's General Manager, an Assistant General Manager, a Department ranger, or a Department of Beaches lifeguard may close any area of a public park in a dangerous or emergency situation and prohibits any unauthorized person from willfully or knowingly entering into such a closed area. (Tsai declaration supporting FOG's opening appeal brief, Exh. 5.)

Neither City enactment provides any basis to overturn the trial court's judgement below or to grant FOG's writ petition.

A. Both of FOG's Arguments are Irrelevant as a Matter of Undisputed Fact

Before even addressing a legal construction of Section 594(c)(4) or Section 63.45, the undisputed facts show they have no application to this writ action. FOG argues that these provisions required the Department's Board to act because park land or the Beachwood gate has been closed "altogether to the public." (AOB 4). FOG provides no citation to evidence in support of their contentions that any park property has been closed, thus it is waived.

California Rules of Court, rule 8.204 (a)(1)(C), requires an

appeal brief to "[s]upport any reference to a matter in the record by a citation to the volume and page number of the record where the matter appears." Thus, "[i]f a party fails to support an argument with the necessary citations to the record, that portion of the brief may be stricken and the argument deemed to have been waived." (*Duarte v. Chino Community Hospital* (1999) 72 Cal.App.4th 849, 856 (*Duarte*); also, *Nwosu v. Uba* (2004) 122 Cal.App.4th 1229, fn. 8.) In *Lonely Maiden Productions, LLC v. GoldenTree Asset Management, LP* (2011) 201 Cal.App.4th 368, 384 (*Lonely Maiden*), the court explained,

> As a general rule, "The reviewing court is not required to make an independent, unassisted study of the record in search of error or grounds to support the judgment." It is the duty of counsel to refer the reviewing court to the portion of the record which supports appellant's contentions on appeal. If no citation "is furnished on a particular point, the court may treat it as waived."

(quoting, *Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115 [from which internal citations are omitted].)

At no point does FOG's appeal brief cite any support for their contention that the Beachwood gate is closed to the public, thus the contention is waived. (See *Lonely Maiden, supra,* 201

Cal.App.4th at 384.)

Moreover, FOG's failure to cite evidence supporting their contention is not an oversight, the contention is untrue. As found by the trial court, supported by substantial evidence, the gate is still used by the public (as an exit point) and by the Department for maintenance and emergency access. (10 AA 2750-51; 7 AA 1897 ¶¶ 15 & 16.) The trial court properly found no park land has been closed. (10 AA 2751 ["Griffith Park remains available for public use"].) Because FOG has not demonstrated, and cannot demonstrate, the factual predicate necessary to its appellate legal arguments, this appellate court need not proceed further to consider the meaning of Section 594(c)(4) or Section 63.45 because those provisions cannot change the outcome of this case. FOG's writ was properly denied.

B. FOG may not Present their "New" Legal Arguments for Review Because they Require Appellate Resolution of Disputed Facts

Additionally, because FOG disputes the trial court's finding that the Beachwood gate remains open and used by the public, they may not present their two new Charter section 594(c)(4) and Municipal Code section 63.45 (a) appellate arguments (which are

not new at all, as explained below, Argument part III (C).)

A legal argument not raised in the trial court normally cannot be asserted for the first time on appeal. (*Nellie Gail, supra,* 4 Cal.App.5th at 997.) "This rule is based on fairness—it would be unfair, both to the trial court and the opposing litigants, to permit a change of theory on appeal." (*Id.*) As an exception to this rule, where all of the facts are undisputed, a party may present a new legal argument on appeal. (*Id.*) "But if the new theory contemplates a factual situation the consequences of which are open to controversy and were not put in issue or presented at the trial the opposing party should not be required to defend against it on appeal." (*Id.*)

FOG's opening appeal brief asserts their Section 594(c)(4) and Section 63.45 contentions are new legal arguments they may present on appeal because the facts are undisputed. (AOB 8.) To succeed, however, FOG's appellate arguments would require this appellate court make findings of fact that contradict the trial court's findings of fact. How this could occur while FOG simultaneously does not dispute the trial court's findings remains a mystery. (See AOB 2 ["this case involves the application of law

to undisputed facts"].) Regardless, FOG's arguments on appeal require this appellate court adjudicate facts that FOG puts into dispute by its arguments, two of which are discussed next.

1. Without Support, FOG Requests this Appellate Court Reverse the Trial Court's Finding that the Gate and Park Remain Open

The trial court found that all Griffith Park land and the Beachwood gate remains open and used by the public, supported by substantial evidence. (10 AA 2744, 2745 & 2751; 7 AA 1893-94 ¶ 6; 7 AA 1895 ¶ 11; 7 AA 1897 ¶¶ 15 & 16.) FOG's appeal brief depends entirely on obtaining an appellate court finding that the gate is closed, in direct contravention of the trial court's findings and record evidence. FOG may not present its new legal arguments because the arguments depend upon resolution of this material disputed question of fact.

2. FOG Alleges the Board Designated the Gate and Access Road a Park Access Point; the Record Shows this did not Happen

Additionally, both of FOG's appellate arguments assert that the Beachwood gate and Access Road are an officially-designated Park entrance, requiring Department Board action to

close. (AOB 4-5 & 9-10.) FOG's contention is improperly supported solely with evidence the trial court excluded. FOG, moreover, nowhere explains, even if their contention were true, what legal provision would require the Department's Board to approve all changes to any officially-designated park entrance. The disputed question of fact raised by FOG, however, would require appellate court resolution which prevents FOG's new legal arguments from proceeding.

Were this appellate court to entertain FOG's invitation to adjudicate this factual question, moreover, the trial court's undisputed findings and the record demonstrates that the Beachwood gate has not been designated as a park entrance. FOG's contrary assertion improperly relies solely on evidence the trial court correctly excluded and which offers no support.

First, FOG improperly cites a park map the trial court excluded, which cannot be considered on appeal. (AOB 10 [citing 3 AA 659 & 661]; Respondent's Appendix ("RA"), pp. 6-8 [evidentiary ruling to City Objection 2][6]; *Merrill, supra,* 26

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[6] FOG omitted this evidentiary ruling from the 2832 pages of Appellants' Appendix.

Cal.4th at 476 [excluded evidence not considered on appeal]; *Claxton, supra,* 129 Cal.App.3d at 658 [abuse of discretion review standard for evidentiary rulings].) FOG has not disclosed or challenged the trial court's evidentiary rulings, and they were correctly made. FOG's citation of excluded evidence offers no support for its contentions on appeal

FOG's unsupported contention, moreover, contradicts the record evidence. The map's creator has declared that the excluded maps were, "not prepared to depict official entrance points to Griffith Park." (7 AA 1888 ¶¶ 7-8.)

Second, FOG's appellate brief argues the Beachwood gate has obtained some sort of geologic fixture status, contending that, "For generations, people have accessed Griffith Park's Hollyridge Trail to the Hollywood Sign through the park's Beachwood Canyon entrance." (AOB 2.) FOG's contention controverts the substantial record evidence and the trial court's undisputed finding that the Access Road never connected to any Griffith Park trail or part of the Park prior to 2001. (10 AA 2743; 7 AA 1896 ¶ 13.)

FOG purports to support its contrary "generations of

access" contention by citing more evidence the trial court excluded. (AOB 2 [citing 2 AA 302 & 396]; 10 AA 2749, n. 7 [evidentiary exclusion].) The document FOG cites is the 2008 Historic-Cultural Monument Application drafted by FOG Appellant Griffith Van Griffith Charitable Trust. (2 AA 302-3.) The trial court excluded the precise pages FOG cites, a correct ruling pursuant to Evidence Code section 1200, subject to no hearsay exception. FOG makes no contention that the trial court's ruling represents an abuse of discretion and has waived the right to dispute it. (See *Centex Homes, supra,* 19 Cal.App.5th at 796-797 [appellate arguments forfeited for failure to support with legal authority or record citation]; See *Claxton, supra,* 129 Cal.App.3d at 658 [abuse of discretion].) The excluded monument application, thus, should not be considered. (See *Merrill, supra,* 26 Cal.4th at 476 [excluded evidence not reviewed].)

The excluded monument application, moreover, does not support FOG's contentions even if it were admissible. The page FOG's cites states, "*Beachwood Drive is not a major entrance into Griffith Park*, but instead enters the park at its southern portion behind the hilly, Hollywoodland neighborhood." (2 AA 396

[emphasis added].) Stating that the Access Road was never a major Griffith Park entrance, the excluded monument application, drafted by FOG, refutes the very contention for which FOG asserts it.

Regardless, for FOG's new appellate legal arguments require appellate court resolution of disputed questions of fact, thus they may not present their Section 594(c)(4) and Section 63.45 arguments for the first time on appeal.

C. Section 594(c)(4) is Inapplicable and FOG's Reading of it is Wrong and Unsupported

FOG's appellate contentions, additionally, are simply incorrect. On its face, Section 594(c)(4) has nothing to do with the facts of this case. That Charter section allows the Board to approve use of park land to open, establish, or maintain a street or public way. (5 AA 1384.) In *Spinks v. Los Angeles* (1934) 220 Cal. 366, the Supreme Court applied an earlier version of the City's Charter containing similar language now found at Section 594(c)(4), to uphold an approval the Department's Board made allowing an extension of Wilshire Boulevard through the City's West Lake Park. FOG does not explain how the Department General Manager's change to the Beachwood gate is a subject

regulated by Section 594(c)(4).

First, FOG presents no legal argument to establish the meaning of "street" and "public way" as used in the Charter, thus cannot establish that the Access Road is regulated by this Charter provision. FOG makes no argument asserting whether the terms "street" and "public way" are defined by City or state law, and if state law, which laws. FOG cites no definition of those terms contained in the Charter or other City ordinance or regulation.

State law, if it applies, provides numerous definitions of "street" and "public way," many of which depend upon whether unrestricted public vehicular use is allowed. Vehicle Code section 360 defines "highway" to include street, defined as, "a way or place of whatever nature, publicly maintained and open to the use of the public for purposes of vehicular travel." Vehicle Code section 590 defines, "street" to mean, "a way or place of whatever nature, publicly maintained and open to the use of the public for purposes of vehicular travel."

Although the record is not fully-developed on this issue because FOG did not present its Section 594(c)(4) argument

below until oral argument of its writ, the record does establish that the Access Road is not a street pursuant to Vehicle Code sections 360 or 590 because the Access Road has been gated to public vehicular traffic since at least 2014. (10 AA 2744; 7 AA 1893-94 ¶¶ 5 & 6.)

Streets and Highways Code section 18609, for purposes of the Municipal Lighting Maintenance District Act of 1927, defines "public way" to include the term street as, "all public highways, roads, streets, avenues, boulevards, alleys, parkways and other rights of way of the public, or any portion thereof, within a city." FOG identifies no evidence in the record establishing whether the gated Access Road running across park land constitutes a public right of way as a matter of law or record title, and, as noted, the Access Road does not qualify as a street pursuant to the Vehicle Code because it is not open to public vehicular use.

These legal definitions of "street" and "public way" are simply examples of some of the different legal definitions that exist for these terms and demonstrate that FOG's failure to provide any legal argument or citation to evidence concerning the meaning of "street" or "public way" as used at Charter section

594(c)(4) constitutes a significant defect in their appellate argument.

Rather than offer legal argument or factual support for the argument, FOG's appeal brief merely states, "it is not disputed that this case involves a 'public way in and through park lands'." (AOB 5.) FOG has not demonstrated a fact merely by demanding the City disprove it. FOG's failure to support its contention with legal argument and record citation forfeits the contention. (See, *Centex Homes, supra,* 19 Cal.App.5th at 796-797.) FOG has forfeited any argument that the Access Road is regulated by Section 594(c)(4) as a street or public way.

Additionally, even if the Access Road were considered a "street" or "public road" as defined by Section 594(c)(4), FOG provides no citation to any evidence showing that the Department's re-programming of the Beachwood gate constitutes any action to open, establish, or maintain the Access Road. The record shows that pedestrian use of the Access Road has changed, from both exit and entry, to exit-only. No evidence shows vehicular uses have changed. It was already open and remains open. It was established long ago. It has not been maintained.

Section 594(c)(4) has no bearing upon the outcome of FOG's writ.

D. FOG Improperly Seeks to Apply Municipal Code Section 63.45 as a Restriction upon the General Manager's Charter Authority

FOG's appeal brief asserts that Municipal Code section 63.45 represents the sole authority of the General Manager to close any park land for any reason. (AOB 5-6). As noted, this argument is irrelevant because no park land has been closed. Moreover, although the trial court excluded FOG's Section 63.45 argument, the statement of decision explains that FOG misunderstands the provision. (10 AA 2747-48.) The trial court explained that Section 63.45, enacted by the City Council, is simply an example of one of the operational powers the Charter confers upon the Department's General Manager. (*Id.*)

As has already been demonstrated in this brief (Argument Part I (D), the trial court found that the Charter authorizes the General Manager to make park operational determinations. (10 AA 2746-49 [General Manager Authority].) Because a City's municipal code must be consistent with its charter, Municipal Code section 63.45 cannot restrict the operational authority grated to the General Manager by the Charter. *See, e.g., Scott v.*

Common Council (1996) 44 Cal.App.4th 684, 694 (city council actions must be consistent with the city's charter.) A provision of the City's Municipal Code cannot override the General Manager's now-established Charter authority. Instead, as the trial court explained, Section 63.45 is but one example of the General Manager's operational authority provided by the Charter. FOG's argument is not only irrelevant, it is wrong.

III. The Court Should Strike FOG's Opening Brief Due to Multiple Layered Violations of the Rules on Appeals

In addition to being legally and factually defective and procedurally improper, FOG's appellate brief is layered with violations of appellate rules of practice. FOG asserts legal and fact arguments with no cited support. Their appeal brief presents legal arguments excluded by the trial court because FOG made them improperly late below, causing facts necessary to the City's appellate opposition to be outside the record. FOG's brief, additionally, cites to excluded evidence. In addition to the fact that it is without merit, the City requests this court strike the brief as authorized by California Rules of Court, rule 8.204(2)(C).

A. The Court Should Strike FOG's Brief Because it Depends Entirely Upon an Unsupported Factual Contention

As explained above in Argument part II (A), FOG's sole argument on appeal is that the Charter requires the Department's Board to approve closure of any park entrance or park property. FOG's appeal brief, thus, requires that FOG provide proof of their factual assertion that the City "closed the Beachwood gate altogether to the public." (AOB 4; also AOB 5-6). At no point does FOG's appeal brief offer any citation to evidence supporting this contention, in violation of requirements of appellate practice. (See, Cal. Rules of Court, rule 8.204(a)(1)(C); *Duarte, supra,* 72 Cal.App.4th at 856.) FOG's unsupported contention should be stricken, as well as all argument upon which this contention relies.

B. FOG's Citation to Excluded and Irrelevant Evidence Should be Stricken

As detailed above at Argument part I (E), FOG's alleged evidence showing past Department Board actions concerning matters allegedly similar to the change made to the Beachwood gate was all excluded by the trial court, the Excluded Evidence. As detailed above at Argument part II (B) (2), the trial court also

excluded the two pieces of evidence FOG's brief cited in support of its untrue contention that the Beachwood gate is an officially-designated entrance to Griffith Park. FOG has not challenged the trial court's evidentiary rulings, which the City demonstrated above were entered properly. This appellate court, therefore should strike all of FOG's citations to excluded evidence and all of FOG's arguments related to that evidence as improperly made without support, and waived. (See *Merrill, supra,* 26 Cal.4th at 476 [no appellate review of excluded evidence]; *Centex Homes, supra,* 19 Cal.App.5th at 796-797 [unsupported legal arguments waived].)

FOG cited the following five piece of evidence, excluded by the trial court as indicated:

(1) Maps excluded by the trial court. (AOB 10 [citing maps at 3 AA 659 & 661]; Respondent's Appendix ("RA"), pp. 6-8 [evidentiary ruling])

(2) The 2008 Griffith Park Monument Application (AOB 2 [citing 2 AA 302 & 396]; 10 AA 2749, n. 7 [evidentiary ruling].)

(3) Draft General Manager report (8 AA 1968-70)[7]

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[7] Evidentiary rulings to items (3) – (5) are made as hand-

(4) City Council motion (8 AA 1970-74), and

(5) A Los Angeles Times Article. (8 AA 1999-2000.)

C. The City is Prejudiced by FOG's Late Trial Arguments, Excluded Below and Labelled as "New" Appellate Arguments

This appellate court should also strike FOG's Municipal Code section 63.45 (a) and Charter section 549(c)(4) contentions discussed above in Argument part II. (AOB 5 & 8.) The trial court excluded FOG's Section 63.45 (a) argument as improperly made on reply for the first time. (10 AA 2747.) The trial court barred the Section 594(c)(4) argument because FOG made it for the first time at oral argument. (RT 11:11-12:22.) FOG's failure to timely present its contentions below prevented the City from submitting opposing evidence which means no opposing evidence is available to the City to address these arguments on appeal. FOG, moreover, has not disclosed, addressed, or challenged the trial court's correct rulings excluding FOG's late arguments, thus has forfeited the right to present them on appeal. (See *Centex Homes,*

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written notations by the trial court on the City's objection papers (10 AA 2705, 2710 & 2714), explained in the judgment (10 AA 2782:4-8.)

supra, 19 Cal.App.5th at 796-797 [appellate arguments forfeited for failure to support with legal authority or record citation].)

The general rule of trial court motion practice is that new evidence is not permitted with reply papers and, "[T]he inclusion of additional evidentiary matter with the reply should only be allowed in the exceptional case …." (*Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1538.) While new reply evidence may be allowed to respond to a new issue raised by a party opposing a motion, it is not allowed simply to support an issue raised, but not established by the moving party' papers. (See *Carbajal v. CWPSC, Inc.* (2016) 245 Cal.App.4th 227, 241 (*Carbajal).*) A trial court's decision to exclude reply evidence is reversed solely for an abuse of discretion. (*Id*.)

Although not the identical issue, the same principles that preclude new evidence on reply, should apply equally to an argument never raised until oral argument, because the opposing party has no ability to marshal law or evidence in response. (See *id*.) FOG's conduct below violated the law against new evidence and argument in support of a party's moving papers. The trial court correctly excluded it. (10 AA 2747; RT 11:11-12:22.)

1. The Trial Court Correctly Excluded FOG's Arguments as Late

Although FOG never requested the trial court take judicial notice of Municipal Code section 63.45, thus, that City provision is not otherwise contained in the trial court record, FOG's reply brief asserted Section 63.45 for the first time in its reply brief. (compare 1 AA 231-44 [trial brief] with 8 AA 2105-06 [reply].) The trial court's unchallenged ruling excluding FOG's late evidence was, therefore, proper. (10 AA 2747; see *Carbajal, supra,* 245 Cal.App.4th at 241.)

The trial court's refusal to consider FOG's Section 594(c)(4) contention, first raised at oral argument, was also correct. Although FOG's opening trial brief presented arguments concerning Charter section 594(c), FOG raised Subpart (4) of that Charter section for the first time at the writ trial oral argument, making a different and new argument. (compare 1 AA 241:15-242:20 [trial brief] with RT 11:11-12:22 [transcript].) FOG's moving brief had argued the City violated Section 594(c)'s requirement that all park land forever remain for public use. (1 AA 241:15-242:20.) The trial court rejected that argument because the Beachwood gate continues to be used by the public.

(10 AA 2751.) At oral argument, FOG asserted Subpart 4 of Section 594(c), governing the opening, establishment, or maintenance of streets and public ways on park lands, arguing it required the Department's Board to approve the Beachwood gate changes. (RT 11:11-12:22.) Given that neither party had presented argument or evidence about how this Subpart 4 applies, the trial court correctly excluded this new argument below.

2. FOG's Late Trial Arguments Prejudice the City Because Necessary Evidence is Absent from the Appellate Record

Because FOG raised Charter section 594(c)(4) and Municipal Code section 63.45 as new arguments after the City filed its opposition materials, at trial, the City was unable to present or argue any other Municipal Code provisions, any legislative history, or present any evidence from Department staff about how these provisions of City law are applied and interpreted or any legislative history, all of which is relevant to statutory interpretation. (See *Yamaha, supra,* 19 Cal.4th at 7-8.) The City, further, was unable to present other Municipal Code provisions that might provide definitions of the terms "street" or

"public way," as used in Charter section 594(c)(4), to determine whether the Access Road is regulated by that Charter provision, which is necessary to FOG's argument. (Discussed above at Argument part II (C).) The trial court correctly excluded FOG's late arguments at trial.

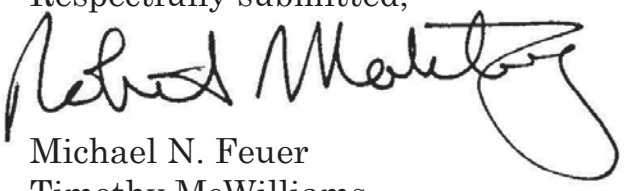
FOG's failure to timely present these City legal provisions for consideration, moreover, is not now cured simply because the City is able to make legal arguments in response to FOG's contentions in this appeal brief. Because new evidence may not be considered on appeal, the City continues to be unable to introduce any evidence relevant to demonstrating a fully-correct statutory construction of Municipal Code section 63.45 or Charter section 594(c)(4). (See *Reserve Insurance Co. v. Pisciotta* (1982) 30 Cal.3d 800, 813 [appeal does not consider evidence of matters outside trial court record].) For example, factual evidence would be relevant to determining whether the Access Road qualifies as a "street" or "public way" as defined by Charter section 549(c)(4). (See Argument, part II (C).) FOG's failure to timely present its evidence and argument below make it equally improper to consider the arguments on appeal. This appellate court should

strike FOG's late trial arguments.

CONCLUSION

The trial court's decision below is correct as a matter of law and supported by substantial evidence. The City requests this appellate court deny FOG's appeal and sustain the trial court's denial of FOG's writ in its entirety.

Respectfully submitted,



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Pursuant to rule 8.204(c) of the California Rules of Court, I hereby certify that this brief contains 11,340 words, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

By 

Robert Mahlowitz

STATE OF CALIFORNIA
California Court of Appeal, Second Appellate District

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California Court of Appeal, Second Appellate District

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